

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

In the Matter

- of -

the Application of **Sherlock Homes Interior Corp.**
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60031

RECOMMENDED ORDER

- by -



Lisa A. Wilkinson
Administrative Law Judge
December 22, 2017

SUMMARY

The determination of the Division of Minority and Women's Business Development (Division) of the New York State Department of Economic Development to deny Sherlock Homes Interior Corp.¹ (Sherlock Homes or applicant) certification as a woman-owned business enterprise should be affirmed for the reasons set forth below.

PROCEEDINGS

This matter considers the appeal, 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 (5 NYCRR) parts 140-144, by Sherlock Homes challenging the determination of the Division that its application does not meet eligibility criteria requirements for certification as a woman-owned business enterprise (WBE).

On behalf of Sherlock Homes, Annmaria Sherlock², president, submitted a WBE application for certification as a woman owned business enterprise to the Division on June 16, 2015 (WBE Exhibit 1). By letter dated October 3, 2016, the Division denied the application for failing to meet three eligibility criteria under 5 NYCRR 144.2 related to ownership, operation, and control, respectively (WBE Exhibit 2).

By letter dated November 2, 2016, John Servider, Esq., counsel for applicant, filed a notice of appeal and requested a hearing. Mr. Servider submitted a request for the status of applicant's appeal by letter dated December 15, 2016. In a notice of hearing dated October 20, 2017 the Division acknowledged Sherlock Homes's request for a hearing, and scheduled the administrative adjudicatory hearing for 1:30 p.m. on November 14, 2017 at the Division's offices in New York City. The notice also reiterated the Division's bases for the denial.

The hearing convened as scheduled. John Servider, Esq. represented applicant. Annmaria Sherlock and James Damian Sherlock testified on behalf of Sherlock Homes. Shirley S. Paul, Esq., Special Assistant, and Phillip Harmonick, Esq., Assistant Counsel, appeared on behalf of the New York State Department of Economic Development Division of Minority and Women's Business Development, (Division). Iliana Farias, Certification Director, testified on

¹ The application materials refer to Sherlock Homes Interior Corp. and Sherlock Homes Interiors Corp. (*see* WBE Exhibit 7). Sherlock Homes Interior Corp. is the name recorded with the New York State Department of State Division of Corporations.

² The application materials refer to Annmaria Sherlock (*see* WBE Exhibit 1, §§ 3 and 4, and WBE Exhibits 4, 5, and 7 and Applicant Exhibit 7) and Annemarie Sherlock (*see* WBE Exhibit 1 at 1). This report uses Annmaria Sherlock because that name appears in correspondence and more frequently in applicant's papers.

behalf of the Division and was called by applicant as a witness. Applicant offered seven exhibits and the Division offered 10 exhibits, all of which I received into evidence.

An audio recording of the proceedings was made and I received a compact audio disk on December 14, 2017 (CD) with one file (TR), whereupon I closed the record. A list of the exhibits received into evidence is attached to this recommended order.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are established by regulation (*see* 5 NYCRR 144.2). To determine whether an applicant should be granted WBE status, the Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application, information presented in supplemental submissions and, if appropriate, from interviews conducted by Division analysts (*see* 5 NYCRR 144.5[a]).

STANDARD OF REVIEW

On this administrative appeal, Sherlock Homes, as applicant, bears the burden of proving that the Division's denial of its application for WBE certification is not supported by substantial evidence (*see* State Administrative Procedure Act [SAPA] § 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

The Division

In its October 3, 2016 denial letter, the Division stated that the application failed to meet three criteria for WBE certification concerning ownership, operation, and control. With respect to ownership, the Division determined that the application failed to identify any capital contributions of money, property, equipment, or expertise by Ms. Sherlock to the business enterprise. With respect to operation, the Division determined that applicant failed to demonstrate that Ms. Sherlock had adequate managerial experience or technical competence to operate the business enterprise. Finally, the Division determined that applicant failed to demonstrate that Ms. Sherlock controlled negotiations on behalf of the business. (*See* WBE Exhibit 2.)

Sherlock Homes

Applicant contends that Ms. Sherlock is the undisputed majority owner of Sherlock Homes, and as such, it is not necessary for her to make a monetary contribution to the business, especially since the funds would be paid to her husband who transferred his shares of stock to her. Applicant further asserts that Ms. Sherlock has demonstrated that she is capable of operating the business and need not perform every activity to be deemed able to manage the business and in control of operations. Applicant further notes that although Mr. Sherlock signed certain contracts, Ms. Sherlock initialed and approved of all contracts entered into by Sherlock Homes. Applicant asks that the Division's determination be overturned in the interests of justice. (*See* TR at 1:35.)

FINDINGS OF FACT

1. Sherlock Homes Interior Corp. (Sherlock Homes) is located in Elmhurst, New York and is primarily engaged in general contracting work associated with interior renovations, including sheet rocking, painting, flooring, kitchens, bathrooms, basements, and offices (WBE Exhibit 1, § 1.D and § 3).
2. Annmaria Sherlock, president of Sherlock Homes, submitted an application on behalf of the corporation for certification as a woman-owned business enterprise on June 16, 2015 (*see* WBE Exhibit 1 at 1).
3. James Damian Sherlock (James Sherlock or Mr. Sherlock), Annmaria Sherlock's husband, established Sherlock Homes in 2005 and operated the corporation as the sole owner and officer from 2005 until January 20, 2014 (TR at 1:07).
4. At the time of the application, Sherlock Homes did not have any full time or part time employees (*see* WBE Exhibit 1, § 1.W).

Ownership

5. On January 20, 2014, James Sherlock surrendered all 100 shares of the outstanding stock of Sherlock Homes. Fifty-eight shares were issued to Annmaria Sherlock and 42 shares were issued to James Sherlock. (Applicant Exhibit 1.)
6. Annmaria Sherlock became the president and treasurer of Sherlock Homes and James Sherlock became the vice president and secretary (WBE Exhibit 1§ 2.A).

7. According to the application, Annmaria Sherlock and James Sherlock did not make a cash or capital contribution to Sherlock Homes to acquire their ownership interest (*see* WBE Exhibit 1, § 2.D).
8. On March 3, 2016, and again on March 24, 2016, the Division asked Annmaria Sherlock to “provide a detailed narrative showing how your equity interest in the business either by contribution of money, property, equipment or expertise is proportionate to your 58% ownership of [Sherlock Homes]” (*see* WBE Exhibit 1 at 9). Ms. Homes responded by letter dated June 1, 2016 which stated in its entirety: “We, [Sherlock Homes] are a small company. The majority of capital input to the Company was Manual Labor [sic], with approximately \$100 cash input” (*see* WBE Exhibit 4).

Operation

9. Annmaria Sherlock attended business college in County Tipperary, Ireland from 1989 to 1991. She worked at Sherlock Homes as a secretary from 2006 to 2013 before she became president in 2014. (*see* WBE Exhibit 5.)
10. James Sherlock attended technical college in County West Meath, Ireland from 1989 to 1991. In 2011, Mr. Sherlock obtained an associates degree in facility management. (*See* WBE Exhibit 6.)
11. Mr. Sherlock worked as a carpentry apprentice in Galway, Ireland from 1991 to 1994 and at a flooring company in Maspeth, New York from 1994 to 2005. From “2005 to the present,” Mr. Sherlock worked at Sherlock Homes doing general carpentry, managing the business, and estimating. (*See* WBE Exhibit 6.)
12. In 2009, James Sherlock procured a full time union construction job with health benefits, which he still holds today (TR at 1:08).
13. According to the application, Ms. Sherlock handles all twelve management functions for Sherlock Homes. Mr. Sherlock is a co-signatory with Ms. Sherlock for business accounts. (*See* WBE Exhibit 1, ¶ 4.A.)
14. In response to the Division’s request on March 3, 2016, for “a detailed description of the day-to-day activities for each individual with ownership or managerial responsibilities at the firm,” applicant produced a one-page description of the daily activities of James and Annmaria Sherlock (*see* WBE Exhibit 7). According to this description, James Sherlock is “a carpenter by trade and does all framing, sheet rocking, plastering and woodwork” and “helps with demolition, painting, cleaning and transporting as necessary.” Annmaria Sherlock “deals with all managerial, administrative and decision making duties that pertain to Sherlock Homes.” Her duties include customer relations, preparing quotes,

contracts and invoices, dealing with vendors, ordering materials, scheduling, and banking. She also “does demolition, painting, cleaning and transportation of garbage and goods” and “helps with interior design decisions.” (See WBE Exhibit 7.)

DISCUSSION

This recommended order considers Sherlock Homes’s November 2, 2016 appeal from the Division’s October 3, 2016 determination to deny certification of Sherlock Homes as a woman-owned business enterprise pursuant to Executive Law article 15-A. Referring to the eligibility criteria outlined at 5 NYCRR 144.2, the Division identified the three bases for the denial.

According to the Division, Sherlock Homes did not show that Ms. Sherlock’s contributions were proportional to her equity interest in the business enterprise as required by 5 NYCRR 144.2(a)(1) (see Exhibit 2). In addition, the Division determined that Sherlock Homes did not demonstrate that Ms. Sherlock possesses adequate technical and managerial experience to operate the business enterprise as required by 5 NYCRR 144.2(b)(1)(i), or that she controlled negotiations for the business enterprise as required by 5 NYCRR 144.2(b)(3) (see Exhibit 2). Each basis is addressed below.

I. Ownership

Section 144.2(a)(1) of 5 NYCRR provides that the contribution of a woman or minority business owner must be proportionate to the owner’s equity interest in the business enterprise, “as demonstrated by, but not limited to, contributions of money, property, equipment or expertise.” The purpose of the capital contribution test is to guard against the installation of woman owners as majority shareholders in a business enterprise for the purpose of obtaining certification. Where the contribution is in the form of property, equipment or expertise, the Division’s review considers the value of such contribution.

The Division has consistently denied applications where an applicant fails to substantiate the amount and source of the capital contribution by the woman owner, or where the contribution is derived from assets provided by, or jointly held with, an ineligible individual. A woman owner cannot rely on gifts of shares of stock to establish a proportionate contribution to the business enterprise in lieu of making a personal investment. (See e.g. *Matter of OTONE Mechanical Construction, Inc.*, Recommended Order, April 25, 2017, available at: https://cdn.esd.ny.gov/mwbe/Data/Hearings/05022017_OTONEMechanicalConstruction_RecommendedOrder.pdf, Final Order 17-28 available from New York State Economic Development Division of Minority and Women’s Business Development [proceeds from jointly held marital property did not constitute a capital contribution solely by the woman owner]; *Matter of Hertel Steel Inc.*, Recommended Order, February 10, 2017, available at

https://cdn.esd.ny.gov/mwbe/Data/Hearings/03102017_HertelSteel_RecommendedOrder.pdf, Final Order 17-12 available from New York State Economic Development Division of Minority and Women's Business Development [business not eligible for WBE certification where the money to purchase the business was from a jointly owned bank account].)

Expertise is a permissible form of capital contribution under the Division's regulations, but only if an applicant provides sufficient evidence of the value of such contributions with the application materials to satisfy the proportionality test (*see e.g. Matter of Casters, Wheels and Industrial Handling, Inc.*, Recommended Order, March 3, 2017, available from New York State Economic Development Division of Minority and Women's Business Development [work experience at the business enterprise is not considered expertise]; Final Order 17-20 available from New York State Economic Development Division of Minority and Women's Business Development]; *Matter of Bentley Bros., Inc.*, Recommended Order, May 11, 2016, available at: https://cdn.esd.ny.gov/mwbe/Data/Hearings/05112016_MatterofBentleyBros_RecommendedOrder.pdf; Final Order 16-16 available from New York State Economic Development Division of Minority and Women's Business Development).

According to the application, Ms. Sherlock made no capital contribution to Sherlock Homes in connection with her acquisition of 58 shares of outstanding stock in January 2014 (*see* WBE Exhibit 1, § 2.D). On March 3, 2016, the Division analyst reviewing the application sent Ms. Sherlock an information request asking for, among other things, a "detailed narrative showing how your equity interest in the business either by contribution of money [sic] property [sic] equipment or expertise is proportionate to your 58% ownership of Sherlock Homes Interior Corp" (WBE Exhibit 1 at 8-9). Ms. Sherlock did not answer this request, prompting a second request on March 24, 2016 (*see* WBE Exhibit 1 at 9). Ms. Sherlock responded by letter dated June 1, 2016³, which stated in its entirety, "[w]e, Sherlock Homes Interior Corp, are a small company. The majority of capital input to the Company was Manual Labor, with approximately \$100 cash" (WBE Exhibit 4). Ms. Sherlock did not identify the source of the capital contribution.

At the hearing, counsel for Sherlock Homes stated that the shares of stock issued to Ms. Sherlock were a gift from her husband (TR at 13:00). Counsel inquired of the Division's witness, Ms. Farias, whether Ms. Sherlock should have paid her husband for the shares to satisfy the ownership requirement, and, if so, how much had to be paid to satisfy the Division's regulations (TR at 19:00). Ms. Farias responded that it was not necessary to reach that question in this case because there was no indication in the application that Ms. Sherlock made any capital contribution to the business, and each application is evaluated on its own facts and circumstances (TR at 21:57).

³ The letter is dated June 1, 2015, but this appears to be a typographical error as the request was sent March 3, 2016 and the first response is dated March 28, 2016.

Although Ms. Sherlock claims to have provided “Manual Labor” to the business (*see* WBE Exhibit 4), she did not explain the nature of the services she provided or their value to the business. From the dearth of information in WBE Exhibit 4, no rational basis exists on which to conclude that the manual labor constituted expertise within the meaning of 5 NYCRR 144.2(a)(1). At the time of the application, Ms. Sherlock did not have a license to operate as a home improvement contractor or as a home improvement sales person in New York City and, therefore, depended on her husband to operate the business.

Inasmuch as Ms. Sherlock failed to substantiate her capital contribution, which was designated as zero in the application, and applicant offered nothing to substantiate the cash contribution Ms. Sherlock later claimed to have contributed, the Division reasonably concluded that Ms. Sherlock had not made a contribution proportionate to her ownership interest. Accordingly, applicant has not met its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that applicant failed to meet the criteria for certification in 5 NYCRR 144.2(a)(1).

II. Operation

Pursuant to 5 NYCRR 144.2(b)(1)(i), the woman owner must demonstrate that she has adequate managerial expertise or technical competence to operate the business enterprise. The Division determined that Ms. Sherlock did not possess the requisite qualifications to operate the business, because prior to becoming majority shareholder in 2014, she worked in an administrative role while her husband was a licensed general contractor and possessed over twenty years of experience in the carpentry industry. (*See* WBE Exhibit 2 at 2-3.)

Sherlock Homes is primarily engaged in interior renovations (*see* WBE Exhibit 1, § 3.C). At the time of the application, Mr. Sherlock possessed a general contractor license and home improvement salesperson license from the City of New York (*see* WBE Exhibit 1, § 3.A), and had worked in the carpentry industry for more than twenty years (*see* WBE Exhibit 6). He attended technical college in Ireland, worked as a carpentry apprentice from 1991 to 1994, worked for a flooring company in New York from 1994 to 2005, worked at Sherlock Homes starting in 2005 doing carpentry, managing the business, banking and estimating. In 2011, Mr. Homes obtained an associates degree in facility management. (*See* WBE Exhibit 6.) Applicant's description of Mr. Sherlock's daily activities states that he “is a carpenter by trade and does all framing, sheet rocking, plastering and woodwork” and “helps with demolition, painting, cleaning and transporting as necessary” (*see* WBE Exhibit 7).

Ms. Sherlock, by contrast, did not attend trade school for carpentry or construction and, at the time of the application, did not possess any certifications or licenses to work as a general contractor in New York City. Ms. Sherlock's work experience prior to 2014 did not involve

carpentry and construction. She attended a business college in Ireland and was the secretary for Sherlock Homes from 2005 to 2013 (*see* WBE Exhibit 5). Ms. Sherlock relied upon her husband who did possess relevant training, job experience and licenses to sign contracts and complete projects on behalf of Sherlock Homes (*see* WBE Exhibit 1, § 3.A, and WBE Exhibits 8-10).

The application states that Ms. Sherlock oversees the management of the business (*see* WBE Exhibit 1, § 4). She testified at the hearing that she is responsible for running the company and managing projects, and meets with customers to review jobs. Ms. Sherlock stated that she is in complete control of business operations and has two employees on the payroll to assist with projects (*see* TR at 53:26). Ms. Sherlock also said that since January 2017, she is the 100% owner of Sherlock Homes, her husband is employed full-time in a union job and is no longer involved in the business and that she now has the necessary licenses to conduct home improvement projects in New York City (*see* TR at 56:50).

On a going forward basis, the facts and circumstances concerning Ms. Sherlock's experience and technical competence to operate the business enterprise may evolve and lead to a different result with respect to the operation criterion. Ms. Sherlock may be able to demonstrate she has the managerial experience and technical competence to operate the business now that her husband has stepped away, she has the necessary licenses from the City of New York to conduct the activities of the business, she has acquired technical skills in the construction trade, and she employs unrelated individuals to assist her with construction activities. At the time of the application, however, Sherlock Homes did not have any full or part-time employees (*see* WBE Exhibit 1, § 1.W). Ms. Sherlock's husband, who worked 20 to 25 hours per week in the business, was the only person who possessed the requisite licenses or certifications to conduct business activities (*see* WBE Exhibit 1, § 1.W and WBE Exhibits 7, 8, 9, and 10) and the skills and experience in carpentry and general contracting to be able to complete the renovation projects (*see* WBE Exhibits 5 and 6).

Based on my review of the application and hearing record, applicant has not demonstrated that at the time of the application, Ms. Sherlock possessed the managerial expertise or technical competence to operate a general contracting business as set forth in the application (*see* WBE Exhibit 1, § 3.C) and as required by 5 NYCRR 144.2(b)(1)(i).

III. Control

The Division's regulations require that women owners demonstrate control of negotiations through the production of signed contracts (*see* 5 NYCRR 144.2[b][3]). To ascertain whether Ms. Sherlock had control of negotiations, the Division requested that applicant submit three fully executed contracts between September 2015 and March 2016. Applicant, in

response, submitted three contracts between Sherlock Homes and its customers; each contract was signed by Mr. Sherlock on behalf of Sherlock Homes (*see* WBE Exhibits 8, 9, and 10).

Ms. Sherlock testified that she did not sign the contracts because at the time of the application she did not have the necessary licenses from the City of New York to do so, but she reviewed and initialed all the contracts (TR at 1:31:55). After the application was filed, Ms. Sherlock obtained a consumer affairs home contractor license and a home improvement sales person license from the City of New York (*see* Applicant Exhibit 4 [issued November 2, 2016] and Applicant Exhibit 5 [indicating issuance after October 27, 2016]), as well as an EPA lead renovator certification (*see* Applicant Exhibit 6 [issued October 28, 2016]). Applicant submitted three contracts with the appeal that were executed after the application was filed, all designating Annmaria Sherlock as the home improvement salesperson (*see* Applicant Exhibit 7). While Annmaria Sherlock now has the requisite licenses to enter into contracts on behalf of Sherlock Homes, the scope of this appeal is limited to whether the information contained in the application provides substantial evidence for the Division's determination that Mr. Sherlock controlled negotiations for applicant. (*See* 5 NYCRR 144.5[a].) Inasmuch as Mr. Sherlock was the only person legally authorized to execute contracts for Sherlock Homes at the time the application was submitted, the Division reasonably concluded that Ms. Sherlock did not control negotiations. Accordingly, applicant has failed to meet its burden of demonstrating that the Division's determination was not supported by substantial evidence.

CONCLUSIONS

1. With respect to the ownership criterion at 5 NYCRR 144.2(a)(1), Sherlock Homes has not met its burden to show that the Division's October 3, 2016 determination to deny the application for WBE certification is not based on substantial evidence.
2. With respect to the operation criteria at 5 NYCRR 144.2(b)(1)(i), Sherlock Homes has not met its burden to show that the Division's October 3, 2016 determination to deny the application for WBE certification is not based on substantial evidence.
3. With respect to the control criteria at 5 NYCRR 144.2(b)(3), Sherlock Homes has not met its burden to show that the Division's October 3, 2016 determination to deny the application for WBE certification is not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny Sherlock Homes's application for certification as a woman-owned business enterprise should be affirmed for the reasons stated in this recommended order.

Attachment: Exhibit List

Matter of Sherlock Homes Interior Corp. Hearing Exhibit List
NYSED File No. 60031
November 14, 2017 (New York City)

APPLICANT'S EXHIBITS

Exhibit No.	Description
A-1	Meeting of Directors Sherlock Homes Interior Corp. January 20, 2014
A-2	Meeting of Directors and Shareholders Sherlock Homes Interior Corp. January 3, 2017
A-3	James Sherlock Payroll Stubs, Pay Dates October 26, 2017 and November 21, 2017
A-4	General Contractor License Sherlock Homes Interior Corp.
A-5	Home Improvement Sales Person License Annmaria Sherlock
A-6	EPA Lead Certificate Annmaria Sherlock
A-7	Three Home Improvement Estimates and Final Contracts

WBE EXHIBITS

Exhibit No.	Description
WBE-1	Certification Application No. 4815817
WBE-2	Division of Minority and Women's Business Development Denial Notice October 3, 2016
WBE-3	Capitalization Narrative March 28, 2016
WBE-4	Capital Contribution Attachment June 1, 2015
WBE-5	Annmaria Sherlock Resume
WBE-6	James Damian Sherlock Resume
WBE-7	Description of Day-to-Day Business Operations
WBE-8	Contract 1 December 3, 2015
WBE-9	Contract 2 February 2, 2016
WBE-10	Contract 3 March 6, 2016