

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MATHEWS CONSULTING, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 98-4073
	)	
SOUTH FLORIDA WATER	)	
MANAGEMENT DISTRICT,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 7 and 8, 1998, at West Palm Beach, Florida, before Susan B. Kirkland, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Carla L. Brown, Esquire  
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For Respondent: Ronald M. Gunzburger, Esquire  
Eckert, Seamans, Cherin & Mellott, L.C.  
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Glenn M. Miller, Esquire  
South Florida Water Management District  
3301 Gun Club Road  
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STATEMENT OF THE ISSUES

Whether Petitioner is eligible for certification as a Minority/Woman Business Enterprise pursuant to Chapter 40E-7,

Part VI, Florida Administrative Code.

PRELIMINARY STATEMENT

On June 4, 1998, Petitioner, Mathews Consulting, Inc. (MCI), applied to Respondent, South Florida Water Management District (District), for certification as a Minority/Woman Business Enterprise (M/WBE). By letter dated June 10, 1998, the District denied MCI's application on the grounds that MCI did not qualify as a M/WBE pursuant to Rules 40E-7.653(2), 40E-7.653(4)(a), and 40E-7.653(4)(b), Florida Administrative Code.<sup>1</sup> MCI requested an administrative hearing. The case was forwarded to the Division of Administrative Hearings for assignment to an administrative law judge.

At the final hearing, Petitioner testified on her own behalf and presented the testimony of Michael Gordon, Paula Campbell, Carolyn Williams, and David Mathews. Petitioner's Exhibits 1-7 and 9-14 were admitted in evidence. Petitioner's Exhibit 8 was not admitted in evidence. Joint Exhibit 1 was admitted in evidence. The parties stipulated to the facts contained in paragraphs E1-E16 of the Joint Prehearing Stipulation. Respondent called Candice Boyer as its witness. Respondent presented no exhibits.

The parties agreed to file their proposed recommended orders within ten days of the filing of the transcript, which was filed on January 21, 1999. The parties' Proposed Recommended Orders were filed on February 1, 1999, and have been considered by the undersigned Administrative Law Judge in rendering this

Recommended Order.

FINDINGS OF FACT

1. Petitioner, Mathews Consulting, Inc. (MCI), is a Florida corporation, incorporated on January 28, 1998, by Rene L. Mathews, a female, and David L. Mathews, a white male. Rene and David Mathews are and were married at the time MCI was incorporated.

2. Ms. Mathews owns 55 percent of the stock of MCI, and Mr. Mathews owns the remaining 45 percent of the stock.

3. Ms. Mathews is the President and Treasurer of MCI, and Mr. Mathews is the Vice President and Secretary.

4. Ms. Mathews has a bachelor of science degree in civil engineering and has been a professional engineer licensed with the State of Florida since 1995. Her primary engineering practice areas are water and waste water treatment, industrial pretreatment, civil engineering, regulatory compliance, odor control/air quality assurance, and construction management. Prior to becoming employed full time with MCI, Ms. Mathews was employed for 8 years as a civil engineer with Hazen and Sawyer.

5. Mr. Mathews is a professional engineer employed full time by Hazen and Sawyer. He specializes mainly in underground pipeline work and landfills.

6. MCI has a board of directors consisting of two people: Rene and David Mathews.

7. The ByLaws of MCI provide at Article Three, Section 3:

Except as provided in the Articles of  
Incorporation and by law, all corporate

powers shall be exercised by or under the authority of, and the business and affairs of the Corporation shall be managed under the direction of, its Board of Directors.

8. MCI is in the business of providing engineering consulting services in the areas of water and waste water treatment, industrial pretreatment, civil engineering, regulatory compliance, odor control/air quality assurance, and construction management.

9. MCI obtained a \$30,000 loan and a \$20,000 line of credit from Barnett Bank (collectively referred to hereafter as the Loan) to be used as start-up capital for MCI. The Loan was evidenced by a promissory note and guaranteed by a security agreement. The bank required both Rene Mathews and David Mathews to individually guarantee the Loan jointly and severally because they were the owners and officers of the corporation.

10. David Mathews is an authorized signatory on MCI's bank account. Mr. Mathews is not authorized on the company credit card or ATM card and has not signed any checks for the company.

11. MCI submitted an application dated June 4, 1998, to Respondent, South Florida Water Management District (District), for certification as a Minority/Woman Business Enterprise (M/WBE).

12. By letter dated June 10, 1998, the District denied MCI's application, stating the following reasons:

a. Documents do not support real and substantial ownership by the minority or woman applicant(s). Rule 40E-7.653(2)

b. Documents do not support that the day-to-day operations are controlled by the minority/woman, nor is there evidence that the minority possess (sic) the authority to direct the management and policy of the business. Rule 40E-7.653.4(4)(a)

c. The composition of the Board of Directors, regardless of percentage of ownership, is not made-up of a majority of minority/woman directors.

If the applicant business is a corporation and the business and affairs of the corporation are managed under the direction of a board of directors as provided in the Articles of Incorporation or ByLaws of the corporation or Section 607.0824, Florida Statute, a majority of the directors must be minority/woman, notwithstanding whether the directors are required to be elected by a majority vote of the outstanding shares of the corporation. Rule 40E-7.653.4(4)(b)

13. The June 10, 1998, letter provided that if an applicant believes that it has been wrongly denied certification that the applicant may request an administrative hearing or do the following:

Submit any information or documentation which clarifies the documentation submitted with the original application and/or request the opportunity to meet with the Office of Supplier Diversity & Outreach within fifteen (15) calendar days of receipt of this notice. The District will only consider information that clarifies the documentation in your original application. Changes occurring after the submission of your original application (i.e., any changes in corporate structure) will not be accepted as clarifying documentation. This office, after its review of any clarifying information will notify the applicant business by certified mail of its final decision to either uphold or overturn its decision to deny the application for certification. If the denial decision is upheld, you may petition for an administrative hearing in accordance with Rule 40E-1.521, Florida Administrative Code. The Petition must be received by the District's Office of Counsel within fifteen (15) days of actual receipt of notice of decision to uphold the denial of



certification.

14. On June 15, 1998, after the District had denied MCI's application, Rene Mathews had a telephone conversation with Candice Boyer, a business operations analyst with the District. Ms. Boyer explained to Ms. Mathews the decision for denial was based on the composition of the board and David Mathews' guarantee of the Loan from Barnett Bank.

15. After the telephone conversation with Ms. Boyer, Rene Mathews contacted her lawyer, who is also her sister. Her attorney drew up a Shareholders Agreement which reflected an effective date of January 28, 1998, and a Guarantee and Indemnification Agreement which reflected an effective date of March 6, 1998. The two documents were not in existence either at the time MCI submitted its application to the District or at the time the District initially denied MCI's application for certification.

16. The minutes of the meeting to incorporate MCI on January 28, 1998, neither reflect nor reference the Shareholders Agreement or the Guarantee and Indemnification Agreement.

17. The Shareholders Agreement stated:

Rene and David desire to set forth in a written agreement the understanding and agreement they made at the time of incorporation of the Corporation as to the authority of Rene to exercise all corporate powers and direct the management of the business and affairs of the Corporations....

18. The agreement further provided:

Rene, as one of the Directors of the Corporation, shall have the sole authority to

exercise all corporate powers and direct the management of the business, policy and affairs of the Corporation. This authority includes, without limitation, the control of the day-to-day operations of the Corporation.

Any authority given to David as one of the Directors of the Corporation to exercise corporate powers and direct the management of the business and affairs of the Corporation, including without limitation, his voting power as a Director of the Corporation, has been transferred to Rene.

It is the intention of Rene and David that the Corporation be for all intents and purposes a Minority/Woman Business Enterprise, notwithstanding any authority, rights, or powers that may be given to David by virtue of the provisions of the ByLaws of the Corporation or the provisions of the Florida Business Organization Act F.S. Chapter 607.

It is understood and agreed that because this Agreement limits the discretion and powers of David as a Director, David is relieved of all liability for acts or omissions imposed by law on directors and all such liability is imposed on Rene.

This Agreement shall not restrict the ability of David to sign documents on behalf of the Corporation under the authority and direction of Rene, as she may so determine from time to time. . . .

19. The Guaranty and Indemnification Agreement stated that the agreement was "entered into as of this 6th day of March, 1998, by and between" Rene and David Mathews. The agreement dealt with their liability for the Loan from Barnett Bank and provided:

Rene and David agree that Rene shall be solely liable under the Guaranties for repayment for the Loan in the event of a default.

To the extent that any action is taken by Barnett Bank against David under the Guaranties, Rene shall indemnify David in any

threatened, pending, or completed action, suit, or proceeding against any expenses (including attorney's fees), judgments and amounts paid in settlement, actually or reasonably incurred by him in connection with such action, suit, or proceeding, including any appeal thereof. . . .

20. On June 19, 1998, Ms. Mathews submitted the Shareholder's Agreement and the Guaranty and Indemnification Agreement to the District. On July 31, 1998, Ms. Mathews and MCI's counsel met with representatives from the District to discuss the initial denial of MCI's application.

21. By letter dated August 4, 1998, the District advised MCI that the information submitted after the application did not support a reversal of the District's decision to deny the application. Although the District reviewed the additional information, the District deemed the Shareholders Agreement and the Guaranty and Indemnification Agreement to be new documentation rather than clarifying information originally submitted in the application. The changes which the documents reflect occurred after the application was submitted and the notice of intent to deny certification was issued.

22. Carolyn Williams, the Director of the Office of Supplier Diversity and Outreach at the District, explained the rationale for not allowing changes after a denial has been issued and why firms which have been denied remain ineligible to reapply for certification for one year after denial pursuant to Rule 40E-7.655, Florida Administrative Code. According to

Ms. Williams, to allow MCI to change its application and essentially restructure the firm would be inconsistent with the District's past practices and would violate the integrity of the program.

## CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.57(1), Florida Statutes.

24. MCI, as the applicant for certification, has the burden to establish by a preponderance of the evidence that it is entitled to be certified as a M/WBE. Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981) and Balino v. Department of Health and Rehabilitative Services, 362 So. 2d 21 (Fla. 1st DCA 1978).

25. Rule 40E-7.655(5), Florida Administrative Code, prohibits an applicant from submitting an application until one year after the date of the denial of the application either by notice of denial or final order denying certification. The District views this prohibition as a limitation on the applicant's ability to amend its application after it has been notified of the District's denial. An agency's interpretation of its own rules is accorded great deference and will not be overturned unless clearly erroneous. State Contracting v. Department of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1998). The District's interpretation of its rule has a rational basis and cannot be said to be clearly erroneous.

26. One of the bases that the District denied MCI's application was for failure to meet the requirements of Rules 40E-7.653(4)(a) and (b), Florida Administrative Code, which

provide:

(4) An applicant must establish that the minority/woman owner seeking certification be the license holder, qualifying agent, and/or the professional license holder and possess the authority to control and exercise dominant control over the management and daily operations of the business.

(a) The discretion of the minority/woman owners shall not be subject to any formal or informal restrictions (including, but not limited to, by-law provisions, purchase agreements, employment agreements, partnership agreements, trust agreements or voting rights, whether cumulative or otherwise), which would vary or usurp managerial discretion customary in the industry.

(b) If the applicant business is a corporation and the business and affairs of the corporation are managed under the direction of a board of directors as provided by the Articles of Incorporation or ByLaws of the corporation or Section 607.0824, F.S., a majority of the directors must be minority/woman owners, notwithstanding whether directors are required to be elected by a majority vote of the outstanding shares of the corporation

27. At the time that MCI submitted its application, MCI was managed by its board of directors, which consisted of David and Rene Mathews. The Shareholders Agreement was not in existence at the time MCI applied for certification and was not in existence when the District initially denied the application by letter dated June 10, 1998. Thus, based on its ByLaws, the MCI's Board of Directors managed the business and affairs of MCI, and the majority of the Board of Directors was not composed of women or minorities when the District initially denied the application.

This corporate structure is contrary to Rule 40E-7.653(4)(b), Florida Administrative Code. The June 10, 1998, letter clearly advised MCI that the District would not consider changes to the application such as changes in corporate structure. The execution of the Shareholder's Agreement was a change in the structure of the corporation in that it purported to change the ByLaws so that the management of the company would be by a single director; therefore, it was an impermissible attempt to amend the application after notification of denial.

28. Petitioner cites Young v. Department of Community Affairs, 625 So. 2d 831 (Fla. 1993) and McDonald v. Department of Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977) for the proposition that the administrative law judge should consider circumstances as they exist at the time of the final hearing and circumstances external to the application. Petitioner fails to realize that the key phrase is "external to the application." The court in McDonald at 584 stated:

The hearing officer's decision to permit evidence of circumstances as they existed at the time of the hearing was correct. The agency may appropriately control the number and frequency of amendments to licensing applications and may by rule prevent substantial amendments of the application in midproceeding. But the hearing officer or agency head conducting Section 120.57 proceedings should freely consider relevant evidence of changing economic circumstances and other current circumstances external to the application. Section 120.57 proceedings are intended to formulate final agency action, not to review action taken earlier or preliminarily.



29. The District has interpreted Rule 40E-7.655(5) to limit the time frames within which an applicant may amend its application; thus while the administrative law judge may consider circumstances that are external to the application, the administrative law judge may not allow amendments to the application.

30. The second reason for denial of the application was the failure of MCI to meet the criteria of 40E-7.653(2), Florida Administrative Code, which requires that the applicant must satisfy the criteria in subsection 3 of the same rule in order for the applicant to be considered 51 percent owned by minorities or women. Rule 40E-7.653(3)(c), Florida Administrative Code, provides:

The minority/woman owners must demonstrate that they share in all the risks assumed by the business firm. Such sharing of risks shall be demonstrated through the minority/woman owners primary role in decision-making, and negotiation and execution of related transaction documents either as individuals or as officers of the business. The minority/woman owners' sharing in business risks shall be commensurate with their percentage of ownership, including start-up costs and contributions, acquisition of additional ownership interests, third-party agreements, and bonding applications. Start-up contributions may be space, cash, equipment, real estate, inventory or services estimated at fair market value. All contributions of capital by the minority/woman owners must be real and substantial. The following are not presumed to be real and substantial contributions:

1. promises to contribute capital
2. notes payable to the applicant

business

3. notes payable to the non-minority/woman owners or the non-minority/women members family members of any owner; and

4. past services rendered by the minority/woman person as an employee, rather than as a decision-maker.

31. The District contends that because David Mathews agreed to guarantee the Loan from Barnett Bank that Rene Mathews did not share risk commensurate with her ownership. Rene also agreed to individually guarantee the Loan; thus, she has taken a risk that is substantially commensurate with her 55 percent ownership of the company. Her guarantee of the loan to MCI is real and substantial.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a Final Order be entered denying Mathews Consulting, Inc.'s application for certification as a M/WBE.

DONE AND ENTERED this 25th day of February, 1999, in Tallahassee, Leon County, Florida.

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SUSAN B. KIRKLAND  
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Filed with the Clerk of the

Division of Administrative Hearings  
this 25th day of February, 1999.

ENDNOTE

<sup>1/</sup> The District's M/WBE Contracting Rule, 40E-7, Part VI, Florida Administrative Code, became effective on October 1, 1996. In July 1998, the District amended the M/WBE Contracting Rule. In the amendment, the provisions cited in the June 10, 1998 denial to MCI were renumbered. Citations herein to the M/WBE Contracting Rule are pre-amendment.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.