

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

In the Matter

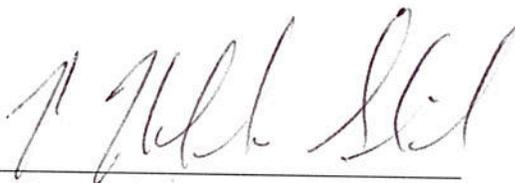
- of -

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

NYS DED File ID No. 59770

RECOMMENDED ORDER

- by -



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P. Nicholas Garlick  
Administrative Law Judge

June 13, 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 Drilling Technologies, Inc. ("applicant") for certification as a woman-owned business enterprise 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 Drilling Technologies, Inc. challenging the determination of the Division that applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Drilling Technologies, Inc.'s application (Exh. DED1) was submitted on April 29, 2015.

Drilling Technologies, Inc.'s application was denied by letter dated August 8, 2016, from Betty Yee, Director of Certification Operations (Exh. DED2). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet two separate eligibility criteria related to the ownership and control of applicant by Sharon Matthews.

By letter dated September 7, 2016, counsel for the applicant appealed from the Division's denial and requested to file a written appeal. In a letter dated September 28, 2016, Division staff stated that the written appeal should be filed on or before November 28, 2016.

In a letter dated November 18, 2016, applicant's counsel requested that the filing deadline be extended. The request was granted without objection.

In papers dated December 19, 2016, applicant's counsel filed the appeal, which consisted of an eleven page brief with

nine exhibits (labelled as exhibits A1-A11 in the attached exhibit chart).

In a letter dated January 20, 2017, applicant's counsel inquired about the status of the appeal.

In a five page memorandum dated May 26, 2017, counsel for the Division filed a response to the appeal with six exhibits (labelled as exhibits DED1-DED6 in the attached exhibit chart).

On May 31, 2017, this matter was assigned to me.

#### **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, and control 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. On administrative appeal, the applicant bears the burden of proof to show its business meets the eligibility criteria for certification as a woman-owned business enterprise (see State Administrative Procedure Act § 306[1]).

#### **POSITIONS OF THE PARTIES**

##### Position of the Division

In its denial letter, the Division asserts that the application failed to meet two separate criteria for certification. First, the Division found that applicant failed to demonstrate that the woman owner, Sharon Matthews, enjoys the customary incidents of ownership and shares in the risks and profits, in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).

Second, the Division found that applicant failed to demonstrate that the woman owner, Sharon Matthews, has control

of business negotiations through the production of signed documents, as required by 5 NYCRR 144.2(b)(3).

Position of the Applicant

Drilling Technologies, 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. Drilling Technologies, Inc. was established on January 18, 2006 (Exh. DED1 at 2). The firm provides horizontal and directional drilling as well as open cut installation of water mains, sewer mains, gas mains, fiber, conduit, and pump stations. The firm also provides excavating, earthmoving and land clearing services (Exh. DED1 at 3).

2. Drilling Technologies, Inc. has a business address of 38 Geneva Boulevard, Wynantskill, New York (Exh. DED1 at 1).

3. Sharon Matthews owns 60% of the common stock of Drilling Technologies, Inc. and serves as its president. Her husband Michael Matthews owns the remaining 40% of the firm and serves as its vice president (Exh. DED1 at 1-3).

4. In 2014, Mr. Matthews received [REDACTED] in compensation from the firm while Ms. Matthews was paid [REDACTED] (Exh. DED3 at 33). The firm made no distributions in 2014 (Exh. DED3 at 31).

5. The three contracts provided during the application process were all executed by Mr. Matthews (Exhs. DED4 at 31, DED5 at 6, and DED6 at 6).

**DISCUSSION**

This report considers applicant's appeal 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 (Exh. DED 1) set forth two bases for

denial related to ownership and control of Drilling Technologies, Inc. Each basis is discussed individually, below.

Ownership

The Division cited as a basis for denial that applicant fails to meet eligibility criteria related to Sharon Matthews's ownership. In its denial letter, the Division asserts that applicant has failed to demonstrate that Sharon Matthews shares in the risks and profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2) (Exh. DED2 at 2). The denial letter states that while Ms. Matthews owns 60% of the common stock of the firm, Mr. Matthews receives significantly greater compensation than his wife (Exh. DED2 at 2).

On the appeal, applicant acknowledges that the company's 2014 tax return shows that Ms. Matthews was compensated [REDACTED] and her husband was paid [REDACTED] (Exh. DED3 at 33) and that the company made no distributions during 2014 (Exh. DED3 at 31). However, applicant argues that the reliance on this fact without consideration of how owner-employees of S-corporations are truly compensated, or the applicability of prevailing wage laws, has led the Division to make an arbitrary and capricious determination that is not based on substantial evidence.

Applicant asserts that Mr. Matthews works in the field as a project manager and that when he is working on public projects prevailing wage laws apply. Ms. Matthews, who does not work in the field, is exempt from prevailing wage laws, and therefore, can be and is paid less than her husband. Applicant argues that by paying Ms. Matthews less, it saves the corporation, which is an S corporation, on payroll taxes and reduces potential losses. In addition, applicant contends that Ms. Matthews does share proportionately in the risks and profits because profits are allocated for tax purposes, though not distributed. Finally, applicant cites a number of other benefits Ms. Matthews receives from the firm, including a vehicle, life and health insurance, as well as a cell phone.

In its response, the Division argues that Ms. Matthews does not share in the risks and profits in proportion to her ownership interest because her husband received significantly

greater compensation from the firm during the most recent tax year. As proof, the Division cites the company's 2014 tax return, which shows that while Ms. Matthews was compensated [REDACTED] during this year, her husband was paid [REDACTED] (Exh. DED3 at 33). The Division also notes that no distributions were made during 2014 (Exh. DED3 at 31).

In response to applicant's argument that the disparity in wages was due to the firm's need to comply with prevailing wage laws, the Division states that this information is not relevant to whether Ms. Matthews receives a proportionate share of the firm's profits. The Division also states that applicant's argument regarding S-corporations is irrelevant, as is the assignment of proportionate shares of profits and losses for tax purposes, because these amounts are left in the business and not distributed. Rather, the Division states that the Division's interpretation of the regulations requires an examination of the actual benefit derived from the business, not allocations for tax purposes.

It is not in dispute that Mr. Matthews received almost twice what Ms. Matthews received from the corporation, which is not proportionate to their respective ownership interests. The Division is correct that applicant's arguments about prevailing wage laws and tax treatment of income are irrelevant to determining the amount of benefit a woman owner receives. Therefore, the record supports the conclusion that applicant has failed to demonstrate that the woman owner, Sharon Matthews, shared in the profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2). The Division's determination was based on substantial evidence.

#### Control

In its denial letter (Exh. 1), the Division contended that the applicant failed to demonstrate that Sharon Matthews has control of business negotiations through the production of signed documents, as required by 5 NYCRR 144.2(b)(3). The denial letter states that all executed contracts submitted with the application are signed by Mr. Matthews on behalf of the firm (Exh. DED2 at 2).

On the appeal, applicant argues that the regulations do not require every contract be signed by Ms. Matthews. Applicant asserts that Ms. Matthews reviews and signs the bid documents which makes the signing of contracts a mere formality. Because Ms. Matthews is a notary and her husband is not, Mr. Matthews often signs so his wife can notarize. Applicant notes that several of the exhibits to the contracts are signed by Ms. Matthews. In addition, Ms. Matthews signed the company's tax returns (Exh. DED3), payroll authorization (Exh. A7), lease agreements (included in Exh. A1), and banking documents (also included in Exh. A1). Also attached to appeal are several letters from clients regarding Ms. Matthews' involvement in projects undertaken by the corporation (Exh. A5) and copies of change orders (Exh. A8). Finally, applicant provides a copy of contracts signed by Ms. Matthews (Exh. A9).

In its response, the Division states that each of the three contracts submitted during the application process was executed by Mr. Matthews (Exhs. DED4 at 31, DED5 at 6, and DED6 at 6). With respect to other documents, including contracts not before the Division at the time of the denial, the Division argues they are either not relevant to the question whether Ms. Matthews executes contracts on behalf of the company or outside the record on appeal. The Division concedes that not every contract need be signed by a woman to meet this eligibility criteria, but in this case, because no contracts with clients signed by Ms. Matthews were submitted, the Division's denial determination was based on substantial evidence.

Based on the information in the record, specifically the fact that Mr. Matthews signed all the contracts provided with the application, the record supports the conclusion that applicant has failed to demonstrate that the woman owner, Sharon Matthews, has control of negotiations as required by 5 NYCRR 144.2(b)(3). The Division's determination was based on substantial evidence.

#### **CONCLUSIONS**

1. Drilling Technologies, Inc. has not demonstrated that the woman owner, Sharon Matthews, enjoyed the customary incidents of ownership and shared in the profits in proportion

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

2. Drilling Technologies, Inc. has not demonstrated that the woman owner, Sharon Matthews, had control of negotiations as required by 5 NYCRR 144.2(b)(3).

#### **RECOMMENDATION**

The Division's determination to deny Drilling Technologies, Inc.'s application for certification as a woman-owned business enterprise should be affirmed, for the reasons stated in its denial letter.

**Matter of Drilling Technologies, Inc.**  
**DED File ID No. 59770**  
**Exhibit List**

<b>Exh. #</b>	<b>Description</b>
A1	Application materials
A2	Division's request for additional information and documents produced
A3	Denial letter (same as DED2)
A4	Division's response to discovery request
A5	Letters from clients
A6	Ms. Matthews's notary license
A7	Payroll authorizations
A8	Change orders
A9	Additional contracts
DED1	Application
DED2	Denial letter
DED3	2014 federal tax return
DED4	Contract with BCI Construction, Inc.
DED5	Contract with the Town of North Greenbush
DED6	Contract with Reale Construction Co., Inc.