

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

In the Matter

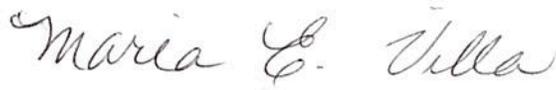
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the Application of **Guthrie Heli-Arc, Inc.**
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60772

RECOMMENDED ORDER

- by -



Maria E. Villa
Administrative Law Judge

June 9, 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 Guthrie Heli-Arc, Inc. (“Guthrie” or “applicant”) certification as a women-owned business enterprise (“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 Guthrie does not meet the eligibility criteria for certification as a WBE.

The Division denied Guthrie's application for WBE certification (Exhibit 1) by letter dated September 14, 2016. Exhibit 2. As discussed below, the denial letter sets forth two grounds under Section 144.2 of 5 NYCRR for the denial, based upon applicant’s failure to demonstrate ownership of Guthrie for certification purposes. By letter dated October 13, 2016, applicant appealed from the Division's determination to deny the application. Exhibit 18. The Division responded by letter dated February 16, 2017, providing information as to the appeal process, and notifying applicant of the hearing scheduled for April 25, 2017. Exhibit 19.

The hearing took place as scheduled on April 25, 2017. Applicant was represented by Michael A. DelPlato, Esq., of the DelPlato Casey law firm, Batavia, New York. Margaret Ryan and Matthew Ryan testified on behalf of applicant. Division staff was represented by Phillip Harmonick, Esq., and called Sarhan El Hussein, a Senior Certification Analyst for the Division, as a witness. The hearing was recorded and this report cites to that recording as “Hearing Recording (‘HR’) at ____.” The hearing recording was provided to the administrative law judge on June 7, 2017, and on that date the record closed.

Both applicant and Division staff offered exhibits, and those exhibits were marked and received into evidence. A chart of those exhibits is attached.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a women-owned business enterprise are established by regulation (see Section 144.2 of 5 NYCRR). For the purposes of determining whether an applicant should be granted or denied 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, on information revealed in supplemental submissions, and if appropriate, on interviews conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of Guthrie'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

Division

The Division argued that applicant failed to meet two ownership requirements for certification as a woman-owned business, pursuant to Section 144.2 of 5 NYCRR. Division Response, at 1. Specifically, the Division asserted that Ms. Ryan had not made a contribution proportionate to her equity interest in the business enterprise, as demonstrated by contributions of money, property, equipment or expertise. See Section 144.2(a)(1) of 5 NYCRR. In this regard, the Division cited the following "relevant facts" in the denial letter:

- Ms. Margaret Ryan and her husband, Mr. Matthew Ryan, own Guthrie Heli-Arc, Inc.
- Ms. Ryan received her shares in Guthrie Heli-Arc, Inc. through a series of transfers from her father, Mr. Will Guthrie, beginning in March of 2012.
- Ms. Ryan's application to certify Guthrie Heli-Arc, Inc. as a Women-owned Business Enterprise stated in section 2.C that Ms. Ryan had not made any contributions of money, property, equipment or expertise in the business enterprise.
- Documents submitted by Ms. Ryan as attachments to the application, and in response to requests for additional information from the Division of Minority and Women's Business Development, did not demonstrate that Ms. Ryan contributed money, property, equipment or expertise to Guthrie Heli-Arc, Inc.

Exhibit 2, at 2. The Division also denied the application based upon applicant's failure to demonstrate that Ms. Ryan shared in the risks and profits of Guthrie in proportion to her ownership interest, as required by Section 144.2(c)(2) of 5 NYCRR, because Mr. Ryan received "significantly greater wage compensation" than Ms. Ryan. Exhibit 2, at 2.

Applicant

In its October 13, 2016 notice of appeal, applicant took the position that Ms. Ryan had made a capital contribution proportionate to her equity interest. Applicant stated that:

- A. Ms. Ryan's sixty percent (60%) ownership of the business is in and of itself a contribution of capital;
- B. Ms. Ryan has expanded the scope of the business from repair and fabrication to municipal equipment sales solely through her sales of such equipment. Sales at I V of

the Application show increase from 2012 to 2014 from [REDACTED].
2015 sales increased to [REDACTED];

- C. [REDACTED];
- D. [REDACTED];
- E. Ms. Ryan has greatly increased the inventory and liquidity of the business;
- F. Ms. Ryan liquidated her 401(k) and used the funds to purchase and equip the present location of the company to ensure its physical location and growth;
- G. When Ms. Ryan assumed ownership of the company from her father it was a failing business. She has completely turned it around;
- H. Ms. Ryan owned ninety percent (90%) of the stock when she assumed ownership. She gifted thirty (30%) percent to her husband, Matt Ryan at a later time. His ownership should not be a consideration.

Exhibit 18, at 1-2. Applicant went on to assert that the Division was incorrect in concluding that Ms. Ryan did not share in the risks and profits in proportion to her ownership interest in the business. Applicant stated that:

- A. Ms. Ryan received less in wages than Mr. Ryan. He is the only R certified welder and he is paid commensurate with his skill. He has been compensated at the same level since he went from a ten percent (10%) owner to a forty percent (40%) owner of equipment;
- B. Mr. Ryan [sic] could take a higher salary but chooses to increase the types and inventory of municipal vehicles for sale and to decrease the business debt;
- C. Ms. Ryan chooses to take a lower salary to permit payment to her father, Will Guthrie, of [REDACTED] per year. He founded the company; he has no other retirement income and he is her father;
- D. Taking a lower wage is a prerogative of management and an absolute requirement of ownership.

Exhibit 18, at 2.

FINDINGS OF FACT

1. Guthrie was acquired from Ms. Ryan's father, Will Guthrie, on November 3, 2013. Guthrie sells trucks and truck equipment, such as sewer trucks, street sweepers, refuse bodies, and recycle trucks. Guthrie is also a DOT-licensed repair and inspection facility. Guthrie is located at 6276 Clinton Street Road, in Bergen, New York. Exhibit 1, at 1-3.

2. Ms. Ryan owns sixty percent of the shares of the company. She became an owner in 2013. She is paid less in wage compensation than her husband, Matthew Ryan. Ms. Ryan received her shares from her father, who started the business. Mr. Ryan is Guthrie's only "R" certified welder.

3. CLR Industries, LLC is a holding company owned jointly by Mr. and Ms. Ryan.
Exhibit 6.

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification to Guthrie as a women-owned business enterprise¹ pursuant to Executive Law Article 15-A. Section 144.2(a)(1) of 5 NYCRR requires that an applicant's contributions to a business for which certification is sought be "proportionate to their equity interest in the enterprise." Contributions may be in the form of money, property, equipment, or expertise.

Applicant took the position that Ms. Ryan's ownership of 60% of Guthrie's stock was sufficient to establish ownership. Applicant also argued that Ms. Ryan contributed expertise when she assumed ownership of the business, and pointed out that the Guthrie's revenues had increased significantly since Ms. Ryan became the majority owner. Ms. Ryan testified that she and her husband started CLR Industries, LLC, which was a holding company formed to fund construction of a building at a new site when Guthrie was obliged to move from its former location. HR at 19:40 (Disc 2). In a letter dated September 6, 2016, Ms. Ryan indicated that she and her husband put a lien on their personal property, and that she cashed in her 401(k), to provide additional funds. Exhibit 6.

Division staff noted that according to the application, no cash or capital contribution was made in connection with Ms. Ryan's acquisition of the business. In addition, Division staff asserted that there was no documentation of a direct contribution by Ms. Ryan, and that the funds were provided by CLR Industries, a jointly owned holding company. With respect to expertise, Division staff contended that applicant did not provide information regarding any such contribution as part of the application.

On appeal, applicant has the burden to demonstrate that the Division's denial was not based upon substantial evidence, and that burden has not been met. Applicant did not establish a contribution of money, property, equipment or expertise that would be proportionate to Ms. Ryan's 60% ownership. Based upon the information before the Division at the time of the denial, it was reasonable for the Division to conclude that applicant had not demonstrated the requisite contribution.

Applicant's response to Section 2(C) of the application, which requested that applicant identify the cash and capital contributions of the owner, was "\$0." Exhibit 1. Although Ms. Ryan testified credibly at hearing that she had paid her father [REDACTED] over the past five years, and provided him with health insurance, a vehicle and gas card, and cellphones, no documentation was provided as part of the application, and Ms. Ryan acknowledged that there was nothing in writing with respect to this arrangement. HR at 14:45 (Disc 2). Similarly, although Ms. Ryan stated at hearing, and in a letter dated September 6, 2016, that she had cashed in her 401(k) to have additional funds to purchase a plot of land in order to relocate the business, the only documentation provided was a March 15, 2012 bank statement with a handwritten notation ("401(k)") indicating a deposit of approximately [REDACTED] Exhibit 6. The

¹ 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, among other things, "at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women"))).

bank account was in both Mr. and Ms. Ryan's names. Ms. Ryan testified that she did not want to put money directly into Guthrie, because she was afraid to do so, and instead formed a separate holding company (CLR Industries) with her husband. HR at 20:00 (Disc 2).

As Division staff stated in its closing argument, the denial grounds related to ownership are tied to the proportionality of what the woman owner contributes to the business in exchange for her 60% ownership, as well as the proportionality of her share of the profits. The application did not identify any contribution, and the other documents relied upon by applicant did not establish a direct contribution by Ms. Ryan. Rather, CLR Industries is a jointly owned holding company capitalized by Ms. Ryan and her husband from a joint bank account. The Division's determination was supported by substantial evidence.

As a second ground for denial on the basis of ownership, the Division contended that Ms. Ryan did not share in the risks and profits of Guthrie in proportion to her ownership interest, as required by Section 144.2(c)(2) of 5 NYCRR, because Mr. Ryan's wage compensation was significantly greater than Ms. Ryan's. Applicant explained that Mr. Ryan received a higher salary because he is Guthrie Heli-Arc's only "R" certified welder, a requirement for repairing, servicing, and re-certifying pressure vessels that contain hazardous or explosive material. Ms. Ryan testified that Mr. Ryan's compensation was originally determined by her father, and that he continued to receive a salary of approximately [REDACTED] after he became an owner of Guthrie. HR at 31:40 (Disc 2). Applicant took the position that Mr. Ryan's compensation as an employee was not related to his ownership interest, and argued that the profit and loss statement (Schedule K-1) for tax year 2014 (Exhibit 8) was more representative of the profit Ms. Ryan and Mr. Ryan obtained from the business, in terms of their relative shares of Guthrie.

In response, Division staff's witness referred to Mr. and Mrs. Ryan's joint personal tax return for tax year 2014 (Exhibit 8). That document, at Statement 5, showed that Mr. Ryan earned [REDACTED] in 2014, while Ms. Ryan earned [REDACTED] (HR at 11:30 (Disc 1)). Division staff also offered a salary report for the second quarter of 2016 (Exhibit 10), which indicated that Mr. Ryan earned [REDACTED] during that time, while Ms. Ryan earned [REDACTED]. Division staff maintained that Schedule K-1, upon which applicant relied, allocates business income to each owner, which is not the same as cash in hand, and went on to assert that even after taking into account the distributions, Mr. Ryan still derived a greater monetary benefit from Guthrie. The Division concluded that even if the business income were taken at full value, which the Division argued would not be appropriate, Mr. and Mrs. Ryan's compensation would be roughly equal.

Applicant failed to meet its burden to show that the Division's conclusion with respect to Ms. Ryan's share of the profits was unreasonable. Applicant conceded that Ms. Ryan's salary is less than Mr. Ryan's, and applicant's arguments in the notice of appeal, and at hearing, were unavailing. The Division's determination with respect to Guthrie's failure to satisfy the requirements of Section 144.2(c)(2) of 5 NYCRR was based upon substantial evidence.

CONCLUSION

As discussed above, applicant did not meet its burden to demonstrate that the Division's determination to deny Guthrie's WBE application for certification was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny Guthrie's application for certification as a women-owned business enterprise should be affirmed, for the reasons stated herein.

Matter of Guthrie Heli-Arc., Inc.
DED File ID No. 60772
Exhibit List

Exhibit No.	Description
1	March 11, 2016 application
2	September 14, 2016 denial letter
3	Stock ledger
4	Cancelled check – Filtrec Corporation
5	Commercial loan invoice
6	September 6, 2016 letter from Margaret Ryan re: response to document request
7	December 1, 2014 term note
8	2014 federal individual income tax return
9	2014 Schedule K-1 forms
10	Quarterly Report – Earnings
11	2017 pay stubs
12	Deposit summary – M&T Checking
13	February 28, 2017 CLR Industries check
14	Customer Base Map – 2012 and 2016
15	April 12, 2017 employment agreement
16	Financial statements
17	Supplier Map – 2012 and 2016
18	October 13, 2016 Notice of Appeal
19	February 16, 2017 letter scheduling hearing
20	E-mail trail
21	August 15, 2016 letter
22	Equipment sales