

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

In the Matter

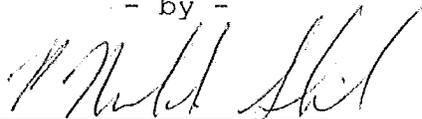
- of -

the Application of
George J. Martin & Son, Inc.
For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 8942

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

June 5, 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 George J. Martin & Son, Inc. ("applicant") for 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 George J. Martin & Son, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

George J. Martin & Son, Inc.'s application was submitted on August 21, 2014 (Exh. DED1).

The application was denied by letter dated October 26, 2016, from Bette Yee, Director of Certification Operations (Exh. DED4). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet three separate eligibility criteria related to the women owners' ownership and operation of the applicant.

In papers dated May 2, 2017, the applicant's counsel, Jennifer Harvey, Esq., of Couch White, LLP, submitted a written appeal, which consisted of an eleven-page letter and three exhibits, described in the attached exhibit chart as A1 - A3.

In an eight-page memorandum dated March 28, 2018, the Division responded to the applicant's appeal. Enclosed with the response was the affidavit of Robyn Clarke, Senior Certification Analyst and four exhibits, described in the attached exhibit chart as DED1-DED4.

On March 29, 2018, this matter was assigned to me.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied woman-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 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 demonstrate that the women owners share in the risks and profits in proportion to their ownership interests in the business enterprise, as required by 5 NYCRR 144.2(c)(2).

Second, the Division found that the applicant failed to demonstrate that the women owners make decisions pertaining to

the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

Third, the Division found that the women owners relied upon for certification do not have adequate managerial experience or technical competence to operate the business enterprise seeking certification, as required by 5 NYCRR 144.2(b)(1)(i).

Position of the Applicant

George J. Martin & Son, Inc. 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. George J. Martin & Son, Inc. is in the business of electrical contracting (Exh. DED 1 at 4). The firm has a business address of 2 Cooper Avenue, Rensselaer, New York (Exh. DED1 at 1).

2. The application reports that Joan Hart owns 49% of George J. Martin & Son, Inc.; her son Brian Hart owns 44%; her husband Donald Hart owns 1%; her daughter Suzanne Mangold owns 1%; her granddaughter Kendra Hart owns 2%; her granddaughter Kelsey Hart owns 2%; and Roberta Whiteman owns 1% (Exh. DED1 at 3).

3. In 2015, George J. Martin & Son, Inc. did not distribute any profits to the owners. In that year, Brian Hart received [REDACTED] in compensation and Joan Hart received [REDACTED] (Exh. DED2 at 5 & 11).

4. Joan Hart serves as president of George J. Martin & Son, Inc. and her primary day-to-day responsibilities include: financial decision making; managing accounts payable and accounts receivable; tracking revenue; managing payroll; budgeting; performing reconciliations; reviewing bid documents and estimates; hiring and firing; and negotiating insurance and other contracts. She works in the office 3-5 days per week and for 3-7 hours per day, based on work flow. She also works from home and is available by phone on an as-needed basis. Exh. DED1 at 9.

4. Brian Hart serves as the vice president of George J. Martin & Son, Inc. and his primary responsibilities include monitoring field operations and establishing and maintaining business relationships as well as serving as the firm's rainmaker (Exh. DED1 at 9). He also possesses a master electrician's license issued by the City of Albany (Exh. DED3).

DISCUSSION

This report considers the appeal of the applicant from the Division's determination to deny certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The Division's denial letter set forth three bases related to the women owners' ownership and operation of George J. Martin & Son, Inc. Each basis is discussed individually, below.

Ownership

In its denial, the Division found that the applicant failed to demonstrate that that the women owners share in the risks and profits in proportion to their ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2). The relevant fact cited in the denial letter is that Mr. Brian Hart, the owner of 44% of the outstanding common stock of the firm, receives substantially greater wage compensation than the women owners of the business enterprise.

On appeal, applicant's counsel cites information Joan Hart provided with the application explaining that she and her son, Brian, received identical salaries and both also receive bonuses. Mr. Hart's bonuses are based on his successful efforts to boost profitability and revenue growth. Ms. Hart explains that it is her hope to transition ownership of the firm to younger family members, and that the growth of the firm has increased its value. She states that she views Mr. Hart's bonuses from 2012 until the present as good business decisions. Applicant's counsel notes that federal tax returns for 2011 through 2015 were included with the application and in 2012, 2013, and 2014, Mr. Hart was paid more than Ms. Hart (Exh. A1). Counsel argues that the use of bonuses to create incentives for

growth should not jeopardize a firm's WBE status.¹ Counsel notes that Ms. Hart also enjoys access to a company car as well as a cell phone. Based on these arguments, counsel concludes that the women owners do enjoy the customary incidents of ownership and share in the risks and profits of the business in proportion to their ownership interests.

In its response, the Division argues that George J. Martin & Son, Inc. is not eligible for certification as a WBE because the male owner of the firm received a greater share of the firm's profits than did its female owners. Specifically, the Division points to the firm's 2015 federal tax returns which report that the firm did not distribute any profits in that year, and that Brian Hart received [REDACTED] in compensation while Joan Hart received [REDACTED]. (Exh. DED2) at 5 & 11).

Based on the evidence in the record, specifically the fact that Brian Hart received a disproportionate percentage of the benefits from his ownership in the firm, the applicant has failed to demonstrate that the woman owners do not share in the risks and profits in proportion to their ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2). The Division's denial on this ground was based on substantial evidence.

Operation

In its denial letter, the Division found that the applicant failed to demonstrate that the women owners make decisions pertaining to the operation of the enterprise, as required by 5 NYCRR 144.2(b)(1). The relevant facts cited in the denial

¹ Counsel cites two cases to support this contention, but as explained in the Division's response, neither case is relevant in this matter. First, counsel cites *Ignelzi Interiors, Inc. v New York City Department of Small Business Services*, 31 Misc3d 642, (Sup Ct, NY County 2011) which is not applicable because: (1) it relates to a denial by a New York City agency and not the State's MWBE program; and (2) it relates to a denial based on who controlled the firm, not on whether the owners received a proportionate share of the profits. In the second case cited by applicant's counsel, *J.A. Marshall Sheet Metal & Roofing v State*, 221 AD2d 759 (3d Dept 1995), the court's majority remanded the matter back to the Division because the Division had focused its review on the time when the woman owner had taken her majority ownership interest, and not at the time of the application. The dissent does note that the woman owner was compensated less than other family members, who were union members, which is not the case here.

letter were: (1) the firm is primarily engaged in providing electrical contracting services; and (2) the woman owners of the firm are primarily responsible for managing the administrative and financial functions, while male individuals, including Brian Hart, are responsible for managing the core functions of the business related to obtaining work and overseeing the delivery of electrical contracting services to clients.

On appeal, applicant's counsel argues that Joan Hart has worked for over forty years and her duties include: financial decision making; managing accounts payable and accounts receivable; tracking revenue; managing payroll; budgeting; performing reconciliations; reviewing bid documents and estimates; hiring and firing; and negotiating insurance and other contracts. She works in the office 3-5 days per week and for 3-7 hours per day, based on work flow. She also works from home and is available by phone on an as-needed basis. Exh. DED1 at 9. In addition, according to the corporation's bylaws, Ms. Hart is the chief executive officer and is authorized to manage the business of the corporation (Exh. A1). Counsel states that the size of the firm prevents Ms. Hart from overseeing field operations, which is done by foremen and supervisors who report to Mr. Hart, who in turn, reports to Ms. Hart. Counsel acknowledges Mr. Hart's significant role in sales, marketing, and supervising field operations, but he is not the only employee performing these duties, nor does he have any role in the administrative functions of the firm. Because Mr. Hart reports to Ms. Hart, she is ultimately in control of estimating, bidding and contracting. Counsel concludes that these facts demonstrate that the Division's denial was not based on substantial evidence.

In its response, the Division argues that George J. Martin & Son, Inc. does not qualify as a WBE because Brian Hart manages the significant operations of the firm. Specifically, it is Mr. Hart who is primarily responsible for obtaining work for the firm, has demonstrated competence in the field of electrical contracting, and is primarily responsible for managing the delivery of services to clients. In her affidavit, Robyn Clarke, Senior Certification Analyst for the Division, points to information provided (cited above) regarding Ms. Hart's role in managing the financial and administrative aspects of the firm.

Based on this information, Ms. Clarke states that she concluded that Ms. Hart did not manage significant operations of the firm because she did not oversee the performance of electrical contracting work for clients and because she did not work full-time (Clarke affidavit, ¶¶29-30). Information provided with the application shows that Brian Hart's primary responsibilities include monitoring field operations and establishing and maintaining business relationships, as well as serving as the firm's rainmaker (Exh. DED1 at 9). Ms. Clarke concluded that it was Mr. Hart who managed the significant operations of the firm (Clarke affidavit, ¶34).

Based on the evidence in the record, specifically the facts that Mr. Hart manages how the firm obtains work and oversees the completion of this work which is how the firm generates revenue, the applicant failed to demonstrate that the women owners make decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). The Division's denial on this ground was based on substantial evidence.

The Division also found that the women owners relied upon for certification do not have adequate managerial experience or technical competence to operate the business enterprise seeking certification, as required by 5 NYCRR 144.2(b)(1)(i). The relevant facts cited in the denial letter were: (1) Brian Hart is a licensed master electrician; and (2) the woman owners of the firm do not possess relevant licenses.

On the appeal, applicant's counsel acknowledges that none of the women owners of the firm are licensed, although Kendra Hart is now in the process of obtaining her license. Counsel argues that the company is not required by New York State to have licenses or certifications to conduct businesses, although a limited number of municipalities do have such a requirement. Thus, the need for a license is very small and if needed, the company would simply hire a licensee for any particular project. However, counsel points to nothing in the record that demonstrates any of the women owners possess the managerial experience or technical competence to manage the revenue generating functions of the firm, namely acquiring electrical contracting work or completing such work. Ms. Hart undoubtedly possesses the administrative skills to manage the office of the

firm, but nothing in the record shows that either she, or any of the other women owners, have the managerial experience or technical competence to manage the field operations of the firm.

In its response, the Division argues that the women owners of George J. Martin & Son, Inc. lacked the necessary managerial experience or technical competence to operate the firm because the application materials failed to provide evidence that the women owners possess the technical ability to evaluate Mr. Hart's work. Ms. Clarke states that the applicant provided only Mr. Hart's master electrician license (Exh. DED3) in response to her document request (Clarke affidavit, ¶25). The Division argues that nothing was provided to indicate that any of the woman owners had ever completed any training or earned any credential demonstrating any level of knowledge about performing electrical work and because of this, Ms. Hart must rely on the technical skills of her son.

Based on the evidence in the record, including the resumes provided and the license issued to Mr. Hart, the applicant failed to demonstrate that the women owners relied upon for certification have adequate managerial experience or technical competence to operate the business enterprise seeking certification, as required by 5 NYCRR 144.2(b)(1)(i). The Division's denial on this ground was based on substantial evidence.

CONCLUSIONS

1. The applicant failed to demonstrate that the women owners share in the risks and profits in proportion to their ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2).
2. The applicant failed to demonstrate that the women owners make decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).
3. The applicant failed to demonstrate that the women owners relied upon for certification have adequate managerial experience or technical competence to operate the business enterprise seeking certification, as required by 5 NYCRR 144.2(b)(1)(i).

RECOMMENDATION

The Division's determination to deny George J. Martin & Son, Inc.'s application for certification as a woman-owned business enterprise should be affirmed, for the reasons stated in this recommended order.

Matter of
George J. Martin & Son, Inc.

DED File ID No. 8942
Exhibit List

Exh. #	Description
DED1	Application
DED2	2015 federal tax returns
DED3	Master electrician's license of Brian Hart
DED4	Denial letter
A1	Application with attachments
A2	Division's discovery request dated 4/17/17
A3	Denial letter