

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
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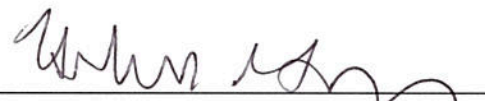
In the Matter

-of-

The Application of **TWIST MANAGEMENT, LLC**
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59858

RECOMMENDED ORDER



Helene G. Goldberger
Administrative Law Judge

May 14, 2019

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 (DED) to deny the application filed by Twist Management, LLC (Twist or applicant) for certification as a woman-owned business enterprise (WBE) be affirmed for the reasons set forth below.

PROCEEDINGS

Twist applied for certification as a woman-owned business enterprise on May 21, 2015. *See*, Exhibit (Ex.) DED-A. By letter dated December 8, 2016, the Division determined that Twist does not meet the eligibility requirements to be certified as a woman-owned business enterprise and denied its application. Ex. DED-L. The grounds for the Division's determination were:

- Pursuant to § 144.2(a)(1), of Title 5 of the New York Compilation of Codes, Rules and Regulations (5 NYCRR), the contribution of women is not proportionate to their equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise.
- Pursuant to §§ 144.2(a)(2) and (c)(2), Twist Management, LLC is not an independent business enterprise.

By letter dated December 28, 2016, Whitney Twist, Partner, appealed the Division's determination to deny Twist's application for WBE certification. Pursuant to Twist's decision to pursue its appeal in writing, by letter dated February 17, 2017, the Division notified Twist that its written appeal was due by April 18, 2017. DED received Twist's timely written appeal dated April 14, 2017 on April 18, 2017. With its appeal, Twist included Appeal (App.) Exhibits A – E. Except for the Operating Agreement (App. Ex. A), the remaining documents are new and were not part of the application and therefore, not considered by the DED analyst. Accordingly, I have not considered these documents in making this Recommended Order.

Respondent, DED, by counsel Donald J. Tobias, submitted its response to the appeal on April 5, 2019. This response includes the affidavit (Aff.) of Raymond Emanuel, the Division's Certification Director, dated April 5, 2019, Exhibits A-S, and the Memorandum of Law in Response to the Appeal (MOL) dated April 5, 2019.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are set forth in the regulations at Title 5 of NYCRR § 144.2. To determine whether an applicant should be granted WBE status, the Division assesses the ownership, operation, control, and

independence of the business enterprise based on information supplied through the application process. The Division reviews the business enterprise as it existed at the time that the application was made, based on representations in the application itself and information presented in supplemental submissions as well as any interviews that the Division's analyst may have conducted. *See*, 5 NYCRR § 144.4(e).

STANDARD OF REVIEW

On this administrative appeal, Twist bears the burden of proving that the Division's denial for WBE certification is not supported by substantial evidence (*see*, State Administrative Procedures Act § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and the 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

The Division denied the application filed by Twist for certification as a woman-owned business enterprise with a letter dated December 8, 2016 (*see*, Exhibit DED-L). The Division determined that Twist failed to demonstrate: (1) that the contribution of women is proportionate to their equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise as required by 5 NYCRR § 144.2(a)(1); and (2) that Twist is an independent enterprise as required by 5 NYCRR §§ 144.2(a)(2) and (c)(2). The Division concluded that Twist is inextricably linked to the family-owned businesses of Transit Steel Buildings and American Dream Development, LLC and has no true independent status. In addition, the two female partners in Twist – relatives of the principles in Transit Steel Builders and American Dream Development LLC – have not demonstrated any contribution in capital or expertise to meet DED standards. With respect to the documents submitted by Twist with its appeal, the Division argues that these represent a failed effort to supplement the record that was before it at the time of the application and should not be considered. Counsel further states that even if these records were to be considered, they do not succeed in showing that the applicant meets the standards.

Twist

In its appeal, Twist begins by accepting full responsibility for its failure to state its case and "for any errors in the application process." Letter of Appeal, April 14, 2017 (Appeal). Twist provides the breakdown of the equity interests set forth in the operating agreement to demonstrate that 85% of the company is women-owned. The Appeal also provides that Whitney Twist "is consistently in the field performing work and services to fulfill the contractual obligations of the

organization” and is “critical to the success of Twist . . .” Appeal, p. 2. Olivia Twist Zawistowski is described as the handler of “many different administrative tasks...” *Id.* And, the Appeal provides that an important aspect of Twist’s business is the rental of shanties and shipping cargos referencing an invoice to show the purchase of this equipment. *Id.*; Ex. App-B. Twist points to the operating agreement as proof that the applicant is an independent enterprise. Twist also notes the invoices submitted as Ex. App-D with either woman as a signatory to further support that the applicant is an independent enterprise. In its appeal, Twist does not deny its relationship to American Dream Development (ADD) but maintains that ADD is treated as any other subcontractor and either woman partner could terminate the relationship.

FINDINGS OF FACT

1. Twist Management LLC is located at 2756 Transit Road, West Seneca, New York, and is described to be in the business of commercial construction. Ex. DED-A, § 3C.
2. The two women partners of Twist (Whitney Twist and Olivia Twist Zawistowski) are the daughters of Oliver Twist and Cynthia Twist who own Transit Steel Buildings Inc. (Transit). DED-A, § 6H. Transit operates from the Transit Road Premises that is owned by Oliver Twist (father of Whitney and Olivia) and is also the same premises where Twist is located. Ex. DED-B.
3. On its website, Transit describes its business as engaged in the construction field and specifically, the sale and installation of pre-engineered steel buildings as well as storage containers described as shanties. Ex. DED-D.
4. Justin Zawistowski, the husband of Olivia Twist was a self-employed contractor from 2009 to late 2013 doing business as American Dream Enterprizes. Ex. DED-E. In October 2013, Mr. Zawistowski formed a limited liability company called American Dream Development LLC (ADD) also located at 2756 Transit Road, West Seneca, New York. Exs. DED-F, G.
5. ADD employs Whitney Twist, one of the Twist partners. Whitney is the sister of Olivia and daughter of Oliver and Cynthia. Ex. DED-I. Mr. Zawistowski is married to Oliva. Ex. DED-G.
6. A sizeable portion of ADD’s revenue is derived from constructing and maintaining the steel buildings that are sold by Transit Steel. Ex. DED-H.
7. Shortly after the formation of ADD, on November 13, 2013, Justin Zawistowski, his spouse Olivia Twist Zawistowski, and Whitney Twist, his sister-in-law, formed Twist Management LLC, also operating from 2756 Transit Road, West Seneca, New York. Exhibit DED-J. In Twist’s operating agreement, the purpose of the company is described as “construction or property acquisition.” Ex. App. A, p. 1, § 2.

8. In Twist's application for WBE certification, the company provides that each of the partners contributed ██████ to the company. Ex. DED-A, § 2C.
9. The application also sets forth that Whitney Twist owned 45% interest in Twist, Olivia Twist Zawistowski was a 40% owner, and Justin Zawistowski owned 15% of the company. Ex. DED-A, § 2A.
10. In its WBE application for certification, Twist provided that it had no employees, machinery, equipment, vehicles or line of credit. Ex. DED-A, §§ 1W, 5C, 5F.
11. Twist provided in its application that it has a lease at 2756 Transit Road for ██████. Ex. DED-A, § 5A, B. This rent was waived by the owner of the premises (Whitney and Olivia's father) in return for "property management." Ex. DED-C.
12. Twist's 2014 K-1 showed ██████ in the Partner's Capital Accounts in the beginning of the year. Ex. DED-M, 17.
13. At the time of Twist's WBE application, Olivia Twist Zawistowski was working at the Restoration Church performing clerical tasks, working at her own company Twis-Tee Designs doing graphic design, handling case management for the Census Data Unit of United Health Care, and performing administrative work for Twist.¹ Ex. DED-N.
14. At the time of Twist's WBE application, while still in college, Whitney Twist described her role as safety coordinator, owner and operator at Twist. Ex. DED-O.
15. Since 2001, Justin Zawistowski has worked as a carpenter in commercial and residential construction. He has a welder's certification and a commercial driver's license. Ex. DED-E.
16. Projects billed to Twist such as Roswell Park Cancer Institute (RPCI) and Goodnature Products were performed by ADD. Exhibits DED-A, §§ 4C, P, Q. *See also*, Certification Director Emanuel Aff., ¶¶ 22-23.
17. Another project cited by Twist in support of its certification application as one that it alone carried out was for Argus Management Group. Ex. DED-R. This work was also for RPCI and performed by ADD. Emanuel Aff., ¶ 24. The phone number on the Twist invoice is the same as ADD's. Exs. DED-P, R.

¹ Twis-Tee is also the name of the D/B/A on the application. Ex. DED-A, § 1C.

DISCUSSION

This recommended order considers Twist's appeal from the Division's December 8, 2016 determination to deny Twist's application for certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The discussion below addresses the bases for the Division's denial.

The standards for determining whether an applicant is eligible to be certified as a woman-owned business enterprise are set forth in 5 NYCRR § 144.2. According to the Division's December 8, 2016 denial letter (*see*, Ex. DED-L), Twist did not demonstrate that the contribution of women is proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise. 5 NYCRR § 144.2(a)(1). Further, in its denial, the Division found that Twist Management, LLC is not an independent business enterprise. 5 NYCRR §§ 144.2(a)(2), (c)(2).

I. Ownership: Contribution Proportionate to Equity Interest

The eligibility criterion at issue requires that the "contribution of the . . . woman owner must be proportionate to [her] equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise." 5 NYCRR § 144.2(a)(1).

The Division argues that the applicant did not identify any relevant contributions to Twist by either woman partner, and therefore, Twist failed to demonstrate that these individuals' contribution of money, property, equipment or expertise is proportionate to their ownership interest in the enterprise. Respondent's MOL, pp. 8-10. In its appeal, Twist points to its operating agreement to prove that 85% of the company is owned by women. Appeal, p. 2. Twist also states that Whitney and Olivia are critical to the operation. *Id.*

However, these self-serving statements do not establish that either women's contributions are proportionate to their equity interests. There is no record that shows the basis for the establishment of the equity interests of the owners. In fact, the application shows that each of the partners contributed only █████ towards the company. Ex. DED-A, § 2C. There is no showing by Twist of any tangible contributions that either Whitney or Olivia has made to the operation of the company. As noted by the application, the initial tax return filed by Twist for the year 2014 showed █████ in the "Partners' Capital Account." Ex. DED-M, p. 17. The application provided that Twist had no equipment, facilities or line of credit. Ex. DED-A, §§ 5A, C, D, F.

In addition, at the time of the application, in addition to her partnership at Twist, Olivia Twist Zawistowski held several positions including a clerical position at a church, graphics designer at what appears to be her own enterprise Twis-Tee, and case manager for United Healthcare. Ex. DED-N. In addition to the fact that her clerical and graphics design work do not establish relevant expertise for the management and control of a construction enterprise, it does

not appear that she would have much time to devote to this role. Whitney Twist was a college student at the time of the application. Ex. DED-O. And, her role at Twist appears to have been one of safety coordinator. *Id.* This would reflect her past experience at Securitas where she had previously worked for less than a year and some background in criminal studies and CPR. *Id.* She also had studied welding and equipment operation but there was no support provided that showed she utilized these skills in any capacity at Twist. *Id.* Whitney Twist also worked for American Dream Enterprizes for eight months doing a variety of clerical activities as well as reading blueprints, troubleshooting and implementation of a safety plan. *Id.*

The description of the experience and education of the two women contrasts sharply with that of Justin Zawistowski who has had lengthy experience in the construction industry since 2015. Ex. DED-E.

Based on this record, the women partners in Twist have not shown any sufficient contribution of capital or expertise to warrant their status in the company. They do not demonstrate working knowledge and expertise to have independent control of the business's enterprise. *Occupational Safety & Environmental Associates v. New York State Department of Economic Development*, 161 AD3d 1592 (4th Dep't 2018). Therefore, I conclude that the Division's determination with regard to the requirement of 5 NYCRR § 144.2(a)(1) is supported by substantial evidence.

II. Independence

The second eligibility criterion at issue requires that the applicant establish itself as an independent business enterprise. 5 NYCRR § 144.2(a)(2) and (c)(2).

The Division has concluded that Twist "is a mere adjunct of the other family businesses that are operated out of the Transit Road Premises (owned ... by the father of Olivia and Whitney Twist), upon which it was and continues to be in all material ways dependent." DED MOL, p. 11. While taking "full responsibility to failing to make the case clearly," Twist responds to this conclusion by stating that the company is actively bidding and performing jobs. Appeal, p. 3. Twist provides that it has significant assets and produces "real and meaningful revenues and profits." Appeal, p. 4. In support of these claims, Twist has produced additional invoices from 2016 relating to its alleged shanty rental business.

With respect to the additional documentation that Twist has included with its appeal, I am not relying on these records because they were not submitted with the application. Section 144.5(a) of 5 NYCRR limits my review as the hearing officer to the records submitted with the certification application. If I were permitted to rely on them, they are not persuasive as they show, as the other documentation in the application, that Twist is merely a component of Transit Steel Building owned and operated by the parents of Whitney and Olivia. See, DED MOL, pp. 16-18; Emanuel Aff., ¶¶ 26-32.

As of its application, Twist did not own any equipment, have any employees and did not pay any rent for the building it leased from the women's parents. Exs. DED-A, §§ 1W, 5C, 5D, B and C. All of the invoices that Twist submitted to the Division as part of its application underscore the entanglement of the family businesses as it is American Dream Development (owned by Justin Zawistowski who is married to Olivia Twist Zawistowski and employs Whitney Zawistowski) that performs the work that Twist bills out. Exs. DED-A, §§ 6B, 6C and 6 H, P, Q. Even the telephone number that appeared on Twist Management's invoices to Argus Management Group was the identical phone number for American Dream Development – Mr. Zawistowski's company. Exs. DED-H, P.

As was the case in *Matter of Skyline Specialty Systems, Inc. v. Gargano*, 294 AD2d 742 (3d Dep't 2002), where the applicant was so entangled with another business by sharing board members, personnel, office, etc., that it clearly was not independent, so is the case here. At the very most, Twist is a tangential aspect of both American Dream Development and Transit Steel Buildings and thus, not eligible for WBE certification. Twist relies on other family-owned businesses for all of its structure, expertise, product and implementation.

The legislative intent of Article 15-A is to serve a remedial purpose and remedy past discrimination experienced by minority and women business owners – not family businesses. The program, to pass constitutional muster, must be narrowly tailored to confer benefits exclusively to members of the protected class to redress prior discrimination – minority and women business owners who made a significant financial investment in business, enjoy the risks and profits of the business, operate the business in fact and have control over the business as a formal matter. See, *Richmond v. J.A. Croson*, 488 US 469, 506 (1989).

Based on the record, the Division's determination to deny WBE certification pursuant to 5 NYCRR §§ 144.2(a)(2) and (c)(2) is supported by substantial evidence.

CONCLUSION

For the reasons outlined above, Twist failed to demonstrate that (1) the contribution of women is proportionate to their equity interest in the business enterprise pursuant to 5 NYCRR § 144.2(a)(1) and (2) the company is an independent business enterprise pursuant to 5 NYCRR §§ 144.2(a)(2), (c)(2).

RECOMMENDATION

For the reasons set forth above, the Director should affirm Division staff's December 8, 2016 determination to deny Twist's application for certification as a woman-owned business enterprise.

Attachment: Exhibit Chart

MATTER OF TWIST MANAGEMENT, LLC
DED FILE No. 59858
EXHIBIT LIST

Exhibit No.	Description	ID	Rec'd	Notes
DED-A	Twist's Application – 5/21/15	√	√	
DED-B	Commercial Lease – 1/1/15	√	√	
DED-C	Waiver of Rent	√	√	
DED-D	Page from Website of Transit Steel Buildings	√	√	
DED-E	Justin Zawistowski Resume	√	√	
DED-F	Department of State – Division of Corporations American Dream LLC	√	√	
DED-G	Justin Zawistowski and Olivia Twist 2013 1040	√	√	
DED-H	American Dream Development Invoices	√	√	
DED-I	2013 W-2 Whitney Twist/American Dream Development	√	√	
DED-J	Department of State – Division of Corporations Twist Management LLC	√	√	

Exhibit No.	Description	ID	Rec'd	Notes
DED-K	Twist Operating Agreement	√	√	
DED-L	Division of Minority and Women's Development Denial – 1/8/16	√	√	
DED-M	2014 K-1 Twist Management	√	√	
DED-N	Resume Olivia Twist Zawistowski	√	√	
DED-O	Resume Whitney Twist	√	√	
DED-P	Invoices – American Dream Development	√	√	
DED-Q	Invoices – American Dream Development	√	√	
DED-R	Twist Bills – Argus Management	√	√	
DED-S	January 2016 Construction Shanty Rental	√		not accepted into evidence
App-A	Twist Management, LLC Operating Agreement	√	√	
App-B	Construction Shanty Rental Invoice	√		not accepted into evidence
App-C	Twist Management Container Rental Invoices	√		not accepted into evidence

Exhibit No.	Description	ID	Rec'd	Notes
App-D	Contracts	√		not accepted into evidence
App-E	Title of Vehicles/Trailers	√		not accepted into evidence