

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

In the Matter

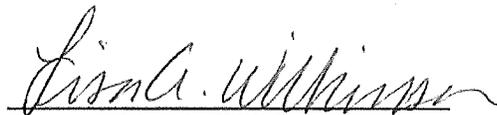
- of -

the Application of **Mahopac Auto Paint & Body Supply Corp.**  
for Certification as a Minority and Women-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 73353

RECOMMENDED ORDER

- by -



Lisa A. Wilkinson  
Administrative Law Judge  
January 30, 2019

## SUMMARY

This report recommends that the determinations of the Division of Minority and Women's Business Development ("Division") of the New York State Department of Economic Development to deny Mahopac Auto Paint & Body Supply Corp. (Mahopac or applicant) certification as a women-owned business enterprise (WBE)<sup>1</sup> be affirmed for the reasons set forth below.

## PROCEEDINGS

This matter involves the appeal by Mahopac 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 Mahopac does not meet the eligibility criteria for certification as a WBE.

The Division denied Mahopac's application for WBE certification (Exhibit DED 1) by letters dated July 17, 2017 (Exhibit DED 2). The denial letter set forth two grounds under 5 NYCRR 144.2 for the denial. According to the Division:

- (1) applicant failed to demonstrate that the women owner shares in the risks and profits in proportion to her ownership interest in the business enterprise (*see* 5 NYCRR 144.2[c][2] [Ownership]); and
- (2) applicant failed to demonstrate that women owner controls negotiations through the production of relevant documents (*see* 5 NYCRR 144.2[b][3] [Control]).

On July 28, 2017, Dawn Oddo, on behalf of applicant, appealed from the denial (DED Exhibit 3). The Division responded by letter dated September 17, 2018, advising applicant that a hearing had been scheduled at its offices in New York, New York, for October 2, 2018 at 10:00 a.m. Subsequently, the hearing was rescheduled to November 6, 2018.

The hearing took place on November 6, 2018 at the Division's offices at 633 Third Avenue, New York, New York. Dawn Oddo and Janette Gentile-Talbot appeared and testified on behalf of applicant. Division staff was represented by Gretchen Robinson, Esq., Assistant Counsel. Abdul Karim Bah, a senior certification analyst employed by the Division, testified on behalf of the Division.

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<sup>1</sup> The 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, inter alia, "at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women"]).

The hearing was recorded by Division staff. The recording was provided to Administrative Law Judge (“ALJ”) Lisa Wilkinson on two compact discs. References to testimony from the hearing are identified by the disc number, and track number, if applicable, and the time on the recording at which the testimony occurs (“HR Disc \_\_”). The Division presented 11 exhibit, all of which I accepted into evidence. Applicant presented 15 exhibits, 12 of which I accepted into evidence. A list of exhibits is attached to this recommended order.

### **ELIGIBILITY CRITERIA**

The eligibility criteria pertaining to certification as a minority and women-owned business enterprise are established by regulation (*see* 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted WBE status, the ownership, control, and operation, of the business enterprise are assessed on the basis of the information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information revealed in supplemental submissions and any interviews that the Division’s analyst may have conducted. (5 NYCRR 144.5[a].)

### **STANDARD OF REVIEW**

On this administrative appeal, applicant bears the burden of proof to establish that the Division's denial of Mahopac’s application for 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**

#### *Division*

The Division’s denial letter asserts that applicant failed to meet two criteria for certification as a woman-owned business enterprise. First, the Division asserts that the woman owner does not share in the risks and profits of the business enterprise in proportion to her ownership interest (5 NYCRR 144.2[c][2]). According to the Division, Ms. Oddo’s husband, Dominick Oddo, received significantly greater compensation from Mahopac during the 2016 tax year than did Ms. Oddo. In addition, the Division asserts that the woman owner does not control negotiations (5 NYCRR 144.2[b][2]) as evidenced by the fact that the contracts

submitted with the WBE application were signed by the spouse of the woman owner. The Division requests that its determination to deny WBE certification to be upheld.

Applicant

Ms. Oddo, on behalf of applicant, contests the Division's denial of the WBE application. Ms. Oddo states that she has worked at a reduced salary for years to meet the cash flow needs of a growing business and that all of the income earned by her and her husband is deposited into a joint bank account. Ms. Oddo also contends that the contracts at issue were executed in 2010 and 2012 and do not reflect current business practices. Ms. Oddo states that since 2013, Janette Gentile-Talbot has handled all new contracts for Mahopac. (DED Exhibit 3.)

**FINDINGS OF FACT**

1. Mahopac Auto Paint & Body Supply Corp., DBA Mahopac Auto Paint (Mahopac), is located at 912 Route 6, Mahopac, New York 10541 (Exhibit DED 1, § 1.D).
2. Mahopac is an automotive supply company that provides products and services, including industrial coatings, tools and equipment to automotive, industrial, fleet and rail businesses (Exhibit DED 1, §§ 3.B. and 3.C).
3. The primary NAICS classification number for Mahopac is NAICS 42 - Wholesale Trade (Exhibit DED 1, § 3.D).
4. Dawn Oddo is the president of Mahopac. Her husband, Dominick Oddo is the secretary. (Exhibit DED 1, §§ 2.A, 2.F.)
5. As of the date of the application, Dawn Oddo and Dominick Oddo held a 51% and 49% interest in Mahopac, respectively (Exhibit DED 1, § 2.D).
6. Mahopac was established on May 1, 1976 by Mary Oddo, Dominick Oddo's mother (HR Disc 2 39:03).
7. Dawn Oddo worked at Mahopac during summer vacations while attending high school and college and returned to Mahopac in 1995 after her husband completed his career in the military. From 1995 to 2008, Ms. Oddo worked as the comptroller. She was responsible for accounts receivable, accounts payable and payroll and implemented inventory and financial control systems. In 2014, Dawn Oddo became president of Mahopac and acquired a majority shareholder interest in the business enterprise. (HR Disc 2 at 39:08; Exhibit DED 4.)

Ownership: risks and profits

8. According to the 2015 federal income tax return for Mahopac, Dawn Oddo received [REDACTED] in compensation and Dominick Oddo received [REDACTED] in compensation (Exhibit DED 6 [Form 1125-E]); Exhibit DED 10 [US Individual Income Tax Return] [reporting [REDACTED] in taxable income received on jointly filed tax return for Dawn and Dominick Oddo]).
9. According to the 2016 federal income tax return for Mahopac, Dawn Oddo received [REDACTED] in compensation and Dominick Oddo received [REDACTED] in compensation (Exhibit DED 7 [Form 1125-E]).

Operation and Control

10. Ms. Oddo is responsible for financial decisions, negotiating insurance, hiring and firing, managing and signing payroll, negotiating contracts (Exhibit DED 1 § 4.A). According to Ms. Oddo's resume, she is responsible for all accounts receivable, payroll, the budget, forecasting, human resources, negotiating contracts, and strategic initiatives (Exhibits DED 4 and 5).
11. Dominick Oddo is the secretary of Mahopac. He manages purchasing equipment and sales. He co-manages marketing and sales with Janette Talbot and is a co-signatory on business accounts with Dawn Oddo. (Exhibit DED 1 § 4.A.) According to Mr. Oddo's resume, he manages business development and strategic initiatives (Exhibit DED 4).
12. Janette Talbot is listed in the WBE application as the chief operating officer and is also identified in documents as a process improvement specialist. She is responsible for the development and implementation of standard operating procedures, business development and strategic initiatives. Ms. Talbot manages estimating projects, bid preparation, and negotiating bonding. She co-manages marketing and sales with Dominic Oddo. (Exhibits DED 1 § 4.A; DED 4; DED 5).
13. Melissa Licone is the supervisor of field operations, according to the WBE application, and is also listed as the customer services manager, responsible for customer service, delivery scheduling and freight management. (Exhibits DED 1 § 4.A and 5.)
14. Dominick Oddo signed the contract between Mahopac and the [REDACTED] with a purchase amount of [REDACTED] and a contract term of March 3, 2015 to June 5, 2017 (Exhibit DED 8).

15. Dominick Oddo signed a purchase order with [REDACTED] on February 25, 2016 with a purchase amount of [REDACTED] (Exhibit DED 9).

## DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification as a minority and women-owned business enterprise, pursuant to Executive Law Article 15-A. 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 provided in supplemental submissions and interviews that are conducted by Division analysts (*see* 5 NYCRR 144.5).

### Ownership: Risks and Profits

The Division determined that Ms. Oddo does not share in the risks and profits of Mahopac in her ownership interest, as required by 5 NYCRR 144.2(c)(2) (*see* Exhibit DED 2 at 2). According to Mahopac's 2015 and 2016 federal income tax returns, Dominick Oddo, the owner of 49% of the outstanding common stock, received significantly greater compensation than Dawn Oddo, the woman owner and majority shareholder (*see* Finding of Facts Nos. 10 and 11). Staff's determination is consistent with the court's determination in *Matter of C.W. Brown, Inc. v Canton* (216 AD2d 841, 843 [3d Dept 1995]), where the court held that staff's review of tax returns, such as those considered in this matter, was substantial evidence to support the Division's determination whether an application for WBE certification meets the eligibility criterion for ownership. The Division staff's determination, based on Mahopac's income tax returns, that Ms. Oddo does not share in the profits of Mahopac in proportion to her ownership interest in the business is rational and should be affirmed.

Ms. Oddo testified that the compensation received by her and her husband is deposited into a joint bank account and constitutes family income (HR Disc 2 at 39:03). Although this arrangement may make sense for the family's management of its finances, it presents an issue for certification in terms of applicant demonstrating that Ms. Oddo receives proportionately more income than her husband as required by 5 NYCRR 144.2(c)(2). Ms. Oddo also testified that the Division should take into account her contributions to the business enterprise, including significant contributions from retirement accounts to fund business operations, through which she has taken on significant risk. Indeed, applicants exhibits establish Ms. Oddo's premature withdrawal from her individual retirement account were deposited into the checking account of Mahopac (*see* Exhibits APP 5, 6, and 7). Although Ms. Oddo has assumed financial risk through her monetary contributions to the business enterprise, it is not clear whether this information was before the Division at the time it made its determination. Moreover, the loan documents provided by applicant were issued to both Dawn Oddo and Dominick Oddo, showing equal assumption of liability on some borrowings (*see* Exhibits APP 1 and 11). Ms. Oddo's

contributions to Mahopac are not relevant on this appeal, in any case, because the Division did not deny the application pursuant to 5 NYCRR 144.2(a)(1) based on applicant's failure to demonstrate that Ms. Oddo made a proportionate contribution to the business enterprise.

Whether Ms. Oddo shares proportionately in the profits of Mahopac is a distinct certification criterion (*see* 5 NYCRR 144.2[c][2]) from her contribution to the business enterprise (*see* 5 NYCRR 144.2[a][1]). According to the Division's regulations, "[t]he ownership and control by the minority group member or woman must be real, substantial and continuing and must go beyond the pro forma ownership of business as reflected in the ownership documents. The minority group member or woman owner shall enjoy the customary incidents of ownership and must share in the risks and profits, in proportion with their ownership interest in the business enterprise" (5 NYCRR 144.2[c][2]). The Division interprets this provision to require that the woman owner share in the profits of the business enterprise proportionately with her ownership interest. The administrative record does not demonstrate that Ms. Oddo shares in 51% of profits of Mahopac.

This case presents the unique circumstance that Dominick Oddo, the spouse of the woman owner, is also a member of a protected class pursuant to Executive Law article 15-A (*see* Executive Law § 310 [8] [defining of minority group member as a United States citizen or permanent resident alien who is and can demonstrate Hispanic heritage]). Because Dominick Oddo is a member of a minority group, his ownership of a business enterprise could be the basis for its certification as a minority business enterprise under Executive Law Article 15-A. Mr. Oddo's status, however, does not provide justification for Mahopac to be certified as a WBE if Ms. Oddo cannot demonstrate compliance with applicable certification requirements.

Neither Executive Law article 15-A nor the Division's certification regulations provide for a blended minority-woman business enterprise certification to cover businesses that have both a woman owner and an owner who is male and a member of a minority group. The minority or woman owner of a business enterprise seeking certification must demonstrate compliance with each applicable certification requirement. Thus, Ms. Oddo cannot rely on the fact that her husband is Hispanic to avoid the requirement in 5 NYCRR 144.2(c)(2) that she receive a proportionate share of the profits of Mahopac. For Mahopac to be certified as a WBE, Ms. Oddo must receive at least a 51% share of the profits. The only way a business enterprise could be certified as both a WBE and a MBE is if it is owned by a woman who is also a minority group member and meets all certification requirements. Because Ms. Oddo is not a member of a minority group, Mahopac can only qualify for one certification under Executive Law article 15-A and 5 NYCRR 144.2, depending on whether Ms. Oddo or Mr. Oddo is the majority shareholder. If Mahopac wants to pursue a WBE certification, it must demonstrate, among other things, that Ms. Oddo receives no less than 51% of the profits of Mahopac. If Mahopac decides to pursue MBE certification, it will need to demonstrate that Mr. Oddo satisfies the certification criteria for ownership, in addition to meeting the other certification requirements.

Control

A business enterprise seeking WBE certification must demonstrate that the woman owner controls the business enterprise (5 NYCRR 144.2[b]). The Division assesses three factors in making this determination, including: (1) whether the woman owner makes decisions pertaining to the operations of the business; (2) whether the applicable legal documents permit the woman owner to make decisions for the business enterprise without restrictions; and (3) whether the woman owner demonstrates control of negotiations, signature authority for payroll, leases, letters of credit, insurance bonds, banking services and contracts, and other business transactions through the production of relevant documents (5 NYCRR 144.2[b][1]-[3]). Focusing on the third factor (5 NYCRR 144.2[b][3]), the Division determined that Ms. Oddo did not demonstrate control of negotiations because the contracts Mahopac submitted to the Division were signed by, or addressed to, Dominick Oddo (*see* Exhibit DED 2).

Mr. Bah testified that he considered the resumes of Dawn Oddo and Dominick Oddo and determined Mr. Oddo was more involved in the core, revenue generating functions of the business while Ms. Oddo focused on day to day administrative duties (HR Disc 1 at 32:21). Since 2015, Dominick has worked at Mahopac as a sales manager and corporate secretary, responsible for strategic growth and business development. From 2004 until 2008 he worked in sales. (Exhibit DED 4.) Ms. Oddo has been the comptroller-president of Mahopac since 2014, responsible for accounts receivable and accounts payable, budget forecasting, strategic initiatives, financial management and growth initiatives, and negotiating contracts. She held the position of comptroller from 1995 to 2014 and was responsible for payroll, accounts receivable and payable, and inventory management. Ms. Oddo has a Bachelor of Science in Accounting. (Exhibit DED 4.) Based on his review of the resumes, Mr. Bah testified that he felt Ms. Oddo was not sufficiently involved the core functions of the business and requested copies of Mahopac three largest contracts to assess control of the business enterprise (HR Disc 1 at 33:51).

Mr. Bah testified that the Division is interested in who signs contracts because that is an indicator of who controls negotiations, a factor the Division considers when assessing whether the woman owner controls a business enterprise (HR Disc 1 at 35:05). The Division submitted two contracts for my consideration at the hearing. One of the contracts was with [REDACTED], dated March 3, 2015 to May 5, 2017, and was signed by Dominick Oddo as an authorized signature (Exhibit DED 8). The other was a purchase order with [REDACTED], dated February 25, 2016, was also signed by Dominick Oddo (Exhibit DED 9). The amount of the [REDACTED] contract was [REDACTED]; the value of the [REDACTED] purchase order was [REDACTED]. The Division determined based on this information that Ms. Oddo does not exercise control over negotiations.

In the case of an application for WBE certification, the Division routinely considers who executes contracts in evaluating whether the woman owner controls negotiations. Ms. Oddo stated in her appeal letter that the contracts at issue were executed in 2010 and 2012, and that since 2013 she has delegated contracting duties to Janette Talbot (*see* DED Exhibit 3). The administrative record, however, does not support this contention. DED Exhibits 8 and 9, which were submitted by applicant, and relied on by the Division, were executed after 2013 and were not signed by Ms. Talbot or Ms. Oddo. Applicant did not produce additional evidence at the hearing to rebut the Division's finding that Ms. Oddo does not sign contracts. Notwithstanding any contrary information contained in the application concerning Ms. Oddo's management of negotiating contracts (*see* Exhibit DED 1, § 4.A), the Division could reasonably conclude based on the information applicant submitted that Ms. Oddo does not control negotiations, as she is required to do pursuant to 5 NYCRR 144.2(b)(3). I note that the substantial evidence standard requires that a given inference is reasonable and plausible, not that it is necessarily the most probable (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]). Because applicant failed to demonstrate that the Division's conclusions and factual determinations were not supported by reasonable proof, I must uphold the Division's determination.

If Mahopac decides to reapply for WBE certification, it will have the opportunity to address this issue through the submission of updated resumes, more recently executed contracts, and other documents necessary to demonstrate that Ms. Oddo controls negotiations as well as the other management functions set forth in 5 NYCRR 144.2(b)(3).

### **CONCLUSION**

The Division's determination that applicant has not met the ownership criteria in 5 NYCRR 144.2(a)(1) or control of negotiations as set forth in 5 NYCRR 144.2(b)(3) is supported by substantial evidence.

### **RECOMMENDATION**

The Division's determination to deny Mahopac's application for WBE certification should be affirmed for the reasons stated in this recommended order.

Attachment: Exhibit List

**MATTER OF MAHOPAC AUTO PAINT & BODY SUPPLY CORP.  
DED FILE No. 10789**

**EXHIBIT LIST**

Exhibit No.	Description	Rec'd
DED 1	Certification Application	Y
DED 2	Denial Letter	Y
DED 3	Applicant Appeal	Y
DED 4	Resumes of Ms. Dawn Oddo, Mr. Dominick Oddo, and Ms. Janette Talbot	Y
DED 5	Duty Narrative for Mahopac Auto Paint Key Employees	Y
DED 6	2015 Mahopac Tax Returns	Y
DED 7	2016 Mahopac Tax Returns	Y
DED 8	 Contract	Y
DED 9	 Purchase Order	Y
DED 10	2015 Personal Income Tax Return Dominick and Dawn Oddo	Y

Exhibit No.	Description	Rec'd
DED 11	2016 Personal Tax Return Dominick and Dawn Oddo	Y
APP 1	Line of Credit Letter September 14, 2016	Y
APP 2	Payroll Statement October 11, 2018	N
APP 3	Payroll Statement February 3, 2016	Y
APP 4	Health Insurance Renewal Letter September 18, 2018	N
APP 5	401K Statement Withdrawal and Bank Deposit 2013	Y
APP 6	401K Statement Withdrawal and Bank Deposit 2014	Y
APP 7	401K Statement withdrawal and Bank Deposit 2018	Y
APP 8	Newspaper Article	Y
APP 9	Lease Renewal April 19, 2016	Y
APP 10	Email Exchange with Mr. Bah June 22, 2017	Y
APP 11	Line of Credit December 22, 2014 Dominick and Dawn Oddo	Y

Exhibit No.	Description	Rec'd
APP-12	Credit Card Statement	Y
APP-13	Bid Award PO Email February 23, 2018	N
APP-14	[REDACTED] Bid Quote Request Email January 24, 2018	N
APP-15	Direct Deposit Bank Statement December 12, 2016	Y