

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

Division of State Government Accountability

Selected Aspects of the Minority- and Women-Owned Business Enterprises Program

**Empire State Development
Corporation - Department of
Economic Development**



Report 2014-S-13

April 2016

Executive Summary

Purpose

To determine if the Empire State Development Corporation's (ESD) Department of Economic Development properly certified and recertified Minority- and Women-Owned Business Enterprises (MWBEs) and processed agencies' annual MWBE goal plans and utilization reports, which are used to prepare an overall MWBE program report to the Governor and the Legislature annually. The audit primarily covers the period from January 15, 2011 through February 27, 2015. However, MWBE certifications and re-certifications were reviewed for the period May 1, 2008 to April 30, 2014.

Background

The Department of Economic Development's (DED) Division of Minority and Women's Business Development (Division) administers, coordinates, and monitors a statewide program to assist the development of MWBEs in accordance with Article 15-A of the New York State Executive Law. The Division's responsibilities include:

- Reviewing contracting agencies' Annual Goal Plans and Quarterly Compliance Reports. The Division requires each contracting agency to submit an Annual Goal Plan on January 15 of each year summarizing its MWBE procurement opportunities based on its annual budget and expenditures.
- Reporting annually to the Governor and the Legislature actual MWBE participation in State contracts.
- Preparing and maintaining an updated directory of certified MWBEs. As of April 2014, DED had certified 7,919 unique businesses as MWBEs. Some businesses are both a minority-owned business enterprise (MBE) and a women-owned business enterprise (WBE).

Key Findings

- Accurate vendor contact information is critical for interested agencies and contractors to identify and contact MWBEs. However, the addresses for five of 20 MWBEs we examined were not accurate. For example, in October 2013, an MWBE was sold to a new owner who renamed the business, but the MWBE's former name and address were still listed in the Division's directory in 2014.
- State agencies and public authorities must file a master goal plan or an update by January 15 of each year. Such plans must also indicate the amount of budgeted expenditures available for MWBE participation. However, plans for ten sampled agencies were submitted late (one by more than five months), and six of the 10 agencies did not explain why significant amounts of their budgets were exempted and excluded from MWBE participation. Further, there was no evidence the Division took actions to address these instances of non-compliance.
- For the audit period, 39 (46.9 percent) of the 83 files we requested were either missing mandatory and required documents used to certify MWBEs or the files could not be located. A lack of mandatory supporting documentation and missing files increase the risk that ineligible firms could be certified as MWBEs. In 2013, DED implemented a fully integrated online certification process for submitting both first-time and re-certification applications, including the required supporting documentation. This automated process should help ensure that applicants provide

DED with all mandatory documents.

Key Recommendations

- Develop and implement formal mechanisms to periodically verify that certified MWBEs are at their address of record.
- Require analysts to obtain all mandatory and other applicable documents before certifying applications. Further, document the reasoning for any waiver of mandatory or required documents.
- Improve record-keeping and archiving systems to ensure that pertinent files and records can be easily retrieved and accessed.
- Formally require and remind agencies to submit goal plans timely.

Agency Comments

ESD's response to the draft report is misleading and disingenuous. In it, ESD repeatedly tries to portray auditors as unwilling to review information provided by ESD and not using due diligence. Such assertions, however, are false. In fact, throughout the unnecessarily lengthy audit process, auditors carefully reviewed all information provided and went to extensive lengths to work with ESD officials. Nevertheless, ESD officials obstructed the audit process, by refusing to provide auditors with access to pertinent records and staff and by failing to provide requested feedback on certain preliminary audit findings. This resulted in significant delays to audit progress.

For example, when auditors tested MWBE certification files, ESD officials allowed discussions of only four files per week and forbade auditors from speaking directly with the staff (based in New York City) who actually performed MWBE certification reviews. Instead, ESD sent an attorney (not based in New York City) to meet with auditors, although the attorney was not responsible for the certification reviews. This process took nine meetings, spread out over four months (from October 3, 2014 to February 4, 2015), but could have been completed in a few weeks if ESD officials were reasonably cooperative.

Other Related Audits/Reports of Interest

[Dormitory Authority of the State of New York: Contract Participation of Minority- and Women-Owned Business Enterprises \(2014-S-7\)](#)

[Metropolitan Transportation Authority: Contract Participation of Minority- and Women-Owned Business Enterprises \(2014-S-6\)](#)

State of New York
Office of the State Comptroller

Division of State Government Accountability

April 4, 2016

Mr. Howard Zemsky
President & CEO Empire State Development Corporation and
Commissioner of the Department of Economic Development
633 Third Avenue
New York, NY 10017

Dear Mr. Zemsky:

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

Following is a report of our audit entitled *Selected Aspects of the Minority- and Women-Owned Business Enterprises Program*. This audit was performed according to the State Comptroller's authority under Article V, Section 1 and Article X, Section 5 of the State Constitution and Section 2803 of the Public Authorities Law.

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

Respectfully submitted,

Office of the State Comptroller
Division of State Government Accountability

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Background

The Department of Economic Development (DED) is a State agency which works in conjunction with the Empire State Development Corporation (ESD), a State public authority, to administer New York State's economic development programs. DED is headed by a Commissioner, who also serves as the President and Chief Executive Officer of ESD.

Article 15-A of the New York State Executive Law (Law) requires State agencies and public authorities to promote the participation of minority- and women-owned business enterprises (MWBEs) in their contracts. The Law, effective July 2010, set the overall statewide MWBE participation goal at 28.92 percent. The Law also creates the Division of Minority and Women's Business Development (Division) within DED and empowers its Director to oversee and administer the statewide MWBE program.

Under the Law, DED is responsible for the certification of small businesses that qualify as MWBEs. As of April 2014, DED had certified 7,919 unique businesses as MWBEs. Some businesses are both a minority-owned business enterprise (MBE) and a women-owned business enterprise (WBE). Such businesses must recertify as MBE and/or WBE every three years.

DED implemented a fully integrated online certification process in 2013 for submittal of both first-time and recertification applications and all supporting documentation. Prior to this, DED processed all applications manually from hard copy paperwork. DED continues to accept hard copy applications for certification, but encourages the use of the electronic system to speed up the process. First-time online applicants will go through a pre-qualifier questionnaire, which is a surface-level indication of their eligibility for MWBE certification. "Fast Track" is available for vendors that are based in New York State and certified as an MBE and/or WBE by other entities, such as the New York City Small Business Services or New York City School Construction Authority.

Once applicants pass the pre-qualifier questionnaire, they are routed to a screen that lists the documents required, depending on their type of business, and also the "Mandatory Documents" to be downloaded, completed, and submitted. When applicants are ready to start the application process, they are routed to another screen with nine sections to be completed. Documents required to be submitted with the application can be sent as a direct attachment to the online submission, by fax, or through the mail as hard copy. The applications then go through a three-phase Audit Review process:

- Intake – Supporting documentation is screened to ensure that all of the required documents have been submitted. A letter is sent to applicants notifying them of any missing documents, which must be provided within 20 business days. If the documents are not submitted, the application is rejected, and the applicant must wait 90 days before filing a new one.
- Audit – The supporting documents are assessed for authenticity. In addition, a desk audit is performed to determine whether the applicant meets all of the qualifying requirements in DED's regulations and Article 15-A. The final stage is the field audit, which may involve

a physical site visit or only a phone interview.

- Approval and review of the application and sign-off by the Director of Certification – A letter of notification is sent to applicants that were approved. The letter to an applicant that was denied provides instructions for the appeal process.

When the certification letter is generated, the data input is done for publication. The firm is added to the Division's MWBE directory. The directory is updated on an ongoing basis, whenever the status of a business changes.

State agencies and public authorities must establish annual goals for MWBE participation in their contracts (expressed as a percentage of total contract spending after exemptions and exclusions). The agencies and authorities then submit their annual goal plan to the Division, which has 30 days to act or the plan is considered approved. Prior to June 2014, according to Section 141.2(d) of DED's regulations, State agencies and authorities had to justify the specific percentages set and, if applicable, provide an explanation as to why percentages were less than those stated in the Law. On June 4, 2014, the regulation was changed, and now State agencies and authorities only have to set goals associated with the State contracts that are expected to be let or performed during the ensuing fiscal year. Agencies and authorities are no longer required to explain why their goal percentages are less than the statewide goal. Nonetheless, DED regulations mandate that agencies and authorities must still make good faith efforts to achieve their goals and report quarterly their MWBE participation to DED.

The MWBE program operates on a State Fiscal Year basis, beginning on April 1 and ending on the following March 31. DED regulations require a master goal plan or an update every year. The Division allows State agencies and public authorities to reasonably exclude from their annual MWBE goal plans goods (materials or services) that have been determined to offer no MWBE prime or subcontracting opportunities. The decision to exclude such items must be based on current industry knowledge that no MWBE firms exist that are capable of providing the particular goods/materials or services excluded from the list. This list must be approved by the Division. If MWBE vendors are identified that can provide the particular goods/materials or services in question, the items should be removed from the exclusion list. Further, this list must be updated as part of each agency's annual goal plan.

The overall objective of the Division and the agencies that implement the MWBE program is to promote increased participation in State contracts by MWBE firms. Citing low MWBE participation statistics at the time (about 10 percent participation), in 2011 the Governor set a statewide MWBE target of 20 percent participation. In October 2014, the target was further increased, to 30 percent. Annually, DED must report to the Governor and Legislature actual MWBE participation in State agency and public authority contracts.

To perform our audit, we selected a judgmental sample of 10 state agencies and public authorities that were required to establish employment and business participation goals for minority and women-owned businesses under the Law. The sampled agencies/authorities included: the City University of New York; the Department of Financial Services; the Dormitory Authority of the State of New York; the Higher Education Services Corporation; the Metropolitan Transportation

Authority; the New York State Insurance Fund; the Niagara Falls Water Board; the Office of Parks, Recreation and Historic Preservation; the Office of Victim Services; and the Westchester County Health Care Corporation.

Audit Findings and Recommendations

We identified a range of issues that hampered DED's ability to effectively carry out its statutory MWBE program responsibilities. Those issues included:

- Inaccurate MWBE vendor address information in the DED directory;
- Agency utilization goal plans that did not fully comply with DED's regulations;
- Incomplete reporting of agency MWBE utilization; and
- A lack of required documentation supporting MWBE certifications and re-certifications.

Also, in 2013, DED transitioned from a manual hard copy process to an automated, electronic system to process MWBE applications and re-certifications. Although DED's new system can improve such processing, it is important that DED be aware of the issues we identified and ensure that sufficient controls (both automated and manual) are established to reliably prevent problems from recurring.

Accuracy of MWBEs' Address Data

Accurate and complete directory information is essential to the MWBE program because agencies and prime contractors rely on the directory to find MWBEs that can perform necessary work and contribute to MWBE utilization goals. Inaccurate directory data could limit agencies' ability to contact MWBEs. According to Division regulations, certified MWBEs must notify the Division within 30 days of any material change in status (e.g., changes in the business address).

We attempted to confirm addresses for 20 MWBEs randomly selected from the Division's directory on April 30, 2014. Specifically, we determined if the vendors' actual addresses on that date were the same as those posted to DED's directory. For five of the 20 vendors, their actual addresses were different from those posted to the directory. Also, we determined that one sampled enterprise was sold in October 2013 and renamed by the new owner without the Division's knowledge. Moreover, the name of the enterprise was not updated on the Division's directory timely, as otherwise required by regulation.

At the time of our fieldwork for this audit, we also performed an audit of the MWBE program at the Metropolitan Transportation Authority (MTA) and found the same problem with contractors' addresses. In the MTA audit, auditors mailed 102 confirmation letters to a sample of MWBEs selected from the Division's directory, as of February 28, 2014. For 29 of the 49 MWBE contractors that did not respond to the letter, auditors visited the addresses posted on the directory, and for six of them, found no evidence that the contractor was located at the site listed. In fact, for one vendor the address listed in the directory was an abandoned storefront.

In May 2015, we rechecked DED's directory for 11 contractors (five from DED and six from MTA) known to have moved and found that the directory had not been updated to reflect the new addresses of nine contractors. Based on our audit work, we concluded that the Division did not have an effective way to determine if MWBEs moved or changed ownership. Consequently, the

Division had limited ability to effectively update the directory, as warranted.

Also, we noted that the Division's inability to properly update vendor data can have considerable implication when an MWBE is sold to another party. As a result of a sale, a business might no longer qualify as a certified MWBE, although it is still identified as such per the directory. For example, the file for a business recertified on April 24, 2012 had a letter (dated September 11, 2012) from its president notifying the Division that the business was sold effective September 4, 2012. According to DED's MWBE directory, this business was still certified as of April 30, 2014. However, according to available information, the business was purchased by a large holding company, and as such, no longer qualified as a certified MWBE. According to Department of State data, the business' original incorporation was dissolved on June 12, 2013. Nevertheless, officials did not update Division records and the directory for over two years, until our auditors notified them in December 2014 of the ownership change.

Recommendations

1. Review and take appropriate action when advised of the sale or transfer of a certified MWBE to another owner. Update the MWBE directory as appropriate.
2. Develop and implement formal mechanisms to periodically verify that certified MWBEs are at their address of record.

Agencies' Annual Goal Planning

Plan Timeliness and Goal Adequacy

We sampled 10 State agencies and public authorities to assess DED's controls over the submission and review of agency goal plans for fiscal years 2011-12, 2012-13, and 2013-14. We determined that all 10 sampled agencies did not fully comply with DED's regulations regarding submission of annual goal plans to the Division by January 15 of each year. For example, we determined that:

- The Department of Financial Services submitted its 2013-14 annual goal plan 31 days late.
- The MTA submitted its 2012-13 annual goal plan 46 days late and its 2013-14 goal plan 198 days late.

A goal plan submitted late (particularly if it is several months after the start of the fiscal year) might be of limited value because the Division has less opportunity to respond with constructive advice, and there might be insufficient time for the agency to take corrective actions before the fiscal year ends. Division officials told us that agencies are notified several days prior to the due dates reminding them to submit their annual goal plans on time; however, there was no documentary evidence of such follow-ups.

Additionally, we reviewed the goal plans for the ten sampled agencies for fiscal years 2011-12, 2012-13, and 2013-14. All ten agencies' annual goals were less than the statewide goal, and

eight did not provide an explanation supporting the reasons why they could not subscribe to the statewide goal, as was mandated by the regulations at the time. As previously noted, in June 2014, the pertinent DED regulations were changed, and Part 141 no longer requires an agency to justify its utilization goal when it is less than the statewide goal.

Amounts Exempted/Excluded From Goal Plans

DED's procedures for MWBE master goal plans require Division analysts to review and approve the reasonableness of contracts and expenditures exempted or excluded from MWBE participation. The amount of an agency budget that is available for goals is the net of the agency's annual budget, less allowable exemptions and exclusions. The Division allows agencies to exempt costs such as payroll and fringe benefits as well as sole-source items, such as postage, electricity, and other utilities. Agencies may also exclude goods/materials or services that have been determined to offer no MWBE prime or subcontracting opportunities.

We reviewed the 10 sampled agencies' MWBE goal plans for the same State fiscal years to determine if plans were reviewed to determine the reasonableness of contracts and expenditures exempted or excluded from MWBE participation. For 2013-14, six of the 10 sampled agencies exempted/excluded over 90 percent of their contracts and expenditures from MWBE participation to arrive at the amount available for MWBE participation. The exempted/excluded amounts ranged from 91.75 percent by the Niagara Falls Water Board to 99.55 percent by the Higher Education Services Corporation. However, the Division had no evidence that its analysts verified that the amounts available for MWBE contracting opportunities were reasonable.

The Division's plan evaluation guidelines also require agencies to explain the variance in total exempted/excluded contracts and expenditures, if it is more than 25 percent from the previous year. For three of the 10 agencies, the variances exceeded 25 percent, but the variances were not explained. For example, the Office of Parks, Recreation and Historical Preservation did not provide any exemption/exclusion information for 2011-12. However, in 2012-13 it exempted/excluded 72.93 percent and in 2013-14 only 7.57 percent. Similarly, the Department of Financial Services had a significant variance as well. In both cases, no goal plan review notes were provided by DED.

Recommendations

3. Formally require and remind agencies to submit goal plans timely.
4. Ensure that agencies' exempted and excluded contracts and expenditures comply with Division regulations to facilitate maximum MWBE participation.
5. Document analysts' verifications of the amounts exempted/excluded.
6. Ensure agencies explain year-over-year variances of 25 percent or more in amounts exempted/excluded.

Agencies' Utilization Reporting

For each fiscal year, DED is required to submit an Annual MWBE Report to the Governor by January 1 of the following calendar year. The Law requires the annual report to summarize the participation by each contracting agency and authority in the MWBE program. However, the Division did not include 24 agencies and authorities in its annual reports that should have been listed. DED stated that the 24 agencies were not included because they believed they had *de minimus* MWBE activity or reported their participation data with another agency's data.

We determined that data of seven agencies were included in the reports of other agencies. For example, the Authorities Budget Office and the Lake George Park Commission were combined in the data reported for the Department of State. Nevertheless, this should be reported separately so that State officials and the public are fully informed about such agencies' compliance with MWBE program and reporting requirements.

Further, the Law does not exempt any agencies from MWBE participation or reporting, regardless of the amount (i.e., *de minimus* nature) of their eligible expenditures. Therefore, the MWBE activity of all agencies and authorities should be listed in the Annual Report, even if DED considers their MWBE expenditures to be *de minimus*. We also noted that the 2013-14 Annual Report listed an agency with less than \$3,000 in MWBE expenditures and only \$740 in MBE expenditures. Consequently, the level at which reportable participation is *de minimus* is unclear.

By not ensuring that all required MWBE program data from agencies is complete and timely, the Division has limited ability to provide a complete assessment of statewide MWBE participation to the Governor and the Legislature. In addition, because certain agencies are not listed (mainly due to low activity), the need for remedial actions may not be identified and consequently, such actions might not be taken.

Recommendation

7. Ensure the Annual Report includes all State agencies and public authorities that are required to report. Also, note agencies whose participation data is combined with another State agency or public authority.

Vendor Certification and Re-certification

DED certifies businesses' compliance with MWBE eligibility rules and posts a list of eligible contractors to its website. State agencies and prime contractors can use this list to identify eligible MWBE contractors/subcontractors. New applicants as well as recertifying applicants must provide certain documentation of ownership by eligible individuals, and provide tax returns and business certificates. Certain documents are categorized as required or mandatory. As such, DED should retain copies of the applications and documents in its files. We sampled 49 contractors from DED's published website listing as of April 30, 2014 and determined that DED could not provide

several mandatory or required documents supporting its decisions to certify firms as MWBEs. Similarly, re-certifications (which occur every three years) also lacked required or mandatory documents. For one MWBE, DED provided no file and no information regarding when it was certified or recertified.

Also, in 2013, DED transitioned from a manual hard copy process to an automated, electronic system to process MWBE applications and re-certifications. Although DED's new system can improve processing, it is important that DED take actions to ensure that sufficient controls (both automated and manual) are established to prevent the problems we identified from recurring.

Initial MWBE Certifications

Twenty-six of the 48 contractors' original certification applications were approved during our scope period; however, DED could not locate files for two of them. We reviewed the remaining 24 new certification files using the criteria in effect at the time the application for MWBE certification was filed for the types of business organizations (corporations or Limited Liability Corporations) applying. The files for 11 DED certifications were missing required or mandatory documents, such as Authority to Do Business, Financial Statements, or Proof of Business Activity. For example, one contractor (certified by another state) was missing required supporting documents, such as a certificate of authority to conduct business in New York State. Another application file was missing Proof of Ethnicity. Without the files to support the eligibility of businesses for MWBE certification, there is an increased risk that ineligible firms could have been certified.

MWBE Re-certifications

For the 48 sampled contractors, we requested the files for 57 re-certifications (18 vendors recertified twice between May 1, 2008 and April 30, 2014). We received and reviewed 39 recertification files for 32 contractors. DED did not provide files for the remaining 18 (57 – 39) re-certifications.

From the available files, we found that mandatory re-certification documents were missing for eight contractors, leading us to question how DED analysts determined that the firms remained eligible for the program. The missing forms included current federal and State personal tax returns, current federal and State business tax returns, and Personal Net Worth statements. Other than acknowledging a record-keeping problem, DED officials could not explain why 26 (46 percent) of the 57 requested files were not available or lacked mandatory documents.

For the 18 MWBEs that were on DED's directory as of April 2014, but whose re-certification files were not provided, seven should have been re-certified in 2013 and three in 2014. The information available for the remaining eight was not sufficient to make a determination.

In response to our preliminary findings, DED officials stated that: "It is the job of an MWBE analyst, using their experience, training, expertise, and knowledge of the relevant law and regulations, to make eligibility determinations based on the totality of the presentation which is given in writing and verbally." Nonetheless, decisions to waive required or mandatory documents (or to accept

verbal or other representations) should have been documented in the Division's files to ensure transparency and accountability; they were not. Consequently, we concluded that there was a risk that certain businesses were recertified as MWBEs, although the files did not support such determinations in writing.

Timeliness of Application Processing

We reviewed the timeliness of the processing of certification and re-certification applications. Certification intake applications are received electronically and by hard copy. Generally, there are two phases to the process: Intake and Determination. During Intake, the Division has 20 days to notify the applicant of any deficiencies in the application or supporting documents. During the determination phase, the Division has 60 days after all documents are received to make a final determination and notify the applicant.

We reviewed 63 files (24 certifications and 39 re-certifications). Nine of the applications did not have a date stamp of receipt, and consequently, we could not assess the timeliness of the Division's processing of those applications. Nonetheless, our review of the remaining applications indicated that the Division was generally in compliance with the prescribed processing time frames for certifications and re-certifications.

Recommendations

8. Require analysts to obtain all mandatory and other applicable documents before certifying applications. Further, document the reasoning for any waiver of mandatory or required documents.
9. Improve record-keeping and archiving systems to ensure that pertinent files and records can be easily retrieved and accessed.

Audit Scope and Methodology

Our audit determined if the Empire State Development Corporation's (ESD) Department of Economic Development (DED) properly certified and recertified Minority- and Women-Owned Business Enterprises (MWBEs) and processed agencies' annual MWBE goal plans and utilization reports, which are used to prepare an overall MWBE program report to the Governor and the Legislature annually. The audit primarily covers the period from January 15, 2011 through February 27, 2015. However, MWBE certifications and re-certifications were reviewed for the period May 1, 2008 to April 30, 2014.

To accomplish our objectives, we reviewed policies and procedures related to agency goal plans and utilization reporting. We interviewed officials of the Division to obtain an understanding of the internal controls related to certification and re-certification of MWBEs and the removal of firms that no longer qualify for MWBE designation from the program directory. We requested applications, supporting documents, and other records and reviewed all of the records received.

We also reviewed the Division's monitoring of the state agencies' MWBE goal submissions and outcomes according to applicable sections of Article 15-A of the State Executive Law and the regulations set forth by the Commissioner of DED.

We selected a judgmental sample of 49 certified MWBEs from a population of 7,919 unique businesses certified as MWBEs in the database obtained from ESD's website on April 30, 2014. We reviewed this sample to determine if the Division is appropriately and timely certifying and re-certifying MWBEs, and removing businesses that do not qualify or are defunct or nonresponsive.

In addition, we selected a judgmental sample of 10 of 97 state agencies and authorities from the 2012-13 NYS Agencies MWBE Expenditure list that were required to establish employment and business participation goals for minority- and women-owned businesses under the Law. The sampled agencies/authorities included: the City University of New York; the Department of Financial Services; the Dormitory Authority of the State of New York; the Higher Education Services Corporation; the Metropolitan Transportation Authority; the New York State Insurance Fund; the Niagara Falls Water Board; the Office of Parks, Recreation and Historic Preservation; the Office of Victim Services; and the Westchester County Health Care Corporation. We reviewed the sample to assess the Division's monitoring and approval of the agencies' Annual Goal Plans and Quarterly Reports for fiscal years 2013-14, 2012-13, and 2011-12.

Also, we compared the Division's Fiscal Year 2011-12 and 2012-13 annual reports of state agencies' and authorities' expenditures and utilization to a compilation of state agencies and authorities expected to have reported for the same fiscal years. We made this comparison to determine if all state agencies and authorities covered by the Law actually reported MWBE utilization, as required.

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

As is our standard practice, we notified ESD and DED officials at the outset of the audit that we would request a representation letter in which management provided assurances, to the best of their knowledge, concerning the relevance, accuracy, and competence of the evidence provided to the auditors during the course of the audit. The representation letter is intended to confirm oral representations made to the auditors and to reduce the likelihood of misunderstandings. In this letter, agency officials assert that, to the best of their knowledge, all relevant financial and programmatic records and related data have been provided to the auditors. Agency officials further affirm that either the agency has complied with all laws, rules, and regulations applicable to its operations that would have a significant effect on the operating practices being audited, or that any exceptions have been disclosed to the auditors.

For this audit, we found it necessary to modify our standard representation letter because ESD/DED management did not provide auditors with access to certain employees, computer systems, and

source supporting documentation. ESD/DED also did not provide documents in a timely manner, and as a result we had to make numerous requests. ESD/DED officials provided a representation letter in connection with this audit. However, ESD/DED modified the representation letter provided to the auditors by removing any acknowledgement of responsibility for records and staff which were not made available to the auditors in a timely manner, or at all. As a result, we lack sufficient assurance from ESD and DED officials that all relevant information was provided to us during the audit.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions, and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these functions do not affect our ability to conduct independent audits of program performance.

Authority

This audit was performed pursuant to the State Comptroller's authority under Article V, Section 1 and Article X, Section 5 of the State Constitution and Section 2803 of the Public Authorities Law.

Reporting Requirements

We provided a draft copy of this report to ESD/DED officials for their review and formal comment. We considered officials' comments in preparing this final report and have included them in their entirety at the end of it. In their response, Department officials generally disagreed with our findings and recommendations. Further, ESD/DED officials repeatedly tried to portray auditors as unwilling to review information provided by ESD/DED and not using due diligence. Such assertions, however, are false. In fact, throughout the unnecessarily lengthy audit process, auditors carefully reviewed all information provided and went to extensive lengths to work with ESD/DED officials. Nevertheless, ESD/DED officials obstructed the audit process, by refusing to provide auditors with access to pertinent records and staff and by failing to provide requested feedback on preliminary audit findings. This resulted in significant delays to audit progress. Also, our rejoinders to certain comments by ESD/DED officials are embedded within their response as our State Comptroller's Comments.

Within 90 days after final release of this report, as required by Section 170 of the Executive Law, the President and CEO of the Empire State Development Corporation 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 why.

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Vision

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

Mission

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

Agency Comments and State Comptroller's Comments



January 15, 2016

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New York, New York 10038

RE: Response to OSC's Final Draft Audit Report for ESD's MWBE Program

Dear Ms. Maldonado:

We are in receipt of your December 9, 2015 letter and Final Draft Audit Report entitled *Selected Aspects of the Minority- and Women-Owned Business Enterprises Program* ("Final Draft Report"). Empire State Development ("ESD") welcomes the opportunity to respond to the Office of the New York State Comptroller's ("OSC") findings regarding the audit of ESD's Minority and Women-Owned Business Enterprises ("MWBE") program.

OSC's audit findings reflect a lack of understanding of the program's relevant laws, regulations, practices and procedures. As a result, OSC's findings and recommendations are fundamentally flawed and need to be corrected. The purpose of this Final Draft Audit Report Response ("Response") is to provide a better understanding of the program's law, policies, and procedures, and address the specific findings and recommendations contained in the Final Draft Report, so that OSC can amend its findings and recommendations accordingly.

Comptroller's Comment: ESD states that the report demonstrates a lack of understanding of the law, regulations, practices, and procedures. However, instead of providing a "better understanding of the program," ESD's response demonstrates a failure to grasp the basic internal control concepts that are the basis for the findings. For example, ESD states that OSC "ignored" the presence of a checklist, which they state supports that ESD reviewed and considered documents as part of the certification process. However, auditors did not ignore the checklist. Instead, as they repeatedly explained to ESD, the auditors determined that without any additional documentation, such as the documents themselves or notes that demonstrated a review occurred, the checklist itself was not sufficient evidence to support the conclusion that the missing documents were reviewed and evaluated as part of the certification process. As ESD should be aware, New York State Internal Control Standards are clear that agencies need to preserve complete and accurate evidence to substantiate significant staff decisions.

Moreover, from beginning to end, ESD's response is misleading and disingenuous. In it, ESD repeatedly attempts to portray auditors as unwilling to review information that ESD provided and not exerting appropriate due diligence. However, the truth is far different. In

fact, throughout the unnecessarily lengthy audit process, ESD obstructed audit work, by refusing to provide the auditors with access to pertinent records and staff and by failing to provide requested feedback on certain preliminary findings. This resulted in significant delays to the audit, as well as an inefficient use of state resources. For example, when our auditors asked to review certification files, ESD officials would allow discussions of only four files each week, and they forbade auditors from speaking to the staff (based in New York City) that actually performed certification reviews and determinations. Instead, ESD sent an attorney (not based in New York City) to meet with auditors, despite the fact that the attorney's job responsibility did not include certification reviews. This process took nine meetings, over four months (October 3, 2014 to February 4, 2015), but could have been completed in about three weeks, if ESD officials were reasonably cooperative.

I. Background

In April 2014, OSC commenced this audit of the Division of Minority and Women's Business Development ("Division") to determine whether ESD's Department of Economic Development ("DED") properly certified and/or recertified MWBEs and properly processed New York State agencies' and authorities' annual goal plans and utilization reports. During the course of the audit, OSC issued five preliminary audit reports which provided preliminary findings and recommendations that were unsupported by fact or law. Specifically, those reports incorrectly alleged, among other things, that ESD failed to report the MWBE utilization rates for thirty-eight state agencies, when, in fact, none of those agencies were statutorily required to report their utilization rates to ESD; the absence of documents in archived files indicated that ESD never received nor considered those documents in determining program eligibility, when, in fact, OSC ignored checklists in the files that reflected that ESD both received and considered those documents when determining eligibility; and ESD improperly monitored agencies' and authorities' exemptions and exclusions, when, in fact, there was no evidence to support this finding. ESD has completely rebutted these and the rest of OSC's findings through our five responses to OSC's preliminary audit reports, the production of voluminous program files, and over twenty-five hours of ESD staff interviews.

Comptroller's Comment: ESD states that OSC has no support that "...ESD improperly monitored agencies' and authorities' exemptions and exclusions..." Again, ESD fails to grasp that the crux of the finding is that very point. ESD had no evidence that it reviewed and approved the reasonableness of agencies' claimed contract and expenditure exemptions and exclusions from MWBE participation, as otherwise required. No notes or even a checklist existed to support that any review was performed.

II. Rebuttal of Findings and Recommendations

In their Final Draft Report, OSC incorrectly found that: (i) ESD improperly monitors the MWBE vendor address information in the OED directory; (ii) ESD staff did not use necessary documentation to properly certify and recertify MWBE vendors; (iii) agency and authority utilization goal plans did not fully comply with DED's regulations; (iv) ESD improperly monitors agencies' and authorities' exemptions and

exclusions; (v) ESD improperly monitors agencies' and authorities' reporting of MWBE utilization; and (vi) not all New York State agencies and authorities that are statutorily required to report their MWBE utilization to ESD are doing so.

Comptroller's Comment: We stand behind our audit conclusions and recommendations, as detailed throughout the audit report. Despite ESD's summary denial to the contrary, the fact remains that there were multiple process deficiencies in ESD's administration and oversight of the MWBE program. Further, with its response, ESD provided no tangible evidence to cause us to change our observations and conclusions. We attribute ESD's lack of cooperation during the audit fieldwork and its dismissive response to the draft report, at least in part, to the various weaknesses we identified in its overall MWBE program administration.

We address all of these findings below:

A. ESD Properly Monitors MWBE Vendor Addresses

ESD staff properly monitors MWBE vendor addresses and comports with all statutory and regulatory obligations in this respect. As the Final Draft Report acknowledges, the MWBE regulations require certified MWBEs to notify the Division within thirty days of any material change in status. A change of address would qualify as a material change in status. Besides fulfilling its regulatory obligations, a certified MWBE vendor is incentivized to notify ESD of a change in address because correct contact information on the MWBE directory makes it easier for agencies and prime contractors to contact the MWBE vendor for a specific project, task or contracted work.

The regulations do not require ESD to repeatedly inquire as to when a certified MWBE vendor's address changes. Again the regulations place the onus on the MWBE vendor to notify ESD of a change in address -a logical requirement because vendors are in the best position to monitor when their addresses have changed.

Comptroller's Comment: We did not indicate that ESD should repeatedly inquire about the addresses of certified MWBEs. However, when a firm notifies ESD that it is no longer an MWBE or that the name has changed, it behooves ESD to ensure that the changes are handled in a timely manner. Furthermore, ESD management should not be purely driven by regulations, but by a desire to do the best job it can with the MWBE Program. However, that level of effort was not evident from the actions of ESD during this audit.

It is, however, important to ESD to have accurate information in its MWBE directory. To achieve this, ESD staff takes several steps to ensure the directory's accuracy. ESD staff checks certified MWBE vendors' addresses against their lease agreements for the space, or deeds of ownership if they operate from properties they own at the time of application. If applicants cannot locate their deeds, then ESD staff accepts mortgage payment receipts. Whenever a change of address is requested, we require a signed lease as supporting documentation. Furthermore, ESD staff periodically sends notices for

certification renewal via email and fax. When staff receives an undeliverable email or fax, they call the certified MWBE vendor with the phone number on record to confirm their address, email, fax, and all contact information. If the staff is unable to reach the vendor by phone, staff then sends a letter requesting that the vendor contact ESD. If the vendor does not respond after thirty days, the vendor loses its certification and ESD removes the vendor from the MWBE directory.

OSC's recommendation that ESD review and take appropriate action when advised of the sale or transfer of a certified MWBE to another owner and develop and implement formal mechanisms to periodically verify that certified MWBEs are located at their address of record is unnecessary because ESD staff already does so. When a staff member confirms that a vendor no longer meets MWBE qualifications because of a sale or transfer, for example, staff always decertifies the vendor. Confirmation is essential; otherwise, staff runs the risk of unfairly decertifying MWBEs. Also, as stated above, program staff already has formal mechanisms in place to periodically confirm the addresses of certified MWBE vendors.

B. ESD Staff Properly Certified and Recertified MWBE Vendors

OSC also recommends that ESD require analysts to obtain all "mandatory" and applicable documents before certifying applications and improve record-keeping and archiving systems to ensure that pertinent files can be easily retrieved and accessed. Both of these recommendations are also unnecessary for several reasons.

First, OSC contends that because ESD's MWBE application materials use the terms "mandatory" and/or "required" that ESD is required, without exception, to have each document prior to ESD's assessment of program eligibility. This contention is unsupported by law or fact. ESD's application requests are not the ultimate standard of program eligibility. Article 15-A of the Executive Law (Exec. L.) and the MWBE regulations establish the standard that ESD's certification analysts use to decide whether they have sufficient information to determine an applicant's eligibility.

Comptroller's Comment: Mandatory is by definition that which is required by law or rules. It is compulsory. Our recommendation states, "Require analysts to obtain all mandatory and other applicable documents before certifying applications. Further, document the reasoning for any waiver of mandatory or required documents." The recommendation acknowledges that there needs to be flexibility in the process, but that subjectivity needs to be avoided. Prior to expounding about purported flaws in OSC reasoning, we would encourage ESD officials to take the time necessary to carefully read what the report and recommendations actually say, instead of creating nonexistent areas of disagreements.

Further, ESD officials claim that the analysts based their decisions, in part, on experience and knowledge about the applicants or MWBEs for re-certification. However, ESD senior management chose to deny access to the very same analysts who actually processed certifications and re-certifications. Therefore, auditors have no

assurance that the assertions of ESD's Director of Compliance (who does not work within the MWBE program) accurately represent what actually occurs within the process. What ESD fails to understand is that those who hold a compliance role know what is theoretically supposed to occur, while those who actually perform the function know what actually occurs. Audits help to assure that the process as it is actually implemented is not arbitrary, so that the public can be assured that businesses that are eligible are not wrongfully penalized based on the whims of a subjective process and those that are ineligible are not wrongly certified and take opportunities away from those for whom the program is intended.

In order to improve the quality of the information we receive, and reduce unnecessary correspondence between ESD and applicants, ESD requests "mandatory" and "required" documents from applicants when required to complete the assessment for certification. ESD interacts with a diverse pool of applicants representing various industries and corporate structures. As a result, documentation necessary to prove a particular element of certification can vary greatly depending on the specific business. In an effort to yield as much information as possible and create consistency among application responses, ESD has attempted to provide universal document requests in our communications with potential applicants. In most instances, ESD application materials that use terms like "required" are accompanied by a proviso that addresses applicability. These requests are not absolute because of the potential to bar certification of certain applicants for not having particular records even though those applicants satisfy the eligibility requirements set forth in the statute and regulations. This result would run counter to ESD's mission to enhance the economic development of these businesses and wrongfully penalize these entities for failing to have documents that they are not required to maintain.

Further, it is important to note that prior to 2013, ESD requested fewer documents in its MWBE application. When OSC drew its sample from firms listed on ESD's MWBE directory on April 30, 2014, the overwhelming majority of the sample was certified prior to 2013. Nevertheless, instead of evaluating the certified firms by the audit criteria applicable at the time of their certification, OSC applied the more rigorous 2014 audit criteria to the applications of entities that were not required to adhere to the 2014 requirements. As such, OSC's finding on this point is inaccurate as it is based on inappropriate audit criteria.

Comptroller's Comment: The auditors applied the criteria applicable for each period of time. We met with ESD officials to review every file and apprised them in great detail of the documents that were missing. Further, when ESD officials provided a valid reason or an alternative document, the auditors used it. For example, Article 15-A, Section 310 (20) states for the number of employees "not to exceed three hundred." The procedures indicate that the applicant should submit a mandatory form "Attachment C Small Business Affidavit" to attest that the firm does not have more than 300 employees. However, ESD officials advised that the applicant can respond to the question online. Based on this input, we accepted both methods.

Second, OSC's assertion that the absence of documents in archived files is indicative of the fact that ESD never received them is a faulty argument. In their Final Draft Report, OSC assumes that the absence of an individual certification document at the time of the audit is equivalent to the absence of the same document during the certification review. This assumption is unreasonable and undermines all conclusions and recommendations which are based on it. We find this position to be problematic for several reasons. During interviews with a certification analyst, OSC auditors asserted this view even when the records checklist showed that the file was, in fact, submitted with the application or when a document was referenced in another part of the submitted materials. ESD should not receive an adverse audit finding that is belied by fact.

Comptroller's Comment: Once again ESD incorrectly claims in its response that the auditors did not or would not accept that analysts made determinations based on "experience, training, expertise, and knowledge of the relevant law and regulations." We understand that decisions may not rely totally upon a specific document; however, the basis for the decision itself should be fully documented. The documentation can be used by the next analyst reviewing the file when a re-certification is due, thus making the process more efficient. Moreover, documentation provides the public with assurance that decisions made by government organizations are not arbitrary, but instead are well supported and transparent. As noted previously, the auditors could not confirm assertions with certification analysts, because ESD refused to provide auditors with access to them. Thus, the absence of documentation became even more problematic.

Finally, ESD states that it "should not receive an adverse finding that is belied by fact." However, the fact remains that ESD did not have the required documentation to support analysts' positions and then did not provide us with access to the staff who could confirm that review steps were actually performed.

It is important to understand and recognize the voluminous nature of the MWBE certification files that were the subject of this Final Draft Report, combined with the extensive handling, review and storage of these application materials. These files often contain dozens of records with several hundred pages of data, so management of these files post-certification when documents have previously been removed and examined for eligibility is difficult. Moreover, archived MWBE certification files are stored in one of three different locations in two cities, which include the State Archives in Albany. Recognizing this difficulty, particularly for archived files stored prior to January 2013, ESD took affirmative steps to rectify this issue. Commencing in January 2013, in order to remedy the prior record retention concerns, ESD began archiving all certification application materials electronically. With the exception of small business forms which were vetted at other points in the certification process, every missing document that has been identified by OSC in the current sample was processed before January 2013, and, therefore did not have the benefit of ESD's remedial efforts regarding record retention. OSC's substitution of a record retention issue for an MWBE analysis and eligibility criteria issue is improper and should not form the basis for any substantive audit findings. Furthermore, it is important to note that despite OSC's unsupported insinuations, OSC has found no instances of vendors that were

inappropriately certified or recertified.

Comptroller's Comment: Again, ESD's assertion is incorrect. The audit found a business that was recertified on April 24, 2012 and the file has a letter (dated September 11, 2012) from its president notifying ESD the business was sold effective September 4, 2012. However, this business was still certified as an MWBE as of April 30, 2014, although it was purchased by a large holding company and no longer qualified as an MWBE. Further, as detailed in our report, ESD did not update its records and the directory until our auditors notified them in December 2014 of the ownership change.

C. ESD Properly Monitors Goal Plan Timeliness and Goal Adequacy

In their Final Draft Report, OSC found that ESD did not properly monitor the timeliness of agencies' and authorities' goals and the adequacy of these goals. This conclusion is incorrect and is based on a lack of understanding of Article 15-A and the MWBE regulations and a lack of due diligence.

In January 2011, the new administration took office and immediately prioritized the review of New York State's MWBE program to increase state agencies' and authorities' MWBE utilization. At that time, the State's overall utilization rate was 10.28%. Based on past utilization rates and previously submitted goal plans, the administration questioned whether agencies and authorities were making sincere and honest efforts to obtain MWBE utilization pursuant to Exec. L. Article 15-A. In order to properly review the program and strategize on how to increase MWBE utilization, the Director of ESD's MWBE program changed the usual January 15th due date for goal plans to September 23, 2011. The authority for this change is found in Exec. L. Article 15-A and the regulations.

Comptroller's Comment: ESD replied to our draft report that the annual goal plan was not due on January 15th because the DED Director changed the date the plans were due for fiscal years 2012 and 2013. However, the regulation cited in DED's response was adopted and became effective June 14, 2014, for the 2015-16 annual goal plan. Thus, the revised due date was not in effect for the annual goal plans we reviewed.

Exec. L. Article 15-A, § 311(1) provides that the Director of the MWBE program shall assist the governor in the formulation and implementation of laws and policies related to MWBEs. 5 NYCRR Part 141.4(c) provides that each state agency or authority shall submit its goal plans on or before January 15th each year, or at such time determined by the Director. Pursuant to the authority granted by the statute and regulations, the Director directed ESD staff to inform agencies and authorities about the new due date for goal plans.

OSC alleges that ESD failed to properly monitor the timeliness of goal plans because Department of Financial Services ("DFS") submitted its 2011-12 annual goal plan 319 days late. This Finding is incorrect for several reasons. First, ESD changed the 2011-12 goal plan due date to September 23, 2011. OSC assumed the due date was January 15, 2011. Second and most importantly, DFS was not formed until October 3, 2011 and therefore could not issue its goal plan on either the original January

15, 2011 due date or the new due date of September 23, 2011. After forming in October 2011, the new agency submitted its goal plan to ESD in November 2011. Consequently, OSC's finding that DFS submitted its goal plan late is not only incorrect, it is impossible and is clearly due to OSC's lack of due diligence.

Comptroller's Comment: OSC's well-defined due diligence process is to verify facts with agency officials by presenting "preliminary findings" for their review prior to the preparation and release of the draft audit report. Agencies are asked to respond to the preliminary findings and identify any factual errors so they may be corrected prior to the issuance of the draft report.

This item appeared in a preliminary finding that OSC provided to ESD. Further, ESD acknowledges in its response that it received and reviewed the five preliminary findings we provided them. However, despite being asked to identify any factual errors and then declining to do so, ESD asserts that OSC did not exert appropriate due diligence. This is untrue. Instead of playing "gotcha" games with the auditors, ESD officials should have understood that they also were responsible for the integrity of the audit process, and thus, they should have advised us of any error in the preliminary finding by responding at the appropriate time. Unfortunately, it appears they chose not to do so. Also, we revised our report to accurately reflect the DFS 2011-12 annual plan.

OSC also alleges that the Metropolitan Transportation Authority ("MTA") submitted its 2012-13 goal plans forty-six days late and its 2013-14 goal plan 198 days late. In 2012, the Director changed MTA's due date to March 1, 2012. Consequently, MTA's 2012-13 goal plan was not late; it was early. Further, MTA's 2013-14 goal plan was not 198 days late as stated in the Final Draft Report. MTA submitted revisions to its goal plan and ESD's online certification and utilization platform overrode MTA's previous goal plan submission date. ESD has records, however, that reflect that MTA submitted its 2013-14 goal plan on February 11, 2013, approximately two weeks after the January 15, 2013 due date as opposed to 198 days after January 15, 2013.

OSC also alleged that ESD did not properly monitor the adequacy of agencies' and authorities' goals because the ten agencies and authorities that OSC sampled had annual goals that were less than the statewide goal and failed to provide explanations supporting the reasons why they did not reach the statewide goal. First, all the agencies and authorities in OSC's sample did provide explanations for not meeting the statewide goal within the listing of their exemptions and exclusions. Second, the statewide goal was not a mandated goal; it was an aspirational goal. Agencies and authorities were not required to reach the statewide goal; rather, they were only required to make a good faith effort to do so.

Comptroller's Comment: If ESD's response is correct that the agencies and authorities explained the reasons they did not meet the statewide goals, we can only surmise that ESD withheld such information from the auditors. In addition, we did not state that the agencies and authorities were required to reach the statewide goals. The report states on page 10 that "eight did not provide an explanation supporting the reasons why they

could not subscribe to the statewide goal, as was mandated by the regulations at the time.” The regulation was changed on June 14, 2014, and would impact the 2015-16 fiscal year.

D. ESD Properly Monitored Agencies' and Authorities' Goal Plans

ESD properly monitors the exemptions and exclusions that agencies and authorities claim in their goal plans. In their Final Draft Report, OSC recommends that ESD (i) ensure agencies' and authorities' exempted and excluded contracts as well as expenditures comply with Division regulations to facilitate maximum MWBE participation; (ii) document analysts' verification of the amounts exempted or excluded; and (iii) ensure agencies and authorities explain year-over-year variances of twenty-five percent or more in amounts exempted or excluded. As explained below, these recommendations are inappropriate.

First, Division policy sets categories for exemptions and exclusions. Analysts review the exemptions and exclusions by confirming whether they fall within the policy-prescribed categories. OSC has identified a few agencies and authorities that have exempted and excluded over ninety percent of their budgets. This is not improper and does not violate the statute and regulations.

As part of their due diligence, agencies and authorities make the determination as to which contracts are exemptible and excludable based on the categorical definitions of exemptions and exclusions. If no opportunities exist for MWBE participation, it would be inappropriate for agencies and authorities not to exempt or exclude those contracts just because it results in a high percentage of agency spending with exemptions and exclusions. Most importantly, OSC has found no instances of improper exemptions or exclusions. Instead, OSC simply tries to cast doubt on agencies' and authorities' exemptions and exclusions without having any concrete evidence to support its claims. OSC's recommendation that ESD ensures that agencies' and authorities' exempted and excluded contracts comply with Division regulations is unnecessary because ESP staff already does this.

Second, OSC recommended that ESD document analysts' verifications of the amount exempted or excluded. This verification is already part of analysts' review on ESD's online certification and utilization platform, which was implemented in January 2013. Further, as part of an analyst's goal plan review, the analyst periodically reviews the policy-prescribed exemption and exclusion categories to determine whether these categories are still valid. When necessary, these categories are amended.

Comptroller's Comment: In response to our draft audit report, ESD officials claim that the analysts reviewed the annual goal plans including the exemptions and exclusions. However, it is implausible that they could not provide any evidence of this review. We note that the procedures for the MWBE Master Goal Plan require the Division's analyst to review and approve the reasonableness of contracts and expenditures exempted or excluded from MWBE participation. Based on our review of the exemption and exclusion list for MTA's constituent agencies, there were several examples of contracts and expenditures that could have benefited from MWBE participation. For example, in fiscal year 2011-2012, we found that MTA's Long Island Railroad (LIRR) exempted extermination services for \$80,000, Debt

Collection services for \$50,000, and Classified & Recruitment Advertisement for \$200,000. As of July 11, 2014, the Division's directory of certified MWBEs listed 20 certified MWBEs for extermination services in the New York City metropolitan area. We believe some of these certified MWBEs could have provided the exempted services.

In addition, a Division official provided goal plan evaluation guidelines, which contain standard questions for analysts regarding agency budget, exemptions, and exclusions when reviewing an agency's annual goal plan. However, Division officials did not allow auditors to question the analysts directly; or provide documentation pertaining to analysts' review notes and/or comments to indicate that the analyst asked relevant and specific questions of the MTA during the review of the MTA's exempt/excluded contracts and expenditures.

Third, OSC also recommended that ESD explain year-over-year variances of twenty-five percent or more in amounts exempted or excluded. Again, this evaluation is already part of analysts' review on ESD's online certification and utilization platform. In fact, analysts explain year-over-year variances of more than twenty percent. Consequently, OSC's recommendation would call for less diligence.

E. All the State Agencies that were Statutorily Required to Report Did, in Fact, Report

ESD included all agencies and authorities that were statutorily required to report their MWBE utilization in its annual MWBE reports to the Governor. OSC's contention that ESD failed to include twenty-four agencies and authorities in its annual reports is incorrect for the following reasons:

First, in their Final Draft Report, OSC acknowledges that the utilization numbers of seven of the alleged twenty-four agencies and authorities were included in the reports of other agencies in the annual MWBE reports. Therefore, OSC's allegation that ESD did not include these seven agencies and authorities in its annual reports is inaccurate and misleading. New York State's overall utilization numbers are the same regardless of whether the seven agencies individually report their utilization numbers or the agencies' utilization numbers are included in the reports of other agencies.

Second, the remaining seventeen agencies and authorities were excluded from the annual reports because they did not reach the statutory mandated threshold amounts prescribed in Exec. L. Article 15-A, § 310(13). The statute provides that agencies and authorities must report the MWBE utilization from state contracts. Subsection 313(13) of the statute defines "state contracts" as written agreements for services in excess of \$25,000 and written agreements for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements in excess of \$100,000. The statute does not require agencies and authorities to report MWBE utilization from written agreements below these threshold amounts. Further, the statute does not grant ESD the authority to require agencies and authorities to report MWBE utilization from written agreements below these threshold amounts. Subsection 313(13) provides that written agreements below the threshold amounts fall outside the scope of Exec. L. Article 15-A.

OSC recommends that ESD requires all agencies and authorities to report MWBE utilization from

all written agreements that have not been exempted or excluded, even if the written agreements fall outside the scope of Exec. L. Article 15-A. Implementing OSC's recommendation would violate Exec. L. Article 15-A § 310(13) or require a legislative change to Exec. L. Article 15-A.

Comptroller's Comment: As is our practice, we shared the initial results of our review of the agencies and authorities in the annual report with ESD in a preliminary finding. ESD replied to the preliminary finding and the number of agencies and authorities was changed from 38 to 24 (including seven that report as part of other agencies). In response to our draft audit report, ESD claims that these agencies and authorities did not have any "written agreements for services in excess of \$25,000 and written agreements for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements in excess of \$100,000," but provided no formal analysis to support its statements. Further, the annual report to the Governor and the legislature does not fully disclose that there are state agencies and authorities that do not participate in the MWBE program. Thus, our conclusion that ESD did not adequately monitor contracting agencies' participation efforts to promote and award contracts to MWBEs is accurate.

III. Conclusion

In closing, despite an audit that lasted over a year, OSC has found no instances of vendors that were inappropriately certified or recertified and no instances of exemptions or exclusions that were improper. Instead of actually finding instances of improper certifications or exemptions and exclusions, OSC simply tries to cast doubt on ESD's successful MWBE program without credible and concrete evidence to support its allegations. ESD welcomes the opportunity to work with OSC to better understand the program, reach findings, and make recommendations that comport with the documentation, relevant laws and regulations, and ESD's processes.

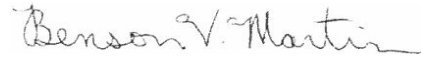
Comptroller's Comment: The statute defines the Division's responsibilities, which include:

- Monitoring contracting agencies' efforts to promote and award state contracts to MWBEs; and
- Reporting to the Governor and the legislature actual MWBE participation in state contracts.

We concluded that ESD was not fulfilling its responsibilities and needs to do so in the future.

Thank you again for this opportunity to respond to your Final Draft Report. Please do not hesitate to contact me if further information is needed.

Yours truly,

A handwritten signature in cursive script that reads "Benson V. Martin".

Benson V. Martin Director
of Compliance