

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

In the Matter

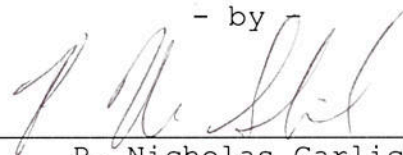
- of -

the Application of  
**WBE Painting, LLC**  
For Certification as a Woman-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 62171

RECOMMENDED ORDER

- by -



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P. Nicholas Garlick  
Administrative Law Judge

August 19, 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 to deny the application of WBE Painting, LLC ("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 WBE Painting, LLC, challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

WBE Painting, LLC's application was submitted on May 18, 2017 (Exh. DED1).

The application was denied by letter dated December 5, 2017, from Raymond Emanuel, Director of Certification Operations. As explained in an attachment to Mr. Emanuel's letter, the application was denied for failing to meet three eligibility criteria related to the women owners' operation of the applicant as well as the applicant's independence (Exh. DED2).

In papers dated May 28, 2018, counsel for the applicant, Jessica A. Myers, Esq. of the law firm Harter, Secrest & Emery, LLP, submitted an appeal. The appeal consists of a sixteen-page memorandum of law and three affidavits: one by Lori A. Cook; one by James H. Wheeler; and one by Kelly Cook. Attached to Kelly Cook's affidavit are nine exhibits, identified in the attached exhibit chart as Exhs. A1-A9.

In a six-page memorandum dated June 5, 2019, the Division responded to the applicant's appeal. Included with the Division's papers were the affidavit of Joseph Sambou, a Senior Certification Analyst employed by the Division, and ten exhibits described in the attached exhibit chart as Exhs. DED1-DED10.

After requesting and receiving permission to respond, applicant's counsel provided a ten-page reply memorandum of law dated June 27, 2019, at which time the record closed.

#### **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, and independence are applied on the basis of information supplied 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, if any, that are conducted by Division analysts.

A dispute regarding what evidence may be examined upon appeal has arisen in this case. The Division states in its response that only information before the agency at the time of the denial is relevant to the appeal, as set forth in 5 NYCRR 144.5(a). Applicant's counsel argues that information not included in the application should be considered on appeal for two reasons: First, because the Division failed provide the applicant written notice that the application was complete and failed to conduct a site visit, thus short-circuiting the application process; and second, because the regulations allow the administrative law judge to request additional information on appeal, as set forth in 5 NYCRR 144.5(a).

Applicant's counsel's argument must fail in this case. With regards to the first point, a site visit is not required. If a site visit or interview had been anticipated, when it became clear to the Division, based on the written submissions, that the application failed to meet WBE certification criteria, it would have been inefficient to continue the Division's review. With regard to the second point, I have not requested any additional information, nor is it necessary, because as explained below, the Division has shown that its denial was based on substantial evidence. Even after review of the material not before the agency at the time of the denial, which is included with the appeal, my conclusions are unchanged. If

the applicant seeks to supplement the application materials in an attempt to show it meets WBE certification criteria, the appropriate means to do so would be to file a new application, not attempt to improperly amend an application after it has been denied.

#### **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 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**

##### Position of the Division

In its denial letter, the Division asserts that the application failed to meet three separate criteria for certification. First, the Division found that applicant failed to demonstrate that the woman owners make decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

Second, the Division found that the woman owners do not devote time on an ongoing basis to the daily operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1)(iii).

Third, the Division found that applicant is not an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) and (c)(2).

##### Position of the Applicant

WBE Painting, LLC, asserts that it meets the criteria for certification and that the Division erred in not granting it status as a woman-owned business enterprise pursuant to

Executive Law Article 15-A. Applicant's counsel argues that applicant is exactly the type of firm the Division should be certifying, and that the denial has limited the firm's growth, expansion and marketability.

#### **FINDINGS OF FACT**

1. WBE Painting, LLC is in the business of providing commercial painting services (Exh. DED1 at 3) and has a business address of 509 Baldwin Street, Elmira, New York (Exh. DED1 at 1).

2. WBE Painting, LLC was established on September 30, 2015, and is owned by four women in equal amounts: Kelly Cook, P. Christine Cook, Lori Cook, and Shannon Cook (Exh. DED1 at 3).

3. The application states that the individual responsible for estimating is Jim Wheeler, a non-minority male (Exh. DED1 at 3). The firm's two largest jobs in 2016 were supervised in the field by Jeremiah Cook and Teddy Grantier (Exh. DED1 at 9, DED6).

4. Kelly Cook works in the office for WBE Painting, LLC between 5 and 10 hours a week, while P. Christine Cook and Lori Cook are employed elsewhere full-time, and Shannon Cook has a young child at home during the day (Exh. DED4).

5. WBE Painting, LLC rents office space from J.H.C. Real Property Management, LLC, which has members in common with John H. Cook Jr. Painting Contractor, Inc. which, in turn, is a business owned, at least in part, by the spouses of the woman owners of the applicant (affidavit of Kelly Cook, ¶¶8 & 100). According to the lease for 2017, the office is approximately 250 square feet and the rent is \$100 per month (Exh. A2). The market rate for similar space is nearly \$7 per square foot (affidavit of Kelly Cook, ¶31).

6. WBE Painting, LLC owns no equipment used for painting, rather it relies on the skilled laborers it hires, on an as-needed basis, to supply their own vehicles, ladders, and personal protective equipment (affidavit of Kelly Cook, ¶47).

7. In 2016, WBE Painting LLC shared employees with J.H. Cook Jr. Painting Contractor, Inc., a business owned, at least

in part, by the spouses of the woman owners of the applicant (Exhs. DED6, DED8, & A6).

## **DISCUSSION**

This recommended order 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 set forth three bases related to the woman owners' operation of the firm as well as its independence.

### **OPERATION**

The first ground for denial was that applicant failed to demonstrate that the woman owners make decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). The relevant facts cited in the denial letter are: (1) WBE Painting, LLC is primarily engaged in providing painting services; (2) the firm is owned by Kelly Cook, P. Christine Cook, Lori Cook, and Ms. Shannon Cook; (3) Kelly Cook is the only owner actively engaged in the management of any aspects of the business; and (4) significant operations of the business related to estimating and the supervision of field operations are managed by male individuals (Exh. DED2).

On the appeal, applicant's counsel asserts that the women owners of WBE Painting, LLC, are familiar with the painting industry because their husbands own a longstanding painting contracting business, John H. Cook Jr. Painting Contractor, Inc. The appeal acknowledges that none of the woman owners does estimates for the WBE Painting, LLC, rather it relies on a freelance estimator, James H. Wheeler, who is paid on an hourly basis.<sup>1</sup> Applicant attempts to minimize the role of the estimator, stating that he only provides a "take off" of quantities to estimate the size and scope of the project, leaving it to Kelly Cook to calculate material and labor costs to arrive at a bid amount. In addition, because some jobs are too small to necessitate employing of a foreman, it is Kelly Cook who fulfills this role: attending pre-bid meetings,

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<sup>1</sup> Mr. Wheeler shares a business address with the applicant, 509 Baldwin Street, Elmira, NY (Affidavit of James H. Wheeler, ¶6).

instructing laborers, visiting the work site as needed, and communicating with clients. Applicant concludes that it is Kelly Cook who manages all significant operations of the business including: identifying potential projects, preparing bid documents, attending meetings and job-site walk-throughs, negotiating and executing contracts, assembling labor crews, purchasing painting materials, working with clients, and processing payroll. Applicant disputes the Division's contention that male employees manage field operations and asserts that Kelly Cook, in consultation with the other women owners, oversees each job. It is not clear that this information was provided with the application nor does applicant's counsel cite to documents that were before the Division at the time of its denial to support these assertions.

In its reply, the Division states that it evaluates who performs significant operations at a particular business by examining the tasks associated with obtaining work and delivering services to its clients: in this case, estimating and supervising field operations. These tasks are often referred to as a business's core functions. The Division does not discuss estimating in its response, though it is cited in the denial letter. However, it should be noted that the application itself states that the sole person responsible for estimating is Jim Wheeler, a non-minority male (Exh. DED1 at 3). With respect to supervising field operations, the Division notes that the application states all four women owners supervise field operations (Exh. DED1 at 4), however, when asked to identify who had supervised the firm's two largest projects, Kelly Cook responded this had been done by Jeremiah Cook and Teddy Grantier (Exh. DED6). This response, combined with the lack of any experience supervising commercial painting experience in any of the owners' resumes (Exh. DED9), is the evidence the Division cites to support its denial.

Applicant's counsel, in her reply, renews her argument that information regarding Kelly Cook's roles with the company at the time of the application, though not before the Division at the time of denial, should be considered on appeal. She again argues that the Division's failure to conduct an interview or site visit precluded the applicant from including this information in the application process. As discussed above, the

Director should reject this argument. Applicant's counsel also argues that the Division's conclusion that non-minority males make key decisions pertaining to the operation of the firm is factually unfounded and that the women owners make all the firm's decisions. Counsel does not argue that Jeremiah Cook and Teddy Grantier did not supervise the firm's two largest jobs in 2016, but insists that they were mere painters who could have been fired by the women owners at any time. Counsel makes a similar argument regarding James Wheeler, who is identified in the application as being responsible for estimating and argues the Division should have interviewed him regarding his duties. Counsel concludes that the Division's denial was arbitrary and capricious because the Division failed to continue to inquire regarding the meaning of the application materials and the Division's reliance on information supplied by the applicant without such further inquiry showed the denial was not based on substantial evidence.

Counsel's argument must be rejected. The Division's reliance on information provided by the applicant during the application process is proper, and if an application is denied, the proper course for an applicant seeking to supplement its application information is to file a new application. Based on the evidence in the record, specifically the fact that the application states a non-minority male manages estimating, and a response to the Division's question stating that Jeremiah Cook and Teddy Grantier supervised the firm's two largest jobs in 2016, the applicant has failed to demonstrate that the woman owners make decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). The Division's denial on this ground was based on substantial evidence.

The second ground for denial was that the woman owners do not devote time on an ongoing basis to the daily operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1)(iii). The relevant fact cited in the denial letter is that Kelly Cook works for WBE Painting, LLC on a part-time basis and none of the other woman owners actively manage the business on a daily basis (Exh. DED2).

On the appeal, applicant's counsel acknowledges that Kelly Cook only works part-time for the firm, but argues that when she



does her duties are significant. Because the firm is now small, it has no full-time employees, but as it expands, so will the roles of all the women owners.

In its response, the Division points to information supplied by Kelly Cook dated September 28, 2017 which states that she works in the office between 5 and 10 hours a week while P. Christine Cook and Lori Cook are employed elsewhere full-time and Shannon Cook has a young child at home during the day (Exh. DED4). Based on this information, Mr. Sambou states that he concluded that the majority of women owners do not devote time on an ongoing basis as required by the regulations (affidavit of Joseph Sambou, ¶11). In its brief, the Division explains that to "qualify for certification, the business must be at least 51% owned and operated by minority or women owners. Because Kelly Cook owns only 25% of the firm, even if [the Division] assumes her 5-10 hours per week are sufficient to meet this standard, given the involvement of the other members/owners is passive, the business does not meet the requirement that minority group members or women must show that they devote time on an ongoing basis to the daily operations of the business."

In her reply, applicant's counsel argues that the Division's interpretation of the relevant regulation is a legal error and that not all, or even a majority of, the owners need contribute substantial time on an ongoing basis. Rather, the regulations only require that an eligible person devote time on an ongoing basis to the daily operations of the firm and because the firm is small, there is no need for additional time to be devoted to the business. In addition, counsel argues that the information provided by Kelly Cook stating she worked only 5-10 hours a week did not reflect how much time she actually spent at the firm because at the time she provided this information to the Division, the firm had [REDACTED].

Again, counsel's arguments must be rejected. While counsel may be advancing a different interpretation of 5 NYCRR 144.2(b)(1)(iii) than the one the Division uses, it does not demonstrate that the Division's interpretation is wrong. Moreover, as discussed above, the fact that Kelly Cook's response that she worked 5-10 hours a week for the firm was made [REDACTED] for the business does not appear to have been

before the Division at the time of the denial. Based on the evidence in the record, specifically the fact that Kelly Cook works at the firm between 5 and 10 hours a week while P. Christine Cook and Lori Cook are employed elsewhere full-time and Shannon Cook has a young child at home during the day (Exh. DED4), the applicant has not demonstrated that the woman owners devote time on an ongoing basis to the daily operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1)(iii). The Division's denial on this ground was based on substantial evidence.

### **INDEPENDENCE**

The third ground for denial was that applicant is not an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) and (c)(2). The relevant facts cited in the denial letter are: (1) WBE Painting, LLC does business from the same address as several businesses owned by the spouses of the owners of WBE Painting, LLC; (2) the firm lacks supplies, equipment, or other physical assets; and (3) WBE Painting, LLC shares employees with John H. Cook, Jr. Painting Contractor, Inc. (Exh. DED2).

On the appeal, applicant's counsel argues because that WBE Painting, LLC, has a written lease and pays the market rate for its space, and the fact that the landlord, J.H.C. Real Property Management LLC, has members in common with John H. Cook, Jr. Painting Contractor, Inc., which is a business owned by the spouses of the woman owners of the applicant, is not relevant.<sup>2</sup> Applicant's counsel argues that the relatively low rent reflects the economic situation in Elmira, New York. With respect to the lack of physical assets owned by the firm, applicant's counsel asserts that none are needed because for the small jobs the firm

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<sup>2</sup> The record is not clear on this claim. The lease for 2017 states that the rent paid for the office is \$100 per month (Exh. A1), but different documents in the record state different sizes for the office. Kelly Cook states the office is 170 square feet and this is the market rate, nearly \$7 per square foot, for Elmira (Affidavit of Kelly Cook ¶¶30-31). However, the 2017 lease states the office is 250 square feet (Exh. A1 at 1), which means the applicant is actually paying considerably below the market rate attested to by Kelly Cook.

does, no specific machinery is needed and other assets, such as paint and brushes, are consumables that are used in performance of the work. In addition, applicant's counsel asserts that in Elmira, it is common practice for laborers to supply their own transportation, ladders, and personal protective equipment. When other equipment is needed to complete a job, the firm rents it.

Applicant's counsel also argues that because WBE Painting, LLC does not operate from the same office or share any equipment with the businesses owned by the spouses of the women owners, it should be considered independent. With respect to the fact that the applicant shares employees with John H. Cook, Jr. Painting Contractor, Inc., applicant's counsel argues that there is only a small labor force of non-union, skilled painters who are routinely hired by all painting firms in the area on an as-needed basis and it would be a disadvantage to the applicant if it could only hire painters who had not worked for John H. Cook, Jr. Painting Contractor, Inc. Counsel argues that the applicant is not a front for John H. Cook, Jr. Painting Contractor, Inc., but rather is an independent business as evidenced by its separate payroll, books, email accounts, bank account, insurance policy, phone account, and proprietary business information, which operates as a competitor to John H. Cook, Jr. Painting Contractor, Inc. rather than being that firm's alter-ego.

In its response, the Division argues that the intertwined nature of WBE Painting, LLC and John H. Cook, Jr. Painting Contractor, Inc. and the fact that they share employees shows the applicant is not an independent business for certification purposes. The Division points to tax information for John H. Cook, Jr. Painting Contractor, Inc., for the last quarter of 2016 which shows both Jeremiah Cook and Edward Grantier were employed by that firm (Exh. DED8). These are the two men identified by Kelly Cook as field supervisors for the applicant's two largest jobs in 2016. The Division also notes that John H. Cook, Jr. Painting Contractor, Inc. has a business address of 510 Baldwin Street while the applicant's address is 509 Baldwin Street.

In her response, applicant's counsel notes that the applicant receives no revenue from John H. Cook, Jr. Painting

Contractor, Inc., the applicant does not share a building or equipment with the other firm, and that the applicant hired an independent contractor as an estimator and skilled laborers on an as-needed basis. The fact that the laborers work for both the applicant and for other firms should not preclude the applicant from being certified as a WBE.

Based on the evidence in the record, specifically the applicant's close connection to other businesses owned by family members, its lack of any painting equipment to complete its jobs, and its sharing of employees with John H. Cook, Jr. Painting Contractor, Inc., the applicant has failed to demonstrate that WBE Painting, LLC is an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) and (c)(2). The Division's denial on this ground was based on substantial evidence.

#### **CONCLUSIONS**

1. The applicant failed to demonstrate that the woman owners make decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

2. The applicant failed to demonstrate that the woman owners devote time on an ongoing basis to the daily operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1)(iii).

3. The applicant failed to demonstrate that WBE Painting LLC is an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) and (c)(2).

#### **RECOMMENDATION**

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

**Matter of  
WBE Painting, LLC  
DED File ID No. 62171  
Exhibit List**

Exh. #	Description
DED1	Application, lease agreement and other documents
DED2	Denial letter
DED3	Division letter dated 9/21/17
DED4	Applicant's response
DED5	Division letter dated 10/13/17 requesting additional information
DED6	Applicant's response
DED7	Division letter dated 11/28/17 requesting additional information
DED8	Applicant's response
DED9	Owners' resumes
DED10	Appeal w/o attachments
A1	Applicant's insurance policy
A2	2017 Lease for applicant's office
A3	Applicants responses to requests for information
A4	Copy of Kelly Cook's business card
A5	Copies of Invoices
A6	Copies of 2016 W2 forms
A7	Appeal scheduling letter
A8	Photos of office space
A9	Updated lease for office for 2018