

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

In the Matter

- of -

the Application of **West Branch, Inc.**  
for Certification as a Women-Owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 45469

RECOMMENDED ORDER

- by -



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Maria E. Villa  
Administrative Law Judge

April 4, 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 West Branch, Inc. (“West Branch” or “applicant”) certification as a women-owned business enterprise<sup>1</sup> (“WBE”) 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 West Branch does not meet the eligibility criteria for certification as a WBE.

The Division denied West Branch’s application for WBE certification (Exhibit 1) by letter dated December 16, 2015. Exhibit 2. The denial letter sets forth four grounds (ownership and operation) under Section 144.2 of 5 NYCRR for the denial. Specifically, according to the Division,

- (1) applicant failed to demonstrate that the contributions of Lisa Tracy, the woman owner, were proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise (see Section 144.2(a)(1) (“Ownership”));
- (2) applicant did not show that Ms. Tracy enjoyed the customary incidents of ownership and shared in the risks and profits, in proportion with her ownership interest in West Branch (see Section 144.2(c)(2) (“Ownership”));
- (3) applicant failed to demonstrate that Ms. Tracy had the experience or technical competence, working knowledge or ability needed to operate the enterprise (see Section 144.2(b)(1)(i) (“Operation”); and
- (4) applicant did not demonstrate that Ms. Tracy made decisions pertaining to the operation of the enterprise (see Section 144.2(b)(1) (“Operation”)).

On July 28, 2016, applicant appealed from the denial (“Appeal”). In lieu of a hearing, the parties agreed to submit their arguments in writing. Applicant was represented by Jennifer Kavney Harvey, Esq., of Couch White, LLP, Albany, New York. The Division responded on January 23, 2017 (“Division Response”). The Division Response included the affidavit of Iliana Farias, sworn to January 20, 2017 (the “Farias Affidavit”). In its Appeal, applicant requested the opportunity to reply to any facts asserted by the Division in the Division Response. The request was granted, and on March 24, 2017, applicant submitted its reply (“Applicant’s Reply”).

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<sup>1</sup> The term “women-owned business enterprise” applies to an enterprise that meets the requisite criteria on the basis of the ownership and control of one woman or of multiple women (see Section 140.1(tt) of 5 NYCRR (defining a women-owned business enterprise as one that is, inter alia, “at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women”)).

A list of exhibits is attached to this recommended order. Exhibits submitted by West Branch were not marked or received if those exhibits were duplicates of exhibits submitted by the Division and already received into the record. This report is based upon the exhibits marked and received.

### **ELIGIBILITY CRITERIA**

The eligibility criteria pertaining to certification as a women-owned business enterprise are established by regulation (see 5 NYCRR Section 144.2). For the purposes of determining whether an applicant should be granted WBE status, the ownership, operation, and control 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 and any interviews that the Division's analyst may have conducted.

### **STANDARD OF REVIEW**

On this administrative appeal, applicant bears the burden of proof to establish that the Division's denial of West Branch's application for WBE certification is not supported by substantial evidence (see State Administrative Procedure Act Section 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 N.Y.3d 494, 499 (2011) (internal quotation marks and citations omitted)).

### **POSITIONS OF THE PARTIES**

#### Applicant

On appeal, applicant addresses the bases cited by the Division for the denial of West Branch's WBE application, and also raised a number of procedural objections, discussed in greater detail below. Applicant argued that the Division did not follow the requisite procedures by requiring it to reapply for certification before the term of its existing certification had expired. Applicant asserted that it was prejudiced because the December 16, 2015 denial letter did not identify any factual basis for the Division's determination to deny West Bank's application.

With respect to ownership, West Branch contends that Ms. Tracy enjoys the customary incidents of ownership, and that her capital contributions are proportionate to her equity interest in the enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise.

With regard to operation, West Branch asserted that as the chief executive officer, Ms. Tracy has the experience, working knowledge and ability to operate the business, and that technical expertise was not necessary. Applicant went on to argue that Ms. Tracy makes decisions pertaining to West Branch's operations.

## Division

The Division argued that its determination was supported by substantial evidence, and that applicant failed to satisfy certification criteria related to ownership and operation of the business enterprise by a woman owner. The Division noted that Ms. Tracy's husband, Darren Tracy, received significantly greater compensation than Ms. Tracy, and also maintained that Ms. Tracy did not make a contribution proportionate to her ownership interest in West Branch.

With respect to operation, the Division contended that applicant failed to show that Ms. Tracy has the technical expertise or technical competence, working knowledge or ability to operate West Branch, and that she does not make decisions pertaining to the operations of the enterprise. The Division took the position that Ms. Tracy relied upon Mr. Tracy for his skills and experience in estimating and supervising field operations. Accordingly, the Division requested that its determination to deny WBE certification to West Branch be upheld.

## **FINDINGS OF FACT**

1. West Branch Inc. is located at 235 Daniels Road, Saratoga Springs, New York. Exhibit 1, at 1.
2. West Branch is a general contractor providing construction services, including excavation and masonry restoration. Exhibit 1, at 3. The company was formed in 1991 by Darren Tracy. Id. Lisa Tracy became the president of West Branch in 1999. Id.
3. Darren Tracy is a licensed engineer and certified masonry restoration specialist. Exhibit 5. Ms. Tracy's resume shows that she has a background in television production and education. Exhibit 5.

## **DISCUSSION**

This report considers applicant's appeal from the Division's determination to deny certification of West Branch as a women-owned business enterprise pursuant to Executive Law Article 15-A.

### *Applicant's Procedural Arguments*

As an initial matter, applicant asserted that it was prejudiced by the Division's failure to provide a factual basis for the denial in the Division's December 16, 2015 letter. According to applicant, "[t]he Division did not identify or cite to a single fact as a predicate for the Determination, and this has prejudiced West Branch from being able to substantively appeal the Determination and prosecute this appeal." Appeal, at 6. In response, the Division noted that the December 16, 2015 denial letter was not a final agency determination, and that the record was still being developed with respect to applicant's entitlement to certification.

On appeal, applicant requested the right to reply to any facts asserted by the Division. The request was granted, and in Applicant's Reply, applicant addressed the Division's factual arguments. Thus, the Division has provided additional facts about the denial, and applicant has availed itself of the opportunity to respond. Consequently, there is no prejudice to applicant with respect to the denial letter.

Applicant also contended that it had been prejudiced "by the Division's use of a process outside established regulation and statute to improperly revoke its certification." Appeal, at 6. Applicant pointed out that West Branch had been certified for approximately twelve years, and argued that the Division "does not, within its regulations or otherwise, have the ability to force a certified entity to reapply for certification, and then deny that new 'application' based on unstated facts." *Id.* According to applicant, West Branch had been deprived of the presumption of eligibility (see Section 144.6(i) of 5 NYCRR ("[d]uring the pendency of a challenge, a presumption of eligibility shall remain in effect for the challenged certified minority- and women-owned business enterprise"). Applicant maintained that West Branch was not afforded the benefit of that presumption because West Branch "was improperly forced to reapply as a new applicant while its prior certification was in force." Appeal, at 6.

In response, the Division pointed out that, pursuant to Section 144.4(b) of 5 NYCRR, an applicant may be directed to reapply for certification at the request of the Director, in lieu of submitting an application at the end of a three-year certification term. The Division noted further that West Branch's certification was never revoked, and that the business is still listed in the Division's database of certified women-owned businesses. See Exhibit 15, at 8. West Branch's certification expired on July 18, 2015, and the Division observed that "[a]lthough the Director's November 19, 2014 request that West Branch submit an application for certification came during the term of its certification, the Department did not deny that application until nearly five months after West Branch's three-year term of certification had expired." Division Response, at 8. The Division concluded that since the Division did not take any action during West Branch's three-year term of certification, "West Branch's certification was never revoked and West Branch could not have suffered prejudice for not benefiting from the revocation procedures enumerated in 5 NYCRR § 144.6." *Id.*

Applicant's arguments are unavailing with respect to these procedural matters. Applicant has not demonstrated that it was prejudiced by the Division's request that West Branch reapply for certification. The remainder of this recommended order addresses the bases for denial enumerated in the Division's December 16, 2015 denial letter.

### Ownership

Section 144.2(a)(1) of 5 NYCRR requires that the woman owner's contributions be proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise. Applicant argued that Lisa Tracy owned 100% of the business. According to applicant, when Darren Tracy formed the company in 1991, he owned 10 shares of stock, for which he paid [REDACTED]. Lisa Tracy became the president in 1999, and 11 shares of stock were issued to her at that time, after she had been working for West Branch "in limited capacities" from 1991 to 1999. Appeal, at 8. Applicant

went on to state that “[i]n 2002, all the shares owned by Darren Tracy were transferred to Lisa Tracy . . . The shares were transferred, but the stock ledger was not updated, which is what has led to the apparent confusion here.” Id.

In response, the Division pointed out that the application specifically indicated that neither Ms. Tracy nor Mr. Tracy made a contribution to West Branch. Exhibit 1, at 3; Farias Affidavit, ¶ 7. According to the Division, “[a]s evidence of her contributions to West Branch, Ms. Tracy provided bank records that bore no intelligible connection to contributions by Ms. Tracy or Mr. Tracy to West Branch.” Division Response, at 2. The Division went on to note that West Branch’s 2014 corporate income tax return “shows ██████ not ██████ in contributions made in conjunction with the issuance of capital stock,” and asserted that the appeal did not identify any documents in the application “that could reasonably have led the Department to conclude that Ms. Tracy made a contribution to West Branch, much less one in proportion to her majority ownership interest.” Id., at 3.

Under the circumstances, it was reasonable for the Division to conclude that Ms. Tracy had not made a contribution proportionate to her business interest in the enterprise. The Division cannot be faulted for errors in the stock ledger provided by applicant, and applicant has the burden to establish entitlement to certification. The Division’s determination with respect to contribution was supported by substantial evidence.

Section 144.2(c)(2) of 5 NYCRR requires an applicant to demonstrate that the woman owner enjoys the customary incidents of ownership, and shares in the risks and profits in proportion with her ownership interest in the enterprise. Applicant argued that Ms. Tracy was the 100% owner of West Branch, and noted that it is a small business with a net income for the first two months of 2015 was approximately ██████. According to applicant, “Ms. Tracy is fully in control of how the profits of the business are disbursed or retained by the Company.” Appeal, at 7. Applicant pointed to ██████ in retained earnings in 2014, “all of which will be paid out to Lisa Tracy as 100% owner when she determines it is appropriate.” Applicant’s Reply, at 3.

In response, the Division asserted that Mr. Tracy received significantly greater compensation than Ms. Tracy in 2014, and that no dividends were issued that might have compensated for the disproportionate salaries. The Division observed that “the Appeal conflates the potential for an owner to share in the risks and profits of a business with actually doing so.” Division Response, at 4. With respect to applicant’s contention that Ms. Tracy owns 100% of West Branch, the Division countered that the application specifically indicated that Ms. Tracy owns 11 shares, and Mr. Tracy owns 10 shares of the company. Moreover, the 2014 corporate tax return identifies Ms. Tracy at the 51% owner and Mr. Tracy as a 49% owner.

Given the application and the supporting documentation, the Division reasonably concluded that Ms. Tracy did not share in the risks and profits of West Branch in proportion with her ownership interest. On appeal, applicant did not meet its burden to show that the Division’s determination to deny certification was not supported by substantial evidence. The Division’s determination with respect to ownership should be affirmed.

## Operation

Section 144.2(b)(1) of 5 NYCRR requires that decisions pertaining to the operations of the business enterprise must be made by the woman owner. In this regard, Section 144.2(b)(1)(i) of 5 NYCRR mandates that an applicant demonstrate that the woman owner has adequate managerial experience or technical competence in the business enterprise seeking certification. In addition, an applicant must show that the woman owner has the working knowledge and ability needed to operate the business enterprise (see 5 NYCRR Section 144.2(b)(1)(ii)). The regulations also require a showing that the minority or woman business owner makes decisions pertaining to operation, and devotes time on an ongoing basis to the daily operation of the business enterprise (see 5 NYCRR Section 144.2(b)(1)(iii)).

Applicant argued that Ms. Tracy had operational control of the business. In the Appeal, applicant stated that Ms. Tracy had worked for West Branch since 1991, and been its president since 1999. According to applicant, her tenure at the business “provided her with substantial managerial experience, as well as the working knowledge and ability to operate the company.” Appeal, at 9.

The Division stated that with respect to the operation of an enterprise seeking certification, the Division

considers whether minority or women owners possess training and certification in disciplines related to providing services to clients of the business for which certification is sought, whether owners have prior managerial experience in the industry that demonstrates their ability to operate the business without relying upon others, and information provided in the application related to the individuals who actively manage the core functions of the business enterprise during its regular business hours.

Division Response, at 4. The Division concluded that applicant failed to demonstrate that Ms. Tracy managed the core functions of West Branch, specifically, estimating and supervising field operations, or that she had the requisite training, certifications or managerial experience to evaluate Mr. Tracy’s work.

Ms. Tracy’s role in the operation of the business supports the Division’s denial. On appeal, applicant notes that she makes financial decisions, prepares bids, negotiates bonding and insurance, manages marketing and sales, hires and fires employees when necessary, purchases equipment, manages and signs payroll, and negotiates contracts. Nevertheless, the functions that enable the business to obtain work and provide services to clients, specifically, estimating and supervising field operations, are within Mr. Tracy’s purview. Applicant acknowledges that Mr. Tracy, as vice president, “contributes in-the-field expertise.” Appeal, at 10. Although Mr. Tracy also has a separate engineering firm, as the Division states, the denial “was premised upon the fact that Mr. Tracy manages the ‘significant operations’ of the business . . . not a claim that Ms. Tracy is completely uninvolved in the operation of West Branch.” Division Response, at 5. The Division cited to *Matter of Northeastern Stud Welding Corp. v. Webster*, 211 A.D.2d 889, 890 (3<sup>rd</sup> Dept. 1995), in which the court upheld a denial where “significant operations [of the

business] are shared and still others are performed” by male individuals. In this case, Mr. Tracy performs those significant operations for West Branch.

Applicant argued that Ms. Tracy had the experience, working knowledge and ability to operate West Branch, citing to *Matter of Era Steel Constr. Corp. v. Egan*, 145 A.D.2d 795 (3<sup>rd</sup> Dept. 1988), for the proposition that technical expertise is not necessary as long as the woman owner seeking certification retains operational control of the enterprise. In response, the Division argued that *Era Steel* was not controlling, inasmuch as that decision predated the exiting statute and regulations, and went on to contend that the fact pattern in *Matter of Northeastern Stud Welding, supra*, more closely resembled the facts in this case. The Division noted that in *Matter of Era Steel*, no one in the business possessed the necessary technical knowledge “to fulfill ordinary tasks which are part of the commercial norm.” 145 A.D.2d at 798. In contrast, in *Matter of Northeastern Stud Welding*, the Division’s denial was upheld where the woman owner employed male individuals with the requisite technical expertise, but she herself did not have the technical ability to evaluate their work. 211 A.D.2d at 891.

This reasoning is persuasive. Mr. Tracy has certifications directly related to the work of West Branch, and as the Division points out, he has also completed a dozen relevant continuing education courses. Exhibit 5, at 2; Farias Affidavit, ¶ 23. The Division stated that Mr. Tracy’s educational background in engineering “is also relevant, although not necessary to the services West Branch provides.” Division Response, at 6. As the Division observed, Ms. Tracy does not have any training or certifications that are relevant to those services.

The record supports the Division's determination regarding the operation of West Branch. The revenue-generating functions are handled by Mr. Tracy, and Ms. Tracy does not have the technical training or managerial experience to do so, as required by Section 144.2(b)(1). Moreover, even assuming that applicant satisfied the operational criteria, applicant did not establish ownership within the meaning of the regulations. The Division’s denial of certification was supported by substantial evidence, and should be affirmed.

## **CONCLUSION**

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

## **RECOMMENDATION**

For the reasons set forth above, the Division's determination to deny West Branch’s application for certification as a women-owned business enterprise should be affirmed.

**Matter of West Branch Inc.**  
**DED File ID No. 45469**  
**Exhibit Chart**

Exhibit No.	Description	Rec'd
1	March 10, 2015 application	✓
2	December 16, 2015 denial letter	✓
3	March 1, 2015 Adirondack Trust bank statement	✓
4	2014 Corporation Income Tax Return	✓
5	Resumes: Lisa Tracy, Darren Tracy	✓
6	February 8, 2003 letter from Brian Ansari, NYS DED, to Lisa Tracy, re certification	✓
7	Website printout: West Branch, Inc.	✓
8	July 19, 2012 letter from Scott Munson, NYS DED, to Lisa Tracy, re certification	✓
9	September 14, 2014 letter from Bette Yee, NYS DED, to Lisa Tracy re new application required	✓
10	June 1, 2016 letter from Jennifer K. Harvey, Esq., Couch White, to Phillip Harmonick, Esq., NYS DED	✓
11	July 1, 2016 e-mail trail re request for records	✓
12	July 6, 2016 e-mail from Phillip Harmonick, Esq. to Jennifer Harvey, Esq., with attached documents	✓
13	July 11, 2016 e-mail trail re: discovery	✓
14	NYS DED: "Frequently Asked Questions On New Codes" (September, 2015)	✓
15	Website printout: New York State Contract System	✓
16	March 10, 2015 application (with additional documents not included in Exhibit 1)	✓
17	Website printout: West Branch Engineering & Consulting, PLLC	✓