

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

In the Matter

- of -

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

NYS DED File ID No. 61154

RECOMMENDED ORDER

- by -



Daniel P. O'Connell  
Administrative Law Judge

September 15, 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 filed by Upstate Rebar, LLC (Upstate Rebar or applicant) for certification as a woman owned business enterprise (WBE) be affirmed for the reasons set forth below.

## PROCEEDINGS

By letter dated February 14, 2017, the Division determined that Upstate Rebar does not meet the eligibility requirements to be certified as a woman owned business enterprise, and denied its application (*see* WBE Exh. 2). With a letter dated February 23, 2017, from Bonnie Chmielowiec, Upstate Rebar appealed from the Division's determination to deny its application for WBE certification, and requested a hearing (*see* WBE Exh. 7). With a notice of appeal hearing dated May 30, 2017, staff from the Division advised Upstate Rebar that the administrative appeal hearing would convene on June 13, 2017 at 10:00 a.m. at the Division's offices located at 633 Third Avenue, New York, New York 10017.

The administrative appeal hearing convened as scheduled. Ms. Chmielowiec represented Upstate Rebar at the hearing and testified. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, represented the Division. Iliana Farias, Senior Certification Analyst, testified on behalf of Division staff.

The administrative hearing was recorded. The New York State Department of Environmental Conservation, Office of Hearings and Mediation Services (OHMS) received a copy of the compact disk (CD)<sup>1</sup> on June 19, 2017. As discussed during the June 13, 2017 hearing, the Division provided the parties' representatives with copies of the CD, and the parties' representatives developed a schedule to file written closing arguments. With a cover letter dated July 21, 2017, Kristen L. Schaub, Esq., from Nesper, Ferber, DiGiacomo, Johnson & Grimm, LLP (Amherst, New York) timely filed a written closing argument on behalf of Upstate Rebar. Mr. Harmonick timely filed a written closing argument for the Division. The record of the hearing closed on July 21, 2017, upon receipt of the parties' closing arguments.

During the June 13, 2017 hearing, the parties offered seven exhibits. I received all exhibits into the evidentiary record (CD 01:01:43, 01:02:05). A copy of the exhibit chart is attached to this recommended order.

## ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman owned business enterprise are outlined in the regulations at Title 5 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (5 NYCRR) § 144.2. To determine whether an applicant

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<sup>1</sup> The CD for the June 13, 2017 hearing includes two tracks. The first track is a recording the administrative hearing that begins with the parties' appearances and concludes with my ruling concerning the receipt of the exhibits into the evidentiary record. The second track on the CD concerns the parties' agreement to file written closing statements. Therefore, references to the record in this recommended order are from the first track of the CD.

should be granted WBE status, the Division assesses the ownership, operation, control, and independence of the business enterprise on the basis of 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 on information presented in supplemental submissions as well as any interviews that the Division's analyst may have conducted. (*See* 5 NYCRR 144.5.)

### **STANDARD OF REVIEW**

On this administrative appeal, Upstate Rebar bears the burden of proving 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 marks and citations omitted]).

### **POSITIONS OF THE PARTIES**

#### The Division

By letter dated February 14, 2017, the Division denied the application filed by Upstate Rebar for certification as a woman owned business enterprise (*see* WBE Exhibit 2). According to the February 14, 2017 denial letter, Bonnie Chmielowiec and the other woman owner do not make decisions pertaining to the operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1). In addition, the Division contended that Upstate Rebar does not meet the criterion outlined at 5 NYCRR 144.2(b)(2) because Ms. Chmielowiec and the other woman owner do not exercise control over the business enterprise. The Division reiterated these claims in the closing argument.

#### Upstate Rebar, LLC

With correspondence dated February 27, 2017, Paul T. Nesper, Esq., counsel for Upstate Rebar, provided copies of the operating agreement signed on May 20, 2008, with referenced schedules, and an amendment to the operating agreement effective January 1, 2012. Based on the operating agreement and amendment, Upstate Rebar contended that Bonnie Chmielowiec serves as the manager of Upstate Rebar, and with her daughter, Lauren, own 63% of the business enterprise. As the manager, Bonnie Chmielowiec addresses all day-to-day operations of Upstate Rebar.

With correspondence from Upstate Rebar's attorney dated April 17, 2017, Ms. Schaub referenced the operating agreement and the amendment previously submitted with the February 27, 2017 correspondence. In addition, Ms. Schaub filed copies of letters from Upstate Rebar's bankers, insurance agents, accountants, and payroll service provider to support the contention that Ms. Chmielowiec manages the day-to-day operations of Upstate Rebar. (*See* WBE Exh. 7.)

In its closing argument, Upstate Rebar argued that the Director should certify Upstate Rebar as a woman owned business enterprise.

### **FINDINGS OF FACT**

1. Upstate Rebar, LLC (Upstate Rebar) has business offices located at 4605 Walden Avenue, Lancaster, New York 14086. Upstate Rebar fabricates reinforcing rebar, and distributes construction supplies and wire mesh. (*See* WBE Exh. 1; CD 06:50, 38:15.)
2. Upstate Rebar is a limited liability company formed on May 20, 2008. Its members are Bonnie A. Chmielowiec, Jonathan K. Chmielowiec, and Lauren J. Chmielowiec. Bonnie Chmielowiec's membership interest in Upstate Rebar is 52%. Jonathon Chmielowiec's membership interest is 24%, and Lauren Chmielowiec's membership interest is also 24%. (*See* WBE Exhs. 1 and 4.)
3. On behalf of Upstate Rebar, Bonnie Chmielowiec filed an application for certification as a woman owned business enterprise (WBE) with the Division on November 19, 2015 (*see* WBE Exh. 1).
4. With a letter dated February 14, 2017, the Division denied Upstate Rebar's application for certification as a woman owned business enterprise (*see* WBE Exh. 2).
5. At Upstate Rebar, Bonnie Chmielowiec's duties and responsibilities focus on financial and human resources management. Jonathan Chmielowiec's duties and responsibilities focus on production management, material purchase, equipment purchase and maintenance, truck purchase and maintenance, as well as sales. (*See* WBE Exh. 1 and 3; CD 09:12.)
6. Another employee central to operations at Upstate Rebar is Darrell Felker. Mr. Felker holds the title of general manager, and his duties and responsibilities focus on equipment purchasing and maintenance, as well as sales management. In addition, Mr. Felker is responsible for estimating. (*See* WBE Exh. 1 and 3; CD 09:56, 10:25.)
7. Ms. Chmielowiec provided the Division with a copy of the operating agreement for Upstate Rebar. This version of the document was neither signed nor dated. According to the operating agreement, Jonathan Chmielowiec is the general manager. The general manager has authority to manage and control the day-to-day operations of the business enterprise. (*See* WBE Exh. 4 [§ 7.B]; CD 12:18, 13:24, 39:25.)
8. In addition, the operating agreement authorizes the appointment of officers. Bonnie Chmielowiec is the president, and presides over meeting of the members. Johnathan is the vice-president and general manager, and Lauren is the secretary and treasurer. (*See* WBE Exh. 4 [§ 7.F]; CD 14:24.)

## DISCUSSION

This recommended order considers Upstate Rebar's February 23, 2017 appeal from the Division's February 14, 2017 determination to deny its application for certification as a woman owned business enterprise pursuant to Executive Law Article 15-A. With respect to operations, the Division determined that Bonnie Chmielowiec and the other woman owner do not make decisions pertaining to the operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1). With respect to exercising control over the business enterprise, the Division asserted that Upstate Rebar did not demonstrate that the operating agreement permits Bonnie Chmielowiec, as the woman-owner of the business enterprise, to make business decisions without restrictions as required by 5 NYCRR 144.2(b)(2). (*See* WBE Exh. 2.)

### I. Operation

Division staff determined that Upstate Rebar did not demonstrate that Ms. Chmielowiec makes decisions pertaining to operations of the business enterprise, as required by 5 NYCRR 144.2(b)(1). To evaluate Upstate Rebar's compliance with this eligibility criterion, Division staff reviewed the nature of the business enterprise and considered who oversees operations. According to staff, Upstate Rebar fabricates reinforcing rebar, and distributes construction supplies and wire mesh. Staff concluded that the core functions of the business enterprise are estimating, selecting the equipment used to distribute construction materials, and supervising field operations. To determine who oversees these functions, staff reviewed the duties of principal employees of Upstate Rebar. (*See* WBE Exh. 1 and 3; CD 06:50, 07:41, 08:51, 38:15.)

Based upon the review of the materials in support of the application, Division staff observed that at Upstate Rebar, Bonnie and Lauren Chmielowiec's duties and responsibilities focus on financial and human resources management. Jonathan Chmielowiec's duties and responsibilities focus on production management, material purchase, equipment purchase and maintenance, truck purchase and maintenance, as well as sales. (*See* WBE Exh. 1 and 3; CD 09:12.)

Staff observed further that Darrell Felker is another employee central to operations at Upstate Rebar. Mr. Felker holds the title of general manager, and his duties and responsibilities focus on equipment purchasing and maintenance, as well as sales management. In addition, Mr. Felker is responsible for estimating. (*See* WBE Exh. 1 and 3; CD 09:56, 10:25.)

To support the determination to deny Upstate Rebar's application for WBE certification, the Division cited *Matter of Northeastern Stud Welding Corp. v Webster*, 211 AD2d 889 (1995) in closing arguments. In *Northeastern Stud Welding*, the court determined that the Division properly denied WBE certification because the woman owner's husband supervised all field operations, among other things (*see id.*, at 891). Because the factual circumstances in *Northeastern Stud Welding*, and the captioned matter are purportedly similar, staff argued that the court's determination to deny WBE certification in *Northeastern Stud Welding* should likewise apply here.

According to Ms. Chmielowiec, she manages all day-to-day activities at Upstate Rebar. For example, Ms. Chmielowiec authorizes all purchasing, considers all employment decisions, and presides at all meetings related to sales, production and shipping. Ms. Chmielowiec noted that not every employee can do every job at a construction company like Upstate Rebar. According to Ms. Chmielowiec, she supervises employees who are directly responsible for certain duties. (CD 18:41, 40:47.)

With respect to some of the core functions identified by Division staff, Ms. Chmielowiec testified that estimating and detailing are undertaken on a limited basis at Upstate Rebar. Often, Upstate Rebar contracts with other companies that specialize in providing estimating and detailing services. Because Upstate Rebar contracts out most estimating and detailing services, Ms. Chmielowiec contended that these operations at Upstate Rebar are not core business functions. (CD 41:43.)

Ms. Chmielowiec admitted that she does not operate the bender to shape rebar pieces. Because workers' compensation insurance premiums are very expensive, Ms. Chmielowiec, as the manager of the business enterprise, has decided to limit the number of employees who operate the bender. Nevertheless, with respect to production, Ms. Chmielowiec stated that she oversees the purchase of every piece of equipment and all operations in the warehouse related to production. (CD 42:36.) Consequently, the supervision of field operations is limited to the delivery of pieces to the job site.

Ms. Chmielowiec explained that when materials are delivered to Upstate Rebar, they are inventoried and stored. After estimating and detailing are completed, usually by outside sources, the rebar is cut, bent or otherwise shaped, marked, and tagged. The pieces are loaded onto a truck, and delivered to the construction site. Employees from Upstate Rebar do not assemble any pieces at the construction site. (CD 55:04, 59:33.)

The business practices outlined in Ms. Chmielowiec's testimony are similar to the factual circumstances considered in *Matter of Era Steel Constr. Corp. v Egan*, 145 AD2d 795 (1988). In *Era Steel*, the woman owner relied upon a professional estimator on an hourly basis and, when awarded jobs, hired a foreman and crew from the local union for each project. The court determined that the woman owner controls the business enterprise when she has the ultimate power to hire and fire the managers. (*See id.* at 797, 799.)

Division staff, however, did not have the benefit of the additional information offered at the hearing prior to issuing the February 14, 2017 determination (CD 19:52). Due to the limited scope of this appeal proceeding, I conclude that the Division's determination that Upstate Rebar does not comply with the eligibility criterion at 5 NYCRR 144.2(b)(1) is based on substantial evidence. Accordingly, this basis for denial should be affirmed.

## II. Control

The issue on appeal is whether Upstate Rebar's application for WBE certification and supporting materials demonstrate that it complies with the requirement at 5 NYCRR 144.2(a)(1). This eligibility criterion states, in full, that the:

[a]rticles of incorporation, corporate bylaws, partnership agreements and other agreements including, but not limited to, loan agreements, lease agreements, supply agreements, credit agreements or other agreements must permit minority group members or women who claim ownership of the business enterprise to make those decisions without restrictions.

In support of the application, Ms. Chmielowiec provided the Division with a copy of the operating agreement for Upstate Rebar. The version of the document initially provided to the Division was neither signed nor dated. As drafted, the operating agreement identified Jonathan Chmielowiec as the general manager. According to the terms of the operating agreement, the general manager has authority to manage and control the day-to-day operations of the business enterprise. (*See* WBE Exh. 4 [§ 7.B]; CD 12:18, 13:24, 39:25.) In addition, this version of the operating agreement authorized the appointment of officers. Bonnie Chmielowiec is identified as the president, who presides over meetings of the members. Johnathan Chmielowiec is identified as the vice-president and general manager, and Lauren Chmielowiec is identified as the secretary and treasurer. (*See* WBE Exh. 4 [§ 7.F]; CD 14:24.)

At the hearing, Ms. Chmielowiec offered a copy of the operating agreement for Upstate Rebar executed on May 20, 2008. The terms of the May 20, 2008 operating agreement are different from the version initially provided in support of the application for WBE certification. The three signatories to the May 20, 2008 operating agreement are Bonnie Chmielowiec, Jonathan Chmielowiec, and Lauren Chmielowiec; they are the members of the limited liability company. In this executed copy, Bonnie Chmielowiec is identified as the manager. According to the terms of the operating agreement, the manager has authority to manage and control the day-to-day operations of the business enterprise. (*See* WBE Exh. 5 [§ 7.B].)<sup>2</sup> The May 20, 2008 version of the operating agreement does not have § 7.F concerning the identification and appointment of officers. Nevertheless, in the application for WBE certification, Bonnie Chmielowiec is identified as the president. Jonathan Chmielowiec is a vice-president and the treasurer, and Lauren Chmielowiec is a vice president and the secretary. (*See* WBE Exh. 1 [§ 2.A].)

During the hearing, Ms. Chmielowiec credibly testified that the version of the operating agreement initially provided in support of Upstate Rebar's application for WBE certification was a working draft and, therefore, submitted in error. Upon receipt of the Division's February 14, 2017 denial letter, Ms. Chmielowiec explained further that she contacted her attorney, Mr. Nesper. Mr. Nesper advised Ms. Chmielowiec that the firm's file included a copy of the May 2008 operating agreement. With a cover of letter dated February 27, 2017, Mr. Nesper provided the Division with a copy of the May 2008 operating agreement, as well as the amendment to the

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<sup>2</sup> *See also*, WBE Exh. 7, enclosures.

operating agreement, effective January 1, 2012. (*See* WBE Exh. 5, 6 and 7; CD 39:25, 40:47, 50:00, 56:40.)

The intent of the eligibility requirement at 5 NYCRR 144.2(b)(2) concerning the designation of woman owners as the decision makers in the corporate documents of the business enterprise is to formalize functional designations. Formalized designations, as reflected in the operating agreement, ensure that woman owners are in fact, the decision makers of the business enterprises seeking WBE certification.

At the time that Upstate Rebar filed its application for WBE certification, the only version of the operating agreement presented to Division staff identified Jonathan Chmielowiec as the general manager of the business enterprise. Because Bonnie Chmielowiec was not identified as Upstate Rebar's general manager in the version of the operating agreement reviewed by Division staff, staff correctly found that Ms. Chmielowiec could not make decisions without restrictions in contravention of the eligibility criterion outlined at 5 NYCRR 144.2(b)(2).

In its closing brief, Upstate Rebar makes two requests. The first is to remit the matter to the Division for reconsideration. The second is to permit Upstate Rebar to reapply immediately rather than having to wait the two years prescribed in the regulations.<sup>3</sup> Upstate Rebar argued that the prescribed waiting period would be detrimental to the business enterprise.

These requests are denied. I have no authority to remit the matter to the Division for reconsideration. As provided by 5 NYCRR 144.5(b), a business enterprise may reapply to the Division after two years from the date of the original notification of denial. If facts and circumstances forming the basis of the denial have changed significantly, the regulation provides that an enterprise may reapply sooner. The exercise of this discretion rests with the Division Director, and not with me. I recommend that the parties' counsel confer about whether the two-year waiting period prescribed in the regulations can be waived, or otherwise shortened, with respect to the captioned matter.

## CONCLUSIONS

1. Based on the foregoing, Upstate Rebar did not demonstrate that Ms. Chmielowiec makes decisions pertaining to operations of the business enterprise, as required by 5 NYCRR 144.2(b)(1).
2. For the reasons outlined above, Upstate Rebar failed to demonstrate that the operating agreement permits Bonnie Chmielowiec, as the woman owner of the business enterprise, to make decisions without restrictions as required by 5 NYCRR 144.2(b)(2).

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<sup>3</sup> In its closing argument, Upstate Rebar cited 21 NYCRR 9606.7(c) as the authority to reapply to the Division for WBE certification. Part 9606 of title 21, however, applies to the New York City School Construction Authority. With respect to the captioned matter, the applicable citation is to 5 NYCRR 144.5(b).

## **RECOMMENDATION**

For the reasons set forth above, the Director should affirm Division staff's February 14, 2017 determination to deny Upstate Rebar's application for certification as a woman owned business enterprise.

Attachment: Exhibit Chart

Division of Minority and Women's Business Development

Exhibit Chart  
**Matter of Upstate Rebar, LLC**  
**NYS DED File ID No. 61154**

Hearing Date: June 13, 2017 (NYC - 10:00 AM)

<b>WBE Exhibit No.</b>	<b>Description</b>
1	Application for WBE Certification by Upstate Rebar, LLC. Application No. 2169800 Started: 10/19/2015 Submitted: 11/19/2015
2	Division's denial letter dated February 14, 2017.
3	Applicant's Response Nos. 16, 17, 18, and 19 concerning duties of Bonnie Chmielowiec, Lauren Chmielowiec, Jonathan Chmielowiec, and Darrell Felker. Requested by Division on 11/7/2016. Response received on 11/16/2016.
4	Operating Agreement of Upstate Rebar, LLC, with attached Schedule A. Undated and unsigned.
5	Operating Agreement of Upstate Rebar, LLC, dated May 20, 2008 with attached Schedules A through G, inclusive. Signed by Bonnie Chmielowiec, Jonathan Chmielowiec, and Lauren Chmielowiec.
6	Amendment to Operating Agreement, effective January 1, 2012, with attached Schedules A, F, and G.
7	Cover letter dated April 17, 2017 from Kristen L. Schaub, Esq., of Nesper, Ferber, DiGiacomo, Johnson & Grimm, LLP, to Cathy Powers, MWBE Appeals Unit, with enclosures.

Enclosures	Division's Denial Letter dated February 14, 2017. (See Exhibit 2.)
	Upstate Rebar's notice of appeal and request for hearing dated February 23, 2017.
	Letter dated February 24, 2017 from Evans Bank.
	Letter dated March 3, 2017 from Key Insurance & Benefits Services.
	Letter dated February 27, 2017 from Moshides Financial Group.
	Letter dated March 16, 2017 from EBC.
	Letter dated March 2, 2017 from Schaefer, Sciarrino & Schulenberg, LLP.
	Letter dated February 27, 2017 from Mr. Nesper of Nesper, Ferber, <i>et al.</i>
	Operating Agreement of Upstate Rebar, LLC, dated May 20, 2008, with attached Schedules. (See Exhibit 5.)
	Amendment to Operating Agreement, effective January 1, 2012, with Schedules A, F, and G. (See Exhibit 6.)

**Ruling:** All exhibits received into evidence (CD 01:01:43, 01:02:05).