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STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

June 6, 2006

Mr. Charles Gargano  
Chairman/Chief Executive Officer  
Empire State Development Corporation  
30 South Pearl Street  
Albany, New York 12245

Re: 2005-F-25

Dear Mr. Gargano:

Pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution; and Article II, Section 8 of the State Finance Law, we have followed up on the actions taken by officials of the Department of Economic Development (Department) to implement the 14 recommendations contained in our audit report, *Participation by Minority and Women-Owned Business Enterprises in State Contracts* (Report 2002-S-55).

**Background, Scope and Objective**

Article 15-A of the Executive Law (Article 15-A) signed in July 1988, was enacted to promote equality of economic opportunities for business enterprises owned by minority groups and women and to eradicate barriers to their participation in State contracts. Article 15-A created the Division of Minority and Women's Business Development (Division) within the Governor's office. In 1992, the Division became part of the Department of Economic Development (Department). The Division's mission is to ensure certified minority and women-owned business enterprises (MWBES) are given the opportunity for meaningful participation in State contracts. The Executive Law makes the Division responsible for monitoring State agencies' compliance with the provisions of Article 15-A. The Division has an annual operating budget of about \$800,000, and employs a director and 11 staff.

Under Article 15-A, State agencies are charged with establishing employment and business participation goals for entities certified as MWBES, and with reporting to the Division on their achievement of these goals. According to the definition in Article 15-A and associated Division regulations, "State agencies" include a wide variety of New York State agencies, public authorities and other State entities. The Division's January 2001 annual report identified 81 State agencies that were required to report this data. The Division's Article 15-A regulations require State agencies among other things to include an equal opportunity/non-discrimination clause in all contracts, identify the best State contracts for MWBES to bid on and provide for primary contractors on large projects to seek participation by sub-contractor MWBES, including setting specific goals and plans

for each contract. State agencies are also required to prepare annual plans that state annual agency goals for MWBE contracts, make good faith effort to achieve the stated goals and submit quarterly reports to the Division.

The Division is responsible for establishing a process to certify MWBEs and encouraging and assisting State agencies in their efforts to increase the participation of MWBEs in State contracts.

The Division is also responsible for:

- reviewing and accepting (or rejecting) agencies' annual plans and quarterly reports to measure agencies efforts to implement Article 15-A;
- reporting annually to the Governor and Legislature on agencies' achievement of Article 15-A goals. This report can identify those agencies that do not make a good faith effort to implement Article 15-A; and
- monitoring Article 15-A waivers (issued by an agency to a contractor who has not complied with MWBE requirements) and the appeal process (initiated when a contractor protests an agency's refusal to grant a waiver).

The Division reports there were 6,802 MWBE-certified businesses in New York State as of January 24, 2006. About half of these firms are located in the New York City region. The Department reports that State agency expenditures with MWBEs statewide totaled \$479.8 million, \$476.8 million and \$513.1 million, respectively, for the 2002-03, 2003-04 and 2004-05 State fiscal years.

Our initial audit report, which was issued on March 26, 2004, examined the Division's oversight of the implementation of Article 15-A of the Executive Law for the period April 1, 1999 through March 31, 2003. Our report identified that MWBE firms have better access to State Contracts under Article 15-A, than they would have otherwise. However, we found the Department had weak oversight over the statute's implementation, which may have diminished the benefit to MWBE firms. State agencies did not file all of the reports due, and therefore the Department could not adequately monitor their activities. Even when they did file, agencies excluded large portions of their expenditures from coverage under the law, by claiming they were non-discretionary expenditures. The process to be certified by the Department as a MWBE business was cumbersome and lengthy, and inadequately monitored by Department management. The objective of our follow-up, which was conducted in accordance with generally accepted government auditing standards, was to assess the extent of implementation as of February 24, 2006 of the 14 recommendations included in our initial report.

### **Summary Conclusions and Status of Audit Recommendations**

We found Department officials have made some progress in correcting some of the problems we identified. Of the 14 audit recommendations, 7 recommendations have been implemented, 1

recommendation has been partially implemented and 6 recommendations have not been implemented.

### **Follow-up Observations**

#### **Recommendation 1**

*Set standard timeframes for processing MWBE certification applications.*

Status - Not Implemented

Agency Action - No standard timeframes for processing MWBE certification applications have been established. The Department has made procedural changes that officials believe will make the process quicker and more consistent. Department officials state the complexity of the various legal corporate structures makes it difficult to set with certainty, a time frame for completing the processing of the applications. Department officials stated that they do have a requirement that each analyst must complete between 10 and 17 applications per month but the process for an individual business cannot be standardized.

#### **Recommendation 2**

*Ensure that Division analysts record application information required by regulations, and maintain the documentation needed to justify certification decisions.*

Status - Implemented

Agency Action - The Department took measures to ensure that analysts record actions and processes as they review each application. The Department has developed a formal interview and site visit questionnaire which is maintained in the applicant's file and provides a more detailed record of the analyst's findings. The Department instituted measures to ensure analysts record all actions related to the certification of a MWBE. The new measures were established in a Department-wide retraining of analysts. The retraining was an oral presentation. The Department issued a memorandum to document the procedures instituted for maintaining the documentation justifying certification decisions.

#### **Recommendation 3**

*Establish a managerial reporting system that can provide statistics on certification and recertification activity so management can determine when processing is not meeting standards, and take steps to address any application backlog that exists.*

Status - Partially Implemented

Agency Action - The Department continues to rely on a computerized spreadsheet to monitor the status of an application, the workload of each analyst and the action taken on applications. The Department is in the process of rewriting and updating its entire application database

system. When completed, the system will include tracking and query functions to determine the status of pending and completed applications. At the time of our review, Department officials could not provide an expected completion date for this project.

#### **Recommendation 4**

*Assess the staff resources dedicated to certification and if staff resources are insufficient, take steps to request and obtain more resources.*

Status - Implemented

Agency Action - As indicated in our initial audit report, the Department's internal audit unit had issued a report which indicated the Department did not have adequate staffing resources to process certifications. The Department has looked internally to provide further assistance to the staff involved in the certification process. Five staff persons from Empire State Development's Community Network Offices have been trained to assist the Department's analysts in reviewing applications. This training was done to deal with the backlog. The Department has requested approval from the Division of the Budget to fill vacant analyst positions. The Department has also recently hired additional staff.

#### **Recommendation 5**

*Provide for a routine recertification process that requires periodic verification of the continuing eligibility of MWBE firms and the accuracy of Directory listings.*

Status - Implemented

Agency Action - The Department has developed steps to provide for a routine recertification of MWBE firms, including periodically verifying the continuing eligibility of MWBE firms and the accuracy of Directory listings. Department officials sent out a mass mailing to all firms that had been listed in the Directory for more than two years. The responses that were returned and determined to be complete were recertified. In late August of 2005, those firms were sent a recertification letter with a two year expiration date. The Department developed an automated system to track the certification date and automatically generate verification notices six months prior to the expiration date of the firm's MWBE certification. The system also tracks them through the six month period to determine whether a response has been received and requires the Department to take action for ones that are not received. If a valid response is received the Department will waive the expiration. If the Department does not receive response or a correct response it will allow the eligibility to expire.

### **Recommendation 6**

*Obtain written information about the certification process for other states to determine whether, and to what extent, their process can be relied on. This could be focused on those states where the applying firms are located. Establish written policies for certifying out-of-state applicants using the amended certification process.*

Status - Implemented

Agency Action - Department officials shared a July 1988 study which was not available during the initial audit. This study addressed the type of review that we recommended in our initial audit. The study concluded that reliance on other states' certifications might be possible. However, due to their form of certification and substantial differences in their laws and programs, automatic acceptance of other states' certifications was not feasible.

Department officials recently researched the laws of the states mentioned in the study and determined that relying their reviews is not feasible because New York State requires more information before certifying a business as an MWBE. Out-of-state applicants must be evaluated using the Department's existing policies and procedures for in-state applicants. Therefore, our recommendation to establish written policies for certifying out-of-state applicants is no longer applicable.

To address this recommendation the Department has entered into partnerships with several city and county municipalities to develop an expedited certification process. Under this process, the State and these municipalities can rely on each others' evaluations to grant certification without the need to duplicate the whole process. The Department reviews the municipalities' criteria to determine if their program is similar to the requirements of Article 15-A. Partnerships exist between the Department and Nassau, Suffolk, Westchester and Rockland Counties and New York City. The Department is currently developing similar partnerships with Onondaga County and the City of Buffalo.

### **Recommendation 7**

*Compile a master list of all the State agencies required to report to the Division under Article 15-A, and update the list as necessary.*

Status - Implemented

Agency Action - The Department compiled a listing of all State agencies required to report to the Department under Article 15-A. The list includes the names of the agency heads, agency liaisons, addresses and contact information. The Department established and documented a procedure to update the master list of State agencies on a regular basis. Department officials also require their staff to verify the contact information on an annual basis.

**Recommendation 8**

*Consistently apply existing procedures to inform State agencies of their noncompliance with reporting requirements. If agencies remain noncompliant, list them by name in the Division's annual report.*

Status - Implemented

Agency Action - Department officials documented efforts to notify noncompliant agencies of their reporting requirements and obtain MWBE expenditure information. Department officials completed and issued annual reports for 2004 and 2005 on February 17, 2006. These annual reports include an appendix which shows the goals and actual utilization of agencies, from which noncompliant agencies can be determined.

**Recommendation 9**

*Petition the State Legislature to enact a remedy to address persistent noncompliance on the part of some State agencies.*

Status - Not Implemented

Agency Action - The Department's position remains unchanged from their response to the initial audit report. Department officials state it's their responsibility to approve goal plans, monitor utilization and collect and report expenditure data. Officials believe there is nothing more the Department can do with regards to noncompliant agencies.

**Recommendation 10**

*Clearly define the types of State agency expenditures that are subject to Article 15-A to help ensure State agencies establish meaningful goals for MWBE participation in State contracts.*

Status - Not Implemented

Agency Action - The Department's position remains unchanged from their response to the initial audit. Department officials state they reviewed applicable laws and guidelines and believe they do not need to clarify the definitions of discretionary and non-discretionary expenditures described in Comptroller's Bulletin A-307-R1.

**Recommendation 11**

*Develop and implement an annual compliance review plan that includes on-site visits to a sample of State agencies selected to obtain reasonable assurance of agencies' overall compliance with Article 15-A and Division regulations.*

Status - Not Implemented

Agency Action - The Department has compliance review procedures in place. However the Department has not conducted a review since our initial audit due to its limited staff resources and the time needed to conduct a compliance review. The Department is currently revising the compliance review process and procedures. The new procedures are expected to allow for review of all agencies. The Department expects to sample and audit ten agencies by December 2006. The new procedures are expected to be in place by April 1, 2006.

**Recommendation 12**

*Reinforce agencies' understanding of Division procedures that require reporting actual expenditure amounts for MWBE participation rather than contract award amounts. Verify agencies' compliance with this requirement, as well as the accuracy of reported MWBE expenditures, during site visits.*

Status - Not Implemented

Agency Action - The Department has not made any site visits since our initial audit. The Department planned a state-wide conference in 2005 to inform agencies of major Department changes and review all of the reporting requirements and MWBE outreach efforts in the awarding agencies' contracts. However, this conference has been postponed while the Department finishes rewriting its utilization and certification databases and developing the new compliance review process and overall agency service procedures, including clarifying expenditures.

**Recommendation 13**

*Prepare and file the Division's Annual Report on the first of January of each year.*

Status - Not Implemented

Agency Action - Department officials state that the annual reports for 2004 and 2005 have been completed and were issued on February 17, 2006. They were not issued by the January 1<sup>st</sup> deadline, with the 2004 report being more than a year late.

**Recommendation 14**

*Develop a more proactive MWBE outreach program to encourage greater MWBE participation in the program.*

Status - Implemented

Agency Action - After our initial audit, the Department undertook a more proactive and consistent MWBE outreach effort. The Department started a quarterly MWBE newsletter and started a workshop series in the spring of 2005 that will continue until March 31, 2006. The workshops were advertised in public service announcements in both English and Spanish.

The newsletter and workshops are in addition to the participation in agency sponsored workshops and events, outreach efforts already underway at the time of our initial audit.

Major contributors to this report were Sheila Emminger, Bill Clynes, Don Collins, and Jennifer Van Tassel.

We would appreciate your response to this report within 30 days, indicating any actions planned to address the unresolved issues discussed in this report. We also thank the management and staff of the Agency for the courtesies and cooperation extended to our auditors during this process.

Very truly yours,

Steven E. Sossei  
Audit Director

cc: Lisa Ng, Division of the Budget