

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

In the Matter

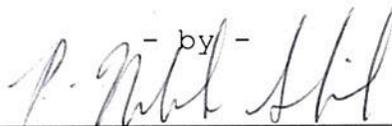
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the Application of
Advanced Builders & Land Development, Inc.
For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 58614

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

September 28, 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 the application of Advanced Builders & Land Development, Inc. ("applicant") for 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 Advanced Builders & Land Development, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Advanced Builders & Land Development, Inc.'s application was submitted on June 11, 2014 (Exh. DED1).

The application was denied by letter dated December 12, 2016, from Bette Yee, Director of Certification Operations (Exh. DED2). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet four separate eligibility criteria related to Olga Baram's ownership, operation, and control of the applicant.

By letter dated January 12, 2017, applicant's counsel submitted its written appeal which consisted of a three-page letter and five exhibits, listed in the attached exhibit chart as A1-A5.

In a ten-page memorandum dated July 6, 2017, the Division responded to the applicant's appeal. Enclosed with the response was the affidavit of Glenn Butler, Senior Certification Analyst for the Division and ten exhibits, described in the attached exhibit chart as DED1-DED10.

On July 7, 2017, this matter was assigned to me.

By email dated July 12, 2017, applicant's counsel requested the opportunity to reply, which was granted, and applicant's nine-page reply was received on August 14, 2017 at which time the record closed.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria regarding the applicant's ownership, operation, control, and independence are applied on the basis of information supplied through the application process.

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 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 applicant'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]).

In his reply, applicant's counsel argues that this is not the appropriate standard because no hearing has been held in this case. This is factually incorrect. The applicant was allowed to choose between having the appeal decided through either an in-person hearing or on written submissions. It chose the latter and the appeal papers and attached exhibits in the record constitute the hearing record. Therefore, applicant's counsel's argument is without merit.

POSITIONS OF THE PARTIES

Position of the Division

In its denial letter, the Division asserts that the application failed to meet four separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner Olga Baram's capital 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, as required by 5 NYCRR 144.2(a)(1).

Second, the Division found that the applicant failed to demonstrate that the woman owner, Olga Baram, shares in the risks and profits in proportion with her ownership interest, as required by 5 NYCRR 144.2(c)(2).

Third, the Division found that the applicant failed to demonstrate that the woman owner, Olga Baram, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

Fourth, the Division found that the corporate bylaws and other documents governing the business enterprise do not permit the woman owner, Olga Baram, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

Position of the Applicant

Advanced Builders & Land Development, Inc. 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. Advanced Builders & Land Development, Inc. is in the business of general contracting for residential and commercial projects, construction consulting and estimating, and design and

consulting for project development (Exh. DED1 at 3)¹. The firm has a business address of 400 Oser Avenue, Suite 2300, Hauppauge, New York.

2. Advanced Builders & Land Development, Inc. was established on October 3, 2005 by Joseph V. Trimarco as the sole shareholder. On June 4, 2014, Mr. Trimarco transferred 51% of his stock to his wife, Olga Baram. (Exh. DED3).

3. Advanced Builders & Land Development, Inc.'s 2015 federal tax return (Exh. DED7) showed no distributions were made to the owners and that [REDACTED] (Exh. DED7 at 10).

4. Ms. Baram is solely responsible for managing marketing and sales and purchasing equipment/sales. Mr. Trimarco is solely responsible for managing estimating, supervising field operations, and managing and signing payroll. Ms. Baram and Mr. Trimarco share management of financial decisions, preparing bids, negotiating bonding and insurance, hiring and firing, negotiating contracts, and signing on business accounts (Exh. DED1 at 4-5).

5. The shareholders' agreement between Ms. Baram and Mr. Trimarco prevents Ms. Baram from acting without Mr. Trimarco's consent because this document requires the unanimous approval of the shareholders on any issue put before them (Exh. DED9 at 3).

6. The corporation's bylaws states that the chairman of the board of directors or the president, in the absence of a chairman, is the chief executive of the business (Exh. DED10 at 4-5). Mr. Trimarco is the chairman of the board (Exh. A3) and the record is not clear as to who serves as president (Exh DED1 at 3 lists both Ms. Baram as president in item 2A and Mr.

¹ In his reply, applicant's counsel states that the firm does not offer consulting services in the areas of estimating and development and contends these services are performed by a second company, Advanced Consulting Estimating Corp., which is wholly owned by Mr. Trimarco (Exh. DED1 at 13). However, this information is contradicted by information in the application which describes the principal services offered by Advanced Builders & Land Development as "General Contracting for Residential and Commercial Projects, Construction Consulting and Estimating Services, Design and Consulting for Project Development" (Exh. DED1 at 3).

Trimarco as such in item 2F. This confusion continues throughout the record).

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. The Division's denial letter set forth four bases related to Ms. Baram's ownership, operation, and control of Advanced Builders & Land Development, Inc. Each basis is discussed individually, below.

Ownership

In its denial, the Division found that the applicant failed to demonstrate that the woman owner Olga Baram'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, as required by 5 NYCRR 144.2(a)(1). The relevant facts cited in the denial letter were: (1) the firm was founded by Mr. Trimarco in 2005 and in 2014 he transferred 51% of the company to Ms. Baram; (2) the application states Ms. Baram's contribution to the firm was in the form of a [REDACTED] and (3) Mr. Trimarco initially capitalized the firm (Exh. DED2 at 2).

On its appeal, the applicant's counsel states that the [REDACTED] paid by Ms. Baram represents a capital contribution which is significantly more than the original contribution made by Mr. Trimarco in 2005. Attached to the appeal is a January 6, 2017 letter from Frederick A. Wightman, CPA which states that the loan made by Ms. Baram was done for accounting purposes only and represents a capital contribution and will not be repaid from the assets of the company (Exh. A1).

In its response, the Division argues that the application materials failed to prove that Ms. Baram made any contribution to the firm at all. In his affidavit, Mr. Butler asserts that he reviewed the application which states that Mr. Trimarco contributed nothing to firm and Ms. Baram contributed [REDACTED] [REDACTED] (Butler affidavit ¶12, Exh. DED1 at 3). The proof provided of Ms. Baram's contribution related to two vehicles (Exh. DED4)

and Mr. Butler states he could not discern any connection between these documents and the contributions claimed (Butler affidavit ¶¶13-14). Mr. Butler then requested additional information regarding the contribution (Exh. DED5) which was provided (Exh. DED1 at 11-12 and Exh. DED6). Ms. Baram states that she contributed ██████████ in the form of cash prior to her purchase of stock which came from another business, Town and Country Homes, which she owns (Exh. DED1 at 11-12). Mr. Butler states that he reviewed the financial records provided and located a ██████████ (Butler affidavit ¶18). He further states that he did not deem these transfers as a contribution by Ms. Baram and his review of the firm's 2012 federal taxes did not show these transfers as capital contributions (Exh. DED6 at 22). The Division argues that had there been a capital contribution it would have appeared on the firm's 2012 tax returns as additional paid-in capital. The Division notes that the reported ██████████ contribution does not appear in the firm's 2015 taxes, either (Exh. DED7 at 3).

With respect to the claim that a ██████████ was made to the firm, the Division responds that it does not consider loans as capital contributions and that there is no proof that such loan was ever made. There are no loan documents in the record and no connection was established between the vehicle records, the transfer of funds, and the alleged loan.

Unmentioned in the Division's response is information on the application stating that Ms. Baram acquired her interest through inheritance, that she had been helping her husband with business operations, and that she acquired her shares through gift by marriage (Exh. DED1 at 2).

In his reply, applicant's counsel reiterates his claim that Ms. Baram paid ██████████ to the firm and such claim is shown in bank statements submitted with the application. No reference is made on the appeal to the date of the payments or where in the record the proof of these payments can be found. A review of the only bank statements provided on the appeal (Exh. DED6 at 1-19) does not show the ██████████ payment to the firm.

The reply also suggests that Ms. Baram made a contribution of expertise to the firm as evidenced by the growth in revenues

since she took an ownership interest in the firm. The value of the expertise is not quantified, nor was it claimed in the application (Exh. DED1 at 3). Because this claim of a contribution of expertise is raised for the first time in the appeal, it was not before the agency at the time of its denial and is, therefore, irrelevant to this appeal.

Based on the evidence in the record, specifically the fact that there is no proof of her claimed [REDACTED] monetary contribution and the fact that she states in the application her shares were received as a gift, the applicant has failed to demonstrate that the woman owner Olga Baram's capital 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, as required by 5 NYCRR 144.2(a)(1). The Division's denial was based on substantial evidence.

The second ground for denying the application regarding Ms. Baram's ownership was that the applicant failed to demonstrate that the woman owner, Olga Baram, shares in the risks and profits in proportion with her ownership interest, as required by 5 NYCRR 144.2(c)(2). The relevant fact cited in the denial letter was that Mr. Trimarco receives greater compensation from the firm than Ms. Baram (Exh. DED2 at 2).

On its appeal, the applicant's counsel states that Ms. Baram's W-2 earnings from the firm for 2016 will be almost double Mr. Trimarco's. Attached to the appeal are copies of the 2016 W-2 forms which show Ms. Baram was paid [REDACTED] (Exh. A2 at 1) and Mr. Trimarco was paid [REDACTED] Exh. A2 at 2). Counsel also states that the firm has an outstanding letter of credit with Bridgehampton National Bank for [REDACTED] for which Ms. Baram is one of the personal guarantors, but this document is not included with the appeal.

In its response, the Division argues that the basis for its denial was the fact that Mr. Trimarco received greater compensation from the firm in 2015 than did Ms. Baram. In his affidavit, Mr. Butler states that he reviewed the firm's 2015 tax return (Exh. DED7) which showed that no distributions were made to the owners and that Mr. Trimarco received twice as much in wages as Ms. Baram (Butler Affidavit ¶¶22-24). Specifically,

the firm's IRS form 1125-E shows Mr. Trimarco was paid [REDACTED] and Ms. Baram was paid [REDACTED] (Exh. DED7 at 10).

With respect to the applicant counsel's claim that Ms. Baram was paid more than Mr. Trimarco in 2016, the Division argues that this evidence was not included in the application materials and is not relevant to the denial.

In his reply, applicant's counsel argues that the firm's 2015 federal income tax return, schedule K-1 shows the profits earned by the company were split according to Mr. Trimarco's and Ms. Baram's ownership interests. These forms show Mr. Trimarco was allocated a profit of [REDACTED] (Exh. DED6 at 7) and Ms. Baram was allocated [REDACTED] (Exh. DED6 at 9). However, these amounts are not distributions received by the shareholders, rather only a bookkeeping exercise which does not reflect an actual benefit to the shareholder.

Finally, applicant's counsel restates that Ms. Baram is a guarantor on the Bridgehampton National Bank Line of Credit which was submitted with the application. However, as stated above, this document is not included in the record on appeal.

Based on the evidence in the record, specifically the fact that in 2015 Ms. Baram was paid half of what Mr. Trimarco was paid by the firm in 2015, the applicant failed to demonstrate that the woman owner, Olga Baram, shares in the risks and profits in proportion with her ownership interest, as required by 5 NYCRR 144.2(c)(2). The Division's denial was based on substantial evidence.

Operation

In its denial letter, the Division found that the applicant failed to demonstrate that the woman owner, Olga Baram, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). The relevant facts cited in the denial letter were: (1) the firm is primarily engaged in providing general contracting and construction consulting services; and (2) Mr. Trimarco manages the core functions of the business, including estimating and field supervision (Exh. DED2 at 3).

On the appeal, the applicant's counsel argues that the core functions performed by Ms. Baram include: (1) supervision of the project manager and construction coordinator; (2) ensuring compliance with safety regulations in the field; (3) ensuring compliance with labor law regulations; (4) managing relationships with subcontractors and material suppliers; (5) supervising construction schedules and budgets; (6) procuring bonding for construction projects; (7) supervising and maintaining machinery and equipment; (8) marketing and public relations; (9) overseeing preparation of company financial statements and forecasting; (10) managing weekly accounts receivable and payable; (11) negotiating contracts with customers; (12) preparing bids and procuring necessary bonds and insurance; (13) managing human resources and weekly payroll; (14) overseeing diversity efforts and planning; and (15) assisting clients with interior design selections.

In its response, the Division argues that Ms. Baram does not operate the Advanced Builders & Land Development, Inc. for the purposes of WBE certification because her role with the firm is limited to administrative, marketing and financial matters and because men manage the significant operations of the business. In his affidavit, Mr. Butler states that after his review of the application's description of the firm's business, he determined the core functions of the firm were estimating and supervision of field work (Butler Affidavit ¶26). These are functions that allow the firm to obtain work and deliver services to clients, and thereby generate revenue. The application further stated that these core functions were managed by Mr. Trimarco (Exh. DED1 at 4-5). Mr. Butler also states that he reviewed the resumes of the owners (Exh. DED8) and concluded that Ms. Baram's role focused on administration, marketing, and financial matters while Mr. Trimarco supervised construction management (Butler Affidavit ¶¶28-29). Mr. Butler's conclusion was confirmed with his review of information regarding the day to day activities of the owners (Exh. DED1 at 11, Butler Affidavit ¶¶31-32).

In the reply, applicant's counsel states that the functions of estimating and supervising field operations are not undertaken by Mr. Trimarco, but rather by a senior project manager, John Barbosa, who reports to Mr. Trimarco. He

continues that without Ms. Baram's leadership, the company would be nothing more than a small, home improvement contractor as it was prior to her ownership. Any delegation to key employees, who happen to be men, is irrelevant to a determination of ownership.

There is no dispute that the management of estimating and supervision of field work are done by men. The Division's characterization of these functions as the core functions of the business due to the fact that this is how the firm generates revenue is reasonable and consistent with other WBE cases. Based on the evidence in the record, the applicant failed to demonstrate that the woman owner, Olga Baram, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). The Division's denial was based on substantial evidence.

Control

The final ground for denial was that the corporate bylaws and other documents governing the business enterprise do not permit the woman owner, Olga Baram, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). The relevant facts cited in the denial letter were: (1) the shareholders' agreement requires unanimous consent for certain actions to be undertaken by the firm; and (2) the bylaws state that Mr. Trimarco is the chairman of the board of directors and the president of the firm and these are the highest ranking posts (Exh. DED2 at 3).

On the appeal, the applicant's counsel states that the minutes of the annual meetings of the board of directors for 2015 and 2016 show Ms. Baram is president and chairman of the board of directors. This is not entirely correct, however. The 2014 minutes list Mr. Trimarco as president and chairman of the board of directors (Exh. A4 at 3). The 2015 minutes list Mr. Trimarco as chairman and president and note the election of Ms. Baram as president of the corporation (Exh. A4 at 2). The 2016 minutes again list Mr. Trimarco as chairman and president and again note the election of Ms. Baram as president (Exh. A4 at 1). In addition, attached to the appeal is a copy of a June 3, 2014 resolution by the board of directors of the firm naming Ms. Baram as president (Exh. A3) which is not consistent with the

minutes of the 2014 annual meeting where Mr. Trimarco is named as president (Exh. A4 at 3). The confusion regarding who is president of the company exists in the application as well as the resumes of the owners.

In its response, the Division states that it denied the application because the shareholders' agreement between Ms. Baram and Mr. Trimarco prevents Ms. Baram from acting without Mr. Trimarco's consent and because she did not demonstrate that she had replaced Mr. Trimarco as the highest ranking officer of the firm. In his affidavit, Mr. Butler states that he reviewed the corporate bylaws and found that this document required the unanimous approval of the shareholders on any issue put before them (Butler affidavit ¶¶ 34-35, Exh. DED9 at 3). Mr. Butler also states that he reviewed the corporation's bylaws (Exh. DED10) which state that the chairman of the board of directors or the president, in the absence of the chairman, is the chief executive of the business (Butler affidavit ¶¶36-37). Mr. Butler concluded that the application identifies Mr. Trimarco as the president of the firm. Mr. Butler did not observe any evidence in the application that Ms. Baram had been elected chairman of the board of directors (Butler affidavit ¶38). Based on this information, Mr. Butler concluded that the relevant corporate documents did not permit Ms. Baram to control the management of the firm without restriction (Butler affidavit ¶39).

With respect to the minutes of the board of directors from 2014, 2015, and 2016 (Exh. A4), the Division states that these documents were not included with the application materials. Even if they had been, the Division notes that each document identifies Mr. Trimarco as the chairman of the board and, therefore, he was the highest ranking officer of the firm.

In his reply, applicant's counsel states that the shareholders' agreement denotes Ms. Baram as president of the firm and that the Division did not request any clarification as to the officers or directors of the corporation. He asserts that even if Mr. Trimarco were the firm's president, it would allow him to preside over shareholders' meetings, the sole function of which would be the election of Directors of the corporation.

Based on the evidence in the record, specifically the shareholders' agreement which limits Ms. Baram's control of the firm, the confusion regarding who holds the office of president, and the fact that Mr. Trimarco is listed on various documents as chairman of the board of directors, the applicant has failed to demonstrate that the corporate bylaws and other documents governing the business enterprise permit the woman owner, Olga Baram, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). The Division's denial was based on substantial evidence.

CONCLUSIONS

1. The applicant failed to demonstrate that the woman owner Olga Baram's capital 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, as required by 5 NYCRR 144.2(a)(1).

2. The applicant failed to demonstrate that the woman owner, Olga Baram, shares in the risks and profits in proportion with her ownership interest, as required by 5 NYCRR 144.2(c)(2).

3. The applicant failed to demonstrate that the woman owner, Olga Baram, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

4. The applicant failed to demonstrate that the corporate bylaws and other documents governing the business enterprise permit the woman owner, Olga Baram, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

RECOMMENDATION

The Division's determination to deny Advanced Builders & Land Development, Inc.'s application for certification as a woman-owned business enterprise should be affirmed, for the reasons stated in this recommended order.

**Matter of
Advanced Builders & Land Development, Inc.**

**DED File ID No. 58614
Exhibit List**

Exh. #	Description
DED1	Application
DED2	Denial letter
DED3	Stock transfer ledger
DED4	Vehicle information
DED5	DED request for additional information
DED6	Bank statements and 2012 federal tax returns
DED7	2015 federal tax return
DED8	Resumes
DED9	Shareholders agreement
DED10	Corporate bylaws
A1	Letter from firm's CPA dated 1/6/17
A2	2016 w-2 forms
A3	Shareholders' resolution
A4	Minutes of annual meeting of board of directors for 2014, 2015, and 2016
A5	Denial letter