

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
625 BROADWAY
ALBANY, NEW YORK 12207

In the Matter

- of -

the Application of Protel Voice Data Security, Inc.
for Certification as a Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 65381

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
December 7, 2023

This matter considers the written appeal by Protel Voice Data Security Inc. (“PVDS” 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 October 16, 2018, PVDS applied for certification as a women-owned business enterprise (“WBE”). PVDS based its application on Ms. Tzvia Herbst and Ms. Malky Ilowitz. (DED Exhibit 1).
2. On June 4, 2021, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) The women owners relied upon for certification did not make capital contributions to the business enterprise proportionate to their equity interest therein as demonstrated by, but not limited to, contributions of money, property, equipment, or expertise (5 NYCRR § 144.2(b)(2);
 - (b) The women owners relied upon for certification do not possess adequate, industry-specific competence to make critical business decisions without relying upon other persons as required under 5 NYCRR § 144.2(c)(1); and
 - (c) The women owners relied upon for certification do not 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. PVDS submitted a request to appeal the denial determination, dated July 21, 2021. (DED Exhibit 3).
4. A Notice to Proceed Via Written Appeal was sent to PVDS on October 3, 2022 (DED Exhibit 4).
5. No additional materials or information were submitted by PVDS.
6. The Division filed an Affidavit of Raymond Emanuel, Director of Certification, dated August 15, 2023, and a brief of Amy H. O'Connor, Esq., counsel for the Division, dated August 16, 2023.

FINDINGS OF FACT

7. PVDS is a licensed security and communications systems installation and service company established in 2010. PVDS is licensed by New York State for the installation, servicing, or maintenance of security or fire alarm systems. The qualifier for PVDS is listed as Simon Herbst. (DED Exhibits 1 and 11).
8. Tzvia Herbst and Malky Ilowitz are the women owners relied upon for certification. Tzvia Herbst is the Director of Operations and owns 30% of PVDS. Malky Ilowitz is the Financial Officer/HR and owns 30% of PVDS. Henry Herbst and Charles Ilowitz are their non-eligible spouses, and each own 20% of PVDS. Mr. Herbst is a co-founder and Field Manager of PVDS and Charles Ilowitz is the Vice President. (DED Exhibits 1, 5-8, and Tribunal I).
9. The critical functions of the business include the installation and maintenance of remote surveillance systems, CCTV systems, and Private Business Exchange (PBE) telephone and voicemail systems. (DED Exhibit 1).
10. According to a narrative included with the application, Tzvia Herbst and Malky Ilowitz decided to establish a security and communications company in late 2009 as their husbands

were about to be laid off from other telecommunications companies. The business enterprise's first bank account was opened in February 2010 with a deposit of \$50 and additional deposits to fund new work were from customers. (DED Exhibit 9).

11. In response to a request for proof of capital contributions the applicant submitted bank statements that showed a beginning balance of \$50 and a deposit of \$16,743.15, made on March 4, 2010. No information regarding the source of the funds deposited was provided. Credit card statements were also submitted, in the name of Marky Ilowitz which appear to show business expenses, and auto loan statements from 2020 were also provided. The auto loan statements are for two vehicles and the borrower listed for both is PVDS. (DED Exhibits 12-14).
12. Tzvia Herbst has a degree in Speech and Language Pathology, is proficient with Microsoft Office products and her professional history, prior to establishing the applicant business, includes work as a Medicaid Service Coordinator for a family services center, and as a patient coordinator / medical escort for a women's community residence. Malky Ilowitz does not have a degree but has work experience in bookkeeping and data entry, and she is knowledgeable with Microsoft Office and QuickBooks. (DED Exhibits 5 and 6).
13. Tzvia Herbst's resume states that she manages and oversees the engineering and technical support team at PVDS, identifies organizational needs, researches and recommends equipment solutions, and oversees and manages service calls and scheduling. Malky Ilowitz's responsibilities at PVDS include payroll deposits, other financial management duties, and human resource responsibilities. (DED Exhibit 5 and 6).

14. Henry Herbst has a background in the installation and maintenance of security cameras, low voltage wiring and PBX systems. At PVDS he manages field staff, attends site meetings, provides technical support, and is a liaison with vendors and clients. (DED Exhibit 7).
15. Charles Ilowitz has 9 years of experience as a telecommunication engineer and is experienced in the installation and design of several communications systems, is certified on all Toshiba products, and is experienced with Qsig networking, and other networking systems. As the Vice President at PVDS he manages financial matters. (DED Exhibit 8).
16. The contract submitted with the application details the scope of PVCD's work and includes: the installation of audio equipment; phone systems; security systems; tech backbone; televisions, voice and data runs, and wifi systems. The contract is signed by Charles (Chaim) Ilowitz. (DED Exhibit 10).

APPLICABLE LAW

5 NYCRR § 144.2 (c)(1) states as follows:

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.

5 NYCRR § 144.2 (c)(2) states as follows:

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 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.

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 GPN Electric 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

The Division denied PVDS's application for certification as a WBE on the basis that PVDS failed to demonstrate that the parties relied upon for certification made capital contributions proportionate to their equity interest therein, as required by 5 NYCRR § 144.2(b)(2). (DED Exhibit 2). The Division interprets this regulation to require an applicant to demonstrate that the women owners contributed, "as demonstrated by, but not limited to, contribution of money, property, equipment, or expertise," in proportion "to their equity interest in the business enterprise." 5 NYCRR § 144.2(b)(2) and see *A.A.C. Contracting, Inc. v NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021). The applicant must substantiate that the source of the capital contribution is by the minority group member or woman owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, dated May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

The Applicant bears the burden in establishing that they have met this certification requirement. Failure to satisfy this burden is proof that the denial was supported by substantial evidence. See *A.A.C. Contracting, Inc. v. NYS Dept. of economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021).

Here, the only submission by the applicant is the letter requesting to appeal the denial determination. In this letter, Tzvia Herbst states that the capital funding for the business was obtained through an American Express Corporate card, and that the vehicles financed for the company were guaranteed by Tzvia Herbst and Malky Ilowitz. However, no other information was provided in relation to the credit lines used or the financing of the vehicles. (DED Exhibit 3). The

letter also states that both Tzvia Herbst and Malky Ilowitz have diverse experience in the business and services industries, however, no other information is provided regarding their experience, or its value, and they make no argument that their expertise should serve as a capital contribution. 5 NYCRR § 144.2(b)(2)(i) (DED Exhibit 3).

The Division argues that the applicant failed to provide documentation of any capital contribution by the woman owners. While the applicant identifies the \$50 opening deposit in the PVDS business account as the capital contribution, and an additional deposit in the amount of \$16,743.15 made to the same account, they provide no additional evidence as to the source of those funds, nor any evidence as to how the funds were repaid. (DED Exhibits 9 and 12). The Chase Ink Visa credit card statements submitted have Marky Ilowitz's name on the statements, however, the expenses on the credit card statement are not explained, and there is no evidence as to the source of the payment of those credit card bills. (DED Exhibit 13). (See, *Matter of Lida Strategic Solutions*, Recommended Order, Mar. 6, 2019 (Final Order 19-02, June 5, 2019) ["random expenses" on credit card statement without explanation do not demonstrate a capital contribution]). Proof as to the source of capital contributions, and in the case of a loan, proof of its repayment, including the source of the repayment, is required to establish that the women owners are the sources of the capital contribution. (See, *C&B Plumbing*, Recommended Order, Dec. 12, 2019 (Final Order 19-28, Dec. 9, 2019), *Atlantic Environmental Testing*, Recommended Order Aug. 5, 2016 (Final Order 16-38, Aug. 8, 2016), and *Matter of Mac Fhionnghaile & Sons Electrical Contracting*, Recommended Order, Nov. 16, 2017 (Final Order 18-01, Jan. 3, 2018 ["WBE program] intended to provide a benefit to women who undertake the financial risks of capitalizing a business themselves"])).

Based on the foregoing, I find that the applicant did not demonstrate that the women owners relied on for certification made capital contributions to PVDS in proportion to their ownership interests. Thus, the Division's determination that the parties relied upon for certification failed to demonstrate that they made a capital contribution to the business enterprise proportionate to their equity interest therein, as required under 5 NYCRR § 144.2(b)(2) is supported by substantial evidence.

II. Industry-Specific Competence

The Division denied PVDS's application for certification as a WBE on the basis that the applicant failed to demonstrate that, Tzvia Herbst and Malky Ilowitz, the women relied upon for certification, possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR § 144.2(c)(1). (DED Exhibit 2). "This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things." (5 NYCRR § 144.2(c)(1)). The Division interprets this regulation to require an applicant to demonstrate that the woman-owner, relied on for certification, have the working knowledge necessary to review or evaluate the work of more experienced employees. (See *In the Matter of Upstate Electrical, LLC v New York State Department of Economic Development*, 179 AD3d 1343 (3d Dept. 2020) citing to *C.W. Brown, Inc. v Canton*, 216 AD 841, 842 (1995) (where the Court affirmed the denial where the woman-owner had no training or experience in the industry to make her qualified to supervise the work of her employees.)) The Division consistently requires that women owners be able to perform the core revenue generating functions of the business enterprise. (See *Matter of Bore Tech LLC*, Recommended Order dated June 1, 2021 (Final Order 21-05, dated December 22, 2021), see also,

Matter of Occupational Safety & Environmental Assoc. Inc. v New York State Department of Economic Development, 161 AD3d 1582 (3d Dept. 2019)).

The Applicant bears the burden of establishing that the woman-owner relied upon for certification has met this requirement. Failure to satisfy this burden is proof that the denial was supported by substantial evidence. See *A.A.C. Contracting, Inc. v. NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021).

Here, the only additional information supplied by the applicant is in the request for appeal, from Tzvia Herbst. (DED Exhibit 3). In that letter, Ms. Herbst speaks of her and Malky Ilowitz's "diverse experience and expertise in business and in the service industry" but provides no details about their knowledge and expertise. (DED Exhibit 3). Further, Ms. Tzvia states that she and Ms. Ilowitz hired Henry Herbst and Charles Ilowitz, because of their expertise in "the telecom industry, to run [PVDS's] daily technical operations department," in effect affirming that she and Ms. Ilowitz do not have industry-specific competence. (DED Exhibit 3). No additional information or submissions regarding the women owner's technical skills, knowledge, or experience is provided.

The Division reviewed the information and documents submitted with the application and identified the products and services provided to clients of PVDS as the installation and service of security and communication systems. (DED Exhibits 1 and 10). The contract provided to the Division describes the scope of the work in that contract to include the installation and programming of audio equipment, cellular boosters, phone systems, CCTV, tech backbone, televisions, voice and data runs, wifi system, and SafeLoc. (DED Exhibit 10). In addition, the business is licensed for security and fire alarm installation, and the qualifying individual on the license is Simon Herbst, not Tzvia Herbst or Malky Ilowitz. (DED Exhibit 11).

Nowhere in the materials before the Division is there any evidence that either Tzvia Herbst or Malky Ilowitz have adequate, industry-specific competence in technical system programming and installation. Both women have backgrounds in either customer and community service, or in administrative work and bookkeeping. There is no evidence that either of the women have any expertise in the core functions of PVDS, and the request for appeal admits that they hired their husbands for that very expertise. (DED Exhibit 3). All the evidence presented indicates that the women owners' experience is purely in service and administration, while both Henry Herbst and Charles Ilowitz have experience and expertise directed towards the core business functions of PVDS. Businesses where the non-eligible spouse has the education and expertise to perform the specialized work and the owner spouse relied upon for certification handles the administrative aspects is considered a family-owned business, which does not meet the criteria for WBE certification. (*Matter of Occupational Safety, supra* at 1583). Thus, the Division's determination that the parties relied upon for certification do not possess adequate, industry-specific competence to make critical business decisions without relying on others, as required under 5 NYCRR § 144.2(c)(1) is supported by substantial evidence.

III. Operation

The Division also denied PVDS's application for certification as a WBE on the basis that the applicant failed to demonstrate that Tzvia Herbst and Malky Ilowitz, the women-owners relied upon for certification, make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise as required by 5 NYCRR § 144.2(c)(2). According to the regulation, the critical functions of the business enterprise shall be determined by the Division based upon, but not limited to, the following factors: (1) "The products or services the business enterprise provides to clients; and" (2) "The means by which the business enterprise obtains

contracts or orders.” 5 NYCRR § 144.2 (c)(2). The Division consistently denies certification where the woman-owner has no training, experience, or working knowledge in the core business functions and other employees or owners have more significant or substantive experience, and exercise that experience, such as by supervising or controlling field operations. (*Matter of Panko Electrical and Maintenance Corp. v Zapata et. al*, 172 AD3d 1682 (3d Dept. 2019), see also *Matter of Upstate Electrical, supra*).

In its evaluation, the Division reviewed, in addition to the application, a contract of PVDS to determine what products and services PVDS provides to clients. (DED Exhibits 1 and 10). The application describes PVDS’s business as including “Cloud based NVR Solutions, Remote Viewing Surveillance Systems, Indoor/outdoor/thermal surveillance, Hybrid video solutions, and Advanced IP CCTV Systems” among other video and surveillance products and services. (DED Exhibit 1). The contract submitted with the application, provides that the scope of work for PVDS includes the installation and programming of audio equipment, cellular boosters, hone systems, CCTV, tech backbone, televisions, voice and data runs, wifi system, and SafeLoc. (DED Exhibit 10). Thus, the Division determined that the critical functions of PVDS to be that of a licensed security and communication installer and service company. (DED Exhibits 1 and 2).

The Division argues that resumes of the women owners make clear, that neither make daily operational decisions with respect to the critical functions of security system and telecommunications programming, installation, and service in the field. Ms. Herbst’s duties are to manage and oversee support teams, plan and develop efficiency systems, research equipment solutions, organization, and handle service calls and scheduling. (DED Exhibit 5). Ms. Ilowitz’s responsibilities are listed as payroll, deposits, account reconciliation, human resources, and cash/card handling, and are clearly financial administrative duties only. (DED Exhibit 6). All the

responsibilities handled by Ms. Herbst and Ms. Ilowitz are administrative and not industry specific, and as such are not related to the critical functions of the business enterprise.

By contrast, the non-eligible owners Henry Herbst and Charles Ilowitz are the persons at PVDS who make decisions on a day-to-day basis with respect to the critical functions of the business which take place in the field. Mr. Herbst is the field supervisor and as evidenced by the signatory to the contract included with the application, Charles Ilowitz is involved in the negotiation and signing of contracts. (DED Exhibit 10). Further, the women owners relied upon for certification have presented no evidence that they have the expertise or training to make operational decisions relating to the critical functions of the business.

It is well settled that where the owner relied upon for certification has no training or experience in the critical functions of the business enterprise and others, with more significant experience, such as an employee or non-qualifying owner, actively engage in the core functions of the business, denial based on lack of operational control is appropriate. (See *Matter of Panko, supra*, and *Matter of Upstate Electrical, supra*). Here, the evidence presented establishes, unequivocally, that both Tzvia Herbst and Malky Ilowitz's roles at PVDS are administrative while their non-eligible spouses are responsible for the day-to-day operations of the business enterprise.

Based on the foregoing, I find that the Division's determination that PVDS has not demonstrated that the women owners relied upon for certification 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) is supported by substantial evidence.

CONCLUSION

PVDS 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)(2), 144.2(c)(1), and 144.2(c)(2) was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny PVDS's application for certification as a woman-owned business enterprise should be affirmed.

In the Matter of Protel Voice Data Security, Inc.
 DED File ID No. 65381
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Certification	Y	Y
DED 2	Denial Determination	Y	Y
DED 3	Request to Appeal	Y	Y
DED 4	Notice to Proceed by Written Appeal Submission	Y	Y
DED 5	Resume of Tzvia Herbst	Y	Y
DED 6	Resume of Malky Ilowitz	Y	Y
DED 7	Resume of Henry Herbst	Y	Y
DED 8	Resume of Charles Ilowitz	Y	Y
DED 9	Start of Business Narrative	Y	Y
DED 10	Met 500 Contract	Y	Y
DED 11	Security/Fire Alarm Installation License	Y	Y
DED 12	Sovereign/Santander Bank Statements	Y	Y
DED 13	Chase Ink Visa Statements	Y	Y
DED 14	Ally Auto Bank Statements	Y	Y
TRIBUNAL 1	Application for Certification - Complete	N	Y