

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
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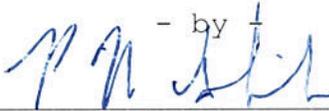
In the Matter

- of -

the Application of
J.C. Smith, Inc.
For Certification as a
Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 9991

RECOMMENDED ORDER

- by 

P. Nicholas Garlick
Administrative Law Judge

March 9, 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 of J.C. Smith, Inc. ("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 J.C. Smith, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

J. C. Smith, Inc.'s application was submitted May 9, 2014 (Exh. DED1). The supporting documents were mailed by Ms. Reed on or about May 12, 2014 (Reed affidavit, November 18, 2016 [Reed affid], ¶15; Exh. 5).

By letter dated July 22, 2014 the Division requested additional tax information from the applicant which Ms. Reed provided (Id. ¶17; Exh. 6).

By letter dated July 1, 2015 the Division requested additional information from the applicant (Exh. DED3) which Ms. Reed provided (Reed affid ¶18; Exh. 7). Included in this response was a written statement which included information about the roles of the owners at the firm (Exh. DED4).

On or about September 21, 2015, a telephone conference between Division staff senior certification analyst Carllita Bell and the women owners of the firm was scheduled and an interview occurred on October 30, 2015 (Reed affid ¶¶20, 21). A copy of the recording of this interview is in the record (Payne reply affirmation, December 19, 2015 [Payne reply affirm], Exh. 1).

The application was denied by letter dated January 12, 2016, from Bette Yee, Director of Certification Operations. As

explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet two separate eligibility criteria related to Joanne Reed's operation and control of the applicant (Exh. DED2).

By letter dated January 18, 2016, the applicant requested a hearing.

By letter dated May 25, 2016, the Division notified the applicant that the hearing in this matter would occur on July 12, 2016 at the Division's office located in Albany, New York.

On May 26, 2016, the matter was assigned to me.

By letter dated June 17, 2016, applicant's counsel wrote to request that the appeal be decided on written submissions.

In an email dated June 28, 2016, attorneys for the parties proposed a briefing schedule which I adopted.

By email dated August 26, 2016, applicant's counsel requested an adjournment of the dates to submit the various papers (Payne affirmation, November 18, 2016 [Payne affirm], Exh. 12). By email dated August 30, 2016, counsel for the Division stated his opposition to such request (Id., Exh. 13).

By letter dated September 1, 2016, counsel for the applicant formally requested an adjournment (Id., Exh. 14).

The first of a series of three conference calls were held with the parties on September 7, 2016.

In papers dated September 30, 2016, the Division filed a brief in this matter. Attached to the brief was the affidavit of Carllita Bell, Senior Certification Analyst with the Division. Attached to Ms. Bell's affidavit were six exhibits listed in the attached exhibit list as DED1-DED6.

A second conference call was held with the parties on October 3, 2016.

On October 7, 2016, the Division provided a cover letter and produced a compact disc containing all documents (in electronic form) constituting the application materials (Payne affirm, Exh. 15).

A third conference call was held on October 17, 2016 during which I asked the Division's counsel if, given the confusion regarding the application materials, the Division would consider rescinding and reevaluating the application.

By email dated October 20, 2016, the Division's counsel informed me that the Division wished to proceed with the appeal (Id., Exh. 17).

By papers dated November 18, 2016, the applicant filed its appeal. Applicant's papers included: (1) a cover letter; (2) a brief; (3) affidavit of Joanne Smith Reed with eight exhibits; (4) affidavit of Mary Smith with one exhibit; (5) affidavit of Jeffrey Smith; (6) affidavit of Jay Smith; and (7) affirmation of Sarah E. Payne, Esq. with seventeen exhibits. All the exhibits are listed in the attached exhibit chart.

In a memorandum dated December 5, 2016, the Division replied to the applicant's appeal.

With papers dated December 19, 2016, the applicant responded to the Division's reply. Applicant's papers consisted of: (1) a sur-reply in support; (2) reply affidavit of Joanne Reed; and (3) reply affirmation of Sarah E. Payne with one exhibit.

The record closed upon receipt of the applicant's papers on December 19, 2016.

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 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 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]).

Applicant's counsel argues that this standard of review, which counsel acknowledges is administrative precedent for these types of cases, is not supported by Executive Law §314(3), 5 NYCRR §144.5 or SAPA §306(1) and that the correct standard is *de novo* review (applicant's brief in support at 11). Counsel's argument is noted, but in light of existing administrative precedent, the substantial evidence standard governs. In any event, I have reviewed the more than 860 pages of materials the applicant claims to have submitted with the application and conclude that the applicant has not demonstrated that it meets certification standards, as explained in detail below.

POSITIONS OF THE PARTIES

Position of the Division

In its denial letter, the Division asserts that the application failed to meet two separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner, Joanne Reed, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

Second, the Division found that the applicant failed to demonstrate that the woman owner, Joanne Reed, is permitted by the corporate documents and relevant business agreements to make business decisions without restriction, as required by 5 NYCRR 144.2(b)(2).

Position of the Applicant

J. C. Smith, Inc. 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 the denial cannot be supported by substantial evidence and is arbitrary, capricious and without a rational basis.

FINDINGS OF FACT

1. J. C. Smith, Inc. is in the business of sales, service and rental of light construction equipment and supplies (Exh. DED1 at 3)¹. The company derives approximately [REDACTED] of its revenue from the sales of construction supplies and materials and [REDACTED] from the rental of light construction equipment (Payne reply affirm, Exh. 1 at 9:45). The company operates retail stores in Syracuse, Albany, Rochester, Binghamton, Utica, and Ithaca; its primary location is in Syracuse (Id. at 1:15).

2. J. C. Smith Contractors & Industrial Center, Inc. was established on July 1, 1976 and the company's name changed to J.C. Smith, Inc. in 1989 (Reed reply affidavit, December 29, 2016). J.C. Smith, Inc. has a business address of 345 Peat Street, Syracuse, New York (Exh. DED1 at 1). In 1994, Josephine Smith (Ms. Reed's mother) acquired approximately 50% of the firm's stock and became its president; a post she held until her death in 2013 (Reed affid ¶7). The firm was certified as a WBE in 1995 (Id., Exh. 1) and was most recently recertified on May 23, 2011 (Id., Exh. 2).

3. On November 18, 2013, the board of directors met and created the post of chief executive officer (CEO) and appointed Ms. Reed to that post (Id. ¶12, Exh. 3). Ms. Reed also provided a copy of the firm's amended by-laws that name the CEO as the corporation's highest officer and make the CEO responsible for the management of the firm (Id., Exh. 4 at G).

4. At the time of the application, J. C. Smith, Inc. was owned by four individuals who also served as corporate officers: Joanne Reed is the CEO and owns 33% of the firm; her brother

¹ In her affidavit, Ms. Reed omits "service" from the list of businesses the firm is involved in (Reed affidavit, November 18, 2016, ¶4).

Jeffrey Smith is president and owns 16% of the firm; her sister-in-law Mary Smith is vice president and owns 18% of the firm; and her brother Jay Smith is secretary and owns 33% of the firm (Exh. DED1 at 3).

5. Mary Smith's duties with the firm include: managing accounts receivable; processing cash receipts; researching and resolving differences with customers regarding their accounts; and the collecting delinquent accounts (affidavit of Mary Smith, Exh. 1).

6. Jeffrey Smith's primary role with the firm is to act as sales manager overseeing store-level performance and supervising sales staff, including the preparation of bids, quotes and estimates (affidavit of Jeffrey Smith, ¶21).

7. Jay Smith's primary role with the firm is to act as a purchasing agent for ordinary supplies the company uses for internal purposes and to manage certain financial matters, such as the company's retirement plan (affidavit of Jay Smith, ¶21).

8. Joanne Reed's daily activities include human resources, balancing bank accounts, managing cash sales, and working with the company's accountant and lawyer (Exh. DED4 at 2). She administers the accounts receivable department, including all aspects of collection and bad debt; resides over human resource issues; and has responsibility for bank matters, including but not limited to account reconciliation (Exh. DED5 at 4).

DISCUSSION

This report considers the applicant's appeal 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 sets forth two bases related to Ms. Reed's operation and control of J.C. Smith, Inc. Each basis is discussed individually, below.

As a preliminary matter, a dispute exists between the applicant and the Division regarding what documents were before the agency at the time it made its determination to deny the application. The applicant claims to have submitted more than 860 pages of documents (Reed affidavit, November 18, 2016, ¶19). The Division states that the application materials are fewer in

number. Details of the applicant's efforts to determine what documents were before Division are set forth below.

By letter dated June 17, 2016, applicant's counsel made a Freedom of Information Law (FOIL) request for the entire administrative record relating to this application (Payne affirm, Exh. 1). In an email dated July 26, 2016, the Division responded (Id., Exh. 2) and attached 230 pages of documents (Id. ¶8). On August 8, 2016, applicant's counsel phoned the Division's Records Access Officer and followed up with an email of the same date listing 20 documents that were submitted with the application that were not received in response to the FOIL request (Id., Exh. 3). The Division's Records Access Officer responded later that day stating that the Division's July 26, 2016 response was complete (Id., Exh. 4).

By letter dated August 26, 2016, applicant's counsel formally appealed from the Division's FOIL denial (Id., Exh. 5). By email dated September 2, 2016, the Division responded stating it had engaged in a further diligent search of its files and located additional documents (Id., Exh. 6) which, according to applicant's counsel, consisted of 152 pages of documents that are largely duplicative of documents contained in Exhibits 5, 6, and 7 to Ms. Reed's November 18, 2016 affidavit (Id. ¶15). Upon review of the documents received pursuant to the FOIL request, applicant's counsel concluded that many of the documents submitted by the applicant were missing (Id. ¶16) and by letter dated September 14, 2016, wrote to the Division stating her conclusion (Id., Exh. 7.)

By letter dated September 13, 2016, the Division's Records Access Appeals Officer informed applicant's counsel that she had directed that the FOIL request be reopened and an additional search made for responsive documents (Id., Exh. 8).

By email dated September 21, 2016 the Division notified applicant's counsel that additional documents had been located (Id., Exh. 9) which according to applicant's counsel consisted of 242 pages of documents that are largely duplicative of documents contained in Exhibits 5, 6, and 7 to Ms. Reed's November 18, 2016 affidavit (Id. ¶19). By letter dated September 26, 2016 applicant's counsel wrote to the Division stating that the FOIL response was still incomplete (Id., Exh.

10). By letter dated October 12, 2016 the Division denied applicant's FOIL appeal (Id., Exh. 11).

In response to my request, counsel for the Division produced a compact disc containing all the documents that were considered the application materials (Id., Exh. 15). The CD contained 29 documents consisting of 217 pages of materials (Id. ¶35). By letter dated October 13, 2016, applicant's counsel wrote concerning the discrepancy between the materials it provided (869 pages) and what the Division considered the application materials (217 pages) (Id., Exh. 16). The Division declined to rescind its denial and reconsider the application based on what the applicant considers all the application materials (Id., Exh. 17).

Thus, a dispute regarding what constitutes the application materials remains. However, it is not necessary to resolve this dispute to decide this appeal, because upon review of the larger record the applicant claims, the applicant has failed to demonstrate that it meets the standards for certification as a WBE, as discussed below.

Operation

In its denial letter, the Division concluded that the applicant failed to demonstrate that the woman owner, Joanne Reed, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

In its brief, the Division argues that the applicant does not meet this standard for certification because male owners of the firm, specifically Jeffrey Smith and Jay Smith, manage the firm's core functions. In her affidavit, Division staff analyst Bell states that in evaluating the application, she reviewed the description of the business provided in the application, which stated the firm was engaged in the sales, service and rental of light construction equipment and supplies. Using this information, she assigned particular weight to the individuals who are responsible for managing the selection of equipment, the sale and leasing of equipment, and the servicing of equipment (Bell affidavit ¶8). The application identified twelve management functions and asked the applicant to identify the individuals responsible (Exh. DED1 at 4-5). Ms. Bell states

that she concluded that three of these management functions are best aligned with the primary activities of the firm: marketing and sales, supervising field operations, and purchasing equipment (Bell affidavit at ¶9). The application identified all four owners (plus another employee) as being responsible for sales and marketing and purchasing equipment (Exh. DED1 at 4-5). Only one owner, Jeffery Smith, was identified as responsible for field operations, which Ms. Bell inferred included the servicing of equipment (Bell affidavit at ¶11).

In an effort to understand who performs the core functions of the business, Ms. Bell requested additional information (Exh. DED3) which the applicant provided (Exh. DED4). Included in this response are brief descriptions of the managerial responsibilities of the owners (Exh. DED4 at 2). Ms. Bell states that this document shows Ms. Reed's duties as primarily human resources, financial and legal matters; Ms. Smith's duties as responsible for accounts receivable; Jeffrey Smith's duties as responsible for managing outside sales, marketing and preparing bids; and Jay Smith's duties as focusing on purchasing supplies and interfacing with manufacturer's representatives (Bell affidavit ¶15). Ms. Bell also states she reviewed the resumes of the owners (Exh. DED5), which identified Ms. Reed as managing accounts receivable, human resources, and banking; Ms. Smith as accounts receivable clerk; Jeffrey Smith as managing various aspects of sales; and Jay Smith as managing the financial affairs of the firm, purchasing and inventory control and in-store sales (Bell affidavit ¶17). On the basis of this information, Ms. Bell concluded that the male owners of the business were responsible for making decisions regarding the core functions of the firm (Bell affidavit ¶18).

On its appeal, the applicant takes issue with the Division's characterization of the core functions of the business. Ms. Reed states that she personally oversees all operations of the firm, exercises ultimate decision making responsibility and directly manages the company's most vital functions (Reed affid ¶37). She states that due to the size of the business, she finds it necessary to delegate low and middle level tasks (Id. ¶39). She describes a four tier management structure that she has implemented (Id. ¶40).

According to Ms. Reed, the first tier functions are the company's core functions. These include: managing capital, physical assets and personnel; managing customers, customer relationships and customer accounts; and legal/compliance matters, because these functions allow the company to generate revenue in its primary lines of business. The primary lines are renting light construction equipment and selling construction materials and supplies (Id. ¶42). She states she handles all first tier operations including signing all company documents; setting and implementing company policies; managing company assets; handling customer issues; overseeing middle management; and maintaining responsibility for legal compliance and other financial matters (Id. ¶43).

Ms. Reed states further that second tier functions include purchasing equipment to rent and materials/supplies to resell; managing rental equipment inventory; managing material/supply inventory; supervising clerks and laborers; preparing quotes, bids and proposals; internal accounting; and negotiating contracts. Ms. Reed claims to often participate in these functions directly, always oversees them, and has ultimate control over them. (Id. ¶44). She states that both Jay and Jeffrey Smith report to her and that she has ultimate authority (Id. ¶46).

Ms. Reed explains that third tier functions include: marketing, scheduling equipment rentals; handling computer sales; preparing estimates; and maintaining/servicing rental equipment (Id. ¶47). Fourth tier functions consist of back office functions (Id. ¶48).

She went on to state that the company does not have significant field operations and that maintaining and servicing rental equipment is not central to the firm's revenue generation (Id. ¶¶50-51). In addition, she states that marketing is not a core function and almost is exclusively accomplished through the company's website (Id. ¶52).

She also states that neither Jeffrey nor Jay Smith solely manage some of the firm's core functions and that their actions are at her direction and under her review and approval (Id. ¶53). Jeffrey Smith serves as the firm's sales manager and oversees store-level performance and supervises sales staff,

including the preparation of bids, quotes and estimates (Id. ¶54). Jay Smith is responsible for purchasing the ordinary supplies the company uses for its internal operations, as opposed to the supplies that the firm sells, and managing certain financial matters, such as the company's retirement plan (Id. ¶56).

She concludes by explaining that estimating is a low-level function governed by policies and procedures she implemented; the company is not bonded; and the company does not have significant field operations (Id. ¶66).

Applicant's counsel argues that the management structure of the firm does not preclude it from obtaining certification. Ms. Reed's powers as CEO give her the authority to make all business decisions. Her decision to delegate or contract out certain management functions is allowed. Counsel argues that although the company's core revenue generating operations are renting light construction equipment and selling construction materials and supplies, the most critical and highest value roles at the firm are the management of financial, physical and human resources, a role filled by Ms. Reed. Counsel argues that Ms. Reed oversees the actions of Jay and Jeffrey Smith and supervises their duties, including Jay's role as sales manager.

In its reply, the Division states that even if the applicant's version of the record is accepted, the firm still does not meet certification standards. The Division states that it looked past Ms. Reed's title of CEO and examined the roles actually performed by the owners and officers of the company. This analysis led the Division to conclude that Jeffrey and Jay Smith operate the core functions of the business, as that term is interpreted and applied in WBE cases. The Division argues that the business is run as a family business and that Ms. Reed's claimed involvement in the business's core functions are not supported by the application materials. The Division concludes that Ms. Reed's title is irrelevant to this denial ground because she does not manage the business's core functions.

In determining who makes decisions pertaining to the operations of the enterprise, as that term is used in 5 NYCRR 144.2(b)(1), the Division examines who makes decisions regarding

the company's core functions. The Division considers core functions as those in which the company is primarily engaged to generate its revenue. In this case, Ms. Bell stated that she concluded that Jeffrey and Jay Smith managed the core functions of the business due to their roles in managing sales and purchasing supplies, respectively. No factual dispute exists regarding the roles of the Smith brothers at the firm.

The applicant contests the Division's characterization of the core functions of the applicant and identifies the company's core functions as: managing capital, physical assets and personnel; managing customers, customer relationships and customer accounts; and legal/compliance matters. Based on this alternative definition of core functions, the applicant argues that Ms. Reed makes decisions pertaining to the operations of the enterprise, as that term is used in 5 NYCRR 144.2(b)(1). However, the applicant's definition of core functions is not the one used by the Division in evaluating WBE applications.

The Division looks at the revenue generating functions of the business. In this case, the management of the rental of light construction equipment supplies █████ of the company's revenue, and sales of construction material and supplies supply the remaining █████ (Payne reply affirm, Exh. 1 at 9:45). Jeffrey Smith is the company's sales manager (Exh. DED5 at 5) and in this role he oversees store-level performance and supervises sales staff's preparation of bids, quotes, and estimates (Reed affidavit, November 18, 2016, ¶54). The record is not clear on who manages the rental of light construction equipment, but Ms. Reed makes no claim to this managerial responsibility. Thus, the record contains no proof that Ms. Reed makes decisions regarding the company's core functions, as that term is used by the Division in evaluating WBE applications. Ms. Reed's claim that she oversees her brothers in her role as CEO is not sufficient to demonstrate that she manages the core functions of the business and makes the decisions pertaining to the operations of the enterprise, sufficient to meet certification criteria as a WBE.

The Division's characterization of the firm as a family business is supported in several instances by the statements of Ms. Reed. At several points during the October 30, 2016

interview, Ms. Reed states that the company is a family business (Payne reply affirm, Exh. 1 at 4:50, 6:30 and 17:40). Further, she states that as the only daughter, her mother wanted her to take over the company to maintain the WBE certification (Id. at 6:00). Based on the application materials, the characterization of the firm as a family business is supported. There is basically equal ownership among the three siblings (and their spouses) and the division of duties among the siblings show shared responsibilities of the firm. While the legal structure of the company is tailored in an attempt to give the appearance of a WBE, an examination of the roles of the owners show it in reality to be a family business.

If the Division's description of the application materials is accepted (approx. 217 pages), the denial is supported by substantial evidence, including the resumes of the owners (Exh. DED5) and the description of their roles (Exh. DED4) which show that Ms. Reed does not manage the rental of light construction equipment, or the sales of construction material and supplies.

If the applicant's description of the application materials is accepted (approx. 860 pages) and a *de novo* review conducted (as the applicant suggests) the result is unchanged. The resumes of the owners and the narratives of their duties are in this record and the applicant points to no other documents which show Ms. Reed's role in managing either sales or rentals, which are the core functions of the business, as discussed above.²

In either case, the applicant failed to demonstrate that the woman owner, Joanne Reed, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

² Applicant's counsel argues in her reply affirmation that the Division's reliance on an analysis of Ms. Reed's role in the company's core functions is improper and arbitrary because the phrase "core functions" does not appear in the regulations. It is beyond the scope of my review to consider the manner in which the Division interprets its regulations (in this case evaluating whether the woman owner makes decisions about the revenue generating functions of the business).

Control

In its denial letter, the Division found that the applicant failed to demonstrate that the woman owner, Joanne Reed, is permitted by the corporate documents and relevant business agreements to make business decisions without restriction, as required by 5 NYCRR 144.2(b)(2).

Ms. Bell states that she reviewed the company's bylaws (Exh. DED6) and that the bylaws do not include any reference to the office of CEO which is held by Ms. Reed (Bell affid ¶20). The bylaws identify the company's president, Jeffrey Smith, as the highest ranking officer and he is empowered to control management of the business (Id. ¶21-22). Since the position of CEO does not exist in the bylaws and Ms. Smith's title of vice-president only allows her to exercise powers granted to her by the president, Ms. Bell concluded that the firm did not meet certification criteria (Id. ¶23-¶25).

The applicant responds on its appeal that the CEO is the highest officer in the company and this is reflected in the minutes of the November 18, 2013 shareholders' meeting and the company's amended bylaws (Reed affid ¶70; Exh. 3). Although the minutes of the meeting are included in the Division's application materials, Ms. Reed states that the Division relied on the company's original by-laws from 1976 (Id. ¶71). She notes that since that time, the company's name was changed from "J.C. Smith Contractors & Industrial Center, Inc." to "J.C. Smith, Inc." in 1989, and that J.C. Smith, Inc. is the name on the application (Id. ¶72). She notes that the current certificate of incorporation and bylaws are not included in the Division's application materials (Id. ¶73; Exh. 4).

Applicant's counsel argues that Ms. Bell's conclusion was based on outdated bylaws and that as a result, the Division's conclusion was not based on substantial evidence. Ms. Reed states that the revised bylaws and minutes of the November 18, 2013 meeting were submitted as part of the application (Reed affid ¶¶70-75; Exhs. 3, 4 at G; Exh. 5, documents 15 & 16).

In its reply, the Division argues that the minutes of the November 18, 2014 meeting do not demonstrate the amendment of the bylaws. The Division acknowledges that the minutes were

considered during the application process, but were not produced as part of the Division's version of the application materials. The Division asserts that the amended bylaws were not submitted with the application and even if they had been, nothing shows that these amended bylaws were actually adopted by the Board or that these bylaws are the current bylaws of the company.

Applicant's counsel responds that the Division's denial was based on bylaws for a company with a name different from that on the application. Counsel states that the amended bylaws were duly adopted but even if they had not been, the conduct and usage of them would be enough. However, while this dispute remains, it is not necessary to resolve the question whether or not the bylaws were duly adopted.

If the Division's description of the application materials is accepted (approx. 217 pages), the denial is not supported by substantial evidence. The denial was based on bylaws for a company with a different name than that of the applicant. However, using this version of the record, it is impossible to conclude that the applicant met its burden, since the amended bylaws were not, according to the Division, submitted with the application materials.

If the applicant's description of the application materials is accepted (approx. 860 pages) and a *de novo* review conducted (as the applicant suggests) the result changes and the applicant would have met its burden of demonstrating that the woman owner, Joanne Reed, is permitted by the corporate documents and relevant business agreements to make business decisions without restriction, as required by 5 NYCRR 144.2(b)(2).

However, because the applicant has failed to demonstrate that the woman owner, Joanne Reed, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1), as discussed above, the question of what constitutes the record on the second denial ground, and whether such denial was proper, need not be reached.

CONCLUSIONS

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

RECOMMENDATION

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

**Matter of
J. C. Smith, Inc.**

**DED File ID No. 9991
Exhibit List**

Division Exhibits

Exh. #	Description
DED1	Application
DED2	Denial letter
DED3	Request for additional information dated July 1, 2015
DED4	Narratives
DED5	Resumes
DED6	1976 Bylaws

Applicant Exhibits

Attached to Affidavit of Joanne Smith Reed

Exh. #	Description
1	Information regarding applicant's previous WBE certification
2	WBE certification letter dated May 23, 2011
3	Minutes of November 18, 2013 board meeting
4	Amended bylaws dated November 18, 2013
5	Application's supporting documents mailed by Ms. Reed on or about May 12, 2014
6	July 22, 2014 request for additional information and response

7	July 1, 2015 request for additional information and response
8	Denial letter

Attached to the affidavit of Mary Smith

Exh. #	Description
1	Resume of Mary Smith

Attached to Affirmation of Sara E. Payne, Esq.

Exh. #	Description
1	FOIL request dated June 17, 2016
2	FOIL response dated July 26, 2016
3	FOIL email dated August 8, 2016
4	FOIL email dated August 8, 2016
5	FOIL appeal dated August 26, 2016
6	Division's email dated September 2, 2016
7	Letter from applicant's counsel dated September 14, 2016
8	Email dated September 15, 2016 and letter dated September 13, 2016 regarding FOIL appeal
9	Email dated September 26, 2016 regarding the discover of additional responsive documents
10	Letter dated September 25, 2016 from applicant's counsel
11	FOIL appeal denial letter dated October 12, 2016
12	Email dated August 26, 2016 from applicant's counsel requesting adjournment

13	Email dated August 30, 2016 from Division's counsel opposing request for adjournment
14	Letter dated September 1, 2016 requesting adjournment
15	Letter dated September 30, 2016 and print out of documents considered by the Division as the application materials
16	Letter dated October 13, 2016 from applicant covering summary of Division's application materials and applicant's materials
17	Email dated October 20, 2016 from Division counsel requesting the appeal go forward

Attached to the reply affirmation of Sarah E. Payne, Esq.

Exh.	Description
1	Recording of interview conducted on October 30, 2015