

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

In the Matter

- of -

the Application of FIS Blue, Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 51808

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
February 1, 2024

This matter considers the written appeal by FIS Blue, Inc. (“FIS” 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 September 16, 2022, Ms. Valerie Sitler, as President and CEO, applied on behalf of FIS for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On April 21, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women must not be encumbered in their ability to realize the benefits of ownership of the business enterprise for which certification is sought, or subject to undue restrictions against alienating such ownership interests, as required under 5 NYCRR §144.2(b)(4);
 - (b) Minority group members or women relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors, as required under 5 NYCRR §144.2(d)(1);
and
 - (c) The business enterprise does not operate independently, as required under 5 NYCRR § 144.2(e).
3. FIS timely filed a Request to Appeal on April 28, 2023 (APP Exhibit A).

4. A notice to proceed via written appeal was sent to FIS on May 6, 2023 (DED Exhibit 4).
5. FIS filed its written appeal by letter dated June 19, 2023, with attachment (APP Exhibit B).
6. The Division filed an Affidavit of Eugenio Alcantara, Certification Director, dated November 9, 2023, and a brief of Candace Williamson Esq., counsel for the Division, dated November 10, 2023.

FINDINGS OF FACT

7. FIS is a manufacturer and supplier of fiber optics with broadcast and military harsh environment applications (DED Exhibit 1).
8. Ms. Valerie Sitler is the President and CEO and has a 51% ownership interest. Her father, Mr. Frank Giotto, is the Vice President and has a 49% ownership interest (DED Exhibit 1).
9. The Board of Directors consists of Ms. Sitler, Mr. Giotto, and Mr. Kirshtein, Attorney (DED Exhibit 1).
10. Article II, Section 4 of the Bylaws states “The Board of Directors shall have the control and general management of the affairs and business of the Corporation...”. Article II, Section 7 states “At any meeting of the Board of Directors... a majority of the Board of Directors shall constitute a quorum for the transaction of business.” Article II, Section 9 states “...the affirmative vote of a majority of the Directors present at any meeting of the Board of Directors at which a quorum is present shall be necessary for the transaction of any item of business thereat.” Article III, Section 3 states “Any officer elected by the Board of Directors may be removed, with or without cause, and a successor elected, by a vote of the Board of Directors.” (DED Exhibit 4).
11. FIS lists Fiber Instrument Sales, Inc. as the business entity it is affiliated with. Fiber Instrument Sales, Inc. was founded by Mr. Giotto, the nonqualifying owner of FIS. Both

entities are registered at the same address, 161 Clear Road, Oriskany, New York. FIS leases the space from Horsht, LLC, at the same address, with Mr. Giotto signing as the landlord, showing that Mr. Giotto leases the space to FIS. FIS and Fiber Instrument Sales, Inc. share personnel. Mr. Giotto is 100% owner of Fiber Instrument Sales, Inc. and serves on its Board along with Ms. Sitler. The businesses have entered into an Agreement for Provision of Corporate Services whereby FIS relies on Fiber Instrument Sales, Inc. to serve as its “agent”, and for the following services: Financial, IT, Treasury, Human Resource, Legal and Corporate Secretary. (DED Exhibits 1, 6, 7 and 8).

APPLICABLE LAW

5 NYCRR §144.2(b)(4) states as follows:

Customary incidents of ownership. Minority group members and women relied upon for certification must not be encumbered in their ability to realize the benefits of ownership of the business enterprise for which certification is sought, or subject to undue restrictions against alienating such ownership interests.

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

(1) Control of business management. A minority group member or woman relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors or serve as a general partner. Any agreements describing the management of the business enterprise shall be consistent with the foregoing.

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 FIS 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

NYCRR §144.2(b)(4) requires that the woman-owner must not be encumbered in her ability to realize the benefits of ownership of the business enterprise and/or be subject to undue restrictions against alienating such ownership interest.

The Board of Directors consists of Ms. Sitler, Mr. Giotto, and Mr. Kirshtein (DED Exhibit 1). Article II, Section 4 of the Bylaws states “The Board of Directors shall have the control and general management of the affairs and business of the Corporation...”. Article II, Section 7 states “At any meeting of the Board of Directors... a majority of the Board of Directors shall constitute a quorum for the transaction of business.” Article II, Section 9 states “...the affirmative vote of a majority of the Directors present at any meeting of the Board of Directors at which a quorum is present shall be necessary for the transaction of any item of business thereat.” Article III, Section 3 states “Any officer elected by the Board of Directors may be removed, with or without cause, and a successor elected, by a vote of the Board of Directors.” (DED Exhibit 4). Since a majority vote of the Directors present at any meeting is required to transact business, Ms. Sitler does not have control over the Board.

Applicant argues on appeal that “Ms. Sitler conducts business on her own, without input from either Mr. Giotto or Mr. Kirshtein” and “Neither Mr. Giotto nor Mr. Kirshtein have ever voted to restrict such power.” (APP Exhibit B). This argument is not persuasive as the bylaws control the operation of the business. Ms. Sitler does not have control over decisions made by the Board since those decisions require the vote of a majority of the Directors.

Applicant concedes that the bylaws are not an accurate reflection of how the business is run and claims that amendments to the bylaws are being made (APP Exhibit B). This is new information that was not before the division at the time of the denial determination and therefore will not be considered. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3rd Dept. 2021).

FIS is managed by the Board of Directors. The Board determines the duties and authority of all officers. The President is subject to the Board’s control. (DED Exhibit 4). Therefore, Ms. Sitler does not control the Board.

The Division's determination to deny the application on the basis that FIS failed to demonstrate that Ms. Sitler is not encumbered in her ability to realize the benefits of ownership of the business and/or be subject to undue restrictions against alienating such ownership interest, as required under 5 NYCRR §144.2(b)(4), is supported by substantial evidence.

II. Control

The Division also denied certification on the ground that Ms. Sitler is not the highest-ranking officer and does not control the board of directors, as required under 5 NYCRR §144.2(d)(1).

As stated above, FIS is managed by the Board of Directors. Ms. Sitler, as President and CEO, is the highest-ranking officer, however, she serves at the pleasure of the Board (DED Exhibit 4). Any officer, including Ms. Sitler, may be removed with or without cause by a majority vote of the Board. Therefore, she does not have the power to independently control the Board.

On appeal, applicant states that Ms. Sitler "does not look to the Board for approval in the operation of the business" (APP Exhibit B). Again, however, the bylaws control the operation of the business, and Ms. Sitler does not have independent control over the decisions of the Board, which require a vote of the majority of the Directors. (DED Exhibit 4)

The Division's determination to deny the application on the basis that FIS failed to demonstrate that Ms. Sitler is the highest-ranking officer and/or controls the board of directors, as required under 5 NYCRR §144.2(d)(1), is supported by substantial evidence.

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

A company failed to demonstrate that it operated independently of any other entity when the documents demonstrated the Applicant business provided the same services as the entity with which it provided work for, and with whom it shared resources, business offices, and staff members. *Matter of Acme Lightning Rod, LLC*, Recommended Order dated February 25, 2020, Final Order 20-02 dated April 21, 2020.

FIS lists Fiber Instrument Sales, Inc. as the business entity it is affiliated with. Fiber Instrument Sales, Inc. was founded by Mr. Giotto, the nonqualifying owner of FIS. Both businesses manufacture and supply fiber optics, but Fiber Instrument Sales, Inc. does not service the military and broadcast sectors (DED Exhibits 1 and 6). Both entities are registered at the same address, 161 Clear Road, Oriskany, New York. FIS leases the space from Horsht, LLC, at the same address, with Mr. Giotto signing as the landlord, showing that Mr. Giotto leases the space to FIS. FIS and Fiber Instrument Sales, Inc. share personnel. Mr. Giotto is 100% owner of Fiber Instrument Sales, Inc. and serves on its Board along with Ms. Sitler. The businesses have entered into an Agreement for Provision of Corporate Services whereby FIS relies on Fiber Instrument Sales, Inc. to serve as its “agent”, and for the following services: Financial, IT, Treasury, Human Resource, Legal and Corporate Secretary. (DED Exhibits 1, 6, 7 and 8).

On appeal, applicant states that although there is sharing of resources, FIS is independent from Fiber Instrument Sales, Inc. and although the business address is the same for both businesses, the building is a complex that houses several businesses. Applicant states that FIS retains its own IT company for computer services, and has its own salespeople, office staff, manufacturing employees, and accounting staff. However, applicant concedes that Fiber Instrument Sales, Inc. does provide corporate services, human resource services, financial services, legal services, and quality management services, which FIS pays for (APP Exhibit B).

However, not only are the two businesses engaged in providing fiber optics to its customer base, the persons in control of the businesses are also shared between the businesses – Ms. Sitler, Mr. Giotto, and Mr. Kirshtein. Also, FIS rents space from Fiber Instrument Sales, Inc., pays them to provide corporate services, and shares employees (DED Exhibits 1, 6, 7 and 8).

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

CONCLUSION

FIS 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)(4), 144.2(d)(1) 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 FIS’ application for certification as a woman-owned business enterprise.

In the Matter of FIS Blue, Inc.
DED File ID No. 51808
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	FIS Blue, Inc. Bylaws	Y	Y
DED 5	Meeting Minutes	Y	Y
DED 6	Narrative Provided by FIS Blue, Inc.	Y	Y
DED 7	Lease Agreement	Y	Y
DED 8	Agreement of Corporate Services	Y	Y