

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

In the Matter

- of -

the Application of **A.J.R. Equities, Inc.**
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60253

RECOMMENDED ORDER

- by -



Richard A. Sherman
Administrative Law Judge

November 21, 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 A.J.R. Equities, Inc. ("A.J.R." or "applicant"), certification as a women-owned business enterprise ("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 A.J.R. does not meet the eligibility criteria for certification as a WBE.

The Division denied A.J.R.'s application for WBE certification (exhibit 1) by letter dated January 21, 2016 (exhibit 2). The denial letter sets forth two grounds under 5 NYCRR 144.2 for the denial. Applicant filed a notice of appeal ("notice"), dated February 22, 2016. The Division advised applicant that the hearing on this matter would be held on September 13, 2016 (Notice of Appeal Hearing from the Division to Victoria Regulbuto, dated June 3, 2016).

I convened the hearing at approximately 11:00 a.m. on September 13, 2016, at the Division's offices, 625 Broadway, Albany, New York. H. Todd Bullard, Esq., represented A.J.R. and called one witness, Victoria Regulbuto. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, represented the Division and called one witness, Matthew LeFebvre, a senior certification analyst for the Division. A list of the exhibits received during the hearing is appended to this report.

Consistent with 5 NYCRR 145.1(m), an audio recording of the hearing was made and the recording was provided to this office on October 7, 2016. Whereupon, the hearing record closed.

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 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 or 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 A.J.R.'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

The Division argues that applicant failed to demonstrate that:

(1) "the minority or woman owner(s) capital contributions are proportionate to their equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise;" and

(2) "the minority or woman owner(s) listed on corporate documents and relevant business agreements permit the minority or woman owner(s) to make business decisions without restrictions"

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

Position of Applicant

Applicant argues that Victoria Regulbuto, the woman owner, "has engaged in activities, conduct and management of AJR that establishes she has real and substantial control of the management of the corporation" (notice ¶ 5).

FINDINGS OF FACT

1. A.J.R. was incorporated on April 22, 1987, and is a special order supplier of hard good and corporate gifting items (exhibit 1 at 2 [items 1.Q, 1.R], 3 [items 3.B-D]).

2. At the time of incorporation, Victoria Regulbuto and her husband, Anthony Regulbuto, were each issued 50 shares of A.J.R.'s stock (exhibit A at 1-4).

3. In January 2011, ten additional shares of A.J.R. stock were issued to Victoria Regulbuto, resulting in a total of 110 shares of issued stock, with Victoria Regulbuto holding 60 shares and Anthony Regulbuto holding 50 shares (exhibit A at 5-8; compact disk [CD] #2,

track [tr] #3 at 0:10¹ [noting that Division staff stipulated that Victoria Regulbuto is the majority owner of A.J.R.).

4. In 1989, Anthony Regulbuto was named president and treasurer of A.J.R., and Victoria Regulbuto was named vice president and secretary (exhibit 5 at 5 [minutes of the annual meeting (1989)]). Anthony Regulbuto was still president, and Victoria Regulbuto was still vice president at the time A.J.R. submitted its WBE application to the Division (see e.g. exhibit 1 at 2-3 [items 1.O, 1.P, 2.A, 2.F]).

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of A.J.R. as a women-owned business enterprise² pursuant to Executive Law Article 15-A. The Division cites two bases in support of upholding the denial, each of which is discussed below.

Ownership: Contribution Proportionate to Equity Interest

The eligibility criterion at issue requires that "the contribution of the . . . woman owner must be proportionate to [her] equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise" (5 NYCRR 144.2[a][1]).

The Division argues that applicant failed to demonstrate that Ms. Regulbuto contributed money to A.J.R. in proportion to her ownership interest in the enterprise (exhibit 2 at 2; CD #1 at 9:10 [citing 5 NYCRR 144.2[a][1]). Specifically, the Division argues that, although some documentation in the record indicates that ██████ was paid for the shares owned by Ms. Regulbuto, no evidence establishes the source of that money (CD #2, tr #3 at 26:35, 27:20). Therefore, the Division argues, the record does not demonstrate that Ms. Regulbuto contributed the funds that were used to purchase the shares of A.J.R. that she owns (id.).

Applicant argues that the record before the Division demonstrates that Ms. Regulbuto paid ██████ for the 60 shares she owns and that Mr. Regulbuto paid ██████ for the 50 shares he owns (CD #2, tr #3 at 2:45 – 5:10 [Ms. Regulbuto testimony citing exhibits A, B]). In support of its position, applicant proffered documentation from its application materials concerning the A.J.R. stock owned by the Regulbutos. These documents show that Ms. Regulbuto owns 60 shares of A.J.R. and Mr. Regulbuto owns 50 shares (exhibit A). These documents also show

¹ The audio recording of the hearing is contained on two compact discs, identified as "CD #1" and "CD #2." CD #2 contains three audio tracks, identified as "tr #1," "tr #2," and "tr #3." Note that CD #2, tr #2 is not part of the evidentiary record. It is nine seconds long and contains part of an off the record discussion relating to a proposed stipulation.

² 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"]).

that, in 1987 the Regulbutos each paid ██████ for 50 shares of A.J.R., and that in 2011 Ms. Regulbuto paid ██████ for an additional 10 shares (id. at 7-8).

The Division stipulated to the fact that Ms. Regulbuto owns a majority of the issued shares of A.J.R. (CD #2, tr #3 at 0:10). The Division analyst testified, however, that the documentation supplied by applicant fails to show whether the funds used to purchase those shares came from Ms. Regulbuto, Mr. Regulbuto, some combination of the two, or some other source (CD #1 at 27:45, 28:10, 58:50, 1:00:35; CD #2, tr #1 at 12:00, 12:25). Without documentation of the source of a capital contribution, the Division argues it cannot determine whether a woman owner contributed in proportion to her ownership interest (CD #2, tr #3 at 26:35, 27:20).

Applicant challenged the Division's argument on two bases: first, that the 1987 stock transaction is too old to expect a business to maintain records showing the source of funds (CD #1 at 53:00; CD #2, tr #3 at 3:55); and second, that the documents submitted with the application should be deemed sufficient proof of Ms. Regulbuto's capital contribution (CD #2, tr #3 at 2:45, 4:40, 32:10, 32:40).

Applicant's position as it relates to the 1987 stock transaction is persuasive. The Division offered no business rationale as to why an enterprise would maintain documents demonstrating proof of the source of funds for stocks that A.J.R. issued to the Regulbutos nearly three decades ago. Yet the absence of such documentation is cited by the Division as a basis for denying certification. I conclude the Division's position on this point is untenable in relation to the 1987 stock issuance.

I do not, however, find applicant's position persuasive in relation to the 2011 stock transaction. The record demonstrates that Ms. Regulbuto did not acquire her majority interest in A.J.R. until 2011, approximately 4½ years before A.J.R. submitted its application for certification to the Division (see exhibits 1 at 1 [indicating the application was started on May 5, 2015 and submitted on July 24, 2015]; A at 5, 7-8 [indicating that Ms. Regulbuto purchased the 10 shares that resulted in her majority ownership on Jan. 20, 2011]). It is not unreasonable for the Division to require documentation from this much more recent issuance of A.J.R. stock.

I note that the Division expressly requested "[d]ocumented proof of sources of capitalization" during the application review process (exhibit 1 at 8 [under heading "Mandatory Documents"]). In response, A.J.R. provided documents that relate to banking transactions from 2015 and have no bearing on the 2011 stock issuance (see CD #1 at 26:10 – 27:05 [LeFebvre testimony concerning the Division's request for documentation and exhibit 3, the applicant's response to the Division's request]).

In addition to the documents noted above, applicant also submitted the relevant stock certificates, A.J.R.'s stock ledger, and a letter from a CPA regarding the 1987 and 2011 stock issuances (exhibits A, B). These documents indicate the number of shares of A.J.R. stock that were issued to Ms. or Mr. Regulbuto, the dates issued, and the amount paid. None of these documents, however, indicate the source of the funds used to pay for the stock.

I conclude that applicant failed to demonstrate that Ms. Regulbuto contributed capital to A.J.R. in proportion to her ownership interest and, therefore, failed to demonstrate that the Division's determination with regard to 5 NYCRR 144.2(a)(1) is not supported by substantial evidence.

Control: Corporate Documents

The applicable regulatory criterion states that the enterprise's "[a]rticles of incorporation, corporate bylaws, partnership agreements and other agreements . . . must permit minority group members or women who claim ownership of the business enterprise to make [decisions pertaining to business operations] without restrictions" (5 NYCRR 144.2[b][2]).

The record establishes that applicant has failed to meet this criterion. Applicant's corporate by-laws state that the president "shall be the Chief Executive Officer of the Corporation [and] shall have general and active management and control of the business and affairs of the Corporation subject to the control of the Board of Directors" (exhibit 4 at 12). Anthony Regulbuto is the president of A.J.R. (findings of fact ¶ 4).

Applicant did not controvert the express provisions of A.J.R.'s by-laws with regard to the role of the president. Nor did applicant proffer evidence to demonstrate that Anthony Regulbuto was no longer president or that the Board of Directors had taken any action to alter the role of the president. Applicant argued, however, that Ms. Regulbuto, as the majority shareholder, controls the enterprise and could remove Mr. Regulbuto as president or reduce his authority (CD #2, tr #3 at 31:20, 36:00). The Division conceded that Ms. Regulbuto could use her majority interest to change the by-laws, but stated that unless and until such a change is made, Mr. Regulbuto retains control under the express provisions of the by-laws (CD #2, tr #3 at 28:10, 29:45)

Applicant argued that, "notwithstanding what may be in some of the corporate documents" Victoria Regulbuto has "real control" of the corporation (CD #1 at 7:00). That, however, is not the criterion at issue. Indeed the Division did not make a determination regarding the actual control of the enterprise (CD #2, tr #1 at 13:20). The fact that Ms. Regulbuto may exert actual control over A.J.R.'s business affairs does not alter the fact that Mr. Regulbuto has authority under the by-laws to manage and control the corporation.

On this record, I conclude that the Division's determination with regard 5 NYCRR 144.2(b)(2) is supported by substantial evidence.

Objection to LeFebvre Testimony

At various times during the proceeding, counsel for applicant objected to the witness called by the Division. These objections were based upon the fact that the Division's witness, Mr. LeFebvre, was not the analyst who made the initial recommendation to deny A.J.R.'s application for certification. Applicant argued that the analyst who made the initial recommendation "should have and could have been present" and that the absence of that analyst was prejudicial to applicant (CD #2, tr #3 at 33:45, 33:55, 34:20). Applicant also questioned Mr. LeFebvre's ability to address legal issues related to the Division's certification program, including relevant case law (CD #1 at 20:45, 21:40).

Counsel for the Division advised that the analyst who undertook the initial review and recommended the denial of A.J.R.'s application for certification was not available to testify (CD #1 at 14:05), but declined to elaborate on why the analyst was not available (CD #1 at 15:30). Division counsel argued that Mr. LeFebvre is a senior analyst with the Division and that he was qualified to provide relevant testimony regarding the bases cited by the Division for the denial and the Division's application review process (CD #1 at 22:35). Division counsel also advised that Mr. LeFebvre was not being offered as a legal expert (CD #1 at 24:35, 24:50).

Applicant did not specify what prejudice would or might result from Mr. LeFebvre's testimony and none is apparent. While it is certainly preferable that the Division produce the analyst who reviewed the application at the time it was denied, the Division is not required to do so. Moreover, the absence of the analyst who undertook the initial review of an application may complicate the Division's ability to demonstrate that its denial of an application is supported by substantial evidence.

Mr. LeFebvre reviewed the application materials for the first time on the morning of the hearing and provided testimony on the basis of that review and his experience as a senior analyst with the Division (CD #1 at 18:40, 20:05, 22:35, 41:00; CD #2, tr #1 at 6:50, 8:10). Mr. LeFebvre has been a senior analyst with the Division for approximately 18 months and has analyzed over 200 applications for certification (CD #1 at 20:05, 24:55).

As discussed in the previous sections of this report, Mr. LeFebvre exhibited sufficient familiarity with the application materials to demonstrate that the denial was based upon substantial evidence. The same documents that were before the analyst who recommended the denial in the first instance were before Mr. LeFebvre. Further, the bases for the denial were set forth in the denial letter sent to A.J.R. and Mr. LeFebvre was able to provide testimony and cite documentation in the record in support of those bases. Nothing in the record indicates that applicant was prejudiced by the foregoing.

Therefore, under the circumstances presented in this proceeding, I overruled applicant's objection to Mr. LeFebvre's testimony regarding his analysis of the application materials and the Division's application review process.

CONCLUSION

As discussed above, applicant failed to meet its burden to demonstrate that the Division's determination to deny A.J.R.'s WBE application for certification was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny A.J.R.'s application for certification as a women-owned business enterprise should be affirmed, for the reasons stated herein.

**Matter of A.J.R. Equities, Inc.
DED File ID No. 60253**

Exhibit List

| Exh. # | Description |
|---------------|---|
| 1 | A.J.R. WBE Application, Submitted July 24, 2015 |
| 2 | Department denial letter to A.J.R., Dated January 21, 2016 |
| 3 | A.J.R. Bank Records (Reconciliation and Checking Summary, June 30, 2015), |
| 4 | A.J.R. By-Laws |
| 5 | A.J.R. Minutes of Annual Meeting of Shareholders (1988) |
| A | A.J.R. Stock Certificates and Related Documents |
| B | Letter from CPA, Dated September 12, 2016, re: A.J.R. Common Stock |
| C | Letter from Chase Bank, Dated September 12, 2016, re: A.J.R. Accounts |
| D | A.J.R. Chase Bank Signature Authorization |
| E | A.J.R. Certificate of Incorporation |
| F | A.J.R. By-Laws |
| G | A.J.R. Minutes of Organization Meeting (1987) |
| H | A.J.R. Listing of States Where Authorized as Supplier |
| I | A.J.R. Listing of Tribes Where Authorized as Supplier |
| J | A.J.R. Annual Permit Update Form (LA Gaming Control Board) |
| K | A.J.R. Foreign Corp. Update Form (MI Dept of Licensing) |
| L | A.J.R. Non-Gaming Enterprise License Application (Seneca Nation) |
| M | A.J.R. Profit & Loss (2013) |