

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

In the Matter

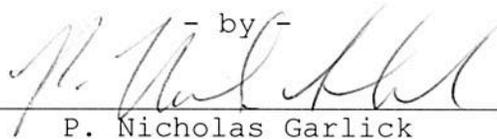
- of -

the Application of
Greenough Paving Co., LLC
For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59079

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

August 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 the application of Greenough Paving Co., 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 Greenough Paving Co., LLC challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Greenough Paving Co., LLC's application was submitted on November 3, 2014 (Exh. DED1 at 1).

The application was denied by letter dated March 30, 2016, from Bette Yee, Director of Certification Operations. As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet two separate eligibility criteria related to Beatrice Greenough's ownership and operation of the applicant.

By letter dated April 14, 2016, Beatrice Greenough, on behalf of the applicant, appealed from the Division's denial determination.

By letter dated May 12, 2016, the Division notified the applicant that the applicant's written appeal should be filed on or before June 30, 2016.

By letter dated June 28, 2016, the applicant submitted its written appeal, which consisted of a cover letter, affidavit of service, affidavit of Beatrice Greenough with one exhibit attached (listed in the attached exhibit chart as A1), and the affidavit of Michael Greenough.

In a three page memorandum dated June 12, 2016, the Division responded to the applicant's appeal. Enclosed with the response were six exhibits, described in the attached exhibit chart as DED1-DED6).

On July 19, 2016, this matter was assigned to me.

By email dated July 19, 2016, Beatrice Greenough submitted an unauthorized response to Division's papers.

By email dated July 19, 2016, I contacted the parties and provided the Division with an opportunity to respond to the unauthorized submission. By email the same day, the Division declined to respond and the record of 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 two separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner Beatrice Greenough'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, Beatrice Greenough, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

Position of the Applicant

Greenough Paving Co., 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. Greenough Paving Co., LLC is in the business of providing paving and sealcoating services for roadways, parking lots, and residential driveways (Exh. DED1 at 3). It has a business address of 3519 Burgoyne Avenue, Hudson Falls, NY 12839 (Exh. DED1 at 1)

2. Greenough Paving Co., LLC was established on March 14, 2008 after having been formed originally as a sole proprietorship by Michael Greenough in 1996 (Exh. DED1 at 3, DED5 ¶4). On April 15, 2014, Beatrice Greenough acquired 51% of Greenough Paving Co., LLC and her husband, Michael retained the remaining 49% (Exh. DED1 at 2-3).

4. There is no proof in the record, other than an assertion in the application (Exh. DED1 at 3) and another in the operating agreement (Exh. DED4 at 16) that Beatrice Greenough made a capital contribution to Greenough Paving Co., LLC.

5. The application states that Beatrice Greenough shares responsibility for the following functions with her husband: (1) financial decisions; (2) estimating; (3) preparing bids; (4) marketing and sales; (5) hiring and firing; (6) supervising field operations; (7) purchasing equipment and sales; (8) negotiating contracts (Exh. DED1 at 4-5). Both are signatories on business accounts (id. at 5). Mrs. Greenough's sole responsibilities include: (1) negotiating bonding; (2) negotiating insurance; and (3) managing and signing payroll (id. at 4-5).

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 two bases related to Mrs. Greenough's ownership and operation of Greenough Paving Co., LLC. Each basis is discussed individually, below.

Ownership

In its denial letter, the Division stated it had determined that the applicant failed to demonstrate that the woman owner Beatrice Greenough's capital contributions were 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. Greenough states that after her husband began the business as a sole proprietorship in 1996 and before Greenough Paving Co., LLC was formed in 2008, she performed uncompensated duties including bookkeeping, advertising, insurance, and the majority of oversight at job sites. In 2008, she began to receive a salary from the firm, but it was not commensurate with her managerial duties (Exh. DED5 ¶4). Her husband corroborates this claim in his affidavit (¶3). This

work, plus her professional expertise led to her acquiring 51% of the business in January 2014 (Exh. DED5 ¶5).

In its response, the Division argues that no proof of Mrs. Greenough's capital contribution was provided with the application materials. The Division notes that the application reports a total contribution of \$135,000 was made by Mrs. Greenough (consisting of \$60,000 in accounting contributions, \$25,000 in cash, and \$50,000 in paving knowledge) (Exh. DED1 at 3) as payment for her 51% of the business, which she acquired on April 15, 2014. The Division notes that it made several attempts to secure proof of these contributions (Exh. DED3) but Mrs. Greenough replied that she did not have any cancelled checks from when the business was started in 1996 (Exh. DED2). Also in the application materials is exhibit C to the operating agreement, which lists a \$25,000 contribution and her experience with taxes, administration and paving (Exh. DED 4 at 16). The Division concludes that this document is not sufficient proof that Mrs. Greenough made a capital contribution to the firm.

In her July 19, 2016 email response, Mrs. Greenough states it is impossible for her to show proof of the time she devoted to the company since its inception in 1996. She states that the numbers provided were a rough estimate of the value of the time she expended for the firm, if someone else had been hired to do the work. She states that she was never told that a paper trail about this was necessary.

It is the responsibility of the applicant to show that it meets all applicable certification standards and there is no evidence in the record to support Mrs. Greenough's claim to have made a \$60,000 accounting contribution, a \$25,000 cash contribution, or a \$50,000 paving knowledge contribution. Because of this the applicant has 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, as required by 5 NYCRR 144.2(a)(1).

Operation

The second ground asserted for denial was that the Division found that the applicant failed to demonstrate that the woman owner, Beatrice Greenough, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

In the appeal, Mrs. Greenough states that since she became majority owner, her role in the firm's business operations has expanded and now she controls and operates it nearly exclusively (Exh. DED5 ¶7). Her husband, she explains, was injured in two car accidents and stepped back from the business, devoting his time to two car washes he now owns (Exh. DED5 ¶7). She states that she now has exclusive responsibility for: (1) hiring and firing; (2) employee scheduling; (3) bookkeeping; (4) insurance; (5) purchasing; and (6) taxes (Exh. DED5 ¶8). She now shares responsibility with her husband and other employees for: (1) overseeing job sites; (2) estimating; and (3) contracting (Exh. DED5 ¶9). She also states that she now devotes 60 hours a week to the business while her husband devotes 20 hours per week (Exh. DED5 ¶10). She continues by providing additional information and clarifications to the information contained in the application (Exh. DED5 ¶¶12-17). She concludes that she runs the day to day operations of the business and makes the managerial decisions (Exh. DED5 ¶18). This information is consistent with that provided in her husband's affidavit (Exh. DED5 ¶¶5-6).

In its reply, the Division argues that the core functions of the business are shared by Mrs. Greenough and her husband. The Division notes that the application states that Beatrice Greenough shares responsibility for the following functions with her husband: (1) financial decisions; (2) estimating; (3) preparing bids; (4) marketing and sales; (5) hiring and firing; (6) supervising field operations; (7) purchasing equipment/sales; and (8) negotiating contracts; and (9) that both are signatories on business accounts (Exh. DED1 at 4-5). Mrs. Greenough's sole responsibilities include: (1) negotiating bonding; (2) negotiating insurance; and (3) managing and signing payroll (Exh. DED 1 at 4-5). The narrative of duties provided with the application also shows that responsibility for

estimates, financial decisions, and marketing are shared (Exh. DED6). The Division also states that the affidavit submitted with the appeal (Exh. DED5), discussed above, is consistent with the information in the application showing shared decision making. The Division concludes that while Mrs. Greenough plays an important role in the firm's operations, important core functions of the business, preparing estimates, ordering, maintaining equipment, and overseeing field operations are shared with her husband. Because of this, the application was properly denied.

The information provided by the applicant in the application clearly shows that the important core functions of the business are shared between the Greenoughs. Even though she has assumed a greater role with the company over the years, the evidence in the record supports the conclusion that the applicant failed to demonstrate that the woman owner, Beatrice Greenough, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

CONCLUSIONS

1. The applicant failed to demonstrate that the woman owner Beatrice Greenough'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, Beatrice Greenough, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

RECOMMENDATION

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

**Matter of
Greenough Paving Co., LLC**

**DED File ID No. 59079
Exhibit List**

Exh. #	Description	# of pages
DED1	Application	11
DED2	Documented proof of sources of capitalization and investments	2
DED3	DED's attempts to obtain proof of capital contribution	3
DED4	Operating Agreement	16
DED5	Affidavit of Beatrice Greenough	19
DED6	Duty and Responsibility Narratives for the Greenoughs	2
A1	Application	11