

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

In the Matter

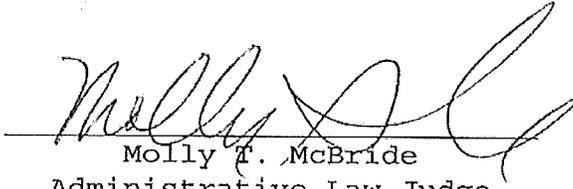
- of -

the Application of GREEN AND SUSTAINABLE SERVICES, LLC
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 55499

RECOMMENDED ORDER

- by -


Molly T. McBride
Administrative Law Judge

April 25, 2018

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 Green and Sustainable Services, LLC. ("GSS" or "applicant") certification as a woman-owned business enterprise ("WBE") be reversed 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 GSS challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

GSS submitted an application to the NYSDDED on March 17, 2015 (Exhibit A). By letter dated October 26, 2016, the Division denied the application for WBE certification (Exhibit B).

Applicant filed an appeal from the denial and requested a hearing. The hearing was held on January 9, 2018 at the Albany office of the NYSDDED. The parties submitted post-hearing closing briefs and the record closed on March 2, 2018.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria regarding, among other things, the applicant's ownership and operation 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 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 two criteria for certification: (1) applicant business has not demonstrated that the woman owner's capital contribution was proportionate to her equity interest in the business enterprise as required by 5 NYCRR 144.2(a)(1); and, (2) the woman owner has not demonstrated adequate managerial experience or technical competence to operate the business enterprise as required by 5 NYCRR 144.2(b)(1)(i).

Position of the Applicant

GSS asserts that it was certified by NYS in 2011 for a three year term, that it meets the criteria for recertification and that the Division erred in not recertifying it as a woman-owned business enterprise pursuant to EL Article 15-A.

FINDINGS OF FACT

1. Green and Sustainable Services LLC was formed by Charlotte Smith and her husband Thomas Smith in 2008 in Texas (Exhibit A, 1.R. and 2.B.). Charlotte Smith owns 55% of the issued shares of stock and Thomas Smith owns 45% (Exhibits A, 2.D. and 71).
2. GSS is in the business of manufacturer/supply, technical service, water treatment, environmental products and service (Exhibit A, 3.B.).
3. The application indicates Charlotte Smith made a capital contribution of [REDACTED] and Thomas Smith made a capital contribution of [REDACTED] to fund the startup of GSS in 2008 (Exhibit A, 2.D.).

4. Charlotte Smith is Chief Executive Officer and Thomas Smith is Chief Technical Officer (Exhibit A, 2.F.).

5. The business is operated from the owners' personal residence.

6. The company sells products for water treatment facilities. All contracts involve the sale of the products for water treatment facilities, some include services as well.

7. When a contract includes services, GSS hires subcontractors to provide those services.

8. GSS does not design water treatment facilities and an engineer is not needed to perform the functions of GSS (Disk 1 at 18:30, 20:00).

9. The woman owner is the only person authorized to enter into contracts on behalf of GSS, negotiate contracts, approve bids, sign checks, hire and fire, and make all financial decisions (Exhibit N).

10. The two owners are the only employees of GSS (Exhibit A. 1.W.) and both owners perform work in the field at job sites at times (Disk 1 at 1:10).

11. The profits of GSS are distributed 55% to the woman majority owner and 45% to the male minority owner (Disk 1 at 17:20)¹.

12. The woman owner earned an MBA, after opening the business, to assist her in the operation of the business (Disk 1 at 50:30) She graduated with a 4.0 GPA (Disk 1 at 51:00).

13. The woman owner completed numerous training and certification programs. She completed Steam Boiler System Operator Training, a 55-hour course, in 2012 and 2014, and a Cooling System Operation Certification in 2012 and 2014 (Exhibit 50). She also provided copies of certifications in six other

¹ References to Disk refer to audio recording of the appeal hearing

areas directly related to the work of the company (Exhibits 37-44).

15. The company received three awards for its work, one from the City of Ft. Worth, one from American Academy of Engineers and Scientists, and one from the US Department of Defense (Disk 1 at 60:30).

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 EL Article 15-A.

OWNERSHIP

Capital Contribution

The Division claims that Charlotte Smith did not make a capital contribution to the business that is proportionate to her equity interest. The standards to determine if a business should be afforded woman-owned business certification are defined in 5 NYCRR 144.2. Section 144.2(a)(1) of 5 NYCRR requires the woman owner to demonstrate she has made a capital contribution to the business enterprise proportionate to her equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise (5 NCYRR 144.2 [a][1]).

Charlotte Smith owns 55% of GSS (Exhibit A). Charlotte Smith contributed [REDACTED] to the startup of GSS in 2008 and her husband contributed [REDACTED] (Exhibit A). The Division's assigned certification analyst Rita Rivas concluded that the initial contribution was not a sufficient capitalization to be granted WBE certification (Disk 2, Tr 3, 3:30). Applicant's counsel argued that the regulations do not require a minimum dollar amount for initial capitalization (Applicant brief dated February 16, 2018, at 3). Applicant also noted that the business did not require a large capitalization, the business is operated out of the owner's home and only employs the two owners (Exhibit A and Brief at 3). The application identifies the company's major equipment as [REDACTED] valued at [REDACTED] (Exhibit A, 5.C.). It has not been shown or alleged that the

business has a large overhead or requires a large cash reserve to operate. Noting has been offered to demonstrate that the initial capitalization, although small, was not sufficient for the startup of the applicant business. An October 19, 2016 letter from applicant's previous attorney to the NYSDSD includes a sworn statement from Charlotte Smith dated April 1, 2015 confirming the initial cash contribution from the two owners, and, a [REDACTED] confirming the shares held by each owner (Exhibits H and 70).

Applicant has demonstrated sufficiently that the woman owner made a capital contribution in proportion to her ownership interest and, therefore, has shown that the Division's denial on this ground was not based on substantial evidence.

OPERATION

The Division also denied the application on the ground that the woman owner lacks the management experience or technical competence to operate the business, which is an element required under 5 NYCRR 144.2(b)(1)(i). The analyst reviewing the application, Rita Rivas, concluded that the business of GSS required an engineer and the minority owner Thomas Smith, as the sole engineer in the business, was the only person with the necessary technical expertise to operate the business (Disk 1 at 15:00, Disk 2, Tr 3 at 30:40). The woman owner has a degree in education and a masters in that field as well as her MBA. She testified at the hearing that an engineer is not needed to perform the work of GSS (Disk 1 at 18:30 and 20:00). The business serves as the middle man supplier of products to operate water treatment facilities.

Certification analyst Rivas stated more than once during her testimony that she does not dispute that the woman owner is the boss and "in control" of the company (Disk 1 at 19:00, Disk 2, Tr 3 at 30:40). The Appellate Division, Third Department, noted in *Matter of C.W. Brown v Canton* (216 AD2d 841, 842 [1995]) that "so long as the woman seeking certification retains operational control of the enterprise, technical expertise is not necessary" (*id.* [citing *Matter of Era Steel Constr. Corp. v Egan*, 145 AD2d 795 (3d Dept 1988)]). The Second Amendment to

Operating Agreement dated March 2011 vests the woman owner with sole management authority (Exhibit N, at 1).

The Division argued in its brief that nothing in the record demonstrated the woman owner's ability to evaluate the work of her engineer husband to determine if he is providing competent services (Division Brief at 8). The application submitted, the documents submitted in support of the application, and the testimony offered at the hearing demonstrate that the woman owner does the same technical work as the minority male owner. The woman owner has demonstrated that she is engaged in every aspect of the business and has been performing those duties with her education, training and experience. The woman owner testified that no engineer is needed to do the work of GSS (Disk 1 at 18:20 & 20:00). During her testimony, the woman owner was questioned about a contract with [REDACTED] referenced in the application (Disk 1 at 34:40 and Exhibit 50). Ms. Smith described in detail the contract and what GSS was providing pursuant to the contract. Her testimony left no doubt that she is clearly knowledgeable and capable of performing the business of GSS and does in fact, perform the key functions of the business. The recertification application identified the woman owner as the only person performing the key functions of the company (Exhibit A at 4). Ms. Smith confirmed the woman owner alone has the authority, and is the only GSS employee who negotiates contracts, approves bids, executes all contracts, and is solely responsible for hiring and firing and more (see Exhibits A & N and Disk 1 at 1:05). The woman owner has the authority to fire her husband (Disk 2 at 1:04)

Ms. Rivas concluded that the applicant business was an engineering firm based upon her review of a list of services offered by the company from the company's website, review of two invoices submitted with the application, [REDACTED] and [REDACTED] in Las Vegas (Exhibit D), and the resume of the woman owner only (Disk 2, Track 3 at 8:25). Rivas stated under oath that the invoices show the sale of products and sales of products does not require an engineer (Disk 2, Tr 3 at 2:22). Ms. Rivas was asked about many documents that were submitted during the application process and she testified that she did not review the vast majority of documents that were submitted with the application (Disk 2, Tr 2 at 10:17). These

documents were submitted in response to document requests made by the Division during the application review process (Disk 2, Track 3 at 10:37). The applicant produced at the hearing a complete copy of all documents that were submitted as part of the application process, a total of 72 exhibits. Ms. Rivas did not offer any explanation as to why she failed to review all of the documents submitted during the application review process, although she was the assigned analyst. Ms. Rivas was questioned as to why her review of the two invoices caused her to conclude that the business engaged in engineering work and she had no explanation other than to say she looked at the company website and viewed the two invoices then concluded the company was engaged in engineering work (Disk 2, Tr 2 at 8:00).

Ms. Rivas acknowledged that the woman owner did supply information about certifications she received for the work performed by GSS but Ms. Rivas did not ask the woman owner about those certifications or what work was done by the woman owner to obtain the certifications (Disk 2, Tr 3 15:30). The woman owner did testify in detail as to the extensive work and time that she spent to obtain the certifications, including twice taking a 55-hour course on Steam Boiler Operation and twice taking a 55-hour course on Cooling System Operation (Disk 1 at 56 and 59). She took both courses twice, two years apart, to master the content (Disk 1 at 60:00).

The applicant has demonstrated that the denial of the application on the grounds of operation was not based on substantial evidence

CONCLUSIONS

1. Green and Sustainable Services, LLC has demonstrated that the woman owner, Charlotte Smith, made a capital contribution to the business that is in proportion to her ownership interest as required by 5 NYCRR 144.2(a)(1) and the denial was not based on substantial evidence.
3. Green and Sustainable Services, LLC has demonstrated that the woman owner, Charlotte Smith has the management experience or technical competence to operate the business as required by 5 NYCRR 144.2(b)(1)(i) and the denial was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny Green and Sustainable Services LLC application for recertification as a woman-owned business enterprise should be reversed for the reasons stated herein.

Applicant Exhibit List

1	Affidavit of Charlotte Smith
2	[REDACTED] letter to Division March 2015
3	GSS application
4	DOS registration
5	Personal Net Worth Statement
6	2014 Balance sheet GSS
7	2014 P & L statement
8	2012-2013 Financial statement
9	IRS Tax Guide
10	2011 GSS Tax Return
11	2012 GSS Tax Return
12	2013 GSS Tax Return
13	2012 Individual tax return
14	2013 Individual Tax Return
15	Membership Interest/ledger
16	Line of credit proof
17	Bank signature card
18	US Citizenship proof
19	Charlotte Smith CV
20	Thomas Smith CV
21	Note for [REDACTED]
22	[REDACTED]

23	Certificate of correction
24	Cert of formation
25	Texas Cert of Fact
26	Cert of Correction
27	Cert of formation
28	Operating Agreement first amendment
29	Fourth Amendment to OA
30	Operating Agreement
31	Second amendment to OA
32	Third amendment to OA
33	ESD attachment B personal financial stmt
34	Proof of gender
35	DBE cert
36	GSS HUB
37	CBS training cert
38	CBS training cert
39	CBS training cert
40	CBS training cert
41	CBS training cert
42	CBS training cert
43	CBS ISI ENV cert
44	CBS training cert
45	NYS sales tax verif

46	NYS sales tax webfile
47	Deed
48	NYS DOS biennial filing
49	NYS DOS corp filing
50	[REDACTED] invoice
51	[REDACTED] March 2015 letter to ESD
52	ESD certify approval 2011
53	ESD Feb 2015 letter
54	Sworn statement CBS to ESD
55	[REDACTED] letter to ESD Feb 2016
56	[REDACTED] letter to ESD March 2015
57	2013 personal tax returns
58	Contract GSS and VA
59	Contract GSS and Southern Nevada VA
60	Contract GSS and VA South Carolina
61	[REDACTED] business line of credit
62	[REDACTED] letter to ESD October 2016
63	2014 Tax return
64	2015 Tax return
65	GSS contract with FBSD
66	[REDACTED]
67	[REDACTED]
68	Check stub [REDACTED]

69	heck stub [REDACTED]
70	Invoice [REDACTED]
71	Stock ledger
72	Charlotte Smith CV

DED Exhibit List

Exh. #	Description
A	Application for MWBE certification
B	DED denial letter of October 26, 2016
C	██████████ letter of February 4, 2016
D	██
E	GSA schedule 2 pages
F	Membership Interest Issuance
G	██████████ letter
H	██████████ letter of October 19, 2016
I	GSS Operating Agreement
J	Charlotte Smith CV
K	Certificate of Completion, Charlotte Smith
L	Thomas Smith CV
M	Texas Certificate of Registration
N	Second Amendment to Operating Agreement
O	Certification and recertification checklist