

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

In the Matter

- of -

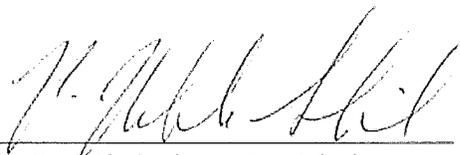
K1 Direct, LLC,

For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61551

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

June 25, 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 K1 Direct, LLC ("applicant") certification as a woman-owned business enterprise 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 K1 Direct, LLC challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

K1 Direct, LLC's application (Exh. DED1) was submitted on April 14, 2016.

The application was denied by letter dated April 4, 2017, from Raymond Emanuel, Director of Certification Operations (Exh. DED2). As explained in an attachment to Mr. Emanuel's letter, the application was denied for failing to demonstrate that K1 Direct, LLC is an independent business enterprise.

By letter dated May 8, 2017, counsel for the applicant appealed from the Division's denial and requested a hearing. This letter enclosed six attachments (Exh. A8).

By letter dated May 11, 2018, the Division notified K1 Direct, LLC that the hearing was scheduled for June 5, 2018.

On May 17, 2018, I was assigned to this matter.

On June 1, 2018, a conference call was convened with the parties to discuss the upcoming hearing.

On June 5, 2018 at 11:00 am, the hearing in this matter was convened at the Division's headquarters at 625 Broadway, Albany, New York. The applicant was represented by David G. Burch, Jr., Esq., and Colm Ryan, Esq. of the law firm Barclay Damon, LLP. The applicant called one witness, Karen LaFever, the owner of

the applicant. The Division was represented by Steven Gawlik, Esq., Senior Attorney, and called on witness, Raymond Emanuel, Director of Certification Operations. The hearing concluded at approximately 1:00 pm.

A recording of the hearing was received on June 6, 2018 at which time the record closed.

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.

On administrative appeal, the applicant bears the burden of proof to show its business meets the eligibility criteria for certification as a woman-owned business enterprise (see State Administrative Procedure Act § 306[1]). To meet its burden, applicant must show that the Division's denial 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 K1 Direct, LLC's application failed to demonstrate that applicant is an

independent business enterprise, as required by 5 NYCRR 144.2(a)(2) and (c)(2).

Position of the Applicant

K1 Direct, LLC 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. K1 Direct, LLC is in the business of providing flaggers along with traffic control equipment to ensure safety in construction work zones (Exh. DED1 at 3). K1 Direct, LLC has a business address of 5700 County Highway 18, Bloomville, New York (Exh. DED1 at 1).

2. K1 Direct, LLC was established on January 15, 2015 by Karen LaFever, who owns 100% of the firm (Exh. DED1 at 3). At the time the business was formed, Ms. LaFever made a [REDACTED] contribution to the firm from an inheritance she received (Exh. A1).

3. Ms. LaFever's husband, Duane LaFever, owns two other companies which are also located at 5700 County Highway 18, Bloomville, New York: (1) Delaware Bulldozing Corp.; and (2) Delaware Sand and Gravel (Exh. DED1 at 6). K1 Direct, LLC leases office space and storage space in an outbuilding from Delaware Bulldozing Corp. for [REDACTED] per month, which includes electricity, heat, water, one phone line, garbage collection, and the use of toilet facilities (DED4). The three businesses share: a front door, a reception area, office space, office equipment, office staff, and office supplies (Exh. A6). All three companies share a mobile phone plan (Exh. DED12 disc 1, track 1 at 37:30) and K1 Direct, LLC uses one of four desks and a file cabinet in the shared office (Exh. DED12 disc 1, track 1 at 23:30).

4. Karen LaFever is employed by Delaware Bulldozing Corp. as an office manager (Exh. DED1 at 5). She is also the office manager for Delaware Sand and Gravel (Exh. A6).

5. K1 Direct, LLC has a checking account from which both Mr. LaFever and Ms. LaFever have authority to write checks (Exh. DED6).

6. K1 Direct, LLC's balance sheet as of December 30, 2015 listed the firm's only asset as a checking account balance of [REDACTED] (Exh. DED8). The firm's profit and loss statement for 2015 showed no expenses for equipment rental (Exh. DED9).

7. The application stated that the two largest completed contracts were one with Delaware Bulldozing Corp. for [REDACTED] and one with [REDACTED] for [REDACTED] (Exh. DED1 at 4C). The only contract listed as active on the application was with Delaware Bulldozing Corp. for [REDACTED] (Exh. DED1 at 4D). In response to an inquiry on March 20, 2017 from the Division requesting the two most recent signed and executed contracts (Exh. DED1 at 9), the applicant provided two documents: a contract with [REDACTED] for [REDACTED] and a contract with Delaware Bulldozing Corp for [REDACTED] (Exh. DED7).

DISCUSSION

This report considers applicant's appeal 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 (Exh. DED2) sets forth a single basis related to the independence of K1 Direct, LLC, namely that the applicant failed to demonstrate that the applicant, K1 Direct, LLC, is an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) and (c)(2). In its denial letter, the Division cited the following relevant facts: (1) the applicant is a single-member LLC owned by Ms. Karen LaFever; (2) the applicant is primarily involved in providing flagging services on construction projects; (3) Ms. LaFever's husband, Duane LaFever owns Delaware Bulldozing Corp., an excavation contractor that does business from 5700 County Highway 18, Bloomville, New York; (4) the applicant leases office space, inclusive of utilities, office equipment, and other supplies from Delaware Bulldozing Corp. for [REDACTED] per month; (5) at the time of the application, the applicant owned no assets besides a small checking account balance; (6) as of the time of the application, the applicant derived the significant majority of its revenue

from Delaware Bulldozing Corp.; and (7) Ms. LaFever is employed as an office manager by Delaware Bulldozing Corp.

On the appeal, counsel for the applicant argues that K1 Direct, LLC is an independent business enterprise and should be certified as a WBE. In her testimony, Ms. LaFever did not dispute any of the facts relied upon by the Division in its denial letter. The dispute between the parties involves the characterization of the relationship between K1 Direct, LLC, and Delaware Bulldozing Corp and whether the two are independent of each other.

It is undisputed that K1 Direct LLC leases office space from Delaware Bulldozing Corp. The lease provides for an annual rent of [REDACTED] and includes electricity, heat, water, one phone line, parking, garbage collection, and use of toilet facilities (Exh. DED4). Ms. LaFever testified that it also includes space in a shed where equipment is stored (Exh. DED12, disc 1, track 1 at 38:30). Ms. LaFever, in her capacity as office manager for Delaware Bulldozing Corp., generated an invoice for the 2016 rent at the end of 2016 (Exh. DED12, disc 1, track 1 at 41:00, Exh. DED5 at 1), which she paid by a check from K1 Direct, LLC (Exh. DED5 at 2). She testified the lease is for space in the office used by both of her husband's businesses, Delaware Bulldozing Corp. and Delaware Sand and Gravel, and that K1 Direct, LLC occupies one of four desks and also has a filing cabinet (Exh. DED12, disc 1, track 1 at 23:30). A sheet listing the resources shared among the three businesses, which Ms. LaFever testified was accurate (Exh. DED12, disc 1, track 1 at 28:30), shows the sharing of: a front door; a reception area; office space; office equipment; office staff; and office supplies (Exh. A6). In addition, all three companies share a mobile phone plan (Exh. DED12, disc 1, track 1 at 37:30). Ms. LaFever testified that this arrangement was adequate but, in the future, if the business were to expand, she could move it to her house and operate out of the garage (Exh. DED12, disc 1, track 1 at 25:00).

In his testimony, Mr. Emanuel stated that after reviewing the shared resources statement (Exh. A6), it was apparent to him that K1 Direct, LLC was relying more on Delaware Bulldozing Corp. than was customary in the industry (Exh. DED12, disc 2,

track 1 at 7:00). He also cited the terms of the lease, which called for an annual rent, rather than the customary monthly payment, as well as the fact that the rent was paid at the end of the year and not in advance (Exh. DED12, disc 2, track 1 at 10:0). The fact that Ms. LaFever generated the invoice and is listed as the contact person for inquiries on behalf of the landlord also indicated that K1 Direct, LLC was not an independent business (Exh. DED5).

Mr. Emanuel also testified that the financial statements submitted by the applicant showed no assets, other than a checking account balance of [REDACTED] (Exh. DED8), and no expense related to equipment rental (Exh. DED9). He acknowledged that the equipment needed to conduct the applicant's business could be modest and include such items as traffic cones, barrels, safety vests, and hard hats (Exh. DED12, disc 2, track 1 at 27:00). However, the lack of any equipment on the applicant's books made him question how the firm generated its income (Exh. DED12, disc 1, track 2 at 28:30). Ms. LaFever testified that the firm owned certain safety equipment and could rent other equipment as necessary (Exh. DED12, disc 1, track 1 at 15:00), but did not discuss the fact that no equipment appeared on the firm's books. On cross examination, she did state that before K1 Direct, LLC was formed, Delaware Bulldozing Corp. used its own employees to flag its jobs (Exh. DED12, disc 1, track 1 at 32:45).

With respect to K1 Direct LLC's reliance on Delaware Bulldozing for a significant majority of its revenue, Mr. Emanuel testified that the application stated that the two largest completed contracts were one with Delaware Bulldozing Corp. for [REDACTED] and one with [REDACTED] for [REDACTED] (Exh. DED1 at 4C). The only contract listed as active on the application was with Delaware Bulldozing Corp. for [REDACTED] (Exh. DED1 at 4D). Upon reviewing this information, the Division requested the two most recent contracts (Exh. DED7), which showed one with [REDACTED] for [REDACTED] and a second with Delaware Bulldozing Corp. for [REDACTED]. Mr. Emanuel stated that this reliance on Delaware Bulldozing Corp. further showed that K1 Direct, LLC was not independent (Exh. DED12, disc 2, track 1 at 18:00).

Based on the evidence in the record, specifically the facts that at the time of the application the applicant shared significant resources with Delaware Bulldozing Corp., failed to show it owned any equipment, and relied on Delaware Bulldozing Corp. for a significant percentage of its revenue, the applicant has not demonstrated that K1 Direct, LLC, is an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) and (c)(2). The Division's denial was based on substantial evidence.

CONCLUSION

The applicant failed to demonstrate that K1 Direct, LLC is an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) and (c)(2).

RECOMMENDATION

The Division's determination to deny K1 Direct, LLC's application for certification as a woman-owned business enterprise should be affirmed, for the reasons stated in this recommended order.

Matter of K1 Direct, LLC
DED File ID No. 61551
Exhibit List

Exh. #	Description
A1	Capitalization check
A2	Letters from potential clients
A3	Estimates
A4	Invoices
A5	Invoices
A6	Shared resources sheet
A7	NYS quarterly tax forms
A8	Letter requesting appeal with six attachments
DED1	Application
DED2	Denial letter
DED3	Shared resources sheet
DED4	Lease
DED5	Rent invoice and check
DED6	Banking form
DED7	Estimates
DED8	Balance sheet
DED9	Profit and loss statement
DED10	Narratives
DED11	Resume of Karen LaFever
DED12	Recording of hearing