

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

In the Matter

- of -

the Application of **Aebi New England, LLC**
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59492

RECOMMENDED ORDER

- by -



Richard A. Sherman
Administrative Law Judge

June 9, 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 Aebi New England, LLC¹ ("Aebi" or "applicant") certification as a women-owned business enterprise ("WBE") be modified in part and, as modified, affirmed, for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal by applicant, pursuant to New York State Executive Law Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("5 NYCRR") Parts 140-144, challenging the determination of the Division that Aebi does not meet the eligibility criteria for certification as a WBE.

The Division denied Aebi's application for WBE certification by letter dated October 5, 2015 (exhibit 1). The denial letter sets forth three grounds under 5 NYCRR 144.2 for the denial. By letter dated October 15, 2015, Aebi appealed from the Division's determination (exhibit D). The Division advised applicant that the hearing on this matter would be held on March 8, 2016 (Notice of Appeal Hearing from the Division to Regina Beach, dated January 28, 2016).

The matter was assigned to me on January 12, 2016. At the request of Division staff, and with the agreement of the parties, the hearing date was rescheduled to March 24, 2016. I convened the hearing at approximately 11:00 a.m. on March 24, 2016, at the Division's offices, 625 Broadway, Albany, New York. Consistent with 5 NYCRR 145.1(m), an audio recording of the hearing was made and the recording was provided to this office on April 6, 2016. A list of the exhibits received during the hearing is appended to this report.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a women-owned business enterprise are established by regulation (see 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted or denied WBE status, the ownership, operation and control of the business enterprise are assessed on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that 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.

¹ The business enterprise is sometimes referred to in the record as "AEBI New England, LLC" (see e.g. exhibits D, E, F). The form of the name used in this report, "Aebi New England, LLC," is the form used on the owners' resumes (exhibits 4, 5), and other documents in the record (see e.g. exhibits M, P, Q; see also CD #1 at 24:20 [testimony by an owner stating that "Aebi is not an acronym"]).

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of Aebi'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 cites three bases for its determination to deny Aebi's application for WBE certification (exhibit 1). Specifically, the Division determined that applicant failed to demonstrate that (1) "the minority or woman owner(s) enjoy the customary incidents of ownership and share in the risks and profits in proportion with their ownership interest in the enterprise;" (2) "the minority or woman owner(s) have the experience or technical competence, working knowledge or ability needed to operate the enterprise;" and (3) "the minority or woman owner(s) listed on corporate documents and relevant business agreements permit the minority or woman owner(s) to make business decisions without restrictions" (exhibit 1 at 2 [citing 5 NYCRR 144.2]).

Position of Applicant

Applicant argues in its request for a hearing that the woman owner, Regina Beach, "shares in the LLC's profits commensurate with her ownership interest," "has significant experience and expertise," and "has the power to control and make business decisions concerning the LLC" (exhibit D).

FINDINGS OF FACT

1. Aebi is a New Hampshire based, foreign limited liability company, established in 2001, that is engaged in the business of sales and service of commercial tractors, trailers, mowers, and snow removal equipment (exhibits 2 at 1 [item 1.D], 2 [items 1.Q, 1.R], 3 [item 3.C]; hearing recording [CD #1²] at 23:10, 24:55, 37:10; see also Department of State Corporation & Business Entity Database, http://www.dos.ny.gov/corps/bus_entity_search.html [accessed Apr. 29, 2016]).

² The audio recording of the hearing is contained on three compact discs: "CD #1," "CD #2," and "CD #3."

2. Aebi's current operating agreement became effective on January 1, 2014 (CD #1 at 40:20; exhibit I at 1) and names Regina Beach as applicant's "Manager/President" (exhibit I at 5 [¶ 4.1], 38; CD #1 at 40:55).

3. Regina Beach and Douglas Beach are married and own 51% and 49% shares in applicant, respectively (exhibit I at 24; CD #1 at 23:40). Aebi's operating agreement states that, on matters submitted to a vote of the members, "each Member shall be entitled to a number of votes equal to the Member's [ownership] percentage" (exhibit I at 3 [¶ 3.2]; CD #1 at 42:25).

4. In 2014, Regina Beach's first year as president of Aebi, Regina Beach and Douglas Beach received [REDACTED] and [REDACTED] in compensation from applicant, respectively (exhibit 3, IRS Form 1125-E; CD #2, track 2 at 6:35).

5. Aebi has a [REDACTED] a line of credit with [REDACTED] for which Regina and Douglas Beach are co-guarantors (exhibit 2 at 5 [item 5.F]; CD #2, track 1 at 14:10). Aebi previously had a [REDACTED] line of credit with [REDACTED] for which Regina and Douglas Beach were co-guarantors (exhibit U at 1, 5, 8; CD #2, track 2 at 0:20).

6. Prior to establishing Aebi, Regina Beach held administrative positions with several organizations. At various times Regina Beach had the title of "Administrative Assistant," "Receptionist/Secretary," "Payroll Supervisor," and "Personnel/Office Manager" (exhibit 5; CD #1 at 28:10).

7. Prior to establishing Aebi, Douglas Beach held positions with several organizations. At various times Douglas Beach had the title of "Owner/Operator," "Heavy equipment operator," "Underground utilities [f]oreman," "Manufacture[r's] representative," "Warehouse and distribution manager," and "Industrial and municipal salesman" (exhibit 4; CD #2, track 2 at 9:25).

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of Aebi as a women-owned business enterprise³ pursuant to Executive Law Article 15-A.

As noted above, the Division cites three bases in its denial of Aebi's WBE application. For the reasons set forth below, I recommend that the first two bases cited by the Division be affirmed and that the third basis be deemed withdrawn.

³ The term "women-owned business enterprise" applies to an enterprise that meets the requisite criteria on the basis of the ownership and control of one woman or of multiple women (see 5 NYCRR 140.1[t] [defining a women-owned business enterprise as one that is, inter alia, "at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women"]).

Risks and Profits - 5 NYCRR 144.2(c)(2)

The eligibility criterion at issue requires that the "woman owner . . . must share in the risks and profits, in proportion with [her] ownership interest" (5 NYCRR 144.2[c][2]).

The Division argues that applicant failed to demonstrate that Regina Beach shares in the risks and profits of Aebi in proportion to her ownership interest (exhibit 1 at 2, CD #1 at 8:35). In support of this basis for denial, the Division asserts that Regina Beach's compensation in 2014 was disproportionately low in comparison to the compensation of Douglas Beach. The Division's analyst testified that in 2014, the first year in which Regina Beach was president and majority shareholder, she was paid only about [REDACTED] while Douglas Beach was paid about [REDACTED] (CD #2, track 2 at 6:35, CD #3 at 6:05; findings of fact ¶¶ 2-4) and that the applicant did not demonstrate that Regina Beach received any other form of compensation or distribution from applicant (CD #2, track 2 at 7:30).

Regina Beach testified that she and her husband are currently compensated at a rate of [REDACTED] and [REDACTED], respectively (CD #2 at 10:05, 10:25). This information, however, was not before the Division at the time of its determination (CD #3 at 8:25 [Lefebvre testimony that the application was denied in 2015 and, therefore, salary information for that year would not have been available]; see also exhibit 2 at 1 [noting application was submitted on March 6, 2015], C [Denial letter dated October 5, 2015]). When asked why the Division did not contact Aebi to ascertain whether Regina Beach's compensation had changed in 2015, the Division analyst stated that he did not consider it necessary given the salary history supplied with the application⁴ (CD #3 at 5:10, 6:05). The Division analyst also testified that, although he is authorized to conduct in-person or telephone interviews with an applicant, he does so only if he finds ambiguities in the documentation supplied by the applicant (*id.* at 0:35).

With regard to risk, applicant argues that Regina Beach is now, and has been, a guarantor on Aebi's lines of credit (CD #2, track 1 at 14:10 [Regina Beach testimony regarding Aebi's current line of credit with [REDACTED] and former line of credit with [REDACTED]]; exhibit U at 5). Regina Beach also testified, however, that Douglas Beach is, and has been, a co-guarantor on Aebi's lines of credit (CD #2, track 2 at 0:20). The line of credit in the record and the testimony at the hearing indicate Regina and Douglas Beach share equally in the risk under Aebi's line of credit (findings of fact ¶ 5). Regina Beach testified that she now bears a greater risk under the line of credit because she is now the majority shareholder of Aebi. The record, however, indicates that Regina and Douglas Beach are both personal guarantors on Aebi's credit line (*id.*). Therefore, their respective ownership interests in Aebi are not relevant.

On this record, I conclude that the Division's determination with regard 5 NYCRR 144.2(c)(2) is supported by substantial evidence.

⁴ The Division analyst relied upon salary information for Regina and Douglas Beach contained in Aebi's federal tax returns. Aside from the year 2014 (exhibit 3), the Division analyst could not recall which years' tax returns were supplied by applicant. I note that the application states that the "[m]ost recent three (3) years of Federal . . . tax returns for the BUSINESS including all statements, schedules, and amendments" are "Mandatory Documents" (exhibit 2 at 6-7). Aebi's application indicates that Regina Beach supplied the federal tax returns for 2012, 2013, and 2014 (*id.* at 7).

Managerial Experience or Technical Competence - 5 NYCRR 144.2(b)(1)(i-ii)

The applicable regulatory criteria state that the woman owner "must have adequate managerial experience or technical competence in the business enterprise seeking certification [and] must demonstrate the working knowledge and ability needed to operate the business enterprise" (5 NYCRR 144.2[b][1][i-ii]).

The Division argues that Aebi is a family-run business and that the allocation of skills and expertise within Aebi are not consistent with the remedial purpose of the WBE program (CD #1 at 7:35). The Division analyst testified that Douglas Beach holds the experience and technical competence necessary to perform the critical revenue generating functions of the enterprise (CD #2, track 2 at 9:25, 10:50, CD #3 at 17:05). He further testified that applicant did not demonstrate that Regina Beach has experience managing a sales team, or that she has received training or experience servicing heavy machinery (CD #2, track 2 at 6:15, 11:15; CD #3 at 14:30).

Aebi is in the business of selling and servicing commercial tractors, trailers, mowers and snow removal equipment (findings of fact ¶ 1). Aebi's exclusive distribution agreement with Aebi Schmidt International Ltd ("ASI") requires Aebi to service the ASI product lines that Aebi sells (CD #2, track 2 at 2:45). Douglas Beach has many years of experience as a heavy equipment operator and as a salesman (findings of fact ¶ 7). He also owned and operated an excavating business for over a decade (*id.*; exhibit 4 at 2). Regina Beach testified that Douglas Beach "is our salesman" (CD #1 at 43:50) and the "bottom line is, you have no sales, we might as well all go home" (*id.* at 46:45). She also testified that when questions arise regarding technical and mechanical matters, Aebi employees will "ask Doug, who is the expert" (*id.* at 1:03:15).

In contrast, prior to the formation of Aebi, Regina Beach held several administrative positions (findings of fact ¶ 6). Regina Beach testified at some length regarding her professional experience prior to the forming Aebi with her husband (CD #1 at 28:10-36:25). Her testimony credibly demonstrated that she was an asset to her former employers and is capable of organizing and implementing complex tasks. However, her resume and testimony do not reflect that she has managerial experience or technical competence relevant to sales and servicing of the products sold by Aebi. These skills were held by Douglas Beach at the time Aebi was formed and he remains the sales and service expert at Aebi today.

Division staff clarified at the hearing that it is not necessary for a woman owner of an enterprise to personally sell and service the products carried by the enterprise. However, where a small family-run business like Aebi is involved, the Division requires that the woman owner have sufficient management and technical expertise to meaningfully supervise those who do sell and service the products carried by the enterprise (CD #3 at 26:10).

The record reflects that Regina Beach plays a critical role to the success of Aebi. She testified that she is "the hub of the wheel that makes this company function" (CD #1 at 26:55). Among other things, she handles "all the financial aspects of the company," "billing and invoicing," and "customer problems" (*id.* at 27:05). She also testified Aebi's three employees go

through Douglas Beach for technical or mechanical matters, but that they, and Douglas Beach, report to her (id. at 27:20).

As Regina Beach herself testified, she and her husband "capitalize on [their] strengths, his strengths are sales [and] mechanical abilities . . . my strengths are administrative and keeping it all going" (CD #2, track 1 at 27:30). It is clear that both Regina and Douglas Beach are essential parts of the success of Aebi. Nevertheless, the record demonstrates that Douglas Beach is the individual who has the sales expertise and technical competence necessary to perform the core revenue generating functions of Aebi.

On this record, I conclude that the Division's determination with regard 5 NYCRR 144.2(b)(1)(i-ii) is supported by substantial evidence.

Operating Agreement - 5 NYCRR 144.2(b)(2)

The applicable regulatory criterion states that the enterprise's "[a]rticles of incorporation, corporate bylaws, partnership agreements and other agreements . . . must permit minority group members or women who claim ownership of the business enterprise to make [decisions pertaining to business operations] without restrictions" (5 NYCRR 144.2[b][2]).

Applicant proffered evidence to demonstrate that it met this criteria (see findings of fact ¶¶ 2-3). Moreover, the Division did not contest this issue at the hearing (CD #1 at 8:00 [Division counsel opening statement, making no reference to provisions of 5 NYCRR 144.2[b][2], CD #3 at 18:15 [Lefebvre testimony conceding that applicant's operating agreement grants Regina Beach a controlling interest and majority vote]). Accordingly, this basis for the denial is deemed withdrawn.

CONCLUSION

As discussed above, applicant has demonstrated that Aebi's operating agreement permits Regina Beach to make decisions pertaining to business operations without restrictions and the Division did not contest this issue at hearing. Accordingly, this basis for the denial should be deemed withdrawn.

Applicant failed, however, to meet its burden to demonstrate that the Division's other two bases for the denial were not supported by substantial evidence. Specifically, I conclude that applicant failed to demonstrate that Regina Beach (i) shares in the risks and profits of Aebi in proportion to her ownership interest, and (ii) has the managerial experience or technical competence necessary to operate the enterprise. Accordingly, the Division's determination to deny Aebi's application for WBE certification should be affirmed.

RECOMMENDATION

The Division's determination to deny Aebi's application for certification as a women-owned business enterprise should be modified in part and, as modified, affirmed, for the reasons stated herein.

**Matter of Aebi New England LLC
DED File ID No. 59492**

Exhibit List

Exh. #	Description
A	Aebi Certification Application Affidavit (dated Mar. 4, 2015)
B	Initial WBE Application Denial Letter (dated Sept. 29, 2015)
C	Corrected WBE Application Denial Letter (dated Oct. 5, 2015)
D	Aebi Request for Hearing (dated Oct. 15, 2015)
E	Aebi Appeal of Denial of FOIL Request (dated Jan. 15, 2016)
F	Division Response to FOIL Appeal (dated Feb. 2, 2016)
G	Resume: Regina Beach (received with stipulation that this is not the version submitted with the WBE application)
H	Aebi New Hampshire Certificate of Existence
I	Aebi Amended & Restated Operating Agreement (dated Jan. 1, 2014)
J	Aebi Vermont Certificate of Organization
K	Aebi Massachusetts Certificate of Organization
L	Aebi Maine Resale Certificate
M	Aebi Rhode Island Certificate of Registration
N	Aebi Connecticut Certificate of Authorization
O	Aebi New York Certificate of Authority
P	Aebi Letter from the President (undated)
Q	Exclusive Distribution Agreement Between Aebi and Aebi Schmidt International Ltd
R	Price Quote Contract
S	Aebi New York City Vendor Questionnaires
T	Aebi Profit & Loss, and Balance Sheet (March 29, 2015)
U	2006 TD Banknorth Promissory Note (principal amount \$200,000)
V	Aebi Sales Growth (2013-2015)
W	Aebi Website Printout
1	WBE Application Denial Letter (dated October 5, 2015)
2	Aebi WBE Certification Application (submitted March 6, 2015)
3	Aebi 2014 Federal Income Tax Return
4	Resume: Douglas Beach
5	Resume: Regina Beach