

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

EVERGLADES SURVEYING JOINT )  
VENTURE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 02-1610  
 )  
SOUTH FLORIDA WATER )  
MANAGEMENT DISTRICT, )  
 )  
Respondent. )  
----- )

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on July 9, 2002, in West Palm Beach, Florida.

APPEARANCES

For Petitioner: Marlon A. Hill, Esquire  
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For Respondent: Catherine M. Linton, Esquire  
South Florida Water Management District  
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STATEMENT OF THE ISSUE

The issue is whether Petitioner's application for certification as a minority business enterprise should be approved.

PRELIMINARY STATEMENT

On March 26, 2002, Respondent, South Florida Water Management District, advised Petitioner, Everglades Surveying Joint Venture, that its application for certification as a minority business enterprise had been denied. Thereafter, Petitioner filed a Petition for Hearing Involving Disputed Issues of Material Fact. The matter was referred to the Division of Administrative Hearings on April 18, 2002, with a request that an Administrative Law Judge be assigned to conduct a hearing. On July 8, 2002, the case was transferred from Administrative Law Judge J. Lawrence Johnston to the undersigned.

By Notice of Hearing dated May 8, 2002, a final hearing was scheduled on July 9, 2002, in West Palm Beach, Florida. Respondent's Motion for Continuance of the final hearing was denied by Order dated June 17, 2002. On June 28, 2002, Respondent's Motion to Amend its Notice of Intent was granted.

At the final hearing, Petitioner presented the testimony of Ray J. Berryman, chief executive officer and manager of Berryman & Henigar, Inc., an engineering and surveying consulting firm, and Mark A. Stokes, a licensed surveyor and senior vice-president of Berryman & Henigar, Inc. Also, Petitioner offered Petitioner's Exhibits 1-18 and 20-23, which were received in evidence. Respondent presented the testimony

of Candice B. Boyer, staff business operations analyst. Also, it offered Respondent's Exhibits 1-29, which were received in evidence. Finally, the undersigned took official recognition of Part VI, Chapter 40E-7, Florida Administrative Code.

The Transcript of the hearing was filed on July 24, 2002. At the request of the parties, the time for filing proposed findings of fact and conclusions of law was extended to August 23, 2002. The same were timely filed by the parties, and they have been considered by the undersigned in the preparation of this Recommended Order.

#### FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

a. Background

1. In this licensing dispute, Respondent, South Florida Water Management District (District), has proposed to deny an application of Petitioner, Everglades Surveying Joint Venture (Everglades), for certification as a minority business enterprise (MBE) under the District's Supplier Diversity & Outreach Program (Program). If the application is approved, Petitioner would be listed on the District's contract solicitation and vendor lists as a minority contractor.

2. In its proposed agency action, as later amended, the District contends that the application should be denied

because: the minority owner fails to meet the criteria in Rule 40E-7.653(5) and (6), Florida Administrative Code; the documents provided by Petitioner "do not support that the day-to-day operations are controlled by the minority applicant, nor is there evidence that the minority applicant possesses the authority to direct the management and policy of the business"; the minority business does not meet the size standard of a small business as required by Section 288.703, Florida Statutes; and the minority owner does not possess the necessary license to qualify the firm in its area of specialty as required by Rule 40E-7.653(5), Florida Administrative Code. In simpler terms, the District has contended that Petitioner's application is deficient in the areas of "management and control, the size standards[,] and the licensure." Petitioner disputes these allegations and contends that it meets all criteria for certification. As to the remaining requirements for certification in Rule 40E-7.653(4), (7), (8), and (9), Florida Administrative Code, the parties have stipulated that all of these criteria have been satisfied.

b. The Minority Owner's Corporate Structure

3. Ray J. Berryman, an Asian-Pacific American, is the minority owner seeking certification. Mr. Berryman is a professional engineer who has been in the engineering and surveying business for almost forty years. After working with

other engineering firms for over a decade, in 1975 he started his own firm in California. At that time, the firm was known as Berryman & Stevenson, but its name was later changed to BSI Consultants, and then to Berryman & Henigar, Inc. The firm provides civil engineering and surveying services to public agencies on the West Coast.

4. In 1994, Mr. Berryman acquired a Florida corporation known as Henigar & Ray, Inc., which was engaged in the business of providing surveying and civil engineering services. Although the company initially operated under the name of Henigar & Ray, Inc., doing business as Berryman & Henigar, in 1998 Mr. Berryman changed its name to Berryman & Henigar, Inc. (BHI), the same name as the California corporation. Mr. Berryman serves as director, chief executive officer, and operating manager of BHI. The firm's headquarters are in Orlando, and it has branch offices in Jacksonville, Tallahassee, Tampa, Ocala, and West Palm Beach.

5. In March 1994, Mr. Berryman formed a Nevada holding company known as Berryman & Henigar Enterprises (BHE), in which he owns 77.5 percent of the stock and serves as chairman of the board and chief executive officer. BHE owns all of the stock in Berryman & Henigar, Inc. (the California corporation); Berryman & Henigar, Inc. (the Florida corporation); Employment Systems, Inc., a "staff easing

company" incorporated in California in 1992; BHE Technical Staffing, a Nevada corporation; and Therapy Network, a Nevada corporation. However, BHE Technical Staffing and Therapy Network are no longer in business. Consolidated financial statements are issued for all of the companies.

6. BHE was formed for the purpose of serving as a vehicle "to allow a relationship to exist" between the Florida and California corporations. After BHE was formed, Mr. Berryman changed the name of both the Florida and California firms (Henigar & Ray, Inc., and BSI Consultants, respectively) to Berryman & Henigar, Inc., one a Florida corporation, the other a California corporation, so that he could have "the strength, if you will, of both companies with a similar name." Except for a few administrative personnel, BHE has no other employees and it performs no professional services.

7. Besides being the owner of BHE and the wholly-owned subsidiaries named above, Mr. Berryman also is a majority owner of at least one affiliated company known as GovPartner, a California firm providing "e-Government solutions for cities, courts, and governmental agencies." Whether Mr. Berryman controls other affiliated companies was not disclosed at hearing.

c. Other MBE Certifications

8. In June 1996, or before the District had a rule on MBE certifications, Henigar & Ray, Inc., doing business as Berryman & Henigar, applied with the District for certification as a MBE to provide civil engineering, surveying, environmental sciences, and construction management services. The application was approved, and a one-year certification was issued. The District then changed from a one-year to a three-year certification, and after an application for recertification was filed in 1997, Henigar & Ray, Inc., was reissued a certification that expired in 2000. By then, the District had adopted a rule which required, among other things, that the minority owner have a professional license in all fields in which the certification was granted. Through what the District calls an "error" or oversight, it failed to note that Mr. Berryman did not hold a professional surveyor's license, and it erroneously continued to certify BHI in the area of surveying.

9. On August 26, 1999, the firm was given "graduated" status, which meant that it was no longer eligible for continued participation in the District's Program as a prime contractor due to the business having a net worth of more than \$3 million and/or an average net income of \$2 million after federal taxes for the preceding two years. However, the firm

could still be counted (as a subcontractor) towards a prime contractor's goal attainment. In November 2000, the firm, then known as BHI, again applied for recertification as a registered vendor. The application was approved on March 1, 2001, for another three-year period, this time in the areas of surveying, civil engineering, and construction management. Whether BHI is still in the graduated status is not known.

10. Besides holding MBE status with the District, BHI has been certified as a MBE with several local governments in Florida, including the City of Tampa, City of Orlando, Tampa Port Authority, and Orange County. Copies of BHI's applications filed with those governmental entities have been made a part of this record.

d. The Joint Venture

11. As an Asian-Pacific American, Mr. Berryman qualifies for minority status. Although not disclosed by the parties, but presumably because BHI has graduated status, and cannot serve as a prime contractor, or because its certification as a MBE in surveying may be taken away, Mr. Berryman desires to become a District MBE through another legal entity and provide surveying services as a prime contractor on the Comprehensive Everglades Restoration Project (CERP) now being undertaken by the District.



12. Before filing his application, Mr. Berryman considered three options: filing as a corporation, a partnership, or a joint venture. He chose a joint venture since it gives the entity "the ability to have control outside of a corporate board." According to Mr. Berryman, even though the joint venture is theoretically controlled by a control board, under the make-up of the venture established here, that board can only represent "what Berryman & Henigar, Inc. commands and requires it to represent." Mr. Berryman also desired to have other members in the joint venture who would "provide a unique geographical location for projects being performed by [CERP]," and thus enhance its "probability of obtaining work through the District as a minority."

13. To this end, Everglades was formed as a joint venture pursuant to a Joint Venture Agreement (Agreement) executed on October 12, 2001. So that Everglades would have a "formidable surveying company that would be able to win work," its members included BHI; GCY, Inc. (GCY), a Florida corporation providing surveying services; Jeffrey C. Cooner and Associates, Inc. (Cooner), a Florida corporation providing surveying services; and Southern Mapping Technology, Inc. (Southern Mapping), a Florida surveying corporation.

14. According to the Agreement, the ownership of the joint venture is as follows:

BHI - 51 percent  
GCY - 16.33 percent  
Cooner - 16.33 percent  
Southern Mapping - 16.33 percent

15. Mr. Berryman opted for BHI to have 51 percent ownership in the joint venture so that he would control the entity. At the same time, however, he desired to give the other participants as much ownership as possible without giving up control.

16. The Agreement establishes a Board of Control (Board) which has the responsibility and authority for the conduct and management of Everglades to approve and execute contracts, formulate and determine the policies of Everglades, approve consultants and subcontractor agreements, approve budgets and schedules, determine the allocation of work among members of Everglades, and decide all other matters necessary to its operations.

17. After the joint venture's formation, five individuals were appointed to the Board: Mark A. Stokes and Steve Sharpe, both BHI employees appointed by Mr. Berryman; George C. Young, Jr., of GCY; Jeffrey C. Cooner of Cooner; and James S. Richmond of Southern Mapping. All members of the Board are non-minorities. In response to the District's proposed denial of the application, in May or June 2002, or six or seven months after it was filed, Mr. Berryman assumed a

seat on the Board, replacing Mr. Sharpe.<sup>1</sup> However, because of a District policy that no amendments to an application will be considered after the application is filed, the District has not taken into account this change in the Board's membership. Petitioner has not challenged the use of that policy.

18. Paragraph 4.3 of the Agreement provides that the Board "shall reach decisions by simple majority vote of total votes cast. BHI shall cast 51 votes; GCY shall cast 16 votes; Cooner shall cast 16 votes; and Southern Mapping shall cast 16 votes." Thus, BHI has ultimate control over all of Everglades' decisions. At the same time, however, there is nothing in the Agreement which says that the Board must consult with Mr. Berryman, and obtain his approval, before a decision is taken.

e. Rule 40E-7.653(5) Criteria

19. Paragraph (5) of the rule requires, among other things, that the applicant establish that the minority owner "possess[es] the authority to control and exercise dominant control over the management and daily operations of the business." The District contends that Mr. Berryman does not exercise such control since he does not sit on the Board, Mr. Stokes and Mr. Sharpe, both non-minorities, are the individuals who actually cast votes on behalf of BHI, and

nothing in the Agreement requires Mr. Stokes and Mr. Sharpe to consult with Mr. Berryman before they make a decision.

20. In reality, Mr. Berryman has absolute control over all of the decisions made by Mr. Stokes, who occupies one of the two BHI seats on the Board. This was confirmed by Mr. Stokes at the hearing and was not contradicted. Even if Mr. Sharpe (who has been replaced by Mr. Berryman) were still on the Board, he would be subject to the same constraints. This is because Mr. Berryman has made it clear that he would quickly replace any BHI Board member who did not vote in accordance with his wishes. Since BHI (and Mr. Berryman) effectively controls the joint venture through 51 percent of the Board's voting power, it is found that the minority owner exercises dominant control over the management and daily operations of the joint venture, as contemplated by the rule.

f. Rule 40E-7.653(6) Criteria

21. Subparagraphs (6)(c) and (d) of the rule require that the applicant establish that "the net worth of the business concern, together with its affiliates, does not exceed five (5) million [dollars]," and that it "employs two-hundred (200) or fewer permanent, full-time employees," respectively. In determining the net worth, the same rule provides that the District shall "consider the most recent

federal tax returns or annual financial statements for the business."

22. After concerns were raised by the District over BHI's net worth and number of permanent employees, BHI filed a letter with the District on April 2, 2002, indicating that it had 118 full-time employees and a negative net worth of \$1,460,176.00. On June 6, 2002, its counsel also filed an affidavit by BHE's Controller, together with consolidated financial reports for the year ending March 29, 2002, reflecting a negative net worth of \$1,293,435 for BHE and all of its subsidiaries, including BHI. Counsel also provided an affidavit by the BHE Benefits Coordinator listing 96 full-time BHI employees as of May 17, 2002.

23. In separate documents submitted earlier by the other joint venture participants, the net worth and number of permanent, full-time employees of each of those participants were as follows: GCY - \$553,000.00 and 25 employees as of November 30, 2001; Cooner - \$300,000.00 and 8 employees as of December 31, 2001; and Southern Mapping - \$527,000.00 and 6 employees as of December 31, 2001. While the fiscal years of the participants are not identical, collectively these figures produce a total positive net worth of all Everglades members (including BHE, the parent of BHI) of \$86,565.00 and less than

200 full-time employees at or about the date the application was filed.

24. Despite this showing by Everglades that it met the net worth and size thresholds for a MBE, over the past two years BHI has made a number of filings with the District and other governmental entities which caused the District to doubt the veracity of the numbers submitted by Everglades and to ultimately deny the application.

25. For example, in its application for recertification filed with the District in November 2000, BHI reflected that it then had a positive net worth of \$1,013,790.00 and 305 full-time employees. In a Statement of Intent to Perform as a MBE Subcontractor dated October 23, 2001, BHI indicated that its net worth was \$1,012,979.00 and that it employed 102 permanent employees. Almost identical numbers were shown in other filings made with the District on November 1, 2001, April 18, 2002, May 24, 2002, and May 31, 2002. However, in a Statement of Intent to Perform as a MBE Subcontractor executed by a BHI corporate officer (Mr. Stokes) on June 18, 2002, and filed with the District, the net worth of BHI was shown as \$4,106,000.00 and the number of permanent, full-time employees was given as 350. Assuming these latter figures are accurate, Everglades would have a total net worth exceeding \$5 million

and more than 200 full-time, permanent employees, both of which exceed the thresholds permitted by the rule.

26. In addition, on April 3, 2000, BHI filed certification documents with Orange County reflecting that it had 305 full-time employees and a positive net worth of \$123,415.00. Identical figures were reflected in a filing made with the City of Tampa on April 3, 2002. In contrast, in a MBE certification filing made with the City of Orlando on May 20, 2002, which included net worth and number of employees for the latest three-year period, BHI represented that it had 97 employees in the years 2000, 2001, and 2002, and that its net worth for those years was a negative \$898,676.00, a negative \$1,376,645.00, and a negative \$1,586,216.00, respectively.

27. To add to the confusion, in an undated document filed with the City of Tampa, BHI indicated that it had 345 full-time employees and 35 part-time employees. However, in a June 12, 2002, filing with the Tampa Port Authority, BHI indicated that it had 116 full-time employees and a negative net worth of \$1,586,216.00.

28. Mr. Berryman conceded that the different filings were "embarrassing" and confusing, and he attributed them to mistakes by careless or untrained in-house personnel. As to the document reflecting a net worth of BHI in excess of \$4

million, it was established that a secretary erroneously filled out the document and Mr. Stokes hurriedly signed it without verifying the numbers. Mr. Berryman also maintained that the numbers submitted by BHI to the District in the April 2, 2002, letter, as supported by the financial reports and affidavits filed on June 6, 2002, are the most accurate reflection of its net worth and number of employees. This assertion is accepted since all of the filings over the years (except the one on June 18, 2002) have consistently indicated that the net worth of BHI is far less than the \$5 million threshold. Moreover, the more credible evidence supports a finding that the number of permanent, full-time employees of BHI and the other joint venture participants is less than 200. Based on these considerations, it is found that Everglades meets the net worth and employee thresholds prescribed by the rule.

g. Professional Licensure Requirement

29. Rule 40E-7.653(5), Florida Administrative Code, requires that the minority owner (Mr. Berryman) seeking certification "be the license holder, or the professional license holder" in the specialty for which certification is sought. Here, Everglades seeks to provide surveying services. The application filed with the District identified five BHI individuals who had professional surveying licenses which



authorized the work, all non-minorities. Mr. Berryman was not identified as being one of them.

30. The rule itself is clear and unambiguous and requires no interpretation. Since its adoption in late 1996, the District has consistently construed it to mean just what it says -- that in order for a minority owner to be certified, the owner must have a professional license in the area being certified. This interpretation of the rule was not shown to be unreasonable or clearly erroneous. Therefore, because Everglades intends to provide surveying services, Mr. Berryman, as the minority owner, must hold a surveyor's license under Chapter 472, Florida Statutes, in order to qualify as a MBE.

31. While it is true that Mr. Berryman is a registered professional engineer (under Chapter 471, Florida Statutes) in the State of Florida (as well as 3 other states), and he can perform almost all of the surveying services under his engineering license,<sup>2</sup> he does not hold a Florida surveyor's license, as required by the rule. While this result may seem unfair and based on highly technical grounds, it is consistent with the plain requirements of the rule.

## CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

33. As the applicant in this cause, Petitioner bears the burden of proving by a preponderance of the evidence that it is entitled to the requested certification. See, e.g., Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987).

33. The District administers a minority business enterprise program under Part VI, Chapter 40E-7, Florida Administrative Code, which is designed to remedy "documented disparities in District contracting and the present effects of past marketplace discrimination." Rule 40E-7.611(1), Florida Administrative Code.

34. In order to establish eligibility for certification as a MBE, an applicant must comply with the criteria set forth in Rule 40E-7.653, Florida Administrative Code. Relevant to this controversy are the standards in paragraphs (5) and (6) which require that the minority owner "be the license holder, or the professional license holder" in the areas being certified, that the minority owner "possess the authority to control and exercise dominant control over the management and daily operations of the business," and that the applicant demonstrate that "the net worth of the business concern,

together with its affiliates, does not exceed five (5) million [dollars]" and that it "employs two-hundred (200) or fewer permanent, full-time employees." The parties have stipulated that all other criteria have been met.

35. An agency's interpretation of its rules which it is charged to administer is to be given great deference, Griffith v. Dep't of Bus. Reg., 613 So. 2d 930, 931 (Fla. 3d DCA 1993), and unless the interpretation is clearly erroneous, it will not be overturned. See, e.g., Eager et al. v. Fla. Keys Aqueduct Authority, 580 So. 2d 771, 772 (Fla. 3d DCA 1991). In this case, Petitioner has not shown that the District's interpretation of Rule 40E-7.653, Florida Administrative Code, is clearly erroneous or otherwise impermissible.

37. Rule 40E-7.653(5), Florida Administrative Code, requires that "[a]n applicant must establish that the minority holder seeking certification be the license holder, or the professional license holder" in the specialty for which certification is being sought. Because Mr. Berryman does not hold a surveyor's license under Chapter 472, Florida Statutes, as required by the rule, he cannot qualify as a minority who is licensed to provide surveying services. This is true even though as a professional engineer licensed under Chapter 471, Florida Statutes, Mr. Berryman can perform virtually all of the services provided by a licensed surveyor. Indeed, Section

471.005(6), Florida Statutes (2001), defines the scope of services that a professional engineer can perform as including "engineering surveys," a term not otherwise defined.<sup>3</sup>

38. The same rule provides that an applicant must establish that the minority owner "possess[es] the authority to control and exercise dominant control over the management and daily operations of the business." Because the greater weight of evidence shows that Mr. Berryman has absolute control over the manner in which the BHI Board members vote, and BHI controls a majority of the joint venture votes, it is concluded that Mr. Berryman has real, substantial, and continuing control over the joint venture, as required by the rule.

39. Finally, the more persuasive evidence shows that during its latest fiscal year, Petitioner's net worth was less than \$5 million and that it employed fewer than 200 permanent, full-time employees. Accordingly, this requirement of the rule has been met.

40. In summary, except for the requirement that the minority owner hold a surveyor's license, Everglades meets all requirements for licensure. Given this deficiency, the application must be denied.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the South Florida Water Management District enter a final order denying the application of Everglades Surveying Joint Venture for certification as a minority business enterprise.

DONE AND ENTERED this 4th day of September, 2002, in Tallahassee, Leon County, Florida.

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DONALD R. ALEXANDER  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 4th day of September, 2002.

ENDNOTES

1/ Mr. Berryman did not initially appoint himself to the Board since he believed he already exercised absolute control over the votes of Mr. Stokes and Mr. Sharpe, and he does not appoint himself to every committee, board, or group formed by one of his companies.

2/ According to Mr. Berryman, he can perform all services normally done by a surveyor except sign a boundary survey. This testimony was not contradicted.

3/ At one time, former Rule 21H-18.11(4), Florida Administrative Code, provided an extensive definition of the term "engineering survey," but the rule was later repealed.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.