

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

In the Matter

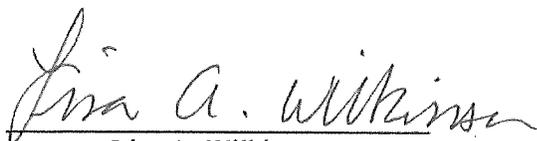
- of -

the Application of Supreme Group, Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60364

RECOMMENDED ORDER

- by -

A handwritten signature in cursive script that reads "Lisa A. Wilkinson". The signature is written in black ink and is positioned above a horizontal line.

Lisa A. Wilkinson
Administrative Law Judge

October 29, 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 the application filed by Supreme Group, Inc. (Supreme Group or applicant) for certification as a woman-owned business enterprise (WBE) be affirmed for the reasons set forth below.

PROCEEDINGS

This matter considers the appeal by Supreme Group 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. Supreme Group challenges the determination of the Division that applicant does not meet the eligibility criteria for certification as a WBE.

Lisa Bozan submitted an application on behalf of Supreme Group for certification as a WBE on July 26, 2016 (*see* DED Exhibit 1). The Division denied Supreme Group's application by letter dated April 3, 2017 (*see* DED Exhibit 2). The Division's April 3, 2017 letter identified two grounds related to the eligibility criteria outlined at 5 NYCRR 144.2 for the denial.

By letter dated April 20, 2017, Joseph Andruzzi, Esq. (Joseph Andruzzi, Esq., Bethpage, New York), counsel for Supreme Group, responded to the Division's April 3, 2017 denial letter, and requested time to file an appeal. The Division originally issued a Notice of Appeal Hearing for November 13, 2017, however, applicant was unable to appear at that hearing. The Division issued a second Notice of Appeal Hearing dated July 27, 2018, which scheduled the hearing for August 13, 2018, at 10:00 a.m. at the Division's offices located at 633 Third Avenue, New York, New York.

The hearing convened as rescheduled on August 13, 2018. Joseph Andruzzi appeared at the hearing on behalf of Supreme Group. Lisa Bozan testified for Supreme Group. Gretchen Robinson, Esq., Assistant Counsel, New York State Department of Economic Development, appeared on behalf of the Division. Natia Simon, Senior Certification Analyst, testified for the Division. The parties offered 18 exhibits during the hearing. An exhibit chart is attached to this recommended order.

An audio recording of the administrative hearing was made. The Office of Hearings and Mediation Services received copies of a compact audio disk on September 7, 2018 with five

audio files numbered as follows: 702.0210; 702.0211; 702.0212; 702.0213; 702.0214; and 702.0215. References to the hearing record will be HR followed by the file number.

By email dated September 19, 2018, I requested supplemental information from the parties. Specifically, I asked applicant to provide documentation to substantiate Ms. Bozan's claim that line 17 of the corporate income tax returns reflected additional income Ms. Bozan testified that she received. I also asked that the parties address two questions:

1. May an applicant for WBE certification pay higher compensation to some of its male employees than it pays to the woman owner where the business enterprise is a non-union shop, and the higher compensated employees are not owners of the business enterprise, are not related to the woman owner of the business enterprise, and are salaried employees based on market conditions, or must a woman owner in all circumstances receive greater compensation than all of her employees to demonstrate compliance with 5 NYCRR 144.2(c)(2)? Is it relevant to the analysis that the woman owner bears all the risk of keeping the business afloat, including the obligation to pay employees' salaries?
2. May a woman owner employ qualified employees to perform work on projects while she is in charge of the management and operation of the company where the male employees have no ownership interest in the company, exercise no control over the operation or management of the company, and are not related to the woman owner?

Ms. Robinson responded on October 10, 2018. Mr. Andruzzi, having been granted an extension by me to respond, submitted a response on October 15, 2018. Although granted an opportunity to submit a sur-reply, Ms. Robinson declined to do so.

ELIGIBILITY CRITERIA

The eligibility criteria for certification as a woman-owned business enterprise are established by regulation (*see* 5 NYCRR 144.2). Based on the information provided during the application process, Division staff evaluate the ownership, operation, and control of applicant to determine whether it should be certified as a woman-owned business enterprise. Staff reviews 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* 5 NYCRR 144.4[e] and 144.5[a]).

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 Supreme Group for certification as a WBE is not supported by substantial evidence (*see* SAPA § 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 its April 3, 2017 denial letter, Division staff stated that Supreme Group failed to meet two criteria for WBE certification as set forth in 5 NYCRR 144.2 concerning Ms. Bozan's ownership and operation of the business enterprise. Specifically, with respect to ownership, the Division contends that applicant did not show that Ms. Bozan shares in the risks and profits of Supreme Group in proportion to her ownership interest in the business enterprise as required by 5 NYCRR 144.2(c)(2) because male employees are paid significantly more than Ms. Bozan. In support of its position, the Division relies on *Matter of C.W. Brown, Inc. v Canton* (216 AD2d 841 [3d Dept 1995]), and *Matter of J.C. Smith, Inc. v New York State Dept. of Economic Dev.* (163 AD3d 1517 [4th Dept 2018]). With respect to the compensation paid to Ms. Bozan, the Division's exhibit 6, the 2015 Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return, shows that Ms. Bozan received about \$ [REDACTED] in wages, while Vito Fragola, the prior owner, received \$ [REDACTED].

The Division objects to applicant's submission of an affidavit from Ms. Bozan's personal accountant purporting to establish Ms. Bozan's compensation, stating that the accountant should have appeared at the hearing, and the Division should have had the opportunity to cross examine the accountant regarding the statements made in his affidavit. The Division notes that the tax returns submitted with the application were not signed, and did not have the electronic signature page ordinarily attached to an E-filed tax return (*see* Division Response dated October 10, 2018 [Division Response], at 1). Additionally, the Division contends that the affidavit is non-responsive to my inquiry because the accountant claims that "[t]he entirety of the value she is describing is not captured exclusively in Line 17 of the return(s)" and that the value she receives as owner is reflected in various categories of business expenses that are ancillary to Ms. Bozan's salary and distributions (*see* Division Response at 2).

Concerning the operation of Supreme Group, the Division asserts that applicant failed to demonstrate that Ms. Bozan has adequate managerial experience or technical competence to operate the enterprise as required by 5 NYCRR 144.2(b)(1)(i). The Division notes that Ms. Bozan worked as a physician's assistant for most of her career, while the male employees of Supreme Group have significant construction related work experience. (*See* DED Exhibit 2.) In its supplemental response, the Division reiterated that Ms. Bozan worked for over a decade as a physician's assistant before acquiring her ownership interest in Supreme Group and that her resume provides no indication that she has any informal experience operating a construction company (*see* Division Response, at 3). The Division concludes that applicant cannot demonstrate compliance with 5 NYCRR 144.2(c)(2) because Ms. Bozan lacks the requisite experience, technical expertise, and basic credentials necessary to operate the business, and the Division properly denied the application (*id.*).

Supreme Group, Inc.

Applicant contends that Ms. Bozan, as its sole shareholder, bears all the risks of operating the business, and that she is obligated to pay her employees prevailing wages pursuant to contracts applicant has entered into with government entities and indeed must pay market wages to maintain a work force. Applicant further contends that Ms. Bozan manages all aspects of the business enterprise and requires competent employees to perform critical tasks on job sites because she travels to all job sites to ensure that work is properly performed and cannot be at all sites at one time. (*See e.g.* affirmation of Joseph Andruzzi, dated October 15, 2018 [Andruzzi aff]; HR 702.012.)

FINDINGS OF FACT

1. Lisa Bozan purchased Supreme Group from Vito Fragola in January 2014 and owns 100% of the corporation's stock (*see* DED Exhibit 1, § 2.A and § 1.U; *see also* DED Exhibit 13 [purchase of business agreement]).
2. Ms. Bozan is the president of Supreme Group (DED Exhibit 1, §§ 1.P, 2.A, 2.F).
3. Supreme Group provides heavy highway and building trade construction, masonry, carpentry, trucking, traffic maintenance services, material supplies, equipment rental, site security, fencing, drainage cleaning, labor for cement work, demolition and construction management services (DED Exhibit 1, § 3.C).
4. On behalf of Supreme Group, Ms. Bozan filed an application for WBE certification on July 26, 2016 (DED Exhibit 1).

5. By letter dated April 3, 2017, the Division denied Supreme Group's application for WBE certification (DED Exhibit 2).

Ownership

6. Ms. Bozan paid \$ [REDACTED] to acquire 100 shares of common stock at the time she purchased Supreme Group (see DED Exhibit 1, §§ 2.C and 2.D).
7. In 2014, Ms. Bozan received \$ [REDACTED] in compensation from Supreme Group (see APP Exhibit A, Form 1125E). In 2015, Ms. Bozan received \$ [REDACTED] in compensation (see DED Exhibit 4, Form 1125-E).
8. In 2015, Supreme Group paid its employees a total of \$ [REDACTED] in wages. The following individuals were paid wages in amounts roughly equal to or greater than the compensation paid to Ms. Bozan:

- | | |
|-------------------------|---------------|
| a. Michael Carter | \$ [REDACTED] |
| b. Claudio Correa | \$ [REDACTED] |
| c. Paul Derushe | \$ [REDACTED] |
| d. Vito Fragola | \$ [REDACTED] |
| e. Brian Heneghan | \$ [REDACTED] |
| f. Andrew Joeffner, Jr. | \$ [REDACTED] |
| g. Fernando Marriott | \$ [REDACTED] |

(see DED Exhibit 6).

9. In 2016, Supreme Group paid its employees a total of \$ [REDACTED] in wages. Ms. Bozan received \$ [REDACTED] in wages. The following individuals received greater compensation than Ms. Bozan:

- | | |
|---------------------|---------------|
| a. Michael Carter | \$ [REDACTED] |
| b. Brian Heneghan | \$ [REDACTED] |
| c. William Pray | \$ [REDACTED] |
| d. Kryzstof Stepian | \$ [REDACTED] |
| e. John Truscello | \$ [REDACTED] |

(see DED Exhibit 7).

10. In the first quarter of 2016, Vito Fragola received compensation in the amount of \$ [REDACTED] from Supreme Group (*see id.*). Vito Fragola left the employment of Supreme Group in early 2016 (HR 702:013).

Operation

11. Ms. Bozan is listed as the responsible individual for all twelve managerial operations listed on the WBE application (*see* DED Exhibit 1, § 4.A).

12. From 2012 to 2014, Ms. Bozan worked at Supreme Group as a part-time manager, and “assisted the owner with contracts, bid documents, payroll, dispatching men, and equipment.” She worked as a physician’s assistant at [REDACTED] from 2000 to 2013. (DED Exhibit 10.)

13. The WBE application states that no licenses, permits, or accreditations are required to conduct the business of Supreme Group and none are held. According to the “Required Documents” section of the WBE application, Ms. Bozan advised the Division on June 2, 2016 that “licenses, permits, certifications, and/or accreditations utilized by this firm to conduct business, including those held by individual” were “not applicable” (DED Exhibit 1, § 3.A, and at 7.)

14. With the application and supplemental materials, Supreme Group submitted certifications held by three employees. Pedro Fuentes completed a *10-hour OSHA Hazard Recognition Training for the Construction Industry Training Course* on June 12, 2016. Jonathan Pelaez completed a *10-hour Occupational Safety and Health Training Course in Construction Safety and Health* on November 23, 2014. Christopher Hewitt completed *10-hour Occupational Safety and Health Training Course in Construction Safety and Health* on June 24, 2010. (DED Exhibit 12.)

15. In response to a request for additional information, applicant submitted resumes of Supreme Group’s key employees including the following: Salvatore Madonia, who has more than 35 years’ experience in the construction industry, is a certified home inspector and has a New York City Construction Superintendent’s license (DED Exhibit 8A); Lawrence B. Brown, Jr., who has more than 35 years’ experience in construction and manufacturing related jobs (DED Exhibit 8B); Shaun O’Donnell, who has worked in the construction industry since 2001 and has a Bachelor’s of Science in Architecture with a major in construction and technology (DED Exhibit 8C); and Jonathan Segura, who has a Bachelor’s of Science in Architecture and has worked in architecture, design and project management (*see* DED Exhibit 8D).

16. Ms. Bozan has a Bachelor of Science degree from the University of Michigan. She worked as a physician's assistant at [REDACTED] from 2000 to 2013. She worked as a part time manager at Supreme Group from 2012 to 2014, assisting the owner with contracts, bid documents, payroll, and dispatching workers and equipment. (see DED Exhibit 10.)
17. Since January 2014, Ms. Bozan has been the president and owner of Supreme Group (*id.* and DED Exhibit 1).

DISCUSSION

This recommended order considers applicant's appeal from the Division's April 3, 2017 determination (see WBE Exhibit 2) to deny the certification of Supreme Group as a woman-owned business enterprise pursuant to Executive Law article 15-A. Referring to the eligibility criteria outlined in 5 NYCRR 144.2, the Division identified two bases for the denial with respect to the ownership and operation of the business enterprise. Each basis is addressed below.

Ownership

The first ground for denial relates to "ownership" and involves section 144.2(c)(2) of 5 NYCRR, which falls under heading "Additional Requirements." The Division relied on that portion of section 144.2(c)(2) that states that "[t]he minority group member or woman owner shall enjoy the customary incidents of ownership and must share in the risks and profits, in proportion with their ownership interest in the business enterprise." The Division's determination that applicant failed to demonstrate that Ms. Bozan shares in the risks and profits of Supreme Group in proportion to her ownership interest in the business is supported by substantial evidence.

Ms. Bozan purchased Supreme Group in 2014 and is its president and sole shareholder (see DED Exhibit 1, §§ 1.P, 1.R, 2.A). In 2014, Ms. Bozan received \$ [REDACTED] in compensation from Supreme Group (see APP Exhibit A, Form 1125E); in 2015, she received \$ [REDACTED] in compensation (see DED Exhibit 4, Form 1125-E); and in 2016 she received \$ [REDACTED] (see DED Exhibit 7). At the hearing, staff offered DED exhibits 6 and 7 into evidence to demonstrate that Ms. Bozan does not share in the risks and profits of Supreme Group in proportion of her ownership interest as required by 5 NYCRR 144.2(c)(2). These exhibits show that the wages paid to male employees far exceed the compensation paid to Ms. Bozan (see DED Exhibits 2, 6 and 7; Finding of Fact Nos. 8 and 9). Exhibit 6 is Supreme Group New York State Quarterly Income Tax Return for the fourth quarter of 2015 and exhibit 7 is Supreme Group's New York State Quarterly Income Tax Return for the fourth quarter of 2016. Exhibits 6 and 7 support staff's claim that male employees are paid significantly more in wages than the compensation paid to Ms. Bozan and constitute substantial evidence to support staff's determination that

Supreme Group does not meet the certification criterion for ownership in 5 NYCRR 144.2(c)(2) (*see* Finding of Facts Nos. 5-8).

Ms. Bozan testified that certain male employees receive higher wages because Supreme Group has contracts with public entities that require employees to be paid the prevailing hourly wage consistent with the requirements set by the New York State Department of Labor and federal government, even though Supreme Group is not a union shop. Although applicant presented government contracts with its WBE application, Ms. Bozan testified as to other non-government contracts that Supreme Group performed. (*See* HR 702.012.) Whether Supreme Group is legally required to pay prevailing wage rates on all of its contracts, or just on its public works contracts, and which employees are subject to the prevailing wage requirement, is not established on this administrative record. The application states that Supreme Group is not a union shop (*see* DED Exhibit 1, § 4.F). Accordingly, the Division would, reasonably, not have inquired further into the wages paid to employees, or assumed that Supreme Group was necessarily obligated to pay prevailing wages, other than to focus on whether Ms. Bozan was being compensated in proportion to her ownership interest in the business as required under 5 NYCRR 144.2(c)(2).

Ms. Bozan also testified that she purchased the business subject to obligations to retain and pay certain employees a set wage, suggesting that contractual obligations may be in play. The administrative record, however, lacks documentation addressing this question. Given the passage of time since Ms. Bozan purchased the business, it is not clear to what extent she is still be bound to honor prior agreements, to the extent they exist.

Finally, Ms. Bozan claims that her compensation exceeds the wage payments she receives, testifying that she is a union member through Local 128 and receives compensation from Supreme Group in the form of benefits payments in addition to wages that total approximately \$ [REDACTED] annually and towards paying her union dues and benefits. (*See* HR 702.013.) Specifically, Ms. Bozan asserts that line 17 of the income tax returns reflects these payments (*see* HR 702-013; APP Exhibit A). Line 17 refers to expenses for taxes and licenses. The value of these payments allegedly made by Supreme Group on Ms. Bozan's behalf is not apparent from the face of the income tax return.

In my September 19, 2018 email, I asked applicant to provide documentation to substantiate Ms. Bozan's claims that the amount reported on line 17 on the corporate tax returns reflected additional compensation she received from Supreme Group. Her attorney submitted an affidavit from Stephen Fragola, Ms. Bozan's accountant, and the brother of Vito Fragola from whom Ms. Bozan purchased Supreme Group (*see* affidavit of Stephen Fragola sworn to October 3, 2018). Mr. Fragola attested to a "summary of relevant corporate expenses" for tax years 2014, 2015 and 2016, including \$ [REDACTED] in 2014, approximately \$ [REDACTED] in 2015, and \$ [REDACTED] in 2016

(see Fragola aff § 9). A table attached to Mr. Fragola's affidavit reported compensation and benefits expenses for 2015 and 2016 as \$ [REDACTED] and \$ [REDACTED], respectively (see Fragola aff, attachment *Supreme Group, Inc. Compensation, Employee Benefits and Expense Reimbursement Analysis: Lisa Bozan*). Mr. Fragola further attests:

Ms. Bozan's personal understanding of where, *and how*, the tax returns reflect those company expenses and their value to her is over simplified. The entirety of the value she is describing is not captured exclusively at line 17 of the return(s). Various categories of business expenses aggregate to the value that she receives as the owner of Supreme Group, Inc. ancillary to her direct salary and distributions

(*id.* § 10 [emphasis in original]). Even assuming that the information Mr. Fragola attests to is accurate, and in admissible form, it fails to demonstrate that Ms. Bozan's compensation was in proportion to her ownership interest in the business enterprise or that the Division's determination to deny the application was in error and not supported by substantial evidence.

Staff's determination is consistent with the court's determination in *Matter of C.W. Brown, Inc. v Canton* (216 AD2d 841, 843 [3d Dept 1995]), where the court held that staff's review of tax returns, such as those considered in this matter, was substantial evidence to support the Division's determination whether an application for WBE certification meets the eligibility criterion for ownership. I conclude that based on the evidence in the record, including Supreme Group's federal income tax returns for 2013 (DED Exhibit 5), 2014 (App Exhibit A), and 2015 (DED Exhibit 4), the 2015 and 2016 quarterly wage statements (see DED Exhibits 6, and 7), and the lack of evidence supporting Ms. Bozan's claims, the Division staff's determination that Ms. Bozan does not share in the profits of Supreme Group in proportion to her ownership interest in the business is rational and should be affirmed.

Capital Contribution

During the hearing and in the Division's supplemental response, the Division raised the issue of Ms. Bozan's capital contribution to the business citing her purchase of Supreme Group from a family friend for a mere \$ [REDACTED] (see Division Response dated October 10, 2018 [Division Response], at 5; HR 702.013). The Division points out that Supreme Group realized gross profits of \$ [REDACTED] in 2013, before it was sold, and the \$ [REDACTED] salary paid to Vito Fragola (Division Response at 5). The Division also questions the value of the company's assets at the time of purchase, noting that the company owned \$ [REDACTED] work of equipment at the time of sale (*id.*). According to the Division:

it would be expected that in an arms-length transaction, the company with such assets and revenues would be sold in accordance to a valuation analysis that included revenue projections of future earnings. . . . Here no other documentation was provided as part of the application that would explain the extremely low dollar-amount paid for such a thriving business, which tends to show that the sale of the company was not real

(*id.*).

The Division's regulations require that the contribution of a woman owner be proportionate to her ownership interest in the business (5 NYCRR 144.2[a][1]) to ensure that the MWBE program directly benefits minority or woman business owners who have a direct financial stake in the business, and to guard against the installation of minority or woman owners as majority shareholders in a business enterprise for the purpose of obtaining certification. Notably, the Division's denial letter did not raise the issue of Ms. Bozan's capital contribution to Supreme Group as a ground for denial. Therefore, I cannot consider this issue on appeal as a basis for denial of the WBE application. Should Supreme Group reapply for certification, however, the Division could examine whether Ms. Bozan's capital contribution satisfies the eligibility criteria for ownership at 5 NYCRR 144.2(a)(1).

Operation: Managerial Experience or Technical Competence

The Division also determined that Ms. Bozan lacks adequate managerial experience or technical competence to operate the business enterprise as required by 5 NYCRR 144.2(b)(1)(i). Although not at issue in this matter, a plain reading of this eligibility criterion supports the interpretation that adequate managerial experience and technical competence in the business enterprise are two independent bases for certification.

The Division stated in its April 3, 2017 denial letter that Supreme Group is primarily engaged in providing heavy highway and building trade construction services and that Ms. Bozan's professional experience prior to joining Supreme Group was as a physician's assistant. According to the Division, Ms. Bozan has not demonstrated that she has training or certification relevant to the services provided by Supreme Group while male employees possess significant managerial and construction-related experience. (*See* DED Exhibit 2.) The Division stated in its supplemental response:

Although [Ms. Bozan] managed the administrative aspects of the company, such as payroll, human resource matters, insurance, and marketing, all necessary certifications, certificates, and licenses, needed to actually perform the daily operational work of a heavy highway and building trade construction company, were held by other executives and employees. . . . Indeed, all necessary certifications or licenses are possessed by other non-qualifying individuals that

were associated with the business prior to her ownership, who continue to be associated with or employed by the company, and who are relied upon heavily for the performance of operations

(Division Response at 3-4).

Ms. Bozan's résumé shows that she has thirteen years work experience as a health care practitioner in the field of oncology and two years of part-time work experience at Supreme Group in an administrative capacity (*see* DED Exhibits 9 and 10). Ms. Bozan only assumed the business operations of Supreme Group in 2014. During the hearing, Ms. Bozan testified that in June 2016 she obtained her OSHA 10-hour health and safety certification, which allows her to be present on project sites, as well as a certification in retaining walls and masonry (*see* HR 72.013). Applicant, however, failed to include Ms. Bozan's certifications in the WBE application. Because the scope of this appeal is limited to the WBE application and supplemental materials that were before the Division at the time it made its determination, I cannot consider evidence of Ms. Bozan's certifications (*see* 5 NYCRR 144.4[e] and 144.5[a]). In contrast to Ms. Bozan's lack of experience, the resumes of male employees submitted with the WBE application show that they possess significant construction industry experience (*see* Finding of Fact No. 15). Ms. Bozan testified that an OSHA 30 certificate is required to manage the construction projects that Supreme Group undertakes and that Supreme Group's project managers possess this certification so that they can supervise projects. Ms. Bozan is not OSHA 30 certified, and, therefore, is not qualified to supervise projects. (*See* HR 702.012.)

As noted above, the substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable" (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY 3d 494, 499 [2011] [internal quotation marks and citations omitted]). The application and supplemental materials before the Division provide substantial evidence to support the Division's determination that Ms. Bozan presently lacks the technical competence or managerial experience to manage the projects undertaken by Supreme Group, even if I credit her testimony that she oversees the operations of the company and is the sole person in control.

Matter of Era Steel Const. Corp. v Egan

In *Matter of Era Steel Const. Corp. v Egan* (145 AD2d 795 [3d Dept 1988] [*Matter of Era Steel*]) the court considered whether a woman or minority owner of interest in a business enterprise must personally have technical expertise or could employ someone full time who does. The woman's ownership and control of the business was not in dispute. The business was a union shop operating under a collective bargaining agreement, focused on steel construction (*see id.* at 797). OGS denied WBE certification on the grounds that the woman owner lacked "the operational control on a daily basis in the field and the working technical knowledge needed to

operate a steel erecting business” (*id.* at 798 [internal quotations omitted]). The woman owner did not have specific construction experience, however, she hired a foreman, crew, and professional estimator for each project (*see id.* at 797-798). The uncontested evidence was that no one other than the woman owner had any ownership interest in petitioner or control over its operations (*see id.* at 797).

Similarities exist with this case, prompting me to ask the parties to address the applicability of *Matter of Era Steel* to the facts presented here. Notably, nothing in the record suggests that Ms. Bozan does not exercise control over the operations of Supreme Group, nor does she share ownership of the company with male individuals. In *Matter of Era Steel*, the woman owner was allowed to hire qualified individuals to carry out projects; Ms. Bozan employs individuals to supervise and work on projects. That Mr. Fragola remained on the payroll following Ms. Bozan’s purchase of the business is not dispositive that he controlled the company, and the evidence in the record does not support the conclusion that he was in charge of operations. The fact that a woman owner assumes a managerial role in a company and oversees the work of the business enterprise rather than working directly on projects does not, itself, disqualify a business from WBE certification (*see e.g. Matter of Kleinberg Electric, Inc.*, Recommended Order March 5, 2018, Final Order 18-15, March 15, 2018; *Matter of Beach Erectors, Inc.*, Recommended Order June 27, 2017, Final Order 17-38, June 20, 2017).

The Division distinguishes this case from *Matter of Era Steel* on the grounds that “there is a fundamental dispute as to whether Ms. Bozan truly owns and independently operates Supreme Group” (Division Response at 6). The Division explains its position as follows:

Ms. Bozan’s ownership interest in Supreme Group is very much in question Again, she purchased an existing business at an extremely low price. She paid herself significantly less money than any other key employee. She has absolutely no background or experience in performing the duties and responsibilities of the core revenue generating functions of the business. She continued for some time to pay Vito Fragola a significant salary, and he continued to present himself as president of the company after he sold the business, as evidenced by the corporate documents filed with DOS and the company website.

(Division Response at 6.)

On the basis of Ms. Bozan’s failure to share in the profits of Supreme Group as discussed above, and given the issues raised with respect to her managerial experience and technical competence to operate Supreme Group discussed below, I accept the Division’s reasoning that this case is distinguishable from *Matter of Era Steel*. I have already addressed the issues of Ms. Bozan’s capital contributions to the business and turn to the question of independence raised by the Division at the hearing and in its post-hearing response.

Two provisions of the Division's regulations are relevant to independence. Section 144.2(a)(1) of 5 NYCRR states that "the business enterprise must demonstrate that it is an independent, continuing entity which has been actively seeking contracts or orders and regularly and actively performing business activities." This provision was not cited in the Division's denial letter. In addition, 5 NYCRR 144.2(c)(2) states:

an eligible minority group member or woman applicant must be an independent business enterprise. The ownership and control by the minority group member or woman must be real, substantial and continuing and must go beyond the pro forma ownership of the business as reflected in the ownership documents. The minority group member or woman owner shall enjoy the customary incidents of ownership and must share in the risks and profits, in proportion with their ownership interest in the business enterprise (emphasis added).

Although the requirement that a business be an independent enterprise is included in 5 NYCRR 144.2(c)(2), along with the requirement for proportionate profit sharing, the Division has consistently treated the question of independence as a separate criterion for certification and cited it as a separate ground for denial under 5 NYCRR 144.2(a)(2) and 144.2(c)(2) (*see e.g. Matter of K1 Direct, LLC*, Recommended Order, June 25, 2018, Final Order 18-37, July 30, 2018; *Matter of eProcess Environmental, Inc.*, Recommended Order May 21, 2018, Final Order 18-27, July 10, 2018; *Matter of Mohegan Wolf Painting Co., LLC*, Recommended Order, December 20, 2017, Final Order 18-04, January 8, 2018). Typical issues raised with respect to independence include the sharing of resources and whether the business enterprise derives a majority of its revenues from another, unqualified business. In this case, the Division's denial letter neither discusses independence, nor presents facts with respect to independence as a separate ground for denial (*see* DED Exhibit 2). Accordingly, independence is not an issue before me on this appeal. Should applicant reapply for certification, however, the Division could consider whether Supreme Group is an independent business enterprise.

Because applicant has not demonstrated that the Division's determination that Ms. Bozan does not share in the risks and profits of the business, and that she lacks the managerial experience to operate the business, was not supported by substantial evidence, I make no further determination with respect to the applicability of *Matter of Era Steel* to the facts presented in this case.

CONCLUSION

For the reasons discussed above, Supreme Group failed to meet its burden to show that the Division's April 3, 2017 determination to deny the application for WBE certification was not based on substantial evidence. Accordingly, the Division's denial should be affirmed.

RECOMMENDATION

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

Attachment: Exhibit Chart

Division of Minority and Women's Business Development
Supreme Group DED File No. 60364
Exhibit List
October 29, 2018

Exhibit Number	Exhibit Description	Total Pages
DED	1	WBE application
DED	2	Supreme Group Denial Letter dated April 3, 2017
DED	3	Supreme Group Stock Ledger
DED	4	Supreme Group 2015 US Income Tax Return
DED	5	Supreme Group 2013 US Income Tax Return
DED	6	Supreme Group NYS-45 Return for Q4 2015
DED	7	Supreme Group NYS-45 Return for Q4 2016
DED	8	Supreme Group Employee and Officer Resumes
DED	9	Resume of Ms. Bozan
DED	10	Updated Resume of Ms. Bozan
DED	11	2014, 2015, and 2016 W-2 forms of Ms. Bozan
DED	12	Certificates of Completion and other certifications of Supreme Group officers and employees.
DED	13	Purchase of Business Agreement
DED	14	Cancelled Checks by Lisa Bozan

Exhibit Number	Exhibit Description	Total Pages	Admitted
Applicant	A	Supreme Group 2014 US Income Tax Return	
Applicant	B	May 14, 2014 AIA subcontractor agreement (formA401) Supreme Group with [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]	
Applicant	C	Lisa Bozan 2015 Personal Income Tax Return	
Applicant	D	Supreme Group 2015 US Corporate Income Tax Return	