

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

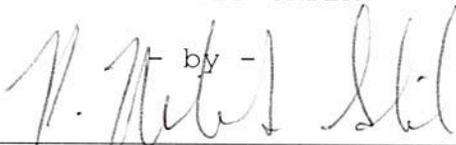
In the Matter

- of -

the Application of  
**Battery Research and Testing, Inc.**  
For Certification as a Woman-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 535

RECOMMENDED ORDER

 - by -

---

P. Nicholas Garlick  
Administrative Law Judge

September 4, 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 Battery Research and Testing, Inc. ("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 Battery Research and Testing, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Battery Research and Testing, Inc.'s application was submitted on February 4, 2016 (Exh. DED3).

The application was denied by letter dated February 25, 2016, 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 four separate eligibility criteria related to Patricia DeMar's ownership and operation of the applicant (Exh. DED6).

By letter dated March 2, 2016, Patricia DeMar, on behalf of the applicant, requested to appeal from the Division's denial determination. Attached to this letter were six exhibits (listed in the attached exhibit chart as A1-A6).

By letter dated April 1, 2016, Ms. DeMar inquired regarding the status of her appeal.

By letter dated May 10, 2016, the Division notified the applicant that the applicant's written appeal should be filed on or before June 27, 2016.

By letter dated May 16, 2016, the applicant submitted its written appeal which consisted of a four page letter and

fourteen exhibits (listed in the attached exhibit chart as A7-A20).

In a five page memorandum dated July 22, 2016, the Division responded to the applicant's appeal. Enclosed with the response were ten exhibits, described in the attached exhibit chart as DED1-DED10.

On July 25, 2016, this matter was assigned to me.

On August 12, 2016, the last of the documents submitted by the applicant were forwarded to me and the record 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 four separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner, Patricia DeMar, enjoys the customary incidents of ownership and shares in the risks and profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).

Second, the Division found that the applicant failed to demonstrate that the woman owner Patricia DeMar'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).

Third, the Division found that the applicant failed to demonstrate that the woman owner, Patricia DeMar, 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).

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

### Position of the Applicant

Battery Research and Testing, 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. Battery Research and Testing, Inc. is in the business of servicing and selling products and equipment to industrial users of stationary batteries (Exh. DED3 at 3). The company has

a business address of 1313 County Route 1, Oswego, New York (Exh. DED3 at 1).

2. Battery Research and Testing, Inc. was established on November 25, 1981 (Exh. DED1). On February 1, 1982, Peter J. DeMar was issued 51% of the company's stock and his wife, Patricia, was issued 49% (Exh. DED2 at 5&7). In April 2002, Mr. DeMar transferred four percent of his interest in the company to three other shareholders (Exh. DED2 at 16-20). During the phone interview with Division staff on February 25, 2016, Ms. DeMar described the company as a family owned business (Exh. DED4 at 19:30).

3. There is no evidence in the record that Patricia DeMar made a capital contribution to Battery Research and Testing, Inc.

4. Patricia DeMar has sole responsibility for financial decisions and negotiating bonding at Battery Research and Testing, Inc. She shares responsibility for negotiating insurance and signing for business accounts. Non-minority males have responsibility for: estimating, preparing bids, marketing and sales; hiring and firing; supervising field operations; and negotiation contracts. (Exh. DED3 at 3-4). During the phone interview with Division staff on February 25, 2016, Ms. DeMar described her role with the company as administrative in nature (Exh. DED4 at 11:00).

## **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 four bases related to Ms. DeMar's ownership and operation of Battery Research and Testing, Inc. Each basis is discussed individually, below.

### **Ownership**

In its denial letter, the Division cited two bases to deny the application based on Ms. DeMar's failure to meet ownership criteria. First, the Division determined that the applicant failed to demonstrate that the woman owner, Patricia DeMar, enjoys the customary incidents of ownership and shares in the

risks and profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).

In its reply, the Division withdraws this ground for denial. Accordingly, this ground for denial is not discussed further and should be strike from the grounds for denial.

The second ownership basis cited in the denial letter stated that the Division had determined that the applicant failed to demonstrate that the woman owner Patricia DeMar'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. DeMar states that she has provided funds to the firm which are reflected on the firm's balance sheet as liabilities. The record contains several balance sheet generated by the applicant bearing various dates (Exhs. A5, A6, A10, A11, A12, & DED8) and these show under account #249 a long term liability "N/P Demar" of various amounts over \$100,000. The appeal seems to indicate that these liabilities are a direct result of the contribution of personal money from a line of credit. Attached to the appeal is a statement for a Home Equity Line in Ms. DeMar's name which shows a credit limit of \$45,000 (Exh. A14) and a corporate resolution to borrow from NBT Bank (Exh. A17 & A18). No explanation of how these various exhibits are related is provided, nor is there any explanation of how the amount of the liability on the balance sheets was calculated. In addition, applicant provided no proof that the money from the line of credit was provided to the business. Finally, applicant provided no proof that Ms. DeMar made any capital contribution to the firm, apart from the loans alleged in the appeal.

In its response, the Division states that Ms. DeMar failed to submit any evidence that she had made a capital contribution to the firm. The Division notes that the application stated that Patricia and Peter DeMar contributed [REDACTED] and describes the contribution as multiple per balance sheet acct #249 (Exh. DED3 at 3). The Division includes with its response a document submitted by the applicant as proof of the sources of capitalization (Exh. DED7). This document shows a series of forty transactions occurring on the firm's books

[REDACTED]

This amount is reflected as a long term liability on the firm's balance sheet dated February 4, 2016 (Exh. DED8 at 2). The Division states that it concluded that Exh. DED7 tracks the balance of loans made by the DeMars to the firm. The Division argues that these uncorroborated loans are not contributions under the regulations. Even if loans could be considered contributions, the lack of proof that these loans were in fact made, such as bank records, loan documents or other supporting documents, was a sufficient basis to support denial of the application.

Based on the evidence in the record and the discussion above, including the lack of proof and an explanation regarding the loans or other contributions made to the business, the applicant has failed to demonstrate that the woman owner Patricia DeMar'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. DeMar's operation of the applicant. First, the Division determined that the applicant failed to demonstrate that the woman owner, Patricia DeMar, 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. DeMar states that her experience as primary owner of the firm for 34 years should suffice as her competence in operating the business. She writes that the stationary battery business is extremely complex and that she leaves technical specifications to technical staff.

In its response, the Division argues that Ms. DeMar failed to submit any evidence as part of the application to demonstrate experience in managing the substantive aspects of battery testing, servicing, and sales. The Division argues that her

resume shows her duties with the firm focus on the management of financial functions (Exh. DED5). On the other hand, the resume of her husband Peter (Exh. DED9) and that of Edward DeMar (Exh. DED10) show that each has more than thirty years of relevant managerial experience in the areas of battery testing, servicing, and sales (in the case of Peter DeMar). Based on this evidence, the Division states it concluded that Ms. DeMar could not evaluate the work of the firm's employees or describe technical specifications of the firm's products to clients, but had to rely on Peter and Edward DeMar to operate the firm. The Division also states that the applicant has failed to identify any evidence in the application that contradicts this conclusion.

Based on the information in the record, including the lack of any indication that Ms. DeMar has the necessary technical background to operate the business, the applicant failed to demonstrate that the woman owner, Patricia DeMar, 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).

The second basis 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, Patricia DeMar, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1)&(b)(1)(iii).

On the appeal, Ms. DeMar states one of her roles is to monitor requests for quotes and to ensure that quotes are provided in a timely manner. She adds she has access to all the company's data. After a contract is awarded, she confirms the equipment is prepared and the technician is correctly matched to the job. She ensures safety issues are addressed and that all materials are ordered and delivered. She also states that for complex bids, she can be part of a team of people at the firm who help assemble quotes.

In its response, the Division states that Ms. DeMar does not make decisions pertaining to the core functions of the firm, namely the management of sales (which is done by Peter DeMar) and the supervision of technicians (which is done by Edward

DeMar) (Exh. DED 3 at 3-4). The Division argues that the application shows Ms. DeMar's roles with the firm are limited to managing financial and administrative matters (Exh. DED3 at 3-4). In addition, because she lives in Florida most of the year, the Division reasoned she could not oversee the technicians working in New York.

Based on the evidence in the record, including the information in the application regarding her limited role in the firm's decision making process, as discussed above, the applicant failed to demonstrate that the woman owner, Patricia DeMar, makes decisions pertaining to the operations of the enterprises, 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, Patricia DeMar'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, Patricia DeMar, 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).

3. The applicant failed to demonstrate that the woman owner, Patricia DeMar, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1)&(b)(1)(iii).

#### **RECOMMENDATION**

The Division's determination to deny Battery Research and Testing, Inc.'s application for certification as a woman-owned business enterprise should be modified by striking the first basis for denial. As so modified, the determination should be affirmed, for the reasons stated in this recommended order.

**Matter of  
Battery Research and Testing, Inc.**

**DED File ID No. 535  
Exhibit List**

Exh. #	Description	# of pages
A1	Part of Division's denial letter	1
A2	Documents related to contract with [REDACTED]	6
A3	Documents related to contract with [REDACTED] [REDACTED]	8
A4	Documents related to the general release by Diefendorf	6
A5	Balance sheet as of March 2, 2016	3
A6	Balance sheet as of December 31, 2014	1
A7	Separation agreement	3
A8	Information referral (IRS form 3949A)	1
A9	Emails relating to invoice 13958	4
A10	Balance sheet as of May 16, 2016	2
A11	Balance sheet as of December 31, 2015	2
A12	Balance sheet as of December 31, 2013	2
A13	Email regarding line of credit	2
A14	Home equity line statements	2
A15	Transactions by account 5/16/16	1
A16	General Journal transaction 8/13/14	1

A17	Corporate resolution to borrow/grant collateral	2
A18	Corporate authorization resolution	2
A19	Contract acknowledgement	1
A20	MOP for Livermore falls ME capacity test project	2
DED1	Applicant's certificate of incorporation	5
DED2	Applicant's stock certificates	20
DED3	Application	10
DED4	Phone interview	On disc
DED5	Resume of Patricia DeMar	1
DED6	Denial letter	3
DED7	Applicant's account 249 journal	1
DED8	Applicant's balance sheet	2
DED9	Resume of Peter DeMar	2
DED10	Resume of Edward DeMar	1