

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

In the Matter

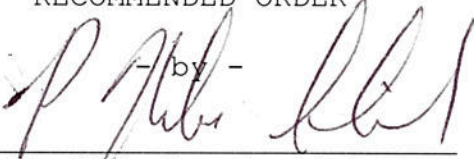
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the Application of
O'Rourke Groundwater Developing, LLC
For Certification as a
Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60344

RECOMMENDED ORDER

- by -



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 O'Rourke Groundwater Developing, LLC ("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 O'Rourke Groundwater Developing, LLC challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

O'Rourke Groundwater Developing, LLC's application was submitted on January 28, 2016 (Exh. DED1).

The application was denied by letter dated June 28, 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 three separate eligibility criteria related to Maryann O'Rourke's ownership and operation of the applicant (Exh. DED3).

By letter dated July 5, 2016, the applicant appealed from the denial.

By letter dated July 22, 2016, the Division notified the applicant that its written appeal in this matter should be received on or before September 2, 2016.

With a cover letter dated August 29, 2016, the applicant submitted a four page appeal. Attached to the appeal was one exhibit labeled in the attached exhibit chart as A1.

In a five-page memo dated May 17, 2017 the Division provided a response to the applicant's appeal. Attached to the

response were six exhibits labeled in the attached exhibit chart as DED1-DED6.

On May 18, 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, 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 criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner Maryann O'Rourke'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, Maryann O'Rourke, 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).

Third, the Division found that the applicant failed to demonstrate that the woman owner, Maryann O'Rourke, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

Position of the Applicant

O'Rourke Groundwater Developing, LLC 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. O'Rourke Groundwater Developing, LLC is in the business of providing well drilling services; installing geothermal looping and heat pumps; grounding boreholes; servicing well water pumps; developing wells and testing pumps; dewatering wells; inspecting and monitoring wells; and well abandonment (Exh. DED1 at 3). The firm has a business address of 12132 County Route 77, Adams, New York (Exh. DED1 at 1).

2. O'Rourke Groundwater Developing, LLC was established on January 4, 2010. Maryann O'Rourke has a 51% ownership interest in the firm and her husband Kevin O'Rourke owns the remaining 49%. (Exh. DED1 at 3). Prior to the firm's creation, the O'Rourkes were involved in another firm, O'Rourke Groundwater Developing, which was operated as a sole proprietorship from July 1989 through December 31, 2009 (Exh. DED1 at 2).

3. The firm's application states that Ms. O'Rourke contributed [REDACTED] in equipment and expertise to the firm and Mr. O'Rourke contributed [REDACTED] in equipment and expertise on January 4, 2010 (Exh. DED1 at 3). No proof of these amounts is in the record.

4. Mr. O'Rourke possesses a Bachelor of Science in agronomy and has been supervising well drilling operations, pump installations, and geothermal looping since July 1989 (Exh. DED6 at 1). Ms. O'Rourke has been handling all financial decisions, payroll, insurance compliance, bidding and bonding since July 1989 (Exh. DED6 at 2).

5. The day-to-day responsibilities of Mr. O'Rourke include performing all the site work, such as drilling, installing geothermal loops and dewatering wells, as well as visiting work sites ahead of time and meeting prospective clients (Exh. DED5 at 2). The day-to-day responsibilities of Ms. O'Rourke include accounting and tax work, bidding, arranging bonding and insurance, scheduling, ordering, advertising, mailing contracts, and other necessary paperwork (Exh. DED5 at 1).

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 sets forth three bases related to Maryann O'Rourke's ownership and operation of O'Rourke Groundwater Developing, LLC. Each basis is discussed individually, below.

Ownership

In its denial letter, the Division concluded that the applicant failed to demonstrate that the woman owner Maryann O'Rourke'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 the documents submitted with the application for the purpose of demonstrating Ms. O'Rourke's contribution are financial statements of the company. Other documents claiming that Ms. O'Rourke's contributed pension funds were not confirmed (Exh. DED3 at 2).

On her appeal, Ms. O'Rourke states that she had worked for the Veterans Administration (VA) in Philadelphia, Pennsylvania between 1974 and 1989. When she left this job, she took money

she had invested in her pension to start a business. Due to the passage of time, she does not have documents to support this claim. She states that if one compounds her contribution of \$15,000 at 14% for 28 years, her investment would have been over \$600,000. Based on this calculation, she concludes, it is reasonable to say that this is how she arrived at her contribution of [REDACTED] along with her expertise and running the business for the past 27 years. (Appeal at 1). Her husband notes that without her initial \$15,000 investment, they would not have been able to start in business (Exh. A1).

In its response, the Division notes that the application states that Ms. O'Rourke contributed [REDACTED] of equipment and expertise to the business on January 4, 2010 and Mr. O'Rourke made a similar contribution of [REDACTED] on the same date (Exh. DED1 at 3). When asked for proof of these contributions, the applicant submitted financial statements for the years 2012, 2013, and 2014 (Exh. DED4). None of these documents show any contributions to the firm. The Division also asked the applicant for documentation to substantiate the claimed capital contributions (Exh. DED1 at 10). In response, Ms. O'Rourke stated that before she left the VA, she took money out of her pension and put it into a prior business¹ (Exh. DED5 at 2). The Division notes that this claim is not substantiated by any proof nor is it consistent with the information provided in the application. The Division continues that whatever her contributions to the prior business may have been in 1989, it has nothing to do with her contribution to O'Rourke Groundwater Developing, LLC which was established on January 4, 2010. The Division concludes that applicant provided no evidence at the time of the denial that Ms. O'Rourke made any contribution to O'Rourke Groundwater Developing, LLC. Further, the new information provided on the appeal regarding the amount of the

¹ The application lists the prior business as O'Rourke Groundwater Developing and states it operated as a sole proprietorship from July 1989 through December 31, 2009 (Exh. DED 1 at 2). Nothing in the record indicates that Ms. O'Rourke was the sole proprietor of this firm.

1989 contribution is not substantiated and is not proof that Ms. O'Rourke made any contribution.

Based on the evidence in the record, including the contradictory and unsubstantiated claims in the application materials about Ms. O'Rourke's contribution, the applicant failed to demonstrate that the woman owner Maryann O'Rourke'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.

Operation

In its denial letter, the Division identified two grounds for denial based on Ms. O'Rourke's operation of O'Rourke Groundwater Developing, LLC. First, the Division found that the applicant failed to demonstrate that the woman owner, Maryann O'Rourke, 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 Ms. O'Rourke has no demonstrated educational background in relevant disciplines; no experience in well drilling operations; and no relevant training in the well drilling industry, while her husband has a relevant educational background in agronomy and significant experience managing well drilling operations (Exh. DED3 at 2-3).

On her appeal, Ms. O'Rourke states that she has been in the groundwater business for 27 years and during this time has been involved in many aspects of the business including: moving equipment to job sites, working at test pumps on drilling sites, meeting potential clients, drawing up contracts, bidding, bonding, insurance, making financial decisions, managing payroll, hiring, and filing required reports. She also states she speaks to clients and arranges the jobs her husband and employee will do.

With respect to the Division's claim that she does not possess relevant training or educational background, she responds that she has had 27 years of on the job training. She acknowledges that she does not possess a degree in agronomy but

argues that such degree is not a requirement to own or operate a drilling business. She continues that she is not aware of any New York State school that offers a curriculum for water well drilling and that most drilling managers do not have a college degree. She concludes that not only does her husband have significant experience managing well drilling operations, she does as well (Appeal at 2-3).

In its response, the Division states that the application contained significant evidence to the effect that Mr. O'Rourke manages the core functions of the business. Specifically, the Division cites resumes supplied with the application that show Mr. O'Rourke has supervised well drilling operations since 1989 while his wife makes no such claim (Exh. DED6). The Division also cites Mr. O'Rourke's academic training in agronomy, while Ms. O'Rourke's resume emphasizes her financial and administrative roles with the firm. The claims made on the appeal about her experience in well drilling were not before the Division at the time of the denial and so cannot be considered on appeal.

Based on the evidence in the record, the applicant failed to demonstrate that the woman owner, Maryann O'Rourke, 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, Maryann O'Rourke, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). Specifically, the denial letter cites the facts that Ms. O'Rourke manages the administrative and financial aspects of the business while her husband manages its field operations (Exh. DED3 at 3).

On her appeal, Ms. O'Rourke states that in addition to managing the administrative and financial aspects of the company she also manages the field operations. She schedules equipment and supplies to job sites, obtains bonding, and signs contracts. She concludes that a good business woman will surround herself with competent and knowledgeable employees (Appeal at 4).

In its response, the Division states that the application materials indicate that it is Mr. O'Rourke who manages the core, revenue-generating field operations of the business, namely drilling wells, while Ms. O'Rourke manages the office (Exh. DED5). The Division concedes that Ms. O'Rourke does manage a core function of estimating, but that the drilling of wells is done by her husband. The fact that she has responsibility for bidding is not, by itself, enough to demonstrate she manages and makes decisions regarding the core, revenue generating function of drilling wells.

Based on the evidence in the record, specifically Ms. O'Rourke's role in the office and Mr. O'Rourke's role supervising field operations, the applicant failed to demonstrate that the woman owner, Maryann O'Rourke, 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.

CONCLUSIONS

1. The applicant failed to demonstrate that the woman owner Maryann O'Rourke'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, Maryann O'Rourke, 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).

3. The applicant failed to demonstrate that the woman owner, Maryann O'Rourke, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

RECOMMENDATION

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

**Matter of
O'Rourke Groundwater Developing, LLC**

**DED File ID No. 60344
Exhibit List**

Exh. #	Description
DED1	Application
DED2	Articles of Organization
DED3	Denial letter
DED4	Financial statements
DED5	Answers to questions
DED6	Resumes
A1	Letter from Kevin O'Rourke