

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

**In the Matter**

**- of -**

**the Application of BIB Services Corp.**  
**for Certification as a Minority-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 2384662**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**December 12, 2023**

This matter considers the written appeal by BIB Services Corp., (“BIB” 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 certification as a minority-owned business enterprise (“MBE”).

### **PROCEDURAL HISTORY**

1. On July 9, 2022, Mr. Lucky Ekhtator, as Owner/Partner, applied on behalf of BIB for certification as a minority-owned business enterprise (“MBE”) (DED Exhibit 1).
2. On March 21, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
  - (a) Minority group members relied upon for certification do not devote time on an ongoing basis to the daily operation of the business enterprise, as required under 5 NYCRR §144.2(c)(3);
  - (b) Minority group members relied upon for certification are not the highest-ranking officers of the business, and do not control the board of directors, as required under 5 NYCRR §144.2(d)(1); and
  - (c) Minority group members relied upon for certification do not negotiate business contracts and represent themselves to clients as the principals of the business enterprise, as demonstrated by fully executed business agreements, as required under 5 NYCRR §144.2(d)(2).
3. BIB timely filed a request to appeal on March 21, 2023 (APP Exhibit A/ DED Exhibit 4).

4. A notice to proceed via written appeal was sent to BIB on March 22, 2023 (DED Exhibit 3).
5. BIB submitted its written appeal by letter dated May 6, 2023 (APP Exhibit B/ DED Exhibit 5).
6. The Division filed an Affidavit of Glenn Butler, Certification Director, dated August 4, 2023, and a brief of Dennie Byam, Esq., counsel for the Division, dated August 9, 2023.

### **FINDINGS OF FACT**

7. BIB is engaged in the business of construction, specializing in drainage, trucking, containers, concrete, saw cutting, landscaping and excavation (DED Exhibit 1).
8. Mr. Lucky Ekhatore is the Owner/Partner and has a 51% ownership interest. Mr. Nicholas Olson is the Owner/Partner and has a 49% ownership interest. (DED Exhibit 1).
9. Mr. Ekhatore works an average of 32 hours per week for another landscaping company called J. Pizzirusso Landscaping as a driver and laborer, and 24 hours per week for BIB as a Supervisor and Operator (DED Exhibit 1). Mr. Ekhatore's resume showed employment with J. Pizzirusso Landscaping from 2017 to present but did not list any employment with BIB (DED Exhibit 7). Mr. Olson's resume listed employment with BIB as President from 2016 to present (DED Exhibit 8).
10. Section 4.1 of the Bylaws state "the business and affairs of the Corporation shall be managed by or under the direction of the Board of Directors, which may exercise all such powers of the Corporation and do all lawful acts and things, subject to any limitations set forth in these Bylaws..." (DED Exhibit 9). In the June 13, 2019, meeting minutes, Mr. Olson was listed as the sole board member and he "constituted the entire Board" (DED Exhibit 10).

11. Copies of business contracts, lease agreements, invoices, subcontractor agreements, and financing agreements provided with the application were all signed by Mr. Olson (DED Exhibits 11 – 20).

### **APPLICABLE LAW**

5 NYCRR §144.2(c)(3) states as follows:

Time devoted to operation of the business enterprise. Minority group members and women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise for which certification is sought.

5 NYCRR §144.2(d)(1) states as follows:

Control of business management. A minority group member or woman relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors or serve as a general partner. Any agreements describing the management of the business enterprise shall be considered with the foregoing.

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

Control of business negotiations. Minority group members and women relied upon for certification must negotiate business contracts and represent themselves to clients as the principals of business entities for which certification is sought, as demonstrated by fully executed business agreements.

### **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 BIB 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. Operation**

The application was denied on the ground that the minority-owner does not devote sufficient time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR§144.2(c)(3). See *In the Matter of Brandt Equipment*, Recommended Order dated April 28, 2020, Final Order 20-26 dated June 2, 2020, affirming denial where the owner devoted 4 hours a day to the company and held full-time outside employment.

Mr. Ekhatov stated that he “worked an average of 32 hours per week as a driver and laborer for J. Pizzirusso Landscaping”. He stated he worked an “average of 24 hours per week for BIB Services Corp. as a Supervisor and an Operator” (DED Exhibit 1). Mr. Ekhatov’s resume reflects his job at J. Pizzirusso Landscaping, but does not list employment with BIB (DED Exhibit 7). Mr. Olson’s resume lists employment with BIB Services Corp. as President from 2016 to present (DED Exhibit 8).

On appeal, Mr. Ekhatov claims that his omission of BIB as an employer on his resume is a typographical error and submitted an updated resume (APP Exhibit 2/DED Exhibit 5). The information and documents provided by applicant in the application were inconsistent. Mr. Ekhatov’s resume reflected that he worked at another landscape company and not at BIB (DED

Exhibit 7). Mr. Olson’s resume stated that he was the President of BIB (DED Exhibit 8). The Bylaws and other documents support that Mr. Olson was the President, only Director of the Board, and was the only individual signing contracts (DED Exhibits 8-20).

Applicant argued on appeal that the tax returns support that Mr. Ekhatore stopped working for J. Pizzirusso Landscaping earlier than his resume indicated. However, his 2020 tax returns contain W-2s from J. Pizzirusso Landscaping that show he continued to work there in 2020 and earned significantly more money there than at BIB (APP Exhibit B/ DED Exhibit 5). This supports Mr. Ekhatore’s admission in the application to his time devoted to BIB compared to the time he devoted to J. Pizzirusso Landscaping (DED Exhibit 1). Also, Mr. Ekhatore received income from a total of four outside companies in 2020 and 2021, reflecting the time devoted to other businesses (DED Exhibit 1). The Division’s denial on the ground that the minority owner does not devote sufficient time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR§144.2(c)(3), was based upon substantial evidence.

5 NYCRR §144.2(d)(1) requires that the minority-owner must control the Board of Directors. Section 4.1 of the Bylaws state that “the business and affairs of the Corporation shall be managed by or under the direction of the Board of Directors, which may exercise all such powers of the Corporation and do all lawful acts and things, subject to any limitations set forth in these Bylaws ...” (DED Exhibit 9). The June 3, 2019, Minutes of the Director’s Meeting states, “the following member was present, constituting the entire board: “Nick Olson” as “the sole director of the Corporation being present” (DED Exhibit 10).

On appeal, applicant submitted a “Corporate Resolution of BIB Services Corp. Inc.”, dated May 9, 2023, stating that Mr. Olson is the President of BIB and Chairman of the Board of Directors. Mr. Ekhatore is listed as Vice President, and he is appointed to the Board of Directors.

(APP Exhibit B/ DED Exhibit 5). Although this document was not before the Division at the time of the denial, it clarifies that Mr. Ekhatov was not appointed to the Board of Directors until adoption of the Corporate Resolution on May 1, 2023. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021).

The applicant has failed to demonstrate that the minority group member relied upon for certification is the highest-ranking officer and controls the Board of Directors, as required by 5 NYCRR §144.2(d)(1).

Minority-owners must demonstrate control of negotiations through the production of signed contracts, as required by 5 NYCRR §144.2(d)(2). Negotiating and executing contracts are related to the core business functions. Signing contracts demonstrates that a minority or woman-owner exercises appropriate control over a business enterprise with respect to business negotiations. See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11, dated November 7, 2022.

Business contracts, lease agreements, invoices, subcontractor agreements, and financing agreements submitted with the application were all signed by Mr. Olson. Mr. Ekhatov's signature did not appear on any of the contracts (DED Exhibits 8 -20). On appeal, applicant submitted additional contracts which were all signed by Mr. Ekhatov. All of these contracts were signed and dated after the submission of the application and are therefore new evidence which will not be considered, as they do not clarify or explain previously submitted materials. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021). Mr. Ekhatov failed to demonstrate that the minority group owner relied upon for certification negotiates business contracts and represents himself to clients as the principal of the business, as required by 5 NYCRR §144.2(d)(2).

### **CONCLUSION**

BIB did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a minority-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§ 144.2(c)(3), 144.2(d)(1) and 144.2(d)(2) 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 BIB's application for certification as a minority-owned business enterprise.



In the Matter of BIB Services Corp.  
DED File ID No. 2384662  
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Request to Appeal	Y	Y
APP B	Appeal Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Notice to Proceed Via Written Appeal	Y	Y
DED 4	Appeal Letter	Y	Y
DED 5	Appeal Submission	Y	Y
DED 6	Stock Transfer Agreement	Y	Y
DED 7	Mr. Lucky Ekhatore's Resume	Y	Y
DED 8	Mr. Nicholas Olson's Resume	Y	Y
DED 9	BIB Services Corp. Bylaws	Y	Y
DED 10	June 3, 2019 Meeting Minutes	Y	Y
DED 11	Reconstruction of Vestty Street Subcontract, May 18, 2021	Y	Y
DED 12	1811 Bellmore lease Agreement, January 1, 2023	Y	Y
DED 13	Stone Construction Corp. Lease Agreement, January 1, 2023	Y	Y
DED 14	Lawn Mower Invoice, July 9, 2022	Y	Y
DED 15	Star Capital Group Financing Agreement, February 21, 2023	Y	Y

DED 16	Gmail Approval Confirmation Notice, March 26, 2022	Y	Y
DED 17	NYCDCC Subcontractor Agreement, February -March 2022	Y	Y
DED 18	Bobcat of Long Island Financing Agreement	Y	Y
DED 19	NYCHA Subcontractor Agreement, March 8, 2022	Y	Y
DED 20	Wells Fargo Purchasing Agreement	Y	Y
DED 21	Stock Transfer	Y	Y
DED 22	Lucky Ekhatore's 2020 Personal Tax Returns	Y	Y
DED 23	Lucky Ekhatore's 2021 Personal Tax Returns	Y	Y