

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

In the Matter

- of -

the Application of GLB Interiors, LLC
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 57454

RECOMMENDED ORDER

- by -



Maria E. Villa
Administrative Law Judge

March 1, 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 GLB Interiors, LLC ("GLB" or "applicant") certification as a woman-owned business enterprise ("WBE") 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 GLB does not meet the eligibility criteria for certification as a WBE.

The Division denied GLB's application for WBE certification (Division Exhibit 1) by letter dated January 9, 2017. Division Exhibit 2. The denial letter stated that GLB's application had been denied because GLB had not demonstrated that it was an independent business enterprise, as required by Section 144.2(a)(2) and (c)(2) of 5 NYCRR. By letter dated February 6, 2017, applicant appealed from the Division's determination to deny the application. Division Exhibit 3. By letter dated November 13, 2017, the Division notified applicant that a hearing had been scheduled for December 5, 2017. Division Exhibit 4.

The hearing took place as scheduled on December 5, 2017. The Division was represented by Phillip Harmonick, Esq., and called Abdul Bah and Natia Simon, both senior certification analysts for the Division. Applicant was represented by Joanna J. Chen, Esq., of the law firm of Phillips Lytle LLP. Gina Fahey testified on applicant's behalf. Both applicant and the Division submitted exhibits, and those exhibits were marked and received into evidence. A chart of those exhibits is attached. The hearing was recorded, and a copy of the recording was provided to the administrative law judge on January 12, 2018, at which point the record closed.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a women-owned business enterprise 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, and control of the business enterprise are assessed based upon 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, on information revealed in supplemental submissions, and if appropriate, on interviews conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of GLB's MWBE 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 argued that applicant failed to demonstrate that GLB is an independent business enterprise, pursuant to Section 144.2 of 5 NYCRR. Exhibit 2. The Division cited the following “relevant facts” in the denial letter:

- The application states that GLB Interiors, LLC (“GLB”) is primarily engaged in “office & commercial furniture dealer/distributor, space-planning and design services, [and] delivery and installation.”
- GLB does business from the same street address as Millington Lockwood, Inc. (“Millington Lockwood”), an office furniture distributor offering design, planning, and installation services. The two firms share office space and equipment.
- GLB makes use of warehouse facilities of Millington Lockwood without a lease.

■ [REDACTED]

Division Exhibit 2, at 2.

Applicant

Applicant contended that GLB was an independent business enterprise. According to applicant, the Division had overlooked or misapprehended several points during the Division’s review of the application. Specifically, applicant disputed the Division’s assertion that GLB uses warehouse facilities without a lease. Applicant stated that GLB’s use of warehouse facilities is governed by a written fee structure agreement. Applicant went on to state that “[n]onetheless, in the interest of full cooperation with the Division, GLB is in the process of revising the fee structure agreement to more specifically set forth the fixed fee and terms of use regarding GLB’s use of warehouse facilities.” Division Exhibit 3, at 2.

With respect to the Division’s assertion that GLB does not [REDACTED], and subcontracts certain work to Millington Lockwood, applicant stated that Gina Fahey, GLB’s owner and president, “maintains full control over management accounting, financing, marketing, and project procurement for GLB.” Division Exhibit 3, at 2. According to applicant, GLB’s use of Millington Lockwood as a subcontractor was a vendor requirement of Herman Miller, Inc., a furniture vendor with whom GLB partners. Applicant indicated that “notwithstanding the foregoing, as GLB grows its business, it continues to explore the feasibility of hiring additional employees and offering more services.” Division Exhibit 3, at 2.

Finally, applicant disputed the Division's statement that GLB does business from the same street address as Millington Lockwood, and shares office space and equipment. Applicant stated that GLB leases a separate suite from Millington Lockwood and pays a fee, pursuant to a written agreement, for all office services. Applicant indicated that "GLB is nonetheless in the process of obtaining new office space with a different landlord, which will be subject to a new lease agreement." Division Exhibit 3, at 2.

FINDINGS OF FACT

1. GLB was established in 2012 and is an office and commercial furniture dealer/distributor, offering space-planning and design services, delivery and installation. Division Exhibit 1, at 3.

2. Gina Fahey is the sole owner. Division Exhibit 1, at 3. [REDACTED]. *Id.* Ms. Fahey's father owns Millington Lockwood and Richway Refinishing. Division Exhibit 1, at 9 (Response 7(a)). Millington Lockwood and Richway Refinishing are located at 3901 Genesee Street, Buffalo, New York, and GLB Interiors occupies Suite 600, at the same location.

3. GLB leases office space from Richway Refinishing for [REDACTED] per month. Division Exhibit 8. GLB's office is accessed through the Richway Refinishing warehouse. Division Exhibits 9, 9A and 10. The lease agreement between GLB and Richway does not specify the square footage of Ms. Fahey's office space, and does not state that Ms. Fahey has access to the warehouse space. Division Exhibit 8. Ms. Fahey regularly accesses the warehouse space as part of GLB's operations, and brings clients into that space approximately 2-3 times per week. Disc 2, Hearing Recording ("HR") at 33:39.

4. GLB subcontracts with Millington Lockwood and Richway Refinishing for design, delivery and installation services, pursuant to a Design, Delivery & Installation Fee Structure Agreement dated December 9, 2015. Division Exhibit 12.

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of GLB as a woman-owned business enterprise¹ pursuant to Executive Law Article 15-A. Section 144.2(c)(2) of 5 NYCRR states that "an eligible minority group member or woman applicant must be an independent business enterprise." The Division stated in its denial letter that applicant "failed to demonstrate that the business enterprise for which certification is sought is an independent business enterprise." Division Exhibit 2, at 2.

The denial letter pointed out that GLB operates from the same location as Millington Lockwood. Division Exhibit 2, at 3. Millington Lockwood and Richway Refinishing are

¹ The term "women-owned business enterprise" applies to an enterprise that meets the requisite criteria based upon the ownership and control of one woman or of multiple women (*see* Section 140.1(tt) of 5 NYCRR (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"))).

located at 3901 Genesee Street, Buffalo, New York. Both companies are owned by Ms. Fahey's father. Division Exhibit 1, at 9, Response 7(a); Disc 2, HR at 59:20. The denial letter stated further that GLB makes use of Millington Lockwood's warehouse facilities without a lease. Nevertheless, in his prefiled testimony, Mr. Bah referred to Division Exhibit 8, a document entitled "Richway Refinishing Property Rental Agreement." Bah Prefiled, A22. That document, executed on February 4, 2013 and revised on January 4, 2016, states that applicant rents "the property at 3901 Genesee Street, Suite 600, on a month to month basis" for [REDACTED] per month. Division Exhibit 8.

In his prefiled testimony, Mr. Bah noted that the agreement does not describe what sort of space, or how much space, is included in Suite 600. Bah Prefiled, at A23. In addition, GLB's office space does not have an exterior door, and Suite 600 is accessed through the interior of the Millington Lockwood warehouse. Division Exhibits 9, 9A, and 10; Disc 1, HR at 49:20. In applicant's February 6, 2017 letter requesting a hearing, applicant indicated that GLB was in the process of obtaining new office space with a different landlord. Division Exhibit 3. At the December 5, 2017 hearing, applicant did not indicate that GLB was now operating out of a different location.

At the hearing, Ms. Fahey testified that she pays above market value for the space that she leases from Richway Refinishing. Disc 2, HR at 31:20. Although Ms. Fahey testified that she was "somewhat familiar" with customary commercial leases, her testimony is not sufficient to substantiate her claims regarding the usual rental cost per square foot of office space in GLB's location. Disc 3, HR at 11:30. Applicant has the burden to show that GLB pays market value, or in this case, above market value, for the space that GLB rents from Richway Refinishing. Applicant did not offer evidence of other commercial leases, or testimony or documentation that would be sufficient to meet that burden. Moreover, the record does not indicate that any information regarding payment of rent above market value was before the Division as part of the review of GLB's application.

Ms. Fahey testified further that the agreement allows her to access the warehouse and showroom. Disc 3, HR at 9:55. In support of this contention, Ms. Fahey referred to Section 3 of the agreement ("Utilities"). That provision states only that "[u]tilities are included in the rental agreement, including: water, power gas, phone service and internet. The maintenance and function of these utilities are the responsibility of Landlord." Division Exhibit 8, at 1. The language of the agreement does not support applicant's assertion.

Although the property rental agreement states that rent is to be paid by the first of the month, it appears from the record that the arrangement is more informal. Specifically, applicant's exhibits show that invoices that reflect rent payments are often paid later than the first of the month. Applicant's Exhibits 6b and 9 (check dated March 14, 2016 includes payments for January and February's rent; check dated April 4, 2016 includes payment for March rent; check dated April 28, 2016 includes payment for April rent; check dated July 5, 2016 includes payment for May and June's rent); Disc 2, HR at 28:19.

Applicant's argument that the agreement was drawn by Mr. Conley, Richway's representative, and therefore any irregularities in the document should be attributed to the drafter, is unavailing. Disc 3, HR at 18:45. The document was provided as part of the

application, and any information outside the terms of the written agreement concerning the square footage of the office, the market value of the space, and access to the premises included, was not before the Division during the review of the application. It was reasonable for the Division to conclude that the property rental agreement did not substantiate GLB's claim that GLB was operating as an independent business enterprise.

With respect to the arrangements among GLB, Richway Refinishing, and Millington Lockwood, applicant referred to Division Exhibit 12, a December 9, 2015 design, delivery and installation fee agreement. Mr. Bah testified that "payment arrangements between the firms appear to have been adopted during the course of Ms. Fahey's application, and there are inconsistencies between the terms of the agreements, the checks, and the tax returns Ms. Fahey filed with the IRS." Bah Prefiled, A45.

GLB's application stated that the company [REDACTED]. Division Exhibit 1, at 2. In her application interview with Ms. Simon, Ms. Fahey stated that as a startup, proximity and access to the Millington Lockwood/Richway Refinishing facility is advantageous, because GLB can minimize overhead costs. Applicant also indicated that its subcontracting agreement with Millington Lockwood for design, delivery and installation services is intended to allow GLB "to keep overhead costs low by outsourcing service on an as-need [sic] basis rather than [REDACTED]." Division Exhibit 1, at 8, Response 7. In applicant's interview, she stated that if the business was going through a "rough patch" she would not have to consistently pay a designer or installer on staff. December 29, 2016 applicant interview at 13:25. At the hearing, Ms. Fahey testified that because of her office location, she does not have to invest in showroom furniture or have a larger demonstration space. Disc 2, HR at 37:15.

At the hearing, Ms. Fahey discussed the design, delivery and installation agreement among GLB, Millington Lockwood, and Richway Refinishing, stating that the services GLB paid for included warehousing of customer products. Ms. Fahey testified further that she partnered with Millington Lockwood because they are an authorized dealer for the Herman Miller line of office furnishings. Disc 2, HR at 12:50. GLB is also an authorized dealer, and Herman Miller sales account for [REDACTED] of GLB's business. Disc 2, HR at 8:45, 12:10. Ms. Fahey discussed the "receipt, delivery and installation" subcontracting agreements which she testified were typical in the industry, where dealerships do not stock product. Disc 2, HR at 48:59.

In response, the Division argued that GLB is uniquely dependent upon Richway Refinishing and Millington Lockwood, and relies upon those businesses for work, or the performance of work. GLB's arguments concerning the customary practice in the industry notwithstanding, in the Buffalo area, GLB relies upon Richway Refinishing and Millington Lockwood. The record as a whole supports the conclusion that GLB's application does not meet the requirements of Section 144.2(c)(2) of 5 NYCRR.

As the Division pointed out, the requirement that a business enterprise be independent ensures that the Division confers program benefits upon minority and women-owned businesses that are most likely to have experienced discrimination in the marketplace, rather than those that enjoy benefits from a connection to a non-WBE firm. See Skyline Specialty,

Inc. v. Gargano, 294 A.D.2d 742, 742 (3rd Dept. 2002) (statute requires that business enterprise be independently owned and operated).

On appeal, applicant has the burden to demonstrate that the Division's denial was not based upon substantial evidence, and that burden has not been met. Based upon the information provided in the application, it was reasonable for the Division to conclude that GLB was dependent upon two businesses owned by Ms. Fahey's father. The Division's determination was supported by substantial evidence.

CONCLUSION

As discussed above, applicant did not meet its burden to demonstrate that the Division's determination to deny GLB's WBE application for certification was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny GLB's application for certification as a women-owned business enterprise should be affirmed, for the reasons stated herein.

Matter of GLB Interiors, LLC
DED File ID No. 57454
Exhibit List

| Exhibit No. | Description | Received? |
|-------------|--|-----------|
| 1 | August 26, 2016 application | ✓ |
| 2 | January 9, 2017 denial letter | ✓ |
| 3 | February 6, 2017 notice of appeal | ✓ |
| 4 | November 13, 2017 letter scheduling hearing | ✓ |
| D 5 | Invoice No. 1516 (5/4/2015) | ✓ |
| D 6 | Invoice No. 1893 (12/19/2015) | ✓ |
| D 7 | Proposal (5/10/2016) – Evergreen Association | ✓ |
| D 8 | Richway Refinishing Property Rental Agreement | ✓ |
| D 9 | Drawing (Warehouse/Showroom) | ✓ |
| D 9A | Drawing (Warehouse/Showroom) with witness markings | ✓ |
| D 10 | Photographs from site visit | ✓ |
| D 11 | August 25, 2016 narrative re: delivery of goods to clients | ✓ |
| D 12 | Millington Lockwood/Richway Refinishing Design, Delivery & Installation Fee Structure Agreement (December 9, 2015) | ✓ |
| D 13 | Purchase Order 1323-2309 | ✓ |
| D 14 | Photocopies of checks | ✓ |
| D 15 | 2015 federal individual tax return | ✓ |
| D 16 | CD recording of interview | ✓ |
| A 5 | Gina Fahey Resume | ✓ |
| A 6 | Supplemental documents for recertification application dated August 26, 2016 | ✓ |
| A 6a | Richway Refinishing Property Rental Agreement | Duplicate |
| A 6b | Cancelled checks; filing receipt – NYS DOS (certificate of assumed name) | ✓ |
| A 6c | Fee Structure Agreement, Purchase Orders, Cancelled Checks | ✓ |
| A 6d | Herman Miller Office Furniture Dealer Agreement, Certification application affidavit, invoices, GLB NYS registration | ✓ |
| A 7 | November 28, 2017 letter from Herman Miller (good standing) | ✓ |
| A 8 | May 5, 2013 certification application | ✓ |
| A 9 | Statements of remittance | ✓ |