

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

In the Matter

- of -

the Application of  
**Owen Steel Company Inc.**

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

NYS DED File ID No. 49143

RECOMMENDED ORDER

- by -

A handwritten signature in cursive script, appearing to read "Molly T. McBride".

Molly T. McBride  
Administrative Law Judge  
February 8, 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 of Owen Steel Company Inc. ("Owen Steel," or "applicant") for certification as a minority and woman-owned business enterprise ("MWBE") 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 Owen Steel Company Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a minority and woman-owned business enterprise. Owen Steel's application was received on April 28, 2016 (DED Exh. 1). The application was denied by letters dated October 26, 2016 by the Division (DED Exh. 4). The application was denied because Owen Steel is not a small business, as required by 5 NYCRR 140.1(aa)(6) (minority-owned business enterprise) and (tt)(1)(vi) (women-owned business enterprise).

By letter dated November 7, 2016, the applicant filed a notice of appeal from the Division's denial determination requesting and submitting a written appeal. Division Staff submitted its written response to the appeal on October 2, 2017.

## ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied minority or 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.

#### STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of applicant's MWBE certification is not supported by substantial evidence (see State Administrative Procedure Act § 306). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that the Division's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate" (Matter of Ridge Rd. Fire Dist. v. Schiano, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

#### POSITIONS OF THE PARTIES

##### Position of the Division

In its denial letters, the Division asserts that Owen Steel is not a small business, as required by 5 NYCRR 140.1(aa)(6) and (tt)(1)(vi).

##### Position of the Applicant

Owen Steel asserts that it meets the criteria for certification and that the Division erred in not granting it status as a minority and woman-owned business enterprise pursuant to Executive Law Article 15-A.

#### FINDINGS OF FACT

1. Owen Steel is in the business of fabrication of structural steel. The firm has a business address of 727 Mauney Drive, Columbia, SC (DED Exh. 1).
2. Anny Zalesne, a minority woman, is the owner and CEO of Owen Steel (DED Exh. 1).
3. Owen Steel submitted an application for recertification as a minority and woman business enterprise to the Division on April 28, 2016 (DED Exh. 1).

4. To qualify for MWBE certification in New York, one criteria that must be met is that the business must not exceed 300 employees, as defined at Article 15-A of the New York State Executive Law.

5. Owen Steel stated in its application for recertification that it employed 296 non-owner employees for the 12 months prior to the application submission (DED Exh. 1 and Owen Steel brief at 1).

6. The review of the application was assigned to Division senior certification analyst Iliana Farias in July 2016 (DED brief at 2).

7. Ms. Farias, during her review of the application, requested U.S. IRS Form 941 quarterly tax returns for the first two quarters of 2016 (DED brief at 3).

8. Applicant submitted the last three quarters of 2015 and first quarter of 2016 Form 941 with the application (DED brief at 2).

9. The IRS Form 941 for the first two quarters of 2016 demonstrated that Owen Steel averaged in excess of 300 non-owner employees (DED Exh. 3 at 38, 42).

#### DISCUSSION

This report considers the appeal of the applicant from the Division's determination to deny certification as a minority and woman-owned business enterprise pursuant to Executive Law Article 15-A.

The Division's denial letters assert that the application failed to demonstrate that Owen Steel is a small business, as required by 5 NYCRR 140.1(aa)(6) and (tt)(1)(vi). The relevant fact cited is that the firm employs more than three hundred individuals (DED Exh. 4 and DED brief).

Iliana Farias, senior certification analyst for the Division was assigned to review the application of Owen Steel. As part of her review of the application, she requested IRS Form 941 for the first two quarters of 2016 on August 9, 2016 and September 27, 2016 (DED brief at 2-3). The forms were

provided by the applicant on or about October 17, 2016 (DED Exh. 3). Ms. Farias determined that the firm employed more than 300 people, on average, during the 12 months leading up to her determination (DED brief at 4-5; DED Exh. 3). The forms show that the number of employees who received wages, tips, or other compensation for the twelve months prior to the review by the Division was 306.25 (DED brief at 4-5; DED Exh. 2 & 3). Ms. Farias concluded that because the average of the quarterly reports exceeded 300 employees, the firm did not meet certification requirements (DED brief at 5). Division employees used the IRS form 941 to calculate the number of employees.

Applicant argues on its appeal that the Division's reliance on US Small Business Administration ("SBA") regulations precluded the Division's review of employment records for the time **after** the application was submitted (Applicant brief at 6). Applicant acknowledges that the NYS MWBE program requires a business to be identified as a "small business" and has set a cap, for purposes of identifying small businesses, as a business that employs a maximum of 300 employees (Applicant brief at 5). Applicant argues that the Division wrongly used second quarter 2016 data and the 3 preceding quarters to calculate the average number of employees employed by Owen Steel (Applicant brief at 5 & 6). Applicant acknowledges the following information: Q1/2016 - 304 employees; Q4/2015 - 303 employees; Q3/2015 - 288 employees. For the second quarter of 2016, IRS Form 941 indicates that the company employed 330 (DED Exh. 3).

However, applicant objects to the use of the data from the second quarter of 2016 (Applicant brief at 3-4). Applicant argues that had it known that a review of records after the filing of the application might be considered, it would have "frozen all hiring until the application was approved" (Applicant brief at 7). Also, it argues that IRS Form 941 does not necessarily identify the number of employees employed on a particular date, but rather the number employed over the course of the quarter (Applicant brief at 7) and the Division should conduct a more detailed analysis to determine actual employees working on each day of the quarter (*id.*). Both of these arguments are without merit when examined in light of the State's objective and purpose of the MWBE program.

The Division is tasked with applying Article 15-A of New York Executive Law to determine what constitutes a "small business" for purposes of certification. New York Executive Law defines small business at NY Executive Law § 310(20): "*Small business*" as used in this section, unless otherwise indicated, shall mean a business which has a significant business presence in the state, is independently owned and operated, not dominant in its field and employs, based on its industry, a certain number of persons as determined by the director, but not to exceed three hundred, taking into consideration factors which include, but are not limited to, federal small business administration standards pursuant to 13 CFR part 121 and any amendments thereto. The director may issue regulations on the construction of the terms in this definition." The purpose of the program is clear, to provide opportunities to small businesses that employ 300 or less employees. The Division is tasked with reviewing an application submitted for certification and all supporting materials. Also, the Division does as its normal practice, request additional information to assist in the review of the application, including obtaining the most current information available regarding the applicant business.

Based on the evidence in the record, the applicant has failed to demonstrate that Owen Steel employs less than 300 people and, therefore, is a small business, as required by 5 NYCRR 140.1(aa)(6) and (tt)(1)(vi). Accordingly, the Division's denial, based upon IRS form 941, was based on substantial evidence.

#### CONCLUSION

The applicant has not demonstrated that Owen Steel is a small business, as required by 5 NYCRR 140.1(aa)(6) and (tt)(1)(vi).

## RECOMMENDATION

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

OWEN STEEL CO. INC.

DED File ID No. 49143

Exhibit List

DED Exh. #	Description
1	Application
2	2016 1 <sup>ST</sup> quarter and 2 <sup>nd</sup> , 3 <sup>rd</sup> and 4 <sup>th</sup> quarter 2015 IRS Form 941
3	Post application submissions from applicant to Iliana Farias
4	Denial letters