

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

In the Matter

- of -

the Application of B. Strong Trucking, Inc.
for Recertification as a Minority-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 2597699

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
May 15, 2024

This matter considers the appeal by B. Strong Trucking, Inc. (“B. Strong” 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 minority-owned business enterprise (“MBE”).

PROCEDURAL HISTORY

1. On December 7, 2022, Mr. James Thorne, as owner, applied on behalf of B. Strong for certification as a minority-owned business enterprise (“MBE”). (DED Exhibit 1)
2. On August 4, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women do not share in the risks and profits of the business enterprise in proportion to their equity interests therein, as required under 5 NYCRR §144.2(b)(3);
 - (b) Minority group members or women relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise, as required under 5 NYCRR §144.2(c)(2); and
 - (c) The business enterprise does not operate independently, as required under 5 NYCRR § 144.2(e).
3. On August 4, 2023, B. Strong submitted a Request for a Hearing. (DED Exhibit 3).
4. On February 6, 2024, a Notice of Hearing was sent to all parties (DED Exhibit 5).
5. On May 7, 2024, a hearing was held and concluded.

FINDINGS OF FACT

6. B. Strong is engaged in the business of specialized freight trucking; delivering or carting away construction material and debris from job sites and owns two dump trucks (DED Exhibits 1 and 4).
7. Mr. James Thorne is the 100% owner of B. Strong (DED Exhibit 1).
8. B. Strong's drivers, Mr. Christopher Paci and Mr. Evan Griminger, both have commercial driver's licenses ("CDLs) and both received wages in excess of ██████ in each of 2021 and 2022, while Mr. Thorne received ██████ in 2021 and ██████ in 2022 (DED Exhibits 6, 7, 8 and 9).
9. B. Strong reported net losses of ██████ on both its 2021 and 2022 tax returns (DED Exhibits 8 and 9).
10. Mr. Thorne is solely responsible for all day-to-day operational decisions for the business. He makes all operational and management decisions relating to scheduling, personnel, asset purchases and customer relations (Hearing Testimony of James Thorne).
11. B. Strong's largest account is with Bancker Construction ("Bancker"), and it makes up ninety percent of B. Strong's business. B. Strong also does business with GGG Construction (DED Exhibit 1).
12. James Thorne has 35 years of experience working in construction. He took classes in safety and regulations at Bancker Construction, where he was employed as a laborer, then foreman, and now as a supervisor (Hearing Testimony of James Thorne).
13. B. Strong does not share equipment, office space, storage space, yard space or staff with Bancker and he receives no tangible benefits from Bancker, aside from being paid for providing freight trucking services (Hearing Testimony of James Thorne).

APPLICABLE LAW

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

Risks and profits. Minority group members and women relied upon for certification must share in the risks and profits of the business enterprise for which certification is sought in proportion to their equity interest therein...

5 NYCRR §144.2(c) states in relevant part as follows:

Operation. Minority group members and women relied upon for certification must make day-to-day decisions concerning the operation of the business enterprise for which certification is sought. The division shall evaluate whether minority group members or women operate a business enterprise for which certification is sought based upon the following criteria:

...(2) Minority group members and women relied upon for certification must make operational decisions on a day-to-day basis with respect to the functions of the business enterprise for which certification is sought. The critical functions of a business enterprise shall be determined by the division based upon the following factors, but is not limited to:

- (i) The products or services the business enterprise provides to clients; and
- (ii) The means by which the business enterprise obtains contracts or orders.

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 B. Strong for recertification 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

Ms. Elizabeth Marchionni, Esq., of Kaufman Dolowich Voluck, appeared at the hearing on behalf of B. Strong Trucking, Inc. The following witness testified on behalf of B. Strong: James C. Thorne, owner. B. Strong offered no exhibits.

Ms. Anequa Pond, Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Glenn Butler, Associate Certification Director, Division of Minority and Women Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1 through 16.

I. Prior Certification

The Division acknowledges that B. Strong was previously certified as a minority-owned business enterprise. The Division asserts that it is not bound to recertify a 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 B. Strong 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, B. Strong had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR §144.2 when it submitted the December 7, 2022, application and supporting materials and cannot rely on the past determinations of the Division.

II. Ownership

The Division denied B. Strong's application for certification as a MBE on the basis that the applicant business failed to demonstrate that Mr. Thorne shared in the risks and profits in proportion to his equity interest therein, as required by 5 NYCRR § 144.2(b)(3). (DED Exhibit 2). 5 NYCRR §144.2(b)(3) requires that the minority-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to his ownership interest in the business. It is well settled that the Division may rely upon financial records as support for the determination that an applicant does not share in the risks and profits in proportion with her

ownership interest. See *Sunrise Credit Services, Inc. v. Zapata*, 57 Misc. 3d 1225 (Sup. Ct. NY County, 2017).

James Thorne testified that as the 100% owner, he assumes 100% of the risk of the business. He guaranteed the loans for the dump trucks that were purchased for the business, and he personally loaned money to the business on an as needed basis. He pays the expenses of the business, including the employees' wages, before he takes any distribution. He acknowledged that his drivers made significantly more money than he did in 2021 and 2022, however the drivers are union workers who are compensated in accordance with the collective bargaining agreement in effect. (Hearing Testimony of James Thorne; DED Exhibit 4).

Glenn Butler testified that Mr. Thorne does take all the risk of the business, but he does not share in the profits in proportion to his ownership interest. He noted that the drivers, Mr. Christopher Paci and Mr. Evan Griminger, both received wages in excess of ██████ in each of 2021 and 2022, while Mr. Thorne received ██████ in 2021 and ██████ in 2022. Therefore, the Division's position is that Mr. Thorne did not share in the profits in proportion to his 100% ownership interest. On cross-examination, Mr. Butler acknowledged that B. Strong reported net losses of ██████ on both its 2021 and 2022 tax returns. (Hearing Testimony of Glenn Butler).

Since B. Strong did not have any profits in 2021 and 2022, Mr. Thorne was unable to pay himself more than his drivers received (Hearing Testimony of James Thorne) He took on 100% of the risk and there were no profits to share. Additionally, Mr. Thorne's personal income taxes reflect that he took 100% of the losses for both 2021 and 2022. (DED Exhibits 15 and 16)

Based on the foregoing, I find that the Division's determination with regards to 5 NYCRR § 144.2(b)(3) is not supported by substantial evidence.

III. Operation

The Division also found that the minority-owner did not make operational decisions on a day-to-day basis with respect to the critical functions of the business, as required by 5 NYCRR §144.2(c)(2). The regulation states that “The critical functions of a business enterprise shall be determined by the division based upon the following factors, but is not limited to: (i) the products or services the business enterprise provides to clients; and (ii) the means by which the business enterprise obtains contracts or orders”. The minority-owner “must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification”. See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4th Dept. 2018).

Here, the products and services provided by applicant include specialized freight trucking (DED Exhibit 1). Mr. Thorne testified that he is solely responsible for all day-to-day operational decisions for the business. He makes all operational and management decisions relating to scheduling, personnel, asset purchases and customer relations. He acknowledges that a CDL is required to drive his dump trucks and he does not possess a CDL. He stated that he couldn’t make the day-to-day decisions of the business if he drove the truck 8 hours per day. He controls the drivers – where they go, what they do, and he does on-site supervision. He has 35 years of experience working in construction. He took classes in safety and regulations at Bancker Construction, where he was employed as a laborer, then foreman, and now as a supervisor (Hearing Testimony of James Thorne).

B. Strong argues that “the critical functions of B. Strong concern management decisions related to the purchase/sale/financing of the Company’s truck fleet, cash flow, scheduling/contracting, personnel, asset purchases, and customer relations. These tasks are all performed by Mr. Thorne...” Mr. Strong is not required to hold a CDL to operate the business;

and if his drivers leave, “the business will continue to operate by replacing the employee; by contrast, Mr. Thorne’s operation of the business and ownership of the Dump Trucks are the key critical components that enable the Company to generate revenue.” B. Strong argues that “the Division wrongly equated the act of truck driving by Paci and Griminger with the responsibilities of owning and operating the truck driving business that are all unequivocally performed by Mr. Thorne.” (DED Exhibit 4).

Glenn Butler testified that Mr. Thorne does not have any experience, training, or certificates for the critical functions of the business which are specialized freight trucking. He stated that Mr. Thorne does not have a CDL and therefore cannot drive the trucks; he needs drivers with a CDL to transport the construction materials to and from the job sites, so he personally does not provide the service of freight trucking. (Hearing Testimony of Glen Butler).

The application and the testimony of Mr. Thorne demonstrated that Mr. Thorne does make operational decisions on a day-to-day basis. Based on the foregoing, I find that the Division’s determination to deny B. Strong’s certification was not based on substantial evidence. Mr. Thorne’s role as sole owner and sole operational decision maker demonstrates he makes operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise, as required under 5 NYCRR §§ 144.2(c)(2).

IV. Independence

The Division further found that B. Strong is not an independent business enterprise, as required under 5 NYCRR §144.2(e). This section considers “(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.”

James Thorne testified that he has worked at Bancker Construction for over 30 years. He decided to start his own freight trucking business. He purchased two dump trucks through the business and personally guaranteed the loans. He hired union workers with CDL licenses to drive the dump trucks. He acknowledged that ninety percent of his revenue has come from business with Bancker Construction in the past. He stated that he advertises on Google Ads and Yelp for his services. He stated that Bancker uses their own trucks and calls him and other freight truck companies when they need additional trucks. He stated that there is no guaranteed work from Bancker. He also stated that he does not share equipment, office space, storage space, yard space or staff with Bancker and he receives no tangible benefits from Bancker, aside from being paid for providing freight trucking services. He acknowledged that he obtained work from Bancker while an employee of Bancker, but B. Strong was not hired based on his relationship with Bancker (Hearing Testimony of James Thorne). Appellant argued that “this is an arms-length negotiated contract and not a circumstance where B. Strong is beholden to Bancker.” Additionally, B. Strong also conducted business with GGG Construction. (DED Exhibits 1 and 4).

Glenn Butler testified that the application shows that B. Strong’s largest account is with Bancker Construction, and it makes up ninety percent of B. Strong’s business. This fact combined with the fact that Mr. Thorne works at Bancker and receives the majority of his income through wages at Bancker Construction, shows that B. Strong is not independent from Bancker. He stated that Mr. Strong’s employment at Bancker and his ownership of B. Strong shows that the two businesses share an employee – Mr. Thorne (Hearing Testimony of Glenn Butler).

Appellant argued that B. Strong's business is limited by its "finite resources". "B. Strong currently owns only two (2) Dump Trucks." "B. Strong is not currently in a position to purchase another truck to enable it to further grow its business at this time. As a result, if a customer needs one or both of B. Strong's trucks, B. Strong is severely limited in its ability to service other customers while it is fulfilling its existing obligations." "By effectively penalizing B. Strong because it lacks greater resources and a larger customer base, the Division imposed additional criteria that bars disadvantaged, small, minority businesses like B. Strong that the program was designed to assist." (DED Exhibit 4).

The application and the testimony of Mr. Thorne demonstrated that B. Strong is an independent business enterprise, as required under 5 NYCRR §144.2(e). Based on the foregoing, I find that Division's determination to deny B. Strong's certification was not based on substantial evidence. B. Strong does solicit business from other businesses and due to its size, has been limited in obtaining additional business at this time.

CONCLUSION

B. Strong met 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 found at 5 NYCRR §144.2(b)(3), 144.2(c)(2) and 144.2(e), was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, I recommend that the Director reverse the Division's determination to deny B. Strong's application for certification as a minority-owned business enterprise.

In the Matter of B. Strong Trucking, Inc.
 DED File ID No. 2597699
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Certification Application	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Appellant's Appeal Form	Y	Y
DED 4	Appellant's Appeal Letter	Y	Y
DED 5	Notice of Hearing	Y	Y
DED 6	2021 W-2 Wage and Tax Statement	Y	Y
DED 7	2022 W-2 Wage and Tax Statement	Y	Y
DED 8	2021 U.S. Income Tax Return for B. Strong	Y	Y
DED 9	2022 U.S. Income Tax Return for B. Strong	Y	Y
DED 10	Commercial Driver's License for Evan Griminger	Y	Y
DED 11	Commercial Driver's License for Christopher Paci	Y	Y
DED 12	June 1, 2023, Narrative Regarding Licensing	Y	Y
DED 13	June 1, 2023 Narrative Regarding Bancker Construction	Y	Y
DED 14	Bancker Construction Confirmation of Rates and Services	Y	Y
DED 15	2021 James Thorne Personal Tax Return	Y	Y
DED 16	2022 James Thorne Personal Tax Return	Y	Y