

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

In the Matter

- of -

the Application of **NCS Home, Inc. d/b/a NCS Technologies**
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59499

RECOMMENDED ORDER

- by -



Maria E. Villa
Administrative Law Judge

June 30, 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 NCS Home, Inc. d/b/a NCS Technologies ("NCS" or "applicant") certification as a women-owned business enterprise¹ ("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 NCS does not meet the eligibility criteria for certification as a WBE.

The Division denied NCS's application for WBE certification (Exhibit 2) by letter dated January 12, 2016. 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 Andrea Corona (the woman owner)'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"));
- (2) applicant failed to demonstrate that Ms. Corona has the experience or technical competence, working knowledge or ability needed to operate the enterprise, and furthermore, applicant failed to show that Ms. Corona 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")); and
- (3) applicant failed to demonstrate that Ms. Corona had control of negotiations, signature authority for payroll, leases, letters of credit, insurance bonds, banking services and contracts, and other business transactions (see Section 144.2(a)(b)(3) ("Control"));

By letter dated February 4, 2016, applicant filed a notice of appeal from the denial (the "Appeal Letter"),² and counsel for the Division responded by letter dated May 26, 2016. Exhibits 3 and 4. In its letter, the Division informed applicant that the hearing was scheduled for June 7, 2016. Exhibit 4, at 1.

¹ 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")).

² The Appeal Letter was authored by Michael Stanczyk, Esq., applicant's counsel. At the hearing, applicant appeared *pro se*.

On June 7, 2016, the hearing was held at 11:00 a.m. at the Division's offices at 625 Broadway, Albany, New York. Division Staff was represented by Phillip Harmonick, Esq., and the Division offered the testimony of Senior Certification Analyst El Hussein Sarhan. Andrea Corona and Thomas Corona testified on applicant's behalf. A list of exhibits received into evidence at the hearing is attached to this recommended order. The hearing was recorded by Division staff, and the recording was provided to the administrative law judge ("ALJ") in compact disc format. This audio recording is approximately one hour and twenty minutes in length, on two discs. References to testimony from the hearing are identified by the approximate time on the recording at which the testimony occurs ("HR at ____").

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 NCS'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 argued that the denial should be reversed. Applicant asserted that the Division did not advance any factual information to support its determination that Ms. Corona lacked the customary incidents of ownership, control and technical expertise. Applicant contended that the denial was based upon improper readings of the applicable regulations. Finally, applicant maintained that the denial was in conflict with the actual facts, which would support a grant of certification as a woman-owned business enterprise.

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 argued that NCS's appeal failed to rebut any of these three bases for the denial and, therefore, the Division requested that its determination to deny WBE certification for NCS be upheld.

FINDINGS OF FACT

1. NCS Home, Inc. d/b/a NCS Technologies is located at 7 Teasel Lane, Skaneateles, New York. Exhibit 2, at 1.
2. NCS provides commercial low voltage products and services, including access control, surveillance, WiFi, data, voice, video, security, and supporting services including design, cabling and installation. Exhibit 2, at 3.
3. NCS was established in 1998. Exhibit 2, at 2. Ms. Corona is the president, and owns 51% of NCS. Her husband, Thomas Corona, is the vice-president, and owns 49%. Exhibit 2, at 3; Exhibit 11.
4. When the company was formed, Ms. Corona made a contribution of [REDACTED] in cash, while Mr. Corona's contribution was in the amount of [REDACTED]. Exhibits 5 and 11. The funds were contributed from a joint checking account. Exhibit 6.
5. Ms. Corona does not draw a salary from NCS. She is a full-time employee of State Farm Insurance, and was paid approximately [REDACTED] in 2013. In 2013, Mr. Corona was paid approximately [REDACTED] by NCS. Exhibit 8, at 28.
6. Mr. Corona holds a low voltage electrical license issued by the City of Syracuse. Exhibit 2, at 3; Exhibit 9.
7. Both Ms. Corona and Mr. Corona are signatories to a line of credit, checking account, and car lease. Exhibits 12, 13 and 17.

DISCUSSION

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

As an initial matter, in the Appeal Letter, applicant contended the Divisions' denial "did not contain any information or facts supporting the conclusions drawn in the Denial, nor did any facts which support the Denial exist." Exhibit 3, at 1. According to applicant, "[t]he reasons stated in the Denial are bare, unsupported determinations without any basis in either fact or law." Id. Applicant argued that the denial should be overturned due to the following reasons, among others:

- (i) the Division lacked any factual information which would allow it to determine that Ms. Corona lacked the customary incidents of ownership, control and technical expertise, which were the overriding factor [sic] relied upon in the Denial;
- (ii) the Division based the denial on improper readings of the applicable regulations; and
- (iii) the Denial was in conflict with the actual facts as they exist in this situation as Ms. Corona does devote sufficient time, enjoy the proportionate incidents of ownership, and possess the control attributes and working knowledge required to operate the Applicant's operations.

Exhibit 3, at 1.

As noted above, 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, if any, that are conducted by Division analysts. As discussed below, given the information that was before the Division when the application was considered, the denial was proper and should be affirmed.

Ownership

The Division denied the application, in part, because in the Division's view, NCS did not demonstrate that Ms. Corona enjoys the customary incidents of ownership, or that she shares in the risks and profits in proportion with her ownership interest in the enterprise. See Section 144.2(c)(2). The Division also advanced an additional basis for denial with respect to the ownership criteria, citing to Section 144.2(a)(1) of 5 NYCRR. That provision states 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."

The application indicates that when NCS was formed, Ms. Corona made a capital contribution of [REDACTED], while Mr. Corona's contribution was in the amount of [REDACTED]. Exhibit 2, at 2. Applicant argued that Ms. Corona had made contributions to the business enterprise in the form of services, and those services need not be technical, but may be managerial in nature. HR at 45:40. Applicant went on to assert that Ms. Corona also has expertise sufficient to run the company. HR at 46:15. Applicant maintained that because NCS is still establishing itself, Ms. Corona has decided to forego a salary in order to encourage the company to grow. Ms. Corona testified that she planned to leave her employment with State Farm as soon as NCS was sufficiently established for her to do so. HR at 42:00.

Applicant introduced copies of a line of credit opened at Solvay Bank, as well as a corporate resolution for a checking account at the same banking institution. Exhibits 12 and 13. Although both documents are signed by Andrea Corona, Thomas Corona is also a signatory, and has the same rights and obligations as Ms. Corona. Id. Applicant also provided a copy of a lease for a company vehicle, but this document lists both Ms. Corona and Mr. Corona as co-lessees. Exhibit 17.

In response, the Division contended that because Ms. Corona does not receive a wage from NCS, she does not share in the profits, and asserted that program benefits must flow to the woman owner. The Division noted that the regulatory criteria at issue are intended to ensure that the benefits that a woman-owned business receives flow “to those most likely to have experienced discrimination in the marketplace, or to have suffered the effects of discrimination.” HR at 3:00. The Division pointed out that “family businesses struggle to meet the requirements,” and that in evaluating an application the Division looks to see whether the woman owner bears investment risks, receives the bulk of the proceeds, and is the “face” of the business.

The Division asserted that the initial capital investment was drawn from the Corona’s joint checking account, and that such an investment did not show that Ms. Corona made a personal investment in NCS. With respect to Ms. Corona’s claim that she contributed expertise, the Division asserted that the nature of that expertise was not clear, nor had applicant shown how it could be valued and how it compared to Mr. Corona’s contribution.

Applicant’s arguments on appeal and the documentation provided are insufficient to establish that the Division’s determination was not based upon substantial evidence. At the time NCS was formed, Mr. and Ms. Corona contributed funds from their joint checking account. In addition, Ms. Corona works full-time for State Farm, and does not share in the profits from NCS, while her husband draws a salary from the business. With respect to risk, both Ms. Corona and her husband are signatories to the line of credit, and both are lessees with respect to the automobile lease. Under the circumstances, NCS appears to be more in the nature of a family business, and it was reasonable for the Division to conclude that applicant did not satisfy the ownership criteria. Consequently, applicant failed to meet its burden with respect to its challenge to this basis for the denial.

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)).

Applicant asserted that Ms. Corona made all final and binding decisions pertaining to operations. At the hearing, Mr. Corona testified that “she makes the decisions.” HR at 2:15 (Disc 2). As part of the application process, the Division requested additional information, and in response, applicant provided a narrative (Exhibit 6). In that document, applicant described Ms. Corona’s role as follows:

As President of NCS Technologies my role is to control the administration of my company. I review and coordinate the scheduling of our projects, including inventory purchases and delivery to the sites. I am involved in

estimating project costs and control all negotiations with sub-contractors. I review time-line schedules as it pertains to each project. At completion I reconcile estimated/actual costs for each. I perform all accounting procedures in my office, including accounts payable, receivables, inventory management, and bank reconciliation. I generate all financial statements and meet with our accountants to review when appropriate. I establish and review all facets involved in Workman Compensation and liability insurance, and perform necessary human resource tasks and manage payroll each week.

Exhibit 6, at 1. Mr. Corona's role

includes sales and marketing efforts and post-sales support. At onset of each major project Thomas supervises and assist the on-site installation and all interaction between NCS and their clients. All instruction and operation review is exclusively completed by Thomas. At the job completion, all follow up and performance evaluations are executed by Thomas.

Id.

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)). Ms. Corona stated that she was able to attend to NCS business despite her outside employment with State Farm. In response, the Division contended that her opportunities to work with NCS are significantly limited due to her outside employment, and that her work schedule prevents her from being the "face" of the business in the field.

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. The Division argued that both Mr. and Ms. Corona operate the business, and stated that it assigned significant weight to the roles of those individuals with the technical training and expertise to provide services in determining who operates NCS. According to the Division, Ms. Corona failed to demonstrate that she had the necessary technical competence and training to operate the business, and instead relied upon her husband, Thomas Corona, to perform those core functions. The Division noted that Mr. Corona holds a low-voltage electrician's license, while Ms. Corona does not. At the hearing, applicant testified credibly that such a license is only required for work in the City of Syracuse, but nevertheless, Ms. Corona is not the licensee, and did not demonstrate technical expertise.

Compared to Mr. Corona, Ms. Corona'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 provides commercial low voltage products and services, including access control, surveillance, WiFi, data, voice, video, security, and supporting services including design, cabling and installation. On this record, applicant has not shown that Ms. Corona has primary responsibility for those core functions. Moreover, Ms. Corona's employment with State Farm restricts the amount of time

she can spend on daily operations. Although applicant asserts that Ms. Corona “is knowledgeable and does participate in the technical side of the Applicant’s activities, including sales calls and discussions” (Exhibit 3), this is not sufficient to establish that Ms. Corona operates the business within the meaning of the regulations. It was not unreasonable for the Division to conclude that NCS is a family business, rather than a WBE. The record supports the Division's determination regarding the operation of NCS. Accordingly, the Division's determination that applicant does not satisfy the operation criteria should be sustained.

Control

Section 144.2(b)(3) of 5 NYCRR requires that, in order for a business to be certified as women-owned, the woman owner must demonstrate “control of negotiations, signature authority for payroll, leases, letters of credit, insurance bonds, banking services and contracts, and other business transactions through production of relevant documents.”

The Division noted that it requested documentation, specifically, signed contracts, but pointed out that the only contract submitted was signed by Mr. Corona. The Division took the position that the signatory to a document was the individual who negotiated the contract. HR at 31:32. Mr. Sarhan, the Division’s witness, testified that in light of the documentation received, he concluded that there was no evidence that Ms. Corona negotiated contracts.

The Appeal Letter does not address this regulatory requirement. At the hearing, applicant maintained that Ms. Corona controlled negotiations. Applicant stated that the business typically did not enter into written contracts, and that if it became necessary to sign a contract, the individual in the field (Mr. Corona) would sign on NCS’s behalf. HR at 38:20; 40:15. The Division countered that if that was the case, applicant had not shown that the woman owner was the “face of the business” and the individual on-site when contract negotiations were undertaken. HR at 8:20 (Disc 2).

Applicant introduced copies of a line of credit opened at Solvay Bank, as well as a corporate resolution for a checking account at the same banking institution. Exhibits 12 and 13. Although both documents are signed by Andrea Corona, Thomas Corona is also a signatory, and has the same rights and obligations as Ms. Corona. *Id.* Applicant also provided a copy of a lease for a company vehicle, but this document lists both Ms. Corona and Mr. Corona as co-lessees. Exhibit 17.

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. Moreover, the documentation submitted by applicant was signed by both husband and wife, rather than by Ms. Corona alone. Consequently, the Division’s denial of certification was supported by substantial evidence, and should be affirmed.

CONCLUSION

Applicant failed to meet its burden to demonstrate that the Division's determination to deny NCS’s application for certification was not based on substantial evidence.

RECOMMENDATION

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

Matter of NCS Home, Inc. d/b/a NCS Technologies
DED File ID No. 59499
Exhibit Chart

Exhibit No.	Description	Received
1	January 12, 2016 denial letter	✓
2	March 16, 2014 application	✓
3	Applicant response to denial (February 4, 2016)	✓
4	May 26, 2016 letter from Olga Candelaria to Andrea Corona re appeal	✓
5	March 3, 1998 invoice – Mackey Caswell & Callahan	✓
6	Applicant’s responses to October 25, 2015 Division e-mail	✓
7	2013 Individual Tax Return	✓
8	Resumes: Andrea Corona and Thomas Corona	✓
9	City of Syracuse Electrical License	✓
10	Demco Purchase Order	✓

11	Shareholder Meeting and Certificates (1998)	✓
12	Line of Credit – Solvay Bank	✓
13	Checking Account – Solvay Bank	✓
14	Bid Proposal: COR Development Company	✓
15	Purchase Order: Fortino & Sons Electric	✓
16	Timecard/Payroll e-mails	✓
17	Car Lease (2002)	✓