

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

In the Matter

- of -

the Application of **North Fork Boutique Gardens Inc.**
for Certification as a Minority or Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59895

RECOMMENDED ORDER

- by -



Maria E. Villa

Maria E. Villa
Administrative Law Judge

February 22, 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 North Fork Boutique Gardens Inc. ("North Fork" or "applicant") certification as a woman-owned business enterprise ("WBE") be modified, and as modified, 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 North Fork does not meet the eligibility criteria for certification as a WBE.

The Division denied North Fork's application for WBE certification (Exhibit 1) by letter dated May 3, 2016. Exhibit 5. The denial letter sets forth two grounds under 5 NYCRR 144.2 for the denial.¹ By letter dated May 25, 2016, applicant appealed from the Division's determination to deny the application. Exhibit 12. The Division responded by letter dated June 2, 2016, providing information as to the appeal process. Exhibit 13. North Fork's appeal was received on July 14, 2016, and on January 10, 2017, the Division filed its response to the appeal ("Division Response").

By e-mail dated January 17, 2017, applicant requested an opportunity to respond. Division staff did not object to the request, and the assigned administrative law judge allowed applicant to file an additional statement. That statement was received on January 18, 2017 ("Applicant's Response").

Both applicant's appeal and the Division Response were accompanied by a number of exhibits, and those exhibits were marked and received into evidence. A chart of those exhibits is attached.

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, and control 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, on information revealed in supplemental submissions, and if appropriate, on interviews conducted by Division analysts.

¹ The Division's January 10, 2017 response to North Fork's appeal states that "[t]he Department will not defend the portion of its denial relating to the contributions of Ms. Rodgers to North Fork in this proceeding. The portion of the denial letter relating to Ms. Rodgers' contributions to North Fork is withdrawn." Accordingly, the denial should be modified to remove the ownership ground as a basis for denial. This recommended order addresses only the question of North Fork's independence for purposes of MWBE certification.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of North Fork's MWBE 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

Division

The Division argued that applicant failed to demonstrate that the minority or woman applicant is an independent business enterprise, pursuant to Section 144.2 of 5 NYCRR. Exhibit 5, at 2. The Division cited the following "relevant facts" in the denial letter:

- North Fork Boutique Gardens shares significant resources with three uncertified business enterprises: WRS Environmental Services, Inc. ("WRS"), Indy 3000, Inc., and Indy 3000 of Mastic, Inc.
- North Fork Boutique Gardens receives informal loans from the abovementioned businesses. The terms of these loans are not memorialized in writing.
- North Fork Boutique Gardens uses vehicles owned by the abovementioned businesses to make product deliveries. The terms of the use of these vehicles are not memorialized in writing.
- Employees of North Fork Boutique Gardens, including Ms. Deborah Rodgers, are employed by the abovementioned businesses.

Exhibit 5, at 2. According to the Division, North Fork is not eligible for certification "because it relies upon staff, vehicles, equipment, and financial resources of other firms . . . as a critical element of its business model." Division Response, at 2.

Applicant

Applicant argued that the information supplied in the application was used against her, and that North Fork is not "a front for a male owned company as alleged by the State Representative." Applicant's Response, at 1. Applicant stated that North Fork was certified as a women-owned business by New York City as well as the State of New Jersey, and that North Fork "is the only actual NYC WBE certified grower/farm operation in New York State." Id., at 2. With respect to North Fork's relationship with WRS, applicant contended that "I have a business relationship with this company to provide landscaping materials and services for remediation projects they perform as part of its business. From time to time we receive deposit advances for larger jobs and/or special order items." Exhibit 12, at 1. Applicant went on to state that "WRS does provide minimal administrative assistance" to North Fork, and that "to obtain this small amount of diverse and timely support would be cost prohibitive . . . if it were not available from a company like WRS." Id., at 2.

FINDINGS OF FACT

1. North Fork was established in 2014 and is a specialized grower and distributor of plants for landscaping and environmental restoration. Exhibit 1, at 10 and 16.
2. Deborah Rodgers is North Fork's sole shareholder. Exhibit 1, at 11.
3. North Fork has received loans from WRS, a business owned by Ms. Rodgers's husband. The loans were made without any terms of repayment, based upon verbal agreements.
4. North Fork employees perform work for WRS on an as-needed basis. Ms. Rodgers and her vice-president, Michelle Stoetzel are paid salaries by WRS. In 2015, Ms. Rodgers was paid [REDACTED] by WRS, and did not draw a salary from North Fork.

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of North Fork as a woman-owned business enterprise² pursuant to Executive Law Article 15-A. Section 144.2(c)(2) of 5 NYCRR states that "an eligible minority group member or woman applicant must be an independent business enterprise." The Division stated in its denial letter that applicant "failed to demonstrate that the business enterprise for which certification is sought is an independent business enterprise." Exhibit 5, at 2. Specifically, the Division contended that "North Fork is not eligible for certification because it is impermissibly dependent upon an uncertified firm owned by Ms. Rodgers' husband." Division Response, at 1.

The Division asserted that North Fork receives financial support from Rodgers family businesses that would not be available to an independent business enterprise, and referred to Exhibit 6, the 2015 Form 1120S for the corporation, which reflects [REDACTED] in inter-company loans from related businesses. As the Division pointed out, "[t]hese loans were made without any form of written agreement, at an unstated level of interest." Division Response, at 2. Although applicant contends that the funds were provided by the Indy companies, which Ms. Rodgers stated that she owns and operates, this assertion is contradicted by applicant's response to the Division's request for further information (Exhibit 7). In that response, applicant stated that North Fork "has borrowed all funds from Indy 3000 Inc., Indy 3000 of Mastic Inc. and WRS Environmental Services Inc. All of these amounts borrowed are verbal agreements. Based on the relationship [between North Fork and these businesses], the loans were predicated on a verbal agreement in lieu of written documentation." Exhibit 7, at 1. The Division went on to note that even if the loans from the Indy companies were not considered, a loan balance of [REDACTED] remains. In light of this information, the Division reasonably concluded that North

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 Section 140.1(tt) of 5 NYCRR (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"))).

Fork “received significant loans without any terms of repayment from a business owned by Mr. Rodgers.” Division Response, at 3.

The Division also maintained that North Fork and WRS share employees. According to the Division, “[t]he ability to shift employees between WRS and North Fork, based upon their respective business needs, is a significant benefit to North Fork that allows it to react quickly to business needs without incurring costs associated with maintaining redundant staff during periods of inactivity.” Division Response, at 3. The Division pointed out that “[i]ndependent business enterprises that do not informally share employees with other businesses cannot enjoy such a benefit.” *Id.* Applicant acknowledged that she is employed by WRS, that she receives a salary from her husband’s company, and that at present, because North Fork “is still in the development mode, its financial status does not permit me to receive a salary.” Exhibit 14, at 2. Applicant asserted that on average, she devoted less than ten percent of her time to WRS.

The Division’s arguments with respect to this point are persuasive. Despite applicant’s contentions with respect to the time she devotes to WRS, Ms. Rodgers’s W-2 for 2015 reflects that she was paid ██████████ by her husband’s company. Moreover, in response to the Division’s request for more information, applicant stated that North Fork employees perform plant installation work for WRS on an as-needed basis. Exhibit 8. With respect to Ms. Stoetzel, North Fork’s vice president, the employment agreement submitted by applicant as part of the appeal states that “[i]rrespective of work location, Michelle [Stoetzel], as a full time employee of WRS, will continue to be compensated by WRS, with her salary and total benefits being determined by WRS and no one else.” Exhibit 20, at 1. On appeal, applicant has the burden to demonstrate that the Division’s denial was not based upon substantial evidence, and that burden has not been met, particularly when the appeal contradicts the information supplied in the application.

Finally, the application submitted by North Fork indicated that North Fork uses vehicles owned by WRS for customer deliveries. Exhibit 11. No documentation was provided showing a formal lease or rental arrangement. The Division concluded that North Fork was able to avail itself of WRS vehicles for customer deliveries on an as-needed basis, which, in the Division’s view, was “not an insignificant benefit.” Division Response, at 3. Applicant maintained that there is a lease agreement between North Fork and WRS, and provided a copy of a January 15, 2016 document stating that North Fork leased a 1995 Freightliner box truck for nine months during an approximately one-year period. Exhibit 19. No proof of payment was provided. The Division stated that the lease agreement was not included with the application, “or demonstrated through the production of relevant documents.” Under the circumstances, the Division reasonably concluded that North Fork used WRS vehicles. Even assuming that applicant has established the existence of a lease, as discussed above, other evidence in the record shows that North Fork is not independent of WRS.

As the Division pointed out, the requirement that a business enterprise be independent “ensures that the Division confers program benefits upon minority and women-owned businesses that are most likely to have experienced discrimination in the marketplace, rather than those that enjoy benefits from a connection to a non-MWBE firm.” Division Response, at 2; see Skyline Specialty, Inc. v. Gargano, 294 A.D.2d 742, 742 (3rd Dept. 2002) (statute

requires that business enterprise be independently owned and operated). Based upon the information provided in the application, it was reasonable for the Division to conclude that North Fork was not independently operated. The Division's determination was supported by substantial evidence.

CONCLUSION

As discussed above, applicant did not meet its burden to demonstrate that the Division's determination to deny North Fork's WBE application for certification was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny North Fork's application for certification as a women-owned business enterprise should be modified to strike the ownership ground as a basis for denial, and as modified, affirmed, for the reasons stated herein.

**Matter of North Fork Boutique Gardens Inc.
DED File ID No. 59895**

Exhibit List

Exhibit No.	Description
1	May 29, 2015 letter from Alfred O. Milton, Director of Certification, NYC Small Business Service, to Deborah Rodgers, with attached application
2	Resume: Deborah Rodgers
3	October 22, 2015 request for additional information from Deborah Rodgers
4	NYS DED final request for additional information from Deborah Rodgers
5	May 3, 2016 denial letter
6	2015 S Corporation tax return
7	Response to Question No. 11
8	Response to Questions 17, 18, 19 and 20
9	Response to Question 16
10	2015 W-2
11	Response to Question 13
12	May 25, 2016 letter from Deborah Rodgers requesting appeal
13	June 2, 2016 letter from Phillip Harmonick, Esq. re: appeal procedure
14	July 11, 2016 appeal, with attached exhibits
15	Applicant's response to denial – ownership, independence
16	Schedule K-1
17	Details of intercompany transactions
18	Schedule L
19	Document re: lease of Freightliner box truck
20	Employment agreement (Michelle Stoetzel)
21	Payments made by North Fork to WRS Environmental