

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

In the Matter

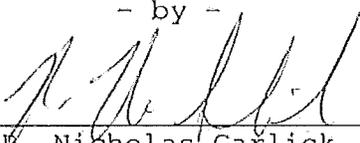
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the Application of  
**Peck Property Maintenance, LLC**  
For Certification as a Woman-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61471

RECOMMENDED ORDER

- by -



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P. Nicholas Garlick  
Administrative Law Judge

July 17, 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 Peck Property Maintenance, 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 Peck Property Maintenance, LLC challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Peck Property Maintenance, LLC's application was submitted on February 8, 2017 (Exh. DED1).

The application was denied by letter dated May 10, 2017, from Raymond Emanuel, Director of Certification Operations (Exh. DED2). As explained in an attachment to Mr. Emanuel's letter, the application was denied for failing to meet four separate eligibility criteria related to the woman owner's ownership and operation of applicant.

By letter dated May 30, 2017, applicant appealed from the denial and requested a hearing.

By letter dated May 21, 2018, the Division notified applicant that the hearing would be held on June 19, 2018, at the Division's headquarters in Albany.

On May 30, 2018, this matter was assigned to me.

On June 19, 2018, a hearing in this matter occurred at 11:00 am at 625 Broadway, Albany, New York. Applicant was represented by Michael D. Callan, Esq. of the law firm Saunders Kahler LLP and he called one witness, Courtney Peck. The Division was represented by Benson V. Martin, Esq., Senior

Attorney, and he called one witness, Glenn Butler, Senior Certification Analyst for the Division.

The record closed on June 22, 2018 with the receipt of the recording of the hearing.

#### **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 four separate criteria for certification.

First, the Division found that applicant failed to demonstrate that the contribution of the woman owner, Courtney Peck, is 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 applicant failed to demonstrate that the woman owner, Courtney Peck, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

Third, the Division found that the woman owner relied upon for certification, Courtney Peck, 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).

Fourth, the Division found that Courtney Peck, the woman owner of the business, does not devote time on an ongoing basis to the daily operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1)(iii).

#### Position of the Applicant

Peck Property Maintenance, LLC 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. Peck Property Maintenance, LLC is an excavation contractor that provides services such as: trenching; grading; installing water lines, sewer lines, and septic tanks; digging foundations; commercial site work; and hauling of demolition materials (Exh. DED1 at 3). The firm has a business address of 6202 Munz Road, Oriskany Falls, New York (Exh. DED1 at 1).

2. At the time of the application, Courtney Peck owned 51% of Peck Property Maintenance, LLC and Charles Peck, her husband, owned the remaining 49% (Exh. DED1 at 3). Section 2C of the application states that Ms. Peck contributed [REDACTED] of expertise and that Charles Peck contributed [REDACTED] of equipment and expertise to the firm (Exh. DED1 at 3).

3. Mr. Peck's resume lists him as the owner/operator of Peck Property Maintenance, LLC and lists his duties as estimating, bidding, and obtaining both commercial and residential excavating work. Prior to this, Mr. Peck worked as an operator of excavation equipment since 1990 for a number of employers. His resume also lists him as the owner/operator of [REDACTED] between 2008 and 2011. Exh. DED4.

4. Ms. Peck's resume does not list her employment with Peck Property Maintenance, LLC nor does it provide any information about what duties she performs for the company. Her resume does list her current employment as an executive assistant for [REDACTED] as well as her past employment as: a project administrator/accounting specialist; a senior secretary; and an on-site supervisor and staff recruiter for a temp agency. Her resume lists her duties as project administrator/accounting specialist executing administrative tasks for members of the construction team, including: calendar management; meeting organization; travel coordination; document management; and managing accounts payable. Exh. DED3.

5. Ms. Peck is employed as an administrative assistant by [REDACTED] and works on business days from 7:30 am until 4:30 pm (Exh. DED1 at 9).

#### **DISCUSSION**

This report considers the appeal of 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 four bases related to the Ms. Peck's ownership and operation of Peck Property Maintenance, LLC. Each basis is discussed individually, below.

#### **Ownership**

In its denial, the Division found that applicant failed to demonstrate that the contribution of the woman owner, Courtney Peck, is 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 facts cited in the denial letter are: (1) Ms. Peck owns 51% of the firm and Mr. Peck owns

49%; and (2) section 2C of the application states that Mr. Peck made greater contributions to the firm than Ms. Peck.

The application reports that Ms. Peck contributed [REDACTED] to the firm in the form of expertise and Mr. Peck contributed [REDACTED] in equipment and expertise (Exh. DED 1 at 3). Ms. Peck testified that she arrived at the value of her expertise claimed in the application, [REDACTED] (Exh. DED1 at 3), by combining the amount of her student loans and the amount of salary she would have received if she had paid herself the market-rate for her work at the firm (Exh. DED5 at 10:30). With respect to her husband's reported contribution to the firm, [REDACTED] (Exh. DED1 at 3), she testified that this this amount was an error (Exh. DED 5 at 11:00) and requested an opportunity to correct his contribution to show he actually contributed [REDACTED] (Exh. DED5 at 12:45).<sup>1</sup> However, as explained above, the administrative hearing is not the appropriate venue to introduce information that was not before the Division at the time of the denial.

Mr. Butler testified that the Division's basis for denying the application on this ground was based on the fact that on the application, Ms. Peck's reported contribution was [REDACTED] and Mr. Peck's was [REDACTED] (Exh. DED5 at 30:00). He also stated that he reviewed the Pecks' resumes and noted that Mr. Peck had considerably more relevant experience and expertise in the excavation field than Ms. Peck (Exh. DED3 & DED4). Specifically, Mr. Butler cited Mr. Peck's more than twenty years of relevant experience, including the prior ownership of another business, and compared it to Ms. Peck's two years of relevant experience (Exh. DED5 at 32:30).

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<sup>1</sup> Ms. Peck testified that the reason for her error was that she had used the total value of the major equipment or machinery owned by the firm, [REDACTED] (Exh. DED1 at 5C), and forgotten to deduct the value of the liens on this equipment listed in section 5G of the application which exceeded the value of the assets, therefore making the assets essentially worth nothing (Exh. DED5 at 12:10). The problem with this explanation is that it ignores the value of the vehicles listed in section 5D of the application and the fact that approximately half of the claimed lien value is on these vehicles. In fact, from the information in the application and Ms. Peck's testimony, it is impossible to understand how she now calculates her husband's contribution.

Based on the evidence in the record, specifically the information regarding contributions included in the application and the Pecks' resumes, applicant has failed to demonstrate that the contribution of the woman owner, Courtney Peck, is 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 on this ground was based on substantial evidence.

### **Operation**

In its denial letter, the Division found that applicant failed to demonstrate that the woman owner makes decisions pertaining to the operation 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 an excavation contractor, primarily engaged in providing trenching, grading, and other sitework services; (2) Mr. Peck is primarily responsible for managing significant operations of the business related to estimating and supervision of field operations; and (3) Ms. Peck is primarily responsible for managing financial and administrative functions of the business.

At the hearing, Ms. Peck testified that while her husband supervises field operations, and operates and maintains the firm's equipment, she is responsible for managing all other aspects of the business, including estimating, as reflected in the application (Exh. DED1 at 3-4). She acknowledged that her husband is responsible for site supervision and operating equipment in the field (Exh. DED5 at 15:30).

Mr. Butler testified that he attempted to confirm the applicant's contention that Ms. Peck managed estimating for the firm, as represented on the application, and so requested the Pecks' resumes. Ms. Peck's resume does not list her employment with Peck Property Management, LLC and lists no duties she performs for it (Exh. DED3). Mr. Peck's resume states that he is responsible for estimating and bidding for the firm (Exh. DED4). Based on this information, Mr. Butler concluded that Ms. Peck did not make decisions regarding estimating and performing field work, and therefore, did not meet certification criteria (Exh. DED5 at 34:30).

Based on the evidence in the record, specifically the lack of evidence supporting Ms. Peck's claim that she provides estimates for the firm and the fact that she does not supervise its field work, the applicant failed to demonstrate that the woman owner makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). The Division's denial on this ground was based on substantial evidence.

The Division also found that the woman owner 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 were: (1) Mr. Peck has significant experience as an equipment operator, and prior experience as the owner of a small business engaged in excavation; and (2) Ms. Peck's prior professional experience in the construction industry was primarily administrative.

Ms. Peck testified that in addition to her administrative experience in the construction industry, she also had experience in the field while working at [REDACTED] (Exh. DED5 at 24:45). However, this claim is not included on her resume (Exh. DED3).

Mr. Butler testified, based on the resumes of the Pecks, that Ms. Peck had not demonstrated either adequate managerial experience or technical competence to operate the firm (Exh. DED3 & DED4). Ms. Peck's resume lists only administrative jobs while Mr. Peck's resume lists many years of experience both owning and operating his own businesses as well as his ability to operate heavy equipment used in the excavating business (Exh. DED5 at 37:00).

Based on the evidence in the record, specifically, Ms. Peck's resume, applicant failed to demonstrate that the woman owner relied upon for certification has adequate managerial experience or technical competence to operate the business enterprise seeking certification, as required by 5 NYCRR 144.2(b)(1)(i). The Division's denial on this ground was based on substantial evidence.

The fourth ground in the Division's denial letter was that Courtney Peck, the woman owner of the business, does not devote time on an ongoing basis to the daily operation of the business

enterprise, as required by 5 NYCRR 144.2(b)(1)(iii). The relevant facts cited in the letter were: (1) Mr. Peck is engaged on a daily basis in the direct operation of the firm during ordinary business hours; and (2) Ms. Peck is employed by [REDACTED] as an administrative assistance during the ordinary business hours of the firm.

In her testimony, Ms. Peck explained that she worked at home for [REDACTED] and could, when needed, stop working for this firm to attend to the business of applicant during ordinary business hours (Exh. DED5 at 26:00). She also stated that she worked more than 80 hours a week between her two jobs (Exh. DED5 at 18:45).

In his testimony, Mr. Butler stated that during his review of the application, he requested additional information regarding Ms. Peck's day-to-day activities and business hours as an employee for [REDACTED] on April 20, 2017. Ms. Peck provided her response on April 27, 2017, which disclosed that as an administrative assistant for this employer her hours were 7:30 am to 4:30 pm but during this time could attend to phone calls and emails for applicant (Exh. DED1 at 9). Based on this information, Mr. Butler concluded that Ms. Peck was not available on an ongoing basis to attend to the daily operations of applicant (Exh. DED5 at 35:00).

Based on the evidence in the record, specifically the fact that Ms. Peck is employed at another job during the normal business hours of the applicant, applicant has failed to show that Courtney Peck, the woman owner of the business, devotes time on an ongoing basis to the daily operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1)(iii). The Division's denial was based on substantial evidence.

#### **CONCLUSIONS**

1. Applicant failed to demonstrate that the contribution of the woman owner, Courtney Peck, is 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. Applicant failed to demonstrate that the woman owner, Courtney Peck, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

3. Applicant failed to demonstrate that the woman owner, Courtney Peck, relied upon for certification has adequate managerial experience or technical competence to operate the business enterprise seeking certification, as required by 5 NYCRR 144.2(b)(1)(i).

4. Applicant failed to show that Courtney Peck, the woman owner of the business, devotes time on an ongoing basis to the daily operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1)(iii).

#### **RECOMMENDATION**

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

Matter of  
Peck Property Maintenance, LLC

DED File ID No. 61471  
Exhibit List

Exh. #	Description
DED1	Application
DED2	Denial letter
DED3	Ms. Peck's resume
DED4	Mr. Peck's resume
DED5	Recording of hearing
A1	Application
A2	Response to request for additional information