State of New York
Office of the State Comptroller
Division of Management Audit

DEPARTMENT OF ECONOMIC DEVELOPMENT

ADMINISTRATION OF THE OMNIBUS PROCUREMENT ACT

REPORT 95-S-79

H. Carl McCall

Comptroller

State of New York
Office of the State Comptroller

Division of Management Audit

Report 95-S-79

Mr. Charles A. Gargano
Commissioner
NYS Department of Economic Development
One Commerce Plaza
Albany, NY 12245

Dear Mr. Gargano:

The following is our audit report on the Department's administration of the Omnibus Procurement Act.

We did this audit according to the State Comptroller's authority as set forth in Section 1, Article V of the State Constitution, and Section 8, Article 2 of the State Finance Law. We list major contributors to this report in Appendix A.

Office of the State Comptroller
Division of Management Audit

December 24, 1996

Executive Summary

Department Of Economic Development Administration Of The Omnibus Procurement Act

Scope of Audit

In 1989, the Governor's Office noted a decline in the number of jobs in New York State, and sought to award a larger portion of the State's private sector contracts to local businesses. The Governor's Office asked New York State Department of Economic Development (Department) officials to propose steps the State could take to increase the number of contracts it awards to businesses based within the State. In response, Department officials developed the Omnibus Procurement Act (Act). The goal of this legislation is to enable more New York State businesses, working within existing State purchasing guidelines, to compete for government contracts. The Act outlines specific procedures that the Department, as well as State agencies and authorities (collectively referred to as "agencies" in this report), must follow in awarding contracts. The Department is also charged with coordinating and monitoring efforts by the agencies to comply with Act provisions.

Our audit addressed the following questions regarding the Department's administration of the Omnibus Procurement Act for the period February 3, 1993 through December 31, 1995.

- Are Department staff providing adequate oversight of agencies' compliance?
- Are Department and agencies' officials complying with Act provisions?

Audit Observations and Conclusions

Department and agencies' officials do not always comply with Act provisions. Also, Department management has taken a passive attitude towards coordinating agencies' statistics and monitoring agencies' compliance. For example, the Act states agencies must submit specific notifications and reports to Department staff for their review and assessment. These notifications and reports provide Department staff the opportunity to assess agency compliance with the Act, and to contact successful out-of-State bidders to encourage them to use New York State-based firms as subcontractors.

Department officials have not established formal controls to ensure that all required notifications and reports are received from agencies. The Department has not met its review and assessment responsibilities regarding the notifications and reports it has received. In fact, Department officials have downplayed their monitoring role. They told us that it is not their responsibility to ensure that agencies submit all required notifications and reports, or to analyze reports received. (See pp. 5-7)

The Department is also required to identify jurisdictions that impose preferences or other trade barriers in their governmental purchasing practices, and to try to persuade such jurisdictions to drop these barriers against New York businesses. To identify such jurisdictions, the Department relied on a survey prepared by the National Association of State Purchasing Officials, dated January 1994. However, this survey was not entirely accurate. If Department officials do not actively and accurately identify jurisdictions that maintain preferential purchasing policies, they cannot negotiate with those jurisdictions to encourage them to change their practices. (See p. 6)

The Act requires all agencies to: identify their procurement contracts awarded to out-of-State firms during the preceding three years; notify the Department at least 15 days before they award any contracts valued at $1 million or more to an out-of-State contractor; prepare and submit an annual report to the Department listing their contracts with both in-State and out-of-State business enterprises; and include contract clauses in all bidding packages requiring contractors to document their efforts to use New York State-based subcontractors and/or suppliers. (See p. 9)

We compared the Department's list of the 15-day notifications received from agencies during the audit period with a list of State contracts valued at more than $1 million that had been awarded to out-of-State firms, as listed on the agencies' annual reports. We found the Department had not been notified about 172 of the 256 applicable contracts, which were valued at $574 million. (See pp. 9-10)

We also found that only 23 of 180 State agencies had submitted a letter or report to the Department to satisfy the annual report requirement. Although these 23 agencies were required to submit 46 annual reports during the two-year period, just 32 reports had been sent to the Department. (See pp. 11-12)

We reviewed ten of the annual reports that were prepared by agencies, and found that many of the reported items, such as contractor location and year of contract award, were inaccurate. Our review also indicated that agencies use inconsistent criteria to identify New York State-based firms. As a result, the Department has not received adequate information to help its management assess agency compliance or identify the positive effect of the Act, if any. (See pp. 11-12)

Response of Department Officials

Department officials believe that our report points to technical issues related to the Act and does not give proper recognition to the "bottom-line" results achieved by the procurement program to date. They also stated that given the current staffing limitations, they are doing all they can to monitor agencies. Some of the agencies replied that they agree with our recommendations regarding the need for the Department to provide for continuous dialogue on the Act's requirements. These agencies also questioned the accuracy of the tabular data. In preparing this final report, all of the tables have been revised to reflect their concerns, where appropriate. We also incorporated their comments in certain sections of this report and the complete text of their comments are included as Appendix B.

Contents

Introduction

Background

In 1989, the Governor's Office noted a decline in the number of jobs in New York State, and sought to award a larger portion of the State's private sector contracts, valued at more than $7 billion annually, to local businesses. The Governor also wanted to ensure that New York State-based businesses had fair access to the $700 billion spent each year by the Federal government and the governments of other states and localities, as well as the hundreds of millions spent by foreign governments. In keeping with these objectives, the Governor's Office asked Department of Economic Development (Department) officials to propose steps the State could take to increase the number of contracts it awards to businesses based within the State.

In response to this request, Department staff sought to determine the in-State/out-of-State spending patterns of six major New York State-based public authorities by surveying their procurement activities. The survey revealed that $1.2 billion (35 percent) of the contracts awarded by these six authorities during the study period had been awarded to out-of-State firms. Department officials estimated that recapturing these contract awards for New York State-based businesses should create approximately 25,000 to 30,000 jobs over an unspecified time period.

Based on these estimates, Department officials developed legislative proposals that were incorporated into the Omnibus Procurement Act (Act), which was enacted in August 1992 and became effective in February 1993. The goal of this legislation is to enable more New York State-based businesses, working within purchasing guidelines the State has instituted to maintain a competitive and unbiased procurement environment, to compete for State contracts. Legislators anticipated that the Act would stimulate economic activity throughout the State, generating increased tax revenues from New York State-based contractors and their employees, and creating thousands of new jobs for other State residents.

To help ensure the achievement of its objectives, the Act outlines specific procedures, detailed later in this report, that the Department, as well as State agencies and authorities (collectively referred to as "agencies" in this report), must follow in the awarding of contracts. The Department is also required to coordinate and monitor efforts by agencies to comply with Act provisions.

Audit Scope, Objectives and Methodology

We audited the Department's administration of the Omnibus Procurement Act (Act) for the period February 3, 1993 through December 31, 1995. The objectives of our performance audit were to determine whether the Department effectively coordinated and monitored agencies' compliance with the Act, and to assess the extent to which the Department and agencies complied with Act provisions. To accomplish our objectives, we evaluated the Department's monitoring of agencies' compliance and reviewed contract activities at five major agencies that collectively awarded hundreds of millions of dollars in procurement contracts during our audit period. These agencies include the Metropolitan Transportation Authority (MTA), two of MTA's primary rail agencies - the New York City Transit (Transit) and the Long Island Rail Road (LIRR), the New York State Office of General Services' Standards and Purchase Unit (OGS), and the New York State Department of Transportation (DOT).

It was not possible to ascertain on an overall basis whether New York State business enterprises are being awarded more contracts from agencies, or whether more New York State-based jobs have been created, as a result of the Act. We found that neither the Department nor the agencies whose records we reviewed maintained the information necessary to make this kind of determination.

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

We use a risk-based approach when selecting activities to be audited. This approach focuses our audit efforts on operations identified through a preliminary survey as having the greatest probability for needing improvement. Consequently, by design, finite audit resources are used to identify where and how improvements can be made. Thus, little audit effort is devoted to reviewing operations that may be relatively efficient or effective. As a result, our audit reports are prepared on an "exception basis." This report, therefore, highlights those areas needing improvement and does not address activities that may be functioning properly.

Response of Department Officials

We provided draft copies of this report to officials of the Department and each of the five agencies for their review and formal comment. Their comments have been considered in preparing this report and are included as Appendix B. Some of the agencies raise concerns as to the accuracy of the tabular data presented herein, our tables and other data have been revised to reflect their concerns where appropriate.

The Department's response included a number of exhibits and attachments which are available for review at the State Comptroller's Office and have not been included in Appendix B.

Within 90 days after the 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.

Department Compliance and Oversight

The Act states that the agencies must submit specific documents, notifications and reports, as listed on page 9, to Department staff for their review and assessment. These materials are intended to help the Department ensure that New York State-based businesses are given an equal chance to compete for State contracts. The Department is also required to identify states that impose preferences or other trade barriers in their governmental purchasing practices, and to try to persuade such states to drop these barriers against New York businesses.

We found that the efforts of Department officials have resulted in several significant economic gains for the State. These achievements include the awarding of a $41 million contract to an out-of-State transit car manufacturer who subsequently set up an assembly plant within the State, and hundreds of millions of dollars in contracts awarded to New York State-based businesses which were previously awarded to out-of-state businesses. We also note the elimination by two states of their preferential contract award practices.

However, we also found that Department officials do not always carry out their responsibilities under the Act or actively monitor agencies' compliance.

For example, the Act requires agencies to notify the Department of their intent to award a contract worth $1 million or more to an out-of-State contractor at least 15 days before the award is made. When the Department receives such notification, Department staff are supposed to contact the successful bidder to encourage them to hire New York State-based firms as subcontractors or to move all or part of their State contract-related operations to New York State. Department staff should also inform in-State businesses of opportunities to participate as subcontractors and suppliers in these contracts. In fact, our review of Department files found that many successful attempts at such have been made. However, we found that the Department has not established controls to ensure that agencies timely report all of their awards in this category. Further, for 89 (61 percent) of the 147 notifications the Department did receive, we found no evidence that the Department had contacted the out-of-State successful bidder, as required, or notified New York State-based firms of the existence of these awards.

According to the Act, agencies must also submit an annual report to the Department, which shows the number of contracts they have with both in-State and out-of-State businesses, as well as other relevant contract information. We reviewed the Department's annual report files as of August 28, 1995, which management told us contained all reports received during the two years that this provision was in effect. We found that only 23 of 180

agencies had submitted a letter or report to the Department to fulfill this requirement. In addition, Department staff had not even determined how many agencies should be submitting annual reports. Without such data, Department staff could not identify agencies' noncompliance. More important, we found that the Department has not reviewed or analyzed any of the reports that were submitted.

The Act also states that the Department must identify all jurisdictions that exercise preferential purchasing practices favoring their own local vendors and try to persuade them to drop their preferences. If those negotiations fail, the Department must inform OGS as well as all State agencies, so that business enterprises whose principal location is in these jurisdictions can be dropped from New York State agency bidder lists.

The Department was required to prepare a list of the jurisdictions exercising preferential purchasing practices by February 3, 1993. Agencies were required to begin using the list by August 2, 1994. Although the Department presented a listing of such jurisdictions to the Office of General Services in June 1994, the Department did not send the list to all other agencies until November 14, 1994-three months late. Furthermore, the Department did not perform its own formal study to develop this list, but based its list on a survey conducted by the National Association of Purchasing Officials. However, this survey was not entirely accurate. For example, the State of Arkansas is listed as currently employing preferential purchasing practices. Yet, Arkansas repealed its preferential purchasing statute prior to the period reportedly covered by the survey.

Department officials emphasized their achievements regarding the Act's objectives and cite the continuous efforts made by the Department's staff to bring business to New York State, enhance the participation of New York businesses in the agency contract award process, and resolve the preferential contract award practices of selected jurisdictions. They also state that they do not have enough staff to perform all of the tasks we identified, or to contact subcontractors and suppliers in all cases. They expressed the belief that the choice of subcontractors and suppliers could be made more efficiently by the contractors themselves, who are best qualified to select the firms that can meet their needs.

This position conflicts with a proposed action plan prepared by Department officials in 1994, which outlined efforts to enhance communication between agencies and Department staff, as well as procedures for assessing the information and data the agencies were to submit. We believe that if Department officials continue to maintain this passive attitude, there is little chance that the Act's objectives can be fully achieved.

Recommendations

1. Establish systems and controls to ensure that agencies file all required notices and reports.

(Department officials disagree with this recommendation because they believe it has already been done using a different approach. They state they work directly with out-of-State contractors and other contractors who contacted the Department seeking information about vendors or minority or women-owned businesses. They also indicated that the Department has a requirement that an out-of-State contractor document efforts made to seek subcontractors and suppliers. This information leads to communication between the Department and contractors.)

Auditors' Comments - We recognize that the Department has taken some action that will provide information about contractors. However, there is still a need for the Department to develop a comprehensive system that will improve its ability to identify all of the agencies not filing the required notices and reports. In addition, the use of one system containing all of the data would be preferable to the fragmented system described in the Department's response.

2. Review these notices and reports to determine if the Act's objectives are being achieved.

3. Maintain an active list of jurisdictions which exercise purchasing preferences and take steps to negotiate an end to such practices.

4. Enhance communications with agencies to ensure that they understand and are in compliance with the Act's provisions.

Agency Compliance

The Act requires all agencies and authorities to comply with the following provisions:

- Agencies must identify (flag) any procurement contract they have awarded to out-of-State firms during the preceding three years. This notice must appear in the New York State Contract Reporter, a Department-published newspaper in which all agencies must list their individual contracts that are valued at more than $5,000;

- Agencies must notify the Department at least 15 days before they award any contracts valued at $1 million or more to an out-of-State business enterprise. The Department must then contact such firms and encourage them to do some of the contracted work within the State, or to use New York State subcontractors/suppliers in performing their contracted work;

- Agencies must provide their annual reports to the Department by June of each year, listing all contract awards greater than or equal to $100,000. Authorities are required to report by February of each year for all of their contracts, regardless of dollar amount. Annual reports are to describe the products or services provided under the contracts, and the dollar value of each agreement, identify each contractor as in-State or out-of State, and explain the process used to select the winning contractors; and

- Contracts with firms that are valued at $1 million or more must include clauses requiring contractors to document their efforts to use New York State subcontractors/suppliers. Contractors are also required to notify the agency of these efforts.

15-Day Notifications

Agencies are not always complying with their obligation to notify the Department before they award contracts valued at $1 million or more to an out-of-State business enterprise. We compared the Department's list of the 15-day notifications received from agencies during the audit period with a list of State contracts valued at more than $1 million that had been awarded to out-of-State firms. This contract award information is listed in the annual reports of the sampled agencies submitted to the Department. We found that the Department had not been notified about 172 of the 256 applicable contracts, which were valued at $574 million. The following chart illustrates the breakdown of these contracts by agency.

Agency (*)	Number of Notifications Required	Number of Notifications Not on File	Missing Notification Contract Dollars (in Millions)
LIRR	13	13	$ 44.0
Transit	26	25	131.6
DOT	9	6	17.0
OGS	208	128	382.2
Totals	256	172	$574.8

(*) We excluded the MTA from our analysis, because it awarded only one contract requiring a 15-day notification during the audit period.

In response to this issue, Department officials believe that our conclusion is misleading since it is not probable that all of these contract dollars would be available to New York-based firms based on the products or services. They cite several examples of contracts where, in the Department's opinion, New York State-based firms could not provide the products or services.

We realize that while there is no guarantee that New York-based subcontractors would have been selected or would have even bid on all of these contracts, the fact remains that by not being notified about the contracts, they never had the opportunity to do so. In addition, this information regarding certain products was not provided to the audit team during our field work.

OGS replied to our report that the number of contracts where notifications were not on file is incorrect. It had determined that 70 of the 128 contracts OGS had an informal agreement with DED that notification would not be necessary because there are no manufacturing/refining facilities located in New York State. We discussed this matter with Department officials but they did not confirm that such as agreement exists. As a result there is no basis for changing the number in our table.

We also found that about half of the 147 notification forms that had been submitted by all agencies, since the Act took effect, had been submitted to the Department fewer than 15 days before the contracts were actually awarded. Failure to notify the Department of these impending contracts within the required time period makes it impossible for Department staff to carry out their responsibilities as outlined in the Act.

DOT officials replied to our report that the number of notifications reported as late for its contracts is incorrect. The number that remains in this report for DOT reflects any changes that were required based on the additional information received from DOT.

Annual Reports

Department staff are supposed to review agencies' annual reports to spot trends as to the number of contracts awarded to either in-State or out-of-State vendors. This review can also identify out-of-State contracts for products or services that could be supplied in the future by New York State-based firms, should these firms be given the opportunity to participate in the bidding process.

We reviewed the Department's annual report files as of August 28, 1995. We were told these files contained all reports received during the first two years after this requirement took effect. We found that 23 (13 percent) of 180 agencies had submitted a letter or report to the Department based on this requirement. Although these 23 agencies were required to submit 46 annual reports during the two-year period, just 32 reports were sent to the Department. Furthermore, 12 of these reports were submitted at least two months after the due date. Although the MTA, Transit and the LIRR prepared annual reports they did not submit any to the Department during this period. An MTA official informed us that she was not aware of this requirement. However, she assured us that the MTA would see that future annual reports, including those of Transit and the LIRR, are submitted to the Department by the due dates.

We reviewed ten of the annual reports prepared by the five sampled agencies, and found that reported items, such as contractor location and year of contract award, were often reported inaccurately. In addition, our comparison of the data in the reports showed that agencies are using inconsistent criteria to classify the in-State/out-of-State status of contractors. As a result, the Department has not received accurate information that management can use to assess agency compliance, to identify any positive effects of the Act, or to formulate plans for improvement.

For example, the agencies we reviewed generally used either the vendor's mailing addresses or the vendor's unverified self-classification of its in-State/out-of-State status. We reviewed a total sample of 88 contracts at the five agencies. We found that the methods used had resulted in the misclassification of several contractors. The following table illustrates the methods used and the number and dollar value of the misclassified contracts.

Agency	Method of Classifying Contractor in-State/out-of-State status on Annual Report	Number of Misclassified Contractors*	Dollar Value of Corresponding Contracts (in millions)
Transit	Vendor Certification	4 of 20	$ 7.9
MTA	Vendor Mailing Address	1 of 8	0.7
OGS	Vendor Certification	4 of 20	9.5
DOT	Vendor Mailing Address	6 of 20	37.5
LIRR	Service Contracts - All considered New York State Purchase Contracts - Vendor Mailing Address	4 of 20	7.8
Totals		19 of 88	$63.4

* The misclassified contractors' status includes both out-of-State contractors classified as in-State, as well as, in-State contractors classified as out-of-State.

We also found that OGS has developed a third description for classifying contractor location, New York State/Foreign. According to OGS officials, this category includes contractors whose products contain both in-State and out-of-State components. However, OGS has not conveyed this definition to contractors so that they know whether or not their businesses should be classified in this category. Further, several agency officials indicated that annual report misclassifications occurred because their staff had been confused about the definition of a New York State business enterprise. They also found it difficult to obtain information from contractors about where the related work was performed.

We also found that DOT, Transit and the LIRR had not reported their contracts by the total award amount, as required by the Act; instead, they were reported in terms of annual expenditures, regardless of the year in which the contract was awarded, negating the benefits of the annual report. For example, we found that 32 contracts included in DOT's 1993-94 annual report had actually been awarded during fiscal year 1992-93. As a result, the contract value reportedly awarded in this report was overstated by $7.4 million. Based on our review of 15-day notifications at both DOT and OGS, we also found that several contracts, valued at approximately $22 million, had been awarded during the audit period, but had not been reported in any of the appropriate annual reports. Therefore, the information provided to Department officials was incomplete.

Contractor Compliance Requirements

According to the Act, all agencies should include the following clauses in the bid packages sent to potential contractors, and promulgate procedures to ensure contractor compliance with these clauses.

(1) "All contractors receiving awards of $1 million or more must either document their efforts to obtain New York State-based subcontractors or suppliers, provide a statement indicating that they do not intend to use subcontractors, or state the methods they used to try to obtain New York State-based subcontractors without success. All successful contractors, regardless of award amount, must list available job opportunities with the New York State Department of Labor."

(2) "Contractors located in a foreign country must cooperate with New York State in trying to obtain contracts for New York State-based business enterprises in their country of domicile."

(3) "As of August 2, 1994, contractors that are located in a jurisdiction deemed discriminatory toward New York State-based vendors, and that would perform any part of their contracted work outside of New York State, may be denied the contract award."

We found that three of the agencies we reviewed had not included either the first and/or second clauses in their bid packages for 37 (45 percent) of the 83 applicable ($1 million) contracts in our sample. In addition, four of the five audited agencies had not added the third clause to any of their contracts. None of the agencies we reviewed had implemented procedures directing contractors to comply with these clauses.

If these clauses are not incorporated into the contracts, and the agency does not monitor the contractors' performance to determine if they have taken these actions, there is a high risk that the Act will not achieve its goal of expanding opportunities for New York State businesses to participate in State contracts.

We believe these deficiencies exist because agency officials have placed a low priority on compliance with Act provisions. However, agencies' officials told us that they were not aware of any requirement for them to monitor contractor compliance with the bid clauses. They also cited the Department for providing little guidance on how to comply successfully with Act provisions.

Several agency representatives claimed that compliance with Act provisions, particularly for Federally-funded contracts, would be contrary to Federal rules and regulations. Such rules, they said, require that all "procurement transactions will be conducted in a manner providing full and open competi-

tion..," and "prohibit[s] the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals..." However, the Act does not inhibit competition, nor does it contain any preferential provisions. Instead, the Act's primary purpose is to enable more New York-based businesses to compete for government contracts.

Recommendations

The Commissioner should encourage agencies to:

5. Meet with Department representatives to obtain a better understanding of Act requirements.

6. Develop procedures and controls to ensure that:

   a. All notices and reports required by the Act are prepared according to Act specifications and are submitted to the Department by the mandated due dates;

   b. Contracts are not awarded to vendors that do not qualify under the Act; and

   c. All successful contractors comply with provisions described by all clauses that must appear in the bid packages, according to the Act.

Major Contributors to This Report

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Charles A. Gargano
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August 26, 1996

Mr. David R. Hancox
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Dear Mr. Hancox:

Attached is Empire State Development's (ESD) response to your draft audit report 95-S-79, the Omnibus Procurement Act (OPA). Our response also includes the findings that were addressed to the agencies and authorities contained in the original audit.

At the outset, we should note that the Omnibus Procurement Act and the Department of Economic Development's Procurement program have significantly assisted New York businesses in obtaining government contracts for goods and services. The Procurement program has also been very effective in leveling the playing field for New York State companies interested in competing for contracts with other states.

Due to the direct efforts of the Procurement program, a substantial number of contracts were performed in New York that otherwise would have been awarded to out-of-state vendors. For example:

- Bombardier Corporation opened a transit car assembly plant in New York to perform a $41 million contract for Metro-North that otherwise would have been built in Vermont.

- Orion Bus in Oriskany, NY has received transit contracts in excess of $200 million that were previously awarded to a company located in New Mexico.

- ABB Traction of Elmira Heights, NY won a $285 million contract with the transit authority in Philadelphia as a direct result of the Procurement program's effective use of the reciprocity provisions of the OPA. In this case, Pennsylvania officials were put on notice that they would be subject to the reciprocity provisions of the OPA if they attempted to by-pass the low bidder, in this case a New York State company, in favor of a Pennsylvania firm.

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Appendix B

- ESD played a lead role in establishing the new GM/Super Steel locomotive plant in Schenectady. This facility will handle contracts with the Long Island Rail Road worth in excess of $150 million that would have otherwise been performed in Ontario and Milwaukee, Wisconsin.

- ESD assisted General Railway Signal of Rochester to compete for and win over $100 million in contracts for signaling equipment. This effort helped to keep contract work in New York that otherwise would have been awarded to an out-of-state firm.

While the draft audit report points to technical issues related to administration of the OPA, it fails to give proper recognition to the "bottom-line" results achieved by the program to date. The fact is that the OPA was designed to help New York firms compete for and win contracts that were leaving the State. This has been done. The OPA was also designed to help recruit companies to New York. Again, there have been a number of successes in this area. Finally, the OPA was designed to level the playing field for New York bidders in other states. Again, the record here is clear. Five states have already agreed to stop penalizing New York bidders as a direct result of the OPA. Instead of recognizing these facts the draft audit report focuses on how the list of discriminating jurisdictions was put together.

In its review of the department's role in administering the OPA, the fact that the OPA was substantially rewritten by the Legislature in both 1993 and 1994 is largely ignored. The Procurement program issued new guidelines to State agencies/authorities on three separate occasions. In effect, the "ink was barely dry" on the final changes to the OPA when the audit began.

We recognize, however, that in the past some procedural elements of the Act have not been effectively implemented by the Department. These weaknesses reflect our findings concerning other past New York State economic development efforts. Because of extensive weaknesses in the administration of economic development programs in the Cuomo Administration, we have been forced to undertake a thorough overhaul of the operations of the Department of Economic Development and the Empire State Development Corporation. This process, which is still ongoing, has resulted in a complete realignment of responsibilities and organizational restructuring, as well as a redesign of administrative processes. It is our belief that the result will be an economic development effort that avoids failures like the insolvency of the Job Development Authority, the over commitment of resources by the Urban Development Corporation, or the failure of the Department of Economic Development to properly oversee programs that were its responsibility, all of which occurred during the past Administration.

With respect to the management of the Department's Procurement program, the subject of this audit, there have been changes made in personnel and organizational structure involving the Procurement Unit, which administered this program. Most notably, the Unit has been integrated into the Division for Small Business, a larger division with greater capability for proactive administration of the OPA requirements. In addition, we are in the process of implementing procedures to remedy the procedural deficiencies identified by your audit. The processes we are implementing, along with a new procedure that we are requesting that OSC implement, will remedy the shortcomings in monitoring that have existed since the inception of the Procurement program, in 1993.

The new Administration is committed to making existing programs, such as the Procurement program, more efficient and responsive to those serviced, while at the same time cutting costs through restructuring and better planning of service delivery. The goals of the OPA are in accord with the Pataki Administration's plan to strengthen New York's industrial and technological base, and the changes we have made in the program's implementation are consistent with ESD's Strategic Plan commitment of unifying the highly fragmented and uncoordinated activities of the past economic development efforts. Administration of the OPA provisions will be enhanced by the findings and developments of the Governor's Task Force on Technology.

While we generally view the report to be constructive, there are several points that are inaccurate and misleading and should be corrected. In addition, both the Office of General Services and the Department of Transportation have raised serious questions about the accuracy of the data presented for their agency.

- The finding on the reciprocity provision of OPA is inaccurate and should be withdrawn or modified. DED cannot be held responsible for identifying the thousands of jurisdictions, from state to township, that exercise "restrictive" purchasing practices. The financial resources required to do so would be neither economical nor efficient. Both the enabling legislation and the law were more specific in identifying the purchasing practices that discriminated against out-of-state vendors. OPA was primarily concerned with any jurisdiction that employed a "preference or similar price distorting mechanism." Contrary to the audit finding, DED directly addressed the requirements of this OPA intent by identifying those states imposing this barrier to the free flow of commerce. As of this date, DED has been successful in effecting the repeal of this type of discriminatory legislation in five of the 13 states that had this practice. In addition, the Department has always sought to eliminate any form of discrimination in procurement practices brought to our attention.

- The finding on DED's monitoring role and its efforts to implement the law, and the implication that millions of dollars of contract money was not available to New York businesses, is misleading and inaccurate. Because many of the out-of-state contracts do not have the potential for New York involvement, either through employment or vendor activity, or New York relocation, the data presented in the audit should contain appropriate caveats. Examples of such contracts include a $2.4 million contract with the original equipment manufacturer, John Deere, for tractors; a $7.5 million contract for software license and upgrades from Oracle Corp.; a $200 million contract for electronic benefit transfer services from Citicorp Services Inc. selected by the Northeast Coalition of States; and raw materials such as Canadian uranium concentrates for the New York Power Authority's nuclear power plants.

- The finding on DED's monitoring of OPA in regard to the flagging of contracts advertised in the "Contract Reporter" is also inaccurate and confusing. DED was not aware of this finding and requests the supporting documentation be provided for verification. Also, the statement "Department staff are supposed to review flagged items to try to match contract's requirements to those firms that might be able to provide such services in the future" is not correct. As the OPA legislation was being drafted, DED was very concerned that the language not be interpreted as showing bid preferences and thus lead to retaliation by other states. The intent was to encourage qualified New York firms to bid, not to "match" them up. DED believes the

laws requiring contract opportunity advertisement in the Contract Reporter, proof of which is an Office of State Comptroller requirement, together with the enhanced controls being implemented will provide adequate monitoring.

We trust you will consider amending the draft report to reflect the facts as presented by DED and the agencies and authorities, in particular the comments by the Office of General Services and the Department of Transportation regarding the audit text.

In conclusion, ESD believes this program and law are integral parts of our Strategic Plan of implementing economic development polices that will enhance the state's competitive position and promote economic growth and job opportunities for New York businesses.

Sincerely,

Charles A. Gargano

Charles A. Gargano
Chairman and Commissioner

Att.

Empire State Development
Department of Economic Development

Response to the Office of the State Comptroller
Audit Report 95-S-79
Administration of the Omnibus Procurement Act

Recommendation No. 1

Establish systems and controls to ensure agencies file all required notices and reports.

ESD Response

DED maintains it has complied and monitored the law's requirements that the Commissioner use this 15-day notification to alert New York State businesses of opportunities to participate as subcontractors and suppliers. However, the approach DED used was to work directly with out-of-state contractors. During the course of the audit ESD management made available to the auditors extensive files showing correspondence between out-of-state contractors and the Department. While many of the contacts originated from the Department in response to a 15-day notification, others originated from the contractors seeking information about vendors or minority or women-owned businesses. Contractor's requests were usually directed to a particular area of the state and for specific commodities and supplies. By using ESD's computer base and the Department of Labor's ES-202 files the Procurment Unit was able to provide more direct OPA assistance. This procedure was efficient and cost-effective. Nevertheless, DED is also exploring procedures for a statewide notification of New York contractors via the Contract Reporter.

DED believes that another effective way to ensure compliance with this requirement is to require agencies to provide documentation of compliance with the 15 day notice prior to contract approval. This, DED also intends to pursue with the Office of the State Comptroller a procedural change that will require the 15-day notice to be part of the pre-audit contract review documentation. This procedure would parallel the OSC requirement that agencies document that the contract opportunity was advertised in the New York State Contract Reporter.

OPA provides built-in controls that provide assurance that the intent of the law is being carried out regardless of whether or not DED receives the notices from state agencies. One purpose of the 15-day notice is to alert New York State businesses of opportunities to participate as subcontractors and suppliers. The built-in control is the OPA requirement that an out-of-state contractor document efforts made to seek subcontractors and suppliers. This requirement generates, in many cases, early communication between the contractor and DED about employment and suppliers, including minority- and women-owned vendors. In addition, OPA requirements are part of Appendix A, the standard and required clauses for all New York State contracts.

As a final control, DED will use the annual reports to verify and cross-check receipt of the 15-day notifications.

In regard to the annual report requirement, state agencies and authorities were recently reminded of this requirement in a memorandum from the Commissioner about another state (Okla.) that dropped its discriminatory preference practices. DED will establish a control directory of all "procurement entities" to ensure state agencies are complying with the OPA. Notices will be sent to all agencies and authorities alerting them to the annual requirements. Follow-up reminders will be sent at appropriate intervals to those that are delinquent with complete documentation of the process.

Recommendation No. 2

Review these notices and reports to help ensure that the Act's objectives are being achieved.

ESD Response

There were two main purposes for the Omnibus Procurement Act of 1992. The first was to ensure New York agencies and authorities spend as much of its goods and services procurement dollars within New York "as practically and legally possible and as fiscally responsible." The second purpose was to stimulate New York's economy by assisting state businesses in acquiring procurement opportunities from other states and foreign governments.

ESD considers both of these objectives to be integral elements in our strategic plan for economic revitalization in New York. The new administration is committed to making all of its programs more efficient and effective. ESD fully intends to comply with this recommendation and use the reports and information to measure the accomplishments of the OPA. The information required to be submitted in the reports will be used in compiling meaningful statistics on New York State procurement activities.

Recommendation No. 3

Maintain an active list of jurisdictions which exercise restrictive purchasing practices and take steps to negotiate an end to such practices.

ESD Response

The audit report is incorrect in stating that, according to the Act, the Department must "identify all jurisdictions that exercise restrictive purchasing practices." DED maintains there are many and varied practices that can be considered "restrictive," such as the OPA law itself, carried out in New York. The law was more specific in defining a discriminating jurisdiction as "any other state or political subdivision thereof which employs a preference or similar price distorting mechanism ..."

See Auditors' Note

Auditors' Note: We changed the word "restrictive" to "preferential."

In implementing the reciprocity provision of OPA, DED was primarily interested in eliminating discriminatory state practices that levied a 2 to 10 percent penalty on out-of-state suppliers. This was widely considered as the primary deterrent in obtaining out-of-state contracts by New York vendors. At the time the legislation was drafted, DED had identified 13 states as having this type of discriminatory practice. As a result of OPA and efforts by Empire State Development, five of the 13 states have repealed laws that penalized New York firms. As explained in our response to the preliminary finding, DED did not rely solely on the "Oregon Survey." Citing the situation regarding Arkansas is confirmation of the effectiveness of DED's actions. The situation cited in California is also inappropriate because the facts were contrary to OPA concerns.

DED will continue to work with all contracting agencies toward the elimination of preferences in the remaining eight states and any instance of discriminatory procurement practice brought to our attention. DED will attempt to seek out this information from New York State businesses and to compile data on the broad range of discriminatory practices exercised by the many procurement entities.

Recommendation No. 4

Enhance communications with agencies to ensure that they understand and comply with the act's provisions.

ESD Response

DED believes this finding was appropriate and is addressing improved communications with agencies directly and through the State Procurement Council established by the Procurement Stewardship Act of 1995, which incorporates many of the OPA requirements. DED is actively involved with the State Procurement Council and the creation of *The Procurement Guidelines,* the state's first comprehensive manual of policy and procedures on state purchasing for commodities, services and technology. DED will put in place communications procedures with agencies to help them comply with the OPA requirements, including advance notice of annual reporting requirements, follow-up to 15-day notices, OPA compliance check-off sheet and other OPA notices. In addition, DED will pursue with the Office of General Services and with the Office of the State Comptroller the sponsoring of an annual statewide conference on OPA and other programs involving procurement.

NEW YORK STATE
DEPARTMENT OF TRANSPORTATION

Response to OSC Draft Audit Report 95-S-79
ADMINISTRATION OF THE OMNIBUS PROCUREMENT ACT

In general, the Department of Transportation (Department) concurs with the tone and the spirit of the draft report, and we are dedicated to fulfilling the goals and objectives of the Omnibus Procurement Act. However, despite our efforts to correct the record, the draft reflects that some misunderstandings remain relating to "improper notification" and the definition of "foreign" vendor. The report's chart on page 8 still contains incorrect data, which was addressed in detail in a letter dated September 28, 1995 from the Director of our Contract Management and Audit Division, Steven F. Lewis, to Mr. Keith Dickter of OSC. It was, and is, our contention that, since all of our capital work is substantially performed in the State, all of our low bidders on capital construction have been properly classified as "New York State" vendors.

In areas other than construction contracts, the Department did made some classification errors by using vendor address rather than the criteria of the work being substantially performed in New York State. Steps have been taken so that these kinds of errors are not repeated in the purchasing area.

Details to support the statement on page 10 of the report that this Department overstated its annual awards by $7.4 million have not been conveyed to the Department. Accordingly, we are unable to comment on the validity of the statement without understanding the specific cases which support the conclusion.

There seems to be another misunderstanding regarding whether the provisions of the Omnibus Procurement Act should be in all contracts, including federally-aided projects. OSC staff were given an advisory from the Federal Highway Administration (FHWA) which clearly stated that the provisions of the Act could not be applied to federal aid projects. The section cited, Title 49, CFR, Part 18.36(c)(1), is quoted in the report. To ignore the federal advisory, would jeopardize federal aid.

Finally, the draft report contained the following two recommendations directed specifically to agencies.

Recommendation 5. ***Meet with Department representatives to obtain a better understanding of Act requirements.***

The Department of Transportation concurs wholeheartedly with Recommendation 5. We feel that a meeting with Empire State Development staff would be very productive as an enhanced ongoing dialog between this Department and the Department of Economic Development, will only serve to improve compliance with the Act.

Recommendation 6. ***Develop procedures and controls to ensure that:***

a. all notices and reports required by the Act are prepared according to Act specifications and are submitted to the Department of Economic Development;

b. contracts are not awarded to vendors that do not qualify under the Act; and

c. all successful contractors comply with provisions described by all clauses that must appear in the bid packages, according to the Act.

The Department of Transportation also concurs with Recommendation 6 for all State-funded projects. As a result of the direction received from FHWA, the OPA language will not appear in any federally funded contract. In addition, adjustments to our internal procedures have already been made to improve the classification of contracts in the non-engineering and goods and services areas, as well as with regard to timely notifications. The Contract Management Bureau's automated data bases have been modified to accommodate our notification responsibilities. Efforts are also underway to improve our procedures where appropriate to increase the completeness and accuracy of the annual report.

OFFICE OF GENERAL SERVICES
STANDARDS AND PURCHASE GROUP (S & P)

Response to the Office of the State Comptroller
Audit Report 95-S-79
Administration of the Omnibus Procurement Act

Recommendation No. 5

Meet with Department representatives to obtain a better understanding of Act requirements.

S&P Response

S&P believes that a continuous dialog with DED is appropriate and essential in not only obtaining a better understanding of the Act's requirements but in coordinating other economic development issues as they relate to the procurement process. S&P maintains a constant dialog and exchange of information with DED, and both entities promote New York State businesses through joint participation at conferences, workshops and task forces. Specifically, S&P worked closely with DED and provided guidance to them in formulating procedures and guidelines for the Act. S&P will continue to communicate with all interested parties and provide assistance in our role as the State's expert on procurement issues.

Recommendation No.6a

Develop procedures and controls to ensure that all notices and reports required by the Act are prepared according to Act specifications and are submitted to the Department by the mandated due dates.

S&P Response

S&P has adequate procedures and controls to ensure that all notices and reports are prepared and submitted as required, notwithstanding the conflicting statutory question's regarding 15-day notification in advance of an award. (Specifically, State Finance Law Article 11 Section 163.9.c. states: "Disclosure of the content of competing offers other than statistical tabulations of bids received in response to an invitation for bids, or of any clarifications of or any revisions thereto shall be prohibited prior to award.")

Recommendation No. 6b

Develop procedures and controls to ensure that contracts are not awarded to vendors that do not qualify under the Act.

S&P Response

S&P has adequate procedures and controls to ensure that all contracts are awarded appropriately and in conformance with all laws and policies of the State of New

York. Additionally, all of our contracts valued in excess of $10,000 are pre-audited and require the approval of the Office of the State Comptroller prior to their issuance.

Recommendation No. 6c

Develop procedures and controls to ensure that all successful contractors comply with provisions described by all clauses that must appear in the bid packages, according to the Act.

S&P Response

As with all contract requirements, whether they appear in contract clauses or are statutory and appear only by reference, S&P strives to ensure full compliance by our contractors. However, active review and investigation of compliance with all such requirements, particularly when subcontracting and/or supplier relationships of a large number of contractors are involved, may not be practical in all instances due to staffing limitations and time constraints. When such review is not possible, S&P focuses resources on those requirements which are either critical to the performance of the contract or have been problematic in the past. In addition, we will investigate any allegations brought to our attention by any responsible party.

Comments specifically related to vendor compliance requirements are addressed later in this response.

Other Comments on the Audit Text

- page 8 (15-day Notification Table) - As indicated in our previous comments on the preliminary report, S&P examined the list of 128 contracts for which pre-notification was not apparently sent to DED. We determined that 70 of those contracts involved commodity areas for which we had an informal agreement with DED that notification would not be necessary for New York State resident firms since there are no manufacturing/refining facilities located in New York State. These commodity areas included Fuel Oil, Gasoline, Diesel Fuel, Natural Gas and Vehicles. We also reviewed the 57 contracts you identified as having inadequate pre-notifications (less than 15 days). We determined that 41 were timely based on the actual date of issuance of the contract. Additionally, one contract was subsequently reduced to $974,376.00.

- page 9 (Contractor Classification Chart) - Our preliminary report comments pointed out the difficulty in arriving at a single classification for multi-part commodities with multiple manufacturing and assembly locations. We note that 3 of the 5 entities indicated they use vendor mailing addresses in lieu of vendor certification as the method of classifying vendors. The audit seems to make no determination as to the preferred method. Since the Act states such reports are based on place of manufacture and not the vendor mailing addresses, we cannot understand why the number of misclassified vendors was not higher for the 3 entities using this method. S&P believes vendor certification, while not error-free, is the superior method of

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classification since the vendor's mailing address does not even relate to the Act's requirements.

- page 9 (last paragraph concluding on page 10) - We find the report in error regarding S&P's informing bidders of our third classification (NYS/F). Questions at the end of each bid document advise all bidders of the 3 classifications used by S&P. We are also concerned that the audit states "so that they know whether or not their businesses should be classified in this category" (underline added). Again "their businesses", i.e. business location, is not the operative criteria under the law. The classifications are based on their bid offering (i.e. place of manufacture). Finally, we reported only one misclassification based on confusion about the definition of NYS business enterprise. The audit itself seems to be confused regarding this definition.

- page 10 (1st full paragraph) - In preliminary audit comments, we advised that of the 3 contracts reported as "missing," one was awarded prior to the report's effective date, and the value of a second was reduced to below the report threshold.

- page 10 - 11 (Vendor Compliance Requirements) - As with the other audited agencies, we do not have a process (or resources) to monitor contractor subsequent compliance with all of the specific, detailed Omnibus Procurement Act provisions. As indicated in our preliminary report comments, for the vast majority of our commodity contracts the "opportunity to participate as subcontractors or suppliers" is nonexistent since bidders must lock in suppliers at the time of the bid opening. Subcontractor/supplier decisions and/or changes are not routinely made during the term of a contract. Not only do bidders need a firm quote from a supplier in order to quote us a firm price, but we need to evaluate their bid in terms of acceptability of the quoted supplier's product. We do not normally encourage contractors to change suppliers after the bid opening. In fact, OSC has indicated that such an offer to change suppliers after the bid opening may be viewed as a change in a bid, and therefore not permissible.

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Memorandum

Metropolitan Transportation Authority

Date August 14, 1996

To Karen Malloy

From Clifford Shockley

Re **Audit Report 95-S-79**

The only recommendation that applies to the MTA is 6a. The MTA was not aware of this Annual Report requirement, but will comply with this requirement immediately.

Please see attached 1995 Annual Procurement Report which we will mail to the Department of Economic Development this week.

Memorandum

Long Island Rail Road

Date: August 19, 1996

To: K. Molloy, MTA Audit

From: W. B. Garrison, Director-Procurement & Materials Management

Re: **Administration of the Omnibus Procurement Act**
Draft Audit Report 95-S-79

I have reviewed the draft audit report and my response to Recommendations 5 and 6 are attached. Please feel free to call me if you need additional information.

Attachment

cc: G. Sullivan
P. Swani

wbg:rlt/95-S-79

Recommendation No. 5. Department of Economic Development representatives conducted extensive consolidated briefing sessions for MTA and its agencies in 1993 prior to the effective date of the Act. In these sessions, Department staff explained the Act, the role the Department would play in administering the Act, and the obligations of the agencies under the Act. A refresher program is undoubtedly required.

We concur with the recommendation to meet with Department representatives to obtain a better understanding of Act requirements but we recommend that such meetings be set up by MTA Headquarters on an all-agency basis so that multiple meetings are avoided and agency staff receive the benefit of hearing problems and issues raised by their sister organizations.

Recommendation No. 6. LIRR had previously prepared procedures for procurement staff to follow and had conducted training programs for staff. The procedures were recently revised to reflect legislative changes in the Act. A copy of this document is attached. Training sessions for procurement staff will be scheduled in the near future to address both the changes in the Act and the contents of the draft audit report. The procedures address the notices and reports required by the Act and include the contract clauses applicable to successful contractors.

With respect to Recommendation 6 b., the 1994 amendment to the OPA statute introduces conflicts with Federal Transit Administration guidelines. These guidelines (Published in FTA Circular 4220.1.D, prohibit geographical preferences in the awarding of contracts while OPA now prohibits awards to firms located in discriminatory jurisdictions. Legal guidance will be required in the event DED begins to publish lists of discriminatory jurisdictions.

Memorandum

Long Island Rail Road

Date: July 29, 1996

To: Holders of P&MM Guidelines and Procedures Manual

From: W. B. Garrison, Director-Procurement & Materials Management

Re: **Updating of Omnibus Procurement Act of 1992 Guidelines**

Attached is an updated set of guidelines dated July 29, 1996 for complying with the Omnibus Procurement Act of 1992. Please insert this in Tab 14 of your Procedures Manual, replacing the version dated 5/27/94. A new Index to the Manual is also attached to replace the existing Index dated January 23, 1996.

The principal change made in this update is to change the definition of out-of-state or foreign as it applies to construction. In the past, for services, we used the location where the work was performed to determine whether to treat the vendor as a foreign firm. This is no longer the way to do it for construction. For such work, the address of the principal place of business of the contractor determines how to make this determination. If that address is out-of-state, the work is being performed by a foreign vendor. There is no change in the prior rule as it relates to services other than construction.

Information about entering New York State contract data into PLS has also been provided.

This change takes effect immediately.

Attachment

wbg:rlt/OPA1

130 Livingston Street
Brooklyn, NY 11201

Lawrence G. Reuter
President

New York City Transit

August 14, 1996

Mr. Nicholas DiMola
Auditor General
Metropolitan Transportation Authority
345 Madison Avenue
New York, N.Y. 10017

Dear Mr. DiMola:

This is MTA NYC Transit's response to Ms. Karen Malloy's request that we comment on the Department of Economic Development's (DED) response to recommendations No. 1 to No. 4 and that we respond to recommendations No. 5 and No. 6 of the Draft Audit "Administration of the Omnibus Procurement Act".

Recommendations No. 1 to No. 4

We generally agree with DED's response to Recommendations No. 1 to No. 4.

We disagree with the implication in DED's response to Recommendation No. 3 that they continue to work together with contracting agencies. Initially, DED provided excellent guidance in implementating the provisions of the Act including briefings and guidelines. However, according to our records the last communication we received from DED was in December of 1993. We have not received any guidance in implementing the 1994 Amendment to the Act nor have we received an official copy of the list of discriminatory jurisdictions.

We also note that several of the corrective measures proposed by DED appear to be focused on providing guidance or assistance to "State Agencies" and not to public authorities/public benefit corporations.

Recommendation No. 5 – **Meet with Department representatives to obtain a better understanding of Act requirements.**

We agree with this recommendation and welcome any assistance that the Department of Economic Development (Department), the lead State Agency under the Act, will offer.

Recommendation No. 6 – **Develop procedures and controls to ensure that:**

a. **All notices and reports required by the Act are prepared according to Act specifications and are submitted to the Department by the mandated due dates;**

We mostly agree with this recommendation and have implemented several measures to insure that notices and reports are submitted to the Department as required by the Act.

(1) 15 Day Notifications:

To ensure that the required 15 day notification is made to the Department prior to the award of a contract for goods or services valued at $1 million or over to a foreign business enterprise, we have revised our procurement pre–execution checklist to add a line item for the submission of the notice. This checklist must be signed by the Procurement Specialist responsible for the procurement and it is approved by a manager prior to the award of the contract.

(2) Annual Report:

Prior to 1996, instead of reporting the total award amount of Master Contracts in the annual report, we reported purchase order expenditures drawn against the relatively small number of "Master Contracts" we award each year. For our 1996 report, we have revised the reporting method for Master Contracts and will report the total award amount.

As noted on page 8 of the draft report, the MTA was not forwarding NYC Transit's reports to the Department because they were unaware of this requirement. MTA has assured us that in the future they will submit our annual report along with the reports of the other MTA affiliates to the Department as required by the Act.

For our annual report, NYC Transit will continue to rely on the contractor's unverified self–classification certification of their in State/out–of–State status included in our Bid documents. We do not have the resources to implement an independent verification system for more than 2500 contracts it effects nor is this a requirement under the Act.

The Act does not contain a mandated first business day of February due date. It takes approximately two months after the end of our calendar year to compile NYC Transit's previous year's procurement transactions and produce a report. The report is then forwarded to the MTA for submission to the Board as a combined package with all the MTA affiliates. After Board approval, the MTA forwards the combined reports to the Department.

b. **Contracts are not awarded to vendors that do not qualify under the Act; and**

We agree with this part of recommendation No. 6 only to the extent that it does not apply to our procurements funded with Federal grant monies.

As part of our Federal Grant Agreement, NYC Transit has agreed "to refrain from using state or local geographic preferences, except those expressly mandated or encouraged by Federal Statute." The Act prohibits us from entering into a contract with a foreign business enterprise which has its principal place of business located in a discriminatory jurisdiction. The prohibition in the Act runs counter to the Federal Grant and creates a geographic preference for contractors located outside of states or other political subdivision thereof that are on the Department's list of discriminatory jurisdictions. To not award a Federally funded contract to a firm located in a discriminatory jurisdiction could jeopardize our Federal funding for that project or for the entire grant. We have requested counsel to provide a formal opinion and to provide recommendations to resolve these conflicting requirements.

c. **All successful contractors comply with provisions described by all clauses that must appear in the bid packages, according to the Act.**

We disagree with this part of recommendation No. 6. We include clauses, provided by the Department, which are similar to clauses (1) and (2) on page 10 of the Draft Audit in our contracts. We have not included clause (3) in our contracts because it will jeopardize our Federal funding.

The Act does not contain any provisions which would enable NYC Transit to "ensure" contractor compliance with clauses (1) and (2). These clauses require the contractor to certify that it has made the efforts required by the Act and to document such efforts. Generally, contractors in developing their bids or proposals identify their subcontractors and labor sources prior to contract award. The Act only requires contractors to document such efforts after the award of the contract. We do not see how we can "ensure" that contractors take actions prior to contract award, when documentation of such actions, and therefore our knowledge of such actions, are only required to be made post–award. Further NYC Transit is concerned that a more active role in ensuring that contractors use New York State subcontractors or residents, would limit competition, and also have the effect of enforcing an in–State or local geographical preference on our contractors which would jeopardize our Federal funding.

Clause (3) advises contractors that if they are located in a jurisdiction deemed to be discriminatory toward New York State based Vendors, they may be denied the contract award. The Act prohibits us from including a contractor, having their principal place of business in a discriminatory jurisdiction, on our bidders list or awarding a contract to said contractor, if it should submit a bid, unless the chief executive officer issues a "best interests" waiver. Contrary to the statement in the last paragraph on page 11 of the Draft Audit that the Act does not inhibit competition, we feel that these prohibitions clearly inhibit or limit competition by firms located within discriminatory jurisdictions and is therefore contrary to the rules and regulations of our Federal grant agreement.

Please call Vincent Marotto at (718) 694–4356 if you have any questions.

Sincerely,

Robin C. Stevens
Vice President, Materiel

cc: B. Spencer
S. Grill
K. Norman
V. Marotto

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