

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

In the Matter

- of -

the Application of **A. Ottavino Corp.**
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 52150

RECOMMENDED ORDER

- by -



Maria E. Villa
Administrative Law Judge

September 19, 2019

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 A. Ottavino Corp. (“Ottavino” or “applicant”) certification as a woman-owned business enterprise¹ (“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 Ottavino does not meet the eligibility criteria for certification as a WBE.

The Division denied Ottavino’s application for WBE certification (Exhibit 1) by letter dated November 15, 2017. Exhibit 2. The denial letter set forth three grounds under 5 NYCRR Section 144.2 for the denial. Specifically, according to the Division,

- (1) applicant failed to demonstrate that the women owners share in the risks and profits in proportion with their ownership interests in the enterprise (see Section 144.2(c)(2) (“Ownership”));
- (2) corporate bylaws and other business agreements do not permit the women owners to make decisions without restrictions (see Section 144.2(b)(2) (“Control”)); and
- (3) the women owners have not demonstrated control of negotiations through production of relevant documents (see Section 144.2(b)(3) (“Control”)).

Exhibit 2. On December 14, 2017, applicant requested a hearing on the denial, and the Division responded by letter dated February 5, 2019, advising applicant that a hearing had been scheduled. Exhibits 3 and 4. At applicant’s request, the hearing was adjourned to May 8, 2019.

The hearing took place as scheduled on May 8, 2019. Applicant was represented by Thomas Rossi, Esq., of the law firm of Rossi, Crowley, Sancimino & Kilgallon, LLP, Douglaston, New York. Applicant called two witnesses, Kate Ottavino and Mohamed Elkordy. Division Staff was represented by Simon Wynn, Esq., and called Raymond Emanuel, Director of Certification Operations for the Division.

A list of exhibits is attached to this recommended order. The hearing was recorded and the recording is approximately 2 hours and 15 minutes in length. References to testimony from the hearing are identified by the time on the recording at which the testimony occurs (“HR at

¹ The term “women-owned business enterprise” applies to an enterprise that meets the requisite criteria based upon 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, inter alia, “at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women”)).

____”). The parties submitted post-hearing briefs on July 5, 2019, and on that date the record closed.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are established by regulation (see 5 NYCRR Section 144.2). For the purposes of determining whether an applicant should be granted WBE status, the ownership, operation, and control of the business enterprise are assessed based on 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, and on information revealed in supplemental submissions and any interviews that the Division’s analyst may have conducted.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that the Division's denial of Ottavino’s application for WBE certification is not supported by substantial evidence (see State Administrative Procedure Act Section 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 N.Y.3rd 494, 499 (2011) (internal quotation and citations omitted)).

POSITIONS OF THE PARTIES

Applicant

On appeal, applicant addresses the bases cited by the Division for the denial of Ottavino’s WBE application. According to applicant, the Division’s denial failed to recognize the significant roles of Sallie, Meg, and Kate Ottavino, the three women owners, in the ownership and control of the business. Applicant argued that the women owners had been involved with the company their entire working lives, and shared all risks and profits in proportion to their ownership interests. Applicant went on to assert that the Division’s characterization of Ottavino as a “family business” was inapposite, and that the decision to reject the recertification application was not based upon substantial evidence, “specifically a misreading of the bylaws and a misunderstanding of the roles played by the women owners of the business.” Applicant’s Brief, at 14. While applicant acknowledged that some undeserving entities attempt to improperly obtain certification, “this is simply not true in the case of A. Ottavino . . . the ownership and control of [the business enterprise] is truly with the three sisters who know the business, work in the business, and have obtained their interest in an unbroken, now 106 year old, chain beginning with their grandfather.” Id.

Division

The Division contends that its determination is supported by substantial evidence, and that applicant failed to satisfy certification criteria related to ownership and operation of the

business enterprise by a woman owner. Specifically, the Division asserted that with respect to ownership, applicant failed to demonstrate that the women owners shared in the risks and profits of Ottavino, in proportion to their ownership interests, in light of the disproportionate salary paid to a male non-owner. With respect to control, the Division maintained that Ottavino's bylaws did not permit the women owners to make decisions without restriction, and that applicant had not shown, through the production of relevant documents, that the three women owners controlled negotiations. Accordingly, the Division requested that its determination to deny WBE certification to Ottavino be upheld.

FINDINGS OF FACT

1. A. Ottavino Corp. is located at 80-60 Pitkin Avenue, Ozone Park, New York. Exhibit 1, at 1.
2. Ottavino is a stone business, offering building restoration, monuments, stone manufacturing, and construction. Exhibit 1, at 3.
3. Adamo Ottavino, the grandfather of the three women owners, established the business in 1913. Exhibit 1, at 2; HR at 9:25 (Track 1).
4. Kate Ottavino, Margaret Ottavino, and Sallie Elkordy are sisters, and each own approximately 1/3 of the outstanding common stock of the corporation. Exhibit 1, at 3. The three sisters are the directors of the corporation. Exhibit 17.
5. The president of A. Ottavino Corp. is Mr. Mohamed Elkordy, who is married to Sallie Elkordy. Exhibit 17. The corporate bylaws provide that "[t]he president shall be the principal executive officer of the corporation and, subject to the control of the board of directors, shall in general supervise and control all of the business and affairs of the corporation." Exhibit 6, at 10, ¶ 6.5.
6. Documents provided with the application indicated that during the 2016 tax year, Mr. Elkordy received greater compensation than all three women owners combined. Exhibit 18.
7. The contracts provided with the application were all signed by Mohamed Elkordy. Exhibits 19, 20, and 21.

DISCUSSION

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

Ownership

Section 144.2(c)(2) of 5 NYCRR requires an applicant to demonstrate that a woman owner shares in the risks and profits in proportion with her ownership interest in the business enterprise.

In the denial letter, the Division stated that applicant failed to satisfy this requirement, based upon the following “relevant facts”:

- Ms. Kate Ottavino, Ms. Margaret Ottavino, and Ms. Sallie Elkordy each own approximately one third (1/3) of the outstanding common stock of A. Ottavino Corp.
- Mr. Mohamed Elkordy, the President of A. Ottavino Corp., received significantly greater compensation from A. Ottavino Corp. than all three women owners of the business combined during A. Ottavino Corp’s 2016 tax year.

Exhibit 2, at 2. Specifically, during 2016, Kate Ottavino’s salary was [REDACTED], Margaret Ottavino’s salary was [REDACTED], and Sallie Ottavino Elkordy’s salary was [REDACTED]. Exhibit 18; HR (Track 1), at 1:01:04. In contrast, Mohammed Elkordy’s salary that year was [REDACTED]. Exhibit 18; HR (Track 1), at 1:00:39. The Division noted that this disparity in compensation occurred in the tax year 2016, when the corporation’s total income was in excess of [REDACTED].

The Division asserted that standing alone, the difference in compensation among the women owners and Mr. Elkordy constitutes a rational basis to conclude that the women owners did not share in the risks and profits in proportion to their ownership interest. The Division went on to argue that “[w]here such proportionality is lacking, that fact suggests that the owner does not possess the skillset or experience required to run and operate the business.” Division’s Brief, at 10. According to the Division, it was reasonable to conclude that the women owners are not operating or controlling the business, but rather that Mr. Elkordy did so.²

Applicant argued that “[r]egardless of the compensation of the employees and officers of Ottavino, the sole shareholders, Margaret Ottavino, Kate Ottavino and Sallie Elkordy, all of whom are female, share all the profits and risks of Ottavino in proportion to their ownership interest.” Exhibit 3, at 1 (emphasis in original). Applicant acknowledged that Mr. Elkordy earned a significantly higher salary than the sisters, but went on to assert that he does not share in the profits of the business, and that his salary “is commensurate with that of a manager with degrees in engineering and architecture working in a key role at a significant construction company.” Applicant’s Brief, at 8. Applicant noted that Mr. Elkordy cannot sign checks without a countersignature by one of the sisters, and although he is paid a higher salary than the women owners, “this does not diminish the women owners’ ‘real, substantial and continuing’

² In its brief, the Division also argued that applicant had not shown that the women owners possessed adequate managerial or technical competence to operate the business enterprise, as required by Section 144.2(b)(1)(i). Division’s Brief, at 14. This regulatory provision was not one of the denial grounds cited by the Division, and is therefore not discussed further in this recommended order. See Exhibit 2.

ownership of the business formed by their grandfather Adamo over 100 years ago and passed down through three generations.” *Id.*; HR at 8:15 (Track 2).

Applicant concluded that “[h]ad the Department made a thorough investigation, interviewed the owners and Mr. Elkordy, visited the office, learned that the person they allege is the *de facto* owner cannot even sign a corporate check, and reviewed the resumes and qualifications of the owners, the substantial evidence would have led directly to the inescapable conclusion that Kate, Meg and Sallie are the *de jure* and *de facto* owners and controllers of A. Ottavino.” Applicant’s Brief, at 9. At the hearing, the testimony of applicant’s witnesses made clear that all three of the sisters play a significant role in the business. Nevertheless, based on the information before the Division at the time of the denial, the analyst reasonably concluded that a non-owner male employee received more in profits than the three women owners combined, given the disparity in compensation among the four individuals involved.

Although the three Ottavino sisters each own 1/3 of the corporation, Mohamed Elkordy’s salary is substantially higher. This fact is sufficient to support the Division’s conclusion that the women owners did not share in the risks and profits of the business in proportion to their ownership interests. As the Division noted, because Ottavino is a C corporation, “net profits are distributed to the shareholders in the form of dividends but, in this case, [REDACTED], so the shareholders’ remuneration came [REDACTED] from wages reported on the W-2 forms.” Division’s Brief, at 5. Moreover, the Division is not required to conduct an interview in order to make a determination on an application. On this record, it was reasonable for the Division to determine that the women owners did not share in the risks and profits of the business, in proportion with their ownership interests; the applicant did not meet its burden to demonstrate otherwise. The Division’s determination that Ottavino did not satisfy the eligibility criterion at Section 144.2(c)(2) of 5 NYCRR was based upon substantial evidence.

Control

Section 144.2(b)(2) of 5 NYCRR requires that the corporate bylaws must permit women owners to make decisions without restrictions. With respect to this requirement, the Division’s denial letter set forth the following facts:

- A. Ottavino Corp. is governed by the By-Laws for A. Ottavino Corp. (the “Bylaws”).
- Section 6.5 of the Bylaws establishes the office of the President of A. Ottavino Corp. and provides that the President “shall in general supervise and control all of the business and affairs of the corporation.”
- Mr. Elkordy is the President of A. Ottavino Corp.

Exhibit 2, at 2.

Applicant pointed out that Section 6.5 of the bylaws provides that the president’s supervision and control is “subject to the control of the board of directors,” and argued that in this case, the “control” by the members of the board of directors (the three women owners), “is real and definitive.” Applicant’s Brief, at 6. The Division asserted that “this language is

included in virtually every standard set of New York corporate by-laws, since it mirrors the longstanding vesting of corporate authority in the Board under the Business Corporations Law. Tellingly, not a single instance was cited at the Hearing where the board of directors did, in fact, exercise its own ‘control’ over the President of the Corporation.” Division’s Brief, at 6. The Division went on to refer to Exhibit 17, the Board minutes dated April 3, 2017, that approved, among other things, the compensation of the President. The Division contended that this was “an imbalance that an independent women owner (or owners) would not, and should not, approve.” *Id.* Applicant responded that the Division “ignored crucial evidence (i.e. the nine words preceding the fifteen words from the bylaws, the fact that Mr. Elkordy cannot sign a corporate check without the approval of the owners, and the significant experience and contributions being made by the sisters).” Division’s Brief, at 7. Applicant concluded that “[s]tanding alone, the inaccurate reading of the bylaws, directly contradicted by the bylaws themselves, concerning who ‘controls’ the business is cause enough to overturn the ruling as not based upon substantial evidence.” *Id.*

In *Matter of Casters, Wheels, and Industrial Handling, Inc.*, the administrative law judge considered an application where the women owner, as chief executive officer and a member of the board of directors, owned the majority of the voting shares. Recommended Order (March 3, 2017); Final Order (March 17, 2017). Applicant in that case argued that even though the bylaws identified the male president of the company as the principal executive officer, with the authority to supervise and control all business and affairs of the corporation, the woman chief executive officer, because of her voting authority, had the power to replace the president and therefore had absolute control over the activities of the business enterprise. Recommended Order, at 7. The administrative law judge concluded that the business did not meet certification requirements, noting that

[t]he intent of the eligibility requirement at 5 NYCRR 144.2(b)(2) concerning the designation or minority and 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 corporation’s by-laws, ensure that minority and woman-owners are in fact, the decision makers of the business enterprise.

Id., at 7-8. The Final Order adopted the administrative law judge’s recommendation. This reasoning is persuasive in this case. Based upon the corporate documents, the Division reasonably concluded that the corporate bylaws indicated that control was not vested in the three women owners, but rather in the president of Ottavino. In its closing brief and at the hearing, the Division included in its arguments the contention that Ottavino operates as a family business. In response, applicant noted that the owners of A. Ottavino Corp. are all women, with significant involvement in the running of the business, unlike the fact patterns in the cases cited by the Division. Nevertheless, in this case, in light of the disparity in compensation and the lack of evidence on the face of the application that the women owners exercised control over business operations, the Division’s determination that Ottavino did not satisfy the criterion set forth in Section 144.2(b)(2) of 5 NYCRR was based upon substantial evidence.

Section 144.2(b)(3) of 5 NYCRR requires that an applicant demonstrate, through production of relevant documents, that women have control of negotiations. With respect to this criterion, the Division denied the application because each of the contracts provided in support of the application were executed by Mr. Elkordy, not the women owners. Exhibits 19, 20, and 21.

At the hearing, the applicant offered credible testimony that Mr. Elkordy cannot submit a bid, or agree to a contract, without approval from one of the sisters. HR at 32:00 (Track 1); HR at 1:55 (Track 2). Nevertheless, the contracts submitted were signed only by Mr. Elkordy. Exhibits 19, 20, and 21. The Division noted that “the three very lucrative contracts submitted to the Division do not include any evidence whatsoever that any of the woman owners, initiated, negotiated, or signed the contracts.” Division’s Brief, at 12.

An applicant has the burden to show that it is entitled to certification, and with respect to this criterion, applicant failed to do so. It is undisputed that the contracts that were provided by Ottavino as part of the application were signed by Mr. Elkordy, not one of the women owners. Although applicant provided credible testimony regarding the women owners’ oversight and control of negotiations, given the information before the Division at the time of the denial, applicant did not meet its burden of proof to show that the Division’s determination was not supported by substantial evidence with respect to the operational criterion of Section 144.2(b)(3) of 5 NYCRR. The Division’s denial of certification was supported by substantial evidence and should be affirmed.

CONCLUSION

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

RECOMMENDATION

For the reasons set forth above, the Division's determination to deny A. Ottavino Corporation’s application for WBE certification should be affirmed.

Matter of A. Ottavino Corp.
 DED File ID No. 52150
Exhibit Chart

Exhibit No.	Description	Rec'd
1	October 6, 2015 application	✓
2	November 15, 2017 denial letter	✓
3	December 14, 2017 letter requesting hearing	✓
4	February 5, 2019 letter scheduling hearing	✓
5	Ottavino Timeline	✓
6	Ottavino By-Laws	✓
7	Resume: Kate Burns Ottavino	✓
8	Resume: Sallie Ottavino Elkordy	✓
9	Resume: Meg Ottavino	✓
10	Transfer Agreement	✓
11	General Indemnity Agreement	✓
12	Corporate Resolution To Borrow	✓
13	Santander Bank Commercial Card Agreement	✓
14	Conservator Specifications	✓
15	Contracts	✓
16	Resumes: Mohamed Elkordy, Kate Burns Ottavino, and Meg Ottavino	✓
17	Minutes of Annual Meeting	✓
18	W-2s	✓
19	[REDACTED]	✓
20	[REDACTED]	✓
21	[REDACTED]	✓
22	Webpage: Construction Management Director Salary	
23	NYS DOS Division of Corporations Entity Information	✓
24	Webpage: Ottavino Corp.	✓