

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

In the Matter

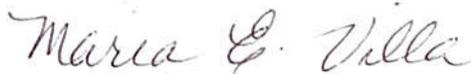
- of -

the Application of **Core Climate Systems, LLC**
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61033

RECOMMENDED ORDER

- by -



Maria E. Villa
Administrative Law Judge

December 12, 2017

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 Core Climate Systems, LLC ("Core Climate" or "applicant") certification as a women-owned business enterprise ("WBE") be affirmed, for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal by applicant, pursuant to New York State Executive Law 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, challenging the determination of the Division that Core Climate does not meet the eligibility criteria for certification as a WBE.

The Division denied Core Climate's application for WBE certification (Exhibit 1) by letter dated February 2, 2017. Exhibit 2. As discussed below, the letter sets forth two grounds under Section 144.2 of 5 NYCRR for the denial, based upon applicant's failure to demonstrate that the women owner operates Core Climate for certification purposes. By letter dated February 20, 2017, applicant appealed from the Division's determination to deny the application. Exhibit 3. The Division responded by letter dated June 22, 2017, providing information as to the appeal process, and notifying applicant of the hearing scheduled for October 10, 2017. Exhibit 4.

The hearing took place as scheduled on October 10, 2017. Denise Stark appeared and testified on behalf of applicant. Division staff was represented by Phillip Harmonick, Esq., and called Sarhan Al Hussein, a Senior Certification Analyst for the Division, as a witness. The hearing was recorded on two compact discs, and this report cites to that recording as "Hearing Recording ('HR') at ___." The hearing recording was provided to the administrative law judge on November 22, 2017, and on that date the record closed.

Both applicant and Division staff offered exhibits, and those exhibits were marked and received into evidence. A chart of those exhibits is attached.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a women-owned business enterprise are established by regulation (see Section 144.2 of 5 NYCRR). For the purposes of determining whether an applicant should be granted or denied WBE status, the ownership, operation, and control of the business enterprise are assessed on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application itself, on information revealed in supplemental submissions, and if appropriate, on interviews conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of Core Climate'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

Division

The Division argued that applicant failed to meet two operational requirements for certification as a woman-owned business, pursuant to Section 144.2 of 5 NYCRR. Specifically, the Division asserted that Denise Stark, the woman owner, did not make decisions pertaining to Core Climate's operation, as required by Section 144.2(b)(1). In this regard, the Division cited the following “relevant facts” in the denial letter:

- Core Climate Systems, LLC is primarily engaged in installing and servicing direct digital control systems in the HVAC industry.
- Mr. Corey Stark is primarily responsible, in whole or in part, for managing significant operations of the business related to estimating and supervising field operations.

Exhibit 2, at 2.

The Division went on to assert that the woman owner of the business enterprise had not demonstrated adequate managerial experience or technical competence to operate Core Climate (see Section 144.2(b)(1)(i)). Specifically, in its denial letter, the Division contended that:

- Ms. Stark has no demonstrated training or technical competence in installing and servicing direct digital control systems in the HVAC industry.
- Ms. Stark lacked managerial experience in installing and servicing direct digital control systems prior to joining Core Climate Systems, LLC.
- Mr. Stark has over twenty-five years of relevant managerial experience, has obtained certifications relevant to the services provided by Core Climate Systems, LLC, and has completed numerous relevant training courses.

Exhibit 2, at 2.

Applicant

In its February 20, 2017 notice of appeal, applicant stated that in the one year since Ms. Stark became a majority owner, sales had doubled. According to applicant, Ms. Stark had prior experience running and managing a successful business, and did not have prior knowledge of the technical details of that business before becoming an owner. Applicant argued that “[a]ctivities

of business management are closely related no matter what business you are running. So my working knowledge comes in the form of management of the daily business activities and from the financial aspect, not in the technical nuts and bolts of programming a DDC [direct digital controls] controller.” Exhibit 3, at 1. Applicant went on to assert that “[t]o be a successful company you do need a technical person but more importantly for the *survival* of a company you need a strong business person who deals with all financial aspects and that is what I bring to this company.” *Id.* (italics and underlining in original).

Applicant stated that Ms. Stark’s duties included financial matters (accounts receivable, accounts payable, all dealings with financial institutions, insurance and bonding); human resources (payroll, hiring and firing, health insurance, retirement); negotiations of annual service agreements; procurement of DDC material, electrical supplies and tools; serving as safety officer for field employees; contract execution (insurance, bonding and contractual obligations, as well as hiring and managing subcontractors); and scheduling and contractual onsite meetings of large projects for Core Climate’s employees as well as subcontractors.

FINDINGS OF FACT

1. Core Climate Systems, LLC is located at 664 East Main Street, Malone, New York. Exhibit 1, at 1.
2. The business was established in 2009, and Denise Stark became a 60% owner on January 1, 2016.
3. Core Climate Systems, LLC installs and services direct digital control systems in the heating, ventilating, and air conditioning industry.
4. Corey Stark worked for Siemens for twenty years as a project manager, before beginning Core Climate in 2009. Exhibit 9, 11:30.
5. Denise Stark also worked for Siemens, doing office work. Exhibit 9, 8:55. Denise Stark is not trained in installing and servicing direct digital control systems. Prior to working for Core Climate, she managed a motel and worked as a registered nurse. Exhibit 5.

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification to Core Climate as a women-owned business enterprise¹ pursuant to Executive Law Article 15-A. Section 144.2(b)(1) of 5 NYCRR requires that an applicant demonstrate that decisions pertaining to the operations of the business enterprise are made by the woman claiming ownership of the business. Moreover, the woman owner must have adequate

¹ The term “women-owned business enterprise” applies to an enterprise that meets the requisite criteria on the basis of the ownership and control of one woman or of multiple women (*see* Section 140.1(tt) of 5 NYCRR (defining a women-owned business enterprise as one that is, among other things, “at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women”)).

managerial experience or technical competence in the business enterprise seeking certification, pursuant to Section 144.2(b)(1)(i).

Applicant maintained that Ms. Stark made decisions pertaining to Core Climate's operation. According to applicant, although Ms. Stark is not trained in installing and servicing direct digital control systems, she performs an essential function by managing financial matters, sales, human resources, and customer relations. Applicant acknowledged her lack of technical experience, but stated that it was a business decision to forego the training, which would have cost tens of thousands of dollars. HR at 20:45. According to Ms. Stark, it would not have been prudent to undertake the training unless she were going to use that knowledge every day. Ms. Stark testified that she does "front line" estimating, and once a decision is made to bid a job, Mr. Stark or other male employees review the estimate. HR at 21:13. The estimate then comes back to her to finalize insurance and bonding. HR at 22:53. Applicant acknowledged that Ms. Stark does not work in the field programming the controllers, but rather troubleshoots over the phone, or refers the issue to the technicians in the field. HR at 20:15.

The Division referred to the resumes and the narrative description of job duties provided by applicant (Exhibits 5, 6 and 8). The Division noted that Ms. Stark's role was primarily management of the office and financial matters, while Mr. Stark had the training and experience to supervise the workers in the field. Ms. Stark is a registered nurse, and from 2002-2005, she owned and operated a motel. Exhibit 5. Her other work experience was as a manager of the Siemens Plattsburgh office from 1999 to 2001, and as an office manager for Core Climate from 2010 to 2015. Id.

Although applicant argued that the certifications provided with the application were obsolete, the Division noted that none of the certifications indicated that Ms. Stark had completed any relevant training in installation and servicing of direct digital controls. After the hearing took place, Ms. Stark sent an e-mail on December 7, 2017, providing Ms. Stark's certificate of completion of Honeywell Spyder training. The certificate was issued to Ms. Stark on November 13, 2017. At the hearing, Ms. Stark testified that this credential is the most relevant training with respect to Core Climate's business. Nevertheless, this information post-dates the hearing and the denial, and cannot be considered on appeal. In addition, Core Climate's notice of appeal included a letter from Christopher Dumas of the New York State Office of General Services, Construction Region 5, detailing Ms. Stark's role as the primary point of contact for projects in 2016. Exhibit 3. Again, this information post-dates the denial, and is excluded from consideration on appeal.

The Division relied upon Matter of Northeast Stud Welding Corp., 211 A.D.2d 889 (3rd Dept. 1995), in which the court concluded that an application for certification as a women-owned business was properly denied. The court reasoned that, although the woman applicant performed some functions, and made some decisions on her own, significant operations were shared and still others were performed solely by her husband. Noting that, while not dispositive, the woman owner had no training or expertise in welding, which was the construction service provided by the business, the court observed that she lacked the technical ability to evaluate her husband's work, "be it stud welding, training others to do so or supervising field operations." Id., at 891 (citations omitted). The court concluded that the enterprise was a family business.

The Division argued that while Ms. Stark has a role in estimating jobs, male employees have a significant role in preparing the takeoffs.² Moreover, the Division pointed out that there was no record evidence that Ms. Stark supervises field operations. The Division noted Mr. Stark's prior experience in his twenty years of employment at Siemens. Ms. Stark does not possess similar experience, and her background is principally as an office manager and registered nurse. Exhibit 5.

The Division's arguments on this point are persuasive. As the Division maintained, the individuals who manage the significant operations of Core Climate's business are non-minority males, who possess the requisite expertise to perform estimates, perform work, and supervise field operations, as opposed to Ms. Stark, whose role is primarily management of financial matters, rather than overseeing field operations or developing estimates. As was the case in Matter of Northeast Stud Welding, Core Climate is a family business, rather than a woman-owned business enterprise.

Based upon the information obtained through the application process, it was reasonable for the Division to conclude that Core Climate did not satisfy the requirements for certification. The Division's determination was supported by substantial evidence, and should be affirmed.

CONCLUSION

As discussed above, applicant did not meet its burden to demonstrate that the Division's determination to deny Core Climate's WBE application for certification was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny Core Climate's application for certification as a women-owned business enterprise should be affirmed.

² The term "takeoff" refers to one of the aspects of the cost estimating process in the construction and related industries. Estimators use construction blueprints, and either manually or through the use of a computer program, "take off" quantities of items required for the job in order to prepare the estimate (for example, the number of light fixtures or outlets required as part of an electrical contract).

Matter of Core Climate Systems, LLC
DED File ID No. 61033
Exhibit List

Exhibit No.	Description	Received?
1	August 23, 2016 application	✓
2	February 2, 2017 denial letter	✓
3	February 20, 2017 notice of appeal	✓
4	June 22, 2017 notice of hearing	✓
5	Resume: Denise Stark	✓
6	Corey Stark – Specification Section 007213 Designated Competent Supervisor	✓
7	Training Certificates	✓
8	Structure of Core Climate Systems	✓
9	CD Recording of Certification Interview	✓
10	Certificates of Completion	✓