

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

In the Matter

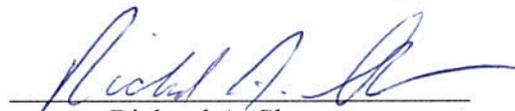
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the Application of **Long Island Vending & Service Co., Inc.**
d/b/a Consolidated Vending Enterprises
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 57077

RECOMMENDED ORDER

- by -



Richard A. Sherman
Administrative Law Judge

October 3, 2017

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 Long Island Vending & Service Co., Inc. d/b/a Consolidated Vending Enterprises ("Long Island Vending" or "applicant"), certification as a women-owned business enterprise ("WBE")¹ be affirmed for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal by applicant, pursuant to New York State Executive Law 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, challenging the determination of the Division that Long Island Vending does not meet the eligibility criteria for certification as a WBE.

The Division denied the application (exhibit 1) filed by Long Island Vending for WBE certification by letter dated December 22, 2016 (exhibit 2). The letter sets forth three grounds under 5 NYCRR 144.2 for the denial. Applicant filed a request for a hearing ("hearing request") by letter dated January 10, 2017. The Division advised applicant that the hearing on this matter would be held on September 5, 2017 (letter from the Division to applicant, dated June 19, 2017).

I convened the hearing at approximately 10:00 a.m. on September 5, 2017, at the Division's offices located at 633 Third Avenue, New York, New York. Renee Maiale, applicant's majority owner, appeared on behalf of Long Island Vending. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, represented the Division and called one witness, Glen Butler, a senior certification analyst for the Division. A list of the exhibits received during the hearing is appended to this report.

Consistent with 5 NYCRR 145.1(m), an audio recording of the hearing was made. A copy of the audio recording on compact disc ("CD") was provided to this office on September 6, 2017, whereupon, the hearing record closed.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a WBE are established by regulation (see 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted or denied WBE status, the ownership, operation, control, and independence of the business enterprise are assessed on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was

¹The term "women-owned business enterprise" applies to an enterprise that meets the requisite criteria on the basis of the ownership and control of one woman or of multiple women (see 5 NYCRR 140.1[tt] [defining a women-owned business enterprise as one that is, among other things, "at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women"]).

made, based on representations in the application itself, and on information revealed in supplemental submissions or 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 WBE certification for Long Island Vending 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

The Division cites three bases for the denial of Long Island Vending's application. First, the Division argues that applicant failed to establish that the woman owner, Renee Maiale, makes decisions pertaining to the operations of the business enterprise (exhibit 2 at 2 [citing 5 NYCRR 144.2(b)(1)]). Second, the Division argues that applicant failed to establish that the corporate bylaws and other business agreements permit Renee Maiale to make decisions without restrictions (exhibit 2 at 3 [citing 5 NYCRR 144.2(b)(2)]). And third, the Division argues that applicant failed to demonstrate through the production of signed contracts that Renee Maiale controls negotiations (exhibit 2 at 3 [citing 5 NYCRR 144.2(b)(3)]).

Position of Applicant

Applicant asserts that Renee Maiale has been the majority shareholder of Long Island Vending since its inception and that she has full control over all decision making for the company (hearing request). Applicant further asserts that, although other personnel may have responsibility for core functions of Long Island Vending, these personnel are supervised and managed by Renee Maiale (id.). Applicant acknowledges that the contract cited by the Division in its denial letter was signed by Ms. Maiale's husband, John J. Maiale. Applicant asserts that the contract was signed by Mr. Maiale because Ms. Maiale was out of state (id.). Lastly, applicant asserts that titles of employees "were given for business practices that unfortunately were not in favor of a woman president which has now caused some confusion" with regard to Long Island Vending's eligibility for WBE certification (id.).

FINDINGS OF FACT

1. Long Island Vending is a corporation, established in 1992, and is in the business of vending machine sales and service, ATM installation and service, and micro markets² (exhibit 1 at 2 [items 1.R], 3-4 [items 5.A-D]; exhibit 4 at 12 [Long Island Vending bylaws, dated May 27, 1992]; CD 3:50 [Butler testimony regarding business activities of applicant]; CD 14:00 [Maiale testimony regarding business activities of applicant]).

2. Renee Maiale is the vice president and owner of 51% of Long Island Vending (exhibit 1 at 3 [item 3.A]; CD 3:35, 15:00 [Maiale testimony that having John J. Maiale as president and Renee Maiale as vice president is "how we always did it"]).

3. John J. Maiale, Renee Maiale's husband, is the president and owner of 16% of Long Island Vending (exhibit 1 at 3 [items 3.A, 3.D]; CD 15:00 [Maiale testimony that having John J. Maiale as president and Renee Maiale as vice president is "how we always did it"]).

4. John R. Maiale, Michael Maiale, and Joseph Maiale, Renee Maiale's sons, hold various positions within the company and each owns 11% of Long Island Vending (exhibit 1 at 3 [items 3.A, 3.D]; exhibit 1 at 7 [narrative description of work performed by each of the Maiales for Long Island Vending personnel]).

5. The only contract submitted by applicant as part of its WBE application was signed by John J. Maiale as president of Long Island Vending (exhibit 5 at 7; CD at 9:00 – 9:35 [Butler testimony that he requested applicant's three largest contracts and was only provided one contract, which was signed by John J. Maiale as president]).

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of Long Island Vending as a WBE pursuant to Executive Law Article 15-A. The Division cites three bases in support of upholding the denial, each of which is discussed below.

Operation: Decisions Pertaining to Operations

The eligibility criterion at issue provides that "[d]ecisions pertaining to the operations of the business enterprise must be made by . . . women claiming ownership of that business enterprise" (5 NYCRR 144.2[b][1]).

The Division argues that applicant failed to demonstrate that Renee Maiale makes decisions pertaining to the enterprise's core functions, particularly decisions related to the selling, operation, and maintenance of applicant's products and services (exhibit 2 at 2; CD at 6:10). These core functions, the Division asserts, are undertaken by Renee Maiale's husband and sons

² As explained at the hearing, a micro market is a kiosk stocked with food and beverages, including refrigerated and frozen items, that is unstaffed and has automated checkout (CD at 14:00).

(exhibit 2 at 2; CD at 5:05, 6:30; 22:25). The Division also asserts that Renee Maiale's roll is primarily administrative (CD at 6:00).

Applicant asserts that Renee Maiale has always been the decision-maker for Long Island Vending and has always run the company (CD at 12:30, 13:30). Applicant also asserts that, although male family members undertake certain core functions of the business, they are all supervised and managed by Renee Maiale (hearing request; CD at 13:30, 26:50). In addition, applicant asserts that John J. Maiale no longer works full time for Long Island Vending and that he now generally works as needed and attends conventions (CD at 16:55).

The application materials support the Division's determination that applicant failed to establish that Renee Maiale makes decisions pertaining to Long Island Vending's core business functions. Although the application states that Renee Maiale undertakes "[g]eneral oversight of all operations," the application also states that responsibility for most of applicant's core business functions is shared among Renee Maiale's husband and sons (exhibit 2 at 7 [narrative description of work performed by Long Island Vending personnel]). The functions attributed to the male family members include: sales, networking, marketing, scheduling deliveries, and ordering and managing inventory (id.).

Applicant failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that decisions pertaining to the operations of Long Island Vending are not made by Renee Maiale as required by 5 NYCRR 144.2(b)(1).

Control: Corporate Documents

The applicable regulatory criterion states that the enterprise's "[a]rticles of incorporation, corporate bylaws, partnership agreements and other agreements . . . must permit minority group members or women who claim ownership of the business enterprise to make [decisions pertaining to business operations] without restrictions" (5 NYCRR 144.2[b][2]).

Applicant's bylaws state that the "president shall . . . appoint, discharge, and determine the compensation of all employees . . . shall sign and execute all contracts in the name of the corporation . . . and shall supervise and control the business and affairs of the corporation" (exhibit 4, art IV, § 4.a; see also CD at 8:20 [Butler testimony regarding president's role under applicant's corporate bylaws]).

The application expressly states that John J. Maiale, Renee Maiale's husband, is the president of Long Island Vending (exhibit 1 at 3 [items 3.A, 3.D]; see also CD at 7:40 [Butler testimony regarding applicant's president]). Additionally, the only contract provided to the Division by applicant is signed by John J. Maiale as president of Long Island Vending (exhibit 5 at 7; see also CD at 9:05 [Butler testimony regarding the signature on contract]).

Applicant concedes that the documents submitted with the application state that John J. Maiale is president and has control of the company (CD at 11:20, 11:35, 16:50). Applicant asserts, however, that John J. Maiale was named president for business reasons because some

clients expected a male to be president (CD at 12:50). Applicant further asserts Renee Maiale is "technically the president," but does not use that title (CD at 21:25).

Notably, applicant proffered a copy of the minutes from the first board meeting of Long Island Vending. The minutes, from June 22, 1992, name Renee Maiale president and John J. Maiale as vice president (exhibit 6 at 20 [as numbered]). The minutes, however, were not provided with the application materials and were not before the Division at the time of its determination to deny the application (see CD at 11:20; 24:00). Additionally, as noted by Division counsel, the 1992 minutes may not reflect the current officers of the corporation, and do not reflect the current ownership of the corporation as set forth in the application (CD at 24:00; see also exhibit 1 at 3 [item 3.A (listing the five current owners); exhibit 1 at 7 [narrative of applicant's history noting that, at one time, a non-family member held a one-third ownership interest in Long Island Vending]).

Although the 1992 board minutes indicate that Renee Maiale was named president of Long Island Vending in 1992, the minutes were not provided to the Division with the application materials. Further, the application materials that were provided to the Division at the time of the denial identify John J. Maiale as the president of Long Island Vending.

Applicant failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that Long Island Vending's corporate governance documents do not authorize Renee Maiale to make business decisions without restriction, as required by 5 NYCRR 144.2(b)(2).

Control: Control of Negotiations

The regulatory criterion states that the applicant must demonstrate that the women owners have "control of negotiations . . . through production of relevant documents" (5 NYCRR 144.2[b][3]).

As discussed above, the documents before the Division at the time of its determination to deny the application identified John J. Maiale as applicant's president. The Division notes that applicant's corporate bylaws expressly provide that the president "shall sign and execute all contracts" (exhibit 4, art IV, § 4.a; exhibit 2 at 3; CD at 23:35). The Division further notes that the only contract that was provided with the application materials was signed by John J. Maiale, in his capacity as president (exhibit 2 at 3; CD at 24:50). The Division argues that these factors support its determination that applicant failed to produce documents to demonstrate that Renee Maiale controls negotiations (*id.*).

Applicant concedes that the Division's position is consistent with the documents that applicant submitted with its application (CD at 11:20, 11:35, 16:50).

Applicant failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's

determination that the documents produced by applicant do not show that Renee Maiale controls negotiations as required by 5 NYCRR 144.2(b)(3).

CONCLUSION

Applicant failed to meet its burden to demonstrate that the record lacks substantial evidence to support the Division's determination to deny Long Island Vending's application on the bases of whether the woman owner, Renee Maiale, (i) makes decisions pertaining to the operations of the business enterprise (see 5 NYCRR 144.2[b][1]); (ii) is permitted by corporate governance documents to make decisions pertaining to business operations without restrictions (5 NYCRR 144.2[b][2]); and (iii) controls negotiations (see 5 NYCRR 144.2[b][3]).

RECOMMENDATION

For the reasons stated herein, the determination of the Division to deny Long Island Vending, Inc. certification as a women-owned business enterprise should be affirmed.

Matter of Long Island Vending Security
DED File ID No. 57077

Exhibit List

Exh. #	Description
1	Long Island Vending WBE Application, submitted June 29, 2016
2	Department WBE Denial Letter to Long Island Vending, dated December 22, 2016
3	Resume of Michael Maiale
4	Long Island Vending bylaws, dated May 27, 1992
5	Contract between Long Island Vending and Farmingdale Auxiliary Service Corp.
6	Minutes of First Meeting of the Board of Directors of Long Island Vending
7	Various business documents relating to Long Island Vending operations