

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

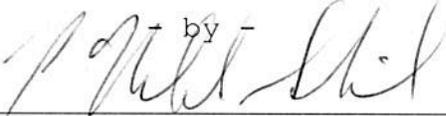
In the Matter

- of -

the Application of  
**Atlantic Environmental Consulting, LLC**  
For Certification as a Woman-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59542

RECOMMENDED ORDER

  
by -  
\_\_\_\_\_  
P. Nicholas Garlick  
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 to deny the application of Atlantic Environmental Consulting, LLC ("applicant") for certification as a woman-owned business enterprise ("WBE") be modified and, as so modified, 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 Atlantic Environmental Consulting, LLC challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Atlantic Environmental Consulting, LLC's application was submitted on March 30, 2015 (Exh. DED3).

The application was denied by letter dated November 30, 2015, from Bette Yee, Director of Certification Operations (Exh. DED4). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet three separate eligibility criteria related to Lynette Weintraub's ownership and operation of the applicant.

By letter dated December 29, 2015, Lynette Weintraub, on behalf of the applicant, appealed from the Division's denial determination.

By letter dated February 19, 2016, the Division notified the applicant that the applicant's written appeal should be filed on or before March 23, 2016.

In an email dated March 16, 2015, Ms. Weintraub requested an extension of time to file the appeal until May 2, 2015. The Division did not object and the request was granted by Chief Administrative Law Judge James T. McClymonds.

By letter dated April 29, 2016, the applicant submitted its written appeal which consisted of a six page letter and seven exhibits, listed in the attached exhibit chart as A1-A7.

In a five page memorandum dated June 16, 2016, the Division responded to the applicant's appeal. Enclosed with the response were eight exhibits, described in the attached exhibit chart as DED1-DED8.

On June 20, 2016, 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 owner's, Lynette Weintraub'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).

Second, the Division found that the applicant failed to demonstrate that the woman owner, Lynette Weintraub, 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).

Third, the Division found that the applicant failed to demonstrate that the woman owner, Lynette Weintraub, makes decision pertaining to the operations of the enterprise or devotes time on an ongoing basis to its daily operations, as required by 5 NYCRR 144.2(b)(1)&(b)(1)(iii).

### Position of the Applicant

Atlantic Environmental Consulting, 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. Atlantic Environmental Consulting, LLC is in the business of providing hazardous materials consultations, specializing primarily in asbestos related services (Exh. DED3 at 3). The company has a business address of 3725 Alpine Drive, Endwell, New York, 13760 (Exh. DED3 at 1).

2. Atlantic Environmental Consulting, LLC was established on April 16, 2007. Lynette Weintraub is the president of the

company and owns 51% of it. Her husband Matthew Weintraub is vice president and owns 49% of the company. (Exh. DED3 at 1-3.)

3. Atlantic Environmental Consulting, LLC was started using the proceeds of a \$35,000 cash advance that was in the form of a loan in the name of Matthew Weintraub (Exh. DED3 at 3; Appeal at 4).

4. In addition to being the president and chief executive officer of Atlantic Environmental Consulting, LLC, Ms. Weintraub is a Disability Analyst II with the New York State Office of Temporary and Disability Assistance (Exh. DED1) and works at this job from Monday through Friday from 7:00 am until 4:00 pm with a fifteen minute break at noon (Exh. DED7). Mr. Weintraub works for Atlantic Environmental Consulting, LLC from 7:00 am until 6:00 pm, Monday through Friday (Exh. DED8).

#### **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. Weintraub's ownership and operation of Atlantic Environmental Consulting, LLC. Each basis is discussed individually, below.

##### **Ownership**

In its denial letter, the Division determined that the applicant failed to demonstrate that the woman owner's, Lynette Weintraub'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).

On the appeal, Ms. Weintraub provides corrections to information provided in the application. With respect to capital contributions, she deletes references to the cost of her college tuition and that of her husband, as well as equipment purchased in 2007. The only capital contribution she identifies was a \$35,000 cash advance made at the time the company was formed. Ms. Weintraub explains that she and her husband commingle their finances and in the spring of 2007 her husband lost his job. At this time, her husband received an unsolicited

mail offer for a \$35,000 loan which was used to start the business. The loan was made in his name. Ms. Weintraub asserts that the Division erred by considering these monies as her husband's contribution to the firm, when she was the only one working and able to assure repayment.

In its response the Division argues that Ms. Weintraub failed to demonstrate a personal contribution of money, property, equipment, or expertise to the applicant. The Division points to information provided in the application that states the capital contributions to the firm were in the form of a bank line of credit, college tuition for both Ms. and Mr. Weintraub, and capital equipment (computers and printers) (Exh. DED3 at 3). The Division states that the college tuition expenses, for her degree in nursing and his degrees in geology and environmental science, are not a contribution to the business enterprise. Ms. Weintraub acknowledges this on her appeal.

With respect to the claimed equipment contribution, the invoices supplied with the application show that this equipment was purchased by the business (Exh. DED5) and do not establish a capital contribution by Ms. Weintraub to the business. Ms. Weintraub also acknowledges this on her appeal.

Finally, the Division argues that insufficient proof of Ms. Weintraub's capital contribution in the form of the bank line of credit was provided. The application materials provided a bank statement which showed the line of credit was made available to Mr. Weintraub, not his wife (Exh. DED6). However, no proof was provided that the proceeds of the line of credit were provided to the business or, if the proceeds were, the Division was unable to determine that such proceeds were attributable to Ms. Weintraub. At best, the Division concludes, the money provided by the line of credit might show a joint and equal capital contribution by Mr. and Ms. Weintraub.

Ms. Weintraub states on her appeal that she and her husband commingle their funds. She also states the loan was in his name. It was not unreasonable for the Division to conclude that this evidence suggests a joint contribution to the business, not a contribution that can be attributable to Ms. Weintraub as required for certification. Based on the evidence in the record

and the discussion above, the applicant has failed to demonstrate that the woman owner's, Lynette Weintraub'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 Division's denial on this ground was based on substantial evidence.

### **Operation**

The Division cited two reasons to deny the application for failing to meet criteria related to Ms. Weintraub's operation of the applicant. First, the Division determined that the applicant failed to demonstrate that the woman owner, Lynette Weintraub, 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).

On the appeal Ms. Weintraub disputes the Division's conclusion and attaches copies of her certification as an asbestos project monitor (Exh. A1) and copies of her refresher certifications (Exh. A2). In its response, the Division concedes that Ms. Weintraub has demonstrated sufficient technical expertise to operate the applicant. Accordingly, this ground for denial is deemed withdrawn and not discussed further.

The second reason cited by the Division for denying the application on operational grounds is that the Division determined that the applicant failed to demonstrate that the woman owner, Lynette Weintraub, makes decision pertaining to the operations of the enterprise or devotes time on an ongoing basis to its daily operations, as required by 5 NYCRR 144.2(b)(1)&(b)(1)(iii).

On the appeal, Ms. Weintraub states she spends many hours on a daily basis working for the company. Ms. Weintraub states that in 2011, she obtained certification to do field work and began working in the field for the company. Attached to her appeal are documents that show she worked in the field for the company on eleven dates: (1) March 17, 2012 (Exhs. A3 & A4 at 1); (2) March 27, 2013 (Exhs. A3 & A4 at 2); (3) August 5-7, 2013 (Exhs. A3 & A4 at 3-11); (4) July 2-3, 2014 (Exhs. A3 & A4 at 12-25); (5) July 11 & 14, 2014 (Exhs. A3 & A4 at 26-37); (6)

August 4, 2014 (Exhs. A3 & A4 at 38-44); and (7) January 23, 2016 (Exhs. A3 & A4 at 45-48). She also includes three letters in support of the company's application (Exhs. A5, A6 & A7).

In its response, the Division argues that the fact that Ms. Weintraub has full-time employment, other than her work for the applicant, demonstrates that she does not devote time on an ongoing basis to the daily operations of the firm or manage its core functions. The Division contends that Ms. Weintraub delegates the core functions of estimating and project management to her husband. The Division points to information provided with the application which shows Ms. Weintraub's daily schedule (Exh. DED7). This schedule shows that Ms. Weintraub is only available for fifteen minutes, between 12:00 pm and 12:15 pm, during regular business hours to attend to the firm's business. The rest of the time, Ms. Weintraub is busy with her full-time job. Mr. Weintraub's schedule shows that he devotes his efforts full-time to the company and manages the business during regular business hours (Exh. DED8). The Division notes that the application states that Mr. Weintraub is solely responsible for managing field operations (Exh. DED3 at 4) and that Mr. and Ms. Weintraub share responsibility for estimating and preparing bids (Exh. DED3 at 5). Because she is not available during normal business hours, the Division concluded that Mr. Weintraub performed these tasks for the business and the Ms. Weintraub could only have time to review the work Mr. Weintraub had done. Because he was performing these core functions of the business, the Division concluded that the business was ineligible for certification. With respect to the claim in the appeal that Ms. Weintraub supervises site work, the Division notes that the application and supporting schedules contradict this claim.

Based on the evidence in the record, as discussed above, the applicant failed to demonstrate that the woman owner, Lynette Weintraub, makes decision pertaining to the operations of the enterprises or devotes time on an ongoing basis to its daily operations, as required by 5 NYCRR 144.2(b)(1)&(b)(1)(iii). The Division's denial was based on substantial evidence.

## **CONCLUSIONS**

1. The applicant failed to demonstrate that the woman owner's, Lynette Weintraub'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).

2. The applicant failed to demonstrate that the woman owner, Lynette Weintraub, makes decision pertaining to the operations of the enterprise or devotes time on an ongoing basis to its daily operations, as required by 5 NYCRR 144.2(b)(1)&(b)(1)(iii).

## **RECOMMENDATION**

The Division's determination to deny Atlantic Environmental Consulting, LLC's application for certification as a woman-owned business enterprise should be modified by striking the second basis for denial. As so modified, the determination should be affirmed, for the reasons stated in this recommended order.

**Matter of  
Atlantic Environmental Consulting, LLC**

**DED File ID No. 59542  
Exhibit List**

| <b>Exh. #</b> | <b>Description</b>  | <b># of pages</b> |
|---------------|---|-------------------|
| A1            | Initial project monitor certification                             | 2                 |
| A2            | Refresher certifications  | 3                 |
| A3            | Project lists   | 1                 |
| A4            | Field experience  | 48                |
| A5            | Support letter from Binghamton University                         | 1                 |
| A6            | Support letter from Lakeland Environmental                        | 1                 |
| A7            | Support letter from Delta Engineers, Architects, & Land Surveyors | 1                 |
| DED1          | Resume of Lynette M. Weintraub                                    | 2                 |
| DED2          | Resume of Matthew C. Weintraub                                    | 2                 |
| DED3          | Application   | 10                |
| DED4          | Denial Letter   | 3                 |
| DED5          | Invoices  | 7                 |
| DED6          | Bank Statement  | 1                 |
| DED7          | Lynette Weintraub schedule of duties                              | 1                 |
| DED8          | Matthew Weintraub schedule of duties                              | 1                 |