

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

In the Matter

- of -

the Application of **Blackstone Advanced Technologies, LLC**
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60553

RECOMMENDED ORDER

- by -

A handwritten signature in cursive script, reading "Maria E. Villa", is written over a horizontal line.

Maria E. Villa
Administrative Law Judge

June 15, 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 Blackstone Advanced Technologies, LLC ("Blackstone" 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 ("NYCRR") Parts 140-144, challenging the determination of the Division that Blackstone does not meet the eligibility criteria for certification as a WBE.

The Division denied Blackstone's application for WBE certification (Exhibit 1) by letter dated October 26, 2016. Exhibit 2. The denial letter sets forth one ground under 5 NYCRR 144.2 for the denial. By letter dated November 17, 2016, applicant appealed from the Division's determination to deny the application. Exhibit 3. The Division responded by letter dated March 2, 2017, scheduling the hearing for May 23, 2017. Exhibit 4.

The hearing took place as scheduled on May 23, 2017. Applicant was represented by David G. Burch, Jr., Esq., of the Barclay Damon law firm, Syracuse, New York. Heather Turner, Michael Metzger, and Sarah Drake testified on behalf of applicant. Division staff was represented by Phillip Harmonick, Esq., and called Carlita Bell, a Senior Certification Analyst for the Division, as a witness. The hearing was recorded and this report cites to that recording as "Hearing Recording ('HR') at ___." The hearing recording was provided to the administrative law judge on June 12, 2017, and on that date the record closed.

Both applicant and Division staff offered exhibits, and those exhibits were marked and received into evidence. A chart of those exhibits is attached.

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, on information revealed in supplemental submissions, and if appropriate, on interviews conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of Blackstone'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

Division

The Division argued that applicant failed to meet the ownership requirement for certification as a woman-owned business, pursuant to Section 144.2 of 5 NYCRR. Exhibit 2. Specifically, the Division asserted that Ms. Turner had not made a capital contribution proportionate to her equity interest in the business enterprise, as demonstrated by contributions of money, property, equipment or expertise. Exhibit 2; see Section 144.2(a)(1) of 5 NYCRR. In this regard, the Division cited the following “relevant facts” in the denial letter:

- Blackstone Advanced Technology [sic], LLC (“BAT”) was organized by Mr. Richard Turner III as a Single Member LLC in 2013.
- On September 1, 2015, pursuant to the Amended and Restated Limited Liability Company Agreement (the “2015 LLC Agreement”) of BAT, Ms. Turner was admitted to BAT as a member and allocated fifty-one percent of the membership units in BAT.
- The 2015 LLC Agreement indicated that Ms. Turner did not make a capital contribution to BAT in connection with obtaining her membership interest therein.
- The application to certify BAT as a WBE represented that Ms. Turner did not make any contributions of money, property, equipment or expertise to BAT.
- Documents submitted as attachments to the application for the purpose of demonstrating capitalization and investments in BAT reflect the purchase by BAT of certain assets, not contributions by the members of BAT to the business.

Exhibit 2, at 2.

Applicant

Applicant argued that Ms. Turner contributed expertise to the business enterprise, and that the [REDACTED] check drawn on a joint account with her husband was her monetary contribution to Blackstone. As a result, applicant maintained that the Division’s denial was not supported by substantial evidence.

FINDINGS OF FACT

1. Blackstone was established in 2013 and is a specialty fabrication sheet metal manufacturer located at 86 Blackstone Avenue in Jamestown, New York. Exhibit 1, at 1-3; HR at 3:20 (Disc 1, Track 3).

2. Upon acquiring the business in 2013, a contribution of [REDACTED] was made by a February 12, 2014 check drawn upon a joint account held by Heather and Richard Turner. Exhibit 5. No other monetary contribution to the business was made when Heather Turner became the president and a 51% owner of the business, as of September 1, 2015.

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of Blackstone as a women-owned business enterprise¹ pursuant to Executive Law Article 15-A. Section 144.2(a)(1) of 5 NYCRR requires that a woman owner's capital contributions to a business for which certification is sought must be "proportionate to their equity interest in the enterprise." Capital contributions may be in the form of money, property, equipment, or expertise.

Applicant observed that the [REDACTED] capital contribution made at the time the business was acquired was in the form of a check drawn on a joint account held by Heather Turner and Richard Turner, and pointed out that Ms. Turner wrote the check. According to applicant, the business had no need for additional working capital at the time the check was drawn, and contended further that Ms. Turner had contributed her expertise to the business during the time the business was acquired in December of 2013 until she became a 51% owner on September 1, 2015.

In this regard, applicant offered testimony from Ms. Turner, Mr. Metzger, and Ms. Drake with respect to Ms. Turner's role in Blackstone. Applicant asserted that Ms. Turner had "an immersive experience" in running Blackstone from the time the business was acquired until the date she became a majority owner. HR at 34:56 (Disc 2, Track 2). Consequently, according to applicant, Ms. Turner was able to increase the profitability of Blackstone and stabilize the company, which had been struggling under the prior ownership, before Richard Turner purchased Blackstone. Applicant argued that the Division's position with respect to Blackstone's application was contrary to the purposes of the Division's WBE program.

In response, the Division noted as an initial matter that the photocopy of the [REDACTED] check (Exhibit 5) was not provided to the Division as part of the application, and could not be considered on appeal. Even if it had been, the Division argued that a *de minimis* joint contribution by both owners was insufficient to support Ms. Turner's majority interest in Blackstone. The Division noted further that the record contains no evidence of any other monetary contribution by Heather Turner, and that the application states that Ms. Turner made no capital or cash contribution to Blackstone. Exhibit 1, at 2(C).

With respect to the applicant's claim that Heather Turner's contribution was in the form of expertise, the Division observed that no evidence in the application or the appeal

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, among other things, "at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women"))).

demonstrated that Ms. Turner contributed expertise in consideration for her majority interest. According to the Division, even if Ms. Turner claimed a contribution of expertise as part of the application process, the Division would have asked “pointed questions” as to the value of that expertise. HR at 29:35 (Disc 2, Track 2). The Division concluded that Blackstone is an investment business for the Turners, and emphasized that it would have been unreasonable for the Division to conclude, on the basis of the application before it and Ms. Turner’s experience, that the claim of expertise was proportionate to her majority interest in Blackstone.

On appeal, applicant has the burden to demonstrate that the Division’s denial was not based upon substantial evidence, and that burden has not been met. Applicant did not establish a contribution of money, property, equipment or expertise that would be proportionate to Ms. Turner’s 51% ownership. The [REDACTED] check (which was not before the Division at the time of the denial) was drawn on a joint account nearly two years before Ms. Turner became an owner, and it is undisputed that no other capital contribution was made. Applicant argued that while Heather Turner did not make any other contribution, neither did Richard Turner. This argument overlooks the fact that Richard Turner is not an applicant for certification as a WBE. The evidence shows that the business was acquired by Richard Turner, who has significant familial resources. Ms. Turner played no part in the initial acquisition of the business, and was only made a 51% owner, and the president of the business, after nearly twenty months had elapsed.

With respect to a contribution of expertise, applicant argued that Ms. Bell, the Division’s analyst, discussed Ms. Turner’s role in the company during two interviews that were conducted, but concluded erroneously that she did not possess the requisite skills to establish entitlement to certification. This argument is unavailing. Applicant did not demonstrate that Ms. Turner’s expertise was a contribution, or provide any valuation of that contribution as part of the application process.

At the hearing, applicant’s witnesses offered testimony that, in the event Ms. Turner were to leave Blackstone, at least two persons would have to be hired to replace her, at a cost of between [REDACTED] and [REDACTED]. HR at 30:12 (Disc 1, Track 3); HR at 10:00 (Disc 2, Track 1). Nevertheless, this information was not before the Division at the time of the denial. Moreover, the experience that Ms. Turner gained during the period before she became an owner of Blackstone was primarily in human resources and information technology, not specialty metal manufacturing.

It was reasonable for the Division to conclude that applicant had not demonstrated the requisite contributions. The Division’s determination was supported by substantial evidence.

CONCLUSION

As discussed above, applicant did not meet its burden to demonstrate that the Division’s determination to deny Blackstone’s WBE application for certification was not based on substantial evidence.

RECOMMENDATION

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

**Matter of Blackstone Advanced Technologies, LLC
DED File ID No. 60553**

Exhibit List

| Exhibit No. | Description |
|-------------|--|
| 1 | March 1, 2016 application |
| 2 | October 26, 2016 denial letter |
| 3 | November 17, 2016 letter requesting hearing |
| 4 | March 2, 2017 letter scheduling hearing |
| 5 | Photocopy of M&T check dated February 12, 2014 |
| 6 | September 1, 2015 Resolution |
| 7 | September 1, 2015 Amended LLC Agreement |
| 8 | Resume – Heather A. Turner |
| 9 | 2015 S Corporation federal tax return |
| 10 | 2015 Asset Purchases |
| 11 | December 31, 2013 Asset Purchase Agreement |
| 12 | Asset Allocation as of December 31, 2013 |
| 13 | Resume: David W. Wilke |
| 14 | Resume: Michael D. Metzger |
| 15 | Resume: Richard E. Turner III |
| 16 | Blackstone PowerPoint presentation with company background |
| 17 | Blackstone brochure |
| 18 | Blackstone organization chart |