

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

In the Matter

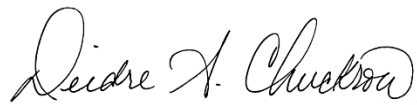
- of -

the Application of JMK ACOUSTICS COMPANY INC.
for Certification as a Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 72942

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
September 4, 2025

This matter considers the written appeal by JMK Acoustics Company Inc. (“JMK” 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 23, 2024, JMK applied for certification as a woman-owned business enterprise (“WBE”). JMK based its application on Ms. Deborah McGuigan. (DED Exhibit 1).
2. On February 3, 2025, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) The woman-owner relied upon for certification does 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);
 - (b) The woman-owner relied upon for certification does 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); and
 - (c) The business enterprise for which certification is sought does not operate independently, as required under 5 NYCRR § 144.2(e).
3. On February 17, 2025, JMK submitted a request to appeal the denial determination. (DED Exhibit 13).

4. On February 18, 2025, a Notice to Proceed via Written Appeal was sent to JMK. (DED Exhibit 3).
5. Applicant submitted a written appeal letter dated March 24, 2025. (APP Exhibit A).
6. The Division filed an Affirmation of Glenn Butler, Associate Certification Director, dated August 19, 2025, and a brief of Lisa S. Berk, Esq., counsel for the Division, dated August 19, 2025.

FINDINGS OF FACT

7. JMK was established in 2019 and is engaged in the business of installing acoustical ceilings and dry wall. (DED Exhibit 1).
8. Ms. Deborah McGuigan, the woman-owner relied upon for certification, is the 100% owner of the applicant business. (DED Exhibit 1).
9. The critical functions of the applicant business, based on the application and contracts submitted, is the installation of acoustical ceiling tiles and drywall. (DED Exhibits 1, 10, and 11, and 12).
10. Ms. McGuigan has an MBA in International Business and a Bachelor of Science degree in Management. She has been the President of the applicant business since 2019. Her responsibilities at JMK are the performance of day-to-day operations which include payroll, bookkeeping, banking, bidding, estimating, submitting job proposals, evaluating expenses, and corresponding with customers and vendors. Her prior experience was as President of JMK Acoustics, Inc., (a company no longer in business) for approximately 15 years, where her responsibilities included “payroll, scheduling, bidding, clerical, etc.” Ms. McGuigan “learned all about construction from her father and her husband,” and states that “[she has] the knowledge about carpentry. Ms. McGuigan’s description of her role at JMK is, “I hire. I

bookkeep, little bit of accounting, marketing, payroll, [and] supervise client communication.” She states that because of her educational background she is “able to conduct all the business. . . [and is] able to do the bookkeeping. . . , able to do the payroll. . . , able to do the marketing.” (DED Exhibits 4, 7, and 8).

11. Ms. McGuigan visits job sites and states that she does so to “meet the clients there. . . show the progress and give them percentages of. . . how far we’ve come” and to “talk about if there’s any issues or potential problems like a change order of some sort, because something. . . has to be changed up or reorder. . . stuff like that.” She states that it is “informative. . . for the client.” She also says she visits work sites to “check on . . . the progress.” (DED Exhibit 7).
12. James McGuigan, Ms. McGuigan’s son, has worked as a carpenter for JMK since 2019. His responsibilities include measuring and installing ceilings and drywall. His prior experience includes approximately eight years as a carpenter for Superior Acoustics. He is “a hands-on carpenter, that is his trade.” (DED Exhibits 6 and 7).
13. Michael McGuigan, Ms. McGuigan’s son, has worked for JMK as an estimator and project manager since 2019. His other experience includes work as a media consultant and estimator for Superior Acoustics, where he still works, and where his responsibilities are “estimate[ing], negotiat[ing] jobs, walk throughs, sales & new client.” He began working for the applicant business “when he left college,” and his expertise is “estimating and supervising on the job.” Michael McGuigan is the estimator for most of [JMK’s] jobs. . . ,” and handles the negotiation of contracts for JMK. “Michael . . . work[s] on the price” and “estimating. . . is probably the most important part. . . , because the client is looking at a bottom-line number.” Michael McGuigan also inspects work at the conclusion of jobs. Michael McGuigan works “ a hundred

percent” for JMK when there are “jobs going,” otherwise he works at Superior Acoustics as an estimator. (DED Exhibits 5 and 7).

14. Philip Quartararo is the supervisor/foreman of JMK. Mr. Quartararo’s “life experience is his resume.” He “has been a carpenter in the commercial construction industry for over thirty years.” “He is skilled as a carpenter, respected as a leader and supervisor and appreciated as an employee.” He is the “supervisor and foreman on the job. . . He’s just been in the industry for so many years. . . He just knows ceilings.” Mr. Quartararo “runs the guys on the job, if [Ms. McGuigan] can’t be there.” “Mr. Quartararo is “hand’s on, and . . . also instruct[s] the other carpenters, where and what to be doing.” Issues which arise on the job are handled by “[Mr. Quartararo] on site and the carpenters on site. . .” He brainstorms with other carpenters to resolve any issues and there has “never [been] an issue. . . they couldn’t resolve. . .” (DED Exhibits 1, 7, and 9).
15. Ms. McGuigan does the “bookkeeping, payroll, sales, insurance, client communication, [and] day to day operations;” Michael McGuigan does estimating and supervision, “depending on availability of work;” James McGuigan “performs carpenter duties when jobs are available and running;” and Phil Quartararo is a carpenter and supervisor “when jobs [are] available.” (DED Exhibit 8).
16. There is no specific education, training, or licensing required to perform the work of the applicant business, “[i]t’s a trade where you learn a lot. . . on the job, especially the carpenters.” A carpenter’s license is not required; however, employees are required to have OSHA safety certificates. James McGuigan and Philip Quartararo both have certificate cards for the OSHA 30-hour Construction Safety and Health program. (DED Exhibits 7 and 12).

17. The application lists Ms. McGuigan's managerial responsibilities as financial decisions, marketing and sales, hiring and firing, purchasing equipment, managing and signing payroll, negotiating contracts, negotiating insurance and signatory for business accounts. Michael McGuigan's responsibilities include estimating, preparing bids, and negotiating contracts. Mr. Quartararo's managerial responsibilities include supervising field operations. (DED Exhibit 1).
18. Upon completion of a job JMK must conduct an inspection to ensure the job is completed to the satisfaction of the client. The inspection is done by Ms. McGuigan, Michael McGuigan as the estimator, and Mr. Quartararo "is typically the one who completes the punch list." (DED Exhibit 7).
19. Superior Acoustics is owned by Ms. McGuigan's spouse Kenneth McGuigan and "runs separately from JMK." Superior Acoustics also installs acoustical ceiling and drywall. "The connection [between JMK and Superior Acoustics] is educational and sometimes advisory." Ms. McGuigan states that Kenneth McGuigan does not have a position, nor does he devote any time to JMK, but that "there are times when [she does] pick up the phone and ask[s] them questions." JMK uses Superior Acoustics' warehouse in Queens to store scaffolding, "but for the rest of it, carpenters and equipment [Superior Acoustics]. . . have their own, so everything is separate except" for the scaffolding. Ms. McGuigan does not devote any time to Superior. (DED Exhibits 7 and 8).
20. Archstone Builders ("Archstone") is the largest completed account for the applicant business. Purchase orders from Archstone, representing the agreement for work, and from supplier Navy Island Acoustic & Architectural Wood Products ("Navy Island") were submitted with the application regarding the Archstone project for the installation of ceiling and drywall at the

Glen Oaks Country Club. The Archstone purchase orders are signed by Ms. McGuigan. The Navy Island invoice is not signed and lists “Ken McGuigan” as the JMK contact for the Glen Oaks Country Club project. The Archstone agreement includes safety provisions which require that JMK must comply with all OSHA requirements. (DED Exhibits 1 and 10).

21. A purchase order between JMK and James E. Fitzgerald, Inc. (“JF, Inc.”) representing an agreement for work by JMK as a subcontractor provides that JMK must “comply with all OSHA, NFPA, NYCDOB, FDNY, DOT, ANSI, AHJ safety rules and regs, laws, and guidelines. . .” The order is signed by Ms. McGuigan. (DED Exhibit 11)

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.

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 JMK 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. Operations: Industry-Specific Competence

JMK's application for certification as a WBE was denied on the basis that the applicant failed to demonstrate that Ms. McGuigan possesses 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).

The Division interprets this regulation to require an applicant to demonstrate that the owner, relied on for certification, has 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 A.D.3d 1343 (3d Dept. 2020) citing to *Matter of C.W. Brown, Inc. v Canton*, 216 A.D.2d 841, 842 (1995) (where the Court affirmed the denial where the owner had no training or experience in the industry to make her qualified to supervise the work of her employees.) The Division requires that owners be able to perform the core revenue generating functions of the business enterprise. See *Matter of CCS Custom Construction Services Corp.*, Recommended Order, March 25, 2025 (Final Order 25-04, April 11, 2025) (Construction and mill work company where owner relied on for certification reviewed and signed contracts, discussed contract details, and hired subcontractors and employees, but did not possess appropriate licenses or certifications, and had no experience in construction or millwork, owner relied on for certification was determined to not possess adequate industry competence, without relying on

others), see also, *Matter of Bore Tech, LLC*, Recommended Order, June 1, 2021 (Final Order 21-05, February 7, 2022), see also, *Matter of Occupational Safety & Environmental Assoc., Inc. v. New York State Department of Economic Development*, 161 A.D.3d 1582 (4th Dept. 2018).

Expertise or experience in office management or general business administration will not satisfy these requirements. 5 NYCRR § 144.2(c)(1). Thus, decisions made regarding the administration of a business entity, such as human resources and payroll, do not satisfy the regulatory requirements for certification. See, *Matter of TJ Clement Construction Co. Inc.*, Recommended Order, April 17, 2025 (Final Order 25-05, May 9, 2025) (denial upheld where owner's responsibilities were for financial decisions, preparing bids, negotiating bonding/insurance/contracts, purchasing equipment, hiring subcontractors, and managing personnel matters, but had no education, licensing, technical training, or job experience relevant to the critical functions of the business of paving, and excavating).

The Applicant bears the burden of establishing that the 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 *Matter of A.A.C. Contracting, Inc. v. New York State Dept. of Economic Development*, 195 A.D.3d 1284 (3d Dept. 2021).

Here, Ms. McGuigan does not possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. While Ms. McGuigan's experience includes more than twenty years at JMK Acoustics, Inc. and at the applicant business, her work at both businesses has been in administration and general business management areas. (DED Exhibits 4 and 7). She holds no licenses, nor was evidence presented regarding her education or trainings in the field. Ms. McGuigan states that she "[has] the knowledge about carpentry" and that she "learned all about construction from her father and her husband." Applicant states that no specific

training or licensure is required for the job, with the exception of OSHA safety trainings and certifications, and that the trade is one in which is learned on the job. Ms. McGuigan does not have an OSHA certification, but both James McGuigan and Philip and Quartararo have completed the OSHA 30-hour safety training. (DED Exhibits 7 and 12).

The Division determined that the critical functions of JMK, based on the application and the products and services the applicant business provides to clients, is the installation of acoustical ceilings and drywall installation. (DED Exhibits 1 and 2). Acoustical ceiling tile installation makes up the bulk of JMK's business revenue. (DED Exhibit 7). Ms. McGuigan's role at the applicant business is administrative, and includes making financial decisions, and insurance, marketing and sales, payroll, bookkeeping, and other HR responsibilities. (DED Exhibits 1, 4, 7, and 8). The work of estimating and negotiating contracts is delegated to Michael McGuigan, James McGuigan, a carpenter performs installations, and Philip Quartararo, is the foreman, job site supervisor, and trainer for the applicant business. (DED Exhibits 1 and 7).

Ms. McGuigan asserts that carpenters learn and gain experience "on the job" through "hands on experience" and that it is Philip Quartararo who provides supervision and training for JMK. (DED Exhibit 7). Further, Ms. McGuigan states that Michael McGuigan does all the estimates and negotiates all the contracts, and that only James McGuigan and Philip Quartararo have OSHA cards. In addition, no evidence, except for statements that Ms. McGuigan knows carpentry, has been presented regarding Ms. McGuigan's industry specific competence as it relates to the installation of acoustical ceilings or drywall.

On appeal, the applicant argues that while she has sought advice and guidance she has "much knowledge about the industry as well as a marketing background," that her reliance on others, both within the industry as well other professionals, such as accountants and lawyers, is

normal practice to get the “business up and running and become profitable.” Applicant also argues that her certification under the NYC Small Business Services, should “alone . . . prove that [JMK is] qualified to be a WBE certified company.”

The certification by NYC Small Business Services is a separate certification which operates under its own rules and guidelines and has no bearing on whether the applicant meets the requirements of New York State’s WMBE program, governed by the regulations found under Title 5 of the New York Codes, Rules and Regulations. Here, the regulations provide specifically that an owner relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. In analyzing whether an individual meets this requirement the Division examines several factors including: (1) 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; (2) the extent to which academic credentials exist for persons employed in the industry; and (3) the extent to which industry-specific expertise may be obtained via direct work experience. (5 NYCRR § 144.2(c)(1)).

Here, the information provided is that while a carpentry license is not required to conduct business, OSHA certifications are required to perform the work of the business, and the only individuals at the applicant business with that certification are James McGuigan and Philip Quartararo. (DED Exhibits 7, 10, 11, and 12). Further, while there are no specific academic credentials for the work of installing acoustic ceilings or drywall, applicant acknowledges that industry-specific expertise is obtained via direct work experience and cites to Mr. Quartararo’s extensive background in the industry, and that James McGuigan and Michael McGuigan both gained expertise while on the job. However, no information, aside from a general statements that

Ms. McGuigan “grew up in the construction industry” and that she “[has] the knowledge about carpentry” was presented regarding her having any specific expertise in the installation of acoustic ceiling tile. (DED Exhibits 7 and 8).

Based on the foregoing, I find that the Division’s determination that the woman-owner relied upon for certification does not possess adequate industry competence to make critical business decisions without relying on other persons as required under 5 NYCRR §§ 144.2(c)(1) is supported by substantial evidence.

II. Operations: Day-to-Day Operations

The Division also denied JMK’s application for certification as a WBE on the basis that the applicant failed to demonstrate that Ms. McGuigan makes 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). (DED Exhibit 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 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 A.D.3d 1682 (3d Dept. 2019), see also *Matter of Upstate Electrical, supra*; *Matter of Jason Office Products Inc.*, Recommended Order, November 22, 2023 (Final Order 23-12, March 8, 2024).

In its evaluation, the Division reviewed the application, narratives supplied by applicant, the resumes of Ms. McGuigan, James McGuigan, and Michael McGuigan, and conducted a site interview with Ms. McGuigan. (DED Exhibits 1, 4, 5, 6, 7, 8, and 9). Section 4A of the application lists Ms. McGuigan's duties and responsibilities at the applicant business as: financial decisions; negotiating insurance; marketing and sales; hiring and firing; purchasing equipment/sales; managing and signing payroll; and signatory for business accounts. (DED Exhibit 1). The application states that Ms. McGuigan shares the responsibility of negotiating contracts with Michael McGuigan. The application also provides that Michael McGuigan is responsible for estimating and preparing bids, and that Phil Quartararo is responsible for supervising field operations. Further, Applicant's narrative responses, to questions from the Division, state that Ms. McGuigan is responsible for "bookkeeping, payroll, sales, insurance, client communication, [and] day to day operations, that Michael McGuigan is the estimator and supervisor, James McGuigan "[p]erforms carpenter duties, and Phil Quartararo is a carpenter and supervisor. (DED Exhibit 8).

During the site interview between the Division and Ms. McGuigan, Ms. McGuigan explained that Phillip Quartararo is the field supervisor, and "runs the guys on the job if I can't be there." (DED Exhibit 7). Ms. McGuigan also stated that Mr. Quartararo is the "supervisor and foreman on the job," citing to his years in the industry and his expertise in ceilings. She also stated that Mr. Quartararo is "hand's on, and . . . also instruct[s] the other carpenters, where and what to be doing. . .," and that he handles all issues which arise on the job by brainstorming with other carpenters, and that those issues are always resolved by him and the carpenters. (DED Exhibit 7). In addition, the contracts submitted for the Archstone project and with JF, Inc. both include provisions which require compliance with OSHA, and James McGuigan and Mr. Quartararo are the only employees with the required OSHA certifications. (DED Exhibits 7, 10, 11, and 12).

Further, while the purchase orders submitted with the application are signed by Ms. McGuigan, during the site interview Ms. McGuigan stated that it is Michael McGuigan who does all estimates and contract negotiations. (DED Exhibits 7 and 10). Additionally, the Navy Island, Inc. purchase order for the materials for the Archstone project, references Ken McGuigan as the contact, and makes no reference to Ms. McGuigan. (DED Exhibit 10).

Here, the evidence presented does not demonstrate that Ms. McGuigan has any training or experience in the critical functions of the applicant business, namely the installation of acoustic ceilings. While Ms. McGuigan does manage the administration of the business, it is Michael McGuigan who does the estimation and contract negotiation and Mr. Quartararo who handles the supervision of the field operations and oversees the day-to-day operations of other carpenters. (DED Exhibits 1, 4, 5, 6, 7, 8, and 9). The statements that Ms. McGuigan visits jobs sites and “[has] knowledge about carpentry” is insufficient to establish that she is running the day-to-day operations of the business given that others are handle the estimating, contract negotiations, field supervision, and installation of the core work, namely the installation of acoustic ceilings, for the applicant business. Further, the fact that she does not possess the required OSHA certification makes it impossible for her to actively engage in the core function of the business on job sites.

It is well settled that where the non-qualifying owner or other employee, with more significant experience, actively engages in the core functions of the business, denial based on lack of operational control is appropriate. See *Panko, supra*, and *Upstate Electrical, supra*. Thus, the evidence presented establishes that Ms. McGuigan is not responsible for the day-to-day operations of the business enterprise, and therefore, the Division’s determination that JMK has not demonstrated that she makes 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.

III. Independence

The Division denied JMK's application for certification as a WBE on the basis that the applicant business failed to demonstrate that it operates independently, as required by 5 NYCRR § 144.2(e). (DED Exhibit 2). To determine whether a business operates independently the Division shall consider, but is not limited to the following: "(1) Whether the business enterprise shares resources with another entity, including, but not limited to, personnel, 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." 5 NYCRR § 144.2 (e).

The Division regularly denies certification where the applicant business is so entwined with another business, such as operating out of the same space, where one business leases the space to the other under unusually favorable terms, where the applicant business is dependent on the other for capitalization and other basic functions, or where a business primarily transacts with one other business entity. See *Matter of Acme Lightning Rod, LLC*, Recommended Order dated March 6, 2020, (Final Order 20-02, April 21, 2020) (applicant denied certification where it shared board members, personnel, office space, etc., and paid that same entity as a subcontractor to perform majority of work) See also, *Matter of Skyline Specialty Systems, Inc. v. Gargano*, 294 A.D.2d 742 (3rd Dept. 2002) (holding the applicant business was so entangled with another business by sharing personnel, offices, etc. that it clearly was not independent).

The Division argues that the applicant business shares employees and warehouse space with Superior Acoustics (“Superior”), a business owned by Ms. McGuigan’s husband, Kenneth McGuigan which provides the same service, installation of acoustical ceilings and drywall, as JMK. In addition, the Division determined that Ms. McGuigan relies on her husband’s expertise, and found that reliance to be a tangible benefit, inconsistent with standard industry practice.

Applicant acknowledges that Michael McGuigan works for both Superior and JMK, and that when JMK has work, Michael McGuigan devotes one hundred percent of his time to JMK. (DED Exhibit 7). In addition, applicant acknowledges that JMK stores scaffolding at one of Superior’s warehouses and that “there are times when [Ms. McGuigan does] pick up the phone and ask [Superior] questions,” but also states that Kenneth McGuigan has no position with JMK, nor does he devote any time to the applicant business. (DED Exhibit 7). Notwithstanding Ms. McGuigan’s assertions that Kenneth McGuigan has no role in the applicant business, the Navy Island purchase order lists Ken McGuigan as the contact at JMK for the purchase of materials. (DED Exhibit 10).

Here, the information provided, in totality, indicates that JMK shares resources and personnel with Superior. First, JMK uses space owned by Superior to store scaffolding. (DED Exhibit 7). No information regarding any agreement, formal or otherwise was provided, and no evidence of payment for storage of JMK’s equipment was provided with the application. Second, Michael McGuigan works for both JMK and Superior, performing the same function for each, and moving back and forth on what appears to be an informal, as needed basis. No information was provided regarding how Michael McGuigan is compensated for his work, and by which business. (DED Exhibits 5 and 7). Third, Kenneth McGuigan, the owner of Superior, also appears to provide services for JMK, as he is listed as the contact on a purchase order for a JMK job. (DED Exhibit

10). No information, reasoning, or other contract(s) or agreement(s) explains Kenneth McGuigan's work relationship with Superior, nor is there any indication that JMK paid Kenneth McGuigan for his work for JMK in securing the supplies. (DED Exhibit 10). These facts, combined, demonstrate that JMK is not independent from Superior and receives tangible benefits, inconsistent with standard industry practice, from Superior, in the way of free storage, shared staff, and uncompensated representation by Kenneth McGuigan. (DED Exhibits 6, 7, and 10). Thus, the totality of the circumstances, that the applicant business receives benefits from Superior in several different areas, provides substantial evidence that JMK receives a tangible benefit from Superior, and as such has not demonstrated that JMK operates independently, as required under 5 NYCRR § 144.2(e)(3).

CONCLUSION

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

RECOMMENDATION

The Division's determination to deny JMK Acoustics Company Inc.'s application for certification as a woman owned business enterprise should be affirmed.

In the Matter of JMK Acoustics Company Inc.
 DED File ID No. 72942
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant Appeal Letter	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	Deborah McGuigan Resume	Y	Y
DED 5	Michael McGuigan Resume	Y	Y
DED 6	James McGuigan Resume	Y	Y
DED 7	Appellant Site Interview	Y	Y
DED 8	Narrative on Key Employees	Y	Y
DED 9	Phil Quartararo Narrative	Y	Y
DED 10	Archstone Builders Contracts and Navy Island Purchase Order	Y	Y
DED 11	James Fitzgerald Contract	Y	Y
DED 12	OSHA 30 Certificates	Y	Y
DED 13	Appeal Form	Y	Y