

**NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
207 GENESEE STREET
UTICA, NEW YORK 13501**

In the Matter

- of -

**the Application of Hartson Total Opening, Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 61941

RECOMMENDED ORDER

--by-



**David A. Murad
Administrative Law Judge**

April 12, 2023

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 filed by Hartson Total Opening, Inc. (HTO or applicant), for certification as a woman-owned business enterprise (WBE) be affirmed for the reasons set forth below.

PROCEEDINGS

This matter considers the written appeal by Hartson Total Opening, Inc. 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 the business enterprise does not meet the eligibility criteria for certification as a WBE.

Kathleen Hartson, as the CEO, applied on behalf of HTO for certification as a WBE on March 7, 2017 (DED 1). In a letter dated January 21, 2020, the Division denied HTO's application (DED 2) and, set forth five grounds for the denial.¹ HTO timely filed a notice of appeal on February 17, 2020 (APP 1). A notice to proceed by written appeal was sent to HTO on May 8, 2020 (DED 3). Applicant submitted its written appeal by letter dated June 29, 2020 (APP 2/ DED 10). The Division responded with papers dated February 16, 2023. A list of the parties' papers is attached to this recommended order as Appendix A.

The eligibility criteria for certification as a woman-owned business enterprise are established by regulation (*see* former 5 NYCRR 144.2). Based on the information provided during the application process, Division staff evaluate the ownership, operation, and control of the applicant to determine whether it should be certified as a woman-owned business enterprise.

Staff review the business enterprise as it existed at the time the application was filed based on representations in the application, as well as information filed in supplemental submissions. (*See* former 5 NYCRR 144.4[e] and 144.5[a].) As discussed further below, applicant's appeal includes documents not reviewed by Division staff before staff issued the January 21, 2020 denial letter. Only evidence which seeks to clarify or explain previously submitted materials will be considered and new evidence will not be considered. *See Scherzi Systems, LLC v. White*, 197 AD 3d 1466 (3d Dept. 2021)

¹ The Division's denial determination and applicant's written appeal, pre-date amendments to 5 NYCRR parts 140-145 that became effective on December 2, 2020. Accordingly, the eligibility criteria set forth under the former regulations are referenced throughout this recommended order.

Accordingly, these documents are irrelevant due to the limited scope of this appeal. Although identified in this recommended order, I have not considered the documents or the information provided therein.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that Division staff's determination to deny the application filed by HTO for certification as a WBE 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 Division staff'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 Staff

In the January 21, 2020, denial letter, Division staff stated that HTO failed to meet five of the criteria for WBE certification set forth in former 5 NYCRR 144.2 concerning Kathleen Hartson's ownership, operation and control of the business enterprise. With respect to ownership, staff concluded that Ms. Hartson, as the woman-owner, did not demonstrate that her contributions were proportionate to her equity interest in the business enterprise, as required by former 5 NYCRR 144.2(a)(1) (DED 2).

With respect to operations, Division staff concluded that HTO did not show that the woman-owner makes decisions pertaining to the operation of the business enterprise, as required by former 5 NYCRR 144.2(b)(1). Staff also determined that Ms. Hartson, as the woman-owner, does not have adequate managerial experience or technical competence to operate the business enterprise, and did not demonstrate the working knowledge and ability needed to operate the business enterprise, as required by former 5 NYCRR 144.2(b)(1)(i) and 144.2(b)(1)(ii). (id).

With respect to control, Division staff concluded that the relevant business agreements do not permit Ms. Hartson to make decisions without restrictions, as required by former 5 NYCRR 144.2(b)(2) (id).

Hartson Total Opening, Inc.

Applicant states that Kathleen Hartson did personally pay for her shares. The checks were written by the business simply as a matter of convenience (APP 2/ DED 10). The tax returns reflect shareholder distributions to her showing the payments by HTO were reported on Form K-1 (DED 4). Applicant argues that Mr. Hartson has functioned solely as a project manager and that Ms. Hartson is responsible for the oversight and performance of all aspects of the business (id). Applicant states that Mr. Hartson has not functioned in the capacity as President and that Ms. Hartson as CEO generates all new business and makes all final executive decisions (id).

FINDINGS OF FACT

1. Hartson Total Opening, Inc. is based in Plattsburgh, New York. HTO manufactures and sells doors and frames along with other hardware accessories (DED 1).
2. HTO was established in 2007. The initial shareholders were Kevin Hartson (81%) and Douglas Hartson (19%). (DED 1).
3. On December 31, 2015, Kathleen Hartson purchased the entirety of Kevin Hartson's shares (81%) for the sum of \$ [REDACTED] (DED 5).
4. All payments composing the purchase price were made by HTO checks (DED 7).
5. HTO's September 30, 2018 Balance Sheet reflects the debt as a liability of the company (DED 6).
6. Douglas Hartson's resume reflects that he has operated HTO as President since January 1, 2008. He became a Certified Architectural Hardware Consultant in 1999. He performs all tasks associated with project managing. He advises and assists architects and contractors on hardware requests (DED 9).
7. Kathleen Hartson's resume lists her duties as Office Manager, Lead Estimator, project assistant, collections since January 2008 (DED 9). She does not hold an Architectural Hardware Consultant Certification.
8. HTO Bylaws identify Mr. Hartson as "President", which is also defined as the "Chief Executive Officer of the corporation", which has "general charge of the business and affairs of the corporation" (DED 8).

DISCUSSION

This recommended order considers applicant's appeal from the Division's determination to deny the certification of HTO as a woman-owned business enterprise pursuant to Executive Law article 15-A. Referring to the eligibility criteria outlined in former 5 NYCRR 144.2, the Division identified five bases for the denial with respect to the ownership and operation of the business enterprise. Specifically, the Division contended that:

1. Kathleen Hartson's contributions are not proportionate to her equity interest in the business enterprise, as required by former 5 NYCRR 144.2(a)(1);
2. The woman-owner does not make decisions pertaining to the operation of the business enterprise, as required by former 5 NYCRR 144.2(b)(1);
3. Ms. Hartson, as the woman-owner, does not have adequate managerial experience or technical competence to operate the business enterprise, as required by former 5 NYCRR 144.2(b)(1)(i);
4. Ms. Hartson did not demonstrate the working knowledge and ability needed to operate the business enterprise, as required by former 5 NYCRR 144.2(b)(1)(ii); and
5. Relevant business agreements do not permit Ms. Hartson to make decisions without restrictions, as required by former 5 NYCCRR 144.2(b)(2).

Each basis is addressed below.

I. Ownership

The Division interprets former 5 NYCRR 144.2(a)(1) to require an applicant to demonstrate that the woman-owner's contribution came from assets belonging solely to the woman-owner. Given this criterion, the Division consistently denies applications for WBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the woman-owner.

The Division argues that applicant failed to demonstrate that Ms. Hartson made contributions to HTO in proportion to her ownership interest in the business as required under former 5 NYCRR 144.2(a)(1). Specifically, the Division states the payments for Ms. Hartson's shares were made by checks written from HTO (DED7). The Division argues that this is insufficient to establish a capital contribution proportionate to her ownership interest, as payments were made by the company, not by Ms. Hartson (id).

Ms. Hartson states that her Schedule K-1 reflects the payments made by HTO as distributions to her. She argues that instead of HTO issuing checks to her and she then issuing checks to pay for the stock, the company directly made the payments "as a matter of convenience" (APP 2/ DED 10).

The documentary evidence establishes that the payments for the stock purchase were made with HTO funds and the liability was reflected as a liability of HTO on its balance sheet.

I conclude that the Division's determination to deny the application on the basis that HTO failed to demonstrate that Ms. Hartson made contributions to HTO in proportion to her ownership interest, as required by former 5 NYCRR 144.2(a)(1) is supported by substantial evidence.

II. Operations

The Division cites three separate operational criteria under former 5NYCRR 144.2(b) as bases for the denial (DED 2). The operational criteria are as follows:

1. "...women do not make decisions pertaining to the operation of the business enterprise. [Former] 5 NYCRR 144.2(b)(1)":
2. "...women relied upon for certification have not demonstrated adequate managerial experience or technical competence to operate the business enterprise. [Former] 5 NYCRR 144.2(b)(1)(i)"; and
3. ...women relied upon for certification have not demonstrated the working knowledge and ability needed to operate the business enterprise. [Former] 5 NYCRR 144.2(b)(1)(ii)".

To determine who makes decisions pertaining to an enterprise's operations, the Division first identifies the core revenue generating functions of the enterprise, and then assesses who within the enterprise is primarily responsible for performing those functions and who has the expertise and knowledge necessary to perform an oversee those functions.

The Division states that HTO manufactures and sells doors and frames along with other related hardware. Mr. Hartson has operated HTO as president since 2007 (DED 9). Applicant stated that an Architectural Hardware Consultant Certificate is required for hardware suppliers on many projects (DED 1, 15). The Certification is held by Mr. Hartson.

Applicant acknowledges that Ms. Hanson does not make decisions related to the mechanical aspects of frame welding or cutting windows in doors, and that the material procurement is specified by the architect (id).

Mr. Hartson is responsible for performing the core revenue generating functions of HTO and has the expertise and knowledge necessary to perform those functions. Ms. Hartson has no direct manufacturing or material procurement experience and is responsible for the administrative aspects of the business.

Applicant submitted additional documents for this appeal:

1. June 24, 2020 correspondence from Northern Insurance Agency;
2. June 25, 2020 correspondence from North Country Chamber of Commerce;
3. Undated correspondence from Bette Cring Construction Group; and
4. February 18, 2020 correspondence from Purcell Construction.

These documents will be disregarded in their entirety since they were not before the Division during its review of the application and are dated after the denial and therefore not relevant. See *In Re: The Application of Lido Strategic Solutions, Inc.* (DED File no. 60212) (March 6, 2019)

(recommended order declining to consider documents offered by the applicant on appeal that were not part of the application and thus not before DED at the time of denial), adopted on June 5, 2019(Final Order).

Applicant failed to demonstrate that the record that was before the Division at the time of its determination to deny the WBE application does not contain substantial evidence to support the Division's determination that Kathleen Hartson does not (i) make decisions pertaining to the operation of the business enterprise, as required under former 5 NYCRR 144.2(b)(1);(ii) have adequate managerial experience or technical competence to operate the business enterprise, as required under former 5 NYCRR 144.2(b)(1)(i); and (iii) have the working knowledge and ability needed to operate the business enterprise, as required under former 5 NYCRR 144.2(b)(1)(ii).

III. Control

The Division states that the relevant business agreements do not permit Ms. Hartson to make decisions without restrictions, as required by former 5 NYCRR 144.2(b)(2). This section provides "articles of incorporation, corporate bylaws...must permit women who claim ownership of the business enterprise to make those decisions without restriction." (id).

The HTO Bylaws submitted in the Application identify Mr. Hartson as "President", which is also defined as the "Chief Executive Officer of the corporation" which has "general charge of the business and affairs of the corporation" (DED 8). Therefore, Ms. Hartson does not have the ability to make decisions without restrictions under the Bylaws.

CONCLUSION

Hartson Total Opening, Inc. did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a woman-owned business enterprise with respect to the eligibility criteria at former 5 NYCRR 144.2(a)(1), 144.2(b)(1), 144.2(b)(1)(i) 144.2(b)(1)(ii), and 144.2(b)(2) was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, I recommend that the Director affirm the Division's determination to deny Hartson Total Opening, Inc's application for certification as a woman-owned business enterprise.

Division of Minority and Women's Business Development

Parties' Papers
Matter of Hartson Total Opening, Inc.
NYS DED File No 61941

- I. Applicant's papers
 1. APP 1- Applicant's Notice of Appeal dated February 17, 2020
 2. APP 2 -Applicant's Appeal letter dated June 29, 2020

- II. Division's Papers
 - A. Declaration of Raymond Emanuel dated February 16, 2023 with attached Exhibits DED 1 through DED 16.
 1. DED 1 – Application for Certification dated March 7, 2017
 2. DED 2 – Division's denial letter dated January 21, 2020
 3. DED 3 – Division's instructions for filing written appeal dated May 8, 2020
 4. DED 4 – HTO Tax Returns 2013-2017
 5. DED 5 – Stock Sale Agreement
 6. DED 6 – September 30, 2018 HTO Balance Sheet
 7. DED 7 – HTO checks to pay for stock purchase
 8. DED 8 – HTO Bylaws
 9. DED 9 – Resumes of Douglas Hartson and Kathleen Hartson
 10. DED 10- Applicant's Appeal letter (see APP 2)
 11. DED 11 -Meeting Minutes
 12. DED 12 – Stock Certificates
 13. DED 13- Stock Transfer Ledger
 14. DED 14-Promissory Note

15. DED 15- WBE Narrative

16. DED 16- Architectural Hardware Consultant Certificate

B. Brief in Response to the Appeal of Hartson Total Opening, Inc., dated March 13, 2023

