

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

In the Matter

- of -

the Application of **Solid Ground Services, Inc.**
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60174

RECOMMENDED ORDER

- by -



Richard A. Sherman
Administrative Law Judge

August 3, 2016

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 Solid Ground Services, Inc. ("SGS" or "applicant") certification as a women-owned business enterprise ("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 ("5 NYCRR") Parts 140-144, challenging the determination of the Division that SGS does not meet the eligibility criteria for certification as a WBE.

The Division denied SGS's application for WBE certification by letter dated January 4, 2016 (exhibit 2). The denial letter sets forth four grounds under 5 NYCRR 144.2 for the denial. By letter ("appeal letter") dated January 22, 2016, SGS appealed from the Division's determination. The Division advised applicant that the hearing on this matter would be held on July 19, 2016 (Notice of Appeal Hearing from the Division to Krystle Bristol, dated June 2, 2016).

I convened the hearing at approximately 11:00 a.m. on July 19, 2016, at the Division's offices, 625 Broadway, Albany, New York. Consistent with 5 NYCRR 145.1(m), an audio recording of the hearing was made and the recording was provided to this office on July 22, 2016. A list of the exhibits received during the hearing is appended to this report.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a women-owned business enterprise are established by regulation (see 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted or denied 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 interviews that are conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of SGS's WBE certification is not supported by substantial evidence (see State Administrative Procedure Act § 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 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

POSITIONS OF THE PARTIES

Position of the Division

In its denial letter, the Division cites four bases for its determination to deny SGS's application for WBE certification (exhibit 2). Specifically, the Division determined that applicant failed to demonstrate that (1) "the minority or woman owner(s) capital contributions are proportionate to their equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise;" (2) "the minority or woman owner(s) have the experience or technical competence, working knowledge or ability needed to operate the enterprise;" (3) "the minority or woman owner(s) make decisions pertaining to the operations of the enterprise;" and (4) "the minority or woman owner(s) devote time on an ongoing basis to the daily operation of the enterprise" (exhibit 2 at 2 [citing 5 NYCRR 144.2]).

Position of Applicant

Applicant argues in its request for a hearing that its application "was not thoroughly reviewed" and that the bases cited by the Division for the denial are countered by the application and information supplied. Specifically, applicant argues that (1) "the majority of the startup capital for the company was supplied by [Krystle Bristol]"; (2) Ms. Bristol has technical competence and is an expert in safety management; (3) Ms. Bristol "negotiate[s], review[s], and sign[s]" essential business agreements; and (4) Ms. Bristol "commit[s] more hours to Solid Ground Services, Inc. than any other employee on staff" (appeal letter at 1).

FINDINGS OF FACT

1. SGS is a Pennsylvania based corporation established in 2014 engaged in the business of excavation and dump trucking (exhibit 1 at 2 [items 1.Q, 1.R], 3 [items 4.A-D]; hearing recording [CD #1¹] at 1:55; see also Department of State Corporation & Business Entity Database, http://www.dos.ny.gov/corps/bus_entity_search.html [accessed Aug. 2, 2016]).
2. Krystle Bristol and Kyle Bristol are married and have ownership interests in applicant of 60% and 40%, respectively (exhibit 1 at 2 [item 2.A]; CD #1 at 3:10).
3. Prior to establishing SGS, Krystle Bristol held management positions with various organizations. Her previous job titles include Store Manager, Operations Manager, Business Manager, and Project Coordinator (exhibit 7 at 1-2). Applicant states that Ms. Bristol "brought experience in [numerous] fields to the table with the inception of SGS" (exhibit 3 at 1). Ms.

¹ The audio recording of the hearing is contained on two compact discs, identified as "CD #1" and "CD #2."

Bristol's prior experience includes "Payroll and Tax Filings," "Licenses and Registrations," "Accounts Payable," "Safety Training," "Negotiating and Executing Contracts," "Final Decision Make (sic) on Major Purchases," "Estimating and Bidding," and "Truck Scheduling and Dispatch" (id. at 1-2).

4. Prior to establishing SGS, Kyle Bristol held construction related positions with various organizations and served in the U.S. Marine Corps (exhibit 7 at 3). His prior experience includes management of numerous construction projects and his previous job titles include Operations Manager, Operator, and Site Superintendent (id.). Mr. Bristol's prior experience includes "Layout and Surveying," "Equipment Operation," "Crew Supervision," "Estimating," and "Managing Maintenance on Trucks and Equipment" (exhibit 3 at 2).

5. Krystle Bristol's duties at SGS include "Payroll and Tax Filings," "Licenses and Registrations," "Accounts Payable," "Safety Training," "Negotiating and Executing Contracts," "Final Decision Make (sic) on Major Purchases," "Estimating and Bidding," and "Truck Scheduling and Dispatch" (exhibit 3 at 2-3).

6. Kyle Bristol's duties at SGS include "Layout and Surveying," "Equipment Operation," "Crew Supervision," "Estimating," and "Managing Maintenance on Trucks and Equipment" (exhibit 3 at 3).

7. Krystle and Kyle Bristol funded applicant's opening bank account in the amount of [REDACTED] by cashing out their respective 401(k) accounts, with Krystle Bristol contributing approximately [REDACTED] and Kyle Bristol contributing approximately [REDACTED] (exhibit 3 at 1-2; CD #1 at 8:25).

8. Applicant obtained an equity line of credit in the amount of [REDACTED] for "start-up cash flow and initial expenses" (exhibit 3 at 1). The line of credit is secured by Krystle and Kyle Bristols' primary residence (exhibit 19 [Credit Agreement and Disclosure at 2, Open-End Mortgage and Security Agreement at 1]) and lists both Krystle and Kyle Bristol as the borrowers (exhibit 19 [Credit Agreement and Disclosure at 1, 4]).

9. The deed for Krystle and Kyle Bristols' primary residence is in both their names (exhibit 6; CD #1 at 41:15).

10. Krystle Bristol and Kyle Bristol are listed as co-borrowers or co-guarantors on loans applicant obtained for the purchase of equipment and trucks (exhibit 18 [Business Loan Agreement, loan date Feb. 20, 2015 at 2 (naming Krystle and Kyle Bristol as guarantors), Business Loan Agreement, loan date Mar. 24, 2015 at 2 (naming Krystle and Kyle Bristol as guarantors), Loan Agreement, made on Mar. 24, 2015 at 1 (naming Krystle and Kyle Bristol as borrowers)]).

11. Krystle Bristol is the elected auditor for Bradford County, PA (CD #1 at 13:25, 32:40; exhibits 3 at 3, 7 at 1). The position is part-time requiring up to 155 six-hour days per year and offers a flexible schedule (exhibit 3 at 3; CD #1 at 33:00). During the construction season, from May to August, Ms. Bristol generally works one or two days per week for the

county, and in the fall and winter she generally works three days per week (exhibit 3 at 3; CD #1 at 33:35; CD #2 at 5:45).

12. Krystle and Kyle Bristol reside at [REDACTED], and operate SGS from their residence (exhibits 1 at 1 [item 1.D], 3 at 1, 6 at 2).

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of SGS as a women-owned business enterprise² pursuant to Executive Law Article 15-A.

As noted above, the Division cites four bases in its denial of SGS's WBE application. For the reasons set forth below, I recommend that the determination of the Division to deny the application be affirmed.

Contribution Proportionate to Equity Interest - 5 NYCRR 144.2(a)(1)

The eligibility criterion at issue requires that "the contribution of the . . . woman owner must be proportionate to [her] equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise" (5 NYCRR 144.2[a][1]).

In response to an inquiry from the Division, applicant stated that Krystle Bristol's contribution of money, property, and expertise to SGS is proportionate to her 60% equity interest in the enterprise (exhibits 1 at 4 [Q & A question 4], 3 at 1 [response to question 4]).

The Division argues that applicant failed to demonstrate that Krystle Bristol's contribution to SGS is proportionate to her 60% ownership interest. Specifically, the Division argues that the application materials failed to establish whether Ms. Bristol contributed more money to the enterprise than did her husband (CD #1 at 3:40).

In support of this basis for denial, the Division analyst testified that the initial deposit into SGS's bank account was comprised of approximately [REDACTED] from Kyle Bristol and [REDACTED] from Krystle Bristol (CD #1 at 8:25). These figures were not contested by Ms. Bristol.

The Division analyst also testified that loan documents supplied by the applicant for a [REDACTED] in 2013 ("2013 loan") indicate that the 2013 loan was secured by a mortgage on Ms. Bristol's primary residence, which she owns jointly with her husband, and that Krystle and Kyle Bristol are listed in the loan documents as co-grantees (CD #1 at 11:15, 11:35, 21:25,

² 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 5 NYCRR 140.1[t] [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"]).

21:50; see also exhibits 5 [Notice of Final Agreement at 1], 6 [deed into Kyle A. Bristol and Krystle R. Bristol). The analyst further testified that applicant did not establish that the proceeds from this loan were used for the benefit of SGS (CD #1 at 11:25, 21:50; see also exhibit 5 [Disbursement Request and Authorization at 1 (stating that the loan was for "Personal, Family, or Household Purposes or Personal Investment")]).

Ms. Bristol acknowledged that the deed to their primary residence is in both her and her husband's name and that the land had been a gift from Kyle Bristol's father (CD #1 at 41:15). She argued, however, that she is the sole "mortgage holder" on the property (CD #1 at 41:20; see also exhibit 3 at 1). The loan documents indicate, and the Division acknowledges, that Ms. Bristol is the sole borrower on the 2013 loan (exhibit 5 [Notice of Final Agreement at 1]; CD #1 at 22:35). However, as discussed above, the Bristols are co-grantees on the loan and pledged their jointly-owned primary residence as security for the loan. Accordingly, both Krystle and Kyle Bristol are obligated to repay the loan.

Ms. Bristol testified the 2013 loan was the source of the initial line of credit that the Bristols obtained for SGS. The line of credit was obtained in 2015 (2015 LOC) and was in the amount of ██████ (CD #1 at 50:45; exhibit 19³). Under the 2015 LOC, both Krystle and Kyle Bristol are named as borrowers and their jointly-owned residence is again used as collateral (exhibit 19 [Credit Agreement and Disclosure at 1-2, Open-End Mortgage and Security Agreement at 1]). Accordingly, the proceeds of the 2013 LOC went to both Krystle and Kyle Bristol and they are both obligated to repay the loan.

Documentation from three other loans are in the record (exhibit 18). Two of these loans name SGS alone as the borrower, and Krystle and Kyle Bristol as co-guarantors (*id.* [Business Loan Agreement, Loan No, 87826453, at 1-2; Business Loan Agreement, Loan No, 87835165, at 1-2). The third loan names SGS, Krystle and Kyle Bristol as the borrowers (Loan Agreement, dated March 24, 2015, at 1]). Accordingly, for each of these three loans, Krystle and Kyle are either named borrowers or co-guarantors.

Ms. Bristol testified that she charged "start-up purchases" for SGS, amounting to over ██████, on her personal credit card (CD #1 at 42:00; see also exhibits 3 at 1, 4). As part of the application process, SGS provided a spreadsheet of these charges covering a period of approximately two years, from January 1, 2014 to December 7, 2015 (exhibit 4 at 2-5). The Division analyst testified that the spreadsheet provided by applicant does not indicate whether the charges were paid for using Ms. Bristol's credit card (CD #1 at 8:40, 10:10; see also exhibit 4). I also note that the record is silent with regard to the source of the funds used to pay Ms. Bristol's credit card bill (see CD #1 at 42:00 [Ms. Bristol's testimony regarding the credit card charges], exhibit 4). Ms. Bristol stated that the Division should have sought more detail regarding the credit card charges. I note that, in response to SGS's application, the Division did

³At the hearing, Ms. Bristol stated she intended to submit documents related to this transaction with the application and noted that she had difficulty uploading some of the larger electronic documents for submission to the Division. Division counsel stipulated to the submittal of the loan documents after the close of the live hearing, provided that staff would be afforded the opportunity to provide written comment on the documents. I held the record open for that purpose and the Division submitted the loan documents, and the Division's written comments, on July 21, 2016. The submission is included in the record as exhibit 19.

request "proof of where the funds came from to start the business" (exhibit 1 at 5 [Q & A, item 8]).

With regard to contribution of expertise, applicant asserts that Ms. Bristol brought numerous skills and experience to the enterprise (exhibit 3 at 1-2, see also findings of fact ¶3). The Division analyst testified that Krystle Bristol's expertise relates predominantly to managing the financial and administrative functions of the enterprise and that Kyle Bristol's expertise is more central to the core revenue generating functions of the business, such as conducting and supervising site work (CD #1 at 14:00, 14:55, 15:30). The Division analyst also testified that applicant did not provide a quantification of the value of either Ms. Bristol's or Mr. Bristol's expertise (id. at 12:20). On this record, applicant did not establish that Krystle Bristol's expertise was contributed to SGS for an equity interest in the enterprise, nor did applicant establish that any such contribution was proportionate to her equity interest.

The Division's determination that applicant failed to demonstrate that Krystle Bristol's contribution to SGS was proportionate to her 60% equity interest is supported by the record. Krystle and Kyle Bristol both contributed to the financing of the enterprise, including generally incurring equal obligations under the terms of the loan agreements. Their primary residence, used both to secure financing and as office space for SGS, is jointly owned by the Bristols. The respective value of Krystle and Kyle Bristols' expertise to SGS is not quantified in the record.

On this record, I conclude that the Division's determination with regard 5 NYCRR 144.2(a)(1) is supported by substantial evidence.

Decisions Pertaining to Operations - 5 NYCRR 144.2(b)(1)

The applicable regulatory criterion states that "[d]ecisions pertaining to the operations of the business enterprise must be made by minority group members or women claiming ownership of that business enterprise" (5 NYCRR 144.2[b][1]). The regulations provide that the "following will be considered in [regard to this criterion]: (i) Minority group members or women must have adequate managerial experience or technical competence in the business enterprise seeking certification[;] (ii) Minority group members or women must demonstrate the working knowledge and ability needed to operate the business enterprise[; and] (iii) Minority group members or women must show that they devote time on an ongoing basis to the daily operation of the business enterprise" (5 NYCRR 144.2[b][1][i-iii]).⁴

Applicant argues that, without Krystle Bristol, "there would be no Solid Ground Services" (CD #1 at 3:20) and that Ms. Bristol's administrative role is very important to the conduct of SGS's business operations (id. at 24:30). In its submittals to the Division on the application, SGS states that Ms. Bristol "manage[s] every aspect of the business operations" (exhibit 3 at 2).

⁴ In its denial letter, the Division lists three bases for the denial under the heading of "OPERATION" (exhibit 2 at 2). For each of these three operations-related bases, the Division refers to criteria set forth under one or more of the following regulatory provisions: 5 NYCRR 144.2(b)(1), 144.2(b)(1)(i), 144.2(b)(1)(ii) or 144.2(b)(1)(iii) (id.). Given this, and the interrelationship between these criteria, I consider the three operations-related bases cited by the Division together in this section of the report.

The Division argues that Krystle Bristol's role at SGS is consistent with that of an administrator and that she does not operate the core revenue generating functions of the business (CD # 1 at 4:50). The Division further argues that Kyle Bristol has the expertise to both conduct and supervise the fieldwork undertaken by SGS and that, the Division argues, is where the value of the business lies (CD #2 at 18:00).

The Division analyst testified that Kyle Bristol has experience operating the equipment and supervising teams in the field, while Krystle Bristol lacks this experience (CD #1 at 14:00; see also findings of fact ¶¶3-4). She further testified Kyle Bristol's experience was critical to the revenue generating functions of the enterprise (CD #1 at 14:55), while Krystle Bristol's role in managing the financial and administrative functions of SGS is less central to the provision of services to clients (CD #1 at 15:30). The Division argues that these facts demonstrate that Ms. Bristol could not manage SGS's field operations without Mr. Bristol (CD #2 at 18:40).

Krystle Bristol testified that her administrative support is critical to the operation of SGS and that "just because you run a backhoe doesn't mean you can run a business" (CD #1 at 46:35). Ms. Bristol's experience prior to forming SGS with her husband, together with her testimony, credibly demonstrate that she plays a critical roll with SGS (see also exhibits 8,⁵ 13, 16). However, her resume and testimony do not reflect that she has managerial experience or technical competence relevant to operating and maintaining heavy equipment or overseeing field operations for SGS. These skills were held by Kyle Bristol at the time SGS was formed and he has been, and remains, the person in charge of field operations for SGS.

It is clear that both Krystle and Kyle Bristol play essential roles in the operation of SGS. Nevertheless, the record demonstrates that Kyle Bristol is the individual who has the field expertise and technical competence necessary to perform the core revenue generating functions of SGS.

The Division also notes that Krystle Bristol is an elected public official and argues that she must split her time between her public duties and her work with SGS. The Division analyst testified that the application indicated that Ms. Bristol's elected position required her to be away from SGS three days per week (CD #1 at 12:50). This assertion is supported by the application materials. In a letter to the Division, dated December 7, 2015, Ms. Bristol stated that, in her

⁵ Exhibit 8 consists of three letters in support of applicant's appeal from individuals familiar with Krystle Bristol and SGS. Two of the letters post-date the Division's denial of the application by several months (the third letter is undated). Division counsel objected to the receipt of the exhibit on the bases that the letters were not before the Division at the time of the determination to deny the application and that it was unclear whether the letters pertain to the period of the Division's review of the application. I overruled the objection on the basis that, although the Division's regulations state that a request for hearing must be based upon documents and information provided during the application process, the regulations also provide that the hearing officer may consider information relating to the documents and information provided (see 5 NYCRR 144.4[e] [stating that "[t]he request for a hearing . . . shall be based on information or documents provided with an application and pursuant to any site visit that may have been carried out"], 5 NYCRR 144.5[a] [stating that "[t]he 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] may request additional information of the applicant and the division and take other actions necessary to make an informed decision"]).

position as the elected auditor for Bradford County, she "can work up to 155 – 6 hour days per year at the county" (exhibit 3 at 3). If Ms. Bristol were to work every week of the year, without taking a week off, 155 days would average 2.98 days per week.

Ms. Bristol testified that her work schedule as a county auditor was flexible and that she often worked only one or two days per week during the prime construction season, from May to August, and three days per week the rest of the year (CD #1 at 33:00; CD #2 at 5:45). Applicant states that, despite Ms. Bristol's position with the county, she works "a minimum of 40 hours per week at Solid Ground Services including most nights and weekends" (exhibit 3 at 3).

I conclude that applicant failed to demonstrate that the Division's determination was not based upon substantial evidence. Although Ms. Bristol is able to work 40 hours per week for SGS by working nights and weekends, applicant's field operations occur during normal business hours. Applicant acknowledges that Kyle Bristol works 10 hour days, five days per week, "during prime construction season" (exhibit 3 at 3 [also noting that Mr. Bristol "works a lot fewer days/hours" outside of the prime construction season]). These factors provide support for the Division's determination that Ms. Bristol's position with the county interferes with her ability to devote time on an ongoing basis to the daily operation of SGS.

Near the end of her testimony, Krystle Bristol testified that she is responsible for all of the scheduling and dispatch of SGS's █████ dump trucks at times when they are not engaged in excavation work for the enterprise (CD #2 at 13:25). Ms. Bristol further testified that dispatching SGS's dump trucks in this manner generates █████ % of the enterprise's sales (*id.* at 14:00). There is nothing in the hearing record that indicates that the extent of SGS's trucking business was before the Division at the time of the denial determination.

The application submitted by SGS, for example, states that the enterprise's primary business is excavation and that dump trucking is secondary (exhibit 1 at 3 [items 4.C, 4.D]). The application also lists eleven services that are provided by SGS, nearly all of these are excavation and site preparation related (*id.* [item 4.A]). Only near the end of this list are dump trucking and hauling services noted (*id.*). Similarly, in response to an inquiry from the Division, applicant provided a list of 21 duties and responsibilities handled by Krystle Bristol for SGS (exhibit 3 at 2-3 [item 12]). Near the end of this list "Truck Scheduling and Dispatch" is noted (*id.*). I also note that Kyle Bristol's duties and responsibilities include "Equipment Operation" and "Managing Maintenance on Trucks and Equipment" (*id.* at 3 [item 13]). Given the foregoing, I conclude that Ms. Bristol's testimony regarding the extent of SGS's dump trucking business does not undermine the Division's determination to deny the application.

On this record, I conclude that the Division's determinations with regard to 5 NYCRR 144.2(b)(1) are supported by substantial evidence.

CONCLUSION

As discussed above, applicant failed to meet its burden to demonstrate that the bases cited by the Division for the denial were not supported by substantial evidence. Specifically, I conclude that applicant failed to demonstrate that Krystle Bristol (1) made capital contributions

proportionate to her equity interest in SGS; (2) has the experience or technical competence, working knowledge or ability needed to operate the enterprise; (3) makes decisions pertaining to the field operations of the enterprise; and (4) devotes time on an ongoing basis to the daily operation of the enterprise.

RECOMMENDATION

The Division's determination to deny SGS's application for certification as a women-owned business enterprise should be affirmed for the reasons stated herein.

**Matter of Solid Ground Services, Inc.
DED File ID No. 60174**

Exhibit List

Exh. #	Description
1	SGS WBE Certification Application (submitted October 15, 2015)
2	WBE Application Denial Letter (dated January 4, 2016)
3	SGS Letter to Division (dated December 7, 2015)
4	Krystle Bristol American Express Credit Card Information
5	Loan Documents
6	Deed into Kyle and Krystle Bristol
7	Resumes for Krystle Bristol and Kyle Bristol
8	Northern Tier Regional Planning & Development Commission Letter (on behalf of SGS) to Division/ALJ (Dated July 15, 2016)
9	Training Documents for Krystle Bristol
10	Computer Screenshots re: SGS Activities
11	SGS Business Certificates and Licenses
12	Daily Activity Log for Krystle Bristol (July 2016)
13	Citizens & Northern Bank Letter (on behalf of SGS) to Division/ALJ (Dated July 16, 2016)
14	SGS Business Contracts
15	SGS Equipment Purchase Documents
16	Small Business Development Center, University of Scranton, Letter (on behalf of SGS) to Division/ALJ (Dated July 18, 2016)
17	401(k) Check Payable to Krystle Bristol
18	Loan Documents, Loans to SGS
19	Loan Documents, Loans to Krystle and Kyle Bristol, with Division Comment Letter (dated July 21, 2016)