

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

In the Matter

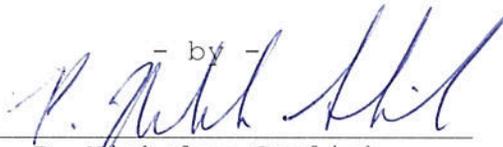
- of -

the Application of
Flemvale Construction, LLC
For Certification as a
Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59840

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

December 20, 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 Flemvale Construction, 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 Flemvale Construction, LLC challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Flemvale Construction, LLC's application was submitted May 12, 2015 (Exh. DED1).

The application was denied by letter dated January 11, 2017, 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 two separate eligibility criteria related to Ericka Fleming's operation of the applicant (Exh. DED2).

By letter dated February 7, 2017, the applicant requested a hearing.

By letter dated June 21, 2017, the Division notified the applicant that the hearing in this matter would occur on October 17, 2017 at the Division's office in Albany, New York.

On July 31, 2017, the matter was assigned to me.

On October 17, 2017, a hearing was convened at 11:00 am at 625 Broadway, Albany, NY. The Division was represented by Phillip Harmonick, Assistant Counsel and called one witness, Iliana Farias, Associate Certification Analyst. The applicant appeared through Ms. Ericka Fleming, who testified, as did one

of the firm's employees, Ms. Emily Hall. The hearing concluded at approximately noon.

The record closed upon receipt of the recording of the hearing on December 4, 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 two separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner, Ericka Fleming, makes

decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

Second, the Division found that the applicant failed to demonstrate that the woman owner, Ericka Fleming, has 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

The applicant 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. Flemvale Construction, LLC is in the business of providing clearing, grading, and restoration services for site development, municipal, and commercial development projects. The firm specializes in the installation of erosion control products, stormwater facilities, site restoration (including topsoil replacement, seeding, and planting), as well as the installation of paver walkways and block retaining walls (Exh. DED1 at 3).

2. Flemvale Construction, LLC has a business address of 123 Depot Street, PO Box 94, Guilford, New York (Exh. DED 1 at 1).

3. Ericka Fleming owns 51% of Flemvale Construction, LLC (Exh. A5); her husband Jason Fleming owns 25%; and her father-in-law Robert Fleming owns 24% (Exh. DED 1 at 3).

4. Ms. Fleming's resume shows no experience in the construction field prior to joining Flemvale Construction, LLC as an owner and indicates her prior jobs as a customer service representative, bookkeeper, and office manager (Exh. DED3 at 1). Jason Fleming's resume shows he holds a degree in civil engineering and is a Professional Engineer with over twelve years' experience in site/civil construction and construction management (Exh. DED3 at 2). Robert Fleming's resume shows over thirty years' experience in site/civil construction and construction management (Exh. DED3 at 3).

5. The only certification earned by Ms. Fleming referenced in the application materials was that she is a notary (Exh. DED3 at 1).

6. The narrative of general daily duties performed by each of the owners of the firm indicates that Jason Fleming is responsible for estimating jobs and overseeing field operations (Exh. DED4). This is consistent with information provided in the application (Exh. DED1 at 4-5).

DISCUSSION

This report considers the 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 two bases related to Ms. Fleming's operation of Flemvale Construction, LLC. Each basis is discussed individually, below.

The first ground cited was that the applicant failed to demonstrate that the woman owner, Ericka Fleming, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

In its denial letter, the Division set forth the following relevant facts: (1) that the applicant is primarily engaged in providing clearing, grading, and restoration services; and (2) the male owners of the firm, Jason Fleming and Robert Fleming, manage the core functions of the business related to estimating and supervising field work.

At the hearing, Ms. Fleming testified that she has a large role in the operations of the company. She has expanded her roles and the time she devotes to the firm's operations. She describes her roles as attending pre-bid meetings, working with her husband to develop estimates, communicating with suppliers, filing all required paperwork, managing accounts payable and receivable, hiring necessary help (Exh. A3), ensuring employees have the required safety training, signing contracts (Exh. A4), and ensuring good customer relations. These functions, she maintains, are the core functions of the firm.

Ms. Farias testified that Ms. Fleming's resume indicated that her experience prior to joining the applicant was primarily

in the bookkeeping field (DED5 at 30:30, DED1 at 1). Jason Fleming's resume indicated he has a degree in engineering and has worked in that field since 2004 (Exhs. DED5 at 31:30, DED3 at 2). Robert Fleming's resume indicates he has 30 years of experience in site/civil construction management and is the Town of Guilford Highway Superintendent (Exh. DED 5 at 32:00; Exh. DED3 at 3). Ms. Farias further testified that estimating and supervising field operations are the core functions of the firm because these functions are how the firm obtains work and generates revenue (Exh. DED5 at 33:30). The application identifies Jason Fleming as responsible for estimating (Exh. DED1 at 4) as does the narrative provided with the application (Exh. DED4). The application further identifies Jason and Robert Fleming as managing the field operations (Exh. DED1 at 5) and this information is also confirmed by the narrative (Exh. DED4).

Based on the evidence in the record and the discussion above, the applicant failed to demonstrate that the woman owner, Ericka Fleming, 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 second ground cited in the denial letter was that the Division concluded that the applicant failed to demonstrate that the woman owner, Ericka Fleming, has adequate managerial experience or technical competence to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i).

In its denial letter, the Division set for the following relevant facts: (1) Ericka Fleming's prior professional experience is in office management and bookkeeping and before joining the applicant; she had no demonstrated training or professional experience in providing sitework services; (2) Jason Fleming has over ten years of relevant construction management experience; and (3) Jason Fleming has participated in continuing education courses relevant to the services provided by the applicant.

At the hearing, Ms. Fleming testified that she has completed several courses and earned certifications relevant to the business including the areas of: (1) lead abatement; (2) erosion and sediment control; and (3) road construction safety

and health (Exh. A2). These certifications are not listed on her resume (Exh. DED3 at 1) nor were they included with the application materials (Exh. DED5 at 21:30). Therefore, they were not before the Division at the time of the denial, and cannot be considered on appeal.

At the hearing, Ms. Farias testified that Ms. Fleming's resume does not indicate experience in either estimating or supervising field work and that no relevant licenses or certifications were listed in the application (Exhs. DED3 at 1, DED5 at 39:45). Jason Fleming's resume shows both management of construction projects in the past as well as a degree in civil engineering (Exh. DED3 at 2). Robert Fleming's resume also indicates extensive experience in the construction field (Exh. DED3 at 3).

Based on the evidence in the record and the discussion above, the applicant failed to demonstrate that the woman owner, Ericka Fleming, has adequate managerial experience or technical competence to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i). The Division's denial was based on substantial evidence.

CONCLUSIONS

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

2. The applicant failed to demonstrate that the woman owner, Ericka Fleming, has adequate managerial experience or technical competence to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i).

RECOMMENDATION

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

**Matter of
Flemvale Construction, LLC**

**DED File ID No. 59840
Exhibit List**

Exh. #	Description
DED1	Application
DED2	Denial letter
DED3	Resumes
DED4	List of duties
DED5	Recording of hearing on disc
A1	Narrative
A2	Certificates held by Ericka Fleming
A3	Payroll summary for 2016
A4	Contract with Village of Oxford
A5	2015 IRS Schedule K1