

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
633 THIRD AVENUE
NEW YORK, NY 10017

In the Matter

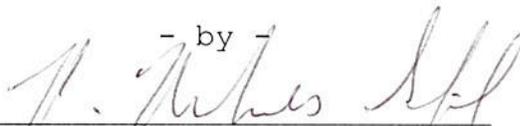
- of -

the Application of
Cimtech, Inc.
For Certification as a
Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60582

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

February 8, 2018

SUMMARY

This report recommends that the determination of the Division of Minority and Women's Business Development ("Division") of the New York State Department of Economic Development to deny the application of Cimtech, Inc. ("applicant") for certification as a woman-owned business enterprise ("WBE") be modified, and as modified, affirmed for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal, pursuant to New York State Executive Law ("EL") Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR") Parts 140-144, by Cimtech, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Cimtech, Inc.'s application was submitted on June 29, 2015 (Exh. DED1).

The application was denied by letter dated August 19, 2016, from Bette Yee, Director of Certification Operations. As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet three separate eligibility criteria related to Ann Pfeiffer's ownership, operation, and control of the applicant (Exh. DED4).

By letter dated August 29, 2016, the applicant sought to appeal from the Division's denial.

By letter dated September 28, 2016, the Division notified the applicant that the written appeal should be submitted on or before November 28, 2016.

In a two-page letter dated November 2, 2016, the applicant appealed from the denial (Exh. A1). Attached to the letter were sixteen exhibits, labeled A2-A17 in the attached chart.

In a six-page memo dated December 26, 2017, Division counsel Phillip Harmonick, Esq., responded. Attached to the

response were six exhibits, labeled DED1-DED6 in the attached chart.

On January 2, 2018, this matter was assigned to me.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria regarding the applicant's ownership, operation, control, and independence are applied on the basis of information supplied through the application process.

The Division reviews the enterprise as it existed at the time the application was made, based on representations in the application itself, and on information revealed in supplemental submissions and interviews that are conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of applicant's WBE certification is not supported by substantial evidence (see State Administrative Procedure Act § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that the Division's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate" (Matter of Ridge Rd. Fire Dist. v Schiano, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

POSITIONS OF THE PARTIES

Position of the Division

In its denial letter, the Division asserts that the application failed to meet three criteria for certification.

First, the Division found that the applicant failed to demonstrate that the contribution of women is proportionate to their equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

Second, the Division found that the applicant failed to demonstrate that the woman owner, Ann Pfeiffer, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

Third, the Division found that the applicant failed to demonstrate that the woman owner is permitted by the corporate documents and relevant business agreements to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

Position of the Applicant

Cimtech, Inc. asserts that it meets the criteria for certification and that the Division erred in not granting it status as a woman-owned business enterprise pursuant to Executive Law Article 15-A.

FINDINGS OF FACT

1. Cimtech, Inc. is in the business of machining, sheet metal fabrication, general fabrication, tube bending, and related activities associated with machine shops (Exh. DED1 at 3). It has a business address of 325 Park East Blvd., New Albany, Indiana (Exh. DED 1 at 1).

2. Originally founded in 1975 with the name Pro Pak, Inc. the firm changed its name to Cimtech, Inc. in 1988, at which time Richard Pfeiffer owned the firm. In February 2000, Mr. Pfeiffer passed away and his wife Anne Pfeiffer inherited the ownership of the firm. (Exhs. A2, A3, A4, A6, & A9).

3. The application identifies David Magula, the firm's secretary, as being solely responsible for financial decisions, negotiating bonding, negotiating insurance, and managing and signing payroll. It identifies Shawn Grimm, the firm's manager of procurement, as being solely responsible for estimating and sharing responsibility for purchasing equipment/sales with Ms. Pfeiffer. It also identifies Frank Wetherington and Drew Keenan, sales managers for the firm, as having responsibility for preparing bids and sharing with Ms. Pfeiffer oversight of marketing and sales, as well as negotiating contracts. Ms. Pfeiffer shares responsibility over hiring and firing with Mark Stopher, the firm's president. The supervision of field

operations is performed by four men. Ms. Pfeiffer is the sole signatory for business accounts. (Exh. DED1 at 4-5). The resumes provided with the application do not contradict the information in the application (Exh. DED3).

4. At the time the application was denied, Mr. Stopher was president of Cimtech, Inc. (Exh. DED1 at 4, DED3 at 2, and Exh. DED6). Article V, Section 5 of the corporate by-laws submitted with the application describe the president as chief executive officer of the corporation and grant him general charge of its business and supervision of its affairs (Exh. DED5 at 9).

DISCUSSION

This report considers the appeal of the applicant from the Division's determination to deny certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The Division's denial letter sets forth three bases related to Anne Pfeiffer's ownership, operation, and control of Cimtech, Inc. Each basis is discussed individually, below.

Ownership

In its denial letter, the Division concluded that the applicant failed to demonstrate that the contribution of the woman owner was proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1). In its denial letter, the Division explains that documents submitted in support of the application do not demonstrate a contribution of money, property, equipment, or expertise by Ms. Pfeiffer to the business enterprise.

On her appeal (Exh. A1), Ms. Pfeiffer states that the firm was originally formed by her late husband, Richard N. Pfeiffer, as Pro-Pak, Inc. and that she took ownership of the firm upon his death.

In its response, the Division does not address this issue and, therefore, it is deemed withdrawn as a basis for denial.

Operation

In its denial letter, the Division found that the applicant failed to demonstrate that the woman owner, Anne Pfeiffer, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). In its denial letter, the Division cites two relevant facts: (1) Cimtech, Inc. is engaged in machining, sheet metal fabrication, and other related activities; and (2) core functions of the business are managed by male individuals, including estimating, procuring materials and inputs, and supervising machining and welding (Exh. DED4).

On her appeal (Exh. A1), Ms. Pfeiffer states that as majority shareholder in the business she is involved in the core functions of the management of the business and ultimately responsible for all corporate decisions. She acknowledges that men are involved in the business's operations, but states that she is ultimately in charge of all operations, including hiring and firing, deciding on all major purchases, assisting on all estimating/quoting for projects and purchasing of needed materials, assisting in marketing and sales, and working with supervisors managing employees.

In its response, the Division argues that Ms. Pfeiffer does not operate the firm for certification purposes because Mr. Stopher and individuals under his supervision manage significant operations of the business. These significant operations include estimating, procuring materials and equipment, and supervising production work, because these functions represent the means by which the firm obtains and performs work. The Division points to the application that indicates Ms. Pfeiffer is solely responsible for signing for business accounts and that all other business functions are either partially or exclusively managed by men. Specifically, the application identifies David Magula, the firm's secretary, as being solely responsible for financial decisions, negotiating bonding, negotiating insurance, and managing and signing payroll. It identifies Shawn Grimm, the firm's manager of procurement, as being solely responsible for estimating and sharing responsibility for purchasing equipment/sales with Ms. Pfeiffer. It also identifies Frank Wetherington and Drew Keenan, sales managers for the firm, as having responsibility for preparing bids and sharing with Ms.

Pfeiffer oversight of marketing and sales, as well as negotiating contracts. Ms. Pfeiffer shares responsibility over hiring and firing with Mr. Stopher, the firm's president. The supervision of field operations is performed by four men. Ms. Pfeiffer is the sole signatory for business accounts. (Exh. DED1 at 4-5). The Division concludes that this information demonstrates that men at the firm perform significant roles in the operation of the firm, making it ineligible for certification as a WBE.

Based on the evidence in the record, specifically the fact that male officers and employees perform significant roles in the operation of the corporation, the applicant failed to demonstrate that the woman owner, Ann Pfeiffer, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). The Division's denial was based on substantial evidence.

Control

In its denial letter, the Division found that the applicant failed to demonstrate that the corporate by-laws and other documents permit the woman owner to make decisions without restriction, as required by 5 NYCRR 144.2(b)(2). In its denial letter, the Division cites four relevant facts: (1) Ms. Pfeiffer is not engaged in one of the officer positions created under the corporate by-laws of Cimtech, Inc.; (2) the application indicates that Ms. Pfeiffer is the CEO of the business enterprise, and that Mr. Mark Stopher is its president; (3) the corporate by-laws provide that the president shall have general charge of the firm's business and supervision of its affairs; and (4) the office of CEO does not exist under the corporate by-laws of the firm.

On the appeal (Exh. A1), Ms. Pfeiffer states that the by-laws were amended on August 24, 2016, to reflect the name change of the corporation, include the title of CEO, and list the CEO's responsibilities.

In its response, the Division argues that at the time the application was reviewed, Mr. Stopher was president of the firm and according to its by-laws, served as its highest-ranking officer (Exh. DED1 at 4, DED3 at 2, & DED6). The Division

points to Article V, Section 5 of the corporate by-laws submitted with the application that make no mention of the office of CEO, but describe the president as chief executive officer of the corporation and grant him general charge of its business and supervision of its affairs (Exh. DED5 at 9). The Division argues that these by-laws demonstrated at the time of the denial that Ms. Pfeiffer is unable to direct Mr. Stopher in the day-to-day management of the firm. The fact that the by-laws were amended after the denial is not relevant to the appeal, the Division concludes.

Based on the evidence in the record, specifically the facts that Mr. Stopher was president at the time of the application and the by-laws in place at the time granted him general charge of firm's business and supervision of its affairs, the applicant failed to demonstrate that the corporate bylaws and other documents permitted the woman owner to make decisions without restriction, as required by 5 NYCRR 144.2(b)(2). The Division's denial was based on substantial evidence.

CONCLUSIONS

1. The applicant failed to demonstrate that the woman owner, Ann Pfeiffer, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).
2. The applicant failed to demonstrate that the woman owner is permitted by the corporate documents and relevant business agreements to make business decisions without restriction, as required by 5 NYCRR 144.2(b)(2).
3. The denial on the ground that applicant failed to demonstrate that the contribution of the woman owner was proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1), was withdrawn on appeal, and should be struck as a basis for denial.

RECOMMENDATION

The Division's determination to deny Cimtech, Inc.'s application for certification as a woman-owned business

enterprise should be modified, and as modified, affirmed for the reasons stated in this recommended order.

**Matter of
Cimtech, Inc.**

**DED File ID No. 60582
Exhibit List**

Exh. #	Description
DED1	Application
DED2	Email to Division dated 8/15/16
DED3	Questionnaire on work history/resumes
DED4	Denial letter
DED5	By-laws of Pro-Pak, Inc.
DED6	Minutes of directors' meetings for Cimtech, Inc.
A1	Appeal letter
A2	History of Cimtech
A3	Timeline
A4	Accountant's response
A5	Record of stock transactions
A6	Documents regarding name change
A7	Documents regarding the formation of ANR Development, Inc.
A8	Refinancing documents
A9	Family trust documents
A10	Lease documents
A11	Loan documents
A12	Satisfaction of mortgage
A13	Asset schedule

A14	Job description of Anne Pfeiffer
A15	Old and new by-laws
A16	Organizational Chart
A17	Letters in support of application