

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

In the Matter

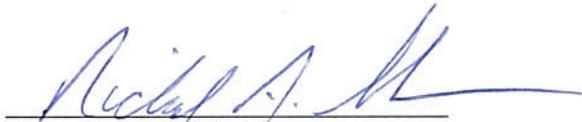
- of -

the Application of **Steel & Duct Fabrication, Inc.**,
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID Number 60804

RECOMMENDED ORDER

- by -

A handwritten signature in blue ink, appearing to read "Richard A. Sherman", is written over a horizontal line.

Richard A. Sherman
Administrative Law Judge

January 31, 2017

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 Steel & Duct Fabrication, Inc. ("Steel & Duct" or "applicant"), certification as a women-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 Steel & Duct does not meet the eligibility criteria for certification as a WBE.

The Division denied the application filed by Steel & Duct for WBE certification (exhibit 1) by letter dated September 14, 2016 (exhibit 2). The denial letter sets forth one basis under 5 NYCRR 144.2 for the denial. Applicant filed a request to appeal ("appeal request"), dated September 22, 2016. The Division advised applicant that the hearing on this matter would be held on December 6, 2016 (Notice of Appeal Hearing from the Division to Monda Mikhail, dated October 17, 2016).

I convened the hearing at approximately 1:30 p.m. on December 6, 2016, at the Division's offices, 633 Third Avenue, New York, New York. Austin Graff, Esq., The Scher Law Firm, LLP, represented Steel & Duct and called three witnesses: Monda Mikhail, president and owner of Steel & Duct; James Mikhail, president and owner of JT&T Air Conditioning Corp.; Steven Smith, general superintendent of Steel & Duct. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, represented the Division and called one witness, El Hussein Sarhan, a senior certification analyst for the Division. A list of the exhibits that were received during the hearing is provided at the end of this report.

Consistent with 5 NYCRR 145.1(m), an audio recording of the hearing was made. The recording was provided to this office on December 8, 2016, whereupon, the hearing 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, 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 revealed 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 WBE certification for Steel & Duct 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

The Division argues that Steel & Duct is not an independent business enterprise (exhibit 2 at 2 [citing 5 NYCRR 144.2(a)(2), (c)(2)]). The Division argues that Steel & Duct is dependent upon its relationship with JT&T Air Conditioning Corp. ("JT&T"), a business that is owned by Monda Mikhail's father, James Mikhail. Among other things, the Division asserts that this dependence is demonstrated by the fact that Steel & Duct's only client is JT&T, Steel & Duct is insured under JT&T's commercial insurance policy, and Steel & Duct shares the same business address with JT&T (exhibit 2 at 2).

Position of Applicant

Applicant argues that Monda Mikhail, the woman owner, developed her understanding of the business through her work at JT&T and that, now that Ms. Mikhail is a New York State licensed professional engineer, she is "ready to branch off on [her] own and work on growing [her] own construction company" (appeal request at 1). Applicant further argues that Ms. Mikhail now is the 60 percent owner of Steel & Duct, that Steel & Duct has its own machinery and equipment, its own employees, and that it leases separate space in the same building that JT&T operates from (id.).

FINDINGS OF FACT

1. Steel & Duct was incorporated on September 6, 1994, and is engaged in the business of fabricating and installing duct work (exhibit 1 at 2-3 [items 1.Q, 1.R, 3.B-D]; compact disc¹ ["CD"] at 22:45, 39:55).

2. Monda Mikhail acquired a 60 percent ownership interest in Steel & Duct on January 1, 2016 (exhibit 1 at 2-3 [items 1.U, 2.A]; CD at 21:45). She purchased her interest from father, James Mikhail, who retained a 40 percent interest in the enterprise (exhibit 1 at 2 [items 1.S, 2.A]; CD at 21:45; exhibit 7).

¹ The Division recorded the audio from the hearing on a compact disc.

3. JT&T is 100 percent owned by James Mikhail and Monda Mikhail is an employee of JT&T (exhibit 1 at 6 [items 6.C, 6.H]; exhibit 3; CD 32:25, 39:25, 43:00).

4. Steel & Duct has one client, JT&T (exhibit 1 at 4 [item 4.C]; exhibit 3 [stating that Steel & Duct "is a subcontractor of JT&T Air Conditioning Corp. and does not work with any other contractors"]; exhibit 5; CD 18:55, 31:50, 37:00).

5. Steel & Duct and JT&T operate out of the same business address, 64-54 Maurice Avenue, Maspeth, New York (exhibit 1 at 1 [item 1.E], 6 [item 6.C]; exhibit 11; CD at 34:55).

6. Steel & Duct is covered under the commercial insurance policy of JT&T (exhibit 6 at 3, 6; CD 36:45).

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of Steel & Duct as a women-owned business enterprise² pursuant to Executive Law Article 15-A. As discussed below, the Division cites one basis in support of the denial.

The Division states in its denial letter that applicant "is not an independent business enterprise" (exhibit 2 at 2 [citing 5 NYCRR 144.2(a)(2) and (c)(2)]). The Division argues that applicant fails to meet this criterion because Steel & Duct is dependent upon JT&T, a corporation that is owned by Monda Mikhail's father, James Mikhail (exhibit 2 at 2). In support of its position, the Division asserts that (i) Steel & Duct does business from the same address as JT&T, (ii) Monda Mikhail is an employee of JT&T, (iii) Steel & Duct has no clients other than JT&T, and (iv) Steel & Duct is insured under JT&T's commercial insurance policy (id.).

Applicant acknowledges that JT&T is owned by James Mikhail (CD at 32:25), but argues that Steel & Duct and JT&T are entirely separate companies (CD at 53:00). Applicant asserts that the work performed by the two corporations is not the same, Steel & Duct does only duct work fabrication and installation, while JT&T does full scale retrofits and replacement of mechanical systems (CD at 22:45). The two corporations use different unions to perform their respective projects, Steel & Duct uses the sheet metal union, while JT&T uses the pipe workers union (CD at 23:10). Steel & Duct also asserts that, other than Monda Mikhail, the two corporations have no shared employees (CD at 32:30), and that Steel & Duct has its own equipment for fabricating duct work (CD at 34:00).

Applicant also acknowledges that many of the Division's factual assertions are accurate. For example, applicant acknowledges that Steel & Duct operates out of the same building as JT&T, but notes that there are five businesses that operate out of that address (CD at 34:55,

² 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, inter alia, "at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women"]).

42:50). Applicant acknowledges that Monda Mikhail works for both Steel & Duct and JT&T, but states that she works most of the day with Steel & Duct (CD at 24:40). Applicant acknowledges that JT&T is its only client, but states that it anticipates that having WBE certification would allow Steel & Duct to secure business with other companies (CD at 37:00). Applicant also acknowledges that it is insured under JT&T's commercial insurance policy, and states that doing so is a big cost savings (CD at 36:45).

On the issue of equipment ownership, I conclude that applicant has shown that the application materials do not contain substantial evidence to support the Division's determination. The application identifies over [REDACTED] worth of equipment that is owned by Steel & Duct (exhibit 1 at 5 [item 5.C]) and nothing that was proffered at hearing controverted that representation.³ As the Division analyst testified, however, the equipment issue is not dispositive of whether Steel & Duct is an independent business enterprise (CD at 16:30).

The other factors cited by the Division for the denial determination on independence grounds are largely uncontested by applicant and are supported by substantial evidence. The application materials show that Steel & Duct and JT&T are owned by related individuals and that Steel & Duct is entirely dependent on JT&T. Steel & Duct was formerly wholly owned by James Mikhail who sold a 60 percent interest in the business to his daughter, Monda Mikhail, on January 1, 2016 (findings of fact ¶ 2). James Mikhail is the sole owner of JT&T (*id.* ¶ 3). Monda Mikhail is employed at both Steel & Duct and JT&T (*id.*). JT&T is Steel & Duct's only client (*id.* ¶ 4). Steel & Duct obtains its commercial insurance coverage under JT&T's commercial insurance policy (*id.* ¶ 6). All of these factors are reflected in the application materials that were before the Division at the time that it made its denial determination and constitute substantial evidence in support of the Division's determination that Steel & Duct is not an independent business enterprise.

Applicant has failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that Steel & Duct is not an independent business enterprise as required by 5 NYCRR 144.2(a)(2) and (c)(2).

Although applicant has not met its burden, I note that Division counsel stated in his closing that "in many ways [Monda Mikhail] is exactly what we would like in the owner of a women-owned business enterprise" (CD at 49:15). The record shows that Ms. Mikhail is a professional engineer and that she is working in a field that has long been male-dominated. The Division conceded that Monda Mikhail owns, operates, and controls Steel & Duct (CD at 51:10). Nevertheless, the Division determined that Steel & Duct did not satisfy the independence

³ As part of the application process, the Division sent a document request to Steel & Duct requesting copies of "equipment or machinery registrations" and that applicant identify any shared equipment (exhibit 4 [items 10, 18]). There is nothing in the record to indicate that registrations are required for the equipment used by Steel & Duct and the application materials state that Steel & Duct "does not share" equipment with another company (exhibit 3 [response to item 18 of the document request]). In addition, at the hearing applicant supplied photographs of the equipment and noted that only sheet metal union workers, like those employed by Steel & Duct, are authorized to use the equipment (CD at 34:25; exhibit 10).

criterion and denied the application on that basis. As discussed above, that determination is supported by substantial evidence.

CONCLUSION

Applicant has not met its burden to demonstrate that the Division's determination to deny the application of Steel & Duct for certification on the basis of independence was not based on substantial evidence.

RECOMMENDATION

For the reasons stated herein, the Division's determination to deny the application of Steel & Duct for certification as a women-owned business enterprise on the basis of 5 NYCRR 144.2(a)(2) and 144.2(c)(2) should be affirmed.

Exhibit List

Exh. #	Description
1	Steel & Duct WBE Application, Submitted June 29, 2016
2	Division denial letter to Steel & Duct, Dated September 14, 2016
3	August 25, 2016, Email Re: Shared Assets (e.g., office space, employees or equipment)
4	Division Document Request
5	JT&T Purchase Orders for Steel & Duct Services
6	Excerpts from JT&T Commercial Insurance Policy
7	Documents Re: Monda Mikhail's Purchase of 60% of Steel & Duct
8	Copy of Monda Mikhail's Professional Engineer License
9	Letters from General Contactors in Support of Steel & Duct's WBE Application
10	Photographs of Steel & Duct Equipment
11	Photograph of Building at 64-54 Maurice Avenue, Maspeth, New York