

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
625 BROADWAY
ALBANY, NEW YORK 12207

In the Matter

- of -

the Application of A.J. Nesti Materials LLC
for Recertification as a Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 53705

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
January 12, 2024

This matter considers the written appeal by A.J. Nesti Materials, LLC (“AJ Nesti” 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 recertification as a woman-owned business enterprise (“WBE”).

PROCEDURAL HISTORY

1. On August 3, 2020 AJ Nesti applied for recertification as a women-owned business enterprise (“WBE”). AJ Nesti based its application on Ms. Alaine Nesti. (DED Exhibit 1).
2. On April 27, 2023, the Division denied the application on the following ground (DED Exhibit 2):
 - (a) The business enterprise for which certification is sought does not operate independently, as required under 5 NYCRR § 144.2(e).
3. AJ Nesti submitted a request to appeal the denial determination, dated May 26, 2023. (DED Exhibit 3).
4. A Notice to Proceed Via Written Appeal was sent to AJ Nesti on May 30, 2023 (DED Exhibit 4).
5. An appeal brief was filed on June 26, 2023 by Peter B. Ford, Esq. and Meghan F. Leemon, Esq., of Piliero Mazza on behalf of AJ Nesti.
6. The Division filed an Affidavit of Amanda Brennan, Project Director, dated November 1, 2023, and a brief of Karen L. Bernstein, counsel for the Division, dated November 2, 2023.

FINDINGS OF FACT

7. AJ Nesti is engaged in the business of “providing transportation and disposal services for contaminated materials”, and the “supply and delivery of fill, certified clean fill, stone. . .and on-site crushing and screening”. (DED Exhibit 1).
8. Alaine Nesti is the 100% owner and the woman relied upon for certification. (DED Exhibit 1).
9. The applicant business was established in March of 2007, and Ms. Nesti is the sole employee. The business operates out of Ms. Nesti’s home. (DED Exhibit 1).
10. The applicant “does not utilize any equipment in [the] performance of the services it provides.” The business “subcontracts drivers, as needed.” The application states that the business “subcontracts solely with C&O Trucking, Inc.” and that “C&O trucking is [the applicant’s] primary subcontractor.” (DED Exhibit 1).
11. The applicant states that its work functions include: soliciting new clients, evaluating incoming projects, sending out proposals, receiving and analyzing data on proposed materials and contaminates, determining most cost effective disposal locations, hiring trucks and leasing dumpsters, scheduling trucking, and communicating with trucking companies and dumpster suppliers for clients. In addition, applicant handles the invoicing and finances. (DED Exhibit 1).

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 CHF for certification as a WBE 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]).

Contrary to applicant's assertion, applicant was denied certification; the certification was not revoked and hence the substantial evidence standard applies.

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 AJ Nesti was previously certified as a woman-owned business enterprise. The Division asserts that it is not bound to recertify a WBE 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 AJ Nesti 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, AJ Nesti had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR §144.2 when it submitted the August 3, 2020, application and supporting materials and cannot rely on the past determinations of the Division.

II. Independence

The Division denied AJ Nesti's application for recertification as a WBE on the basis that the applicant business failed to demonstrate that it operates independently, 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 regularly 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 unusually favorable terms, where the applicant business is dependent on the other for capitalization and other basic functions, or 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) (applicant denied certification where it shared board members, personnel, office space, etc., and paid that same entity as a subcontractor to perform majority of work). See also, *Matter of Skyline Specialty Systems, Inc. v. Gargano*, 294 AD 2d 742 (3rd Dept. 2002) (holding the applicant business was so entangled with another business by sharing personnel, offices, etc. that it clearly was not independent).

Here, the applicant business works as a broker or intermediary and contracts with companies to arrange and manage waste disposal. (DED Exhibit 1). The business operates out of Ms. Nesti's home, and Ms. Nesti is the sole employee. (DED Exhibit 1). The applicant describes the business as one which "provides transportation and disposal services for contaminated materials." The application also lists other services provided including "supply and delivery of fill, certified clean fill, stone, etc., and on-site crushing and screening." (DED Exhibit 1).

The applicant further explains the business and states that it "does not utilize any equipment in [the] performance of the services it provides." The business' functions are described as soliciting new clients, evaluating incoming projects, sending out proposals, receiving and analyzing data on proposed materials and contaminants, determining most cost-effective disposal locations, hiring trucks and leasing dumpsters, scheduling trucking, and communicating with trucking companies and dumpster suppliers for clients. (DED Exhibit 1). The applicant admits that it subcontracts all its labor and states that it "subcontracts drivers, as needed. . ." and "subcontract[s] dumpsters when required . . ." (DED Exhibit 1). The applicant states that it "subcontracts solely with C&O

Trucking, Inc.” and that “C&O trucking is [the applicant’s] primary subcontractor.” (DED Exhibit 1).

The critical functions of the business, based on the description provided by the applicant is the “transportation and disposal” of contaminated materials. (DED Exhibit 1). Here, the applicant admits that it does not engage in the actual transportation and disposal, but subcontracts the work to others, and that it solely or primarily uses a single trucking company to perform the work. (DED Exhibit 1; APP Exhibit A). One of the criteria to be considered under the regulation is “whether the business enterprise transacts business primarily with one other entity”. In this case AJ Nesti, by their own admission, primarily contracts with only one other entity for trucking, one of the core functions of the business. (DED Exhibit 1; APP Exhibit A).

In addition, the regulation permits for additional considerations beyond that of those specifically listed. (5 NYCRR § 144.2(e)). Here, in addition to solely contracting with one entity for a critical business function, the business itself does not engage in any of the core functions, relying on subcontractors to perform all of the actual disposal. (DED Exhibit 1; APP Exhibit A).

Based on the foregoing, I find that the applicant has not demonstrated that AJ Nesti operates independently. Accordingly, the Division’s determination that the business enterprise does not operate independently, as required under 5 NYCRR § 144.2(e) is supported by substantial evidence.

CONCLUSION

AJ Nesti did not meet its burden to demonstrate that the Division’s determination to deny its application for certification as a 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 A.J. Nesti's application for certification as a woman-owned business enterprise should be affirmed.

In the Matter of A.J. Nesti Materials LLC
 DED File ID No. 53705
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant Appeal Brief	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Determination	Y	Y
DED 3	Request to Appeal	Y	Y
DED 4	Notice to Proceed by Written Appeal Submission	Y	Y
DED 5	2019 Business Tax Returns	Y	Y
DED 6	2020 Business Tax Returns	Y	Y
DED 7	2021 Business Tax Returns	Y	Y