

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

In the Matter

- of -

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

NYS DED File ID No. 59124

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

May 12, 2016

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 Special Testing Laboratories, 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 Special Testing Laboratories, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Special Testing Laboratories, Inc.'s application was submitted on November 17, 2014 (Exh. DED2).

The application was denied by letter dated November 6, 2015, from Bette Yee, Director of Certification Operations (Exh. DED1). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet three separate eligibility criteria related to Virginia Speciale's ownership and control of the applicant.

By letter dated November 11, 2015, Virginia Speciale, on behalf of the applicant, filed a notice of appeal disputing the Division's denial determination.

By letter dated December 14, 2015, the Division notified the applicant that the applicant's written appeal should be submitted before January 18, 2016.

By letter dated December 18, 2015, the applicant requested an extension.

By letter dated December 24, 2015, the Division notified the applicant that the applicant's written appeal should be submitted on or before February 22, 2016.

With a cover letter dated February 10, 2016, the applicant filed its written appeal and eleven exhibits (listed in the attached exhibit chart as exhibits A1-A11).

The Division submitted its response, which included a three page memorandum dated March 9, 2016. Attached to the response were six exhibits (listed in the attached exhibit chart as exhibits DED1 - DED6). At this time the record in this matter closed.

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 owner, Virginia Speciale, enjoys the customary incidents of ownership and shares in the risks and profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).

Second, the Division found that the applicant failed to demonstrate that the woman owner's, Virginia Speciale'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).

Third, the Division found that the applicant failed to demonstrate that the corporate documents and relevant business agreements permit the woman owner, Virginia Speciale, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

Position of the Applicant

Special Testing Laboratories, 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. Special Testing Laboratories, Inc. was established on December 24, 1992. It is in the business of providing testing and inspection services of construction materials to clients in New York and Connecticut (Exh. DED2 at 2-3).

2. Virginia Speciale owns 52% of the common stock of Special Testing Laboratories, Inc. (Exh. DED2 at 2).

3. Richard A. Speciale received [REDACTED] in wages from the applicant and Ms. Speciale received [REDACTED] in 2014 (Exh. DED4 at 62).

4. Richard Speciale is the president of Special Testing Laboratories, Inc. and the bylaws of the corporation empower the president to have general and active management of the corporation (Exh. DED5 at 10). Virginia Speciale is the treasurer and secretary of the corporation and enjoys only limited powers under the bylaws (Exh. DED5 at 11-12).

5. Special Testing Laboratories, Inc. has been certified as a woman owned business by the State of Connecticut (Exh. A3 & A4) and the Port Authority of New York and New Jersey (Exh. A5).

DISCUSSION

This report considers the written 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. Speciale's ownership and control of Special Testing Laboratories, Inc. Each basis is discussed individually, below.

Ownership

In its denial letter, the Division cited two grounds based on the applicant's failure to meet ownership criteria set forth in the applicable regulations. The first ground cited by the Division was that the applicant failed to demonstrate that the woman owner, Virginia Speciale, enjoys the customary incidents of ownership and shares in the risks and profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).

In the appeal, Ms. Speciale states that she took over management of the applicant in 2006 upon her husband's retirement; as proof of this she provides a letter from the vice-president of the applicant (Exh. A1). She decided to take a smaller salary in order to grow the business and during the recession she could not increase her salary. Once the economy recovered and the business's revenues increased, she reinvested profits in order to build up the company's resources, hire

additional staff, purchase a new truck, and upgrade laboratory equipment. She has also been able to increase her compensation and provided a copy of a recent pay stub (for the period between 1/23/16 - 2/5/16) which shows gross income of [REDACTED] (Exh. A11).

In its response, the Division states that Richard A. Speciale receives compensation from the applicant that is many times greater than that received by Ms. Speciale. Tax forms submitted by the applicant show that Mr. Speciale received [REDACTED] in wages while Ms. Speciale received only [REDACTED] (Exh. DED4 at 62). Based on these facts, the Division concludes that Ms. Speciale does not share in the profits from the business in proportion to her ownership interest.

Based on the evidence in the record, specifically the tax forms for 2014, and the discussion above, the applicant has not demonstrated that the woman owner, Virginia Speciale, enjoys the customary incidents of ownership and shares in the risks and profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2). The pay stub was submitted by Ms. Speciale (Exh. A11) after the Division denied the application and cannot be considered on appeal.

The second ground related to the ownership criteria was that the applicant failed to demonstrate that the woman owner's, Virginia Speciale'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).

In the appeal, Ms. Speciale states that the applicant was formed more than twenty years ago and that since its formation, the company has not needed additional investments. The appeal does not argue that that Ms. Speciale has contributed property or equipment to the business. With respect to expertise, the appeal mentions that Ms. Speciale has nearly thirty years of experience in the industry, but does not argue that this experience is a contribution of expertise, as the term is used in the regulations.

In its response, the Division states that Ms. Speciale has failed to provide any proof that she made a capital contribution

to the applicant. The application states that a \$1,000 capital contribution to the firm was made by Ms. Speciale on December 24, 1992 (exh DED2 at 2). During the application process, Ms. Speciale sent a letter stating that the capital contribution came from her personal checking account, but that a copy of the check was no longer available (Exh. DED3). The Division argues that without evidence of a capital contribution, it was required to deny the application.

Based on the evidence in the record and the discussion above, the applicant has failed to demonstrate that the woman owner, Virginia Speciale'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 record lacks evidence that any capital contribution of money was made to the company and applicant makes no assertion that the woman owner's contribution was in the form of expertise.

Control

The Division found that the applicant failed to demonstrate that the corporate documents and relevant business agreements permit the woman owner, Virginia Speciale, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

In the appeal, Ms. Speciale states that she has the ultimate and final authority for all business agreements relevant to the running of the applicant. She contends that she signs all contracts, purchase orders, and change orders. She also approves the purchase of equipment for the business. She concludes that there are no restrictions on any business decisions that she makes for the company. As proof of her authority, she includes documents she signed on behalf of the applicant, including: (1) a guarantee (Exh. A2); (2) proof of purchase of a motor vehicle (Exh. A6); (3) loan and grant documents (Exh. A7 & A8); (4) a repayment plan agreement (Exh. A9); and a promissory note (Exh. A10).

In its response, the Division states the application identifies Richard Speciale as the President/Chief Executive

Officer of the applicant and Ms. Speciale is identified as corporate secretary and treasurer (Exh. DED2 at 2). The most recent corporate minutes also identify Mr. Speciale as president (Exh. DED6 at 16). The Division cites the bylaws for the applicant which state that the president is chief executive officer and has general and active management of the business while the authority of the secretary and treasurer of the corporation is limited (Exh. DED 5 at 10-12). Based on this evidence, the Division concludes that the corporate documents do not allow Ms. Speciale to make decisions without restrictions.

Based on the evidence in the record and the discussion above, the applicant failed to demonstrate that the corporate documents and relevant business agreements permit the woman owner, Virginia Speciale, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). The corporate bylaws authorize Mr. Speciale to manage the company, not Ms. Speciale.

CONCLUSIONS

1. The applicant failed to demonstrate that the woman owner, Virginia Speciale, enjoys the customary incidents of ownership and shares in the risks and profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).

2. The applicant failed to demonstrate that the woman owner's, Virginia Speciale'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).

3. The applicant failed to demonstrate that the corporate documents and relevant business agreements permit the woman owner, Virginia Speciale, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

RECOMMENDATION

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

**Matter of
Special Testing Laboratories, Inc.**

**DED File ID No. 59124
Exhibit List**

Exh. #	Description	# of pages
A1	Letter from John Hardman, P.E.	1
A2	Guarantee with Myers Construction	1
A3	NYC Department of Buildings approval	1
A4	Connecticut certificate w/ cover	2
A5	Port Authority certificate	1
A6	Receipt for purchase of truck 2016	2
A7	Loan documents from Ct DECD	5
A8	Grant documents from Ct DECD	7
A9	NVLAP contract for payment	7
A10	NRC contract for payment	5
A11	Copy of current pay stub	1
DED1	Denial letter dated November 6, 2015	3
DED2	Application	9
DED3	Capital contribution letter	1
DED4	2014 1040 tax form	85
DED5	Bylaws	15
DED6	Board of directors meeting minutes	16