

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

In the Matter

- of -

the Application of Kelly Contracting, Inc.  
for Certification as a Woman-owned Business Enterprise  
Pursuant to Executive Law Article 15-A

NYS DED File ID No. 58554

RECOMMENDED ORDER

- by -



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Molly T. McBride  
Administrative Law Judge

August 5, 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 ("DED") to deny Kelly Contracting, Inc., ("Kelly" or "applicant") certification as a woman-owned business enterprise be reversed, 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 Kelly Contracting, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise. Applicant's application for certification (Exhibit A) dated May 29, 2014 was denied by letter dated November 12, 2015 (Exhibit 1). The denial was based on three grounds: (1) applicant failed to demonstrate that the woman owner enjoys the customary incidents of ownership and shares the risks in profits in proportion with her ownership interest in the enterprise (5 NYCRR 144.2); (2) applicant failed to demonstrate that the woman owner's capital contribution is proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise (5 NYCRR 144.2); and (3) applicant failed to demonstrate that the woman owner has the experience or technical competence, working knowledge or ability needed to operate the enterprise (5 NYCRR 144.2).

Kelly filed a notice of appeal from the denial by letter dated December 11, 2015 (Exhibit C) and an appeal brief dated February 6, 2016 (Exhibit E). By reply brief dated March 30, 2016, DED responded to the appeal (Exhibit 9).

Upon receipt of the DED reply brief, this matter was assigned to me. Upon receipt of the file, I created the attached Exhibit List. The exhibits listed constitute the entire record upon which this report is based.

## **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 and control are applied on the basis of information supplied through the application process (see 5 NYCRR 144.2[a]).

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. On administrative appeal, the applicant bears the burden of proving its business meets the eligibility criteria for certification as a woman-owned business enterprise (see State Administrative Procedure Act § 306[1]). To satisfy its burden of proof, the applicant must show that the Division's determination is not supported by substantial evidence, which is "such relevant proof as a reasonable mind may accept as adequate" (Matter of Ridge Rd. Fire Dist. v Schiano, 16 NY3d 494, 499 [2001] [internal quotation marks and citations omitted]).

## **POSITIONS OF THE PARTIES**

### Position of the Division

In its response to the appeal, the Division asserts that the applicant has failed to meet the requirements of 5 NYCRR 144.2(a)(1), 5 NYCRR 144.2(b)(i) and (ii), and 5 NYCRR 144.2(c)(2) (Exhibit 9, at 1 & 2). The Division contends (1) applicant failed to demonstrate that the woman owner'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 (5 NYCRR 144.2[a][1]); (2) applicant failed to demonstrate that the woman owner has the experience or technical competence, working knowledge or ability needed to operate the enterprise as required by 5 NYCRR 144.2(b)(i) and (ii); and (3) applicant failed to demonstrate she enjoys the customary incidents of ownership and share in the risks and profits in proportion with her ownership interest (5 NYCRR 144.2[c][2]).

## Position of the Applicant

Kelly Contracting, 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. Kelly Contracting, Inc. was established in 1994 by Jeffrey Kelly (Exhibit A, 7.a.). Kelly is a construction-related installation company specializing in commercial millwork, casework, and running trim (id., 13.a and 13.b).
2. Majority ownership in Kelly Contracting, Inc. was sold by Jeffrey Kelly to his wife Christine Burkey-Kelly in 2014 (Exhibit A, 7.b.). Christine Burkey-Kelly paid Jeffrey Kelly the sum of \$4,355.40 in May 2014 for 51% of the common shares of the company (Exhibits A, 9.b. and 16).
3. Christine Burkey-Kelly owns 51% of the company and Jeffrey Kelly owns 49% of the company (Exhibit A, 7.d.)
4. Christine Burkey-Kelly is President, Secretary and Treasurer of the corporation and Jeffrey Kelly is Vice President (Exhibit O).
5. Jeffrey Kelly was President of applicant, majority shareholder and was responsible for managing the company until April 2012 when he became ill (Exhibit E, at 1). He is on permanent disability and is physically unable to manage the business (Exhibit R, at 3-6).
6. Burkey-Kelly worked for applicant as a part-time employee from 2000 until 2012, serving in an administrative role (Exhibit E, at 1). Burkey-Kelly took over management of the applicant after her husband became ill in 2012 (Exhibit E, at 2).
7. The value of the common stock shares purchased by Burkey-Kelly was calculated by an attorney hired by applicant (Exhibit P).

8. Burkey-Kelly does the following work for applicant company: project management and contract execution; contract negotiations and execution for contracts with sub-contractors, managing insurance requirements and payments to sub-contractors; payroll and health insurance management; all banking transactions for the company with M & T Bank; reviewing property and casualty insurance contracts, commercial vehicle insurance, documents and coverage inquiries for business contract needs; all accounts payable and accounts receivable; project management including daily interaction with applicant company employees, sub-contractors, general contractors; final approval and signing of all contracts, her signature is required on all contracts (Exhibit S).

9. Burkey-Kelly is personal guarantor on the company's Home Depot charge account which pays for 90% of the business expenditures (Exhibit E, at 3). All vehicles that were previously registered to Jeffrey Kelly were transferred to the company upon Burkey-Kelly's management of the company (Exhibit E, at 3). A vehicle owned, registered and insured by Burkey-Kelly is used by the applicant business, replacing a vehicle that was owned by Jeffrey Kelly (Exhibit E, at 3).

## **DISCUSSION**

This report considers applicant's appeal from the Division's determination to deny certification as a woman-owned business enterprise (WBE) pursuant to Executive Law Article 15-A.

### Ownership

The Division claims that Christine Burkey-Kelly has failed to demonstrate that she made a capital contribution proportionate to her equity interest in the business. Applicant stated that she purchased 51% of the shares of common stock held by Jeffrey Kelly for the sum of \$4355.40 in May 2014. The Division, by letter dated October 30, 2015 requested the following: "Please provide a cancelled check and bank statement for Christine Burkey-Kelly's \$4,355 transfer of ownership" (Exhibit 3, p.1). Burkey-Kelly submitted a copy of a check written to Jeffrey Kelly, from a bank account in the name of Christine Burkey-Kelly alone, in the amount of \$4,355.40, dated

May 29, 2014, and a copy of the bank statement from the same account evidencing that the check was cashed and the funds were withdrawn from her account on June 2, 2014 (Exhibit P). The Division, in the response to the written appeal, incorrectly stated that the funds were deposited back into the account that the check was written from (Exhibit 9 at p.2). Burkey-Kelly explained in her appeal that her attorney valued the stock at \$4355.40 and she paid that amount, based upon his valuation (Exhibit C, at 3). The Division did not question the value placed on the stock purchase. Applicant also supplied documentation regarding a line of credit secured by the applicant's home (owned jointly with Jeffrey Kelly) that is used to fund the business as well (id.). By email dated March 31, 2016, Burkey-Kelly indicated that \$80,000 was invested into the business when she became majority shareholder in 2012, funded by the line of credit (Exhibit Q). This information was furnished via email communication. The application for WBE certification states on the signature page:

FIRST, this Application form, the supporting documents, and other information provided in support of the Application are considered part of the Application. It is recognized and acknowledged that the information contained in the Application is given under oath and that any misrepresentation may be grounds for denial of certification (Exhibit A, at 15).

The information supplied in support of the application is therefore considered as "given under oath" and can be considered evidence. Applicant did provide evidence of the purchase of a majority interest in the company in her submissions, including a March 2016 email that the Division did not respond to. She submitted evidence that she invested \$80,000.00 in cash in the business in 2012 with proceeds from a line of credit secured by her residence she jointly owns with Jeffrey Kelly. Finally, she purchased an SUV that is registered and insured by her and used by the applicant company (Exhibit E, p. 4). The Division's conclusion that applicant did not provide proof of a capital contribution in proportion to her equity interest is not supported by substantial evidence.

The applicant has demonstrated that the woman owner made a capital contribution in proportion to her equity interest in the enterprise pursuant to 5 NYCRR 144.2(a)(1).

### Risks and Profits

The Division also denied the application based upon applicant's failure to demonstrate that the woman owner enjoys the customary incidents of ownership and shares in the risks and profits in proportion to her ownership interest as required by 5 NYCRR 144.2(c)(2). The Division determined the woman owner's compensation, disproportionately lower than "each of the key male employees of Kelly Contracting" (Exhibit 9), demonstrates that she does not share in the risks and profits as required by the regulations.

Applicant asserts in an email dated March 31, 2016, submitted in response to the Division's reply, that she pays herself an income sufficient to support her family, funds her retirement account regularly, and puts all other profits back into the business to support its growth (Exhibit Q). The Division reply states that the woman owner did not submit any proof of receiving other profits from the business (Exhibit 9). Burkey-Kelly claims to have re-invested earnings of applicant company into the company, purchasing equipment, vehicles, computer software, website expenses and various other expenses (Exhibit Q). She also claims to pay her family medical expenses through the business (Exhibit Q), contributes to a retirement plan for herself and husband with company funds (Exhibit T), and pays family expenses through the business which she pays income taxes on (Exhibit Q).

Burkey-Kelly invested \$80,000 of home equity funds into the applicant business to keep it operating in 2012 (Exhibit Q). It is secured by the residence owned jointly by Jeffrey Kelly and Burkey-Kelly (Exhibit E, at 3). Applicant submitted 2015 payroll records, through September 2015, that demonstrate that Burkey-Kelly received a weekly salary of [REDACTED], additional payments of approximately [REDACTED] on eight occasions from March 6, 2015 through August 2015, and pre-tax contributions to an IRA plan (Exhibit T).

The Division termed Burkey-Kelly's compensation as minimal to explain one of the basis for denial. The Division noted

that applicant addresses her risks in the appeal but not the "minimal compensation" (Exhibit 9). Her income in 2014 was approximately [REDACTED] (Exhibit V). The Division, in its reply brief, stated that Burkey-Kelly's wages totaled [REDACTED] for 2014, however that failed to include the before-tax IRA contributions of [REDACTED] that are included on the W-2 wage statement for Burkey-Kelly. Burkey-Kelly was the only employee to receive pre-tax IRA contributions from the business in 2014, and she and Jeffrey Kelly were the only employees through September 2015 to receive that benefit (Exhibits T and V).

The Division noted that the ownership requirement serves to ensure that the significant benefits that may accrue to a business as a result of the state contracting preferences associated with the MWBE certification may be realized by the woman owner and not to employees who are not members of the protected class (Exhibit 9). The Division concluded in its reply brief that employee Francis Peltier is the "lead project manager." The records do not support the conclusion that Peltier is the "lead project manager" or a key employee who will benefit from MWBE certification. That conclusion is not supported by financial records or payroll records or statements of Burkey-Kelly. Applicant has established the woman owner shares in risks and profits of the business and that the Division's conclusion is not based on substantial evidence.

#### Technical Expertise

The Division also denied the application for certification based upon applicant's failure to demonstrate that the woman owner has the experience or technical competence, working knowledge or ability needed to operate the enterprise (5 NYCRR 144.2[b][i] & [ii]). Burkey-Kelly began working with the business in 2000 serving in an administrative role (Exhibit H). Her previous work experience had been in the marketing and sales fields and she has a BS in Marketing from SUNY Brockport (id.). In May 2011 she opened her own business that bought and sold restored homes (Exhibit H). She stated that when her husband became ill she took over the management of applicant business and put her own home remodeling business on hold (Exhibit C). She presented a copy of OSHA Hazworks certification she received in 2013 to show she has received training necessary to the company business (Exhibit U). She stated that she has attended seminars and workshops to provide

further training and knowledge in the field (Exhibit 3 at 3). Applicant submitted an affidavit from employee Francis Peltier, sworn to January 26, 2016, wherein he stated that Burkey-Kelly is responsible for project management daily, as well as the following: drafting weekly schedules, trouble shooting, placing final pricing on estimates, submitting of change orders, determining prevailing wage rates, final contract negotiations, project management, reviewing all current, future potential contracts, establishing new accounts, and maintaining current accounts, all outgoing billing to customers, all bill paying, final approval and signing of all contracts, "Christine's signature is required on all contracts in order for these contracts to be legally binding" (Exhibit S). Additionally, nine affidavits were submitted by applicant from businesses who work for or with applicant company which all state that Burkey-Kelly is the company representative with whom they work on projects in various capacities (Exhibit S).

Burkey-Kelly disputes that Peltier is lead project manager and questions the basis for that conclusion (Exhibit Q). She acknowledged that she did get help from Peltier when her husband first became ill and that she did learn from him and claims that she waited two years to seek certification until she was fully capable of managing all aspects of the business (Exhibit Q). The record shows Peltier is responsible for estimating, preparing bids and supervising field operations (Exhibit A), and the evidence shows that Burkey-Kelly is responsible for the same duties.

Applicant has established that Burkey-Kelly has the experience or technical competence, working knowledge or ability needed to operate the enterprise as required by 5 NYCRR 144.2(b)(i & ii) and that the Division's determination that she did not is not supported by substantial evidence.

#### **CONCLUSIONS**

1. Kelly Contracting Inc. has demonstrated that the Division's determination that the woman owner has not made a capital contribution that is proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise pursuant to 5 NYCRR 144.2(a)(1) is not supported by substantial evidence.

2. Kelly Contracting Inc. has demonstrated that the Division's determination that the woman-owner does not enjoy the customary incidents of ownership and share in the risks and profits in proportion with her ownership interest (5 NYCRR 144.2[c][2]) is not supported by substantial evidence.

3. Kelly Contracting Inc. has demonstrated that the Division's determination that the woman owner does not have the experience, technical competence, working knowledge or ability needed to operate the business (5 NYCRR 144.2[b][i] & [ii]) is not supported by substantial evidence.

#### **RECOMMENDATION**

The Division's determination to deny the application of Kelly Contracting Inc. for certification as a woman-owned business enterprise should be reversed, for the reasons stated herein.

**Matter of Kelly Contracting Inc.**  
**DED File ID No. 58554**  
**Exhibit List**

<b>Exh. #</b>	<b>Description</b>
1	DED denial letter.
2	Application for WBE certification
3	Department Document Request
4	Applicant response to document request
5	Applicant 2014 W-2 forms
6	Applicant 2015 payroll records
7	Resume Christine Burkey-Kelly
8	Resume of Francis Peltier
9	DED Response to Appeal

**Matter of Kelly Contracting Inc.**  
**DED File ID No. 58554**  
**Applicant Exhibit List**

Exh. #	Description
A	Application
B	DED Denial letter
C	Applicant's letter requesting appeal
D	DED Appeal schedule
E	Applicant's appeal brief
F	M & T Letter to Applicant re: bank account
G	Applicant's 2014 Profit and Loss statement
H	Resumes Burkey-Kelly, Jeffrey Kelly, Francis Peltier
I	2011 S Corp return
J	2012 S Corp return
K	2013 S Corp return
L	1994 Certificate of Incorporation
M	First Revised Corp. By-laws
N	Second Revised Corp. By-laws
O	Resolution of Board of Directors
P	Check of Burkey-Kelly to Kelly and bank statement
Q	Burkey-Kelly Email March 2016
R	Jeffrey Kelly medical records
S	Affidavits regarding job duties of Burkey-Kelly
T	Applicant's 2015 payroll records
U	OSHA Hazworks certification to Burkey-Kelly
V	Applicant's 2014 W-2s