

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

In the Matter

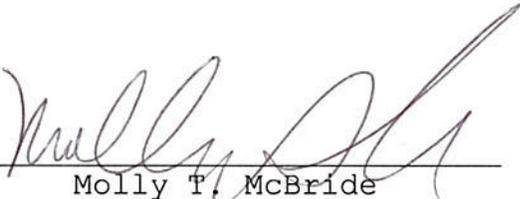
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the Application of **S & M Tire Recycling, Inc.**
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 51417

RECOMMENDED ORDER

- by -


Molly T. McBride
Administrative Law Judge

November 30, 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 S & M Tire Recycling, Inc. ("SM" or "applicant") 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 SM challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

SM submitted an application to the NYSDDED on October 23, 2013 (Exhibit 5). By letter dated February 10, 2016, the Division denied the application for WBE certification.

Applicant filed an appeal from the denial and submitted a written appeal received June 30, 2016. The Division opposed the appeal by letter dated July 25, 2016.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria 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, if any, 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's capital contribution is proportionate to her equity interest in the business; (2) applicant business has failed to demonstrate that the woman owner makes decisions pertaining to the operations of the enterprise; (3) applicant business has failed to demonstrate that the woman owner shares in the risks and profits in proportion to her ownership interest.

Position of the Applicant

SM 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. S & M Tire Recycling, Inc. was formed in 2008¹ (Exhibit 5, 1.R.). Mary Lou Mancuso is President and owns 51% of the company and Salvatore Mancuso is Vice President and owns 49% of the company (Exhibit 5, 2.A.).
2. SM is a tire recycling business (Exhibit 5, 3.B. & C.).
3. Mary Lou Mancuso performs the following duties: financial decisions, preparing bids, negotiating bonding, negotiating insurance, and managing payroll. Salvatore Mancuso performs the following duties: estimating, marketing and sales, hiring and firing, and purchasing equipment/sales. Mary Lou and Salvatore share the following duties: negotiating contracts, signatories for business accounts. A male employee is responsible for supervising field operations (Exhibit 5, 4.A.).
4. The application of SM requesting WBE certification (Exhibit 5) states that Mary Lou Mancuso made capital contributions to SM

¹ The application filed indicates that the business was established on April 7, 2008. It also indicates that the two owners took ownership and were appointed to the Board of Directors on April 7, 2004. For purposes of this Recommended Order, I will use the date of April 7, 2008.

[REDACTED]

5. Mary Lou Mancuso owns 51% of the business and 102 shares of common stock and Salvatore Mancuso owns 49% of the business and 98 shares of common stock (Exhibit 5, 2.A. & D.).

6. Mary Lou Mancuso is President and Salvatore Mancuso is Vice-President (Exhibit 5, 2.F.).

7. SM shares office space and warehouse space with S & M Prompt Rubbish Removal Services, Inc. (S & M Rubbish), a business owned by the Salvatore F. Mancuso, the husband of Mary Lou Mancuso and the father of Salvatore Mancuso (Exhibit 5, 6.H.-J.). Mary Lou Mancuso worked for S & M Rubbish from 1977-2008. Salvatore Mancuso has worked for S & M Rubbish since 1995 and continues to work for that company (Exhibit 12).

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. Section 144.2 of 5 NYCRR defines the criteria to be applied in certifying businesses for minority or woman-owned business enterprise status. In this matter, the application was denied based upon (1) the applicant's failure to demonstrate the woman owner's capital contribution is proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise pursuant to 5 NYCRR 144.2(a)(1); (2) the applicant's failure to demonstrate that the woman owner shares in the risks and profits in proportion to her ownership interest pursuant to 5 NYCRR 144.2(c)(2); and (3) the applicant's failure to demonstrate that the woman makes decisions pertaining to the operation of the business pursuant to 5 NYCRR 144.2(b)(1).

The Division determined the woman owner did not make a capital contribution to the business in proportion to her 51% ownership interest; the woman owner does not share in the risks and profits in proportion to her 51% ownership interest; and the woman owner does not operate the business without the assistance of her son and another male employee, who perform the core functions.

Capital contribution

The applicant alleged Mrs. Mancuso made a capital [REDACTED] form of [REDACTED] letter from Salvatore F. Mancuso, who claims he gifted [REDACTED] to Mary Lou Mancuso to compensate her for her unpaid work at his business, S & M Rubbish where she was employed from 1977 to 2008 (Exhibits 8 & 9). Salvatore F. Mancuso stated that Mary Lou Mancuso was given the equipment "in lieu of compensation for all the years she assisted me with daily office and accounting functions" (Exhibit 9). Division staff notes in its brief that [REDACTED] offered no proof that she took title of [REDACTED] (Exhibit 14, at 2). Also, the Division notes that Mrs. [REDACTED] offered no explanation as to why she would be owed over [REDACTED] in uncompensated services from her husband's business. [REDACTED] alleges Salvatore F. Mancuso gifted applicant [REDACTED] to SM, with Mrs. Mancuso playing no role in [REDACTED] he no evidence was presented in the application process to counter this conclusion.

Applicant has not presented sufficient evidence to demonstrate that the Division's determination that the woman owner failed to demonstrate a capital contribution was not supported by substantial evidence.

Share in risks and profits

The Division also denied the application on the grounds that applicant failed to demonstrate that the woman owner shared in the risks and profits of the business in proportion to her ownership interest. As stated above, Mary Lou Mancuso owns 51% of the business and her son Salvatore owns 49%. Payroll records furnished by applicant indicate the male owner is being paid a salary as is the Miguel Aguayo, Jr., the male employee who is solely responsible for supervision of field operations (Exhibit 10). Only the woman owner is not being paid a salary. The minority or woman owner must demonstrate that the ownership is real and not pro forma, "(2) ...The minority group member or woman owner must enjoy the customary incidents of ownership and must share in the risks and profits, in proportion with their ownership interest in the business enterprise" (5 NYCRR

144.2[c][2])). Mary Lou Mancuso submitted a statement during the application review process that she elects to forgo a salary to provide operational cash for the business (Exhibit 11). No explanation was offered as to why her son, a 49% owner, was not forgoing a salary. While Mrs. Mancuso did submit a letter stating that she has paid herself distributions from the business, she made no mention as to whether Salvatore Mancuso, the male owner, was receiving similar distributions. That information was also submitted after the denial was issued by the Division. The Division argues that distributions are not relevant. The Division contends if the woman owner is forgoing a salary while the male owner is not, the rule is not being met.

The formula for determining how distributions are paid to the woman owner was not offered. No proof was submitted to show that Mary Lou Mancuso, as 51% owner, shares in the profits of the business in proportion to her 51% ownership. Applicant has failed to show that the Division's determination that the woman owner does not share in the risks and profits is not supported by substantial evidence.

Core Functions

SM is in the business of purchasing scrap tires, shredding them and offering the shredded product for sale (Exhibit 5). The Division determined that the core functions of the business are managing tire collection, shredding and sales (Exhibit 14, at 5). The regulations regarding WBE certification require the woman owner control the core functions of the business seeking certification. Section 144.2(b)(1) reads, in part, "(1) decisions pertaining to the operations of the business enterprise must be made by ... women claiming ownership of that business enterprise." All the information supplied during the application process indicate that Mary Lou Mancuso is responsible for the administrative and financial end of the business rather than the technical operations of field supervision (conducted solely by a male employee) or core functions of estimating and marketing and sales (conducted solely by the male owner) (Exhibit 5, 4.A. 1-12). Her prior employment with S & M Rubbish was as a secretary/receptionist (Exhibit 3). Mary Lou Mancuso's job duties with SM do not include the core functions of the business.

Applicant has failed to show the Division's determination that the woman owner fails to perform the core functions of the business enterprise is not supported by substantial evidence.

CONCLUSIONS

1. SM has failed to demonstrate that the woman owner Mary Lou Mancuso made a capital contribution to the business in proportion to her ownership interest as required by 5 NYCRR 144.2(a)(1).
2. SM has failed to demonstrate that the woman owner Mary Lou Mancuso shares in the risks and profits in proportion to her ownership interest as required by 5 NYCRR 144.2(c)(2).
3. SM has failed to demonstrate that the woman owner Mary Lou Mancuso has control over the core functions of the business as required by 5 NYCRR 144.2(b)(1).

RECOMMENDATION

The Division's determination to deny S & M Tire Recycling, Inc.'s application for certification as a woman-owned business enterprise should be affirmed, for the reasons stated herein.

Matter of S & M Tire Recycling, Inc.

Exh. #	Description
1	Certificate of incorporation
2	Response to Q. 16
3	Mary Lou Mancuso resume
4	Mary Lou Mancuso stock certificate
5	Application for WBE certification dated October 23, 2013
6	Response to Q. 10
7	ESD letter to respondent dated May 12, 2016
8	Response to Q. 2
9	Salvatore F. Mancuso letter dated October 4, 2013
10	Payroll Records 2014
11	Response to Q. 17
12	Resume Salvatore Mancuso
13	Response to Q.3
14	EDS Response to Appeal
15	Appeal of S & M Tire Recycling, Inc.