

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

In the Matter

- of -

the Application of **Tambe Metal Products, Inc.**
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60191

RECOMMENDED ORDER

- by -



Molly T. McBride
Administrative Law Judge
January 19, 2017

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 ("NYSDED") to deny Tambe Metal Products, Inc., ("Tambe" or "applicant") 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 Tambe challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Tambe submitted an application to the NYSDDED on October 26, 2015 (Exhibit 1). By letter dated January 4, 2016, the Division denied the application for WBE certification (Exhibit 2).

Applicant filed an appeal from the denial and requested a hearing. A hearing was held on August 2, 2016 at the Division's offices located at 625 Broadway, Albany, New York. Tambe appeared by Renee Tambe and counsel, Lorisa LaRocca, Esq. of Woods Oviatt Gilman LLP. The Division was represented by senior attorney Philip Harmonick and senior certification analyst Glenn Butler.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria are applied on the basis of information supplied through the application process (see 5 NYCRR 144.2[a]). 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, if any, that are conducted by Division analysts. On administrative appeal, the applicant bears the burden of proving its business meets the eligibility criteria for certification as a woman-owned business enterprise (see State Administrative Procedure Act § 306[1]) and, to carry its burden, the applicant must show that the Division's determination is not supported by substantial evidence. The

appeal determination shall be limited as follows: the hearing officer shall conduct a hearing based upon information set forth in the request for a hearing relating to the information provided with the certification application and during any site visit that had been carried out (5 NYCRR 144.5[a]).

POSITIONS OF THE PARTIES

Position of the Division

The Division's denial letter asserts that applicant failed to meet three criteria for certification: (1) applicant business has failed to demonstrate that the woman owner's capital contribution is proportionate to her equity interest in the business; (2) applicant business has failed to demonstrate that the woman owner shares in the risks and profits in proportion to her ownership interest; and (3) applicant business has failed to demonstrate that the woman owner has control over negotiations, signature authority for payroll, leases, letter of credit, insurance bonds, banking services and contracts and other business transactions.

Position of the Applicant

Tambe 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. Tambe Metal Products, Inc. was formed in 1996 by Frank Tambe (Exhibit 1, 1.R.). Renee Tambe, President, owns 51% of the company, her father Frank Tambe, Executive Vice President and Treasurer, owns 25% of the company, and her mother Margo, Secretary, owns 24% of the company (Exhibit 1, 2.A.).
2. Tambe is a sheet metal manufacturing business (Exhibit 1, 3.B. & C.).
3. Renee Tambe solely performs the following duties: negotiating bonding, negotiating insurance, managing and signing payroll. Frank Tambe and Renee Tambe perform the following duties: financial decisions, marketing and sales, hiring and firing, purchasing equipment/sales, negotiating contracts, signatories for business accounts (Exhibit 1, 4.A.). Employee Jonathan McColl solely supervises field operations (Exhibit 1,

4.A.8.), assists with estimating, coordinating manufacturing and deliveries, is liaison between shop staff and office staff for all programming and manufacturing, is involved with purchasing, and coordinates with shop foreman on crew size and job start dates (Exhibit 4).

4. The application for WBE certification states that Renee Tambe made a capital contribution to the business in the form of "expertise and day-to-day contribution" with a value of \$25,000 (Exhibit 1, 2.C.).

6. Frank Tambe is [REDACTED] in the amount of approximately [REDACTED] (Exhibit 1, 5.G.).

7. Renee Tambe has [REDACTED] as shown on the company balance sheets supplied in the application process (Exhibit C).

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. On July 19, 1988, New York State enacted a comprehensive program designed to increase the participation of minority and women-owned enterprises in contracts awarded by the State and its agencies (see generally Executive Law art 15-A, §§ 310-318; L 1988, ch 261, § 63, effective July 25, 1990). Section 144.2 of 5 NYCRR defines the rules to be applied in certifying businesses for minority- or woman-owned business enterprise status. In this matter, the application was denied based upon, (1) the applicant's failure to demonstrate the woman owner's capital contribution is proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise pursuant to 5 NYCRR 144.2(a)(1); (2) the applicant's failure to demonstrate that the woman owner shares in the risks and profits in proportion to her ownership interest pursuant to 5 NYCRR 144.2(c)(2); and (3) the applicant's failure to demonstrate that the woman owner has control over negotiations, signature authority for payroll, leases, letter of credit, insurance bonds, banking services and contracts and other business transactions pursuant to 5 NYCRR 144.2(b)(3).

Capital contribution

The applicant alleged Ms. Tambe made a capital contribution equal to her 51% ownership interest in the form of expertise and day-to-day operation that was valued at \$25,000 in the application (Exhibit 1, 2.C.) Frank Tambe, Renee's father and Margo Tambe, her mother, are also listed as having made a capital contribution in the form of expertise and day-to-day operation with a value of \$12,500.00 each (Exhibit 1).

Renee Tambe worked for Tambe Metal Products from 1991-2000 as the office and accounting manager (Exhibit 4). She left the company in 2000 due to "family turmoil" (Disk 1 at 7:30)¹. Applicant returned to assist with the operation of Tambe in 2011 when the company was close to going out of business (Disk 1 at 9:35). She returned to take over the duties of controller of the company and her father had little involvement with the company (Disk 1 at 9:30). Her parents were the only shareholders when she returned to the company (Disk 1 at 8:45) in 2011. Her father helped "smooth over" relationships with vendors to keep the business open and Renee Tambe claims, worked approximately one day a week at the time that she returned (Disk 1 at 9:40).

Renee Tambe developed relationships with customers and worked to get new customers when she returned to Tambe, attempting to keep the company in business (Disk 1 at 10:30). She oversaw the company's operations and managed contracts and cash management (Disk 1 at 12:30). Her father played a small role in the company and was living primarily in Florida in 2011 (Disk 1 at 13:00). Frank and Margot Tambe transferred 51% of the shares of the company to their daughter in 2015 but she did not believe that the company had any value since it was close to going out of business (Disk 1 at 13:44). Renee Tambe produced a balance sheet for the company dated September 2015 which showed

[REDACTED]
(Exhibit C).

The Division requested documentation of the capitalization of the stock transfer to Renee and the written response was, in part, "The transfers were made as gifts without additional cash consideration as part of Mr. and Mrs. Tambe's estate and business succession planned in consideration of Renee's continuous and expanding contributions to the business" (Exhibit G).

¹ Disks refer to audio transcript of the hearing held herein on August 16, 2016.

Renee Tambe contends that in addition to her expertise and day-to-day work, her capital contribution was in the form of personal checks she wrote to the company in the amount of [REDACTED] in 2015 as well as charging [REDACTED] to her personal credit card in 2015 (Disk 1 at 13:45 and Exhibit B). She produced canceled checks showing the funds she put into the business and the credit card charge at the hearing held in August 2016 (Exhibit B). Renee Tambe also submitted documents that were related to loans that the company has taken out and expenses paid by the company, including payments of union dues for employees (Exhibit 3). Those documents were submitted by Tambe to support the position that Renee Tambe made a capital contribution to the business (Disk 1 at 58:00). Those documents did not show a capital contribution being made by Renee according to Division senior certification analyst Glenn Butler (Disk 1 at 59:30, Exhibit 3). Also, the personal funds Renee Tambe put into the business that she explained in a narrative during the application process (Disk 1 at 1:00) have been identified as loans to shareholder on the company balance sheets and not capital contributions used to purchase majority ownership of the company (Exhibit C). Glen Butler confirmed that loans do not constitute a capital contribution (Disk 1 at 1:03). Loans are repayable and not a capital contribution, which is an investment (Disk 1 at 1:02). Renee Tambe testified that she believes these amounts were identified as loans so that, if the business failed, she could get the money repaid (Disk 1 at 35:20).

Renee Tambe also produced her 2014 W-2 from Tambe which showed she was paid [REDACTED] in salary (Exhibit 5). Her salary demonstrates she is being paid a fair salary for her position (Exhibit 5) and she did not claim to be underpaid for her role with the company (Disk 1 at 1:04).

Applicant has not presented sufficient evidence to demonstrate that the Division's determination that the woman owner failed to demonstrate a capital contribution was not supported by substantial evidence.

Risks and Profits

The Division also denied the application based upon Ms. Tambe failing to show that she shares in the risks and profits in proportion to her ownership interest. The Division determined that Frank and Margo Tambe bear the majority of financial risks associated with the business, not Renee (Disk 1 at 1:04 and Exhibit 2). The Tambe balance sheet provided by applicant dated June 30, 2015 lists the following long term company liabilities:
[REDACTED]

[REDACTED] (Exhibit 6). The only shareholders of Tambe at the time of that balance sheet were Frank and Margo Tambe (Exhibit 1) and, therefore, Glen Butler concluded that those loans amounting to [REDACTED] were made by Frank and/or Margo Tambe and not Renee Tambe. As such, Frank and/or Margo Tambe bear the risks associated with operating the business (Disk 1 at 1:06). Also, Frank Tambe is identified as [REDACTED]

[REDACTED] (Exhibits 1, 7 & 8).

[REDACTED] (Exhibits 7 & 8). Mr. Butler also noted that Renee Tambe is compensated fairly for her work for the company as evidenced by the 2014 W-2 issued to Renee (Disk 1 at 1:04 and Exhibit 5).

Applicant has not presented sufficient evidence to demonstrate that the Division's determination that the woman owner fails to share in the risks and profits in proportion to her ownership interest was not supported by substantial evidence.

Control

The third basis for the denial of the application was that applicant business failed to demonstrate that the woman owner had control over negotiations, signature authority for payroll, leases, letter of credit, insurance bonds, banking services and contracts, and other business transactions (Exhibit 2). The business was started in 1996 by Renee's parents, Frank and Margot. Renee worked for the company as an employee from 1991-2000 (Exhibit 4). She served as office and accounting manager during those years (*id.*). She returned to Tambe in 2011 and took on the jobs of controller, overseeing estimating/sales, human resources, purchasing, sales, and receivables management (Exhibit 4). Employee Jonathan McColl has served as General Manager since 2007 (Exhibit 4). Frank Tambe, as Executive Vice President and and Treasurer since 2012, has performed the following duties: "Sales-maintain and transfer relationships to next generation, weekly and monthly meetings on growth opportunities, assistance to marketing and sales, consultant, bid review with estimators/sales, provide expertise on machinery/production, attend business gatherings in industry" (Id). The application states that Frank and Renee share the following managerial operations: (1) financial decisions; (2) marketing and sales; (3) hiring and firing; (4) purchasing

equipment/sales; (5) negotiating contracts; (6) signatories for business accounts (Exhibit 1, at 4). Frank maintained a presence with the company and served as a key player for the company to maintain business relationships according to Ms. Tambe's testimony (Disk 1 at 9:00).

The Division, as part of the application review, requested executed contracts from applicant. A contract between Tambe and Eagle Mechanical was produced that was executed by employee McColl on behalf of Tambe and not Ms. Tambe (Exhibit 9). A purchase order was produced between Tambe and Kogok Corporation that was not signed by Renee Tambe (Exhibit 10). A lease agreement was produced that was executed by Renee Tambe on behalf of Tambe that was between Tambe and her father Frank Tambe's business Tambe Enterprises, LLC (Exhibit D). Glenn Butler confirmed the business documents submitted during the application process and only a lease agreement between Tambe and Frank Tambe's business Tambe Enterprises, LLC was executed by Renee on behalf of the company (Exhibit 2 at 4:30, 7:00).

The Division determined applicant business failed to demonstrate that Renee Tambe has control over negotiations, signature authority for payroll, leases, letter of credit, insurance bonds, banking services and contracts and other business transactions as required by 5 NYCRR 144.2(b)(3) (Exhibit 2). The regulations regarding WBE certification require the woman owner to control the above enumerated functions of the business seeking certification.

Applicant has failed to show the Division's determination that the woman owner fails to have the necessary control of the required business operations is not supported by substantial evidence.

CONCLUSIONS

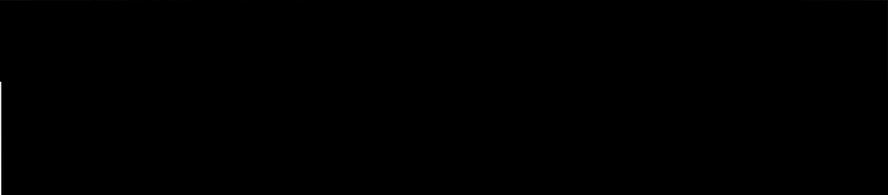
1. Tambe has failed to demonstrate that the woman owner Renee Tambe has made a capital contribution to the business in proportion to her ownership interest as required by 5 NYCRR 144.2(a)(1).
2. Tambe has failed to demonstrate that the woman owner Renee Tambe shares in the risks and profits in proportion to her ownership interest as required by 5 NYCRR 144.2(c)(2).

3. Tambe has failed to demonstrate that the woman owner Renee Tambe has control over negotiations, signature authority for payroll, leases, letter of credit, insurance bonds, banking services and contracts, and other business transactions as required by 5 NYCRR 144.2(b)(3).

RECOMMENDATION

The Division's determination to deny Tambe Metal Products, Inc.'s application for certification as a woman-owned business enterprise should be affirmed, for the reasons stated herein.

Matter of Tambe Metal Products, Inc. DED Exhibits

Exh. #	Description
1	Application of Tambe for WBE certification 10/26/15
2	Denial for WBE certification dated January 4, 2016.
3	Various cancelled checks of Tambe & Renee Tambe, loan documents of company
4	Resumes Renee Tambe, Jonathan McColl, Frank Tambe, William Kashella
5	2014 personal tax return Renee Tambe
6	Tambe balance sheet June 30, 2015
7	
8	
9	Tambe contract with Eagle Mechanical dated June 10, 2015
10	Kogok Purchase order with Tambe dated July 2015

Matter of Tambe Metal Products, Inc. Applicant Exhibits

Exhibit List

Exh. #	Description
A	[REDACTED]
B	3 canceled checks of Renee Tambe and credit card charge receipt of 3/13/2015
C	Tambe balance sheet, October 2015
D	Lease agreement for 7500 Main Street between Tambe Enterprises and Tambe Metal Products
E	Tambe balance sheet, August 2015
F	Tambe check no. 16035 dated 8/14/15
G	Supplemental responses to application