

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MELBOURNE SAND TRANSPORT COMPANY,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 91-4787
)	
DEPARTMENT OF TRANSPORTATION,)	
)	
Respondent.)	
_____)	

RCOMMENDED ORDER

Pursuant to notice, a final hearing in the above-styled matter was held on September 19, 1991, in Melbourne, Florida, before Joyous D. Parrish, a designated Hearing Officer of the Division of Administrative Hearings. The parties were represented at the hearing as follows:

APPEARANCES

For Petitioner: Vincent G. Torpy, Jr.
FRESE, FALLACE, NASH & TORPY, P.A.
930 South Harbor City Boulevard, No. 505
Melbourne, Florida 32901

For Respondent: Pamela A. Arthur
Assistant General Counsel
Pamela S. Leslie
Deputy General Counsel
Department of Transportation
605 Suwannee Street, Mail Station 58
Tallahassee, Florida 32399-0458

STATEMENT OF THE ISSUES

The central issue in this case is whether Petitioner is entitled to be certified as a disadvantaged business enterprise pursuant to Rule 14-78.005, Florida Administrative Code.

PRELIMINARY STATEMENT

This case began on July 3, 1991, when the Department of Transportation (Department) notified the Petitioner that its application for certification as a disadvantaged business enterprise was denied. The basis for the denial was stated to be Rule 14-78.005, Florida Administrative Code, which requires that ownership and control of the applicant be exercised by socially and economically disadvantaged individuals. On July 18, 1991, the Petitioner timely filed a request for an administrative hearing on the denial and the matter was forwarded to the Division of Administrative Hearings for formal proceedings on July 30, 1991.

At the hearing, the Petitioner presented the testimony of the following witnesses: Jane Waelti, Eloise Waelti, and Rick Waelti. Petitioner's exhibits numbered 1 and 2 were received into evidence. Juanita Moore and Thomas S. Kayser testified on behalf of the Department and its exhibits numbered 1 through 10 were admitted into evidence. The Department also filed the deposition testimony of Jane Waelti, Eloise Waelti, and Rick Waelti to be considered as a part of this record.

After the hearing, the parties were granted ten days leave from the filing of the transcript within which to file proposed recommended orders. The transcript of the proceedings was filed with the Division of Administrative Hearings on October 3, 1991. Subsequently, the Department filed a motion for time extension to file proposed findings of fact and conclusions of law to which the Petitioner agreed.

By order entered October 8, 1991, the parties were given until October 28, 1991, to file their proposed recommended orders. Those proposals have been considered in the preparation of this order. Specific rulings on the proposed findings of fact are included in the attached appendix.

FINDINGS OF FACT

Based upon the testimony of the witnesses and the documentary evidence received at the hearing, the following findings of fact are made:

1. Jane, Rick and Eloise Waelti are the owners of all stock issued by Melbourne Sand Transport Company, Inc., the Petitioner in this case.

2. Petitioner is, therefore, a private, family-owned entity and is one of four affiliated companies owned and managed by the Waelti family.

3. Together, Jane and Eloise Waelti own 59 percent of the Petitioner's stock. Consequently, a majority of the Petitioner's stock is owned by women, a category of socially and economically disadvantaged individuals as described in Rule 14-78.002, Florida Administrative Code. Rick and Eloise Waelti, brother and sister, each own 41 percent of the Petitioner's stock. Jane, their mother, currently owns 18 percent of the stock.

4. In 1962, Jane and Melvin Waelti moved their family to Brevard County, Florida and purchased Melbourne Sand Company. Over the years that enterprise grew and evolved into four related companies, all involved in the business of selling sand and aggregate, and the short and long range hauling of it. The companies are: Melbourne Sand Company, Inc. responsible for marketing and management; Melbourne Sand Transport Company, Inc. responsible for long range trucking; Melbourne Sand Supply Company responsible for short range trucking; and Melbourne Sand Mining Company, the entity that owns the physical plant and buildings from which all Waelti operations are run.

5. After her husband Melvin's death in 1978, Jane Waelti became the majority stockholder in all Waelti family businesses. Jane Waelti has worked full and part-time in the businesses since 1965.

6. Rick Waelti became president of Melbourne Sand Company at his father's death. Rick took charge of the operations side of the family businesses while Jane continued to handle office matters including personnel functions. Also at that time, Eloise Waelti was recruited to work in the businesses because of her

prior banking experience. To that end, Eloise took over the fiscal responsibilities for the family businesses.

7. Currently, responsibilities related to the day-to-day operations of the Petitioner have been delegated to nonowner employees of the company. For example, Petitioner employs a dispatcher who is responsible for assuring vehicles are dispatched to job locations as may be required. That individual also interviews and hires drivers for the company's trucks.

8. Similarly, another nonowner employee solicits work for the company and prepares bids for submission on jobs. That employee also coordinates projects with the dispatcher so that jobs are completed in a timely manner.

9. Rick, Eloise, and Jane Waelti are in the office to assure that all others are performing their respective jobs appropriately. Rick verifies the operations are being conducted correctly; Eloise serves as comptroller verifying funds are available for projects, acquisitions, or repairs; and Jane coordinates personnel and insurance concerns.

10. Thus, decisions regarding problems affecting the Petitioner are dealt with by the Waeltis as a committee. They meet on an almost daily basis to resolve any policy or business decision collectively. For example, if a repair is needed in order to get a vehicle back in service, the trio will meet to decide the pros and cons of having the vehicle repaired.

11. In 1990, the Petitioner applied for and received a Small Business Administration Loan in the amount of \$800,000. To qualify for the loan, Jane Waelti pledged land valued at \$1.6 million. Rick and Eloise also signed personally to guarantee the loan but did not provide collateral. This loan allowed the Petitioner to remain solvent and to keep control of its fleet of trucks.

12. In 1991, Rick resigned as president of Petitioner and Eloise was selected to succeed him. Jane is tapering off her hours and responsibilities with the company as she is eligible for Social Security benefits which she wants to begin drawing.

13. During 1990, Rick was state president of the Jaycees and was unavailable to supervise work for the Petitioner. During that time, Petitioner conducted business without hardship. Petitioner's nonowner employees, who Rick trained, have taken over many responsibilities for the company.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings.

15. Pursuant to law, the Department administers a program to certify applicants as disadvantaged business enterprises (DBEs). DBEs are given a competitive advantage since they become eligible to participate in programs set aside for DBE contract goals.

16. Because federal funding is involved in DBE projects, the Department must assure that federal standards are met when certifying DBEs.

17. An applicant for DBE certification bears the burden of establishing it is entitled to such certification.

18. Chapter 14-78, Florida Administrative Code, provides, in pertinent part:

14-78.002 Definitions. Throughout this rule chapter, the following words and phrases shall have the respective meanings set forth below unless a different meaning is plainly required by the context:

(1) "Socially and Economically Disadvantaged Individuals" means those individuals:

(a) Who are citizens of the United States or lawfully admitted permanent residents and who are women. . . Individuals in the following groups are presumed to be socially and economically disadvantaged; provided, however, this presumption is rebuttable:

* * *

5. Women.

* * *

(3) "Disadvantaged Business Enterprise" or "DBE" means a small business concern:

(a) Which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, . . . and

(b) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

14-78.005 Standards for Certification of DBEs.

(1) To ensure that this rule chapter benefits only small business concerns which are at least 51 percent owned and controlled in both form and substance by one or more socially and economically disadvantaged individuals, the Department shall certify firms who wish to participate as DBEs under this rule chapter.

* * *

(7) A firm seeking certification and recertification as a DBE shall meet the following standards. A firm which does not fulfill all the Department's criteria for certification shall not be considered a Disadvantaged Business Enterprise.

* * *

1. The ownership and control exercised by socially and economically disadvantaged individuals shall be real, substantial, and continuing, and shall go beyond mere pro forma ownership of the firm, as reflected in its ownership documents.

* * *

(e) To be certified under this rule chapter, the DBE shall be one in which the socially and economically disadvantaged owner shall also possess the power to direct or cause the

direction of the management, policies, and operations of the firm and to make day-to-day as well as major business decisions concerning the firm's management, policy, and operation.

* * *

2. In assessing the power of the minority owner to direct or cause the direction of the firm, the Department will look past stock ownership and consider the minority applicant's ownership interest, knowledge of the particular business, background, involvement in the business on a day-to-day basis, expertise, involvement by the non-minority owners, employees or non-employees, other full or part-time employment by the minority applicant and the size of the applicant's business.

3. In further determining whether the socially and economically disadvantaged owners also possess the power to direct or cause the direction of the management, policies and operations of the firm and have the requisite decision-making authority, the Department may look to the control lodged in the owners who are not socially and economically disadvantaged individuals. If the owners who are not socially and economically disadvantaged individuals are disproportionately or primarily responsible for the operation of the enterprise or if there exists any requirement which prevents the socially and economically disadvantaged owners from making business decisions without concurrence of any owner or employee who is not a socially and economically disadvantaged individual, then the enterprise, for purposes of this rule chapter, is not controlled by socially and economically disadvantaged individuals and shall not be considered a DBE within the meaning of this rule chapter.

19. In this case, the issue is whether the socially and economically disadvantaged owners, Jane and Eloise Waelti, possess the requisite control dictated by the rule. Clearly, as majority stockholders they have the ability to control, by voting their shares together, the operations of the Petitioner's business. However, the rule also speaks to whether the owners possess the operational expertise to manage the business. In this case, the record establishes that the Waeltis collectively make decisions regarding the business, that Rick is instrumental in the training of key employees to whom responsibility has been delegated and that he is responsible for assuring such individuals perform as directed, that Jane and Eloise have little experience in the bidding or soliciting for jobs, and that Jane and Eloise are primarily responsible for office activities. Accordingly, Petitioner has failed to establish that the socially and economically disadvantaged owners have the knowledge, training or experience to direct the overall operations of the Petitioner without assistance from the owner who is not socially and economically disadvantaged.

RECOMMENDATION

Based on the foregoing, it is

RECOMMENDED:

That the Department of Transportation enter a final order denying the DBE certification requested by the Petitioner.

DONE and ENTERED this 31st day of October, 1991, in Tallahassee, Leon County, Florida.

JOYOUS D. PARRISH
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32301
(904)488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of October, 1991.

APPENDIX TO CASE NO. 91-4787

RULINGS ON THE PROPOSED FINDINGS OF FACT SUBMITTED BY THE PETITIONER:

1. Paragraphs 1 through 6 are accepted.
2. To the extent that paragraph 7 states that Jane owned the majority of stock and, therefore, could "out vote" her children, paragraph 7 is accepted; otherwise, rejected as contrary to the weight of the evidence since it is clear Rick had the expertise necessary to keep his mother's business running smoothly.
3. Paragraphs 8 and 9 are accepted.

RULINGS ON THE PROPOSED FINDINGS OF FACT SUBMITTED BY THE RESPONDENT:

1. Paragraphs 1 through 16 are accepted.
2. Paragraph 17 is rejected as contrary to the weight of the evidence.
3. Paragraphs 18 through 24 are accepted.
4. Paragraph 25 is rejected as irrelevant.
5. Paragraph 26 is accepted to the extent it finds Eloise has little expertise or experience in the operational areas of the Petitioner; otherwise rejected as argument.
6. Paragraphs 27 through 29 are accepted.
7. Paragraph 30 is accepted to the extent that it finds Rick has the operational expertise for the Petitioner; otherwise rejected as argument.
8. Paragraphs 31 and 32 are accepted.
9. Paragraph 33 is rejected as contrary to the weight of the evidence; however, such areas are critical but so are others-one would not operate without the other.
10. Paragraphs 34 through 39 are accepted.
11. Paragraph 40 is accepted but is irrelevant.

12. Paragraph 41 is rejected as not supported by the weight of the evidence or argument.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.