

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

In the Matter

- of -

the Application of **Hertel Steel Inc.**
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 55660

RECOMMENDED ORDER

- by -



Maria E. Villa
Administrative Law Judge

February 10, 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 to deny Hertel Steel, Inc. (“Hertel” or “applicant”) certification as a women-owned business enterprise¹ (“WBE”) be affirmed, for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal by applicant, pursuant to New York State Executive Law 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, challenging the determination of the Division that Hertel does not meet the eligibility criteria for certification as a WBE.

The Division denied Hertel’s application for WBE certification (Exhibit 2) by letter dated June 14, 2016. Division Exhibit 1. The denial letter sets forth two grounds under 5 NYCRR Section 144.2 for the denial. Specifically, according to the Division,

- (1) applicant failed to demonstrate that Heather LaShomb’s 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 (see Section 144.2(a)(1) (“Ownership”)); and
- (2) applicant failed to demonstrate that Ms. LaShomb has the experience or technical competence, working knowledge or ability needed to operate the enterprise, or that she makes decisions pertaining to the operation of the enterprise, or that she devotes time on an ongoing basis to the enterprise’s daily operations (see Section 144.2(b)(1)(i) – (iii) (“Operation”)).

On July 18, 2016, applicant filed a notice of appeal from the denial, and the Division responded by letter dated October 17, 2016, advising applicant that a hearing had been scheduled. Applicant Exhibits 39 and 40.

The hearing went forward as scheduled on December 20, 2016. Applicant was represented by Rand Allgaier, Esq., and called Heather LaShomb as a witness. Division Staff was represented by Phillip Harmonick, Esq., and called Natia Simon, a senior certification analyst employed by the Division. Ms. Simon was the analyst who reviewed Hertel’s application.

A list of exhibits is attached to this recommended order. Exhibits submitted by Hertel were not marked or received if those exhibits were duplicates of exhibits submitted by the Division and already received into the record. The hearing was recorded by Division staff, and the recording was provided to the administrative law judge (“ALJ”) in compact disc format.

¹ The term “women-owned business enterprise” applies to an enterprise that meets the requisite criteria on the basis of the ownership and control of one woman or of multiple women (see Section 140.1(tt) of 5 NYCRR (defining a women-owned business enterprise as one that is, inter alia, “at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women”)).

This audio recording is approximately one hour long, on one compact disc. References to testimony from the hearing are identified by the time on the recording at which the testimony occurs (“HR at ____”).

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a women-owned business enterprise are established by regulation (see 5 NYCRR Section 144.2). For the purposes of determining whether an applicant should be granted WBE status, the ownership, operation, and control of the business enterprise are assessed on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information revealed in supplemental submissions and any interviews that the Division’s analyst may have conducted.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that the Division's denial of Hertel’s application for WBE certification is not supported by substantial evidence (see State Administrative Procedure Act Section 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 N.Y.3d 494, 499 (2011) (internal quotation marks and citations omitted)).

POSITIONS OF THE PARTIES

Applicant

On appeal, applicant addresses the bases cited by the Division for the denial of Hertel’s WBE application. Applicant asserted that the funds used to purchase the business were drawn from an account held jointly by both Mr. and Ms. LaShomb, and that Ms. LaShomb has made a contribution of expertise over and above her capital contribution. With regard to operation, applicant asserts that Ms. LaShomb’s job duties are more extensive than her husband’s, that she makes decisions pertaining to Hertel’s operation, and devotes time to that operation on an ongoing basis.

Division

The Division contends that its determination is supported by substantial evidence, and that applicant failed to satisfy certification criteria related to ownership and operation of the business enterprise by a woman owner. Specifically, the Division asserted that with respect to ownership, applicant failed to demonstrate that Ms. LaShomb’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. With respect to operation, the Division contended that applicant failed to show that Ms. LaShomb has the technical expertise or

technical competence, working knowledge or ability to operate Hertel. Accordingly, the Division requested that its determination to deny WBE certification to Hertel be upheld.

FINDINGS OF FACT

1. Hertel Steel Inc. is located at 6675 Pickard Drive, Syracuse, New York. Division Exhibit 2, at 1.
2. Hertel is a construction related company, supplying rebar, welded wire mesh, and accessories for concrete reinforcing. Hertel also provides shop drawings for construction projects. The company cuts and bends rebar, and fabricates pre-tied structures. Hertel can also serve as a subcontractor when Hertel places the rebar and mesh at a construction site. Division Exhibit 2, at 3.
3. The funds used to purchase Hertel Steel were obtained from an account owned jointly by Mr. and Ms. LaShomb. Division Exhibits 3 and 4. Heather LaShomb owns 51% of the shares of stock in Hertel, and Jason LaShomb owns 49%. Division Exhibit 2, at 3.
4. Ms. LaShomb worked for Hertel Steel for two years before purchasing the business. She has been president of the business since 2015.

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of Hertel as a women-owned business enterprise pursuant to Executive Law Article 15-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 provided in supplemental submissions and interviews that are conducted by Division analysts.

Ownership

Section 144.2(a)(1) of 5 NYCRR requires an applicant to demonstrate that the woman owner's 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.

In the denial letter, the Division stated that applicant failed to satisfy the ownership criteria, based upon the following "relevant facts":

- Attachments to the application in support of Ms. LaShomb's claimed capital contribution reflect an agreement for the joint purchase by Ms. LaShomb and Mr. Jason LaShomb of the business enterprise.
- No documents submitted as part of the application reflect a contribution by Ms. LaShomb separately from Mr. LaShomb.

- No documents submitted as part of the application reflect a direct contribution by Ms. LaShomb to the business enterprise.

Division Exhibit 1, at 2. Ms. LaShomb countered that the purchase of Hertel Steel “was as a partnership between myself and Mr. LaShomb.” Applicant Exhibit 39, at 1. She went on to assert that “[a]s a couple married for nearly 17 years, our finances are inextricably connected.” Id. Ms. LaShomb stated that the only large sums of money in individual accounts are retirement accounts, and went on to say that “I could have liquidated my 401K, however that would not have been the best financial decision to make.” Id.

At the hearing, the Division’s witness, Ms. Simon, testified that as part of her review of the application, she requested a copy of the agreement for the purchase of Hertel Steel. HR at 5:05; Division Exhibit 4. Ms. Simon concluded that the company was purchased jointly, because both Jason and Heather LaShomb signed the agreement and the promissory note, and the source of the money for the purchase consisted of the funds drawn from the LaShomb’s jointly owned bank account. HR at 5:22; Division Exhibits 2, 3 and 4.

In response, applicant maintained that Ms. LaShomb considered the money in the joint account to be hers, and cited to Section 675 of the New York State Banking Law for the proposition that the funds in a joint account belong to either of the account holders and can be paid out to one of the individuals named on the account without regard to the other account holder. Applicant argued that the Division’s position would impose a significant hardship on a married woman seeking certification, and noted further that the percentage difference in equity interest as between Mr. and Ms. LaShomb (49% and 51%) amounted to [REDACTED] down payment used to purchase the business.

Applicant also contended that Ms. LaShomb made a contribution of expertise to the business, pointing out that Ms. LaShomb was hired in 2011 by Hertel’s then-president, Nancy Cushing, and thereafter Ms. LaShomb was promoted to vice president in anticipation of ultimately purchasing the business from Ms. Cushing. The business was sold in January of 2015, and applicant noted that at that point Ms. LaShomb had three years’ of experience in managing the business, which Mr. LaShomb did not have. Ms. LaShomb testified that she worked side-by-side with Ms. Cushing, and that eventually she and Ms. Cushing shared the same duties, such that Ms. LaShomb was able to run the business when Ms. Cushing was absent. HR at 21:00. Ms. LaShomb stated that her husband did not know or understand many aspects of her responsibilities, and referred to Applicant Exhibit 38, which lists Ms. LaShomb’s exclusive job responsibilities, as well as those tasks she shares with other employees, including her husband.

Ms. LaShomb testified that among other things, she negotiates contracts, handles insurance, and is responsible for invoicing, human resources, and the LEEDs certification for the business. According to Ms. LaShomb, her husband is more “hands on,” and his only exclusive duty is training fork truck drivers for the business. HR at 27:21, 33:12. She testified that in contrast, her responsibilities are much more extensive. Applicant Exhibit 38. Applicant asserted that Ms. LaShomb’s contribution of expertise, after three years of training and two years as president, was more than proportionate to her equity interest in the business.

The Division responded that the materials submitted with the application established that the business was purchased jointly by Mr. and Ms. LaShomb, and that applicant's citation to the Banking Law was unavailing, because the assets were jointly held and could be drawn by either. The Division pointed out applicant's claims of a contribution in the form of expertise were not before the Division as part of the application, and that if such claims had been made, the Division would have requested substantiation. According to the Division, simply working for a business enterprise is not a contribution of expertise; if it were, then each employee would be able to satisfy this requirement. The Division took the position that when an application is reviewed, the Division looks for an uncompensated contribution of expertise. In response, Applicant contended that the Division's position was illogical, because if Ms. LaShomb had received her training at a competitor, instead of on the job, that would count as a contribution of expertise.

The Division established that its determination to deny certification to Hertel Steel was supported by substantial evidence. The record demonstrates that the business was acquired jointly, and the Division reasonably concluded that ownership was allocated at the time of purchase to obtain certification, rather than in recognition of Ms. LaShomb's greater contribution. With respect to a contribution of expertise, the Division pointed out that applicant did not raise this basis for certification pursuant to the ownership requirement, nor did applicant quantify its claimed contribution as part of its application for certification. The Division's determination with respect to ownership should be affirmed.

Operation

Section 144.2(b)(1) of 5 NYCRR requires that decisions pertaining to the operations of the business enterprise must be made by the woman owner. In this regard, Section 144.2(b)(1)(i) of 5 NYCRR mandates that an applicant demonstrate that the woman owner has adequate managerial experience or technical competence in the business enterprise seeking certification. In addition, an applicant must show that the woman owner has the working knowledge and ability needed to operate the business enterprise (see 5 NYCRR Section 144.2(b)(1)(ii)). The regulations also require a showing that the minority or woman business owner makes decisions pertaining to operation, and devotes time on an ongoing basis to the daily operation of the business enterprise (see 5 NYCRR Section 144.2(b)(1)(iii)).

With respect to operation, the Division's denial letter set forth the following "relevant facts":

- Ms. Lashomb's education is in medical and veterinary technology.
- Mr. LaShomb's education is in civil engineering
- Ms. Lashomb's has [sic] no relevant managerial experience prior to joining Hertel Steel.
- Mr. LaShomb has nearly twenty years of relevant work experience.

Division Exhibit 1, at 2. In response, Ms. LaShomb asserted that she spent three and a half years training under Nancy Cushing, the previous owner and president, and that she had "taken on every aspect of the duties that [Ms. Cushing] performed." Applicant Exhibit 39, at 1. Ms. LaShomb went on to contend that while the business could function without Mr. LaShomb, she

is “the only person who knows how to do many of the high end aspects of running this company.” Id., at 2.

The testimony and evidence at hearing focused on the applicant’s managerial experience or technical competence, and working knowledge and ability to operate Hertel. The Division did not address the requirement that an applicant make decisions pertaining to operation, or devote time on a daily basis to the operation of the business.

Ms. Simon, the Division’s witness, testified that when she reviewed the application, she noted that the resumes submitted indicated that Mr. LaShomb had been working in the construction industry since 1997, while Ms. LaShomb had a different background. Ms. Simon requested a narrative description of their respective duties, and applicant submitted Division Exhibit 6. Ms. Simon concluded that Mr. LaShomb had more relevant experience with respect to Hertel’s core functions, and performed those functions for Hertel, while Ms. LaShomb’s duties were administrative.

The Division noted that Hertel is a construction business, and argued that it was reasonable for the Division to evaluate who at Hertel performs the functions that enable the business to obtain work and provide services to clients. According to the Division, those functions could be administrative, for example, in the case of a payroll management firm, but contended that for a construction business, the key functions are estimating and supervising field operations. In this case, Mr. LaShomb and other male employees perform those functions for Hertel. The Division went on to assert that Ms. LaShomb does not play an active role with respect to those functions, nor does she have the technical training or managerial experience to do so. Moreover, the Division pointed out that none of the training Ms. LaShomb received from Ms. Cushing was in estimating or supervising field operations.

Applicant took the position that the same facts used to demonstrate ownership were sufficient to satisfy the operation requirement. Applicant contended that Ms. LaShomb was solely responsible for nearly all operational decisions, and argued further that although the Executive Law provides for a statewide advocate to assist applicants, the position has been vacant for more than two years. According to applicant, Ms. LaShomb received no assistance in preparing her application, and that each claimed failure would have been more fully addressed if an advocate had been available to her.

At the hearing, Ms. LaShomb testified that she is solely responsible for nearly all operational decisions of the business. While she acknowledged that male employees estimate larger projects, she stated that invoicing, a function she performs, “is almost like a back end estimate.” HR at 41:51. She stated that she has taken a blueprint reading course, as well as fork truck training and OSHA 10-hour construction training. Ms. LaShomb testified that the time she might devote to estimating a job would be better spent attending to her other responsibilities, particularly since an estimate might not lead to an actual job. Applicant pointed out that the business would not exist if Ms. LaShomb did not perform her duties with respect to negotiating contracts, and dealing with insurance and payroll. According to applicant, while estimating and supervising field operations are a source of funding, the business would not exist without all the other functions for which Ms. LaShomb is solely responsible. Applicant noted that the previous owners, Meredith and Nancy Cushing, had backgrounds in education and veterinary technology.

Ms. LaShomb testified that due to Mr. LaShomb's health concerns, she wanted to be sure before purchasing the business that she could handle running the business on her own.

The record supports the Division's determination regarding the operation of Hertel. Although Ms. LaShomb testified credibly regarding her extensive responsibilities with the company, the revenue-generating functions are handled by male employees. Moreover, even assuming that applicant satisfied the operational criteria, applicant did not establish ownership within the meaning of the regulations. The Division's denial of certification was supported by substantial evidence, and should be affirmed.

CONCLUSION

As discussed above, applicant failed to meet its burden to demonstrate that the Division's determination to deny Hertel's application for certification was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, the Division's determination to deny Hertel's application for certification as a women-owned business enterprise should be affirmed.

Matter of Hertel Steel Inc.
DED File ID No. 55660
Exhibit Chart

Exhibit No.	Description	Rec'd
Division 1	June 14, 2016 denial letter	✓
Division 2	March 19, 2015 application	✓
Division 3	Copy of check and statement of sale	✓
Division 4	Stock purchase agreement	✓
Division 5	Resumes: Heather LaShomb; Jason LaShomb	✓
Division 6	Job Descriptions	✓
Applicant 1	Department of State Registration	✓
Applicant 2	Personal Net Worth Affidavit	✓
Applicant 3	Current year financial statements	✓
Applicant 4	Compiled financial statements and supplementary information (2013 and 2012)	✓
Applicant 5	Compiled financial statements and supplementary information (2012 and 2011)	✓
Applicant 6	2011 business tax returns	✓
Applicant 7	2012 business tax returns	✓
Applicant 8	2013 business tax returns	✓
Applicant 9	2012 and 2013 individual tax returns	✓
Applicant 10	Bank signature card	✓
Applicant 11	Proof of citizenship	✓
Applicant 12	Lease agreement	✓
Applicant 13	Stock certificates	✓
Applicant 14	Articles of incorporation	✓
Applicant 15	Stock ledger	✓
Applicant 16	By-laws	✓
Applicant 17	Meeting minutes	✓
Applicant 18	State filing receipt	✓
Applicant 19	Personal net worth worksheet	✓
Applicant 20	Proof of gender	✓
Applicant 21	Proof of minority status	✓
Applicant 22	Third-party agreements	✓
Applicant 23	Certification documentation	✓
Applicant 24	Employment agreements	✓
Applicant 25	Certifications	✓
Applicant 26	NYS Vendor Tax Registration	✓

Applicant 27	Lease Agreement	✓
Applicant 28	Vehicle Registrations	✓
Applicant 29	Out of State Certificate to Conduct Business	✓
Applicant 30	Stock Pledge Agreement	✓
Applicant 31	Subcontract Agreements	✓
Applicant 32	2014 Tax Returns	✓
Applicant 33	Promissory Note	✓
Applicant 34	Loan Agreements and Lines of Credit	✓
Applicant 35	2015 Payroll Records	✓
Applicant 36	Financial Contribution by Heather LaShomb	✓
Applicant 37	Affidavit of Nancy Cushing (December 3, 2016) – not notarized	✓
Applicant 38	Heather LaShomb/Jason LaShomb Job Responsibilities	✓
Applicant 39	July 18, 2016 appeal letter	✓
Applicant 40	October 17, 2016 letter scheduling hearing	✓