

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

In the Matter

- of -

MLB Trucking, LLC DBA Beaver Trucking,

For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 5546

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

May 25, 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 MLB Trucking, LLC DBA Beaver Trucking ("applicant" or "MLB") certification as a woman-owned business enterprise 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 MLB challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

MLB's application (Exh. DED1) was submitted on March 11, 2014.

The application was denied by letter dated May 20, 2016, from Bette Yee, Director of Certification Operations (Exh. DED3). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to demonstrate that MLB is an independent business enterprise.

By letter of June 24, 2016, counsel for the applicant, appealed from the Division's denial and requested a hearing.

By letter dated January 4, 2017, the Division notified MLB that the hearing was scheduled for March 14, 2017.

On January 9, 2017, I was assigned to this matter.

In an email dated February 16, 2017, counsel for the applicant requested to convert the matter to a written appeal and on February 17, 2017 the parties proposed a briefing schedule, which I adopted.

Applicant's counsel filed a six-page brief dated March 17, 2017. Attached to the brief were the affidavit of Mary Louise Burrows and ten exhibits, listed in the attached exhibit chart as A1-A10.

In a four page memorandum dated April 12, 2017, the Division responded. Attached to the Division's papers was the affidavit of Cleneice Mincey and seven exhibits, listed in the attached exhibit chart as DED1-DED7.

In a one-page reply dated April 28, 2017, applicant's counsel provided a reply.

By email dated April 28, 2017, Division counsel declined to submit a sur-reply and 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.

On administrative appeal, the applicant bears the burden of proof to show its business meets the eligibility criteria for certification as a woman-owned business enterprise (see State Administrative Procedure Act § 306[1]).

POSITIONS OF THE PARTIES

Position of the Division

In its denial letter, the Division asserts that MLB's application failed to demonstrate that applicant is an independent business enterprise, as required by 5 NYCRR 144.2(c)(2).

Position of the Applicant

MLB 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. MLB Trucking, LLC DBA Beaver Trucking provides hauling services, deals in sand and gravel, and provides trucking transportation services. MLB has a business address of P.O. Box 191, Oriskany, New York 13424 (Exh. DED1 at 1-3.)

2. At the time of the application, Mary Louise Burrows owned 51% of MLB and Jeannine Burrows, Mary Louise Burrows's daughter-in-law, owned 49%. Both women are members and managers of the firm (Burrows affidavit ¶7 & Exh. A5). They also share responsibility for managing the firm (Exh. A6).

3. The firm has existed in several forms over the years. Beaver Trucking, Inc. ("Beaver") was established in July 1984 by Mary Louise Burrows for the purpose of trucking sand and stone and related business and she was its sole owner, director, and officer (Burrows affidavit ¶2 & Exh. A1). In December 1990, Mary Louise Burrows dissolved Beaver and restructured the business as a sole proprietorship operating under the assumed name of Beaver Trucking (Burrows affidavit ¶3 & Exh. A2). In September 2002, Mary Louise Burrows converted the sole proprietorship to a limited liability company called MLB Trucking, LLC DBA Beaver Trucking in which she was the sole member and manager of the company (Burrows affidavit ¶5 & Exh. A4). In 2002, Jeannine Burrows began working at the company (Burrows affidavit ¶6). In December 2012, Mary Louise Burrows transferred 49% of her ownership interest to Jeannine Burrows (Burrows affidavit ¶7 & Exh. A5).

4. The business, in its various forms, was certified as a WBE from 1992 until March 2014 (Exhs. A3 & DED2).

5. MLB's principal place of business is 5599 Lovers Lane, Oriskany, NY (Mary Louise Burrows's residence) and its mailing address is P.O. Box 191, Oriskany, NY, 13424. MLB's trucks are kept at 437 Oriskany Boulevard, Whitesboro, NY where it leases 300 square feet of dedicated truck storage and garage space in a pole frame building (Burrows affidavit ¶9 & Exh. A7). The lessor is BHB Properties, LLC and the lease is signed by Mary Louise Burrows' son, Frederick R. Burrows, Jr., Manager (Exh. A7 at 2).

6. There are at least two other businesses that maintain truck storage, garage space, and do business at this location (Exh. A8). One company is Fred Burrows Trucking and Excavating, LLC (FBTE), which is owned by Mary Louise Burrows's son, and the second is Penske, an unrelated business (Burrows affidavit ¶10).

7. The sole business of MLB is providing dump truck services. The firm owns and operates [REDACTED] tri-axle dump trucks. When necessary, it purchases and resells aggregates and other materials to sell to its customers. At times, these materials are purchased from FBTE. (Burrows affidavit, ¶11-12.)

8. MLB employs, on average, [REDACTED] full-time, seasonal truck drivers (Burrows affidavit, ¶13 & Exh. A9).

9. MLB contracts with FBTE for shared services, including office space, office equipment and software, and employees (Burrows affidavit, ¶14 & Exh. A10). In addition, FBTE occasionally performs the routine maintenance of MLB's trucks; shares its computer equipment, a copier, and a fax machine with MLB; and FBTE makes office staff available to MLB to answer the phone when the owners are not available (Burrows affidavit, ¶14). Because FBTE offers sitework/earthwork construction services, there are times when it works with the same customers as MLB (Burrows affidavit, ¶15).

DISCUSSION

This report considers applicant's appeal 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 (Exh. DED3) sets forth a single basis related to the independence of MLB, namely that the applicant failed to demonstrate that the applicant, MLB Trucking, LLC DBA Beaver Trucking, is an independent business enterprise, as required by 5 NYCRR 144.2(c)(2). In its denial letter, the Division cited the following relevant facts: (1) MLB does business from the same address as another trucking firm, FBTE; (2) MLB and FBTE share some of the same clients; (3) MLB leases office space, garage space, storage space, employees, office equipment and software from FBTE; (4) MLB pays FBTE a fee of [REDACTED] per month for the shared services; and (5) MLB purchases aggregates from FBTE.

On the appeal, counsel for the applicant argues that MLB is an independent business enterprise and should be certified as a WBE. Counsel asserts that all decisions, control and performance of the day-to-day operations of the firm are made by women and that the company is not dependent upon any other entity. While acknowledging the close relationship with FBTE, counsel argues that these shared services are simply to achieve economies of scale and in no way rise to the level of dependence. Counsel contends that MLB's largest customers include the area's main general contractors on New York State Office of General Services and State University of New York projects and often involve many trucking companies, but this sharing of clients is not proof of a lack of independence. With respect to the fact that MLB purchases aggregate and other supplies from FBTE, counsel states that it is the closest supplier of such materials to where MLB is located and the cost of such materials is at the market price.

In its response, the Division argues that the applicant is not an independent business enterprise because it obtains virtually all business support services it requires, such as office space, insurance, employee benefits, supplies, and vehicle maintenance from FBTE. In her affidavit, division analyst Cleneice Mincey (who reviewed the application and recommended denial), states that she requested a variety of information regarding the interactions of MLB and FBTE (Mincey affidavit ¶9, Exh. DED1 at 5-7). Several documents were provided in response and are discussed below.

The first document cited by Ms. Mincey is a description of the relationship between the companies which states that both companies provided services in the construction industry. MLB provides only transportation services, while FBTE provides both transportation and construction services. Both companies operate similar style dump trucks and FBTE hires MLB to provide transportation services. (Exh. DED4).

The second document cited by Ms. Mincey explains the commonalities between the two companies, and states that MLB leases an office in the same building as FBTE; rents truck storage nearby; and the landlord for both properties is BHB

Properties LLC.¹ This document also states that routine maintenance on MLB's trucks is occasionally performed by FBTE employees at FTBE's garage and payments are made quarterly. Both companies share the same computer server and software. In addition, the use of a copier and fax machine are included in the rent paid by MLB for office space. In addition, FBTE office staff may answer the phones for MLB trucking when the owners are not available. Finally, due to the overlapping nature of the businesses, there are times where both companies work for the same customer. (Exh. DED5.)

Based on her review of these documents, Ms. Mincey concluded MLB receives a wide range of support services from FBTE (Mincey affidavit ¶13). She also noted that no formal agreement was provided regarding the arrangements between MLB and FBTE for services and office facilities (Mincey affidavit ¶15) and the Division argues that this arrangement is not what one might reasonably expect of two independent entities contracting at arm's length.

Also provided by the applicant were twenty-four pages of invoices and cancelled checks between the two companies which show MLB paid FBTE for vehicle insurance; fuel; and employee benefits (including dental and life insurance). These documents also show that these invoices are prepared quarterly. (Exh. DED7.)

Ms. Mincey concludes that MLB relies on FBTE for an enormous range of services, facilities, and goods. As a result it benefits from economies of scale as a result of its relationship with FBTE, lowering its costs of insurance, employee benefits, parts, and equipment. She states that there is no proof that MLB is contractually bound to reimburse FBTE at regular intervals and can make payment when operating funds allow. For these reasons, she recommended denial of the WBE application on the basis that MLB was not an independent business enterprise (Mincey affidavit ¶21). In its response, the Division echoes this and states that MLB relies on FBTE to provide virtually everything needed to operate the business, except for the trucks themselves. This reliance allows MLB to

¹ The lease is signed by Frederick R. Burrows, Jr. on behalf of BHB Properties LLC (Exh. DED6).

be more competitive than other small firms that are truly independent.

In its reply, applicant's counsel reiterates that MLB is owned, operated and controlled by women and that Mary Louise Burrows exercises the authority to independently control the day-to-day business decisions and operations of MLB. With respect to the issues identified by the Division, counsel argues that they are not vital to the nature or existence of the company but rather are collateral and that every business has some advantages and disadvantages. Counsel concludes that that denial is not supported by the record and should be reversed.

Based on the evidence in the record, the applicant failed to demonstrate that MLB Trucking, LLC DBA Beaver Trucking, is an independent business enterprise, as required by 5 NYCRR 144.2(c)(2). Rather, at the time the application was being considered, it was so closely linked with FBTE to preclude it from being able to meet certification standards. Specifically, MLB's reliance on FBTE for nearly every aspect of its business operations indicates that it is not independent as that term is used in the Division's WBE regulations. The Division's denial was based on substantial evidence.

CONCLUSION

The applicant failed to demonstrate that MLB Trucking, LLC DBA Beaver Trucking is an independent business enterprise, as required by 5 NYCRR 144.2(c)(2).

RECOMMENDATION

The Division's determination to deny MLB Trucking, LLC DBA Beaver Trucking's application for certification as a minority and woman-owned business enterprise should be affirmed, for the reasons stated in this recommended order.

Matter of MLB Trucking, LLC DBA Beaver Trucking
DED File ID No. 5546
Exhibit List

Exh. #	Description
A1	Corporate documents of Beaver Trucking, Inc.
A2	Certificate of dissolution and other documents for Beaver Trucking, Inc.
A3	Documents relating to past WBE certifications
A4	Corporate documents of MLB
A5	Assignment and assumption agreement
A6	Resumes of owners
A7	Lease agreement
A8	Photo of leased space
A9	Tax forms
A10	Evidence of rent payments
DED1	Application
DED2	Letter from the Division dated March 21, 2011
DED3	Denial letter
DED4	Description of relationship between applicant and Fred Burrows Trucking & Excavating
DED5	Commonalities between Fred Burrows Trucking and Excavating and the applicant
DED6	Lease agreement
DED7	Various invoices and cancelled checks