

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

In the Matter

- of -

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

NYS DED File ID No. 52530

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

November 29, 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 Blenderbox, 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 Blenderbox, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Blenderbox, Inc.'s application was submitted on September 26, 2014 (Exh. DED1).

The application was denied by letter dated February 12, 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 two separate eligibility criteria related to Sarah Jeffries's ownership and control of the applicant (Exh. DED2).

By letter dated June 9, 2016, the Division notified Ms. Jeffries that the hearing in this matter would occur on October 11, 2016.

On June 10, 2016, this matter was assigned to me.

On September 29, 2016 a conference call was held with the parties to discuss the upcoming hearing.

On October 11, 2016, a hearing in this matter was convened at the Division's New York City Office located at 633 Third Avenue, New York, New York. The applicant was represented by Horace Flowers, Esq. and he called one witness, Sarah Jeffries. The Division was represented by Phillip Harmonick, Esq. and he

called one witness, Iliana Farias, Senior Certification Analyst with the Division.

The record closed upon receipt of the recording of the hearing on October 31, 2016.

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 three separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner Sarah Jeffries'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 woman owner, Sarah Jeffries, has control of negotiations, signature authority for payroll, leases, letters of credit, insurance bonds, banking services and contracts and other business transactions, as required by 5 NYCRR 144.2(b)(3).

Position of the Applicant

Blenderbox, 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. Blenderbox, Inc. is in the business of designing and developing websites for clients and has a business address of 26 Dobbin Street, 3rd Floor, Brooklyn, New York (Exh. DED1 at 1-3).

2. Blenderbox, Inc. was established on September 7, 2000 (Exh. DED1 at 2). When the corporation was formed Sarah Jeffries and her husband each owned 50% of the corporation shares (Exh. A2 at 5-6). On January 1, 2007, Ms. Jeffries bought one percent of the firm from her husband for ten dollars (Exh. A2 at 1). At the time of the application, Sarah Jeffries served as president of the corporation and owned 51% of its stock. Her husband Jason Jeffries served as vice president of the corporation and owned the remaining 49% of its stock (Exh. DED1 at 2-3). The corporation has 22 employees (Exh. A1).

3. On January 10, 2006, Mr. Jeffries established a second business, Bedford Cheese Shop, Inc. (Exh. A4). Mr. Jeffries spends approximately ten hours a week at this corporation (Exh. DED5 at 20:00).

4. In 2013, Blenderbox, Inc. paid Ms. Jeffries [REDACTED] and Mr. Jeffries [REDACTED] (Exh. A3 at 3-4). In 2014, Blenderbox, Inc. paid Ms. Jeffries [REDACTED] and Mr. Jeffries [REDACTED] (Exh. A3 at 1-2).

5. Both Mr. and Ms. Jeffries are authorized to sign checks (Exh. A5). Both are also personal guarantors on the business's line of credit (Exh. A5 at 3).

6. In the application materials, the applicant did not submit any contracts that were signed by Ms. Jeffries (Exh. DED5 at 1:10:00).

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 sets forth three bases related to Ms. Jeffries's ownership and operation of Blenderbox, Inc. Each basis is discussed individually, below.

Ownership

In its denial letter, the Division concluded that the applicant failed to demonstrate that the woman owner Sarah Jeffries'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).

At the hearing Ms. Jeffries testified that when the business began, she and her husband each owned 50% of the business and the application states they each contributed [REDACTED] of personal assets to start the business (Exh. DED1 at 3). In January 2007, she purchased one percent of his stock for [REDACTED] (Exh. A8). The reason for this change in ownership was because her husband was becoming involved in a second business, Bedford Cheese Shop, Inc., and was spending less time at Blenderbox, Inc. while her role with it was increasing (Exh. DED5 at 18:00). At the time there was no discussion of WBE certification (Exh. DED5 at 20:15).

Applicant's counsel concedes that the sale of the one percent of the firm to Ms. Jeffries was a gift. However, he argues this gift is permissible and points to federal regulations for disadvantaged business enterprises ("DBE"), which he argues is akin to the Division's WBE program. These regulations allow a gift if it is shown by clear and convincing

evidence that such gift was made for reasons other than obtaining certification (Exh. DED5 at 1:05:00; A7, 49 CFR 26.69[g]).

In her testimony, DED analyst Farias testified that she reviewed the application and made several document requests (Exh. DED5 at 1:10:00). When asked to provide proof of the capital contribution, Ms. Jeffries provided a letter from her bank stating she was a co-signer on the business account (Exh. DED3; Exh. DED5 at 1:05:30). Ms. Farias then again requested proof of capitalization, and Ms. Jeffries provided a stock purchase agreement (Exh. A2) which provided that [REDACTED] was paid for the one percent of stock Ms. Jeffries purchased from her husband. Ms. Farias testified that this was not proof of Ms. Jeffries's capitalization nor was other information that was provided about the firm's line of credit (Exh. DED5 at 1:12:15). She noted that the application itself said that the one percent share of the firm from Mr. Jeffries was a gift (Exh. DED1 at 14, Exh. DED5 at 1:18:00). She also testified that Ms. Jeffries did not claim to have provided expertise to the business as a form of capitalization (Exh. DED5 at 1:12:45). In his closing statement, Division's counsel argues that there was no proof in the application documents that Ms. Jeffries made any contribution, either for her original 50% of the firm or for the additional 1% which was purchased later.

Based on the evidence in the record, the applicant failed to demonstrate that the woman owner Sarah Jeffries'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. Simply put, the applicant provided nothing showing a capital contribution and no claim was made that Ms. Jeffries made a contribution in the form of expertise. With respect to applicant's counsel's claim that a gift is permissible under federal regulations, counsel offers nothing to show that the Division should follow these regulations in administering its own program.

Control

In its denial letter, the Division found that the applicant failed to demonstrate that the woman owner, Sarah Jeffries, has control of negotiations, signature authority for payroll, leases, letters of credit, insurance bonds, banking services and contracts and other business transactions, as required by 5 NYCRR 144.2(b)(3).

At the hearing Ms. Jeffries testified that she is the president of the corporation and her husband is vice president, however, he is also listed as CEO on some documents (Exh. DED5 at 32:30). She delegates to her husband many decisions regarding the operations of the firm and much of the paperwork (Exh. DED5 at 32:00, 46:45). They both sign contracts with clients (Exh. DED5 at 33:30). She testified that her duties as creative director keep her busy so that she does not have time to sign every contract (Exh. DED5 at 39:00). She estimated that of the firm's business, 55%-60% of the revenue of the firm comes from web design (her specialty) and the remainder comes from development (her husband's specialty) (Exh. DED5 at 39:45). She also testified that did not sign the contracts for the three largest completed accounts and the three largest active projects listed in the application (Exh. DED1 at 5; DED 5 at 43:50, DED4). Mr. Jeffries signed the lease for the business premises (Exh. DED 5 at 46:30). At the hearing the applicant included three contracts that Ms. Jeffries signed (Exh. A6; DED5 at 45:30), but these were not submitted with the application (Exh. DED5 at 49:00). She testified that no matter who signs the contract, she has final say as to which contracts are executed (Exh. DED5 at 47:45).

In her testimony, DED analyst Farias testified that she reviewed the application and made several document requests (Exh. DED5 at 1:10:00). She testified that she requested copies of executed contracts, none of which were signed by Ms. Jeffries (DED4). The applicant provided no contracts that were signed by Ms. Jeffries (Exh. DED5 at 1:14:00).

Based on the evidence in the record, the applicant failed to demonstrate that the woman owner, Sarah Jeffries, has control of negotiations, signature authority for payroll, leases, letters of credit, insurance bonds, banking services and

contracts and other business transactions, as required by 5 NYCRR 144.2(b)(3). The applicant provided no contracts that were signed by Ms. Jeffries as part of the application process. The Division's denial was based upon substantial evidence.

CONCLUSIONS

1. The applicant failed to demonstrate that the woman owner Sarah Jeffries'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 woman owner, Sarah Jeffries, has control of negotiations, signature authority for payroll, leases, letters of credit, insurance bonds, banking services and contracts and other business transactions, as required by 5 NYCRR 144.2(b)(3).

RECOMMENDATION

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

**Matter of
Blenderbox, Inc.**

**DED File ID No. 52530
Exhibit List**

Exh. #	Description	# of pages
DED1	Application	14
DED2	Denial letter	3
DED3	Letter from HSBC	1
DED4	3 contracts submitted with application	14
DED5	Recording of hearing	On disc
A1	List of employees	1
A2	Stock purchase agreement and certificates	11
A3	2013 & 2014 W2 forms	4
A4	Papers regarding Bedford Cheese Shop	4
A5	Banking documents	7
A6	Three contracts	13
A7	Federal DBE regulations	1
A8	Fusilli letter	1
A9	Jeffries affidavit	1