

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

In the Matter

- of -

the Application of BROWN SARDINA, INC.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 72315

RECOMMENDED ORDER

-by-

A handwritten signature in black ink, appearing to read "David A. Murad", is written over a horizontal line.

David A. Murad
Administrative Law Judge
February 14, 2025

This matter considers the written appeal by Brown Sardina, Inc. (“BSI” 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 woman-owned business enterprise (“WBE”).

PROCEDURAL HISTORY

1. On April 22, 2024, Ms. Natalie Brown, as President, applied on behalf of BSI for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On July 25, 2024, 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); and
 - (b) The business enterprise does not contribute to the New York State economy through payment of taxes, or the purchase of made in New York State products or materials, or by having any payroll in New York State, as required under 5 NYCRR §§144.2(f)(2), 140.1(gg), and 140.1 (hh).
3. BSI filed a Request to Appeal on August 22, 2024 (DED Exhibit 3).
4. A notice to proceed via written appeal was sent to BSI on August 22, 2024 (DED Exhibit 4).

5. BSI filed its written appeal by Memorandum of Law dated September 20, 2024, by Zachary Blodgett, Esq. of Harter Secrest & Emery LLP (APP Exhibit A).
6. The Division filed an Affidavit of Abdul Bah, Associate Certification Director, dated January 29, 2025, and a brief of Karen Bernstein Esq., counsel for the Division, dated January 29, 2025.

FINDINGS OF FACT

7. BSI is engaged in the business of Landscape Architecture, Planning, and Urban Design (DED Exhibit 1).
8. Natalie Brown is the President and has a 51% ownership interest. William Brown, Natalie Brown's father, is a Principal and has a 49% ownership interest (DED Exhibit 1).
9. On August 12, 2021, William Brown loaned the business \$ [REDACTED], representing the value of receivables to which he was entitled. At that time, William Brown was the sole owner of BSI (DED Exhibit 1; APP Exhibit A). A Promissory Note ("Capitalization Note") was signed by William Brown as President of BSI. Payments were made to William Brown from BSI's checking account (DED Exhibit 6). The balance of the Capitalization Note at the time of the application was \$ [REDACTED] (DED Exhibit 5).
10. On August 13, 2021, Natalie Brown purchased 51% of BSI from William Brown (DED Exhibit 1). Natalie Brown and William Brown entered into a Stock Purchase Agreement (DED Exhibit 7) and a Promissory Note ("Equity Purchase Note") (DED Exhibit 8), both in the principal amount of \$ [REDACTED]. Checks showing payments on the Equity Purchase Note reflect Natalie Brown as the owner of the account and are made payable to William Brown (DED Exhibit 9). The balance of the Equity Purchase Note at the time of the application was \$ [REDACTED] (DED Exhibit 9).

11. The application states that BSI is only authorized to do business in the State of Massachusetts (DED Exhibit 1). On April 19, 2024, BSI registered with the New York State Department of State as a foreign business corporation (DED Exhibit 18). BSI's bank accounts, accountant and attorney are located in Massachusetts (DED Exhibit 1). Business Tax Returns for 2022 and 2023 include a Federal return and a Massachusetts return (DED Exhibits 10 and 11).
12. The three (3) largest completed accounts for the prior three (3) years were in Massachusetts. The three (3) largest active projects listed are also in Massachusetts (DED Exhibit 1).
13. Narratives submitted with the application state "Brown Sardina is not currently conducting business in New York State." (DED Exhibits 15 and 16).
14. The application provides a letter proposal for a project in Esopus, New York. "This is a contract for a project in Esopus, New York that we are working on... We do not have any other work in the State of New York." The contract "pertains to a project for construction of dormitories and related improvements at the campus of a private high school in Esopus, New York." The contract is with DRA Architects, an entity located within Massachusetts and BSI "does not and cannot directly purchase construction materials or labor (or hire others to do so), as these activities are not within the permitted scope of authority for design professionals in New York State." (DED Exhibit 17; APP Exhibit A).

APPLICABLE LAW

5 NYCRR §144.2(b)(3) states in relevant part 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(f)(2) states as follows:

Small business requirement. 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.

5 NYCRR §140.1(gg) states as follows:

Significant business presence. A business authorized to do business in New York State, and that makes a contribution to the New York State economy through payment of taxes, or the purchase of made in New York State products or materials, or that has any payroll in New York State.

5 NYCRR §140.1(hh) states in relevant part as follows:

Small business. 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 hundred people...

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 BSI 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]).

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. Ownership

NYCRR §144.2(b)(3) requires that the woman-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to her ownership interest in the business.

The Division routinely denies certification where the woman-owner does not share in the risks and profits in proportion with her ownership interest. See *Matter of Spring Electric*, Recommended Order dated March 17, 2017, Final Order 17-21 dated March 27, 2017; *Matter of C.W. Brown, Inc. v. Canton*, 216 AD 3d 841 (3d Dept. 1995).

On August 12, 2021, William Brown loaned the business \$ [REDACTED], representing the value of receivables to which he was entitled. At that time, William Brown was the sole owner of BSI (DED Exhibit 1; APP Exhibit A). A Promissory Note (“Capitalization Note”) was signed by William Brown as President of BSI. Payments were made to William Brown from BSI’s checking account (DED Exhibit 6). The balance of the Capitalization Note at the time of the application was \$ [REDACTED] (DED Exhibit 5).

On August 13, 2021, Natalie Brown purchased 51% of BSI from William Brown (DED Exhibit 1). Natalie Brown and William Brown entered into a Stock Purchase Agreement (DED Exhibit 7) and a Promissory Note (“Equity Purchase Note”) (DED Exhibit 8), both in the principal amount of \$ [REDACTED]. Checks showing payments on the Equity Purchase Note reflect Natalie Brown as the owner of the account and are made payable to William Brown (DED Exhibit 9). The balance of the Equity Purchase Note at the time of the application was \$ [REDACTED] (DED Exhibit 9).

William Brown bears the risk on the Capitalization Note in the original amount of \$ [REDACTED] and Natalie Brown bears the risk on the Equity Purchase Note for her stock purchase, in the original amount of \$ [REDACTED]. Therefore, William Brown bears 76% of the risk, and Natalie Brown bears 24% of the risk. When considering the outstanding balance of the Capitalization Note (\$ [REDACTED]) and the Equity Purchase Note (\$ [REDACTED] at the time of the application, William Brown bears 74.5% of the risk and Natalie Brown bears 25.5% of the risk. (DED Exhibits 5 and 9). Therefore, Natalie Brown does not share in the risks in proportion to her ownership interest.

On appeal, applicant states that the balance of the Capitalization Note is \$ [REDACTED], and the current balance of the Equity Purchase Note is \$ [REDACTED] (APP Exhibit A). The percentage of risk still reflects that Natalie Brown bears 25.85% of the risk and William Brown bears 74.15% of the risk. Applicant further stated that Ms. Brown “has a larger stake in paying back the Company’s debt.” (APP Exhibit A). When assigning 51% of the Capitalization Note to Ms. Brown, she would bear the risk for \$ [REDACTED] ($\$ [REDACTED] \times 51\%$). Adding that balance to the balance of the Equity Purchase Note, Ms. Brown would bear the risk for \$ [REDACTED] ($\$ [REDACTED] + \$ [REDACTED]$). this amount is less than the \$ [REDACTED] current balance of the Capitalization Note, which Mr. Brown risks if the Capitalization Note is not paid.

Applicant further argued that “Ms. Brown’s salary rely (sic) upon her (and by extension, Brown Sardina’s) success, demonstrating that she shares in the risks and profits of the Company in proportion to her equity interest.” Applicant stated that there was a “scrivener’s error” on the 2023 Tax Returns and “their actual salaries were transposed, and it was Natalie Brown who earned a higher salary.” However, even allowing this new information to clarify the application, this only shows that Ms. Brown shares proportionally in the profits of the business, not the risks (APP Exhibit A).

The Division's determination to deny the application on the basis that BSI failed to demonstrate that Ms. Brown shared in the risks in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(3), is supported by substantial evidence.

II. Small Business

The Division denied BSI's application on the basis that BSI failed to demonstrate that the business made a contribution to the New York State economy through payment of taxes, or the purchase of made in New York State products or materials, or by having any payroll in New York State. The Division cited 5 NYCRR §144.2(f)(2), which states "Small business requirement. 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." The Division further cited 5 NYCRR §§140.1(gg) and 140.1(hh), which define "Significant business presence", and "Small business", respectively. (DED Exhibit 2).

5 NYCRR §140.1(hh) states that a small business is "a business which has a significant business presence in the State..."

5 NYCRR §140.1(gg) states a "significant business presence" includes making "a contribution to the New York State economy through payment of taxes, or the purchase of made in New York State products or materials, or that has any payroll in New York State."

The application states that BSI is only authorized to do business in the State of Massachusetts (DED Exhibit 1). On April 19, 2024, BSI registered with the New York State Department of State as a foreign business corporation (DED Exhibit 18). BSI's bank accounts,

accountant and attorney are located in Massachusetts (DED Exhibit 1). Business Tax Returns for 2022 and 2023 include a Federal return and a Massachusetts return (DED Exhibits 10 and 11).

The three (3) largest completed accounts for the prior three (3) years were in Massachusetts. The three (3) largest active projects listed are also in Massachusetts (DED Exhibit 1).

Narratives submitted with the application state “Brown Sardina is not currently conducting business in New York State.” (DED Exhibits 15 and 16).

The application provides a letter proposal for a project in Esopus, New York. “This is a contract for a project in Esopus, New York that we are working on... We do not have any other work in the State of New York.” The contract “pertains to a project for construction of dormitories and related improvements at the campus of a private high school in Esopus, New York.” The contract is with DRA Architects, an entity located within Massachusetts and BSI “does not and cannot directly purchase construction materials or labor (or hire others to do so), as these activities are not within the permitted scope of authority for design professionals in New York State.” (DED Exhibit 17; APP Exhibit A).

No evidence was provided to show that BSI paid any payroll or taxes in New York State or purchased any made in New York State materials or products.

On appeal, BSI argues its contract for a project in Esopus, New York is evidence that it is conducting business in New York. The contract “pertains to a project for construction of dormitories and related improvements at the campus of a private high school in Esopus, New York.” However, the contract is with DRA Architects, an entity located within Massachusetts and the work will not result in BSI paying payroll or taxes in New York State or purchasing made in New York State products or materials. BSI “does not and cannot directly purchase construction

materials or labor (or hire others to do so), as these activities are not within the permitted scope of authority for design professionals in New York State.” (DED Exhibit 17; APP Exhibit A).

Applicant further argues that BSI’s contract “results in issuance of plans and specifications that require New York-based contractors and subcontractors to purchase New York-made products and materials and hire New York-based laborers to carry out the work incident to the Company’s professional design... In this way, Brown Sardina is making a substantial contribution to the New York economy.” (APP Exhibit A). However, the regulations require the business applying for certification itself must pay taxes or payroll in New York State, or purchase made in New York State products or materials. 5 NYCRR §§144.2(f)(2), 140.1(gg), and 140.1 (hh).

The Division’s determination to deny the application on the basis that BSI failed to demonstrate that the business contributes to the New York State economy through payment of taxes, or the purchase of made in New York State products or materials, or by having any payroll in New York State, as required under 5 NYCRR §§144.2(f)(2), 140.1(gg), and 140.1 (hh), is supported by substantial evidence.

CONCLUSION

BSI 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(b)(3), 144.2(f)(2), 140.1(gg), 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 BSI’s application for certification as a woman-owned business enterprise.

In the Matter of Brown Sardina, Inc.
DED File ID No. 72315
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Appeal Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Applicant's Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	8/12/2021 Capitalization Note	Y	Y
DED 6	Capitalization Note Checks	Y	Y
DED 7	Stock Purchase Agreement	Y	Y
DED 8	Equity Purchase Note	Y	Y
DED 9	Equity Purchase Checks	Y	Y
DED 10	2022 BSI Tax Returns	Y	Y
DED 11	2023 BSI Tax Returns	Y	Y
DED 12	Contract with Briarwood Construction Corp.	Y	Y
DED 13	Contract with DeNisco Design Inc. 1	Y	Y
DED 14	Contract with DeNisco Design Inc. 2	Y	Y
DED 15	Narrative regarding proof of payment to subcontractors	Y	Y
DED 16	Narrative regarding proof of conducting business in NYS	Y	Y

DED 17	Contract with DRA Architects	Y	Y
DED 18	NYS DOS Entity Information	Y	Y