

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

In the Matter

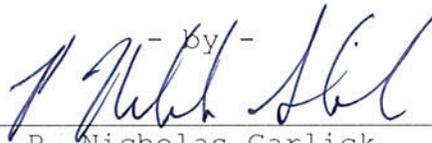
- of -

the Application of  
**Staroba Plastics, Inc.**  
For Certification as a Woman-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 58898

RECOMMENDED ORDER

- by -



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P. Nicholas Garlick  
Administrative Law Judge

October 3, 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 Staroba Plastics, Inc. ("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 Staroba Plastics, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Staroba Plastics, Inc.'s application was submitted on August 26, 2014 (Exh. DED1).

The application was denied by letter dated February 11, 2016, from Bette Yee, Director of Certification Operations (Exh. DED2). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet two separate eligibility criteria related to Barbara Staroba's ownership of the applicant (Exh. DED2).

With a cover letter dated July 1, 2016, the applicant's counsel submitted its written appeal which consisted of a ten page appeal and eleven exhibits (listed in the attached exhibit chart as A-K).

In a five page memorandum dated August 16, 2016, the Division responded to the applicant's appeal. Enclosed with the response were five exhibits (listed in the attached exhibit chart as DED1-DED5).

On September 1, 2016, this matter was assigned to me.

## **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 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 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, Barbara Staroba, 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 Barbara Staroba'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).

Position of the Applicant

Staroba Plastics, Inc. 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. Staroba Plastics, Inc. is in the business of using injection molds to turn raw materials into finished products. The primary finished product is roofing tiles that look like slate. (Exh. DED1 at 3).

2. Staroba Plastics, Inc. has a business address of 42 Edgewood Drive, Holland, New York (Exh. DED1 at 1).

3. Staroba Plastics, Inc. was established on December 18, 1980. On January 29, 2014, Barbara Staroba acquired 51% of the shares of the company. The remaining shares are owned by her husband, Miro Staroba. (Exh. DED1 at 3).

4. In 2014, Staroba Plastics, Inc. paid Mr. Staroba [REDACTED] and Ms. Staroba [REDACTED] (Exh. DED5 at 15-16).

**DISCUSSION**

This report considers the 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. Staroba's ownership of Staroba Plastics, Inc. Each basis is discussed individually, below.

First, the Division determined that the applicant failed to demonstrate that the woman owner, Barbara Staroba, 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 argues that numerous documents submitted during the application process show that Ms. Staroba shares in the risks and profits of the business. In an affidavit included as part of the appeal, Ms. Staroba asserts that she shares the risks of the firm in proportion with her ownership interest and cites three documents to demonstrate that she personally guaranteed loans of the company (Affidavit of B. Staroba, ¶¶11-14, Exhs. D, E, & F). She also asserts she shares proportionately in the profits of the firm and argues that because she owns 51% of the firm (Exh. G) and is its president (Exh. H) that pursuant to its bylaws (Exh. I) she has the authority to determine salaries, declare dividends and control all the financial decisions of the firm (Affidavit of B. Staroba, ¶¶15-19). She explains that since she assumed the roles of majority shareholder and president, she has not raised her salary or declared dividends for strategic business reasons (Affidavit of B. Staroba, ¶20). She concludes that if the firm was sold, merged or dissolved, that she would be entitled to 51% of the proceeds (Affidavit of B. Staroba, ¶21).

Applicant's counsel argues that the above evidence, which was before the Division at the time it made its denial determination, shows that Ms. Staroba shares proportionately in the risks and profits of the business. Counsel concludes that even though she paid herself less than her husband, she had the power to, at any time, increase her salary or pay herself a bonus. This, plus her entitlement to 51% of the business proceeds should the business be sold, demonstrate that the Division's denial determination was not based on substantial evidence.

In its response, the Division states that it based its denial on this ground on the wages paid by the firm in 2014 to the Starobas. The W2 forms for this year show that Mr. Staroba received [REDACTED] and Ms. Staroba received [REDACTED] (Exh. DED5 at 15-16). In his affidavit, Mr. LeFebvre stated that the tax forms indicated that no dividends were paid by the firm that year (Affidavit of M. LeFebvre ¶20). He also states that he did not consider the firm's retained earnings in his review, because such earnings may be restricted by business and legal concerns (Affidavit of M. LeFebvre ¶¶21-24).

With respect to her share of the profits, the salary information provided shows that Mr. Staroba received more of the benefits of the company than did his wife. Based on the evidence in the record and the discussion above, the applicant failed to demonstrate that the woman owner, Barbara Staroba, 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). The Division's denial on this ground was based on substantial evidence.

The second ownership basis cited in the denial letter stated that the Division had determined that the applicant failed to demonstrate that Barbara Staroba'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).

On the appeal, applicant's counsel asserts that Ms. Staroba has made five types of contributions to the firm. First, she has guaranteed the company's debts. Second, she contributed her time for the past 35 years in the management of the company's day-to-day affairs. According to applicant "sweat equity" should also be considered a contribution (Affidavit of B. Staroba, ¶29). Third, during her time working at the firm, Ms. Staroba has worked in multiple areas of the company's operation and during such time she has become an expert. This expertise is reflected in her resume and should also be considered a contribution (Exh. K). Fourth, at the time the company was formed, Ms. Staroba loaned money to the firm. In her affidavit she claims that of the approximately [REDACTED] used to start the firm (Exh. J), approximately [REDACTED] was her contribution (Affidavit of B. Staroba, ¶24). Fifth, because Ms. Staroba has accepted a salary below industry standards, this unquantified amount should also be considered a contribution (Affidavit of B. Staroba, ¶27). Counsel concludes that these contributions demonstrated that the Division's denial was not based on substantial evidence.

In its reply, the Division asserts that the application materials failed to substantiate any capital contribution to the

firm made by Ms. Staroba. The Division notes that the application states that Ms. Staroba made a contribution of [REDACTED] in cash to the firm on December 18, 1980, the same date her husband made a cash contribution of [REDACTED] (Exh. DED1 at 3). The only supporting evidence for this contribution is an undated one-page document attached to the application which purports to demonstrate this capital contribution and states that because the company was started 34 years ago, bank records are no longer available (Exh. DED3). In his affidavit, Division staff member Matthew LeFebvre states that he reviewed the application materials including Exhibit DED3 and the firm's 2014 federal tax return (Exh. DED4) which showed an amount of capital stock of [REDACTED] (Exh. DED4 at 5, line 22b). He states that this information was not sufficient to provide evidence of a capital contribution sufficient to meet certification criteria because it provided no means to evaluate the contribution of Ms. Staroba in relation to her husband or to evaluate the source of these funds. A request for more information was sent to applicant's counsel, but applicant failed to provide the necessary documentary evidence of a contribution of money, property, equipment or expertise by Ms. Staroba to the firm. (Affidavit of M. LeFebvre ¶¶7-17).

In response to arguments raised in the appeal that Ms. Staroba made contributions of both money and expertise, the Division replies that the claim she personally guaranteed business loans was not made in the application materials. Even if such a claim had been made, the Division argues that such guarantees are not contributions. In the event that such guarantees were to be considered contributions, the proof provided show that the two most recent guarantees were made by both Ms. Staroba and her husband, jointly (Exhs. D & E).

Responding to the claim in the appeal that certain loans made at the time of the corporation's formation were subsequently turned into paid-in capital (Exh. J), the Division notes that this information was not included with the application and the sums presented do not mirror the amounts referenced in the application (and no explanation of the discrepancy is provided). The Division concludes that the record contains no information regarding the source of Ms. Staroba's contribution.

Finally, with respect to the claim in the appeal that Ms. Staroba contributed expertise in the form of management of its day-to-day affairs and accepted a reduced salary, the Division notes that this claim was not presented in the application materials and has no bearing on whether the Division's denial was based on substantial evidence. The Division also notes that applicant made no quantification of the amount of this contribution or how it might be calculated.

It may be that Ms. Staroba could show a contribution in proportion to her 51% ownership share based on expanding the information and arguments presented in the appeal; however, this information was not presented in the application materials or provided in response to document requests. The only information before the Division at the time it made its denial determination was the claim in the application that Ms. Staroba had made a contribution of [REDACTED] in cash to the firm on December 18, 1980 and exhibit DED3; there was no supporting documentation or other information provided. Based on this evidence, and the discussion above, the applicant has failed to demonstrate that the Barbara Staroba'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 on this ground was based on substantial evidence.

#### **CONCLUSIONS**

1. The applicant failed to demonstrate that the woman owner, Barbara Staroba, 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's, Barbara Staroba'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).

## **RECOMMENDATION**

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

**Matter of  
Staroba Plastics, Inc.**

**DED File ID No. 58898  
Exhibit List**

<b>Exh. #</b>	<b>Description</b>
DED1	Application
DED2	Denial letter
DED3	Capital contributions
DED4	2014 tax returns
DED5	2014 W2 forms
A	Complete application
B	Correspondence between applicant's counsel and Division analysts
C	Denial letter
D	Reaffirmation agreement dated February 21, 2014
E	Demand note dated July 24, 2015
F	Unlimited continuing guaranty dated July 23, 2010
G	Stock certificates
H	Board resolution
I	Corporate by-laws
J	CPA letter dated March 7, 2001
K	Resume of B. Staroba