

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

In the Matter

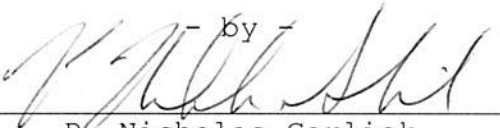
- of -

the Application of
PSI Plumbing, Inc.
For Certification as a Minority-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 58853

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

August 8, 2016

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 PSI Plumbing, Inc. ("applicant") for certification as a minority-owned business enterprise ("MBE") 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 PSI Plumbing, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a minority-owned business enterprise.

PSI Plumbing, Inc.'s application was submitted on July 15, 2014 (Exh. DED1).

The application was denied by letter dated August 20, 2015, from Bette Yee, Director of Certification Operations (Exh. DED2). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet two separate eligibility criteria related to Javier Torres's ownership and control of the applicant.

The applicant timely requested a hearing on the Division's denial.

On December 1, 2015, I was assigned this matter.

By letter dated December 16, 2015, the Division notified the applicant that the appeal hearing would occur on February 2, 2016.

On December 17, 2015, this matter was reassigned to Administrative Law Judge Molly T. McBride.

By letter dated January 18, 2016, Javier Torres, on behalf of the applicant, requested a postponement of the hearing. The request was granted and the hearing was rescheduled for July 5, 2016.

On June 30, 2016, ALJ McBride convened a telephone conference with the parties to discuss the upcoming hearing.

On July 1, 2016, this matter was re-assigned to me.

On July 5, 2016 at 11:00 am, the hearing in this matter was held at the Division's offices located at 633 Third Avenue, New York, NY 10017. The Division was represented by Phillip Harmonick, Esq. who called one witness, Division Analyst Cleneice Mincey. The applicant was represented by Javier Torres, vice president of the applicant, who appeared and testified on behalf of the applicant. The hearing concluded at approximately noon.

The record of this matter closed on July 20, 2016 with the receipt of the audio recording of the hearing (Exh. DED6).

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied minority-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 MBE 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 the applicant failed to demonstrate that the minority owner Javier Torres's capital contributions are proportionate to his 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 the applicant failed to demonstrate that the corporate documents and relevant business agreements permit the minority owner, Javier Torres, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

Position of the Applicant

PSI Plumbing, Inc. asserts that it meets the criteria for certification and that the Division erred in not granting it status as a minority-owned business enterprise pursuant to Executive Law Article 15-A.

FINDINGS OF FACT

1. PSI Plumbing, Inc. is in the business of providing commercial and residential plumbing and heating services. It has a business address of 28 West 44th Street, 16th floor, New York, New York. (Exh. DED1 at 1-3).

2. PSI Plumbing, Inc. was established on February 1, 1999 by Michael Tchejeyan who contributed \$100,000 to the firm (Exh. DED1 at 2). On October 31, 2013, Mr. Tchejeyan sold 51% of the stock in the firm to Javier Torres, who made no cash contribution to the firm, but contributed his master plumber license (Exh. DED1 at 2).

3. Mr. Tchejeyan is the president of PSI Plumbing, Inc. and Mr. Torres is the vice president (Exhs. DED1, DED4 & DED5). The by-laws of the corporation state that the president shall be

the chief executive officer of the corporation and shall have general charge of the entire business. The by-laws further state that the vice present shall have such powers and duties as delegated to him by the president. (Exh. DED3 at 13).

4. A shareholder's agreement signed by Mr. Tshejeyan and Mr. Torres states that certain actions of the corporation, including the sale of stock, creation of indebtedness in excess of \$100,000, and the amendment of the corporation's certificate of incorporation may only be undertaken with the consent of shareholders owning 100% of the stock (Exh. DED5 at 3). This document also names Mr. Tshejeyan as president and cannot be altered except with the agreement of Mr. Tshejeyan (Exh. DED5 at 1, 14).

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification as a minority-owned business enterprise pursuant to Executive Law Article 15-A. The Division's denial letter set forth two bases related to Mr. Torres's ownership and control of PSI Plumbing, Inc. Each basis is discussed individually, below.

Ownership

In its denial letter, the Division determined that the applicant failed to demonstrate that the minority owner Javier Torres's capital contributions are proportionate to his 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).

At the hearing, Ms. Mincey testified that she had reviewed the application materials and determined that the applicant had not shown that Mr. Torres had made a capital contribution to the firm (Exh. DED6 at 13:30). The application states that the firm was established on February 1, 1999 with a \$100,000 contribution from Mr. Tchejeyan and that on October 31, 2013, Mr. Torres contributed \$0 in the form of his master plumber license (Exh. DED1 at 2). She stated that the applicant did not submit any information showing Mr. Torres had made a contribution of funds

to the firm (Exh. DED6 at 14:00), nor was any information presented quantifying the value of Mr. Torres's license.

At the hearing Mr. Torres stated that he believed that the applicant met certification standards and entered a binder full of exhibits (listed in the attached exhibit chart) but he did not specifically discuss his capital contribution and none of his exhibits address this point either.

Based on the evidence in the record and the discussion above, the applicant has failed to demonstrate that the minority owner Javier Torres's capital contributions are proportionate to his 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).

Control

The second ground for denial cited by the Division was that the applicant failed to demonstrate that the corporate documents and relevant business agreements permit the minority owner, Javier Torres, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

In her testimony, Ms. Mincey stated that documents submitted with the application show that Mr. Tchejeyan is the president of PSI Plumbing, Inc. and Mr. Torres is the vice president (Exhs. DED1, DED4, DED5, & DED6 at 14:00). She testified that the by-laws of the corporation state that the president shall be the chief executive officer of the corporation and shall have general charge of the entire business and further state that the vice present shall have such powers and duties as are delegated to him by the president (Exhs. DED3 at 13 & DED6 at 16:20). These documents showed that Mr. Torres was not able to make business decisions without restrictions (Exhs. DED5 at 1 & 14 & DED6 at 17:20).

Ms. Mincey also testified that a shareholder's agreement signed by Mr. Tshejeyan and Mr. Torres states that certain actions of the corporation, including the sale of stock, creation of indebtedness in excess of \$100,000, and the amendment of the corporation's certificate of incorporation may only be undertaken with the consent of shareholders owning 100%

of the stock (Exh. DED5 at 3). This document also demonstrates that Mr. Torres does not control the business, as required for certification as a minority owned business (Exh. DED6 at 17:30).

At the hearing Mr. Torres stated that he believed that the applicant met certification standards and entered a binder full of exhibits (listed in the attached exhibit chart) but he did not specifically discuss the issue of his control over the applicant and none of his exhibits refute the information provided in Ms. Mincey's testimony.

Based on the evidence in the record, including the corporation's by-laws and the shareholder agreement, the applicant failed to demonstrate that the corporate documents and relevant business agreements permit the minority owner, Javier Torres, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

CONCLUSIONS

1. The applicant failed to demonstrate that the minority owner Javier Torres's capital contributions are proportionate to his 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. The applicant failed to demonstrate that the corporate documents and relevant business agreements permit the minority owner, Javier Torres, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

RECOMMENDATION

The Division's determination to deny PSI Plumbing, Inc.'s application for certification as a minority-owned business enterprise should be affirmed, for the reasons stated in this recommended order.

**Matter of
PSI Plumbing, Inc.**

**DED File ID No. 58853
Exhibit List**

Exh. #	Description
DED1	Application
DED2	Denial letter
DED3	Applicant's by-laws
DED4	Minutes of annual meeting held September 20, 2013
DED5	Shareholders' s agreement
DED6	Recording of hearing
A1	MWBE Application for NYC program
A2	Resumes of Javier Torres and Michael Tscheleyan
A3	Business signature card
A4	Applicant's financial statements from 2013 and 2014
A5	Applicant's corporate tax returns for 2013, 2014, & 2015
A6	Mr. Torres's birth certificate
A7	Professional licenses held by Mr. Torres
A8	Applicant's lease
A9	Various contracts
A10	Additional contracts

A11	Information related to the applicant's vehicles
A12	Duplicate of A6
A13	Information relating to the applicant's finances, including canceled checks, loan documents
A14	Letter regarding bonding of applicant
A15	Applicant's certificate of incorporation
A16	New York State Department of State filing receipt
A17	Applicant's by-laws
A18	New York State Tax Department Certificate of Authority
A19	Shareholder's agreement
A20	Stock certificates
A21	Corporate minutes dated October 1, 2013