

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

In the Matter

- of -

the Application of Rios Partners, LLC
for Certification as a Minority-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 69682

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
January 26, 2024

This matter considers the written appeal by Rios Partners, LLC (“Rios” 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 December 5, 2022, Mr. Joshua Riojas, as CEO, applied on behalf of Rios for certification as a minority-owned business enterprise (“MBE”) (DED Exhibit 1).
2. On April 6, 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. Rios timely filed a Request to Appeal on May 4, 2023 (APP Exhibit A).
4. A notice to proceed via written appeal was sent to Rios on May 15, 2023 (DED Exhibit 3).

5. Rios filed its written appeal by letter dated June 5, 2023, with attachment, from its attorney, Meghan Leemon Esq. of PilieroMazza PLLC (APP Exhibit B).
6. The Division filed an Affidavit of Robyn Clarke, Associate Certification Director, dated October 24, 2023, and a brief of Diedre Chuckrow Esq., counsel for the Division, dated October 24, 2023.

FINDINGS OF FACT

7. Rios is engaged in the business of providing management consulting services (DED Exhibit 1).
8. Mr. Joshua Riojas is the CEO and has a 51% ownership interest. Mr. Zachary Osborne is the President and has a 49% ownership interest. (DED Exhibit 1).
9. In 2020, Mr. Riojas received a total economic benefit from Rios in the amount of \$ [REDACTED], and Mr. Osborne received a total economic benefit in the amount of \$ [REDACTED] (DED Exhibit 4). Mr. Rios's economic benefit was 50.849% and Mr. Osborne's benefit was 49.150%.
10. In 2021, Mr. Rios received a total economic benefit in the amount of \$ [REDACTED] and Mr. Osborne received a total economic benefit in the amount of \$ [REDACTED] (DED Exhibit 5). Mr. Rios's economic benefit was 50.738% and Mr. Osborne's economic benefit was 49.262%
11. Mr. Riojas' resume states "Enabling commercial and government clients to develop and execute high impact strategy. Primary focus on strategy development, human capital and organizational efficiency, and measuring & improving performance. Work with nonprofit, commercial and government clients" (DED Exhibit 6). Mr. Riojas has direct

management of senior leadership, the Business Support Team “and day to day management of the IT Legal, Finance, and HR functions.” (DED Exhibit 9).

12. Mr. Osborne’s resume states “Enabling government, non-profit and commercial clients to develop and execute high impact strategy. Primary focus on Human-Centered Design (HCD), strategy development, human capital & organizational efficiency, and measuring & improving performance” (DED Exhibit 7). Mr. Osborne manages “the day to day operations of the consulting staff to include performance management” (DED Exhibit 9).
13. In 2021, Rios paid subcontractors \$ [REDACTED] (57%) and paid salaries and wages in the amount of \$ [REDACTED] (43%) (DED Exhibits 1, 5 and 10).
14. Rios entered into a “Mentor Protégé Agreement” with Boston Consulting Group (BCG). The agreement provides that BCG will provide access to “Knowledge Transfer artifacts” and will make materials “available at BCG offices...” and BCG agrees to provide access to use of BCG administrative items and general support items, to permit Rios to make use of third-party resources through BCG, and to “permit Rios Partners to acquire (or use) software licenses and BCG licensed propriety software for JV [joint venture] opportunities and projects on a cost-reimbursement (e.g., incremental or software seat license cost) basis.” Also, BCG will “allow Rios to acquire office supplies at BCG contract rates on a cost reimbursement basis” and will allow Rios employees to attend BCG training programs (DED Exhibits 8 and 13).
15. Rios and BCG jointly formed RB Management Consultants, LLC. Under its Operating Agreement, Rios and BCG “pursue various business opportunities with the US government” and states that “Rios lacks the necessary capacity to procure and perform government contracts on its own” (DED Exhibit 15).

16. Applicant stated that “Our biggest client is the Federal Government, and a significant portion of the work we compete for require partnering with other firms. While we do many smaller pieces of work independently, the larger projects require a diverse set of skills that no one firm has.” (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) Operational decisions. 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 Rios 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. 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 there is a disparity in compensation between the majority shareholder and other owners of the business. See *Matter of Keith Titus Corporation*, Recommended Order dated October 9, 2019, Final Order 19-28, dated January 16,

2020: *Matter of Quality Industries, Inc.*, Recommended Order dated June 4, 2019, Final Order 19-15, dated August 2, 2019; *Matter of Spring Electric*, Recommended Order dated March 17, 2017, Final Order 17-21, dated March 27, 2017.

In 2020, Mr. Riojas received a total economic benefit from Rios in the amount of \$ [REDACTED] and Mr. Osborne received a total economic benefit in the amount of \$ [REDACTED] (DED Exhibit 4). Mr. Rios's economic benefit was 50.849% and Mr. Osborne's benefit was 49.150%. In 2021, Mr. Rios received a total economic benefit in the amount of \$ [REDACTED] and Mr. Osborne received a total economic benefit in the amount of \$ [REDACTED] (DED Exhibit 5). Mr. Rios's economic benefit was 50.738% and Mr. Osborne's economic benefit was 49.262%.

Mr. Rios's share of the profits falls just below the 51% required to satisfy the proportionality requirement. See *Matter of National Recovery Solutions, LLC*, Recommended Order dated May 25, 2017, Final Order 17-31, dated June 5, 2017 (Where owner relied on for certification and the non-relied on owner "receive approximately the same benefit in terms of monies actually paid out by the company... the applicant has failed to demonstrate that [the owner relied on for certification] shares in the risks and profits in proportion to [their] ownership interest in the business...").

Applicant argues on appeal that the Division should not have included salary in determining compensation for the owners (APP Exhibit B). However, wages have been consistently included in compensation. See *Matter of C.W. Brown v. Canton*, 216 AD 2d 841 (3rd Dept. 1995) and *Sunrise Credit Services, Inc. v. Zapata and NYS Department of Economic Development, et al*, 57 Misc. 3d 1225 (NY Sup. Ct. 2017).

The Division's determination to deny the application on the basis that Rios failed to demonstrate that Mr. Riojas 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 MBE certification. See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4th Dept. 2018).

Mr. Riojas' resume states "Enabling commercial and government clients to develop and execute high impact strategy. Primary focus on strategy development, human capital and organizational efficiency, and measuring & improving performance. Work with nonprofit, commercial and government clients" (DED Exhibit 6). Mr. Riojas has direct management of senior leadership, the Business Support Team "and day to day management of the IT Legal, Finance, and HR functions." (DED Exhibit 9).

Mr. Osborne's resume states "Enabling government, non-profit and commercial clients to develop and execute high impact strategy. Primary focus on Human-Centered Design (HCD), strategy development, human capital & organizational efficiency, and measuring & improving

performance” (DED Exhibit 7). Mr. Osborne manages “the day-to-day operations of the consulting staff to include performance management” (DED Exhibit 9).

The core function of Rios is management consulting (DED Exhibit 1). As stated above, Mr. Riojas handles the day-to-day management of the IT Legal, Finance, and HR functions (DED Exhibit 9), while Mr. Osborne manages the day-to-day operations of the consulting staff. Mr. Riojas spends between “10-20% of his time on business development, sales, and client engagement.” Mr. Osborne spends approximately 75% “of his time on business development, sales, and partner/sub-contractor management.” (DED Exhibit 9). Mr. Osborne therefore makes the day-to-day operational decisions with respect to the critical functions of the business, not Mr. Riojas.

Applicant argues on appeal that the Operating Agreement should have been relied upon in determining who makes operational decisions on a day-to-day basis with respect to the critical functions of the business. The Operating Agreement reflects that Mr. Riojas is the highest-ranking member of the business and has “general supervision, direction, and control of the day-to-day business and affairs of the corporation.” (APP Exhibit B). However, this does not support the argument that Mr. Riojas independently makes operational decisions with respect to the critical functions of the business. Also, the Operating Agreement provides that the President, Mr. Osborne, also supervises and controls day-to-day business affairs (DED Exhibit 15).

The Division’s determination to deny the application on the basis that Rios failed to demonstrate that Mr. Riojas 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.

III. Independence

The Division further found that Rios is not an independent business enterprise, as required under 5 NYCRR §144.2(e). This section considers “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... 5 NYCRR §144.2(e)(1), and “whether the business enterprise receives tangible benefits as a result of a connection to another entity...”. 5 NYCRR §144.2(e)(3).

In 2021, Rios paid subcontractors \$ [REDACTED] (43%) and paid salaries and wages in the amount of \$ [REDACTED] (57%) (DED Exhibits 1, 5 and 10).

Rios entered into a “Mentor Protégé Agreement” with Boston Consulting Group (BCG). The agreement provides that BCG will provide access to “Knowledge Transfer artifacts” and will make materials “available at BCG offices...” and BCG agrees to provide access to use of BCG administrative items and general support items, to permit Rios to make use of third-party resources through BCG, and to “permit Rios Partners to acquire (or use) software licenses and BCG licensed propriety software for JV [joint venture] opportunities and projects on a cost-reimbursement (e.g., incremental or software seat license cost) basis.” Also, BCG will “allow Rios to acquire office supplies at BCG contract rates on a cost reimbursement basis” and will allow Rios employees to attend BCG training programs. (DED Exhibits 8 and 13). These are tangible benefits Rios receives from BCG through the Mentor Protégé Agreement.

Rios and BCG jointly formed RB Management Consultants, LLC. Under its Operating Agreement, Rios and BCG “pursue various business opportunities with the US government” and states that “Rios lacks the necessary capacity to procure and perform government contracts on its own” (DED Exhibit 15).

Applicant stated “Our biggest client is the Federal Government, and a significant portion of the work we compete for require partnering with other firms. While we do many smaller pieces of work independently, the larger projects require a diverse set of skills that no one firm has.” (DED Exhibit 12).

Rios relies on relationships with large firms in order to contract and work on almost half of its business (DED Exhibits 1, 5 and 10). The above shows that Rios receives substantial tangible benefits as a result of its connection with BCG and other companies, and therefore does not operate independently.

Applicant argues on appeal “In the federal space, any company that is awarded a set-aside contract for services can subcontract up to fifty percent (50%) of the work to non-similarly situated entities” and “Similarly, there is no prohibition on the use of subcontractors by MBEs.” (APP Exhibit B). However, qualification under another program does not estop the Division from denying certification for MBE status for failure to meet its eligibility requirements.

The Division’s determination to deny the application on the basis that Rios failed to demonstrate that the business is an independent enterprise, as required under 5 NYCRR §144.2(e), is supported by substantial evidence.

CONCLUSION

Rios 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), 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 affirm the Division's determination to deny Rios's application for certification as a minority-owned business enterprise.

In the Matter of Rios Partners, LLC
DED File No. 69682
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	2020 Business Tax Return	Y	Y
DED 5	2021 Business Tax Return	Y	Y
DED 6	Joshua Riojas Resume	Y	Y
DED 7	Zachary Osborne Resume	Y	Y
DED 8	Narrative regarding relationship with Boston Consulting Group	Y	Y
DED 9	Narrative regarding roles of Joshua Riojas and Zachary Osborne	Y	Y
DED 10	Rios 2021 Form 1096	Y	Y
DED 11	Rios 2021 1099 Forms	Y	Y
DED 12	Narrative regarding use of Subcontractors	Y	Y
DED 13	Mentor Protégé Agreement with Rios and Boston Consulting Group	Y	Y
DED 14	Operating Agreement between Rios and Boston Consulting Group	Y	Y
DED 15	Rios Amended Operating Agreement	Y	Y