

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

In the Matter

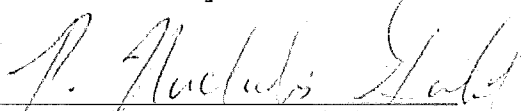
- of -

the Application of  
**River Rock Dock, Inc.**  
For Certification as a Woman-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 53320

RECOMMENDED ORDER

- by -

  
\_\_\_\_\_  
P. Nicholas Garlick  
Administrative Law Judge

June 6, 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 River Rock Dock, 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 River Rock Dock, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

River Rock Dock, Inc.'s application was submitted on March 4, 2014 (Exh. DED1).

The application was denied by letter dated October 17, 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 four separate eligibility criteria related to the woman owner's ownership, operation, and control of the applicant.

By letter dated November 29, 2016, the applicant appealed from the denial.

In a two-page letter dated March 3, 2017, the applicant submitted its appeal.

In a seven-page memorandum dated April 3, 2018, the Division responded to the applicant's appeal. Six exhibits were included with the Division's papers and are described in the attached exhibit chart as DED1-DED6.

On April 4, 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 four separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the contribution of the woman owner, Tracey Myers, 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 the applicant failed to demonstrate that the woman owner, Tracey Myers, 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, Tracey Myers, 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 the woman owner relied upon for certification, Tracey Myers, has not demonstrated control of negotiations through the production of signed contracts, as required by 5 NYCRR 144.2(b)(3).

Position of the Applicant

River Rock Dock, 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. River Rock Dock, Inc. is marine a construction company and provides services including: fabricating and installing steel pile permanent docks with pressure treated decking/staving or composite products; constructing and installing boat ports, boat houses, boat ramps, seawalls, retaining walls, boardwalks, and piers; installing steel and wooden piles; installing electric elevator boat lifts, integrated lifts, and other marine accessories; repairing boathouses, seawalls, and docks; dredging; welding, steel fabricating, excavating, as well as providing carpentry and hardscape installation services (Exh. DED1 at 3). The firm has a business address of 7407 Canaseraga Road, Chittenango, New York (Exh. DED1 at 1).

2. At the time of the application, Tracey Myers owned 75% of the common stock of River Rock Dock, Inc. and her husband Donald Myers owned the remaining 25%. The application reports that Ms. Myers made the following contributions to the firm:

[REDACTED]

[REDACTED] The application also reports that Mr. Myers contributed  
[REDACTED]  
[REDACTED]. Exh. DED1 at 3.

3. The 2015 tax returns of River Rock Dock, Inc. show only  
[REDACTED] reported as capital stock (Exh. DED6 at 6, line 22).

4. Ms. Myers manages the firm's financial decisions, prepares bids, negotiates bonding and insurance, oversees marketing and sales, manages payroll, and negotiates contracts. Mr. Myers does estimating for the firm and supervises field operations. Both owners share responsibility for hiring and firing, purchasing equipment/sales, and are signatories for business accounts. (Exh. DED1 at 4-5).

5. Ms. Myers's resume states she has been a secretary at Syracuse University since February 2003 and prior to this worked for USAirways, Inc. as a sales supervisor, sales manager, and human resources generalist from August 1985 through October 2001. The list attached to her resume of education, skills, and accomplishments contains nothing regarding the marine construction industry. Exh. DED3 at 1-3.

6. Mr. Myers's resume lists his abilities as including: welding; designing docks, seawalls, boathouses and boat ports; operating barges, pile drivers, excavators, and hydraulic drills; estimating; and supervising employees. He has been working in the construction and welding fields since 1980. Exh. DED3 at 4.

#### **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 four bases related to Ms. Myers's ownership, operation, and control of River Rock Dock, Inc. Each basis is discussed individually, below.

#### **Ownership**

In its denial, the Division found that the applicant failed to demonstrate that the contribution of the woman owner, Tracey Myers, 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. Tracey Myers owns 75% of the outstanding stock of the corporation and her husband, Donald, owns 25%; (2) the application represents that Ms. Myers contributed [REDACTED] in cash, [REDACTED] in equipment, and [REDACTED] while her husband contributed [REDACTED]; and (3) the documents submitted with the application do not support the claimed contributions or show that Ms. Myers's contributions are proportionate to her ownership in the corporation.

On appeal, Ms. Myers states that the firm was established many years ago, making it very difficult to recall contributions. She states that when the company was started there were not a lot of contributions, but that she and her husband put everything they had into the business including cash savings, loans on credit cards, and personally owned office equipment. From these initial investments and the profits from the company's first small jobs, more and larger equipment could be purchased. Under her leadership, with her husband's management skills and her employees' hard work, the company has continued to grow and prosper.

In its response, the Division points to Ms. Myers's claimed contributions reported in the application, [REDACTED] in cash/savings, and [REDACTED] in the form of [REDACTED] (Exh. DED1 at 3), and states that these claims are unsubstantiated and demonstrably inaccurate. The Division points to a letter provided by the applicant that states that the cancelled checks documenting the initial ownership capital contribution of the business are not attainable (Exh. DED5). A description of the unquantified equipment mentioned in the application and provided to the business by Mr. Myers was requested (Exh. DED1 at 10) but not provided (Exh. DED1 at 11). The Division states further that the firm's 2015 tax returns show only [REDACTED] reported as capital stock (Exh. DED6 at 6, line 22).

Based on the evidence in the record, specifically the lack of any proof of the claimed [REDACTED] cash contribution by Ms. Myers and fact that the firm's [REDACTED] tax return shows only [REDACTED] in capital stock, the applicant has failed to demonstrate that the contribution of the woman owner, Tracey Myers, 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 the 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 corporation is a marine construction company engaged in activities such as welding, steel fabrication, and excavation; and (2) Mr. Myers manages the core functions of the business, including estimating projects and supervising field operations.

On appeal, Ms. Myers contends that she does make decisions pertaining to the operation of the firm, but acknowledges that her husband manages the core functions of the business. She argues that she delegates this role to her husband and that no successful business is a one man/woman operation.

In its response, the Division argues that the applicant does not qualify as a WBE because Ms. Myers relies upon Mr. Myers's skills and experience to manage the significant operations of the firm, specifically the tasks of estimating and supervising field operations, as reported on the application (Exh. DED1 at 4). The Division points to Mr. Myers's resume, which confirms his role with the firm, while Ms. Myers's resume does not mention River Rock Dock, Inc. or her role there; rather, it focuses on her employment as a secretary at Syracuse University (Exh. DED3). In addition, the firm's 2015 tax return reports that Mr. Myers devoted 100% of his time to the business, while Ms. Myers devoted 50% of her time (Exh. DED6 at 9).

Based on the evidence in the record, specifically the fact that Mr. Myers is responsible for estimating and supervising field operations, 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) Ms. Myers's professional experience prior to becoming the owner of the firm was in office management and human resources; and (2) Mr. Myers has over thirty years of relevant work experience, direct experience managing marine construction work, and relevant training in welding and machinery operation.

On the appeal, Ms. Myers acknowledges that she does not know how to weld and that her husband does have work experience relevant to welding and machine operation. She questions why she cannot own a business where welding is one of the many components of the business. She concludes that she knows what work needs to get done and what skills potential employees must have in order to be hired to do the work.

In its response, the Division argues that Ms. Myers does not operate the firm because she lacks the technical ability to evaluate the work of her husband and has no training or expertise in the work the business performs. The Division points to Ms. Myers's resume which reflects no experience in estimating, welding, steel fabrication, or excavation, while Mr. Myers's resume shows he has completed an apprenticeship and spent his entire career performing work relevant to the business (Exh. DED3). The Division concludes that the appeal fails to identify any evidence that Ms. Myers possesses the technical ability to evaluate her husband's work.

Based on the evidence in the record, specifically the lack of any training or relevant experience relevant to the marine construction business, the 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.

### **Control**

In its denial letter the Division also claimed that the woman owner relied upon for certification has not demonstrated control of negotiations through the production of signed contracts, as required by 5 NYCRR 144.2(b)(3). In its response to the appeal, the Division withdraws this ground for denial.

### **CONCLUSIONS**

1. The applicant failed to demonstrate that the contribution of the woman owner, Tracey Myers, 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. The applicant failed to demonstrate that the woman owner, Tracey Myers, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

3. The applicant failed to demonstrate that the woman owner, Tracey Myers, 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).

### **RECOMMENDATION**

The Division's determination to deny River Rock Dock, Inc.'s application for certification as a woman-owned business enterprise should be modified and, as modified, affirmed for the reasons stated in this recommended order.

Matter of  
River Rock Dock, Inc.

DED File ID No. 53320  
Exhibit List

Exh. #	Description
DED1	Application
DED2	2010 WBE denial letter
DED3	Resumes
DED4	Denial letter
DED5	Statement on proof of capitalization
DED6	2015 corporate tax returns