

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

In the Matter

- of -

the Application of JB Security, Inc.
for Certification as a Minority-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 54910

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
September 26, 2024

This matter considers the written appeal by JB Security, Inc. (“JBS” 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 October 14, 2023, Mr. Jason Tirado, as President, applied on behalf of JBS for certification as a minority-owned business enterprise (“MBE”) (DED Exhibit 1).
2. On January 5, 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) 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).
3. JBS timely filed a Request to Appeal on January 31, 2024 (DED Exhibit 18).
4. A notice to proceed via written appeal was sent to JBS on February 1, 2024 (DED Exhibit 19).
5. JBS filed its written appeal by letter dated March 4, 2024 (APP Exhibit A).

6. The Division filed an Affidavit of Glenn Butler, Certification Director, dated August 9, 2024, and a brief of Laurel Wedinger-Gyimesi Esq., counsel for the Division, dated August 16, 2024.

FINDINGS OF FACT

7. JBS provides security guard services (DED Exhibit 1).
8. Mr. Jason Tirado is President and has a 100% ownership interest. (DED Exhibit 1).
9. Mr. Tirado received wages from JBS in the amount of \$[REDACTED] in both 2021 and 2022 (DED Exhibit 5). Carmen Tirado Rodriguez, the Senior Operations Manager and Mr. Tirado's mother, received wages in the amount of \$[REDACTED] in both 2021 and 2022 (DED Exhibits 1 and 6; APP Exhibit A). Richard Rodriguez, the Field Supervisor and Mr. Tirado's step-father, received wages in the amount of \$[REDACTED] in 2021 and \$[REDACTED] in 2022 (DED Exhibits 1 and 7; APP Exhibit A). Virgen Rodriguez, the Operations Manager received wages in the amount of \$[REDACTED] in 2022 (DED Exhibits 1 and 8). Lorenzo Rodriguez received wages in the amount of \$[REDACTED] (DED Exhibit 9).
10. In 2021, JBS had gross receipts of \$[REDACTED], paid salaries and wages of \$[REDACTED], and had a taxable income of \$[REDACTED] (DED Exhibit 10). In 2022, JBS had gross receipts of \$[REDACTED], paid salaries and wages of \$[REDACTED], and had a taxable income of \$[REDACTED] (DED Exhibit 11).
11. Jason Tirado is responsible for financial decisions and negotiating bonding and is one of two signatories on the business account. Carmen Tirado is responsible for estimating, negotiating insurance, marketing and sales, purchasing equipment/sales, and managing/signing payroll. Richard Rodriguez is the second signatory on the business

account, responsible for hiring/firing and supervising field operations. Virgen Rodriguez is responsible for preparing bids and negotiating contracts (DED Exhibit 1).

12. A narrative provided with the application provides that Jason Tirado is responsible for “Contract acquisitions, assists with invoice submittals, payment receivables, quality assurance and contract negotiations. Submits MBE applications with state/New York city/etc. Renews security company license biannually.” The narrative further states Richard Rodriguez “Creates work schedules for security guards on file. Checks job sites during work shifts as obligated by client requests. Teaches security guards the use of security clock systems and wand systems as detailed in contract requests by clients. Issues uniforms and other security items as needed. Maintains security guard company vehicles. Creates and submits time sheets to operations manager for invoice purposes. Monitors security guard license renewals. Assists with new employee onboarding. Acts as liaison between the construction site representatives and the security guard staff for quality assurance purposes. Coordinates contract submittals such as security guard booths, heaters, power, and sufficient restrooms.” (DED Exhibit 12).

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(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.

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 JBS for certification as an 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. Ownership

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.

The Division routinely denies certification where the majority shareholder receives less compensation than other owners of the business, and other employees of the business. See, e.g., *Park Sales & Service, Inc.*, Recommended Order dated September 25, 2023, Final Order 23-10 dated October 13, 2023; *ERS Consultants, Inc.*, Recommended Order dated September 19, 2023, Final Order 23-09 dated October 13, 2023; *Keith Titus Corp.*, Recommended Order dated October 9, 2019, Final Order 19-29 dated January 16, 2020.

In determining total compensation, the Division considers financial records such as tax returns and salary/wage statements including W-2's. See, e.g., *C.W. Brown, Inc. v. Canton*, 216 A.D. 2d 841 (3d Dept. 1995); *Sunrise Credit Services, Inc. v. Zapata*, 57 Misc. 3d 1225 (Sup. Ct. NY County 2017).

Mr. Tirado received wages from JBS in the amount of \$[REDACTED] in both 2021 and 2022 (DED Exhibit 5). Carmen Tirado Rodriguez, the Senior Operations Manager and Mr. Tirado's mother, received wages in the amount of \$[REDACTED] in both 2021 and 2022 (DED Exhibits 1 and 6; APP Exhibit A). Richard Rodriguez, the Field Supervisor and Mr. Tirado's step-father, received wages in the amount of \$[REDACTED] in 2021 and \$[REDACTED] in 2022 (DED Exhibits 1 and 7; APP Exhibit A). Virgen Rodriguez, the Operations Manager received wages in the amount of \$[REDACTED] in 2022 (DED Exhibits 1 and 8). Lorenzo Rodriguez received wages in the amount of \$[REDACTED] (DED Exhibit 9).

In 2021, JBS had gross receipts of \$[REDACTED], paid salaries and wages of \$[REDACTED], and had a taxable income of \$[REDACTED] (DED Exhibit 10). In 2022, JBS had gross receipts of \$[REDACTED], paid salaries and wages of \$[REDACTED], and had a taxable income of \$[REDACTED] (DED Exhibit 11).

Mr. Tirado is paid less than Carmen Tirado Rodriguez, Richard Rodriguez, Virgen Rodriguez, and Lorenzo Rodriguez. On appeal, Mr. Tirado states “We haven’t turned a profit at the end of the year so I don’t receive dividend distributions nor do I care to. The pay I get is what has been agreed to by me and my parents.” (APP Exhibit A). The salary paid to Carmen Tirado Rodriguez is over 20 times the salary paid to Mr. Tirado and a significant reason as to why the company “has not turned a profit”.

The Division’s determination to deny the application on the basis that JBS failed to demonstrate that Mr. Tirado shared in the risks and profits in proportion to his ownership interest, as required under 5 NYCRR §144.2(b)(3) is supported by substantial evidence.

II. Operation

5 NYCRR §144.2(c)(2) states that “Minority group members... relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical 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”.

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).

Jason Tirado is responsible for financial decisions and negotiating bonding and is one of two signatories on the business account. Carmen Tirado is responsible for estimating, negotiating

insurance, marketing and sales, purchasing equipment/sales, and managing/signing payroll. Richard Rodriguez is the second signatory on the business account, responsible for hiring/firing and supervising field operations. Virgen Rodriguez is responsible for preparing bids and negotiating contracts (DED Exhibit 1).

A narrative provided with the application provides that Jason Tirado is responsible for “Contract acquisitions, assists with invoice submittals, payment receivables, quality assurance and contract negotiations. Submits MBE applications with state/New York city/etc. Renews security company license biannually.” The narrative further states Richard Rodriguez “Creates work schedules for security guards on file. Checks job sites during work shifts as obligated by client requests. Teaches security guards the use of security clock systems and wand systems as detailed in contract requests by clients. Issues uniforms and other security items as needed. Maintains security guard company vehicles. Creates and submits time sheets to operations manager for invoice purposes. Monitors security guard license renewals. Assists with new employee onboarding. Acts as liaison between the construction site representatives and the security guard staff for quality assurance purposes. Coordinates contract submittals such as security guard booths, heaters, power, and sufficient restrooms.” (DED Exhibit 12).

Although Mr. Tirado claims on appeal to have passed the license exam, the Watch, Guard, Or Patrol Agency License issued to JBS states “For the term of two years from the date hereof, to be represented as Principal, by the qualified member named on the attached.” However, the attachment was not provided and as such the qualified member is not named (DED Exhibit 15; APP Exhibit A).

On appeal, Mr. Tirado states “The company is mine now and has always been but when they [my parents] retire they are going to pass the clients, the original clients, to me. The clients

they have dealt with since the late 1980s and early 90's. The clients they have will be mine. I don't own these clients... the bigger clients are theirs per say. Those clients only do business with me now because of the relationship they have with my parents." (APP Exhibit A).

Mr. Tirado failed to establish that he performs any of the duties of the business that involve the retention, assigning, training or field supervision of the security guards used by JBS. His responsibilities listed above are predominantly administrative in nature. As stated above, Richard Rodriguez is the Security Guard Field Supervisor. He performs the critical functions of the business with his numerous responsibilities listed above (DED Exhibits 1 and 12).

The Division's determination to deny the application on the basis that JBS failed to demonstrate that Mr. Tirado makes operational decisions on a day-to-day basis with respect to the critical functions of the business, as required under 5 NYCRR §144.2(c)(2), is supported by substantial evidence.

CONCLUSION

JBS 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(b)(3) and 144.2(c)(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 JBS's application for certification as a minority-owned business enterprise.

In the Matter of JB Security, Inc.
DED File ID No. 54910
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Appeal Letter dated March 4, 2024	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Certification of Incorporation for JB Security, Inc.	Y	Y
DED 4	Agreement to be bound by the Certification Application Affidavit	Y	Y
DED 5	2021 and 2022 W-2s Jason Tirado	Y	Y
DED 6	2021 and 2022 W-2s Carmen Tirado Rodriguez	Y	Y
DED 7	2021 and 2022 W-2s Richard Rodriguez	Y	Y
DED 8	2022 W-2 Virgen Rodriguez	Y	Y
DED 9	2021 W-2 Lorenzo Rodriguez	Y	Y
DED 10	2021 Tax Return JB Security Inc.	Y	Y
DED 11	2022 Tax Return JB Security Inc.	Y	Y
DED 12	Narrative Re: Duties of Owner/Employees of JB Security Inc.	Y	Y
DED 13	Contract Between JB Security Inc. and Borcuia College	Y	Y
DED 14	Jason Tirado Resume	Y	Y
DED 15	Watch, Guard or Patrol Agency License JB Security	Y	Y
DED 16	Jason Tirado 2021 and 2022 Personal Tax Returns	Y	Y
DED 17	Richard Rodriguez Resume	Y	Y

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 18	Request to Appeal	Y	Y
DED 19	Notice to Proceed Via Written Appeal	Y	Y