

New York State
Department of Economic Development
633 Third Avenue
New York, NY 10017

In the Matter

-of-

the Application of
Outer-County Construction Corp.
For Certification as a Woman-Owned Business Enterprise
Pursuant to Executive Law Article 15-A

NYS DED File ID No. 54385

Recommended Order

-by-



Aiesha L. Hudson
Administrative Law Judge

April 20, 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 Outer-County Construction Corp. ("Outer-County Construction" or "applicant") for certification as a woman-owned business enterprise ("WBE") 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 Outer-County Construction Corp. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise. The applicant requested an appeal in writing pursuant to 5 NYCRR 144.5.

Outer-County Construction's application for recertification was submitted on February 16, 2015 (State's Ex. 1).

The application was denied by letter dated August 5, 2016 from Bette Yee, Director of Certification Operations (State's Ex. 6, Bates at 111). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet three separate eligibility criteria related to Christine Plante's operation and control of the applicant (State's Ex. 6, at Bates 112-113).

By two-page letter dated November 22, 2016, the applicant appealed from the denial (Applicant's Ex. 1). Attached to the letter were three attachments (labelled Applicant's Exhibits 2-4 in the attached exhibit chart).

In a six-page memorandum dated November 15, 2017, the Division responded to the applicant's appeal with six exhibits (labelled as State's Exhibits 1-6 in the attached exhibit chart).

This matter was thereafter assigned to Administrative Law Judge Teneka Frost-Amusa. Judge Frost-Amusa was subsequently appointed to the Schenectady City Court, and the matter was re-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, independence, and net worth are applied on the basis of information received by the Division 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 conclusion 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 N.Y.3d 494, 499 (2011) (internal quotation marks and citations omitted)).

POSITIONS OF THE PARTIES

Position of the Division

The Division cites three bases for the denial of Outer-County Construction's application for recertification as a WBE.

First, the Division argues that the applicant failed to establish that the corporate by-laws and other business agreements permit the woman owner, Christine Plante, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

Second, the Division argues that the applicant failed to demonstrate through the production of signed contracts that the woman owner, Christine Plante, controls business negotiations, as required by 5 NYCRR 144.2(b)(3).

Third, the Division argues that the applicant failed to establish that the woman owner, Christine Plante, makes decisions pertaining to the operations of the business enterprise, as required by 5 NYCRR 144.2(b)(1).

Position of the Applicant

Outer-County Construction asserts that it meets the criteria for certification and that the Division erred in not granting it status as a WBE pursuant to Executive Law Article 15-A.

On appeal, the applicant contends that Christine Plante has always run the business operations and management of Outer-County Construction, and has been focused on the financial aspects of the business. According to the applicant, Outer-County Construction employs estimators, field supervisors, and subcontractors to handle the day-to-day work in the field, but Ms. Plante tracks current customers and projects and has recently assumed new responsibilities related to negotiating, managing, and coordinating subcontractors.

The applicant maintains that Ms. Plante not only owns a 51% ownership interest in Outer-County Construction, but also owns the majority of the voting stock in the company. The applicant contends that the documentation stating otherwise is outdated and was inadvertently included in Outer-County Construction's WBE certification application.

The applicant further contends that, although Ms. Plante runs the business operations and management of Outer-County Construction, Mr. Plante often signs the contracts because it is more practical for him to do so while he is out in the field.

FINDINGS OF FACT

1. Outer-County Construction is a corporation established on September 1, 1987, which provides construction related services (State's Ex. 1, at Bates 3-4). It has a business address of 2229 Pine Avenue, Ronkonkoma, NY 11779 (State's Ex. 1, at Bates 2).

2. In its application for WBE certification, Outer-County Construction identified Christine Plante as the Vice-President of Outer-County Construction, with a 51% ownership interest, and identified Gregory Plante as President of Outer-County Construction, with a 49% ownership interest in the business (State's Ex. 1, at Bates 4).

3. Outer-County Construction was previously owned by Christine Plante's father, Bruce Wakefield, who sold all the issued and outstanding stock of the company to Christine and Gregory Plante on January 1, 2007 for [REDACTED] (State's Ex. 4, at Bates 34-37; Applicant's Ex. 1).

4. On February 16, 2015, Outer-County Construction filed an application for WBE certification, which was electronically signed by Gregory Plante with the designation President of Outer-County Construction Corp. (State's Ex. 1, at Bates 7).

5. Outer-County Construction's WBE application indicated that its two most recent significant jobs involved roof replacement (State's Ex. 1, at Bates 5).

6. When requested by the Division, Outer-County Construction provided one-page descriptions of the roles of Ms. Plante, Mr. Plante, Mr. Bruce Wakefield, and other key employees in the day-to-day operations of Outer-County Construction's business (State's Ex. 3, Bates 12-15). Those documents describe Ms. Plante as being responsible for management of the business' administrative and fiscal day-to-day operations, such as managing contracts, coordinating scheduling, and handling the business' accounts payable and receivable (State's Ex. 3, at Bates 12). The documents describe Mr. Plante's primary duties as focused on field supervision and job cost estimating, in addition to managing day-to-day operations with employees and coordinating staff scheduling (State's Ex. 3, at Bates 13). The documents also indicate that Mr. Wakefield's primary duty is job cost estimating and identify him as Lead Estimator for certain projects "ranging up to \$1 million" (State's Ex. 3, at Bates 14). Mr. Wakefield also consults with long-term planning for the business (State's Ex. 3, at Bates 14).

7. Outer-County Construction's by-laws, minutes, and two agreements of sale were also provided to the Division (State's Ex. 4). Section 7 of Article II of the by-laws requires that any action authorized by Outer-County Construction's shareholders, other than the election of directors, must be by majority vote except as otherwise required by law (State's Ex. 4, at Bates 19).

8. According to Section 2 of Article V of its by-laws, the President of Outer-County Construction is the chief executive officer and is granted "general charge of the entire business of the Corporation" (State's Ex. 4, at Bates 26). The by-laws state that the Vice-President has only those powers delegated to her by the President or whatever powers and duties assigned to her by the Board of Directors (State's Ex. 4, at Bates 26).

9. The August 2, 2007 Agreement of Sale between Christine and Gregory Plante indicates that, although Ms. Plante owns 51% of the outstanding common stock, both she and Mr. Plante own [REDACTED] shares of voting stock, limiting Ms. Plante's exercise of majority control (State's Ex. 4, at Bates 32).

10. Ms. Plante did not sign any of the three fully-executed contracts Outer-County Construction provided to the Division during the application process (State's Ex. 5).¹ Mr. Plante signed two of the contracts, including contracts between Outer-County Construction and [REDACTED] and [REDACTED] (State's Ex. 5, at Bates 41-58; 104-109). Mr. Wakefield signed the third contract provided by the applicant, which was between Outer-County Construction and [REDACTED] (State's Ex. 5, at Bates 87-103).

11. On appeal, the appellant provided documents purporting to show that Outer-County Construction re-issued stock certificates for Christine and Greg Plante in 2013 (Applicant's Ex. 1-2). Per stock certificates issued July 1, 2013, Ms. Plante owns [REDACTED] voting shares and [REDACTED] non-voting shares of Outer-County Construction Corp. and Mr. Plante owns [REDACTED] voting shares and [REDACTED] non-voting shares of Outer-County Construction Corp. (Applicant's Ex. 2).

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 of denial related to Christine Plante's operation and control of Outer-County Construction. Each basis is discussed individually below.

¹ Outer-County Construction provided four (4) contracts during the WBE certification application process, including a subcontract between Outer-County Construction and [REDACTED] (State's Ex. 5, at Bates 59-86). However, because the applicant's contract with [REDACTED] is not signed by [REDACTED] it will not be considered as it has no evidentiary value. Notably, consideration of the contract would not weigh in the applicant's favor since it is signed on behalf of Outer-County Construction by Greg Plante in his capacity as President.

Control: Corporate Documents

The applicable regulatory criterion states that the enterprise's "[a]rticles of incorporation, corporate bylaws, partnership agreements and other agreements . . . must permit minority group members or women who claim ownership of the business enterprise to make [decisions pertaining to business operations] without restrictions" 5 NYCRR 144.2(b)(2).

In its denial letter, the Division found that the corporate by-laws and other documents governing the business enterprise do not permit the woman-owner to make decisions without restrictions. As reasons for denial, the Division cites these relevant facts: (1) Ms. Plante is the owner of [redacted] voting shares and [redacted] non-voting shares in the business enterprise; (2) Mr. Plante is the owner of [redacted] voting shares and [redacted] non-voting shares in the business enterprise; (3) Section 7 of Article II of the corporate by-laws of Outer-County Construction Corp. requires that any action by shareholders, other than the election of directors, be by majority vote of the shareholders, except as otherwise required by law; (4) Section 2 of Article V of the corporate by-laws of Outer-County Construction Corp. indicates that the President shall "be the chief executive officer of the Corporation, and shall have general charge of the entire business of the Corporation"; (5) Section 3 of Article V of the corporate by-laws indicates that the Vice-President "shall have such of the President's powers and duties as the President may from time to time delegate"; and (6) Mr. Plante is the President of Outer-County Construction and Ms. Plante is Vice-President (State's Ex. 6, at Bates 113).

In its appeal letter, Outer-County Construction contends that incorrect information about the stock ownership of the business was submitted with its WBE recertification application, and it attached what it contends are current stock certificates to show the correct ownership distribution of Outer-County Construction's stock. According to the stock certificates dated July 1, 2013, Christine Plante owns [redacted] voting shares and [redacted] non-voting shares of Outer-County Construction, while her husband owns [redacted] voting shares and [redacted] non-voting shares (Applicant's Ex. 2). Notably, however, Outer-County Construction's appeal does not address the Division's contention that Ms. Plante's ability as a majority shareholder to make binding decisions on behalf of Outer-County Construction is restricted because Mr. Plante is President of the company and she is Vice-President.

In response to Outer-County Construction's appeal, the Division argues that Outer-County Construction is not entitled to WBE certification because Ms. Plante is unable to exercise her majority control over Mr. Plante, the President of the Outer-County Construction. Outer-County Construction's corporate by-laws designate the President as chief executive officer of the company and grant him "general charge of the entire business" (State's Ex. 4, at Bates 26). The Vice-President is designated only those responsibilities delegated to her by the president or whatever powers and duties assigned to her by the Board of Directors (State's Ex. 4, at Bates 26). The applicant's WBE certification application indicates that Mr. Plante is President and Ms. Plante is Vice-President of Outer-County Construction, and Mr. Plante signed and submitted the WBE application in his capacity as President (State's Ex. 1 at Bates 4, 7). The Division argues that because Mr. Plante outranks Ms. Plante in the corporate hierarchy, Ms. Plante is unable to direct Mr. Plante's day-to-day operation of Outer-County Construction's business.

Furthermore, the August 7, 2007 purchase agreement the applicant provided during the application process indicates that both Mr. Plante and Ms. Plante own the same number of voting shares in Outer-County Construction despite Ms. Plante being a majority shareholder (State's Ex. 4, at Bates 32). Outer-County Construction's by-laws require a majority vote of the shareholders for actions by shareholders other than election of the board of the directors (State's Ex. 4, at Bates 19). Thus, the Division argues that because Ms. Plante does not own the majority of *voting* shares she is restricted from exercising her majority control over Outer-County Construction.

In response to the applicant's contention that the composition of Outer-County Construction's stock ownership changed and the stock were re-issued in 2013, the Division points out that this information was not before the Division at the time it made its decision. Therefore, it is irrelevant to the issue of whether the Division's determination is supported by substantial evidence. Moreover, the Division argues that no evidence was presented that the stock certificates were validly issued. Lastly, the Division contends that even if the re-issued stock certificates are taken at face value as authentic, and Ms. Plante therefore does possess a majority of Outer-County Construction's voting stock, the Division's denial determination is still supported by substantial evidence based on the fact that Mr. Plante, as President, outranks Ms. Plante, who is Vice President.

I agree. Outer-County Construction's corporate by-laws clearly establish that the office of Vice-President is subordinate to the office of President and the President shall take on the role of chief executive officer. Therefore, although Ms. Plante is involved in the management and operation of Outer-County Construction, Mr. Plante is legally the highest-ranking officer of the corporation with the authority to direct Ms. Plante's actions. *See C.W. Brown, Inc. v. Canton*, 216 A.D.2d 841, 843 (3d Dep't 1995) (finding denial of WBE certification supported by substantial evidence where corporate by-laws did not prevent woman-owner from making operational decisions but did provide that her husband, as president and CEO, had sole management authority).

Based on the evidence in the record, the applicant has failed to demonstrate that the corporate bylaws and other documents governing Outer-County Construction permit the woman-owner, Christine Plante, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). The Division's denial, therefore, was based on the substantial evidence.

Control: Control Negotiations

The regulatory criterion states that the applicant must demonstrate that the woman owner has "control of negotiations . . . through production of relevant documents" (5 NYCRR 144.2(b)(3)).

In its denial letter, the Division argues that Outer-County Construction has failed to demonstrate that Christine Plante controls business negotiations for Outer-County Construction. As reasons for denial, the Division cites two relevant facts: (1) Ms. Plante provided four executed contracts between Outer-County Construction and its clients; and (2) Of the four

contracts provided in connection with the application, three are signed by Mr. Plante and none are signed by Ms. Plante (State's Ex. 6, at Bates 112).

In its appeal, Outer-County Construction argues that although Ms. Plante runs the business operations and management, Mr. Plante often signs the contracts because it is more practical for him to do so while he is out in the field (Applicant's Ex. 1).

In response, the Division points out that the applicant provided three contracts which were signed by Mr. Plante, but it provided no contracts demonstrating Ms. Plante's control of business negotiations on behalf of Outer-County Construction (State's Ex. 5). The Division also noted that the applicant did not put forth any arguments or evidence that Ms. Plante controls contract negotiations on appeal.

Outer-County Construction's appeal fails to address the crux of the reason for the Division's denial determination. Section 141.2(b)(3) requires an applicant for WBE certification to demonstrate that the woman owner has control of negotiations through production of documents. Outer-County Construction has offered no documents that demonstrate that Ms. Plante controls negotiations as required by the regulation. Accordingly, the applicant has failed to demonstrate the Division's determination was not based on substantial evidence.

Operation: Decisions Pertaining to Operation

The eligibility criterion at issue provides that "[d]ecisions pertaining to the operations of the business enterprise must be made by . . . women claiming ownership of that business enterprise" 5 NYCRR 144.2(b)(1).

In its denial letter, the Division argues that Outer-County Construction has failed to demonstrate that Christine Plante makes decisions pertaining to the operation of the business. As reasons for denial, the Division cites two relevant facts: (1) Ms. Christine Plante manages financial and human resources aspects of Outer-County Construction; and (2) Ms. Plante's male co-owner, Mr. Gregory Plante, manages the core functions of the business enterprise including, but not limited to, estimating projects and supervising field work (State's Ex. 6, at Bates 112).

On appeal, counsel for Outer-County Construction states that Christine Plante has always run the business operations and management of Outer-County Construction (Applicant's Ex. 1). In a letter supporting Outer-County Construction's appeal, Ms. Plante explains that she has been focused on all aspects of the applicant's finances, such as meeting with suppliers and subcontractors regarding pricing and working with banks to build the company's working capital (Applicant's Ex. 3). She states that due to the success of the business, she has employed estimators, field supervisors, and subcontractors to handle the day-to-day work in the field, but she still tracks projects (Applicant's Ex. 3). The appeal also claims that, at present, neither she or her husband handle the estimates or field supervision, as that work is now performed by subcontractors and estimators. The applicant also contends that Ms. Plante has new duties which include "negotiating, managing, and coordinating . . . subcontractors" in addition to her existing operation and management duties. (Applicant's Ex. 1).

In its response, the Division argues that Ms. Plante, for WBE certification purposes, does not operate the firm because Mr. Plante and Mr. Wakefield manage the significant operations of Outer-County Construction's business. While evaluating Outer-County Construction's WBE certification application, the Division identified cost estimation and the supervision of field operations as the significant operations of Outer-County Construction's business because (1) cost estimating is a central element to preparing the bids necessary for the firm to obtain work and (2) field work is the service the contractor is paid to perform. The Division argues that the job descriptions the applicant provided during the application process clearly identify Mr. Plante and Mr. Wakefield as the individuals at Outer-County Construction who are primarily responsible for the significant operations of providing field supervision and detailed cost estimation, while Ms. Plante's job description does not indicate she has any role in either (State's Ex. 3, Bates 12-14).

In response to the applicant's contention that currently neither Mr. Plante nor Ms. Plante handle the estimates or field supervision, and that Ms. Plante has assumed new duties related to negotiating with and coordinating subcontractors, the Division argues that applicant has provided no evidence to support these claims, which clearly contradict the evidence currently in the record.

I find that the Division's determination that Ms. Plante does not make decisions pertaining to Outer-County's Construction's business operations is supported by substantial evidence, for two reasons. First, evidence in the record supports that Ms. Plante does not make decisions pertaining to Outer-County's core functions: job cost estimating and supervising field work. Outer-County Construction does not deny that job cost estimating and supervision of field operations are significant operations for the applicant's business. The evidence in the record shows that Ms. Plante's responsibilities do not include her management of (or any role in) either operation. To the contrary, in the documents applicant provided during the application process, Ms. Plante's job duties and responsibilities focus on financial and human resource management: managing contracts and daily operations, coordinating schedules, monitoring cash flow, working with employees for day-to-day operations, and working on branding and advertising (State's Ex. 3, at Bates 12). None of those duties are related to the significant operations of job cost estimating and field supervision, which are the core revenue producing functions of the business. On the other hand, the application materials indicate that the male-owner Mr. Plante's primary duties and responsibilities involve managing the day-to-day operations of the employees in the field (crews of up to 40 men), as well as providing job cost estimating (State's Ex. 3, at Bates 13). The application further indicates that Mr. Wakefield, Ms. Plante's father and former owner of the business, is designated "Lead Estimator" and provides detailed job cost estimating (State's Ex. 3, at Bates 14).

Second, the Division's decision that Ms. Plante does not operate Outer-County Construction for WBE recertification purposes is supported by evidence in the record showing that control of the applicant's day-to-day operations is shared between Ms. Plante, her husband, and Mr. Wakefield. A woman-owner does not make decisions pertaining to the operation of a business enterprise within the meaning of §144.2(b)(1) where she "performs some functions and makes some decisions on her own; yet significant operations are shared and still others are performed by [men] alone". *Matter of Northeastern Stud Welding Corp. v. Webster*, 211 A.D.2d 889, 890 (3d Dep't 1995). Here, the record shows that Ms. Plante is solely responsible for

managing the fiscal operations, as well as branding and advertising for the business, but that she shares control of running the day-to-day operations and staff scheduling with Mr. Plante and Mr. Wakefield (State's Ex. 3, at Bates 12-15). Also, while Ms. Plante's job description states that she is responsible for managing contracts, both Mr. Plante and Mr. Wakefield have authority to sign contracts on behalf of the applicant (State's Ex. 5). On the other hand, job cost estimating and field supervision, significant operations of Outer-County Construction's business, are performed and managed by Mr. Plante (with assistance from Mr. Wakefield), but not by Ms. Plante (State's Ex. 3, at Bates 12-15).

The applicant maintains that circumstances have changed and the responsibilities for both Mr. Plante and Ms. Plante are different, in that Mr. Plante and Ms. Plante no longer handle cost estimates or field supervision, Outer County Construction employs estimators and subcontractors to do field work, and that Ms. Plante has new responsibilities involving negotiating with and coordinating subcontractors (Applicant's Ex. 1, 3). However, that information was not before the Division at the time it made its decision and directly contradicts the evidence the applicant previously provided to the Division. The Division reviews an application for certification based on the information provided during the application process, and if an applicant does not supply information sufficient to establish she meets the criteria of the statute, the Division may deny the application.

That said, the applicant's representations indicate that Ms. Plante has taken on more responsibility in the management of Outer-County Construction's business. They also describe Ms. Plante having some involvement in the management of the employees and subcontractors that Outer-County Construction now employs to perform job cost estimation and field work, the core functions of Outer-County Construction's business. Those added responsibilities are relevant evidence of Ms. Plante's decision-making role in the operations of Outer-County Construction's business. However, the Division did not have the benefit of this additional information, or the opportunity to flesh out the details related thereto, prior to making its determination.

Therefore, based on the information in the record at the time of the Division's determination, I conclude that Outer-County Construction has failed to demonstrate that the woman owner, Christine Plante, makes decisions pertaining to Outer-County Construction's core functions, as required by 5 NYCRR 144.2(b)(1), and the Division's determination was based on substantial evidence.²

CONCLUSION

1. Outer-County Construction Corp. has not demonstrated that the woman owner, Christine Plante, is permitted by corporate governance documents to make decisions pertaining to business operations without restrictions, as required by 5 NYCRR 144.2(b)(2).

² Given that the applicant has failed to demonstrate compliance with the requirements of 5 NYCRR 144.2(b)(2) and 5 NYCRR 144.2(b)(3), the issue of whether the applicant has established that the woman owner makes decisions pertaining to the operations of the business enterprise, in compliance with 5 NYCRR 144.2(b)(1), may be a moot.

2. Outer-County Construction Corp. has not demonstrated that the woman owner, Christine Plante, has control of business negotiations through the production of signed contracts, as required by 5 NYCRR 144.2(b)(3).

3. Outer-County Construction Corp. has not demonstrated that the woman owner, Christine Plante, makes decisions pertaining to the operations of the business enterprise, as required by 5 NYCRR 144.2(b)(1).

RECOMMENDATION

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

**MATTER OF
OUTER-COUNTY CONSTRUCTION CORP.
DED FILE ID NO. 54385**

EXHIBIT LIST

Exhibit#	Description	# of pages
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