



DASNY

ANDREW M. CUOMO
Governor

ALFONSO L. CARNEY, JR.
Chair

GERRARD P. BUSHELL
President

October 6, 2015

Hon. Andrew M. Cuomo
Governor
NYS Executive Chamber
State Capitol, 2nd Floor
Albany, New York 12224

Senator John J. Flanagan
President Pro Tempore, NYS Senate
State Capitol, Room 330
Albany, New York 12224

Senator John A. DeFrancisco
Chairman, Senate Finance
Committee
State Capitol
Room 416
Albany, New York 12224

Assemblyman Joseph D. Morelle
Majority Leader, NYS Assembly
Legislative Office Building
Room 926
Albany, New York 12248

Dear Sirs:

In accordance with the provisions of Section 170 of the Executive Law, we are hereby submitting to your Office a copy of the Dormitory Authority of the State of New York's response regarding recommendations for corrective action set forth in the Office of the State Comptroller's audit of DASNY's MWBE Program.

Should you have any questions, please feel free to contact me at 518-257-3180.

Very truly yours,

Gerrard P. Bushell
President

cc: Senator Andrea Stewart-Cousins
Assemblyman Brian Kolb
Senator Liz Krueger
Assemblyman Bob Oaks
Enclosure

Hon. Thomas P. DiNapoli ✓
Comptroller
Office of State Comptroller
110 State Street, 15th Floor
Albany, New York 12236

Assemblyman Carl E. Heastie
Speaker, NYS Assembly
Legislative Office Building, Room 932
Albany, New York 12248

Assemblyman Herman D. Farrell
Chairman, Assembly Ways and
Means Committee
Legislative Office Building
Room 923
Albany, New York 12248

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OCT 08 2015

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October 6, 2015

The Honorable Thomas P. DiNapoli
State Comptroller
NYS Office of the State Comptroller
110 State Street
Albany, NY 12236

RE: Dormitory Authority of the State of New York
Contract Participation of Minority-and-Women-Owned Business Enterprises
Report 2014-S-7

Ladies and Gentlemen:

On July 8, 2015, the Office of State Comptroller ("OSC") released the final report, "Contract Participation of Minority- and Women-Owned Business Enterprises," which was the result of an audit conducted at the Dormitory Authority of the State of New York ("DASNY") from April 1, 2011 to December 31, 2013. In accordance with Section 170 of the Executive Law, within ninety days of the release of the final report, we are advising you of our progress to date with respect to the seven recommendations contained in the report.

The Comptroller's report is based upon a flawed understanding of the State's MWBE Program, and the laws, rules and sound operational practices that govern and support this Program, as stated in DASNY's audit response. There is absolutely no mandatory statewide MWBE goal established by Article 15-A, and the regulations at 5 NYCRR Parts 140-145 were amended effective June 4, 2014 (more than a year prior to the release of this audit) to clarify the correct procedure for MWBE goal-setting at an agency-specific level. By applying incorrect standards, the audit mischaracterizes DASNY's compliance with Article 15-A and makes recommendations that are not supported by existing law or regulation.

Recommendation #1:

Develop and implement formal processes to properly establish annual MWBE participation goals. The formal processes should include, but not be limited to: (1) Documenting the Methodology, including quantitative analysis, used to establish annual MWBE participation goals (both overall and industry-specific); (2) Explanations of variances between the Authority's overall and industry-specific MWBE participation goals and the statewide goals established in the Law; and (3) Requesting and obtaining formal DED approval of proposed MWBE participation goals that are less than the statewide goals established by the Law.

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Response – OSC already admitted in its comments that DASNY is not required to set its annual Minority and Women Business Enterprises (“MWBE”) participation goal at 28.92% (Comment 2, p. 20), thus recognizing that the percentages set forth in Executive Law § 313 are not mandatory thresholds that must be adhered to or explained away. Yet this recommendation characterizes the percentages in Executive Law § 313 as exactly that – mandatory thresholds – and requires that DASNY adopt procedures justifying any departure from these percentages on a variance basis (OSC sub-comment 2) subject to DED approval (OSC sub-comment 3).

Effective June 4, 2014 (i.e., more than a year prior to the release of this audit), the Department of Economic Development (“DED”) amended the implementing regulations at 5 NYCRR Part 141 (State Agency Responsibilities) to conform the prior regulations to Article 15-A and existing public policy and clarify that:

- Each agency and authority must establish **agency-specific** MWBE participation goals based upon the findings of the 2010 Disparity Study, as required by Executive Law Section 313(1-b) (5 NYCRR § 141.2[a]);
- Each agency and authority must adopt and file an **agency-specific** Master Goal Plan with the DED, setting forth each agency or authority’s annual MWBE utilization goals (5 NYCRR §§ 141.2[b], 141.3[a] and 141.4[a]); and
- Agency-specific goals shall be set based upon a review of the scope, character and relevant expenditures associated with State contracts that are expected to be let in the relevant fiscal year and shall be based upon specific factors concerning said contracts (5 NYCRR § 141.2[c]), including without limitation the **statewide availability** of MWBEs for construction, construction-related services, non-construction services and commodities contained in the 2010 Disparity Study and Executive Law Section 313[1] (see, 5 NYCRR §141.2[c][1]).

Recommendation #1 calls for process revisions that are based upon an inaccurate reading of Article 15-A and a prior version of the implementing regulations at 5 NYCRR Parts 140 -145, which have been amended. There is no mandatory statewide MWBE goal established by Article 15-A, and the regulations at 5 NYCRR Parts 140-145 were amended to clarify the correct procedure for MWBE goal-setting at an agency-specific level. Moreover, DASNY established agency-specific MWBE participation goals and submitted an agency-specific Goal Plan for each year of the audit, as required by law and regulation. DASNY’s response to Recommendation #1, therefore, is qualified by these factors, and the above explanation is provided so that State officials have a proper context for DASNY’s response.

With respect to OSC’s sub-comments to Recommendation #1:

(1) Documenting the Methodology, including quantitative analysis, used to establish annual MWBE participation goals (both overall and industry-specific) –

DASNY already has established practices in place for demonstrating compliance with Executive Law Article 15-A and the implementing regulations at 5 NYCRR Parts 140 – 145. DASNY sets annual MWBE participation goals in accordance with these established practices.

To further memorialize its practices, DASNY will document its established practices in a consolidated written procedure which accurately reflects the relevant legal framework in Executive Law Article 15-A, including without limitation all recent amendments to applicable regulatory law effective June 4, 2014. DASNY's procedure, however, will be developed in accordance with Article 15-A and 5 NYCRR Parts 140 – 145 (as amended), exclusive of OSC sub-comments (2) and (3).

Implementation Date: December 31, 2015

(2) Explanations of variances between the Authority's overall and industry-specific MWBE participation goals and the statewide goals established in the Law –

As previously explained, no explanation of variances is required under the current regulatory framework.¹ Recognizing that the existing regulations potentially conflicted with the requirements of Executive Law §§ 313[1] and [1-b], the DED regulations were comprehensively updated effective June 4, 2014 to reflect existing law and policy changes.

(3) Requesting and obtaining formal DED approval of proposed MWBE participation goals that are less than the statewide goals established by the Law –

As previously explained, no formal DED approval is required in cases where DASNY's agency-specific MWBE participation goals are less than percentages listed in Executive Law § 313[1] because Executive Law 313[1] does not establish mandatory thresholds that must be adhered to or explained away on a variance basis.

DASNY will continue to set goals in accordance with applicable law and policy, including without limitation Executive Law Article 15-A and 5 NYCRR Part 141 (State Agency Responsibilities). Moreover, DASNY will continue to prepare a Master Goal Plan (5 NYCRR §141.3), file that Master Goal Plan with the DED (5 NYCRR § 141.4) and participate in the DED's Master Goal Plan review process (5 NYCRR § 141.5). As significant portions of OSC's process recommendation are based upon old law, with which DASNY cannot comply, DASNY's written procedures will reflect applicable law and regulation, and will not address sub-comments (2) and (3).

¹ Without limitation, the DED specifically repealed former 5 NYCRR § 141.2, which OSC relies upon to assert (at page 7) that formal explanation is required in cases where DASNY's agency-specific MWBE participation goal is less than 28.92% (see, e.g., OSC Comment 5 at page 20).

Recommendation #2:

Develop and implement formal mechanisms to quality assure data entered into the Authority's automated MWBE participation reporting system.

Response – DASNY has and will continue to apply formal data quality assurance tools. Historically, DASNY's staff has performed manual sampling review of contractor payment data entries. DASNY is in the process of transitioning to the New York State Contract System, which is used by agencies and authorities throughout the State. The new system contains automated audit capabilities for prime contractors, subcontractors and suppliers, which verify payment receipt with the payment recipient and notify DASNY of any discrepancies. DASNY's transition to the State Contract System is expected to be completed by March 31, 2016. During the course of this transition, DASNY has instituted a system of checks and balances to quality assure data entered into the legacy reporting system. For example, DASNY actively utilizes 'system edit' features whereby the legacy reporting system compares data entered to baseline contract information, and flags potential inaccuracies. Also, staff performs a more aggressive manual sampling review of the data entries to monitor, among other things, payment value to contract value and previous payments to contractors.

Implementation Date: March 31, 2016

Recommendation #3:

Develop and implement formal processes to correct data-entry errors, including providing revised amounts and participation rates to DED and other stakeholders.

Response - This recommendation reflects existing DASNY practice, which has been in place for years. DASNY currently self-corrects identified data-entry errors prior to submittal of the required information to DED. In the event the errors are identified subsequent to submittal of the quarterly expenditure reports to DED, DASNY has the ability, with DED's approval, to correct the data errors in the New York State Contract System.

Recommendation #4:

Report no more than the actual amount paid by the Authority when a MWBE prime contractor makes a related payment to a MWBE subcontractor.

Response – Unreconciled reporting of prime contractor and MWBE subcontractor data was a function of an antiquated, legacy reporting system where prime contractor and subcontractor utilization was entered separately, but was not reconciled on an individual contract basis. DASNY has transitioned to a modernized electronic system, the New York State Contract System, for all reporting to DED. The New York State Contract System has enhanced utilization tracking capabilities such that the prime and subcontractor data may be reconciled.

Implementation – Implementation complete. As stated above, DASNY continues to transition with respect to other features of the State Contract System with a projected March 31, 2016 completion date.

Recommendation #5:

Ensure that MWBE program data is properly updated and adjusted when an MWBE contractor is unable to perform specific work and a non-MWBE contractor must be paid to perform the work in question.

Response – DASNY will draft and implement procedures and/or make changes to its contracting system to ensure that the various divisions within DASNY are alerted whenever an MWBE contractor is no longer performing work, so that MWBE program data may be properly updated and adjusted.

Implementation Date: December 31, 2015

Recommendation #6:

Develop and implement steps to verify that “in care of” MWBE vendors have actually provided the specified goods and/or services before reporting the corresponding payment participation amounts to DED.

Response – DASNY is currently transitioning to the New York State Contract System, which has enhanced utilization tracking capabilities such that the MWBE subcontractor may certify that it has provided the specified goods and/or services and has received payment(s) accordingly. During the transition period, DASNY will continue its existing practice of verifying payments to “in care of” MWBE subcontractors and suppliers by examining cancelled checks, subcontract agreements and other supporting documentation.

Implementation Date: March 31, 2016

Recommendation #7:

Obtain clarification from DED regarding the reporting of non-construction professional service payments for MWBE program participation purposes. Follow such guidance in preparing quarterly MWBE program reports.

Response – This recommendation was implemented during the audit period, on March 31, 2015, when DASNY began reporting to DED non-construction professional service payments for MWBE program participation purposes.



DASNY

The Honorable Thomas P. DiNapoli
October 6, 2015
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DASNY has had an exemplary record in regard to its MWBE Program, and has for over twenty years been a leader among State agencies and authorities in establishing and meeting MWBE utilization goals. We have and will continue to identify and implement process improvements to the Program so as to better serve our clients and the citizens of New York State.

Very truly yours,

A handwritten signature in black ink, appearing to read "Gerrard P. Bushell".

Gerrard P. Bushell
President

A handwritten signature in black ink, appearing to read "Alfonso L. Carney, Jr.".

Alfonso L. Carney, Jr.
Chair

110 State Street



Dormitory Authority of the State of New York
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