

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

In the Matter

- of -

**the Application of 192 Branch Interior Services, Inc. dba Branch Services
for Recertification as a Minority-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 55696

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
March 21, 2024

This matter considers the appeal by 192 Branch Interior Services, Inc. dba Branch Services (“Branch Services” or “applicant”) 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 140144, challenging the determination of the Division of Minority and Women’s Business Development (“Division”) of the New York State Department of Economic Development (“DED”) that the business enterprise does not meet the eligibility criteria for recertification as a minority-owned business enterprise (“MBE”).

PROCEDURAL HISTORY

1. On October 12, 2022, Mr. Arthur Chu, as President, applied on behalf of Branch Services for recertification as a minority-owned business enterprise (“MBE”). (DED Exhibit 1)
2. On July 31, 2023, the Division denied the application on the ground that the business enterprise failed to demonstrate that it employs fewer than three hundred people, as required under 5 NYCRR §§144.2(f)(2) and 140.1(hh). (DED Exhibit 2)
3. Branch Services timely filed a Request to Appeal on August 30, 2023 (APP Exhibit A/ DED Exhibit 3).
4. A notice to proceed via written appeal was sent to Branch Services on August 31, 2023 (DED Exhibit 4).
5. Branch Services filed its written appeal by memorandum with attachments from its attorneys, Colleen F. Dowd, Esq., and Richard T. Cordano, Esq., of Russo, Karl, Widmaier& Cordano, PLLC on September 29, 2023. (APP Exhibit B).
6. The Division filed an Affidavit of Raymond Emanuel, Associate Director, dated January 8, 2024, and a brief of Michael Paff Esq., counsel for the Division, dated January 9, 2024.

FINDINGS OF FACT

7. Branch Services is engaged in the business of environmental remediation including but not limited to asbestos, lead, mold and oil, as well as restoration services including but not limited to water, fire, smoke and wind damage (DED Exhibit 1).
8. Mr. Arthur Chu is the President and 100% owner of Branch Services (DED Exhibit 1).
9. Branch Services' Form W-3 for 2021 reflected 418 employees and Form W-3 for 2022 reflected 529 employees (DED Exhibit 7). Forms W-2 for 2021 and 2022 reflected the same numbers (DED Exhibit 9). The Form 941 quarterly reports for 2021 and 2022 reported 257 employees and 281 employees respectively (DED Exhibit 8).

APPLICABLE LAW

Article 15-A, Section 310(20) defines small business as:

“small business” as used in this section, unless otherwise indicated, shall mean a business which... 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.

5 NYCRR §144.2(f)(2) states as follows:

Applications to certify business enterprises as minority and women-owned business enterprises must satisfy the small business requirement. Any business enterprise for which certification as a minority or woman-owned business enterprise is sought must be a small business, as that term is defined in Part 140 of this Title.

5 NYCRR §140.1(hh) states that a “small business” is:

[a] business which has a significant business presence in the State, is independently owned and operated and is not dominant in its field, but in no event employs more than three In determining whether the enterprise meets the definition of a small business as herein provided, consideration shall be given to federal small business

administration standards prescribed in 13 CFR Section 121.201, effective as of December 22, 2020.

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 Branch Services for certification as a MBE is not supported by substantial evidence (*see* State Administrative Procedure Act § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that Division staff's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]).

The review is limited to such information that was before the division at the time of the denial determination (5 NYCRR 145.2(b)(1)). Evidence that seeks to clarify and explain previously submitted materials will be considered, however new evidence will not be considered. (*See Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021))

DISCUSSION

I. Prior Certification

The Division acknowledges that Branch Services was previously certified as a minority-owned business enterprise. The Division asserts that it is not bound to recertify an MBE if its prior determinations were made in error. The Division argues that based on the application and supplemental material submitted by applicant, Division staff correctly determined that applicant was not eligible for recertification.

The Division is correct that it is not obligated to certify Branch Services based on its prior determinations. It is well settled that the doctrine of equitable estoppel cannot, as a general rule, be invoked against a governmental agency in the exercise of its governmental function. See *Matter of Daleview Nursing Home v. Axelrod*, 62 NY2d 30 (1984); *Matter of Atlantic States Legal Found., Inc. v. New York State Dept. of Environmental Conservation*, 119 AD3d 1172 (2014).

With the expiration of its certification, Branch Services had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the October 12, 2022, application and supporting materials and cannot rely on the past determinations of the Division.

II. Small Business

The Division denied Branch Services' application for recertification as an MBE on the basis that Branch Services failed to demonstrate that the business employs fewer than three hundred people, as required by 5 NYCRR §§ 144.2(f)(2) and 140.1(hh). (DED Exhibit 2)

The issue of how to calculate the number of employees for purposes of determining eligibility for the MWBE program has been previously addressed in three Final Orders issued by the Division, *Matter of Superior Workforce Solutions, Inc.*, Recommended Order dated March 13, 2017, Final Order 17-19 dated March 23, 2017; *Matter of Jennifer Temps, Inc.*, Recommended Order dated March 16, 2022, Final Order 22-03 dated March 31, 2022; and *Matter of First Choice Group CNY, Inc.*, Recommended Order dated March 21, 2023, Final Order dated July 17, 2023.

In *Superior Workforce*, the Administrative Law Judge rejected Appellant's argument that SBA Regulations should control the determination of a business' number of employees, holding that the record reflected that the business employed more than three hundred people.

In *Jennifer Temps*, the Administrative Law Judge found that substantial evidence supported

the denial, referencing the Appellant's application and its tax filings which listed more than 600 employees.

In *First Choice Group*, the Administrative Law Judge found that the issue of how to calculate the number of employees for purposes of the MWBE program had already been addressed in *Superior Workforce* and *Jennifer Temps*, and that "these prior decisions are consistent with the plain language of Executive Law §310(20) and 5 NYCRR former §140.1(gg)", which is now listed as current regulation 5 NYCRR §140.1(hh).

Branch Services' Form W-3 for 2021 reflected 418 employees and Form W-3 for 2022 reflected 529 employees (DED Exhibit 7). Forms W-2 for 2021 and 2022 reflected the same numbers (DED Exhibit 9). The Form 941 quarterly reports for 2021 and 2022 reported 257 employees and 281 employees respectively (DED Exhibit 8). Applicant explained the discrepancy as "The 941 forms only show the number of employees from the 12th of one month. For example, the 3rd qtr 2022 return captures the number of employees @ 9/12, which was 39. The first week of the qtr we had 272 employees." (DED Exhibit 1). On appeal, applicant states the Court should ignore the inconsistent information regarding the number of employees listed under the applicant's W-3 and W-2 forms and rely solely on the form 941 submissions, which reflect less than 300 employees in 2021 and 2022. Applicant argues it "should not be penalized for their honesty when they attempt to explain the discrepancy in numbers between federal quarterly form 941s and the separate W3 forms, which identified a larger number of employees – an overwhelming majority of which worked less than two weeks over the course of an entire year for the Company." (APP Exhibit B).

However, the IRS requires the total number of employees for the quarter to be reported on Form 941. This includes part-time/temporary employees who were paid wages at any point during

the quarter. See <https://www.irs.gov/pub/irs-pdf/i941.pdf>. Applicant's Form 941 reporting provides only a snapshot of the number of employees on a given day and does not accurately list the total number of employees in each quarter.

As found in *First Choice Group*, the Division's reliance in this matter on the number of employees listed on the application and tax filings is rational and reasonable where applicant listed more than three hundred employees on its tax documents. *Skyline Specialty Inc. v. Gargano*, 294 A.D.2d 742 (3d Dept. 2002) (giving "substantial deference" to MWBE Division where its "interpretation of the regulations is not irrational or unreasonable").

Applicant further argues on appeal that the Division should use the Federal Small Business Administration's ("SBA") regulations instead of the State law requirements for the number of employees in a small business (APP Exhibit B). 5 NYCRR §144.2(f)(2) states "Applications to certify business enterprises as minority and women-owned business enterprises must satisfy the small business requirement. Any business enterprise for which certification as a minority or woman-owned business enterprise is sought must be a small business, as that term is defined in Part 140 of this Title." Article 15-A, Section 310(20) defines small business as:

"small business" as used in this section, unless otherwise indicated, shall mean a business which... 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.

Applicant cites 13 C.F.R. Section 121.201, stating that applicant falls within the category of environmental remediation services, which reflects "size standards in number of employees" as 1,000, and states that "The purpose of including the Small Business Administration's size standards must be given legal consideration and cannot be eliminated by the agency." (APP Exhibit

B). However, as the Division argues in its Brief, “There is nothing in the Executive Law or the MWBE regulations that would suggest that taking SBA standards “into consideration” is meant to override the plain meaning of the 300-employee limit.”

Applicant further argues on appeal that the Division violated its governing statute in failing to timely review the application and, in doing so, violated Branch Services’ due process rights and that the Division’s decision, therefore, should be set aside. However, time schedules are directory, not mandatory, and a delay in the procedures of a state agency does not violate a petitioner’s rights unless there is a showing of substantial actual prejudice. See *Matter of Corning Glass Works v. Ovsanik*, 84 N.Y.2d 619, 623-625. Applicant has not established that there was a substantial actual prejudice in the claimed delay. As noted by the Division in its Brief, “Applicant has remained on the Directory of Certified Firms,” and “was not prohibited from conducting business in New York or obtaining contracts during the pendency of the application or appeal process.”

Branch Services failed to demonstrate at the time of its application that the business employed fewer than three hundred people, as required by 5 NYCRR §§144.2(f)(2) and 140.1(hh).

CONCLUSION

Branch Services did not meet its burden to demonstrate that the Division’s determination to deny its application for recertification as a minority-owned business enterprise with respect to the eligibility criteria found at 5 NYCRR §§144.2(f)(2) and 140.1(hh), was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, I recommend that the Director affirm the Division’s determination to deny Branch Services’ application for recertification as a minority-owned business enterprise.

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 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Request to Appeal	Y	Y
APP B	Written Appeal Submission	Y	Y
DED 1	Certification Application	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Written Appeal Submission	Y	Y
DED 6	Stock Owners Agreement	Y	Y
DED 7	W-3 for 2021 and 2022	Y	Y
DED 8	Quarterly 941 Reports for 2021 and 2022	Y	Y
DED 9	W-2s for 2021 and 2022	Y	Y