

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

In the Matter

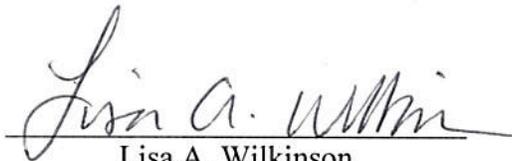
- of -

the Application of **Diana Builders**
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60261

RECOMMENDED ORDER

- by -

A handwritten signature in cursive script that reads "Lisa A. Wilkinson". The signature is written in dark ink and is positioned above a horizontal line.

Lisa A. Wilkinson
Administrative Law Judge

December 5, 2016

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 Diana Builders (Diana Builders or applicant) certification as a woman-owned business enterprise (WBE) be affirmed for the reasons set forth below.

PROCEEDINGS

Applicant Diana Builders submitted an application for certification as a women-owned business on September 1, 2015 (see Exh 1).

By a letter dated April 6, 2016, the Division determined that Diana Builders does not meet the eligibility requirements to be certified as a woman-owned business enterprise, and denied Diana Builder's application (see Exh 2). In a letter dated April 27, 2016, Lisa J. Hartle, on behalf of Diana Builders, appealed from the Division's determination to deny WBE certification (see Exh 3).

The Division acknowledged Diana Builder's request for an appeal in writing in a notice of appeal dated June 1, 2016, and directed that written submissions be submitted by July 7, 2016. The notice also reiterated the Division's bases for the denial.

The Division filed a response dated November 29, 2016, with exhibits (see Exhs 5 and 6). The matter was assigned to Administrative Law Judge Lisa Wilkinson. An exhibit chart is attached to this recommended order.

Finding no additional written submissions from Ms. Hartle in the file, on December 2, 2016, I sent an email to Lisa J. Hartle, owner of Diana Builders, and Phillip Harmonick, Esq., counsel to the Division, to inquire whether Diana Builders had filed an appeal on July 7, 2016 (see Exh 7). Mr. Harmonick responded the same day that the Division represented to him that Mr. Hartle adopted her April 27, 2016 letter as her written appeal and that he had not received any other written submissions from Ms. Hartle (see id.). Ms. Hartle did not respond to my email.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are established by regulation (see 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 should be granted WBE status, the Division assesses the ownership, operation, and control of the business enterprise on the basis of 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, information presented in supplemental submissions and, if appropriate, from interviews conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, Diana Builders, as the applicant, bears the burden of proving that the Division's denial of its 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 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

In the April 6, 2016 denial letter, the Division asserted that the application failed to meet two criteria for WBE certification as outlined in 5 NYCRR 144.2 concerning the ownership and operation of Diana Builders (see Exh 2).

With respect to ownership, the Division determined that Diana Builders did not meet the ownership criteria outlined at 5 NYCRR 144.2(c)(2) because the application failed to demonstrate that the woman owner enjoyed the customary incidents of ownership and shared in the risks and profits in proportion to her ownership interests in the business enterprise.

With respect to operation, the Division determined that Diana Builders failed to demonstrate that the woman owner devoted time on an ongoing basis to the daily operation of the enterprise as required by 5 NYCRR 144.2 inasmuch as she had other full-time employment with the New York State Department of Health, part time employment at a local establishment, and worked only part-time for the business enterprise.

Diana Builders

In a letter dated April 27, 2016, which she adopted as her written appeal, Lisa J. Hartle stated:

1. Ownership: I am the sole owner of the company. I am solely responsible for all aspects of the business, i.e., taxes, payables, insurances, workers' compensation audits, issues with any jobs, etc. If any of these are not taken care of no person other than myself is responsible.
2. Operation: Although I am not on job sites all of the time, I am responsible for all employees and scope of work. I am responsible for all of the office work, including site binders, estimating, insurances obtaining submittals, completing AIA's, accounts payable, accounts receivable, payroll, NYS Tax submissions, Worker's compensation audits, and maintaining electronic and paper files.

I work several hours completing all of the above tasks, whether it be 5:00 AM or 11 PM and several hours in between, daily, weekends, and holidays. I am also in the process of hiring a girl to answer telephone, return calls, and complete some filing at my office for a few hours in the mornings, which will be another female employee. She is scheduled to start May 2, 2016.

(Exh 3 at 1).

FINDINGS OF FACT

I. General

1. Diana Builders is located at 13425 French Settlement Road, Harrisville, New York 13648 (see Exh 1 [Certification Application submitted September 1, 2015] [10 pages]).
2. Diana Builders was established as a sole proprietorship on April 1, 2014. Lisa J. Hartle is the owner (see Exh 1 at 1.Q, 1.P, and 1.R).
3. Diana Builders is engaged in the construction business providing framing, roofing, siding, windows and door installation, and interior finishes (see Exh 1 at 3.B and 3.C).
4. On behalf of Diana Builders, Lisa J. Hartle submitted an application for certification as a woman owned business enterprise dated September 1, 2015 (see Exh 1 at 1).
5. By letter dated April 6, 2016, the Division denied Diana Builder's application for certification as a woman owned business enterprise (see Exh 2).

II. Risk and Profits

6. Ms. Hartle does not receive any wage compensation from Diana Builders (see Exh 6 at 17-19 of 39).
7. According to payroll records submitted with the application, Diana Builders has six hourly employees all of whom are male (see Exh 6 at 17 of 39¹ [payroll journal]) and eight weekly paid employees who are also male (see Exh 6 at 19 of 39).
8. According to Ms. Hartle's federal personal income tax returns for 2014, she realized a [REDACTED] from Diana Builders (see Exh 6 at 21 and 23 of 39).

¹ The citation to the pages of Division exhibit 6 of the Division's November 29, 2016 refer to the pages of the PDF file.

III. Operation

9. Ms. Hartle works at Diana Builders on a part-time basis before and after her full-time employment and on weekends and holidays (see Exh. 3).
10. Rusty Westcott is the foreman responsible for supervising field operations (see Exh 1 4.A.8). He is paid approximately [REDACTED] (see Exh 6 at 19 of 39).
11. Ms. Hartle does not supervise any field operations for Diana Builders (see Exh 4.A.8).

DISCUSSION

This recommended order considers Diana Builder's April 27, 2016 appeal from the Division's April 6, 2016 determination to deny certification of Diana Builders as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The discussion that follows addresses the bases for the Division's denial.

Referring to the eligibility criteria outlined at 5 NYCRR 144.2, the Division identified the following bases for the denial. According to the Division, Diana Builders did not show that the woman owner enjoyed the customary incidents of ownership and shared in the risks and profits in proportion to her ownership interests in the business enterprise (see Exh 2). With respect to the operation of the business enterprise, the Division determined that Diana Builders failed to demonstrate that the woman owner devoted time on an ongoing basis to the daily operation of the enterprise as required by 5 NYCRR 144.2 (see id.).

Ownership

Diana Builders is a sole proprietorship and Lisa J. Hartle is its owner (see Exh 1 at 1.P and 1.Q).

To be certified as a WBE, an applicant must demonstrate that the ownership and control by a woman owner is "real, substantial and continuing and must go beyond the pro forma ownership of business as reflected in the ownership documents" (5 NYCRR 144.2[c][2]). The purpose of this requirement is to ensure that the women actually bear the risks and enjoy the benefits of owning the business, and are not merely owners based solely on corporate documents.

Relevant to this appeal is the ownership requirement that applicants "enjoy the customary incidents of ownership and [] share in the risks and profits, in proportion with their ownership interest in the business enterprise" (5 NYCRR 144.2[c][2]). This requirement ensures that the significant benefits that may accrue to the business as a result of State contracting preferences associated with WBE certification do not flow disproportionately to persons who are not members of a protected class.

The Division's determination that Lisa Hartle does not share in the risks and profits of the business is supported by substantial evidence (see 5 NYCRR 144.2[c][2]). The Division may take into account disproportionate allocation of wages between male and female owners of a

business in determining whether to certify a business as a WBE (see Matter of C.W. Brown Inc. v Canton, 216 AD2d 841, 843 [3d Dept 1995]). Here, the payroll records of Diana Builders establish that Ms. Hartle [REDACTED] (see Exh 6, at 17-19 of 39 [payroll journal]). Conversely, the male employees, including Ms. Hartle's son Justin Hartle, received significant compensation. Six hourly employees, all of whom were male, were paid at hourly rates of [REDACTED] (see Exh 6 at 17 of 39 [payroll journal]). Eight other male employees were paid wages on a weekly basis in the range of [REDACTED] per hour (see Exh 6 at 19 of 39 [Paychex timesheet]).

Ms. Hartle states that she incurs costs and risks associated with being the owner of Diana Builder, however, no evidence exists that she has received any benefit from her ownership interest. According to her 2014 personal federal income tax returns, she realized [REDACTED] from Diana Builders (see Exh 5 at 21 of 39 [1040 US Individual Income Tax Return]).

Inasmuch as Ms. Hartle personally [REDACTED] of the business enterprise, and received no wages while the male employees received significant wages, the Division's determination that Ms. Hartle does not share proportionately in the risks and profits of the business enterprise is supported by substantial evidence.

Operation

Woman owners of a business seeking certification as a WBE must "devote time on an ongoing basis to the daily operation of the business enterprise" (5 NYCRR 144.2[b][1][iii]). The Department's determination that Ms. Hartle is not involved to a significant degree in the day-to-day operation of Diana Builders and that she delegates substantially all managerial duties to male employees is supported by substantial evidence.

The application submissions demonstrate that Ms. Hartle maintains significant outside employment through which she earns all of her personal income. Form W2 records submitted with the application show that Ms. Hartle worked for the New York State Department of Health and Time Out Lounge in Gouverneur, New York while she owned Diana Builders (see Exh 6 at 36 of 39 [W2 wage and tax statement for NYS Department of Health showing wages of [REDACTED]], 37 of 39 [W2 wage and tax statement for Time Out Lounge showing wages of [REDACTED]]). Ms. Hartle's resume makes no mention of her involvement with Diana Builders (see Exh 6 at 39 of 39 [Lisa Hartle resume]).

Ms. Hartle's statement that she works "several hours completing [taxes, payables, insurances, workers' compensation audits, issues with any jobs, etc.] whether it be 5:00 AM or 11 PM and several hours in between, daily, weekends, and holidays" actually undermines her claim that she has significant involvement overseeing and managing the core, construction related functions of the business (see Exh 3). According to the application, the core business functions of Diana Builders, which is engaged in construction related activities, are managed by Rusty Westcott, the foreman, who supervises field operations (see Exh 1 at 4 of 10).

In sum, the Division's determination that Ms. Hartle does not devote time on an ongoing basis to Diane Builders is supported by substantial evidence.

CONCLUSIONS

1. With respect to the ownership criteria at 5 NYCRR 144.2(a)(1) and (c)(2), Diana Builders did not meet its burden to show that the Division's April 6, 2016 determination to deny the application of Diana Builders for WBE certification is not based on substantial evidence.
2. With respect to the operation criteria at 5 NYCRR 144.2(b)(1)(i), Diana Builders did not meet its burden to show that the Division's April 6, 2016 determination to deny the application of Diana Builders for WBE certification is not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny Diana Builder's application for certification as a woman-owned business enterprise should be affirmed for the reasons set forth above.

Attachment: Exhibit List

Division of Minority and Women's Business Development

Exhibit Chart

Diana Builders

NYS DED File ID No. 60261

Exhibit No.	Description
1	Certification Application filed by Diana Builders Application No.: 2048447 Submitted: September 1, 2015
2	Division's denial letter dated April 6, 2016
3	Diana Builder's request to appeal dated April 27, 2016
4	Division's notice of appeal dated June 1, 2016
5	Division Response dated November 29, 2016
6	Division Exhibits – 39 pages
7	Email from Phillip Harmonick to ALJ Wilkinson dated December 2, 2016

Ruling: Exhibits 1 through 7 received.