

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

In the Matter

- of -

the Application of **Athletic Fields of America, Inc.**
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A

NYS DED File ID No. 60190

RECOMMENDED ORDER

- by -



Molly T. McBride
Administrative Law Judge

July 17, 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 ("NYSDED") to deny Athletic Fields of America, Inc. ("Athletic Fields" or "applicant") 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 Athletic Fields challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Athletic Fields submitted an application to the Division on September 25, 2015 seeking WBE certification (Exhibit A). By letter dated June 7, 2016 the Division denied the application (Exhibit 2).

Applicant filed an appeal of the denial and filed a written appeal dated August 11, 2016 (Exhibit B). The Division responded to the appeal by letter dated April 19, 2017 (Exhibit 6).

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria regarding, among other things, the applicant's ownership and operation, are applied on the basis of information supplied through the application process (see 5 NYCRR 144.2[a]). 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. On administrative appeal, the applicant bears the burden of proving its business meets the

eligibility criteria for certification as a woman-owned business enterprise (see State Administrative Procedure Act § 306[1]).

POSITIONS OF THE PARTIES

Position of the Division

The Division asserts that the applicant failed to meet two criteria for certification. The Division found that the applicant failed to demonstrate that the woman owner's capital contribution is proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise pursuant to 5 NYCRR 144.2(a)(1); and the business enterprise is not an independent business enterprise as required by 5 NYCRR 144.2(c)(2).

Position of the Applicant

Athletic Fields 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. Athletic Fields of America was formed in 1997 by Paul Martino, husband of current woman owner Debra Martino. In 1999, Paul Martino transferred ownership to his sister who, in 2001, transferred 100% ownership to Debra Martino for [REDACTED]¹ (Exhibit C).
2. Athletic Fields is in the business of installing synthetic turf (Exhibit A, 3.C.).
3. Athletic Fields rents garage and warehouse space from Debra's husband Paul Martino (T. at 6:25)².

¹ Debra Martino submitted a written statement that she was unable to locate proof of payment for the stock purchase.

² Senior Certification Analyst Carlitta Bell reviewed the file and conducted a telephone interview with Debra Martino on April 8, 2016. The numbers refer to the recorded interview.

4. Athletic Fields has a shared resource agreement with Paul Martino's business, Applied Landscape Technologies ("Applied Landscape"), that provides for the sharing of employees as well as garage and warehouse space between Athletic Fields and Applied Landscape Technologies (Exhibit 5 and T. at 6:25). The resource sharing agreement reads, in part, "Full time employees of Applied Landscape Technologies may from time to time perform services for Athletic Fields of America. Athletic Fields shall not be required to reimburse Applied Landscape Technologies for such services" (Exhibit 5 at 1). The agreement also provides for Applied Landscape and Athletic Fields to share garage and warehouse space, but makes no mention of any financial arrangement for these shared spaces. Debra Martino indicated that she does not pay Applied Landscape for the shared space (T. at 7:00).

5. Applied Landscape is in the business of designing and building parks and ball fields (T. at 13:00).

6. Debra Martino built Athletic Fields business after purchasing it in 2001 from her husband's sister (T. at 15:15). Senior certification analyst Carlitta Bell asked Ms. Martino how she built the business to which Ms. Martino replied "Well I started working for Applied Landscape so that's how the business got started" (T. at 15:00).

7. Athletic Fields gets at least one half of its business from Paul Martino's company. One half of Athletic Fields 2016 gross sales came from Applied Landscape and totaled approximately [REDACTED] (T. at 13:20).

8. Debra Martino's typical work day includes sending payroll hours to the payroll service hired by Athletic Fields, answering emails, managing accounts payable and receivable, scheduling employees. She does not prepare bids or supervise on site (Transcript at 3:58).

9. Ms. Martino stated that her work hours change each day, she works 3-6 hours a day until she leaves to take care of her school age children (T. at 8:50).

DISCUSSION

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

OWNERSHIP

Capital Contribution

The Division claims that Debra Martino did not make a capital contribution to the business that is proportionate to her equity interest. Section 144.2 of 5 NYCRR, Eligibility criteria, provides:

The following standards shall be used to determine whether a business enterprise is eligible to be certified as a minority- or woman-owned business enterprise.

(a) Ownership. For the purposes of determining whether an applicant should be granted or denied minority- or woman-owned business enterprise status, or whether such status should be revoked, the following rules regarding ownership shall be applied on the basis of information supplied in relation to the application:

(1) 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.

The Division's denial letter states that applicant failed to provide proof of the woman owner's capital contribution to the business enterprise (Exhibit 2). The Department's response to the appeal, dated April 19, 2017, did not address the capital contribution issue further (Exhibit 6). The application states that Debra Martino made a [REDACTED] capital contribution to Athletic Fields in 2001 but no proof, support or explanation was offered in the written appeal of that [REDACTED] contribution (Exhibits A, 2.C. & B). Ms. Martino alleges in her written appeal and during her telephone interview with the Division that she made a capital contribution of [REDACTED] when she purchased the company from her sister-in-law in 2001, although she has not been able to locate proof of the purchase.

In the written appeal filed by Athletic Fields, Debra Martino claims the "original contributions were not significant because the company did not require a lot of startup capital" (Exhibit B). She claims the company was built through relationships (Exhibit B). She also states that her husband helped her establish those relationships with vendors and customers to generate business (Exhibit B). Ms. Martino also claims on her appeal that her personal guarantee and personal credit were used to purchase vehicles, machinery and equipment over the years but again, no proof was presented. A purchase record was submitted for a truck purchased by Athletic Fields in 2016, and there is no evidence that Debra Martino can be held personally liable should Athletic Fields default on the vehicle purchase loan (Exhibit B).

Ms. Martino also claims she contributed expertise to the start of the company (Exhibit B). She listed several jobs she had prior to her purchase of Athletic Fields, claiming that her office manager and bookkeeper positions at those companies gave her sufficient expertise in the artificial turf installation business to operate the company (Exhibit B). Those arguments are not persuasive in light of her admission that her husband and his company helped her build and develop her business over the years.

The applicant's arguments are not sufficient to overturn the Division's determination.

Applicant has not presented sufficient evidence to demonstrate that the Division's determination that the woman owner failed to demonstrate a capital contribution was not supported by substantial evidence.

INDEPENDENCE

The Division also denied the application based upon the applicant's failure to demonstrate that Athletic Fields is an independent business (Exhibit 2). The Division found that applicant failed to demonstrate that it is "an independent, continuing entity which has been actively seeking contracts or orders and regularly and actively performing business activities" (5 NYCRR 144.2[a][2]) The Division concluded that Athletic Fields is not independent of Applied Landscape, the company owned by Paul Martino. Debra Martino has acknowledged

that Paul Martino helped her to establish and build the business when she bought it in 2001 from his sister (see above). In addition to Paul Martino and Applied Landscape helping Debra Martino build the company, Applied Landscape provides at least half of the company's gross receipts. That amounted to gross receipts of [REDACTED] in 2016 (Exhibit B). Applied Landscape designs and builds parks and ball fields and Athletic Fields installs the synthetic turf at some, if not all of those projects. Further, applicant produced a shared resources agreement that demonstrated that Applied Landscape allows Athletic Fields to share its employees as well as garage and warehouse space free of charge (Exhibit 5). Athletic Fields gets garage and warehouse space, employees and at least half of its gross revenue from Applied Landscape. Also, Debra Martino said that her company also subcontracts some of its work to Applied Landscape (T. 5:45). Finally, applicant supplied tax records during the application process that showed that Athletic Fields, although it owes rent to Paul Martino, apparently may not always pay that rent. Tax records from 2014 supplied by applicant showed a debt to an affiliate of almost [REDACTED] that Debra Martino stated could be attributed to cost of shared resources including garage and warehouse space owed to Applied Landscape that has not been paid (T. at 5:00 & Exhibit 3). As stated earlier, Athletic Fields does not compensate Applied Landscape for use of employees and garage and warehouse space that is shared by the two companies.

Applicant has not presented sufficient evidence to demonstrate that the Division's determination that Athletic Fields failed to demonstrate its independence from Applied Landscape was not supported by substantial evidence.

CONCLUSIONS

1. Athletic Fields of America failed to demonstrate that the woman owner, Debra Martino, has made a capital contribution to the business that is in proportion to her ownership interest as required by 5 NYCRR 144.2(a)(1) in the form of money, expertise, experience or knowledge.
2. Athletic Fields of America failed to demonstrate that the business enterprise is independent of other business enterprises as required by 5 NYCRR 144.2(c)(2).

RECOMMENDATION

The Division's determination to deny Athletic Fields of America's application for certification as a woman-owned business enterprise should be affirmed, for the reasons stated herein.

Matter of Athletic Fields of America

DED File ID No. 60190

DED Exhibit List

Exh. #	Description
1	Application for WBE certification
2	Denial of WBE certification letter dated 6/7/16
3	Attachment to Application, question #10
4	2014 Tax Return of AFOA
5	Resource sharing agreement between AFOA and Applied Landscape
6	Division response to appeal dated 4/19/17

Matter of Athletic Fields of America
DED File ID No.60190
Applicant Exhibit List

Exh. #	Description
A	Application
B	Written appeal with attachments dated 8/11/16
C	Written memorandum dated 1/19/16