

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

In the Matter

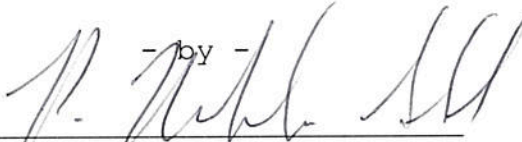
- of -

the Application of  
**Northern Snow & Dirt, Inc.**  
For Certification as a Woman-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 46059

RECOMMENDED ORDER

- by -



---

P. Nicholas Garlick  
Administrative Law Judge

September 28, 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 Northern Snow & Dirt, Inc. ("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 Northern Snow & Dirt, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Northern Snow & Dirt, Inc.'s application was submitted on April 28, 2014 (Exh. DED1).

The application was denied by letter dated August 19, 2016, from Bette Yee, Director of Certification Operations (Exh. DED4). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet two separate eligibility criteria related to Shelly J. Pitcher's ownership and operation of the applicant.

By letter dated September 9, 2016, applicant submitted its written appeal which consisted of a one-page letter.

In a seven-page memorandum dated September 1, 2017, the Division responded to the applicant's appeal. Enclosed with the response were six exhibits, described in the attached exhibit chart as DED1-DED6.

On September 5, 2017, 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 two separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner Shelly J. Pitcher'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 applicant failed to demonstrate that the woman owner, Shelly J. Pitcher, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

## Position of the Applicant

Northern Snow & Dirt, 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. Northern Snow & Dirt, Inc. is in the business of construction, excavation, demolition and landscaping (Exh. DED1 at 3). The firm has a business address of 24 Flaglar Drive, Plattsburgh, New York (Exh. DED1 at 1).

2. Northern Snow & Dirt, Inc. was established on March 7, 2000 by Shelly and Jeff Pitcher. Ms. Pitcher owns 60% of the firm and serves as its president. Mr. Pitcher owns the remaining 40% and serves as its vice president. (Exh. DED1 at 3).

3. In 2000, Mr. and Ms. Pitcher transferred [REDACTED] [REDACTED] from a pre-existing partnership to establish equity in the corporation (Exh. DED5).

4. Mr. Pitcher's roles at the firm include supervising job sites, compiling and calculating materials and manpower for bids, and getting quotes from suppliers. Ms. Pitcher's roles at the firm include managing the administrative and financial affairs of the firm. (Exh. DED6).

### **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 two bases related to Ms. Pitcher's ownership and operation of Northern Snow & Dirt, Inc. Each basis is discussed individually, below.

#### **Ownership**

In its denial, the Division found that the applicant failed to demonstrate that the woman owner Shelly J. Pitcher'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 was that the application did not identify contributions of money, property, equipment, or expertise by Ms. Pitcher to the firm that are proportionate to her ownership interest.

On the appeal, Ms. Pitcher states that contributions to the corporation in the form of money, property, and equipment came from a pre-existing partnership in exchange for stock. Since the corporation was formed in 2000, she states that all purchases, selling and trading of equipment was done by her as are all financial decisions. She, alone, has power to sign for borrowing and depository accounts and only she serves as guarantor on all loans. She states that the firm has been a certified WBE for five years which has allowed it to gain work and grow. Loss of WBE status will hurt the company greatly and affect other companies that it subcontracts with, forcing them to hire firms out of the area and out-of-state to meet WBE requirements.

In its response, the Division argues that Ms. Pitcher and her husband each made equal contributions to the firm and, therefore, the firm is ineligible for WBE certification. The Division cites to a document submitted in the application materials stating that the Pitchers transferred [REDACTED] [REDACTED] from a pre-existing partnership to establish equity in the corporation (Exh. DED5). This document states that Ms. Pitcher was given 60% of the company because of the year-round nature of her office work and her husband received 40% because of the seasonal nature of his field work for the company (Exh. DED5). The Division argues that Ms. Pitcher's claimed extra work for the firm is not a contribution for certification purposes and that no explanation of the nature of her duties, the additional hours, or any foregone compensation was provided. Because the stated contributions of money and equipment were joint, the Division concludes, Northern Snow and Dirt, Inc. is not eligible for WBE certification.

Based on the evidence in the record, specifically the fact that all contributions to the firm were made jointly by Mr. and Ms. Pitcher, the applicant has failed to demonstrate that the

woman owner, Shelly J. Pitcher'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 applicant failed to demonstrate that the woman owner, Shelly J. Pitcher, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). The relevant facts cited in the denial letter were: (1) the firm is primarily engaged in excavation and demolition; (2) the core functions of the business relating to the preparing of estimates and supervising field operations were done by men; and (3) Ms. Pitcher's role in the business is limited to administrative and financial activities (Exh. DED4 at 2).

In the appeal, Ms. Pitcher states that if she were to be on the job site, she would have to be on the certified payroll because most of the company's business is on prevailing wage projects. This would cost the company more. Her husband is paid to supervise the jobs.

In its response, the Division argues the firm is operated as a family business and not a WBE because Ms. Pitcher manages the office functions while Mr. Pitcher manages field operations. The Division argues that because the firm is in the business of construction, excavation, demolition, and landscaping that the core functions of the business are estimating and supervision of field operations because this is how the firm obtains work and delivers services to clients. A document provided with the application describes the respective roles of the Pitchers which shows Mr. Pitcher as responsible for estimating and supervising field operations (Exh. DED6). This information is confirmed by the resumes submitted (Exh. DED3).

There is no dispute that estimating and supervision of field work are done by Mr. Pitcher. The Division's characterization of these functions as the core functions of the business due to the fact that this is how the firm generates

revenue is reasonable and consistent with other WBE cases. Based on the evidence in the record, the applicant failed to demonstrate that the woman owner, Shelly J. Pitcher, 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.

#### **CONCLUSIONS**

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

#### **RECOMMENDATION**

The Division's determination to deny Northern Snow & Dirt, Inc.'s application for certification as a woman-owned business enterprise should be affirmed, for the reasons stated in this recommended order.

**Matter of  
Northern Snow & Dirt, Inc.**

**DED File ID No. 46059  
Exhibit List**

<b>Exh. #</b>	<b>Description</b>
DED1	Application
DED2	Narrative
DED3	Resume
DED4	Denial letter
DED5	Narrative
DED6	Duties and responsibilities