

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

In the Matter

- of -

the Application of Tudo Enterprises, LLC
for Certification as a Minority/Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 69549

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
July 31, 2024

This matter considers the appeal by TUDO Enterprises, LLC (“TUDO” 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/woman-owned business enterprise (“MWBE”).

PROCEDURAL HISTORY

1. On November 5, 2022, Ms. Vanessa Encarnacao, as owner, applied on behalf of TUDO for certification as a minority/woman-owned business enterprise (“MWBE”). (DED Exhibit 1)
2. On April 12, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority/women group members or women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1);
 - (b) Minority/women group members or women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise, as required under 5 NYCRR §144.2(c)(3); and
 - (c) The business enterprise must operate independently, as required under 5 NYCRR §144.2(e).
3. On May 10, 2023, TUDO submitted a Request to Appeal via a Hearing (DED Exhibit 3).
4. On April 5, 2024, a Notice of Hearing was sent to all parties (DED Exhibit 4).
5. On July 24, 2024, a hearing was held and concluded.

FINDINGS OF FACT

6. Tudo is engaged in concrete work and masonry, including concrete sidewalks, concrete curbs, handicap ramps, concrete panels, curb and gutter, aprons, and other types of concrete flat work (APP Exhibit 1).
7. Ms. Vanessa Encarnacao is the 100% owner of Tudo (DED Exhibit 1).
8. Ms. Encarnacao has been running the business since its inception in 2016. She makes all final decisions involving the business operations. She receives the plans and specifications from clients, provides estimates for material and labor, orders the concrete for the job, and supervises the work on site. Her resume reflects that she has a 30-hour Construction and Safety OSHA Certificate, and she has taken Civil Engineering Technology classes at Nassau Community College (DED Exhibits 1 and 13; Hearing Testimony of Vanessa Encarnacao).
9. Ms. Encarnacao also worked for Stasi Industries, Inc. from 2016 to present as the Operations Manager. She was “responsible for all day-to-day operations of the company. Both, in the office and in the field.” Her responsibilities include procuring bids and RFP’s, conducting take-offs, securing paperwork for contract signing, negotiating contracts, project scheduling, ordering materials, certified payroll, elations reporting and compliance (DED Exhibit 13).
10. In 2020, 2021 and 2022, she devoted approximately 90 percent of her time at Tudo and 10 percent of her time at Stasi Industries. She testified that she averaged approximately 16 hours per week at Stasi during that period. She stated that she earned between \$■ - \$■ per hour in 2020 and 2021, and \$■ per hour in 2022 for consulting services at Stasi. (Hearing Testimony of Vanessa Encarnacao).

11. Ms. Encarnacao received \$ [REDACTED] in wages from Stasi in 2020, \$ [REDACTED] in wages in 2021, and \$ [REDACTED] in wages in 2022 (DED Exhibits 7, 8 and 9).
12. Tudo had no employees for 6 of the 7 years in its operation through 2022. Tudo employed 14 part-time workers in 2021. Ms. Encarnacao stated that because Tudo “did not have consistent work that would warrant keeping a full-time crew the whole year round, I had to use employees when I had work for them.” In 2022, Tudo acted as the General Contractor for a site job in East Hampton, so that job was performed with subcontractors, “which is the only reason I did not have employees.” (DED Exhibit 1;Hearing Testimony of Raymond Emanuel; Hearing Testimony of Vanessa Encarnacao).
13. Ms. Encarnacao stated that “On projects that I am hired to consult on or manage (where there is other scope than concrete), I use subcontractors.” (DED Exhibit 1).

APPLICABLE LAW

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:

- (1) Competence in the industry. Minority group members and women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things. In evaluating whether a minority group member or woman possesses adequate, industry-specific competence, the division shall consider factors, including, but not limited to:
 - (i) Whether individuals employed by the business enterprise for which certification is sought are required to obtain licenses or certifications to provide products or services to the clients of the business enterprise;
 - (ii) The extent to which academic credentials exist for persons employed in the industry; and
 - (iii)The extent to which industry-specific expertise may be obtained via direct work experience...

- (3) 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(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 TUDO for certification as a MWBE 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

Mr. Horace Flowers, Esq. appeared at the hearing on behalf of Tudo Enterprises, LLC. The following witnesses testified on behalf of Tudo: Vanessa Encarnacao. Tudo offered APP Exhibits 1 through 4, and 6 through 11. Tudo did not offer APP Exhibit 5. APP Exhibits 1 through 4 and 6 through 10 were admitted into evidence APP Exhibit 11 was not admitted into evidence.

Mr. Michael Paff, Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Raymond Emanuel, Associate Director, Division of Minority and Women Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1 - 28.

I. Operation

5 NYCRR §144.2(c)(1) requires that the minority/woman-owner possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. In *C.W. Brown, Inc. v. Canton*, 216 A.D.2d 841 (3d Dept 1995), the Court affirmed the denial where the woman-owner had no training or experience in the industry, nor could she specify the “working knowledge” necessary to review the estimates made by or evaluate the work of more experienced employees. 5 NYCRR §144.2(c)(1) states that “this requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things.”

With regard to managerial experience, the minority/woman-owner must identify the management experience and day to day management activities she engaged in. See *Scherzi Systems, LLC v. White*, 187 AD3d 1466 (3rd Dept. 2021).

The Division’s regulations “do not require an applicant to possess formal academic training or to have completed an apprenticeship in order to demonstrate technical competence to operate a

business.” *Matter of Northern Scapes Inc.*, Recommended Order dated May 18, 2018, Final Order 18-31, dated June 5, 2018 (applicant relied on for certification, who has managed projects through oversight of project managers and possesses managerial experience has the competence to operate the applicant business). Further, there is no regulatory requirement for any formal academic training, only that the woman owner possesses adequate competence to make decisions and to make those decisions on a day-to-day basis. See *Northern Scapes*, supra.

Ms. Encarnacao testified that she has been running the business since its inception in 2016. She makes all final decisions involving the business operations. She receives the plans and specifications from clients, provides estimates for material and labor, orders the concrete for the job, and supervises the work on site. Her previous employment with Stasi, Gold Coast Pavers, Inc. and M&A Asphalt provided the experience necessary for her to start her own business. In 2021 and 2022, she took several civil engineering technology courses at Nassau Community College, including Construction Methods, Construction Estimating, Construction Planning and Scheduling, Blueprint Reading, and Introduction to Computer-Aided Drafting (Hearing testimony of Vanessa Encarnacao/ APP Exhibit 9).

Raymond Emanuel, Associate Director, testified that Ms. Encarnacao does not have any industry specific expertise; her skills are related to general business or office management. The critical functions of the business are concrete work and masonry, including concrete sidewalks, concrete curbs, handicap ramps, concrete panels, curb and gutter, aprons, and other types of concrete flat work, as stated in the application. He stated that Ms. Encarnacao’s resume reflects that her responsibilities include consulting, supervising and coordinating projects; and that her prior experience included procuring bids and RFPs, conducting take-offs, securing paperwork for contract signing, negotiating contracts, project scheduling, ordering materials, certified payroll, and office management. He stated that Ms. Encarnacao does not have the education, training, or

experience to oversee the critical functions of the business (Hearing Testimony of Raymond Emanuel/ DED Exhibit 13).

Ms. Encarnacao has handled most of the critical functions of Tudo's business, including reading the plans and specifications from clients, providing estimates for material and labor, ordering the concrete for the job, and supervising the work on site. (Hearing Testimony of Vanessa Encarnacao). However, she does not have any training or experience in doing the concrete work herself. She must rely upon hiring laborers or subcontractors to do the work.

. Based on the foregoing, I find that the Division's determination to deny Tudo's certification under 5 NYCRR §144.2(c)(1) was based on substantial evidence.

The application was also denied on the ground that the minority/woman-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). The Division has consistently found that part-time work for a business does not qualify as devoting time to the daily operation of the business. See *Matter of Brandt Equipment*, Recommended Order dated April 28, 2020, Final Order 20-06, dated June 2, 2020.

Vanessa Encarnacao testified that between 2020 and 2022, she devoted approximately 90 percent of her time to Tudo and 10 percent of her time to Stasi. She stated that she worked approximately 16 hours per week for Stasi during that period. She stated her hourly rate was between \$■■■■\$■■■/ hour in 2020 and 2021, and she was a consultant in 2022, where her hourly rate was \$■■■/ hour. (Hearing Testimony of Vanessa Encarnacao). Ms. Encarnacao received \$■■■■■■ in wages from Stasi in 2020, \$■■■■■■ in wages in 2021, and \$■■■■■■ in wages in 2022 (DED Exhibits 7, 8 and 9).

Raymond Emanuel testified that Ms. Encarnacao worked as an employee of Stasi while running the business of Tudo. He testified that the W-2 statements referred to above reflect that

her outside employment proves that she failed to demonstrate that she devotes sufficient time on an ongoing basis to the daily operation of Tudo (Hearing Testimony of James Murphy).

Based upon the wages received by Ms. Encarnacao from Stasi in 2020 through 2022, her testimony that she devoted 90% of her time to Tudo is not credible, and the Division's finding that she failed to demonstrate that she devotes sufficient time on an ongoing basis to the daily operation of Tudo, was based on substantial evidence.

Based on the foregoing, I find that the Division's determination to deny Tudo's certification under 5 NYCRR §144.2(c)(3) was based on substantial evidence.

II. Independence

The Division further found that Tudo 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).

Ms. Encarnacao testified that Tudo does not share office space, equipment or employees with any other entity and does not receive any tangible benefits from any other business. She confirmed that she only uses employees when she has work for them (Hearing Testimony of Vanessa Encarnacao). She stated that "On projects that I am hired to consult on or manage (where there is other scope than concrete), I use subcontractors." (DED Exhibit 1).

Raymond Emanuel testified that Tudo did not have any employees for 6 of the 7 years in operation. The only year Tudo had employees was in 2021, when it had 14 part-time employees. He stated that these laborers are hired only when contracts are secured and otherwise Tudo has no employees. He testified that Tudo utilized subcontractors in 2022. He further testified that the only

asset of the business listed by Tudo is a 2001 International dump truck. He testified that the Division considered the fact that the wages paid to employees as compared to the gross receipts of the business in 2020, 2021 and 2022 shows that it is not an independent business. (Hearing Testimony of Raymond Emanuel).

Tudo is not an independent business enterprise since it only hires laborers when contracts are secured and acts as a General Contractor on projects it is hired to consult or manage and uses subcontractors on those projects.

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

CONCLUSION

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

In the Matter of Tudo Enterprises, LLC
DED File ID No. 69549
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP 1	Questus Letter	Y	Y
APP 2	Narrative – 9/22/22	Y	Y
APP 3	Tudo Employee Explanation	Y	Y
APP 4	Quotes	Y	Y
APP 5	Tudo Agreements	N	N
APP 6	American Paving Invoices	Y	Y
APP 7	Fieldstone staging Invoices	Y	Y
APP 8	A to Z Express Wash Invoice	Y	Y
APP 9	Civil Engineering Courses	Y	Y
APP 10	American Paving Village of Great Neck Invoices	Y	Y
APP 11	American Paving Village of Freeport Invoice and emails	Y	N
DED 1	Certification Application	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Appellant’s Appeal Letter	Y	Y
DED 4	Notice of Hearing	Y	Y
DED 5	Tudo 2020 Tax Returns	Y	Y
DED 6	1099 Fieldstone	Y	Y
DED 7	2020 Individual Tax Return	Y	Y

DED 8	2021 Individual Tax Return	Y	Y
DED 9	2022 Individual Tax Return	Y	Y
DED 10	Tudo 2021 W-3	Y	Y
DED 11	Tudo Employee Information	Y	Y
DED 12	Tudo 2020 clarification	Y	Y
DED 13	Vanessa Encarnacao Resume	Y	Y
DED 14	Vanessa Encarnacao OSHA	Y	Y
DED 15	Questus Letter	Y	Y
DED 16	Narrative – 11/5/21	Y	Y
DED 17	Tudo Employee Explanation	Y	Y
DED 18	Tudo Enterprises Consideration Letter	Y	Y
DED 19	Tudo Narrative – 11/10/21	Y	Y
DED 20	Tudo Q & A	Y	Y
DED 21	Quotes	Y	Y
DED 22	American Paving Invoices	Y	Y
DED 23	Fieldstone staging	Y	Y
DED 24	Ultimate Valley Holdings	Y	Y
DED 25	Centerreach paving	Y	Y
DED 26	GRH Fly-In	Y	Y
DED 27	Nassau DPW	Y	Y
DED 28	Rockville Centre Material - Stasi	Y	Y