

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

In the Matter

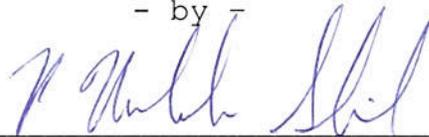
- of -

the Application of
Access Computer Floors, LLC
For Certification as a Minority-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 47562

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

September 24, 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 the application of Access Computer Floors, LLC ("applicant") for certification as a minority-owned business enterprise ("MBE") 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 Access Computer Floors, LLC challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a minority-owned business enterprise.

Access Computer Floors, LLC's application was submitted on September 23, 2015 (Exh. DED4).

The application was denied by letter dated November 21, 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 three eligibility criteria related to Manuel Lopez's ownership and control of the applicant.

In a two-page letter dated February 13, 2017, the applicant submitted an appeal. Attached to the appeal were five attachments, described in the exhibit chart as Exhibits A1-A5.

In a seventeen-page memorandum of law dated August 13, 2019, the Division responded to the applicant's appeal. Included with the Division's papers were the affidavit of Raymond Emanuel, the Division's Director of Certification Operations, and ten exhibits described in the attached exhibit chart as DED1-DED10.

On August 19, 2019, this matter was assigned to me.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied minority-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 MBE 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 three separate criteria for certification. First, the Division found that the applicant failed to show that the minority owner, Manuel Lopez, owns at least 51% of the business enterprise, as required by 5 NYCRR 144.1(aa)(1).

Second, the Division found that the minority owner, Manuel Lopez, does not share in the risks and profits in proportion to his equity interest, as required by 5 NYCRR 144.2(c)(2).

Third, the Division found that the relevant documents governing the business enterprise do not permit the minority owner, Manuel Lopez, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

Position of the Applicant

Access Computer Floors, LLC asserts that it meets the criteria for certification and that the Division erred in not granting it status as a minority-owned business enterprise pursuant to Executive Law Article 15-A.

FINDINGS OF FACT

1. Access Computer Floors, LLC is in the business of selling, servicing, and installing raised access flooring (Exh. DED4 at 3). The firm has a business address of 79 Wellington Place, Westwood, New Jersey (Exh. DED1 at 1).

2. The documents in the record provide differing information regarding the ownership of Access Computer Floors, LLC. The application states that Manuel Lopez, Jr. owns 51% of the firm and Virginia R. Boenigk owns the remaining 49% (Exh. DED4 at 3), as does the firm's operating agreement (Exh. DED3 at 4). The firm's tax returns for 2012, 2013 and 2014 report Mr. Lopez owns 50% of the firm, Ms. Boenigk owns 49%, and George Boenigk, Ms Boenigk's husband, owns 1% (Exhs. DED6, DED7, and DED8).¹

3. In 2014, Mr. Lopez was paid [REDACTED] by Access Computer Floors, LLC (Exh. DED9 at 20) while Ms. Boenigk was paid [REDACTED] and Mr. Boenigk received [REDACTED] (Exh. DED10 at 20). In 2015, Mr. Lopez earned [REDACTED] (Exh. DED9 at 41) while Ms. Boenigk earned [REDACTED] and Mr. Boenigk earned [REDACTED] (Exh. DED10 at 41)

4. The version of the firm's operating agreement (dated March 18, 2005) included with the application names Mr. Lopez and Ms. Boenigk as managing members and states that any

¹ The issue of ownership interests in the firm is further confused by information provided by the firm's CPA (which was not before the Division at the time of the denial) stating that Mr. Lopez owns 51% of the firm, Ms. Boenigk owns 48%, and her husband owns 1%, and that the 2012-15 tax returns were in error (Exh. A1).

difference arising as to any matter within the authority of the managing members shall be decided by a majority in number of the managing members (Exh. DED3 at 9).

DISCUSSION

This recommended order considers the appeal of the applicant from the Division's determination to deny certification as a minority-owned business enterprise pursuant to Executive Law Article 15-A. The Division's denial letter set forth three bases related to Manuel Lopez's ownership of Access Computer Floors, LLC. Each is discussed separately, below.

OWNERSHIP

The first denial ground is that the applicant failed to show that the minority owner, Manuel Lopez, owns at least 51% of the business enterprise, as required by 5 NYCRR 144.1(aa)(1). The relevant facts cited in the denial letter are: (1) the application states that Manuel Lopez owns 51% of the applicant and Virginia Boenigk owns 49%; (2) the firm's 2014 federal tax return indicates that Mr. Lopez owns 50% of the company; (3) the 2014 tax return also shows Ms. Boenigk owns 49% of the firm; and (4) the 2014 tax return reports George Lopez owns 1% of the firm (George Lopez lives at the same address and has the same social security number as Ms. Boenigk's husband, George Boenigk).

On the appeal, Mr. Lopez and Ms. Boenigk state that the applicant is a minority owned business that is certified by the City of New York, the New York/New Jersey Minority Purchasing Council and, in the past, the Division (Exh. A4). With respect to this denial ground, they attach to the appeal a copy of an operating agreement for the firm dated January 1, 2006 (Exh. A2) which shows Mr. Lopez owns 51% of the applicant.

Also attached to the appeal is a letter from the firm's Certified Public Accountant, Linda Lewis, who explains that the firm began as a partnership between Mr. Lopez, who owned 51% of company, and George Boenigk, who owned 49%. When Mr. Boenigk got ill, his wife Virginia took her husband's ownership interest. When Mr. Boenigk recovered sufficiently to return to work, he was given 1% of the firm so he could retain his union membership and benefits. This 1% share should have come from

his wife's ownership interest, but instead the accountant mistakenly deducted it from Mr. Lopez's, thus causing the error on the firm's tax returns (Exh. A1). The firm's CPA also provides a second letter and a copy of the firm's 2016 tax returns showing Mr. Lopez owns 51% of the firm (Exh. A5).

In its response, the Division states that it reviewed the tax returns submitted with the application and they were not consistent with information provided on the application. Specifically, the application states that Mr. Lopez owns 51% of the firm and Ms. Boenigk owns the remaining 49% (Exh. DED1 at 3), however, the firm's tax return provided a different ownership breakdown. The firm's 2012 tax returns list Mr. Lopez as the 50% owner, Ms. Boenigk as the 49% owner, and George Lopez² (Exh. DED6). This information is repeated in the firm's 2013 tax returns (Exh. DED7) and 2014 tax returns (Exh. DED8). It is also reflected in Mr. Lopez's individual tax returns for 2015 (Exh. DED9). With respect to the information submitted on the appeal purporting to correct these inconsistencies in ownership interests, the Division correctly points out that this information was not submitted with the application and is inconsistent with filed tax forms.

Based on the evidence in the record, specifically the fact that filed tax returns for 2012, 2013, 2014 and 2015 all show Mr. Lopez as owner of 50% of the applicant, Access Computer Floors, LLC has failed to show that the minority owner, Manuel Lopez, owns at least 51% of the business enterprise, as required by 5 NYCRR 144.2(aa)(1). The Division's denial on this ground was based on substantial evidence.

The second ground for denial cited in the denial letter was that the minority owner, Manuel Lopez, does not share in the risks and profits in proportion to his equity interest, as required by 5 NYCRR 144.2(c)(2). The relevant fact cited in the denial letter is that George Boenigk receives greater wage compensation than does Mr. Lopez from the firm.

On the appeal, Mr. Lopez and Ms. Boenigk do not address this denial ground. The firm's CPA does in her letter, stating

² This may be a mistaken last name because George Lopez has the same address as George Boenigk.

that Mr. Lopez has no children and did not need the money while the Boenigk's have three children and needed more of the firm's profits (Exh. A1).

In its response, the Division argues that Mr. Lopez was paid substantially less during 2014 and 2015 than the other owners of the firm, despite his claimed majority ownership interest. The firm's 2014 tax returns show that Mr. Lopez was paid [REDACTED] (Exh. DED9 at 20) while Ms. Boenigk was paid [REDACTED] and Mr. Boenigk received [REDACTED] (Exh. DED10 at 20). In 2015, tax returns show Mr. Lopez earned [REDACTED] (Exh. DED9 at 41) while Ms. Boenigk earned [REDACTED] and Mr. Boenigk earned [REDACTED] (Exh. DED10 at 41). The Division concludes that Mr. Lopez did not share proportionately in the profits of the firm.

Based on the evidence in the record, specifically the fact that Mr. Lopez earned significantly less than the combined earnings of the other owners, the applicant has failed to show that the minority owner, Manuel Lopez, shares in the risks and profits in proportion to his equity interest, as required by 5 NYCRR 144.2(c)(2). The Division's denial on this ground was based on substantial evidence.

CONTROL

The third ground for denial was that the relevant agreements governing the business enterprise do not permit the minority owner, Manuel Lopez, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). The relevant facts cited in the denial letter are: (1) the operating agreement for the firm (dated March 18, 2005) states that the firm shall be managed by the managing members; (2) the managing members are Mr. Lopez and Ms. Boenigk; and (3) the agreement states that differences arising as to any matter shall be decided by a majority of the managing members.

In the appeal, Mr. Lopez and Ms. Boenigk state that Mr. Lopez owns 51% of the firm and provide a copy of the firm's operating agreement dated January 1, 2006. This agreement states that Mr. Lopez has majority voting rights on all decisions (Exh. A2 at 2). This agreement, they state, supersedes another document supplied on the appeal, a partnership agreement, dated January 2001 which stated that the

owners of the firm shall have equal rights and control over the firm (Exh. A3 at 3).

In its response, the Division cites the version of the firm's operating agreement (dated March 18, 2005) included with the application which names Mr. Lopez and Ms. Boenigk as managing members and states that any difference arising as to any matter within the authority of the managing members shall be decided by a majority in number of the managing members (Exh. DED3 at 9). Because there are only two managing members, the Division concludes that Mr. Lopez cannot make decisions without Ms. Boenigk's concurrence. With respect to the partnership agreement (Exh. A3) and the operating agreement, dated January 1, 2016, (Exh. A2) submitted on the appeal, the Division states that these documents were not submitted with application and not before the Division at the time of the denial. Therefore, these two documents are irrelevant on appeal.

Based on the evidence in the record, specifically the fact that operating agreement submitted with the application requires Ms. Boenigk's assent before any Mr. Lopez can make decisions regarding the business, the applicant has failed to demonstrate that the relevant agreements governing the business enterprise permit the minority owner, Manuel Lopez, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). The Division's denial on this ground was based on substantial evidence.

CONCLUSIONS

1. The applicant failed to show that the minority owner, Manuel Lopez, owns at least 51% of the business enterprise, as required by 5 NYCRR 144.1(aa)(1).

2. The applicant failed to show that the minority owner, Manuel Lopez, shares in the risks and profits in proportion to his equity interest, as required by 5 NYCRR 144.2(c)(2).

3. The applicant failed to show that the relevant agreements governing the business enterprise permit the minority owner, Manuel Lopez, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

RECOMMENDATION

The Division's determination to deny Access Computer Floors, LLC's application for certification as a minority-owned business enterprise should be affirmed for the reasons stated in this recommended order.

**Matter of
Access Computer Floors, LLC**

**DED File ID No. 47562
Exhibit List**

Exh. #	Description
DED1	New Jersey and NYS Department of State Division of Corporations information about applicant
DED2	Narrative about firm
DED3	Operating agreement dated 3/18/05
DED4	Application
DED5	Denial letter
DED6	Applicant's 2012 federal tax returns
DED7	Applicant's 2013 federal tax returns
DED8	Applicant's 2014 federal tax returns
DED9	Lopez tax returns 2014 and 2015
DED10	Boenigks' tax returns 2014 and 2015
A1	2/16/17 letter from L. Lewis, CPA
A2	Operating agreement dated 1/1/06
A3	Partnership agreement
A4	MBE Certificates
A5	5/5/17 letter from L. Lewis, CPA