

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

In the Matter

- of -

the Application of **KTR Trucking, LLC**
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59790

RECOMMENDED ORDER

- by -



Daniel P. O'Connell
Administrative Law Judge

October 26, 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 KTR Trucking, LLC (KTR or applicant) certification as a woman owned business enterprise (WBE) be modified and, as so modified, affirmed for the reasons set forth below.

PROCEEDINGS

With a letter dated February 18, 2016, the Division determined that KTR does not meet the eligibility requirements to be certified as a woman owned business enterprise, and denied KTR's application (*see* WBE Exh. 2). In a letter received on March 11, 2016, Kari Royce, on behalf of KTR, appealed from the Division's determination to deny WBE certification.

In a notice of appeal hearing dated June 2, 2016, the Division acknowledged KTR's request for a hearing, and scheduled the administrative adjudicatory hearing for 11:00 AM on August 30, 2016 at the Division's offices in Albany, New York. The notice also reiterated the Division's bases for the denial.

The administrative adjudicatory hearing convened as scheduled. Kari Royce represented KTR. Timothy S. Royce and Ms. Royce testified on behalf of applicant. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, appeared on behalf of the Division. Matthew LeFebvre, Senior Certification Analyst, testified for the Division. During the hearing, the parties offered 19 exhibits, which include a copy of the completed application form for WBE certification filed by KTR (WBE Exh. 1 [submitted May 4, 2014]). An exhibit chart is attached to this recommended order.

An audio recording of the administrative adjudicatory hearing was made. The Office of Hearings and Mediation Services received copies of two compact audio disks (CD1 and CD2) on August 25, 2016. Whereupon the hearing record closed.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman owned business enterprise are established by regulation (*see* Title 5 of the Official Compilation of Codes, Rules, and Regulations of the State of New York [5 NYCRR] 144.2). To determine whether an applicant should be granted WBE status, the Division assesses the ownership, operation, and control of the business enterprise on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application, information presented in supplemental submissions and, if appropriate, from interviews conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, KTR, as applicant, bears the burden of proving that the Division's denial of its application for 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

The Division

In the February 18, 2016 denial letter, the Division asserted that the application failed to meet four criteria for WBE certification as outlined in 5 NYCRR 144.2 concerning Ms. Royce's ownership and operation of KTR (*see* WBE Exh. 2).

With respect to ownership, the Division initially determined that KTR did not meet the ownership criteria outlined at 5 NYCRR 144.2(c)(2) and 5 NYCRR 144.2(a)(1). In his closing statement, however, Mr. Harmonick said that because Ms. Royce personally guarantees the debt for KTR, Ms. Royce, as the woman owner, shares in the risks and profits in proportion to her ownership interest, as required by 5 NYCRR 144.2(c)(2). Accordingly, the Division withdrew its determination that KTR does not comply with the eligibility criterion at 5 NYCRR 144.2(c)(2) as a basis for the denial. (CD2 00:25:06.) The Division maintained, however, that KTR did not show how Ms. Royce contributed to the business enterprise in proportion to her equity interest in KTR as demonstrated by, but not limited to, contributions of money, property, equipment, or expertise, as required by 5 NYCRR 144.2(a)(1).

With respect to operations, the Division determined that KTR did not demonstrate how Ms. Royce has the experience or technical competence, working knowledge, or ability needed to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i) and (ii). The Division also found that KTR failed to show that Ms. Royce makes decisions pertaining to operations of the enterprise, or devotes time, on an ongoing basis, to the daily operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1)(iii).

KTR Trucking, LLC

In a letter dated March 11, 2016, Kari Royce, on behalf of KTR, appealed from the Division's February 18, 2016 determination to deny WBE certification. According to Ms. Royce, she is the owner of KTR and shares in its risks and profits. Ms. Royce explained how she obtained financing to start her business. In addition, Ms. Royce explained that since filing the application for certification in May 2015, she financed and purchased a new truck. Ms. Royce stated that the risks and profits are both her responsibility and her reward.

Ms. Royce noted that KTR Trucking, LLC, has been in business for four years. During which time, Ms. Royce has developed relationships with vendors, contractors, and employees in an effort to grow the business. Prior to starting KTR, Ms. Royce managed departments for other companies and supervised 250 employees. Ms. Royce said that these experiences naturally transferred to the operation of KTR.

FINDINGS OF FACT

I. General

1. KTR Trucking, LLC (KTR), has business offices located at 20 County Route 23A, Constantia, New York 13044. KTR is a trucking subcontractor that provides dump truck services for contractors throughout New York State. KTR trucks haul aggregate and other materials to construction sites, and spoil away from construction sites. (See WBE Exh. 1; CD1 00:41:02.)
2. Kari A. Royce is the owner of KTR Trucking, LLC (see WBE Exh. 1).
3. On behalf of KTR Trucking, LLC, Ms. Royce submitted an application for WBE certification with the Division on May 4, 2015 (see WBE Exh. 1).
4. By letter dated February 18, 2016, the Division denied KTR's application for certification as a woman owned business enterprise (see WBE Exh. 2).

II. Ownership

5. The source of the capital contribution reported in the application for WBE certification (see WBE Exh. 1 at § 2.C) was [REDACTED] (see WBE Exhs. 3 and 4).

III. Operation

6. John Royce is Ms. Royce's brother-in-law. He holds a valid New York State Class A commercial driver license, and is employed by KTR on a seasonal, full-time basis. (See WBE Exhs. 1 and 6; CD1 00:17:28, 00:18:08.)
7. Ms. Royce's résumé does not include any training or prior experience with respect to operating or maintaining trucks or other vehicles (see WBE Exh. 5; CD1 00:19:23, 00:22:35).
8. Except for driving the truck, Ms. Royce is responsible for all other operations at KTR (CD1 00:33:41, CD 2 00:15:49, 00:16:29).
9. Pursuant to federal regulations, Ms. Royce's health status disqualifies her from obtaining a New York State Class A commercial driver license (see WBE Exh. 19; CD2 00:14:13).

10. Ms. Royce dedicates 15 to 20 hours per week to KTR's operations (*see* WBE Exh. 1 at 11 [Response 6]), CD1 00:23:54), which results in up to 40 hours of work per week for the truck driver (*see* WBE Exh. 11). Nevertheless, Ms. Royce is on call whenever KTR's truck has been dispatched. Ms. Royce visits the job sites on a weekly basis to supervise the truck driver's work. (*See* WBE Exh. 1 at 11 [Response 6]; CD1 00:32:26.)

DISCUSSION

This recommended order considers KTR's March 11, 2016 appeal from the Division's February 18, 2016 determination to deny certification of KTR as a woman owned business enterprise pursuant to Executive Law Article 15-A. The discussion that follows addresses the bases for the Division's denial.

Referring to the eligibility criteria outlined at 5 NYCRR 144.2, the Division identified the following bases for the denial. According to the Division, KTR did not show that the capital contribution by Ms. Royce is proportional 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). (*See* WBE Exh. 2.)

With respect to exercising control over the business enterprise, the Division determined that Ms. Royce does not have either the managerial experience and technical competence, or the working knowledge and ability needed to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i) and (ii). In addition, the Division determined that Ms. Royce did not demonstrate that she makes decisions pertaining to operations of the enterprise, or devotes time on an ongoing basis to the daily operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1)(iii). Each basis is addressed below.

I. Ownership

According to section 2.C of the application for WBE certification (*see* WBE Exh. 1 at 3), Kari Royce made a capital contribution of [REDACTED] in June 2011 to the business enterprise. Upon review, Division staff determined that the source of the contribution was [REDACTED].

[REDACTED] Timothy Royce provided the cash to Kari Royce who, in turn, used it to purchase KTR's first truck. Accordingly, Division staff determined that Ms. Royce did not make a capital contribution to the business enterprise, as required by 5 NYCRR 144.2(a)(1), because the source of the capital came from Mr. Royce and not the woman owner of the business enterprise. (*See* WBE Exhs. 3 and 4; CD 00:06:14, 00:07:07, 00:11:04.)

At the hearing, KTR offered more details about the capital contribution. Mr. Royce credibly testified that the cash he provided to Ms. Royce for KTR's first truck was a loan, and not a gift. Within two years after starting the business, Ms. Royce obtained a commercial loan to refinance the cost of the truck and to repay Mr. Royce. (*See* WBE Exhs. 3, 4, and 7; CD1 00:29:45, 00:31:17, 00:31:39, 31:52.)

Nevertheless, the record about Ms. Royce's capital contribution to KTR remains incomplete. The initial capital contribution reported in the application was [REDACTED] (*see* WBE Exh. 1 § 2.C at 3). According to the loan papers (*see* WBE Exh. 3), however, Mr. Royce borrowed [REDACTED] which is about two thirds of the capital contribution noted in the application (*i.e.*, [REDACTED]). Also, KTR offered WBE Exhibit 7 to show that Ms. Royce paid off the commercial loan that she obtained to refinance the cost of the truck and to repay Mr. Royce. As of April 29, 2016, the principal balance owed was [REDACTED] (*see* WBE Exh. 7; CD2 00:01:00). The principal balance of the commercial loan on April 29, 2016 (*i.e.*, [REDACTED]) is less than half of the amount of [REDACTED] and less than one third of the initial capital contribution (*i.e.*, [REDACTED] reported in the application for WBE certification.

KTR offered no information about the original terms of the loan agreement between Timothy Royce and Kari Royce, or the original terms of the commercial loan that Ms. Royce obtained to refinance the cost of the truck and to repay Mr. Royce. Absent these and other details, Division staff reasonably determined that Kari Royce, as the woman owner of KTR, did not make the capital contribution identified in section 2.C of the application. Furthermore, KTR offered nothing to demonstrate any other contributions that Ms. Royce may have made to the business enterprise, such as property or expertise. Therefore, I conclude that the Division's determination to deny WBE certification to KTR because Ms. Royce did not make any contributions of capital, property, or expertise in proportion to her equity interest in the enterprise as required by 5 NYCRR 144.2(a)(1) is supported by substantial evidence.

II. Operation

The Division determined that KTR did not demonstrate that Kari Royce has managerial experience or technical competence, as well as the working knowledge and ability needed to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i) and (ii). The Division argued that compliance with these eligibility criteria requires the woman owner to engage in the critical revenue generating functions of the business enterprise.

Division staff noted that KTR consists of two employees (CD1Tr1 00:20:55, 00:21:43), and asserted that identifying the relevant critical revenue generating functions depends on the size of the business enterprise (CD1Tr1 00:23:19). According to Division staff, the critical revenue generating functions for a small trucking firm, such as KTR, are driving and operating the truck (CD1 00:21:11, 00:21:43). On the one hand, Ms. Royce's résumé (*see* WBE Exh. 5) does not include any training or prior experience with respect to operating or maintaining vehicles (CD1 00:19:23, 00:22:35). On the other hand, John Royce's Class A commercial driver license (*see* WBE Exh. 6) authorizes him to drive and operate KTR's truck (CD1 00:17:28, 00:21:11). Because Ms. Royce is not engaged in the critical revenue generating functions of KTR concerning the driving and operation of the truck, Division staff concluded that KTR does not comply with the eligibility criteria at 5 NYCRR 144.2(b)(1)(ii) and (iii).

KTR contended that driving and operating the truck are not the only critical functions of the business enterprise (CD2 00:10:25). To support this contention KTR noted that Ms. Royce's résumé shows that prior to establishing KTR, she worked as an Instructor Coordinator for the National Safety Council in Syracuse, New York (*see* WBE Exh. 5). While working for the

National Safety Council, Ms. Royce testified that she became familiar with federal safety requirements, many of which apply to the trucking industry (CD2 00:31:09). In addition, the testimony of KTR's witnesses established that Ms. Royce repairs and maintains KTR's trucks, and engages in other duties related to the business enterprise such as promoting KTR's services and developing business contacts, interacting with contractors about the details associated with hauling jobs, preparing truck papers, and representing KTR during the annual workers' compensation audit with the New York State Insurance Fund (*see* WBE Exhs. 14, 16, and 17; CD1 00:32:51, 00:34:04, 00:34:28, CD2 00:08:44, 00:11:19, 00:12:17, 00:16:29). Except for driving the truck, Ms. Royce is responsible for all other operations at KTR (CD1 00:33:41, CD2 00:15:49, 00:16:29).

However, Ms. Royce's résumé, does not identify these additional duties and responsibilities, and KTR did not otherwise provide information about Ms. Royce's many additional duties and responsibilities in the application materials. Consequently, the documentation supporting Ms. Royce's additional experiences was not before Division staff when the Division issued the February 18, 2016 determination. Therefore, the Division's determination to deny WBE certification because KTR did not demonstrate that Ms. Royce has managerial experience or technical competence, as well as the working knowledge and ability needed to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i) and (ii), is supported by substantial evidence.

As an additional basis for the denial, the Division contended that Ms. Royce did not demonstrate that she makes decisions pertaining to operations of the enterprise, or devotes time on an ongoing basis to the daily operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1) and 144.2(b)(1)(iii), respectively. The Division proffered no evidence to show that Ms. Royce failed to demonstrate that she makes decisions pertaining to operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). Rather, the Division's presentation at the hearing focused on the claim that Ms. Royce does not devote time on an ongoing basis to the daily operation of the business enterprise as required by 5 NYCRR 144.2(b)(1)(iii) (CD1Tr1 00:19:11, 00:23:54, 00:26:09).

According to KTR's response for information (*see* WBE Exh. 1 at 11 [Response 6]), Ms. Royce dedicates 15 to 20 hours per week to KTR's operations (CD1 00:23:54). Division staff determined that KTR does not meet the eligibility criterion at 5 NYCRR 144.2(b)(1)(iii) because Ms. Royce does not work full-time at the business enterprise (CD1 00:19:23, 00:26:09).

On behalf of KTR, Ms. Royce's response also states, in pertinent part, that:

[a]s an owner I am on call all day, every day should a problem develop with my truck or driver, such as a flat tire or failed hose/belt. In addition I visit the job sites weekly to ensure my high standard of service (*see* WBE Exh. 1 at 11 [Response 6]; *see also* CD1 00:32:26).

This response in the application materials demonstrates that Ms. Royce is available whenever KTR's truck is dispatched, and that Ms. Royce follows up with site visits. The time that Ms. Royce contributes to KTR results in full-time work for the truck driver (*see* WBE Exh.

11). Accordingly, I conclude that Ms. Royce devotes time on an ongoing basis to the daily operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1)(iii).

The above referenced response was before Division staff when the Division issued the February 18, 2016 determination. Therefore, based on the record of this appeal, I conclude that the Division's determination that KTR does not comply with the eligibility criteria at 5 NYCRR 144.2(b)(1)(iii), is not based on substantial evidence. Accordingly, this basis for denial should be reversed.

CONCLUSIONS

1. With respect to the ownership criterion at 5 NYCRR 144.2(a)(1), KTR did not meet its burden to show that the Division's February 18, 2016 determination to deny the application for WBE certification is not based on substantial evidence.
2. With respect to the operation criteria at 5 NYCRR 144.2(b)(1)(i) and (ii), KTR did not meet its burden to show that the Division's February 18, 2016 determination to deny the application for WBE certification is not based on substantial evidence.
3. The Division did not support its claim that Ms. Royce failed to demonstrate that she makes decisions pertaining to operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).
4. With respect to the operation criterion at 5 NYCRR 144.2(b)(1)(iii), KTR did meet its burden to show that the Division's February 18, 2016 determination to deny the application for WBE certification is not based on substantial evidence.

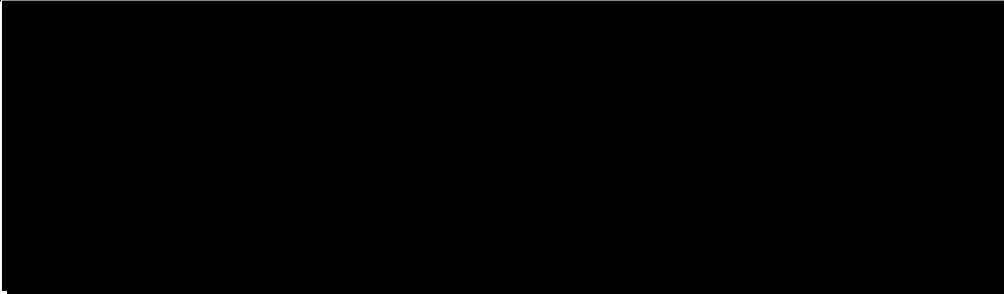
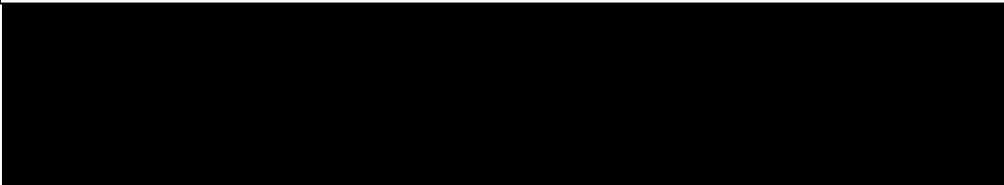
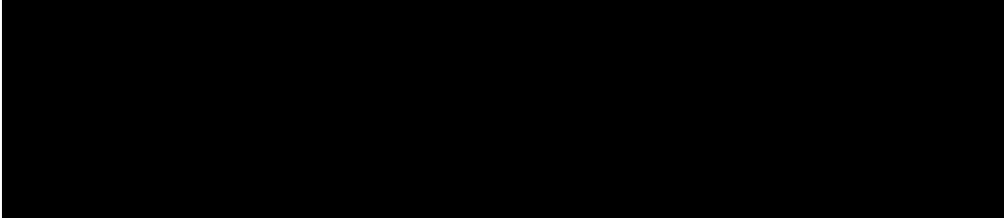
RECOMMENDATION

The Division's determination to deny KTR's application for certification as a woman-owned business enterprise should be modified and, as so modified, affirmed for the reasons set forth above.

Attachment: Exhibit List

Division of Minority and Women's Business Development

Exhibit Chart
Matter of KTR Trucking, LLC
 WBE File No. 59790
 Hearing Date: August 30, 2016

WBE Exhibit No.	Description
1	Certification Application filed by KTR Trucking, LLC Application No.: 6975868 Submitted: May 4, 2015
2	Division's denial letter dated February 18, 2016
3	
4	
5	Résumé of Kari Royce
6	Copies of New York State Commercial Driver License John D. Royce, Jr. Timothy S Royce
7	
8	

9	
10	<p>KeyBank KTR Trucking, LLC Business MasterCard Statement July 11, 2016 – August 10, 2016</p> <p>KeyBank KTR Trucking, LLC Business Banking Statement July 31, 2016</p>
11	<p>Time Card for John D. Royce Week of August 15, 2016</p> <p>Driver's Vehicle Inspection Report August 15-17, 2016</p>
12	<p>Invoice dated August 20, 2016 From KTR Trucking, LLC to Ballard Construction, Inc. Load Tickets for August 8-11, 2016</p>
13	<p>Load Tickets and Account Payable Forms Lehigh Hanson, Inc.</p>
14	<p>Hanson Aggregates Memo Truckers Agreement/Insurance Requirements "Truck Papers"</p>
15	<p>Various Payments Barrett Paving Materials, Inc. Ballard Construction, Inc.</p>
16	<p>An example of correspondence from a contractor with attached truck order</p>
17	<p>New York State Insurance Fund Audit May 24, 2016 Review of Workers' Compensation Policy</p>
18	<p>Reference letter from Hanson Aggregates New York, LLC</p>

19	Federal Motor Carrier Safety Administration Department of Transportation Physical Exams Driver Certification
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Ruling: WBE Exhibits 1 through 19, inclusive, are received into evidence (CD2 00:24:15).