

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

In the Matter

- of -

the Application of **Hershy Engineering and Consulting, P.C.**,
for Certification as a Minority-owned Business Enterprise
and as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 55037

RECOMMENDED ORDER

- by -

A handwritten signature in blue ink, appearing to read "Richard A. Sherman", is written over a horizontal line.

Richard A. Sherman
Administrative Law Judge

January 26, 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 Hershy Engineering and Consulting, P.C. ("Hershy" or "applicant"), certification as either a minority-owned business enterprise or as a women-owned business enterprise ("MWBE")¹ 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, challenging the determination of the Division that Hershy does not meet the eligibility criteria for certification as an MWBE.

The Division denied the application (exhibit 1) filed by Hershy for MWBE certification by letters dated June 30, 2016 (exhibit 2 [denial of the WBE certification], exhibit 2A [denial of the MBE certification]). The texts of the two denial letters are largely identical and set forth the same two grounds under 5 NYCRR 144.2 for the denials. Applicant filed a notice of appeal ("notice of appeal"), dated July 22, 2016. After the original hearing date was adjourned at applicant's request, the Division advised applicant that the hearing on this matter would be held on December 6, 2016 (letter from the Division to applicant's counsel, dated October 17, 2016).

I convened the hearing at approximately 10:00 a.m. on December 6, 2016, at the Division's offices, 633 Third Avenue, New York, New York. Michael J. Mattia, Esq., and Marvin L. Schechter, Esq., of Tunstead & Schechter, appeared on behalf of Hershy. Mr. Mattia called three witnesses: Manisha Patel, President, Hershy Engineering and Consulting, P.C.; Chetan Patel, CRC Associates Inc.; and Ashford Abbacy, CPA. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, represented the Division and called one witness, Matthew LeFebvre, a senior certification analyst for the Division. A list of the exhibits received during the hearing is appended to this report.

Consistent with 5 NYCRR 145.1(m), an audio recording of the hearing was made. The recording was provided to this office on December 8, 2016, whereupon, the hearing record closed.

¹ Applicant filed for certification both as a minority-owned business enterprise ("MBE") and as a women-owned business enterprise ("WBE"). The regulatory criteria at issue in this proceeding and the bases cited by the Division for denying the certifications are the same for either certification (see exhibits 2, 2A). Accordingly, this report will address the MBE and WBE certifications as a single certification, referred to herein as an "MWBE" certification.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as an MWBE are established by regulation (see 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted or denied MBE or WBE status, the ownership, operation, control, and independence of the business enterprise are assessed 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 itself, and on information revealed in supplemental submissions or interviews that are conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of MWBE certification for Hershy 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

The Division cited two bases for the denial of Hershy's application. First, the Division argues that applicant failed to establish that the woman/minority owner, Manisha Patel, made capital contributions to Hershy in proportion to her ownership interest in the enterprise (exhibit 2 at 2 [citing 5 NYCRR 144.2(a)(1)]). Second, the Division argues that Hershy is not an independent business enterprise (exhibit 2 at 2 [citing 5 NYCRR 144.2(c)(2)]).

Position of Applicant

Applicant argues that Hershy's owner, Manisha Patel, has always been the sole owner of the enterprise, has over 29 years' experience in the industry, and is a licensed New York State professional engineer (notice of appeal at 1). Applicant further argues that the Division misread the application materials to reach the conclusion that CRC Associates Inc., a corporation owned by Manisha Patel's husband, made greater capital contributions to Hershy than did Ms. Patel (id.). Applicant also sets forth several factors that it argues demonstrate that Hershy is an independent business enterprise (id. at 2).

FINDINGS OF FACT

1. Hershy was established on December 13, 2010, and provides construction management services in civil, electrical, and mechanical engineering (exhibit 1 at 2-4 [items 1.R, 5.A-I]).
2. Manisha Patel is the President of Hershy and is, and has always been, the sole owner of Hershy (exhibit 1 at 2-3 [items 1.O, 2.B, 3.A]; compact disc ["CD"], track 1² at 8:45 [LeFebvre testimony that Ms. Patel has a "100 percent ownership" interest in Hershy]; CD, track 3 at 6:55 [Manisha Patel testimony that she is the president and has always been the sole owner of Hershy]).
3. The initial capital contribution for Manisha Patel's ownership interest was in the amount of [REDACTED] (exhibit 3 at 4 [line 22]; CD, track 1 at 9:45).
4. Hershy's 2014 federal tax return states that Hershy received [REDACTED] in additional paid-in capital in 2014 (exhibit 3 at 4 [line 23]; CD, track 1 at 9:55).
5. Manisha Patel's husband, Chetan Patel, is the owner of CRC Associates Inc. ("CRC") and Recchia Electrical Contracting Corp. ("Recchia") (exhibit 1 at 3 [item 4.E]; CD, track 1 at 3:05, track 2 at 29:10).
6. Hershy, CRC and Recchia operate out of the same building located at 300 Maple Avenue, South Plainfield, NJ (see exhibit 1 at 1 [item 1.F]; exhibit 5 [CRC checks showing CRC's address]; exhibit 6 [Hershy invoice showing Hershy's address]; exhibit 7 [Recchia purchase order showing Recchia's address]).

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of Hershy as an MWBE pursuant to Executive Law Article 15-A. The Division cites two bases in support of upholding the denial, each of which is discussed below.

Ownership: Contribution Proportionate to Equity Interest

The eligibility criterion at issue requires that "the contribution of the minority group member(s) or woman owner must be 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]).

The Division argues that applicant failed to demonstrate that Manisha Patel contributed funds to Hershy in proportion to her ownership interest in the enterprise (exhibit 2 at 2 [citing 5 NYCRR 144.2[a][1]). Specifically, the Division argues that contributions of capital from CRC

² The audio recording of the hearing is contained on a compact disc containing three tracks.

"vastly exceeded" contributions from Ms. Patel (CD, track 3 at 1:04:30). The Division asserts that the application materials show that Ms. Patel paid ██████ for her 100 percent ownership of Hershy, while CRC contributed ██████ in paid-in capital to the enterprise (CD, track 1 at 9:45).

Applicant argues that Manisha Patel is the lone capital contributor to the enterprise (CD, track 1 at 2:40). Applicant further argues that CRC has never owned Hershy stock and, therefore, cannot make a capital contribution to Hershy (*id.* at 3:30). Applicant asserts that the ██████ that was identified in Hershy's tax return as additional paid-in capital was mischaracterized (*id.* at 3:45; CD, track 3 at 18:50, 53:55). These funds, applicant asserts, consisted of loans and other payments from CRC to Hershy (CD, track 1 at 3:45; track 3 at 12:50, 55:55-58:45).

The Division does not contest applicant's assertion that Manisha Patel owns 100 percent of Hershy (*see* CD, track 1 at 8:45). The Division asserts, however, that it requested documentation relating to the ██████ additional paid-in capital shown on Hershy's 2014 federal tax return and that applicant responded by providing proof of payments from CRC to Hershy (CD, track 1 at 11:40, 12:05). The Division argues that, since Hershy's tax return listed the ██████ as additional paid-in capital and Hershy provided documentation indicating that the contribution consisted of payments from CRC to Hershy, its determination to deny Hershy's MWBE application is supported by the application materials.

The federal tax return submitted to the Division by Hershy during the application process plainly states that Hershy received ██████ in additional paid-in capital in 2014. The Division requested further explanation of the ██████ payment and applicant represented that "[i]n anticipation of potential future projects and to address the need for working capital, I [Manisha Patel] decided to contribute additional capital of ██████ to the business" (exhibit 1 at 6 [Q & A section, item 1]). When the Division requested additional documentation relating to the ██████ payment, applicant supplied checks and other documents that showed the source of the additional paid-in capital was not Manisha Patel, but rather, the source of the funds was CRC (*see* exhibits 4, 5). Given this, the Division's determination that the application materials failed to demonstrate that Manisha Patel's contribution of money was proportionate to her equity interest in the business enterprise is supported by substantial evidence.

I note that the CPA called by applicant testified that a non-owner cannot make capital contributions to a company. The Division analyst testified, however, that CRC could make such a contribution to Hershy regardless of whether CRC held an equity interest in Hershy.

The eligibility criterion at issue states only that "the contribution of the minority group member(s) or woman owner must be 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]). This provision does not state that only contributions from owners will be considered.³ Here, the application materials indicated that over ██████ was

³ As noted above, the ██████ additional paid-in capital was reported on applicant's 2014 federal tax return. IRS Publication 542, which provides information on the general tax provisions that apply to U.S. domestic corporations, states that "[c]ontributions to the capital of a corporation, whether or not by shareholders, are paid-in capital" (*id.* at 5 [rev. Dec. 2012][emphasis supplied]).

contributed to Hershy and that Manisha Patel owned 100 percent of the enterprise despite having contributed only [REDACTED]. When considered against the much greater contribution of money made by CRC to Hershy, the Division's determination that Ms. Patel's equity interest was not in proportion to her contribution of money to Hershy was supported by substantial evidence in the application materials.

At the hearing, applicant provided information and documentation that contradicted the information provided in the application materials concerning the nature of the [REDACTED] payment from CRC to Hershy (see generally CD, track 3 at 12:50-14:30 [Manisha Patel testimony that the [REDACTED] payment consisted of a loan and other payments from CRC to Hershy], 55:55-56:45 [Abbacy testimony that the [REDACTED] payment consisted primarily of loans and other payments from CRC to Hershy]; exhibit 21). This information, however, was not before the Division at the time of the denial determination. As discussed above, applicant's responses to the Division's inquiries concerning the [REDACTED] payment were consistent with the Division's determination to deny the application.

Applicant has failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that Manisha Patel's contribution to Hershy is not proportionate to her equity interest in the enterprise, as required by 5 NYCRR 144.2(a)(1).

Independent business enterprise

The Division states in its denial letters that applicant "is not an independent business enterprise" (exhibit 2 at 2 [citing 5 NYCRR 144.2(c)(2)]).

The Division argues that applicant fails to meet this criterion because Hershy is dependent upon CRC and Recchia, corporations that are owned by Manisha Patel's husband (exhibit 2 at 2). In support of its position, the Division notes that Hershy does business from the same address as CRC and Recchia and that Hershy received infusions of capital from CRC. The Division also asserts that all of the contracts that Hershy submitted with its application were with CRC or Recchia and that the contracts do not contain industry-standard terms, such as the scope of work. (Id.)

Applicant acknowledges that CRC and Recchia are owned by Chetan Patel (CD, track 1 at 3:05), but argues CRC and Recchia are entirely different companies with no common shareholders, officers or employees (id. at 3:35). Applicant also acknowledges that Hershy, CRC and Recchia operate out of the same building but asserts that they each use a different suite number (id. at 4:25). Applicant further asserts that CRC and Recchia paid Hershy for the services they received from Hershy and that the contracts between these companies contained terms that were similar to the terms in contracts with other companies (id. at 5:45, 6:10).

Applicant has not demonstrated that the Division's determination was not based on substantial evidence. As the Division analyst testified, all of the contracts that Hershy supplied to the Division during the application process were with either CRC or Recchia, two companies owned by Manisha Patel's husband (CD, track 1 at 17:20, track 2 at 2:40, 30:40). The Division analyst further testified that doing business with entities owned by a spouse is not a "per se"

basis to deny an application, but an applicant's reliance on a single source of business is cause for further inquiry by the Division (id., track 1 at 20:45, track 2 at 2:55). Here, the Division requested the three largest contracts Hershy entered into over the prior two years (exhibit 1 at 6 [Q&A, item 5]) and, in response, applicant provided copies of three purchase orders, all of which were with CRC or Recchia (id., CD, track 1 at 16:25, 16:40 [citing exhibit 7]).

Manisha Patel testified that she did not know why she only submitted contracts with CRC and Recchia during the application process and stated that she did have contracts with other entities at the time that Hershy submitted its application to the Division (CD, track 3 at 24:45, 25:05). At hearing, applicant produced documents relating to contracts with other entities, but these documents were either executed after Hershy's application was submitted to the Division on July 22, 2015, or related to work that was not awarded to Hershy (see exhibits 14-18; CD, track 3 at 29:10 [Manisha Patel testimony that Hershy did not perform work reflected in exhibit 14]; CD, track 3 at 29:55 [Manisha Patel testimony that exhibit 15 relates to a contract entered into after Hershy submitted its application]; CD, track 3 at 31:00 [Manisha Patel testimony that exhibit 16 relates to a contract entered into after Hershy submitted its application]; CD, track 3 at 32:40 [Manisha Patel testimony that exhibit 17 relates to a contract entered into after Hershy submitted its application]; CD, track 3 at 34:00 [Manisha Patel testimony relating to exhibit 18, a subcontract agreement that is dated March 16, 2016]).

There is also support in the record for the Division's determination that Hershy, CRC, and Recchia operate from the same location. The parties agree that all three businesses operate out of the same building (see findings of fact ¶ 6; CD, track 3 at 20:30). Applicant asserts, however, that each entity has its own suite number (CD, track 3 at 20:30). In this regard, I note that the application indicates Hershy works out of suite 205 (exhibit 1 at 1 [item 1.F]), but other documents indicate that Hershy uses suite 101, the same suite used by CRC (see e.g. exhibit 5 [CRC checks with address showing suite 101]; exhibit 6 [Hershy invoice with address showing suite 101]; exhibit 9 [Hershy check with address showing suite 101]).

The Division also argues that the large infusion of cash Hershy received from CRC, regardless of whether it was in the form of paid-in capital or a loan, demonstrates that Hershy is not an independent enterprise (CD, track 3 at 1:06:00). The Division notes that no loan documents were provided and no evidence indicates that Hershy paid interest on the loan. Although Hershy argued that the cash infusion was, at least in part, in the form of loans from CRC that were paid back, Hershy did not provide loan documents at the hearing and did not assert that interest was paid on the loan (see generally CD, track 3 at 12:50-14:50 [Manisha Patel testimony that the 2014 loan was for ██████████ and that the loan was paid back (referencing exhibit 9 [check, dated Nov. 21, 2016, for ██████████ from Hershy to CRC])]).

Applicant has failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that Hershy is not an independent business enterprise as required by 5 NYCRR 144.2(c)(2).

CONCLUSION

As discussed above, applicant has failed to meet its burden to demonstrate that the Division's determination to deny the application of Hershey for MWBE certification was not based on substantial evidence.

RECOMMENDATION

For the reasons stated herein, the Division's determination to deny the application of Hershey for certification as a minority-owned or a women-owned business enterprise on the basis of 5 NYCRR 144.2(a)(1) and 144.2(c)(2) should be affirmed.

**Matter of Hershy Engineering and Consulting, P.C.
DED File ID No. 55037**

Exhibit List

Exh. #	Description
1	Hershy MBE and WBE Application, submitted July 22, 2015
2	Department WBE Denial Letter to Hershy, dated June 30, 2016
2A	Department MBE Denial Letter to Hershy, dated June 30, 2016
3	Hershy Tax Documents (2014)
4	Email Exchange Between Division and Manisha Patel
5	Copies of Check from CRC to Hershy
6	Copy of Hershy Invoice for Engineering Services
7	Recchia and CRC Purchase Orders for Hershy Services
8	Hershy Checking Account Records
9	Copy of Check from Hershy to CRC
10	CRC Purchase Orders for Hershy Services
11	Resume of Manisha Patel
12	Copy of Check from Hershy to CRC
13	Emails From Hershy Soliciting Business
14	Request for Approval of Subcontractor (LiRo Group Prime Contractor)
15	Request for Approval of Subcontractor (LiRo Group Prime Contractor)
16	Subconsultant Agreement Between KC Engineering and Hershy
17	Request for Approval of Subcontractor (LiRo Group Prime Contractor)
18	Subcontract Agreement Between Techno Consult, Inc., and Hershy
19	Table of Hershy Contracts
20	List of MBE and WBE Certified Firms
21	Letter from Ashford Abbacy, CPA