

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

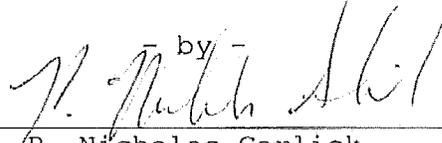
In the Matter

- of -

the Application of
Evay Development Associates, LLC
For Certification as a Woman-owned and
a Minority-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 56980

RECOMMENDED ORDER

by -


P. Nicholas Garlick
Administrative Law Judge

June 6, 2018

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 Evay Development Associates, LLC ("applicant") for certification as a woman-owned business enterprise ("WBE") and 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 Evay Development Associates, LLC challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise and a minority-owned business enterprise.

Evay Development Associates, LLC's application was submitted on July 14, 2015 (Exh. DED1).

The application was denied by letters dated April 4, 2017, from Raymond Emanuel, Director of Certification Operations (Exh. DED9). As explained in an attachment to Ms. Emanuel's letters, the application was denied for failing to meet two separate eligibility criteria related to Etta Fearon's ownership and operation of the applicant.

In a letter dated April 27, 2017, the applicant appealed from the denial.

By letter dated March 20, 2018, the Division notified the applicant that a hearing in this matter would occur on April 10, 2018 at 1:30 pm in the Division's New York City office located at 633 Third Avenue, New York, New York.

The hearing occurred as scheduled. The applicant was represented by Ms. Fearon, who testified, as did Arthur Yellin, the minority owner of the firm. The Division was represented by Phillip Harmonick, Esq. and called one witness, Iliana Farias, Director of Certification Operations. The hearing concluded at

approximately 2:15 pm and the record closed with receipt of the recording of the hearing on May 7, 2018.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied woman-owned or 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 WBE and 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 letters, the Division asserts that the application failed to meet two separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman and minority owner Etta Fearon'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 woman and minority owner relied upon for certification, Etta Fearon, does not make decisions pertaining to the operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1).

Position of the Applicant

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

FINDINGS OF FACT

1. Evay Development Associates, LLC is in the business of construction and renovation of properties in the Bronx (Exh. DED1 at 3) and has a business address of 1334 East Gunhill Road, Bronx, New York (Exh. DED1 at 1).

2. Evay Development Associates, LLC was established on October 13, 2004. Ms. Etta V. Fearon owns 51% of the firm and serves as its president. Arthur Yellin owns the remaining 49% and serves as the firm's vice president. Exh. DED 1 at 2.

3. Etta Fearon is responsible for managing: hiring and firing; managing and signing payroll; negotiating contracts; purchasing; and signing business accounts. Arthur Yelling is responsible for: estimating jobs, preparing bids, and supervising field operations. They share responsibility for: financial decisions and marketing. Exh. DED3 at 15.

DISCUSSION

This report considers the appeal of the applicant from the Division's determination to deny certification as a woman-owned and minority-owned business enterprise pursuant to Executive Law Article 15-A. The Division's denial letters set forth two bases related to Ms. Fearon's ownership and operation of Evay Development Associates, LLC. Each basis is discussed individually, below.

Ownership

In its denials, the Division found that the applicant failed to demonstrate that the woman and minority owner Etta Fearon'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 letters are: (1) Ms. Fearon owns 51% of the firm and Mr. Yellin owns 49%; (2) materials submitted with the application indicate that they each contributed approximately [REDACTED]; (3) other documents submitted attribute [REDACTED] in contributions of money and property to Mr. Yellin; and (4) the application does not include evidence that Ms. Fearon made greater contributions to the firm than Mr. Yellin.

At the hearing, Ms. Fearon spoke about how, as an immigrant, she started in business. With the assistance of training provided by New York City and Mr. Yellin, she formed the applicant and now provides services to underserved communities. She spoke with pride of helping those in need. Mr. Yellin testified regarding the history of the firm. The two owners first met in 2000, she is a licensed real estate broker and he a licensed architect. After discussion, they decided to work together and made unspecified contributions to the firm. He spoke of two jobs that the firm completed where it lost money and said the firm has always finished jobs and paid their subcontractors. He concluded that the firm will continue to work to serve the community.

In her testimony, Ms. Farias testified that the New York City MWBE Certification Application included with the Division's fast track application reported the following contributions to the business on October 13, 2004: Ms. Fearon contributed [REDACTED] in cash, equipment, property and expertise; and Mr. Yellin contributed [REDACTED] in cash, equipment, property, and expertise (Exh. DED at 13). In response to the Division's request for proof of these claimed contributions, Ms. Fearon provided a letter affidavit signed by both Ms. Fearon and Mr. Yellin stating that each of them contributed approximately [REDACTED] (Exh. DED4). Ms. Farias testified that because this document did not identify the source of the funds and additional

proof of the claimed contributions, the letter affidavit was not acceptable proof for the Division (Exh. DED10 at 12:30). In addition, the firm's 2015 federal tax returns show that [REDACTED] in capital stock was issued by the firm and [REDACTED] additional paid-in capital (Exh. DED5 at 5, lines 22 & 23). A second request for information was sent regarding these figures on February 27, 2017 (Exh. DED1 at 6). In response, Ms. Fearon submitted information stating that the [REDACTED] of additional paid in capital was the sum of the value of the land, buildings, and renovations [REDACTED] and cash contributions by Mr. Yellin of [REDACTED] (Exh. DED6). The Division also introduced the deed for property transferred from Mr. Yellin to the company (Exh. DED7).

Based on the evidence in the record, the applicant has failed to demonstrate that the woman and minority owner Etta Fearon'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 letters, the Division found that the woman and minority owner relied upon for certification, Etta Fearon, does not make decisions pertaining to the operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1). The relevant facts cited in the denial letters are: (1) the firm is primarily engaged in providing general contracting services; (2) Mr. Yellin is primarily responsible for managing significant operations of the business related to estimating and supervising field operations; and (3) Ms. Fearon is primarily engaged in office management and managing human resources.

As stated above, at the hearing Ms. Fearon and Mr. Yellin spoke, but not about this ground for denial.

In her testimony, Ms. Farias stated that application materials indicated that the management of significant operations of the firm was done by Mr. Yellin (Exh. DED10 at 20:00). The New York City MWBE Certification Application indicates that Etta Fearon is responsible for hiring and firing, managing payroll, negotiating contracts, purchasing, and signing

business accounts, while Arthur Yelling is responsible for estimating jobs, preparing bids, and supervising field operations (Exh. DED3 at 15). The Division requested additional documentation regarding the roles of the owners and Ms. Fearon provided a narrative stating that Ms. Fearon's primary functions are in the office while Mr. Yellin's primary role was to do field work and prepare estimates (Exh. DED9). Ms. Farias stated that the Division considers estimating and supervising field operations to be the significant management functions of the firm (Exh. DED10 at 20:30).

Based on the evidence in the record, applicant failed to demonstrate that the woman and minority owner, Etta Fearon, makes decisions pertaining to the operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1). The Division's denial was based on substantial evidence.

CONCLUSIONS

1. The applicant failed to demonstrate that the woman and minority owner, Etta Fearon'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 and minority owner relied upon for certification, Etta Fearon, makes decisions pertaining to the operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1).

RECOMMENDATION

The Division's determination to deny Evay Development Associates, LLC's application for certification as a woman-owned and minority-owned business enterprise should be affirmed for the reasons stated in this recommended order.

**Matter of
Evay Development Associates, LLC**

**DED File ID No. 56980
Exhibit List**

Exh. #	Description
DED1	Application
DED2	Denial of earlier application
DED3	NYC MWBE applications
DED4	Letter affidavit
DED5	2015 federal tax forms
DED6	Information regarding contributions
DED7	Deed
DED8	Narrative regarding duties of owners
DED9	Denial letters
DED10	Recording of hearing
A1	LLC operating agreement
A2	NYSDOS filing receipt
A3	Invoice
A4	Tax ID number
A5	Letter from ██████ regarding vendor application
A6	Same as DED8
A7	Same as DED6
A8	Personal financial statement worksheet
A9	Deed
A10	Same as DED7

A11	NYC MWBE certification letter
A12	NYC MWBE certificate
A13	Credentials of Ms. Fearon