

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

In the Matter

- of -

the Application of **ALPHA DRILLING & BLASTING, INC.**
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 51242

RECOMMENDED ORDER

- by -



Molly T. McBride
Administrative Law Judge

March 16, 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 Alpha Drilling & Blasting, Inc.'s ("Alpha" 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 Alpha challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Alpha submitted an application to the NYSDED on February 22, 2016 (Exhibit 1). By letter dated January 24, 2017, the Division denied the application for WBE certification (Exhibit 2).

Applicant filed an appeal from the denial and requested a hearing. The hearing was held on August 15, 2017 at the Albany office of the NYSDED.

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 applicant business failed to show that the woman owner 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).

Position of the Applicant

Alpha 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. Alpha Drilling and Blasting, Inc. was formed by Lori Florian in March 2007 (Exhibit 1, 1.R. and 2. B.). Lori Florian owns 100% of the issued shares of stock of Alpha (Exhibit 1, 2.D.).
2. Alpha is a blasting and drilling business (Exhibit 1, 3.B. & C.).
3. Lori Florian performs all of the key functions of Alpha, including the following: financial decisions, estimating, bid preparation, hiring and firing, field operations supervision, purchasing equipment and sales, contract negotiation (Exhibit 1, 4.A.).
4. Lori Florian is a NYS licensed blaster and all blasting licenses necessary for Alpha to operate are held by her (Exhibit 1, 3.A.).

5. Lori Florian performs all aspects of the business, including field blasting work (Disk at 12:30)¹.
7. Lori Florian contributed money to the business at various times since its inception in 2007(Disk at 6:50, Exhibit B).
8. Lori Florian began the business in 2007 after having worked at a similar business for thirty years with her ex-husband (Disk at 8:27).
9. Lori Florian's ex-husband did not pay her money owed under the divorce decree that she intended to use to start Alpha so she applied for business loans to start the business (Disk at 8:40).
10. Lori Florian was not able to secure a bank loan so David and Honey Florian (Lori's parents) loaned her money to start Alpha (Disk at 9:30).
11. Lori Florian personally guaranteed the repayment of loans from her parents in the amount of [REDACTED] by Demand Note executed in 2010 (Exhibit C).
12. Lori Florian sold "everything and anything" she had, except her home, to finance the start of Alpha in 2007 (Disk at 9:30).
14. Lori Florian had thirty years of blasting experience when she started Alpha (8:20).
15. David and Honey Florian reside out of state and are not alleged to be involved with the business in any way except for loaning the business money (Disk at 13:20).
16. Lori Florian supports herself solely by earnings from Alpha (Disk at 13:46) and she would not be able to support herself without those earnings (13:50). She plans to sell Alpha at age 65 to fund her retirement (Disk at 14:10).

¹ References audio transcript of hearing held on August 15, 2017.

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.

OWNERSHIP

Capital Contribution

The Division claims that Lori Florian 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]).

Lori Florian is the sole owner and shareholder of Alpha (Exhibit 1). The application indicates Lori Florian contributed [REDACTED] in loans to the business in May 2007 as her cash and capital contribution (Exhibit 1, 2.C.). She also produced a document entitled "Sources of Capitalization" that listed loans from Lori Florian Britton to the business totaling [REDACTED] (Exhibit 4). Exhibit 4 contained canceled checks from David and Honey Florian (Lori's parents) to Alpha totaling [REDACTED], from David and Honey Florian to Lori (Britton) Florian totaling [REDACTED] and canceled checks from Lori (Britton) Florian to Alpha totaling [REDACTED]. It also contains the records of the auto loan in the amount of [REDACTED] Lori took out for a vehicle titled to her but used by the business. Lori Florian testified that she was unable to solely finance the startup of the business when her ex-husband failed to comply with their divorce decree and pay her an undisclosed amount of money (Disk at 8:40). She was unable to secure a bank loan as well (Disk at 8:40). She sold "everything and anything" she owned, except her home, and started the business in 2007 (Disk at 9:30). She borrowed money from her parents as well to start Alpha (See id). She repaid at least some of the loans after she successfully

recovered the money from her ex-husband in 2011(Disk at 10:13 and Exh. D).

Lori Florian testified that she traded in her personal automobile to help fund the purchase of a truck to be used by Alpha (Disk at 13:45). She financed the purchase with her personal vehicle trade in valued at [REDACTED] and a loan of [REDACTED] that she took out with [REDACTED] (Exhibit 4). Her parents also paid for the purchase of a truck for the business in 2007. The records submitted during the application review process demonstrated that David and Honey Florian loaned money to both Lori Florian and Alpha Drilling in 2007 and subsequent years. The loans totaled [REDACTED] (Exhibits 4, 6, A, B, C & D). All funds loaned by the woman owner's parents were personally guaranteed by a Demand Note executed by the woman owner in 2010 (Exhibit C). Records produced at the hearing detailing funds loaned by David and Honey Florian (Exhibit 4) and capitalization funded by Lori Florian were prepared the day before the hearing by Lori Florian. During the application review process the certification analyst reviewing the application, Matthew Lefebvre, requested documentation from applicant regarding capitalization. Lori Florian produced canceled checks verifying loans from her parents (Exhibit 6). She testified at the hearing that the question did not specifically ask her what money she used to start the company (Disk at 53:30) and she did not document at that time her contributions to the business startup (id).

Raymond Emmanuel testified on behalf of DED at the hearing and stated that the Division looks for key things when examining capitalization: (1) what was contributed by the woman, and (2) what is received by the woman (Disk at 40:00). He concluded that the application must be denied because David Florian funded the startup of the company rather than Lori Florian (Disk at 40:35).

Lori Florian testified at the hearing that she had worked in the drilling and blasting business for thirty years at the time that she started Alpha (Disk at 8:27). Lori Florian is a licensed blaster and holds all required licensing for the business (Exhibit 1, 3.A., Disk at 12:30). Lori works on every aspect of the business, including in-the-field blasting and day to day management of the company (Disk at 13:00, Exhibit 1, 4.A. 1-12). Lori Florian clearly contributed expertise to the

business to capitalize the start of the business. There is no dispute that she has the specialized skill and experience to start and operate a blasting business.

The application refers to cash contribution only. The company startup was capitalized with loans from David and Honey Florian that are guaranteed by the woman owner. The fact that the loans were issued by the woman owner's parents rather than a bank does not alter the nature of the funding. The funds were a loan and the loan was guaranteed by the woman owner. The woman owner capitalized the startup of the business with loans she personally guaranteed.

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

RISKS AND PROFITS

The application was also denied on the basis that applicant business did not demonstrate that the woman owner shares in the risks and profits in proportion to her ownership interest as required by 5 NYCRR 144.2((c)(2)). As discussed above, the business startup as well as funding for the years 2007-2011 came from David and Honey Florian in the amount of approximately [REDACTED] (Exhibit C). Lori Florian executed a Demand Note agreeing to pay David Florian the sum of [REDACTED] on demand (Exhibit C). Should the business fail, David Florian's Demand Note is not impacted. Further, it is undisputed that Lori Florian made cash contributions to the business startup² during the years of its operation up to the time of the application for WBE certification (Exhibits B & 7).

Lori Florian bears the risk should the business fail. As she testified at the hearing, Alpha Drilling is her sole source of income and support (Disk at 13:50). She is intending to sell the business to fund her retirement as well (Disk at 14:10). Lori Florian's current situation and her future financial

² Lori Florian testified that she sold everything she had to fund the startup of the business and contributed all proceeds from her divorce settlement to the business.

stability are dependent on the financial success of Alpha Drilling. She has executed the Demand Note agreeing to repay the loans to David Florian when requested by David, regardless of the stability or profits of Alpha Drilling. Her obligation to pay is in no way affected by the success or failure of the business.

Lori Florian has demonstrated that the denial based on risks and profits is not supported by substantial evidence.

CONCLUSIONS

1. Alpha Drilling has demonstrated that the woman owner, Lori Florian, made a capital contribution to the business that is in proportion to her ownership interest as required by 5 NYCRR 144.2(a)(1).

3. Alpha Drilling has shown that the denial of the application on the basis of the woman owner not sharing in the risks and profits in proportion to her ownership interest is not supported by substantial evidence.

RECOMMENDATION

The Division's determination to deny Alpha application for certification as a woman-owned business enterprise should be reversed for the reasons stated herein.

**Matter of Alpha Drilling
DED File ID No. 51242
Applicant Exhibit List**

Exh. #	Description
A	Loans payable- David Florian 7/24/08-8/14/17
B	Payable sheet, loans by Lori Florian to business
C	David Florian Demand Note
D	 and cancelled checks

DED Exhibit List

Exh. #	Description
1	Application for MWBE certification
2	DED denial letter of January 24, 2017
3	One page letter from applicant dated December 2016
4	Sources of capitalization
5	2014 corporate tax return
6	Florian checks #3892, 3906, 3917, 4011
7	Bartlett letter of July 2011