

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

In the Matter

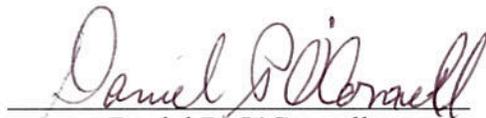
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the Application of **2B Architecture + Design, PLLC**,  
for Certification as a Woman-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60661

RECOMMENDED ORDER

- by -



Daniel P. O'Connell  
Administrative Law Judge

June 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 the application filed by 2B Architecture + Design, PLLC (2B Architecture or applicant) for certification as a woman-owned business enterprise (WBE) be affirmed for the reasons set forth below.

## **PROCEEDINGS**

By letter dated August 2, 2016 (*see* WBE Exh. 2), the Division determined that 2B Architecture does not meet the eligibility requirements to be certified as a woman-owned business enterprise, and denied its application. With a letter dated August 15, 2016, from Amy L. Bloss, 2B Architecture appealed from the Division's determination to deny its application for WBE certification (*see* WBE Exh. 3).

With a letter dated September 2, 2016, staff from the Division confirmed that 2B Architecture agreed to submit its appeal in writing in lieu of an administrative hearing. The Division's September 2, 2016 letter set October 14, 2016 as the due date for 2B Architecture to file its appeal. With a cover letter dated October 3, 2016, Ms. Bloss filed an appeal on behalf of 2B Architecture with Exhibits A through G, inclusive. On behalf of the Division, Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, filed a response dated March 23, 2017 with Exhibits 1 through 3, inclusive. Some of the exhibits offered by the parties are duplicates. A copy of the exhibit chart is attached to this recommended order.

## **ELIGIBILITY CRITERIA**

The eligibility criteria pertaining to certification as a woman-owned business enterprise are outlined in the regulations at Title 5 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (5 NYCRR) § 144.2. To determine whether an applicant should be granted WBE status, the Division assesses the ownership, operation, control, and independence of the business enterprise on the basis of information supplied through the application process. The Division reviews the business enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information presented in supplemental submissions as well as any interviews that the Division's analyst may have conducted. (*See* 5 NYCRR 144.5[5].)

## **STANDARD OF REVIEW**

On this administrative appeal, 2B Architecture bears the burden of proving that the Division's denial of the application for WBE certification is not supported by substantial evidence (*see* State Administrative Procedure Act § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that the Division's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as

adequate” (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

## **POSITIONS OF THE PARTIES**

### The Division

The Division denied the application filed by 2B Architecture for certification as a woman-owned business enterprise with a letter dated August 2, 2016 (*see* WBE Exhibit 2). According to the August 2, 2016 correspondence, 2B Architecture does not meet the criterion outlined at 5 NYCRR 144.2(b)(2) because Amy Bloss does not exercise control over the business enterprise.

### 2B Architecture + Design, PLLC

In correspondence dated August 15, 2016, Amy Bloss stated that the members of 2B Architecture amended the original operating agreement, with a corporate resolution dated August 11, 2016, to reflect Scott G. Bloss’s reduced role in the enterprise. According to Ms. Bloss, the August 11, 2016 amended operating agreement reflects the current nature of her relationship in the company, which has evolved since its inception in June 2014. (*See* WBE Exh. 3.) Ms. Bloss reiterated these points, among others, in 2B Architecture’s written appeal dated October 3, 2016.

## **FINDINGS OF FACT**

1. 2B Architecture + Design, PLLC (2B Architecture), has business offices located at 12346 Pople Road, Cato, New York 13033. 2B Architecture is a full service architectural firm specializing in commercial, educational, healthcare, and residential construction, additions, and renovations. (*See* WBE Exh. 1).
2. 2B Architecture is a limited liability company formed on June 24, 2014. Its members are Amy Lynn Bloss, and her spouse, Scott Gerald Bloss. Ms. Bloss’s membership interest in 2B Architecture is 51%, and Mr. Bloss’s membership interest is 49%. (*See* WBE Exhs. 1 and 4.)
3. On behalf of 2B Architecture, Amy Bloss filed an application for certification as a woman-owned business enterprise (WBE) with the Division on August 3, 2015 (*see* WBE Exh. 1).
4. With a letter dated August 2, 2016, the Division denied 2B Architecture’s application for certification as a woman-owned business enterprise (*see* WBE Exh. 2).
5. Amy Bloss provided the Division with a copy of the operating agreement for 2B Architecture dated June 24, 2014. Ms. Bloss and Mr. Bloss are the only signatories to the operating agreement. According to operating agreement, Ms. Bloss is the managing member, and Mr. Bloss is identified as a member. (*See* WBE Exh. 4.)

6. Article V of the operating agreement for 2B Architecture is entitled, *Management: Rights, Powers, and Duties*. According to Art. V § 5.2, certain actions require unanimous approval of the managers before these actions may be undertaken. Such actions include, among others, borrowing money (§ 5.2.1), selling, mortgaging, or transferring all, or substantially all, of the company's assets (§ 5.2.3), amending the articles of organization (§ 5.2.4), purchasing or selling any major equipment or property with a value in excess of \$10,000 (§ 5.2.6), paying expenses greater than \$5,000 (§ 5.2.7), and hiring new employees (§ 5.2.8).

## DISCUSSION

This recommended order considers 2B Architecture's October 3, 2016 appeal from the Division's August 2, 2016 determination to deny 2B Architecture's application for certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. With respect to exercising control over the business enterprise, the Division asserted that 2B Architecture did not demonstrate that the operating agreement permits Amy Bloss, as the woman-owner of the business enterprise, to make business decisions without restrictions as required by 5 NYCRR 144.2(b)(2). (*See* WBE Exh. 2.)

The issue on appeal is whether 2B Architecture demonstrated compliance with the requirement at 5 NYCRR 144.2(b)(2), which states, in full, that:

[a]rticles of incorporation, corporate bylaws, partnership agreements and other agreements including, but not limited to, loan agreements, lease agreements, supply agreements, credit agreements or other agreements must permit minority group members or women who claim ownership of the business enterprise to make those decisions without restrictions.

The rights, powers, and duties of the members are outlined in Article V of 2B Architecture's June 24, 2014 operating agreement. Generally, each manager has the right to act for and bind the business enterprise in the ordinary course of business. Some areas of the business related to financing, leasing, and development, among others, require a majority vote of the members. With respect to these areas, Ms. Bloss can exercise control over the business enterprise because her voting interest is two (2) as the managing member, and Mr. Bloss's voting interest is one (1). (*See* WBE Exh. 4 at 12.)

However, the June 24, 2014 operating agreement for 2B Architecture expressly identifies eight actions that require the unanimous approval of the managers (*see* WBE 4 at 12 [Art. V, § 5.2]). Such actions include, among others, borrowing money (§ 5.2.1), selling, mortgaging, or transferring all, or substantially all, of the company's assets (§ 5.2.3), amending the articles of organization (§ 5.2.4), purchasing or selling any major equipment or property with a value in excess of \$10,000 (§ 5.2.6), paying expenses greater than \$5,000 (§ 5.2.7), and hiring new employees (§ 5.2.8). (*See* WBE Exh. 4 at 12.) Therefore, in order to undertake any of the actions listed in Art. V § 5.2 of the June 14, 2014 operating agreement, Amy Bloss and Scott Bloss must both agree what the appropriate course of action should be.

The Division argued that when, as here, the operating agreement vests the authority to direct the business in individuals who are not women, the woman-owner is not in control of the business enterprise. The Division concluded that 2B Architecture's June 24, 2014 operating agreement, which requires unanimous member consent to undertake certain business functions, inappropriately restricts Amy Bloss's decision making authority in contravention of the certification criterion at 5 NYCRR 144.2(b)(2).

With 2B Architecture's October 3, 2016 appeal, Ms. Bloss explained that subsequent to the Division's August 2, 2016 denial determination, the members of 2B Architecture amended the operating agreement. In support, Ms. Bloss provided copies of an August 11, 2016 resolution, which authorized amendments to the June 24, 2014 operating agreement (*see* WBE Exh. 5), and a copy of the amended operating agreement for 2B Architecture (*see* WBE Exh. 6).

Based on the resolution, the operating agreement, as amended on August 11, 2016, increased Amy Bloss's economic interest to 75%, and decreased Scott Bloss's economic interest to 25%. The definition of the term *majority vote* has been changed and means the member who owns more than 75% of the membership interest. The actions outlined in Art. V § 5.2 now require the unanimous approval of the managing members before these actions may be undertaken. (*See* WBE Exhs. 5 and 6.)

The Division noted the following. Both the August 11, 2016 resolution (*see* WBE Exh. 5) and the amended operating agreement of the same date (*see* WBE Exh. 6), postdate the Division's August 2, 2016 denial determination (*see* WBE Exh. 2). Division staff, therefore, did not have this information as part of the review of 2B Architecture's application for WBE certification. Accordingly, I conclude that WBE Exhibits 5 and 6 are not relevant to the issue on appeal.

In the March 23, 2017 response, the Division contended further that if staff had had the opportunity to review WBE Exhibits 5 and 6 as part of the review of 2B Architecture's application for WBE certification, staff's determination would not have changed. The Division noted that a majority vote in the August 11, 2016 amended operating agreement requires the vote of members owning "more that 75% of the Membership Interests owned by all Members" (*see* WBE Exh. 5 at 4). However, pursuant to the August 11, 2016 resolution and amended operating agreement, Ms. Bloss's economic interest is set at 75%. Voting alone, therefore, the Division asserted that Ms. Bloss would not have "more than 75% of the Membership Interests" to implement the activities outlined in Art. V § 5.2. Although staff's interpretation may be useful with respect to a future application by 2B Architecture, I do not rely on it here. As noted above, the interpretation relates to WBE Exhibits 5 and 6, which are not relevant to the issue on appeal.

The intent of the eligibility requirement at 5 NYCRR 144.2(b)(2) concerning the designation of woman-owners as the decision makers in the corporate documents of the business enterprise is to formalize functional designations. Formalized designations, as reflected in the operating agreement, ensure that woman-owners are in fact, the decision makers of the business enterprise. Consequently, at the time that 2B Architecture filed its application for WBE certification, Division staff correctly found that Amy Bloss's decision making authority with

respect to a select set of business activities identified in the June 24, 2014 operating agreement would be restricted in contravention of the eligibility criterion outlined at 5 NYCRR 144.2(b)(2).

### **CONCLUSION**

For the reasons outlined above, 2B Architecture failed to demonstrate that the June 24, 2014 operating agreement permits Amy Bloss, as the woman-owner of the business enterprise, to make decisions without restrictions as required by 5 NYCRR 144.2(b)(2).

### **RECOMMENDATION**

For the reasons set forth above, the Director should affirm Division staff's August 2, 2016 determination to deny 2B Architecture's application for certification as a woman-owned business enterprise.

Attachment: Exhibit Chart

Division of Minority and Women's Business Development

Exhibit Chart  
**Matter of 2B Architecture + Design, PLLC**  
 WBE Case No. 60661

<b>WBE Exh. No.</b>	<b>Description</b>	<b>Applicant</b>	<b>Division</b>
1	Application filed by 2B Architecture + Design, PLLC No. 9084356 Started: July 6, 2015 Submitted: August 3, 2015		Exhibit 1
2	Division's denial letter Dated: August 2, 2016	Exhibit A	Exhibit 3
3	Appeal Letter from 2B Architecture + Design, PLLC By Amy L. Bloss, dated: August 15, 2016	Exhibit B	
4	Limited Liability Operating Agreement of 2B Architecture + Design, PLLC Operating Agreement Dated: June 24, 2014	Exhibit C	Exhibit 2
5	Corporate Resolution authorizing Amendments to the Operating Agreement Dated: August 11, 2016	Exhibit E	
6	Limited Liability Operating Agreement of 2B Architecture + Design, PLLC Amended Operating Agreement Dated: August 11, 2016	Exhibit D	
7	Sample Proposals 2B Architecture + Design, PLLC	Exhibit F	
8	Checking account transaction history from June 3, 2016 to October 3, 2016.	Exhibit G	