

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
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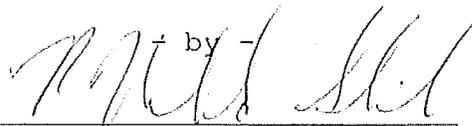
In the Matter

- of -

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

NYS DED File ID No. 60400

RECOMMENDED ORDER

by 

P. Nicholas Garlick
Administrative Law Judge

May 21, 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 eProcess Environmental, 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 eProcess Environmental, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

eProcess Environmental, Inc.'s application was submitted on October 6, 2015 (Exh. DED1).

The application was denied by letter dated November 1, 2016, from Bette Yee, Director of Certification Operations (Exh. DED8). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet three separate eligibility criteria related to Cleo Reeves's and Kaylee Koester's ownership and operation of the applicant, as well as the firm's independence.

In a three-page letter dated March 6, 2017, the applicant's counsel, Jennifer B. Granzow, Esq. of the Wladis Law Firm, P.C., appealed from the denial. Attached to the appeal were six exhibits labeled in the attached exhibit chart as A1-A6.

In a nine-page memorandum dated March 26, 2018, the Division responded to the applicant's appeal. Enclosed with the response were ten exhibits, described in the attached exhibit chart as DED1-DED10.

On March 27, 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 owners, Cleo Reeves and Kaylee Koester, contributions are proportionate to their 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 owners relied upon for certification, Cleo Reeves and Kaylee Koester, do 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 eProcess Environmental, Inc. is not an independent enterprise, as required by 5 NYCRR 144.2(a)(2) & (c)(2).

Position of the Applicant

eProcess Environmental, 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. eProcess Environmental, Inc. is in the business of supplying, installing, and servicing environmental equipment and services for wastewater treatment (Exh. DED1 at 3). The firm has a business address of 3101 Seneca Turnpike, Chittenango, New York (Exh. DED1 at 1). Two other businesses owned by Mark Koester also do business from this address, Koester Associates, Inc. and Shell Properties (Exh. DED1 at 7).

2. eProcess Environmental, Inc. was established on March 21, 2013 by Cleo Reeves and Mark Koester (Exh. DED1 at 3). On January 1, 2015, Kaylee Koester bought shares in the firm (Exh. A1). At the time of the application, Cleo Reeves owned 12% of the firm's common stock, Kaylee Koester owned 44%, and Mark Koester owned 44% (Exh. DED1 at 3).

3. The application states that Cleo Reeves contributed [REDACTED] to the business, Kaylee Koester contributed [REDACTED], and Mark Koester contributed [REDACTED] (Exh. DED1 at 3). The applicant submitted self-generated letters confirming these amounts (Exh. DED2), but no other proof of these amounts is in the record. The firm's 2015 federal tax returns show only [REDACTED] in capital stock (Exh. DED9 at 4, line 22).

4. Mark Koester's resume reports he has college degrees in sanitary engineering and environmental science as well as over

thirty years of experience in the wastewater treatment industry (Exh. DED4).

5. Cleo Reeves's resume reports no academic work relevant to wastewater treatment. Her prior employment was as a bookkeeper/tax preparation assistant and the owner of a pool and spa services business in Florida (Exh. DED5), where she resides (see Exh. DED6).

6. Kaylee Koester's resume reports no academic work relevant to wastewater treatment. Her prior employment was in the food service industry and as a veterinarian's assistant. Her role at eProcess Environmental, Inc. is described as bookkeeping and public relations. (Exh. DED7).

7. On January 1, 2015, eProcess Environmental, Inc. and Koester Associates, Inc. entered into a management agreement. This agreement stated that Koester Associates, Inc. would provide: administrative services including human resources and administrative oversight; accounting and bookkeeping services; reception services and telephone answering; and the use of office space and office equipment (Exh. DED3).¹

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. Reeves's and Ms. Koester's ownership and operation of eProcess Environmental, Inc., as well as the independence of the firm. Each basis is discussed individually, below.

Ownership

In its denial, the Division found that the applicant failed to demonstrate that the woman owners, Cleo Reeves and Kaylee Koester, contributions were proportionate to their 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

¹ On the appeal, applicant claims this agreement is no longer in force, but no proof of this fact is provided in the record.

facts cited in the denial letter are: (1) Kaylee Koester owns 44% of the stock of the firm, Cleo Reeves owns 12%, and Mark Koester owns 44%; (2) the application states that Ms. Koester contributed [REDACTED] in cash to the firm, Ms. Reeves contributed [REDACTED], and Mr. Koester contributed [REDACTED]; and (3) the application does not include supporting documents, such as bank records, demonstrating these claimed contributions.

On the appeal, applicant's counsel states that when the company was formed, Ms. Reeves and Mr. Koester provided funds which covered the costs of organizing the firm. Attached to the appeal is corporate resolution memorializing Ms. Koester's purchase of her shares (Exh. A1). Because the firm does not have receipts for the payments to third parties for the initial organizing expense, self-generated receipts from the company were provided with the application (Exh. DED2).

In its response, the Division argues that the firm is not eligible for WBE certification because Ms. Reeves and Ms. Koester failed to demonstrate that they made any contribution to the firm. The Division notes that the application claims that Ms. Reeves contributed [REDACTED] and Ms. Koester contributed [REDACTED] (Exh. DED1 at 3). As proof of these contributions, letters were provided from the firm stating that these contributions had been made (Exh. DED2). However, the Division points to the firm's 2015 tax return which shows that only [REDACTED] in capital stock had been issued (Exh. DED9 at 4, line 22). In addition, the Division notes that when Ms. Koester received her shares which she claims to have paid [REDACTED] (for 44% of the firm), the firm had a book value of [REDACTED] (a sum derived by adding the value of the capital stock and retained earnings on the firm's 2015 tax forms) (Exh. DED9 at 4, lines 22 & 24). The Division concludes that Ms. Koester's purchase of shares was likely motivated by a desire to secure WBE certification, rather than for business reasons.

Based on the evidence in the record, specifically the inconsistencies between the claimed contributions reported on the application and the information provided in the firm's 2015 tax return, the applicant has failed to demonstrate that the woman owners, Cleo Reeves and Kaylee Koester, made contributions proportionate to their 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 women owners relied upon for certification, Cleo Reeves and Kaylee Koester, do 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) eProcess is primarily engaged in supplying, installing, and servicing environmental equipment for wastewater treatment and providing related services; (2) Ms. Koester's work experience is primarily in the food service industry and she has no training, academic credentials, or managerial experience relevant to wastewater treatment or wastewater treatment equipment; (3) Ms. Reeves' prior managerial experience is primarily in bookkeeping and office management and she has no training, academic credentials, or managerial experience relevant to wastewater treatment or wastewater treatment equipment; and (4) Mr. Koester has owned and operated Koester Associates, Inc. since 1989 and the firm is engaged in providing design, equipment installation, and related services for wastewater facilities. In addition, Mr. Koester has earned a Bachelor's Degree in Environmental Science from Syracuse University.

On the appeal, applicant's counsel states that, contrary to information provided in the application, the firm is primarily a sales business and does not install or service what it sells; instead, it engages third party providers to install and service its products. She notes that no customary or standard level or type of education is required to engage in the business conducted by the company, and states that Ms. Koester has taken courses, attended equipment and process training classes, and has been actively involved with the company's projects. Counsel acknowledges that Ms. Koester's prior work experience was not technical in nature, but she has learned these skills on the job and is now firmly immersed in the details of equipment supply, field progress, and managing the firm's contracts and finances.

In addition, counsel argues that Ms. Reeves's past experience, including over twenty years in the pool and spa business, have given her the skills and expertise needed to manage the firm's contract negotiations, equipment procurement, field service scheduling, personnel training, and project closeouts. Counsel also acknowledges that Ms. Reeves did not have expertise in water and wastewater treatment before starting the company, but her experience and knowledge she gained with the firm has been a tremendous asset. While Mr. Koester has provided technical expertise, it is the woman owners who have been primarily responsible for the daily operation and management of the company. To support this claim, counsel provides a spreadsheet documenting the company's work and the owners' responsibilities (Exh. A2).

In its response, the Division argues that Mr. Koester possesses decades of experience servicing and selling wastewater treatment equipment and has relevant academic credentials as detailed in his resume (Exh. DED4). In contrast, the women owners' resumes show that they do not possess any demonstrated experience in the sale and implementation of wastewater treatment equipment nor do they possess any technical training or academic credentials (Exhs. DED5 & DED7). The Division concludes that the women owners lack the experience or technical ability to oversee the work of Mr. Koester and, therefore, the company does not meet the requirements for WBE certification.

The Division also addresses several claims made in the appeal. First, with regard to the claim that the firm only engages in the sales of wastewater treatment equipment, the Division notes that this is not how the firm is described in the application, which states the firm also installs and services such equipment (Exh. DED1 at 3). Second, nothing in the record indicates that Ms. Reeves's experience in pool and spa sales might be relevant to her role with the firm. Third, with respect to Ms. Koester's claim to have learned the business during her time with the firm, the Division notes that her resume only states her roles in managing the firm's finances and public relations (Exh. DED7).

Based on the evidence in the record, specifically the resumes of the owners of the firm, applicant failed to

demonstrate that the woman owners, Cleo Reeves and Kaylee Koester, 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 Division's denial was based on substantial evidence.

Independence

In its denial letter, the Division found that eProcess Environmental, Inc. is not an independent enterprise, as required by 5 NYCRR 144.2(a)(2) & (c)(2). The relevant facts cited in the denial letter are: (1) eProcess and Koester Associates, Inc. entered into a management agreement under which Koester Associates, Inc. will provide eProcess with the use of Koester Associates' office space, office equipment, administrative staff, and financial staff; (2) eProcess does not maintain employees or possess any physical assets; and (3) eProcess subcontracts the significant majority of its work to Koester Associates, Inc. and obtains equipment that it provides to customers from Koester Associates, Inc.

On the appeal, applicant's counsel states that at the time the business was formed, it entered into a management agreement with Koester Associates, Inc. for office space, equipment, and clerical support. This agreement is no longer in place and the owners of the firm now work from home offices or the road which allows for cost savings and growth of the business. Counsel states that the owners work on their personal computers, phones, and office equipment because the firm does not own any equipment. Counsel admits that the firm subcontracts a significant portion of its work to Koester Associates, Inc. but that it also works with other subcontractors and claims to provide several contracts as proof with its appeal. However, none of the exhibits (A3, A4, A5, A6, & A7) are contracts between the firm and a subcontractor. Counsel concludes that the firm is independent and that is operated by Ms. Reeves and Ms. Koester.

In its response, the Division states that the applicant relies on Koester Associates, Inc. for office space as well as administrative, human resources, and accounting staff pursuant to a management agreement (Exh. DED3). This arrangement, the Division argues, indicates that the firm is not an independent

business. In addition, the Division notes that the firm has no capacity to perform its contracted work, has no employees, and no inventory, equipment or other physical assets (Exh. DED9). All contracts are performed by third parties, often Koester Associates, Inc. (Exh. DED10). The Division concludes that the record lacks proof that the management agreement is no longer in place, as is claimed on the appeal.

Based on the evidence in the record, specifically the management agreement and the firm's close relationship with Koester Associates, Inc., applicant failed to demonstrate that eProcess Environmental, Inc. is an independent enterprise, as required by 5 NYCRR 144.2(a)(2) & (c)(2). The Division's denial was based on substantial evidence.

CONCLUSIONS

1. Applicant failed to demonstrate that the women owners, Cleo Reeves and Kaylee Koester, made contributions proportionate to their 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 women owners relied upon for certification, Cleo Reeves and Kaylee Koester, have adequate managerial experience or technical competence to operate the business enterprise seeking certification, as required by 5 NYCRR 144.2(b)(1)(i).

3. Applicant failed to demonstrate that eProcess Environmental, Inc. is an independent enterprise, as required by 5 NYCRR 144.2(a)(2) & (c)(2).

RECOMMENDATION

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

Matter of
eProcess Environmental, Inc.

DED File ID No. 60400
Exhibit List

Exh. #	Description
DED1	Application
DED2	Letters regarding contributions
DED3	Management agreement
DED4	Mark Koester resume
DED5	Cleo Reeves resume
DED6	Note regarding Ms. Reeves's residence
DED7	Kaylee resume
DED8	Denial letter
DED9	2015 federal tax forms
DED10	Purchase orders
A1	Special meeting of shareholders consent
A2	Spreadsheet regarding projects and owners' responsibilities
A3	Information regarding contract with [REDACTED]
A4	Information regarding contract with [REDACTED]
A5	Purchase orders
A6	Financial statements dated 2/7/15