

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

In the Matter

- of -

the Application of **Whitman Engineering**
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 58289

RECOMMENDED ORDER

- by -



Molly T. McBride
Administrative Law Judge
March 20, 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 Whitman Engineering ("Whitman" or "applicant") certification as a woman-owned business enterprise ("WBE") be reversed, 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 Whitman challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Whitman submitted a Fast Track WBE application to the NYSDDED on April 15, 2014 (Exhibit 1). By letter dated February 12, 2016, the Division denied the application for WBE certification (Exhibit 2).

Applicant filed an appeal from the denial and requested a hearing. The hearing was held on January 24, 2017 at the Division's offices located at 625 Broadway, Albany, New York. Whitman appeared by Kate Whitman, David Whitman and counsel, Benjamin Neidl, Esq., and John Jay Bove, Esq. of Jackson Lewis, P.C. The Division was represented by Senior Attorney Philip Harmonick and Senior Certification Analyst Allen Culbreath.

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 hearing officer conducts the 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).

POSITIONS OF THE PARTIES

Position of the Division

The Division's denial letter asserts that applicant failed to meet one criteria for certification: applicant failed to demonstrate that the woman owner's capital contribution is proportionate to her equity interest in the business.

Position of the Applicant

Whitman 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. Kate Whitman, President, owns 51% of applicant company, and her husband David Whitman, Vice President, owns 49% of applicant company (Exhibit 1, 2.A.).
2. Whitman is an engineering firm that provides engineering design and consulting services for the commercial construction industry (Exhibit 1, 4.A.).
3. Kate Whitman made a capital contribution to Whitman Engineering in proportion to her ownership interest in the form of business contacts and expertise.

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification as a woman-owned business enterprise (WBE) pursuant to Executive Law Article 15-A. 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 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).

Capital contribution

The applicant contends that Kate Whitman, majority shareholder, made a capital contribution equal to her 51% ownership interest (Exhibit 4). Kate Whitman supported that contention in a written narrative submitted as part of the application process which stated, in part, her capital contribution was in the form of "my services as a Professional Engineer, with 14 years experience in the construction industry" and "my contacts with customers, architects and engineers" (Exhibit 4). The applicant business was formed by David Whitman in 2006; however, the business did not begin operation until February 2007 when Kate Whitman became majority shareholder (Disk 1 at 11:50)¹. Kate and David Whitman were employees of Roundout Electric when Kate became majority shareholder (Disk 1 at 10:30). Both worked as engineers for Roundout and now work as engineers for Whitman. As noted, applicant company was idle after its formation in 2006. Kate Whitman believed that she could bring business to Whitman and she wrote up a proposal for David proposing that she be awarded 51% ownership of the business (Disk 1 at 11:50 and Exhibit 4). Kate Whitman had many clients at Roundout and David had only IBM as a client (Disk 1, 11:00). Kate's proposal was accepted by David and a special meeting of the Board of Directors of Whitman Engineering was held on February 2, 2007 accepting the proposal to make Kate Whitman majority shareholder (Exhibit 4). David agreed to Kate being the majority shareholder because Kate had the majority of the business contacts and he believed that she would be bringing the majority of the business to applicant company (Disk 1 at 1:10) and because she does more work for the business (Disk 1 at 49:16). The company had four clients in 2007 and all were brought in by Kate Whitman (Disk 1 at 13:15, 15:30, 48:20). At the hearing held on January 24, 2017, Kate Whitman described the clients the company had in 2007, detailing how she brought all of the business into the company. It was understood by David and Kate that she would be bringing in the majority if not all of the business into the company when she became majority shareholder (Disk 1 at 15:48).

The business was begun out of their home (Disk 1 at 21:10) and no money was put into the business to start other than opening a business bank account with a joint [REDACTED] (Disk 1 at 20:20). They used equipment at their employment [REDACTED] to do some of the work and they worked evenings and weekends (Disk 1

¹ Disk refers to the audio recording of the hearing held in this matter.

at 20:40). The company used earnings to buy its own equipment (Disk 1 at 21:10).

Testimony was provided as to the duties performed by Kate and David Whitman. Kate Whitman performs the fire suppression, electrical and plumbing design work of the business (Disk 1 at 22:00) and David Whitman handles the mechanical engineering design work (Disk 1 at 25:00). Detailed testimony was provided by Kate Whitman as to the three engineering areas she works in for the applicant business and the one area that David Whitman works in (Exhibits E-H). David Whitman corroborated the information testified to by Kate and submitted in support of the application (Exhibits E-H) and stated that the information was accurate (Disk 1 at 46:45).

Allen Culbreath, Senior Certification Analyst for the Division of Minority and Women Business Development testified that he reviewed Whitman's application and all of the supporting documents, and recommended a denial of the application (Disk 1 at 53:00). He requested proof of the capital contribution of Kate Whitman, who provided minutes of the special meeting and a narrative of the business startup (Exhibit 4), and a report of all clients of the business since 2007 (Exhibit H, Disk 1 at 57:00). Culbreath did not find it credible that Kate Whitman provided more to the business startup than her husband. He concluded that since she was licensed the same month she was made majority shareholder (Disk 1 at 57:30), and since David and Kate had the same work experience at Roundout Electric where they both performed project management and bid preparation, they equally contributed to the start of the business (Disk 1 at 58:20). Mr. Culbreath conducted a recorded telephone interview with Kate Whitman (Exhibit 5) in December 2015 (Disk 1 at 59:56) and concluded that David and Kate per [REDACTED] complementary roles, jointly funded the start up by using [REDACTED] of joint money to open a business bank account, and had [REDACTED] contributions to the startup (59:40).

Mr. Culbreath agreed that a capital contribution can be made in non-cash form such as expertise and experience (5 NYCRR 144.2[a][1]). A review of the recorded telephone interview indicates that during the interview, Kate Whitman explained that she was awarded a majority ownership in the applicant business, because she was bringing the majority of the business to the applicant company (Exhibit 5 at 7:03). Kate Whitman indicated to Mr. Culbreath in the December 2015 interview that her majority ownership was agreed to by her and David based on "who had the better clients" (Exhibit 5 at 7:30). As noted earlier, David Whitman also testified as to this fact.

The testimony offered at the hearing mirrored the documents supplied in support of the application, and the statements of Kate Whitman in her interview with Mr. Culbreath, which established that Kate Whitman contributed more to the startup of the business than David Whitman, and that her contribution was in proportion to her majority interest.

Applicant has met its burden showing the Division's determination that the woman owner failed to demonstrate a capital contribution was not supported by substantial evidence. Kate Whitman supplied capital contribution in proportion to her 51% ownership in the form of expertise and business contacts.

CONCLUSIONS

Whitman has demonstrated that the woman owner Kate Whitman has made a capital contribution to the business in proportion to her ownership interest as required by 5 NYCRR 144.2(a)(1).

RECOMMENDATION

The Division's determination to deny Whitman Engineering's application for certification as a woman-owned business enterprise should be reversed for the reasons stated herein.

Matter of Whitman Engineering -- DED Exhibits

Exh. #	Description
1	Application of Whitman for WBE certification April 15, 2014
2	Denial of WBE certification dated February 12, 2016
3	Acquisition of ownership dated November 10, 2015
4	Minutes of Special Meeting of Whitman
5	CD of recorded telephone interview of kate Whitman December 2015

Matter of Whitman Engineering -- Applicant Exhibits

Exhibit List

Exh. #	Description
A	Certificate of incorporation 12-22-06
B	Stock certificate Kate Whitman shares
C	Stock certificate David Whitman shares
D	Bylaws Whitman Engineering
E	Design plans MKMG
F	Design plans Health Quest
G	Design plans Caramount Medical
H	Whitman Custom Transaction Detail Report