

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

In the Matter

- of -

**the Application of Teaching & Learning Consultants, Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 58355

RECOMMENDED ORDER

-by-



**David Murad
Administrative Law Judge
May 18, 2023**

This matter considers the written appeal by Teaching & Learning Consultants, Inc., (“TLC” 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 May 26, 2017, Ms. Bernadette Cleland, as president, applied on behalf of Teaching & Learning Consultants, Inc. for recertification as a woman-owned business enterprise (DED Exhibit 1).
2. On July 31, 2020, the Division denied the application on the grounds that TLC failed to demonstrate that it is an independent business enterprise, as it shares office space, contracts, and contact information with another business enterprise, namely Miller Educational Consulting Services, Inc. (DED Exhibit 2).
3. TLC timely filed a notice of appeal on August 26, 2020 (APP Exhibit 1).
4. A notice to proceed by written appeal was sent to TLC on September 14, 2020 (DED Exhibit 3).
5. TLC submitted its written appeal by letter dated October 6, 2020 (APP Exhibit 2).
6. The Division filed an Affidavit of Amanda Brennan, Project Director dated January 27, 2023, and a brief of Dennie Byam, Esq., counsel for the Division, dated February 2, 2023.

FINDINGS OF FACT

1. TLC is an educational consulting business that offers school districts programming development and support as well as professional development training (DED Exhibit 1).
2. Ms. Bernadette Cleland is the president of TLC and has a 100% ownership interest (DED Exhibit 1).
3. According to the applicant's website, Albert Duffy Miller and Bernadette Cleland are listed as cofounders of Teaching Learning Solutions (APP Exhibit 2).
4. The applicant shares office space with Miller Educational Consulting Services, Inc. ("MEC") which is 100% owned by Mr. Miller (DED Exhibit 1).
5. In 2019, the applicant received 60% of her work from MEC (DED Exhibit 2),
6. In prior years, the applicant received 40% of her revenue from MEC (DED Exhibit 2).
7. TLC, MEC and Teaching Learning Solutions all share the same address (DED Exhibits 2, 12 and 14).
8. MEC entered into contracts d/b/a/ Teaching Learning Solutions (DED Exhibits 7 and 9).
9. MEC entered into subcontractor agreements with TLC (DED Exhibits 4 and 8).

APPLICABLE LAW

5 NYCRR former § 144.2 (a)(2) states as follows:

(2) the business enterprise must demonstrate that it is an independent, continuing entity which has been actively seeking contracts or orders and regularly and actively performing business activities.

5 NYCRR former § 144.2 (c)(2) states in relevant part as follows:

(2) an eligible minority group member or woman applicant must be an independent business enterprise.

In 2020, 5 NYCRR §§ 140-145 were amended, updating the regulations and clarifying the Division's interpretations of its regulations. See 2020 NY REG TEXT 548304 (NS).

Current 5 NYCRR § 144.2 (e) states as follows:

(e) 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 TLC for recertification 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 or 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)).

Accordingly, applicant's attachments A, B and C will not be considered (APP Exhibit 2).

DISCUSSION

The Division denied TLC's application for recertification as a WBE on the basis that TLC failed to demonstrate that it is an independent business enterprise, as required by 5 NYCRR former 144.2(a)(2) and 5 NYCRR former 144.2(c)(2) (DED Exhibit 2).

The Division examined TLC's contracts and found that for the three largest accounts for which TLC provided services over the two-year period, TLC was not the contractor nor paid directly from the organization. TLC was paid by Miller Educational Consulting Services, Inc. (MEC). Evidence in the record establishes that MEC entered into the contracts d/b/a/ Teaching Learning Solutions and subsequently MEC entered into subcontractor agreements with TLC (DED Exhibits 4-10).

The Division also reviewed the applicant's website and found that the website is for Teaching Learning Solutions and not Teaching & Learning Consultants. According to the "Our Team" section of the applicant website, Albert Duffy Miller and Bernadette Cleland are listed as co-founders of Teaching Learning Solutions. Although the applicant argued that Teaching Learning Solutions is a trade name that both TLC and MEC use when applying for contracts that would include both companies, the applicant applied for WBE status as Teaching & Learning Consultants, a separate entity. In addition, the contracts were entered into by MEC d/b/a/ Teaching Learning Solutions and not the applicant (DED Exhibits 2 and 7).

The one contract that applicant provided in the name of Teaching and Learning Consultants evidences the website as www.teachinglearningsolutions.com and email as ████████@teachinglearningsolutions.com. In fact, applicant used this email address to communicate

with the division and listed it on her certification application. Accordingly, the applicant's business website and methods of communication with the division have no reference to Teaching & Learning Consultants (DED Exhibits 1 and 14).

The Division also found that TLC shares office space with MEC and that MEC, Teaching Learning Solutions and TLC all share the same address. Additionally, the applicant derived 60% of her work from MEC in 2019 and 40% of her revenue from MEC in prior years (DED Exhibits 2, 12 and 14).

Accordingly, the sharing of contracts, office space and contact information demonstrates that TLC is not an independent business. The record before the division at the time of its determination to deny the WBE application contains substantial evidence to support its finding that TLC is not an independent business enterprise as required under 5 NYCRR former 144.2(a)(2) and 5 NYCRR former 144.2(c)(2).

RECOMMENDATION

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

In the Matter of Teaching & Learning Consultants, Inc.
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 Exhibit Chart

Exhibit #:	Description of the Exhibits
DED 1	Application for Recertification – 5/26/2017
DED 2	Denial Letter – 7/31/2020
DED 3	Notice to Proceed via Written Appeal – 9/14/2020
DED 4	LAUSD Subcontractor Agreement – 1/1/2017
DED 5	LAUSD Agreement – 9/13/2017
DED 6	LAUSD Certification Forms – 6/14/2017
DED 7	Gwinnett County Public Schools Agreement – 3/20/2018
DED 8	HI DOE Subcontractor Agreement - 4/1/2018
DED 9	HI DOE Supplemental Contract - 2/20/2019
DED 10	Miller Educational Consulting Payout Report
DED 11	Narrative Response to Question 11
DED 12	BOCES Contract with Teaching & Learning Consultants, Inc.
DED 13	BOCES Invoice
DED 14	6/9/2020 Emails
APP 1	Applicant's Notice of Appeal – 8/26/ 2020

APP 2

Applicant's Appeal letter – 10/6/2020