

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

In the Matter

- of -

the Application of **SK Enterprises I, Inc.**
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59576

RECOMMENDED ORDER

- by -



Molly T. McBride
Administrative Law Judge

October 4, 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 ("NYSDED") to deny SK Enterprises I, Inc. ("SK" or "applicant") certification as a woman-owned business enterprise ("WBE") be modified and as so modified, 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 SK challenging the determination of the Division that applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

SK submitted an application to the NYSDDED on April 10, 2015 (Exhibit 5). By letter dated October 16, 2015, the Division denied the application for WBE certification (Exhibit 1).

Applicant filed an appeal from the denial and requested a hearing. The hearing was held on April 12, 2016 at the Albany office of the NYSDDED.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria regarding, among other things, the applicant's control and operation are applied on the basis of information supplied through the application process (see 5 NYCRR 144.2[a]). 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. On administrative appeal, the applicant bears the burden of proving its business meets the eligibility criteria for certification as a woman-owned business enterprise (see State Administrative Procedure Act § 306[1]). To carry its burden, the applicant must show that the Division's determination is not supported by substantial evidence.

POSITIONS OF THE PARTIES

Position of the Division

The Division's denial letter asserts that applicant failed to meet three criteria for certification: (1) applicant business has failed to demonstrate that the woman owner has the experience or technical competence, working knowledge or ability needed to operate the enterprise; (2) applicant business has failed to demonstrate that the woman owner makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operation of the business; and (3) applicant business has failed to demonstrate that the woman owner controls negotiations, signature authority for payroll, lease, letter of credit, insurance bonds, banking services and other business transactions.¹

Position of the Applicant

SK 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. SK Enterprises, Inc. was formed in 2009 (Exhibit 5, 1.R.). Stephanie Fiacco, President, owns 51% of the shares of SK and her nephew Kristin Frego, Vice President, owns 49% of the shares (Exhibit 5, 1.S., 2.D.; Exhibit 2).

2. SK is a construction related business that provides masonry, construction, site grading and excavation, general construction, carpentry work, roofing, trucking, railroad construction, paving, and snow removal services (Exhibit 5, 3.B. & C.).

¹ The denial letter also stated that applicant failed to demonstrate that the woman owner enjoys the customary incidents of ownership and shares in the risks and profits in proportion with her ownership interest in the enterprise. Division staff withdrew this ground for denial at the hearing. Accordingly, the denial should be modified.

3. Stephanie Fiacco and Kristin Frego both perform the key functions of SK, including the following: financial decisions, estimating, bid preparation, hiring and firing, field operations supervision, purchasing equipment and sales (Exhibit 5, 4.A.).

4. Stephanie Fiacco and Kristin Frego are guarantors on three business loans [REDACTED] to purchase equipment for SK, totaling approximately [REDACTED] (Exhibit 5, 5.G.).

[REDACTED] Stephanie Fiacco and Kristin Frego are guarantors on a [REDACTED] line of credit issued to SK (Exhibit 5, 5.F.).

6. Stephanie Fiacco, in addition to being President of SK, works full time as a medical records clerk at Health Services of Northern New York (Exhibit 5, 6.A. & C. and Disk 1 at 7:40).²

7. Kristin Frego, in addition to being Vice President of SK, works as a project manager for Fiacco and Riley Construction, Inc. (Exhibit 5 at 6.A. & C.)

8. Stephanie Fiacco had no experience in the construction field before SK Enterprises, Inc. (Exhibit 7). Kristin Frego has been working in the construction field since 1992 (Exhibit 8).

DISCUSSION

This report considers the appeal of the applicant from the Division's determination to deny certification as a woman-owned business enterprise (WBE) pursuant to Executive Law Article 15-A. The standards to determine if a business should be afforded woman-owned business enterprise certification are defined in 5 NYCRR 144.2.

The Department alleged that the applicant failed to demonstrate that the woman owner has control over the business as required by 5 NYCRR 144.2(b).

Section 144.2(b) of 5 NYCRR provides:

"Control. Determinations as to whether minority group members or women control the business enterprise will be made according to the following criteria:

² Disk refers to audio transcript of the hearing held herein on April 12, 2016.

"(1) Decisions pertaining to the operations of the business enterprise must be made by minority group members or women claiming ownership of that business enterprise. The following will be considered in this regard:

"(i) Minority group members or women must have adequate managerial experience or technical competence in the business enterprise seeking certification.

"(ii) Minority group members or women must demonstrate the working knowledge and ability needed to operate the business enterprise.

"(iii) Minority group members or women must show that they devote time on an on-going basis to the daily operation of the business enterprise.

. . . .

"(3) Minority group members or women 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 denial letter, prepared in conjunction with Division senior certification analyst Iliana Farias, noted that applicant failed to demonstrate that the woman owner has the experience or technical competence, working knowledge or ability needed to operate the business. Ms. Farias testified at the hearing held herein that Ms. Fiacco demonstrated neither the work experience nor the training needed to operate SK (Disk 2 at 7:28). Stephanie Fiacco had no prior experience in the construction business, works full time as a medical records clerk, and works for SK during the evening and on weekends (Disk 2 at 7:47 & Exhibit 7). Stephanie Fiacco consulted with her husband, an experienced construction foreman, before starting the business (Disk 1 at 7:10). He told her that he did not believe that she could operate the business on her own so she brought in her nephew Kristin, also experienced in the construction field, to help start and operate the business (Disk 1 at 7:20). Mr. Frego is Vice President of the company (Exhibit 5).

Ms. Fiacco's husband, works 40 hours per week in season for SK (Disk 2 at 6:25 and 6:40 & Exhibit 6). Mr. Frego, has over 20 years of experience in construction work and is identified on the application as performing the core functions of SK (Disk 2 at 7:47 & Exhibits 5, 7 & 8). Mr. Frego also serves as a project manager for another construction company, Fiacco and Riley Construction, Inc. (Exhibit 5 at 6.A.). Thus, the employees with experience, technical competence, and working knowledge to operate applicant are Mr. Fiacco and Mr. Frego, not

the woman owner. Accordingly, NYSDED's determination is supported by substantial evidence.

The denial letter also concluded that applicant failed to establish that the woman owner makes decisions pertaining to the operations of the enterprise or devote time on an ongoing basis to the daily operation of the enterprise. Ms. Fiacco detailed what work she performs for SK, including negotiating contracts and meeting with customers (Exhibits A, C, D, E & F and Disk 1 at 8:40). By her own admission, she discusses "everything" with Mr. Frego (Disk 1 at 8:40). The testimony of Stephanie Fiacco made it clear that she and Mr. Frego operate the business together. The record taken as a whole also makes it clear that Ms. Fiacco and her nephew operate the business together. While Ms. Fiacco did document that she performs some of the company duties on her own [Exhibit 5 at 4.A.(5)], and she testified about specific projects that she negotiated, prepared and signed contracts for (Disk 1 at 11:00-14:00 and Exhibits A,C,D,E,F), she also testified that she meets with and discusses potential contracts with her nephew before agreeing to take jobs (Disk 1 at 18:20). She has learned a lot over time about how to run the business (Disk 1 at 21:45) but she confers with her nephew on "everything", and referred to him as her business partner (Disk 1 at 21:37).

According to Stephanie Fiacco, she works evenings and weekends for SK and consults with her nephew daily about what is happening with the business (Disk 1 at 7:35). Since she is not available during the day, day to day management is being conducted by Kristin Frego and other male employees. Applicant was asked to submit the three largest contracts that SK has had to date. All three contracts were signed by Kristin Frego (Exhibits 2-4). Fiacco and Frego share the management responsibilities of the business (Exhibit 5 at 3, Disk 1 at 18:45). Ms. Fiacco relies on Mr. Frego to assist her in making the business operation decisions (Disk 1 at 18:20, 21:45 & 21:37). Thus, NYSDED's determination on decision making and time devoted by the woman owner is supported by substantial evidence.

The Division also denied the application on the ground that applicant failed to demonstrate that Ms. Fiacco has control over negotiations, signature authority for payroll, leases, letter of credit, insurance bonds, banking services and contracts and other business transactions. Applicant failed to show that Ms. Fiacco performs those functions of the business without the assistance of her nephew and husband and other employees of the business. The application, documents supplied during the

application process, and testimony offered at the hearing show that the woman owner and her nephew Kristin Frego share control of negotiations and other core functions. They are co-guarantors on the line of credit issued to the business (Exhibit 5 at 5.F.) and they are co-guarantors on three loans that were taken out to purchase equipment for the business (Exhibit 5 at 5.G.). Fiacco and Frego are the sole board members for the business (Exhibit 5 at 2.F.) and sole shareholders (Exhibit 5 at 2.C.). They are business partners according to Stephanie Fiacco, she does nothing on her own without conferring with her partner Frego (Disk 1 at 21:37). Accordingly, NYSDED's determination is supported by substantial evidence.

CONCLUSIONS

1. SK has failed to demonstrate that the woman owner Stephanie Fiacco has the experience or technical competence, working knowledge or ability needed to operate the enterprise.
2. SK has failed to demonstrate that the woman owner Stephanie Fiacco makes decisions pertaining to the operations of the business without her male partner or devote time on an ongoing basis to the daily operation of the business.
3. SK has failed to demonstrate that the woman owner Stephanie Fiacco has control over the business transactions.
4. The denial should be modified to strike the denial on the ground that applicant failed to demonstrate that the woman owner enjoys the customary incidents of ownership and shares in the risks and profits in proportion to her ownership interest in the enterprise.

RECOMMENDATION

The Division's determination to deny SK Enterprises, Inc.'s application for certification as a woman-owned business enterprise should be modified and, as so modified, affirmed, for the reasons stated herein.

Matter of SK Enterprises, Inc.
DED File ID No.
DED Exhibit List

Exh. #	Description
1	Denial letter of October 16, 2015
2	Contract with Burns Bros. Contractors, Inc.
3	Subcontract with W.M. Schultz Construction, Inc.
4	Purchase Order with Murnane Building Contractors, Inc.
5	Application for WBE certification dated April 10, 2015
6	October 1, 2015 SK letter
7	Fiacco resume
8	Frego resume
9	October 12, 2015 SK Letter

Applicant Exhibit List

Exh. #	Description
A	Purchase Order Potsdam Specialty 12/29/15
B	Installment security agreement with Anderson Equipment Company 10/27/15
C	Purchase order Potsdam Specialty 12/8/15, 17398
D	Purchase order Potsdam Specialty 12/8/15, 17397
E	Purchase Order Potsdam Specialty 12/8/15, 17396
F	Purchase Order Potsdam Specialty 12/8/15, 17395
G	Highway Use Tax Form
H	Promissory Note NBT Bank 6/27/13
I	Promissory Note NBT Bank 3/24/14
J	Worker's compensation and employers liability insurance policy