

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
633 THIRD AVENUE
NEW YORK, NY 10017

In the Matter

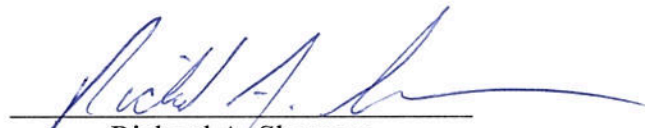
- of -

the Application of **Tech Valley Security, Inc.**
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59830

RECOMMENDED ORDER

- by -



Richard A. Sherman
Administrative Law Judge

August 25, 2017

SUMMARY

This report recommends that the determination of the Division of Minority and Women's Business Development ("Division") of the New York State Department of Economic Development to deny Tech Valley Security, Inc. ("Tech Valley" or "applicant"), certification as a women-owned business enterprise ("WBE")¹ be affirmed for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal by 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 ("NYCRR") Parts 140-144, challenging the determination of the Division that Tech Valley does not meet the eligibility criteria for certification as a WBE.

The Division denied the application (exhibit 1) filed by Tech Valley for WBE certification by letter dated October 17, 2016 (exhibit 2). The letter sets forth four grounds under 5 NYCRR 144.2 for the denial. Applicant filed a notice of appeal ("notice of appeal"), dated November 15, 2016. The Division advised applicant that the hearing on this matter would be held on July 11, 2017 (letter from the Division to applicant, dated March 2, 2017).

I convened the hearing at approximately 11:00 a.m. on July 11, 2017, at the Division's offices located at 625 Broadway, Albany, New York. Antoinette Murphy, Katie Murphy Gagnon, and Robert Wolfgang appeared on behalf of Tech Valley and each provided testimony. Mr. Wolfgang cross examined the Division's witness and made a closing statement on behalf of the applicant. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, represented the Division and called one witness, El Hussein Sarhan, a senior certification analyst for the Division. Mr. Sarhan testified via video conference from the Division's New York City office. A list of the exhibits received during the hearing is appended to this report.

Consistent with 5 NYCRR 145.1(m), an audio recording of the hearing was made. A copy of the audio recording on two compact discs ("CD1" and "CD2") was provided to this office on July 28, 2017, whereupon, the hearing record closed.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a WBE are established by regulation (see 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted or denied WBE status, the ownership, operation, control, and independence of the

¹The term "women-owned business enterprise" applies to an enterprise that meets the requisite criteria on the basis of the ownership and control of one woman or of multiple women (see 5 NYCRR 140.1[tt] [defining a women-owned business enterprise as one that is, among other things, "at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women"]).

business enterprise are assessed on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information revealed in supplemental submissions or interviews that are conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of WBE certification for Tech Valley 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 the Division's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate" (Matter of Ridge Rd. Fire Dist. v Schiano, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

POSITIONS OF THE PARTIES

Position of the Division

The Division cites four bases for the denial of Tech Valley's application. First, the Division argues that applicant failed to establish that the woman owner, Antoinette Murphy, makes decisions pertaining to the operations of the business enterprise (exhibit 2 at 2 [citing 5 NYCRR 144.2(b)(1)]). Second, the Division argues that applicant failed to establish that Antoinette Murphy has adequate managerial experience or technical competence to operate the business enterprise (exhibit 2 at 2 [citing 5 NYCRR 144.2(b)(1)(i)]). Third, the Division argues that applicant failed to establish that Antoinette Murphy devotes time on an ongoing basis to the daily operations of the business enterprise (exhibit 2 at 3 [citing 5 NYCRR 144.2(b)(1)(iii)]). And fourth, the Division argues that applicant failed to demonstrate through the production of signed contracts that Antoinette Murphy controls negotiations (exhibit 2 at 3 [citing 5 NYCRR 144.2(b)(3)]).

Position of Applicant

Applicant states that at the hearing it "hope[s] to be able to address the reasons for denial" and "explain the operation of [the] business" (notice of appeal at 1). Applicant also indicates that it is receptive to "chang[ing] any procedures necessary to comply" with the requirements of the MWBE regulations (id.).

FINDINGS OF FACT

1. Tech Valley is a corporation, established on July 9, 2003, and is in the business of providing security consulting, investigative services, training, security guards, and other services (exhibit 1 at 2 [items 1.Q-R], 3 [items 3.A-D]; exhibit 9 at 5 [Tech Valley stock certification,

dated July 9, 2003]; CD1 4:31 [Sarhan testimony regarding business activities of applicant]; CD1 45:10 [Wolfgang testimony regarding business activities of applicant]).

2. Antoinette Murphy is the President and 100% owner of Tech Valley (exhibit 1 at 2-3 [items 1.P, 2.A, 2.F]; exhibit 5; CD1 39:50 [Murphy testimony regarding her ownership of Tech Valley]). She received no compensation from Tech Valley in 2015 (exhibit 8 at 1, 26 [IRS form 1040, as numbered]; CD1 14:25 [Sarhan testimony that 2015 tax returns show Ms. Murphy received no income from Tech Valley], 41:15 [Murphy testimony that she did not need to take a salary from Tech Valley]).

3. Prior to becoming the owner of Tech Valley in 2005, Antoinette Murphy had never worked in the security consulting or investigative services industry and she is not a licensed private investigator (exhibit 7 at 1; CD1 at 39:50 [Murphy testimony that she took over the business after her husband passed away, but that she is not a private investigator]).

4. Robert Wolfgang was, at the time the application was submitted to the Division, the chief executive officer and secretary of Tech Valley and worked at Tech Valley full time (exhibit 1 at 2-3 [items 1.O, 2.F]; exhibit 5 [stating Mr. Wolfgang is Tech Valley's CEO "[f]ull time"]). He became CEO of Tech Valley in 2007 (exhibit 7 at 5). Since January 2016, Mr. Wolfgang has reduced his involvement with Tech Valley (CD1 at 42:40 [Gagnon testimony that Wolfgang is "stepping away" from his management role at Tech Valley]; CD1 at 46:55 [Wolfgang testimony that he has not received a salary from Tech Valley since January 2016 and instead receives only consulting fees]).

5. Robert Wolfgang served as a police officer with the City of Albany Police Department for 33 years, retiring as the Chief of Police in 2004 (exhibit 7 at 5). He is licensed by the New York State Department of State as a private investigator (exhibit 6).

6. Antoinette Murphy's primary source of income is from her position as the receiver of taxes for the Town of East Greenbush (exhibit 7 at 1; exhibit 8 at 1, 26 [IRS form 1040, Statement 7]; CD1 at 14:50 [Sarhan testimony regarding Ms. Murphy' reported income for 2015]; CD1 40:25 [Murphy testimony regarding sources of income]). Ms. Murphy also owns and manages rental properties that provide additional income (exhibit 7 at 1 [noting Ms. Murphy "owns a number of properties"]; exhibit 8 at 1, 16 [IRS form 1040 (showing rental property income)]; CD1 at 40:25 [Murphy testimony that "I also have properties that I take care of"])).

7. All of the contracts and related documents submitted by Tech Valley as part of its MWBE application were signed by Robert Wolfgang or identified him as the addressee or sender (exhibit 4; CD1 at 16:30 [Sarhan testimony that Wolfgang signed all contracts provided]).

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of Tech Valley as a WBE pursuant to Executive Law Article 15-A. The Division cites four bases in support of upholding the denial, each of which is discussed below.

Operation: Decisions Pertaining to Operations

The eligibility criterion at issue provides that "[d]ecisions pertaining to the operations of the business enterprise must be made by . . . women claiming ownership of that business enterprise" (5 NYCRR 144.2[b][1]).

The Division argues that applicant failed to demonstrate that Antoinette Murphy makes decisions pertaining to the enterprise's core functions, including decisions related to hiring and firing, marketing, and supervising field operations (exhibit 2 at 2; CD1 at 8:00-10:30).

Applicant argues that the Division's determination shows a "widespread misunderstanding" of Tech Valley's operations (CD2 at 0:20) and that a more comprehensive evaluation would have clarified "what we do, how we do it, and who's involved in what" (CD2 at 0:35). Tech Valley further argues that Robert Wolfgang, as CEO, always pursued applicant's business objectives based upon his understanding of the directions he received from Antoinette Murphy (CD2 at 1:35).

The application materials support the Division's determination that applicant failed to establish that Antoinette Murphy makes decisions pertaining to Tech Valley's core business functions. The application states that responsibility for most business functions is shared between Antoinette Murphy and Robert Wolfgang, with some functions also shared with other Tech Valley personnel (exhibit 1 at 4-5 [item 4.A]). With regard to supervising field operations, however, only Robert Wolfgang is identified as having managerial responsibility (*id.* [item 4.A.8]).

Additionally, the narrative that applicant provided to the Division describing the roles of certain Tech Valley employees states that Ms. Murphy "assists" with several business functions, but only lists "oversee[ing] payroll" as falling within her purview alone (exhibit 5). In contrast, the narrative states that Robert Wolfgang is responsible for such core functions as supervising field operations, conducting investigations, interacting with clients and government agencies, and developing and delivering training (*id.*).

Applicant failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that decisions pertaining to the operations of Tech Valley are not made by Antoinette Murphy as required by 5 NYCRR 144.2(b)(1).

Operation: Managerial Experience or Technical Expertise

The eligibility criterion at issue requires that the applicant demonstrate that the women owners "have adequate managerial experience or technical competence in the business enterprise seeking certification" (5 NYCRR 144.2[b][1][i]).

The Division states that its determination to deny the application on this criterion is supported by the fact that Antoinette Murphy does not possess a private investigator license, and that she had no managerial experience in the security consulting and investigative services

industry prior to becoming the owner of Tech Valley (exhibit 2 at 2). The Division further notes that Robert Wolfgang, Tech Valley's CEO, has a private investigator license (id.).

Applicant concedes that Antoinette Murphy does not possess a private investigator license, but asserts that Ms. Murphy could study for the licensing exam and then obtain a license (CD1 at 54:05). Applicant further asserts that not all members of a firm that offers private investigator services have to be licensed because all other staff may "come under" the qualified individual's license (CD1 at 54:00). Lastly, applicant asserts that Ms. Murphy gained a "second-hand" understanding of investigative work before she acquired Tech Valley because of her years of marriage to a police detective (CD1 at 26:45).

General Business Law § 70(2) states that a corporation must obtain a license from the Department of State prior to "engag[ing] in the business of private investigator." Pursuant to General Business Law § 72(1), in order to obtain a private investigator license, a corporation must have at least one member that meets specific minimum qualifications as an investigator (e.g., the member may qualify by passing the licensing exam and demonstrating regular employment as an investigator with a police department for a period of not less than three years [id.]). Robert Wolfgang holds the licensure required for Tech Valley to engage in the business of private investigator, one of its core revenue generating functions (exhibit 6). Antoinette Murphy, by her own admission, is not a private investigator (CD1 at 39:55 [Murphy testimony that she is "not a PI at all"]).

Applicant failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that Antoinette Murphy does not have adequate managerial experience or technical competence in the business enterprise seeking certification as required by 5 NYCRR 144.2(b)(1)(i).

Operation: Devote Time on an Ongoing Basis

The eligibility criterion at issue requires that the applicant demonstrate that the women owners "devote time on an ongoing basis to the daily operation of the business enterprise" (5 NYCRR 144.2[b][1][iii]).

Division staff argues that applicant fails to meet this criterion because Antoinette Murphy is employed as the receiver of taxes for the Town of East Greenbush and does not work full-time for Tech Valley (exhibit 2 at 3). Staff also asserts that Robert Wolfgang "manages the business of Tech Valley Security on a full-time basis" (id.).

Applicant admits that Antoinette Murphy is the receiver of taxes and that she also owns and manages rental properties (CD1 at 40:25 [Murphy testimony regarding outside work]). Applicant, however, questions whether Ms. Murphy's outside work should preclude applicant from qualifying for WBE certification (CD1 at 27:45 [Wolfgang questioning of the Division' witness]).

The documentation before the Division at the time of its determination to deny the application provides substantial evidence that Antoinette Murphy does not devote time on an

ongoing basis to the daily operation of the business. Ms. Murphy's principal source of income is her salary as receiver of taxes, she also receives income from her management of rental properties that she owns, and she does not receive a salary from Tech Valley (see findings of fact ¶ 3). Further, the narrative that applicant provided to the Division states that Ms. Murphy will "meet with [Tech Valley] Staff as needed" and that her "[h]ours vary" (exhibit 5). In contrast, applicant's narrative states that Mr. Wolfgang is the "[f]ull time" CEO of Tech Valley (id.).

Applicant has failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that Antoinette Murphy does not devote time on an ongoing basis to the daily operation of the business enterprise as required by 5 NYCRR 144.2(b)(1)(iii).

Control: Control of Negotiations

The regulatory criterion states that the applicant must demonstrate that the women owners "control of negotiations . . . through production of relevant documents" (5 NYCRR 144.2[b][3]).

The Division argues that because all of the contracts that applicant provided between itself and its clients were signed by Robert Wolfgang, applicant failed to demonstrate through the production of documents that Antoinette Murphy controls negotiations (exhibit 2 at 3; CD1 at 27:55, 31:55).

Applicant asserts that Robert Wolfgang was authorized, as the CEO of Tech Valley, to sign contracts and that it is not unusual for a CEO to do so (CD1 at 47:40). Applicant also asserts that the narrative it provided to the Division in the application materials concerning the roles of Tech Valley personnel does not tell the entire story, and that Antoinette Murphy "was still the boss" (CD1 at 49:05). To demonstrate Ms. Murphy's control, applicant provided a letter it sent to the Capital District Transit Authority, dated April 24, 2017, stating that Antoinette Murphy had "directed" Mr. Wolfgang to "act as [her] Tech Valley contact" in relation to a contract bid (exhibit 9 at 14²).

I agree with applicant that the individual who signs a contract on behalf of a business is not necessarily the same individual who controls the contract negotiation. Nevertheless, in a small company such as Tech Valley the signature on its contracts does provide some indication of who controls negotiations for the business. This particularly true where, as here, the individual signing the contracts is the business's CEO. In addition to signing the contracts, Robert Wolfgang is also identified as the addressee or sender on the correspondence in the record relating to these contracts (see exhibit 4).

I note also that the narrative provided by applicant concerning the roles of Tech Valley personnel states that both Antoinette Murphy and another Tech Valley employee "[a]ssist with negotiating contracts" (exhibit 5 [emphasis supplied]). While, in contrast, the narrative states that Robert Wolfgang "[n]egotiate[s] contracts with Antoinette Murphy and [the other

² The April 24, 2017 letter post-dates the determination of the Division to deny Tech Valley's WBE application and was not before the Division at the time of the determination.

employee]" (id.). On the whole, I conclude that the application materials contain substantial evidence in support of the Division's determination on this issue.

Applicant failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that the documents produced by applicant do not show that Antoinette Murphy controls negotiations as required by 5 NYCRR 144.2(b)(3).

CONCLUSION

Applicant failed to meet its burden to demonstrate that the record lacks substantial evidence to support the Division's determination to deny Tech Valley's application on the bases of whether the woman owner, Antoinette Murphy, (i) makes decisions pertaining to the operations of the business enterprise (see 5 NYCRR 144.2[b][1]); (ii) has adequate managerial experience or technical competence to operate the business enterprise (see 5 NYCRR 144.2[b][1][i]); (iii) devotes time on an ongoing basis to the daily operation of the business enterprise (see 5 NYCRR 144.2[b][1][iii]); and (iv) controls negotiations (see 5 NYCRR 144.2[b][3]).

RECOMMENDATION

For the reasons stated herein, the determination of the Division to deny Tech Valley Security, Inc., certification as a women-owned business enterprise should be affirmed.

**Matter of Tech Valley Security
DED File ID No. 59830**

Exhibit List

| Exh. # | Description |
|---------------|---|
| 1 | Tech Valley WBE Application, submitted May 12, 2015 |
| 2 | Department WBE Denial Letter to Tech Valley, dated October 17, 2016 |
| 3 | Department of State, Private Investigator License issued to Tech Valley |
| 4 | Tech Valley executed contracts and related documents |
| 5 | Tech Valley narrative re: roles of key personnel |
| 6 | Department of State document identifying Robert Wolfgang as a "QUALIFYING Officer/Principal of TECH VALLEY SECURITY CORP a duly licensed PRIVATE INVESTIGATOR" |
| 7 | Resumes of Tech Valley key personnel |
| 8 | 2015 federal tax return for Antoinette Murphy |
| 9 | Bound folder of documents proffered by applicant, includes: Stock Transfer Ledger and related documents, MWBE application materials, employee earnings record (1/1/16-7/6/17), Tech Valley marketing brochure |