

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

In the Matter

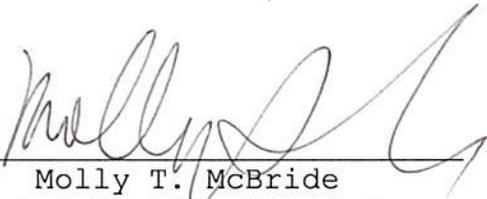
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the Application of **R & R Metal Fabrication and Welding LLC**  
for Certification as a Minority-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60360

RECOMMENDED ORDER

- by -



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Molly T. McBride  
Administrative Law Judge

August 25, 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 ("NYSDED") to deny R & R Metal Fabrication & Welding LLC ("R & R" or "applicant") certification as a minority-owned business enterprise ("MBE") 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 R & R challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a minority-owned business enterprise.

R & R submitted an application to the New York State Minority and Women-owned Business Enterprise Program on March 9, 2016 (Exhibit 1). By letter dated October 14, 2016 the Division denied the applicant's request for minority-business enterprise certification (Exhibit 2). Applicant filed an appeal from the denial by letter dated November 1, 2016 and requested a hearing which was held on May 9, 2016 at the Albany office of the NYSD. NYSD was represented by Phillip Harmonick, Esq., assistant counsel, and Raymond Emmanuel, Director of Certification, and applicant appeared by Khemraj Persaud and Shamadai Sahamdao.

## **ELIGIBILITY CRITERIA**

For the purposes of determining whether an applicant should be granted or denied minority-owned business enterprise status, regulatory criteria regarding, among other things, the applicant's operation are applied on the basis of information supplied through the application process (see 5 NYCRR 144.2[a]). 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 proving that the Division's denial of applicant's MBE 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

The Division asserts that the applicant failed to meet one criteria for certification. The Division found that the applicant failed to demonstrate that the R & R is an independent business enterprise pursuant to 5 NYCRR 144.2(a)(2) and (c)(2).

R & R asserts that it meets the criteria for certification and that the Division erred in not granting it status as a minority-owned business enterprise pursuant to Executive Law Article 15-A.

### **FINDINGS OF FACT**

1. R & R was begun on May 13, 2014 (Exhibit 1 at 2.A.).
2. Khemraj Persaud, minority owner, formed R & R in 2014 and is the sole shareholder (Exhibit 1 at 2.A.).
3. R & R is a metal fabrication and welding business (Exhibit 1 at 3.C.).
4. Khemraj Persaud is responsible for the following managerial operations: financial decisions, negotiating bonding and insurance, marketing and sales, purchasing, payroll, and signatory for business accounts (Exhibit 1 at 4.A.).

5. R & R employee Richard Farnan was responsible for estimating, preparing bids, supervising field operations and negotiating contracts (Exhibit 1 at 4.A.). He was identified on the application as estimator/project manager (id).

6. The application identifies the three largest completed accounts and the contract amount for the previous three years as: 1) DeBrino Caulking, \$160,000; 2) DeBrino Caulking, \$45,000; and 3) Seiko, \$29,491 (Exhibit 1 at 4.C.).

7. R & R employee Richard Farnan was employed as a project manager for DeBrino Caulking at the same time applicant was under contract with DeBrino (T. 26:30).

8. Khemraj Persaud was an employee of DeBrino Caulking at the same time applicant was under contract with DeBrino (T.4:30 and Exhibit 1, 4.C.).

#### **DISCUSSION**

This report considers the appeal of the applicant from the Division's determination to deny certification as a minority-owned business enterprise (MBE) pursuant to Executive Law Article 15-A.

#### **INDEPENDENCE**

The Division denied the application for minority business certification on the basis that applicant failed to demonstrate that it was an independent enterprise pursuant to 5 NYCRR 144.2(a)(2).

Section 144.2 of 5 NYCRR reads, in relevant part:

(a) Ownership. For the purposes of determining whether an applicant should be granted or denied minority- or woman-owned business enterprise status, or whether such status should be revoked, the following rules regarding ownership shall be applied on the basis of information supplied in relation to the application:

(2) the business enterprise must demonstrate that it is an independent, continuing entity which has been actively seeking contracts or orders and regularly and actively performing business activities; and

(c) Additional Requirements:

(2) an eligible minority group member or woman applicant must be an independent business enterprise.

The application of R & R demonstrates that at the time of its submission, four of the key managerial operations of R & R were being performed by employee/project manager Richard Farnan, namely estimating, preparing bids, supervising field operations and negotiating contracts (Exhibit 1, 4.A). The application identifies Mr. Farnan as the estimator/project manager (see id.). Additionally, it was established at the hearing held herein that Mr. Farnan was also an employee of DeBrino at the time that R & R was under contract with DeBrino. Also, Mr. Persaud submitted his 2015 W-2 wage statements as part of the application review process. One of the W-2s submitted demonstrated that Mr. Persaud was an employee of DeBrino at the time that R & R was under contract with DeBrino (Exhibit 4). The documentation submitted demonstrates R & R is closely intertwined with DeBrino Caulking and derived the vast majority of its income from contracts with DeBrino at the time of the application.

Mr. Persaud testified at the hearing that he was put on the DeBrino payroll to avoid purchasing insurance. According to Mr. Persaud, R & R entered into a contract with DeBrino to serve as a subcontractor on a job with the City of Saratoga Springs (R. 4:00). The City required R & R to purchase liability insurance to serve as subcontractor and the cost for the insurance would have been \$12,000.00 (T. 4:30, Exhibit A). Persaud became an employee of DeBrino to negate the need for the insurance (T. 4:00). A letter from Saratoga Springs (Exhibit A) was produced at the hearing indicating that the City of Saratoga Springs required the insurance for applicant to serve as DeBrino's subcontractor for the Saratoga Springs project (T. 7:00).

Mr. Persaud testified income paid to him as an employee was deducted from the payments owed under the terms of the subcontract (T. 4:00).

Mr. Farnan was also an employee of DeBrino at the time of the application. Mr. Persaud presented a letter from DeBrino that indicated that he, Persaud, was independent from DeBrino although he was an employee (Exhibit B, T. 7:10). Persaud was a DeBrino employee for the Saratoga Springs project only (T. 4:50). Applicant testified that R & R had done work for DeBrino prior to the Saratoga Springs project (T. 25:00).

The application was denied in part, because the majority of income of R & R at the time of the application was derived from contracts with DeBrino (T. 41:30) and the Division concluded that the two were too closely connected. Applicant produced a contract between R & R and DeBrino (Exhibit D) that was signed by R & R project manager and employee Richard Farnan on behalf of DeBrino (R. 26:10). Mr. Farnan was serving as project manager for DeBrino while serving as project manager for applicant (T. 26:30).

Applicant also produced contracts that R & R has with businesses other than DeBrino. These contracts were executed before and after the application for MBE was submitted, reviewed, and denied (Exhibit F, G & H). The Division does not dispute that applicant has contracts with businesses other than DeBrino (T. 48:20).

Raymond Emmanuel, senior certification analyst for the Division testified on behalf of the Division. Mr. Emmanuel noted that the applicant had identified its largest contracts for the prior three years (T. 41:30). Two of the three contracts were with DeBrino totaling \$205,000 and the third contract was with Seiko totaling \$29,000.00 (Exhibit 1). Mr. Emmanuel testified that the application showed that DeBrino was the main revenue source for applicant and Mr. Persaud was an employee of DeBrino indicating a close connection between Mr. Persaud and DeBrino (T. 43:15). The records indicated that most of applicant's business revenue came from DeBrino and Mr. Persaud was an employee of DeBrino at the time of the application (T. 44:00). Mr. Farnan was an employee of DeBrino and R & R at the time of the application and R & R relied on him to perform key functions (Exhibit 1, T. 44:00). The Division concluded that applicant relied on DeBrino more than is customary in the industry (T. 44:20) and failed to demonstrate its independence from DeBrino.

Applicant has failed to establish that the Division's determination was not supported by substantial evidence.

#### **CONCLUSIONS**

R & R failed to demonstrate that the business enterprise is an independent enterprise as required by 5 NYCRR 144.2(a)(2) and (c)(2).

#### **RECOMMENDATION**

The Division's determination to deny R & R's application for certification as a minority-owned business enterprise should be affirmed, for the reasons stated herein.

Matter of R & R Metal Fabrication and Welding LLC

DED File ID No. 60360  
Applicant Exhibit List

Exh. #	Description
A	October 25, 2016 letter from Saratoga Springs
B	DeBrino October 21, 2016 letter
C	DeBrino invoice for \$142,000
D	DeBrino Invoice for \$121,210
E	Seiko Invoice
F	Contract with Patterson dated May, 2017
G	Contract with Schmenti dated April, 2017
H	Contract and Invoice with West-winds dated March 2017
I	Contract with Banton dated August 2016
J	Contract with RB Contracting dated July 2016
K	Contract with PCC dated August 2015

**Matter of R & R Metal Fabrication and Welding, LLC**  
**DED File ID No. 60360**  
**DED Exhibit List**

<b>Exh. #</b>	<b>Description</b>
1	Application
2	Division's Denial letter dated October 14, 2016
3	Khemraj Persaud 2015 Tax return
4	Persaud 2015 W-2
5	R & R customer sales summary