

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
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NEW YORK, NY 10017

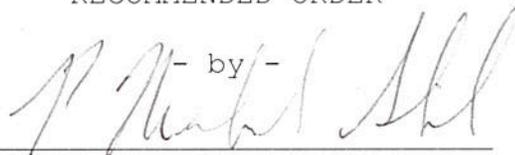
In the Matter

- of -

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

NYS DED File ID No. 60395

RECOMMENDED ORDER

- by -


P. Nicholas Garlick
Administrative Law Judge

March 17, 2017

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

Spring Electric, Inc.'s application was submitted on May 25, 2015 (Exh. DED2).

The application was denied by letter dated August 4, 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 five separate eligibility criteria related to Victoria J. Spring's ownership and operation of the applicant (Exh. DED1).

By letter dated August 30, 2016, the applicant requested a hearing (Exh. A1).

By letter dated December 14, 2016, the Division notified the applicant that the hearing in this matter would occur at 11:00 am on January 31, 2017 at the Division's office located at 625 Broadway, Albany, New York.

On December 23, 2016, this matter was assigned to me.

On January 25, 2017, a conference call was held with the parties to discuss the upcoming hearing.

On January 31, 2017, a hearing in this matter was convened at the Division's Albany Office at 11:00 am. The applicant was represented by Robert Hess, Esq., of the law firm Sullivan, Hess

& Youngblood, P.C., and he called two witnesses: Victoria Spring and Patrick Spring. The Division was represented by Phillip Harmonick, Esq. and he called one witness, Sarhan El-Hussein, Senior Certification Analyst with the Division. The hearing concluded at approximately 1:00 pm.

The record closed upon receipt of the recording of the hearing on or about February 10, 2017.

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 five criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner Victoria J. Spring'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, Victoria J. Spring, shares in the risks and profits in proportion to her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2).

Third, the Division found that the applicant failed to demonstrate that the woman owner, Victoria J. Spring, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii).

Fourth, the Division found that the applicant failed to demonstrate that the woman owner, Victoria J. Spring, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

Fifth, the Division found that the applicant failed to demonstrate that the woman owner, Victoria J. Spring, devotes time on an ongoing basis to the daily operation of the enterprise, as required by 5 NYCRR 144.2(b)(1)(iii).

Position of the Applicant

Spring Electric, 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. Spring Electric, Inc. is in the business of electrical contracting (Exh. DED2 at 2), specifically commercial electrical work and lighting (Exh. DED9, Disc 1 at 5:00).

2. Spring Electric, Inc. was established on May 13, 2014 (Exh. A3) and has a business address of 1408 Red Mill Road, Rensselaer, New York (Exh. A4).

3. Spring Electric, Inc. was started with a [REDACTED] [REDACTED] (Exh. DED9, Disc 1 at 7:30). The applicant's 2015 federal tax return shows that there is no capital stock or paid-in capital for Spring Electric, Inc. (Exh. DED4 at 4, lines 22-23).

4. The Springs' 2015 federal form 1040 shows the salaries paid to Ms. Spring and her husband by the business were [REDACTED] [REDACTED], respectively (Exh. DED5 at 14).

5. Ms. Spring does not possess an electrical license, does not have any experience in the electrical field, and does not supervise the electricians that work for the company (Exh. DED7 at 2). Mr. Spring is a licensed electrician in the City of Troy (Exh. DED8) and has over twenty years of relevant work experience (Exh. DED7 at 1).

6. Ms. Spring has a full-time job with the East Greenbush Central School District (Exh. DED7 at 2) and works there from 8 am until 4 pm, with a half hour or forty five minutes for lunch (Exh. DED9, Disc 1 at 42:00).

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 five bases related to Victoria J. Spring's ownership and operation of Spring Electric, 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 Victoria J. Spring'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). Specifically, the letter states that while Victoria J. Spring owns 51% of the stock of the company, the application lists her capital contribution as [REDACTED]

[REDACTED]. No documents were included with the application to confirm that she made any capital contribution to the firm separately from her husband.

At the hearing, Victoria J. Spring testified that the business was started with the proceeds [REDACTED] (Exh. DED9, Disc 1 at 7:30).

[REDACTED] (Exh. A2) [REDACTED]. Without this money, they could not have purchased it (Exh. DED9, Disc 1 at 8:15). She also testified that she brought work experience in business administration, an associate's degree in accounting, and experience in contract bidding to the business (Exh. DED9, Disc 1 at 9:30-11:00), although she acknowledged that no claim of a contribution of expertise was made in the application (Exh. DED9, Disc 1 at 48:30).

In his testimony, DED analyst El-Hussein testified that he reviewed the application materials and concluded the application did not meet certification standards (Exh. DED9, Disc 2 at 12:30). With regard to Ms. Spring's contribution to the business, Mr. El-Hussein testified the application stated that Ms. Spring had made a [REDACTED] loan to the business on June 30, 2015 (Exh. DED2 at 3). He asked for additional information about her contribution (Exh. DED2 at 10, item 7) which confirmed this loan (Exh. DED3). He stated that this loan did not show that she had made any capital contribution to the firm because it had to be paid back (Exh. DED9, Disc 2 at 13:45). In addition, Mr. El-Hussein stated that the applicant's 2015 federal tax return shows that there is no capital stock or paid-in capital (Exh. DED4 at 4, lines 22-23).

As discussed above, nothing in the record indicates that any capital contribution was made to the firm and no claim of a contribution of expertise was made in the application. Based on the evidence in the record, the applicant failed to demonstrate that the woman owner Victoria J. Spring'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.

In its denial letter, the Division also concluded that the applicant failed to demonstrate that the woman owner, Victoria J. Spring, shares in the risks and profits in proportion to her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2). Specifically, the letter states that her husband's compensation from the firm significantly exceeds hers.

At the hearing, Victoria J. Spring testified that she had been paid less than her husband by the firm at the time of the application, but that was not the case since (Exh. DED9, Disc 1 at 36:00). She explained that this was because she wanted to pay her husband prevailing wage to determine the true cost of his labor (Exh. DED9, Disc 1 at 37:00).

In his testimony, DED analyst El-Hussein testified that he reviewed the application materials and concluded the application did not meet certification standards (Exh. DED9, Disc 2 at 12:30). With regards to this criteria, he stated he reviewed the Spring's 2015 federal form 1040 (Exh. DED9, Disc 2 at 17:00) which shows the salaries paid to Ms. Spring and her husband by the business were [REDACTED] respectively (Exh. DED5 at 14).

Based on the evidence in the record, specifically the fact that Victoria J. Spring receives a significantly smaller salary than her husband, the applicant has failed to demonstrate that Victoria J. Spring shares in the risks and profits in proportion to her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2). The Division's denial on this ground was based on substantial evidence.

Operation

In its denial letter, the Division identified three grounds for denial based on Ms. Spring's operation of Spring Electric, Inc. First, the Division found that the applicant failed to demonstrate that the woman owner, Victoria J. Spring, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii). Specifically, the denial letter states

that while Ms. Spring manages the financial and administrative aspects of the firm, her husband manages the core functions of the business, including estimating projects and supervising the performance of electrical work.

At the hearing Victoria J. Spring testified that she disagreed with the Division's definition of the core functions of the business, estimating projects and supervising the performance of electrical work, and that core functions are the management of the business (Exh. DED9, Disc 1 at 39:30). In her letter requesting a hearing she argues that bid bonding, purchasing insurance, billing, and compliance submittals should also be considered core functions (Exh. A1). Her husband agreed in his testimony stating that the hard part of the business for him was bookkeeping and paperwork (Exh. DED9, Disc 2 at 8:15) and that he was most comfortable doing high voltage electrical work and climbing ladders (Exh. DED9, Disc 2 at 4:00).

In his testimony, DED analyst El-Hussein testified that he reviewed the application materials and concluded the application did not meet certification standards (Exh. DED9, Disc 2 at 12:30). With regards to this criteria, Mr. El-Hussein testified that Ms. Spring did not possess an electrical license, does not have any experience in the electrical field, and does not supervise the electricians that work for the company (Exh. DED9, Disc 2 at 20:00). He also noted that her husband is a licensed electrician in the City of Troy (Exh. DED8).

As counsel for the Division stated in his closing statement, the core functions of a business are those that involve doing the work for the client and generating revenue. In this case, the supervision and performance of the electrical work, as well as estimating such work, are properly considered the core functions of the business. Ms. Spring does not perform these functions at the company. Based on the evidence in the record, the applicant failed to demonstrate that the woman owner, Victoria J. Spring, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii). The Division's denial was based on substantial evidence.

The second ground relating to the operation of the firm stated in the denial letter was that applicant failed to

demonstrate that the woman owner, Victoria J. Spring, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). Specifically, the Division cites the facts that Mr. Spring is a licensed master electrician and has over twenty years of relevant work experience, while Ms. Spring has no formal training or license relevant to the work performed by the company and her work experience demonstrates a background in office management and accounting.

At the hearing, Victoria J. Spring testified that she is not an electrician but that she runs the business. She also stated that she was planning on taking the test to receive a master electrician's license (Exh. DED9, Disc 1 at 40:20-42:00).

In his testimony, DED analyst El-Hussein testified that he reviewed the application materials and concluded the application did not meet certification standards (Exh. DED9, Disc 2 at 12:30). With regards to whether Ms. Spring makes decisions pertaining to the operation of the enterprise, he testified that she does not have experience as an electrician (Exh. DED9, Disc 2 at 18:30). In response to Mr. El-Hussein's request, the applicant provided a narrative which included descriptions of the duties of Mr. and Ms. Spring (Exh. DED6). This document shows her duties relate to the administration of the business while Mr. Spring either completes or oversees the electrical work of the company (Exh. DED6 at 3-4).

Based on the evidence in the record, specifically Ms. Spring's lack of experience and technical qualifications in the electrical field, and her inability to make decisions regarding electrical contracting work, the applicant failed to demonstrate that the woman owner, Victoria J. Spring, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). The Division's denial was based on substantial evidence.

The third ground relating to the operation of the firm stated in the denial letter was that applicant failed to demonstrate that the woman owner, Victoria J. Spring, devotes time on an ongoing basis to the daily operation of the enterprise, as required by 5 NYCRR 144.2(b)(1)(iii). Specifically, the denial letter cited the fact that Ms. Spring is employed during the regular business hours of the firm at a

local school district while her husband works full-time at the firm.

At the hearing, Victoria J. Spring testified that she is employed full-time at the East Greenbush School District and her hours are from 8 am until 4 pm, with a half hour or forty five minutes for lunch (Exh. DED9, Disc 1 at 42:00). She stated that she devotes time in the morning before work to the business as well as time during her lunch break, after work, and on weekends (Exh. DED9, Disc 1 at 42:30). She also stated that she is always available by phone.

In his testimony, DED analyst El-Hussein testified that he reviewed the application materials and concluded that the application did not meet certification standards (Exh. DED9, Disc 2 at 12:30). With regards to whether Ms. Spring devotes time on an ongoing basis to the operation of the business, Mr. El-Hussein testified that he reviewed her resume which showed she had a full-time job with the East Greenbush Central School District (Exh. DED7 at 2) which was confirmed by her tax forms (Exh. DED9, Disc 2 at 19:30).

In his closing statement, counsel for the Division correctly pointed out that Ms. Spring is not available during normal business hours either at the job sites or in the office. Based on the evidence in the record, the applicant failed to demonstrate that the woman owner, Victoria J. Spring, devotes time on an ongoing basis to the daily operation of the enterprise, as required by 5 NYCRR 144.2(b)(1)(iii). The Division's denial was based on substantial evidence.

CONCLUSIONS

1. The applicant failed to demonstrate that the woman owner Victoria J. Spring'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, Victoria J. Spring, shares in the risks and profits in

proportion to her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2).

3. The applicant failed to demonstrate that the woman owner, Victoria J. Spring, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii).

4. The applicant failed to demonstrate that the woman owner, Victoria J. Spring, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

5. The applicant failed to demonstrate that the woman owner, Victoria J. Spring, devotes time on an ongoing basis to the daily operation of the enterprise, as required by 5 NYCRR 144.2(b)(1)(iii).

RECOMMENDATION

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

**Matter of
Spring Electric, Inc.**

**DED File ID No. 60395
Exhibit List**

Exh. #	Description
DED1	Denial letter
DED2	Application
DED3	Capital contribution narrative and attachments
DED4	IRS form 1120S for 2015
DED5	IRS form 1040 for 2015
DED6	Narrative regarding history and roles at firm
DED7	Resumes of Patrick and Victoria Spring
DED8	Master Electrician License for Patrick Spring
DED9	Recording of hearing on two discs
A1	Denial letter
A2	Copy of check
A3	NYS Department of State receipt
A4	Certificate of incorporation
A5	Stock transfer ledger
A6	Bid documents