

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

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COMPTROLLER**



***NEW YORK STATE DEPARTMENT OF
ECONOMIC DEVELOPMENT***

***PARTICIPATION BY MINORITY AND WOMEN-
OWNED BUSINESS ENTERPRISES IN STATE
CONTRACTS***

2002-S-55

DIVISION OF STATE SERVICES

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Alan G. Hevesi
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Report 2002-S-55

Mr. Charles Gargano
Commissioner
NYS Department of Economic Development
633 Third Avenue
New York, NY 10017-6706

Dear Mr. Gargano:

The following is our report on the Department of Economic Development's oversight of the implementation of Article 15-A of the Executive Law related to participation by minority and women-owned business enterprises in State contracts.

This audit was performed pursuant to the State Comptroller's authority as set forth in Article V, Section 1, of the State Constitution; and Article II, Section 8, of the State Finance Law. Major contributors to the report are listed in Appendix A.

Office of the State Comptroller
Division of State Services

March 26, 2004

EXECUTIVE SUMMARY

DEPARTMENT OF ECONOMIC DEVELOPMENT

PARTICIPATION BY MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES IN STATE CONTRACTS

SCOPE OF AUDIT

Article 15-A of the Executive Law (Article 15-A), was enacted in 1988 to promote equality of economic opportunity for minority and women-owned business enterprises (MWBEs) and to eradicate barriers to their participation in State contracts. The Division of Minority and Women’s Business Development (Division), originally part of the Governor’s office, has been part of the Department of Economic Development (Department) since 1992. Legislation to extend Article 15-A beyond December 31, 2003, was passed by the State Legislature.

Under this statute, the term “State agency” is broadly defined to include a wide variety of State agencies, public authorities and other State entities. Such State agencies are charged with establishing employment and business participation goals for MWBEs, for making a “good faith” effort to achieve the goals, and for reporting quarterly to the Division on MWBE participation in their contracts. The Division is responsible for certifying firms as MWBEs for State contract business and for monitoring State agencies’ compliance with Article 15-A. The Division reported that MWBE participation in State contracts for the three fiscal years ended March 31, 2002 were as follows: \$822 million (1999-00); \$509 million (2000-01); and \$558.2 million (2001-02).

Our audit addressed the following questions about Division oversight of the implementation of Article 15-A for the period April 1, 1999 through March 31, 2003:

- Has Article 15-A promoted MWBE participation in State contracts?
- Has the Division been effective in certifying businesses for MWBE participation, and in monitoring agencies’ compliance with Article 15-A provisions?

AUDIT OBSERVATIONS AND CONCLUSIONS

We conclude that Article 15-A has provided MWBE firms with access to State contract business that they otherwise might not have. However, we also found that the Division's weak oversight of the statute's implementation may have limited the potential for greater MWBE participation in State contracts. To better promote the equality of economic opportunity for MWBEs, the Division should improve its application processing efficiency and strengthen its monitoring and oversight of agencies MWBE goal setting, utilization and reporting.

We conclude that Article 15-A should be maintained to preserve an existing means for MWBEs to access State business. However, our audit revealed that the Division's weak oversight of the statute's implementation may have limited the statute's potential benefit for MWBE firms. For example, the Division's MWBE certification process is cumbersome and inadequately controlled. The Division has not set standards for the time the application process should take, or established a reporting system that adequately tracks the applications in process, which, on average, takes more than five months. Although Division officials attributed the lengthy processing time to Division analysts' thorough review of each case, we found that 23 of the 50 applications did not contain the documentation of applicant contact the Division requires. Further, of the 50 surveys we mailed to MWBE firms listed in the Division's Directory, 3 were returned as "undeliverable." Officials said that, because of staff shortages, the current management does not recertify firms every two years. In fact, they do not have a timeframe for regularly recertifying MWBE firms to make sure they are still qualified and still in business. We recommend the Division develop time standards and a reporting system to improve processing efficiency; document applicant contacts; and recertify MWBEs on a periodic basis. We also recommend the Department explore ways to devote adequate resources to certification tasks. (See pp. 13 -22)

In reviewing the Division's oversight of Article 15-A's implementation, we found that about 25 percent of State agencies did not file one or more quarterly reports due for the 2000-01 fiscal year. The Division could not be sure that it received all the reports due because it had no master list of all the State agencies required to file. Further, when State agencies do not report their achievement of MWBE goals, the Division simply informs them of their noncompliant status. The Division has no authority to enforce compliance. In response to our inquiry, officials at one State agency replied that they did not file the reports because they did not have a Financial Management System to compile the data. They advised that they now have a Procurement Management System and will be able to file the reports. Another State agency replied that the reports were prepared but not filed with the Division due to an internal miscommunication. Article 15-A requires all reporting agencies to prepare an annual agency goal plan for participation by certified minority-owned and women-owned enterprises, expressed as a percentage of aggregate expenditures. Article 15-A exempts

certain expenditures from the annual agency goals. For example, staff salaries, fringe benefits, and contracts related to banking relationships are exempt. However, we found that the agency goal-setting process was not documented for eight agencies that we visited. Moreover, generally agencies were falling short of the goals that they set and we question whether the goals that were set represented sufficient contract dollars to constitute a “good faith” effort to expand MWBE participation in State business. Finally, our visits to eight State agencies revealed that four agencies were not reporting participation data properly, and that one agency had overstated its MWBE participation by more than \$25 million. We recommended the Division improve its oversight of Article 15-A implementation by developing a master list of reporting agencies; prominently reporting noncompliant agencies in the Division’s Annual Report; and establishing a compliance review process to obtain reasonable assurance of agencies’ overall compliance. (See pp. 23-34)

COMMENTS OF DEPARTMENT OFFICIALS

A draft copy of this report was provided to Department of Economic Development officials for their review and comment. Their comments have been considered in preparing this final report, and are included as Appendix B. Where appropriate we have made changes to our report.

Department officials disputed many of our conclusions and generally did not agree with our recommendations or indicated that the recommended action was already in place. Our comments to the Department’s response are included as Appendix C, State Comptroller’s Notes.

CONTENTS

Introduction

Background	9
Audit Scope, Objectives and Methodology	11
Response of Department Officials	12

Participation of Minority and Women-Owned Business Enterprises in State Contracts

Management of the MWBE Certification Process	13
Certification of MWBEs	14
Timeliness of Certification Processing	16
Recertification Process	18
Coordination with Other Governmental Entities	19
Recommendations	20

Monitoring and Reporting on Agencies' Compliance with MWBE Goals

Submission of Required Reports	23
Achievement of MWBE Goals	25
Compliance with Reporting Requirements	27
Division Outreach Efforts	29
Recommendations	31

Appendix A

Major Contributors to This Report	35
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Appendix B

Response of Department of Economic Development Officials	37
----------------------------------------------------------	----

Appendix C

State Comptroller's Notes	59
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INTRODUCTION

Background

Article 15-A of the Executive Law (Article 15-A) signed in July 1988, was enacted to promote equality of economic opportunities for business enterprises owned by minority groups and women and to eradicate barriers to their participation in State contracts. Article 15-A created the Division of Minority and Women's Business Development (Division) within the Governor's office. In 1992, the Division became part of the Department of Economic Development (Department). The Division's mission is to ensure certified minority and women-owned business enterprises (MWBES) are given the opportunity for meaningful participation in State contracts. The Executive Law makes the Division responsible for monitoring State agencies' compliance with the provisions of Article 15-A. The Division has an annual operating budget of about \$800,000, and employs a director and 11 staff. Article 15-A was due to expire on December 31, 2003. Legislation to extend the program was passed by the State Legislature.

Under Article 15-A, State agencies are charged with establishing employment and business participation goals for entities certified as MWBES, and with reporting to the Division on their achievement of these goals. According to the definition in Article 15-A and associated Division regulations, "State agencies" include a wide variety of New York State agencies, public authorities and other State entities. The Division's January 2001 annual report identified 81 State agencies that were required to report this data. The Division's Article 15-A regulations require State agencies to:

- include an equal opportunity/non-discrimination clause in all contracts;
- identify the best State contracts for MWBES to bid on;
- provide for primary contractors on large projects to seek participation by sub-contractor MWBES, including setting specific goals and plans for each contract;

- prepare annual plans that state annual agency goals for MWBE contracts, stated as a percentage of total agency contract spending;
- make good faith effort to achieve the stated goals; and
- submit quarterly reports on compliance with these goals.

The Division's oversight responsibilities include:

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

The Division reports there were 6,594 MWBE-certified businesses in New York State as January 8, 2003. About half of these firms are located in the New York City region. The Department reports that State agency expenditures with MWBEs statewide totaled \$822 million, \$509 million and \$558.2 million, respectively, for the 1999-00, 2000-01 and 2001-02 State fiscal years.

Audit Scope, Objectives, and Methodology

We audited the Division's oversight of the implementation of Article 15-A of the Executive Law for the period April 1, 1999 through March 31, 2003. The objectives of our performance audit were to assess the overall impact of Article 15-A in promoting MWBE participation in State contracts, and the effectiveness of the Division's oversight efforts, including certifying businesses for MWBE participation, and monitoring agencies compliance with Article 15-A of the Executive Law.

To accomplish our objectives, we reviewed the provisions of Article 15-A of the Executive Law, related Division regulations and relevant Division records. We tested the thoroughness and efficiency of the Division's processing of MWBE applications by reviewing a randomly selected sample of 50 applications for certification received during the period April 1, 1999 through March 31, 2002. We also visited eight State agencies (Battery Park City Authority, Metropolitan Transportation Authority, NYS Division of Housing and Community Renewal, NYS Banking Department, NYS Department of Transportation; Dormitory Authority of the State of New York; NYS Department of Motor Vehicles; and the Convention Center Operating Corporation). We selected these agencies judgmentally to obtain a mix of contracting activity. During our site visits, we examined the way State agencies establish and report on achieving MWBE goals, and reviewed the accuracy of reported MWBE expenditures. Further, we mailed questionnaires to a random sample of 50 certified MWBEs to survey these contractors' satisfaction with the Division's implementation of Article 15-A. We also interviewed both Division and State agency officials.

We conducted our audit in accordance with generally accepted government auditing standards. Such standards require that we plan and perform our audit to adequately assess those operations of the Department that are included within the scope of our audit. Further, these standards require that we understand the Department's internal control structure, and compliance with those laws, rules and regulations that are relevant to the operations that are 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 that 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.

Response of Department Officials

A draft copy of this report was provided to Department of Economic Development (Department) officials for their review and comment. Their comments have been considered in preparing this final report, and are included as Appendix B. Where appropriate we have made changes to our report. In addition, the State Comptroller's Notes to the Department's response are included as Appendix C.

Within 90 days after final release of this report, as required by Section 170 of the Executive Law, the Commissioner of the Department of Economic Development 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.

PARTICIPATION OF MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES IN STATE CONTRACTS

Article 15-A was enacted to promote equality of economic opportunity for MWBE firms by granting them access to State contract business. Without this statute, it is less likely that State agencies would make the effort needed to encourage MWBE participation in State contracts. However, the Division needs to change certain aspects of its administration of New York State's MWBE program to make it an efficient and effective vehicle for increasing MWBEs opportunity to participate in State contracts. The MWBE certification process is very lengthy; it takes the Division more than five months, on average, to process a firm's application. Further, although Division efforts to oversee State agencies' implementation of Article 15-A are hampered by a lack of adequate resources and a lack of enforcement authority, we also found the Division does not always use the resources it does possess to encourage compliance and to monitor agencies' achievement of MWBE goals. With more assertive Division administration and oversight, Article 15-A can provide more MWBE firms with a chance to participate in State contracts.

Management of the MWBE Certification Process

The Division is responsible for certifying firms' MWBE status so they can gain access to greater participation in State contract business. However, we found that the Division certification process is lengthy and time-consuming. Further the Division does not have a reporting system in place to adequately monitor the status of MWBE applications, and does not maintain adequate documentation to show whether steps in the certification process were completed within mandated timeframes, or performed at all. Division officials also told us they no longer conform to a prior Division practice of recertifying MWBE firms every two years to make sure firms still meet MWBE criteria. Thus, the Division's list of certified MWBEs may be outdated and unreliable. We also believe the Division can reduce the number of applications it must process, as well as

the burden on MWBE applicants, by allowing certification reciprocity with other governmental entities.

Certification of MWBEs

As required by Article 15-A, the Division has established a process for certifying firms as MWBEs. Potential MWBEs must fill out a 17-page document (available through the Internet) to apply for and obtain MWBE certification. The Division's Certification Unit receives the applications for certification and determines whether the firms meet the legal and regulatory requirements for MWBE certification, including the requirement for at least 51 percent minority or women ownership and control of the business. Division analysts decide whether to grant certification based on a review of the application; contact with the applicant by means of telephone interview; and, for New York State firms, a site visit to the applicant's place of business. Upon certification, the Division enters the business's name and other pertinent information in its MWBE Directory database (Directory), which is accessible on the Internet. The Division also recertifies firms' MWBE status in response to specific information or at the discretion of the Director of the Division.

The Division received 566, 555 and 655 applications from businesses seeking MWBE certification or recertification in the 1999-00, 2000-01 and 2001-02 fiscal years, respectively. During this three-year period, the Division certified an average of 66 percent of the applications it received each year. Businesses whose applications are denied must wait two years from the date of the denial letter to reapply for certification.

Certification is denied in those instances when applicants:

- cannot demonstrate that ownership is at least 51 percent minority or women;
- report less than one year of business activity; or
- do not submit all the required information.

Firms whose applications are rejected because of incomplete information, and businesses that withdraw an application prior to a site visit, may reapply after 90 days from the date of the rejection letter or the withdrawal date, respectively.

The certification process requires Division staff to review the firm's application; collect all the necessary information that must accompany the application; conduct a telephone interview and initiate a questionnaire; and to visit the applicant's place of business to, among other things, complete another questionnaire to document the result of the visit. Since the site visit is intended to be the last step in the process, it is Division policy that staff analysts should complete the telephone interview questionnaire and obtain as much documentation as possible before visiting the applicant. Examples of the information that must be submitted include a Small Business Administration letter of approval; a certificate of partnership or incorporation; a concession or franchise agreement; tax returns; bank signature cards; and resumes of key officials. Regulations state the Division must issue a written final determination to approve or deny certification within 60 days of the visit.

Division officials stated that analysts must complete a questionnaire for each applicant reflecting information obtained from both the telephone interview and site visit (the same form may be used). Division administrative procedures require the analysts keep detailed records of their work in each applicant's file. Documentation is important because it reflects the applicant's responses to questions about business ownership and decision-making. For example, it would be important that the application process document when a husband rather than a female applicant actually runs the business because the business would not be eligible for certification as MWBE. The Division contends that the certification process is very lengthy because of the amount of work involved in doing all the certification steps, including the telephone interview and site visit performed for each applicant.

To determine the extent to which the Division maintains this required documentation, we reviewed a randomly selected sample of 50 MWBE applications from 1,776 applications received during the period April 1, 1999 through March 31, 2002. Our review revealed that documentation was often missing or incomplete, and the analyst decisions to approve or deny certification were sometimes not supported. For example:

- for 23 files, the telephone interview date was missing;
- for 24 files, site visit dates were missing; and
- for 28 files, the questionnaires were incomplete.

During our examination, we noted that one firm withdrew its application, but there were no analyst notes or a completed interview available to explain why the firm decided to withdraw. For another firm, the Division issued a November 6, 2002 notice of intent to revoke the firm's certified status unless the Division received requested items for recertification within 30 days. Although the file contained no evidence this documentation was submitted, the firm was still listed as certified in the Division's MWBE Directory in April 2003.

If the Division is to ensure that it complies with the regulations requiring that certification be decided within 60 days of the visit, it is essential that analysts date the questionnaires that document site visits. Questionnaires should also be fully completed, and determinations supported, both to comply with Division procedures, and to demonstrate a sound basis for Division decisions and recommendations to applicants. If the site visit or telephone interview requirement was waived, the applicant's file should indicate the waiver, explain why it was granted, and note the basis for the analyst's decision to approve or deny certification.

Timeliness of Certification Processing

Other than stating that certification must be made within 60 days from the site visit to the applicant's business, Division regulations do not indicate how long the entire certification process should take. We found that the Division takes, on average, between five and six months to process an application. For an MWBE applicant awaiting the opportunity to bid on State contracts, this delay could hinder, rather than encourage, the applicant's participation in State contract business. We believe processing consumes more time than it should because the Division has not set processing time standards, does not collect and review information about processing efficiency, and does not devote adequate resources to certification functions.

To process applications in a timely manner, the Division should set standards for processing times for applications from a sole proprietorship or partnership or a corporation with a simple ownership structure. With standards in place, management can monitor staff performance and workload. Division officials told us they consider it inappropriate to establish an average turn-around time for processing applications because each application is unique. However, we believe setting such

standards are essential for measuring, and improving processing efficiency.

The Division should also establish a monthly reporting system that permits management to evaluate the certification process and implement steps to alleviate any processing backlogs. Division managers told us they produce a monthly report showing the number of applications approved and denied in the month, however, the report does not show application processing time. The reports provided were for assessing workload or productivity but did not provide support to assess the efficiency of the certification process. Thus, we conclude the Division has no reliable way of determining if applications are processed in a reasonable time, or if the number of pending applications is increasing. In examining Division processing efficiency for our sample of 50 randomly selected applications, we determined that it took, on average, 171 days to process 48 of the applications (2 files were missing) for certified status. Division officials told us the certification process is lengthy because analysts must review the application, request needed additional information, and perform and document both a telephone interview and a site visit. (In response to our draft audit report, Department officials advised us that, subsequent to our field work, the information systems database has started to generate a report on the total number of applications and the processing time.)

A 2002 report from the Department's Internal Auditor concluded that the Division should add staff to reduce both processing time and the backlog of applications. As of May 2003, however, the Department had not taken steps to address the issue of Division staffing, which has dropped from about 48 employees in 1992, when the Department first assumed responsibility for Division operations, to 12 employees in 2003. To process applications more efficiently, the Department should examine the adequacy of the resources committed to this task.

Recertification Process

Periodic recertification of MWBEs is necessary because the status of the MWBE business could change over time (including change in ownership, address, type of product or service offered) or the firm could cease to be a going concern. Although neither Article 15-A nor Department regulations prescribe when or how often participating MWBE firms should be recertified, it has been the Division's practice to recertify firms every two years. This two-year recertification requirement is also noted on the MWBE application form. A firm does not actually lose its certification status until the Division determines that it no longer qualifies as MWBE.

The Division does not have managerial reports or statistics showing the status of its recertification efforts; and it does not keep track of the number of firms that were certified more than two years ago and need to be recertified. To determine the status of the Division's recertification efforts, we downloaded Directory information and found that approximately 3,709 firms certified since 1997 had not been recertified.

In response to our preliminary findings, Division officials indicated that they no longer require certification within two years, in large part because they do not have enough staff to consistently perform this function within the two-year timeframe. Instead, the Division initiates recertification reviews in response to a third-party complaint, in reaction to information about ownership changes, or at the Director's discretion. However, we believe regular recertification is essential to keep the directory current and accurate. To illustrate the need for recertification, we were advised that a Division effort to verify the Directory's accuracy and listed MWBE's eligibility, begun in 1996 and continuing into 1998, resulted in revocation of certified status for 2,239 MWBE firms. Thus, it is clear that there is a need to continually reassess firms' eligibility for MWBE status.

Division officials acknowledged that, since the 1996-98 verification effort, they have not regularly recertified firms every two years, in conformance with the prior policy. To test the reliability of the Directory listing, we sent survey questionnaires to a random sample of 50 MWBE firms, listed in the Directory as certified MWBEs. We received responses from only 19 firms; 3 surveys were returned to us as "undeliverable addressee unknown." In addition, 2 of the 19 firms responding to the

questionnaire indicated their products or services had changed since they were certified. Therefore, we conclude there is a significant risk that firms listed in the Directory of certified MWBEs may no longer qualify for MWBE certification. To make sure the Directory contains reliable information about currently qualified MWBEs in the State, the Division should reinstate its policy of recertification on a two-year, or other regular period. The accuracy and reliability of the Directory is also important because employees at State agencies use the Directory to determine whether a vendor can be used to achieve the agency goal.

Coordination with Other Governmental Entities

The Division is the only agency authorized by Article 15-A to certify firms as MWBEs. The Division's present policy does not allow for reciprocity with any other government agency at the Federal, State, or local level when determining MWBE status. However, Section 144.2 of the regulations allows the Division to waive the site visit when an out-of-state firm applies for certification and submits evidence of certification by another governmental agency that has a certification program. We found the Division does not consistently apply its existing policy. Our sample of 50 applications included 7 out-of-state certification files (applications); 4 applications did not contain evidence of the required telephone interview and 1 file had no documentation of a site visit. The site visit would not be waived in this case because the applicant did not submit MWBE certification from another governmental entity.

To avoid duplication of efforts for those applicants who have already been certified as qualifying MWBE firms, the Division should accept certifications granted by governmental entities with recognizable MWBE programs. Eliminating or simplifying the application process for such applicants would reduce the burden on the applicants and the Division. Division officials said they do not recognize any other State MWBE program because they are not as comprehensive as New York State law requires. However, the Division has not done any analysis of the programs of bordering states nor has it reviewed the programs of any other state. Therefore, their across-the-board elimination of these other state programs may not be justified or practical. The Division should reassess its position on this issue, and pursue reciprocity agreements with other governmental entities to the greatest extent possible.

Recommendations

1. Set standard timeframes for processing MWBE certification applications.

(In response to the draft report, Department officials indicated they would consider the recommendation. However, they caution that even if a standard timeframe policy is adopted, they need to have the flexibility to account for the variety and complexity of applications.)

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

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

(In response to Recommendations 2 and 3, Department officials indicated they have a certification database where applications are entered as they are received and assigned a file number. The database contains various fields that allow the analyst to make entries regarding the work done and status of an application. They also have a managerial tracking system that provides information regarding an application and its status.)

Auditor's Comments: The response correctly describes the information systems in place during the audit. However, we found that decisions were not always documented and that the Department could not provide summary information on the number of applications at each stage of the process.

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

Recommendations (Cont'd)

(Department officials replied to the draft report that “resources are scarce throughout state government” and “In short, as it always has, the Division will continue to strive to satisfy its mandate with the resources available to it.”)

Auditor's Comments: We appreciate the Department's position that it “will continue to strive to satisfy its mandate with the resources available to it.” However, as part of this effort, the Department should identify the resources needed to improve its administration of the Program, such as processing MWBE applications for certification in a timely manner.

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

(Department officials replied to the draft report that they will consider the viability of both a mandatory requirement compelling all minority-owned business enterprises (MBEs) or women-owned business enterprises (WBEs) to periodically provide specific information verifying their continued eligibility and also a limited certification life requiring businesses to reapply after a certain period. Department officials also noted that there is no requirement for the re-certification of MWBEs. In addition, the regulations require a certified business enterprise to notify the Division of any material change in the information contained in or documents submitted with the original application. They also added that they will initiate a re-certification review in response to complaints, random audits, etc.)

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

Recommendations (Cont'd)

(Department officials replied to the draft report that the report misstates the Division's position regarding recognition of any other state's MWBE program. They explain that New York State requires more information before certifying a business.)

Auditor's Comments: We reiterate that some work should be done to obtain information about the process in other states in an effort to determine whether, with some modifications, the Division would be able to use it. We believe that given its limited resources, the Department may benefit by using information from other states about MWBEs.

MONITORING AND REPORTING ON AGENCIES' COMPLIANCE WITH MWBE GOALS

Article 15-A requires all reporting agencies to establish an annual plan with goals for MWBE participation expressed as a percentage of aggregate agency expenditures. Agencies must report on the achievement of these goals in quarterly reports to the Division. However, we found the following indication that the Division does not effectively monitor or report on agencies required to implement MWBE programs:

- the Division has no master list of all agencies required to report;
- the Division does not have the authority to enforce reporting compliance, or use the means it does have to promote compliance;
- agencies have not made a “good faith” effort to meet the goals; in 2001-02, only 24 percent of the reporting agencies met MBE goals, and just 41 percent achieved WBE goals;
- some agencies set very low goals in terms of real expenditures;
- the Division is making slow progress in doing on-site reviews to confirm documentation of agency compliance; and
- Division annual reports on MWBE participation were submitted between four and nine months late for the last three fiscal years.

Submission of Required Reports

Division regulations state that all agencies required to comply with Article 15-A must submit their annual plan of MWBE goals to the Division for approval and file quarterly MWBE utilization reports to document the extent to which they have

met their goals. However, we found that the Division could not ensure it received the required plans and reports from all the agencies mandated to submit them because Division officials did not have a master list of all agencies required to file. Without an updated master list of reporting agencies, the Division may lose track of agencies that must file, but have not done so.

In determining whether all reporting agencies had filed as required, we found six State agencies that filed for one year, but not for other years. Division personnel could not answer with certainty whether these six agencies had filed with a related agency, or filed at all. The Division should implement procedures that authorize agencies to elect how they will report, and then monitor to ensure the agencies conform to this method.

State agencies must also file quarterly reports of their goal achievement. Although agencies are ultimately responsible for the accuracy of these reports, Division staff are to review the reports for apparent omissions and errors, and are to resolve identified problems with an agency's liaison. At year-end, the Division uses quarterly report data to generate the agency's annual utilization summary. After agency verification, this summary becomes the agency's final annual report. Beginning in fiscal year 2002-03, agencies are required to submit their quarterly report electronically. However, we found that a significant number of agencies did not submit quarterly reports, or submitted incomplete reports whose problems were not resolved. For example, almost one-fourth of the 81 agencies required to file in fiscal year 2000-01 were missing the last quarterly report, that contains the fourth quarter and yearly totals for that year. A total of 25 agencies were missing the last quarterly report during the three State fiscal years ended March 31, 2002.

Article 15-A does not give the Division any enforcement authority to compel agencies' cooperation in filing annual plans and quarterly reports. Since they lack this authority, Division officials state they use a process that encourages timely reporting by means of successive steps: an analyst first follows up with the agency liaison; then, an official letter is sent to the Deputy Director of the agency; and if the agency remains noncompliant, a letter is sent from the Division Director to the agency's executive officer stating that the agency is not

complying with Article 15-A. However, we found the Division does not always follow this process. When we asked Division officials to provide copies of the letter sent to agencies that had failed to submit or submitted 54 incomplete quarterly utilization reports, they provided us with just 33, and could not explain why the other 21 letters were not sent.

Furthermore, we question the usefulness of this process, particularly for agencies that are persistently noncompliant. For example, at least two State agencies did not file a MWBE utilization report in any of the three years in our scope period. One State agency replied that it did not have a Financial Management System to compile data. However, it recently acquired a Procurement Management System and will file the reports. Another State agency replied that reports were not filed due to an internal miscommunication. This occurred despite the fact that the Division sent some or all the letters intended to induce compliance. Absent enforcement authority that would enable the Division to penalize agencies for noncompliance, we believe the Division should consistently follow its established process for encouraging compliance, and also list the names of non-compliant agencies – and the extent of their noncompliance – in the Division’s annual report to the Governor and the Legislature.

We sent letters to 13 agencies that did not report as required for one or more quarters during our audit. Of the 12 agencies that responded four agencies sent copies of reports they indicate were filed; four agencies confirmed they did not file the reports; two agencies that did not file prepared them as part of their response; and two did not have the reports because one agency destroyed the reports and one agency indicated they filed as part of another agency.

Achievement of MWBE Goals

Article 15-A requires all reporting agencies to prepare an annual agency goal plan, that includes separate agency goals for participation by certified minority-owned business enterprises (MBEs) and certified women-owned business enterprises (WBEs), expressed as a percentage of aggregate agency expenditures. Although Article 15-A requires that agencies make a good faith effort to implement the MWBE program, the majority of agencies have not met the participation

goals they set, and the goals themselves sometimes constitute very limited amounts of expenditures.

The MWBE participation achieved by State agencies in the following table indicates that State agencies are not making the good faith effort to implement Article 15-A. In each year, substantially more than half of the reporting agencies did not meet their annual goals for MBEs and WBEs. Further, the Department's report shows that for eight agencies (not necessarily the same agencies) the "MBE Goal" and "WBE Goal" participation in fiscal years 2000-01 and 2001-02 was "0.00."

Division's Individual Agency Goals, Utilization, and Expenditure Summary Report, Agency MWBE Goal Achievement for Fiscal Years 2000 – 2002								
Fiscal Year	Number of Agencies	Total Expenditures (millions)	MBE Utilization (millions)	Agencies Meeting Goals	Agencies with Zero MBE Goals	WBE Utilization (millions)	Agencies Meeting Goals	Agencies with Zero WBE Goals
1999-00	63	10,556.3	468.6	20 (32%)	2	353.4	24 (38%)	2
2000-01	81	6,926.0	324.8	17 (21%)	8	184.2	23 (28%)	8
2001-02	82	7,425.9	305.6	20 (24%)	8	252.6	34 (41%)	8

We visited a judgmental sample of eight agencies to find out how they determined their annual MBE and WBE goals. These agencies were selected to obtain a mix of reporting agencies and contracting activity based on their annual volume of purchasing. We noted that these agencies did not document the process of agency goal setting. Representatives from the various agencies said they relied on the prior year's performance and their own experience to set goals. Among the reasons they noted for not reaching their goals were that not enough MWBEs were in business in the relevant industry, or that a specific MWBE was not large enough to accomplish the job. For the eight agencies we visited for the three-year period 1999-00, 2000-01, and 2001-02, only three agencies changed their goals. The remaining five agencies did not modify their goals.

We also found that many of the goals agencies set for themselves represent very low expenditures in dollar terms. When established, the agency goal plan does not explain how the amounts included for Article 15-A were determined. The only spending for other-than-personal service (OTPS) costs that Article 15-A explicitly exempts from its provisions are contracts related to banking relationships, insurance policies and the sale

of bonds, notes or other securities. For example, one State agency with a total OTPS appropriation of \$23.6 million in the 1999-00 fiscal year categorized only \$425,000 of this amount as discretionary funds subject to MWBE participation. Agency officials had thus defined most of their OTPS expenditures (purchases from Corcraft, preferred vendors, etc.) as non-discretionary, and not subject to Article 15-A.

Without adequate documentation of agency goal setting and, as discussed in the following section of this report, without sufficient oversight of agency MWBE programs, there is increased risk that agencies significantly limit the spending to which Article 15-A applies. As a result, even some agencies that meet their MBE or WBE goals may be meeting very low goals. Implementation on this scale may comply with the letter of the statute, but not with its intent. In addition, we note that there is no reference in the statute's language to justify the exclusion of any but the specifically named contract expenditures from Article 15-A requirements.

Compliance with Reporting Requirements

Division procedures require that agencies report their MWBE participation achievement based on contract payments (rather than contract awards) made to certified MWBE firms. Division administrative procedures state that Division analysts should conduct compliance reviews and field visits at reporting agencies to verify the contracts awarded and actual payments made to currently-certified MWBEs. In a prior audit (Report 95-S-30, issued October 25, 1995), we cited the Division for allowing agencies to overstate MWBE expenditures by reporting payments made to non-certified firms and by reporting in terms of awarded contract amounts instead of actual payments.

During this audit, we were advised that the Division is in the process of implementing a compliance review program that includes a desk review of requested documentation and a site visit. The review includes an assessment of the agency's adherence to the established MWBE-participation goals and a comparison of the reported MWBE utilization amounts with supporting documentation. To start the program, the Division chose to review three agencies that had high annual expenditures: Dormitory Authority of the State of New York, the New York State Thruway Authority, and the New York State Department of Transportation. The reviews were scheduled to

start in September 2002 and to last no longer than three months. However, since the reports for these agencies were all dated May 30, 2003, the reviews took considerably longer than three months to complete. Although officials originally stated they planned to review three agencies the first year, and six agencies every subsequent year, they have now determined to change the review process. We believe a change is needed. Even if the Division completes 6 reviews every year, it would take the Division more than 13 years to review all 81 agencies that were required to file, according to the Division's 2001 annual report.

We found there is definitely a need for more active Division oversight of agency compliance, since the eight agencies we visited did not always operate their MWBE programs in compliance with the legislation and Division regulations. For example, we found that four agencies were still reporting their MWBE expenditures in terms of contracted amounts instead of actual expenditures, despite Division requirements that they report MWBE utilizations in terms of actual payments. We also found that three of the eight agencies had submitted quarterly utilization reports that were not always mathematically correct.

We reviewed the reports Battery Park City Authority (BPCA) used to generate the quarterly utilization reports, and found they did not always reconcile with the supporting agency procurement summary. To illustrate, the BPCA commodities report for July-September 2000 showed total expenditures of \$356,127, while the purchase order listings that supported these expenditures accounted for \$197,764 – a difference of \$158,363. Similarly, commodities report for January-March 2001 showed total expenditures of \$206,276 and purchase order listing accounting for \$197,190 – a difference of \$9,086.

Our comparison of the six different quarterly utilization reports submitted by the Metropolitan Transportation Authority (MTA) (quarters ended June 1999, June 2000, April 2001, September 2001, December 2001 and March 2002) to corresponding detail reports revealed the utilization reports were inaccurate. The total amount of the summaries of \$81,417,054 for all the agency's subcontractors exceeded the total amount of the supporting details of \$72,818,633 by \$8,598,421. The total amount of the summaries of \$32,713,584 for all the agency's prime contractors exceeded the total amount of the supporting details of \$15,762,078 by \$16,951,506. Therefore, for the

quarters identified, the MTA overstated its MWBEs participation by \$25,549,927.

We also found that the Division does not comply with its own reporting requirements in a timely manner. On January 1 of each year, the Division is required to submit an Annual Report to the Governor and other key State officials on the level of MWBE participation during the fiscal year that ended the previous March 31. According to the Division officials, the Division has submitted these reports late for the last three fiscal years. The 1999-00 report was submitted more than nine months late, reportedly because a new Director had just been appointed, and because the Department was concentrating on recovering from September 11 (which occurred nine months after the report was due). The reason given for issuing the 2000-01 report more than nine months late was that the Department was adjusting to using a new MWBE utilization reporting system. Officials explained that the more than four-month delay in issuing the 2001-02 report was caused by the need for changes in data from agencies using fiscal years other than the State fiscal year.

Since the Department does not prepare and submit its Annual Report when it is due, neither state policymakers nor the public are informed timely about the levels of MWBE-business participation. Delays in reporting on Article 15-A's effectiveness also make it less likely that State agencies will be encouraged to make greater efforts to increase MWBE participation.

Division Outreach Efforts

Article 15-A makes the Division responsible for encouraging and assisting contracting agencies in their efforts to increase participation by MWBEs on State contracts and subcontracts. However, we found the Division relies on reporting agencies for outreach to MWBE firms rather than initiating any outreach efforts on its own. Division officials stated they do not engage in their own MWBE outreach because they do not have funds for this purpose.

For example, the Division recommended in their FY 2000-01 annual report that the reporting agencies organize each year at least 2 forums or workshops dedicated to promoting MWBE participation. We were told the Division sends representatives to these events to answer questions about certification, etc., and

also takes part in events promoting upcoming State contracting opportunities. For example, the Division and Empire State Development Corporation (ESDC), also jointly sponsored several forums where general contractors that are beginning ESDC-sponsored construction projects are encouraged to seek MWBE participation as subcontractors.

Reporting agencies' outreach efforts have included the following:

- The Dormitory Authority (DASNY) conducted workshops providing opportunity for MWBE firms to meet with DASNY Purchasing Teams and learn more about doing business with the authority. DASNY also hosted annual MWBE Small Business Conferences to foster increased MWBE participation, provide information on its technical assistance programs, etc.
- During the 2000-01 fiscal year, BPCA co-sponsored an annual conference on Bonding, Banking and Insurance to provide information relevant to MWBE businesses.
- The MTA sponsored the Annual Purchasing Exchange in the 2000-01 fiscal year for MWBE firms from New York and New Jersey. Procurement staff from nine of New York's power suppliers such as Con Edison and Long Island Power Authority (LIPA) participated in the event.
- In the 2000-01 fiscal year, the State Department of Transportation developed a project-specific outreach mailing for prime and subcontracting opportunities; redesigned its certification application; and developed an outreach package providing information on the MWBE programs, contact persons and certification program.

Furthermore, 11 of the 19 MWBE firms that responded to our questionnaire stated they were never invited to any procurement offerings during the three years ended March 31, 2002. Several firms (11 of 19) replied that becoming a certified MWBE did not improve their opportunity to obtain State contracts. Of the 11 firms, four suggested improvements such as "more advanced notice of a RFP," and "give local business a list of [MWBE] vendors." Six of the 19 replied that their opportunity for access to business had improved due to Article 15-A. (After the draft report was issued a WBE replied that the law was the reason

her company had procurement opportunities for participating in State contracts. This WBE also indicated there is too much paper and there is a need to monitor the prime contractors.)

Recommendations

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

(In response to the draft report, Department officials included a copy of their Master list. They also indicated that they had a Master list when we did our audit.)

Auditor's Comments: Contrary to the Department's response, and despite repeated requests, we were not provided a Master list during our audit. In addition, the list provided contains the name of one State agency that is obsolete and two of the agencies on the list actually are authorized to report as part of another agency according to letters from these two agencies.

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

(Responding to the draft report, Department officials indicated that the noncompliant agencies are listed.)

Auditor's Comments: Our review of the reports for fiscal years 1999-00, 2000-01 and 2001-02 showed that the noncompliant agencies were not listed in 2000-01.

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

(The Department viewed this recommendation as inappropriate stating that it attempts to impose a legislative preference upon an executive department.)

Recommendations (Cont'd)

Auditor's Comments: During our fieldwork, Division officials stated that they did not have any means of enforcing the requirements of Article 15-A making it difficult to obtain compliance from all State agencies required to participate in the Program. As a result, a recommendation was made to address this lack of enforcement ability. The recommendation is not the result of a legislative preference.

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

(Department officials replied that they will notify reporting agencies of the Comptroller's Bulletin A-307-R1 that addresses discretionary and non-discretionary expenditures that apply to MWBE utilization and reporting.)

Auditor's Comments: We acknowledge that Bulletin A-307-R1 defines expenditures subject to MWBE utilization and reporting. However, as our report points out, agencies may not be establishing reasonable goals consistent with this definition. Our report demonstrates an example of one agency that from an OTPS appropriation of \$23.6 million categorized just \$425,000 of this amount as discretionary. Yet, there is no indication from the Department that it reviews information from State agencies. Communication and intervention beyond renotifying agencies of the Bulletin may be needed.

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

Recommendations (Cont'd)

(Department officials replied to the draft report that they had developed an agency review plan in September 2002. In June 2003 they developed a new process to review information on line and eliminate the on-site visit. They believe this will allow them to do a better review of agency compliance.)

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

(The Department replied to the draft report that the auditors did not acknowledge the fact that State agencies have been notified that they have to report actual expenditures and not contract award amounts. They also indicate the information regarding payments will allow them to do a better job of monitoring compliance.)

Auditor's Comments: The report does acknowledge the extent of monitoring done by the Division during the audit period. However, in our view there is a need for the improvement and perhaps the new compliance process developed in June 2003 will address this issue.

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

(The Department replied to the draft report that it will submit the annual report to the Governor and the legislature in a more timely fashion in the future.)

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

(The Department replied to the draft report that it is not required under the law to do outreach. The Department pointed out that it has an active outreach program including various education and marketing efforts and information provided via State websites.)

Recommendations (Cont'd)

Auditor's Comments: As indicated in the report, we found that the most of the outreach was done by certain State agencies and the Department participated in those events. We believe that the Department should do more on its own to encourage an increase in the participation of MWBEs in State contracts.

MAJOR CONTRIBUTORS TO THIS REPORT

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Shirley Rodriguez Remeneski
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September 16, 2003

Carmen Maldonado
Office of the State Comptroller
Division of State Services – Audit Bureau
123 William Street
New York, New York 10038

Dear Ms. Maldonado:

Thank you for the draft audit report (2002-S-55) concerning the Division of Minority and Woman Business Development’s (DMWBD or the Division) oversight of Article 15-A of the Executive Law. We appreciate the opportunity to respond.

Article 15-A is intended to allow minority-owned or woman-owned businesses (MWBEs) a clear opportunity to participate in state contracts. The Division is tasked with administering Article 15-A and has always and continues to do more than is required of it under the law despite reduced staffing and resources, which have impacted all of state government.

As a preliminary matter, our two responses to your preliminary audits and information provided as a result of the final meeting seem to address various assertions in this report, however you failed to take notice of these facts in this draft audit report. In addition, this draft audit report does not acknowledge the fact that many of our responses had been put into effect prior to the meeting with the auditors for a closing conference. Consequently, we are attaching our responses to the preliminary audit report to be incorporated and considered as part of this response.

*
**Note
1**

Additionally, there are numerous misunderstandings or misstatements throughout this draft audit report. First, with regards to the section on “Achievement of MWBE Goals”, the draft audit states that 8 agencies opted to set zero goals for MBE and WBE participation in fiscal years 00-01 and 01-02. This is incorrect. In fact, during the 3 fiscal years covered by this audit, no agency set and submitted a goal plan with an overall zero goal nor separately for MBEs and WBEs. Those 8 agencies that are mentioned in the draft audit did not submit any goal plan at all, nor did they submit quarterly reports. The auditors simply did not read the report correctly. Furthermore, the auditors could have asked us for copies of our acceptance letter of those set goals for those 8 agencies to verify what they assumed.

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**Note
2**

Secondly, we strongly disagree with the draft audit’s conclusion that agencies can unilaterally decide which types of expenditures are subject to Article 15-A, and as a result some agencies set very low goals in terms of real expenditures. During the length of the audit, we discussed this

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**Notes
2, 3**

Empire State Development Corporation
633 Third Avenue New York, New York 10017-6754 Tel 212 803 3230 Fax 212 803 3236

* See State Comptroller's Notes, page 59

issue repeatedly. We were asked to define “discretionary” and “non-discretionary” spending and to produce the source authorizing this definition and reporting requirement. We cited Accounting Bulletin No. A-307-R1 dated November 16th, 1999. However, the auditors then, and in this draft audit report, ignore this document. Article 4A of the Economic Development Law requires the Office of State Comptroller (OSC) to assist this Department in collecting information on the participation of certified businesses for each contracting agency. Pursuant to this, OSC and the Department agreed on a new coding system to collect information to be used by the Department to generate reports on 1) discretionary spending by agencies and 2) the portion of those discretionary spending that are made to MWBEs. Bulletin # A-307-R1 explained this new coding system and defines what “discretionary” and “non-discretionary” payment items are. This draft audit report incorrectly concludes that agency officials define most of their “other-than-personal services” costs as “non-discretionary” and therefore not subject to Article 15-A reporting requirements (the audit cites preferred sources and sole source contracts as examples). OSC’s Bulletin # A-307-R1 defines those very items as “non-discretionary”. Therefore, pursuant to Article 4A of the Economic Development Law, the published OSC Bulletin agreed to by the Department, becomes policy as it relates to what is “discretionary” and “non-discretionary” spending and subsequently what is required to be reported to the Department.

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Notes
2, 3

Third, OSC has not met its obligations under Bulletin #A-307-R1, the Department has to compile the data that is supposed to be generated by OSC pursuant to this bulletin. A compliance review of state agencies by the Department could be more efficient if we receive the data from OSC.

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Note
4

Fourth, with regards to the draft audit’s conclusion in the Division’s enforcement of agency reporting requirements, we question the auditors determination that there were 54 agencies that had at least 1 quarterly report missing during the 3 fiscal years covered by the audit. Our empirical review of the 3 fiscal years based on the annual reports submitted to the Governor and legislature as well as our agency compliance database, indicate that there were only 46 agencies who submitted less than 4 quarterly reports – including those agencies who submitted no reports.

*
Note
2

Furthermore, the same 8 agencies each year repeatedly did not comply at all with the reporting requirement, in other words 10% of all reporting agencies were non-complaint repeatedly over the 3 fiscal year period covered by this audit. On average, the remaining 7 agencies that reported less than 4 but at least 1 quarter on a yearly basis over the 3 fiscal years covered by this audit, were not the same agencies but varied from year to year and the reasons for this also vary. For example while the Office of State Comptroller has complied by submitting 4 quarterly reports during fiscal years 99-00 and 00-01, they have repeatedly not complied during fiscal years 01-02, and 02-03 by not submitting any quarterly reports during those fiscal years. OSC’s reason given to us for non-compliance was that they did not have the dedicated staff for this assignment. The Department is as aggressive as permitted by law, in enforcing non-compliance, under the circumstances, we strongly disagree that our process for notifying state agencies through calls, emails and correspondence when they have not submitted quarterly reports is ineffective. Particularly when the same 8 agencies continually do not comply while for all other agencies our notices serve to remind them of their lateness and those agencies ultimately comply.

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Note
5

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Note
2

* See State Comptroller's Notes, page 59

Finally, as we have not heard back on our communication with Bob Meheroff concerning the representation letter, we assume that the letters from Ms. Remeneski and Mr. Vidro are sufficient for your purpose.

*
Note
6

Recommendation 1

Set standard timeframes for processing applications.

The Division will consider this recommendation. However, the auditors fail to recognize that applications range in complexity due to various business operations and ownership structures. Therefore, simply grouping applications by legal structure (i.e. partnership, limited liability corporation, S corporation etc.) as recommended by this audit, would not establish a standard processing time for reviewing applications. Thus, in the event that a timeframe policy is adopted, given the variety and complexity of the applications, the Division would need to retain flexibility to account for such variances.

Recommendations 2 and 3

Ensure that the Division analysts record application information required by regulation and maintain the documentation needed to justify certification decisions. Establish a reporting system for certification tracking to allow both for application monitoring and managerial action to keep applications flowing.

The auditors have not acknowledged in this audit the Department's response to the preliminary observations submitted in June of 2003. Such previous response by the Department demonstrated that the Division ensures that analysts maintain all application materials and information upon which decisions are based. To reiterate, the Division maintains a certification database where applications are entered as they are received and assigned a file number. The database contains various fields that allow the analyst to make entries regarding the work done and status of an application. The Division requires analysts to make entries in the certification database to allow the Division consistent and standard monitoring of actions taken on an application (e.g. when correspondence was sent, when a phone call was made, interview scheduled/conducted, site visit scheduled/conducted, other status information). This system remains under constant review and upgrades will be made to better the system as needed.

Furthermore, the Division also has in place managerial tracking systems, which also provide information regarding an application and its status. The Director receives weekly reports from the intake unit listing the new applications, returned applications, and those applications under verification review. The Director also receives weekly reports from the certification analysts listing the firms certified, rejected, denied and verified. All this information is transferred into an excel program and a report is generated by unit and by specific analyst. This allows the Division to know the status of any application, the workload of each analyst, the length of time an MBE or WBE has been certified, and how long it takes to process a particular application. The managerial systems that are currently in place provide the Division a reliable means of determining if applications are processed in a reasonable time or if the numbers of pending

applications are increasing. The auditors were provided with spreadsheets and logs from these systems. Therefore, the Division is of the belief that the auditors must not understand the systems because the systems clearly provide the Division an ability to assess the certification process.

Recommendation 4

Assess staff resources dedicated to certification and, if insufficient, request and obtain more resources.

As you are aware, resources are scarce throughout state government. In short, as it always has, the Division will continue to strive to satisfy its mandate with the resources available to it.

Recommendation 5

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

There is no limited certification life or automatic re-certification requirement. Firms remain certified until they are asked to reapply. In addition, 5 NYCRR § 144.8(a)(1) requires a certified business enterprise to notify the Division within 30-days following any material change in the information contained in or documents submitted with the original application. Therefore, the burden of proving continuing eligibility for certification in light of changing circumstances lies plainly with the MBE or WBE whether the Division seeks verification or whether the MBE or WBE certification information changes. Nevertheless, the Division does initiate re-certification reviews in response to third-party complaints, in reaction to ownership changes, and by random audit. Furthermore, it should be noted that a mandatory MBE or WBE reapplication process requiring application every few years is impractical if not impossible given the number of both new and re-certification applications that would need to be processed each year. Nonetheless, the Division will consider the viability of both a mandatory requirement compelling all MBE or WBEs to periodically provide specific information verifying the MBE's or WBE's continued eligibility for certification and also a limited certification life requiring all MBE's and WBE's to reapply after a certain period.

Recommendation 6

Research and consider automatic certification for firms certified in other states.

This audit misstates the Division's position. This audit states that the Division does not recognize any other state MWBE program because they are not as comprehensive as New York State Law. As the Department made clear in its response to the preliminary observations submitted in June of 2003, program requirements and processes differ among the states, including eligibility and certification requirements, the Division has not recognized any other state certification process for reciprocity or automatic certification. Many states rely entirely on the federal certification process, which certifies Disadvantage Business Enterprises ("DBE") – an

entity not recognized by Article 15-A. Many states also have a broader definition of a “member of a minority group” which may not fit the same definition in Article 15-A. Some states operate under a self-certification program, where firms need only submit an affidavit stating they are a minority or woman enterprise. Though the Division requests out of state certification information in its application review process, the Division must review each out-of-state application under the same due diligence standard as New York State firms applying for certification. The Division has, to the extent provided by law and deemed sufficient, set practices and policy for considering the certification of firms by other states. 5 NYCRR §144.2(c)(5) permits the Division to waive site visits when the out-of-state firm has a certification from a home state with a recognized MWBD program, and permits but does not mandate, that a site visit be made when a firm does not have certification from their home state. Division policy is to conduct a desk review of the application with due diligence and conduct a phone interview in order to make a determination of eligibility. Due to limited resources, the Division has not conducted site visits to out-of-state firms. In addition, for monitoring purposes the Division has amended its certification procedures to require identification of out-of-state firms in the monitoring process to ensure that entries will be made in the certification database by the analysts in order to monitor any action taken on an out-of-state application as it is being reviewed.

Recommendation 7

Compile and regularly update master list of agencies required to report.

The auditors fail to acknowledge that the Division has compiled a master list of agencies required to report. When developing the on-line reporting system, the Division determined which agencies were required to report under Article 15-A, which sub-agencies reported separately and what agencies voluntarily report. Each agency was then given a code number for identification and tracking purposes and assigned to an analyst. At present, the total number of agencies on the master list as kept by the Division’s on-line database are 83 agencies that are required to report including those that voluntarily do so. Attached at the end of this response is the database master list.

Recommendation 8

Consistently apply existing procedures to inform State agencies of their noncompliance with reporting requirements, if agencies remain non-compliant, list them by name in the Division’s annual report.

As the Department stated in its response to the preliminary observations submitted in June of 2003, the Department currently list non-compliant agencies by name in the appendix entitled “Individual Agency Goal, Utilization and Expenditure Summary Report” of the Division’s annual report.

In addition, the Division notifies the agency liaison via email, that the quarterly reports are due 15 days after the quarter has ended (the 15th of July, October, January and April). After 30-days

have passed from the end of the quarter, the Division notifies the agency liaison via correspondence that the agency must submit their quarterly reports. This time period is given because agencies receive monthly work force and payment reports from Contractors on existing construction projects, and quarterly reports on non-construction expenditures. The Division allows the time for the agency to compile the data and have it converted to the required reporting format for on-line submission. The Division will notify the agency head of its agency's non-compliance at the end of the quarter following the current quarter. Nonetheless, in some instances the Division receives no response from either an agency liaison or agency head. For example, during the 3 fiscal year periods covered by the audit, the Office of State Comptroller refused to submit quarterly or annual utilization reports despite continued contact and notification. This is an issue that must be addressed within the Comptroller's Office as well as other non-compliant state agencies.

Recommendation 9

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

The Comptroller is authorized to audit current programs and can make recommendations on program activities. This recommendation goes beyond that function and the Department believes that it is inappropriate for the Comptroller to attempt to impose its legislative preference upon an executive department, especially via a "recommendation" to lobby the legislature for a statutory change the Comptroller favors. In addition, given the sun setting of the statute and its extension, the legislature and the Governor have given Article 15-A due consideration as you note in your draft audit.

Recommendation 10

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

The Division believes that Article 15-A is clear on this issue and the Division will continue to administer accordingly. However, the Division will notify reporting agencies of the Comptroller's Bulletin A-307-R1 that addresses discretionary and non-discretionary expenditures and that this bulletin specifically applies to MWBE utilization and reporting. It should be noted that Bulletin A-307-R1 was drafted pursuant to law specifically for MWBE reporting.

According to the Division, the Office of State Comptroller has failed to "monitor and report on the level of participation in each agency's payment of goods and services" as required under Bulletin A-307-R1. Such compliance reporting would aid the Division in its compliance mission and we hereby request that the Office of State Comptroller adhere to its responsibilities under Bulletin A-307-R1.

Recommendation 11

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

The Division had developed and has been implementing an agency review plan that includes an on-site visit. The Division requests two contracts from the agency being reviewed, one contract for over \$25,000 in services and commodities and one for over \$100,000 in construction related projects. After a desk audit, the Division visits the agency to review any files and documents related to the contracts submitted. However, as the Department stated in its response to the preliminary observations submitted in June of 2003, the Division has recently developed a process to use a new on-line reporting system and utilization database to establish a desk review procedure eliminating the on-site visit, which is neither required nor necessary. The new process is more efficient and will thereby permit more agency compliance reviews per year. For example, the Division has expanded the utilization database whereby agencies will now be required to submit payment information (voucher number, payment order number, or project ID number) in order to track payments to a particular quarter or fiscal year. This will serve two purposes. First, the Division will be able to query the database and identify multiple payments with a similar tracking number and verify whether they are expenditures or commitments. Second, the Division may request the contract related to those payments for compliance review purposes.

Recommendation 12

Reinforce agencies' understanding of Division procedures that require reporting actual expenditures rather than contract award amounts. Verify compliance with this procedure and the accuracy of the reports.

The auditors fail to acknowledge that they were provided with evidence that the Division has in fact contacted agencies regarding Division policy on submitting expenditures (actual payments) rather than commitments (contract awards). The auditors were also provided with evidence of notification to those agencies that were not in compliance with this policy and the Division's efforts to assist those agencies in complying with such policy. Additionally, Division analysts periodically request from agencies that actual cancelled checks for payments made be submitted to the Division for any given quarter in order to verify that the utilization reports are correct. This highlights the need for OSC to compile and submit to the Department the required data pursuant to Bulletin #A-307-R1 so we can accurately compare what has in fact been paid and what agencies submit to us. Agencies whose payments are made through OSC can be easily monitored pursuant to Bulletin #A-307-R1 allowing Division analysts to more closely monitor those agencies over which OSC has no fiscal or contract payment jurisdiction, such as the two cited in this draft audit, and other authorities.

Recommendation 13

* Notes 2, 4

* See State Comptroller's Notes, page 59

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

Again, as the Department stated in its response to the preliminary observations submitted in June of 2003, the development of the on-line and bulk upload reporting system, along with the newly developed utilization database, which allows the Division to make various searches and queries, has considerably shortened the time that a utilization summary report can be generated for the annual report. We can expect that the annual report will be submitted to the Governor and the legislature in a more timely fashion in the future.

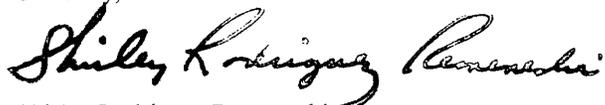
Recommendation 14

Develop a more proactive outreach program.

This was also addressed in the Department's response to the preliminary observations submitted in June of 2003. To reiterate, though not required under the law, the Division has an active outreach program, including various education and marketing efforts and information provided via state web sites. In addition, as part of Empire State Development Corporation's (ESD) Department of Economic Revitalization (ER), the Division's mission has been augmented to marketing the various ESD programs to MWBEs and identifying and assisting eligible clients in accessing public and private sector capital and technical assistance. As such, the Division works with other ER units such as the Entrepreneurial Assistance Program to provide technical assistance to owners and operators of start-up businesses and the Capital Access Unit to direct MWBEs to financial assistance. Thus, the Division will continue to due outreach and work in conjunction with other state agencies to develop conferences, forums and workshops focused on issues related to the development and expansion of opportunities for MWBEs.

Thank you for your interest in the Division and for the opportunity to respond.

Sincerely,



Shirley Rodriguez Remeneski
Senior Vice President

Agency Database Master List		
agencyc	agencyname	analyst
01300	ADIRONDACK PARK AGENCY	mbesong@empire.state.ny.us
01570	ADVOCATE FOR PERSONS W/DISABILITIES	mbesong@empire.state.ny.us
01370	AGING, OFFICE FOR THE	wrponce@empire.state.ny.us
06110	AGRICULTURE & MARKETS STATE FAIR	wrponce@empire.state.ny.us
06000	AGRICULTURE & MARKETS, DEPARTMENT OF	wrponce@empire.state.ny.us
99999	ALBANY COUNTY AIRPORT	
21720	ALBANY PORT DISTRICT COMMISSION	mbesong@empire.state.ny.us
01030	ALCOHOLIC BEVERAGE CONTROL (LIQUOR AUTH)	pramsey@empire.state.ny.us
53000	ALCOHOLISM & SUBSTANCE ABUSE	mbesong@empire.state.ny.us
01360	ARTS, NYS COUNCIL ON THE	pramsey@empire.state.ny.us
07000	BANKING DEPARTMENT	mbesong@empire.state.ny.us
90100	BATTERY PARK CITY AUTHORITY	wrponce@empire.state.ny.us
55020	BRIDGE AUTHORITY	mbesong@empire.state.ny.us
01010	BUDGET, DIV OF THE	mbesong@empire.state.ny.us
21780	CAPITAL DISTRICT TRANS. AUTH.	mbesong@empire.state.ny.us
01580	CHILDREN & FAMILIES, COUNCIL ON	mbesong@empire.state.ny.us
25000	CHILDREN & FAMILY SERVICES, OFFICE OF	wrponce@empire.state.ny.us
08000	CIVIL SERVICE, DEPT. OF	mbesong@empire.state.ny.us
99908	CNY CENTRO, INC.	pramsey@empire.state.ny.us
02000	COMPTROLLER, OFFICE OF THE STATE	wrponce@empire.state.ny.us
01120	CONSUMER PROTECTION BOARD	mbesong@empire.state.ny.us
01530	CORRECTION, STATE COMMISSION (done by CJS)	mbesong@empire.state.ny.us
10160	CORRECTIONAL SERVICES, NYS DEPARTMENT OF	mbesong@empire.state.ny.us
01400	CRIME VICTIMS COMP BOARD	mbesong@empire.state.ny.us
01490	CRIMINAL JUSTICE SERVICES, DIVISION OF	mbesong@empire.state.ny.us
70000	CUNY	pramsey@empire.state.ny.us
51280	DEVELOPMENT DISABILITIES PLANNING COUNCIL	wrponce@empire.state.ny.us
21800	DORMITORY AUTHORITY	pramsey@empire.state.ny.us
22000	ECONOMIC DEVELOPMENT, DEPARTMENT OF	pramsey@empire.state.ny.us
11000	EDUCATION, DEPT. OF	mbesong@empire.state.ny.us
01540	ELECTIONS, STATE BOARD OF	wrponce@empire.state.ny.us
28760	EMPIRE CENTER AT THE EGG	pramsey@empire.state.ny.us
21910	EMPIRE STATE DEVELOPMENT CORP.	pramsey@empire.state.ny.us
01150	EMPLOYEE RELATIONS, GOVERNORS OFFICE OF	wrponce@empire.state.ny.us
21190	ENERGY RESEARCH & DEVELOPMENT AUTHORITY	wrponce@empire.state.ny.us
09000	ENVIRONMENTAL CONSERVATION	wrponce@empire.state.ny.us
01000	EXECUTIVE CHAMBER	mbesong@empire.state.ny.us
01051	GENERAL SERVICES DESIGN & CONSTRUCTION	
01050	GENERAL SERVICES, OFFICE OF	wrponce@empire.state.ny.us
99902	HEALTH & HOSPITAL CORP., NYC	pramsey@empire.state.ny.us
12000	HEALTH, DEPT. OF	mbesong@empire.state.ny.us
11100	HIGHER EDUCATION SERVICES CORP.	wrponce@empire.state.ny.us
01080	HOUSING & COMMUNITY RENEWAL	wrponce@empire.state.ny.us
07950	HOUSING FINANCE AGENCY	pramsey@empire.state.ny.us
01090	HUMAN RIGHTS, DIV OF	pramsey@empire.state.ny.us
21700	INSPECTOR GENERAL, OFFICE OF THE STATE	mbesong@empire.state.ny.us
13000	INSURANCE DEPARTMENT	pramsey@empire.state.ny.us
14640	INSURANCE FUND	pramsey@empire.state.ny.us
21920	JACOB JAVITS CONVENTION CENTER	pramsey@empire.state.ny.us
14000	LABOR, DEPT. OF	pramsey@empire.state.ny.us
21670	LONG ISLAND POWER AUTHORITY	pramsey@empire.state.ny.us
20050	LOTTERY, DIV. OF THE	pramsey@empire.state.ny.us
50000	MENTAL HEALTH, OFFICE OF	wrponce@empire.state.ny.us
51000	MENTAL RETARDATION & DEV. DISABILITIES	wrponce@empire.state.ny.us
21250	METROPOLITAN TRANSPORTATION AUTHORITY	pramsey@empire.state.ny.us

01070	MILITARY & NAVAL AFFAIRS, DIV. OF	wrponce@empire.state.ny.us
21960	MORTGAGE AGENCY (SONYMA)	pramsey@empire.state.ny.us
23000	MOTOR VEHICLES, DEPT OF	wrponce@empire.state.ny.us
21930	MUNICIPAL ASST. CORP	pramsey@empire.state.ny.us
21120	NATURAL HERITAGE TRUST	wrponce@empire.state.ny.us
21770	NIAGARA FRONTIER TRANS. AUTHORITY	
21360	OLYMPIC REGIONAL DEVELOPMENT AUTHORITY	mbesong@empire.state.ny.us
49070	PARKS, REC. & HISTORIC PRESERVATION	wrponce@empire.state.ny.us
01020	PAROLE, DIVISION OF	mbesong@empire.state.ny.us
99905	POWER AUTHORITY, NEW YORK	pramsey@empire.state.ny.us
01200	PROBATION & CORRECTIONAL ALT. (Done by CJS)	mbesong@empire.state.ny.us
08010	PUBLIC EMPLOYMENT RELATIONS BOARD	wrponce@empire.state.ny.us
16000	PUBLIC SERVICE, DEPARTMENT OF	mbesong@empire.state.ny.us
01590	QUALITY OF CARE FOR THE MENTALLY DISAB.	wrponce@empire.state.ny.us
01510	RACING & WAGERING BOARD, NYS	pramsey@empire.state.ny.us
01310	REAL PROPERTY SERVICES	wrponce@empire.state.ny.us
21110	REGULATORY REFORM	mbesong@empire.state.ny.us
21830	ROOSEVELT ISLAND OPERATING CORP.	pramsey@empire.state.ny.us
21470	SCIENCE & TECHNOLOGY FOUNDATION	
01060	STATE POLICE, DIV. OF	mbesong@empire.state.ny.us
28990	STATE UNIVERSITY CONSTRUCTION FUND	pramsey@empire.state.ny.us
19000	STATE, DEPT. OF	mbesong@empire.state.ny.us
28000	SUNY CENTRAL	wrponce@empire.state.ny.us
20000	TAXATION & FINANCE, DEPARTMENT OF	mbesong@empire.state.ny.us
27000	TEMPORARY AND DISABILITY ASSISTANCE, OFFICE OF	mbesong@empire.state.ny.us
55090	THRUWAY AUTHORITY	wrponce@empire.state.ny.us
17000	TRANSPORTATION, DEPT OF	mbesong@empire.state.ny.us
01190	VETERAN'S AFFAIRS	wrponce@empire.state.ny.us
14010	WORKERS COMPENSATION BOARD	wrponce@empire.state.ny.us
21719	HUDSON RIVER TRUST FUND	pramsey@empire.state.ny.us

New York State Office of the State Comptroller

Alan G. Hevesi, State Comptroller

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Accounting Bulletin

Bulletin No. A-307-R1
November 16, 1999

Voucher Preparation Changes for MWBE Reporting

Search this site:

Purpose Pursuant to Article 4A of the Economic Development Law, OSC and DED's Division of Minority and Women's Business Development (MWBD) have agreed on a new voucher coding requirement. *The new coding requirement is designed to use the Central Accounting System (CAS) to collect information to be used by DED to generate reports on (1) 'discretionary' payments made by agencies and (2) the portion of those discretionary payments that are made to MWBE's. In generating these reports centrally, MWBD will reduce agency reporting requirements.*

DED recognizes that while these reports will show total payments to MWBE's, in dollars and as a percentage of total discretionary payments, the reports may not necessarily reflect the aggressive efforts made by some agencies to include MWBE's in all procurement.

Voucher Coding Requirement For all vouchers with a payment date of 4/1/93 or later, if the payment is 'discretionary' as defined later in this Bulletin, agencies must enter a 'D' in the Statewide Indicator field as shown on Exhibit A. A 'D' must be coded on all discretionary payments whether or not made to an MWBE. All payments processed without a 'D' will be considered non-discretionary.

Agencies using older voucher stock without the pre-printed "Indicator-Statewide" block must enter the 'D' as shown on Exhibit B. Agencies that bulkload vouchers must ensure the 'D' Statewide Indicator is included in all discretionary payment transactions.

Note: The "Indicator-Statewide" is a 5-position alphanumeric field. The new 'D' code can be entered in any of the 5 positions. Since no other Statewide Indicator codes have been assigned by OSC, the remaining 4 positions will be blank.

The reports ultimately generated by DED will only be as accurate as the 'discretionary' indicators and Payee ID's that are entered into (cont'd) the CAS. Careful voucher preparation and entry into the CAS will help avoid time-consuming follow-up in explaining report amounts to DED.

Discretionary/ "Discretionary" payments are those payments in which the

Non-Discretionary agency has had some discretion in the selection of vendors, contractors or individuals providing goods or services. For purposes of MWBE reporting, the following are included among discretionary payments and should be coded with a 'D':

- Payments for emergency goods and services;
- Consortia payments;
- Payments against contracts with travel agents.

The following types of payments are considered non-discretionary:

- Payments to any governmental entity or public benefit corporation (except when that entity competed with for-profit organizations for the contract);
- Payments for employee fringe benefits;
- All payments, including travel reimbursements, to employees (except when they are providing goods/services as non-employees);
- Travel payments to lodging establishments and travel agents selected by employees;
- Payments made directly to a common carrier;
- Payments to preferred sources;
- Payments against statewide term contracts (P-Contracts, including 'as specified' contracts);
- Payments for real estate leases negotiated by an entity other than your agency;
- Sole source contract payments (as determined by OGS guidelines for sole source contracts);
- Payments for utilities, postage, telephone;
- Conference fee payments;
- Payments for magazines/periodicals/journals;
- Membership payments to associations and professional licensing fees paid by agencies;
- Payments to not-for-profit (NFP) organizations (except when the NFP competed with for-profit organizations for the contract).

Impact on Reporting

By April 1, OSC will modify the VOU065, Payee list by Agency and Voucher, to print the Statewide Indicator. Agencies can then use the VOU065 to verify the inclusion or exclusion of the Statewide Indicator on payments. Statewide Indicator will also be included in Payment History (M171) records provided to agencies.

If any payment is inaccurately coded, contact your agency liaison at DED, (518)292-5250, for correction of MWBE reporting. Agencies should note that OSC is providing the means for DED to accumulate this information, but OSC will not take any action to change incorrect Statewide Indicator data in payment history records.

DED will use the information collected by the CAS to monitor and report on the level of participation by MWBE's in each agency's payments for goods and services. This will eliminate some agency MWBE reporting requirements. However, certain agency MWBE reporting must continue, such as reporting on sub-contractors and petty cash payments, as well as identification of uncertified MWBE's. Specifics on revised agency reporting requirements will be sent to agencies by DED.

Questions

Direct MWBE questions on this bulletin to **Wendell Ramat-Ponce**, (518)292-5250. Direct other questions to the Accounting Information Center at (518) 473-1170.

Empire State Development

Jorge I. Vidr6, Esq.
Director
Division of Minority & Women's Business Development

July 2, 2003

Joseph F. Smith
State Program Examiner II
Office of the New York State Comptroller
123 William Street
New York, New York 10038-3804

Dear Mr. Smith:

Thank you for your letter dated June 4, 2003 and the preliminary agency compliance audit report attached thereto.

As you know, shortly prior to your audit the Department also had an internal audit prepared which pointed out certain areas in which the Division needed to improve. These areas in large part mirror some of your points. We will continue to work to address the areas in need of improvements.

In response to your request for a statement of representation, please know that all relevant documents and information was properly disclosed and that our responses to both your team's audit inquiries and to this preliminary report are, to the best of my knowledge and belief, accurate and in legal compliance. Per your assurance, we appreciate having the opportunity to reply to any further preliminary audit reports resulting from your ongoing investigation. We look forward to continuing our cooperative relationship with you and to bettering the program under Article 15-A and we appreciate the opportunity to respond to your preliminary certification audit and our comments are as follows.

Initially, you need to correct the third bullet point in the background section of the report. It currently reads that state law requires DMWBD promulgate "rules and regulations to ensure that MWBEs are awarded a fair share of contracts." To the contrary, State law charges the Division with ensuring that certified businesses are given the opportunity for meaningful participation in the performance of state contracts so as to facilitate the awarding of a fair share of state contracts. See Executive Law Section 313(1). There is no requirement that the Division ensures contracts are awarded to certified businesses. This is an important distinction on both a practical and programmatic level as well as on a legal/constitutional level.

Recommendations 1 and 2:

Establish a master list of the agencies subject to the Article 15-A filing requirements. Determine what sub-agencies are required to report through parent agency or independent of parent agency.

New York State Department of Economic Development
655 Third Avenue, New York, New York 10017 Tel: 212 303 3113
Web Site: www.empire.state.ny.us

DMWBD Response:

The Division will work to create a master list of agencies required to report based on the requirements and listed agencies found in Executive Law Section 310(11). In addition, the Division will ask parent state entities to identify what sub-agencies are within the parent and request that the parent state agency make a determination as to whether the entity will be included in the parent agency's goal determination and utilization reporting. That determination, once final and agreed upon, will be used to set the threshold requirement for whether the parent and sub-agencies both need to establish separate goals and submit independent quarterly utilization reports or whether the sub falls within the parent for Article 15-A purposes.

Recommendation 3:

Ensure Agency Heads are timely notified of their Agency's non-compliance to quarterly utilization reporting.

DMWBD Response:

Currently, the Division notifies the agency liaison via email, that the quarterly reports are due 15 days after the quarter has ended (the 15th of July, October, January and April). After the 30-days have passed from the end of the quarter, the Division notifies the agency liaison via correspondence that they must submit their quarterly reports. This time period is given because agencies receive monthly work force and payment reports from Contractors on existing construction projects, and quarterly reports on non-construction expenditures. The Division allows the time for the agency to compile the data and have it converted to the required reporting format for on-line submission.

Given the practical considerations, the Division believes that a reasonable time to notify the agency head of its agency's non-compliance is at the end of the quarter following the current quarter. However, regardless of change in process, in some instances the Division receives no response from either an agency liaison or agency head.

Recommendations 4 and 7:

List in the Division's annual report to the Governor and Legislature the agencies that have not complied with Article 15-A.

DMWBD Response:

It was the practice of the Division to list non-compliant agencies separately in the Division's annual report. Once the "Individual Agency Goal, Utilization and Expenditure Summary Report" was made a part of the report as an appendix, listing the non-complaint agencies separately was abandoned. This is because the appendix report highlighted the non-compliant agencies. Nonetheless, the Division will resume the practice of listing the non-compliant

agencies separately.

Recommendations 5 and 8:

Expand the Division's annual on-site compliance review to cover more agencies.
Require all reporting agencies to use the actual expenditure amounts instead of contract amounts.

DMWBD Response:

The Division believes that on-site visits (which require the Division to dedicate a significant portion of its limited resources) as part of its compliance review may not be necessary. Currently, the Division requests two contracts from the agency being reviewed, one contract for over \$25,000 in services and commodities and one for over \$100,000 in construction related projects. After a desk audit, the Division will visit the agency to review any files and documents related to the contracts submitted.

The Division proposes to develop a process to use the new on-line reporting system and utilization database (discussed in more detail below within this section), to establish a desk review procedure, eliminate the on-site and save both quantitative and qualitative time permitting more agency compliance reviews per year.

Division policy, effective since 1992, has been that agencies must report actual expenditures (payments) rather than contract awards (commitments). As part of this policy change, agencies were given supporting documents with work sheets to capture the appropriate expenditure data and definitions to ensure correct compliance. This policy remains in place, and while the Division has migrated from hard copies to on-line reporting, the data sheets utilized by the agencies remain the same and our Utilization Database will only accept the appropriate expenditures.

The Division proposes to expand the Utilization Database where agencies will be required to submit payment information (voucher number, payment order number, or project ID number) in order to track payments to a particular quarter or fiscal year. This would serve two purposes. First, the Division will be able to query the database and identify multiple payments with a similar tracking number and verify whether they are expenditures or commitments. Second, the Division could make a determination to request a contract attached to those payments for compliance review purposes.

Recommendation 6:

Ensure the Division submits its Annual Report to the Governor and Legislature in a more timely fashion.

DMWBD Response:

The development of the on-line and bulk upload reporting system, along with the newly

developed Utilization Database which allows the Division to make various searches and queries, has considerably shortened the time that a utilization summary report can be generated for the Annual Report.

Recommendation No. 9:

Develop a more proactive outreach program.

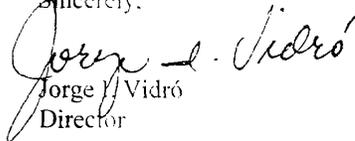
DMWBD Response:

The Division is in full compliance with Section 311(4) which permits the Director to provide general assistance to certified and potentially certifiable MWBEs. As discussed with you at some length, the Division has provided assistance and worked cooperatively with other agencies and programs to provide assistance. For example, the Division has worked closely with the Empire State Development's Economic Revitalization (ER) program to market the various ESD programs to MWBEs and identifying and assisting eligible clients in accessing public and private sector capital and technical assistance. The Division works with ER units such as the Entrepreneurial Assistance Program to provide technical assistance to owners and operators of start-up businesses and the Capital Access Unit to direct MWBEs to financial assistance and to inform potential MWBEs of the DMWBE program.

In addition, the Division works in conjunction with other state agencies to develop conferences, forums and workshops focused on issues related to the development and expansion of opportunities for MWBEs. Such outreach includes the annual Competitive Edge Conference and the Office of General Services Procurement Conference. The Division also participates in community organization functions focused on MWBEs such as the NY/NJ Purchasing Council conference. We see no will continue with our outreach and assistance

Thank you for your interest in the Division and for the opportunity to respond.

Sincerely,


Jorge J. Vidr6
Director

Empire State Development

Jorge I. Vidró, Esq.
Director
Division of Minority & Women's Business Development

July 2, 2003

Joseph F. Smith
State Program Examiner II
Office of the New York State Comptroller
123 William Street
New York, New York 10038-3804

Dear Mr. Smith:

Thank you for your letter dated June 10, 2003 and the preliminary audit report addressing Article 15-A certification issues attached thereto.

As you know, shortly prior to your audit the Department also had an internal audit prepared which pointed out certain areas in which the Division needed to improve. These areas in large part mirror some of your points. We will continue to work to address the areas in need of improvement.

In response to your request for a statement of representation, please know that all relevant documentation and information was properly disclosed and that our responses to both your team's audit inquiries and to this preliminary report are, to the best of my knowledge and belief, accurate and in legal compliance. Per your assurance, we appreciate having the opportunity to reply to any further preliminary audit reports resulting from your ongoing investigation. We look forward to continuing our cooperative relationship with you and to bettering the program under Article 15-A.

We appreciate the opportunity to respond to your preliminary certification audit and our comments are as follows.

Several basic issues in your report need to be corrected. First, you state repeatedly that the Division requires re-certification every two years. There is no statute, regulation or policy that we believe requires re-certification every two years. 5 NYCRR § 144.5 provides that the certification lasts for two years or until the Division requests reapplication. In practice, under my watch the Division has allowed the certifications to run until it requests reapplication. Indeed, the Division's certification letter states: "Be advised that your certification remains in effect until such time as you are contacted by this office for re-certification." See also, 5 NYCRR § 144.8(a)(1). In addition, the letter advises the firm that they are responsible for notifying the Division with any change in company circumstances including change of address, within 30-days of the occurrence."

New York State Department of Economic Development
633 Third Avenue, New York, New York 10017 Tel 212 803 3100
Web Site: www.empire.state.ny.us

Second, the Division has a system in place to track firms "grandfathered" in under 5 NYCRR §144.3, and to determine whether they have been or need to be verified. Indeed, you cite the annual report to point out that in 1996, 1997 and part of 1998, the Division undertook a major effort to verify the continued eligibility of certified firms, where, you conclude that some 38% of certified firms were revoked. The purpose of that verification process was to purge the system of MBEs and WBEs that no longer qualify for certification and the review looked at the firms of which certifications were the oldest – including those grandfathered under 5 NYCRR §144.3.

Third, the preliminary report is in error where it notes that the Division "is in a process of discussing joint MWBE certification efforts" with municipalities and the New York State Dormitory Authority. This is discussed more below (Response to Recommendation 4), however, it should be noted here that the Division has not discussed acting as the certification "clearinghouse" for local municipalities. The Division has discussed with municipalities their proposed MWBE programs and the possibility of providing training.

Finally, your conclusion that the Division lacks a managerial system to track applications and certified firms is also not accurate as discussed below in the Division's response to your recommendations.

Recommendation 1:

Prepare a risk assessment of the Division operations to determine the Division's performance of its responsibilities.

Response:

Internal risk assessment requirements will be adhered to and, after the Division is afforded a reasonable time to implement changes that will improve the program, I will seek an internal risk assessment to verify the appropriateness and effectiveness of the program augmentation.

As you know, both the Department and the Division have conducted internal assessments of the Division and its performance. Though there are areas where the Division can improve, the Division has satisfied its responsibilities under Article 15-A and has done so despite the diminution of resources throughout the Department and the Division. The Division has put into play systems for certification and utilization (agency services), including tracking mechanisms to determine the workflow and workload of its certification analysts and it continues to refine those systems and optimize its resources.

In addition, the Division will continue to reviews its operations to generally determine what steps might improve the systems, including the development of new databases for both utilization and certification which would allow the Division to improve its efficiency and effectiveness on both fronts. As conveyed to your team, the Division will continue to look for ways to utilize all the resources available to it to improve its performance.

Recommendation 2:

Establish managerial reporting system to provide statistical data of certified firms and re-certified firms and pending applications for certification and verification.

Response:

The Division currently has in place managerial tracking systems that provides this information. I receive weekly reports from the intake unit listing the new applications, returned applications, and those applications under verification review. I also receive weekly reports from the certification analysts listing the firms certified, rejected, denied and verified. All this information is then transferred into an excel program and a report is generated on the unit and by specific analyst allowing the Division to know the status of any application and the workload of each analyst. This system also allows the Division to determine the length of time an MBE or WBE has been certified and how long it takes to process a particular application.

The Division also maintains the certification database where applications are entered as they are received and assigned a file number. The database contains various fields that allow the analyst to make entries regarding the work done and status of an application. The Division will establish an administrative policy requiring analysts to make entries in the certification database to allow the Division consistent and standard monitoring of actions taken on an application (e.g. when correspondence was sent, when a phone call was made, interview scheduled/conducted, site visit scheduled/conducted, other status information).

Recommendation 3:

Ensure the re-certification/verification program is an on-going process performed at a rate allowing firms to be re-certified or verified every 2 years.

DMWBD Response:

As discussed above there is no absolute two-year re-certification requirement in law, policy or practice. As a matter of practice and policy, firms remain certified until they are asked to reapply. In addition, 5 NYCRR § 144.8(a)(1) requires a certified business enterprise to notify the Division within 30-days following any material change in the information contained in or documents submitted with the original application. Therefore, though the Division can and does seek to verify eligibility, the burden of proving continuing eligibility for certification in light of changing circumstances lies plainly with the MBE or WBE whether the Division seeks verification or whether the MBE or WBE certification information changes.

It should be noted that a mandatory MBE or WBE reapplication process every two years is impractical if not impossible given the large numbers of new applications that need to be processed each year. The Division will consider the viability of both a mandatory requirement compelling all MBEs or WBEs to periodically provide specific information verifying the MBE's or WBE's continued eligibility for certification and also a limited certification life requiring all MBE's and WBE's to reapply after a certain period.

Recommendation 4:

Establish written policy for certifying out-of-state firms and "reciprocity" between other state agencies and out-of-state certifying agencies.

DMWBD Response:

This is addressed in 5 NYCRR § 144.2(c)(5). This section permits the Division to waive site visits when the out-of-state firm has a certification from a home state with a recognized MWBD program, and permits but does not mandate, that a site visit be made when a firm does not have certification from their home state. Division policy is to conduct a desk review of the application with due diligence and conduct a phone interview in order to make a determination of eligibility. Due to limited resources, the Division has not conducted site visits to out-of-state firms.

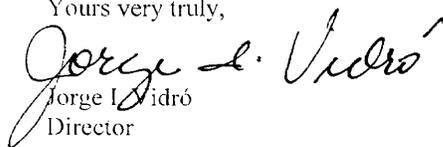
Because program requirements and processes differ among the states, including certification requirements, the Division has not recognized any other state certification process for reciprocity. A majority of other states with a certification program rely entirely on the federal certification process, which certifies Disadvantage Business Enterprises ("DBE") – an entity not recognized by Article 15-A. Other states have a broader definition of a "member of a minority group" which may not fit the same definition in Article 15-A, and yet other states have a self-certification program, where firms need only submit an Affidavit stating they are a minority or woman enterprise. Though the Division requests out of state certification information in its application review process, given statutory mandate, the Division must review each out-of-state application under the same due diligence standard as New York State firms applying for certification.

With regards to reciprocity with other New York State agencies, the Division is exclusively charged with certifying firms as MBE or WBEs. Other New York State certifying agencies do so for purposes of the federal program and only for designation as a DBE. In the case of local municipalities, while they can and often do mirror state criteria for MBE or WBE certification, they also include DBEs and Locally Based Enterprises (LBEs) as a certifiable entity within their WMBE program, and in some instances religious groups in their definition of minority group members. While the Division does currently use a uniform certification application, the Division reviews and makes its determination based on the criteria for state MBE or WBE certification pursuant to Article 15-A. Criteria for federal DBE designation which differs from Article 15-A designation requirements, precludes reciprocity with other certifying agencies using the federal designation standards.

For monitoring purposes, the Division will amend its certification procedures to require identification of out-of-state firms in the monitoring process to ensure that entries will be made in the certification database by the analysts to monitor any action taken on an out-of-state application as it is being reviewed.

Thank you again for your interest in the Division.

Yours very truly,


Jorge L. Vidro
Director

State Comptroller's Notes

1. This draft report reflects the conditions found during our audit as well as the Department's response to the preliminary findings where sufficient information was provided to support the need for a change to those findings. For example, the Department replied to the preliminary report that they are not required to recertify MWBEs every two years. In preparing the draft audit report we made changes to reflect this Department's reply. We also changed the report section related to the Division's outreach activities.
2. This report has been revised to reflect information contained in the Department's response to the draft audit report.
3. Although the Department responded that state agencies do not establish the type of expenditures that are available for MWBE participation, they were unable to demonstrate that they independently determine the amount of expenditures for each agency nor did they review the agency reports to determine whether the amounts were reasonable and complete.
4. Regarding Bulletin #A-307-R1 and the Department's comment that "A compliance review of State agencies by the Department could be more efficient if we receive the data from OSC," we have a letter from a Department official notifying OSC to stop preparing the tapes. The letter states, "Thank you for providing the Division of Minority and Women's Business Development with OSC payment, disbursement and contract record files. At this time we no longer need OSC to generate these files for us. We will contact you if we need to have the tapes run in the future. Thank you again." Accordingly, OSC stopped providing the information as requested. During our current audit, Department officials could not provide any information that OSC was requested to reinstate the process of preparing these tapes. Therefore, it is inappropriate for Department officials to respond to our draft report that their job would be easier and they would be more efficient if OSC provided the information.

However, in an effort to move forward and to improve the administration of the Program, the Department and OSC have agreed to work together to establish a process where OSC will provide the data (as reported by the State agencies) to the Department for its use. We note that the Department remains responsible for administration of the Program.

5. Our records show that for 2001-02 all required reports were submitted to the Department by OSC. For 2002-03, OSC submitted the reports to the Department in September 2003 due to an extended leave of absence of key personnel responsible for preparing our reports. Our records show the reports were accepted by Department officials. In addition, we do not understand how the

Department arrived at 46 agencies. Our work papers reflect a total of 25 agencies not filing the last quarterly report due during the three-year period ended March 31, 2002.

6. We are pleased that the Department provided a revised representation letter. The report was revised to reflect that this matter was addressed.