

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

In the Matter

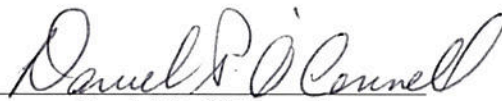
- of -

the Application of
Beam Mack Sales and Service, Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59348

RECOMMENDED ORDER

- by -


Daniel P. O'Connell
Administrative Law Judge

October 31, 2016

SUMMARY

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 by Beam Mack Sales and Service, Inc. (Beam Mack or applicant) for certification as a woman-owned business enterprise (WBE) should be affirmed for the reasons set forth below.

PROCEEDINGS

This matter considers the appeal, 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, by applicant challenging the determination of the Division that Beam Mack's application does not meet the eligibility requirements for certification as a woman-owned business enterprise.

On behalf of Beam Mack Sales and Service, Inc., Chelsea Conway submitted the application for certification to the Division on January 13, 2015 (WBE Exh. 22). Subsequently, by letter dated January 7, 2016, the Division denied the application for failing to meet six eligibility criteria outlined at 5 NYCRR 144.2 concerning Chelsea Conway's ownership, operation, and control of Beam Mack (WBE Exh. 23).

By letter dated February 4, 2016, Kenneth W. Africano, Esq. (Harter, Secrest & Emery, LLP [Rochester, New York]), filed a notice of appeal on behalf of Beam Mack, which responded to the bases identified in the Division's January 7, 2016 denial letter. In the February 4, 2016 notice of appeal, Mr. Africano requested a hearing on behalf of Beam Mack.

In a notice of appeal hearing dated April 1, 2016, the Division scheduled the hearing for May 31, 2016 at the Division's offices in New York City. After a telephone conference call with the parties on May 25, 2016, the hearing was rescheduled for 11:00 a.m. on August 18, 2016 at the Division's offices in Albany, New York.

The hearing convened as scheduled. Mr. Africano represented applicant, and Thomas Conway and Chelsea Conway testified. Phillip Harmonick, Assistant Counsel, New York State Department of Economic Development, appeared on behalf of the Division. Glenn Butler, Senior Certification Analyst, testified for the Division. During the hearing, the parties offered 28 exhibits, all of which were received into evidence. An exhibit chart is attached to this recommended order.

An audio recording of the proceedings was made. On August 25, 2016, I received three audio compact disks (CDs) from the Division. The hearing record closed on August 29, 2016 upon the timely receipt of the parties' written closing statements.

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 any interviews that the Division's analyst may have conducted.

STANDARD OF REVIEW

On this administrative appeal, Beam Mack bears the burden of proving that the Division's denial of the applicant for 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]).

POSITIONS OF THE PARTIES

The Division

In the January 7, 2016 denial letter, the Division asserted that the application failed to meet six criteria for WBE certification as outlined in Title 5 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (5 NYCRR) 144.2 concerning Ms. Conway's ownership, operation, and control of Beam Mack.

With respect to ownership, the Division found that Beam Mack did not demonstrate how Ms. Conway enjoys the customary incidents of ownership and shares in the risks and profits in proportion to her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2). In addition, the Division found that applicant did not show how Ms. Conway'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).

Concerning operation, the Division found that Beam Mack failed to demonstrate that Ms. Conway has either the experience and technical competence, working knowledge, or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i) and (ii). The Division also found that applicant did not show that the Ms. Conway makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

With respect to control, the Division found that Beam Mack failed to demonstrate that Ms. Conway makes business decisions without restrictions because she is not identified on corporate documents and relevant business agreements as having such authority, pursuant to 5 NYCRR 144.2(b)(2). The Division also found that applicant did not show that Ms. Conway has control of negotiations, signature authority for payroll, leases, letter of credit, insurance bonds,

banking services and contracts, and other business transactions, as required by 5 NYCRR 144.2(b)(3).

Beam Mack Sales and Services, Inc.

Beam Mack Sales and Service, Inc. asserted in its February 4, 2016 notice of appeal 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. Beam Mack addressed each of the bases identified in the January 7, 2016 denial letter.

Although Ms. Conway has been the Chief Executive Officer (CEO) and President of Beam Mack for less than two years, Beam Mack noted that Ms. Conway has, nevertheless, demonstrated her decision making authority by being engaged in numerous terminations and hirings, including the replacement of the previous president. Beam Mack noted further that Ms. Conway has made other significant changes to the business enterprise by analyzing sales and lease profitability, implementing inventory controls with the parts department and electronic time tickets for the service department, redesigning the company's website and email system, and designing a company logo. Beam Mack claimed that Ms. Conway owns a majority of the shares of stock, and limits her compensation in order to maximize retained earnings, which increases the value of her equity interest in Beam Mack.

FINDINGS OF FACT

I. General

1. In 1950, Fred Beam founded Beam Mack Sales and Services, Inc., with his business partner, Elmer Conway. Elmer Conway was Thomas Conway's father, and Chelsea Conway's grandfather. (Compact Disk [CD] 1 Track [Tr] 1 00:05:41.)
2. Beam Mack currently owns and operates five dealerships in New York State that sell, lease, and service trucks and buses manufactured by Mack Truck and Volvo Trucks of North America, among others (CD1Tr3 00:09:54, 00:49:28, 00:50:00). Beam Mack has two dealerships in Rochester, one in Syracuse, one in Watertown, and one in Elmira (CD1Tr3 00:09:54). In addition to the truck dealership, Beam Mack operates a bus dealership in Elmira (CD1Tr3 00:16:19).
3. With respect to the sales, lease, and service of trucks and buses, Beam Mack has several subsidiaries. They include the following: (1) Conway Beam Leasing, Inc.; (2) Empire Bus Leasing, LLC; (3) Empire Bus Sales, LLC; (4) and Conway Volvo. (CD2Tr1 00:03:11, 00:04:22.)
4. Thomas Conway became president of Beam Mack in the early 1980s. (CD1Tr1 00:06:28, 00:07:45.) Currently, Mr. Conway is the chair of the board for Beam Mack. The other board members are Chelsea Conway, who is Mr. Conway's daughter, and Matthew Sommers. Mr. Sommers is the chief financial officer for Beam Mack. (CD1Tr1 00:04:35, 00:04:53; CD1Tr3 00:21:58.) Until August 2015, Jay Hill was

president of Beam Mack and a member of the board of directors. (See WBE Exhs. 1, 3, and 22 at § 2.F; CD3Tr3 00:03:18.)

5. Elmer Conway gifted shares of his stock in Beam Mack to his son, Thomas Conway (CD1Tr3 00:00:49, 00:01:09). In 2006, Thomas Conway began transferring his shares of Beam Mack stock to Chelsea Conway. In addition, Elmer Conway and his estate, upon his death, transferred shares of Beam Mack stock to Chelsea Conway. (CD1Tr3 00:12:00.)

II. Ownership

6. Beam Mack has issued two classes of common stock shares. The Class A common stock are voting shares, and the Class B common stock are non-voting shares. As of January 5, 2015, Chelsea Conway owned 2,094.80 Class A voting shares of Beam Mack stock. As of December 31, 2012, Chelsea Conway owned 74,167.60 Class B non-voting shares of Beam Mack stock. (See WBE Exhs. 4, 5, and 6.)
7. According to Beam Mack's stock ledger (WBE Exh. 6), the original number of Class A common stock voting shares are 4,538.80. These shares are distributed among Thomas Conway (1,853.60 [40.8%]), Lindsay Conway¹ (0 [0%]), Chelsea Conway (2,094.80 [46.2%]), and the Treasury (590.40 [13.0%]). The status of the shares held by the Treasury is not known.
8. According to Beam Mack's stock ledger (WBE Exh. 6), the original number of Class B common stock non-voting shares are 86,237.10. These shares are distributed among Thomas Conway (0 [0%]), Lindsay Conway (852.0 [0.9%]), Chelsea Conway (74,167.60 [86.0%]), and the Treasury (11,217.50 [13.0%]). The status of the shares held by the Treasury is not known.
9. The sum of the original number of Class A common stock voting shares (4,538.80) and the original number of Class B common stock non-voting shares (86,237.10) is 90,775.90. Chelsea Conway owns 84.0%² of the sum of the original number of Class A and Class B shares of Beam Mack's stock, which is the majority of the shares. (CD1Tr3 00:22:20.)
10. In October 2014, Chelsea Conway began working full-time at Beam Mack (CD3Tr3 00:04:48, 00:06:26), subsequent to her graduation from the University of Denver in May 2014 with her Master's Degree in Business Administration (see WBE Exh. 2). In December 2014, Chelsea Conway became Beam Mack's CEO (see WBE Exh. 3; CD1Tr3 00:03:21, 00:27:02, 00:29:05, 00:30:32).
11. In 2014, Jay Hill's compensation, as president of Beam Mack, was \$430,157. Thomas Conway's compensation was [REDACTED] and Matthew S. Sommers's compensation was [REDACTED].

¹ Lindsay Conway is Chelsea's sister (CD3Tr3 00:00:46).

² $74,167.60 + 2094.80 = 76,262.40$. $100 \times (76,262.40/90,775.90) = 84.0\%$.

\$ [REDACTED] In 2014, Chelsea Conway's compensation was [REDACTED] (See WBE Exh. 1; CD2Tr2 00:14:13, 00:14:18.)

12. Based on a payroll schedule from January 1, 2015 to August 31, 2015 for all of Beam Mack's employees. The year to date gross wages (8 months) paid to Mr. Hill, as president of Beam Mack, were [REDACTED]. Mr. Sommers's year to date gross wages were [REDACTED]. Mr. Conway's year to date gross wages were [REDACTED]. Ms. Conway's year to date gross wages were [REDACTED] (See WBE Exh. 26 at 11, 12, 18, and 32; CD2Tr2 00:15:32, 00:16:05, 00:17:43.)
13. In 2015, Ms. Conway received a base salary of \$ [REDACTED] and a bonus of \$ [REDACTED] (CD1Tr3 00:44:53).
14. Ms. Conway estimated that the retained earnings in 2015 were [REDACTED] (CD1Tr3 00:47:26).
15. According to the application for WBE certification, Thomas Conway, Chelsea Conway, and Lindsay Conway are listed as making capital contributions to Beam Mack. However, the value reported by each contributor for their respective contribution is \$0. (See WBE Exh. 22 at § 2.C.)
16. In supplemental responses, Beam Mack stated that it was incorporated in December 1950, and does not have any records about Elmer Conway's initial investments or sources of capitalization. Since incorporation, Beam Mack has been owned and operated by members of the Conway family. Over time, the ownership of Beam Mack has passed to various family members through stock transfers. (See WBE Exhs. 22 at 9 [Questions 3 and 4], 24 and 25.)

III. Operation

17. Beam Mack provided resumes for Thomas Conway, Jay Hill, Matthew Sommers, Frank Taylor, Robert Maloney, and Chelsea Conway.³ According to the résumés, Messrs. Conway and Hill each have 30 years of experience in the business. (See WBE Exh. 27; CD2Tr2 00:19:20, 00:21:26, 00:19:45.) In addition, Beam Mack employs eight other executives or officers who work in operations and managerial positions (CD2Tr2 00:21:009).
18. Prior to completing her graduate studies in May 2014, Ms. Conway was employed on a part-time basis at Beam Mack in non-managerial positions. Ms. Conway began to acquire managerial experience after she started working full-time at Beam Mack in October 2014. (See WBE Exhs. 2 and 27; CD2Tr2 00:23:16, 00:24:13.)

³ Ms. Conway's résumé is also identified in the hearing record as WBE Exhibit 2.

IV. Control

19. Article II, Section 1 of Beam Mack's by-laws provides for a board of directors, or an executive committee. The directors are elected by the shareholders. The board of directors has the authority to manage and control the affairs and business of the corporation. (*See* WBE Exh. 7 at Art. II, § 1.) The minimum number of directors is three (*see* WBE Exh. 7 at Art. II, § 2). The board of directors, in turn, must elect a president, a secretary, and a treasurer. The board of directors may elect a chair of the board, one or more vice-presidents, and other corporate officers. (*See* WBE Exh. 7 at Art III, § 1.)
20. The by-laws identify the corporate officers, and prescribe their duties and responsibilities. The chair of the board will preside at the meetings of the board of directors, and perform any other duties as the board may direct (*see* WBE Exh. 7 at Art. III, § 5). The president will be the chief executive officer of the corporation and, subject to the direction of the board of directors, will generally manage the affairs of the corporation. Beam Mack's by-laws do not provide for a chief executive officer separate from the president. (*See* WBE Exh. 7 at Art. III, § 6.)
21. In January 2015, Jay Hill was the president of Beam Mack, and Thomas Conway was the chair of the board. In January 2015, Chelsea Conway was named the chief executive officer at the annual stockholders meeting. (*See* WBE Exhs. 3, and 22 at § 2.F; CD1Tr3 00:05:20, 00:21:58, CD2Tr2 00:26:30, 00:26:46, 00:27:14.)
22. On August 27, 2015, the Division staff asked Beam Mack to provide copies of the three largest contracts executed by Beam Mack that included information about the scope of services, invoices and contractor involvement (*see* WBE Exh. 22 at 9 [Question 8]), as well as copies of all third party agreements such as equipment rental information, purchase agreements, and management service agreements (*see* WBE Exh. 22 at 10 [Question 9]). Ms. Conway did not sign any of the documents provided by Beam Mack in response to this inquiry. (CD2Tr2 00:29:30, CD3Tr1 00:04:05.)

DISCUSSION

This recommended order considers the appeal from the Division's determination to deny Beam Mack's application for certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The Division's January 7, 2016 denial letter sets forth six bases related to Ms. Conway's ownership, operation, and control of Beam Mack. Each is discussed below.

I. Ownership

In its January 7, 2016 letter (*see* WBE Exh. 23), the Division cited two grounds for denial based on the ownership criteria. First, the Division determined that Beam Mack failed to demonstrate that Ms. Conway enjoys the customary incidents of ownership and shares in the risks and profits in proportion to her ownership interest in the enterprise, as required by 5

NYCRR 144.2(c)(2). With respect to this criterion, the basis for the Division’s determination is the disparity in the level of compensation that Ms. Conway received in 2014 and 2015 compared to the other corporate officers at Beam Mack.

Based on Form 1120-E from Beam Mack’s 2014 corporate tax return (*see* WBE Exh. 1), Mr. Conway’s compensation was [REDACTED], and Mr. Hill’s compensation was [REDACTED]. The Chief Financial Officer is Mr. Sommers, and his compensation was [REDACTED]. In contrast, Chelsea Conway’s compensation was [REDACTED]. (*See* WBE Exh. 1; CD2Tr2 00:14:13, 00:14:18.)

Corporate Officer	Title	2014 Compensation
Thomas Conway	Chair of the Board	[REDACTED]
Jay Hill	President	[REDACTED]
Matthew Sommers	CFO	[REDACTED]
Chelsea Conway	CEO	[REDACTED]

Table 1: Summary of compensation received by Beam Mack’s corporate officers in 2014.

During the review of its application, Beam Mack provided the Division with a copy of a payroll schedule for all Beam Mack employees from January 1, 2015 to August 31, 2015 (eight months) (*see* WBE Exh. 26). The year to date gross wages paid to Mr. Conway were [REDACTED]. Mr. Hill’s year to date gross wages were [REDACTED]. Mr. Sommers’s year to date gross wages were [REDACTED]. However, Chelsea Conway’s year to date gross wages were [REDACTED]. (*See* WBE Exhs. 26 at 11, 12, 18, and 32; CD2Tr2 00:15:32, 00:16:05, 00:17:43.)

Based on the 2014 tax records and the 2015 payroll records, Division staff found that the male corporate officers at Beam Mack received substantially more compensation than Chelsea Conway (CD2Tr2 00:18:32). Accordingly, staff concluded that Ms. Conway does not enjoy the customary incidents of ownership by sharing in the risks and profits in proportion to her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2). In addition, the Division noted that Ms. Conway did not share in the profits of the business enterprise through any other means such as dividend payments (*see* Division’s closing at 2).

At the hearing, Ms. Conway testified that she began working full-time at Beam Mack in October 2014 (CD3Tr3 00:04:48, 00:06:26), which would have limited her compensation for that particular year. With respect to her compensation for 2015, Ms. Conway also testified that she received a base salary of [REDACTED] and a bonus of [REDACTED]. Ms. Conway testified further that as CEO, she could have taken more compensation in 2015, but decided not to. Ms. Conway explained that the effect of this decision was to keep more money, in the form of retained earnings, in the business. According to Ms. Conway, the deferred compensation, in the form of retained earnings, should be considered her personal investment in Beam Mack. Ms. Conway estimated that the retained earnings in 2015 were [REDACTED] (CD1Tr3 00:44:53, 00:45:14, 00:47:26.)

In its closing statement, Beam Mack argued that sharing in the risks and profits of the business enterprise can take many forms, and should not be limited to a comparison of the compensation earned by other corporate officers. Beam Mack noted, first, that its shareholders

are Chelsea Conway, Thomas Conway, and Lindsey Conway (*see* WBE Exh. 22 at § 2.A), and that other corporate officers, such as Messrs. Hill and Sommers, are not shareholders. Second, Beam Mack noted that a salesperson, who had a strong year, may make more money in salary and bonuses than the owner of the company (*see e.g.*, Mr. Conway's rebuttal testimony at CD3Tr3 00:03:41). Beam Mack argued that Ms. Conway's benefits from any retained earnings, as the majority shareholder, and that this benefit dwarfs any disparity in the salaries earned by the other corporate officers. (*See* Beam Mack's closing at 3-4.)

At the time that Beam Mack filed the application for WBE certification, the only information before the Division was Beam Mack's federal Corporation Tax Return (Form 1120) for 2014 (*see* WBE Exh. 1), and the payroll information from 2015 (*see* WBE Exh. 26). This information showed a large disparity in the compensation that Ms. Conway received in 2014 and 2015 compared to the other corporate officers. In *Matter of CW Brown, Inc. v Canton* (216 AD2d 841, 843 [3d Dept 1995]), the court held that staff's review of tax returns, such as those considered in the captioned matter, was substantial evidence to support the Division's determination whether an applicant for WBE certification meets the criterion at 5 NYCRR 144.2(c)(2).

With respect to Beam Mack's argument about the retained earnings from 2015, I note that Beam Mack did not identify any information that it had submitted either with the January 2015 application for WBE certification, or subsequently in response to Division staff's August 27, 2015 document request, that refutes the Division's determination based upon the review of the tax returns and payroll information. As noted above, the scope of the review in this proceeding is limited to whether the Division's denial of the application for WBE certification is supported by substantial evidence. Accordingly, I conclude that it is, and recommend that the Division's determination that Beam Mack's application does not meet the eligibility criterion at 5 NYCRR 144.2(c)(2) be affirmed.

In addition, the Division determined that Beam Mack did not show that Ms. Conway'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). As noted above, Section 2 of the application for WBE certification includes a set of questions about ownership, and Question 2.C requests information about the cash and capital that the owners have contributed to the business enterprise. In Beam Mack's application, three contributors are identified. They are Thomas Conway, Chelsea Conway, and Lindsay Conway. For each contributor, the value of their respective contribution is reported as \$0. (*See* WBE Exh. 2 at § 2.C.)

Beam Mack responded to the August 27, 2015 document request with documents identified in the hearing record as WBE Exhibits 24 and 25. WBE Exhibit 24 states, among other things, that Beam Mack was incorporated in December 1950, and that no records exist about Elmer Conway's initial investment or sources of capitalization. WBE Exhibit 25 notes that Beam Mack is not a startup. Furthermore, Beam Mack was incorporated in 1950, and has continuously been in business for 65 years. During the entire operating period, Beam Mack has been owned and operated by members of the Conway family. Over time, the ownership of Beam Mack has passed to various family members through stock transfers. As previously noted, Ms.

Conway testified that she limited her salary in order to preserve Beam Mack's retained earnings, and that she considered the deferred compensation to be her personal investment in Beam Mack. (CD1Tr3 00:44:5300:45:14, 00:47:26.)

During the hearing, staff testified that the Division frequently considers applications for WBE certification where the business enterprise has been either inherited or gifted. Even under such circumstances, the Division maintained that an applicant must, nevertheless, demonstrate that the woman owner's contribution is proportionate to her equity interest in the business enterprise. (CD2Tr2 00:38:10, 00:39:06.)

In its closing statement, the Division contended that retained earnings are not capital contributions for the purposes of accounting. The Division contended further that if retained earnings were considered to be the woman owner's capital contribution, the individual who was gifted a majority interest in a business could fulfill the requirement at 5 NYCRR 144.2(a)(1) without actually making any personal investment in the business enterprise. The Division argued that according to Ms. Conway's testimony, she could not disburse all retained earnings without causing operational harm to Beam Mack, and did not quantify the amount of retained earnings needed to meet Beam Mack's ongoing operational needs. Absent a more detailed explanation, the Division argued that the value of Ms. Conway's contribution is not part of the hearing record. (See Division's closing at 1-2.)

Beam Mack correctly observed that the woman owner's contribution to the business enterprise is not exclusively limited to a financial one. In addition to money, woman owners may, in the alternative, contribute property, equipment, or expertise. (See 5 NYCRR 144.2[a][1].) Beam Mack argued further that gifted shares do not, in themselves, bar certification. To support the latter argument, Beam Mack cited *Matter of JA Marshall Sheet Metal & Roofing v State of New York* (221 AD2d 759, 760 [3d Dept 1995]). (See Applicant's closing at 5.)

Beam Mack contended that Ms. Conway has contributed expertise to the business enterprise. Beam Mack noted that Ms. Conway worked part-time at Beam Mack during summers while attending high school, college, and graduate school. During this part-time employment, Ms. Conway gained an understanding of how various business operations at Beam Mack worked. Beam Mack contended further that Ms. Conway has contributed an outstanding academic record to the business enterprise based on her undergraduate and graduate grade point averages. (See WBE Exh. 2; CD1Tr3 00:22:54-00:24:57; see also, Applicant's closing at 6-7.)

The hearing record shows that when Beam Mack filed the application for WBE certification in January 2015, Ms. Conway had not made any financial contribution to the business in proportion to her equity interest in the business enterprise. After inquiries made by Division staff (see WBE Exh. 22 at 9 [Questions 3 and 4]), Beam Mack provided additional information, identified in the hearing record as WEB Exhibits 24 and 25, concerning sources of capitalization and other contributions. In these responses, Beam Mack did not identify other contributions of property, equipment, or expertise that Ms. Conway made to the business enterprise. Accordingly, the Division correctly concluded that Beam Mack did not meet its

burden to show how the woman owner's contribution was proportionate to her equity interest in the business enterprise, as required by 5 NYCRR 122.4(a)(1).

Beam Mack argued that its 2015 retained earnings⁴ are Ms. Conway's monetary contribution to the business enterprise that would satisfy the eligibility criterion at 5 NYCRR 122.4(a)(1). During the hearing, however, Beam Mack did not show that it had provided information about the retained earnings when it either filed the application for WBE certification, or responded to August 27, 2015 document request. Moreover, at the hearing, Beam Mack argued for the first time that Ms. Conway's expertise is a contribution to the business enterprise. This argument was not before the Division when it issued its January 7, 2016 determination. Beam Mack's claims related to retained earnings and to contributions of expertise may have merit, but because they were not before the Division at the time it made the January 7, 2016 determination, these claims cannot be considered as part of the appeal.

II. Operation

In its January 7, 2016 letter (*see* WBE Exh. 23), the Division cited two grounds for denial based on the operation criteria. First, the Division determined that Beam Mack failed to demonstrate that Ms. Conway has the experience or technical competence, working knowledge, or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i) and (ii). The Division discussed these eligibility criteria in its closing statement at 2-3.

At the hearing, Division staff acknowledged that specific licenses or other credentials are not needed to operate a business enterprise of this nature. Therefore, staff relied on managerial experiences to evaluate Ms. Conway's level of experience and technical competence. (CD2Tr3 00:20:09.) Upon review of the resumes for Thomas Conway, Jay Hill, Matthew Sommers, Frank Taylor, Robert Maloney, and Chelsea Conway (*see* WBE Exhs. 2 and 27), Division staff determined that the male corporate officers at Beam Mack have substantially more years of experience than Chelsea Conway. For example, Messrs. Conway and Hill each have 30 years of experience in the business. (*See* WBE Exh. 27; CD2Tr2 00:19:20, 00:19:45.) In addition, Beam Mack employs eight other executives or officers who work in operations and managerial positions (CD2Tr2 00:21:009.)

In contrast, Division staff noted that prior to completing her graduate studies in May 2014, Ms. Conway had been employed at Beam Mack on a part-time or seasonal basis in non-managerial positions. Staff concluded that Ms. Conway had not acquired a sufficient level of managerial experience to run the business when she began working full-time at Beam Mack in October 2014. (*See* WBE Exh. 2; CD2Tr2 00:23:16, 00:24:13.)

In its closing statement, Beam Mack addressed the following points with respect to the eligibility criteria outlined at 5 NYCRR 144.2(b)(1)(i) and (ii) (*see* Applicant's closing at 7-8). First, Beam Mack argued that Ms. Conway's part-time work at Beam Mack during summers and school breaks provided extensive opportunities to learn about its various operations. Ms. Conway testified that she shadowed Beam Mack staff members who worked in the office, and reviewed accounts receivable and accounts payable (CD1Tr3 00:22:54). At other times, Ms.

⁴ Ms. Conway testified that Beam Mack's retained earnings were [REDACTED] for 2015 (CD1Tr3 00:47:26).

Conway worked in the parts and service departments. In the parts department, Ms. Conway worked at the counter and retrieved parts from the stock room. (CD1Tr3 00:23:44.) When she worked in the service department, Ms. Conway wrote repair orders and forward them to the service personnel (CD1Tr3 00:24:06).

Second, Ms. Conway explained that during her undergraduate and graduate studies, she chose themes for her projects in her business courses that focused on selling, leasing, or servicing trucks (CD1Tr3 00:24:34-00:24:57). Beam Mack noted that Ms. Conway's undergraduate and graduate grade point averages are laudable (*see* WBE Exh. 2).

Third, Ms. Conway attended the American Truck Dealers (ATD) Academy after she began working full-time at Beam Mack. The academy consisted of six, one-week sessions that addressed the operating requirements for commercial truck dealerships. WBE Exhibit 10 is a copy of Ms. Conway's ATD Academy certificate dated March 31, 2016. (CD1Tr3 00:53:32, 00:54:54.)

Fourth, Mack Trucks and Volvo Trucks North America have sales and service agreements with Beam Mack. A condition of the agreements is for Beam Mack to designate a "Dealer Principal," and for Mack Trucks and Volvo Trucks North America to accept the designee. During the hearing, Beam Mack offered WBE Exhibits 8 and 9 to demonstrate that Chelsea Conway was the dealer principal for these two truck manufacturers. WBE Exhibit 8 is a letter dated August 18, 2015 from Volvo Trucks North America, which approves Beam Mack's request to designate Ms. Conway as the dealer principal at Beam Mack for Volvo Trucks North America. Similarly, WBE Exhibit 9 is a letter dated August 18, 2015 from Mack Trucks, which approves Beam Mack's request to designate Ms. Conway as the dealer principal at Beam Mack for Mack Trucks. (*See* WBE Exh. 8 and 9; CD1Tr3 00:50:27-00:52:22.)

Based on the foregoing, Beam Mack argued that Ms. Conway has extensive knowledge of the business enterprise, and directly oversees sales. Beam Mack also argued that Ms. Conway does not have to be a salesperson or even have direct knowledge of how to sell trucks in order for Beam Mack to obtain WBE certification. According to Beam Mack, technical competence to fulfill ordinary tasks that are part of industry practices is not required. To support this argument, Beam Mack cited *Matter of Era Steel Constr. Corp. v Egan* (145 AD2d 795, 798 [3d Dept 1988]). (*See* Applicant's closing at 8.)

In this case, the Division's approach to determining compliance with the eligibility requirements outlined at 5 NYCRR 144.2(b)(1)(i) and (ii) is reasonable and plausible. Beam Mack offered no evidence to show that Ms. Conway's part-time employment was as a manager. Since becoming a full-time employee at Beam Mack in October 2014, Ms. Conway's level of management experience, therefore, had been limited in comparison to Messrs. Conway's and Hill's level. These corporate officers each have over 30 years of managerial experience. Therefore, the applicant failed to demonstrate that the woman owner, Chelsea Conway, has the experience or technical competence, working knowledge, or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i) and (ii).

Ms. Conway's designations in August 2015 as the dealer principal for Mack Truck (*see* WBE Exh. 9), and Volvo Truck North America (*see* WBE Exh. 8), as well as her successful completion of the ATD Academy in March 2016 (*see* WBE Exh. 10) may contribute to Ms. Conway's experience and technical competence. However, Beam Mack did not offer this information until the hearing. Because this information was not before the Division when it made the January 7, 2016 determination, the information is not considered in this administrative appeal.

The second basis asserted for denial on operational grounds was that Beam Mack did not show how Ms. Conway makes decisions pertaining to the operations of the enterprise as required by 5 NYCRR 144.2(b)(1). At the hearing, Division staff testified that the August 27, 2016 information request asked Beam Mack to provide a detailed narrative outlining Ms. Conway's daily duties and responsibilities. With this request, staff also requested information about how much time Ms. Conway devoted to these duties and responsibilities. Beam Mack responded with a document identified in the hearing record as WBE Exhibit 25. According to Division staff, Beam Mack's response was not complete, and staff could not make a determination with respect to this eligibility criterion. (*See* WBE Exhs. 22 at 10 [Question No. 11], and 25; CD2Tr2 00:24:36; *see also* Division's closing at 3.)

During the hearing, Ms. Conway testified that she has made a number of decisions since coming to work full-time at Beam Mack in October 2014. Many of them are related to technology. For example, under Ms. Conway's direction, Beam Mack upgraded its email system and retained a different email provider. With these upgrades, Beam Mack employees are able to access their email from their smart phones, and from their desktops. (CD1Tr3 00:55:52.) Also, Ms. Conway explained that she hired a consultant to develop a logo for Beam Mack – its first in the history of the company (CD1Tr3 00:57:51). In addition, Ms. Conway hired a second consultant to upgrade Beam Mack's website. The upgrade focused on improving inquires on the various internet search engines. (CD1Tr3 00:59:44.)

Ms. Conway also reorganized the parts and service departments, and developed a paperless process. When trucks come in for service, the needed parts are identified, and selected from the parts department. The parts are brought over to the service department for installation. According to Ms. Conway, these innovations have resulted in faster service calls. The upgrades required a new software program, and Ms. Conway signed the contract on behalf of Beam Mack. (CD1Tr3 00:58:30, 00:59:24.) With these upgrades, the parts inventory has been computerized. Ms. Conway explained that with a computerized inventory, Beam Mack can develop reports about the use and availability of stock items, which can improve efficiency and save money. (*See* WBE Exh. 11; CD1Tr3 01:00:15.)

Furthermore, Ms. Conway initiated a process to monitor and analyze sales at Beam Mack that had not been previously undertaken. In consultation with the General Manager for Sales, Rob Maloney, Ms. Conway determined that a sales representative was no longer needed at Beam Mack based on these recently initiated sales analyses, and Ms. Conway terminated the sales representative's employment at Beam Mack. (*See* WBE Exh. 12; CD1Tr3 01:03:29-01:04:05.)

The foregoing circumstances may demonstrate that Ms. Conway makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). However, the information about these changes initiated by Ms. Conway at Beam Mack was not before the Division when it made the January 7, 2016 determination (CD2Tr1 00:30:21-00:31:58). Therefore, this information is outside the scope of this proceeding. Consequently, Beam Mack failed to demonstrate at the time it filed its application for WBE certification that Ms. Conway makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

III. Control

In its January 7, 2016 letter (*see* WBE Exh. 23), the Division determined that Beam Mack failed to demonstrate that Ms. Conway makes business decisions without restrictions because she is not identified on corporate documents and relevant business agreements as having such authority, as required by 5 NYCRR 144.2(b)(2). The basis for the Division's determination was a review of Beam Mack's by-laws, and the information presented in the application for WBE certification (*see* Division's closing at 3-4).

WBE Exhibit 7 is a copy of Beam Mack's by-laws, which identify the corporate officers and prescribe their duties and responsibilities. The chair of the board will preside at the meetings of the board of directors, and perform any other duties as the board may direct (*see* WBE Exh. 7 at Art. III, § 5). The president will be the chief executive officer of the corporation and, subject to the direction of the board of directors, will generally manage the affairs of the corporation (*see* WBE Exh. 7 at Art. III, § 6). In Article III, § 6 of Beam Mack's by-laws, the term, *chief executive officer (CEO)*, is associated only with the duties and responsibilities of the president. Other than the president, no separate corporate officer is identified in Beam Mack's by-laws as the chief executive officer. (*See* WBE Exh. 7.)

Beam Mack filed its application for WBE certification on January 13, 2015. According to the application and related documents, Jay Hill was the president of Beam Mack, and Thomas Conway was the chair of the board. Chelsea Conway was identified as the CEO. (*See* WBE Exhs. 2, 3, 22 at § 2.F, and 27; CD1Tr3 00:05:20, 00:21:58, CD2Tr2 00:26:30, 00:26:46, 00:27:14.) As part of Beam Mack's rebuttal case, Thomas Conway testified that Chelsea Conway was given the title of CEO to avoid taking away the title of president from Mr. Hill (CD3Tr3 00:02:30).

In its closing statement, Beam Mack acknowledged that its by-laws do not provide for a CEO. Beam Mack asserted, however, that it would not be the first small business that did not pay attention to the details of its by-laws. Beam Mack argued that the deficiency in naming Ms. Conway as the CEO is one of form, not function, and that the deficiency has been remedied. (*See* Applicant's closing at 9.) Due to his unwillingness to accept Ms. Conway as the head of Beam Mack, Mr. Hill's employment at Beam Mack was terminated in mid-August 2015 (CD3Tr3 00:03:18), subsequent to when Beam Mack filed its application for certification (*see* WBE Exh. 22 [January 13, 2016]).

After Mr. Hill left Beam Mack's employ, Beam Mack contended that Ms. Conway became the president in addition to being the CEO. To demonstrate this transition, Beam Mack attached a copy of the minutes from Beam Mack's annual stockholders meeting held on December 29, 2015.⁵ Applicant noted further that its witnesses testified about how Ms. Conway has been in control of Beam Mack from January 2015 to the present. (*See* Applicant's closing at 9).

Indeed, the intent of 5 NYCRR 122.2(b)(2) concerning the designation of woman owners as the decision makers in the corporate documents of the business enterprise is to formalize functional designations. Formalized designations, as reflected in the enterprise's by-laws, ensure that the woman owners are, in fact, the decision makers of the business enterprises. Consequently, at the time that Beam Mack filed its application for certification, Division staff correctly found that Chelsea Conway was not the president of Beam Mack.⁶ Therefore, Division staff appropriately determined that Ms. Conway could not make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

The Division also concluded that Beam Mack did not show that Ms. Conway has control of negotiations, signature authority for payroll, leases, letter of credit, insurance bonds, banking services and contracts, and other business transactions, as required by 5 NYCRR 144.2(b)(3). The Division discussed the basis for the determination in its closing statement at 3.

In a document request dated August 27, 2015, Division staff asked Beam Mack to provide: (1) copies of the three largest contracts executed by Beam Mack that include information about the scope of services, invoices, and contractor involvement (*see* WBE Exh. 22 at 9 [Question 8]), as well as (2) copies of all third party agreements that include equipment rental information, purchase agreements, and management service agreements (*see* WBE Exh. 22 at 10 [Question 9]). The purpose of this inquiry was to determine whether and, if so, to what extent, Ms. Conway controls business transactions at Beam Mack. (CD2Tr2 00:29:30, CD3Tr1 00:04:05.)

In response, Beam Mack provided a copy of a lease agreement dated July 6, 2011 between Conway Beam Leasing, Inc. and Alyne, LLC. The lease agreement is identified as Exhibit 28 in the hearing record. Jay Hill signed the lease on behalf of Conway Beam Leasing, Inc., as its vice-president. (*See* WBE Exh. 28; CD2Tr2 00:30:49, 00:31:07.) Beam Mack also provided one unsigned contract summary, and one unsigned invoice. Beam Mack did not

⁵ The minutes from Beam Mack's December 29, 2015 annual stockholders meeting are attached to Beam Mack's closing statement as Exhibit A. Applicant had not offered the minutes from Beam Mack's December 29, 2015 annual stockholders' meeting at the August 18, 2016 administrative hearing. In the closing statement (at 9, note 1), Beam Mack requested that I receive Exhibit A into the evidentiary record. In an email from Mr. Harmonick dated August 26, 2016, the Division objected to the receipt of Exhibit A. Among other things, the Division noted that the minutes do not provide any information about the time and manner of Ms. Conway's appointment as president. The Division noted further that because this document was not introduced at the hearing, the Division did not have the opportunity to cross-examine Ms. Conway about the meeting minutes. I find that applicant's proffer of Exhibit A with its written closing statement is untimely. I, therefore, deny the request to receive it into evidence.

⁶ With respect to 5 NYCRR 144.2(b)(2), the Division took no issue with Thomas Conway serving as the chair of the board of directors of Beam Mack.

provide any other signed contracts in response to the August 27, 2015 document request. (CD2Tr2 00:30:37, 00:31:42, CD3Tr1 00:00:30, 00:00:57, 00:01:20.) After reviewing this information, Division staff could not determine that Ms. Conway negotiates contracts on behalf of Beam Mack (CD2Tr2 00:32:00), and concluded that Beam Mack does not meet the eligibility requirement at 5 NYCRR 144.2(b)(3).

To demonstrate compliance with the eligibility criterion outlined at 5 NYCRR 144.2(b)(3) concerning control of negotiations, among other things, Beam Mack identified, in its closing statement (at 8-10), the supporting evidence it had offered at the hearing. Much of this evidence, among other things, was discussed in the preceding section of this report (*infra* at 10-13). For example, under Ms. Conway's direction, Beam Mack upgraded its email system and retained a different email provider (CD1Tr3 00:55:52). Ms. Conway hired different consultants to develop a logo (CD1Tr3 00:57:51), and to upgrade Beam Mack's website (CD1Tr3 00:59:44).

Ms. Conway also offered testimony about the various agreements that she has signed on behalf of Beam Mack since becoming the CEO. For banking services, Beam Mack uses M&T Bank, and Ms. Conway, among others, has signature authority with M&T Bank (*see* WBE Exh. 15; CD2Tr1 00:19:42, 00:20:09). Ms. Conway offered the agreement between Beam Mack and HIMO Motor Sales USA, Inc. concerning the sales and service of HIMO trucks, which is a division of Toyota. Ms. Conway signed this agreement on behalf of Beam Mack on March 26, 2015. (*See* WBE Exh. 16; CD2Tr1 00:21:21.) With respect to the software upgrades associated with how the parts and service departments process repairs, Ms. Conway signed an agreement with CDK Global, LLC on May 10, 2016 (*see* WBE Exh. 17; CD2Tr1 00:23:01).

As noted above, the foregoing technology updates and associated agreements may demonstrate that Ms. Conway controls negotiations and other aspects of the business enterprise, as required by 5 NYCRR 144.2(b)(3). However, Beam Mack did not offer any information about these agreements until the administrative hearing. As a result, this information was not before the Division when it issued the January 7, 2016 determination (CD2Tr1 00:30:21-00:31:58), and is, therefore, outside the scope of this appeals proceeding. Consequently, Beam Mack failed to demonstrate at the time it filed the application for certification that Ms. Conway controlled negotiations and other aspects of the business enterprise, as required by 5 NYCRR 144.2(b)(3).

CONCLUSIONS

1. At the time it filed the application for WBE certification, Beam Mack did not demonstrate how Ms. Conway enjoys the customary incidents of ownership and shares in the risks and profits in proportion to her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).
2. Beam Mack did not show that Ms. Conway'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).

3. Beam Mack failed to demonstrate that Ms. Conway has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i) and (ii).
4. Beam Mack did not show that Ms. Conway makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).
5. Beam Mack did not prove that Ms. Conway makes business decisions without restrictions because she is not identified on corporate documents and relevant business agreements has having such authority, as required by 5 NYCRR 144.2(b)(2).
6. Beam Mack did not show that the Ms. Conway has control of negotiations, signature authority for payroll, leases, letter of credit, insurance bonds, banking services and contracts, and other business transactions, as required by 5 NYCRR 144.2(b)(3).

RECOMMENDATION

The Division's determination to deny Beam Mack Sales and Service, Inc.'s application for certification as a woman-owned business enterprise should be affirmed, for the reasons stated in this recommended order.

Beam Mack may take the steps necessary to comply with the eligibility criteria outlined at 5 NYCRR 144.2. Subsequently, as provided by the regulations (*see* 5 NYCRR 144.5[b]), Beam Mack may reapply for WBE certification.

Attachment: Exhibit Chart

Division of Minority and Women's Business Development

Exhibit Chart

Matter of Beam Mack Sales and Service, Inc.

WBE File No. 59348

Hearing Date: August 18, 2016

WBE Exhibit No.	Description
1	IRS Form 1120 US Corporation Income Tax Return 2014
2	Résumé of Chelsea Conway (See WBE Exh. 27)
3	Beam Mack Sales and Service, Inc. Minutes from Annual Stockholders Meeting December 30, 2014
4	Copies of Class B Non-voting Common Stock August 1, 2006 to December 21, 2012
5	Copies of Class A Voting Common Stock January 5, 2015 to February 3, 2014
6	Stock Ledger for Beam Mack Sales and Service, Inc.
7	By-Laws of Beam Mack Sales and Service, Inc. October 20, 1987
8	Volvo Trucks North America Correspondence dated August 18, 2015
9	Mack Trucks Correspondence dated August 18, 2015
10	National Automobile Dealers Association ATD Academy Certificate Chelsea Leigh Conway March 31, 2016

11	Beam Rochester 14623 Inventory Performance Report January 2016 – December 2015 Employee Sales Analysis
12	Empire Bus Sales Analysis 2016 Empire Bus Sales Analysis 2015 Empire Bus Sales Analysis 2014
13	Beam Mack CEO Responsibilities Key Note Dates Vacation dates for Chairman of the Board Reoccurring Responsibilities
14	General Manager Meeting Agenda: November 10 th GM Meeting Q4, 2015
15	M&T Bank Certified Banking Resolutions of Corporation for Beam Mack Sales & Service, Inc. Adopted: December 23, 2014
16	Hino Motors Sales USA, Inc. Hino Managed Inventory Program Dealer Agreement Chelsea L. Conway, CEO March 26, 2015
17	CDK Global, LLC Schedule to Master Services Agreement Contract No. 98034896 Chelsea Conway, CEO May 10, 2016
18	Certification Application: Company Profile Beam Mack Sales and Service, Inc. Application Type: New Application Application No.: 2870032
19	ESD Attachment B: Personal Financial Statement Worksheet Beam Mack Sales and Service, Inc. Chelsea Leigh Conway

20	ESD Attachment A: NYS MWBE Certification Individual Personal Net Worth Affidavit Chelsea L. Conway January 9, 2015
21	ESD Division of Minority and Women's Business Development Certification Application Affidavit Chelsea L. Conway January 2, 2015
22	Beam Mack Sales and Service, Inc. Certification Application Application No. 2870032 Submitted: January 13, 2015
23	Division's January 7, 2016 denial letter
24	Beam Mack Sales and Service, Inc. Documented Proof of Sources of Capitalization and Investments
25	WMBE Questions relating to Beam Mack Sales and Service Background Responses
26	Beam Mack Sales and Service, Inc. Payroll Documents
27	Beam Mack Sales and Service, Inc. Résumés: Chelsea Conway (<i>see</i> WBE Exh. 2) Thomas A. Conway Matthew S. Sommers, CPA Jay Hill Frank B. Taylor Robert C. Maloney
28	Conway Beam Leasing, Inc. Full Service Lease Agreement July 6, 2011

Ruling: All exhibits, identified above, received into evidence (CD3Tr3 00:08:00).