

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
625 BROADWAY
ALBANY, NEW YORK 12245

In the Matter

- of -

the Application of 7 Ocean Group, Inc.
for Recertification as a Minority and Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 52486

RECOMMENDED ORDER

-by-



Theresa Wells
Administrative Law Judge
May 6, 2024

This matter considers the written appeal by 7 Ocean Group, Inc., (“7 OCEAN” 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 140-144, 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 re-certification as a minority and woman-owned business enterprise (“MWBE”).

PROCEDURAL HISTORY

1. On September 30, 2022, Beatrix Porto, as President, applied on behalf of 7 OCEAN for re-certification as a minority and woman-owned business enterprise (“MWBE”). (DED Exhibit 1).
2. On August 9, 2023, the Division denied the application on the grounds that: (DED Exhibit 2)
 - (a) The business enterprise must operate independently, as required under 5 NYCRR §144.2(e).
3. 7 OCEAN submitted its Request to Appeal by letter dated October 12, 2023. (DED Exhibit 3).
4. A Notice to Proceed via Written Appeal was sent to the Applicant on October 24, 2023. (DED Exhibit 4).
5. 7 OCEAN submitted its written appeal by Tyler Horowitz, Esq. of Brown Rudnick, counsel for Applicant, by letter dated November 1, 2023. (APP Exhibit B).
6. The Division filed an Affidavit of Eugenio Alcantara, Certification Director, dated March 13, 2024, and a brief of Lisa Berk, Esq., counsel for the Division, dated March 15, 2024.

FINDINGS OF FACT

7. 7 OCEAN is a general contractor business which provides janitorial services, residential renovation, interior painting, carpet and flooring installation. (DED Exhibit 1).
8. Beatrix Porto is the President of 7 OCEAN and has a 100% ownership interest. (DED Exhibit 1).
9. 7 OCEAN operates out of two locations, New York and Florida. (DED Exhibit 1).
10. 7 OCEAN's work in Florida is seasonal and the hours vary. (DED Exhibit 6).
11. In 2020, 7 OCEAN's gross receipts reported were [REDACTED]. In 2021, 7 OCEAN's gross receipts reported were [REDACTED]. (DED Exhibit 7).
12. In 2022, 7 OCEAN had 12 permanent employees. (DED Exhibit 5).
13. In 2020 and 2021, more than 50% of 7 OCEAN's revenue was paid to subcontractors. (DED Exhibits 6, 7 and 8).
14. 7 OCEAN paid for outside services, in the form of janitorial and construction services, in 2020 and 2021, amounting to [REDACTED] and [REDACTED], respectively, from the subcontractors by Applicant. (DED Exhibits 7 and 8).
15. In 2020, Applicant paid approximately 31 subcontractors for work performed. In 2021, Applicant paid 21 subcontractors for work performed. Two subcontractors, AC Global and SCT Maintenance Services, accounted for more than 50% of the work in 2020 and 2021. (DED Exhibits 7 and 8).

APPLICABLE LAW

5 NYCRR § 144.2(e) states as follows:

Independence. Business enterprises for which certification is sought must operate independently. In order to determine whether such business enterprises operate independently, the division shall consider but not be limited to the following criteria:

- (1) Whether the business enterprise shares resources with another entity, including, but not limited to, personnel, equipment, office space, warehouse and other storage space, and yard space;
- (2) Whether the business enterprise transacts business primarily with one other entity; and
- (3) Whether the business enterprise receives tangible benefits as a result of a connection to another entity, and whether such benefits are consistent with standard industry practices.

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 7 OCEAN for certification as a MWBE 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

7 OCEAN states it has been certified since 2009 and has "benefited tremendously from the MWBE certification both financially and reputationally." (APP Exhibit B).

The Division acknowledges that 7 OCEAN was previously certified as a minority and woman-owned business enterprise. The Division asserts that it is not bound to recertify a MWBE if its prior determinations were made in error. The Division argues that based on the application and supplemental material submitted by applicant, the Division staff correctly determined that applicant was not eligible for re-certification. (DED Exhibit 2).

The Division is correct that it is not obligated to certify 7 OCEAN 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, 7 OCEAN had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR §144.2 when it submitted its September 30, 2022, application and supporting materials and cannot rely on the past determinations of the Division.

II. Independence

The Division denied 7 OCEAN's application for re-certification as a MWBE on the basis that 7 OCEAN failed to demonstrate that the business is an independent enterprise, as required by 5 NYCRR 144.2(e). (DED Exhibit 2). To determine whether a business operates independently the Division shall consider, but is not limited to the following: "(1) Whether the business enterprise shares resources with another entity, including, but not limited to, personnel, office space, warehouse and other storage space, and yard space; (2) Whether the business enterprise transacts business primarily with one other entity; and (3) Whether the business enterprise receives tangible benefits as a result of a connection to another entity, and whether such benefits are consistent with standard industry practices." (5 NYCRR § 144.2 (e) (1) (2) and (3)).

The Division consistently denies certification where the applicant business is so entwined with another business, such as operating out of the same space, where one business leases the space to the other under favorable terms, where the applicant business is dependent on the other for capitalization and other basic functions, and where a business primarily transacts with one other business entity. (See *Matter of Acme Lightning Rod, LLC*, Recommended Order dated March 6, 2020, Final Order dated April 21, 2020); see also *Matter of Skyline Specialty Systems, Inc. v. Gargano*, 294 AD 2d 742 (3rd Dept. 2002)). In the *Matter of A.J. Nesti Materials LLC*, Recommended Order dated January 12, 2024, Final Order 2024-02 dated February 22, 2024, the Division denied certification where the applicant did not use any of the equipment in the performance of the service it provided, and the applicant subcontracted all of its labor, and the applicant relied primarily on one subcontractor to perform the core functions of the business enterprise.

With regard to the sharing of resources, such as personnel and space, Applicant states it does not share resources with another entity. Applicant states it employs its own employees and leases its own office space. Regarding whether the Applicant transacts business primarily with one other entity, the Applicant states it has completed over 63 projects with 20 separate client accounts. These projects range from providing janitorial services and interior painting to carpet and flooring installation to remodeling and construction services. Regarding whether the Applicant receives tangible benefits as a result of a connection to another entity, and whether such benefits are consistent with standard industry practices, the Applicant states it does not receive any tangible benefits as a result of a connection to another entity, including their subcontractors. Applicant emphasizes that it is a general contractor, and in that role, it oversees and manages all of 7 OCEAN's projects. In addition to the absence of tangible benefits, Applicant argues the hiring

of subcontractors is consistent with industry standard practices. Applicant states general contractors hire the subcontractors to handle the tasks the general contractor is not equipped to perform. This practice allows the general contractors to maximize the quality and efficiency of each project. Moreover, the Applicant states the use of subcontractors does not hinder the Applicant's ability to control and monitor and determine the scope of each subcontractors' work. (APP Exhibit B).

The Division states that 7 OCEAN relies upon subcontractors for personnel and equipment to perform Applicant's critical business functions, which amounts to shared resources. Regarding whether the Applicant transacts business primarily with one other entity, the Division points out that roughly 31 subcontractors generated more than half of the Applicant's gross receipts, [REDACTED], in 2020. In 2021, roughly 21 subcontractors generated more than half of the Applicant's gross receipts of [REDACTED]. The business' critical functions include providing janitorial services, residential renovation, interior painting, carpet and flooring installation. The Division points out that the application for certification states that 7 OCEAN has 40 full-time employees and 15 part-time employees. However, the Applicant's Federal 941s, for all four quarters of 2022, states that the business only employed 12 full-time individuals. Therefore, the majority of 7 OCEAN's work was completed by subcontractors. (DED Exhibits 1, 5, 6, 7 and 8).

The Division states it did not deny the re-certification based on the Applicant's use of subcontractors. Rather the Division's rationale for denial of the certification was attributed to the Applicant subcontracting the vast majority of the work. The Division points out that it transacts business primarily with two other entities, AC Global and SCT Maintenance Services. The Division states 7 OCEAN receives tangible benefits as a result of the relationships between the

Applicant and the subcontractors. The Division argues this arrangement is not consistent with standard industry practices. (DED Exhibits 1, 2, 5, 6, 7 and 8).

The evidence shows that greater than 50% of total business revenue was paid out during 2020 and 2021 for the work the subcontractors performed for Applicant by subcontractors. In 2020, while 7 OCEAN paid its salaried employees a total of [REDACTED], 7 OCEAN's 31 commissions/subcontractors were paid a total of [REDACTED]. In 2021, while 7 OCEAN paid salaried employees a total of [REDACTED], roughly 21 commissions/subcontractors were paid a total of [REDACTED]. (DED Exhibits 7 and 8).

While 7 OCEAN employees perform a portion of Applicant's work, the evidence shows that it is the subcontractors' personnel who are performing the majority of the business' critical business functions. Applicant subcontracts primarily with two companies, AC Global and SCT Maintenance Services. However, 7 OCEAN also contracted with 19 other business entities in 2021, and with 29 other entities in 2020. While the Applicant arguably receives tangible benefits as a result of the relationships between 7 OCEAN and its subcontractors, due to the nature of the work performed, this is consistent with standard industry practices. (DED Exhibits 1, 5, 6, 7 and 8; APP Exhibit B).

While Applicant relies upon its subcontractors to generate revenue, it does not rely solely on subcontractors. Similar to the *Matter of A.J. Nesti*, supra, without these subcontractors, Applicant would be unable to perform the critical functions of the business that generate more than half of the company's gross receipts. However, unlike the *Matter of A.J. Nesti*, supra, 7 OCEAN uses both the full-time employees and the subcontractors to perform the work. The subcontractor personnel are not 7 OCEAN employees. Similarly, the subcontractors use their own equipment

rather than 7 OCEAN's equipment to complete a project. Therefore, there is not a sharing of resources. (DED Exhibits 1, 5, 6, 7 and 8; APP Exhibit B).

While in the *Matter of A.J. Nesti*, supra, the applicant contracted primarily with one other entity and the applicant did none of the work herself, the evidence provided here shows the majority of the work has been divided between 7 OCEAN employees and multiple subcontractors. 7 OCEAN has 12 full-time employees. Therefore, the subcontractors are not performing 100% of Applicant's work. While the majority of the contracted work is delegated to two subcontractors, 7 OCEAN worked with 29 other subcontractors in 2020 and worked with 19 other subcontractors in 2021. Therefore, the Applicant transacts business with multiple entities rather than primarily with one other entity. (DED Exhibits 1, 5, 6, 7 and 8; APP Exhibit B).

The relationships between 7 OCEAN and the subcontractors allow Applicant to keep overhead costs lower by reducing the number of full-time employees/personnel, and associated costs, making contracted work higher quality and more efficiently performed. Arguably, these are tangible benefits, but this arrangement is consistent with standard industry practices. (DED Exhibits 1, 5, 6, 7 and 8; APP Exhibit B).

These facts support finding 7 OCEAN operates independently.

The record before the Division at the time of its determination to deny the MWBE application does not contain substantial evidence to support its finding that the party relied upon for re-certification failed to demonstrate that the business is an independent enterprise as required under 5 NYCRR §144.2(e).

CONCLUSION

7 OCEAN met its burden to demonstrate that the Division's determination to deny its application for re-certification as a minority and woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §144.2(e) was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny 7 OCEAN's application for re-certification as a minority and woman-owned business enterprise should be reversed.

In the Matter of 7 Ocean Group, Inc.
DED File ID No. 52486
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant Request to Appeal	Y	Y
APP B	Applicant Written Appeal Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Applicant Request to Appeal	Y	Y
DED 4	Notice to Proceed via Written Appeal	Y	Y
DED 5	941 forms for 2022	Y	Y
DED 6	Narrative dated July 17, 2023	Y	Y
DED 7	Business Tax Returns 2021 and 2022	Y	Y
DED 8	1099 forms for years 2020 and 2021	Y	Y