

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

In the Matter
- of -
the Application of Jacob Feinberg Katz & Michaeli Consulting Group, LLC
for Recertification as a Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 52255

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
August 13, 2024

This matter considers the appeal by Jacob Feinberg Katz & Michaeli Consulting Group, LLC (“JFK & M Consulting” 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 recertification as a woman-owned business enterprise (“WBE”).

PROCEDURAL HISTORY

1. On September 20, 2021, JFK & M Consulting applied for recertification as a women-owned business enterprise (“WBE”). JFK & M Consulting based its application on Ms. Cindy Feinberg. (APP Exhibit 1; DED Exhibit 1).
2. On August 7, 2023, the Division denied the application on the following grounds (APP Exhibit 20; DED Exhibit 2):
 - a. The minority group members or women 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), and
 - b. The minority group members or women owner relied upon for certification do not negotiate business contracts and represent themselves to clients as the principals of the business enterprise, as demonstrated by fully executed business agreements, as required under 5 NYCRR § 144.2(d)(2), and
 - c. The business enterprise for which certification is sought does not operate independently, as required under 5 NYCRR § 144.2(e).

3. JFK & M Consulting submitted a request to appeal the denial determination, dated August 7, 2023. (APP Exhibit 21; DED Exhibit 3).
4. A Notice of Hearing was sent to all parties on April 26, 2024 (DED Exhibit 4).
5. A hearing was held on June 18, 2024, June 25, 2024, and continued and concluded on July 3, 2024.

FINDINGS OF FACT

6. JFK & M Consulting is engaged in the business of consulting engineering services. (Hearing Testimony of Ms. Feinberg; APP Exhibit 1; DED Exhibit 1;).
7. Cindy Feinberg is the woman owner relied upon for recertification and is the President, partner, member, CEO (or COO), and 52% owner of the applicant business¹. Ms. Feinberg began the business in 2007. She recruited Ed Feinberg, Michael Jacob, and Jonathan Michaeli, who are all partners, listed as members in the Operating Agreement, and 16% owners in the applicant business. (Hearing Testimony of Ms. Feinberg; APP Exhibits 1, 18, and 20; DED Exhibits 1, 2, and 16).
8. Ms. Feinberg refers to herself as the CEO, and signs documents as “the CEO Member.” (Hearing Testimony of Ms. Feinberg).
9. The applicant business’ Operating Agreement (“Agreement”) defines “Majority in Interest” as meaning “fifty-one percent (51%) ownership in the Company.” Article 5 of the Agreement states that the Chief Operating Officer “shall have general and active supervision and direction over the day-to-day business affairs of the Company.” The Agreement also provides that the members of JFK & M Consulting “shall direct, manage, and control the business. . . to the

¹ Ms. Feinberg identified herself as the CEO during testimony, is listed as the President on the application, and as the Chief Operating Officer (COO) in the applicant business’ Operating Agreement. There is no position of CEO in the Operating Agreement.

extent permitted in this Article. . .” In addition, the members are “[s]ubject to the terms and conditions of th[e] Agreement, . . . [and] shall have full and complete authority, power, and discretion to manage and control the business, affairs, and properties of [JFK & M Consulting], to make all decisions regarding those matters and to perform any and all other acts or activities customary or incidental to the management of the Company’s business.” (APP Exhibit 18; DED Exhibit 16).

10. The Chief Operating Officer (“COO”) is Cindy Feinberg “unless and until otherwise determined by a Majority in Interest. . .” The COO “shall have general and active supervision and direction over the day-to-day business affairs of the Company.” (APP Exhibit 18; DED Exhibit 16).

11. The owners of JFK & M Consulting “share all the standard responsibilities of running a Professional Engineering Services Firm. All the partners actively provide “management and design services for the projects for which they are designated as the Partner-in-Charge.” (Hearing Testimony of Ms. Feinberg; APP Exhibit 16; DED Exhibit 15;).

12. “Major financial decisions. . . are the responsibilities of Cindy Feinberg and Edward Feinberg;” Ms. Feinberg and Mr. Michaeli are responsible for negotiating insurance agreements; Ms. Feinberg and Mr. Jacob are responsible for purchasing equipment and supplies for the applicant business; and Ms. Feinberg is responsible for managing and signing payroll. (APP Exhibit 16; DED Exhibit 15).

13. Meetings are held weekly between the Partners to discuss projects and to give an opportunity for all Partners “to feel as though they are being heard.” Ultimately, Ms. Feinberg, after meeting with Partners and “taking everything into consideration” makes the decisions regarding the projects taken on by JFK&M Consulting. (Hearing Testimony of Ms. Feinberg).

14. Projects are obtained by JFK&M Consulting through the business' Building Development department, or through an existing relationship with a particular Partner. Many projects come to the business through "relationships" and "relationship building" is a critical component of obtaining business. Partners of the firm are critical for both their work expertise and their relationships with potential clients. The final decision on whether JFK&M Consulting will take on a project is made by Cindy Feinberg. (Hearing Testimony of Ms. Feinberg).
15. The partners of JFK&M Consulting are listed as the "Partner in Charge" depending on the project and in that role will interface with the client. Ms. Feinberg is intimately aware of the projects and reviews the proposals and fees on projects and is the final decision maker on whether the company will take on any project. Ms. Feinberg also manages change orders, trains staff, checks documents, and handles questions on projects. (Hearing Testimony of Ms. Feinberg).
16. The most recent, highest value contracts were submitted with JFK&M Consulting's Application. All the contracts submitted were signed by Mr. Feinberg, Mr. Jacob, or Mr. Michaeli. Applicant submitted the largest contracts which fell into the time frame of the application. Contracts of comparable value, signed in 2016, and still active were not submitted in favor of submitting the largest. Applicant gave no consideration as to the signors of the contracts in their submissions. (Hearing Testimony of Ms. Feinberg).
17. Ms. Feinberg, Mr. Feinberg, and Mr. Michaeli each are partners in another firm, JFK & M Engineers, LLP ("JFK & M Eng."). JFK & M Eng. is a professional services firm, and has no employees, outside of the three partners. JFK & M Consultants and JFK & M Eng. share office space and have an intercompany agreement ("Agreement") which provides that the two companies will provide engineering and consulting services. JFK & M Eng. is owned by Ms.

Feinberg, Mr. Feinberg, and Jonathan Michaeli. Ms. Feinberg is the majority owner of JFK & M Eng., and the company is currently certified as an WBE by the Division. JFK & M Consulting retains JFK & M Eng. on 95% of their projects. The Agreement states that JFK & M Eng. "... is qualified and authorized to provide professional engineering services in the State of New York..." and that JFK & M Consulting will "retain [JFK & M Eng.] on an ongoing basis to provide professional engineering services to the extent required pursuant to each Consultant Agreement..." (Hearing Testimony of Ms. Feinberg; APP Exhibits 1, 14, and 15; DED Exhibits 1, 24, and 25).

18. At the time that JFK & M Consultants was established, only individuals with a New York State Professional Engineering License were permitted to be a partner in an Engineering LLP. Ms. Feinberg wanted to include some partners, who had extensive experience and important relationships but who did not hold a Professional Engineering License, as partners in the firm. To do so, Ms. Feinberg created two entities, one an LLC and one an LLP to entice experienced, yet unlicensed, engineers, to join the firm. (Hearing Testimony of Ms. Feinberg).
19. Ms. Kerry Keegan is the Senior Vice President of Design and Construction for the Brooklyn Navy Yard Development Corporation. Ms. Keegan worked with Ms. Feinberg on several projects which employed JFK & M as both the subcontractor and prime on several projects, including one in which JFK & M Consultants was hired to inspect all of the Navy Yard's buildings for deficiencies or improvements regarding mechanical, electrical, heating, and fire protection systems, and evaluated the power needs of the entire yard and what updates or changes could be made to update those systems. Ms. Feinberg has been Ms. Keegan's primary point of contact on those projects and was the signatory on subcontracts. (Hearing Testimony of Ms. Keegan).

APPLICABLE LAW

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 (d)(2) states as follows:

Control. Minority group members and women relied upon for certification must have the power to control the business enterprise for which certification is sought. The division shall assess whether minority group members and women possess such control based upon the following criteria:

- (2) Control of business negotiations. Minority group members and women relied upon for certification must negotiate business contracts and represent themselves to clients as the principals of business entities for which certification is sought, as demonstrated by fully executed business agreements.

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 JFK & M 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

James P. Youngs, Esq., of Hancock Estabrook, LLP, appeared at the hearing on behalf of JFK & M. The following witnesses testified on behalf of JFK & M: Cindy Feinberg, President, JFK & M; Kerry Keegan, Senior Vice President, Design and Construction, Brooklyn Navy Yard Development Corporation. JFK & M offered the following exhibits which were admitted into evidence: APP Exhibits 1, 2, 3, 4, 5, 6, 9, 11, 12, 13, 14, 15, 16, 17, 18, 20, and 21.

Ms. Misha Wright, Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Ms. Folashade Olatunbosun, Senior Certification Analyst, Division of Minority and Women Business

Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 21, 23, 24, 25, and 27.

I. Prior Certification

The Division acknowledged that JFK & M was previously certified as a woman-owned business enterprise (“WBE”). The Division asserts that it is not bound to recertify a WBE if its prior determinations were made in error. The Division argues that based on the application and supplemental material submitted by applicant, Division staff correctly determined that applicant was not eligible for recertification.

The Division is correct that it is not obligated to certify JFK & M based on its prior determinations. It is well settled that the doctrine of equitable estoppel cannot, as a general rule, be invoked against a governmental agency in the exercise of its governmental function. See *Matter of Daleview Nursing Home v. Axelrod*, 62 NY2d 30 (1984); *Matter of Atlantic States Legal Found., Inc. v. New York State Dept. of Environmental Conservation*, 119 AD3d 1172 (2014).

With the expiration of its certification, JFK & M had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR §144.2 when it submitted the September 20, 2021, application and supporting materials and cannot rely on the past determinations of the Division.

II. Operation

The Division denied JFK & M’s application for certification as a WBE on the basis that the applicant failed to demonstrate that Cindy Feinberg, the woman-owner relied upon for certification, made 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).

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).

Counsel for the applicant argued that the evidence provided in the application in conjunction with the testimony of the witnesses at hearing, to clarify the previously proffered information, supports a finding that the Division did not have substantial evidence that Ms. Feinberg does not make operational decisions regarding the day-to-day critical functions of the business. Counsel argues that the denial determination only asserts that Ms. Feinberg shares administrative functions and is silent as to her role regarding the critical functions of the business enterprise, which the Division finds is consulting engineering services. Counsel argues that the Division’s determination rests on information that Ms. Feinberg shares the roles relating to financial decisions, negotiating insurance, and the purchase of equipment and supplies, and states that none of those roles are ones that the Division itself holds out as critical functions of a business enterprise. Further, Counsel argues that the Division misreads the Operating Agreement, and

ignores the provision which states that the Chief Operating Officer has “general and active supervision and direction over the day-to-day business affairs of [JFK & M Consulting]. (APP Exhibit 18; DED Exhibit 16).

The Division argued that the evidence before the Division failed to establish that Ms. Feinberg makes operational decisions on a day-to-day basis with respect to the critical functions of the business, to wit consulting engineering services. (APP Exhibits 1 and 20; DED Exhibits 1 and 2). The Division states that Ms. Feinberg “does not have the sole ability to make financial decisions, negotiate insurances, or purchase equipment and supplies without her partners. . .” (APP Exhibits 16 and 20; DED Exhibits 2 and 15). At hearing, the Division states that they also relied on contracts submitted by the applicant which were signed by the non-qualifying owners of JFK & M, and not by Ms. Feinberg, and argued that the contracts evidence that Edward Feinberg, Michael Jacob, and Jonathan Michaeli are the partners who make the day-to-day decisions regarding the critical functions of the business. (APP Exhibits 2 through 6, and 20; DED Exhibits 2, and 5 through 14). The Division also stated that the narrative provided by the applicant business demonstrates that Ms. Feinberg shares responsibilities with her partners and as such she does not make independent operational decisions. (APP Exhibit 16; DED Exhibit 15). Further, the Division argued that the Operating Agreement should not be interpreted to provide Ms. Feinberg with ultimate decision-making authority over the other partners, stating that the document provides that day to day operations are shared, further supporting the Division’s determination. (APP Exhibit 18; DED Exhibit 16).

Ms. Feinberg testified in detail concerning the nature of the business, how it operates, and that the management structure of the business allows for all partners to be heard at both biweekly meetings and in impromptu meetings, but that ultimately, she is the decision maker regarding all

consultation agreements and which projects JFK & M will accept. (Hearing Testimony of Ms. Feinberg; APP Exhibit 18; DED Exhibit 16).

Ms. Feinberg testified that the business is relationship driven and explained that on private projects the work often comes in through the partner with an existing relationship with the client, and sometimes through referrals from other firms. The Partner in Charge of a project is the partner who signs the contract, but Ms. Feinberg states that is after her approval. (Hearing Testimony of Ms. Feinberg). On public projects JFK & M Consulting's Business Development lead will apply for a project through an RFP or in response to an RFQ, but Ms. Feinberg drafts the proposals and fees on all public projects. (Hearing Testimony of Ms. Feinberg).

Ms. Folashede Olatunbosun, the Senior Certification Analyst assigned to the instant case, testified at the hearing, that the critical functions of the business were determined to be consultant engineering services based upon the information provided in the application, including the section regarding the "primary business activity," the contracts provided, and the narratives regarding who is responsible for what day-to-day activities. (Hearing Testimony of Ms. Olatunbosun; APP Exhibits 1, 2, 3, 4, 5, 6, 16, and 20; DED Exhibits 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15). A letter dated May 23, 2023, submitted in response to a question by the Division, asking for "a detailed narrative explaining the duties and responsibilities of Cindy Feinberg, and all other principals, partners, key personnel, and subcontractors performing the day-to-day functions concerning the applicant business" was reviewed by Ms. Olatunbosun. (APP Exhibits 1 and 16; DED Exhibits 1 and 15). Based on that narrative, and the contracts submitted Ms. Olatunbosun testified that the Division found that the partners of JFK & M Consulting appeared to share in the day-to-day operations and had autonomy and their own responsibility regarding the contracts that they brought into the business, and that Ms. Feinberg did not make operational decisions on a day-

to-day basis with respect to the critical functions of the business enterprise, but that the other partners made those decisions. ((Hearing Testimony of Ms. Olatunbosun; APP Exhibit 16; DED Exhibit 15).

While the denial determination did not list the contracts referenced above, as a reason to deny certification on this ground, Ms. Olatunbosun testified those contracts were taken into consideration in conjunction with the narrative regarding day-to-day responsibilities and the operating agreement. (Hearing Testimony of Ms. Olatunbosun; APP Exhibit 20; DED Exhibit 2). Importantly, the narrative states that more than just administrative functions are shared (APP Exhibit 18; DED Exhibit 15). and provides information on design responsibilities and states that, “[a]ll four partners are active in providing management and design services for the projects for which they are designated as the Partner-in-Charge. . .” and that all the applicant business’ projects “have a Partner-in-Charge. . .from the beginning to the completion of the project.” Ms. Feinberg did testify that she is aware of and must ultimately approve all projects, but that information is new information that runs counter to the information provided to the Division at the time of application and may not now be considered. ((Hearing Testimony of Ms. Feinberg; APP Exhibit 18; DED Exhibit 15; see *Scherzi*, supra).

The information relied upon by the Division, which includes: the narrative which provides that the work of the agency is at best shared among all the partners; the ten contracts all signed by partners other than Ms. Feinberg; and the Operating Agreement which provides that all “members shall have full and complete authority, power, and discretion to manage and control the business”, constitutes substantial evidence. The applicant failed to demonstrate that Ms. Friedman 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).

III. Control

Minority/women-owners must have the power to control the business enterprise for which certification is sought and must negotiate business contracts and represent themselves to clients as the principals of the business as demonstrated through the production of signed contracts, as required by 5 NYCRR §144.2(d)(2). Negotiating and executing contracts are related to the core business functions. (See *Matter of C EZ Key Service*, Recommended Order dated January 5, 2024; Final Order 24-01 dated February 22, 2024). Signing contracts demonstrates that a minority/woman-owner exercises appropriate control over a business enterprise with respect to business negotiations. (See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11 dated November 7, 2022). Substantial evidence supports the Division's denial where no evidence was presented that the minority/woman-owner signs contracts on behalf of the business. (See *Matter of Jaclyn Building Services*, Recommended Order dated May 23, 2016, Final Order 16-21 dated May 25, 2016).

Here, the applicant provided ten of JFK & M Consulting's largest executed contracts with their application. All of the contracts produced were signed by a partner other than Ms. Feinberg. (APP Exhibits 2, 3, 4, 5, and 6; DED Exhibits 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14).

Applicant's Counsel argued that Ms. Feinberg is in control of the business, holds herself out as the C.E.O., and manages the business in a way which does not require her to sign all the contracts entered into by the applicant. Applicant concedes that the contracts produced by JFK & M Consulting did not have Ms. Feinberg's signature and argues that as all contracts executed by the business must be approved by Ms. Feinberg prior to their execution, that therefore, the need for her signatures should not be required. (Hearing Testimony of Ms. Feinberg). Counsel further contends, that the contracts produced were the largest of the most recent contracts, and that

contracts signed and executed by Ms. Feinberg were not provided, as the applicant was trying to submit precisely what the Division requested in its re-certification application, without thought to the signatories of those contracts. Counsel contends that the testimony at the hearing from both Ms. Feinberg and Ms. Keegan, combined with the language of the Operating Agreement, supports the finding that Ms. Feinberg is in control of JFK & M Consulting's business negotiations.

The Division argues that the information before the Division at the time of application, specifically, the contracts provided by the applicant, do not demonstrate that Ms. Feinberg controls business negotiations, as none of the contracts submitted are executed by her. (APP Exhibits 2, 3,4,5, and 6; DED Exhibits 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14). The Division also argued that the language of the Operating Agreement indicates that the partners of the firm are authorized to enter into contracts and to have "full and complete authority, power, and discretion to manage and control the business. . ." (APP Exhibit 18; DED Exhibit 16).

At hearing, Ms. Feinberg testified that the contracts submitted were both the largest and most recent, and that other large contracts signed by Ms. Feinberg, which, while still in effect and had been executed prior to the expiration of the business' prior WBE Certification, were not submitted over concerns that the Division wanted the most recent executed contracts. (Hearing Testimony of Ms. Feinberg). In addition, Ms. Feinberg testified that she refers to herself as the C.E.O. of the business enterprise, and while the Operating Agreement uses the term C.O.O., she, and the other members of the applicant business refer to her as the C.E.O. (Hearing Testimony of Ms. Feinberg; APP Exhibit 18; DED Exhibit 16;). She also explained that she reviews all proposals, contracts, and agreements, and that contracts may not be entered into without her consent and approval, and she cited to the Operating Agreement which lists her as the C.O.O. (Hearing Testimony of Ms. Feinberg; APP Exhibit 18; DED Exhibit 16).

Ms. Keegan, the Senior Vice President of Design and Construction for the Brooklyn Navy Yard Development Corporation (“Navy Yard”) testified that she has worked on several projects in which JFK & M Consulting has been both a sub-contractor and primary contractor and that Ms. Feinberg was always the point person for JFK & M Consulting, and the person who signed change orders, the subcontracting contracts, and primary contracts. (Hearing Testimony of Ms. Keegan). The information relating to contracts between the Navy Yard and the business applicant is new information, not merely clarifying, and was not before the Division at the time of the application, therefore, it cannot now be considered. (See *Scherzi*, supra).

Ms. Olatunbosun testified that based on the application and documentation submitted with the application, there was insufficient evidence that Ms. Feinberg negotiated business contracts. Specifically, Ms. Olatunbosun testified that none of the ten contracts submitted by the applicant business were signed by Ms. Feinberg, and instead were signed by one of the non-qualifying partners. (Hearing Testimony of Olatunbosun; APP Exhibits 2, 3, 4, 5, and 6; DED Exhibits 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14). Ms. Olatunbosun further testified that based upon her review it was determined that “all four partners . . . had autonomy as the partner-in-charge to make their own decisions with respect to the contracts and the services that the firm is providing,” which supported the conclusion that the applicant failed to demonstrate that Ms. Feinberg negotiated business contracts on behalf of the business enterprise. (Hearing Testimony of Ms. Olatunbosun).

While Ms. Feinberg’s testimony clarified that she does represent herself to both clients and the community as the principal of the business, this does not overcome the fact that at all ten of the contracts submitted to the Division were executed by other partners of the company, and that the narrative and Operating Agreement provide that the partners of the business have the

ability to make their own decisions with respect to those contracts where they are the partner-in-charge. Further, the regulation specifically requires that the owner relied upon for certification must demonstrate that they are the principal of the business through “fully executed business agreements.” (5 NYCRR §144.2(d)(2)).

Here, the applicant failed to satisfy their burden that the Division’s denial was not based upon substantial evidence. Therefore, the Division’s determination that JFK & M Consulting failed to demonstrate that the woman relied upon for certification negotiates business contracts and represents herself to clients as the principals of business entities for which certification is sought, as demonstrated by fully executed business agreements as required by 5 NYCRR §144.2(d)(2) is supported by substantial evidence.

IV. Independence

Finally, the Division also denied JFK & M Consulting’s application for recertification 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) (1) (2) and (3))

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 dated 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 AD 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).

Here, JFK & M Consulting operates under a joint firm agreement with JFK & M Eng and contracts with each other on 95% of their projects. (Hearing Testimony of Ms. Feinberg; APP Exhibits 14 and 15; DED Exhibits 24 and 25;). The companies also share offices, and the owners of JFK & M Eng. are all also owners of the applicant business. The companies have worked under this agreement and ownership structure since their respective inception in 2007. (Hearing Testimony of Ms. Feinberg APP Exhibits 14 and 15; DED Exhibits 24 and 25).

Counsel for the applicant argued that Ms. Feinberg owns and controls both JFK & M Consulting and JFK & M Eng., and that the companies have always operated together, and have always been certified by the Division as WBEs. Counsel stated that the reason for the creation of the two entities was to incentivize a non-licensed engineer to join the company, by being able to offer a non-licensed engineer an equity interest in the business, an opportunity that was impossible at the inception of the business due to New York State's Business Corporation law in existence at that time. (Hearing Testimony of Ms. Feinberg). Counsel argues that the formation of the business, to operate as two entities, was Ms. Feinberg's idea, as it enabled the company to bring in experience and talent, notwithstanding state licensure. In addition, counsel contends that the denial

by the Division under this provision is illogical, as JFK & M Eng, a business with the same ownership structure, owned and operated by the same woman relied upon for certification, remains certified.

The Division argued that the information before the Division at the time of application, is that the applicant business shares resources, including office space and personnel, transacts exclusively for licensed engineering services, and receives a tangible benefit, inconsistent with standard industry practice, with JFK & M, Eng. (Hearing Testimony of Ms. Olatunbosun; APP Exhibits 14 and 15; DED Exhibits 14 and 25;). Further, the Division argued that the ownership and certification status of JFK & M, Eng. is irrelevant to the instant application.

Ms. Feinberg testified that she, Mr. Feinberg, and Mr. Michaeli are each partners in another firm, JFK & M Eng. There is no dispute that JFK & M Eng. is a professional services firm, and has no employees, outside of the three partners. (Hearing Testimony of Ms. Feinberg; APP Exhibit 1, 14, and 15; DED Exhibits 1, 24, and 25). Both the applicant and the Division agree that the two companies share office space and work under an intercompany agreement. The Agreement states that JFK & M Eng. "... is qualified and authorized to provide professional engineering services in the State of New York..." and that JFK & M Consulting will "retain [JFK & M Eng.] on an ongoing basis to provide professional engineering services to the extent required pursuant to each Consultant Agreement..." (Hearing Testimony of Ms. Feinberg; APP Exhibits 1, 14, and 15; DED Exhibits 1, 24, and 25). Ms. Feinberg testified that at the time the business was established a non-licensed engineer was not permitted to have an equity ownership in a licensed professional services firm (LLP). (Hearing Testimony of Ms. Feinberg;) Therefore, Ms. Feinberg opted to create two firms, one an LLC and one an LLP which could work together, and still provide an equity opportunity for a non-licensed engineer. (Hearing Testimony of Ms. Feinberg).

While the reasons why JFK & M Consulting and JFK & M Eng were created are sound, they do not overcome the regulation which requires that a business operates independently. Further, the fact that JFK & M Eng. is currently certified as a WBE by the Division is not relevant, nor is its certification an issue before this Tribunal. The only issue which may now be considered is whether the Division had substantial evidence to support its denial determination on the basis of independence under 5 NYCRR 144.2(e).

Here, based on the foregoing, it is clear, that the applicant business does not operate independently, and that the Division's determination to deny certification on the grounds of independence was based on substantial evidence.

CONCLUSION

JFK & M Consulting 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)(2), 144.2(d)(2), and 144.2(e).

RECOMMENDATION

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

In the Matter of Jacob Feinberg Katz & Michaeli Consulting Group, LLC
DED File ID No. 52255
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP 1	Recertification Application	Y	Y
APP 2	JFK & M Agreement Between Architect and Consultant - Baruch Signed	Y	Y
APP 3	JFK & M Architect Subcontract Agreement 12.9.19 EXECUTED	Y	Y
APP 4	JFKM NYC Health & Hospitals Requirements Contract - Extension	Y	Y
APP 5	JFKM NYC Health & Hosp Requirements Contract - Original Contract Signed	Y	Y
APP 6	JFKM Pace University - 163 Williams St Architect Agreement	Y	Y
APP 7	JFKM Pace University - 163 Williams St Architect Proposal	N	N
APP 8	Shearman & Sterling LLP - JFKM Agreement Fully-Executed	N	N
APP 9	JFK&M Engineers LLP Department of State Certificate of Authorization	Y	Y
APP 10	JFKM NY Licenses and LEED Certifications Cover Page	N	N
APP 11	Cindy Feinberg NYS License	Y	Y
APP 12	Cindy Feinberg LEED Certificate	Y	Y
APP 13	Katz Withdrawal Agreement Redacted	Y	Y
APP 14	JFKM Letter Re JFKM Engineers LLP	Y	Y
APP 15	Joint Firm Agreement	Y	Y
APP 16	JFKM Letter Re JFKM Partner Day-to-Day Responsibilities	Y	Y
APP 17	Partner s Resumes - 5-25-2023	Y	Y

APP 18	04.14.10 JFK and M Operating Agreement	Y	Y
APP 19	Amendment to Operating Agreement - Jacob Feinberg	N	N
APP 20	2023-8-7 Determination Letter	Y	Y
APP 21	Request to Appeal Denial Determination	Y	Y
APP 22	Contract with DASNY dated Dec. 29, 2020	Y	N
APP 23	Contract with Skidmore, Owings & Merrill, LLP, Nov. 1, 2018	Y	N
APP 24	Contract with Yeshiva University, dated October 19, 2023	Y	N
APP 25	Contract with City University Construction Fund dated July 27, 2022	Y	N
APP 26	Contract with JB & B – JFK Airport, dated March 16, 2022	Y	N
APP 27	Contract with Brown and Caldwell – Richmond WWT, dated Nov. 13, 2020	Y	N
APP 28	Contract with Urbahn Architects dated December 1, 2021	Y	N
APP 29	Urbahn Architects – Rider to Consultant Agreement, dated March 23, 2021	Y	N
APP 30	Contract with Langan Engineers, dated September 11, 2019	Y	N
APP 31	Contract with Stony Brook dated May 17, 2021	Y	N
APP 32	Pace University Consulting Agreement dated March 13, 2020	Y	N
APP 33	Contract with Brooklyn Navy Yard, dated March 15, 2016	Y	N
APP 34	2015 Application for Recertification as NYS WBE	Y	N
APP 35	2016 NYS WBE Certification Approval Letter	Y	N
APP 36	JFKM 2016 NYS WBE Certificate	Y	N
APP 37	2020 Certification Extension Approval Letter	Y	N

APP 38	2020 MBE Certification	Y	N
APP 39	JFK&M Engineers LLP MWBE Certification 2020	Y	N
APP 40	2015 Application – JFKM Letter Re JFK&M Partner Day to Day Responsibilities	Y	N
APP 41	2015 Application – JFKM Letter Re JFK&M Engineer LLP	Y	N
APP 42	5 NYCRR 144.2	Y	N
DED 1	JFKM WBE Recertification Application	Y	Y
DED 2	Denial Determination Letter for WBE Application (dated 8/7/23)	Y	Y
DED 3	JFKM Request to Appeal Denial Determination	Y	Y
DED 4	Notice of Hearing and Conference (dated 4/26/24)	Y	Y
DED 5	JFKM Agreement Between Architect and Consultant Baruch Signed	Y	Y
DED 6	JFKM Proposal - Baruch	Y	Y
DED 7	JFKM NYC HH Requirements Contract Original Contract Signed (effective 2/17/17)	Y	Y
DED 8	JFKM NYC HH Requirements Contract Extension (dated 4/13/20)	Y	Y
DED 9	JFKM NYC HH Requirements Contract Work Order (effective 12/29/20)	Y	Y
DED 10	Shearman JFKM Agreement Fully Executed (dated September 26, 2019)	Y	Y
DED 11	JFKM Pace University 163 Williams St. Architect Agreement	Y	Y
DED 12	JFKM Pace University 163 Williams St. Architect Agreement Signed (dated July 28, 2020)	Y	Y
DED 13	JFKM Architect STV Subcontract Agreement Executed (dated 12/9/19)	Y	Y
DED 14	JFKM (STV) SCAP PS 253 -K- Amendment 1 (dated 8/10/21)	Y	Y
DED 15	Letter Re JFKM Partner Day-to-Day Responsibilities	Y	Y

DED 16	JFKM Operating Agreement	Y	Y
DED 17	Amendment to [JFKM] Operating Agreement	Y	Y
DED 18	JFKM 2019 Taxes	N	N
DED 19	JFKM 2020 Taxes	N	N
DED 20	Cindy Feinberg 2020 Personal Taxes	N	N
DED 21	JFKM 2021 Taxes	Y	Y
DED 22	Cindy Feinberg 2021 Personal Taxes	N	N
DED 23	100 12 FL JFKM Executed Lease Extension (dated 11/28/22)	Y	Y
DED 24	JFKM Letter Re JFKM Engineers LLP	Y	Y
DED 25	Joint Firm Agreement (“Intercompany Agreement”)	Y	Y
DED 26	JFKM NY Licenses and LEED Certifications	N	N
DED 27	Cindy Feinberg Professional Engineer (PE) License	Y	Y
DED 28	Edward Feinberg PE License	N	N
DED 29	Jonathan Michaeli PE NYS License	N	N
DED 30	JFKM Partners Resumes	N	N
DED 31	“JFK and M Certificate of Authorization” (Ashley Chin PE License)	N	N