

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

In the Matter

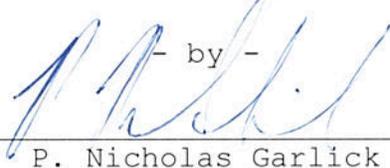
- of -

the Application of
Spur Line Construction Corp.
For Certification as a
Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59952

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
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 the application of Spur Line Construction Corp. ("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 Spur Line Construction Corp. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Spur Line Construction Corp.'s application was received on June 8, 2015 (Exh. DED1).

The application was denied by letter dated April 12, 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 Eileen Osborn's ownership and operation of the applicant (Exh. DED4).

By letter dated April 27, 2016, Eileen Osborn appealed from the Division's denial determination.

By letter dated June 1, 2016, the Division notified Ms. Osborn that her written appeal should be submitted on or before July 7, 2016.

By letter dated June 28, 2016, Eileen Osborn submitted a written appeal which consisted of a five page letter.

In a five page memorandum dated September 1, 2016, the Division responded. Attached to the response were six exhibits, listed on the attached exhibit chart as DED1-DED6.

On September 6, 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 two separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner Eileen Osborn'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, Eileen Osborn, 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).

Position of the Applicant

Spur Line Construction Corp. 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. Spur Line Construction Corp. is in the business of powerline construction, high voltage overhead and underground line construction, high voltage testing, and pole setting (Exh. DED1 at 3). It has a mailing address of 11171 Alley Road, Alden, New York (Exh. DED1 at 1).

2. Spur Line Construction Corp. was established on August 28, 2013 and Eileen Osborn serves as its president, secretary and treasurer; she also owns 51% of its stock. Her husband, Ronald Osborn, serves as the company's vice-president and owns 49% of the company's stock. (Exh. DED1 at 2-3.)

3. Ms. Osborn purchased her share of the company for \$51 and her husband paid \$49 (Exh. DED1 at 3). In addition to this cash contribution, the Osborns also contributed property and equipment that was jointly owned and valued at [REDACTED] (Exh. DED1 at 3). The application also states that Ms. Osborn contributed \$80,000 in management expertise and her husband contributed \$500,000 in electrical expertise (Exh. DED1 at 3).

4. Mr. Osborn's resume indicates that at the time of the application, he was employed by National Grid as a Line Mechanic and has held this position since 2007. Prior to that he worked in the electrical industry in various capacities, including Director of Sales and Marketing, Electrical and Project Manager, Power Line Foreman, as well as the vice-president and owner of a construction firm dating back to 1995. In addition, Mr. Osborn has training in electrical engineering from Canton University and Erie County Community College. He also possesses a National

Grid certification, a climbing certification, and an overhead line worker certification. Also listed on his resume is training related to: reading blue prints, Occupational Safety and Health Administration (OSHA) requirements, the national electric code, management, systems control and programming, Mine Safety and Health Administration (MSHA) requirements, hazardous waste operations and handling, and drug and alcohol awareness. He also hold a Class A commercial driver's license. (Exh. DED2.)

5. Ms. Osborn's resume shows that except for employment with Spur Line Construction Corp. since 2013, all her work experience is as a teacher and education administrator (Exh. DED3).

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 Ms. Osborn's ownership and operation of Spur Line Construction Corp. Each basis is discussed individually, below.

Ownership

The ownership ground for denial was that the applicant failed to demonstrate that the woman owner Eileen Osborn'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. Osborn explains that when the company was started, she and her husband jointly contributed property and equipment valued at [REDACTED]. She states that since the application was submitted, she has provided additional contributions to the firm, but no amounts are referenced or proof provided. She claims that her work as an educator has provided her the ability to successfully run the firm and oversee its field operations. These skills include: her organizational and reference skills; her commitment to personal development; her office skills; her travel experience as an

educator; and her interviewing skills. These skills and her various roles at the company, justify her 51% ownership in the company.

In its response, the Division argues that the application materials did not demonstrate that Ms. Osborn made any contribution to the company. The application identifies three contributions to the firm at its inception: property and equipment that was jointly owned by Mr. and Ms. Osborn valued at [REDACTED]; \$80,000 in management expertise contributed by Ms. Osborn; and \$500,000 in electrical expertise contributed by Mr. Osborn (Exh. DED1 at 3). The Division points out that other information provided by the applicant which states that [REDACTED] worth of equipment was contributed to the firm (Exh. DED5), is inconsistent with the information provided in the application. When DED staff requested clarification of the apparent discrepancy (Exh. DED1 at 10), the applicant supplied a series of documents (Exh. DED6). These documents include: bank statements, cancelled checks, photographs of equipment, and a summary of transactions. After its review, the Division concluded that these documents inferred that the contributions referenced were joint contributions from both Mr. and Ms. Osborn, and provided no proof of her individual contribution. The Division concludes that based on the information before it when it made its denial determination (Exhs. DED1, DED5, & DED6), discussed above, that the decision was based on substantial evidence. The documents were not consistent with each other, no justification of the contributions of expertise was provided, and all contributions appeared to be jointly made.

Based on the information in the record and the discussion above, specifically the lack of any proof of a capital contribution made by Ms. Osborn separate and apart from the joint contributions and the lack of any quantification of the value of her expertise, the applicant failed to demonstrate that the woman owner Eileen Osborn'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).

Operation

In its denial letter, the Division found that the applicant failed to demonstrate that the woman owner, Eileen Osborn, 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).

On the appeal, Ms. Osborn states the company has grown due to her efforts and in the future she will personally pursue courses and apprenticing related to the actual electrical construction aspects of her company. She acknowledges that she does not have a business background or training in business, but that she is a driven person with the desire and skill to make her company a success. She continues that she recently completed a course in business basics that covered topics including: legal/risk management, estimating, bidding and procurement, bonding and insurance, accounting and cost projecting, scheduling, project management, sales and marketing, and human resources. She is also developing a network of contacts in the construction industry and is a member of several trade organizations. She also reports that she has begun working with the Small Business Development Center at Buffalo State College to increase her skills. She also states that she is developing a website, assessing the company's bonding and insurance needs. This information demonstrates, she concludes, that she has the technical competence, working knowledge and abilities to operate the business.

In its response, the Division states that Mr. Osborn possesses the training, certifications, licenses, and prior managerial experience central to the operation of the firm while Ms. Osborn does not. Because Ms. Osborn cannot meaningfully evaluate the work of her husband or the company's employees, she does not operate it for WBE certification purposes. Attached to the Division's response are the resumes of both Mr. and Ms. Osborn (Exhs. DED2 & DED3). Mr. Osborn's resume indicates that at the time of the application he was employed by National Grid as a line mechanic and has held this position since 2007. Prior to that he worked in the electrical industry in various capacities, including Director of Sales and Marketing, Electrical and Project Manager, Power Line Foreman, as well as

the vice-president and owner of a construction firm dating back to 1995. In addition, Mr. Osborn has training in electrical engineering from Canton University and Erie County Community College. He also possesses a National Grid certification, a climbing certification, and an overhead line worker certification. Also listed on his resume is training related to: reading blue prints, Occupational Safety and Health Administration (OSHA) requirements, the national electric code, management, systems control and programing, Mine Safety and Health Administration (MSHA) requirements, hazardous waste operations and handling, and drug and alcohol awareness. He also hold a Class A commercial driver's license. (Exh. DED2.) Ms. Osborn's resume shows that except for employment with Spur Line Construction Corp. since 2013, all her work experience is as a teacher and education administrator (Exh. DED3). The Division concludes that Ms. Osborn's lack of training, credentials, and experience relevant to electrical contracting was substantial evidence upon which to base its denial.

Based on the evidence in the record and the discussion above, including the fact that Mr. Osborn has the technical skills and experience to operate the revenue generating core functions of the firm while Ms. Osborn does not, the applicant has failed to demonstrate that the woman owner, Eileen Osborn, 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). The Division's denial determination on this ground was based on substantial evidence.

CONCLUSIONS

1. The applicant failed to demonstrate that the woman owner Eileen Osborn'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, Eileen Osborn, 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).

RECOMMENDATION

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

**Matter of
Spur Line Construction Corp.**

**DED File ID No. 59952
Exhibit List**

| Exh. # | Description | # of pages |
|---------------|---------------------------------|-------------------|
| DED1 | Application | 11 |
| DED2 | Resume of Ronald Osborn | 2 |
| DED3 | Resume of Alicia L. Osborn | 4 |
| DED4 | Denial letter | 3 |
| DED5 | Capital contribution attachment | 1 |
| DED6 | Response to document request | 16 |