

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

In the Matter

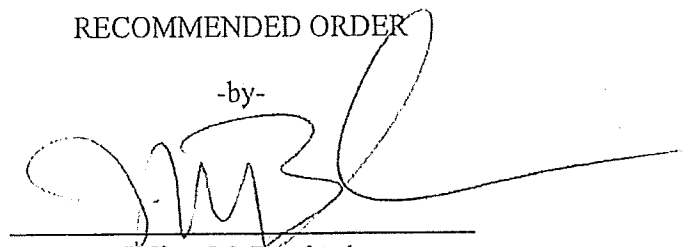
-of-

the Application of Your Way Custom Cabinets Inc., DBA Fina Cabinets
For Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 44450

RECOMMENDED ORDER

-by-

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Jeffrey M. Bernbach
Administrative Law Judge

July 12, 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 Your Way Custom Cabinets Inc. ("Your Way" 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 Your Way does not meet the eligibility criteria for certification as a MWBE.

The Division denied the application (Exhibit 1) filed by Your Way for MWBE certification by letter, dated August 21, 2017 (Exhibit 6). The letter sets forth 2 grounds under 5 NYCRR 144.2 for the denial. Applicant filed a notice of appeal, dated September 7, 2017. The Division advised applicant that the hearing on this matter would be held on March 29, 2018 (letter from the Division to applicant, dated March 1, 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. Annette Alberti and Charles J. Gallo, CPA, appeared, and both provided testimony on behalf of Your Way. Mr. Gallo 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, Nataya Simon, 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 April 7, 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"]).

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 Your Way 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 two bases for denial of Your Way's application. First, the Division argues that applicant failed to demonstrate that the female owner, Annette Alberti, shares in the risks and profits in proportion with her ownership interests in the business enterprise 5 NYCRR section 144.2(c)2. Second, the Division argues that applicant failed to demonstrate that female owner Annette Alberti makes decisions pertaining to the operation of the business enterprise (citing 5 NYCRR section 144.2 (b)(1

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 woodworking, such is not necessary for her to run the business.

FINDINGS OF FACT

1. Your Way is primarily engaged in the manufacturing and sale of wood cabinetry.
2. Annette Alberti, a female, is president and owner of 100% of the shares of Your Way.

3. Ms. Alberti is primarily responsible for managing the administrative and financial affairs of Your Way, including accounting, bookkeeping, insurance quotes, and banking.
4. Ms. Alberti does not know the woodworking business but knows business in general.
5. Ms. Alberti's husband, John Alberti, is Vice President of Sales and primarily engaged in measuring, supervising field operations and estimating custom jobs.
6. Your Way has 10 employees plus Annette Alberti, 6 of whom work in the shop manufacturing and 4 who work in the office.
7. In 2015, Annette was paid [REDACTED] by Your Way and John Alberti was paid [REDACTED].
8. Ms. Alberti's parents bought the business for her, and her husband John, who was already working in the industry, and went to work for her in the business.

DISCUSSION

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

1. Women Do Not Share In The Risks And Profits In Proportion With Their Ownership Interest In The Business Enterprise

The Division relies for its finding on the fact that John Alberti's wages substantially exceeded those of Annette Alberti and, as such, Annette Alberti's earnings are not proportionate with her ownership interest. Applicant argues that the Division's reliance solely on the level of Annette's earnings is misplaced as it is probative of nothing because the owner always gets paid last with whatever is left - - after paying wages, for supplies, etc.

While I find that applicant's position regarding the realities of owners generally getting paid last in the real world to be correct, it fails to take into account the somewhat unique, not necessarily "real world", criteria applied to the issuance of certifications by the Division. To insure that the mission of the Division is accomplished - - that of assisting women and minority owners of predominantly small start-up businesses to succeed, despite the potential discrimination they may encounter - - certifications are granted to those intended to benefit therefrom based upon the specific criteria set forth in NYCRR. Therefore, because general accounting principles are not necessarily a determining consideration as to whether to grant certification, applicant's failure to meet the requirement that she share equally in the risks and

profits in proportion with her ownership interest in the business enterprise properly contributed to denial of certification.

2. Women Do Not Make Decisions Pertaining to the Operation of 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]).

While Annette Alberti certainly makes critical decisions pertaining to the operation of Your Way, they are not decisions relating to the core function of Your Way - - woodworking - - about which she readily concedes she has little or no knowledge. Those core decisions, relating to estimating jobs, manufacturing products and supervising field work are the exclusive province of John Alberti. Again, while CPA Charles Gallo may well be correct that in the "real world" most businesses fail largely for lack of proper administration so that it is incorrect to suggest that John Alberti's duties and responsibilities are more important than those of Annette Alberti's, the fact remains that under applicable regulation of the Division, it is the core business responsibilities, as opposed to "real world" responsibilities, that control.

CONCLUSION

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

RECOMMENDATION

For the reasons stated herein, the determination of the Division to deny Your Way certification as a woman owned business enterprise should be affirmed.

Matter of Your Way Custom Cabinets Inc.

DED File ID No. 44450

Exhibit List

Exhibit #	
1	Your Way Custom Cabinets Inc., application, submitted October 30, 2015
2	Sample Estimate
3	Resumes of John Alberti, Annette Alberti and Paul Alberti
4	Description Of Responsibilities Of Key Employees Provided By Annette Alberti
5	2015 Tax Returns for Annette and John Alberti
6	Letter of Denial