

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

In the Matter

- of -

the Application of **Sustainable Structures, LLC**
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61479

RECOMMENDED ORDER

- by -

/s/

Michele M. Stefanucci
Administrative Law Judge

April 9, 2020

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 Sustainable Structures, LLC (applicant or Sustainable Structures) certification as a woman-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, of the determination of the Division that applicant does not meet the eligibility criteria for certification as a WBE.

Applicant submitted an application for WBE certification on January 4, 2017 (DED 1). By letter dated May 9, 2018, the Division denied the application (DED 2). In the letter, the Division set forth the following grounds for the denial of certification:

- (1) applicant failed to demonstrate that the women owner makes decisions pertaining to the business enterprise (5 NYCRR 144.2[b][1]); and
- (2) applicant failed to demonstrate that the women owner devotes time on an ongoing basis to the daily operation of the business enterprise (5 NYCRR 144.2[b][1][iii]) (DED 2).

On June 22, 2018, applicant requested a hearing on the denial (DED 3). By letter dated February 26, 2020, the Division advised applicant that a hearing had been scheduled. The hearing took place on March 10, 2020. Corryn Carey, president of Sustainable Structures, testified for the business enterprise. Fawziyyah Slavov, Esq. appeared on behalf of the Division and Matthew LeFebvre, Senior Certification Analyst, provided testimony for the Division.

An audio recording of the hearing was made and received by my office on March 19, 2020. The recording is approximately 1 hour, 50 minutes in length and consists of three tracks. References to testimony from the hearing are identified by the time on the recording at which the testimony occurs (Track __ at __).

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are established by regulation (*see* 5 NYCRR Section 144.2). For the purposes of determining whether an applicant should be granted WBE status, the ownership, operation, and control of the business enterprise are assessed based on 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, and on information revealed in supplemental submissions and any interviews that the Division's analyst may have conducted (*see* 5 NYCRR 144.4[e] and 144.5[a]).

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that the Division's denial of the application for 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 and citations omitted]).

POSITIONS OF THE PARTIES

Division

The Division contends that its determination to deny WBE certification to Sustainable Structures is supported by substantial evidence, and that applicant failed to satisfy certification criteria related to operation of the business enterprise by a woman owner (Track 1, 3:25). Specifically, the Division asserts that applicant failed to demonstrate that the woman owner makes decisions relative to the operation of the business enterprise and devotes time on an ongoing basis to the daily operation of the business enterprise (*see* 5 NYCRR 144.2[b][1]; 5 NYCRR 144.2[b][1][iii]; DED 2 at 2-3).

The Division bases its decision on several relevant facts (DED 2). Sustainable Structures is a single-member LLC, owned by Corryn Carey, which provides construction management services (*id.* at 2). According to the Division, a vital component of construction management is an on-site presence in the field during normal workday hours (Track 2 at 27:00; 30:21). According to the Division, information provided by Ms. Carey during the application process indicated that applicant employs Dan Carey, Ms. Careys cousin, to supervise job sites, and Robert Carey, Ms. Carey's father, to assist with estimates and walk-throughs (Track 2 at 27.46; 28:37). It is the Divisions' position that since Ms. Carey is employed full time during regular business hours at another construction management company, she is not available to supervise daily field operations and therefore relies on non-qualifying individuals to perform critical revenue generating functions of the business (Track 2 at 30:21).

Moreover, the Division asserts that Ms. Carey failed to demonstrate that she devotes time on an ongoing basis to the daily operation of the business enterprise as required by 5 NYCRR 144.2(1)(b)(iii). In support of this position, the Division cites Ms. Carey's full-time employment at another construction management firm during regular business hours (DED 2 at 2). According to the Division, Ms. Carey's full-time employment interferes with her ability to devote time on an ongoing basis to the daily operation of Sustainable Structures (*id.*).

Applicant

On appeal, applicant argues that the Division's decision to deny WBE certification should be vacated, as Sustainable Structures is independently owned, operated and controlled by a woman, Corryn Carey (DED 3 at 1). Applicant argues that Ms. Carey's extensive experience

in the construction industry demonstrates that she possesses the working knowledge and ability to operate Sustainable Structures' business of construction management (*id.* at 2). Moreover, applicant maintains that Ms. Carey, the president of Sustainable Structures, is the sole signatory on the bank account and makes all decisions pertaining to the operation of the enterprise including the negotiation of contracts, leases and loan agreements (*id.* at 2, 5).

According to applicant, Sustainable Structures employs Robert Carey and previously employed Dan Carey (DED 3 at 1). It is applicant's position that although Robert Carey has extensive experience in all aspects of the construction industry, his role with Sustainable Structures is limited to that of a part-time estimator (*id.*). With regard to Dan Carey's employment status and job duties, applicant maintains that "Dan Carey is no longer an employee of Sustainable. An assistant site superintendent is responsible for providing day-to-day site supervision. A field report is filled out daily with man count, description of work done, weather and relevant pictures and sent via e-mail to Ms. Carey for her review" (*id.* at 1, 28-30).

Ms. Carey clarified that while Robert Carey's construction company, Carey Construction, and Sustainable Structures, share an address, they are separate business entities and Carey Construction ceased operating in 2015. According to Ms. Carey, Sustainable Structures has been leasing the space from Robert Carey since 2016 (DED 3, 18-24; Track 1 at 12:37).

Finally, applicant maintains that Ms. Carey devotes time on an ongoing basis to Sustainable Structures by utilizing "a cloud-base file sharing platform" that provides her with access to files regardless of her location (DED 3 at 2). Moreover, applicant contends that the use of "Goto meetings, conference calls, and zoolz are useful tools that allow Ms. Carey to work remotely. In addition, Ms. Carey visits job sites a couple times a month and receives progress reports on a daily basis via email . . . Ms. Carey is highly motivated and has spent the past two years working long hours and weekends to establish Sustainable as a separate business" (*id.*).

FINDINGS OF FACT

1. Sustainable Structures is a single member LLC owned by Corryn Carey. Corryn Carey has 100% ownership and is the president of Sustainable Structures. DED 3 at 1.
2. Sustainable Structures is a construction management business, located at 73 Furnace Street, Kingston, New York. DED 1 at 1, 3.
3. Sustainable Structures does not "self-perform," but sub-contracts out all direct labor. DED 1 at 10.
4. Sustainable Structures was established in 2009 but did not begin operations until 2016, when Corryn Carey purchased the business from her mother, Joyce Carey. The stock sale agreement for acquisition of the business indicated a purchase price of ██████████, however Corryn Carey paid Joyce Carey ██████████. "The ██████████ represented seed money which is still in the business". DED 1 at 2 and 10.

5. On the application for WBE, Corryn Carey is identified as the person responsible for all managerial operations listed in section 4.A. DED 1 at 3-4.
6. Corryn Carey is a full-time employee at [REDACTED], a construction management company located in New York, New York. DED 1 at 6; DED 3 at 3.
7. Robert Carey is the father of Corryn Carey. Sustainable Structures employs Robert Carey as a part-time estimator on projects. In addition, Robert Carey joins Ms. Carey on “walk-throughs” and participates in meetings with ownership designers. Robert Carey has extensive experience in the construction industry and is the former owner of Carey Construction. DED 1 at 2; DED 3 at 1; Track 2 at 27:25).
8. Sustainable Structures shares an address with Carey Construction. Carey Construction is no longer in operation and Robert Carey leases the premises at 73 Furnace Street, Kingston, New York, to Sustainable Structures. The lease agreement was executed on March 1, 2016. DED 3 at 1, 18-24.
9. Dan Carey is the cousin of Corryn Carey. Sustainable Structures employs Dan Carey as an assistant site supervisor. In that capacity, Dan Carey would provide Ms. Carey with daily field reports, including project conditions, man counts and photographs of the site. In addition, Dan Carey was responsible for locking up the site at the end of the work day. DED 3 at 1, 28; Track 1 at 10:15
10. Two contracts accompanied Sustainable Structures’ application for WBE certification, and are identified in the WBE application as the [REDACTED] and the [REDACTED]. DED 1 at 7; DED 4; DED 5.
11. Pursuant to the [REDACTED], Sustainable Structures was to “Furnish and install Temporary Shoring & Wall Stabilization.” DED 4 at 1.
12. Pursuant to the [REDACTED], Sustainable Structures was “to furnish efficient construction administration, management services and supervision.” Dan Carey was the on-site assistant supervisor for this project and provided daily field reports to Ms. Carey. DED 5 at 3, 28.
13. A telephone interview with Ms. Carey was conducted by Matthew LeFebvre in April 2018. DED 3 at 2; A4.

DISCUSSION

This recommended order considers applicant's appeal from the Division's determination pursuant to Executive Law 15-A, to deny Sustainable Structures’ certification as a woman-owned business enterprise.

Pursuant to 5 NYCRR 144.2(b)(1), a business enterprise applying for certification as a WBE is required to establish that decisions pertaining to the operations of the business are made by the woman claiming ownership of the enterprise. In evaluating this criterion, the Division considers whether the woman owner has independent operational control over the core functions of the business enterprise (*see Matter of J.C. Smith v New York State Dept. of Economic Dev.*, 163 AD3d 1517 [4th Dept 2018]).

Moreover, the woman owner must demonstrate that she devotes time on an ongoing basis to the daily operation of the business (5 NYCRR 144.2[b][1][iii]). In this regard, the Division will consider whether the woman owner's full-time employment during normal business hours at another business enterprise interferes with her ability to devote time to the day-to-day operation of the WBE (*see e.g. Matter of Watson Farms*, NYS DED File No. 47585, July 19, 2018).

Sustainable Structures is a single member LLC owned by Corryn Carey that provides construction management services (DED 1 at 3). During the hearing, Division witness Matthew LeFebvre testified that a vital component of providing construction management services is on-site supervision of field operations, working with sub-contractors and completing written reports (Track 2 at 30:24). Here, evidence in the hearing record indicates that Ms. Carey maintains full time employment during normal business hours at [REDACTED] (Track 1 at 19:23). While Ms. Carey is able to rearrange her schedule with her full-time employer to visit projects sites as needed, she is not available on a daily basis during normal business hours to supervise day-to-day operations (Track 1 at 14:23). Furthermore, evidence in the hearing record indicates that Ms. Carey relies on non-qualifying individuals with substantial experience in the construction industry, specifically Robert Carey and Dan Carey, to perform these core business functions (Track 2 at 30-44).

Accordingly, I conclude that based upon the information provided to the Division during the application process, it was reasonable for the Division to determine that Ms. Carey's full-time employment at [REDACTED] interferes with her ability to fulfill the core functions of Sustainable Structures and that as a result of that full-time employment, non-qualifying individuals performed vital business functions.

CONCLUSION

As discussed above, applicant failed to meet its burden to demonstrate that the Division's determination that Sustainable Structures did not satisfy the eligibility criterion of 5 NYCRR 144.2(b)(1) and 5 NYCRR 144.2(b)(1)(iii) was based upon substantial evidence.

RECOMMENDATION

For the reasons set forth above, the Division's determination to deny Sustainable Structures LLC's application for WBE certification should be affirmed.

Matter of Sustainable Structures, LLC
 DED File ID No. 61479
Exhibit Chart

Exhibit No.	Description	Rec'd
DED 1	Certification Application submitted 1/4/17	✓
DED 2	Denial Letter for WBE Certification dated 5/9/18	✓
DED 3	DED Appeal Hearing Letter dated 6/22/18	✓
DED 4	[REDACTED]	✓
DED 5	[REDACTED]	✓
DED 6	Sustainable Structures, LLC Balance Sheet	✓
DED 7	Resume: Corryn B. Carey	✓
A1*	Correspondence from [REDACTED] to Judge Stefanucci, dated 3/6/20	
A2*	Correspondence from Hugh Lewis to Judge Stefanucci, dated 3/6/20	
A3*	[REDACTED] Minutes dated 1/6/17	
A4	Email Correspondence between Corryn Carey and Matthew LeFebvre dated 12/4/17	✓
A5*	Email Correspondence between Corryn Carey and the design team for [REDACTED], dated 5/17	

*The Division objected to Applicant's Exhibits A1-3 and A5 on the grounds that the information contained therein was not provided to the Division during the application process.