

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

In the Matter

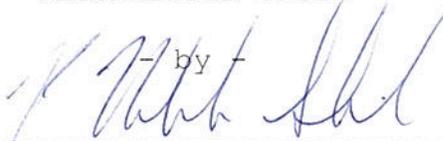
- of -

the Application of
Superior Workforce Solutions, Inc.
For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 44206

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

March 13, 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 the application of Superior Workforce Solutions, Inc. ("applicant") for certification as a woman-owned business enterprise ("WBE") be affirmed for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal, pursuant to New York State Executive Law ("EL") 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, by Superior Workforce Solutions, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Superior Workforce Solutions, Inc.'s application was received on March 11, 2015 (Exh. DED1 at 1).

The application was denied by letter dated March 31, 2016, from Bette Yee, Director of Certification Operations (Exh. DED3). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to demonstrate that it met the small business criteria set forth in MWBE regulations, 5 NYCRR 140.1.

By letter dated April 29, 2016, applicant's counsel, on behalf of the applicant, filed a notice of appeal from the Division's denial determination.

By letter dated June 15, 2016, the Division notified the applicant that the applicant's written appeal should be filed on or before July 25, 2016.

In an eight page letter brief dated July 25, 2016, the applicant's counsel submitted the written appeal and attached four exhibits, described in the attached exhibit chart as A1-A4.

In a four page memorandum dated December 23, 2016, the Division responded to the applicant's appeal. Attached to the

appeal was the affidavit of Senior Certification Analyst Clencie Mincey and six exhibits, described in the attached exhibit chart as DED1-DED6.

On January 3, 2017, this matter was assigned to me.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria regarding the applicant's ownership, operation, control, and independence are applied on the basis of information supplied through the application process.

The Division reviews the enterprise as it existed at the time the application was made, based on representations in the application itself, and on information revealed in supplemental submissions and 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 applicant's WBE 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

Position of the Division

In its denial letter, the Division asserts that the application failed to demonstrate that it meets the small business criteria, as set forth in 5 NYCRR 140.1.

Position of the Applicant

Superior Workforce Solutions, Inc. asserts that it meets the criteria for certification and that the Division erred in not granting it status as a woman-owned business enterprise pursuant to Executive Law Article 15-A.

FINDINGS OF FACT

1. Superior Workforce Solutions, Inc. is in the business of providing consulting services in the areas of administrative and general management, personnel management, human resources, and computer system integration design (Exh. DED1 at 3). The firm has a business address of 250 International Drive, Williamsville, New York, 14221.

2. Superior Workforce Solutions, Inc. was established on November 12, 1965. Lynne Marie Finn owns 52% of the firm. (Exh. DED1 at 2-3).

3. Superior Workforce Solutions, Inc. employed an average of more than 300 people during 2014 (Exh. DED6).

DISCUSSION

This report considers the appeal of the applicant from the Division's determination to deny certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The Division's denial letter asserts that the application failed to demonstrate that it meets the small business criteria, as set forth in 5 NYCRR 140.1, as the sole ground for denial.

On the appeal, applicant's counsel asserts that the Division failed to properly apply the criteria for WBE status in 5 NYCRR 140.1(gg). Counsel argues that the firm only employs [REDACTED] employees (Exh. A4 at 1). The brief also contends that the company has a significant presence in New York State; is independently owned and operated; and is not dominant in its field. None of these requirements are at issue in this appeal.

With respect to the claim that it has less than 300 employees, applicant's counsel argues that its federal and state tax forms include both direct staff and temporary contract employees assigned to perform services at a customer's business

location. These forms include payments involving these temporary workers, which is a service the company provides to its clients. These temporary employees do not perform any business function for Superior Workforce Solutions, Inc. and are not controlled or overseen by it. Thus, counsel argues, in order to ascertain the true number of employees of the firm, it is necessary to deduct the temporary workers from the total.

Citing federal regulations adopted by the Small Business Administration ("SBA"), counsel argues that temporary contract employees are considered employees of the company that they are performing work for, not the temporary staffing company which placed the individuals at the company. Using this federal definition, counsel argues, Superior Workforce Solutions, Inc. meets certification criteria. Counsel also argues that the staffing industry should be an exception to the 300 employee threshold found in NYS MWBE law because firms in this industry are in the business of supplying temporary workers (Exh. A4 at 1-2).

In its response, the Division argues that Superior Workforce Solutions, Inc. employs more than 300 people and exceeds the maximum number of employees allowed by Executive Law § 310(20) and 5 NYCRR 140.1(tt)(1)(vi). Cleneice Mincey, a Senior Certification Analyst for the Division was assigned to review the application (Mincey affidavit, ¶2). During her review, Ms. Mincey concluded that the firm employed more than 300 people, and therefore, did not meet the definition of small business, as that term is used in the relevant statute and regulation (Mincey affidavit, ¶6). This conclusion was based upon her review of the company's 2014 federal tax return (Exh. DED4), other federal tax information (Exh. DED5), and New York State tax information (Exh. DED6). Based upon her review, she concluded that the firm employed an average of more than 300 people on a monthly and quarterly basis in 2014 (Mincey affidavit, ¶12). The NYS tax information for 2014 reflected an average monthly employment of approximately [REDACTED] people (Exh. DED6).

In response to the applicant's argument that temporary employees should be excluded from the calculation, based on federal SBA regulations, the Division responds that the federal

definition cannot be applied in the context of the State MWBE program. The Division continues that the State MWBE program does not allow for an adjustment based on temporary workers and would contradict the plain language of Executive Law § 310(20).

Based on the evidence in the record, the applicant has failed to demonstrate that it meets the small business criteria, as set forth in 5 NYCRR 140.1. The information in the record shows it employed more than 300 people in 2014 (Exh. DED6). Applicant's argument that it should be exempt from this threshold based on a federal definition of "employee" is without merit. Although Executive Law § 310(20) incorporates by reference federal Small Business Administration standards contained in 13 CFR part 121, it does not incorporate the federal definition relied upon by applicant (see 13 CFR 126.103 [definition of employee for purposes of the federal HUBZone program]). Applicant provides no rationale or legal authority for incorporating the definition of employee from a specific federal program into the State's MWBE program. Accordingly, the Division's denial was based on substantial evidence.

CONCLUSION

The applicant failed to demonstrate that that it meets the small business criteria, as set forth in 5 NYCRR 140.1.

RECOMMENDATION

The Division's determination to deny Superior Workforce Solutions, Inc.'s application for certification as a woman-owned business enterprise should be affirmed for the reasons stated in this recommended order.

**Matter of
Superior Workforce Solutions, Inc.**

**DED File ID No. 44206
Exhibit List**

Exh. #	Description
DED1	Application
DED2	WBE certification for Superior Staff Resources, Inc.
DED3	Denial letter
DED4	2014 Federal tax information
DED5	Federal quarterly tax information for 2014
DED6	State quarterly tax information for 2014
A1	Renewal application
A2	Application
A3	Denial letter
A4	Letter dated March 18, 2016 with attachments