

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

In the Matter

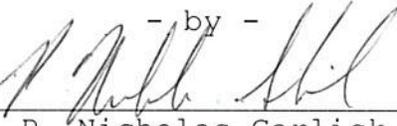
- of -

the Application of
Coqui Creations Corp. DBA Landscape Concepts
For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 58274

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

May 19, 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 the application of Coqui Creations Corp. DBA Landscape Concepts ("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 Coqui Creations Corp. DBA Landscape Concepts challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Coqui Creations Corp. DBA Landscape Concepts's application was submitted on February 25, 2014 (Exh. DED3).

The application was denied by letter dated September 29, 2015, from Bette Yee, Director of Certification Operations (Exh. DED1). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet two separate eligibility criteria related to Mary Anne Rivera's ownership and operation of the applicant.

By letter dated October 28, 2015, Mary Anne Rivera, on behalf of the applicant, requested a hearing to appeal from the Division's denial determination (Exh. A30).

By letter dated December 16, 2015, the Division notified the applicant that a hearing would be held on the denial on January 19, 2016 (Exh. A29).

By letter dated January 12, 2016, applicant's counsel requested an adjournment of the hearing.

On January 14, 2016, a conference call was held with the parties to discuss deciding the appeal on papers.

By email dated January 22, 2016, the parties proposed a schedule for written submissions instead of convening a hearing. By email of the same date I agreed. All submissions were timely received.

With a cover letter dated February 18, 2016, counsel for the applicant submitted its appeal. Attached to the appeal were thirty exhibits (labeled exhibits A1-A30 in the attached exhibit chart).

In a four-page memorandum dated March 16, 2016, the Division responded to the appeal. Attached to the response were four exhibits (labeled exhibits DED1-DED4 in the attached exhibit chart).

In a letter dated March 31, 2016, counsel for the applicant replied to the Division's response.

In an email dated April 1, 2016, the Division waived its right to provide a sur-response and the record closed.

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 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 meet two separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner, Mary Anne Rivera, enjoys the customary incidents of ownership and shares in the risks and profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).

Second, the Division found that the applicant failed to demonstrate that the woman owner, Mary Anne Rivera, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR 144.2(b)(1) & (b)(1)(iii).

Position of the Applicant

Coqui Creations Corp. DBA Landscape Concepts 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. Coqui Creations Corp. DBA Landscape Concepts is a full service landscape company that provides full property management services for residential and commercial firms, including design, irrigation, lighting, masonry and tree services (Exh. DED3 at 2).

2. Coqui Creations Corp. DBA Landscape Concepts was established on March 17, 2003 by Ms. Rivera (Exh. A26 & A27).

3. Mary Ann Rivera owns 51% of the stock in Coqui Creations Corp. DBA Landscape Concepts and her husband Gary Rivera owns the remaining 49% (Exh. A22). Ms. Rivera

contributed [REDACTED] to the corporation and her husband contributed [REDACTED] (Exh. DED3 at 2). Ms. Rivera is the president and treasurer of the corporation and Mr. Rivera is the vice president and secretary (Exh. DED3 at 2).

4. In 2014, Coqui Creations Corp. DBA Landscape Concepts paid a salary of [REDACTED] to Gary Rivera and a salary of [REDACTED] to Mary Ann Rivera (Exh. DED2 at 9). In 2013, Coqui Creations Corp. DBA Landscape Concepts paid a salary of [REDACTED] to Gary Rivera and a salary of [REDACTED] to Mary Ann Rivera (Exh. A7 at 9).

5. Ms. Rivera has sole responsibility for: negotiating bonding, negotiating insurance, marketing and sales, hiring and firing, managing and signing payroll, and negotiating contracts. Ms. Rivera shares responsibility for financial decisions, preparing bids, and signing for business accounts with her husband. Gary Rivera has sole responsibility for estimating, supervising field operations, and purchasing equipment/sales (Exh. DED 3 at 3-4).

DISCUSSION

This report considers the written 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 set forth two bases related to Ms. Rivera's ownership and operation of Coqui Creations Corp. DBA Landscape Concepts. Each basis is discussed individually, below.

Ownership

In its denial letter, the Division stated that the applicant failed to demonstrate that the woman owner, Mary Anne Rivera, enjoys the customary incidents of ownership and shares in the risks and profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).

On the appeal, applicant's counsel disputes the denial on this ground and maintains that sufficient documentation was submitted with the application to demonstrate that the applicant meets certification standards. It is undisputed that Ms. Rivera

owns 51% of the corporation, was its incorporator, and serves as its president and secretary.

In its response, the Division argues that Ms. Rivera's husband receives a disproportionate share of the benefits from the business enterprise which compromises the applicant's ability to meet the certification criteria. To support its argument, the Division refers to the applicant's 2014 federal tax return which shows that Mr. Rivera was paid [REDACTED] while his wife was paid [REDACTED] (Exh. DED2 at 9). The Division states that no information in the application materials demonstrates that Ms. Rivera received any dividends or other benefits from the applicant.

In its reply, applicant's counsel does not address the disparity in salary between Ms. Rivera and her husband. Rather the reply restates arguments made on the appeal without addressing the specific basis upon which the denial for failing to meet the ownership criteria was based.

Based on the evidence in the record and the discussion above, the applicant has not demonstrated that the woman owner, Mary Anne Rivera, enjoys the customary incidents of ownership and shares in the risks and profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2). Her husband, the minority shareholder in the corporation, was paid more than three times more than she was in 2014. The Division's determination that Ms. Rivera does not enjoy the customary incidents of ownership and does not enjoy a proportionate share of the profits of the business is supported by substantial evidence.

Operation

The Division also determined that the applicant failed to demonstrate that the woman owner, Mary Anne Rivera, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR 144.2(b)(1) & (b)(1)(iii).

On its appeal, applicant's counsel argues that Ms. Rivera exercises the authority to control independently the day to day business decisions of the corporation. Counsel notes Ms.

Rivera's formal training as a horticulturist, her experience as the outdoor gardens manager at the New York Botanical Gardens, and points to the narrative supplied with the application that describes Ms. Rivera as a "hands on" business owner. This narrative states that Ms. Rivera: runs the office and office staff consisting of an office manager and bookkeeper; schedules the crew's jobs; oversees the crew's work for the installation of design projects and maintenance customers; designs the landscape projects that the company completes; and handles client relations (Exh. A25 at 3). Applicant's counsel also refers to information in the application itself that states Ms. Rivera has sole responsibility for: negotiating bonding, negotiating insurance, marketing and sales, hiring and firing, managing and signing payroll and negotiating contracts. Ms. Rivera also shares responsibility for financial decisions, preparing bids, and signing for business accounts with her husband (Exh. DED 3 at 3-4).

In its response, the Division argues that Ms. Rivera's husband operates the core functions of the business enterprise which compromises the applicant's ability to meet the certification criteria. The Division explains that because of the small size of the applicant, substantially greater weight was given in the evaluation of the application to the fact that Mr. Rivera oversees the field operations and estimating, leading the Division to come to the conclusion that Mr. Rivera operated the core functions of the business for certification purposes. The Division does not challenge Ms. Rivera's capacity to manage the business but based its denial on the fact that she does not manage its core functions. The Division concludes that the applicant is a family business that draws upon the respective skills and abilities of the Riveras and as such does not meet certification criteria to be a WBE.

In its reply, applicant's counsel does not address the different roles performed by Ms. Rivera and her husband. Rather, the reply restates arguments made on the appeal without addressing the specific basis upon which the denial for failing to meet the operation criteria was based.

Based on the evidence in the record and the discussion above, the applicant has failed to demonstrate that the woman

owner, Mary Anne Rivera, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR 144.2(b)(1)(i)-(iii). The core functions of the business, estimating and supervising field operations, are not undertaken by the woman owner. The Division's denial on this ground was based upon substantial evidence.

CONCLUSIONS

1. The applicant failed to demonstrated that the woman owner, Mary Anne Rivera, enjoys the customary incidents of ownership and shares in the risks and profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).

2. The applicant failed to demonstrate that the woman owner, Mary Anne Rivera, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR 144.2(b)(1) & (b)(1)(iii).

RECOMMENDATION

The Division's determination to deny Coqui Creations Corp. DBA Landscape Concepts's application for certification as a woman-owned business enterprise should be affirmed, for the reasons stated in this recommended order.

**Matter of
Coqui Creations Corp. DBA Landscape Concepts**

**DED File ID No. 58274
Exhibit List**

Exh. #	Description	# of pages
A1	Application for MWBE certification from the Port Authority of NY and NJ	20
A2	NYS ESD certification of individual net worth	4
A3	Addendum to Exhibit A1	5
A4	NYC MWBE certification affidavit	5
A5	ESD certification affidavit	2
A6	Applicant's profit and loss statement from 1/1/14 - 2/23/14	1
A7	2013 IRS form 1120S	18
A8	2013 NY S-corporation franchise tax return	9
A9	Applicant's IRS form 1120S for 2014 (same as Exh. DED3)	17
A10	2014 NY S-corporation franchise tax return	12
A11	2013 NYS resident income tax return	6
A12	2014 NYS itemized deduction schedule	5
A13	2014 IRS form 1040	17
A14	Proposal dated August 17, 2015	3
A15	Proposal dated June 2, 2015	2

A16	Draft contract dated March 4, 2015	5
A17	Draft contract dated February 27, 2015	5
A18	Email receipt for ESD MWBE application	2
A19	Application document list	3
A20	Application	8
A21	Emails between applicant and Division analyst	21
A22	Stock register and certificates	9
A23	Emails between applicant and Division staff	4
A24	Emails between applicant and Division staff	3
A25	Information about business leases; capital contributions; narrative of responsibilities; resume of owners	5
A26	Corporate documents including: NYSDOS filing receipt, certificate of incorporation, by laws, corporate minutes, meeting notices	50
A27	NYSDOS website entity information about applicant	2
A28	Denial letter (same as Exh. DED1)	3
A29	Letter from Division scheduling hearing	2
A30	Applicant's letter requesting hearing	2
DED1	Denial letter dated September 29, 2015 (same as Exh. A28)	3
DED2	Applicant's IRS form 1120S for 2014 (same as Exh. A9)	17

DED3	Application	10
DED4	Recording of phone interview	on disc