

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

In the Matter

- of -

the Application of **BRT Planning International, LLC**,  
for Certification as a Women-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60504

RECOMMENDED ORDER

- by -



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Richard A. Sherman  
Administrative Law Judge

April 7, 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 BRT Planning International, LLC ("BRT" or "applicant"), certification as a women-owned business enterprise ("WBE")<sup>1</sup> be modified in part 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 BRT does not meet the eligibility criteria for certification as a WBE.

The Division denied the application (exhibit 1) filed by BRT for WBE certification by letter dated August 16, 2016 (exhibit 2). The denial letter sets forth two grounds under 5 NYCRR 144.2 for the denial. Applicant filed a notice of appeal ("notice of appeal"), dated August 30, 2016. The Division advised applicant that the hearing on this matter would be held on March 21, 2017 (letter from the Division to applicant, dated January 4, 2017).

I convened the hearing at approximately 10:00 a.m. on March 21, 2017, at the Division's offices, 633 Third Avenue, New York, New York. Johanna Weinstock appeared on behalf of BRT and called only herself as a witness. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, represented the Division and called one witness, Iliana Farias, a senior certification analyst for the Division. A list of the 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. The recording was provided to this office on March 22, 2017, whereupon, the hearing record closed.

## **ELIGIBILITY CRITERIA**

The eligibility criteria pertaining to certification as a WBE 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.

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<sup>1</sup>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"]).

## STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of WBE certification for BRT 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 cited two bases for the denial of BRT's application. First, the Division argues that applicant failed to establish that the woman owner, Johanna Weinstock, made capital contributions to BRT in proportion to her ownership interest in the enterprise (exhibit 2 at 2 [citing 5 NYCRR 144.2(a)(1)]). Second, the Division argues that applicant failed to establish that the woman owner, Johanna Weinstock, shares in the risks and profits, in proportion to her ownership interest in BRT (exhibit 2 at 2 [citing 5 NYCRR 144.2(c)(2)]).

### Position of Applicant

Applicant argues that BRT's owner, Johanna Weinstock, is the president and 51% owner of BRT and that she has final decision-making power over all corporate decisions (notice of appeal at 1). Applicant acknowledges that when BRT was initially capitalized the funds were provided by Walter Hook, the 49% owner of the company. Applicant asserts, however, that Ms. Weinstock repaid Mr. Hook 51% of his capital contribution shortly after BRT was established, and that "proof of the subsequent paper trail has been provided" (id.). Applicant also asserts that Mr. Hook's greater experience allows him to bill clients at a higher hourly rate, but that the pay differential between Ms. Weinstock and Mr. Hook is equalizing over time (id.). Applicant also notes that BRT distributes profits to shareholders in proportion to their ownership (id. at 1-2).

## FINDINGS OF FACT

1. BRT was established on October 6, 2014, and provides transportation planning consulting services (exhibit 1 at 10 [items 14, 18], 16 [item 38]).
2. Johanna Weinstock is the President of BRT and owns 51% of BRT (exhibit 1 at 11 [item 19]; compact disc ["CD"] at 3:55). Walter Hook is Vice President of BRT, owns 49% of BRT, and is married to Ms. Weinstock (id.; exhibit 1 at 23 [item 5]; CD at 13:45).

3. The initial capital contribution into BRT was made by check, dated March 15, 2015, in the amount of ██████ drawn on an account held by Walter Hook (exhibits 4, 5, 6 [Form 1120S at 4 (schedule L, line 22)]; CD at 8:30, 10:10, 14:20).

4. On March 16, 2015, Ms. Weinstock transferred ██████ from an account she holds individually into an account held jointly with Mr. Hook (exhibits 4, A at 2; CD at 14:10, 14:40).

5. On June 19, 2015, Mr. Hook transferred ██████ from the account held jointly by Ms. Weinstock and Mr. Hook into an account held by Mr. Hook individually (exhibits 4, B; CD at 16:30).

6. In 2015, Ms. Weinstock and Mr. Hook received ██████ and ██████ respectively, in compensation from BRT (exhibit 7). BRT made no distributions in 2015 (CD at 11:50, 19:15).

## DISCUSSION

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

### Ownership: Contribution Proportionate to Equity Interest

The eligibility criterion at issue requires that "the contribution of the minority group member(s) or woman owner must be proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise" (5 NYCRR 144.2[a][1]).

The Division argues that applicant failed to demonstrate that Johanna Weinstock contributed funds to BRT in proportion to her ownership interest in the enterprise (exhibit 2 at 2 [citing 5 NYCRR 144.2[a][1]). Specifically, the Division argues that the application does not include proof that Ms. Weinstock contributed money, property, equipment, or expertise to BRT and that Ms. Weinstock "did not claim to have made contributions . . . separately from Mr. Hook" (exhibit 2 at 2). The Division asserts that the documents before the Division at the time of the denial determination demonstrate that BRT was capitalized with ██████ and that the entire amount was funded from an account held by Walter Hook alone (CD at 8:00 - 10:40).

Applicant concedes that the initial capital contribution was funded from an account held by Walter Hook, but asserts that the manner of payment was simply a matter of convenience, as Mr. Hook was "the person with the check in hand" on the day they opened BRT's account (CD at 14:20). Applicant further asserts that Ms. Weinstock reimbursed Mr. Hook for her 51% share of the initial capitalization by drawing funds from her personal account, placing those funds in an account held jointly with Mr. Hook, who then transferred the reimbursement amount into his personal account (CD at 14:40 – 15:40). Although Ms. Weinstock acknowledged "the ambiguity of this transaction" (CD at 13:50), her testimony is entirely consistent with the explanation

provided to the Division as part of the application process (see exhibit 4). Accordingly, the Division's statement that Ms. Weinstock "did not claim to have made contributions . . . separately from Mr. Hook" (exhibit 2 at 2) is contrary to the record.

At the hearing, Ms. Weinstock presented documentation that supported her explanation of how the initial capital contribution was funded (see exhibits A, B). On the day after Mr. Hook issued the [REDACTED] check to capitalize BRT, Ms. Weinstock transferred funds from an account held in her name alone to an account held jointly by Ms. Weinstock and Mr. Hook (see exhibit 5 [Mr. Hook's check dated March 15, 2015]; exhibit A [transfer of funds from Ms. Weinstock's individual account into the joint account on March 16, 2015<sup>2</sup>]). Subsequently, Mr. Hook transferred [REDACTED] from the joint account into his individual account (exhibit B).

Ms. Weinstock testified that she provided a large number of documents to the New York City Minority and Women-owned Business Enterprise Program (MWBE)<sup>3</sup> as part of BRT's WBE application with New York City (CD at 23:25), and that she believed that exhibits A and B were among the documents provided (CD at 23:35). She also testified that she did not know whether the documents were forwarded to the Division (id.). Although the Division argued in its closing that exhibits A and B were not before the Division at the time of the denial determination (CD at 26:00), the Division did not proffer testimony or other evidence to demonstrate that the exhibits were not provided. Both exhibit 5, proffered by the Division, and exhibit B, proffered by applicant, indicate that they were printed or generated on January 25, 2016<sup>4</sup> (see id. [top left corner of both documents]). BRT's application for WBE certification with MWBE was approved on February 19, 2016, nearly four weeks after the date shown at the top of these two exhibits. It appears likely, therefore, that Ms. Weinstock provided documents related to the capitalization of BRT to MWBE as part of the WBE application process.

Applicant's narrative explanation of the source of capitalization (exhibit 4) is consistent with the testimony adduced at hearing and nothing that was before the Division at the time of the denial refutes that explanation. Documentation proffered at the hearing corroborates applicant's narrative and the Division did not proffer evidence to refute applicant's assertion that exhibits A and B were provided as part of the application process.

Applicant met 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 Johanna Weinstock's contribution to BRT was not proportionate to her equity interest in the enterprise, as required by 5 NYCRR 144.2(a)(1).

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<sup>2</sup> Ms. Weinstock testified that the amount transferred was substantially more than the amount required to reimburse Mr. Hook because she was moving other funds for investment purposes (CD at 14:55, 15:35).

<sup>3</sup> The Division accepts applications submitted to certain other MWBE programs on a "fast-track" basis. BRT's application was filled with MWBE and supplemented to meet the requirements of the Division. (CD at 6:45.)

<sup>4</sup> Exhibit A does not bear a date indicating when it was printed.

### Ownership: Risks and Profits

The eligibility criterion at issue requires that the "woman owner . . . must share in the risks and profits, in proportion with [her] ownership interest" (5 NYCRR 144.2[c][2]).

Division staff argues that the compensation received by Ms. Weinstock is not proportionate to her ownership interest in BRT. Staff argues that Mr. Hook's compensation significantly exceeds that of Ms. Weinstock (exhibit 2 at 2). Staff asserts that this determination is supported by the 2015 W-2s for Ms. Weinstock and Mr. Hook that were provided by BRT (CD at 11:20). The W-2s state that Ms. Weinstock and Mr. Hook received [REDACTED], respectively, in compensation from BRT in 2015 (exhibit 7). The Division also asserted that Ms. Weinstock received no distributions from BRT to offset the pay discrepancy (CD at 11:50).

Applicant asserts that the compensation received by Ms. Weinstock and Mr. Hook reflects the fact that Mr. Hook has several more years of experience and, therefore, is able to demand a higher hourly rate from clients than Ms. Weinstock (CD at 18:45). Applicant acknowledges that no distributions were made in 2015, but asserts that BRT made a small distribution in 2016 and that BRT's operating agreement requires distributions to be made in proportion to ownership interest (CD at 19:15). Applicant further asserts that the compensation of Ms. Weinstock and Mr. Hook should equalize over time as Ms. Weinstock gains experience (CD at 22:30).

Given the disparity in compensation paid by BRT to Ms. Weinstock and Mr. Hook, the arguments raised by applicant are insufficient to overturn the Division's determination that Ms. Weinstock does not share in risks and profits of BRT in proportion to her ownership interest. The denial determination was made by the Division in August of 2016. Ms. Weinstock's compensation in 2015 was a fraction of that paid to Mr. Hook. The documents proffered by applicant from 2016 were not before the Division at the time of the denial determination, and applicant's arguments associated with those documents do not undermine the Division's determination.

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 Ms. Weinstock does not share in the risks and profits of BRT in proportion to her ownership interest as required by 5 NYCRR 144.2(c)(2).

### **CONCLUSION**

Applicant met its burden to demonstrate that the record lacks substantial evidence to support the Division's determination to deny BRT's application on the basis of whether Ms. Weinstock's capital contribution was in proportion to her ownership interest. Applicant failed, however, to meet its burden to demonstrate that the record lacks substantial evidence to support the Division's determination to deny the application on the basis of whether Ms. Weinstock shares in the risks and profits of BRT in proportion to her ownership interest.

## **RECOMMENDATION**

For the reasons stated herein, the Division's determination to deny BRT's application for WBE certification on the basis of 5 NYCRR 144.2(a)(1) should be reversed, and the Division's determination to deny the application on the basis of 144.2(c)(2) should be affirmed. Accordingly, the determination of the Division to deny BRT Planning International, LLC, certification as a women-owned business enterprise should be modified in part and, as modified, affirmed.

**Matter of BRT Planning International, LLC  
DED File ID No. 60504**

**Exhibit List**

<b>Exh. #</b>	<b>Description</b>
1	BRT WBE Application, Submitted to New York City Minority and Women-owned Business Enterprise Program, with Addendum for NYS Certification
2	Department WBE Denial Letter to BRT, dated August 16, 2016
3	Document Request from the Division to Applicant
4	Applicant Narrative Response to Item 3 of Document Request
5	Check Image
6	BRT 2015 Tax Return
7	2015 W-2s for Ms. Weinstock and Mr. Hook
A	Synchrony Bank Account Statement
B	Vanguard Account Transaction History
C	GoDaddy Account Receipt
D	Fidelity Transaction Confirmation
E	2016 Schedule K-1