

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

In the Matter

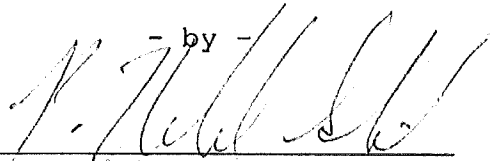
- of -

the Application of
Lasting Images Corp.
For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60824

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

December 4, 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 Lasting Images Corp. ("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 Lasting Images Corp. challenging the determination of the Division that applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Lasting Images Corp.'s application was submitted on July 9, 2015 (Exh. DED1).

The application was denied by letter dated December 9, 2016, from Bette Yee, Director of Certification Operations (Exh. DED8). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet two separate eligibility criteria related to Judy Kandel's ownership and operation of the applicant.

In a six-page letter dated February 27, 2017, Ms. Kandel appealed from the Division's denial. Included with the appeal were five exhibits, described in the attached exhibit chart as A1-A5.

In a six-page memorandum dated November 15, 2018, the Division responded to applicant's appeal. Included with the Division's papers were nine exhibits described in the attached exhibit chart as DED1-DED9.

On November 19, 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 two separate criteria for certification.

First, the Division found that applicant failed to demonstrate that the contribution of the woman owner, Judy Kandel, is 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 applicant failed to demonstrate that the woman owner, Judy Kandel, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

Position of the Applicant

Lasting Images Corp. 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. Lasting Images Corp. is in the business of providing general construction services, landscaping, and snow removal (Exh. DED1 at 3). The firm has a business address of 166 Nancy Drive, East Meadow, New York (Exh. DED1 at 1).

2. Lasting Images Corp. was formed on September 6, 1996 by Paul Kandel and on January 22, 1999, the stock in the firm was transferred to his wife, Judy Kandel, who retained ownership at the time of the application (Exh. DED1 at 2). Ms. Kandel paid nothing for the shares and no other contribution is claimed in the application materials (Exh. DED1 at 3, DED2, DED3, and DED4).

3. The application states that Judy Kandel manages all aspects of the business, including supervising field operations (Exh. DED1 at 4). However, none of the other documents in the record support this claim (Exh. DED5, DED6, and DED7). Information disclosed by Ms. Kandel during the phone interview with Division staff on December 9, 2016, indicates that it is Ms. Kandel's husband and son along with sub-contractors that supervise field operations (Exh. DED9 at 2:00).

DISCUSSION

This report considers the appeal of 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 two bases related to the Ms. Kandel's ownership and operation of Lasting Images Corp. Each basis is discussed individually, below.

Ownership

In its denial, the Division found that applicant failed to demonstrate that the contribution of the woman owner, Judy Kandel, is 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 letter are: (1) the firm was founded by Paul Kandel; (2) in 1999, Mr. Kandel gifted the firm to Judy Kandel; and (3) the application does not identify any contributions of money, property, equipment, or expertise by Ms. Kandel to the firm (Exh. DED8 at 2).

On appeal, Ms. Kandel does not dispute the facts that her husband founded the firm in 1996 or that he subsequently gifted it to her in 1999. Rather, she argues that she does not have to prove she made a financial contribution, as required by the regulations, because at the time of the gift the firm was suffering financial losses. She states that the Division failed to make a thorough inquiry which would include evaluating the net value-to-losses at the time of transfer. Since becoming the owner of the firm, she states she has improved the delivery of services to clients which have resulted in increased revenue. She concludes that because the business was not profitable at the time she received the shares, they were essentially worthless, and that while she did not claim any capital contribution to the firm, she did comply with the intent of the regulations.

In its response, the Division argues that because Ms. Kandel does not claim to have made any contribution to the firm, the application failed to meet the criteria set forth 5 NYCRR 144.2(a)(1). The Division points to several documents in the record, each of which state that Ms. Kandel made no contribution when she was given all the shares in the firm by her husband (Exh. DED1 at 2 & 3, DED2, DED3, and DED4). In response to claims on the appeal that improvements to the firm's delivery of services and revenue stream should be considered contributions, the Division responds that Ms. Kandel did not identify these claimed contributions in the application materials, nor was their value quantified. With respect to Ms. Kandel's claim that

because the business was not profitable at the time she took ownership, no proof of contribution is required, the Division concludes that this argument is not supported by any relevant law or regulation.

Based on the evidence in the record, specifically the fact that Ms. Kandel has failed to show she made any contribution to the firm, applicant has failed to demonstrate that the contribution of the woman owner, Judy Kandel, is 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 on this ground was based on substantial evidence.

Operation

In its denial letter, the Division found that applicant failed to demonstrate that the woman owner makes decisions pertaining to the operation of the enterprise, as required by 5 NYCRR 144.2(b)(1). The relevant facts cited in the denial letter were: (1) the firm is primarily engaged in providing general contracting, landscaping, and snow removal services; and (2) male individuals, including Ms. Kandel's husband and son, are solely responsible for supervising the field operations of the firm (Exh. DED8 at 2-3).

On appeal, Ms. Kandel states that the Division failed to properly review all the facts. Because she claims that the State regulations do not address this issue of control, she cites federal regulations for the Disadvantaged Business Enterprise and the federal definition of control of a business. She asserts that because her husband works full-time for another company (Exh. A4) and her son is a full-time student (Exh. A5), the Division failed to draw the reasonable inference that she is solely responsible for performing every critical aspect of the business activity of the firm. To support this claim, Ms. Kandel attached three letters from clients and associates (Exh. A1, A2, and A3). However, all of these letters are dated well after the denial letter was issued, and therefore, were not before the Division as part of the application and cannot be considered on appeal.

In its response, the Division argues that while Ms. Kandel indicated in the application that she managed the firm's field operations (Exh. DED1 at 4), she provided no evidence of this claim in the supporting information she submitted. The Division points to three documents that make no specific mention of the woman owner supervising field operations: Ms Kandel's resume (Exh. DED5); a narrative of Ms. Kandel's duties at the firm (Exh. DED6); and Ms. Kandel's work schedule (Exh. DED7). In addition, the Division notes that during her telephone interview Ms. Kandel stated that her husband, son, or subcontractors supervise the work in the field (Exh. DED9 at 2:00). With respect to applicant's reference to federal regulations, the Division notes that these regulations are not pertinent to this appeal, which is governed by State law. The Division concludes that Ms. Kandel has failed to demonstrate that her business meets the criteria set forth in 5 NYCRR 144.2(b)(1).

Based on the evidence in the record, specifically the fact that the record contains no support for Ms. Kandel's claim that she supervises field operations, applicant failed to demonstrate that the woman owner makes 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.

CONCLUSIONS

1. Applicant failed to demonstrate that the contribution of the woman owner, Judy Kandel, is 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. Applicant failed to demonstrate that the woman owner, Judy Kandel, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

RECOMMENDATION

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

Matter of
Lasting Images Corp.

DED File ID No. 60824
Exhibit List

Exh. #	Description
DED1	Application
DED2	Narrative of firm's history
DED3	Information regarding capital contributions
DED4	Information regarding sources of capitalization
DED5	Ms. Kandel's resume
DED6	Narrative of Ms. Kandel's duties
DED7	Narrative of Ms. Kandel's work schedule
DED8	Denial letter
DED9	Audio recording of telephone interview
A1	██████ letter
A2	██████ letter
A3	██████ letter
A4	2016 W2 forms for Paul Kandel
A5	Transcript for Philip Kandel