

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

In the Matter

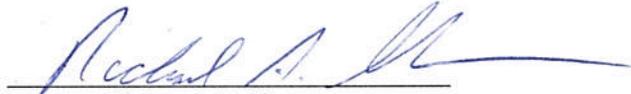
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the Application of **Y&B Lighting & Electric Supplies, LLC**,
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60869

RECOMMENDED ORDER

- by -



Richard A. Sherman
Administrative Law Judge

May 19, 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 Y&B Lighting & Electric Supplies, LLC ("Y&B" or "applicant"), certification as a women-owned business enterprise ("WBE")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 Y&B does not meet the eligibility criteria for certification as a WBE.

The Division denied the application (exhibit 1) filed by Y&B for WBE certification by letter dated August 12, 2016 (exhibit 2). The denial letter sets forth three grounds under 5 NYCRR 144.2 for the denial. Applicant filed a notice of appeal ("notice of appeal"), dated September 28, 2016. The Division advised applicant that the hearing on this matter would be held on March 21, 2017 (letter from the Division to applicant, dated January 4, 2017).

I convened the hearing at approximately 1:30 p.m. on March 21, 2017, at the Division's offices, 633 Third Avenue, New York, New York. Michael Korsinsky, Esq., Korsinsky & Klein, LLP, appeared on behalf of Y&B and called two witnesses: Ms. Chaya Braver, President, Y&B; and Mr. Yoel Braver, Vice President, Y&B. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, represented the Division and called one witness, El Hussein Sarhan, 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. A copy of the audio recording on compact disc ("CD") was provided to this office on March 24, 2017, whereupon, the hearing record closed.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a WBE are established by regulation (see 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted or denied WBE status, the ownership, operation, control, and independence of the business enterprise are assessed on the basis of information supplied through the application

¹The 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 5 NYCRR 140.1[tt] [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"]).

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 WBE certification for Y&B 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 three bases for the denial of Y&B's application. First, the Division argues that applicant failed to establish that the woman owner, Chaya Braver, made capital contributions to Y&B 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 applicant failed to establish that the woman owner, Chaya Braver, shares in the risks and profits in proportion to her ownership interest in Y&B (exhibit 2 at 2 [citing 5 NYCRR 144.2(c)(2)]). And, third, the Division argues that applicant failed to establish that the operating agreement and other documents governing Y&B's operations permit the woman owner, Chaya Braver, to make decisions without restrictions (exhibit 2 at 3 [citing 5 NYCRR 144.2(b)(2)]).

Position of Applicant

Applicant argues that "Y&B qualifies as a Minority and/or Women owned business" and that its "business structure complies with the applicable statutory requirements" (notice of appeal at 1). Applicant also states that both members of Y&B are Hasidic Jews and that "Hasidic Jews are recognized as a minority by State and Federal Law" (id.).

FINDINGS OF FACT

1. Y&B is a Limited Liability Company, established on August 17, 2004, and is in the business of lighting and electrical supply and installation (exhibit 1 at 2 [items 1.R], 3 [items 3.A-D]; exhibit 10 [description of Y&B]; CD, part 3 at 19:45).

2. Chaya Braver is the President of Y&B and owns 51% of Y&B (exhibit 1 at 2-3 [items 1.P, 2.A, 2.D]; CD, part 3 at 20:20). Yoel Braver is Vice President of Y&B, owns 49% of Y&B, and is married to Chaya Braver (exhibit 1 at 2-3 [items 2.A, 2.D]; CD, part 3 at 12:05).

3. Neither Chaya Braver nor Yoel Braver made a monetary contribution to Y&B (exhibit 1 at 3 [item 2.C]; CD, part 3 at 26:15 [Chaya Braver testimony that her contribution was in the form of expertise, not monetary]).

4. Chaya Braver and Yoel Braver received [REDACTED], respectively, in compensation from Y&B in 2015 (exhibit 6 [IRS form 1125-E]; CD, part 2 at 11:25, 12:05).

5. Pursuant to Y&B's operating agreement Chaya Braver and Yoel Braver each receive 50 percent of the net profits or losses of the company (exhibit 7 at 4 [article VII]; CD, part 2 at 14:05).

6. Pursuant to Y&B's operating agreement Yoel Braver is the sole voting member and manager of Y&B, and is responsible for the day-to-day management and all operations of the business (exhibit 7 at 1 [preamble], 2 [article III ¶ 3.9], 5 [article VIII ¶ 8.2, 8.3(B)]).

7. Pursuant to Y&B's operating agreement Chaya Braver is the non-voting member of Y&B, and "does not have any authority or voice in any of the operations or affairs of [Y&B] whatsoever" (exhibit 7 at 1 [preamble], 5 [article VIII ¶ 8.3(B)]).

DISCUSSION

As a preliminary matter, I note that Y&B asserted at the outset of the hearing that it had intended to apply for both WBE and Minority Business Enterprise ("MBE") certification (CD, part 1 at 3:00, part 2 at 0:20). Applicant noted that the application it submitted states on its face that the firm is applying for both certifications (CD, part 1 at 3:20; see exhibit 1 at 1 [item 1.A]). Applicant sought to address both certifications at the hearing.

The Division stated that only Y&B's WBE application was before it and that all the documents submitted by applicant pertain to the WBE application (CD, part 2 at 1:50). The Division noted that there is a separate "tab" on the Division's e-filing system for those seeking to file an MBE application and that Y&B did not submit an application under that tab (CD, part 1 at 2:15). The Division stated that its denial determination pertains only to Y&B's WBE certification and, therefore, the Division opposed Y&B's request that the hearing address both certifications (CD, part 1 at 2:35, part 2 at 1:50).

The Division's position is supported by the record. Although Y&B indicated on its WBE application that it was also applying for MBE certification, Y&B did not submit an MBE application to the Division, and the Division made no determinations pertaining to whether Y&B qualified for MBE certification. Therefore, I ruled that the hearing would address only the Division's denial of Y&B's WBE certification (CD, part 2 at 2:20). I also noted that the ruling does not preclude applicant from filing separately for MBE certification (id.).

This report considers applicant's appeal from the Division's determination to deny certification of Y&B as a WBE pursuant to Executive Law Article 15-A. The Division cites three 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 Chaya Braver made a capital contribution to Y&B that was in proportion to her ownership interest in the enterprise (exhibit 2 at 2 [citing 5 NYCRR 144.2[a][1]). Specifically, the Division asserts that the application states that neither owner made a capital contribution to Y&B and that the documents submitted with the application to show the source of Y&B's capitalization do not demonstrate that this eligibility criterion is met (CD, part 2 at 7:30-9:35).

Applicant acknowledges that the application indicates that neither owner made a capital contribution, but asserts that Chaya Braver contributed her expertise to the enterprise (CD, part 3 at 26:15). Applicant also argues that the application does not provide for an estimate of the dollar value of Chaya Braver's contribution of expertise and that the documents before the Division indicate she made a significant contribution of expertise (CD, part 3 at 39:30, 40:05; see also CD, part 3 at 26:15, 31:05-32:10, 33:55 [Chaya Braver testimony that she contributed her expertise and that, although it was not quantified in the application, her resume shows the expertise that was contributed]).

On its application, Y&B indicated that no capital contributions were made to the enterprise (exhibit 1 at 3 [item 2.C]). Applicant argues that it entered "\$0" on the application because the contribution of the owners was in the form of expertise, not cash (CD, part 3 at 39:30). Chaya Braver testified that her contribution of expertise could be quantified, but it would be difficult and that she assumed her resume would show her contribution (CD, part 3 at 31:05-32:10).

The application requires an applicant to "identify the cash and capital contributions" made by the owners (exhibit 1 at 3 [item 2.C]). Under 5 NYCRR 144.2(a)(1), contributions are broadly defined to include, without limitation, "contributions of money, property, equipment or expertise." Further, the application includes a column for the applicant to indicate the type of contribution made (e.g., money or expertise), and a separate column to indicate the dollar value of the contribution (see exhibit 1 at 3 [item 2.C]). Accordingly, applicant's interpretation (that only contributions of cash were requested under the application) is not supported by the record.

Although Chaya Braver may have contributed expertise to the enterprise, applicant made no attempt to quantify the value of that contribution. Moreover, the fact that an owner brings significant expertise to an enterprise does not, by itself, establish that such expertise is a capital contribution. Rather, it must be shown that the expertise was contributed (i.e., uncompensated, or undercompensated) to qualify as a capital contribution.

Applicant 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 Chaya Braver's contribution to Y&B was not proportionate to her equity interest in the enterprise, as required by 5 NYCRR 144.2(a)(1).

Ownership: Risks and Profits

The eligibility criterion at issue requires that the "woman owner enjoy the customary incidents of ownership and must share in the risks and profits, in proportion with [her] ownership interest" (5 NYCRR 144.2[c][2]).

Division staff argues that the compensation received by Chaya Braver is not proportionate to her ownership interest in Y&B. Staff argues that Yoel Braver's compensation significantly exceeds that of Chaya Braver (exhibit 2 at 2). Staff asserts that this determination is supported by the 2015 tax return for Y&B that was provided by the applicant (CD, part 2 at 11:25). In addition, the Division notes that applicant's operating agreement states that profits are to be split evenly between Chaya Braver and Yoel Braver (CD, part 2 at 14:05).

Applicant questioned the Division's witness with regard to whether the compensation of officers shown on applicant's tax return reflects salary alone or other forms of compensation (CD, part 2 at 23:20, 24:50). The Division's witness testified that he relied on the compensation numbers reported by Y&B on its tax returns, but acknowledged that he did not know what applicant had included in the compensation reported to the IRS (CD, part 2 at 23:20). Applicant argued that the compensation shown was for tax purposes and may not reflect the Bravers' actual compensation (CD, part 2 at 24:50, part 3 at 43:35). Applicant further argued that all money paid to the owners flows through to a joint account and, therefore, who receives more compensation is not relevant (CD, part 3 at 47:35).

Applicant's arguments are not sufficient to demonstrate a lack of substantial evidence for the Division's denial determination. Applicant's 2015 federal tax returns state that Chaya Braver and Yoel Braver received [REDACTED], respectively, in compensation² from Y&B (exhibit 6 [form 1125-E]). Division staff conceded that the composition of the compensation figures is not shown in the tax return, but asserted that the figures reported by Y&B reflect each officer's actual realized compensation, regardless of its source (CD, part 2 at 23:20). Notably, applicant did not present documentation concerning the composition of the reported compensation and no such documents were before the Division at the time of the denial determination.³

² With respect to officer compensation, the IRS instructs filers to "[e]nter each officer's total deductible compensation (such as salaries, commissions, bonuses, taxable fringe benefits, etc.). For officers of an S corporation, include fringe benefits and expenditures made on behalf of officers owning more than 2% of the corporation's stock" (IRS, Instructions for Form 1125-E at 2 [Rev. Oct. 2016]).

³ I note that applicant proffered documents that relate to an amended quarterly tax filing by Y&B for the fourth quarter of the 2014 tax year (see exhibit 8). Those documents, however, were not before the Division at the time of its determination and did not relate to the 2015 federal tax return in evidence (CD, part 2 at 44:25-48:30). Applicant also failed to proffer testimony to explain how these documents demonstrate that the Division's determination was not supported by substantial evidence.

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 Chaya Braver does not share in the risks and profits of Y&B in proportion to her ownership interest as required by 5 NYCRR 144.2(c)(2).

Control: Corporate Documents

The applicable regulatory criterion states that the enterprise's "[a]rticles of incorporation, corporate bylaws, partnership agreements and other agreements . . . must permit minority group members or women who claim ownership of the business enterprise to make [decisions pertaining to business operations] without restrictions" (5 NYCRR 144.2[b][2]).

The record establishes that applicant has failed to meet this criterion. Applicant's operating agreement states that Yoel Braver is the sole voting member and manager of Y&B and that he is responsible for the day-to-day management and all operations of the business (exhibit 7 at 1 [preamble], 2 [article III ¶ 3.9], 5 [article VIII ¶ 8.2, 8.3]). As Division staff noted at the hearing, the operating agreement states that the voting member, Yoel Braver, "is the only Member having any Voting Interests in the Company. The NonVoting Member [Chaya Braver] has no Voting Interest . . . and does not have any authority or voice in any of the operations or affairs of the Company whatsoever" (exhibit 7 at 5 [article VIII ¶ 8.3(B)]; CD, part 2 at 15:50-16:40).

Applicant did not controvert the express terms of Y&B's operating agreement with regard to the stated roles of Chaya Braver and Yoel Braver. Nor did applicant proffer evidence to demonstrate that the operating agreement had been rescinded or amended.

Applicant argued, however, that Chaya Braver is the true manager of the enterprise, regardless of what the operating agreement states (CD, part 3 at 42:30, 45:00). Applicant also argued that, the Bravers' culture, as Hasidic Jews, limits applicant's ability to meet the eligibility requirements for WBE certification, but that the reality is that Chaya Braver makes all business decisions for Y&B (CD, part 3 at 41:30-42:35).

The fact that Chaya Braver may exert actual control over Y&B's business affairs does not alter the fact that she has no authority under the operating agreement to manage and control the corporation.

Applicant 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 Y&B's corporate governance documents do not authorize Chaya Braver to make business decisions without restriction, as required by 5 NYCRR 144.2(b)(2).

CONCLUSION

Applicant failed to meet its burden to demonstrate that the record lacks substantial evidence to support the Division's determination to deny Y&B's application on the basis of whether the woman owner, Chaya Braver, (i) made contributions to Y&B in proportion to her

equity interest in the enterprise (see 5 NYCRR 144.2[a][1]); (ii) shares in the risks and profits of Y&B in proportion to her ownership interest in the enterprise (see 5 NYCRR 144.2[c][2]); and (iii) is authorized under Y&B's corporate governance documents to make decisions without restrictions (see 5 NYCRR 144.2[b][2]).

RECOMMENDATION

For the reasons stated herein, the determination of the Division to deny Y&B Lighting & Electric Supplies, LLC, certification as a women-owned business enterprise should be affirmed.

**Matter of Y&B Lighting & Electric Supplies, LLC
DED File ID No. 60869**

Exhibit List

Exh. #	Description
1	Y&B WBE Application, submitted March 31, 2016
2	Department WBE Denial Letter to Y&B, dated August 12, 2016
3	Closing Statement for purchase of Y&B facility
4	Check Images
5	Mortgage for Y&B Business Premises
6	Y&B 2015 Tax Return
7	Y&B Amended Operating Agreement, dated March 28, 2016
8	Amended Quarterly Combined Withholding (2014)
9	Resume: Yoel Braver
10	Resume: Chaya Braver
11	Y&B Membership Unit Ledger and Certificates