

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

In the Matter

-of-

the Application of Pro Tile Distributors, Inc.
For Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61887

RECOMMENDED ORDER

-by-

A handwritten signature in black ink, appearing to read 'J. Bernbach', is written over a horizontal line. The signature is stylized and cursive.

Jeffrey M. Bernbach
Administrative Law Judge

December 11, 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 Pro Tile Distributors, Inc. ("Pro Tile" or "applicant") certification as a women-owned business enterprise ("MWBE")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 Pro Tile does not meet the eligibility criteria for certification as a MWBE.

The Division denied the application (Exhibit 4) filed by Pro Tile for MWBE certification by letter dated June 15, 2017 (Exhibit 1). The letter sets forth 3 grounds under 5 NYCRR 144.2 for the denial. Applicant filed a notice of appeal dated July 20, 2017. The Division advised applicant that the hearing on this matter would be held on September 27, 2018 (letter from the Division to applicant, dated September 10, 2018).

I convened the hearing at approximately 10:00a.m. on September 27, 2018, at the Division's offices located at 633 Third Avenue, New York, NY. Jennifer Giannini-Leavy, Lisa Costa and Angela Lisciandra appeared, and provided testimony on behalf of Pro Tile, and Mark A. Rubeo, Jr., applicant's counsel, appeared and cross-examined the Division's witness and made opening and closing statements on behalf of the applicant. Gretchen Robinson, Esq., Senior Counsel, New York State Department of Economic Development, represented the Division and called one witness, Glenn Butler, a senior certification analyst for the Division. A list of 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 a compact disc ("CD") was provided to the undersigned on or about October 25, 2018, and written post-hearing submissions were submitted by counsel on October 9, 2018 and October 26, 2018, respectively, whereupon, the hearing record was closed.

¹ 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, among other things, "at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women"].

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a MWBE are established by regulation (see 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted or denied MWBE 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 made, based on representations in the application itself, and on information provided 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 MWBE certification for Pro Tile is not supported by substantial evidence (see State Administrative Procedure Act Section 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 denial of Pro Tile's application. First, the Division argues that applicant failed to demonstrate that the women owners' contribution, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise is proportionate to their equity interest in the business enterprise (5 NYCRR section 144.2 (a)(1)); second, the Division argues that the women owners do not share in the risks and profits in proportion with their ownership interest in the business enterprise (5 NYCRR section 144.2(c)(2)); and, third, the Division argues that the women owners do not make decisions pertaining to the operation of the business enterprise (5 NYCRR section 144.2(b)(1)).

Position of Applicant

As discussed more fully below, applicant argues that the women owners do in fact meet all requisite criteria for certification.

FINDINGS OF FACT

1. Jennifer Giannini-Leavy, Lisa Costa and Angela Lisciandra, the daughters of Louis Giannini, each own 18 percent of the outstanding shares of common stock in Pro Tile.

2. Louis Giannini, a male, owns 46% of the outstanding shares of common stock of Pro Tile.
3. The 3 women owners listed above, who did not contribute money in exchange for their equity interest in Pro Tile, contend that they contributed commensurate expertise in exchange for their respective ownership interests in Pro Tile.

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of Pro Tile as a woman owned business enterprise pursuant to Executive Law Article 15-A. The Division cites three bases in support of the denial, each of which is discussed below.

At the outset, before even turning to the specific criteria on which the Division based its denial of certification, it is necessary to address the substantial evidence standard applicable to review of said denial. Applicant relies on a definition thereof set forth in 300 Gramatan Ave. Assoc. v. State Division of Human Rights, 45 N.Y. 2d 176, 179, 408 N.Y.S. 2d 54 (1978), which is less restrictive than that set forth in subsequent decisions, such as Matter of Ridge Rd Fire Dist. V. Schiano, referred to above, and in the very recent decision in Matter of Haug v. State Univ. of N.Y. at Potsdam, 2018 N.Y. Slip. Op. 06964 (October 18, 2018). In this Article 78 proceeding, the Court of Appeals, in addressing the concept of substantial evidence in the context of a judicial appeal from an administrative hearing at which evidence was taken, observed as follows: the administrative decision makers' findings are to be accorded deference; courts have no right to review the facts as to the weight of the evidence to be given them; the substantial evidence standard is a minimal standard and requires only that a given inference is reasonable and plausible, not necessarily the most probable; and there can be substantial evidence on both sides of an issue or to support various conclusions - all of which serves to reinforce to an applicant, the inherent difficulty faced in seeking to reverse a determination based upon the substantial evidence standard.

In addition, it must be noted that family owned businesses, which by their very nature often operate with a less formal structure than non-family owned businesses, will sometimes find it more difficult to obtain certification than non-family owned businesses; especially, in light of the mission of the Division which is to assist small and frequently start-up businesses owned by minorities and women to succeed despite discrimination they may experience.

Turning now to the specific grounds for denial of certification:

The contribution of women is not proportionate to their equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise. 5 NYCRR section 144.2(a)(1).

I find that the Division's conclusion that the application did not include any evidence that any of the women owners of Pro Tile made a contribution to the business is not supported by substantial evidence. As applicant correctly argues, based on their education and prior work experience, including having worked at Pro Tile, each of the women provided valuable expertise to the business enterprise. While acknowledging at the hearing the nature of such contributions, the Division's witness sought to contest the value thereof; specifically disputing the notion that the value of such individual contribution was sufficient to warrant the percentage of ownership received in exchange therefor. When pressed to justify the basis for his conclusion, the Division's witness could only assert that it was based on his general knowledge of what businesses are worth. Under the circumstances, I find such testimony vague and unsupported by evidence in the record and, therefore, insufficient to meet the substantial evidence standard.

While the Division correctly argues that the transfers of shares of stock were for tax purposes characterized on Louis Giannini's tax return as gifts from Louis Giannini to his daughters and that no specific dollar value was assigned to the contributions of expertise by the daughters in exchange for their shares of stock, neither alters my conclusion. First, the taxable nature of the transfers of stock involves entirely different criteria and consequences from those attendant with the issue of whether the daughters provided adequate expertise in exchange therefor sufficient to satisfy the requirements of the NYCRR. Thus, I find that "gifts" for tax purposes are neither automatically inconsistent with, nor mutually exclusive from, a determination that the daughters' contributions of expertise in exchange for their shares of stock was sufficient. And, second, while it is correct that the women did, in fact, fail to assign a specific numerical value to their expertise and qualifications, any attempt to have done so under the circumstance of their application would at best be arbitrary and based on mere speculation, as will generally be so in similar cases. I find it inherent in the application that the respective contributions of experience and qualifications is claimed to be sufficient to warrant the transfers of shares to the daughters. Were I to conclude otherwise, such would effectively preclude women and/or minority family members in particular from relying on contributions of expertise to justify ownership in a family owned business. Should this, in fact, be the Division's intent, then it should be reflected in the statute itself.

Women do not share in the risks and profits in proportion to their ownership interest in the business enterprise. 5 NYCRR section 144.2(c)(2)

While it may well be that the women owners do, in fact, share equally in the risks and profits in proportion with their ownership interest in the business enterprise, the Division's finding that they do not is a direct result of defects in the application materials submitted by applicant, which defects applicant acknowledged at the hearing and for which the applicant itself must bear consequences. Applicant failed to submit W-2 forms and, as admitted by applicant at the hearing, the corporate tax return reflected only salary paid to Louis Giannini, while showing no salaries paid to his daughters. Applicant argues that this was apparently some type of error on its part, but the fact remains that this was the documentation submitted in support of their request. While applicant argues that the K-1 Profit Distributions portion of applicant's 2016 tax return shows distributions consistent with the percentage of ownership among Louis Giannini and his daughters, such does not fill the evidentiary void regarding salary

information. In such circumstances, it cannot be said that the Division's denial is not based on substantial evidence.

Women do not make decisions pertaining to the operation
of the business enterprise. 5 NYCRR section 144.2(b)(1)

It is essentially undisputed in the record that applicant's President Jennifer Giannini-Leavy oversees all sales, operations and financial and administrative functions of the business, including payroll, accounting, accounts payable and credit and customer relations; that Vice President Lisa Costa acts as marketing manager, creating, planning and overseeing print and electronic media advertising, managing the website and email accounts and creating sales tools for company products; and, that applicant's Secretary, Angela Lisciandra, supervises all administrative support staff and manages project documents and the database. The issue arises with respect to what the Division considers the core functions of the business - - warehousing logistics and customer service - - which, according to the application were the job duties of Director of Operations Peter Milo. Ms. Giannini-Leavy testified convincingly that she, not Mr. Milo, had the final decision making authority on those matters, and that she, not Milo, had the exclusive authority to hire and fire employees and to enter into contracts and to otherwise bind Pro Tile. Thus, while there is evidence, and, considering that such is only a "minimal standard," even substantial evidence, on both sides of the issue, under the substantial evidence standard on review, I am constrained from according weight to conflicting evidence. Even if I were to conclude that applicant's testimony at the hearing is the more persuasive evidence, I am required under the substantial evidence standard to accord deference to the Division's finding and not simply substitute my view of the competing evidence for that of the Division; and thus must recommend that the Division's determination be affirmed.

CONCLUSION

Applicant has not met the burden of demonstrating that the record lacks substantial evidence to support the Division's determination to deny Pro Tile's application on two of the three bases it relied upon.

RECOMMENDATION

For the reasons stated herein, the determination of the Division to deny Pro Tile Distributors, Inc. certification as a woman owned business enterprise should be affirmed.

Matter of Pro Tile Distributors, Inc.

DED File ID No. 61887

Exhibit List

Exhibit #	
1	Denial Letter
2	Appeal Letter
3	Notice of Appeal Hearing
4	Pro Tile's Application
5	Applicant Resumes
6	Applicant's Quarterly Report
7	June 5 Q & A Responses
8	2016 Corporate Tax Returns
9	Louis and Carol Giannini's Gift Tax Return for 2012
10	Louis and Carol Giannini's Gift Tax Return for 2016