

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

In the Matter

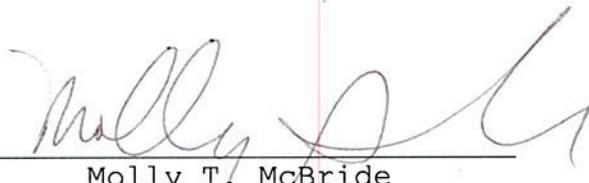
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the Application of **Fiddlehead Creek, LLC**
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60743

RECOMMENDED ORDER

- by -



Molly T. McBride
Administrative Law Judge
April 11, 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 ("NYSDED") to deny Fiddlehead Creek LLC ("Fiddlehead" or "applicant") 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 Fiddlehead challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Fiddlehead submitted an application to NYSDDED on February 24, 2016 (Exhibit A). By letter dated August 30, 2016, the Division denied the application for WBE certification.

Applicant filed an appeal from the denial, requested a hearing and a hearing was held on March 7, 2017 at the Division's offices located at 625 Broadway, Albany, New York. Fiddlehead appeared by Emily DeBolt. The Division was represented by Senior Attorney Craig Alfred, Esq. and Senior Certification Analyst Matthew Lefebvre.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria are applied on the basis of information supplied through the application process (see 5 NYCRR 144.2[a]). 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, if any, that are conducted by Division analysts. On administrative appeal, the applicant bears the burden of proving its business meets the eligibility criteria for certification as a woman-owned business enterprise (see State Administrative Procedure Act § 306[1]) and, to carry its burden, the applicant must show that the Division's determination is not supported by substantial evidence. The appeal determinations shall be limited as follows: (a) The

hearing officer shall conduct a hearing based upon information set forth in the request for a hearing relating to the information provided with the certification application and during any site visit that had been carried out and interviews conducted (5 NYCRR 144.5).

POSITIONS OF THE PARTIES

Position of the Division

The Division's denial letter asserts that applicant failed to meet two criteria for certification: (1) applicant business has failed to demonstrate that the woman owner's capital contribution is proportionate to her equity interest in the business (5 NYCRR 144.2(a)(1)); and (2) applicant business has failed to demonstrate that the agreements governing the business enterprise permit the woman owner to make decisions without restrictions (5 NYCRR 144.2(b)(2)).

Position of the Applicant

Fiddlehead 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. Emily DeBolt owns 55% of applicant company, and her husband Christopher DeBolt owns 45% of applicant company¹ (Exhibit A, 2.A.).
2. Fiddlehead, formed in June 2012, is a nursery grower of native plants. It also provides consulting and design services (Exhibit A, 3.C.).
3. Fiddlehead management is governed by an Operating Agreement signed by the two shareholders, Emily and Christopher DeBolt.
4. The Fiddlehead Operating Agreement requires authorization by managers for any other member manager to bind the LLC.

¹ The application for WBE certification indicates that Emily DeBolt is a 55% owner of the business and Christopher DeBolt is a 45% owner but the application also indicates that Emily owns 65 shares of the common stock and Christopher owns 35 shares which would give her 65% ownership in the applicant business.

5. The Fiddlehead Operating Agreement identifies members as managers and states "each member shall have the authority to bind the company with respect to any act, provided that the managers have authorized said member to take such action."

6. Emily DeBolt and Christopher DeBolt are the members and managers of Fiddlehead Creek, LLC.

7. Fiddlehead was financed with funds from the joint bank account of Emily and Christopher DeBolt.

DISCUSSION

This report considers the appeal of applicant from the Division's determination to deny certification as a woman-owned business enterprise (WBE) pursuant to Executive Law Article 15-A. Section 144.2 of 5 NYCRR defines the rules to be applied in certifying businesses for minority- or woman-owned business enterprise status. In this matter, the application was denied based upon applicant's failure to demonstrate the woman owner's capital contribution is proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise pursuant to 5 NYCRR 144.2(a)(1); and upon applicant's failure to demonstrate that the agreements governing the business enterprise permit the woman owner to make decisions without restrictions (see Division denial letter dated August 30, 2016).

CAPITAL CONTRIBUTION

The applicant contends that Emily DeBolt, majority shareholder, made a capital contribution equal to her 55% ownership interest in the form of expertise and cash (Exhibits A & 10). The application identifies a cash contribution of [REDACTED] by the woman owner and a [REDACTED] contribution from her husband (Exhibit A, 2.C.). Emily DeBolt provided a written narrative submitted on September 19, 2016 as part of her appeal of the Division's denial further detailing her contribution (See letter of Emily DeBolt dated September 19, 2016). DeBolt also supported her position regarding capital contribution at the hearing held on March 7, 2017 (Disks 1-3, dated March 7, 2017).² She claimed at the hearing she made both a cash contribution and a contribution in the form of expertise.

² Disk refers to the audio recording of the appeal hearing held March 7, 2017.

Cash Contribution

Applicant asserted that Emily DeBolt made a capital contribution of [REDACTED] and her husband made a capital contribution of [REDACTED] in June 2012 to start the business (Exhibit A, 2.C.). Emily DeBolt was issued 65 shares of common stock at that time and Christopher DeBolt was issued 35 shares (id.). Emily DeBolt testified at the appeal hearing that the [REDACTED] she contributed came from a joint account she has with her husband and, because she earned approximately twice as much as her husband at the time of the payment in 2012 (Exhibit 3), the funds in the joint account were proportionately more hers than her husband's (Disk 1 at 6:30). During the application review process, applicant was asked by Senior Certification Analyst Matthew Lefebvre to provide proof of the [REDACTED] capital contribution indicated on the application, but applicant was unable to locate the canceled check at that time (Disk 1 at 11:50). Emily DeBolt testified at the appeal hearing that after the denial was issued, she found the proof of funding. She searched further and found a September 2012 canceled check from the joint bank account of Emily and Christopher DeBolt issued to applicant business in the amount of [REDACTED] (Exhibit 2) which she claims represented the capital contribution (Disk 1 at 11:50). The application indicated the total capital contribution was [REDACTED] (Exhibit A, 2.C.), not [REDACTED] and it was made in June 2012 rather than September 2012. These discrepancies were not explained. In addition to the September 2012 check, Emily claims she made capital contributions in the form of other funds given to the business from her and her husband's joint bank account. She testified about contributions she has made to the business and produced a Fiddlehead Creek LLC Account QuickReport (Disk 1 at 8:00, Exhibit 1). However, the testimony and the accompanying report do not support her cash capital contribution argument for two reasons: (1) the records relate to multiple years before and after the applicant LLC business was formed in 2012 and the timing discrepancy was not explained; and (2) the documentation did not evidence the woman owner putting in her own funds as the checks were drawn on a joint bank account (Exhibit 1 and Disk 1 at 8:40).

Expertise

Emily DeBolt claimed for the first time at the appeal hearing that she made a capital contribution in the form of expertise as well as cash (Disk 1 at 21:40). To support that argument she presented proof of payments made to her for presentation work on native plants as well as a stipend paid for teaching a class on native plants at a community college (Exhibits 5-11). She also presented a list showing all of her presentations on native plants and gardening from 2010 to 2017

(Exhibit 12). Ms. DeBolt has demonstrated her expertise in the business of Fiddlehead Creek, LLC (Disk 1 at 28:25). She testified that her husband Christopher does not have the expertise or experience (Disk 1 at 30:30). She acknowledges that she did not supply this information during the application process because she did not know it was relevant and necessary (Disk 1 at 36:00). She claims that the application process does not ask for proof of or information regarding expertise and if she was "given the opportunity to demonstrate her expertise" she would have been happy to do so (Disk 1 at 36:30).

On administrative appeal, applicant bears the burden of proving its business meets the eligibility criteria for certification as a woman-owned business enterprise (see State Administrative Procedure Act § 306[1]) and, to carry its burden, the applicant must show that the Division's determination is not supported by substantial evidence. Applicant presented no information regarding Ms. DeBolt's expertise for the Division to review. It was made for the first time at the appeal hearing. Also, applicant was unable to present proof of the cash capital contribution until the hearing, and the evidence submitted is not conclusive. Applicant has failed to demonstrate that the determination as to capital contribution was not supported by substantial evidence.

CONTROL

The second reason the Division denied the application for WBE certification was that the Operating Agreement for the business does not permit the woman owner to make decisions without restriction (See Division denial letter dated August 30, 2016). Fiddlehead Creek, LLC is controlled by an Operating Agreement executed by the two owners, Emily and Christopher DeBolt (Exhibit B). Pursuant to the Operating Agreement, the LLC management shall be by Member Managers, and Emily and Christopher are the "Managers" (Exhibit B, 3.01). The "property, business and affairs of the Company shall be managed by the managers" (Exhibit B, § 3.02). The Agreement restricts the authority of the Members as follows: "each Member shall have authority to bind the company with respect to any act, provided that the Managers have authorized said Member to take such action" (Exhibit B, § 3.02). The Operating Agreement uses both the term "Member" and "Manager" as well as "Member Manager" which can seem unclear. However, it clearly states that the business management will be by the Member Managers who are Emily and Christopher and neither has the authority to bind the company without the authorization of the other Member Manager. There is no question that the woman majority owner may not act

to bind the company without the authorization of the male member manager. Applicant has failed to demonstrate that the determination as to control was not supported by substantial evidence.

CONCLUSIONS

Fiddlehead Creek, LLC has not demonstrated that the woman owner has made a capital contribution to the business in proportion to her ownership interest as required by 5 NYCRR 144.2(a)(1); or that the agreements governing the business enterprise permit the woman owner to make decisions without restrictions as required by 5 NYCRR 144.2(b)(2).

RECOMMENDATION

The Division's determination to deny Fiddlehead Creek, LLC's application for certification as a woman-owned business enterprise should be affirmed for the reasons stated herein.

Matter of Fiddlehead Creek DED Exhibits

Exh. #	Description
A	Application of Fiddlehead for WBE certification February 24, 2016
B	Operating Agreement of Fiddlehead dated July 26, 2012

Matter of Fiddlehead Creek, LLC. Applicant Exhibits

Exh. #	Description
1	Fiddlehead Account QuickReport
2	Personal check of DeBolts to Fiddlehead 9/26/12
3	2012 W-2s of Emily and Christopher DeBolt
4	2009-2012 W-2s of Emily and Christopher DeBolt
5	Check stub dated 3/2015
6	Check stub dated 5/16
7	Check stub dated 4/16
8	Check stub dated 2/17
9	Payment from National Garden Club 10/16
10	Check stub dated 10/15
11	CT Nursery and Landscape Association letter 2/1/17
12	Presentations of Emily DeBolt 2010-2017
13	Contract with Lake George Association
14	Fiddlehead Creek brochures
15	Capitol Region Chamber letter
16	2007 W-2 and house purchase records
17	Bill of Sale and agreement to purchase truck for Fiddlehead