

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

In the Matter

- of -

the Application of **Research Works, Inc.**
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 58874

RECOMMENDED ORDER

- by -



Daniel P. O'Connell
Administrative Law Judge

June 22, 2016

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 Research Works, Inc. (Research Works or applicant) certification as a woman-owned business enterprise (WBE) be reversed, for the reasons set forth below.

PROCEEDINGS

In its denial letter dated November 6, 2015 (*see* WBE Exh. 2), the Division determined that Research Works does not meet the eligibility requirements to be certified as a woman-owned business enterprise, and denied Research Works's application (*see* WBE Exh. 1). According to the Division, Research Works did not demonstrate that the woman owner enjoys the customary incidents of ownership and shares in the risks and profits in proportion with her ownership interest in the enterprise (*see* 5 NYCRR 144.2[c][2]). This matter considers the December 4, 2015 appeal by Research Works (*see* WBE Exh. 4), 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. The appeal challenges the Division's November 6, 2015 determination.

By notice of appeal dated December 4, 2015 (*see* WBE Exh. 4), Research Works requested a hearing. By letter dated March 4, 2016, the Division scheduled the hearing for April 26, 2016 at 11:00 a.m. at the Division's offices at 625 Broadway, Eighth Floor, Albany, New York 12207 (*see* WBE Exhibit 3). The hearing convened as scheduled. At the hearing, Research Works was represented by its President, Kathleen Toms, Ph.D. During the hearing, Dr. Toms and Michael S. Lurie testified on behalf of applicant. Mr. Lurie is a Certified Public Accountant, and is President of Lurie & Co., PC.

Craig Alfred, Esq., Assistant Counsel, New York State Department of Economic Development, represented the Division. Matt LeFebvre testified on behalf of the Division. Mr. LeFebvre is a Senior Certification Analyst with the Division.

The hearing was recorded. On May 24, 2016, the Office of Hearings and Mediation Services (OHMS) of the New York State Department of Environmental Conservation received copies of the audio compact disks (CD1 and CD2), whereupon, the record of the hearing closed.

In addition to the testimony of the witnesses identified above, the parties offered a number of exhibits (WBE Exh. 1-11). All exhibits offered at the hearing were received into evidence (CD2 00:11:57). An exhibit list is attached to this recommended order.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are established by regulation (*see* 5 NYCRR 144.2). To determine whether an applicant should

be granted WBE status, the Division assesses the ownership, operation, and control of the business enterprise 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, information presented in supplemental submissions and, if appropriate, from interviews conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, Research Works, as applicant, bears the burden of proving that the Division's denial of its WBE certification 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

Research Works Industries, Inc.

Dr. Toms serves as the President of the Board of Directors of Research Works. Research Works is a business-purposed, not-for-profit corporation that provides research, evaluation and technical assistance to high-need, high-risk clients in the public education sector (CD1 00:39:14; *see also* WBE Exh. 1 at 3).

Research Works argues that the basis cited for the denial is without merit, and responded with a summary basis of the appeal in the December 4, 2015 notice of appeal (*see* WBE Exh. 4). First, Research Works addresses the applicable ownership criteria outlined at 5 NYCRR 144.2(a)(1)-(5). Second, Research Works addresses the control criteria outlined at 5 NYCRR 144.2(b)(1)-(3). Finally, with respect to the additional requirements outlined at 5 NYCRR 144.2(c), Research Works refers back to the information presented with respect to 5 NYCRR 144.2(a) and (b). Research Works contends that it meets all applicable requirements to be certified as a woman-owned business enterprise.

The Division

According to the Division, the woman owner of Research Works does not enjoy the customary incidents of ownership and does not share in the risks and profits, in proportion to her ownership interest in the business enterprise. The bases for the denial of the WBE certification application filed by Research Works are the terms and conditions in the certificate of incorporation (WBE Exh. 5), and the bylaws (WBE Exh. 6). Upon dissolution of the corporation, the certificate of incorporation requires all remaining assets and property to be distributed to either another not-for-profit organization, or a state or local government for a public purpose (*see* WBE Exh. 5 at ¶ 5). The bylaws prohibit Class A members from selling or transferring their interest in the corporation (*see* WBE Exh. 6 § 2.5).

FINDINGS OF FACT

1. Research Works, Inc., has business offices located at 40 Garden Street, Suite 201, Poughkeepsie, New York 12601-3135. Research Works provides research, evaluation and technical assistance to high-need, high-risk clients in the public education sector. Research Works is a Type C business-purposed, not-for-profit corporation (*see* Not-for-Profit Corporation Law [N-PCL] §§ 102[a][5] and 201¹), rather than a charity. Research Works was formed in March 2003. (CD1 00:39:14, 00:42:30; *see also* WBE Exh. 1 and 5 at ¶ 4.)
2. Kathleen Toms, Ph.D., is the President of the Board of Directors of Research Works (*see* WBE Exh. 1; CD1 00:39:14). The President is the Chief Executive Officer of the corporation (*see* WBE Exh. 6 § 4.2; CD1 00:44:06).
3. The Board of Directors for Research Works consists of Kathleen Toms as President, Susan Pujdak as Treasurer, and Sarah Toms as Secretary. All members of the Board of Directors are women. (*See* WBE Exh. 1, 4 at 2.) Pursuant to the bylaws, Research Works is organized on a membership basis and does not issue any stock (*see* WBE Exh. 6 § 2.1; *see also* WBE Exh. 1 at 2-3). The terms of the bylaws provide for two classes of members. The number of Class A members are limited to three, and are identified above. Class A members have voting rights. Class B members have no voting rights. (*See* WBE Exh. 6 §§ 2.2 and 3.5) Based on the record of this proceeding, it is not known whether Research Works has any Class B members and, if so, who they are.
4. According to the bylaws for Research Works, Class A members are prohibited from selling or transferring their interest (*see* WBE Exh. 6 § 2.5). In addition, Research Works cannot distribute any net earnings to its members, officers, or other private persons pursuant to the terms of the certificate of incorporation (*see* WBE Exh. 5 at ¶ 5). Research Works, however, may pay reasonable compensation for services rendered by its officers and employee. (*See* WBE Exh. 6 § 9.1.) The President has the authority to appoint and discharge employees and to fix their salaries, subject to review by the Board of Directors (*see* WBE Exh. 6 § 4.2; CD1 00:48:39).
5. The fifth paragraph of the certificate of incorporation for Research Works states, in part, that in the event of dissolution, all of the remaining assets and property must be distributed to either another not-for-profit organization, or a state or local government for a public purpose (*see* WBE Exh. 5 ¶ 5; CD1 00:12:09.)
6. Although Research Works is a business-purposed, not-for-profit corporation, it pays federal and State income taxes (CD1 00:44:48; *see also* WBE Exhs. 7 [US Corporation Income Tax Return, Form 1120, Tax year 2011], 8 [US Corporation Income Tax Return, Form 1120, Tax year 2012], 9 [US Corporation Income Tax Return, Form 1120, Tax year 2013], and 10 [US Corporation Income Tax Return, Form 1120, Tax year 2014]). For tax

¹ Effective prior to July 1, 2014.

purposes, Research Works pays taxes in a manner similar to any C or S Corporation (CD1 00:44:48, 00:57:27; CD2 00:00:41; *see also* WBE Exh. 11).

7. Exhibits 7, 8, 9, and 10 are copies of US Corporation Income Tax Returns (IRS Form 1120) for 2011, 2012, 2013 and 2014. These exhibits also include New York State returns for the same years. In 2011, applicant filed a return with New Jersey. Line 12 on IRS Form 1120 reports the compensation of the officers from Form 1125-E, line 4. On Exhibits 7, 8, 9, and 10, Kathleen Toms is the only officer identified on Form 1125-E. (*See* WBE Exh. 7, 8, 9, and 10.)
8. Kathleen Toms is the sole guarantor for loan agreements and credit agreements (*see* WBE Exh. 4 at 3). In February 2013, Dr. Toms secured a loan for [REDACTED] on behalf of applicant, and is responsible for its repayment (*see* WBE Exh. 1 at 2). (CD1 00:44:48.)
9. By letter dated November 6, 2015, the Division denied Research Works's application for certification as a woman-owned business enterprise (*see* WBE Exh. 2).

DISCUSSION

This report considers Research Works's appeal from the Division's determination to deny certification of Research Works as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The discussion that follows first addresses the procedural issue raised by Research Works. The discussion then turns to the basis for the Division's denial.

I. Research Works's Procedural Objection

During the hearing, Dr. Toms explained the difficulties that Research Works experienced while attempting to file an application for WBE certification. To begin the online application process on the Division's website, applicants must complete a survey. Dr. Toms said that Question No. 9 inquires whether the applicant is a not-for-profit organization. When Dr. Toms responded in the affirmative to Question No. 9, her access to the online application was terminated. (CD2 00:06:00.) Subsequently, Dr. Toms spoke with staff from the Division who advised her that not-for-profits are not eligible for WBE certification (CD2 00:04:16). Eventually, Dr. Toms obtained permission from Division staff to respond to Question No. 9 in the affirmative, which allowed Research Works to complete the online application for WBE certification, and to provide additional documentation to support the application (CD2 00:06:53).

Section 314 of Executive Law Article 15-A directs the Director of the Division of Minority and Women's Business Development to promulgate rules and regulations to implement the certification program for minority and woman-owned business enterprises. Pursuant to 5 NYCRR 140.1(c), a business enterprise is defined as an entity authorized to engage in lawful business transactions in accordance with New York law. As expressly stated in the regulatory definition, business enterprises include not-for-profit corporations (*see* 5 NYCRR 140.1[c]).

Based on the regulatory definition at 5 NYCRR 140.1(c), it appears that the Division's initial survey, as described during Dr. Toms's testimony (CD2 00:04:16-00:06:53), impedes the

application process for those business enterprises that respond to Question No. 9 in the affirmative. With respect to the captioned matter, applicant's persistence eventually led Research Works to obtain access to the online application for WBE certification. Whether, and if so how, the initial screening survey should be amended to better comply with the regulatory definition of the term, *business enterprise*, is beyond the scope of this proceeding.

II. Division's Denial

The standards for determining whether an applicant is eligible to be certified as a woman-owned business enterprise are outlined at 5 NYCRR 144.2. Of these criteria, the Division identified only the standard outlined at 5 NYCRR 144.2(c)(2) as the basis for the denial (*see* WBE Exh. 2). The criterion at 5 NYCRR 144.2(c)(2) requires an applicant to demonstrate that the woman owner enjoys the customary incidents of ownership and shares in the risks and profits, in proportion to her ownership interest in the business enterprise. The Division identified no other eligibility criteria outlined at 5 NYCRR 144.2 to be at issue in this proceeding.

The Division's witness explained that a purpose of the certification program is to assure that woman owners can benefit without restriction from the ownership in the applicant enterprise. With reference to Research Work's certificate of incorporation (WBE Exh. 5) and its bylaws (WBE Exh. 6), the Division's witness explained that the woman owner of Research Works does not enjoy the customary incidents of ownership, and does not share in the risks and profits, in proportion to her ownership interest in the business enterprise, because the woman owner cannot receive any distributions of the assets or the property upon the dissolution of the business enterprise (CD1 00:10:59, 00:12:37). When, as here, the woman owner cannot sell the business enterprise or otherwise transfer ownership in the business, the Division's witnesses concluded that Dr. Toms does not share in the risks and profits of Research Works (CD1 00:13:35).

I conclude, however, that the Division's evaluation of the eligibility criterion outlined at 5 NYCRR 144.2(c)(2) as applied to this applicant is irrational because Research Works cannot, as a matter of law, conduct any activities for pecuniary profit or financial gain (*see* N-PCL § 204). Consequently, applicant's certification of incorporation and its bylaws comport with certain legal limitations related to the ownership and transferability of all business assets. Because the Division failed to consider the legal limitations of the business enterprise in its evaluation of applicant's ability to comply with this eligibility criterion, the Division's March 4, 2016 denial is not adequately supported.

With respect to the pending application, Research Works must demonstrate compliance with the eligibility criterion outlined at 5 NYCRR 144.2(c)(2). Based on the following, I conclude that Dr. Toms, as the woman owner of Research works, enjoys the customary incidents of ownership and shares in the risks and profits, in proportion to her ownership interest in the business enterprise. As the sole guarantor for loan agreements and credit agreements, Dr. Toms, shares exclusively in any risks associated with operating Research Works. If Research Works dissolves before Dr. Toms satisfies the terms and conditions of any outstanding loan or credit agreements, she could not rely on any corporate assets, subsequent to dissolution, as a potential source of revenue to meet any outstanding obligations. Indeed, this circumstance may limit the

ability of the business enterprise to obtain loans and negotiate credit agreements. In this regard, Dr. Toms may incur greater risks, as the woman owner of Research Works, when attempting to secure future loan and credit agreements than her counterparts who own and operate for-profit corporations.

In addition, Dr. Toms has an incentive to enjoy the benefits currently associated with the business enterprise, given its corporate structure, because the continued, successful operation of Research Works is necessary to sustain Dr. Tom's source of income and that of her employees. Short of forming a successor not-for-profit corporation, pursuant to the Not-for-Profit Corporation Law, as well as the terms and conditions of the bylaws for Research Works, Dr. Toms would lose the ownership benefits associated with her salary.

CONCLUSIONS

1. Research Works complies with the eligibility criterion outlined at 5 NYCRR 144.2(c)(2) because Dr. Toms, as the woman owner of Research Works, enjoys the customary incidents of ownership and shares in the risks and profits, in proportion to her ownership interest in the not-for-profit business enterprise to the extent allowed by the Not-for-Profit Corporation Law.
2. To the extent that Kathleen Toms continues to serve as President of the Board of Directors, Research Works complies with the applicable eligibility criteria outlined at 5 NYCRR 144.2.
3. Research Works, as applicant, has met its burden of proof to show that the Division's denial of its WBE certification is not supported by substantial evidence.

RECOMMENDATION

For the reasons set forth above, the Division's determination to deny Research Works's application for certification as a woman-owned business enterprise should be reversed.

Attachment: Exhibit List

Division of Minority and Women's Business Development

Exhibit Chart
Matter of Research Works, Inc.
April 26, 2016

Exhibit No.	Description
1	Application filed by Research Works, Inc. (App No. 341232 [10 pages])
2	Division's November 6, 2015 denial letter
3	Division's Notice of Hearing dated March 4, 2016
4	Research Works, Inc.'s Notice of Appeal dated December 4, 2015
5	Certificate of Incorporation of Research Works, Inc. dated March 7, 2003
6	By-Laws of Research Works, Inc. A Non-Profit Corporation
7	US Corporation Income Tax Return Form 1120 Tax Year 2011
8	US Corporation Income Tax Return Form 1120 Tax Year 2012
9	US Corporation Income Tax Return Form 1120 Tax Year 2013
10	US Corporation Income Tax Return Form 1120 Tax Year 2014
11	Letter dated June 2, 2104 from Michael S. Lurie, CPA, Lurie & Co., PC To Michelle Almeida, Esq., Iseman, Cunningham, Riester & Hyde, LLP.