

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

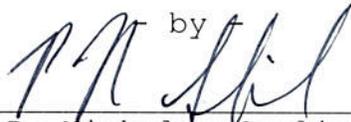
In the Matter

- of -

the Application of
CDP Excavating Services, LLC
For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 57922

RECOMMENDED ORDER

 by

P. Nicholas Garlick
Administrative Law Judge

May 25, 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 CDP Excavating Services, 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 CDP Excavating Services, LLC challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

CDP Excavating Services, LLC's application was submitted on November 6, 2013 (Exh. DED2).

The application was denied by letter dated September 22, 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 two separate eligibility criteria related to Cathie Perry's operation of the applicant.

By letter dated September 28, 2015, Ms. Perry filed a notice of appeal from the denial.

In a letter dated November 2, 2015, counsel for the Division notified Ms. Perry that her written appeal should be submitted on or before December 3, 2015.

In a three page letter dated November 17, 2015, the applicant submitted the appeal. No exhibits were attached to the appeal.

In a two page letter dated May 10, 2016, the Division responded. Attached to the response were five exhibits (listed in the attached exhibit chart as DED1-DED5).

On May 16, 2016, I was assigned to this matter.

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 two separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner, Cathie Perry, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii).

Second, the Division found that the applicant failed to demonstrate that the woman owner, Cathie Perry, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operation of the enterprise, as required by 5 NYCRR 144.2(b)(1) and 144.2(b)(1)(iii).

Position of the Applicant

CDP Excavating Services, 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. CDP Excavating Services, LLC was established on April 9, 2012 by Cathie Perry, who owns 100% of the firm (Exh. DED2 at 2).

2. CDP Excavating Services, LLC is in the business of excavation, demolition, site development, septic system installation, snow removal, trucking, hauling, concrete installation, concrete demolition, brush and debris removal, land clearing, grading, natural gas line installation, trenching, landscaping, mowing, dumpster service, basement waterproofing, foundation, and repair and installation (Exh DED2 at 3).

3. The record contains no evidence showing that Cathie Perry had any experience in the construction or landscaping business before starting CDP Excavating Services, LLC (Exh. DED3). The application states that she has many years of experience in the industry, but no proof of this claim is provided (Exh. DED2 at 8). Her husband, Jason A. Perry, did have experience as a Grounds Supervisor for Syracuse University (Exh. DED4). According to the application, Mr. Perry is not currently employed outside of his work as a laborer for CDP Excavating Services, LLC (Exh. DED2 at 9). The couple's 2014 federal tax return lists Ms. Perry's occupation as an "ultra sound tech" (Exh. DED5 at 2) and the application confirms this (Exh. DED2 at 8). In her September 28, 2015 notice of appeal and on the appeal, Ms. Perry states that this job is full time.

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 two bases related to Ms. Perry's operation of CDP Excavating Services, LLC. Each basis is discussed individually, below.

At the outset, it is important to note that the administrative record in this appeal is very limited and includes the appeal itself, the Division's response and five exhibits.

The first ground for denial was that the applicant failed to demonstrate that the woman owner, Cathie Perry, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii).

On the appeal, Ms. Perry states that she has owned the applicant since 2012. Her first exposure to heavy equipment was as a young girl on her uncle's farm, where she would help whenever he would allow. She states further that she has many friends and colleagues in this field of work and states that her expertise is in the operation of the firm and that she controls all the fiscal and operational matters of the company. She also states that she is learning and gaining experience as she runs the business and that her knowledge and experience expands every day. She describes how the company has demolished mobile homes and pools, and installed septic systems. She states that she reviews blueprints, orders supplies, occasionally drives a truck and trailer, works in the trenches when needed, installs and glues pipe, and has been involved in other aspects of septic construction. She concludes that she is responsible for overseeing the projects from commencement to completion, ordering supplies, putting together estimates, contracts, invoicing, and payments, and banking for all contracts. No documents are supplied with the appeal to support these claims.

In its response, the Division argues that the application materials demonstrate that Ms. Perry lacks the managerial experience or technical competence required for certification.

Specifically, the Division points to the applicant's resume, which fails to show any experience in business management, construction, excavation or demolition beyond her work for the applicant. The Division continues that the resume does not set forth Ms. Perry's work history between 1995 until 2012 (Exh. DED3). In addition, her resume makes no mention of her present full-time employment either.

The Division also attaches to its response a copy of Ms. Perry's husband's resume (Exh. DED4). This document shows that Jason A. Perry, who is described in the application as a laborer for the applicant (Exh. DED2 at 8), worked for Syracuse University as a grounds supervisor and supervised 64 employees until August 2015. The Division argues that Mr. Perry's resume shows that his duties with Syracuse University are directly related to those done by the applicant. The Division concludes that the applicant's failure to provide any evidence of Ms. Perry's professional experience in the construction field shows that the applicant does not meet the criteria for WBE certification.

Because the applicant has failed to show that Ms. Perry has any experience or working knowledge necessary to operate the applicant and Mr. Perry's resume indicates that he does, the firm does not meet the criteria for certification. Consequently, the applicant failed to demonstrate that the woman owner, Cathie Perry, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii).

The second ground asserted for denial was that the applicant failed to demonstrate that the woman owner, Cathie Perry, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operation of the enterprise, as required by 5 NYCRR 144.2(b)(1) and 144.2(b)(1)(iii).

On the appeal, Ms. Perry states that she currently works a full-time job to support her family and devotes an additional 40-50 hours per week to the applicant. She states that she uses her mornings, lunch hours and evenings to conduct the firm's business.

In its response, the Division argues that Ms. Perry's full-time job as an ultrasound technician (Exhs. DED5 at 2; DED2 at 8) limits her ability to devote time on an ongoing basis to the daily operations of the firm. The Division concludes that the applicant has failed to demonstrate that she devotes time on an ongoing basis to the daily operation of the applicant.

Based on the evidence in the record and the above discussion, the applicant has failed to demonstrate that Ms. Perry is available during normal business hours to attend to business matters of the firm because of her full time employment as an ultrasound technician. Because of this, the applicant failed to demonstrate that the woman owner, Cathie Perry, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operation of the enterprise, as required by 5 NYCRR 144.2(b)(1) and 144.2(b)(1)(iii).

CONCLUSIONS

1. The applicant failed to demonstrate that the woman owner, Cathie Perry, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii).

2. The applicant failed to demonstrate that the woman owner, Cathie Perry, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operation of the enterprise, as required by 5 NYCRR 144.2(b)(1) and 144.2(b)(1)(iii).

RECOMMENDATION

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

**Matter of
CDP Excavating Services, LLC**

**DED File ID No. 57922
Exhibit List**

Exh. #	Description	# of pages
DED1	Denial letter dated September 22, 2015	3
DED2	Application	9
DED3	Resume of Cathie Perry	1
DED4	Resume of Jason A Perry	1
DED5	2014 federal and NY State tax returns	13