

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

In the Matter

- of -

the Application of **Atlantic Granite & Marble, Inc.**  
for Certification as a Women-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61287

RECOMMENDED ORDER

- by -



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Richard A. Sherman  
Administrative Law Judge

March 12, 2018

## **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 Atlantic Granite & Marble, Inc. ("Atlantic" or "applicant") certification as a women-owned business enterprise ("WBE")<sup>1</sup> 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 Atlantic does not meet the eligibility criteria for certification as a WBE.

The Division denied the application (exhibit 1) filed by Atlantic for WBE certification by letter dated February 28, 2017 (exhibit 12). The denial letter sets forth three grounds under 5 NYCRR 144.2 for the denial. Applicant filed a notice of appeal ("notice of appeal") and the Division advised applicant that the appeal hearing would be held on February 6, 2018 (letter from the Division to applicant, dated January 11, 2018).

I convened the hearing at approximately 11:00 a.m. on February 6, 2018, at the Division's offices, 625 Broadway, Albany, New York. Kathleen Frank and Catherine Scarlata appeared on behalf of Atlantic, and Ms. Frank testified. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, represented the Division and called one witness, Glen Butler, a senior certification analyst for the Division. Mr. Butler participated by videoconference from the Division's offices in New York City. The parties proffered a total of thirteen exhibits, all of which were received into evidence on stipulation of the parties. A list of the exhibits is appended to this report.

Consistent with 5 NYCRR 145.1(m), an audio recording of the hearing was made. A copy of the audio recording on compact disc ("CD") was provided to this office on February 26, 2018, whereupon, the hearing record closed.

## **ELIGIBILITY CRITERIA**

The eligibility criteria pertaining to certification as a WBE 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, control, and independence 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

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<sup>1</sup>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[tt] [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"]).

made, based on representations in the application itself, and on information revealed in supplemental submissions or 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 WBE certification for Atlantic 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

The Division cited three bases for the denial of Atlantic's application. First, the Division argues that applicant failed to establish that the women owners, Kathleen Frank and Catherine Scarlata, own a majority interest in Atlantic (exhibit 12 at 2 [citing 5 NYCRR 144.2(a)(5)]). Second, the Division argues that applicant failed to establish that the women owners, Kathleen Frank and Catherine Scarlata, made capital contributions to Atlantic in proportion to their ownership interests in the enterprise (exhibit 12 at 2 [citing 5 NYCRR 144.2(a)(1)]). Third, the Division argues that applicant failed to establish that the women owners, Kathleen Frank and Catherine Scarlata, share in the risks and profits of the enterprise in proportion to their ownership interests (exhibit 12 at 3 [citing 5 NYCRR 144.2(c)(2)]).

### Position of Applicant

Applicant argues that its 2015 federal tax return, which did not indicate that Catherine Scarlata held an ownership interest in Atlantic, has been amended to correct that error (notice of appeal at 1). Applicant also states that Kathleen Frank and Catherine Scarlata were gifted their ownership interests "because this is a family owned business" (id.). With regard to compensation, applicant states that compensation is "divided up by family" (id. at 2). Applicant argues that "the amounts earned by each individual are not relevant" and that the total compensation received by Kathleen Frank and her husband, Douglas Frank, should be considered (id.).

## FINDINGS OF FACT

1. Atlantic is a corporation, established on July 14, 1987, and is a supplier and installer of granite countertops, marble, and limestone vanity tops and other specialty items (exhibit 1 at 2 [items 1.Q, 1.R]; exhibit 1 at 3 [items 3.B-D]).

2. Kathleen Frank is the President of Atlantic and owns 41% of Atlantic (exhibit 1 at 2-3 [items 1.O, 2.A, 2.D]).

3. In addition to Kathleen Frank, the application lists three other owners of Atlantic: Tim Scarlata<sup>2</sup> (23%), Gerard Leva (23%), and Catherine Scarlata (13%) (exhibit 1 at 2-3 [items 2.A, 2.D]). They are all identified as officers of Atlantic (*id.* at 2-3 [item 2.A]).

4. Neither Kathleen Frank nor Catherine Scarlata made a monetary contribution to Atlantic for their respective ownership interests (exhibit 1 at 3 [items 2.C, 2.D (stating that, of the current owners, only Gerard Leva paid for his shares of the company)]; CD at 15:05 [Butler testimony that the women owners were gifted their shares in the company]).

5. In 2015, Kathleen Frank received nearly [REDACTED] less in compensation from Atlantic than her husband, Douglas Frank (exhibit 11 [W-2 wage and tax statements]; CD 23:25 [Butler testimony on the Franks' compensation]).

6. In 2015, Catherine Scarlata received nearly [REDACTED] less in compensation from Atlantic than her husband, Tim Scarlata 2015 (exhibit 10 [W-2 wage and tax statements]; CD 21:00 [Butler testimony on the Scarlatas' compensation]).

7. In 2015, Douglas Frank received higher compensation from Atlantic than Kathleen Frank, Catherine Scarlata, or Tim Scarlata (exhibits 10, 11 [W-2 wage and tax statements]).

8. In fiscal year 2015 (ending March 31, 2016), Tim Scarlata received nearly [REDACTED] more in compensation from Atlantic than Kathleen Frank (exhibit 5 [form 1125-E, compensation of officers]).

## DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of Atlantic as a WBE pursuant to Executive Law Article 15-A. The Division cites three bases in support of upholding the denial, each of which is discussed below.

### Ownership: Own at Least 51 Percent of Authorized Stock

The eligibility criterion at issue requires that "a corporation must have issued at least fifty-one (51) percent of its authorized voting and all other stock to minority group members or women shareholders" (5 NYCRR 144.2[a][5]).

The Division argues that applicant failed to establish that the women owners, Kathleen Frank and Catherine Scarlata, owned at least 51% of Atlantic's outstanding stock at the time that the application was submitted (exhibit 12 at 2 [citing 5 NYCRR 144.2(a)(5)]). The Division states that Atlantic's 2015 federal tax return states that Kathleen Frank owns 41% of

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<sup>2</sup> Tim Scarlata is sometimes referred to as "Timy" Scarlata in the record.

the outstanding stock, and that 59% of the outstanding stock is owned by males (Tim Scarlata [36%] and Gerard Leva [23%]).

Applicant asserts that its 2015 federal tax return was erroneous, and that Atlantic filed an amended return with the correct ownership information (notice of appeal at 1). Applicant also asserts that the amended federal tax return shows that Tim Scarlata transferred 13% of Atlantic's common stock to Catherine Scarlata, thereby resulting in women owning a total of 54% of Atlantic's common stock (id.).

At the hearing, applicant provided a copy of the amended 2015 federal tax return. The amended return states that Kathleen Frank owns 41% of the outstanding stock, Catherine Scarlata owns 13%, Tim Scarlata owns 23%, and Gerard Leva owns 23% (exhibit 13 at 12 [schedule G (form 1120)]). This document was not before the Division at the time of the denial determination and, therefore, was not considered by the Division.

The Division analyst testified that, on two occasions, he requested additional information and materials relating to the ownership of Atlantic because information contained in the application lacked clarity or was conflicting (CD at 8:10, 12:20, 13:20). The analyst also testified that Atlantic's last response to his requests for ownership information showed confusion over the number of treasury shares held by the corporation (CD at 13:20; see also exhibit 7 ¶ 2 [Atlantic's response stating that the "shares held in treasury" were more than twice that which had been previously reported]). Additionally, in response to the Division's request for board minutes relating to changes in the corporation's ownership, applicant stated that "share transfers were discussed with [Atlantic's] attorney and accountants [but] no formal 'minutes' were recorded" (exhibit 7 ¶ 4). Ms. Frank also acknowledged that Atlantic's records were, at times, "not kept the way they should have been kept" (CD at 40:35).

The Division analyst testified that, given his concerns about some of the ownership information contained in the application materials, he relied upon the ownership information that was reported in applicant's 2015 federal tax returns (CD at 5:50-14:40). On the basis of the federal tax return, the analyst concluded that women did not own 51% of the corporation (CD at 12:05).

Applicant failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that applicant had not issued at least 51 percent of its authorized stock to women shareholders, as required by 5 NYCRR 144.2(a)(5).

#### Ownership: Contribution Proportionate to Equity Interest

The eligibility criterion at issue requires that "the contribution of the minority group member(s) or woman owner must be proportionate to their 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]).

The Division argues that applicant failed to demonstrate that Kathleen Frank and Catherine Scarlata made capital contributions to Atlantic in proportion to their respective

ownership interests in the enterprise (exhibit 12 at 2 [citing 5 NYCRR 144.2[a][1])). Specifically, the Division asserts that the application states that neither woman owner made a capital contribution to Atlantic (*id.*). Further, the application indicates that, of the current owners, only a male, Mr. Leva, made a capital contribution (exhibit 1 at 3 [item 2.D]; CD 15:45). The Division analyst testified that both Kathleen Frank and Catherine Scarlata were gifted their shares in Atlantic (CD at 15:05).

Applicant acknowledges that Kathleen Frank's father, Salvatore Scarlata "transferred shares of stock to [Kathleen Frank] because [she had] been a major part of the business for many years and for succession planning of the Company" (exhibit 3 at 2 [response to question 3]). Applicant further acknowledges that Catherine Scarlata "was transferred . . . 13% equity interest" in Atlantic "[d]ue to her longevity with the Company, the fact that she is part of the family, and the role she has with the Company" (*id.*). Applicant also states that Kathleen Frank made a capital contribution to Atlantic in the form of a [REDACTED] loan in 2016 (*id.* at 3 [response to question 4]).

On its application, Atlantic indicated that no capital contributions were made to the enterprise by the woman owners (exhibit 1 at 3 [items 2.C, 2.D]). The application requires an applicant to "identify the cash and capital contributions" made by the owners (exhibit 1 at 3 [item 2.C]). Contributions are broadly defined under 5 NYCRR 144.2(a)(1) to include, without limitation, "contributions of money, property, equipment or expertise" and the application allows an applicant to indicate the type of contribution an owner made (e.g., money or expertise) and the dollar value of the contribution (*see* exhibit 1 at 3 [item 2.C]).

Although applicant states that the women owners were transferred shares in the corporation due, in part, to their respective roles with Atlantic, applicant made no attempt to quantify the value of the women owners' contributions. Moreover, the fact that an owner plays a significant role within an enterprise does not, by itself, establish that an owner has made a capital contribution. Rather, it must be shown that the owner's labor or expertise was contributed (i.e., uncompensated, or undercompensated) to qualify as a capital contribution. Lastly, as the Division analyst noted, loans to a company must be repaid and do not qualify as capital contributions (CD at 16:25).

Applicant failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that the women owners' contributions to Atlantic were not proportionate to their respective equity interests in the enterprise, as required by 5 NYCRR 144.2(a)(1).

#### Ownership: Risks and Profits

The eligibility criterion at issue requires that the "woman owner enjoy the customary incidents of ownership and must share in the risks and profits, in proportion with [her] ownership interest" (5 NYCRR 144.2[c][2]).

Division staff argues that the compensation received by the women owners is not proportionate to their respective ownership interests in Atlantic. Staff argues that Tim Scarlata's compensation exceeds that of the women owners (exhibit 12 at 3). Staff argues that this

determination is supported by the 2015 federal tax return for Atlantic that was provided by the applicant (CD 20:15). In addition, the Division analyst testified that Kathleen Frank received less compensation from Atlantic than her husband, Douglas Frank (CD at 23:25).

Applicant argued that compensation paid to Kathleen and Douglas Frank all goes into the same bank account and, therefore, compensation is "not an issue" (CD at 28:30 [Frank testimony, noting that the same is true for Catherine and Tim Scarlata]). Ms. Frank testified that the corporation was started by her father who, due to his "old Italian mentality," believed that a man should make more money than a woman (CD at 28:15). Ms. Frank also testified that, in recent years, Tim Scarlata has showed little interest in the business and is seldom there (CD at 28:50). Lastly, Ms. Frank testified that a site visit by the Division would have shown that she and Ms. Scarlata "are running this business" (CD at 31:35).

Applicant's arguments and testimony are not sufficient to demonstrate a lack of substantial evidence for the Division's denial determination. Applicant's 2015 federal tax return shows that Kathleen Frank was paid less by Atlantic during fiscal year 2015 than her brother, Tim Scarlata, despite the fact that she owns more stock in the business (see findings of fact ¶¶ 2, 3, 8). Kathleen and Douglas Franks' 2015 joint tax return shows that Kathleen Frank was paid less by Atlantic in 2015 than her husband, despite the fact that her husband is not an owner of the business (see findings of fact ¶¶ 3, 5).

Applicant has failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that Kathleen Frank and Catherine Scarlata do not share in the risks and profits of Atlantic in proportion to their respective ownership interests, as required by 5 NYCRR 144.2(c)(2).

## **CONCLUSION**

Applicant failed to meet its burden to demonstrate that the record lacks substantial evidence to support the Division's determination to deny Atlantic's application on the basis of whether the women owners, Kathleen Frank and Catherine Scarlata, (i) were issued at least 51 percent of Atlantic's authorized stock (see 5 NYCRR 144.2[a][5]) (ii) made contributions to Atlantic in proportion to their respective equity interests in the enterprise (see 5 NYCRR 144.2[a][1]); and (iii) share in the risks and profits of Atlantic in proportion to their respective ownership interests in the enterprise (see 5 NYCRR 144.2[c][2]).

## **RECOMMENDATION**

For the reasons stated herein, the determination of the Division to deny Atlantic Granite & Marble, Inc. certification as a women-owned business enterprise should be affirmed.

**Matter of Atlantic Granite & Marble, Inc.**  
**DED File ID No. 61287**

**Exhibit List**

<b>Exh. #</b>	<b>Description</b>
1	Atlantic WBE Application, submitted July 20, 2015
2	Atlantic Record of Trade of Company Stock, dated March 29, 2014
3	Division Request for Information, dated December 15, 2016 (applicant responses are noted in blue)
4	Assignment of Stock Interest, dated October 2014
5	Atlantic Federal Tax Return (fiscal year 2015)
6	Atlantic Stock Certificate Ledger
7	Applicant Response, undated, to Questions from the Division
8	First Niagara Term Sheet for Lines of Credit
9	Resume: Catherine Scarlata
10	Tim and Catherine Scarlata Federal Tax Return (2015)
11	Douglas and Kathleen Frank Federal Tax Return (2015)
12	Department WBE Denial Letter to Atlantic, dated February 28, 2017
13	Amended Tax Return (fiscal year 2015)