

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

In the Matter

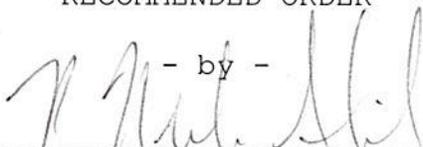
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the Application of
Penn Fabricators, Inc.
For Certification as a Minority-owned and
Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 58386

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

September 8, 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 Penn Fabricators, Inc. ("applicant") for certification as a minority-owned business enterprise ("MBE") and 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 Penn Fabricators, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a minority-owned business enterprise and a woman-owned business enterprise.

Penn Fabricators, Inc.'s application was received on March 6, 2014 (Exh. DED1 at 1).

The application was denied by letter dated January 22, 2016, from Bette Yee, Director of Certification Operations. As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet three separate eligibility criteria related to Teresa Penn's ownership and operation of the applicant.

By letter received February 17, 2016, Teresa Penn's attorney, on behalf of the applicant, appealed from the Division's denial determination.

By letter dated May 20, 2016, the Division notified the applicant that the applicant's written appeal should be filed on or before July 6, 2016.

By letter dated July 1, 2016, the applicant's counsel submitted its written appeal which consisted of a two page letter and five exhibits (listed in the attached exhibit chart as A1 - A5).

In a three page memorandum dated August 10, 2016, the Division responded to the applicant's appeal. Enclosed with the response were six exhibits, described in the attached exhibit chart as DED1-DED6).

On August 11, 2016, this matter was assigned to me.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied minority-owned business enterprise and 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 that are 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 MBE and 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 three separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the minority and woman owner Teresa Penn's capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

Second, the Division found that the applicant failed to demonstrate that the minority and woman owner, Teresa Penn, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii).

Third, the Division found that the applicant failed to demonstrate that the minority and woman owner, Teresa Penn, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

Position of the Applicant

Penn Fabricators, Inc. asserts that it meets the criteria for certification and that the Division erred in not granting it status as a minority-owned business enterprise and a woman-owned business enterprise pursuant to Executive Law Article 15-A.

FINDINGS OF FACT

1. Penn Fabricators, Inc. is in the business of fabricating and installing countertops and other products made from solid surface, quartz, and stone materials. It has a business address of 100 Bellport Avenue, Yaphank, New York. (Exh. DED1).

2. Penn Fabricators, Inc. was established on October 9, 1991. Teresa Penn became the 100% owner of the firm on January 1, 2010. Ms. Penn did not pay anything for her shares in the firm (Exh. DED1 at 3). According to Ms. Penn, her husband, Robert, was given the tools and machinery from his late father's company and used these assets to start the company in October 1991 (Exhs. DED2 & DED3).

3. Mr. Penn holds a home improvement contractor license issued by Suffolk County (Exh. DED5).

4. There is nothing in the record to show that Ms. Penn's duties with the firm involve any field work, or the fabrication or installation of countertops.

DISCUSSION

This report considers the appeal of the applicant from the Division's determination to deny certification as a minority-owned business enterprise and a woman-owned business enterprise pursuant to Executive Law Article 15-A. The Division's denial letter set forth three bases related to Mrs. Penn's ownership and operation of Penn Fabricators, Inc. Each basis is discussed individually, below.

Ownership

The ownership ground for denial was that the applicant failed to demonstrate that the minority and woman owner Teresa Penn'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, as required by 5 NYCRR 144.2(a)(1).

In the appeal letter, counsel does not address this ground for denial. Counsel explains that the five exhibits attached to his letter are documents not included with the original application. Because of this, they are not properly considered in this appeal. The first document (Exh. A1) shows Ms. Penn owns 100% of the Penn Fabricators, Inc., a fact not in dispute. According to counsel, three of these exhibits (Exhs. A2, A3 and A4) relate to real property acquired by another firm, Penn & Son Properties, LLC that Ms. Penn has an interest in. This property is to be used to house the operations of Penn Fabricators, Inc. and those of another company owned by her husband Robert Penn. The last document (Exh. A5) is a guaranty signed by Ms. Penn for certain debts of Penn & Son Properties, LLC. Nothing in either the appeal letter or the exhibits addresses Ms. Penn's contribution to Penn Fabricators, Inc.

In its response, the Division notes that in the application Ms. Penn claims to have made no contribution to the firm (Exh. DED 1 at 3). The Division also points to a January 24, 2014 letter Ms. Penn wrote that her husband was given the tools and

machinery from his late father's company and used these assets to start the company in October 1991 (Exh. DED2). This information was also included in a second letter dated July 13, 2015 (Exh. DED3). Since Ms. Penn has failed to demonstrate any capital contribution to the firm, the Division concludes that it was justified in its denial.

Based on the lack of evidence in the record of any capital contribution by Ms. Penn, the applicant has failed to demonstrate that the minority and woman owner, Teresa Penn's, capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1). The Division's denial determination on this ground was based on substantial evidence.

Operation

In its denial letter, the Division asserted two grounds for denying the application for failure to meet certification criteria related to the operation of the applicant. First, the Division found that the applicant failed to demonstrate that the minority and woman owner, Teresa Penn, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii).

On the appeal, applicant's counsel does not address Ms. Penn's experience, technical competence, working knowledge or abilities. None of the exhibits presented address these points either.

In its response, the Division states that during its review of the application it determined that Ms. Penn did not demonstrate the experience, technical competence, working knowledge or abilities required for certification. The Division points to Ms. Penn's resume which lists her duties with the firm as: accounting/bookkeeping/collections, human resources, and customer services (Exh. DED4). The Division argues that her resume does not list any expertise or training in the field in which the firm does business. While the application states that Ms. Penn performs all managerial operations at the firm (Exh. DED1 at 3-4), no proof of this claim is provided on appeal. In

addition, her husband holds a home improvement contractor license (Exh. DED5) and nothing in this record shows that she has similar qualifications.

Based on the evidence in the record and the discussion above, including the lack of any reference to her ability to fabricate or install countertops, the applicant has failed to demonstrate that the minority and woman owner, Teresa Penn, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii). The Division's denial determination on this ground was based on substantial evidence.

The second ground asserted for denial on operational grounds was that the applicant failed to demonstrate that the minority and woman owner, Teresa Penn, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

On the appeal, applicant's counsel states that since January 1, 2010, Ms. Penn has completely run the business and her responsibilities include, but are not limited to, billing, shipping, managing employees, maintaining licenses, accounting and all of the day to day activities of any business. No proof of this claim is included with the appeal and the appeal makes no reference to any documents that were submitted with the application to support this claim.

In its response, the Division states that during its review of the application it determined that Ms. Penn did not demonstrate that she makes decisions pertaining to the critical operations of the firm. The Division argues that even though Ms. Penn claims to manage all functions of the business in the application (Exh. DED1), other documents contradict this claim. The Division notes that: her resume lists only that she oversees accounting/bookkeeping/collections, human resources, and customer services (Exh. DED4); her husband holds the home improvement license; and the appeal states that since January 1, 2010, she has completely run the business but then only lists billing, shipping, managing employees, maintaining licenses, accounting and all the day to day activities of any business. The Division concludes that Ms. Penn has failed to demonstrate

that she makes decisions pertaining to the critical functions of the business and therefore, does not meet certification criteria.

Nothing in the record indicates that Ms. Penn performs any duties for the business outside the office. There is no claim that she fabricates countertops or that she installs them. Because these are the revenue generating functions of the business and there is no proof that she makes decisions regarding these functions, the applicant has failed to demonstrate that the minority and woman owner, Teresa Penn, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). The Division's denial determination on this ground was based on substantial evidence.

CONCLUSIONS

1. The applicant failed to demonstrate that the minority and woman owner, Teresa Penn's, capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

2. The applicant failed to demonstrate that the minority and woman owner, Teresa Penn, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii).

3. The applicant failed to demonstrate that the minority and woman owner, Teresa Penn, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

RECOMMENDATION

The Division's determination to deny Penn Fabricators, Inc.'s application for certification as a minority-owned business enterprise and a woman-owned business enterprise should be affirmed for the reasons stated in this recommended order.

**Matter of
Penn Fabricators, Inc.**

**DED File ID No. 58386
Exhibit List**

Exh. #	Description	# of pages
DED1	Application	10
DED2	Letter from Ms. Penn dated January 24, 2014	1
DED3	Letter from Ms. Penn dated July 13, 2015	
DED4	Resume of Teresa Penn	1
DED5	Home improvement contractor license held by Robert Penn	1
DED6	Letter in support of appeal	1
A1	Applicant's K-1 form for tax year 2014	1
A2	Letter from counsel dated May 17, 2016	5
A3	Equipment lease	51
A4	Closing certificate dated May 18, 2016	63
A5	Guaranty of all liability	10