

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

In the Matter

- of -

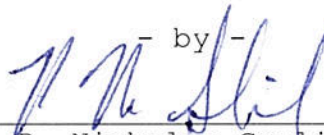
the Application of
Imperatives, Inc.

For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60641

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

July 5, 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 Imperatives, 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 Imperatives, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Imperatives, Inc.'s application was submitted on January 8, 2016 (Exh. DED1).

In two emails dated June 16, 2016 the Division contacted the applicant regarding the status of the application (Exhs. A1 & A2).

The application was denied by letter dated July 14, 2016, from Bette Yee, Director of Certification Operations (Exh. DED5). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet four separate eligibility criteria related to Jane Metzger's ownership, operation, and control of the applicant.

By letter dated August 5, 2016, Jane Metzger, on behalf of the applicant, appealed from the Division's denial determination.

By letter dated August 16, 2016, the Division notified the applicant that the applicant's written appeal should be filed on or before September 30, 2016.

By letter dated September 8, 2016, the applicant submitted its written appeal which consisted of a six page letter and nine exhibits (listed in the attached exhibit chart as A1 - A9).

By letter dated December 5, 2016, the applicant submitted additional material regarding its appeal including a two page letter and one additional exhibit (listed in the attached exhibit chart as A10).

By letter dated December 29, 2016, the applicant submitted a three page letter listing business opportunities that would become available to it if it were certified.

In an eight page memorandum dated June 12, 2017, the Division responded to the applicant's appeal. Enclosed with the response were ten exhibits, described in the attached exhibit chart as DED1-DED10.

On June 13, 2017, this matter was assigned to me.

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]).

POSITIONS OF THE PARTIES

Position of the Division

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

First, the Division found that the applicant failed to demonstrate that the woman owner Jane Metzger's capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

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

Third, the Division found that the applicant failed to demonstrate that the woman owner, Jane Metzger, has adequate managerial experience or technical competence to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i).

Fourth, the Division found that the corporate bylaws and other documents governing the business enterprise do not permit the woman-owner, Jane Metzger, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

Position of the Applicant

Imperatives, 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.

FINDINGS OF FACT

1. Imperatives, Inc. is in the business of providing digital media signage (Exh. DED1 at 4). The firm has a business address of 2818 Curry Road, Schenectady, New York (Exh. DED 1 at 1).

2. Imperatives, Inc. was established on November 15, 2000 by Jan Metzger. On October 26, 2015, Mr. Metzger transferred 56.6% of the shares to his wife Jane Metzger for [REDACTED] (Exhs. DED1 at 4 & DED2). This money was in the form of a check written on a joint account owned by the Metzgers (Exh. DED6) and the price paid was [REDACTED] per share for 51,000 shares (Exh. DED7).

3. According to the 2014 tax returns, Imperatives, Inc. had a book value at the end of that year of more than [REDACTED] (Exh. DED8).

4. The application lists Mr. Metzger has having sole responsibility for: estimating, preparing bids, negotiating insurance, supervising field operations, and negotiating contracts. Ms. Metzger has sole responsibility for: negotiating bonding, and marketing and sales. They share responsibility for: financial decisions, hiring and firing, purchasing equipment, and managing payroll, and both are signatories on business accounts (Exh. DED1 at 5-6).

5. Jan Metzger hold a Bachelor of Science degree in electrical engineering. He is the founder of Imperatives, Inc. and manages creative digital signage projects from conception to completion. He has more than 25 years designing and developing applications of digital signage packages (Exh. DED3).

6. Jane Metzger has an Associates degree in nursing and a Bachelor of Arts degree in public administration. She worked as a nurse and a manager in the healthcare industry until 2000, when she came to work for Imperatives, Inc. Her resume lists her has the CEO and director of marketing. It describes her duties as leading marketing campaigns, supervising project launches, and consumer relations. (Exh. DED4.)

7. Jan Metzger serves as president of Imperatives, Inc. and Jane Metzger serves as its chief executive officer (CEO) (Exh. DED1 at 3). The corporation's bylaws state that the president of the corporation "shall have general and active management of the business of the corporation" (Exh. DED9 at 5).

DISCUSSION

This report considers the appeal of the applicant 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 set forth four bases related to Ms. Metzger's ownership, operation, and control of Imperatives, Inc. Each basis is discussed individually, below.

Ownership

In its denial, the Division found that the applicant failed to demonstrate that the woman owner Jane Metzger's capital contributions were proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1). The relevant facts cited in the denial letter were: Ms. Metzger owned 56.67% of the corporation's common stock; Mr. Metzger owns the remaining 43.33%; all contributions identified in the application were made jointly by Mr. and Ms. Metzger; and no documents were included with the application to show Ms. Metzger made an independent contribution to the business (Exh. DED5 at 2).

On its appeal, the applicant cites section 675 of the New York State Banking Law for the proposition that all owners of a joint bank account have full rights to the monies in the account (Exh. A3). Attached to the appeal are copies of three of Jane Metzger's payroll checks (dated September 15, 2015, September 29, 2015, and October 13, 2015, which were deposited in the Metzger's joint account (Exh. A4).¹ The appeal states that subsequent to the denial, Ms. Metzger engaged in another transaction where a check dated August 4, 2016 (Exh. A5) which the appeal claims represents money from Jane Metzger's savings account was written to the firm to demonstrate her purchase of a controlling interest in the company. Another check dated August 29, 2016 is also included showing a reimbursement from the company to the Metzgers' joint account of the original purchase (Exh. A6). These new documents, according to the applicant

¹ The applicant does not claim that these checks were before the Division at the time it made its denial determination.

demonstrate that Ms. Metzger made a capital contribution in proportion to her ownership interest.

In its response, the Division argues that Ms. Metzger's contributions to the firm came from a joint bank account she owns with her husband and the amount paid for her share was not proportionate to her equity interest. The Division includes with their papers a copy of a check in the amount of [REDACTED] drawn on the joint bank account of the Metzgers (Exh. DED6) as well as a bill of sale for 51,000 shares at a price of [REDACTED] per share (Exh. DED7). Because the funds for this purchase came from a joint account (and not from Ms. Metzger alone) the Division argues that the applicant has failed to demonstrate any independent contribution.

In addition, the Division argues that the price for the shares paid ([REDACTED]) did not reflect the true value of the firm. Citing the firm's 2014 federal tax return which showed the firm's book value in excess of [REDACTED] (Exh. DED8), the Division argues that the value of the shares transferred at the end of 2014 was approximately [REDACTED] and the amount paid was just a fraction of what they were worth. The Division does not dispute the applicability of NYS Banking Law § 675 to the joint account, but argues a different interpretation -- that contributions from this account should be treated as joint contributions -- and that its interpretation is entitled to deference because it is not irrational or unreasonable. With respect to the new documentation created after the application was denied (Exhs. A5 & A6), the Division notes that these are not relevant to the instant proceeding because they were not before the Division at the time the denial determination was made. Even if these checks were relevant, the Division concludes that the amount paid for the shares is too small in relation to the value of the firm at the time of purchase to demonstrate a proportionate contribution.

Based on the evidence in the record, specifically the fact that at the time the denial determination was made, no evidence showed that Ms. Metzger had made an independent contribution for her shares in the firm, coupled with the fact that the amount of the claimed contribution was so small in comparison to the value she acquired, the applicant has failed to demonstrate that the

woman owner Jane Metzger's capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1). The Division's denial was based on substantial evidence.

Operation

In its denial letter, the Division asserted two grounds for denying the application for failure to meet certification criteria related to the operation of the applicant. First, the Division found that the applicant failed to demonstrate that the woman owner, Jane Metzger, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). The relevant facts cited in the denial letter were: the application indicates that Ms. Metzger solely manages marketing and negotiating of bonding for the company; and Mr. Metzger solely manages the core functions of the business including estimating, developing signage, and implementing signage for clients (Exh. DED5 at 3).

On the appeal, the applicant argues that the application only requested a description of who had the responsibility for a few aspects of the business and failed to consider other important ones including: managing the company's growth; providing leadership; developing and finalizing training programs; creating new products; and organizing the roll-out of new products. The appeal cites three examples of Ms. Metzger's other responsibilities: (1) her role in explaining to an advertising company that her firm could do more for them than the first job they were contacted about; (2) her role in developing pre-training materials for clients which makes the time used for training more efficient; and (3) her role in the company's newest product which puts digital signs above ATMs for advertising. The appeal also states that Ms. Metzger is the lead person from the company to attend trade shows and meetings.

In the applicant's December 5, 2016 letter, Ms. Metzger's expanding role in providing quotes for customers and overseeing the bidding process are described (Exh. A10), due in large part to her husband's increasing role at her father-in-law's company.

In its response, the Division argues that Ms. Metzger does not make decisions pertaining to the operations of the firm. Citing the Metzgers' resumes, the Division states that Ms. Metzger's role at the firm is centered on marketing (Exh. DED3) while her husband is responsible for managing the design and implementation of digital signage for clients (Exh. DED4). The Division concludes that nothing on the appeal shows Ms. Metzger has a role in company's design and implementation of digital signage.

A review of the application shows that Mr. Metzger has sole responsibility for: estimating, preparing bids, negotiating insurance, supervising field operations, and negotiating contracts. Ms. Metzger has sole responsibility for: negotiating bonding, and marketing and sales. They share responsibility for: financial decisions, hiring and firing, purchasing equipment, managing payroll, and both are signatories on business accounts (Exh. DED1 at 5-6). This shows that Mr. Metzger is primarily responsible for the firm's revenue generation.

Based on the evidence in the record, the application materials show that decisions regarding the operations of the core, revenue producing functions of the applicant are performed by Mr. Metzger. Because of this, the applicant failed to demonstrate that the woman owner, Jane Metzger, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). The Division's denial was based on substantial evidence.

The second operational ground asserted for denial was that the applicant failed to demonstrate that the woman owner, Jane Metzger, has the managerial experience or technical competence needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i). The relevant facts cited in the denial letter were: the application does not establish that Ms. Metzger has any training or competence in the use of digital design or content management software; and Mr. Metzger has over thirty years' experience utilizing relevant software.

On the appeal, the applicant states that Ms. Metzger was employed from 1988 through 2000 at Albany Medical Center during which time she was assistant director of utilization management,

then director of utilization management, and finally a project manager. In 2000, she was hired as the director of marketing for the applicant during which time she learned the business. In the fall of 2015 she purchased the controlling shares of the firm from her husband, who at the time was the sole owner. At that time, her husband's father needed additional help from his son to run a second business.

In its response, the Division argues that Ms. Metzger lacks the managerial experience or technical competence to operate the firm because she lacks the ability to critically evaluate her husband's work designing and implementing digital signage. The Division cites Mr. Metzger's resume which shows nearly thirty years of industry experience, his ability to use relevant software and develop content, as well as his training in electrical engineering (Exh. DED3). In contrast, Ms. Metzger does not claim any software or electrical experience that would allow her to evaluate her husband's work (Exh. DED4).

Based on the evidence in the record, including the educational backgrounds of the Metzgers and their work history, the applicant has failed to demonstrate that the woman owner, Jane Metzger, has the managerial experience or technical competence needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i). The Division's denial was based on substantial evidence.

Control

The final ground for denial was that the corporate bylaws and other documents governing the business enterprise do not permit the woman-owner, Jane Metzger, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). The relevant facts cited in the denial letter were: the application states that Ms. Metzger is the chief executive officer of the business and Mr. Metzger is president; the corporate bylaws do not provide for a CEO; the bylaws state that the president shall be CEO and have general active management of the business of the corporation; and the minutes of the most recent board meeting establish that Mr. Metzger is the president of the corporation (Exh. DED5 at 3).

On the appeal, the applicant states that after the new office of CEO was created at the October 23, 2015 board meeting, the corporate bylaws were not amended due to an oversight (Exh. A8). The bylaws were subsequently amended on August 2, 2016 (Exh. A9).

In its response, the Division cites the corporation's bylaws in effect at the time the denial was made. This document states that the president of the corporation "shall have general and active management of the business of the corporation" (Exh. DED9 at 5) and it is not disputed that Mr. Metzger is the president of the corporation. Because her husband was the highest ranking officer of the business, Ms. Metzger lacks the power to overrule her husband on corporate matters, because the office of CEO is not mentioned in the bylaws. With regard to the August 2016 amendment to the bylaws included with the appeal, the Division responds that since it was not included with the application materials, it is irrelevant to the appeal. The Division concludes that even if the amendment had been before it, the bylaws still grant the president the general and active management of the business of the corporation and the CEO does not have the power to overrule any decision made by the president.

Based on the evidence in the record and the discussion above, the corporate bylaws and other documents governing the business enterprise in force at the time of the denial do not permit the woman-owner, Jane Metzger, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). The Division's denial was based on substantial evidence.

CONCLUSIONS

1. The applicant failed to demonstrate that the woman owner Jane Metzger's capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

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

3. The applicant failed to demonstrate that the woman owner, Jane Metzger, has the managerial experience or technical competence needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii).

4. The applicant failed to demonstrate that the corporate bylaws and other documents governing the business enterprise do not permit the woman-owner, Jane Metzger, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

RECOMMENDATION

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

**Matter of
Imperatives, Inc.**

**DED File ID No. 60641
Exhibit List**

Exh. #	Description
DED1	Application
DED2	Stock ledger
DED3	Jan Metzger's resume
DED4	Jane Metzger's resume
DED5	Denial letter
DED6	Cancelled checks
DED7	Bill of sale for issued stock
DED8	Excerpt from tax return
DED9	Corporate bylaws
DED10	Transcript of proceedings for reincorporation
A1	Email from NYS contract system
A2	Email from NYS contract system
A3	NYS law regarding joint deposits and shares
A4	Copies of checks
A5	Copies of check
A6	Copies of check
A7	Resume of Jane Metzger
A8	Shareholder meeting notes
A9	Bylaw amendment
A10	NYSOSC appeal