

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

In the Matter

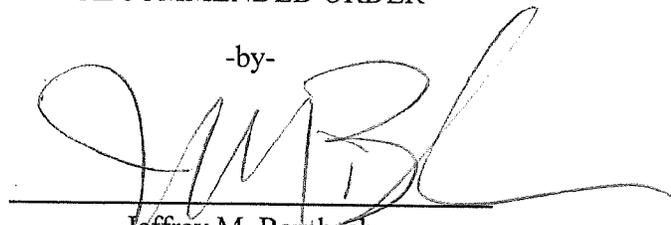
-of-

the Application of Red Hook Sign & Electric Corp.
For Certification as a Minority and Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61419

RECOMMENDED ORDER

-by-

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

Jeffrey M. Bernbach
Administrative Law Judge

April 25, 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 Red Hook Sign & Electric Corp. ("Red Hook" or "applicant"), certification as a minority and 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 Red Hook does not meet the eligibility criteria for certification as a MWBE.

The Division denied the application (Exhibit 1) filed by Red Hook for MWBE certification by letters dated May 11, 2017 (Exhibit 10). The letters set forth 3 grounds under 5 NYCRR 144.2 for the denial. Applicant filed a notice of appeal dated June 5, 2017. The Division advised applicant that the hearing on this matter would be held on March 1, 2018 (letter from the Division to applicant, dated February 13, 2018).

I convened the hearing at approximately 10:00a.m. on March 1, 2018, at the Division's offices located at 633 Third Avenue, New York, NY. Sandra Fernandez and Argentina Pena appeared, and Sandra Fernandez provided testimony on behalf of Red Hook. Ms. Fernandez cross examined the Division's witness and made opening and closing statements on behalf of the applicant. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, represented the Division and called one witness, Alan Cuthbreath, 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 March 8, 2018, 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[t]) [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"]. The term minority owned business enterprise is one that is, among other things, at least 51 percent owned by one or more United States citizens or permanent resident aliens who are minority group members (see 5 NYCRR 140.1(a)(a)).

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 Red Hook 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 Red Hook's application. First, the Division argues that applicant failed to demonstrate that female- minority owner Sandra Fernandez makes decisions pertaining to the operation of the business enterprise (citing 5 NYCRR section 144.2(b)(1)). Second, the Division argues that applicant failed to establish Sandra Fernandez that has demonstrated adequate managerial expertise or technical competence to operate the business enterprise (5 NYCRR section 144.2(b)(1)(i)). Third, the Division argues that applicant failed to establish that Red Hook is an independent business enterprise (5 NYCRR section 144.2(a)(2)(c)(2)).

Position of Applicant

Applicant argues that she manages the business, handles all administrative matters and, although she has no training or experience with respect to sign installation, such is not necessary for her to supervise the installers as she does.

FINDINGS OF FACT

1. Red Hook is primarily engaged in fabricating and installing signs.

2. Sandra Fernandez, a minority female, is owner of 100% of the shares of Red Hook.
3. Ms. Fernandez is primarily responsible for managing the administrative and financial affairs of Red Hook.
4. Ms. Fernandez's professional experience prior to joining Red Hook was administrative in nature (See Exhibits 5 & 6).
5. Ms. Fernandez has no training, experience or licenses relevant to sign installation.
6. A sign hanging business must be licensed by the New York City Department of Buildings (See Exhibit 2).
7. There are only 43 sign installers licensed by the City of New York (See Exhibit 2).
8. Jeffrey Woods, Vice President of Red Hook and holder of a sign hanging license, is primarily responsible for managing projects, including sign fabrication and installation of signs (See Exhibit 4).
9. Gregory Vekker, Vice President of Red Hook, is primarily responsible for preparing proposals and making presentations to potential clients of Red Hook.
10. During the year 2015, Red Hook had no employees other than Ms. Fernandez and incurred \$ [REDACTED] in contractor costs. Total costs of goods sold was \$ [REDACTED] (Exhibits 7 & 8).

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of Red Hook as a minority and 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.

Operation: (1) Decisions Pertaining to Operations and (2) Adequate Managerial Experience or Technical Competence to Operate the Business Enterprise.

The eligibility criteria at issue provides (a) that "decisions pertaining to the operations of the business enterprise must be made by minorities or women claiming ownership of that business enterprise" (5 NYCRR 144.2 [b][1]), and (b) that minority-women owners "have adequate managerial experience or technical competence in the business enterprise seeking certification." (5 NYCRR 144.2[b][1][i]).

The Division argues essentially that applicant failed to demonstrate that Sandra Fernandez makes decisions pertaining to the business and that she lacked the necessary experience or technical competence to operate the business enterprise's core functions - - sign fabrication and installation. Applicant argues essentially that Ms. Fernandez supervises the fabrication and installation of signs, despite having no technical training or experience with respect thereto, as such training and experience is not necessary for such supervision.

The evidence establishes that fabrication and installation of signs especially is a highly specialized and potentially dangerous enterprise. If not properly installed, signs hanging above sidewalks and roadways present a potentially serious risk of falling. Thus, New York City requires sign installers to be licensed by the Department of Buildings, which has issued only 43 such licenses, reflecting the limited number of persons possessing the requisite qualifications.

I find it entirely counter-intuitive to conclude that Ms. Fernandez is qualified or able to supervise sign installers in the absence of any technical training or experience doing so. I find that sign fabrication and installation is managed by Jeffrey Woods (who is specifically licensed to do so). And, thus, I find that the Division's determination is supported by substantial evidence.

Independent Business Enterprise

The eligibility criterion at issue provides that the applicant must be "an independent business enterprise (5 NYCRR section 144.2(a)(2)(c)(2)). I find that the Division's determination that Red Hook is not an independent business enterprise is supported by substantial evidence. The evidence demonstrates that Red Hook was not able to complete work on its own, and, thus, was not independent. During calendar year 2015, it had only a single employee, Sandra Fernandez (See Exhibits 7 & 8). It subcontracted \$ [REDACTED] (on a gross cost of services of \$ [REDACTED]) worth of work to other businesses. Ms. Fernandez testified that the work in question was performed by a sister company, RH Media Services, which is engaged in production, printing and brokerage. In 2015, it had several employees - - some of whom subsequently became employees of Red Hook - - so that Red Hook had 8 employees in 2017 and 12 employees in 2018. Ms. Fernandez conceded that she had not made the Division aware of the foregoing and that in response to the Division's request for a list of subcontractors, she supplied only checks for payments to two subcontractors in the amounts of \$ [REDACTED] and \$ [REDACTED], respectively. In the end, it is of no moment whether the work was performed by employees of the sister company, as RH Media Services is not the applicant herein, nor is it even mentioned in the application.

CONCLUSION

Applicant has not met the burden of demonstrating that the record lacks substantial evidence to support the Division's determination to deny Red Hook's application on the bases stated.

RECOMMENDATION

For the reasons stated herein, the determination of the Division to deny Red Hook Sign & Electric Corp. certification as a minority-woman owned business enterprise should be affirmed.

Matter of Red Hook Sign & Electric Corp.

DED File ID No. 61419

Exhibit List

Exhibit #	
1	Red Hook Sign & Electric Corp, application, submitted August 12, 2015
2	NYC Buildings Department license for Jeffrey Woods
3	Master License for Peter Fotiadis, Sr.
4	Listing of NYC Master Sign License holders
5	Resume of Sandra Fernandez
6	Division's request for Fernandez narrative of duties
7	Red Hook Form NYS 45
8	Red Hook Tax Return
9	Red Hook checks to contractors
10	Letters of denial