

# *A REPORT BY THE NEW YORK STATE OFFICE OF THE STATE COMPTROLLER*

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**Alan G. Hevesi  
COMPTROLLER**



***BATTERY PARK CITY AUTHORITY  
INTERNAL CONTROLS OVER CONTRACTING***

***REPORT 2005-S-8***

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**DIVISION OF STATE SERVICES**

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**Alan G. Hevesi**  
**COMPTROLLER**

**Report 2005-S-8**

Mr. James Cavanaugh  
President and Chief Executive Officer  
Hugh L. Carey Battery Park City Authority  
One World Financial Center - 24<sup>th</sup> Floor  
New York, NY 10281

Dear Mr. Cavanaugh:

The following is our audit report addressing internal controls over contracting practices of the Battery Park City Authority.

This audit was performed according to the State Comptroller's authority as set forth in Article X, Section 5, of the State Constitution and Section 2803 of the Public Authorities Law. Major contributors to this report are listed in Appendix A.

*Office of the State Comptroller*  
*Division of State Services*

April 6, 2006



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# **EXECUTIVE SUMMARY**

## **BATTERY PARK CITY AUTHORITY INTERNAL CONTROLS OVER CONTRACTING**

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### **SCOPE OF AUDIT**

The Battery Park City Authority (BPCA) was established in 1968 as a public benefit corporation to supervise the development of a 92-acre area created from landfill on the lower west side of Manhattan, along the Hudson River. The site includes approximately 9,000 residential units, 8 million square feet of office space, a 500,000-square foot commodities trading facility, a marina, two hotels, a multiplex cinema, museums, public schools, retail space, and parks. BPCA enters into contracts for design, construction, and consulting services, as well as various other purposes. It had 179 open contracts (i.e., contracts which are in progress and/or for which payment is in progress) totaling \$103 million as of October 31, 2004, the end of its fiscal year. BPCA, which has 62 employees, is governed by a Board of Directors (Board) consisting of three members appointed by the Governor, with the advice and consent of the New York State Senate.

Our audit addressed the following question relating to BPCA's contracting practices:

- Has BPCA established and implemented adequate internal controls to ensure contracts are competitively solicited and properly awarded?

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### **AUDIT OBSERVATIONS AND CONCLUSIONS**

We found that, for the most part, BPCA has established adequate internal controls over the soliciting and awarding of contracts, but needs to improve the implementation of these controls. While BPCA has comprehensive guidelines for soliciting and awarding contracts on a competitive basis, BPCA has not always complied with these guidelines.

Contracts may be amended where it is appropriate to adjust the scope of work, the period of the contract, or certain specifications that may not have been foreseen or anticipated at the time the initial contract was entered into. Of the 22 contracts included in our review, 16 had amendments. We concluded that three of these contracts were amended to include work that should either have been anticipated and included in the initial competitive process or awarded separately.

These amendments were multiyear in nature and resulted in a significantly greater project scope. Yet there was insufficient documentation that BPCA had taken steps to ensure that these vendors had provided the additional contracted services at reasonable prices. Such practices are not consistent with awarding contracts on a competitive basis to obtain the most reasonable cost and do not promote a competitive process or provide the opportunity for other vendors to compete for BPCA work. (See pp. 13-15)

We found that BPCA complied with many of the requirements contained in its procurement guidelines. For example, award recipients were evaluated to assess their experience and capabilities, and contracts were approved by the Board, when such approval was required. However, BPCA's practice is to retain documents from unsuccessful bidders for only one year. As a result, we could not always confirm whether BPCA had actually received the number of bids it claimed it had for the contracts we reviewed. (See pp. 16-18)

When the lowest price is not the sole criteria for selecting a contractor, the selection criteria should be clearly established in the request for bid documents. For three contracts in which the low bidder was not selected, we found no evidence that BPCA had informed potential bidders that a minimum number of service hours would be expected in their proposals. For two of these three contracts, we found BPCA's selection was based, at least in part, on an inaccurate analysis of the number of hours proposed. (See pp. 18-19)

Article 15-A of the Executive Law directs State agencies to increase the participation by minority- and women-owned business enterprises on State contracts and subcontracts. Through its outreach program, BPCA informs minority- and women-owned business enterprises about upcoming contract and employment opportunities. However, we found the need for improvement in BPCA's reporting and monitoring of minority- and women-owned business enterprise participation in BPCA contracts. (See pp. 21-22)

Our report contains seven recommendations to improve BPCA's contracting practices.

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## **COMMENTS OF BPCA OFFICIALS**

**W**e provided a draft copy of this report to BPCA officials for their review and comment. Their comments were considered in preparing this report. Although BPCA officials do not agree with some of the audit conclusions, they generally agree with the recommendations and indicate action will be taken to implement them.

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# INTRODUCTION

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## *Background*

The Battery Park City Authority (BPCA) was established in 1968 as a public benefit corporation to supervise the development of a 92-acre area created from landfill on the lower west side of Manhattan, along the Hudson River. The site includes approximately 9,000 residential units, 8 million square feet of office space, a 500,000-square foot commodities trading facility, a marina, two hotels, a multiplex cinema, museums, public schools, retail space, and parks. Construction at the site is almost complete, except for the development of approximately 1.8 million square feet of additional commercial space and 2,200 more residential units. BPCA, which has 62 employees, is governed by a Board of Directors (Board) consisting of three members appointed by the Governor, with the advice and consent of the New York State Senate.

BPCA enters into contracts for design, construction, and consulting services, as well as various other purposes. It had 179 open contracts (i.e., contracts which are in progress and/or for which payment is in progress) totaling \$103 million as of October 31, 2004, the end of its fiscal year. The 179 contracts included 124 that BPCA classified as competitively bid. During the fiscal year ended October 31, 2004, BPCA entered into 66 contracts totaling \$18.4 million. There were also 106 contract amendments totaling \$13.3 million.

Section 2879 of the Public Authorities Law (Law) requires public authorities to establish comprehensive guidelines detailing the process by which contracts are used, awarded, monitored, and reported. Article 15-A of the Executive Law requires public authorities to promote the meaningful participation of minority- and women-owned business enterprises in the performance of contracts.

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## *Audit Scope, Objective and Methodology*

We examined selected contracting practices of BPCA for the period of November 1, 2003 through October 31, 2004.

Our audit objective was to determine whether BPCA has established and implemented adequate internal controls to ensure contracts are competitively solicited and properly awarded.

To accomplish our objective, we interviewed BPCA officials; reviewed pertinent policies, procedures, laws, rules and regulations; and examined agency records and reports. For our review, we judgmentally selected 22 contracts totaling \$42 million from BPCA's 179 contracts that were open during the fiscal year ended October 31, 2004. The contracts in our sample were for various services such as construction, planning and design, legal, advertising and information technology. Of these 22 contracts, BPCA classified 18, with a total value of \$38 million, as competitively-procured and four, valued at \$4 million, as sole-sourced. Included in our sample were seven contracts awarded during the year ended October 31, 2004. We primarily chose contracts in excess of \$500,000, as well as a few smaller ones.

We conducted our audit in accordance with generally accepted government auditing standards. Such standards require that we plan and do our audit to adequately assess those procedures and operations included within the audit scope. Further, these standards require that we understand BPCA's internal control systems and compliance with those laws, rules and regulations that are relevant to BPCA's procedures and operations included in our audit scope. An audit includes examining, on a test basis, evidence supporting transactions recorded in the accounting and operating records and applying such other auditing procedures, as we consider necessary in the circumstances. An audit also includes assessing the estimates, judgments and decisions made by management. We believe our audit provides a reasonable basis for our findings, conclusions and recommendations.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State, several of which are performed by the Division of State Services. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions and public authorities, some of whom have minority voting rights. These duties may

be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these management functions do not affect our ability to conduct independent audits of program performance.

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### ***Response of BPCA Officials to Audit***

A draft copy of this report was provided to BPCA officials for their review and comment. Their comments have been considered in preparing this report and are included as Appendix B. Although BPCA officials do not agree with some of the audit conclusions, they generally agree with the recommendations and indicate action will be taken to implement them. Appendix C is the State Comptroller's Notes to BPCA's response.

Within 90 days after the final release of this report, as required by Section 170 of the Executive Law, the President of the Battery Park City Authority shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where recommendations were not implemented, the reasons therefor.



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## INTERNAL CONTROLS OVER CONTRACTING

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To ensure that contracts are competitively solicited and properly awarded, adequate internal controls need to be established and implemented. We examined controls and found that, for the most part, BPCA has established adequate internal controls over the soliciting and awarding of contracts, but needs to improve the implementation of these controls.

Section 2879 of the Law requires public authorities to establish comprehensive procurement guidelines detailing the policies and procedures for the awarding, monitoring and reporting of contracting activities to ensure that contractors are selected on a competitive basis. BPCA's Procurement Guidelines (Guidelines) require employees to use their best efforts to select contractors using a competitive process. The Guidelines permit the competitive process to be waived when it is in BPCA's best interest to select a vendor using a non-competitive method, such as when only one vendor is capable of performing the required service or when the timely acquisition of the service precludes a competitive process. The majority of BPCA's contracts, open as of October 31, 2004, were reportedly awarded through a competitive process.

The Guidelines define the contract selection process that should be followed, and require detailed documentation of that process. The announcement of opportunities for such contracts is to be published in the *New York State Contract Reporter* (Contract Reporter). To prevent improprieties during the procurement process, bids must be received in a sealed envelope at one designated location, logged in, and the envelope date and time stamped upon receipt. Thereafter, they are stored in a locked cabinet until the formal bid opening. BPCA holds a formal bid opening in the presence of department staff and either the Internal Control Officer or an employee of the Internal Audit Department. At the bid opening, BPCA staff are required to verify that each bidder has submitted the required documentation, such as financial statements, references, and a statement of non-collusion. Vendor backgrounds must be checked on a public document database, such as Lexis/Nexis or Dun & Bradstreet. Individual references are to be followed up, and the vendor's prior performance on contracts with New York

City (City) agencies must be researched on the City's central repository of information on contractors with whom the City does business.

For personal service contracts, the Guidelines require a review of the technical merits of the proposals, as well as of the vendors' experience, capabilities, pricing, fees, and billing rates. In the case of contracts for the acquisition of goods, the lowest-price vendor should usually be selected if that firm has the required qualifications and can meet the commercial and technical requirements of the proposal. There must be a documented justification for an award to a vendor that is not the low bidder, explaining the reason for the selection.

To help ensure that these procedures are followed, BPCA's Contract Selection Committee (Committee) reviews the process by which contractors and consultants are chosen by departments for projects valued over \$15,000. The Committee is comprised of five voting members: the Executive Vice President of Operations, the Executive Vice President and General Counsel, the Senior Vice President of Finance and Chief Financial Officer, the Senior Vice President of Project Development and Management, and the Director of Affirmative Action. In addition to these members, the Vice President of Internal Audit and the Internal Control Officer are non-voting members who provide advice about and oversight of the selection process for the other Committee members. Also, all contracts valued at \$250,000 or more must be approved by BPCA's Board. For contracts between \$250,000 and \$2.5 million, amendments must be approved by the Board if they exceed 10 percent of the previously-approved amount. For contracts greater than \$2.5 million, amendments must be approved by the Board if they exceed 5 percent of the previously-approved amount.

BPCA complies with many of the procurement procedures called for by its Guidelines. However, as detailed in our report, we have identified some improvement opportunities. We identified instances where contractors were providing services that had not been advertised and for which bids had not been specifically solicited. In these instances, BPCA amended existing contracts, rather than seeking competition for the additional work. In other cases, the vendor selection process had not been adequately documented; there was insufficient

evidence that more than one vendor was considered; and certain other required selection practices had not been followed.

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## **Contract Amendments**

Contracts may be amended when it becomes necessary to adjust the scope of work, the period of the contract, or certain specifications that may not have been foreseen or anticipated at the time the initial contract was entered into.

As of October 31, 2004, BPCA had issued 449 contract amendments totaling \$39.1 million, on the 179 open contracts. Of those totals, there were 106 amendments totaling \$13.3 million that were approved in the year ended October 31, 2004. Of the 22 contracts included in our review, 16 had been amended. We concluded that three of these contracts were amended to include work that should either have been anticipated and included in the initial competitive process or awarded separately. In these three instances, BPCA had awarded consultation contracts for initial project planning, at prices ranging from \$70,000 to almost \$1 million. The contracts were subsequently amended at additional cost to include subsequent project phases, such as actual project designs, project documentation, construction administration services, or work on a different site. These amendments, which were multi-year in nature, resulted in a significantly greater project scope, and there was insufficient documentation that BPCA had taken steps to ensure that these vendors had provided the additional contracted services at reasonable prices. These instances indicate the need for greater controls over the amendment process. The following are details relating to these contracts and some of their amendments:

- BPCA reported that in May 2000, it awarded a competitively-bid contract for landscape design at one of its parks to a landscape architecture firm for \$962,150. The project had been advertised in the Contract Reporter, and BPCA had canvassed other agencies for potential bidders. Seven firms were interviewed in the award process. BPCA amended the contract in 2004 to include work at an adjacent site for \$1.55 million. Several other amendments were made to this contract, so that by the end of the 2004 fiscal year, its original \$962,150 price had grown to \$4.3 million. BPCA officials state that the 2004 amendment was for an extension of

the original project which the Board had approved for \$2 million - that when the additional land became available, it was decided to extend the original park onto that location.

- In September 2002, BPCA records indicate that it approved a competitively-bid consulting contract relating to Battery Park City street safety issues and designs for traffic aisle and pedestrian crossings to an architect for \$100,000. In 2003, the contract was amended by \$950,000 to include utility survey work, security engineering, and research and development - services that were not part of the original bid advertisement. In 2004, BPCA issued another amendment for \$1.4 million that included contract administration services, which also had not been listed in the original advertisement in the Contract Reporter. By the time these and other amendments were added, the original \$100,000 competitively-bid contract had a total value of \$2.85 million. BPCA officials maintain that any sort of architectural project is done in multiple phases and interested consultants would be aware of them. However, the ad in the Contract Reporter only stated the need for an architect to develop a design for streets, barriers and sidewalks and to study traffic medians. There was no reference to the work covered by these amendments; the ad did not adequately explain the scope and magnitude of this project.
- In April 1996, BPCA awarded a \$70,000 contract for a landscape feasibility study at a Battery Park City park. This award was single-sourced because the contractor was working on a BPCA project adjacent to the contract site, and BPCA considered the proposed work an extension of the project already underway. Six years later, in April 2002, this contract was amended for \$605,000 to include the actual design of the park's landscaping. In 2004, it was amended again for \$850,000 to add additional redesign and construction oversight services. After other amendments, the total value of this contract was \$2.7 million, as of October 31, 2004. BPCA officials maintain that the contractor was the only vendor capable of the landscape design and administrative services required for this project.

In regard to these three contracts, BPCA officials explained that they retained the same vendor for the work specified in the amendments primarily because the consultants had acquired skills and knowledge of the projects while working on their initial phases. They pointed out that they want a smooth transition through the phases and are reluctant to advertise for different contractors as each step is completed. This management approach is incorporated in the Guidelines provision that allows the competitive process to be waived in the interest of guaranteeing the continuation of services and the orderly development of projects. The Guidelines also allow the competitive process to be bypassed if officials believe it would benefit BPCA.

We understand the potential benefits of using the same contractor through various phases of a project or for similar projects. However, we are concerned about the use of amendments over a period of years for scope changes or substantial increases in the contract price. Such practices do not promote a competitive process or provide the opportunity for other vendors to compete for BPCA work. Furthermore, we observed that the amendments for these three contracts lacked adequate documentation that such services were procured at a reasonable cost.

### **Recommendations**

1. Use competitive bidding for all contract changes that constitute a scope change or a substantial increase in the contract price, unless the contractor is uniquely qualified and BPCA can document that continued work would be at a reasonable price.

(BPCA officials replied that the use of competitive bidding for all contract changes that constitute a change of scope would be unworkable. However, they indicated that they will endeavor to more explicitly identify the entire scope of project requirements for design contracts in the Contract Reporter advertisement.)

## Recommendations (Cont'd)

2. Ensure that there is sufficient documentation of the methods used to determine the reasonableness of amendment costs.

(BPCA officials indicated that they will retain documentation on the reasonableness of amendment costs.)

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### ***Contract Awards***

It is important for organizations to document critical decisions and significant events. These decisions and events often result in the use, commitment, or transfer of resources. By recording and retaining information related to these decisions and events, management creates a history that can serve as justification for its actions. BPCA, as a governmental entity, needs to retain procurement documentation long enough that in the event the award process is questioned, it can adequately support its decisions.

A competitive procurement process should include an analysis of all bids received. Also, all significant criteria for bid evaluation should be incorporated in the Request for Proposal (RFP) so all vendors are aware of the criteria against which their bids will be evaluated. RFPs are often used for complex procurements where in addition to the cost, other factors, such as technical specifications and vendors' qualifications, are important. BPCA Guidelines state that when RFPs are used, they should state the nature of the goods and services sought, as well as other information that may be desirable.

We examined 18 competitively-bid contracts to determine whether the needed services were advertised; bids were submitted; references and financial statements were provided; bids were evaluated and background checks were performed; and contracts were approved as required. We also checked for compliance with Executive Order 127, which requires increased disclosure of persons and organizations contacting State government about procurement transactions.

We found that BPCA had complied with many of these requirements for the contacts reviewed, as follows:

- BPCA Guidelines require procurement contract opportunities to be advertised in the Contract Reporter. We found evidence of advertisement for all 18 contracts classified as competitively bid.
- Part of BPCA's evaluation of proposals includes assessing the experience and capabilities of prospective consultants. We found that BPCA, on the whole, does a good job in evaluating award recipients. For 16 of 18 award recipients, we saw evidence that BPCA checked out their backgrounds on a public database and that there was a review of their financial statements for 17 of the 18 contracts. We also saw evidence that references were checked for 8 contractors, but saw no evidence for 5 others. For 5 other firms, references were not checked because the firms had previously done business with BPCA.
- Of the 18 contracts in our sample, 13 were not subject to Executive Order 127 because they were awarded before August 2003 when the Order was effective. We found that BPCA checked for Executive Order 127 compliance for 4 of the 5 contracts subject to the Order.
- We found the required Board approval for the 11 contracts in our sample that exceeded \$250,000.

However, we found the need for improvement in some other areas, including record retention and the accuracy of bid evaluations.

BPCA needs to clarify its policy concerning the retention of bid documentation. In 2000, BPCA adopted the *Records Retention and Disposition Schedule MI-1* issued by the State Archives Division of the State Education Department (SED). That document states that purchasing files should be retained for at least six years. We contacted SED officials and they confirmed that the *Records Retention and Disposition Schedule MI-1* requires that proposals - both successful and unsuccessful - be retained for at least six years. However, BPCA officials do not believe that their consultant and construction contracts and proposals are specifically covered by the SED document. While BPCA generally retains documentation from the successful bidders; BPCA states its practice is to retain documentation from the unsuccessful bidders for only one year. The

documentation for these contract proposals is often quite extensive and BPCA explained that it does not have the space to retain these materials for a longer period. However, in our review of the 18 competitively bid contracts, we found that BPCA's practices are inconsistent with either the one-year or six-year time frames. As a result, we could not always confirm whether BPCA had actually received the number of bids it claimed it had for the contracts we reviewed.

For three contracts totaling \$4.8 million, the bid documentation provided to us did not fully support one of the reasons used to justify the proposal selected. In one case, involving the selection of a construction management team, BPCA had asked a consultant to help select one of eight proposals for services related to ball fields in a park. The consultant narrowed down the choices to two - one for \$870,851 and another for \$664,059. He deemed both equally acceptable, but recommended the vendor who had made the less-costly proposal. He said his selection was based on the "cohesion in the [vendor's] management philosophy and the experience of the landscape architect." Documents indicate that BPCA officials selected the more costly \$870,851 proposal. One of the reasons was because the vendor would supply 1,000 more service hours over the life of the contract. However, when we compared the service hours listed in both proposals, we found that the vendor BPCA selected had actually proposed only 164 hours more, not 1,000 hours more. In the second instance, involving the selection of a construction manager to oversee a park reconstruction project, BPCA had narrowed down the proposals to four. One of the reasons cited for choosing the selected firm was that even though its cost was greater than the other three, the additional cost was "a result of additional person-hours" that the firm offered over the other three firms. However, we found this justification is not correct as one firm had proposed about 5,000 more hours than the selected firm, while another about 50 more hours than the selected firm. In the third case, we could not verify the number of hours proposed by the losing vendors because BPCA had not retained their bids.

BPCA officials state that the number of hours proposed by prospective consultants is one of a number of factors considered when evaluating project proposals. BPCA also considers project understanding, staffing approach, experience, mix of hours, competence of staff and cost. However in the above three contracts, one of BPCA's justifications for not

selecting the lowest-priced proposal was related to the number of hours proposed. Also, we found no evidence that BPCA had indicated in the RFP or the Contract Reporter that a minimum number of service hours would be expected. Contractors trying to submit a successful low bid may in fact have undermined their bids by minimizing the number of hours proposed. When the lowest price is not the sole criteria for selecting a contractor, the selection criteria should be clearly established in the request for bid documents.

### **Recommendations**

3. Clarify the record retention policy and ensure consistent compliance.

(BPCA officials agreed to clarify their policy, indicating they will retain documents for six years.)

4. Ensure that RFPs and bid specifications inform potential bidders of the criteria to be used to evaluate the proposals.

(BPCA officials indicated that they will take steps to ensure that RFPs and bid specifications clearly inform potential bidders of the criteria for evaluation of bids.)

5. Ensure the justification for selecting a particular firm accurately reflects what is in the submitted proposals.

(BPCA officials did not respond directly to this recommendation.)



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## CONTRACT PARTICIPATION BY MINORITY- AND WOMEN-OWNED BUSINESS ENTERPRISES

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Article 15-A of the Executive Law (Article 15-A) directs State Agencies to increase the participation by minority- and women-owned business enterprises on State contracts and subcontracts. The Rules and Regulations of the Department of Economic Development (DED) require that each State agency, including BPCA, set participation goals for minority- and women-owned business enterprises (MWBE) in its contracts. They also require that on a quarterly basis, agencies report to DED their level of MWBE contract participation in terms of the dollars they pay to MWBE firms.

We found that BPCA prepared the four quarterly DED reports for 2004. BPCA's goal is that 5 percent of the contract dollars spent be to women-owned business enterprises and 12 percent be to minority-owned business enterprises. We found that in 2004, BPCA reported achieving only 3.32 percent women-owned and 3.36 percent minority-owned business enterprise participation. Furthermore, this number may not be accurate as BPCA reports participation amounts in terms of dollars awarded, rather than in actual dollars paid.

To achieve compliance with Article 15-A, BPCA's Affirmative Action Program calls for contractors to submit various monthly reports indicating the extent that the MWBE goals have been achieved. To determine whether contractors are submitting the required monthly reports, we selected a judgmental sample of 6 contracts from the 22 that we had reviewed. We chose these six because they were multi-million dollar construction and design contracts which provided for many opportunities for MWBE participation. During the 12-month period ended October 31, 2004, there should have been 60 monthly reports on payments to MWBE subcontractors for five contracts. (One of the six contractors did not have to file reports because it received a BPCA waiver as it had no subcontractors.) Only 9 of the 60 reports were submitted. Each contractor is also required to submit monthly reports regarding the number of minority and women in their workforce. BPCA had not received any of 72 monthly contractor workforce utilization reports for the six

contractors for the year. BPCA officials told us they will improve monitoring of contractors' compliance with MWBE goals.

BPCA has an outreach program designed to inform MWBEs about its upcoming contracting and employment opportunities on the BPCA contracts. BPCA advertises the upcoming opportunities for contracting in the Contract Reporter and also in the Amsterdam News, Browns Letters, Minority Commerce, Employment Weekly, and the Dodge Report. It sponsors conferences and workshops for MWBEs, working with groups such as the New York State Black and Puerto Rican Caucus, the Hispanic Legislative Task Force, and BPCA's own Competitive Edge Conference. It also works with groups such as the Regional Alliance for Small Contractors, Professional Women in Construction, and Jamaica Business Center.

### **Recommendations**

6. Ensure that MWBE participation in BPCA contracts is reported to DED in terms of actual dollars paid, not in terms of dollars awarded.
7. Improve monitoring of contractor compliance with MWBE participation and workforce utilization goals.

(BPCA officials responded that they will implement recommendations 6 and 7.)

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## MAJOR CONTRIBUTORS TO THIS REPORT

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Frank Houston

Cindi Frieder

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## APPENDIX B



January 23, 2006

Mr. Frank Houston  
Audit Director  
Office of the State Comptroller  
Division of State Services  
123 Williams Street  
New York, NY 10038

Re: Report 2005-S-8  
Draft Report Response

Dear Mr. Houston:

This is a response to the Draft Audit Report (2005-S-8) by the New York State Office of the Comptroller about the internal controls over contracting practices at Battery Park City Authority (“the Authority”) for the fiscal year ended October 31, 2004. While we agree with a number of the recommendations, we believe that others are without merit, show an incorrect understanding of the project management and development process at the Authority, and will not enhance internal controls already in place.

First, in discussing the receipt and custody of bids, the report’s introductory section failed to consider important internal controls related to the receipt and custody of bids. Previously, the State auditors recommended that the Authority institute a procedure requiring that all bids/proposals received by the Authority be logged in upon receipt. The Authority adopted that recommendation several years ago and has practiced the following documented procedures: all bid envelopes are date/time stamped upon receipt, and the bids are logged-in to a hard copy log book, maintained by our receptionist. Thereafter, the bids/proposals are stored in a locked cabinet until the formal bid opening when all timely proposals are opened. Those which are untimely are returned, unopened, to the sender. Immediately prior to the formal bid opening, the project manager or contract administrator signs out the proposals; noting the time and date that the bid envelopes were retrieved from their locked and secured location. These procedures serve as additional internal controls which ensure that only the bids received by the due date/time are included in the bid opening. The bid logbook is retained by the Authority as support documentation of these control procedures.

\*  
**Note**  
1

Although the report properly acknowledges that the Authority has “comprehensive guidelines for soliciting and awarding contracts on a competitive basis,” the report concludes that work for three contracts with amendments “should either have been anticipated and included in the initial competitive process or awarded separately.” The contracts cited to illustrate this proposition are design contracts. These comments

disregard the Authority's methodology, and generally accepted industry practice, of retaining one designer for all stages of a design project – from the pre-schematic phase through construction in order to maintain continuity in design services. Thus, when an architect begins the project with a feasibility study and design proposals, it would violate the industry practice to then hire a new architect for the next phase, design development, or for the subsequent phase, the preparation of construction documents. Each of these phases is required in any given project. In fact, the design contract discussed on page 11 was approved by the Members of the Board of the Authority for \$2 million from the outset. The contract for the initial phase of the project was in the amount of \$962,150; only a portion of the total amount approved for the project. Thus, it is clear that from the outset that it was understood that the work would be done in phases and that the entire contract amount would not be applied in the first phase.

\*  
**Note**  
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Moreover, although it is not recognized in the report, there is often a necessity during the lifespan of a contract, to amend that contract due to unanticipated field conditions, a change in the construction program, or in the case of a design project, the phasing of the project. The assertion that a competitive process should be commenced when these situations arise demonstrates a lack of familiarity with the reality of scheduling construction projects. In construction, timing is everything. Failure to proceed from one phase into the next, as scheduled, causes a domino effect of delays and invites claims for delay damages against the owner, making the project more expensive. Moreover, such delays may imperil the ability to perform certain tasks, as weather considerations often dictate the ability to perform critical construction tasks. Thus, the assertion that a competitive process be instituted in the midst of a construction project does not comport with the realities of construction and the costs associated therewith.

Based upon the foregoing, we find that the recommendation 1, that the Authority use competitive bidding for all contract changes constituting a change of scope, to be unworkable. Moreover, we believe that we do clearly document the unique qualifications of design professionals who continue to work on on-going projects. Nonetheless, the Authority notes the intent behind the auditors' recommendation 1 and will endeavor to more explicitly identify the entire scope of our project requirements for design contracts in the NYS Contract Reporter advertisement. With respect to recommendation 2, the Authority will retain in the file the documentation relied upon by the construction managers, or other professionals, to determine that amendment costs are reasonable.

As to recommendation 3, the Authority must point out that the assertion that the auditors were unable to confirm the timeliness of receipt of certain bids is not supported by fact. As discussed on page 1 of this response, after a previous Comptroller's audit some years ago, the auditors recommended that the Authority maintain a bid log book. They explained that this log book would be utilized as a contemporaneous record of the date and time when proposals for work/projects arrive. In implementing this suggestion, the Authority added the additional step of creating a column in the logbook where the receptionist records the condition of the proposal envelope when it arrives. Thus, it is immediately apparent upon receipt of the bid whether a bid has been opened and or tampered with, and provides a clear record for the auditors permitting them to ascertain

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**Note**  
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\* See State Comptroller's Notes, page 31

the integrity of the proposal at the time it was received. This procedure has been in use at the Authority since at least June of 2000 and it provides an excellent record of who bid on each project and when the bid was received by the Authority. Had the auditors chosen to review the log book entries, they would have found that all bids were accounted for without exception. Additionally, the auditors could have chosen to contact the losing proposers to confirm whether they had submitted proposals and in what amount. Thus, the statement that the auditors were unable to verify that bids had been received in a timely manner was inaccurate.

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**Note**  
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The Authority has clarified the six-year document retention policy set forth in the Records Retention and Disposition Schedule and will now retain all bid documents for six years. The Authority agreed with the auditors' recommendation number 3, and has improved its records retention policy in the interest of enhanced accountability.

In discussing certain construction contracts, the report stated that the Authority justified selecting one contractor over another based on an inaccurate assessment of the number of hours that one prospective contractor was expected to provide versus the other. The report cites one case where Authority chose one proposer who had offered 1,000 more hours more than the other. The report further states that according to the auditors' calculations the differential in the proposed hours was 164 not 1,000. We believe that the auditors are mistaken in their calculations because the documents that they reviewed clearly show that the difference in hours was 964 (4,994 less 4,030) and not 164; making the proposer who was chosen a better value. Thus, the comment that a contractor was chosen based on an inaccurate analysis of the hours proposed, is without basis and should be stricken from the report (See Auditor's recommendation 5.)

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**Note**  
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Moreover, the report mistakenly concludes from the two examples cited in the report, that the hours proposed by a contractor is the primary consideration in the award of contracts at the Authority and that this fact should be included in the RFPs distributed to prospective contractors. The hours to be provided is only one of many factors utilized in selecting the most qualified, lowest proposer, and pre-stating the number of expected hours would stifle, not encourage competition. For example, the audit report discusses an instance where the Authority selected one contractor who proposed to provide the Authority with more hours than another but, in critiquing the Authority's choice, the report does not include the entire rationale for the choice of the winning proposer. As noted in the report, cost is only one of many factors in choosing the best contractor to perform the work. In the case cited, Authority management believed that the unsuccessful proposers had inadequate staffing levels in critical segments of the work and that the successful proposer had allocated sufficient person-hours to the planning stage to allow for the proper review of drawings and proposals to minimize change orders. The successful proposer also had a well-respected sustainability subconsultant who offered to create a workshop to identify sustainability opportunities at the beginning of the project, strategies to increase energy performance by at least 20 percent over the New York State Energy Code (as per the NYS Executive Order No. 111), and proposed methods to ensure compliance with the sustainability goals set for the project. These reasons for selection of the successful proposers were clearly documented in the Contract Selection Committee

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materials, as required by the Authority's procurement guidelines, but were not mentioned in the auditors report.

While we believe that the Authority is already listing the selection criteria for its contracts in its RFPs, we will take steps to ensure that RFPs and bid specifications even more clearly inform potential bidders of the criteria for evaluation of bids, as set forth in recommendation 4.

The report cites a third example in this section and states that the auditors were unable to verify the number of hours proposed by an unsuccessful vendor because the Authority had not retained the unsuccessful bids. A bid tabulation worksheet for this project was provided to the auditors for their review. This bid tabulation worksheet clearly indicates the staffing hours proposed by each of the proposers. The bid tabulation is created during the opening of the bids and signed by three witnesses to the bid opening – the contract administrator, the project manager and either the Internal Control Officer or a staff member of the Internal Audit department.

* <b>Note</b> 5
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As to the auditors' observations about the Authority's M/WBE program, in 2003, the Authority began an on-going overhaul of its Affirmative Action program including the appointment of a Director, Field Inspector and Administrative Assistant dedicated to insuring that the Authority provides opportunities for minority and women owned businesses as outlined in Article 15A of the Executive Law. The Authority's M/WBE program has since been applauded by numerous organizations created to promote minority, women and disenfranchised businesses participation in government contracts. We have received awards from the Regional Alliance, the NYC Hispanic Chamber of Commerce, the Jamaica Business Center, AMENY and Professional Women in Construction for our outstanding outreach program and the amount of dollars awarded to M/WBE businesses.

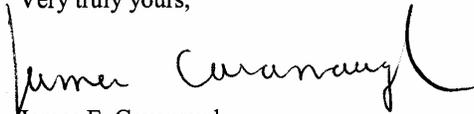
In addition to the M/WBE requirements of Article 15-A, the Battery Park City Authority goes a step further, and includes in its leases a mandate that its developer tenants award contracts to M/WBE businesses. Since 1998, as a result of this lease requirement, \$183,067,851 million in contracts have been awarded to M/WBE companies. Under the Article 15-A reporting requirements, the Authority has no mechanism to report these opportunities. Nonetheless, we believe that the accolades of the M/WBE community illustrate the Authority's dedication to, and compliance with, the spirit and legislative intent of Article 15-A of the Executive Law.

The audit report recognizes that the Authority prepared the four DED quarterly reports required by Executive Law 15-A for 2004, but goes on to comment that the Authority needs to improve its controls over compliance with Article 15-A. The report states that the Authority was reporting M/WBE participation amounts in terms of dollars awarded rather than in actual dollars. This error has been corrected. Based on the auditor's observations during the time of the audit, the Authority immediately corrected its reporting to dollars actually paid to M/WBE prime and sub-contractors in 2005, as opposed to dollars awarded.

The Authority accepts recommendations 6 and 7 and will implement those recommendations.

We would like to express our appreciation for your audit services and will continue to provide our fullest cooperation to the auditors.

Very truly yours,

A handwritten signature in black ink that reads "James E. Cavanaugh". The signature is written in a cursive style with a large, sweeping flourish at the end.

James E. Cavanaugh  
President & CEO

cc: Hon. Alan G. Hevesi  
Comptroller



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***State Comptroller's Notes***

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1. Certain matters presented in the draft report were revised in this final report based upon the response of BPCA officials. In addition, the related recommendation was deleted.
2. While we recognize the potential benefits of using the same contractor through various phases of a project, the project's advertisement should state that these phases would be part of the contract. Phased projects need to be fully estimated ahead of time and be advertised as phased projects. The three contracts addressed in the report, however, were not advertised with that important information. The use of amendments over a period of years for proposed contract changes that constitute a project scope change or a substantial increase in the contract price does not promote a competitive process or provide the opportunity for other vendors to compete for BPCA work. Furthermore, the amendments for these three contracts lacked adequate documentation that such services were procured at a reasonable cost.
3. Subsequent to the Audit Exit Conference, we informed BPCA officials that we reviewed the bid documents and agreed that one contractor had proposed 4,994 hours, but determined the second contractor had proposed 4,830 hours, rather than the 4,030 hours BPCA reported. We determined a difference of only 164 hours, as we stated in the report. We provided BPCA officials with documentation for our calculation.
4. Nowhere in the report do we state that a contractor's proposed hours was BPCA's primary or sole consideration in the award of a contract. However, in the three contracts we sited in the report, one of BPCA's justifications for not selecting the lowest-priced proposal was related to the number of hours proposed. Yet, we found no evidence that BPCA had indicated in the RFP or the Contract Reporter advertisement that a minimum number of service hours would be expected. Contractors trying to submit a successful low bid may in fact have undermined their bids by minimizing the number of hours proposed. When the lowest price is not the sole criteria for selecting a contractor, the selection criteria should be clearly established in the request for bid documents.
5. The bid tabulation sheet provided by BPCA during the audit, which was signed by four witnesses and dated April 24, 2000 (the bid opening date), did not include proposed staffing hours. Subsequent to the issuance of the draft audit report, BPCA provided the auditors with a bid tabulation sheet which included proposed staffing hours. However, the sheet was not signed and was dated May 16, 2000. This document was neither created at the time of the bid opening nor witnessed as required by BPCA's procedures.