

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

In the Matter

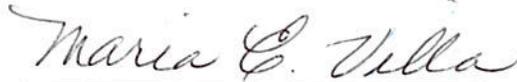
- of -

the Application of **Bentley Bros., Inc.**  
for Certification as a Women-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 58210

RECOMMENDED ORDER

- by -



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Maria E. Villa  
Administrative Law Judge

May 11, 2016

## 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 Bentley Bros., Inc. ("Bentley" or "applicant") certification as a women-owned business enterprise<sup>1</sup> ("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 Bentley does not meet the eligibility criteria for certification as a WBE.

The Division denied Bentley's application for WBE certification (Exhibit 2) by letter dated November 2, 2015. Exhibit 1. The denial letter sets forth three grounds under 5 NYCRR Section 144.2 for the denial. Specifically, according to the Division,

- (1) applicant failed to demonstrate that Ms. Bentley's capital contributions were proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise (see Section 144.2(a)(1) ("Ownership")); and
- (2) applicant failed to demonstrate that corporate documents and relevant business agreements permitted Ms. Bentley to make business decisions without restrictions (see Section 144.2(a)(b)(2) ("Control"));
- (3) applicant failed to demonstrate that Ms. Bentley has the experience or technical competence, working knowledge or ability needed to operate the enterprise, and furthermore, the applicant failed to show that Ms. Bentley made decisions pertaining to the operation of the enterprise or devoted time on an ongoing basis to the enterprise's daily operations (see Section 144.2(b)(1)(i) – (iii) ("Operation")).

Applicant filed a notice of appeal from the denial, and counsel for the Division responded by letter dated January 28, 2016. Exhibits 9 and 10. In its letter, the Division informed applicant that a hearing was scheduled for February 23, 2016, but applicant subsequently elected to file a written appeal in lieu of a hearing.

On March 25, 2016, Bentley provided its brief to set aside the Division's denial of woman-owned business status ("Applicant's Brief"). Applicant also provided a number of

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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 Section 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")).

exhibits. The Division's brief and exhibits in response were received on April 19, 2016 ("Division Brief").

A list of exhibits is attached to this recommended order. Exhibits submitted by Bentley were not marked or received to the extent that those exhibits were duplicates of exhibits submitted by the Division and already received into the record.

### **ELIGIBILITY CRITERIA**

The eligibility criteria pertaining to certification as a women-owned business enterprise are established by regulation (see 5 NYCRR Section 144.2). For the purposes of determining whether an applicant should be granted 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, 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 proof to establish that the Division's denial of Bentley's WBE certification is not supported by substantial evidence (see State Administrative Procedure Act Section 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 N.Y.3d 494, 499 (2011) (internal quotation marks and citations omitted)).

### **POSITIONS OF THE PARTIES**

#### Applicant

On appeal, applicant addresses the bases cited by the Division for the denial of Bentley's WBE application. With respect to ownership, applicant states that Ms. Bentley provided documentation of her capital contributions in response to a request from the Division. Applicant also states that Ms. Bentley has contributed her knowledge and expertise to the enterprise. With regard to operation, applicant asserts that Ms. Bentley makes decisions pertaining the business's operation, and devotes time to that operation on an ongoing basis.

#### Division

In its response to the appeal, the Division argues that its determination is supported by substantial evidence. Specifically, the Division argues that applicant failed to satisfy certification criteria related to ownership, operation, and control of the business enterprise by a woman owner. The Division contended that Ms. Bentley's father, David Bentley, "was disproportionately responsible for the capitalization of Bentley Bros, that the Applicant relies on

Mr. Bentley's significant industry experience to sell and service tractors, and that Mr. Bentley operates the core functions of Bentley Bros." Division Brief, at 1.

The Division argues that Bentley's appeal fails to rebut any of these three bases for the denial and, therefore, the Division requests that its determination to deny WBE certification for Bentley be upheld.

### **FINDINGS OF FACT**

1. Bentley Bros., Inc. is located at 13936 State Route 31, Albion, New York. Exhibit 2, at 1.
2. Bentley sells and services Kubota tractors, and also sells parts for Kubota tractors. In addition, Bentley sells farm implements and other attachments for the tractors. Exhibit 2, at 3.
3. Bentley was established in 1925. Exhibit 2, at 2.
4. David Bentley, Ms. Bentley's father, assumed ownership of Bentley in 1991. Exhibit 2, at 2. The application lists Laura Bentley as the owner as of January 1, 2011. Id.
5. The application indicates that Ms. Bentley made a contribution in the form of expertise in the amount of \$200,000, while Mr. Bentley's contribution of expertise was in the amount of \$300,000. Exhibit 2, at 2.

### **DISCUSSION**

This report considers applicant's appeal from the Division's determination to deny certification of Bentley as a women-owned business enterprise pursuant to Executive Law Article 15-A.

As an initial matter, applicant argued that the denial was arbitrary and capricious, and without a rational basis. In this regard, applicant contended that the Division's letters included only "bald assertions" for its denial of Ms. Bentley's application, made no factual determinations, and merely summarized the Division's decisions "with conclusory legal assertions" making reference to the regulations. Applicant's Brief, at 3. Applicant argued that "[t]his list of denial reasons does not provide the Petitioner with an explanation of how particular facts from the application were evaluated or considered." Id.

Applicant went on to state that it had not been informed of the Division's interpretation of the facts specific to the application, and

can merely speculate, based on the denial letter that the Respondent either: (1) made a determination unsupported by substantial evidence because Respondent did not have enough information about the realities of Petitioner's business operations; (2) misinterpreted items in the application or relied on outdated documents in issuing a

preliminary denial; or (3) the decision reached may have been arbitrary and capricious.

Applicant's Brief, at 4.

On appeal, an applicant may request a hearing, or submit a written appeal. In this case, applicant elected to provide a written submission, and the Division filed a response. The Division's response amplified the three bases for denial set forth in the Division's November 2, 2015 letter. As discussed below, given the information that was before the Division when the application was considered, the denial was proper and should be affirmed.

In addition, with respect to each basis for the Division's denial, applicant took the position that, in the alternative, new facts and circumstances warranted setting aside the denial and granting certification or other appropriate relief. Applicant provided additional documents, which were not before the Division at the time the application was being considered, and pointed out that if the facts and circumstances forming the basis for the denial had changed significantly, applicant would be entitled to re-apply for certification sooner than the two year waiting period from the date of denial. Applicant included documentation of an additional purchase of six shares, for a total of 81 shares owned by Ms. Bentley, with 67 owned by Mr. Bentley. Applicant also provided an updated resume, and other documentation that post-dated the denial.

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 provided in supplemental submissions and interviews that are conducted by Division analysts. Consequently, the additional documents provided by applicant on appeal are not considered in evaluating whether the Division's denial was proper.

#### Ownership

Section 144.2(a)(1) of 5 NYCRR provides that the contribution of a woman or minority business owner must be proportionate to the owner's equity interest in the business enterprise, "as demonstrated by, but not limited to, contributions of money, property, equipment or expertise." At issue in this proceeding is whether Laura Bentley's contributions to Bentley are in proportion to her ownership interest.

The application indicates that Ms. Bentley made a capital contribution in the form of expertise in the amount of \$200,000, while Mr. Bentley's contribution of expertise was in the amount of \$300,000. Exhibit 2, at 2. Applicant argued that Ms. Bentley had made contributions to the business enterprise in the form of money, as well as expertise. Specifically, applicant stated that Ms. Bentley had been given 25 shares of stock in Bentley "in consideration for Ms. Bentley's contribution to the business in the form of expertise." Applicant's Brief, at 5. Applicant went on to indicate that on January 1, 2011, "Ms. Bentley purchased 50 shares pursuant to a stock purchase agreement with a promissory note in the amount of [REDACTED]." Applicant's Brief, at 5; Exhibit 12.

Applicant went on to assert that "[i]n addition to her monetary contributions in return for equity, Ms. Bentley has provided for the business through her expertise and her day-to-day

role as owner.” Applicant’s Brief, at 6. Applicant argued that Ms. Bentley uses her education in advertising, public relations, and business to market the business, as well as managing personnel, negotiating and signing contracts, and accounting. According to applicant, “[t]he totality of Ms. Bentley’s expertise at the time of the submittal of the application along with her monetary contributions for the majority of her shares is sufficiently proportionate to her equity interest.” Applicant’s Brief, at 7. Applicant included documentation that post-dated the denial of an additional purchase of six shares, for a total of 81 shares owned by Ms. Bentley, with 67 owned by Mr. Bentley.

In response, the Division pointed out that on the application, Mr. Bentley’s capital contribution was greater than Ms. Bentley’s. Exhibit 2, at 2. The Division asserted that “[o]n this basis alone, the Department might have properly determined that the Applicant had not made a capital contribution to Bentley Bros that was ‘proportionate to [her] equity interest in the business enterprise,’ as is required by 5 NYCRR § 144.2(a)(1).” Division Brief, at 2. The Division went on to note that applicant did not submit any evidence of having made a \$200,000 capital contribution. The Division pointed out that applicant’s argument that her initial shares in Bentley were received in consideration for Ms. Bentley’s contributions of expertise relied upon Mr. Bentley’s affidavit. Exhibit 15. The Division observed that the affidavit does not contain a statement to that effect. Moreover, the Division noted that the affidavit “does not shed any light on how the value of the Applicant’s purported contribution was determined or how the Department might have approached valuing the Applicant’s purported contribution in evaluating the application.” Division Brief, at 2.

With respect to the stock purchase agreement, the Division took that position that the purchase of stock from another shareholder should not be construed as a capital contribution to the business enterprise. The Division went on to argue that even if a stock purchase could be so construed, the appeal did not provide any proof of payments made under the stock purchase agreement.

Applicant’s arguments on appeal and the documentation provided are insufficient to establish that the Division’s determination was not based upon substantial evidence. The Division’s arguments with respect to ownership are persuasive, and the record supports the Division’s determination on the issue of contribution. Consequently, applicant failed to meet its burden with respect to its challenge to this basis for the denial. The Division’s determination that applicant does not satisfy the ownership criteria was reasonable and based on substantial evidence, and should be affirmed.

### Control

Section 144.2(b)(2) of 5 NYCRR requires that, in order for a business to be certified as women-owned, “articles of incorporation, corporate bylaws, partnership agreements and other agreements . . . must permit . . . women who claim ownership of the business enterprise to make [] decisions without restrictions.” Pursuant to Bentley’s corporate bylaws, the “general charge of the business and affairs of the corporation” are vested in the president. Exhibit 7, at 8. During the interview, in response to a question by the analyst, Ms. Bentley indicated that there had been no changes to the corporation’s bylaws. Exhibit 6, at 6:30. The application included several contracts that had been signed by Mr. Bentley as president. Exhibit 3.

Applicant argued that Ms. Bentley controlled the business, and made decisions without restrictions. Applicant went on to state that Ms. Bentley “is involved in all aspects of managerial operations except for preparing estimates and supervising field operations.” Applicant’s Brief, at 9; Exhibits 2, 9, 12, and 14. According to applicant, “Ms. Bentley has considered herself to be in charge . . . and Mr. Bentley also views her in this role.” Applicant’s Brief, at 9. Applicant pointed out that Ms. Bentley signed the federal and State 2013 and 2014 corporate tax returns as president. Exhibits 25-28. According to Applicant, Mr. and Ms. Bentley did not officially change titles and update the corporate documents to reflect the change until August 20, 2015, “though they acted in practice as if Ms. Bentley was President upon majority ownership. . . . Until then, they interpreted the bylaws as general guidelines.” Applicant’s Brief, at 10 (internal citations omitted).

Applicant acknowledged that several of the agreements were signed before Ms. Bentley became the owner, but contended that Ms. Bentley has been updating records and agreements. Applicant went on to state that “[s]ome documents have not been updated for business reasons.” Applicant’s Brief, at 11. Specifically, applicant made reference to a letter of credit from First Niagara Bank. According to applicant, “it has not been a priority to update” the document, but “First Niagara has been informed of the needed correction of their records to reflect Ms. Bentley as President.” *Id.*

Applicant urged that the application be reconsidered and approved, or in the alternative, that the application be rejected so that applicant could re-apply without being subject to the two-year waiting period following a notice of denial (see Section 144.5(b) of 5 NYCRR). Nevertheless, on appeal, applicant recognized that “due to Ms. Bentley’s confidence in her actual control of the business and her haste in applying, many of Petitioner’s documents did not name Ms. Bentley as President at the time of filing. These inconsistencies in the documents resulted from the fact that Ms. Bentley had only been majority owner for one year at the time of filing the application and had failed to update all documents to reflect her official role as President.” Applicant’s Brief, at 12.

The Division responded that the application did not demonstrate that Ms. Bentley was the president of Bentley, “and accordingly the Department was unable to determine that the Applicant was permitted by the corporate bylaws of Bentley Bros to make decisions without restrictions.” Division Brief, at 6. The Division went on to observe that it was unable to verify that Ms. Bentley was the president, “and accordingly inferred that Mr. Bentley remained the President.” *Id.* Moreover, during the telephone interview, Ms. Bentley stated her title as “corporate secretary and owner,” and her father’s as “sales manager and owner.” Exhibit 6, at 00:39 and 12:00. Under the circumstances, it is reasonable that the Division concluded that Mr. Bentley retained control.

The Division noted that on appeal, Ms. Bentley provided evidence that she was elected president of Bentley on August 20, 2015. Exhibit 16, at 2. According to the Division, “[h]ad this information been before the Department at the time of its denial determination, the Department would likely have reached a different conclusion with respect to the control of Bentley Bros. However, as the minutes of the meeting of the Board of Directors of Bentley Bros were not included as part of the Applicant’s application, they do not demonstrate that the

Department's initial determination was not supported by substantial evidence." Division Brief, at 7.

On this record, applicant's arguments are not persuasive. The Division reviews an application for certification based upon the information provided, and if an applicant does not supply information sufficient to establish control by the woman owner, the application is properly denied. Applicant conceded that documents establishing Ms. Bentley's control were not before the Division at the time the application was considered. Moreover, even assuming that applicant has demonstrated that Ms. Bentley controls the business for purposes of certification, applicant has not shown that Ms. Bentley owns Bentley (as discussed above) or operates Bentley (as discussed below). Consequently, the Division's denial of certification was supported by substantial evidence, and should be affirmed.

### Operation

Section 144.2(b)(1) of 5 NYCRR requires that decisions pertaining to the operations of the business enterprise must be made by the woman owner. In this regard, Section 144.2(b)(1)(i) of 5 NYCRR mandates that an applicant demonstrate that the woman owner has adequate managerial experience or technical competence in the business enterprise seeking certification. In addition, an applicant must show that the woman owner has the working knowledge and ability needed to operate the business enterprise (see 5 NYCRR Section 144.2(b)(1)(ii)). The regulations also require a showing that the minority or woman business owner makes decisions pertaining to operation, and devotes time on an ongoing basis to the daily operation of the business enterprise (see 5 NYCRR Section 144.2(b)(1)(iii)).

On appeal, applicant pointed out that the regulation only requires that managerial experience and technical competence need only be "adequate." Applicant's Brief, at 13. Applicant argued that Ms. Bentley's resume and work experience together "should be considered 'adequate' as a whole." Id., at 14. Applicant contended that it was not necessary for Ms. Bentley to know and be able to perform all the functions of a business, and noted in her appeal letter that she stated that she "could step into any role within the business as needed except for a mechanic." Exhibit 9. Applicant referred to the updated resume that was provided with the appeal, and maintained that the resume provided with the application was submitted because "Ms. Bentley quickly put together a resume for the purpose of the application and did not comprehend a need to be more descriptive in her skills and abilities." Applicant's Brief, at 15.

Applicant asserted that Ms. Bentley made all final and binding decisions pertaining to operations. Applicant expressed the belief that the application may have been denied because the Division assumed that Ms. Bentley could not make decisions independently because her father was still involved in the business as an officer and sales manager. Applicant disputed this conclusion, arguing that the business "has been slowly transitioning from 'family-owned' to 'woman-owned' since 2007 when Ms. Bentley returned to the family business as an adult and began informal full-time training to take over the business and began serving on the board." Applicant's Brief, at 16.

Applicant also went on to address the provision of the regulation that requires that an applicant demonstrate that she devotes time on an ongoing basis to the daily operation of the

business enterprise (Section 144.2(b)(1)(iii). The Division did not discuss this aspect of the application, and it is therefore undisputed that Ms. Bentley devotes time on an ongoing basis to Bentley sufficient to satisfy this regulatory requirement.

The Division took the position that, where an applicant does not have technical expertise or working knowledge within the industry, and delegates operation of core business functions to an individual not eligible for certification, the business cannot be eligible. According to the Division, Ms. Bentley failed to demonstrate that she had the necessary skills and experience to operate the business, and instead relied upon her father to perform the core functions of selling and servicing tractors.

The Division noted that Ms. Bentley “demonstrated no substantive experience or working knowledge in the sale or servicing of tractors.” Division Brief, at 3. The Division pointed out that the resumes submitted with the application, as well as the interview conducted with Ms. Bentley, “identify Mr. Bentley as the individual primarily responsible for selling tractors.” Division Brief, at 5; Exhibits 4, 5 and 6. In contrast to Mr. Bentley’s resume, which reflected over twenty years of managerial experience with the company, including experience as a sales manager, as well as relevant education in agricultural business, Ms. Bentley’s resume “indicated that her role with Bentley Bros was limited to serving as a ‘parts manager’ and performing certain financial tasks.” Division Brief, at 3; Exhibits 4 and 5. With respect to the updated resume submitted on appeal, the Division argued that the resume “provides information on a range of financial and human resources functions that the Applicant performs, but offers little insight into the specific experience that the Applicant has developed with respect to selling and servicing tractors.” Division Brief, at 4.

The Division went on to assert that Ms. Bentley does not make decisions pertaining to selling and servicing tractors, the core functions of the business. The Division noted that, according to the application, Ms. Bentley plays no role in estimating or supervising field operations. Exhibit 2, at 3-4. Referring to Mr. Bentley’s resume, the Division observed that he is the sales manager for the business. Exhibit 5. The Division also cited to the certification interview, during which Ms. Bentley stated “that Mr. Bentley is responsible for managing salespersons and sales operations in general.” Division Brief, at 5; Exhibit 6 at 11:15. The Division accordingly “inferred from the Applicant’s application materials that Mr. Bentley continues to be the primary manager for selling and servicing tractors, while the Applicant’s managerial role is primarily oriented around office administration, certain financial tasks, and general marketing of the business.” Division Brief, at 5.

Compared to Mr. Bentley, Ms. Bentley’s role in the operation of the business enterprise is more limited, and does not rise to the level of operation of core functions. The business is engaged in selling and servicing tractors, and on this record, applicant has not demonstrated that Ms. Bentley has primary responsibility for those core functions. The record supports the Division's determination regarding the operation of Bentley. Accordingly, the Division's determination that applicant does not satisfy the operation criteria should be sustained.

## **CONCLUSION**

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

## **RECOMMENDATION**

For the reasons set forth above, the Division's determination to deny Bentley's application for certification as a women-owned business enterprise should be affirmed.

**Matter of Bentley Bros., Inc.**  
**DED File ID No. 58210**  
**Exhibit Chart**

Exhibit No.	Description
1	November 2, 2015 denial letter (Also Applicant's A-36; not marked)
2	February 3, 2014 application (Also Applicant's A-3; not marked)
3	March 21, 2012 Demand Grid Note (First Niagara) (Also Applicant's A-32; not marked)
4	Resume: Laura Bentley (Also Applicant's A-12; not marked)
5	Resume: David Bentley (Also Applicant's A-14; not marked)
6	Audio CD of interview (Also Applicant's A-48; provided via e-mail; not marked)
7	Bentley Bros., Inc. By-Laws (Also Applicant's A-19; not marked)
8	Shareholder Meeting Minutes (January 2, 2010) (A-16)
9	Applicant response to denial (undated) (A-39)
10	January 28, 2016 letter from Phillip Harmonick, Esq. to Laura Bentley re appeal (A-41)

11	Stock Certificate Ledger 2010-2013 (A-43)
12	January 1, 2011 Stock Purchase Agreement (A-49)
13	Laura Bentley Updated Resume (A-65)
14	Affidavit of Petitioner, Laura Bentley, sworn to March 25, 2016 (A-68)
15	Affidavit of David Bentley, sworn to March 25, 2016 (A-72)
16	Minutes of Special Meeting of Board of Directors (August 20, 2015) (A-74)
17	NYS DOS Corporate Entity Information Page (A-79)
18	February 10, 2016 Northpoint Commercial Finance Letter of Credit (A-81)
19	GE Dealer Information Update Form (February 10, 2016) (A-87)
20	TCF Inventory Finance Form (February 15, 2016) (A-88)
21	March 7, 2016 Promissory Note (A-89)
22	Stock Certificate Ledger Updated March 7, 2016) (A-95)
23	Stock Certificates July 1, 2010 to March 7, 2016 (A-96)

24	February 11, 2016 First Niagara Bank Certified Resolutions For A Corporation (A-109)
25	2013 Federal Corporate Tax Return (A-111)
26	2013 State Corporate Tax Return (A-134)
27	2014 Federal Corporate Tax Return (A-156)
28	2014 State Corporate Tax Return (A-180)
29	2015 W-2s for Laura and David Bentley (A-198)