

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

In the Matter

- of -

the Application of  
**Mohegan Wolf Painting Co., LLC**  
For Certification as a Minority-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60988

RECOMMENDED ORDER

- by -



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P. Nicholas Garlick  
Administrative Law Judge

December 20, 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 the application of Mohegan Wolf Painting Co., LLC ("applicant") for certification as a minority-owned business enterprise ("MBE") be 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 Mohegan Wolf Painting Co., LLC challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a minority-owned business enterprise.

Mohegan Wolf Painting Co., LLC's application was submitted on September 9, 2016 (Exh. DED1).

The application was denied by letter dated January 4, 2017, from Bette Yee, Director of Certification Operations (Exh. DED9). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to demonstrate that Mohegan Wolf Painting Co., LLC is an independent business enterprise.

By letter dated January 11, 2017, the applicant submitted its written appeal, which consisted of a two-page letter and no exhibits.

In a six-page memorandum dated November 1, 2017, the Division responded to the applicant's appeal. Enclosed with the response were nine exhibits, described in the attached exhibit chart as DED1-DED9.

On November 7, 2017, this matter was assigned to me.

## **ELIGIBILITY CRITERIA**

For the purposes of determining whether an applicant should be granted or denied minority-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 MBE 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 demonstrate that applicant is an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) & (c)(2).

##### Position of the Applicant

Mohegan Wolf Painting Co., LLC asserts that it meets the criteria for certification and that the Division erred in not granting it status as a minority-owned business enterprise pursuant to Executive Law Article 15-A.

#### **FINDINGS OF FACT**

1. Mohegan Wolf Painting Co., LLC is in the business of providing painting and wall covering services (Exh. DED1 at 3). The application indicated that the firm has a business address of 1 Four Mile River Road, Old Lyme, Connecticut (Exh. DED1 at

1), however, the lease provided with the application showed it leased offices at 458 Shore Road in Old Lyme from 458 Shore Road, LLC for an annual rent of [REDACTED] per year (Exh. DED3 at 1). The lease was signed on behalf of the applicant by Joe Quidgeon and on behalf of the lessor by Mark J. Brett (Exh. DED3 at 5).

2. Mohegan Wolf Painting Co., LLC is solely owned by Joe Quidgeon, a Native American (Exh. DED1 at 3). The contact person on the application is Matthew Fleisher, the applicant's comptroller (Exh. DED1 at 2). Mr. Fleisher is not a minority group member. He is also a signatory for the applicant's business accounts (Exh. DED1 at 4) and authored the instant appeal.

3. Mr. Quidgeon resides at a tribal retirement center in Uncasville, Connecticut (Exh. DED2 at 1).

4. A subcontract agreement provided with the application shows the applicant working as subcontractor for M. Brett Painting Co., Inc. The agreement is signed by Mr. Quidgeon and Mr. Brett (Exh. DED4).

5. The applicant's 2015 federal tax return shows the firm had [REDACTED] in gross receipts (Exh. DED5 at 5) and [REDACTED] in subcontractor costs (Exh. DED5 at 10).

6. A review of subcontract agreements in the record shows that the applicant subcontracted with M. Brett Painting Co., Inc. at least 15 times between July 2014 and November 2015 (Exh. DED6).

7. The applicant stated that it derives [REDACTED] of its volume from M. Brett Painting Co., Inc. and that Matthew Fleisher provides approximately 15 hours per week of management services to M. Brett Painting Co., Inc. (Exh. DED8).

#### **DISCUSSION**

This report considers the appeal of the applicant from the Division's determination to deny certification as a minority-owned business enterprise pursuant to Executive Law Article 15-A.

In its denial letter, the Division determined that the applicant failed to demonstrate that it is an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) & (c)(2). This letter cited five relevant facts: (1) the applicant does business primarily from a residential address; (2) the applicant is engaged in an office sharing arrangement with another painting firm, M. Brett Painting Co., Inc. without a written agreement; (3) the applicant subcontracts the majority of its work to M. Brett Painting Co., Inc.; (4) the applicant obtains a significant portion of its work through contracts from M. Brett Painting Co., Inc.; and (5) Mr. Fleisher performs managerial duties for both the applicant and M. Brett Painting Co., Inc. (Exh. DED9).

On his appeal, Mr. Fleisher disagrees with the denial and states that the applicant is a 100% legitimate stand-alone minority business and is recognized as such by the State of Connecticut. He asserts that the applicant rents space within an office co-op with three other firms, one of which is M. Brett Painting Co., Inc. He acknowledges that during 2015, when the applicant was going through a cash crunch, it did subcontract a large portion of its work. However, since that time the firm has self-performed several large contracts (which he claims were included with the application materials but were not provided on appeal). He acknowledges that the applicant does subcontract with M. Brett Painting Co., Inc., but also has completed numerous projects for other general contractors including the Mohegan tribe. He states that he works full time as a consultant for Shore Painting Consultants, Inc. because of his experience and no other employer can keep him busy and maintain his salary. As a consultant, he organizes projects and serves as project manager for many firms, including M. Brett Painting Co., Inc. He concludes by arguing that although the applicant has an alliance with M. Brett Painting Co., Inc., this does not mean that the applicant is not a stand-alone company that has been in existence for over a decade.

In its response, the Division argues that Mohegan Wolf Painting Co., LLC is not independent because it shares resources with M. Brett Painting Co., Inc. and passes over the majority of its work to M. Brett Painting Co., Inc. To support its claim, the Division cites Mr. Quidgeon's 2015 federal tax return which

shows that over [REDACTED] of Mohegan Wolf Painting Co., LLC's gross revenue was in turn subcontracted. Further, because all but one of the subcontracts provided with the application (Exh. DED6) were with M. Brett Painting Co., Inc., the Division concluded that Mohegan Wolf Painting Co., LLC passes most of its work to M. Brett Painting Co., Inc. The only other contract in the record is a subcontract from M. Brett Painting Co., Inc. to the applicant (Exh. DED4). The Division states that because Mr. Fleisher works for both firms and the nature of their sharing of business space is not fully explained, the Division concluded that the businesses were not independent for certification purposes.

In response to claims made on the appeal, the Division argues that none are supported by record evidence and even if they were, this would not alter the Division's denial. Specifically, the Division argues there is no proof that the applicant owns or leases space at 1 Four Mile Road, as claimed in the application, and even if such proof were supplied, it would not change the fact that the applicant shares facilities and office amenities supplied by a business associate with M. Brett Painting Co., Inc. Regarding Mr. Fleisher's claim that he is a consultant to businesses other than the applicant and M. Brett Painting Co., Inc., the Division responds that this is also unsupported in the record. Moreover, the fact that he works for these two firms is relevant to whether the applicant is an independent business.

Based on the evidence in the record, specifically the fact that in 2015 the applicant subcontracted approximately [REDACTED] of its revenue to M. Brett Painting Co., Inc., the two firms shared office resources, and the role of Mr. Fleisher in both businesses, the applicant failed to demonstrate that applicant is an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) & (c)(2). The Division's denial was based upon substantial evidence.

#### **CONCLUSION**

The applicant failed to demonstrate that applicant is an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) & (c)(2).

### **RECOMMENDATION**

The Division's determination to deny Mohegan Wolf Painting Co., LLC's application for certification as a minority-owned business enterprise should be affirmed, for the reasons stated in this recommended order.

**Matter of  
Mohegan Wolf Painting Co., LLC**

**DED File ID No. 60988  
Exhibit List**

<b>Exh. #</b>	<b>Description</b>
DED1	Application
DED2	Resume of Joseph Quidgeon, Sr.
DED3	Lease
DED4	Subcontract agreement
DED5	2015 tax return
DED6	Subcontracts
DED7	Subcontracts
DED8	Narrative of relationship
DED9	Denial letter