

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
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NEW YORK, NY 10017

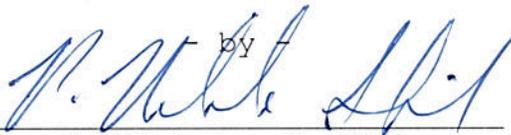
In the Matter

- of -

the Application of
Tri-County Excavating, Inc.
For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 58525

RECOMMENDED ORDER

by

P. Nicholas Garlick
Administrative Law Judge

March 5, 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 the application of Tri-County Excavating, Inc. ("applicant") for certification as a woman-owned business enterprise ("WBE") be modified and, as modified, 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 Tri-County Excavating, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Tri-County Excavating, Inc.'s application was submitted on March 5, 2014 (Exh. DED1).

The application was denied by letter dated October 13, 2016, from Bette Yee, Director of Certification Operations (Exh. DED5). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet three separate eligibility criteria related to Tracey Winters's ownership, operation, and control of the applicant.

In a letter dated March 30, 2017, the Division notified the applicant that its appeal should be submitted no later than May 8, 2017.

By letter dated May 17, 2017, applicant submitted its written appeal which consisted of a three-page letter.¹

In an eight-page memorandum dated February 1, 2018, the Division responded to the applicant's appeal. Enclosed with the

¹ The late-filed appeal was accepted over the objections of Division staff by Chief Administrative Law Judge James T. McClymonds.

response were eight exhibits, described in the attached exhibit chart as DED1-DED8.

On February 2, 2018, 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 separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner Tracey Winters'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 woman owner, Tracey Winters, relied upon for certification does not have adequate managerial experience or technical competence to operate the business enterprise seeking certification, as required by 5 NYCRR 144.2(b)(1)(i).

Third, the Division found that the relevant business agreements do not permit the woman owner, Tracey Winters, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

Position of the Applicant

Tri-County Excavating, 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. Tri-County Excavating, Inc. is in the business of providing site development services for residential, commercial, and public works projects, including installation of septic systems and water lines (Exh. DED1 at 3). The firm has a business address of 1776 Townline Road, Geneva, New York (Exh. DED1 at 1).

2. Tri-County Excavating, Inc. was established on November 26, 2004. At that time Tracey Winters and Robert Wright were each issued one share of stock (Exh. DED2 at 1). On January 2, 2013, Ms. Winters was issued an additional 50 shares and Mr. Wright received 48 (Exh. DED2 at 1). At the time of the application, Ms. Winters owned 51% of the shares of the firm and served as its treasurer while Mr. Wright owned 49% of the firm and served as its president (Exh. DED1 at 3) and chairperson of its board of directors (Exh. DED7 at 23).

3. The application states that a capital contribution was made in the form of loans: [REDACTED] from Ms. Winters and [REDACTED]

from Mr. Wright (Exh. DED1 at 3). The firm's 2013 federal tax return shows that no capital contribution was made for the 2013 issuance of stock (Exh. DED3 at 5, line 23).

4. Ms. Winters's resume describes her duties at Tri-County Excavating, Inc. as being responsible for all aspects of business ownership, including marketing, handling insurance and licenses, meeting customers on site, estimating and site development plans, scheduling of jobs, ordering products to complete work in progress, permits, research, and engineering as required in order to obtain permits to perform work, all business returns, purchasing new equipment, hiring, and general business planning. Before starting the applicant, she served eight years as the office manager of another excavating firm where she answered phones, handled accounts receivable and payable, managed the general ledger, as well as providing estimates, scheduling crews, and overseeing payroll. (Exh. DED4 at 2.)

5. Mr. Wright's resume describes his duties at Tri-County Excavating, Inc. as being responsible for all aspects of business ownership, including management of employees and overseeing crews, repairs and maintenance of vehicles and equipment, scheduling of jobs, ordering products to complete jobs, purchasing new equipment, hiring, general business planning, and repairs and maintenance of shop and yard. Before starting the applicant, he served as foreman for eight years at the same firm Ms. Winters worked where he oversaw projects related to residential development, including excavation, foundations, electrical, water, sewer, grading, and driveways. (Exh. DED 4 at 1.)

6. Article II, section 3 of the corporation's bylaws state: "Unless otherwise ordered by the Board of Directors after the adoption of these By-Laws, the Chairman of the Board of Directors, or when the office of Chairman of the Board of Directors is vacant, the President shall be the Chief Executive Officer of the Corporation" (Exh. DED7 at 21).

DISCUSSION

This report considers the appeal of the applicant 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 set forth three bases related to Ms. Winters's ownership, operation, and control of Tri-County Excavating, Inc. Each basis is discussed individually, below.

Ownership

In its denial, the Division found that the applicant failed to demonstrate that the woman owner Tracey Winters'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). The relevant fact cited in the denial letter are: (1) when it was founded in 2004, Ms. Winters owned an equal share of the firm with Robert Wright; (2) in 2013, additional shares were issued so that now Ms. Winters owns 51% and Mr. Wright owns 49%; (3) the application identified capital contributions as loans, which are liabilities to be repaid; (4) and that the documents showing these purported contributions are line of credit agreements which do not show contributions.

In the appeal, Ms. Winters states that when the business began, she was the only one who owned anything personally that a bank would collateralize and she used her personal assets to finance the business. She also worked without a paycheck when the business started, working in the field during the day and on paperwork in the evenings. She concludes that she has never been paid for these efforts.

In its response, the Division states that the application materials fail to show that either Ms. Winters or Mr. Wright made any contribution to the firm and, from this fact, the Division concluded that they agreed to make Ms. Winters the majority owner for the purposes of obtaining WBE certification. Because only loans were shown as contributions to the firm on the application (Exh. DED1 at 3) and the 2013 federal tax return shows no outstanding shareholder loans (Exh. DED3 at 5), these loans must have been repaid. Because the record contains no

proof of a capital contribution by Ms. Winters when she gained her majority ownership in 2013, the Division concludes the applicant is ineligible for WBE certification. The Division rejects Ms. Winters's claim that she made a contribution in the form of unpaid wages because these claims are not substantiated or quantified, nor were they identified in the application materials.

Based on the evidence in the record, specifically the fact that no contributions to the firm by anyone are either claimed or documented, the applicant has failed to demonstrate that the woman owner Tracey Winters'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 was based on substantial evidence.

Operation

In its denial letter, the Division found that the woman owner, Tracey Winters, relied upon for certification does not have adequate managerial experience or technical competence to operate the business enterprise seeking certification, as required by 5 NYCRR 144.2(b)(1)(i). The relevant facts cited in the denial letter are: (1) the firm is primarily engaged in site preparation; (2) Ms. Winters's experience before starting the company was in administrative and office management roles; (3) she has no demonstrated training or experience managing sitework; and (4) Mr. Wright has twenty years of relevant managerial experience in the industry and was a foreman responsible for overseeing sitework before founding the firm.

In the appeal, Ms. Winters states that she has been running this business since 2004 and before that, had run a similar business since 1996. She states she works with trade groups, ensures compliance with changing rules and regulations, as well as working on code compliance issues. She concludes that the firm's employees and Mr. Wright rely on her to explain the details of each job. Ms. Winters continues that she has been running this company for fourteen years, routinely meeting with customers, estimating all jobs, scheduling all work, serving as the point of contact between the firm and its customers, laying

out jobsites, directing all work, and solving problems as they arise.

In its response, the Division states that Ms. Winters's prior professional experience before starting the applicant was limited to office positions and that she has no training or experience in managing site work in the field. Mr. Wright, on the other hand, has decades of industry-specific managerial experience related to supervising site work in the field. Because of the information presented in the resumes, the firm is ineligible for WBE certification.

The Division mischaracterizes the information in Ms. Winters's resume which clearly states that she performed estimates at her prior employer, a task she continues at the applicant, so the Division's conclusion that she only worked in the office is not supported by the information in the resume. Her knowledge of estimating and scheduling work crews demonstrates some managerial experience in the business the firm performs. It also demonstrates some technical competence, because it would be impossible to provide competitive and competent estimates without a degree of technical competence. However, it is not necessary to reach the issue of whether the Division's denial was based on substantial evidence on this criterion because the application obviously fails on the grounds of ownership, above, and control, below.

Control

In its denial letter, the Division found that the relevant business agreements do not permit the woman owner, Tracey Winters, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). The relevant facts cited in the denial letter are: (1) the shareholders agreement prevents the sale of shares in the business except upon the incapacity of the other shareholder; (2) the corporate bylaws provide that the chairman of the board of directors shall be the chief executive officer of the corporation; and (3) Mr. Wright is the chairman of the board of directors.

On the appeal, Ms. Winters explains that the terms of the shareholders agreement were her idea and established to maintain the commitment of Mr. Wright to the firm. With respect to the

titles held by her and Mr. Wright, Ms. Winters states that an attorney advised her that these titles were not important. Further, the titles do not indicate her actual power within the corporation.

In its response, the Division states that the application (Exh. DED1 at 3) and the supporting documents both name Mr. Wright as the president of the corporation (Exh. DED6 at 5 & 14). The corporate bylaws read in relevant part "Unless otherwise ordered by the Board of Directors after the adoption of these By-Laws, the Chairman of the Board of Directors, or when the office of Chairman of the Board of Directors is vacant, the President shall be the Chief Executive Officer of the Corporation" (Exh. DED7 at 21). The parties' papers on appeal do not show that the board of directors have superseded this clause. Since Mr. Wright, in addition to serving as president, is named as its chairperson in the 2005 annual board minutes (Exh. DED7 at 23), he serves as the highest-ranking officer and director. This leads the Division to conclude that Ms. Winters does not control the corporation, which is required for WBE certification. The Division also points to the shareholders' agreement that restricts either party from selling shares without the consent of the other. This restriction, the Division concludes, prevents Ms. Winters from selling her controlling interest in the firm.

Based on the evidence in the record, specifically the fact that under the corporation's bylaws Mr. Wright controls the firm, the applicant failed to demonstrate that the relevant business agreements permit the woman owner, Tracey Winters, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). The Division's denial was based on substantial evidence.

CONCLUSIONS

1. The applicant failed to demonstrate that the woman owner Tracey Winters'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 relevant business agreements permit the woman owner, Tracey Winters, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

RECOMMENDATION

The Division's determination to deny Tri-County Excavating, Inc.'s application for certification as a woman-owned business enterprise should be modified by striking the operational ground for denial and, as so modified, affirmed for the reasons stated in this recommended order.

**Matter of
Tri-County Excavating, Inc.**

**DED File ID No. 58525
Exhibit List**

Exh. #	Description
DED1	Application
DED2	Shareholder log
DED3	2013 federal tax return
DED4	Resumes
DED5	Denial letter
DED6	Corporate documents
DED7	Corporate bylaws
DED8	Shareholders' agreement