

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

In the Matter

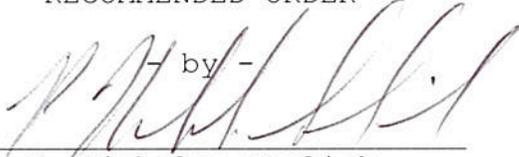
- of -

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

NYS DED File ID No. 60402

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

October 3, 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 Diehlux, 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 Diehlux, LLC challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Diehlux, LLC's application was received on December 21, 2015 (Exh. DED1).

The application was denied by letter dated April 5, 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 four separate eligibility criteria related to Alicia Diehl's ownership, operation and control of the applicant (Exh. DED4).

By letter received April 26, 2016, Alicia Diehl appealed from the Division's denial determination.

By letter dated June 27, 2016, Alicia Diehl submitted a written appeal which consisted of a five page letter and eight exhibits (listed in the attached exhibit chart as A1 - A8).

In a seven page memo dated August 24, 2016, the Division responded. Attached to the response were six exhibits, listed on the attached exhibit chart as DED1-DED6.

On September 1, 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 four separate criteria for certification.

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

Fourth, the Division found that the applicant failed to demonstrate that the corporate documents and relevant business agreements permit the woman owner, Alicia Diehl, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

Position of the Applicant

Diehlux, 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. Diehlux, LLC is in the business of providing innovative ecological and natural resource consulting services for project developers in the energy, land development and telecommunications markets (Exh. DED1 at 3). It has a mailing address of 194 Park Street, Canandaigua, New York.

2. Diehlux, LLC was established on June 16, 2014. Alicia Diehl owns 51% of the company and serves as its CEO. Her husband, Colin Diehl owns 49% of the company and serves as its president (Exh. DED1 at 3).

3. Neither Ms. Diehl, nor her husband, made any capital contribution to the firm (Exh. DED1 at 3).

4. The application does not identify Ms. Diehl as having sole responsibility over any of the firm's managerial operations. She shares management of: (1) financial decisions; (2) negotiating insurance; (3) hiring and firing; (4) purchasing

equipment/sales; (5) managing and signing payroll; and (6) signing on business accounts. She plays no role in the firm's: (1) estimating; (2) preparation of bids; (3) negotiating bonding; (4) marketing and sales; (5) supervising field operations; and (6) negotiating contracts. Her husband shares managerial responsibility over all the firm's management operations (Exh. DED1 at 4).

5. Mr. Diehl's resume indicates he has earned an associates degree in natural resource conservation and a bachelor of science in wildlife sciences. He has also completed training relevant to the firm's operation for the Federal Energy Regulatory Commission, New York State Department of Environmental Conservation (DEC), Monroe County, and is a certified wetlands delineator. He is also a licensed timber rattlesnake handler in DEC Region 3. He holds an Occupational and Safety Health Administration (OSHA) construction certificate; a public vessel joint pilot and engineer license; and a stream investigation, stabilization and design certificate (Exh. DED2).

6. Ms. Diehl's resume shows an undergraduate degree in English and a masters in counselor education. She is currently employed at the Catholic Charities of Wayne County as a counselor and supervisor. This document shows no work experience in the field of environmental consulting (Exh. DED3).

7. The firm's operating agreement provides that the president "shall in general supervise and control all of the business affairs of the Company" (Exh. DED6 at 11).

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 sets forth four bases related to Ms. Diehl's ownership, operation and control of Diehlux, LLC. Each basis is discussed individually, below.

As a preliminary matter, Ms. Diehl states that she is at fault for not supplying enough documentation with her application and is using the appeal to provide further

documentation and explanation beyond what was initially provided. As explained above, this appeal can only consider information that was provided to the Division at the time the application was denied.

Ownership

The ownership ground for denial was that the applicant failed to demonstrate that the woman owner Alicia Diehl'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).

On the appeal, Ms. Diehl explains that [REDACTED] [REDACTED] which she used for the firm's expenses (Exh. A5) and that this loan was not disclosed during the application process. She also states that she has taken very little pay from the company to ensure enough money for the firm to continue to operate and grow.

In its response, the Division notes that the application does not identify any contribution to the firm by Ms. Diehl and only shows that a [REDACTED] loan was made by her husband (Exh. DED1 at 3). The Division states that it does not consider loans, which are repaid, to be a form of contribution. The Division also examined the firm's balance sheet which showed an owner investment of \$0 (Exh DED5). The Division concludes that because both Ms. Diehl and her husband didn't make any capital contribution to the firm, this "equal lack of contribution from both owners of Diehlux would be proportionately reflected in equal ownership interests, not a majority ownership interest for Mrs. Diehl" (Response at 2-3). In response to the claims in the appeal that [REDACTED] to the firm and that this should be considered a contribution, the Division responds that this amount is reflected on the company's balance sheet (Exh. DED5) as a loan. The Division then repeats its assertion that loans should not be properly considered contributions. With respect to Ms. Diehl's claim that she contributed expertise in the form of uncompensated work, the Division responds that this claim was not made in the application and no quantification of this amount is provided.

The only information before the Division when it made its denial determination were the application (Exh. DED1) and the firm's balance sheet (Exh. DED5) which both show no contribution was made by anyone to the firm. Because of this, no evidence supports a finding that Ms. Diehl made a capital contribution to the firm. Accordingly, the applicant failed to demonstrate that the woman owner Alicia Diehl'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 determination on this ground was based on substantial evidence.

Operation

In its denial letter, the Division asserted two grounds for denying the application for failure to meet certification criteria related to the operation of the applicant. First, the Division found that the applicant failed to demonstrate that the woman owner, Alicia Diehl, 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) and (ii).

On the appeal, Ms. Diehl notes that the regulations state that the woman owner must have adequate managerial experience or technical competence in the business enterprise (see 5 NYCRR 144.2[b][1]). She argues that she has extensive managerial expertise and that the business could not survive on technical knowledge alone. She then lists her actions to get the company started including: creating a website; developing internal systems; managing employees; marketing; attending seminars; writing proposals; and meeting with clients. She states that during her career she has acquired the experience and skills to manage the firm's projects and uses these skills on a daily basis at the firm. She includes with her appeal proof that she holds a certificate in nonprofit management (Exh. A3) and provides an updated resume (Exh. A4) which expands from one paragraph to two and a half pages information about her role with the firm compared to the resume presented with the application (Exh. DED3).

In its response, the Division states that Mr. Diehl operates the core functions of the business and possesses the

critical technical training and managerial experience that his wife lacks. The application identifies the business as providing ecological and natural resource consulting services (Exh. DED1 at 3). The Division argues that both the application and the resumes submitted show that Mr. Diehl performs the core functions of the firm, including developing proposals and overseeing environmental compliance. These facts, combined with the fact that Ms. Diehl is also employed at Catholic Charities of Wayne County, while her husband does not have outside employment, led the Division to conclude that she is not available on a sufficiently regular basis during normal business hours to allow her to oversee project management. The Division concludes that because Mr. Diehl provides the revenue-generating services to the firm's clients, the application did not meet certification criteria.

With respect to the applicant's claim that Ms. Diehl possesses managerial experience outside the environmental consulting field, the Division responds that in order for a business to be certified the woman owner must possess relevant technical experience, general managerial experience is insufficient to operate this environmental consulting firm.

While Ms. Diehl undoubtedly possesses management skills, none of them were in the environmental consulting field before the firm was started. Based on the evidence in the record and the discussion above, including the fact that her husband has the technical skill to operate the firm and manages its revenue generating functions, the applicant has failed to demonstrate that the woman owner, Alicia Diehl, 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) and (ii). The Division's denial determination on this ground was based on substantial evidence.

The second ground asserted for denial on operational grounds was that the applicant failed to demonstrate that the woman owner, Alicia Diehl, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii).

On the appeal, Ms. Diehl lists the decisions she makes for the firm including: determining the company's fees; negotiating

with subcontractors; assigning projects to employees; hiring and firing; negotiating contracts; and purchasing insurance.

In its response, the Division states that Mr. Diehl possesses the critical technical training and managerial experience that his wife lacks. She possesses no academic training, licenses, or certification relevant to the services provided by the firm. In contrast, her husband has a bachelor of science in wildlife sciences, has completed trainings on State and federal environmental regulations, has completed OSHA training, and possesses relevant wildlife handling licenses (Exh. DED2). This information led the Division to conclude that Ms. Diehl must rely on her husband's knowledge and skills to make decisions at the firm because she lacks similar training, work experience, and credentials.

With respect to the list of duties that Ms. Diehl performs provided on the appeal, the Division states that none of the duties pertain to project management and were not included in the application. This information, even if it had been before the Division at the time it made its determination to deny the application, would be insufficient to warrant certification on this ground.

Based on the information before the Division at the time the denial determination was made, there was no information that Ms. Diehl made decisions regarding the core, or revenue generating, functions of providing environmental consulting services. Because of this and based on the discussion above, the applicant has failed to demonstrate that the woman owner, Alicia Diehl, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). The Division's denial determination on this ground was based on substantial evidence.

Control

The control ground for denial was that the Division found that the applicant failed to demonstrate that the corporate documents and relevant business agreements permit the woman owner, Alicia Diehl, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

In the appeal, Ms. Diehl claims that she is a manager as described in section 6.5 of the operating agreement (Exh. A8) and therefore has control over the president's actions. She states that she has ultimate authority for signing contracts, final decisions, and all day-to-day decisions.

In its response, the Division states that the application identifies Mr. Diehl as the firm's president (Exh. DED1 at 3) and the firm's operating agreement provides that the president "shall in general supervise and control all of the business affairs of the Company" (Exh. DED6 at 11). There is no reference to the title of CEO, which is Ms. Diehl's title. Based on this information, the Division determined that he had general management of the business.

In response to the claim in the appeal that Ms. Diehl is a manager of the firm, and therefore, could remove Mr. Diehl, the Division notes that nothing in the record shows that Ms. Diehl has been appointed a manager pursuant to the terms of the operating agreement or that she is even an officer of the company.

Based on the evidence in the record, specifically the firm's operating agreement quoted above, and the fact that Mr. Diehl is the firm's president, the applicant failed to demonstrate that the corporate documents and relevant business agreements permit the woman owner, Alicia Diehl, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). The Division's denial determination on this ground was based on substantial evidence.

CONCLUSIONS

1. The applicant failed to demonstrate that the woman owner Alicia Diehl'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 woman owner, Alicia Diehl, 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) and (ii).

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

4. The applicant failed to demonstrate that the corporate documents and relevant business agreements permit the woman owner, Alicia Diehl, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

RECOMMENDATION

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

**Matter of
Diehlux, LLC**

**DED File ID No. 60402
Exhibit List**

Exh. #	Description	# of pages
DED1	Application	9
DED2	Resume of Colin A Diehl	6
DED3	Resume of Alicia L. Diehl	2
DED4	Denial letter	3
DED5	Balance sheet	2
DED6	Operating Agreement	22
A1	Profit and Loss statement for January - November 2015	1
A2	2014 IRS schedule K-1	1
A3	Certificate in Nonprofit Management	1
A4	Resume of Alicia Diehl	3
A5	Loan agreement and checks	6
A6	Transaction history page	1
A7	Purchase order	1
A8	Pages 8 & 11 from operating agreement	2