

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

In the Matter

- of -

S.L. TEST BORING, INC.,

For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 52203

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

February 8, 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 to deny S.L. Test Boring, Inc. ("applicant") 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 S.L. Test Boring, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

S.L. Test Boring, Inc.'s application (Exh. DED1) was submitted on July 5, 2016.

The application was denied by letter dated December 16, 2016, from Bette Yee, Director of Certification Operations (Exh. DED3). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to demonstrate that S.L. Test Boring, Inc. is an independent business enterprise.

By letter dated January 6, 2017, Loretta Luning, president of the applicant, appealed from the Division's denial.

In papers dated November 9, 2017, the Division responded to the appeal in a five-page memorandum. Attached were four exhibits, listed in the attached exhibit chart as DED1-DED4.

On November 13, 2017, I was assigned to this matter.

Ms. Luning requested an opportunity to reply to the Division's response, which was granted. Her papers were received on November 29, 2017 and consisted of a four-page memorandum with eight exhibits attached, listed in the attached chart as A1-A8.

In a four-page memorandum dated December 15, 2017, the Division provided a sur-response.

In an unauthorized email dated December 15, 2017, Ms. Luning responded to the Division's papers and the record closed.

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.

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 S.L. Test Boring, Inc.'s application failed to demonstrate that applicant is an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) & (c)(2).

Position of the Applicant

S.L. Test Boring, 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. S.L. Test Boring, Inc. is in the business of providing boring services for building construction (Exh. DED1 at 3). The firm has a business address of 16 Ashland Drive, Kings Park, New York (Exh. DED1 at 1).

2. Loretta Luning owns 100% of the stock of S.L. Test Boring, Inc. and serves as its president (Exh. DED1 at 3).

3. In response to the Division's questions, Ms. Luning stated that all field drilling operations are provided by Deangelo Drilling as a subcontractor (Exh. DED1 at 9).

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. DED3) sets forth a single basis related to the independence of the applicant; specifically, that it failed to demonstrate that it is an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) & (c)(2).

In its denial letter, the Division cited the following relevant facts: (1) the firm is engaged in providing drilling and boring services; (2) the firm does not employ any persons besides Ms. Luning; (3) the firm subcontracts out performance of all drilling and boring services on its projects, primarily to Deangelo Drilling; and (4) the firm does business from a residential address in Kings Park, New York.

On the appeal, Ms. Luning states that the firm and its predecessor were certified by New York State as WBEs since 1985. The firm continues to be certified as a WBE by New York City and as a Disadvantaged Business Enterprise (DBE) by the MTA. She explains that in October 2015, the firm's two drillers had to retire for health reasons and the firm had difficulty securing qualified replacements. She notes that the firm and its predecessor have always been home-based businesses, but had used off-site storage facilities for field equipment and test boring tools.

In its response, the Division argues that the applicant lacks the equipment, employees, or facilities to actually perform drilling and boring services. Instead, the Division states, the applicant subcontracts its work out to Deangelo Drilling, another firm that provides drilling and boring services. Therefore, the Division concluded that the applicant is not an independent business enterprise, as required by 5

NYCRR 144.2(a)(2) & (c)(2). The basis for the denial includes: (1) the business is conducted out of 16 Ashland Drive, Kings Park, New York (Exh. DED1 at 1) which is also Ms. Luning's personal address (Exh. DED2 at 8); (2) the application showed two permanent employees (Exh. DED1 at 3) but no salaries were reported as paid in 2015 (Exh. DED2 at 1); (3) the application stated Ms. Luning had contributed a drill rig to the firm which originally cost [REDACTED] in 2002 (Exh. DED1 at 4) but that the firm's 2015 tax forms showed the value of all depreciable assets was less than [REDACTED] (Exh. DED2 at 4); and (4) all field drilling and operations are provided by Deangelo Drilling as a sub-contractor (Exh. DED1 at 10). Based on the above, the Division concluded that the applicant was not independent because it lacks the capacity to perform work independently and passes all of its work to Deangelo Drilling. The Division argued that the applicant only acts as an intermediary between clients and Deangelo Drilling. The Division went on to contend that the appeal includes no documentation or proof that the applicant has its own employees or equipment, and concluded that Ms. Luning only does paperwork in her home office while Deangelo Drilling performs all field work.

In her reply, Ms. Luning addresses several of the points raised by the Division. First, she states that the firm did own a drill rig in 2015, but sold it in late March 2016 (Exh. A1). Second, she states that the firm did pay [REDACTED] in salaries in 2015 and that amount was included in the [REDACTED] reported at the cost of goods sold (Exh. DED2 at 1 & 5). Third, she reports that the applicant does not share office space with Deangelo Drilling and that the firm's office has always been in a residential setting. Fourth, she states she prepares and signs all contracts (Exh. A2). She also notes that no interview or site visit was ever conducted (Exh. A3) and that the firm is certified as a DBE by MTA and a WBE by NYC (Exh. A4). She also includes a copy of a transaction register showing payments made to Land Air Water Environmental Services (a WBE firm) from January 2015 through 2016 for sub-contracting and consulting expenses (Exh. A5) as well as a letter from its president (Exh. A6). She also explains that the firm now co-owns a drilling rig (Exh. A7). She concludes by disputing the Division's conclusion that without Deangelo Drilling, her firm could not perform its

contracts, and discussed the work done by the firm, her role in the work, and the fact that she can and does use other firms as subcontractors. As a final attachment to her reply, Ms. Luning includes a letter from a client that acknowledges that Deangelo Drilling provides drilling services to the applicant and describes the relationship between the applicant and Deangelo Drilling as a team-oriented approach (Exh. A8).

In its sur-response, the Division argues that none of the arguments or documents supplied by the applicant have shown that the denial should be reversed. The Division reiterates that because the applicant does not own a drilling rig, it must subcontract to complete its work. It also points to the lack of formal contracts between the applicant and Deangelo Drilling, and asserts that even if a site visit had been done, it would not have changed these facts. The Division acknowledges that Ms. Luning does perform a variety of administrative services in connection with contracts awarded and that the applicant shares employees or offices with Deangelo Drilling. However, the fact that it does not and cannot perform drilling and boring work itself shows that the applicant is not an independent firm. Rather, the applicant must rely on other firms, primarily Deangelo Drilling, to complete its contracts.

In her December 15, 2017 email, Ms. Luning reiterates many of the points in her previous submissions, but does not demonstrate that the Division's determination to deny her application was improper. The application materials describe S.L. Test Boring, Inc. as a firm that must contract out all drilling and boring operations to other firms. It also states that all work is subcontracted to Deangelo Drilling (Exh. DED1 at 9). This description is confirmed in the letter provided by Ms. Luning from one of her clients that describes the relationship between the two firms as a team (Exh. A8). These materials show that S.L. Test Boring, Inc. is not capable of performing the work it contracts to do, and therefore is not independent, as that phrase is used in the applicable regulations. Based on the evidence in the record, the applicant failed to demonstrate that S.L. Test Boring, Inc. is an independent business enterprise, as required by 5 NYCRR 144.2(c)(2). The Division's denial was based on substantial evidence.

CONCLUSION

The applicant failed to demonstrate that S.L. Test Boring, Inc. is an independent business enterprise, as required by 5 NYCRR 144.2(c)(2).

RECOMMENDATION

The Division's determination to deny S.L. Test Boring, Inc.'s application for certification as a woman-owned business enterprise should be affirmed, for the reasons stated in this recommended order.

Matter of S.L. TEST BORING, INC.
DED File ID No. 52203
Exhibit List

Exh. #	Description
A1	Photo and bill of sale of drill rig
A2	Shelter Island subcontract & proposal
A3	Emails
A4	MTA DBE Certification documents
A5	Subcontracting account information
A6	Letter in support of application
A7	Photo of drill rig
A8	Letter in support of application
DED1	Application
DED2	2015 IRS form 1120S
DED3	Denial letter
DED4	2013 IRS schedule K