

New York State Office of the State Comptroller
Thomas P. DiNapoli

Division of State Government Accountability

Contract Participation of Minority- and Women-Owned Business Enterprises

Dormitory Authority of the State of New York



Report 2014-S-7

July 2015

Executive Summary

Purpose

To determine whether the Dormitory Authority of the State of New York properly established annual contract participation goals for minority- and women-owned business enterprises and accurately reported program results to the Department of Economic Development. The audit covered the period of April 1, 2011 through December 31, 2013.

Background

Article 15-A of the New York State Executive Law (Law) requires State agencies and public authorities to promote the participation of minority- and women-owned business enterprises (MWBEs) in their contracts. State agencies and public authorities are required to establish annual goals for such participation, make a “good faith” effort to achieve their goals, and report quarterly on their level of participation to the Department of Economic Development (DED), a division of Empire State Development. DED is responsible for the certification of MWBEs. The Dormitory Authority of the State of New York (Authority), a public benefit corporation that finances and constructs buildings for public and not-for-profit entities, is among those entities required to comply with the Law.

Key Findings

- The Law set the State’s MWBE participation target at 28.92 percent, and the Authority set annual goals of 20 percent to 26 percent for the 2011-12 through 2014-15 fiscal years. However, the Authority did not explain why its MWBE participation goals were less than the goal established by the Law, as otherwise required per DED regulation.
- The Authority overstated its MWBE contract participation when reporting to DED. A judgmental sample of payments to prime contractors totaling \$37.8 million was overstated by \$9.2 million (24 percent), and a judgmental sample of payments to subcontractors totaling \$25.9 million was overstated by \$4 million (15 percent).
- In preparing reports to DED, the Authority did not make adjustments for payments to MWBE prime contractors who in turn paid other MWBE contractors as subcontractors.
- The Authority did not report payments for non-construction professional services, although it made payments to MWBEs in this industry segment.

Key Recommendations

- Develop and implement formal processes to properly establish annual MWBE participation goals. The formal processes should include, but not be limited to: documenting the methodology, including quantitative analysis, used to establish annual MWBE participation goals.
- Develop and implement formal mechanisms to quality assure data entered into the Authority’s automated MWBE participation reporting system.
- Develop and implement formal processes to correct data-entry errors, including providing revised amounts and participation rates to DED and other stakeholders.
- Report no more than the actual amount paid by the Authority when a MWBE prime contractor makes a related payment to a MWBE subcontractor.
- Contact DED to obtain clarification regarding the reporting of non-construction professional

service payments for MWBE program participation purposes. Follow such guidance in preparing quarterly MWBE program reports.

Other Related Audits/Reports of Interest

[Metropolitan Transportation Authority: Minority and Women's Business Enterprise Reporting \(2010-S-9\)](#)

[Dormitory Authority of the State of New York: Mission Statement and Performance Measures \(2013-S-13\)](#)

**State of New York
Office of the State Comptroller**

Division of State Government Accountability

July 8, 2015

Mr. Alfonso L. Carney, Jr.
Chair
Dormitory Authority of the State of New York
515 Broadway
Albany, NY 12207-2964

Dear Mr. Carney:

The Office of the State Comptroller is committed to helping State agencies, public authorities and local government agencies manage their resources efficiently and effectively. By so doing, it provides accountability for tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is a report of our audit entitled *Contract Participation of Minority- and Women-Owned Business Enterprises*. This audit was performed pursuant 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.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this report, please feel free to contact us.

Respectfully submitted,

*Office of the State Comptroller
Division of State Government Accountability*

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Background

The Dormitory Authority of the State of New York (Authority) is a public benefit corporation established in 1944 for the purpose of financing and constructing dormitories for the State's teachers' colleges. Over time, the Authority's purpose was expanded to finance and construct buildings for a variety of public and not-for-profit entities, including universities, healthcare facilities, and State agencies. Its current mission is to deliver exceptional customer service and professional expertise on every financing and construction project in a cost-effective manner and to advance the policy goals of the State. The Authority is governed by an 11-member Board and has approximately 535 employees located at three offices (Albany, Buffalo, and New York City) and nearly 60 field sites across the State.

Article 15-A of the New York State Executive Law (Law) requires State agencies and public authorities to promote the participation of minority- and women-owned business enterprises (MWBEs) in their contracts. The Law set the overall statewide MWBE participation goal at 28.92 percent, effective July 2010. The Director of the Division of Minority and Women's Business Development at the Department of Economic Development (DED) is responsible for overseeing the statewide MWBE program. DED is also responsible for the certification of small businesses that qualify as MWBEs. As of February 2014, DED had certified 5,755 unique businesses as MWBEs. Some businesses are both a minority-owned business enterprise (MBE) and a women-owned business enterprise (WBE).

Under the Law, State agencies and public authorities must establish annual goals for MWBE participation in their contracts (expressed as a percentage of total contract spending after exemptions and exclusions), make a good faith effort to achieve those goals, and report quarterly on their MWBE participation to DED. The Authority's Opportunities Programs Group (OPG) is responsible for developing, implementing, and evaluating the effectiveness of the Authority's MWBE program. The OPG also is responsible for ensuring the Authority's compliance with the Law, which includes preparing the quarterly reports to DED.

For the fiscal year ended March 31, 2012, the Authority reported payments of \$200.3 million to MWBEs out of \$864.9 million in total contract payments, for a MWBE participation rate of 23.2 percent (see Exhibit A). For the fiscal year ended March 31, 2013, the Authority reported MWBE payments of \$181.8 million out of \$839.3 million in total contract payments, for a participation rate of 21.7 percent (see Exhibit B). Also, for the nine months ended December 31, 2013, the Authority reported MWBE payments of \$166.2 million out of \$591.4 million, for a participation rate of 28.1 percent.

Audit Findings and Recommendations

For the fiscal years 2011-12 through 2014-15, the Authority set its annual MWBE goals at 20 to 26 percent, which were lower than the statewide participation goal of 28.92 percent set forth by the Law. Moreover, the Authority did not formally explain why its annual goals were less than the Law's goal, as otherwise required by DED regulation. Also, based on our reviews of selected payments the Authority made to prime contractors (and prime contractors subsequently made to subcontractors), the Authority likely overstated its MWBE participation in its reports to DED. In addition, the Authority did not report payments for non-construction professional services, although it makes MWBE payments for such services.

Setting Program Participation Goals

The Law set the overall statewide MWBE participation goal at 28.92 percent, effective July 2010. In addition to the overall statewide goal, participation goals were established for several specific industries (construction, construction related professional services, non-construction related services, and commodities). Specific goals were also established for MBEs and WBEs. Table 1 notes the overall target participation percentage as well as the goals by industry and for MBEs and WBEs.

Table 1

Type of Industry	MBE Goal (Percent)	WBE Goal (Percent)	Total MWBE Goal (Percent)
All Industries	16.53	12.39	28.92
Construction	14.34	8.41	22.75
Construction Related Professional Services	13.21	11.32	24.53
Non-Construction Related Services	19.60	17.44	37.04
Commodities	16.11	10.93	27.04

State agencies and public authorities must set their annual goals for each State fiscal year, and then submit their annual goal plan to DED, which has 30 days to act or the plan is considered approved. According to DED regulations, State agencies and public authorities must include the justification for the specific percentages set and, if necessary, an explanation of why those percentages are less than those stated in the Law.

The Authority's overall annual MWBE participation goals, however, ranged from 20 percent to 26 percent during the audit period. According to Authority officials, these goals were consistent with guidance provided by the Executive. Nonetheless, Authority officials could not demonstrate how they determined the Authority's overall MWBE participation goals or industry-specific goals for the four years reviewed. Table 2 details the MWBE participation goals the Authority submitted to DED for each of the four fiscal years ending March 31, 2015.

Table 2

Fiscal Year	MBE Goal (Percent)	WBE Goal (Percent)	MWBE Goal (Percent)
2011-12	17.00	9.00	26.00
2012-13	13.00	7.00	20.00
2013-14	11.85	9.11	20.96
2014-15	14.17	7.73	21.90

Ranging from 20 to 26 percent, all of the annual goals were less (and sometimes significantly less) than the 28.92 percent statewide goal set forth by the Law. Authorities may submit MWBE plans with participation goals that are less than the statewide goal; they must also include explanations for the lower goals, as required by DED Regulation 141.2.d. However, when the Authority submitted its goals to DED, it did not explain why the goals were less than the level in the Law, as otherwise required by DED. Also, DED neither requested an explanation from the Authority, nor denied the Authority's proposed goals. Officials explained that the goal of 28.92 percent participation was not achievable, due to certain unique circumstances faced by the Authority. However, Authority officials provided no formal analysis of these circumstances.

We also noted that the Authority allocated portions of the overall MWBE goals among the four industries specified in the Law and submitted the individual industry goals to DED. However, according to Authority officials, the Authority did not actively track progress toward the industry-specific participation goals, as greater priority was placed on achievement of the overall program goal. Further, the industry-specific goals were not based on a formal quantitative analysis, including pertinent historical data. Instead, officials simply tried to ensure that the sum of the industry-specific goals equaled the Authority's overall participation goal.

For example, for the 2012-13 fiscal year, the Authority set its overall MWBE participation goal for commodity subcontractors at 20 percent (including 13 percent for MBEs and 7 percent for WBEs), although it had no commodity subcontractors that were MWBEs. Authority officials could have justified a commodity subcontractor goal of zero percent, but submitted an amount to DED knowing that the actual participation rate would likely be lower than the target (and perhaps as low as zero).

Without a basis for the participation goals established for the various individual industries, the Authority has limited assurance that it has set appropriate goals to assess the effectiveness of efforts to achieve and maintain sufficient MWBE participation in those industries.

Recommendation

1. Develop and implement formal processes to properly establish annual MWBE participation goals. The formal processes should include, but not be limited to:

- Documenting the methodology, including quantitative analysis, used to establish annual MWBE participation goals (both overall and industry-specific);
- Explanations of variances between the Authority's overall and industry-specific MWBE participation goals and the statewide goals established in the Law; and
- Requesting and obtaining formal DED approval of proposed MWBE participation goals that are less than the statewide goal established by the Law.

Reporting Program Participation Results

Each quarter, the Authority is required to report total contract payments and the amounts paid to its MWBE prime contractors and subcontractors to DED. This data is used to calculate the percentage of total contract payments made to MWBEs (or the MWBE participation rate). The Authority pays its prime contractors, who in turn pay subcontractors. The Authority reports to DED: all payments it makes to MWBE prime contractors; all payments made by prime contractors to MWBE first-tier subcontractors; and all payments made by first-tier subcontractors to MWBE second-tier subcontractors. Information about payments to MWBE prime contractors comes from the Authority's automated payment system. Information about first- and second-tier subcontractors comes from compliance reports submitted by the prime contractors and the first-tier subcontractors. An average of 3,200 individual subcontractor payments is reported on more than 900 compliance reports each quarter.

OPG (the unit responsible for overseeing the Authority's MWBE program) posts information from the compliance reports to the Authority's automated MWBE compliance system. OPG also prepares and submits the Authority's quarterly reports to DED, which compiles the quarterly participation information from 97 State agencies and public authorities into a single annual report that is sent to the Governor and the Legislature. This report is also posted to DED's website. The Authority accounted for 17 percent of the State's total MWBE participation for fiscal year 2011-12 and 12 percent for fiscal year 2012-13. These are significant percentages, and they underscore the importance of the Authority reporting accurate MWBE participation data to DED.

Payments to Prime Contractors

We selected a judgmental sample of 52 payments (totaling \$37.8 million) made to MWBE prime contractors during our audit period. These payments represented about 24 percent of the amount the Authority reported to DED as paid to MWBE prime contractors during the period. However, 34 (65 percent) of the 52 payments were reported to DED incorrectly, resulting in the Authority overstating its total MWBE participation by \$9.2 million (24 percent). Specifically, we identified three types of errors that led to the over-reporting, as follows:

- For prime contractors, the Authority reported 31 payments (totaling \$28.2 million) in MWBE participation when the actual payments totaled only \$23.6 million (or \$4.6 million less than reported). The Law allows payments from MWBE prime contractors to MWBE subcontractors to be counted towards MWBE participation goals. However, in preparing reports to DED, the Authority did not make adjustments for payments to MWBE prime

contractors who in turn paid other MWBE contractors (as subcontractors). For example, if an MWBE prime contractor requested a payment of \$100,000 that included \$10,000 for an MWBE subcontractor, the Authority reported a total of \$110,000 in MWBE utilization, even though it paid the MWBE only \$100,000. According to Authority officials, they report prime contractor and subcontractor utilization separately, and DED totals the numbers without adjusting for amounts that are double counted. At the time of our audit fieldwork, DED was in the process of implementing a new system, and Authority officials believe that the new system will be able to reconcile such payments for more accurate reporting.

- The Authority reported \$3.1 million in payments to a non-MWBE contractor as MWBE utilization payments. The contract was originally awarded to a MWBE prime contractor that was unable to complete the project. Consequently, a surety bond company hired a replacement prime contractor that was not an MWBE. Because the Authority's system tracks participation by contract rather than payee, the \$3.1 million paid for the replacement (non-MWBE) contractor was reported to DED as if the original company (an MWBE) did the work. Thus, the actual MWBE utilization rate on this contract was zero percent (and not 100 percent as reported).
- The Authority reported MWBE participation for two payments made to non-MWBE prime contractors for purchases of office furniture purportedly handled by MWBE vendors selected from contracts arranged by the New York State Office of General Services rather than the Authority or its prime contractors. The payments of \$1.5 million were sent to the prime contractor's address, with a notation that they were "in care of" the MWBE vendor. However, there was no credible evidence that the MWBE vendor actually had any role in the procurements. For both payments, the prime contractor handled the arrangements for the purchase and delivery of the office furniture. Further, we sent letters to the MWBE vendors, asking them to confirm their participation in these procurements. However, the MWBE vendors did not respond to us. Given the absence of documentary evidence that should have been readily available, it would appear that the actual MWBE participation rate for these two payments was zero percent (and not 100 percent).

Payments to Subcontractors

We selected a judgmental sample of 21 payments (totaling \$25.9 million) made by prime contractors to MWBE subcontractors during our audit period. This represented about 7 percent of the amount the Authority reported to DED for MWBE subcontractor participation during our audit period. However, 8 (38 percent) of the 21 amounts were reported to DED incorrectly, resulting in the Authority overstating its MWBE subcontractor participation by about \$4 million. For the eight incorrect amounts, four were attributable to data-entry errors, three included amounts that were double counted, and the remaining transaction had both types of errors.

One reason for the data-entry errors is that the system does not allow corrections after payments are reported to DED. Instead, OPG staff entered a payment of \$1 to indicate a data-entry error and then adjusted future payments to the contractor in question so that the total payment amount at the end of the contract was correct. The system also has no edit checks to flag when the amounts paid to all subcontractors exceeded the total paid to the prime contractor. The double counting occurred when a MWBE subcontractor pays another MWBE subcontractor, and the

Authority reported the entire amount paid to both parties without any adjustment. As a result, the Authority reported total MWBE participation amounts that exceeded the amounts actually paid to the MWBEs.

For the eight amounts that were incorrect, the Authority reported \$11.24 million in MWBE participation (out of \$75.99 million in total payments), resulting in a participation rate of 14.7 percent. However, the correct participation amount for these eight payments should have been only \$7.25 million (or nearly \$4 million less than the Authority reported), for a participation rate of 9.6 percent. Data-entry errors accounted for \$3.68 million of the overstatement, while double counting totaled about \$316,000.

Non-Construction Professional Services

The Authority did not include participation goals for non-construction professional services (such as legal services, risk management, and underwriting) in its annual plan submitted to DED. The Authority also did not include payments for such services in the quarterly reports it filed with DED. As previously noted, the Authority included payments for construction related professional services in its quarterly reports.

According to Authority officials, they have not received sufficiently clear guidance from DED pertaining to the reporting of contracts for non-construction professional services for MWBE program purposes. Certain DED guidance found on its website entitled “Summary of Article 15-A of the Executive Law” lists several non-construction services that could dissuade agencies from reporting payments for such services. Notably, the same Summary states that State agencies and public authorities may voluntarily report these amounts to DED for the MWBE program. Further, DED’s system has a code for certain non-construction professional services. Thus, the Authority should request and obtain the necessary guidance and clarifications from DED to determine whether and how it should report non-construction professional services for the MWBE program. By reporting such services, the Authority might be able to demonstrate that it is in greater compliance with the Law.

In response to our preliminary findings, Authority officials indicated that the Authority reports its MWBE non-construction professional service payments to the Authorities Budget Office (ABO). However, this does not help the Authority to comply with the Law, including requirements for reporting MWBE contract participation.

Recommendations

2. Develop and implement formal mechanisms to quality assure data entered into the Authority’s automated MWBE participation reporting system.
3. Develop and implement formal processes to correct data-entry errors, including providing revised amounts and participation rates to DED and other stakeholders.
4. Report no more than the actual amount paid by the Authority when a MWBE prime contractor

makes a related payment to a MWBE subcontractor.

5. Ensure that MWBE program data is properly updated and adjusted when an MWBE contractor is unable to perform specified work and a non-MWBE contractor must be paid to perform the work in question.
6. Develop and implement steps to verify that “in care of” MWBE vendors have actually provided the specified goods and/or services before reporting the corresponding payment participation amounts to DED.
7. Obtain clarification from DED regarding the reporting of non-construction professional service payments for MWBE program participation purposes. Follow such guidance in preparing quarterly MWBE program reports.

Audit Scope and Methodology

Our audit determined whether the Authority properly established annual contract participation goals for MWBEs and accurately reported program results to DED. The audit covered the period of April 1, 2011 through December 31, 2013.

To accomplish our objectives and assess related internal controls, we reviewed relevant State Laws, New York Codes, Rules and Regulations, DED guidance regarding Law implementation, and the applicable Authority policies and procedures to track and report MWBE utilization. We also interviewed officials from the Authority’s OPG and Purchasing Department, as well as various Project Managers. We reviewed the quarterly reports the Authority submitted to DED for our audit period. We took additional steps to confirm the accuracy of the amounts reported, including requests for confirmations from subcontractors.

We selected two judgmental samples of amounts paid to contractors and subcontractors, from the quarterly reports the Authority submitted to DED between April 1, 2011 and December 31, 2013. We selected 52 amounts totaling \$37,813,401 paid by the Authority to certified MWBE prime contractors and 21 amounts totaling \$25,934,570 reported by prime contractors as payments to certified MWBE subcontractors. We selected our samples based on the dollar amounts and number of payments made to the contractors. Through the two samples, we tested about 12 percent of the MWBE participation amounts the Authority reported to DED during our audit period. For each amount in our sample, we reviewed the supporting documentation maintained by the Authority to determine whether the amount was correctly reported to DED. We also verified that the contractor was a DED-certified MWBE.

We conducted our performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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. 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 functions do not affect our ability to conduct independent audits of program performance.

Authority

This audit was performed pursuant 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.

Reporting Requirements

We provided a draft copy of this report to Authority officials for their review and formal comment. We considered the Authority's comments in preparing this report and have included them at the end of it. In their response, Authority officials generally disagreed with our observations and conclusions. However, officials also indicated that the audit provided useful observations about data management, and they will formalize the Authority's process to establish annual MWBE participation goals. Also, our rejoinders to certain Authority comments are included in the report's State Comptroller's Comments.

Within 90 days of the final release of this report, as required by Section 170 of the Executive Law, the Chairman of the Dormitory Authority of the State of New York 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 the recommendations were not implemented, the reasons why.

Contributors to This Report

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Vision

A team of accountability experts respected for providing information that decision makers value.

Mission

To improve government operations by conducting independent audits, reviews and evaluations of New York State and New York City taxpayer financed programs.

Exhibit A

MWBE Participation Amounts Reported to DED For FY 2011-12 (See Note Below)

Industry	Total Contract Amount \$	\$ Amounts Paid to MBEs	\$ Amounts Paid to WBEs	Total \$ Amounts Paid to MWBEs
Prime Contractors				
Commodities	\$44,220,097	\$728,162	\$2,045,093	\$2,773,255
Construction Consultants	320,631,383	3,131,254	4,436,157	7,567,411
Construction	493,941,860	33,239,595	8,613,751	41,853,346
Services Consultants	6,116,564	334,965	377,161	712,126
Subcontractors				
Commodities		0	0	0
Construction Consultants		37,863,539	34,578,320	72,441,859
Construction		46,328,347	28,547,349	74,875,696
Services Consultants		18,638	55,593	74,231
Totals	\$864,909,904	\$121,644,500	\$78,653,424	\$200,297,924

MWBE Participation Percentage: $\$200,297,924 / \$864,909,904 = \underline{23.2 \text{ percent}}$

Note: As detailed in the body of the audit report, the amounts the Authority reported to DED likely overstate actual MWBE participation.

Exhibit B

**MWBE Participation Amounts Reported to DED
For FY 2012-13
(See Note Below)**

Industry	Total Contract Amount \$	\$ Amounts Paid to MBEs	\$ Amounts Paid to WBEs	Total \$ Amounts Paid to MWBEs
Prime Contractors				
Commodities	\$15,439,794	\$3,108,042	\$6,573,254	\$9,681,296
Construction Consultants	433,597,077	3,375,203	3,696,470	7,071,673
Construction	383,676,919	36,378,499	6,604,744	42,983,243
Services Consultants	6,587,711	260,729	403,704	664,433
Subcontractors				
Commodities		0	0	0
Construction Consultants		38,354,487	31,964,335	70,318,822
Construction		32,101,420	18,943,896	51,045,316
Services Consultants		31,600	3,916	35,516
Totals	\$839,301,501	\$113,609,980	\$68,190,319	\$181,800,299

MWBE Participation Percentage: $\$181,800,299 / \$839,301,501 = \underline{21.7 \text{ percent}}$

Note: As detailed in the body of the audit report, the amounts the Authority reported to DED likely overstate actual MWBE participation.

Agency Comments



Alfonso L. Carney, Jr., Chair
Paul T. Williams, Jr., President

Contract Participation of Minority and Women-Owned Business Enterprises

DASNY Response to:
NYS Office of the State Comptroller
Report 2014-S-7

3/20/2015

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Executive Summary

General

The Dormitory Authority of the State of New York (DASNY) takes exception to many of the findings contained within Report 2014-S-7 (the Report) from the NYS Office of the State Comptroller (OSC). The Report fails to provide appropriate and necessary context to salient facts and observations and demonstrates a general lack of understanding of the New York State minority and women-owned business enterprise (MWBE) program by the OSC auditors. As a result, OSC's Report has unfairly and improperly misrepresented DASNY's MWBE program in a negative light despite DASNY's proven record of accomplishment in opportunity programs for the full and fair participation of New York MWBEs in State contracting.

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Comment
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Background

DASNY has had an exemplary record in regard to the utilization of MWBE's and has for over twenty years been a leader among State agencies and authorities in establishing and meeting MWBE utilization goals. Over the past 10 years, DASNY has annually exceeded 20% MWBE utilization in regard to construction services, a record we believe is unmatched by any other State construction entity. In addition, over the past six years, DASNY has been the unquestioned leader on the NYS platform in successfully incorporating professional service firms, including architects, engineers, attorneys, investment bankers, securities brokers, insurance brokers and accountants into the procurement process and engaging such firms at high levels of participation.¹

Key Response to Findings

- Despite OSC's claim to the contrary, DASNY has set all MWBE goals in accordance with the relevant provisions of Article 15-A, which is the governing statute for DASNY's MWBE program. OSC's claim that DASNY failed to set MWBE goals in accordance with that law or that DASNY's MWBE goals should have been 28.92% is completely false.
- OSC judgmentally selected approximately 150 payments from the over 44,000 payments made during a 2.75 year period based upon criteria which were not disclosed to DASNY. It is clear that the audit results developed by OSC based on the small judgmental sample don't fairly and accurately reflect DASNY's track record and success in the MWBE utilization arena.
- OSC's claims concerning overstated payments by DASNY to MWBEs are inaccurate. Three of the five errors discovered were self-corrected by DASNY in the same fiscal year and the remaining two errors will be corrected. Further, even if those representations were not corrected, which they will be, those purported errors and the remaining two that were not corrected would constitute roughly 0.6% of DASNY's contracting expenditures and 2% of DASNY's MWBE utilization during the audit period.
- OSC's observation about data collection relative to prime and sub-contractors has been addressed and is no longer an issue concerning DASNY's reporting to DED.
- OSC's observation about DASNY's reporting of professional services has been addressed and is no longer an issue.

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¹ For example, prior to 2008, MWBE utilization among investment banks was 3%. In subsequent years, utilization has been in excess of 20%; utilization of securities brokers grew from 0% to over 30% in traditional (non-electronic) trading; for the first time in DASNY's 70 year history, a MWBE accounting firm participates in DASNY's annual financial audit and completes 30% of the work; and DASNY incorporated MWBE law firms in its bond counsel and underwriting legal work for the first time in over 20 years, with fully 4 MWBE firms participating regularly as bond counsel.

*See State Comptroller's Comments, page 20.

March 20, 2015

Ms. Carmen Maldonado
 Office of the State Comptroller
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 Albany, New York 12236

Dear Ms. Maldonado:

This letter is in response to the Report 2014-S-7 (the Report) from the NYS Office of the State Comptroller (OSC). The Report, as a function of process and context, inaccurately and unfairly portrays DASNY's MWBE utilization record. We believe that the audit was ill-timed due to the transitional period that DASNY and other "State agencies" are navigating concerning the implementation of the 2010 Business Diversification Act and the advent of the New York State Contract System (NYSCS), which is still evolving. We also take issue with the manner in which the audit was conducted and findings have been portrayed. OSC's judgmental sample, failed to provide appropriate context in situations where it was warranted and the misapplication of clear legal and regulatory standards were troubling. DASNY is grateful for the constructive recommendations made in the Report, but ultimately, these failures by OSC proved fatal to what could have otherwise been a more productive and useful audit of DASNY's MWBE program.

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 Comment
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Setting Program Participation Goals:

There is no evidence to support OSC's "Key Finding" that DASNY was required, by law, to set its MWBE goals at 28.92% during the audit period. OSC's contention that the law requires DASNY to set goals in that fashion is completely inaccurate and reflective of OSC's failure to understand the MWBE program, and the laws, rules and sound operational practices that govern and support this program. Executive Law § 313 (1-b) and 5 NYCRR 141.2, the law and regulation that govern agency-specific goal setting, respectively, require DASNY to consider the statewide MWBE goals identified in Executive Law § 313(1) in order to apply those statewide numbers to the DASNY procurement and contracting context, which is exactly what DASNY did in each of the subject fiscal years that were covered by this audit. OSC's suggestion that DASNY was required, or even that DASNY should have adopted the statewide MWBE goals of 28.92%, which is derived from the 2010 Disparity Study and codified in Executive Law § 313(1), is not supported by law or policy. OSC has similarly provided no evidence to support their conclusion that such an adoption is prudent, warranted or even beneficial to the MWBE community. For these reasons, DASNY rejects OSC's finding and recommendation in whole.

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Payments to Subcontractors:

DASNY takes issue with OSC's chosen methodology for sampling during this audit and has concluded that OSC failed to meet the generally accepted government auditing standards to support this audit finding. DASNY acknowledges that some form of sampling is required for OSC to be able to provide reasonable analysis for over 44,000 DASNY payment transactions. That does not, however, permit OSC to draw unsupported conclusions from what appear to be insufficient and unrepresentative data sets. In our view, OSC's judgmental sample, did not allow the auditors to objectively review and assess

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conditions at DASNY and then draw reasonable conclusions based on their observations and relevant input from DASNY. DASNY acknowledges some form of sampling was required for OSC to provide reasonable analysis for over 44,000 payment transactions during the audit period. However, OSC's decision to sample two separate sets of data regarding DASNY's payments to MWBEs and ultimately use only one data set as the basis of their findings is troubling.

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It is important to note that OSC judgmental sample of payments to MWBE subcontractors totaling 25.9 million were not overstated by \$4.1 million by DASNY in its reporting to ESD. The data entry errors amounted to two entries valued at \$1.3 million after the self-correction by DASNY during the reporting period. To give additional context, there is no recognition in the report that for the period covered by the audit DASNY OPG staff data manually entered approximately 9,789 subcontractor payment entries.

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Reporting Program Participation Results:

DASNY's long established practice of reporting data pertaining to MWBE utilization is a function of the legacy reporting system where prime contractor and subcontractor utilization data was entered separately but was not reconciled on an individual contract basis where MWBE prime contractors and subcontractors were working on the same project. Moving forward as DASNY is transitioning into the NYSCS system, which has enhanced utilization tracking capabilities, the reporting of MWBE Prime and MWBE sub-contractor dollars will be reconciled to account for these scenarios.

Non-Construction Professional Services:


DASNY will confer with its Agency Services Representative at ESD to submit MWBE Financial /Professional Services spend for the time frame of the audit. Moving forward the MWBE spend from this sector will be included in future reporting to ESD.

OSC Recommendations

DASNY will formalize its process on the establishment of annual MWBE participation goals. With DASNY's full transition into the NYSCS improvement opportunities denoted by the report regarding data entry and payments to MWBE Primes and MWBE subcontractors will be addressed through the NYSCS.

In conclusion, DASNY has a rich history and commitment to diversity and inclusion, and encourages MWBE utilization in all of its procurements. OSC's MWBE Program Audit provided some useful observations about our data management which we will continue to explore and fine tune.

Sincerely,


 Paul T. Williams, Jr.
 President

State Comptroller's Comments

1. Our report does not unfairly and/or improperly misrepresent the Authority's accomplishments with respect to its MWBE program. In fact, we performed our audit according to professional standards, which required us to obtain sufficient evidence to provide a reasonable basis for our findings and conclusions. For example, we noted that officials attributed some inaccurate program reporting to payments made to MWBE prime contractors, who in turn paid MWBE subcontractors (thus contributing to double counting of certain MWBE payments). Authority officials further advised us that the double counting occurred because the MWBE reporting system lacked a process to appropriately adjust data for such potentially duplicative payments.
2. The Authority's assertion is wrong. We did not state that the Authority was required to set its annual participation goals at the statewide goal of 28.92 percent. In fact, our report clearly states that the Authority set annual MWBE participation rates of 20 to 26 percent during the audit period, but did not explain to DED why its goals were less than the statewide goal, as otherwise required by DED regulation.
3. Our report clearly details the basis and methodology for selecting our judgmental samples of payment amounts included in the MWBE program participation data the Authority reported to DED. Specifically, we selected 52 amounts totaling \$37.8 million, or 23.5 percent of the total prime contractor payments the Authority reported to DED. Also, we selected 21 amounts totaling \$25.8 million, or 6.7 percent of the total MWBE subcontractor payments that the Authority reported. Thus, our samples represented material portions of the Authority's reported MWBE program participation. Moreover, we remain confident that the evidence we obtained from the sampled transactions provided a reasonable basis for our findings and conclusions.
4. Our samples included about 12 percent of the total MWBE participation the Authority reported to DED during the audit period. As such, we did not perform detailed tests of about 88 percent of the reported participation. If we significantly increased our testing, there is considerable risk that the amount of over-reported MWBE activity would have materially exceeded 2 percent of the total reported participation. As detailed in our report, the Authority overstated payments to prime contractors by \$9.2 million (or 24 percent of the amount tested). Also, payments to subcontractors were overstated by nearly \$4 million (or about 15 percent of the amount tested).
5. To the contrary, our report neither suggests nor formally recommends that the Authority adopt the statewide MWBE goal of 28.92 percent. As detailed previously, our report notes that the Authority established MWBE participation goals that were materially less than the statewide goal, without formal explanation why they were less than that goal. Hence, our report recommends that the Authority: explain why its program goals were less than the statewide goal; and obtain formal DED approval when its agency goal is less than the statewide goal. Also, it appears that the Authority summarily rejects a recommendation our report, in fact, does not make.
6. The Authority's assertion regarding generally accepted government auditing standards (GAGAS) and the use of judgmental sampling is wrong. In fact, GAGAS permits the use of judgmental sampling, and we complied with GAGAS in the use of the samples we selected for the audit. Also, see State Comptroller's Comment #3.

7. Consistent with professional auditing practice, we drew two samples to test the reliability of the Authority's MWBE data. We used one sample to test the accuracy of particular data elements and the second sample to assess data completeness. Based on that work, we determined that certain information in the Authority's MWBE reporting system was inaccurate or incomplete. Moreover, we shared the results of our data reliability testing with Authority officials in October 2014, and officials did not question our methodology or results throughout the remainder of our audit fieldwork. Thus, it is unclear why, subsequent to our fieldwork, Authority officials became "troubled" by our use of multiple samples.
8. We maintain that the MWBE amounts that the Authority reported to DED for our selected subcontractors were overstated by \$4.1 million, based on the records made available to us at the time of our audit fieldwork. In addition, during our fieldwork, we provided Authority officials with preliminary findings regarding the \$4.1 million of payments in question. In their response, Authority officials did not dispute the pertinent facts we presented. Moreover, officials acknowledged that MWBE prime and MWBE subcontracting data were not reconciled during the period of the audit. Further, they indicated that the Authority will be better able to reconcile such payments in the future as it transitions to the new NYS Contract System (or NYSCS).