

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

In the Matter

- of -

the Application of **Diversified Industries of WNY, Ltd.**
for Certification as a Minority or Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 48637

RECOMMENDED ORDER

- by -



Richard A. Sherman
Administrative Law Judge

September 7, 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 Diversified Industries of WNY, Ltd. ("Diversified" or "applicant") certification as a minority or women-owned business enterprise ("MWBE") be reversed, 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 Diversified does not meet the eligibility criteria for certification as a MWBE.

The Division denied Diversified's application for MWBE certification (exhibit 3) by letters dated October 27 and 29, 2015 (exhibit 2¹). The denial letters set forth two grounds under 5 NYCRR 144.2 for the denial. By letter dated November 12, 2015, applicant objected to the denial and sought information from the Division regarding the appeals process (exhibit 1 at 1). By letter ("appeal") dated February 4, 2016, applicant appealed from the Division's determination to deny the application. On July 20, 2016, the Division filed its response ("response") to the appeal.

This matter was assigned to me on July 26, 2016. Upon receipt of the file, I created the attached exhibit list. Exhibits designated 1 through 8 were submitted by the Division and exhibits designated A through G were submitted by applicant.² The submittals noted above and the exhibits listed in the attachment constitute the entire record upon which this report is based.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a women-owned business enterprise are established by regulation (see 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted or denied MWBE 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.

¹ Exhibit 2 contains four denial letters; two dated October 27, 2015 denying Diversified's application as it relates to minority business enterprise ("MBE") certification, and two dated October 29, 2015 denying Diversified's application as it relates to women business enterprise ("WBE") certification. Aside from references to either MBE or WBE, the four letters appear identical and cite the same reasons for the denial. Citations to exhibit 2 will reference only the pages of the first letter in the exhibit.

² Applicant's exhibits are the seven enclosures listed in its February 4, 2016 appeal (see appeal at 2).

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of Diversified's MWBE 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

The Division argues that applicant failed to demonstrate that:

(1) "the minority or woman owner(s) have the experience or technical competence, working knowledge or ability needed to operate the enterprise"; and

(2) "the minority or woman applicant is an independent business enterprise"

(exhibit 2 at 2 [citing 5 NYCRR 144.2]).

Position of Applicant

Applicant argues that the bases cited by the Division for the denial are not "true and accurate" (appeal at 1). Applicant asserts that the woman and minority owner, Allison Hernandez, has "the necessary tools and relationships to develop and run [applicant's] business to its fullest capacity" (id.). Applicant further asserts it is an independent business enterprise and that its relationship with M&M Improvement Services, Inc. ("M&M"), is "strictly a lease agreement" (id.). Applicant acknowledges that her father works at M&M, but asserts that her father has no ownership interest in M&M (see id.).

FINDINGS OF FACT

1. Diversified was established in 1990 and is engaged in light commercial construction (exhibit 3 at 3 [items 4.A-D]).

2. On January 1, 2013, Allison Hernandez, a minority woman, became the owner of 65% of the outstanding shares of Diversified's stock (exhibits 3 at 2 [items 1.T, 1.U, 2.A]; A at 1, 4).

3. To conduct its business, applicant is required to have a City of Buffalo Light Commercial Contractor License ("contractor license") (exhibits 3 at 3 [item 3.A]; A at 41-42

[copies of contractor license]; see also City of Buffalo Code § 144-2[A] [license requirements for construction activity]). Allison Hernandez is the only individual identified in the application materials as having held a contractor license (exhibits 3 at 3 [item 3.A]; A at 41-42 [copies of contractor license]).

4. Allison Hernandez is the only individual identified in the application materials as having management responsibilities at Diversified (exhibit 3 at 3-4 [items 4.A.1-12]).

5. Applicant has only two employees: its president, Ms. Hernandez; and its vice-president, JoAnn Hernandez (exhibit 3 at 2 [items 1.W, 2.A]). JoAnn Hernandez, a non-minority woman, holds a 35% ownership interest in applicant (id. [item 2.A]).

6. Allison Hernandez completed the 2013 MWBE and Small Business Contractor Bond Readiness Training Program (exhibit A at 43 [course certificate]).

7. Diversified shares office space with M&M (exhibit 3 at 5 [item 6.I]). The application materials state that no other relationship exists between applicant and M&M (exhibit 7).

8. Diversified leases its office space, on a month-to-month basis, from a private individual (exhibit 8 at 1-2).

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of Diversified as a minority or women-owned business enterprise³ pursuant to Executive Law Article 15-A. The Division cites two bases in support of upholding the denial, both of which are discussed below.

Managerial Experience, Technical Competence, Working Knowledge and Ability

The applicable regulatory criteria state that the minority or woman owner "must have adequate managerial experience or technical competence in the business enterprise seeking certification [and] must demonstrate the working knowledge and ability needed to operate the business enterprise" (5 NYCRR 144.2[b][1][i-ii]).

The Division argues that "[t]he documents submitted with the application indicate that [Diversified's owners'] only experience in the light commercial construction industry is administrative" (response at 1). The Division refers to the work experience set forth in the resumes of the two owners and states that "the Division concluded that the owners of Diversified

³ 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 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"]).

Industries did not have the experience or technical competence, working knowledge or ability needed to operate the enterprise" (id. at 1-2).

Applicant argues that Ms. Hernandez "grew up in [the construction] industry" and that her "passion has always been the construction field" (appeal at 1). Applicant notes that both of Ms. Hernandez's parents worked in the industry and that Ms. Hernandez worked at the same construction company as her father beginning in 2010 (id.). Applicant also notes that Ms. Hernandez completed the MWBE and Small Business Contractor Bond Readiness Training Program in 2013 (id.; see also findings of fact ¶ 6). Applicant argues that the knowledge Ms. Hernandez obtained working in the industry and from her parents has equipped her with "the necessary tools and relationships to develop and run [applicant's] business to its fullest capacity" (appeal at 1).

Applicant has met its burden to demonstrate that the record lacks substantial evidence to support the Division's determination to deny certification on the basis of 5 NYCRR 144.2(b)(1)(i-ii). First, I note that applicant has only two employees, its owners (findings of fact ¶ 2, 5), and Allison Hernandez is the only individual identified in the application materials as having management responsibilities at Diversified (findings of fact ¶ 4). The Division does not identify any evidence establishing who, if not the owners, provides the managerial experience, technical competence, working knowledge or ability needed to operate the business.

Additionally, to conduct its business, applicant is required to have a Light Commercial Contractor License ("contractor license") from the City of Buffalo and Allison Hernandez is the only individual identified in the application materials as having held a contractor license (findings of fact ¶ 3). The City of Buffalo Code defines "light commercial" as "contractors whose operations as such are the performance of light construction on commercial structures whose work does not require special skill or use of specialized building trades or crafts" (City of Buffalo Code § 144-1)

As with any small business, the extent of its owner's knowledge, ability, and expertise may limit the type of projects that Diversified is able to pursue and undertake. The record here, however, does not support the conclusion that Ms. Hernandez does not have the technical competence and ability to operate applicant's business.

On this record, I conclude that the Division's determination with regard 5 NYCRR 144.2(b)(1)(i-ii) is not supported by substantial evidence.

Independent business enterprise

The Division states in its denial letters that applicant failed to demonstrate that "the minority or woman applicant is an independent business enterprise" (exhibit 2 at 2). This criterion is set forth at 5 NYCRR 144.2(c)(2) (stating that "an eligible minority group member or woman applicant must be an independent business enterprise").

The Division argues that applicant fails to meet this criterion "because it appeared that Diversified Industries relies on M&M" (response at 2). In support of its position, the Division notes that Diversified shares office space with M&M and that Ms. Hernandez's father works for

M&M (see id.). The Division also asserts that Diversified "does not pay any rent to M&M" (id.). Lastly, the Division argues that "because Diversified Industries shares the same NAICS⁴ code as M&M it is difficult to determine how these two businesses that are closely tied to one another perform any separate functions from one another" (id.).

Applicant argues that its relationship with M&M "was strictly a lease agreement which was in-kind" and that, although Ms. Hernandez's father works for M&M, he "has never had any ownership in M&M Improvement Services or Diversified" (appeal at 1). In response to an inquiry from the Division, applicant states that M&M "does general construction and has no involvement with Diversified" (exhibit 7).

The Division's conclusion that Diversified is not independent because it "appeared" to rely upon M&M is speculative and fails to cite substantial evidence in support of the denial on the basis of independence. The Division's statement that applicant does not pay "any" rent to M&M is belied by the lease documents. These documents, executed more than a year before Diversified applied to the Division for MWBE certification, state that payment will be "in-kind" (exhibit 8 at 1). Although use of the term "in-kind" might reasonably be expected to prompt further inquiries from the Division, it does not support the Division's determination that applicant does not pay any rent to M&M.⁵ In response to an inquiry from the Division concerning the lease, applicant advised the Division that it would be moving its offices "back to 66 Cory Avenue" in Buffalo (exhibit 7). I note that 66 Cory Avenue is the address shown on the letterhead on applicant's appeal (appeal at 1).

The fact that Ms. Hernandez's father is an employee of M&M is not sufficient to support the inference that Diversified is somehow dependent upon M&M. In response to an inquiry from the Division, Diversified provided a statement that her father was not an owner of M&M and is "just considered an employee" (exhibit E; see also exhibit G [statement from M&M confirming that Ms. Hernandez's father has never had an ownership interest in M&M]). Certainly, it is not an uncommon occurrence for a daughter to strike out on her own after having worked at a business where one of her parents also worked.

I also find unavailing the Division's argument that sharing the same NAICS code warrants denial. First, the Division did not cite to a document, nor did I locate one in the record, that establishes the NAICS code or codes under which M&M operates. Moreover, assuming the codes are the same, it would not alter my assessment of this basis for denial. As with the Division's argument concerning Ms. Hernandez's father, it would not be an uncommon occurrence for a small business owner to engage in activities that were similar to those she learned while working as an employee at another company.

⁴ NAICS is an acronym for the North American Industry Classification System used to identify the area or areas of commercial activity in which a business is engaged.

⁵ I also note that the "landlord" identified under the lease is not M&M, but rather a private individual. The Division does not provide information regarding the connection, if any, between the landlord and M&M.

Applicant has met its burden to demonstrate that the record lacks substantial evidence to support the Division's determination to deny certification on the basis of 5 NYCRR 144.2(b)(c)(2).

CONCLUSION

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

RECOMMENDATION

The Division's determination to deny Diversified's application for certification as a minority or women-owned business enterprise should be reversed, for the reasons stated herein.

**Matter of Diversified Industries of WNY, Ltd.
DED File ID No. 48637**

Exhibit List

Exh. #	Description
1	Applicant letter dated November 12, 2015, objecting to the denial; Applicant appeal, dated February 4, 2016
2	Department denial letters to Diversified, dated October 27 and 29, 2015
3	Diversified MWBE Certification Application, Submitted May 21, 2014
4	Resume of Allison Hernandez
5	Tax Documents for JoAnn and Oscar Hernandez's (2013, 2014)
6	Resume of JoAnn Hernandez
7	Diversified Statement Re: Its Relationship with M&M Improvement Services
8	Diversified Lease Agreement
A	Documents Re: History of Diversified's Ownership
B	Resumes
C	Diversified Lease Agreement
D	Diversified Statement Re: Its Relationship with M&M Improvement Services
E	Diversified Statement Re: Relationship between Allison and JoAnn Hernandez, Diversified and M&M Improvement Services
F	Erie County & Buffalo Joint MBE Certification, and Course Certifications for Allison Hernandez
G	Letter from M&M Improvement Services