Only 1.8% of the general counsels in the Fortune 1000 list and only 2.67% of partners at major law firms are of Asian descent. The need for change remains as strong as ever. Both companies and law firms recognize this need for change and have implemented a series of diversity initiatives. But have these programs been successful? This course will present an analysis regarding the results of various corporate MBE diversity program, MBE certification requirements and foster a robust discussion regarding whether MBE certification as a requirement to participation in diversity programs is an additional hurdle; whether diversity programs will be successful in furthering the growth of successful Asian attorneys, both from a short and long term perspective; and whether and how each of us can contribute to assisting the success of others in our community.

Program Chair & Moderator:
Kathleen C. Chen, Senior Associate, Lowe & Associates LLC

Speakers:
Vincent M. Gonzales, Senior Environmental Counsel, Southern California Gas Company, a Sempra Energy Utility
Jason H. Wilson, Member, Willenken Wilson Loh & Delgado LLP
Michael Yap, Chief Legal Officer, Prudential International Investments
AGENDA
Pathways to Success – Is MBE Certification a Red Herring

1:45 pm – Introduction to Speakers

1:50 pm – Overview of history of MBE programs, specific MBE programs, and results.

1:55 pm – Discussion and Interpretation of the Results – e.g. Have the MBE programs been successful in creating a proportional skill set. To the extent that the results show that the programs are weighted towards certain sectors (e.g. litigation, immigration, labor and employment), how should we view those results in terms of professional successfulness.
  ➢ Related Materials: See Audit Results for Chicago, New York and Maryland

2:15 – Certification versus Diversity - e.g. Is MBE certification adding an additional barrier to entry? Studies have shown that capital access is the major hurdle faced by MBE companies, but loans are a factor that MBE certification companies access. Is the system appropriately designed? Does it cause certification to be a distraction from the underlying diversity goals?
  ➢ Related Materials: See US Commerce MBDA Study Finds Capital Access Remains Major Barrier to Success for Minority-Owned Firms; National Minority Supplier Diversity Council Requirements

2:22 - What can individual firms do to take advantage of MBE programs?
  ➢ Related Materials: See powerpoint

2:42 – Next Steps – e.g. In the areas that are trailing, how do we grow the set of transactional firms? Is MBE certification the right path or should we focus on other diversity initiatives?

2:52 pm – What can each of us do to create opportunities for other diverse attorneys?

3:00 pm – Session End
REVIEW OF THE
SMALL DISADVANTAGED BUSINESS
CERTIFICATION PROGRAM

AUDIT REPORT NUMBER 5-04

NOVEMBER 4, 2004

This report may contain proprietary information subject to the provisions of 18 USC 1905 and must not be released to the public or another agency without permission of the Office of Inspector General.
TO: Albert B. Stubblefield  
Acting Associate Administrator for Business Development

FROM: Robert G. Seabrooks  
Assistant Inspector General for Auditing

SUBJECT: Review of the Small Disadvantaged Business (SDB) Certification Program

The Office of Inspector General (OIG) completed an audit survey of the SDB Certification Program to determine whether SBA is properly evaluating the qualifications of applicant firms for certification or re-certification (hereafter referred to simply as “certification”) as SDBs. We found significant problems with SBA’s evaluation processes and supporting systems. Based on the results of the audit survey, we determined that a full audit of the program is not warranted at this time because those results would not likely change if we reviewed a larger sample of application files. This report presents the results of our review.

BACKGROUND

SBA administers two assistance programs for small businesses owned by socially and economically disadvantaged individuals, the Minority Small Business and Capital Ownership Development Program (8(a) Program), and the SDB Certification Program. While the 8(a) Program offers a broad scope of assistance to firms owned by socially and economically disadvantaged individuals, SDB certification strictly pertains to benefits in federal procurement. Section 8(a) firms automatically qualify as SDBs, but other firms may apply for SDB-only certification.

SBA certifies small businesses as SDBs if they meet specific social disadvantage, economic disadvantage, ownership, control, and size eligibility criteria. SDBs must meet all 8(a) eligibility requirements, with few exceptions. SDBs do not, for example, have a “potential for success” requirement and their owners have a higher adjusted net worth dollar limit for program entry. Once approved, the firm is added to an on-line registry of SDBs maintained in the Central Contracting Registry (CCR), where it is eligible for price evaluation adjustments of up to ten
percent when bidding on Federal contracts in certain industries. The program also provides evaluation credits for prime contractors who achieve SDB subcontracting targets. This helps Federal agencies achieve the government-wide goal of five percent SDB participation in prime contracting. The certification period is for three years at which point the SDB may apply for re-certification for another three years. According to the CCR, there were 2,918, non-8(a) SDBs as of March 9, 2004.

OBJECTIVE, SCOPE AND METHODOLOGY

The survey objective was to determine whether SBA is properly evaluating the qualifications of SDB-only applicant firms (i.e., those that are not also 8(a) firms) for certification as SDBs. We completed a survey rather than a comprehensive audit of the program. As part of the survey, we interviewed SBA employees/contractors, and reviewed government laws, regulations, policies and procedures pertaining to the SDB Certification Program. We also reviewed Office of Hearing and Appeals (OHA) cases for guidance in evaluating certain eligibility criteria.

Based on data provided by the program office, we randomly selected ten SDB-only application files from the 970 companies approved for certification in Fiscal Year (FY) 2003 and reviewed each file to determine whether criteria were met for the five eligibility elements of social disadvantage, economic disadvantage, ownership, control, and size. Based on data generated from the SDB application tracking system, we queried SBA’s loan accounting data base to determine whether any of the 2,612 owners of SDB’s receiving SDB-only certification from FY 2001 through FY 2003 defaulted on SBA loans and reviewed the relevant SDB certification file for every identified defaulted loan.

The scope of our survey was limited in the following three ways: (1) we could not review some of the files included in our initial sample because SBA could not locate them; (2) we could not compare the financial condition of the applicant to the financial profiles of small businesses in the same primary industry classification because SBA did not have current peer business performance comparison data; and (3) we could only make very limited use of the SDB application tracking system since an official acknowledged that it was inaccurate.

We performed audit survey work from March to July, 2004 in Washington, D.C. The survey was conducted in accordance with Government Auditing Standards.

SURVEY RESULTS

Eligibility reviewers in SBA’s Office of Certification and Eligibility (OCE) did not adequately consider whether owners of companies applying for SDB certification were economically disadvantaged. Contrary to regulations, eligibility reviewers were also certifying companies as SDBs when their owners had defaulted on government obligations. As a result, at least two of the ten SDBs in our sample should not have been certified. An additional firm that indicated a Federal delinquency on its SBA Form 1010 without providing an explanation may
need to be de-certified once a follow-up is done. Moreover, the owners of seven other companies certified from June 2001 to April 2004, but not in our sample, had defaulted on SBA loans. Companies inappropriately obtaining SDB certification could receive Federal contracts which would otherwise be awarded to eligible SDBs. Additionally, we found (1) data integrity problems with an SDB application tracking system and (2) inadequacies in file safekeeping, as program officials could locate only two-thirds of the files requested for review by auditors.

SBA Management generally agreed with Findings 1, 3, and 4, and with the exception of Recommendation 1C, agreed with all the recommendations contained in those findings. For Recommendation 1C, they did not want to de-certify the firm found unqualified for program participation based on the owner of the firm’s total assets without further investigation. SBA management agreed with the language of Finding 2’s title and the recommendations in that finding, but disagreed with the finding’s premise. Specifically, they disagreed that regulations prohibit applicants with prior Federal loan defaults from participating in the SDB Certification Program. Management’s response to the draft report is included as Attachment 1.

Finding 1: Criteria for Determining the Economic Disadvantage of SDB Owners were not Properly Applied.

Of the four criteria to be considered when determining economic disadvantage for owners of companies applying for SDB certification, OCE did not analyze two and inadequately considered a third. OCE officials stated they made their economic disadvantage determination based on whether the individual’s adjusted net worth was under $750,000 and on “a totality of the circumstances” for assets and income. While adjusted net worth is the sole economic disadvantage criterion for which the Code of Federal Regulations (CFR) sets a fixed dollar limit for SDB certification, the CFR requires that SBA consider the three other criteria (total assets, two years’ personal income, and business peer performance comparison). Since only adjusted net worth has a fixed dollar limit, OCE reviewers primarily focused on that criterion, and gave insufficient consideration to the other three. OCE reviewers were not comparing the financial performance of each applicant company with that of its peers since officials appeared unaware that the CFR required this criterion be considered when determining economic disadvantage. The fair market value of all assets was not analyzed when determining economic disadvantage.

None of the reviewed OCE certification analyses contained a discussion of total assets when determining whether each company’s owner was economically disadvantaged. According to 13 CFR 124.104 (c), which lists the factors to be considered when determining whether an individual is economically disadvantaged, SBA will examine the fair market value of all assets, whether encumbered or not, in considering factors relating to the personal financial condition of any individual claiming disadvantaged status.

Importantly, an OHA ruling, Pride Technologies, Inc. (1996), found that SBA acted properly in denying a firm’s entry into the 8(a) Program (and hence, into the SDB Program) based on the business owner’s total assets exceeding $4.1 million, among other factors. This OHA ruling also stated that as long as one of the reasons SBA used for denying economic
disadvantage, e.g., total assets, is upheld, the denial will be sustained. Moreover, the SDB Training Manual (p.7) indicates that high total assets are one of the “red flag” factors affecting economic disadvantage.

We reviewed one file in which the individual had total assets of approximately $5.7 million, yet the applicant firm was nonetheless certified as an SDB. The OCE certification analysis did not mention total assets, but stated that the owner was economically disadvantaged based on his adjusted net worth and compensation. At a total approaching $6 million, the individual’s assets seem excessive for someone claiming economic disadvantage, especially after the Pride Technologies, Inc. OHA ruling.

*Income was insufficiently analyzed when determining economic disadvantage.*

None of the reviewed OCE certification analyses included a discussion of whether the adjusted gross income of the company’s owner was in the top two percent of all filers, and only three of the ten reviewed files included a discussion of whether the company’s owner adjusted gross income was in the top one percent of all filers. According to 13 CFR 124.104 (c), SBA will examine personal income for the past two years in considering factors relating to the personal financial condition of any individual claiming disadvantaged status. According to one OHA ruling, Autek Systems Corporation (1992), SBA may properly conclude that a socially disadvantaged individual is not economically disadvantaged based solely on the high income of such socially disadvantaged individual relative to the income of Americans generally. A second OHA ruling, Oak Ridge Tool-Engineering, Inc. (2000), found that excessive personal income alone can result in a finding that an individual is not economically disadvantaged, even if the individual’s net worth is within the regulatory limit. A third OHA ruling, Corvus Group, Inc. (2002), found that SBA reasonably determined that the business owners were not economically disadvantaged when each owner’s average adjusted gross income over the past two years placed each among the top two percent of all filers. Moreover, the SDB Training Manual (p.7) indicates that “high average two year income (example: top 1-2% of U.S. taxpayers)” is one of the “red flag” factors affecting economic disadvantage.

*Industry standards were not being used to compare the financial performance of the applicant concern with that of its peers when determining economic disadvantage.*

In all ten of the files reviewed, we found no evidence that industry standards were used to compare the financial performance of the applicant concern with that of its peers as one of the criteria for determining economic disadvantage. SDB officials appeared unaware that they were required to make this comparison in determining economic disadvantage. According to 13 CFR 124.104 (c), “SBA will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that SBA compares include total assets, net sales, pre tax profit, sales/working capital ratio, and net worth.” Also, an OHA ruling, Shashikant P. Savla, D/B/A Kabil Associates (1991), found that the applicant concern’s financial profile must be compared to non-disadvantaged businesses in the same or similar line of business.
Reference books that contain financial performance statistics of firms in particular industries are available from various vendors. However, according to SBA officials, such books have not been purchased by SBA for several years, so neither the SDB Certification Program nor the 8(a) Program had the current reference books necessary to make those comparisons.

Recommendations

We recommend that the Acting Associate Administrator for Business Development:

1A. Develop and implement procedures to ensure that SDB reviewers properly apply all four criteria for determining economic disadvantage, per 13 CFR 124.104(c), using 8(a) Program thresholds for maximum income and total assets, and industry financial performance comparisons.

1B. Ensure that SDB and 8(a) employees who conduct eligibility reviews have access to the current reference material necessary to compare a company’s financial performance with that of its peers.

1C. De-certify the one small business concern found by auditors to be unqualified for SDB certification, and have it removed from the database of SDB firms maintained on the Centralized Contractor Registry (CCR) web site.

Finding 2: SDB Eligibility Reviewers were not Checking for Applicant Past-Due Taxes or Other Delinquent Federal Financial Obligations.

SDB eligibility reviewers were not checking whether applicants answered affirmatively to a question concerning derogatory financial information on their SDB application form (SBA Form 1010). On two applications, the business owner had checked “Yes” next to the question, “Does the firm have any past due taxes or any other delinquent Federal, state or local financial obligations outstanding or liens against it?” One applicant’s file showed a defaulted SBA loan and tax liens. The other file did not contain any explanation concerning the delinquent Federal obligation. Neither reviewer write-up in the files addressed these issues, yet both firms were nonetheless certified.

These actions contradicted regulations prohibiting applicants with prior Federal loan defaults from participating in the 8(a) Program and, hence, the SDB Certification Program. Additionally, querying SBA’s loan accounting data base using data from the program office’s application tracking system revealed seven other SDB owners whose companies were certified from June 2001 to April 2004 with defaulted SBA loans. For these seven companies, three of the owners stated on the SBA Form 1010 that the firm did not have any delinquent Federal obligations, one stated the firm did, two apparently did not submit the SBA Form 1010, and one

1 While we requested data from the SDB application tracking system concerning companies certified from FY 2001 through FY 2003, we received data that overlapped that time period.
owner correctly stated his company did not have a defaulted loan but did not note that another company he owned defaulted on a SBA loan. Consequently, firms that have defaulted on Federal obligations can still be certified as SDBs and potentially win preferred government contracts.

According to 13 CFR 124.108 (e), “neither a firm nor any of its principals that fails to pay significant financial obligations owed to the Federal Government, including unresolved tax liens and defaults on Federal loans or other Federally assisted financing, is eligible for admission to or participation in the 8(a) BD program.” According to 13 CFR 124.1002, 8(a) BD eligibility criteria will be used when qualifying as an SDB, unless otherwise stated in the CFR. There are no separate provisions for SDBs concerning this requirement. Moreover, two OHA cases, Brushworks Unlimited (2000) and Curtoom Construction (1996), found that SBA had appropriately terminated participant(s) in the 8(a) Program for failing to pay Federal obligations.

The SDB Certification Program did not have procedures for verifying that applicants have not defaulted on Federal obligations such as SBA loans. Furthermore, according to an SDB Certification Program official, they believed 13 CFR 124.108 (e) only applied to 8(a) firms, and Office of General Counsel and SDB Certification Program staff informed him that a default on a Federal obligation was not a permanent bar itself to SDB certification. However, the CFR is clear that this requirement applies to the SDB Certification Program. The SDB Program office will not comply with current government regulations until procedures are implemented to check for loan delinquencies or defaults on Federal obligations.

**Recommendations**

We recommend that the Acting Associate Administrator for Business Development:

2A. Develop and implement procedures to ensure that SDB eligibility reviewers check all applicants for possible defaulted SBA loans by, for example, querying SBA’s loan accounting system using the applicant’s Social Security number.

2B. Update the SDB eligibility reviewer checklist to include a review of questions answered affirmatively on the SBA Form 1010.

2C. Develop and implement procedures to ensure that SDB eligibility reviewer write-ups include a discussion to address questions answered affirmatively on the SBA Form 1010.

2D. Develop and implement procedures to ensure that SDB eligibility reviewers recommend denial of SDB certification if a firm or any of its principals do not comply with 13 CFR 124.108(e).

2E. Determine whether the company responding affirmatively to a question on the SBA Form 1010 concerning derogatory financial information, but not providing an explanation, is in violation of 13 CFR 124.108(e).
2F. Give each SDB or its owner found to have defaulted on a Federal Government debt or unresolved tax lien an opportunity to pay back the outstanding obligation. If this is not possible, then de-certify the firm and remove it from the database of SDB firms maintained on the Centralized Contractor Registry (CCR) web site.

Finding 3: Criteria for Managing Agency Records were not Followed.

SBA did not comply with its record management procedures in that files are not adequately safeguarded, and was unable to locate files initially requested during our audit. We found several SDB application files to be missing. Auditors originally requested ten specific files for review, but had to select five additional files because some could not be located. An SDB Program staff member said it took two people two hours to retrieve six out of the ten files originally requested. Additional time was needed to find their replacements due to files being out of order. The missing files were found after the OIG completed its review. One program official indicated that shared facilities and inadequate file space have promoted disorganized records management. Officials also noted that the file room had recently been moved twice and files might have been misfiled during the moves.

According to Standard Operating Procedure (SOP) 0041 2, Records Management Program (p. 9), adequate and proper documentation of Agency decisions should be made and preserved. The SOP also mandates the safeguarding of documents to ensure security and confidentiality for persons directly affected by the Agency's activities.

Missing case files affects the integrity of SBA’s operations and can make SDB re-certification more difficult without the original application documents. Furthermore, the security and confidentiality of SDB applicants’ personal information are not adequately protected if their files are missing. At a minimum, disorganized files promote the inefficient use of staff resources when records cannot be retrieved in a timely manner.

Recommendation

3A. We recommend that the Acting Associate Administrator for Business Development ensure that the SDB application filing system safeguards critical program documents in accordance with SOP 0041 2, Records Management Program.

Finding 4: Program Officials Need to Ensure that the new Database Contains Correct Information.

Officials from the Office of Certification and Eligibility (OCE) did not follow the guidance of OMB Circular A-123 in developing management controls to ensure that reliable information was obtained and maintained. The program office currently uses a database to track the processing of SDB applications. Since the database was designed to be more than a tracking system, it contains numerous data fields in addition to the tracking data. We attempted to use
some of this data to conduct our audit survey, but encountered numerous problems with the reliability and integrity of the information. Examples of such problems included null fields in columns for “net worth” and “adjusted net worth,” incomplete data in other fields, and significantly fewer business owners than businesses contained in the database.

Program officials said they plan to implement a new database and migrate “scrubbed” data from the application tracking system to the new database. Additionally, program participants will be asked to confirm the accuracy of the data. Due to the sheer volume of information that must be cleaned-up, however, the old data may still not be sufficiently accurate to be used reliably after incorporation into the new system.

According to OMB Circular A-123, as Federal employees develop and implement strategies for reengineering agency programs and operations, they should design management structures that help ensure accountability for results, and include appropriate, cost-effective controls. The Circular defines “management controls” as the organization, policies, and procedures used by agencies to reasonably ensure reliable and timely information is obtained, maintained, reported and used for decision making.

During the time period we were reviewing, the Program Office was only using the database for tracking application files. As such, it appears that little if any emphasis was placed on ensuring the accuracy of the data contained in the other fields. Program officials also confirmed that no management controls had been developed to ensure the accuracy of the data, such as a second level review, and there was nothing to prevent an applicant from mistakenly being entered twice. Due to this lack of controls, there is risk that the new database could be corrupted by migrating inaccurate and unreliable data from the application tracking system to the new database.

**Recommendation**

4A. We recommend that the Acting Associate Administrator for Business Development ensure the reliability and integrity of all data in the tracking system before that data is migrated to the new database.

**SBA MANAGEMENT’S COMMENTS**

SBA Management generally agreed with Findings 1, 3, and 4, and with the exception of Recommendation 1C, agreed with all the recommendations contained in those findings. For Recommendation 1C, they did not want to de-certify the firm found unqualified for program participation based on the owner of the firm’s total assets without further investigation. Management stated that the OHA opinion cited in the report “does not mandate a finding of no economic disadvantage, under any circumstances, if an individual has $4.1 million in total assets.” SBA Management wants to further investigate this matter because “there may be other circumstances warranting a finding of economic disadvantage.”
SBA management agreed with the language of Finding 2’s title and the recommendations in that finding, but disagreed with the finding’s premise. Specifically, they disagreed that regulations prohibit applicants with prior Federal loan defaults from participating in the SDB Certification Program. SBA Management agreed that the CFR language states that 8(a) Program eligibility criteria will be used when qualifying as an SDB, unless otherwise stated in the SDB subpart of the regulations. However, they described how two other 8(a) Program eligibility requirements were handled in the SDB subpart of the regulations to demonstrate that it is not at all clear that the CFR portion cited above applies to defaulting on prior federal loans. Specifically, another 8(a) Program eligibility requirement was repeated in the SDB portion of the CFR and it could be argued that this was done “to distinguish it from additional eligibility criteria that are not required for SDB.” Another 8(a) Program eligibility requirement, “good character,” was not included as an exclusion in the SDB portion of the CFR despite the fact that SBA stated in the Federal Register that it was not a requirement for SDB certification. SBA Management requested that we modify the final report to exclude any references to SBA non-compliance with the regulations.

SBA Management also discussed improvements that they have already taken to implement some of the recommendations. At a meeting held at the conclusion of the audit survey, OCE officials noted that they have taken steps to improve processes associated with reviewing, tracking, and filing SDB applications. Specifically, program officials said eligibility reviewers are now using OHA cases as guidance in determining excessive individual income and total asset amounts for economic disadvantage, two levels of review are now employed to strengthen case determinations, a recently issued Standard Operating Procedure (SOP) provides better guidance on many matters, they have received the reference books for peer business performance comparisons, the application backlog has been reduced, and the filing system has been revamped. Additionally, program officials have drafted an SBA Policy Notice to clarify that “good character” and not defaulting on Federal financial obligations are requirements for SDB certification.

**OIG EVALUATION OF SBA MANAGEMENT’S COMMENTS**

Since SBA Management generally agreed with Findings 1, 3, and 4, we have limited our evaluation to the points of disagreement. Specifically, we disagree that SBA needs to further investigate whether the company cited in recommendation 1C should be de-certified. The Program Office “investigated” this issue during the audit and presented us with their written analysis of why they believed the individual was economically disadvantaged. We disagreed that the circumstances included in their analysis warranted a determination that the assets were not excessive, and note that they did not include this analysis in their formal comments to this report. Further, since the *Pride Technologies, Inc.* OHA case found that $4.1 million is an excessive amount of assets, we believe that a subsequent finding that assets nearly 40 percent greater are not excessive would be arbitrary and capricious. As such, we have not changed the recommendation.

We also disagreed with SBA Management’s response to Finding 2. Specifically, our finding applies only to an applicant’s history of one or more defaults on Federal financial
obligations and not to the broader issue of “good character.” The issue of defaulted Federal financial obligations is not otherwise provided in the SDB subpart of the regulations, per 13 CFR 124.1002(a), and it therefore applies in determining an applicant’s qualifications for program certification. As such, we have not modified the finding.

Finally, we agreed with several minor text changes suggested by SBA Management and incorporated those changes into this report.

* * * * *

The recommendations in this audit report are based on the conclusions of the Auditing Division. The recommendations are subject to review, management decision and action by your office in accordance with existing Agency procedures for audit follow-up and resolution.

Please provide us your management decision for each recommendation within 30 days. Your management decisions should be recorded on the attached SBA Forms 1824, “Recommendation Action Sheet,” and show either your proposed corrective action and target date for completion, or explanation of your disagreement with our recommendations.

Should you or your staff have any questions, please contact Robert G. Hultberg, Director, Business Development Programs Group at (202) 205-7577.

Attachments
MEMORANDUM

DATE: October 26, 2004

TO: Robert G. Seabrooks
Assistant Inspector General for Auditing

FROM: Frank J. Lalumiere
Deputy Associate Deputy Administrator
Office of Government Contracting and
Business Development

Al Stubblefield
Acting Associate Administrator
Office of Business Development

RE: Response to Draft Audit Report—Review of the Small Disadvantaged
Business (SDB) Certification Program

Thank you for the opportunity to comment on your review of the SDB certification program. We agree with most of your findings and recommendations, and are already implementing many of the suggested changes to improve our program delivery and management controls.

This office agrees generally with Findings 1, 3, and 4. With regard to Finding 1, we request that the draft report on p.3 accurately reflect the regulations at 13 C.F.R. 124.104(c), by referring to two years' “personal income” rather than “adjusted gross income.” (1st paragraph under Finding 1). This office has already made substantial progress on Recommendations 1A and 1B, as we have already incorporated an examination of an individual's personal income and total assets into SDB analyses and the office has recently received the reference books for the peer business performance comparisons. Regarding Recommendation 1C, this office respectfully disagrees with a recommendation to decertify this firm without further investigation. The decision of the Office of Hearings and Appeals (OHA) referenced in your draft report does not mandate a finding of no economic disadvantage, under any circumstances, if an individual has $4.1 million in total assets. The Pride decision holds that SBA was not arbitrary and capricious in deciding this amount was excessive, in this particular case. It does not hold that SBA must find any amount over $4.1 million to be excessive in all circumstances in the future. Although, as you state in your report, this individual’s assets in the case your office reviewed may “seem excessive,” there may be other circumstances warranting a finding of economic disadvantage, and this office would appreciate an opportunity to further examine this file, in lieu of an automatic decertification. Going forward, as the
analysts are now examining the applications for excessive total assets and excessive personal income, situations such as this are unlikely to arise.

With regard to Finding 3, this office agrees that improvements in our filing system were necessary and agree with Recommendation 3A. In addition to an on-going reorganization of our filing system, copies of all Agency SDB decisions in FY05 are being kept in readily accessible binders in chronological order.

With regard to Finding 4, this office agrees that any new database for the SDB program should contain accurate information and we agree with Recommendation 4A.

However, regarding Finding 2, while agreeing with both the language of your finding, that “SDB Eligibility Reviewers were not Checking for Applicant Past-Due Taxes or Other Delinquent Federal Financial Obligations,” and the recommendations to include this as criteria for SDB certification, this office does not agree with the premise on which this Finding is based. Your report states on p.5 that these actions [not addressing delinquent Federal obligations] “contradicted regulations prohibiting applicants with prior Federal loan defaults from participating in the 8(a) Program and, hence, the SDB Certification Program.” You further state (p.6) that: “the CFR is clear that this requirement applies to the SDB Certification Program.” We respectfully disagree with these two assertions. In fact, it is not at all “clear” from the regulations that this requirement applies to SDB certification.

It is true that 13 CFR 124.1002(a) states that in determining whether a firm qualifies as an SDB, there should be reliance on 8(a) criteria unless otherwise provided in the SDB subpart of the regulations. Citizenship is one of the requirements included in the 8(a) criteria. 13 CFR 124.101 states that an 8(a) firm must be “unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of the United States…” (Emphasis added). However, within the SDB subpart, 13 CFR 124.1002(d) states: “Additional eligibility criteria. Except for tribes, ANCs, CDCs and NHOs, each individual claiming disadvantaged status must be a citizen of the United States.” Therefore, it could be argued that citizenship was specifically included in the SDB criteria to distinguish it from additional eligibility criteria for 8(a) that are not required for SDB. This would include the “other eligibility requirements” included in 13 CFR 124.108, such as good character and Federal financial obligations. This interpretation is bolstered by the history of the SDB regulations. In the Agency’s comments accompanying the promulgation of the Final Rule for the SDB program, the supplementary information included a brief description of an SDB certification decision: “Such a decision will include the ownership and control of the firm, the size status of the firm, and the disadvantaged status of those individuals claiming to be disadvantaged.” 63 FR 35767, 35768 (June 30, 1998). Nowhere does it state that the decision include an examination of character or Federal financial obligations. Further, in the discussion of public comments, SBA explained that the proposed 124.1002(d) would have required SBA to consider the character of individuals claiming disadvantaged status, but the Agency decided against it as a matter of policy, stating that “SBA does not believe that SBA should look at the character of the firm or
individuals claiming disadvantaged status as part of its SDB determination.” 63 FR 35767, 35768 (June 30, 1998). Therefore, the final rule 124.1002(d) included only citizenship, not good character.

As it is not at all clear that examining these criteria has been a regulatory requirement for SDB certification, and to more accurately represent that this would be an Agency policy change to improve our program, we suggest rephrasing the explanation of the finding. This would entail modifying the two assertions referenced above on pages 5 and 6, as well as any other reference to our alleged non-compliance with our regulations. We would also suggest revising the language on p.1 which claims that “SDBs must meet all 8(a) eligibility requirements except that they do not have a ‘potential for success’ requirement and their owners have a higher adjusted net worth dollar limit for program entry,” and the language on p.2 in Survey Results, which asserts that: “Contrary to regulations, eligibility reviewers were also certifying companies as SDBs when their owners had defaulted on government obligations.”

In sum, we do agree with the ultimate conclusion of Finding 2: that examining good character and Federal financial obligations would be a positive improvement to the SDB program. This office is also in agreement with all six recommendations pertaining to Finding 2. In fact, we have a Policy Notice currently in clearance, which would clarify the policy of the Agency to now include character and Federal financial obligations as criteria for SDB. (Note: the draft report erroneously states that the management action includes the drafting of an Information Notice.) Once this Policy Notice is issued, this office will proceed with implementing your recommendations.

We appreciate the opportunity for input and look forward to working with you to maintain the integrity of the SDB program and certification process.
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MBDA Study Finds Capital Access Remains Major Barrier to Success for Minority-Owned Firms

Washington, D.C. (January 29, 2010) – Access to capital remains one of the most important factors limiting the success of minority-owned businesses, inhibiting their ability to grow and create new jobs, according to a new report released today by the U.S. Commerce Department’s Minority Business Development Agency (MBDA). But minority-owned businesses do continue to be the engine of employment in emerging and minority communities. “Disparities in Capital Access Between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs” found that despite limited access to capital, total unemployment during the last recession in 2001 would have been even higher if not for the minority-business community.

“Having access to working capital – capital used to keep operations going and to pay bills – could mean the difference between the success and failure of that business,” said David Hinson, MBDA’s National Director. “The growth of minority-owned firms depends on a variety of capital sources and MBDA is focused on breaking through these barriers in accessing capital to make sure that minority owned businesses are able to reach economic success.

“Last year, MBDA helped minority owned businesses access $800 million in financial packages including loans, bonding and venture capital. Despite this success, there are more firms that could successfully contribute to job creation and our economy if they had the necessary capital for growth.”

Some of the key findings of the report, which was authored by Dr. Robert W. Fairlie and Dr. Alicia Robb, include:

- Minority-owned firms are less likely to receive loans than non-minority-owned firms regardless of firm size. According to an analysis of data from the Survey of Small Business Finances, for firms with gross receipts over $500,000, 52 percent of non-minority-owned firms received loans compared to 41 percent of minority-owned firms.
- When minority-owned firms do receive financing, it is for less money and at a higher interest rate than non-minority-owned firms regardless of the size of the firm. Minority-owned firms paid an average of 7.8 percent in interest rates for loans compared to 6.4 percent for non-minority-owned firms. Among firms with gross receipts under $500,000, minority-owned firms paid an average of 9.1 percent in interest rates compared to 6.9 percent for non-minority-owned firms.
- Minority-owned firms receive smaller equity investments than non-minority owned firms even when controlling for firm size, yet venture capital funds focused on investing in the minority business community are highly competitive. The average amount of new equity investments in minority-owned firms receiving equity is 43 percent of the average of new equity investments in non-minority-owned firms.
- Disparity in total investments in minority-owned firms compared to those in non-minority-owned firms grew after the first year of business operations. According to the analysis of the data from the Kauffman Firm Survey, minority-owned firms investments into their firms were about 18 percent lower in the first year of operations compared to those of non-minority-owned firms. This disparity grew in the subsequent three years of operations, where minorities investments into their firms were about 36 percent lower compared to those of non-minority-owned firms.
- Minority-owned firms have consistently created jobs – with pay at similar levels to those of non-minority owned firms – even during times filled with economic challenges.
- Minority-owned firms’ revenue lags behind non-minority owned firms’ revenue, but their growth in number of firms, total gross receipts, number of employees and total annual payroll far outpaces that of non-minority owned firms. Minority entrepreneurs face challenges (including lower family wealth and difficulty penetrating financial markets and networks) that limit their ability to secure financing for their businesses. Having access to capital would increase the chances of success, help create new jobs and have a positive impact on the U.S. and global economies.

MBDA will be submitting the report to Members of Congress for their use in proposing legislative solutions to the access to capital problem. In addition, MBDA continually reviews programs and services to ensure that minority-owned firms who are clients of our nationwide network of Minority Business Centers are served in ways that meet their financial needs.

Executive Summary - Disparities in Capital Access between Minority and Non-Minority Businesses
Download the full report

About the Minority Business Development Agency (MBDA)
MBDA (www.mbda.gov), U.S. Department of Commerce, serves minority entrepreneurs across America who are building and growing businesses. For the last 40 years, MBDA has promoted the growth and competitiveness of minority-owned firms. These firms are then better equipped to create jobs, impact local economies and compete successfully in domestic and global marketplaces. With a nationwide...
network of nearly 50 business centers and strategic partners, MBDA assists minority entrepreneurs and business owners with consulting services, contract and financing opportunities, bonding and certification services, building business-to-business alliances and executive training.

**MBDA Contact**
Lahne Mattas-Curry, 202-482-4690
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Senator James C. Rosapepe, Co-Chair, Joint Audit Committee
Delegate Guy J. Guzzone, Co-Chair, Joint Audit Committee
Members of Joint Audit Committee
Annapolis, Maryland

Ladies and Gentlemen:

Section 9-1A-35 of the State Government Article of the Annotated Code of Maryland requires the Office of Legislative Audits each fiscal year to audit and evaluate the use of the funds by eligible fund managers who receive grants from the Board of Public Works (BPW) to provide investment capital and loans to small, minority, and women-owned businesses in the State. The grants are to be made from the Small, Minority, and Women-Owned Businesses Account which is funded by 1.5 percent of video lottery terminal proceeds. BPW is to ensure that the fund managers allocate at least 50 percent of the funds to small, minority, and women-owned businesses in the jurisdictions and communities surrounding video lottery facilities.

We conducted an audit of the Account and noted that, as of June 30, 2012, no grants had been made from the Account to fund managers. Accordingly, we recommend that BPW ensure that a grant process for using Account funds is carried out, and grants are awarded to eligible fund managers to accomplish the purpose of the Account. On August 22, 2012, subsequent to our fieldwork, BPW entered into a Memorandum of Understanding with the Department of Business and Economic Development (DBED) for DBED to manage the grants program on BPW's behalf.

We determined that proper accountability had been established over the Account, which had a balance at June 30, 2012 totaling $2,606,388. Receipts into the Account have totaled $4,473,388 for fiscal years 2011 and 2012, and one transfer from the Account of $1,867,000 was made in June 2012 to the Education Trust Fund as specified by law.
We wish to acknowledge the cooperation extended to us during the course of this audit by BPW.

Respectfully submitted,

[Signature]

Thomas J. Barnickel III, CPA
Acting Legislative Auditor
Background Information

Small, Minority, and Women-Owned Businesses Account

During the 2007 special session, the General Assembly enacted legislation to license video lottery terminal (VLT) gaming in Maryland contingent on the legislation being ratified by the voters of the State. In the November 2008 general election, the voters of Maryland ratified a constitutional amendment authorizing VLTs in the State. As a result of the ratification of the constitutional amendment, the Small, Minority, and Women-Owned Businesses Account (Account) was established; the legislation creating the Account was similarly enacted during the 2007 special session. State Law generally requires that 1.5 percent of VLT proceeds be paid into the Account, which is a special, nonlapsing fund administered by the Comptroller of Maryland under the authority of the Board of Public Works (BPW). State Law specifies that the Account is to be used by the BPW to make grants to eligible fund managers to provide investment capital and loans to small, minority, and women-owned businesses in the State, of which at least 50 percent must be allocated to such businesses in the jurisdictions and communities surrounding a video lottery facility. BPW is responsible for ensuring that the fund managers allocate the funds in accordance with the State law.

Video Lottery Facility Licenses and Operations

Licenses have been awarded to operate VLT casinos in Cecil, Worcester, Anne Arundel, and Allegany Counties and Baltimore City. The casinos in Cecil, Worcester, and Anne Arundel Counties began VLT gaming operations on September 27, 2010, January 4, 2011, and June 6, 2012, respectively. VLT gaming operations have not begun in Allegany County and Baltimore City.

Audit Scope, Objectives, and Methodology

Scope and Objectives

Section 9-1A-35 of the State Government Article of the Annotated Code of Maryland requires the Office of Legislative Audits each fiscal year to audit and evaluate the utilization of the funds that are allocated to small, minority, and women-owned businesses by eligible fund managers who received grants from
the BPW. As part of the audit, we also determined that the appropriate amounts were paid into the Account, disbursements or transfers from the Account were properly authorized, and proper accountability was established over the Account.

Our audit was performed 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.

Methodology

To accomplish our objectives, we interviewed employees of the BPW and the Department of Business and Economic Development (DBED), which as of August 22, 2012, was designated by the BPW to manage the grant program authorized by State law. We also reviewed the records maintained by the Comptroller for the Account, including the one transfer from the Account to the Education Trust Fund. Finally, we verified that the amounts transferred into the Account during fiscal years 2011 and 2012 were proper based on the total VLT revenue reflected in the records of the State Lottery Agency. As of June 30, 2012, no grants to any fund managers had been made from the Account.

Our fieldwork was completed during the period from March through July 2012. A copy of the draft report was provided to the BPW. The BPW’s response to our findings and recommendations is included as an appendix to this report. As prescribed in State Government Article, Section 2-1224 of the Annotated Code of Maryland, we will advise the BPW regarding the results of our review of its response.

Conclusions

We concluded that proper accountability had been established over the Account. Specifically, as of June 30, 2012, the Account had been funded as required by law and the one transfer from the Account to another State fund was made in accordance with law. No Account funds had yet been disbursed to fund managers to provide investment capital and loans to small, minority, and women-owned businesses in the State.

Since inception through June 30, 2012, the Small, Minority, and Women-Owned Businesses Account has been properly credited with 1.5 percent of VLT proceeds as specified by law. The Account began receiving funds during fiscal year 2011 when the first VLT facility began gaming operations.
A transfer of $1,867,000 from the Account to the Education Trust Fund was made on June 1, 2012. This transfer was authorized by the enactment of Chapter 1, Laws of Maryland, 2012 Special Session 1 (Budget Reconciliation and Financing Act of 2012).

A summary of Account activity through June 30, 2012, according to the Comptroller’s accounting records, is presented below.

<table>
<thead>
<tr>
<th>Summary of Account Activity</th>
<th>Fiscal Years 2011 and 2012</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Receipts</strong></td>
<td></td>
</tr>
<tr>
<td>Fiscal Year 2011</td>
<td>$1,546,992</td>
</tr>
<tr>
<td>Fiscal Year 2012</td>
<td>2,926,396</td>
</tr>
<tr>
<td><strong>Total Receipts</strong></td>
<td>4,473,388</td>
</tr>
<tr>
<td>Transfer to the Education Trust Fund – June 1, 2012</td>
<td>(1,867,000)</td>
</tr>
</tbody>
</table>

**Findings and Recommendations**

**Grant Awards**

**Finding 1**

As of June 30, 2012, the Board of Public Works (BPW) had not made any grants to fund managers from the Account.

**Analysis**

As of June 30, 2012, the BPW had not made any grants to eligible fund managers from the Account. State law specifies that BPW shall use the Account to make grants to eligible fund managers (entities with significant financial or investment experience) to provide investment capital and loans to small, minority, and women-owned businesses in the State. The law also requires that BPW ensure that eligible fund managers allocate at least 50 percent of the funds to small, minority, and women-owned businesses in jurisdictions and communities surrounding a video lottery facility and set the maximum amount of grant money that each eligible fund manager may use to pay expenses for administrative, actuarial, legal, and technical services.
We were advised by BPW staff that the Department of Business and Economic Development (DBED), at the instruction of the Governor, was in the process of preparing a proposal for BPW to designate DBED as the administering agency for the grant program. BPW staff also advised us that no grants would be made from the Account until BPW has approved a plan from DBED. On August 22, 2012, subsequent to our field work, the BPW entered into a Memorandum of Understanding (MOU) with DBED to have DBED manage the grants program on BPW’s behalf.

Recommendation 1
We recommend that BPW
a. ensure that the MOU grant process for using Account funds is carried out as intended,
b. award grants to fund managers to accomplish the purpose of the Account, and
c. ensure fund managers comply with the related law and applicable grant terms.
October 12, 2012

Mr. Thomas J. Barnickel, CPA
Acting Legislative Auditor
301 West Preston Street, Room 1202
Baltimore, Maryland 21201

Dear Mr. Barnickel:

Our response to the audit report on the Video Lottery Operations Revenue – Small, Minority, and Women-Owned Businesses Account for fiscal years 2011 and 2012 is as follows.

**Audit Finding:** As of June 30, 2012, the Board of Public Works had not made any grants to fund managers from the Account.

**Recommendation:** We recommend that the Board of Public Works:
- ensure that the MOU grant process for using Account funds is carried out as intended;
- award grants to fund managers to accomplish the purpose of the Account; and
- ensure fund managers comply with the related law and applicable grant terms.

**Our Response:** The Board of Public Works agrees with the audit finding and the recommendation. As noted in the audit report, on August 22, 2012, the Board delegated to the Department of Business and Economic Development the authority to procure fund managers and designated DBED to administer the program as the Board’s agent. Currently, DBED is engaged in a competitive process to procure fund managers. Based on the procurement, DBED will recommend proposed awards to the Board for approval. Through its approval process, the Board will make sure that the selections are of fund managers who will accomplish the Account’s purpose. Once fund managers are in place, the Board – through DBED – will likewise ensure that the fund managers comply with State law.

Sincerely,

Sheila McDonald

cc: The Honorable Martin O’Malley
    The Honorable Nancy K. Kopp
    The Honorable Peter Franchot
AUDIT TEAM

Stephen C. Pease, CPA
Audit Manager

Terry S. Gibson
Senior Auditor
REPORT OF THE INSPECTOR GENERAL'S OFFICE:

******************************************************************************

REVIEW OF THE MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE PROGRAM

MAY 2010
May 20, 2010

To the Mayor, Members of the City Council, the City Clerk, the City Treasurer, and the residents of the City of Chicago:

Enclosed is a review of the City’s minority and women-owned business enterprise program.

1. Background

Mayor Harold Washington began an affirmative action program for City contracts in 1985 by executive order. The minority and women-owned business enterprise (MWBE) program was continued through successive mayoral administrations and an ordinance codifying the City’s program into law was passed in 1990. The scope of the MWBE program is extremely large. Since 1991, the City has reported over $9.5 billion in awarded contracts to MWBEs, an average of over $500 million a year.

2. Summary of Findings

Over the past several years, the IGO has conducted numerous investigations examining fraud, abuse, and mismanagement in the MWBE program. Recently, the IGO conducted a program review to analyze how actual participation in the program compares to the participation statistics that are reported to the City Council and the public.

Our investigations and analysis have revealed broad and pervasive deficiencies in the administration of the City’s MWBE program and that the City cannot determine whether or not the program is achieving its goals. As a result, the program has been beset by fraud and unlawful brokers, and MWBE participation is likely far less than the publicly reported participation statistics. Specifically, the IGO found that:

- Fraud, abuse, and mismanagement are widespread in the MWBE program. Recent sustained or soon to be sustained IGO investigations into the MWBE program have involved contractors that have been awarded over $1 billion in City contracts since 2003.

---

1 In the review we use the term “MWBE program” to refer to the City’s affirmative action contracting program and the term “MWBE(s)” to refer to all firms that participate in the program.
• Our analysis of construction contracts that ended in 2008 found that actual payments to MWBEs and Disadvantaged Business Enterprises (DBEs) were over 15 percent less (more than $19 million) than the City’s publicly reported statistics for the contracts we reviewed. Were the over-reporting for 2008 applied to the over $2.5 billion in construction contracts reportedly awarded to MWBEs and DBEs since 1995, actual participation in all the City’s construction contracts, between 1995 and 2008, has been $400 million less than the City’s publicly reported participation statistics.

• Non construction contracts comprise the majority (70% of the dollar value) of reported MWBE participation awarded since 1995. For these contracts, due to the historical lack of auditing of non-construction participation, the lack of rigor in the auditing process that was recently put in place, and the prevalence of fraud and abuse in the program, it is likely that actual participation is also significantly lower in non-construction than the publicly reported participation.

• Many of the problems in the MWBE program are attributable to the City’s poor administration of the program. Specifically, the administrative deficiencies include:
  
  o Not collecting, analyzing, or reporting data on actual payments to MWBEs.
  o Lack of cooperation between City departments in administering the program.
  o Failure to track payments to MWBEs as contracts are performed.
  o Mistakes in assessing actual MWBE participation.
  o Laxness in determining eligibility for the program.
  o Insufficient resources devoted to the program’s administration.

The City’s failure to collect all relevant data, its inconsistent application of the program’s rules and regulations, and a lack of cooperation between the user departments and the Department of Procurement Services (DPS) have all contributed to the program’s poor administration. Despite a lawsuit challenging the program’s constitutionality and several high-profile scandals involving the program, these failings have not been corrected. The MWBE program requires continuous oversight and analysis, yet the City has failed to successfully address the program’s problems as they have arisen.

3. Summary of Recommendations

The failings of the program cannot and should not be blamed on a single person or a single department, and therefore no single policy change can fix the program. First and foremost, the City must collect and report data on actual payments to MWBEs. While better data reporting will help the program better accomplish its goals, the City must also improve the administration of

---

2 Disadvantaged Business Enterprises (DBEs) refers to a federal affirmative action contracting program and is only applicable on certain federally-funded contracts.

3 From 1995 through 2004 this figure includes DBE awards. From 2005 through 2008 DBE awards are excluded.

4 DPS was the principal program administrator for much of its history. In October 2009, the Mayor transferred most aspects of the program administration and oversight to the Office of Compliance. The analysis period for this report precedes the transfer. However, the problems detailed have not abated since the transfer and, if anything, have grown worse.
the program. The administration needs to rigorously enforce the program’s rules and regulations and ensure that participants act in good faith. Specifically, the City must:

- Track and report actual payments to MWBEs.
- Increase cooperation between City departments to properly administer the program.
- Require more detailed documentation of payments to MWBEs.
- Consider directly paying subcontractors.
- Clearly define and consistently apply MWBE regulations.
- Increase resources for program administration.
- Increase enforcement of penalties for non-compliance with MWBE commitments.

Going forward, the City must confront the longstanding problems that plague the program, which is a cornerstone of City economic and social policy. To do this, the City must engage in rigorous, continuous analysis of how the program is administered and of the program’s effectiveness and there must be a commitment from all parts of City government to the program’s goals, including, most notably, from the user departments that execute the City’s contracts. By doing so, the City will ensure that the program is run effectively and efficiently and that MWBE participants are receiving all the benefits of the program to which they are entitled.

Respectfully,

Joseph M. Ferguson
Inspector General
City of Chicago
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EXECUTIVE SUMMARY

1. Background

For nearly 40 years, affirmative action programs in government contracting have been in place in the United States. The purpose of these programs is to remedy the effects of past or current discrimination by establishing a level playing field in the awarding of government contracts. The programs were initially aimed at minority-owned business enterprises (MBEs) and have since grown to include women-owned business enterprises (WBEs) and other “disadvantaged” business enterprises (DBEs). In Chicago, Mayor Harold Washington began an affirmative action program for City contracts in 1985 by executive order. The Minority and Women-owned Business Enterprise (MWBE) program was continued through successive mayoral administrations and an ordinance codifying the City’s program into law was passed in 1990. The scope of the MWBE program is extremely large. Since 1991, the City has reported over $9.5 billion in awarded contracts to MWBEs, an average of over $500 million a year.

In response to patterns revealed through several major investigations concerning the City’s MWBE program, the Inspector General’s Office (IGO) analyzed the program’s management and administration. Additionally, the IGO analyzed how actual participation in the program compares to the participation statistics that are reported to the City Council and the public. Our analysis and findings are described in this report. The analysis is based on IGO investigations that have been conducted over the last several years; reviews of audits conducted by the Department of Procurement Services (DPS); interviews with City employees; reviews of the regulations and ordinances governing the program; and reviews of hundreds of City contract files.

2. Summary of Findings

The following sections detail findings from our investigations and analysis of the MWBE program.

(A) Investigations Have Uncovered Pervasive Fraud and Abuse of the Program

The IGO has uncovered numerous instances of City vendors abusing the MWBE program. Since 2005, IGO investigations have resulted in recommendations that 15 MWBEs be decertified and/or debarred. Currently, the IGO has over 30 open administrative or criminal investigations.

---

1 In this report we will use the term “MWBE program” to refer to the City’s affirmative action contracting program and the term “MWBE(s)” to refer to all firms that participate in the program. The program includes three separate categories: Minority-owned Business Enterprises (MBEs), Women-owned Business Enterprises (WBEs), and Business Enterprises owned by People with Disabilities (BEPDs). We use the term MWBE because MBEs and WBEs are by far the two largest parts of the City’s program. BEPDs are a small subset of the overall program with only 13 BEPDs currently certified out of a total program size of over 2,500 firms. Disadvantaged Business Enterprises (DBEs) refers to a federal affirmative action contracting program and is only applicable on certain federally-funded contracts.

2 In this usage, participation means payments to MWBEs in accordance with the program’s rules and regulations.
related to the MWBE program. Recent IGO sustained or soon to be sustained investigations into fraud, abuse, and mismanagement in the MWBE program involve contractors that were awarded over $1 billion in City contracts (either as prime contractors or as subcontractors) since 2003.

The investigations have revealed that there are two major ways that MWBE participation is falsified: front companies and pass-throughs. A front company asserts that it is an MWBE, when, in reality, the company and its profits are actually controlled by a non-minority male.

Pass-throughs are situations in which an MWBE gets a City contract (or more often gets a subcontract with a prime contractor) but instead of performing the work themselves, the MWBEs contract with one or several non-MWBEs that carry out the contract. In this way, payments are routed through MWBEs to create the appearance of MWBE participation, but in actuality, non-MWBEs receive the contract dollars.

In addition to front companies and pass-throughs, this office has uncovered abuse of the program by brokers to create the illusion of MWBE participation. Brokers, who are excluded by law from the program, are defined as “a person or entity that fills orders by purchasing or receiving supplies from a third party supplier rather than out of existing inventory, and provides no commercially useful function other than acting as a conduit between a supplier and a customer.”

(B) Actual Payments to MWBEs Are Likely Significantly Lower than Publicly Reported Statistics

The IGO conducted an analysis of the MWBE program to review how actual participation in the program compared to reported participation. DPS has publicly reported participation in the MWBE program based on awarded contracts and not on payments actually made to MWBEs. DPS has internally audited individual City contracts to determine how much MWBEs are paid, but the results of these audits are not collected or analyzed.

Because of this lack of analysis and data collection, the publicly reported statistics do not accurately represent program results and performance. A 1998 analysis of the City’s program found that actual payments made to MWBEs were less than the amounts promised in the original contracts. During the 2003 trial in which the constitutionality of the City’s program was challenged, the City’s own lawyer argued that the publicly reported participation statistics overstate the program’s impact.

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3 It is important to note that some of these investigations have been referred to the IGO by the administration and further that the administration has initiated certain decertifications and debarments on its own initiative.
4 An IGO investigation is sustained when the preponderance of the evidence establishes that misconduct has occurred.
6 In October 2009, the Office of Compliance (Compliance) assumed responsibility for most aspects of MWBE program administration.
Our analysis included 66 construction contracts that ended in 2008. Twenty-two of the contracts had DBE requirements, while 44 had MWBE requirements. The contracts had a combined final value of approximately $385 million. The DBE contracts had a combined value of $150 million, while the MWBE contracts were worth $235 million.

We calculated the publicly reported MWBE participation for this set of contracts and compared it to what DPS’s internal audits determined was the actual participation based on contract spending. Within DPS’s audits, we found a number of mistakes that overstated actual MWBE participation. Correcting for these mistakes, we calculated actual participation using the underlying documentation based on DPS’s rules and regulations.

Our analysis determined that actual participation for construction contracts was over 15 percent less (more than $19 million) than the publicly reported statistics. Among MBEs, the actual participation was 22 percent lower than award and among WBEs, the actual participation was almost 32 percent lower. In the DBE contracts we reviewed, actual participation was essentially the same as the publicly reported participation. Focusing on the 44 contracts in which the City’s MWBE requirements were applied, actual participation for MWBEs was over 24 percent less than the publicly reported participation statistics.

The chart below compares the MWBE and DBE participation at contract award and the actual participation according to the IGO’s analysis.

<table>
<thead>
<tr>
<th>Table- MWBE and DBE Participation in Construction Contracts Ending in 2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>Participation in $ Based on Contract Award</td>
</tr>
<tr>
<td>DBE</td>
</tr>
<tr>
<td>MBE</td>
</tr>
<tr>
<td>WBE</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

Source: IGO

Were the over-reporting for 2008 applied to the over $2.5 billion in construction contracts awarded to MWBEs and DBEs since 1995, actual MWBE and DBE participation in all the City’s construction contracts, between 1995 and 2008, has been $400 million less than the publicly reported participation statistics.

The conservatively estimated actual rate of participation of 15 percent less than the publicly reported statistics still probably exaggerates actual MWBE participation. Given the pervasive

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9 DBE requirements are affirmative action contracting goals that are applied to certain federally-funded contracts, while MWBE requirements are applied to all other contracts, with the exception of sole source and emergency contracts.

10 From 1995 through 2004 this figure includes DBE awards. From 2005 through 2008 DBE awards are excluded.
fraud and abuse of the program we have observed during the course of our investigations, it is highly likely that actual participation is significantly lower than the reduced participation observed in our review. The laxness in the City’s certification and compliance processes makes it likely that our analysis credits participation to ineligible firms that have engaged in yet undiscovered abuses of the MWBE program. Additionally, the documentation - lien waivers - that we used to determine actual participation can easily be and, as revealed in numerous IGO investigations, has been manipulated to overstate participation.

For non-construction contracts, which comprise the majority of program contracts and spending (70% of program dollars), we were unable to estimate actual participation in part because the City has only recently begun attempting to audit such contracts, and is still unable to audit every non-construction contract. Also, the underlying documentation for non-construction audits is less rigorous than for construction audits. In the audits we did review, we found a number of discrepancies.

Although we were unable to estimate actual participation in non-construction, due to the historical lack of auditing of non-construction participation, the lack of rigor in the auditing process that was recently put in place, and the prevalence of fraud and abuse in the program it is likely that actual participation is also significantly lower in non-construction than the publicly reported participation.

(C) Problems with Program Administration

IGO investigations and analysis have identified multiple problems with the way the MWBE program is administered. The Lowry Report, which provided the initial justification for the MWBE program, cautioned that the administration of an affirmative action contracting program “is a hands-on process that requires close scrutiny and instant response to issues before they become major problems.”11 The City’s program does not meet this standard. Our investigations and analysis have revealed that the MWBE program is poorly administered and the administration cannot determine whether or not it is achieving its goals. One DPS official aptly summed up the program as “a lot of paperwork and pushing paper.”12 The result of this substandard administration is that the program has been beset by fraud and brokers, and MWBE participation is likely far less than the publicly reported statistics.

One of the program’s most fundamental problems is that although the City audits individual contracts to examine actual participation, it does not collect and analyze data on actual payments to MWBEs or track actual participation as contracts progress, lending an overall appearance that achieving the program’s economic and social goals is not the hallmark of program administration, but rather simply hitting the numbers to meet public reporting requirements. This makes it extremely difficult to analyze the program’s true impact and to ensure that City vendors maintain their commitments to the MWBE participation goals.

12 Interview #1.
The practice of reporting participation based on contract awards has resulted in inaccurate and unrealistic projections and promotion of the program’s achievement. Because the participation statistics are the main criteria by which the program is evaluated by the City Council and the public, the success of the MWBE program is judged by the public and the City Council on a set of metrics that are currently unreliable.

The documentation that the administration uses to audit actual payments to MWBEs is often insufficient and can be easily manipulated to overstate MWBE participation. For construction contracts, the lien waivers that are used to document payments that are going to MWBE subcontractors are often unreliable. Recent investigations have revealed instances where MWBEs submitted lien waivers that made it appear that they received payments far in excess of what they actually received. MWBEs may do this because prime contractors, which exercise control (and thus leverage) over the size and timing of payments to their subcontractors, make it a requirement of payment or in exchange for a fee.

For non-construction contracts, payments are verified through the attestations of prime contractors and MWBEs. However, affidavits from prime contractors and subcontractors are susceptible to exploitation by contractors that want to overstate participation. Like the problems with the lien waiver process described above, MWBEs could be easily influenced to overstate how much they were paid by prime contractors, who could make this overstatement a condition of payment. The fact that DPS has accepted what a prime contractor reports if the MWBE subcontractor itself does not report how much it was paid makes it even easier for prime contractors and/or subcontractors to overstate participation. Prime contractors could overstate participation in what they report to DPS, while MWBE subcontractors could simply not respond and DPS would conclude that the prime contractor’s reported payments are accurate.

There is little cooperation between City departments in administering the program. This problem stems from a pervasive belief in the user departments that the MWBE program is solely the responsibility of DPS. The limited cooperation between DPS and the user departments has contributed to a lack of access to timely information, a failure to monitor actual MWBE participation as contracts are performed, duplicative data collection, and a greater administrative burden for the City’s vendors. It also has made it less likely for the administration to uncover front companies, brokers, and pass-throughs.

In the course of our investigations and program analysis, we have found glaring mistakes in how firms are certified. During one firm’s application process for the MWBE program, a site visit by a DPS certification officer revealed that the firm was likely a broker. However, the certification officer’s site visit report concludes by saying “as I mentioned to [the firm’s owner], put a strong paperwork package together for [the certification officer].” The implication of this report is that despite strong evidence that the applicant firm is a broker; DPS will certify the firm anyway provided it can make itself look legitimate on paper. The firm went on to be certified, and has since received tens of millions of dollars in City contracts. In the certification process for

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13 User departments refer to the departments that manage project work performed under contract with the City.
14 Certified means that the firm was given MWBE status.
15 Per the City’s Municipal Code, Sec. 2-92-480, brokers are not allowed to participate in the MWBE program.
another firm, we uncovered mistakes in how a firm’s annual gross receipts\textsuperscript{17} were calculated. These mistakes led to the continued certification of this firm although it should have graduated\textsuperscript{18} from the program. Due to this mistaken certification, this firm has been credited with tens of millions of dollars of participation that should have gone to eligible MWBEs.

In auditing payments to MWBEs, we found numerous instances of DPS over-counting participation. Although documentation revealed that firms were acting as pass-throughs, DPS compliance officers nevertheless counted these firms’ participation. Program compliance officers also often over-counted the participation of MWBE suppliers in construction contracts in contradiction of the program’s regulations. In one contracting area, the compliance officer did not use the proper documentation to audit payments to MWBEs. Instead, this officer relied on documentation that other DPS officials view as unreliable. As a result, DPS was unable to uncover massive shortfalls in participation on one of the City’s largest contracts.

Part of the reason for these mistakes is the administration has not complied with and meaningfully enforced its own rules and regulations regarding the program. In certain areas, the administration has issued incomplete regulations that lead to confusion among City personnel about how to administer the program. In interviewing DPS personnel, we sometimes received different, often contradictory, interpretations of the program’s regulations.

For construction and non-construction contracts, we found that the City does not typically set contract-specific MWBE goals, but rather applies the same MWBE goals to each contract. This practice ignores the varying availability of MWBEs in different industries and variations in subcontracting opportunities on different contracts. Thus, unrealistically high goals are set on some contracts, while inadequate goals are set on others.

While the construction and non-construction ordinances give the City the authority to charge penalties to firms that fail to meet MWBE participation commitments, the major contracting departments do little to enforce unmet MWBE commitments, and consequently, there appear to be few repercussions for contractors that fail to meet their commitments. In response to data requests, the City’s major construction contracting departments all reported that they had no record of penalties being charged from the beginning of 2005 through May 2009. In the past, a City department assessed penalties based on underutilization of MWBEs. However, the IGO has been informed by a City employee\textsuperscript{19} that in 2001 the Department of Law directed this department to stop assessing penalties related to the MWBE requirements.\textsuperscript{20}

Lastly, we found that the 2010 budget of the Office of Compliance (Compliance), which was transferred responsibility for most aspects of the program’s administration in October 2009, does

\textsuperscript{17}This is a key criterion for MWBE certification. Firms that exceed an annual gross receipts limit are ineligible for the program.

\textsuperscript{18}Graduation from the MWBE program occurs when either a firm’s annual gross receipts or the personal net worth of the firm’s owner, exceed the program’s eligibility criteria.

\textsuperscript{19}Interview #4.

\textsuperscript{20}The IGO requested documents from the Department of Law (Law) relating specifically to advice provided to DPS not to collect penalties for non-participation. Law invoked attorney-client privilege, thus leaving the IGO without adequate information to assess the basis of the directive to DPS to suspend pursuit of ordinance-prescribed penalty assessments.
not provide sufficient resources to administer the program. Program administration under Compliance is being attempted with 7 budgeted positions and a half-million dollar contract budget to conduct all MWBE certifications and all post-contract award MWBE compliance. By comparison, in 2009, DPS was budgeted 12 positions in certification alone. The history of the program makes clear that with this limited budget and staffing, Compliance will not be able to: properly scrutinize firms that attempt to become MWBE (or DBE) certified, conduct any meaningful assessment of actual MWBE participation on City contracts, or address any of the major deficiencies in the program’s administration detailed above. A recent interview with a City official confirmed that Compliance is struggling to simply keep up with the volume of MWBE certification-related work, let alone improve the City certification process, and has only one staff member assessing actual MWBE participation on all the City’s contracts. Given the resources allocated to Compliance in the 2010 budget, the fraud, abuse, and mismanagement that have plagued the program since its inception are all but assured to continue unabated.

3. Summary of Recommendations

The failings of the program cannot and should not be blamed on a single person or a single department, and therefore no single policy change can fix the program. Rather, what are needed are both a rigorous program administration and a commitment from all parts of City government to the program’s goals, including, most notably, from the user departments which manage the City’s contracts. In the following sections, we offer a series of recommendations to help the program better fulfill its mission.

(A) Improvements in Data Collection and Reporting

The City must make a number of improvements in the collection and reporting of data regarding the MWBE program. Compliance must begin tracking actual payments to MWBEs and all subcontractors and report this data to the City Council and the public. DPS was already conducting audits of contracts to determine actual participation. However, it did not collect or analyze this data. Instead, each audit was stored individually in the files associated with each contract. Compliance must collect and report the results of the audits it conducts. Finally, the user departments must begin electronically filing documents related to contracts in order to provide the compliance officers, who assess MWBE participation as contracts progress, with timely access to information.

(B) Improvements in Administration

The City must take several steps to improve the administration of the program. First, the City’s leadership and the officials who administer the program must not view the MWBE program as merely “pushing paper”, but rather as a means of achieving the program’s important social and economic policy objectives.

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21 We assume for the purpose of our analysis, notwithstanding the recent transfer of Hiring Compliance from the Office of Compliance (Compliance) to our office, that MWBE certification and post-award contract compliance will remain situated in Compliance. Our recommendations apply regardless of where the City decides to base MWBE program administration from this point forward.
I. Improved Payment Verification

In order to properly verify actual payments to MWBEs, the administration has to collect better documentation from the City’s vendors. Currently, the verification process often relies on documentation that can easily be and has been manipulated to overstate MWBE participation. At a minimum, the administration must require contractors to submit canceled checks to verify what MWBEs are actually paid.

In lieu of improved verification from the contractors, the City should consider directly paying subcontractors which would eliminate most of the uncertainty about how much MWBEs are being paid, which would in turn decrease the administrative burden on the grossly understaffed MWBE compliance unit. Direct payment of subcontractors would also ensure that MWBEs and other small firms would get paid faster. This is especially important for MWBEs, which often have limited access to credit and are, on average, smaller that their non-MWBE counterparts. Finally, direct payment would have the further benefit of reducing the ability of prime contractors to withhold payments from subcontractors, which is sometimes used as leverage by unsavory prime contractors to induce over-reporting of MWBE participation.

II. More Inter-Departmental Cooperation

In order for the MWBE program to improve, it must be better integrated into the City’s contracting process. The program and its various components (certification, contract-specific goal setting, and assessing actual participation) cannot function if they are operated in a vacuum, disconnected from all other aspects of contract administration. Rather, each component of the MWBE program needs to rely on information and expertise from the personnel who let and manage the City’s contracts.

Specifically, Compliance and DPS need greater cooperation from the City’s user departments, which must play a greater and more substantively engaged role in the administration of the program. Greater collaboration between the user departments, DPS, and Compliance would enable the administration to more quickly identify shortfalls in MWBE participation and more accurately assess the validity of MWBE participation as contracts are performed.

The user departments should monitor and report on MWBE participation as contracts are performed. Because of their day-to-day management of City contracts, user departments are best suited to fulfill this role. Another way to increase the involvement of user department contract managers would be to have them certify that, to the best of their knowledge; the documents that contractors submit to detail MWBE participation accurately reflect the work each subcontractor performed. This requirement will help establish that the user departments are partly responsible for the program’s administration.

A more far-reaching step would be to embed MWBE compliance officers in each major user department. These officers could train contracting personnel on MWBE issues and help them better identify MWBE problems as they arise. Rather than have these MWBE compliance officers report to the user department, these officers could report directly to the head of MWBE compliance in the Compliance department. This would better ensure that the officers all have a
uniform understanding of the MWBE regulations and that MWBE administration is standardized across departments.

III. Consistently Apply Program Regulations

Compliance must improve the certification and compliance functions of the program. Currently, certification officers are more focused on ensuring that firms simply complete all the required documentation rather than scrutinizing and assessing the validity of this documentation. Going forward, certification officers must more thoroughly review the legitimacy of applications for the program. The compliance unit assessing MWBE participation needs to have a better understanding of the contracts it monitors and be able to better validate the information that firms submit. In both certification and compliance, the administration needs to more consistently apply the rules and regulations that govern the program.

IV. Increase Contract Specific Goal Setting

For construction and non-construction contracts, the City must set MWBE goals on a contract-specific basis. Different City contracts allow for varying degrees of MWBE participation, yet the City generally applies the same contracting goals to every contract. This ignores industry differences in MWBE availability and variations in subcontracting opportunities on different contracts. In order to ensure a program that better conforms to actual MWBE contracting opportunities, the City must set MWBE goals for individual contracts based on the availability and capacity of MWBEs in individual industries.

V. More Resources for Program Administration

To properly oversee the program substantially more resources must be devoted to its administration. Although the City is under great fiscal strain, if more resources are not devoted to MWBE administration, the almost certain result is the continued fraud and misadministration of millions of dollars that should be directed to the service of the important social and economic goals of the program.

VI. Changes in Regulations

The administration must change several specific regulations of the program. Currently, the treatment of spousal income in determining a firm’s eligibility creates a loophole that can easily be and has been abused by front companies or by wealthy owners who hide assets in their non-eligible spouse’s name. This loophole should be closed by including a full accounting of spousal income in the personal net worth calculation.

Additionally, the City has been ineffective at preventing brokers from participating in the program. The City should follow the lead of the State of Illinois and amend its broker policy so that it allows brokers to participate in the program but only count their commissions as MWBE participation. By only counting broker commissions as participation, the City can reduce its own, as well as non-MWBE firms’ incentive to use brokers.
4. Conclusion

Our investigations and analysis have revealed that the MWBE program is poorly administered and that the City cannot determine whether or not the program is achieving its goals. Part of the result of this substandard administration is that the program has been beset by fraud and brokers, and MWBE participation is likely far less than the publicly reported statistics.

The City’s failure to collect relevant data, its inconsistent application of the program’s rules and regulations, and a lack of cooperation between the user departments and DPS have all contributed to the program’s poor administration. Despite a lawsuit challenging the program’s constitutionality and several high-profile scandals involving the program, these failings have not been corrected. The MWBE program requires continuous oversight and analysis, yet the City has not successfully addressed the program’s problems as they have arisen.

Going forward, the City must confront the problems that plague the program. To do this, there must be a commitment from all parts of City government to the program’s goals and rigorous, continuous analysis of how the program is administered and of the program’s effectiveness.
A. **CHICAGO’S MWBE PROGRAM**

1. **Initial Program**

The City’s inaugural foray into affirmative action in government contracting began in 1983, when Mayor Harold Washington “established a goal of at least 25 percent combined M/WBE participation on all city contracts.”\(^\text{22}\) In 1985, through an executive order, this goal was formally mandated and the City’s Minority and Women-owned Business Enterprise (MWBE) program was created.\(^\text{23}\) The rationale for the program’s creation was that “there exists a statistically significant disparity between the minority and female populations of the City of Chicago and both the number of minority-owned and women-owned businesses in the City and the number of such businesses being awarded City contracts.”\(^\text{24}\) This disparity was attributed to “long standing social and economic barriers impairing women and minorities.”\(^\text{25}\) The Order defined minorities as “blacks; Hispanics, regardless of race; Asian-Americans and Pacific Islanders; American Indian and Alaskan Native.”\(^\text{26}\) A Minority-owned business (MBE) or Women-owned business (WBE) was defined as “a business which is at least 51% owned” by minorities or women and “whose management and daily operations are controlled” by minorities or women.\(^\text{27}\) In order to rectify this disparity, the City established “a goal of awarding not less than 25% of the annual dollar value of all City contracts to qualified MBEs and 5% of the annual dollar value of all City contracts to qualified WBEs.”\(^\text{28}\)

When Mayor Richard M. Daley took office in April 1989, he re-issued the Executive Order. However, in that same year, in the *City of Richmond v. J.A. Croson Co*\(^\text{29}\), the Supreme Court ruled an affirmative action contracting program unconstitutional because the City of Richmond did not provide enough evidence to justify its program [For more on this decision, See Appendix A- History of Affirmative Action in Government Contracting]. This ruling threatened to invalidate programs around the country, including the Chicago program. In response to the Court’s decision in *Croson*, Mayor Daley appointed a blue-ribbon panel to study the City’s program. In March 1990, the panel concluded that “the city’s existing set-aside goals were ‘appropriate and sustainable’ under the *Croson* decision.”\(^\text{30}\) In 1990, after a series of hearings that marshaled evidence for the program’s existence, the City Council passed an ordinance that made the MWBE program law. The ordinance kept in place the same goals that were enacted by Mayor Washington’s initial executive order. The ordinance was passed “shortly before U.S. District Court Judge Milton I. Shadur was expected to declare the program unconstitutional.”\(^\text{31}\)

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\(^{23}\) City of Chicago. Executive Order 85-2.
\(^{24}\) Id.
\(^{25}\) Id.
\(^{26}\) Id.
\(^{27}\) Id.
\(^{28}\) Id.
\(^{31}\) Id.
Because the lawsuit was based on the initial executive order, the City Council “passage of the ordinance made the court case moot.”

2. Builders Association of Greater Chicago v. City of Chicago

In 1996, the Builders Association of Greater Chicago (BAGC) challenged the constitutionality of the City’s MWBE program as it related to construction contracts. In 2003, a federal court held that Chicago’s program did not meet the constitutional standard set forth by the Supreme Court’s Croson decision. The court found that while the City had a compelling interest to remedy past racial discrimination in the construction industry, the program was no longer “narrowly tailored” to simply remedy the effects of that discrimination. The court cited a number of factors that made the City’s program too broad: it did not sunset; few firms graduated from the program; and few waivers from the goals were granted. While the court found the City’s program unconstitutional, court implementation of the decision was stayed for six months to give the City time to create a more narrowly tailored program.

3. The 2004 Revision of the Construction Program

In response to the Builders decision, the City convened a Task Force to recommend how to change the program. In March 2004, the Task Force held public hearings “during which over 60 witnesses from community groups, businesses, associations and other interested parties, testified.” The Task Force was responsible for reaching out to constituents affected by the program and recommending the best ways to improve it. The City also conducted a statistical study in order to examine the extent of the discrimination in the Chicago construction industry and to determine what the contracting goals of the program should be, based on the availability of minority and women-owned firms.

This study outlined the criteria by which the City should judge whether discrimination exists in the construction (or any other) industry. Through a statistical regression analysis, the study calculated the advantage/penalty to the owner of a construction firm who had certain racial and gender characteristics. An owner of a construction firm was defined as anybody who was self-employed in the industry. The study found that, when controlling for all other characteristics, being African American, Hispanic or a woman, had a negative effect on the earnings of the self-employed in construction in Chicago. The author of the study concluded that this statistical analysis is “the concrete measure of the penalty imposed on those who are not non-minority males.”

In addition to establishing this concrete measure of discrimination, the study used census data to calculate the availability of minority and women-owned construction firms in Chicago. First, the study calculated the percentage of the self-employed who were African American or Hispanic in

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35 Id., pg. 89.
Chicago construction. Second, it adjusted this initial estimate of availability upwards because African American and Hispanic owned firms rely more heavily on government sales than their white-owned counterparts. Because the study sought an availability estimate for MWBEs attempting to sell to the government, it believed it was appropriate to make this adjustment. After this adjustment, the study calculated the availability, and thus the goal, of minority-owned firms at 24.2 percent. For women-owned firms, the study simply took the self-employment percentage of women, 3.9 percent, and did not adjust this figure.

In June 2004, the City passed an amended ordinance that changed the MWBE program as it applied to construction contracts. The program as applied to other City contracts had not (and still has not) been challenged in court and thus was not amended. Based on the study discussed above, the goals were set at 24 percent for minority-owned firms and 4 percent for women-owned firms. The legislation implemented a personal net worth limit of $750,000 for owners of certified firms and an annual gross receipts limit for certified firms based on the Small Business Administration’s (SBA) small business size standards. The ordinance was amended in 2006 to raise the personal net worth threshold to $2 million dollars (since increased to $2.04 million due to inflation). Also, the ordinance was amended so that it would sunset after five years, in December 2009.

4. The 2009 Reauthorization of the Construction Program

After the revamped ordinance was adopted, the City was required to review the program periodically and to continue to examine ongoing statistical evidence for the program’s goals. In 2009, before the City Council debated a reauthorization of the MWBE construction ordinance, the City commissioned another statistical analysis of the City’s construction industry. This study found the City’s construction industry largely unchanged from five years earlier. All else equal, there remained a penalty attached to being a minority or a woman in construction self-employment.

Instead of using census data, the availability calculation in this study was based on Dun and Bradstreet (D&B) data and found a much smaller number of minority and women-owned firms in construction. The author believed that this is partly a result of the D&B data not always labeling the racial and gender characteristics of firms. After adjusting for this mislabeling, the study found the availability of minority-owned construction firms to be 13.3 percent and 11.8 percent for women-owned firms. The study then made two adjustments to the minority-owned firm availability. Like the previous study, it adjusted the number upwards for the greater reliance of African American and Hispanic-owned firms on sales to the government. This resulted in a MBE figure of 14.6 percent.

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38 Id., pg. 48.
41 Id., pg. 89.
42 Id., pg. 102.
The second adjustment was a “but-for” adjustment, which attempted to determine the availability of minority-owned firms if there had not been past discrimination in the industry. This adjustment was only applied to the African American and Hispanic availability figures because the author believed there was not statistical evidence to warrant an adjustment for women or other minority-owned firms.43 The result of the “but-for” adjustment was a large increase in the MBE availability to 24 percent.44

While the author determined that the availability of women-owned firms was 11.8 percent in the construction marketplace in Chicago, he argued that the WBE goal should remain at its previous level of 4 percent. The author’s rationale for setting the WBE goal at 66 percent less than the availability estimate was that he did not find strong statistical evidence that women-owned construction firms experience discrimination in Chicago.

On July 29, 2009, the City Council reauthorized the program through 2015. The only changes to the program were the addition of Native Americans as a disadvantaged group and an interim review scheduled for 2012.

5. Non-construction Program

While the construction component of the City’s MWBE program has undergone changes and revisions due to the Builders case, the program as it applies to non-construction contracts has largely been unchanged since its inception in 1990. The largest subsets of non-construction contracts are work services, commodities, and professional services. The ordinance establishes an overall goal in non-construction contracts of 25 percent for MBEs and 5 percent for WBEs.45 While construction is the largest single area of MWBE participation, taken together the different types of non-construction contracts accounted for over 63 percent of the total dollar amount of MWBE participation reported in 2008, in terms of contract awards.

There are several differences between the construction and non-construction program. While non-construction limits the annual gross receipts a participating firm can receive, this limit is generally higher than the limit in construction. The limit in non-construction was set at $27 million in 2000 and is adjusted annually for inflation (it is almost $34 million for 2010), while the construction program’s limit is based on the SBA small business size standards, which for most construction industries is lower.46 There is no personal net worth limit for participation in the non-construction program. There is a target market program in non-construction, while there is not one in construction.47 The chart below highlights the differences between the two programs.

44 Id., pg. 104.
46 For some industries, the SBA size standards rely on employee headcounts rather than annual gross receipts.
47 After the 2004 revision to the construction ordinance, the Target Market program was ended in construction contracts.
### Table 1- Comparing the Construction and Non-construction MWBE programs

<table>
<thead>
<tr>
<th>Program Characteristics</th>
<th>Construction</th>
<th>Non-construction</th>
</tr>
</thead>
<tbody>
<tr>
<td>MBE Goal</td>
<td>24 percent</td>
<td>25 percent⁴⁸</td>
</tr>
<tr>
<td>WBE Goal</td>
<td>4 percent</td>
<td>5 percent</td>
</tr>
<tr>
<td>Limit on firm owner's personal net worth</td>
<td>$2.04 million</td>
<td>None</td>
</tr>
<tr>
<td>Limit on firm's annual gross receipts</td>
<td>SBA small business size standards by industry (Generally, $14 million for specialty trade contractors and $33.5 million for building and civil construction)</td>
<td>Nearly $34 million in 2010. Adjusted annually for Inflation</td>
</tr>
<tr>
<td>Time period over which to calculate gross receipts</td>
<td>5 years</td>
<td>3 years</td>
</tr>
<tr>
<td>Reserve contracts for MWBEs (Target Market)</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Goals based on statistical evidence</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Sunset Provision</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

### (A) Target Market Program

Within non-construction contracts, the City has a Target Market program, which directs contracts to MWBEs. This program reserves a percentage of the City’s contracts and limits participation to MWBEs.⁴⁹ Contracts are not eligible for the program unless “there are at least three qualified MBEs or WBEs interested in participating in that type of contract.”⁵⁰ Through the Target Market program, DPS has a goal of awarding 10 percent of all City non-construction contracts to MBEs and 1 percent to WBEs.⁵¹ This program was formerly in place for construction contracts but was discontinued in 2004 when the MWBE construction program was revamped.

The table below shows the amount of contracts that were awarded through the Target Market program from 1993-2004.

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⁴⁸ This MBE goal and the WBE goal on the line below are the Citywide MWBE goals for non-construction contracts. The individual contracting goals inserted in the contract language of each non-construction contract are a minimum of 16.9% for MBEs and 4.5% for WBEs.


⁵⁰ *Id.*, 2-92-460.

⁵¹ *Id.*, 2-92-420.
Table 2- Contracts Awarded thru Target Market 1993-2004

<table>
<thead>
<tr>
<th>Year</th>
<th>Contracts awarded to MBEs thru Target Market in $</th>
<th>Contracts awarded to WBEs thru Target Market in $</th>
<th>Contracts awarded to MWBEs thru Target Market in $</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>$19,954,071</td>
<td>$3,926,393</td>
<td>$23,880,464</td>
</tr>
<tr>
<td>1994</td>
<td>$38,191,137</td>
<td>$4,995,926</td>
<td>$43,187,063</td>
</tr>
<tr>
<td>1995</td>
<td>$40,843,479</td>
<td>$11,894,337</td>
<td>$52,737,816</td>
</tr>
<tr>
<td>1996</td>
<td>$24,040,765</td>
<td>$9,840,803</td>
<td>$33,881,568</td>
</tr>
<tr>
<td>1997</td>
<td>$49,798,732</td>
<td>$7,640,192</td>
<td>$57,438,924</td>
</tr>
<tr>
<td>1998</td>
<td>$39,917,079</td>
<td>$10,734,772</td>
<td>$50,651,851</td>
</tr>
<tr>
<td>1999</td>
<td>$54,688,487</td>
<td>$9,176,745</td>
<td>$63,865,232</td>
</tr>
<tr>
<td>2000</td>
<td>$109,135,104</td>
<td>$18,584,215</td>
<td>$127,719,319</td>
</tr>
<tr>
<td>2001</td>
<td>$94,613,498</td>
<td>$38,790,070</td>
<td>$133,403,568</td>
</tr>
<tr>
<td>2002</td>
<td>$171,211,359</td>
<td>$24,343,469</td>
<td>$195,554,828</td>
</tr>
<tr>
<td>2003</td>
<td>$146,246,903</td>
<td>$44,816,880</td>
<td>$191,063,783</td>
</tr>
<tr>
<td>2004</td>
<td>$75,559,058</td>
<td>$18,844,425</td>
<td>$94,403,483</td>
</tr>
</tbody>
</table>

Source of 1995-2004 data: DPS MWBE Fact Sheets

Does not include pending TM awards

B. SCOPE OF CHICAGO’S MWBE PROGRAM

The table below details the broad scope of the MWBE program. Since 1991, the administration has reported that over $9.5 billion in City contracts has been awarded to MWBEs. Over this period, the reported MWBE participation has averaged 36 percent of the total value of the contracts awarded, although it has fluctuated from an annual low of 30 percent to a high of 45 percent.

It is important to note that these figures exclude Public Building Commission and Tax-Increment Financing (TIF) funded contracts. Also, there are no MWBE requirements on sole source and emergency contracts. Therefore, the City does not count the value of these contracts when it calculates the percentage of contract dollars going to MWBEs.

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52 Data prior to 2005 include DBE participation. Data from 2005 through 2008 does not include DBE participation.
53 City spending via direct vouchers (spending not attached to a City contract) also does not have MWBE requirements. A recent May 2010 IGO audit found that City spending via direct vouchers rarely went to MWBEs. (http://www.chicagoinspectorgeneral.org/pdf/igo_audit_direct-vouchers.pdf last accessed May 19, 2010)
### Table 3- Contracts Awarded to MWBEs 1991-2008

<table>
<thead>
<tr>
<th>Year</th>
<th>Contracts Awarded in $</th>
<th>Contracts Awarded to MBEs in $</th>
<th>MBE %</th>
<th>Contracts Awarded to WBEs in $</th>
<th>WBE %</th>
<th>Contracts Awarded to MWBEs in $</th>
<th>MWBE %</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>$598,534,397</td>
<td>$159,497,925</td>
<td>26.65%</td>
<td>$42,488,075</td>
<td>7.10%</td>
<td>$201,986,000</td>
<td>33.75%</td>
</tr>
<tr>
<td>1992</td>
<td>$583,342,997</td>
<td>$175,781,712</td>
<td>30.13%</td>
<td>$28,207,092</td>
<td>4.84%</td>
<td>$203,988,804</td>
<td>34.97%</td>
</tr>
<tr>
<td>1993</td>
<td>$864,877,697</td>
<td>$213,178,649</td>
<td>24.65%</td>
<td>$62,701,650</td>
<td>7.25%</td>
<td>$275,880,299</td>
<td>31.90%</td>
</tr>
<tr>
<td>1994</td>
<td>$798,284,700</td>
<td>$199,601,200</td>
<td>25.00%</td>
<td>$46,462,700</td>
<td>5.82%</td>
<td>$246,063,900</td>
<td>30.82%</td>
</tr>
<tr>
<td>1995</td>
<td>$681,258,600</td>
<td>$205,142,600</td>
<td>30.11%</td>
<td>$63,284,500</td>
<td>9.29%</td>
<td>$268,427,100</td>
<td>39.40%</td>
</tr>
<tr>
<td>1996</td>
<td>$1,050,738,400</td>
<td>$272,238,500</td>
<td>25.91%</td>
<td>$90,640,800</td>
<td>8.63%</td>
<td>$362,879,300</td>
<td>34.54%</td>
</tr>
<tr>
<td>1997</td>
<td>$1,043,112,300</td>
<td>$256,158,700</td>
<td>24.56%</td>
<td>$77,199,700</td>
<td>7.40%</td>
<td>$333,358,400</td>
<td>31.96%</td>
</tr>
<tr>
<td>1998</td>
<td>$1,480,495,300</td>
<td>$439,260,700</td>
<td>29.67%</td>
<td>$160,130,300</td>
<td>10.82%</td>
<td>$599,391,000</td>
<td>40.49%</td>
</tr>
<tr>
<td>1999</td>
<td>$1,982,993,600</td>
<td>$512,459,100</td>
<td>25.84%</td>
<td>$177,503,400</td>
<td>8.95%</td>
<td>$689,962,500</td>
<td>34.79%</td>
</tr>
<tr>
<td>2000</td>
<td>$1,147,369,900</td>
<td>$378,455,200</td>
<td>32.98%</td>
<td>$104,186,400</td>
<td>9.08%</td>
<td>$482,641,600</td>
<td>42.07%</td>
</tr>
<tr>
<td>2001</td>
<td>$1,912,152,100</td>
<td>$499,265,000</td>
<td>26.11%</td>
<td>$140,264,700</td>
<td>7.34%</td>
<td>$639,529,700</td>
<td>33.45%</td>
</tr>
<tr>
<td>2002</td>
<td>$1,513,257,072</td>
<td>$478,425,596</td>
<td>31.62%</td>
<td>$140,700,067</td>
<td>9.30%</td>
<td>$619,125,663</td>
<td>40.91%</td>
</tr>
<tr>
<td>2003</td>
<td>$1,289,576,213</td>
<td>$460,458,388</td>
<td>35.71%</td>
<td>$125,726,475</td>
<td>9.75%</td>
<td>$586,184,863</td>
<td>45.46%</td>
</tr>
<tr>
<td>2004</td>
<td>$911,558,749</td>
<td>$280,926,249</td>
<td>30.82%</td>
<td>$63,842,526</td>
<td>7.00%</td>
<td>$344,768,775</td>
<td>37.82%</td>
</tr>
<tr>
<td>2005</td>
<td>$2,016,981,666</td>
<td>$465,072,670</td>
<td>23.06%</td>
<td>$138,858,000</td>
<td>6.88%</td>
<td>$603,930,670</td>
<td>30.94%</td>
</tr>
<tr>
<td>2006</td>
<td>$3,150,950,174</td>
<td>$876,788,972</td>
<td>27.83%</td>
<td>$205,159,351</td>
<td>6.51%</td>
<td>$1,081,948,323</td>
<td>34.34%</td>
</tr>
<tr>
<td>2007</td>
<td>$2,941,915,658</td>
<td>$722,678,127</td>
<td>24.56%</td>
<td>$219,585,886</td>
<td>7.46%</td>
<td>$942,264,013</td>
<td>32.03%</td>
</tr>
<tr>
<td>2008</td>
<td>$2,437,266,418</td>
<td>$722,934,714</td>
<td>29.66%</td>
<td>$312,153,681</td>
<td>12.81%</td>
<td>$1,035,088,395</td>
<td>42.47%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$26,404,665,941</strong></td>
<td><strong>$7,318,324,002</strong></td>
<td>27.72%</td>
<td><strong>$2,199,095,303</strong></td>
<td>8.33%</td>
<td><strong>$9,517,419,305</strong></td>
<td>36.04%</td>
</tr>
</tbody>
</table>

Source: DPS MWBE Fact Sheets and Miscellaneous DPS Records; Figures may not sum to total due to rounding

The **Contracts Awarded in $** does not include certain contracts that are excluded from the MWBE participation statistics. Most notably, sole-source and emergency contracts are not included in these values.

While the above figures represent contract awards and not actual payments, they demonstrate that the MWBE program is one of the City’s largest economic development tools. By comparison, the 2010 budget for the Department of Community Development, which is the City department primarily tasked with promoting economic development, is $354 million.54

The chart below plots MBE and WBE participation as a percentage of all contract dollars awarded from 1991 to 2008. The chart demonstrates the fluctuations in participation in both categories over the 18-year period.

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54 City of Chicago. Annual Appropriation Ordinance for 2010. pg. 441. This does not include TIF spending.
1. Participation by Ethnicity

The table below shows the average MWBE participation in terms of contract awards by ethnicity since 1991.

<table>
<thead>
<tr>
<th>Ethnicity/ Category</th>
<th>Dollar Value of Contracts Awarded</th>
<th>Percentage of Value of Total Contracts Awarded</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American</td>
<td>$2,990,271,768</td>
<td>11.32%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>$2,662,645,211</td>
<td>10.08%</td>
</tr>
<tr>
<td>Women (Non-Minority)</td>
<td>$1,836,092,958</td>
<td>6.95%</td>
</tr>
<tr>
<td>Asian</td>
<td>$1,652,397,791</td>
<td>6.26%</td>
</tr>
<tr>
<td>DBE</td>
<td>$266,038,726</td>
<td>1.01%</td>
</tr>
<tr>
<td>Non-Designated/Other</td>
<td>$109,976,726</td>
<td>0.42%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>$9,517,423,181</td>
<td>36.04%</td>
</tr>
</tbody>
</table>

Source: DPS Fact Sheets; Figures may not sum to total due to rounding.

Prior to 2005, DPS's statistics for the DBE program were not broken down by ethnicity. Thus, in this table all DBE awards appear as a single line. Data from 2005-2008 does not include DBE data.

Note: Due to several minor discrepancies in DPS Fact Sheets, the total contract value shown in Table 4 does not reconcile to the total contract value in Table 3. The difference is $3,876.

While African Americans have the highest share of MWBE participation over the last 18 years, their share of awarded contracts has declined in recent years. The chart below shows the
percentage of MWBE participation by ethnicity. As the chart demonstrates, the participation of African American firms peaked in 2001 and then declined over the next several years before rebounding somewhat in 2008. Hispanic participation has fluctuated significantly but reached its peak in 2008. Asian participation has trended upwards over the last 18 years although there was a significant drop off in 2008. Non-minority women participation has remained fairly consistent but increased dramatically in 2008.

2. Participation in Construction

Construction is the largest contract area of the MWBE program. The table below details MWBE participation in awarded construction contracts from 1995-2008 broken down by ethnicity. The table shows that in percentage terms Hispanics have accounted for over a third of the program’s total participation over the last 14 years.
### Table 5- Construction Contracts Awarded to MWBEs 1995-2008 by Ethnicity/ Category

<table>
<thead>
<tr>
<th>Ethnicity/ Category</th>
<th>Dollar Value of Construction Contracts Awarded</th>
<th>Percentage of Total Construction Contracts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hispanic</td>
<td>$920,346,586</td>
<td>14.16%</td>
</tr>
<tr>
<td>African American</td>
<td>$594,479,418</td>
<td>9.14%</td>
</tr>
<tr>
<td>Women (Non-Minority)</td>
<td>$461,923,658</td>
<td>7.10%</td>
</tr>
<tr>
<td>Asian</td>
<td>$447,134,590</td>
<td>6.88%</td>
</tr>
<tr>
<td>DBE or Non-Designated</td>
<td>$130,279,478</td>
<td>2.00%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>$2,554,163,730</strong></td>
<td><strong>39.28%</strong></td>
</tr>
</tbody>
</table>

Source: DPS Fact Sheets. Data before 1995 was unavailable; Figures may not sum to total due to rounding

Note: Prior to 2005, DPS’s statistics for the DBE program were not broken down by ethnicity. Thus, in this table all DBE awards appear as a single line. Data from 2005-2008 does not include DBE data.

### 3. Participation in Non-Construction

Non-construction contracts account for two-thirds of the City’s procurement dollars. The table below shows MWBE participation in non-construction contracts from 1995 through 2008. In non-construction, African Americans have accounted for over one-third of the total MWBE participation over the last 14 years.

### Table 6- Non-construction Contracts Awarded to MWBEs 1995-2008 by Ethnicity/ Category

<table>
<thead>
<tr>
<th>Ethnicity/ Category</th>
<th>Dollar Value of Construction Contracts Awarded</th>
<th>Percentage of Total Construction Contracts</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American</td>
<td>$2,044,630,695</td>
<td>11.99%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>$1,502,460,454</td>
<td>8.81%</td>
</tr>
<tr>
<td>Women (Non-Minority)</td>
<td>$1,226,848,314</td>
<td>7.19%</td>
</tr>
<tr>
<td>Asian</td>
<td>$1,068,187,841</td>
<td>6.26%</td>
</tr>
<tr>
<td>DBE or Non-Designated</td>
<td>$193,208,845</td>
<td>1.13%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>$6,035,336,149</strong></td>
<td><strong>35.38%</strong></td>
</tr>
</tbody>
</table>

Source: DPS Fact Sheets. Data before 1995 was unavailable; Figures may not sum to total due to rounding

Note: Prior to 2005, DPS’s statistics for the DBE program were not broken down by ethnicity. Thus, in this table all DBE awards appear as a single line. Data from 2005-2008 does not include DBE data.

### C. Research on the Impact of Chicago’s MWBE Program

Research on the impact of Chicago’s MWBE program has been limited. There are several reasons for this including, difficulties isolating the program’s impact on the broader economy, data on payments to subcontractors not being collected, and the lack of formal program evaluations. A discussion of the program’s impact is discussed below. [For a discussion of research on the impact of affirmative action in government contracting nationally, see Appendix B.]
1. Research on Benefits

The MWBE program’s goal is to remedy the effects of past discrimination by establishing a level playing field in the awarding of government contracts. This is accomplished by directing City contracts to MWBEs, which, in turn, is supposed to generate demand for MWBEs, which will “spur their creation and enhance their success.”

(A) Increase in Contracts Awarded to MWBEs

The MWBE program has likely increased the share of contracts being awarded to MWBEs. In 1984, the year before the program began, 19.2 percent of the dollar value of all City contracts was awarded to MWBEs. In 2008, the City awarded over 42% of the dollar value of its contracts to MWBEs. In construction, MBE participation at contract award in 1984 was 11.3 percent. Today, it stands at over 40 percent. Even though these data reflect contract awards and not actual payments, it is highly likely that a larger portion of the City’s contract dollars are going to MWBEs today than when the program began.

(B) Program’s Impact on Economic Development of Minority and Women-Owned Businesses Is Unclear

In terms of spurring the creation of MWBEs, data show that the self-employment rates of African-Americans, Hispanics, and white women has grown relative to the self-employment rates of white men. In all lines of business, between 1989 and 1999, the self-employment rates for African-Americans, Hispanics, and white women in the Chicago area grew while the rates for white men declined. In the construction industry, the self-employment rates of African-Americans and Hispanics grew substantially, while for white men there was only a slight increase. The self-employment rate of white women in construction in the Chicago-area barely changed between 1989 and 1999.

The increase in relative self-employment rates points to the increased business formation of MWBEs. Since these gains occurred while the MWBE program was in place, the data is consistent with the hypothesis that by directing contracts to MWBEs the program “is encouraging small-business formation and self employment entry among groups targeted by the preferences.” However, “there is no way of proving this linkage with the existing data. This reduction in self-employment disparity could be explained by broader economic factors and researchers have not yet isolated the impact of the MWBE program on these changes in relative self-employment rates.

57 Id., Exhibit 3-4.
59 Id., pg. 21.
60 Id., pg. 22.
61 Id., pg. 22.
2. Criticism of the Program

(A) Publicly Reported Statistics Overstate Participation

A criticism of the program is that the administration’s practice of reporting contract award data as opposed to actual payment data overstates MWBE participation. In the Builders trial, the City’s own lawyer argued “that the city’s publicly announced figures on minority contracting should be ‘greeted with great skepticism’ and ‘do not accurately portray the real economic impact’ of the program.”\(^{62}\) A 1998 study by a City consultant tracked actual payments to MWBEs, who were prime contractors and had been awarded contracts in 1992. The study found that “discrepancies between reported awards and actual payouts work to reduce the MBE and WBE share of procurement spending.”\(^{63}\) While conducted in 1998, this study was not revealed to the City Council until 2004 during the debate over reforming the MWBE construction program.\(^{64}\) In response some aldermen called for reporting payout information. However, the City still reports participation based on contract awards.

(B) Fraud and Abuse of the Program Has Been Widely Reported

Since its inception, a problem with the City’s program has been the existence of front companies. Even before Mayor Washington’s Executive Order was issued, the Lowry report noted that as the Washington administration instituted an increased focus on MWBE participation a number of questionable firms certified themselves as MWBEs.\(^{65}\) In 1989, the Better Government Association released a study that showed rampant fraud throughout the program and despite the official statistics far less money was going to minority and women-owned businesses. Scandals in the 1990s continued to trouble the program.\(^{66}\) Over the past several years, there have been several prominent instances of firms abusing the City’s MWBE program. In 2005, the United States Attorney charged that “the politically connected Duff family used its matriarch and a trusted black associate to pose as fronts for phony women- and minority-owned businesses in a massive, decade-year fraud that garnered more than $100 million in contracts from the City of Chicago.”\(^{67}\) Two years later, Duff pleaded guilty to charges of racketeering and was sentenced to nine years in prison.\(^{68}\)

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D. **ADMINISTRATION OF MWBE PROGRAM**

The City’s MWBE program was until recently administered by the Department of Procurement Services (DPS). In October 2009, the Office of Compliance (Compliance) assumed responsibility for the majority of the program’s administration.\(^{69}\) However, because the program also relates to the City’s other contract management functions, the user departments\(^{70}\) have played and will continue to play a role in its administration. Compliance will now certify firms for the program and monitor post contract-award compliance with the MWBE goals. DPS will retain responsibility for MWBE goal setting and compliance at contract award. The administrative process described in this section also applies to the DBE program\(^{71}\) that the City administers. This section describes the administration of the program as it is supposed to occur under the program’s rules and regulations. Deficiencies in the conduct of the program administration are detailed in Section G.

1. **Initial Certification of Firms**

The certification unit is tasked with certifying firms for the City’s MWBE program, as well as for the federal DBE program. In order to be certified as an MWBE, an applicant firm must meet several criteria. First, it must establish that the majority ownership and day-to-day control is held by a member of a disadvantaged group as defined by the MWBE ordinance or demonstrate that individually the owners have been socially disadvantaged through prejudice.\(^{72}\) A firm must demonstrate that it is independent, viable, and has the expertise to perform the work in the area it is seeking certification. To participate in the construction program, an applicant owner must document that his or her personal net worth is under $2.04 million and that the firm’s gross receipts do not exceed the small business size standards set forth by the SBA.\(^{73}\) For non-construction contracts, there is no personal net worth limit and the annual gross receipts limit is nearly $34 million for 2010.\(^{74}\)

The certification process begins with an applicant firm submitting detailed documentation to prove that it meets the program’s requirements. These documents include tax records for the firm and the owner, banking, payroll, and loan information, office and equipment leases, agreements with manufacturers (if the applicant wants to supply materials), and other records. Certification officers review these documents to determine whether an applicant meets the program criteria. In addition to document reviews, the certification officers may, at their discretion, interview applicant owners and conduct site visits at the firms’ places of business.

2. **Annual Recertification**

Once certified, a firm’s certification remains valid for five years. However, each year the firm must annually submit documentation to demonstrate that it remains eligible for the program. If

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\(^{69}\) The analysis period for this report precedes the transfer.

\(^{70}\) User departments refer to the departments that manage project work performed under contract with the City.

\(^{71}\) The DBE program is applicable on certain federally-funded contracts.


\(^{73}\) *Id.*, 2-92-670.

\(^{74}\) *Id.*, 2-92-420.
nothing that would affect the firm’s certification has happened over the preceding year, a firm submits a “No Change Affidavit” where it states that “no changes in the circumstances of (firm’s name) affecting it’s [sic] ability to meet the minority and/or women and/or disabled owned status, ownership or control of requirements of… the amended Municipal Code.” Owners are also required to annually submit both their firm’s and their personal tax returns to show that they continue to meet the personal net worth limit, where applicable, and gross receipts requirements.

3. MWBE Compliance at Contract Award

The other administrative component of the MWBE program is contract compliance. During the contract award process, compliance officers work to ensure that the contract complies with the MWBE participation goals.

Each City contract has several documents related to the City’s MWBE program (or DBE program if the contract is funded by the U.S. Department of Transportation). The Schedule C-1 details a prime contractor’s commitment to use specific MWBE subcontractors on the contract. If the prime contractor is itself an MWBE, a Schedule C-1 is still completed. It describes what service the MWBE will perform on the contract and what dollar value it is estimated to receive for these services. Attached to this schedule is a current certification letter from the City that documents that the MWBE is currently certified and lists the services for which it is certified. A separate Schedule C-1 is completed for each MWBE. The Schedule C-1s are completed and signed by the MWBEs.

The Schedule D-1 summarizes the prime contractor’s commitment to all the MWBEs that will work on the contract. It lists each MWBE and an estimate of what it will be paid and is completed and signed by the prime contractor. The document adds up the estimate of what will be paid to MBEs and WBEs and calculates the MWBE percentages based on the overall contract value. It is these percentages that form the basis of the MWBE participation numbers that DPS reports to the City Council and the public. The compliance officers review these documents to ensure “that the work for which the subcontractors have been identified is within their area of specialty, and that their certification is current.”

While the majority of the responsibility for the program was transferred to Compliance, DPS retains the responsibility for goal setting and analyzing compliance at contract award. DPS also retains responsibility for identifying Target Market solicitations and evaluating MWBE waiver requests.

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75 City of Chicago. MBE/WBE/BEPD No Change Affidavit.
4. Tracking Actual Participation

Once contract performance begins, user departments are supposed to monitor the ongoing participation of MWBEs on City contracts.\textsuperscript{78} Payments to MWBEs are supposed to be tracked using Subcontractor Payment Certifications (Certification forms), which are submitted with each invoice by prime contractors to the user departments.\textsuperscript{79} These documents detail how much money will be paid to all subcontractors (including MWBEs) on each invoice and are the basis of the subcontractor payment information that is reported on DPS’s contract payment website.\textsuperscript{80}

In addition to the Certification forms, on construction contracts, prime contractors are also required to submit Status Reports of MBE/WBE Subcontract Payments (Status Reports) with each monthly invoice. Although these documents are submitted to user departments, the procurement manual provides that contractors will not be paid “until the current Status Report has been filed with DPS”.\textsuperscript{81}

One difference between the Certification forms and the Status Reports is that the Status Reports only detail payments to MWBEs, while the Certification forms detail payments to all subcontractors. Another difference is that the Certification forms contain only the amount each subcontractor will be paid on the particular invoice to which the form is attached, while the Status Reports contain the same information (for each MWBE) and in addition provide a cumulative total of how much each MWBE has been paid to date under the contract.

On non-construction contracts, the procurement manual directs contractors to submit DBE/MBE/WBE Utilization Reports (Utilization Reports) at least on a quarterly basis.\textsuperscript{82} These reports detail the amount paid to date to each MWBE (or DBE in the case of certain federally-funded contracts) and what service each MWBE (or DBE) is performing. These documents are supposed to be submitted to DPS’s (now Compliance’s) compliance unit.\textsuperscript{83}

5. Auditing of Construction Contracts

When it was responsible for assessing actual MWBE participation, the compliance unit in DPS maintained a compliance file on each contract containing information relating to MWBE compliance. This included correspondence between the compliance unit and prime contractors and subcontractors, the initial compliance plan, and in the case of construction contracts, lien waivers. The files also contained the MWBE audits that determine if contractors are in compliance with the MWBE goals at the end of contracts.

\textsuperscript{80}(http://webapps.cityofchicago.org/VCSearchWeb/org/cityofchicago/vcssearch/controller/agencySelection/begin.do last accessed April 28, 2010)
\textsuperscript{82} Id., pg. 99.
\textsuperscript{83} Id., pg. 99.
For the City’s construction projects, as for any construction project in Illinois, contractors and laborers who work on the project are entitled to place a mechanic’s lien on a project in order to ensure payment for their work.\(^{84}\) Once contractors and laborers are paid, they give lien waivers as a receipt documenting that they have been paid and waive their right to place a lien on the project. These lien waivers establish a paper trail of actual monies received by each firm on a construction project.

Lien waivers form the basis of the compliance unit’s audits of actual MWBE participation. These audits consist of analyzing the lien waivers on each construction project to determine how much MWBEs have been paid on a given project and if these amounts conform to the percentages that the prime contractor committed to at the beginning of the contract.

### 6. Evaluating MWBE Participation on Construction Contracts\(^{85}\)

To be credited for MWBE participation, a firm must provide a commercially useful function in relation to the project work being performed.\(^{86}\) “A MBE or WBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project, through which funds are passed in order to obtain the appearance of MBE or WBE participation.”\(^{87}\) Specifically, the regulations state that:

“If a MBE or WBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the MBE or WBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, it is presumptively not performing a commercially useful function.”\(^{88}\)

Once it has been established that a firm is providing a commercially useful function, the compliance unit must determine how much actual participation each MWBE has achieved. Particularly in construction contracts, MWBEs often enter into business relationships with non-MWBE firms (e.g., supplier agreements or subcontracts) and these business relationships must be evaluated by the compliance unit in calculating MWBE participation. These regulations apply whether the MWBE is a prime contractor or subcontractor. When an MWBE is itself a subcontractor and subcontracts with other firms, these other firms are referred to as 2\(^{nd}\) tier (or further) subcontractors. (They are referred to as 2\(^{nd}\) tier (or further) because they are two (or more) contracting levels away from the prime contractor.)

The overarching principle of these regulations is that only the work actually performed by the certified firm’s own forces should be counted toward participation.\(^{89}\) The regulations dictate that leased equipment, supplies, and materials that an MWBE purchases and uses itself should count

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\(^{85}\) The City’s MWBE regulations governing construction contracts are based on the federal DBE program’s regulations.
\(^{86}\) City of Chicago. “Special Conditions Regarding Minority Business Enterprise Commitment and Women Business Enterprise Commitment in Construction Contracts.” Section IV- G.
\(^{87}\) *Id.*, Section IV- G-2
\(^{88}\) *Id.*, Section IV- G-3
\(^{89}\) *Id.*, Section IV- A.
as participation. However, any work that an MWBE subcontracts to a non-MWBE firm should not count as participation.

(A) Supplier Participation

The regulations also define compliance standards for firms that act solely as regular dealers or suppliers, that is, firms that only provide goods and perform no labor on a contract. In this instance, 60 percent of the cost of materials or supplies purchased from an MWBE supplier should be counted toward MWBE goals. However, if an MWBE manufactures the products it is supplying then 100 percent of the value of the goods it is providing should be credited to MWBE participation.

7. Auditing of Non-Construction Contracts

The assessments of non-construction contracts rely on less complete documentation. Because lien waivers are not used on non-construction contracts, compliance officers request affidavits from both prime contractors and subcontractors in order to determine MWBE participation. Compliance officers reconcile the payments that prime contractors report to the payments that MWBE subcontractors report receiving. If there is a disagreement, officers follow up with both parties and make a determination. However, if compliance officers do not receive a response from subcontractors they accept what the prime contractor reports, generally without scrutiny. Once they have established how much MWBEs received, the officers determine if there is a shortfall between the MWBE commitment made at the beginning of a contract and the actual payments made to MWBEs.

(A) Indirect Participation

One of the differences between construction and non-construction contracts is that in non-construction, firms sometimes meet the MWBE requirements through indirect participation. Indirect participation allows City contractors to achieve MWBE participation on City contracts by purchasing goods or services from MWBEs that are not directly funded by the City contracts. However, the goods and services purchased from the MWBE must be related to the City contract, in that the contractor would not need these goods or services if he/she had not won the City contract. Indirect participation is commonly used to purchase vehicles, janitorial, and accounting services.

(B) Supplier Participation

In the non-construction program, the participation of MWBE suppliers or dealers is treated differently than in the construction program. In construction, the participation of MWBE

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90 City of Chicago. “Special Conditions Regarding Minority Business Enterprise Commitment and Women Business Enterprise Commitment in Construction Contracts.” Section IV- A. For example, a MWBE certified painting company will receive credit for the purchase of paint and related supplies that it utilizes on the contract.
91 Id., Section IV- C.
92 Id., Section IV- D.
suppliers is counted at 60 percent of the overall value of the goods obtained. However, in non-construction DPS counts 100 percent of an MWBE’s supplier’s contract as MWBE participation.

<table>
<thead>
<tr>
<th>Table 7- Evaluating MWBE Participation in Construction vs. Non-construction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Documentation submitted to DPS to verify participation</td>
</tr>
<tr>
<td>Lien Waivers</td>
</tr>
<tr>
<td>Indirect participation</td>
</tr>
<tr>
<td>Treatment of supplier participation</td>
</tr>
</tbody>
</table>

8. Consequences of Non-participation

If a contractor fails to meet the MWBE goals to which it has agreed, both the construction and non-construction ordinances give the City the right to collect penalties from the contractor equal to the amount of the shortfall between the amount committed to MWBEs and the amount actually paid.

An additional consequence of non-participation is that, in the event of a shortfall, the compliance officer notifies the prime contractor in writing that it has not achieved the MWBE commitment and that the subcontractor has a right to arbitration to collect the difference between the committed amount and the amount actually paid. Letters are sent to the MWBE subcontractors informing them of the shortfall and their right to arbitration.

9. Improvements to MWBE Administration

In 2009, DPS began to implement a web-based system, called Certification and Compliance (C2), to help in the administration of the MWBE program. The goals of C2 are to streamline the administrative burden of the program and make the monitoring process less paper intensive. Currently, monitoring compliance involves mailing documents to prime contractors and subcontractors. In turn, DPS, when it was responsible for monitoring MWBE compliance, received information from prime contractors and subcontractors almost exclusively in paper format. This meant that DPS must manually enter almost all the data it uses to track MWBE compliance.

C2 will enable Compliance (which now has responsibility for monitoring MWBE compliance) to better monitor reported MWBE compliance on an ongoing basis by having prime contractors enter their payments to subcontractors online. Once entered an email will be automatically generated and sent to the subcontractor for it to confirm that the prime contractor’s reported

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93 By non-construction ordinance, we are referring to the section of the ordinance from section 2-92-420 through 2-92-570. This section of the ordinance governs the MWBE program as it applies to all non-construction contracts, while section 2-92-650 through 2-92-780 governs the MWBE program as it applies to construction contracts.
payment is accurate. Administration officials believe that this will help to ensure better auditing of non-construction contracts in particular because it will increase the responsiveness of subcontractors. C2 will collect the results of reported payments to MWBEs in a single database, which should allow Compliance to report actual payments to MWBEs. Currently, the audits that track actual payments are stored individually with each contract and not analyzed or collected.

10. Transfer of MWBE Administration to Compliance

In October 2009, the City transferred the administration of the MWBE program from DPS to Compliance. The transfer made Compliance “responsible for all post-award contract monitoring and the City’s M/WBE Certification Program.” However, DPS continues “to evaluate compliance at the Bid submittal and pre-award contract stage.”

The 2010 budget outlines the resources that Compliance has to administer the program. The table below compares the 2009 appropriation for DPS to administer the entire program and the 2010 budget for Compliance to administer the majority of the program. While DPS retained the pre-award MWBE compliance functions, it is unclear from the 2010 Budget how many staff are devoted to these functions.

<table>
<thead>
<tr>
<th>Table 8- MWBE Administrative Budget Comparison</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
<tr>
<td>Funding (all funds)</td>
</tr>
<tr>
<td>Total Funded Salaries</td>
</tr>
<tr>
<td>Funded Salaries as a Percentage of Total Budget</td>
</tr>
<tr>
<td>Budgeted Positions</td>
</tr>
</tbody>
</table>

Source: 2009 and 2010 Program and Budget Summary
Source: 2010 Budget Recommendations
Note: Funded salaries do not include reductions in personnel spending due to furloughs and partial government shut down days

The table shows that the administration gave Compliance half the resources allocated to DPS in 2009, while being assigned responsibility for the majority of the administrative functions of the program. Compliance has a staff of 7 and a contract budget of $500,000 to administer all of certification and post-award compliance monitoring. By comparison, in 2009, DPS was budgeted 12 positions in MWBE certification alone.

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97 Id.
E. **Examples of Firms Evading MWBE Participation**

The IGO has uncovered numerous instances of City vendors abusing the MWBE program. Since 2005, IGO investigations have resulted in recommendations that 15 MWBEs be decertified and/or debarred. Currently, we have over 30 open administrative or criminal investigations related to the MWBE program. Our investigations have revealed that there are two major ways that MWBE participation is falsified: front companies and companies acting as “pass-throughs”, which we define as MWBEs that transfer the vast majority of their contracts to non-MWBEs. In addition, companies acting as brokers overstate MWBE participation on certain contracts. The investigations also have illustrated that these schemes are often orchestrated by prime contractors.

IGO investigations, while anecdotal, speak to a larger pattern of abuse of the City’s program because they have not involved small contracts nor are they confined to one department. Recent IGO sustained or soon to be sustained investigations of fraud, abuse, and mismanagement in the MWBE program involve contractors that have been awarded over $1 billion in City contracts (either as prime contractors or as subcontractors) since 2003. Several of these investigations are detailed below.

1. **Front Companies**

Probably the most widely reported type of MWBE fraud is front companies. An MWBE front is a company that certifies it is an MWBE with a minority or a woman both as the owner and in control of the day-to-day operations of the company. However, in reality the minority or woman is an owner in name only and the company and its profits are actually controlled by a non-minority male. The Duff case referenced above is an example of a front company.

Another example of a front company, revealed through an IGO investigation, was a WBE that held a contract to provide technical services to the City. The investigation showed that the ex-husband of the woman who allegedly owned and operated the company actually had day-to-day control over the business, while the woman lived out of the state for most of the year. For years, the company maintained its WBE certification while the ex-husband managed nearly all aspects of the business.

2. **Pass-throughs**

A second way that companies evade the MWBE participation requirements is by using MWBEs as pass-throughs. In these situations, an MWBE gets a City contract (or more often gets a subcontract with a prime contractor) to perform a certain service. Instead of providing the service, the MWBE contracts with one or several non-certified firms, which actually perform the work. The MWBEs perform “no commercially useful function” and payments are routed through them to achieve the appearance of MWBE participation. The pass-throughs that IGO

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98 The examples detailed in this section are descriptions of IGO investigations that, due to the confidential nature of IGO investigations, do not reveal the identity of the subjects being investigated.
99 An IGO investigation is sustained when the preponderance of the evidence establishes that misconduct has occurred.
investigations have uncovered are largely done at the direction of non-MWBE prime contractors. There are also more nuanced pass-through relationships where MWBEs perform some small portion of the work they are supposed to provide but subcontract the bulk of the work to non-certified firms. Four IGO investigations that uncovered pass-throughs are detailed below.

An investigation showed that an MBE was utilized by a non-MWBE prime contractor for the purpose of generating fictitious minority participation. The MBE firm’s owner stated that this company was hired by a prime contractor to provide structural materials on a large construction project, but his company also was directed to subcontract a significant portion of its contract to non-certified firms which had been pre-selected by the prime contractor. Many of the services contracted through the MBE were those for which the MBE was incapable of providing. A review of lien-waivers submitted to the City by the MBE indicates that a vast majority of the payments provided to the MBE were eventually disbursed to non-certified firms. The documentation shows that the MBE retained less than 10% of the original subcontract’s value.

A different investigation revealed that a company certified to perform several services, subcontracted nearly all of its work out to non-certified companies and did little more than act as a pass-through between prime contractors and non-certified subcontractors. This company subcontracted over 90 percent of its contracts and had no staff to perform in one of its certification areas. For example, a prime contractor would pay this MWBE for a given service. The firm would then subcontract most of the work to non-certified companies, while the prime contractor would claim MWBE utilization for everything paid to this firm regardless of how much was routed to non-certified subcontractors.

Another IGO investigation showed that a WBE owner won a large subcontract although it lacked the expertise and labor force required to perform the proposed work. The WBE was asked by the prime contractor to submit the bid and told that the actual work was going to be performed by a non-certified firm. The WBE was told to add several thousand dollars to the bid price before submitting its bid to the City. This incremental value was intended to be the WBE’s fee for serving as a pass-through. During the course of the construction project, the WBE transferred 100% of the money that her company received from the prime contractor to the non-certified firm and did not retain any amount.

An additional investigation revealed that an MWBE served as a conduit to pass payments from the prime contractor to non-certified suppliers. The MWBE provided administrative services only, such as collecting paperwork and distributing payments, and it was not actively involved in ordering products or making other significant decisions. It did not take delivery of any products and all materials were shipped directly to the prime contractor. The non-MWBE suppliers had no business relationship with the MWBE except to receive product orders and payment.

3. **Brokers**

IGO investigations have revealed a number of City contracts in which MWBEs act as brokers. The City’s regulations do not allow the use of brokers, which are defined as “a person or entity that fills orders by purchasing or receiving supplies from a third party supplier rather than out of existing inventory, and provides no commercially useful function other than acting as a conduit
between a supplier and a customer.” Typically, MWBEs act as brokers on commodities contracts. In these situations, MWBEs win a contract (or a subcontract) to provide a commodity and do not supply the commodity themselves but instead simply order the goods from a non-MWBE who delivers the product to the City (or prime contractor). Three examples of brokers are detailed below.

An IGO investigation identified a WBE that was used as supplier on several City contracts. In this arrangement, the City would place an order with the prime contractor, who would in turn pass the order to the WBE, who would order the goods from a non-MWBE and direct that the goods be directly shipped to the City. This WBE had no employees, trucks, contracts with the prime contractor, warehouse, or inventory. While providing no useful function, this WBE would add a broker fee of 100% of the contract value in exchange for using its name for WBE credit.

An additional investigation revealed that a non-MWBE had a contract to provide a commodity to the City. Upon the expiration of the contract, DPS decided to attach Target Market status to the next letting of this contract. Because of the contract’s Target Market status, the non-MWBE could not bid on it, but had worked with an MBE in the past. The MBE successfully bid on the new contract. The non-MWBE was not listed as a subcontractor by the MBE on its bid documents, yet it performed all of the work on the contract. When the City needed more of this commodity, it contacted the non-MWBE, not the MBE (the company that was actually awarded the Target Market contract). The MBE was paid a set percentage of each invoice for its efforts. The scheme fell apart when the owner of the MBE died.

Another investigation involved a Target Market contract for a highly specialized, federally-regulated product. For several years, the City purchased the product directly from the manufacturer, one of only four authorized manufacturers of this product, none of which were MWBE certified. In 2003, the City decided to make the contract a Target Market contract. The MWBE firm which won the contract did nothing more than pass along the City's orders to the manufacturer. The manufacturer still produced the product and shipped the orders directly to the City using its own trucking contracts. For shuffling paper, the MWBE firm added on about 5% to the price of the product, a cost that was ultimately borne by the City and its taxpayers.

F. REVIEW OF ACTUAL MWBE PARTICIPATION

Because IGO investigations have revealed that on certain contracts actual payments to MWBEs are less than the publicly reported statistics, we conducted a review of a set of contracts to develop an estimate of the actual payments going to MWBEs.

1. Analysis of Construction Contracts

To determine actual participation for construction contracts, we obtained a list from DPS of 75 construction contracts that ended in 2008. Eight of these contracts were target market contracts that were either not audited or only partially audited. This made it difficult to determine what payments contractors received and thus these contracts were excluded from our analysis. In addition, one of these contracts was an emergency contract and thus did not have MWBE...
participation requirements so it was also excluded. This left 66 contracts for our review. We examined DPS’s audits for each of these contracts and calculated the total actual MWBE participation. While most of the work and spending on these contracts happened between 2005 and 2007, this was the most recent set of contracts that DPS’s compliance unit had audited.

The 66 contracts had a combined final value of approximately $385 million and were concentrated in the Departments of Aviation, Transportation, and Water Management. Twenty-two of the contracts had DBE requirements, while 44 had MWBE requirements.\(^1\) The DBE contracts had a combined value of $150 million, while the MWBE contracts were worth $235 million. Because the review includes both MWBE and DBE contracts, in this section, we will use the term MWBE to encompass firms that participated on the DBE contracts, as well as the MWBE contracts.

\(\text{(A) Publicly Reported MWBE Participation}\)

The first step of the analysis was to determine what participation had been reported publicly by DPS for this set of contracts. As discussed above, the participation reported by DPS is based on the Schedule D that details the MWBE commitments at the beginning of each contract. To determine citywide MWBE participation, DPS uses a database that aggregates the MWBE percentages for each city contract. These percentages are applied to each individual contract’s value at contract award and an amount of MWBE participation is calculated. In addition to the value at contract award, the database adjusts participation to reflect contract modifications as contract work progresses. Thus, if modifications reduce or increase the value of a contract, MWBE participation on that contract is reduced or increased. On a monthly basis, DPS totals up the MWBE participation based on contract awards and modifications and divides this by the total value of awards and modifications to arrive at the citywide participation percentages that are reported publicly.

Using records from this database, we analyzed the reported participation for the 66 contracts in our analysis. For 43 of the contracts, we were able to determine what participation was reported during the entire course of contract performance.\(^2\) While participation generally reflected the percentages on the Schedule Ds, in several instances, we discovered variations between what was reported through the database and the Schedule D percentages.

The most common mistake was when the prime contractor was an MWBE. For these contracts the database typically reported MWBE participation at close to 100%. This was despite the fact that the Schedule Ds and compliance plans for these contracts showed participation at often significantly lower levels. In two instances, the compliance plans showed that the participation of the MWBE prime contractor would be below 30 percent. However, in each of these cases

\(^1\) DBE requirements are applied to certain federally-funded contracts, while MWBE requirements are applied to all other contracts, with the exception of sole source and emergency contracts.

\(^2\) For some of the contracts, there were small variations between the final contract values reported in DPS’s contract files and the contract values contained in the database. To correct this problem, we calculated the participation percentage reported through the database and applied it to the final contract values in the contract files to calculate the publicly reported MWBE participation.
MWBE participation was recorded and reported at or near 100 percent of the contract, grossly inflating the proposed participation.

We also observed less systematic mistakes. On one of the largest contracts we reviewed, a mistake in the database resulted in MWBE participation being severely underreported. While the Schedule D for this contract listed MBE participation at 24 percent, the database credited MBE participation for the contract at less than 10 percent. On two contracts, mistakes caused DPS’s database to credit participation at over 100 percent of the value of each contract.

Because the database’s records only go back to the beginning of 2005, the full record for 23 of the contracts was not in the database. For these contracts, we used the original Schedule D percentages as the basis for the publicly reported participation. We applied these percentages to the final contract values to calculate the publicly reported MWBE participation.

(B) Actual MWBE Participation Based on Payment Data

After calculating the reported MWBE participation we compared it to the actual payments to MWBEs. For the group of contracts as a whole, DPS’s audits show that actual participation was higher than participation projected at contract award. This suggests that although DPS does not systematically track or report actual MWBE participation, actual participation is higher than the contract award numbers that it does report. There are some differences in the separate participation categories, but overall DPS audits found actual participation numbers to be somewhat higher than the publicly reported participation at contract award. However, our analysis found that the DPS audits contained a number of mistakes, and that the actual participation was over 15 percent less than the reported participation.

While our review sought to analyze what DPS determined actual participation to be, we also reviewed their calculations by looking at the underlying documentation, lien waivers, of the audits to see how participation was counted. We found a number of participation determinations in DPS audits that overstated actual MWBE participation. Correcting for these mistakes, we calculated actual participation using the underlying documentation based on DPS’s rules and regulations.103

The table below compares the results of our analysis and the reported participation for the 66 contracts. Our analysis determined that actual participation was over 15 percent less than the publicly reported participation. For MBEs, the actual participation is over 22 percent lower than award and for WBEs, the actual participation is almost 32 percent lower. In the DBE contracts we reviewed, actual participation was essentially the same as the reported participation. In terms of dollars, our analysis showed that MWBEs were paid over $19 million less than what the City reported. Focusing on the 44 contracts with the City’s MWBE requirements (not the federal DBE

103 Our analysis of actual participation is based on information contained in DPS’s compliance files. It is important to note some caveats concerning the information in these files. These files contained DPS’s audits that show how DPS compliance officers calculated actual participation. However, it was not always clear what the DPS audits concluded regarding participation levels. Further, the compliance files did not always contain the lien waivers for 2nd tier subcontractors which meant it was not possible to trace every contract dollar to its final recipient. Lastly, it was sometimes difficult to determine when firms were eligible for the program and if the work they were performing was within their certification areas.
requirements), actual participation for MWBEs was over 24 percent less than the publicly reported participation statistics.

Table 9- Comparing MWBE participation at contract award and in the IGO Analysis

<table>
<thead>
<tr>
<th></th>
<th>Participation in $ Based on Contract Award</th>
<th>Actual Participation in $ - IGO Analysis</th>
<th>Dollar Value Variance between IGO Analysis and Award</th>
<th>Percentage Variance between IGO Analysis and Contract Award</th>
</tr>
</thead>
<tbody>
<tr>
<td>DBE</td>
<td>$43,391,312</td>
<td>$43,563,670</td>
<td>$172,359</td>
<td>0.40%</td>
</tr>
<tr>
<td>MBE</td>
<td>$62,487,565</td>
<td>$48,672,259</td>
<td>-$13,815,306</td>
<td>-22.11%</td>
</tr>
<tr>
<td>WBE</td>
<td>$18,549,931</td>
<td>$12,646,680</td>
<td>-$5,903,251</td>
<td>-31.82%</td>
</tr>
<tr>
<td>Total</td>
<td>$124,428,808</td>
<td>$104,882,610</td>
<td>-$19,546,198</td>
<td>-15.71%</td>
</tr>
</tbody>
</table>

Source: IGO

For the group of contracts as a whole, participation was reported at 32 percent. We determined that actual participation was 27 percent. The chart below compares the MWBE and DBE participation at contract award and the actual participation according to our analysis as a percentage of the total contract values.

Table 10- Comparing MWBE Percentage Participation

<table>
<thead>
<tr>
<th>Participation Percentage of the Total Value of contracts</th>
<th>Participation Based on Contract Award</th>
<th>Actual Participation - IGO Analysis</th>
<th>Percentage Variance between IGO Analysis and Contract Award</th>
</tr>
</thead>
<tbody>
<tr>
<td>DBE</td>
<td>29.09%</td>
<td>29.21%</td>
<td>0.40%</td>
</tr>
<tr>
<td>MBE</td>
<td>26.42%</td>
<td>20.58%</td>
<td>-22.11%</td>
</tr>
<tr>
<td>WBE</td>
<td>7.84%</td>
<td>5.35%</td>
<td>-31.82%</td>
</tr>
<tr>
<td>Total</td>
<td>32.27%</td>
<td>27.20%</td>
<td>-15.71%</td>
</tr>
</tbody>
</table>

Source: IGO

Note: The DBE percentages are calculated using the total value of contracts where DBE requirements apply, while the MBE and WBE percentages are calculated using the total value of contracts where MWBE requirements apply.

(C) How DPS’s Audits Overstate Participation

Based on our review, we found a difference of over $26 million between DPS’s audits and our analysis. The table below shows the difference between DPS’s audits and our analysis broken down by participation category.
### Table 11- Comparing MWBE participation in DPS audits and IGO Analysis

<table>
<thead>
<tr>
<th></th>
<th>Participation in $ Based on DPS Audits</th>
<th>Actual Participation in $ - IGO Analysis</th>
<th>Dollar Value Variance between IGO Analysis and DPS Audits</th>
</tr>
</thead>
<tbody>
<tr>
<td>DBE</td>
<td>$48,589,858</td>
<td>$43,563,670</td>
<td>-$5,026,188</td>
</tr>
<tr>
<td>MBE</td>
<td>$64,207,354</td>
<td>$48,672,259</td>
<td>-$15,535,095</td>
</tr>
<tr>
<td>WBE</td>
<td>$18,257,579</td>
<td>$12,646,680</td>
<td>-$5,610,899</td>
</tr>
<tr>
<td>Total</td>
<td>$131,054,792</td>
<td>$104,882,610</td>
<td>-$26,172,182</td>
</tr>
</tbody>
</table>

Source: IGO

There were several different scenarios that account for the difference between DPS’s audits and our analysis. The table below shows the categories that make up the difference. Each category is further detailed in the following sections.

### Table 12- Reason for Difference between DPS audits and IGO Analysis

<table>
<thead>
<tr>
<th>Reason</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pass-Throughs</td>
<td>$14,499,723</td>
</tr>
<tr>
<td>Front company</td>
<td>$3,776,187</td>
</tr>
<tr>
<td>Over-counted participation of MWBE prime contractors</td>
<td>$2,688,419</td>
</tr>
<tr>
<td>Other</td>
<td>$2,196,399</td>
</tr>
<tr>
<td>Improperly certified firm</td>
<td>$1,680,108</td>
</tr>
<tr>
<td>Over-counted supplier participation</td>
<td>$1,331,346</td>
</tr>
<tr>
<td>Total</td>
<td>$26,172,182</td>
</tr>
</tbody>
</table>

Source: IGO

I. Pass-Throughs

The largest reason for the difference is that our review determined that several of the MWBE subcontractors acted as pass-throughs, which accounted for approximately 55 percent of the difference between DPS’s audits and our analysis.

a. Prime Contractor Has Direct Relationship with Second Tier Subcontractor

There are several different types of pass-throughs in the contracts we analyzed. One form of pass-through relationship involves an MWBE subcontractor subcontracting a large portion (at least 69 percent in each of the contracts in which we observed this relationship) of its contract to one or multiple 2nd tier suppliers, with which the prime contractor has a direct relationship on the contract. In several instances, the prime contractor purchased materials directly from a non-MWBE supplier and MWBE subcontractors purchased the same types of materials from the same supplier.
This is an example of a pass-through relationship. It does not make economic sense for a prime contractor to purchase some materials from firm A (the non-MWBE firm) directly and also contract with firm B (the MWBE firm) which then purchases the same type of materials from firm A. The MWBE regulations state that “a MBE or WBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project, through which funds are passed in order to obtain the appearance of MBE or WBE participation.”\textsuperscript{104} It appears that the major purpose of this relationship is to route payments through an MWBE in order to achieve the participation goals set forth by the City.

Through our review, we identified several contracts in which this relationship was present. By deducting all the payments that flow to 2\textsuperscript{nd} tier non-MWBE subcontractors, with whom prime contractors have contractual relationships, MWBE participation was reduced by $7.2 million from DPS’s audit figures.

b. Large Subcontracts Routed Through MWBE Subcontractors

Another type of pass-through is where MWBEs subcontract large portions of contracts to non-MWBEs. In these pass-throughs, the MWBE subcontractor received a minimal percentage of the dollars spent, with the vast majority of the dollars being further subcontracted to a non-MWBE firm. In the most egregious example, a nearly $2 million subcontract was given to an MWBE, but of the $2 million, only $50,000 ended up with the MWBE while the rest was subcontracted to non-MWBEs. We observed these types of relationships on two contracts and deducted the subcontracts to non-MWBEs from the participation total. This resulted in a reduction of $4 million from DPS’s audit figures.

c. **Subcontracting Labor Services to Non-MWBEs**

A further pass-through relationship we observed was the subcontracting of labor to non-MWBEs by MWBEs. The regulations are clear that the subcontracting of labor to non-MWBEs should not be counted as participation. Yet in numerous contracts we reviewed, DPS’s compliance unit counted 100 percent of the money going to an MWBE, although the MWBE firm subcontracted a portion of its labor to non-MWBEs. In accordance with DPS’s rules and regulations, we deducted all payments for labor to non-MWBEs, which resulted in a $1.8 million reduction from DPS’s audit figures.

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**d. MWBE Contract Performance Through Use of non-MWBE Prime Contractor Personnel**

In two of the contracts we observed an additional type of pass-through relationship. After reviewing a DPS analysis of payroll records, we observed that an MWBE was performing nearly its entire contract with a non-MWBE prime contractor’s personnel. On one contract, it appeared that 12 of the 17 workers on the MWBE’s payroll had worked for the prime contractor on this very same contract. Of the 5 workers who had not also worked for the prime contractor on this contract, 4 of the workers had worked for the prime contractor on other City contracts. The regulations state that “the value of the work actually performed by the MBE’s or WBE’s own forces shall be counted towards the contract specific goals.”\(^{105}\) In this case, the MWBE appears to be using the non-MWBE prime contractor’s labor to perform its work and thus this participation was not counted in our analysis.

In addition to using non-MWBE labor, this MWBE was also purchasing materials from a company with whom the prime contractor had a relationship, the pass-through relationship described above. Based on the observation of two types of pass-through relationships, we concluded that the MWBE was not performing a commercially useful function and should not have had any of its participation counted by DPS. This resulted in a $650,000 reduction in participation from DPS’s audit figures.

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**e. Large Materials Purchase Routed through MWBEs**

The final pass-through relationship observed in this set of contracts is where an MWBE subcontractor performed a small amount of labor on a contract but purchased a large amount of materials from a non-MWBE subcontractor. In two contracts we reviewed, the MWBE subcontractor kept a small percentage of the dollars spent, with the majority of the dollars being used to purchase materials from a non-MWBE electrical firm.

In one contract, an MWBE received a subcontract for electrical work from a non-MWBE who was also an electrical contractor. Forty four percent of the total value of the MWBE’s contract was used by the MWBE to purchase materials and perform work on the contract. The remaining 56 percent of the contract was used to purchase materials from a non-MWBE electrical firm.

\(^{105}\) City of Chicago. “Special Conditions Regarding Minority Business Enterprise Commitment and Women Business Enterprise Commitment in Construction Contracts.” Section IV- A.
company. Payroll records show that the non-MWBE electrical contractor who subcontracted with the MWBE, employed five times as much labor on the contract, in terms of labor hours worked, but spent roughly the same amount on materials. With two companies performing similar work, it is highly unlikely that a company that performs one-fifth as much work as another company would use the same amount of materials as the company doing five times as much work.

The documents associated with this contract demonstrate an unrealistic business relationship. What appears to be happening on this contract is that the larger non-MWBE routed materials purchases through the MWBE and then used those materials for its own work on the project. In purchasing the extraneous materials, the MWBE appears to not perform a commercially useful function and we thus discounted the 56 percent of the contract that went to the non-MWBE electrical company. We identified an additional contract where this occurred and deducted the payments that went to non-MWBEs. These two reductions resulted in a decrease of almost $800,000 from DPS’s audit figures.

II. Front Company

One of our investigations revealed that one of the companies that is frequently utilized in the contracts we reviewed is a front company. This company was certified as an MWBE to provide a variety of materials. The MWBE has a number of City contracts, but in actuality a non-MWBE company provided the materials the MWBE was contracted to supply. Therefore, its participation was discounted, which resulted in a reduction of $3.8 million in actual participation from DPS’s audit figures.

III. Over-counting of MWBE Prime Contractor Participation

Another source of the difference between DPS’s audits and our analysis is that in ten contracts where the prime contractor was an MWBE, compliance counted 100 percent of the contract as MWBE participation. However, according to the MWBE regulations, it is necessary to subtract out payments to non-MWBE subcontractors that are not materials purchases that are consumed by the labor of the MWBE’s own workforce. Subtracting payments to non-MWBE firms on these contracts resulted in a reduction in actual participation of over $2.7 million from DPS’s audit figures.

106 City of Chicago. “Special Conditions Regarding Minority Business Enterprise Commitment and Women Business Enterprise Commitment in Construction Contracts.” Section IV- C.

107 In reviewing these contracts, it was sometimes difficult to determine exactly how much money ended up with the MWBE prime contractor because DPS did not audit these contracts as fully as contracts in which the prime contractor is a non-MWBE. For these contracts, we used the documentation available, which were the Status Reports that detailed how much the MWBE prime contractor subcontracted to non-MWBEs. In some of these contracts, we did not have the Status Reports that detailed the full amount that was spent with non-MWBEs. In these instances, we assumed that the actual payments to the non-MWBE subcontractors mirrored the subcontract prices that were documented on partial Status Reports. We also tried to corroborate the information on the Status Reports with information from affidavits of availability that the prime contractors had submitted on other City contracts. Affidavits of availability are submitted by prime contractors on City contracts. They detail what other work the prime contractor is engaged in. For each contract the prime contractor has it lists all subcontracts. By reviewing affidavits of availability from other City contracts, we were able to generally corroborate the subcontracting information in the contracts that were part of our analysis.
IV. Crediting an Ineligible Firm

One firm receiving a significant amount of credit for participation in the contracts we reviewed should not have been certified on two of the contracts.\footnote{It appeared that in DPS’s audits, a firm was considered eligible if they were certified at the time the contract was awarded. If firms became ineligible for the program during the course of the contract, their participation was still credited. Our review relied on the same convention.} In one case, the MWBE was decertified as a DBE one month before it was listed as a participant on a new contract. This was a simple failure of a compliance officer to check if this firm’s certification was current. With this finding, we discounted the firm’s DBE participation on this contract and another contract that it was awarded after it had been decertified. This resulted in a reduction of $1.7 million in participation from DPS’s audit figures.

V. Over-counting of Suppliers\footnote{It is important to note that counting MWBE suppliers at 60 percent does not appear in the City’s MWBE construction ordinance. However, it has been included in DPS regulations and is the practice by which DPS analyzes supplier participation on construction contracts. For DBE contracts, there is no question that suppliers must be counted at 60 percent per the federal regulations.}

According to the program regulations, the participation of MWBE subcontractors who act as suppliers or distributors should be counted at 60 percent of the contract value. In a number of instances in the contracts we reviewed, MWBE suppliers were counted at 100 percent by DPS. In all these instances, the firms’ Schedule C-1s stated that only 60 percent of the contract values should be applied to MWBE participation. Correctly counting these suppliers at 60 percent reduces the actual participation for the group of contracts by $1.3 million from DPS’s audit figures.

2. Actual Participation in Non-construction Contracts

While we attempted to calculate actual participation in non-construction contracts, ultimately we were unable to do so, due to several factors. First, DPS only recently began auditing every non-construction contract, so audits of some contracts were unavailable. Second, audits of non-construction participation often rely on incomplete documentation. Lastly, we observed inconsistencies in the few audits we were able to review.

(A) Non-construction Contract Audits Have Only Recently Begun

In analyzing the audits of non-construction contracts and through interviews with DPS officials, we found that DPS only began attempting to audit all non-construction contracts within the last five years. However, there are still non-construction contracts not being audited. During the period of our review, there was no compliance officer assigned to Architecture and Engineering contracts due to vacant positions within the compliance unit, so these contracts were not being audited.
(B) Audits Rely on Incomplete Documentation

In non-construction, DPS compared prime contractor and subcontractor affidavits to determine MWBE participation. These affidavits are statements from prime contractors and subcontractors attesting to how much the MWBE subcontractors were paid on a given contract. If there was a disagreement between what the prime contractor and subcontractors report, compliance officers sought additional documentation such as canceled checks to reconcile the disagreement. If DPS did not receive a response from the MWBEs, compliance officers assumed that the prime contractor’s reported payments to the MWBEs were accurate.

In some audits, MWBEs did not respond to the compliance officers and so the audits simply accepted what the non-MWBE reported paying the MWBE. This seems to contradict DPS’s policy regarding the Subcontractor Payment Certification forms in construction contracts. As discussed above, these forms are reports from prime contractors that state how much has been paid to MWBEs. DPS officials do not believe the information on these forms to be reliable because it is not verified by subcontractors. Therefore, in auditing participation at the end of construction contracts, DPS required prime contractors to submit lien waivers from subcontractors as proof of payment to MWBEs. Yet, in non-construction, DPS accepted what prime contractors report, often without confirmation from MWBE subcontractors.

When both the non-construction prime contractors and subcontractors responded but disagreed on the amount of payment, DPS was supposed to seek further information, such as canceled checks in order to reconcile the disagreement. While we did observe DPS seeking follow up information to resolve some disagreements on non-construction contracts, we also reviewed several audits where there were large unresolved disagreements between what prime contractors and subcontractors reported they were paid.

(C) Audits Contain Inconsistencies

In reviewing DPS audits of MWBE participation in non-construction, we found inconsistencies. In several audits we reviewed, firms were credited with participation that was greater than the total dollars spent on the contract. This problem was generally seen when firms were claiming indirect participation, but was also observed on several contracts involving direct participation. One audit credits $4.3 million in direct participation to a MWBE on a contract for which total expenditures are $1.5 million.

Since it is impossible for an MWBE to receive more money from a contract than the total value of a contract, this reporting mistake appears to occur in part because contractors are unclear on what contracts DPS was seeking information. Often, MWBEs have multiple City contracts with the same prime contractor and when DPS asked for payment information, MWBEs reported all payments they have received from a given prime contractor, without differentiating between individual contracts. Prime contractors will make similar reporting mistakes about payments that they make to MWBEs. This confusion led to reported payments that appear inflated. In the audits we reviewed, DPS sometimes did not resolve this inflated payment reporting. The reporting mistakes made by prime contractors and subcontractors and DPS’s incomplete efforts to correct

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110 Interview #2.
them point to a lack of resources available to conduct these audits and a lack of rigor in MWBE compliance audits.

3. Extrapolation from the Results of Our Analysis

   (A) Construction Contracts

Our review of audits of construction contracts concluded in 2008 conservatively found that actual MWBE participation was more than 15 percent less than the publicly reported statistics for these contracts. Based on DPS statistics, the City has awarded over $2.5 billion in construction contracts to MWBEs since 1995. Assuming that actual MWBE participation for all of the City’s construction contracts since 1995 has been on average 15 percent less than award, the result is that between 1995 and 2008 actual MWBE participation in construction has been $400 million less than the publicly reported participation statistics.

However, the conclusion that participation is 15 percent less than the publicly reported statistics still probably exaggerates MWBE participation. For several reasons, it is highly likely that actual participation is significantly lower than the reduced participation observed in our review. First, our analysis was based on lien waivers that document how much MWBEs were paid on given contracts. As detailed in the next section, there are serious concerns with the accuracy of this information. IGO investigations and testimony during the Builders trial have illustrated that lien waivers can easily be and have been manipulated to overstate participation. An analysis that verified the accuracy of the information contained in the lien waivers would likely show a further reduction in participation.

Second, given the prevalence of fraud and abuse in the MWBE program and the laxness in the City’s certification process (discussed below), it is likely that our analysis credits participation to ineligible firms that have engaged in yet undiscovered abuses of the MWBE program.

Finally, an underreporting mistake in participation at contract award in the contracts we reviewed, led to a smaller discrepancy between actual participation and participation at contract award than would have otherwise been observed. As discussed above, the most systemic mistake we identified in the database DPS uses to calculate the publicly reported participation statistics was the over-reporting of MWBE participation when an MWBE was the prime contractor. This occurred because subcontracts to non-MWBE firms were not subtracted from the MWBE prime contractor’s participation. Yet, a singular mistake we uncovered undercounted MBE participation on one of the 66 contracts we reviewed by over $5 million. If this underreporting mistake had not occurred our analysis would have shown actual participation to be over 19 percent less than the publicly reported statistics, making the overstatement of MWBE participation during this period nearly $25 million.

Given that the more systemic mistakes we uncovered in the DPS database resulted in participation being over-reported, it is likely that the large, underreporting mistake in these 66 contracts, which led to less of a discrepancy in actual participation than would have otherwise been observed, is an outlier. Thus, if we were to review the actual MWBE participation in all the

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111 From 1995 through 2004 this figure includes DBE awards. From 2005 through 2008 DBE awards are excluded.
construction contracts that have been awarded since 2005, when DPS began using the MWBE database to calculate awarded participation, it is likely that we would observe far less (relative) underreporting of participation. In turn, if our review of actual participation in these 66 contracts is representative of actual participation since 2005, then we would likely observe a larger discrepancy between reported participation and actual payments to MWBEs.

(B) Non-construction Contracts

For non-construction contracts, we were unable to calculate actual participation in part because the administration only recently began auditing non-construction contracts and still does not audit every contract.

Although we were unable to calculate actual participation in non-construction, due to the historical lack of auditing of non-construction participation, the lack of rigor in the auditing process that was recently put in place, and the prevalence of fraud and abuse in the program it is likely that actual participation is also significantly lower in non-construction than the publicly reported participation.

G. Problems with MWBE Administration

Through IGO investigations and our analysis of actual MWBE participation, we have identified multiple problems with the way the MWBE program is administered. The Lowry Report cautioned that the administration of an affirmative action contracting program “is a hands-on process that requires close scrutiny and instant response to issues before they become major problems.” The City’s program does not meet this standard. The picture that has emerged from our analysis is of a poorly administered program that does not know whether or not it is achieving its goals. One DPS official aptly summed up the program as “a lot of paperwork and pushing paper.”

Part of the result of this poor administration is that the program has been beset by fraud and brokers, and MWBE participation is likely far less than the participation levels that the City annually reports. The specific administrative problems we have identified are detailed below.

1. The Administration Does Not Report Data on Actual Payments to MWBEs

When it was responsible for the program, DPS audited individual contracts to examine actual participation, but the department did not collect and analyze data on actual payments to MWBEs. Therefore, DPS could report what the actual participation was on any one contract, but could not report what participation was for the City as a whole. This failure to track actual participation is the reason that DPS was unable to calculate any statistics on actual participation and instead based its public reports on projected participation when contracts were awarded.

112 Provided the initial justification for Mayor Washington’s Executive Order that began the MWBE program.
114 Interview #1.
The administration’s practice of reporting participation based on contract awards has overstated the impact of the program and created an unrealistic idea of what the program is achieving. Because the participation statistics are the main criteria by which the program is evaluated by the City Council and the public, the MWBE program is primarily evaluated with analytically suspect data. This, in turn, makes a comprehensive analysis of the program’s impact impossible.

Another consequence of reporting participation based on contract award, is that it has undercut administrative incentive to fully monitor actual payments to MWBEs through the course of a contract. This lack of scrutiny on MWBE participation during contract performance means that it is more likely for participation to be reduced through modifications and the non-usage of MWBE subcontractors. It also makes it more likely for front companies or pass-throughs to abuse the program because they have a smaller chance of being uncovered.

2. Insufficient Documentation in DPS Audits of Actual Participation

In both the construction and non-construction programs, the documents used to verify payments to MWBEs have serious flaws.

(A) Inadequate Payment Verification in Non-construction

In non-construction (again when DPS was responsible for monitoring actual MWBE participation), DPS compared prime contractor and subcontractor affidavits to determine MWBE participation. These affidavits are statements from prime contractors and subcontractors attesting to how much they were paid on a given contract. If there was a disagreement between what was reported, compliance officers sought additional documentation such as canceled checks to reconcile the disagreement. If DPS did not receive a response from the MWBEs, compliance officers assumed that the prime contractor’s reported payments to MWBEs were accurate.

This verification process was not sufficient to make determinations of actual participation. Affidavits from prime contractors and subcontractors are susceptible to exploitation by contractors that want to overstate participation. Like the problems with the lien waiver process described below, MWBEs could be easily influenced to overstate how much they were paid by prime contractors, who could make this overstatement a condition of payment and/or future contracts. The fact that DPS accepted what a prime contractor reported if the subcontractor did not respond made it even easier for prime contractors and/or subcontractors to overstate participation. Prime contractors could overstate participation in what they report to DPS, while MWBE subcontractors could simply not respond and DPS would conclude that the prime contractor’s reported payments are accurate.

This also seemed to contradict DPS’s policy regarding the Subcontractor Payment Certification forms in construction contracts. As discussed above, these forms are reports from prime contractors that state how much has been paid to MWBEs. DPS officials do not believe the information on these forms to be reliable because it is not verified by subcontractors. Yet, for non-construction contracts, DPS allowed payments to MWBEs to be verified without confirmation from MWBE subcontractors.

115 Interview #2.
DPS in part recognized problems with their verification process and hoped to remedy it through the implementation of the C2 system. C2 is a web-based system where prime contractors and subcontractors will report the payments that MWBEs receive. When prime contractors report how much they have paid an MWBE, the system will automatically generate a letter or email to the MWBE so that they can verify what the prime contractor reported. If implemented properly, the system will streamline the verification process and make it easier for both prime contractors and subcontractors to report payments to MWBEs.

However, while C2 will make it easier for prime contractors and subcontractors to report payment data to Compliance, which is now responsible for assessing participation, it will not address the underlying deficiencies in how payments to MWBEs are verified. C2 will still not prevent prime contractors and subcontractors from overstating MWBE participation because Compliance will still be relying on the attestations of prime contractors and subcontractors to verify payments. Thus, the problem of MWBE subcontractors overstating what they have been paid or simply not responding to the City’s inquiries is unaddressed by C2.

**(B) Abuse of Lien Waivers in Construction**

While lien waivers better document the payments that are going to MWBE subcontractors, there are also problems with the reliability of lien waivers. In the *Builders* trial, a DPS compliance officer testified that he “has observed prime contractors abusing lien waivers to the detriment of MBE’s and WBE’s.”\(^{116}\) While lien waivers are supposed to document what subcontractors have been paid, the compliance officer testified that “prime contractors require subcontractors to sign lien waivers prior to getting paid because the contractor has advised the subcontractor that the City would not pay the prime until the City has the waivers.”\(^{117}\) By having the subcontractors sign lien waivers before they receive payment, “the subcontractor has lost their leverage.”\(^{118}\) This testimony was corroborated by an owner of a construction company who testified that his company “generally sets its contracts up on public jobs so subs get paid after [his company] is paid.” However, the company “is required to submit lien waivers from its subs. So subs are required to give lien waivers before they are paid.”\(^{119}\)

If subcontractors have to sign lien waivers before they receive payment, then there is a great potential for abuse of the lien waiver process. An IGO investigation revealed that some companies engage in a process of over-liening. In over-liening, MWBEs submit lien waivers that make it appear that they receive payments that satisfy the MWBE goals. In actuality, the MWBEs receive far less in payment than the lien waivers represent. MWBEs may over-lien because prime contractors make it a requirement of payment. We have also seen instances where MWBEs, in exchange for a fee, provide lien waivers to non-MWBEs that claim the MWBEs have worked on a contract, when in actuality the work has gone to non-MWBEs.

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\(^{117}\) *Id.*, pg. 59.

\(^{118}\) *Id.*, pg. 59.

\(^{119}\) *Id.*, pg. 60.
3. Lack of Cooperation between DPS and User Departments

One of the program’s most fundamental problems has been the lack of cooperation between the user departments and DPS. This problem stems from a pervasive belief in the user departments that the MWBE program is solely the responsibility of DPS (and now Compliance). The limited cooperation between DPS and the user departments has contributed to a lack of user department accountability for MWBE contracting goals, a lack of DPS access to timely information, a collective failure to monitor actual MWBE participation as contracts are performed, duplicative data collection, and a greater administrative burden for the City’s vendors. It also has made it less likely for the administration to uncover front companies, brokers, and pass-throughs.

(A) Lack of Information and Document Sharing

DPS and the user departments do not share documents and information related to the administration of MWBE program.

For instance, in construction contracts, MWBE compliance is assessed using lien waivers. User departments maintain the complete set of lien waivers for any contract because prime contractors must submit lien waivers with each invoice in order to receive payment. However, when DPS was responsible for assessing MWBE compliance, its compliance officers did not get the lien waivers from the user departments but rather requested them directly from prime contractors. This resulted, on the one hand, in contractors having to submit two copies of the same documents to two different City departments and, on the other, in DPS having to expend time and resources securing information and documents already held in other City departments.

With regard to contract modifications, a DPS official expressed frustration that DPS often did not receive documents related to contract modifications from the user departments until well after they have been approved, even though modifications often impact MWBE participation.120 Lack of information sharing has led to over-crediting of MWBE participation at contract award by DPS because compliance officers often only focus on the Schedule C-1 and D-1 forms, while ignoring contradictory disclosures easily found in other contract documents. A recent IGO investigation illustrates this problem.

An MBE was awarded a multi-million dollar professional services contract and on the Schedule D-1, the MBE disclosed the participation of two WBE firms, totaling about 5% of the contract’s value. The MBE did not disclose, nor did the Schedule D-1 specifically request the disclosure of, non-certified subcontractors.121 However, the MBE subcontracted out a substantial portion of the contract to non-certified firms, a fact that would have been obvious to the DPS compliance officers had they looked at other documents related to the contract, rather than just the Schedule C-1s and Schedule D-1.

120 Interview #1.
121 This in contrast to the Schedule D-1 for construction contracts, which requests the disclosure of non-certified subcontractors.
For example, the user department made at least one extensive and detailed PowerPoint presentation regarding the project to other procurement officials. The presentation clearly identified several non-certified firms that would be involved. Had the compliance officials attended the presentation, reviewed the PowerPoint slides, or even just communicated with the user department personnel assigned to the project, they could have easily determined that the Schedule D-1 did not accurately describe the MWBE participation on the contract.

Additionally, the MBE submitted (in the same packet of documents that included the Schedule C-1s and the Schedule D-1) an Economic Disclosure Statement (EDS). The EDS included a disclosure of “Retained Parties.” There, the MBE disclosed all of the non-certified subcontractors that would work on the project. Again, if the compliance officers had just looked at the EDS, they would have discovered that the Schedule D-1 overstated MWBE participation.

(B) User Department Failure to Monitor MWBE Participation as Contracts are Performed

According to the City’s procurement manual, the user departments are supposed to monitor MWBE compliance as contracts are performed. However, in reviews of hundreds of contract files and in various interviews with user department staff, we could identify little effort by the user departments to track MWBE compliance on an on-going basis.

After the professional services contract referenced in the previous section commenced, the MBE submitted Certification forms to the user departments that disclosed subcontractor payments. The MBE accurately listed the name of and amount paid to all of its subcontractors, including the non-certified ones. If the user department had been reviewing these payments and compared them to the Schedule D-1, it would have realized that the Schedule D-1 significantly overstated the actual MWBE participation on the contract.

In another investigation, we found that a contract manager for a user department observed several MWBEs who appeared to be operating as pass-throughs on a large construction contract. At the same time, the compliance officer in DPS responsible for monitoring this contract was unaware of these relationships. The contract manager did not communicate these observations to DPS because he/she viewed DPS as the department ultimately responsible for monitoring MWBE compliance.

When DPS was responsible for post-award MWBE compliance, it was supposed to receive quarterly Utilization Reports for non-constructions contracts. But, DPS only received these if they explicitly asked vendors to submit them. In practice, the only assessment of MWBE participation was done by DPS after a contract ended. By not tracking compliance through the course of contracts, the City did not uncover participation shortfalls until contracts had been completed. This made it impossible for the administration to address problems in MWBE participation during contract performance.

123 Interview #3.
(C) No Cooperation in Making Compliance Determinations

In order to assess MWBE participation, particularly on construction contracts, a detailed understanding of the work being performed on a contract is often needed. As described above, counting participation often hinges on specific details of contracts such as which subcontractors count as suppliers and how responsibility for different parts of a contract is organized. However, a DPS official rightly pointed out that on construction contracts DPS (now Compliance) compliance officers have a limited connection to what is happening on a jobsite.124

The user departments, which are responsible for the day-to-day management of contracts, are in a position to assist DPS (now Compliance) with assessing participation. However, we could find little evidence of the user departments and DPS working together to examine the intricacies of MWBE participation.

4. City Does Not Follow Its Own Policy

In many parts of the MWBE program, the City incorrectly applies its own written policies and procedures.

(A) Mistakes in Assessing MWBE Compliance

In construction, our analysis discovered inconsistencies in how DPS assesses MWBE compliance. As detailed above, our analysis of audits of construction contracts revealed numerous instances of DPS compliance officers not closely examining lien waivers, and as a result not identifying pass-throughs and crediting more MWBE participation than actually occurred. In addition, we found numerous instances of DPS over-counting supplier participation in direct violation of the program’s regulations. Further, in the 66 contracts we reviewed, we found instances of a firm that was not certified being credited with participation.

(B) Not Using Lien Waivers to Assess Participation

For certain construction contracts, DPS did not use lien waivers to verify actual participation. Instead, the compliance officer relied on the Status Reports, which are not verified by subcontractors. Because of this practice, DPS did not realize that a firm that was being credited with tens of millions of dollars of MWBE participation was in actuality serving as a pass-through and receiving less than 10 percent of a contract’s value. One look at the lien waivers would have revealed this pass-through relationship, but because DPS did not review lien waivers for certain construction contracts, DPS only realized what was happening when the IGO brought this to its attention.

(C) Laxness and Mistakes in Certifying MWBEs

In reviewing MWBE certification files, we found a glaring laxness in the City’s certification process. In one instance, a DPS certification officer’s report on a site visit of an applicant firm states that the owner of the firm “said that she is a GC [general contractor] and she subbed out

124 Interview #1.
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[subcontracted] 100% of two different projects.”125 The site visit report then rightly asks “is she a GC or simply an experienced broker of services?”126 However, the certification officer’s report concludes by saying “as I mentioned to [the firm’s owner], put a strong paperwork package together for [the certification officer].”127 The implication of this report is that despite strong evidence that the applicant firm is a broker, DPS would certify the firm anyway provided it could make itself look legitimate on paper. This firm went on to be certified and has been awarded tens of millions of dollars in City contracts over the last several years.

In addition, we found mistakes in the way that personal net worth and gross receipts were calculated. In one instance, a calculation mistake resulted in allowing a firm to remain in the program for an extra two years (this firm is one of the largest MWBE participants). In this instance, DPS moved to decertify the firm because it believed its gross receipts exceeded the limit established for the program. However, the firm challenged DPS’s finding on the grounds that it had misinterpreted the SBA regulations. Although DPS had interpreted the regulations correctly, it backed down and allowed the firm to remain certified.

The IGO has encountered numerous situations in which an applicant artificially reduced their net worth below the limit by titling assets in the name of their non-eligible spouse, or by placing assets in revocable trusts or similar vehicles. For example, an applicant for WBE certification in the construction field failed to disclose a $700,000 vacation home. When confronted by the IGO, the applicant stated that she did not disclose the home because it was titled in her non-eligible spouse’s name. But the applicant conceded that the home was purchased partly with income generated by her, and that she regularly used the home.

In another example, an applicant for Airport Concessions Disadvantaged Business Enterprise (ACDBE)128 certification failed to disclose numerous substantial assets held in revocable trusts for the benefit of her children. Revocable trusts, as opposed to irrevocable trusts, can be revoked by the settlor (here, the applicant) at any time and usually for any reason. (In contrast, an irrevocable trust forever alienates the trust assets from the settlor in favor of the trust’s beneficiaries.) Because the applicant still controlled the assets in the trusts, the value of those assets should have counted towards her personal net worth.

(D) Little Contract-Specific Goal Setting

The construction ordinance states that while the City’s overall goals are to award 24 percent of all contracts to MBEs and 4 percent of all contracts to WBEs, the City may apply different goals to different contracts based on the availability of MWBEs, “the scope of the contract”, and “normal industry practice.”129 This provision recognizes that it is impractical to assume that MWBE participation will be uniform on each construction contract. However, in our analysis of

126 Id.
127 Id.
128 Similar to the DBE program, this is a federal program that requires affirmative action in government contracting for airport concessionaires. As part of its responsibilities in operating O’Hare and Midway airports, the City operates an ACDBE program.
actual participation and during the course of our investigations, we have observed little contract-specific goal setting in the City’s construction contracts.

Although the non-construction ordinance sets a minimum MBE and WBE percentage for each contract, these percentages can be raised on individual contracts. Just as in construction, in our analysis and investigations of non-construction contracts, we observed little contract-specific goal setting with the same MBE and WBE percentages included in nearly all non-construction contracts.

By rarely setting contract-specific goals, the City has created situations where unrealistically high goals are applied to some contracts and inadequate goals are applied to others. In establishing unrealistically high goals on some contracts, the City encourages firms to engage in fraud and abuse of the program. By setting goals that are too low on other contracts, the City is not maximizing MWBE participation in some areas. The City lets a wide variety of construction and non-construction contracts and applying the same numerical goals to each contract does not reflect the reality of the opportunity for MWBE participation in the City’s contracts.

\( (E) \) Contractors Face Few Consequences For Not Meeting MWBE Participation Commitments

While the construction and non-construction ordinances give the City the authority to charge penalties to firms that fail to meet MWBE participation commitments, it appears that over the last several years, the City has rarely used this authority. We requested data from the City’s major construction contracting departments on the exact amount of MWBE penalties that they had charged from the beginning of 2005 through May 2009. All responded that they had no record of penalties being charged.

In the past, a City department assessed penalties based on underutilization of MWBEs. However, the IGO has been informed by a City employee that in 2001 the Department of Law directed this department to stop assessing penalties related to the MWBE requirements.\(^{130}\) This was corroborated by a DPS official, who also stated that penalties cannot be charged for failure to meet MWBE commitments.\(^{131}\) The IGO requested documents from the Department of Law (Law) relating to advice provided to DPS not to collect penalties for non-participation. Law invoked attorney-client privilege, thus leaving the IGO without adequate information to assess the basis of the directive to suspend ordinance-prescribed penalty assessments.

Instead of assessing penalties in the context of the contract closing process at which time the user department can collect on such assessments by drawing against retainage\(^{132}\), DPS simply notifies MWBE subcontractors of their right to seek arbitration to collect the difference between the committed amount and the amount actually paid. In practice, few subcontractors seek arbitration likely due to a desire not to offend prime contractors from whom they will likely seek business in

\(^{130}\) Interview #4.
\(^{131}\) Interview #1.
\(^{132}\) Retainage is a percentage of the dollar value of each contract that is held by the user department until the contract is closed to ensure that a vendor’s performance is in accordance with the specifications of the contract.
the future. As a result there appears to be little financial penalty assessed on non-compliant firms.

Additionally, the City’s procurement manual has a section on Vendor Performance Evaluations, which are used “to improve the quality of our vendor pool and will become one of the tools to measure vendor responsibility.” While these evaluations are supposed to be used to track MWBE participation, among other measures of vendor quality, in practice, the MWBE information is never entered into the evaluations. This prevents DPS from evaluating the MWBE compliance of City vendors, which could help identify vendors who consistently do not meet their participation goals.

In short, the City does little to enforce unmet MWBE commitments, and consequently, there are effectively no repercussions for contractors that fail to meet their commitments.

5. Confusion Regarding MWBE Regulations

Our investigations and analysis have revealed that there was confusion within DPS about the MWBE program’s rules and regulations. In several interviews with DPS staff regarding the certification requirements for suppliers, we received different interpretations from different personnel. Under the current regulations suppliers of bulk items do not need to maintain an inventory in order to be certified. DPS employees differed in their definitions of what constitutes a bulk item. One employee provided different definitions of bulk items in separate interviews. None of these interpretations were based on written rules but rather on the individual employees’ experience. The lack of consistency in how regulations are applied undermined DPS’s certification decisions.

6. Vague Description of MWBE Work

The Schedule C-1 forms detail what services MWBEs will perform on a City contract. Too often, these forms do not provide a detailed description of services that MWBEs will perform. In numerous contracts we reviewed, the description of service on these forms is a mere four or five words to explain hundreds of thousands of dollars in spending. These short descriptions make it difficult for compliance officers to have a good understanding of the work that MWBEs are supposed to be performing. This, in turn, makes it difficult for compliance officers to determine whether MWBEs are capable of providing the services outlined on the Schedule C-1s. Also, if compliance officers do not have a clear, detailed understanding of what services MWBEs are supposed to provide, it is hard to assess the validity of MWBE participation as contracts progress.

7. The City’s 2010 Budget Does Not Provide Sufficient Administrative Resources for the MWBE Program

The 2010 Budget provides Compliance with 7 budgeted positions and a contract budget of $500,000 to conduct all MWBE certifications and monitor all post-contract award MWBE compliance. The historical record makes clear that it is simply impossible for Compliance to

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properly administer the program with these limited resources. With this limited budget and staffing, Compliance will not be able to: properly scrutinize firms who attempt to become MWBE (or DBE) certified, conduct any meaningful assessment of actual MWBE participation on City contracts, or address any of the major deficiencies in the program’s administration detailed above.

With 7 budgeted positions and a small contract budget, Compliance will not be able to monitor MWBE compliance on each contract on an ongoing basis. Once C2 is fully implemented, City vendors will enter payments to MWBEs into a centralized database, which will enable the reporting of actual payments to MWBEs. However, C2 does not address the underlying deficiencies in how payments to MWBEs are documented. C2 will still rely on the payments that prime contractors and subcontractors report without validating the information. With limited resources, Compliance will not be able to comprehensively assess the validity of the payment information reported through C2.

Compliance will not be able to perform the certification functions of the MWBE program. The program’s 2,500 certified firms each submit annual No Change Affidavits and have to recertify every five years. Additionally, new firms will continue to apply for certification. The resources provided to Compliance will make it impossible to adequately handle this workload. This workload will be even more difficult to contend with if Compliance hopes to improve the City’s lax certification process, by instituting a more rigorous examination process prior to approving a firm’s certification.

A recent interview confirmed that the resources allocated to Compliance are nowhere near sufficient to administer the MWBE program. In the interview, a City worker with knowledge of Compliance’s administration of the MWBE program related to the IGO that there are currently 5 staff members in Compliance working on the MWBE program. Under the direction of a supervisor, there are 3 certification officers working on certification applications. In addition, there are 6 part-time consultants who assist the certification officers by conducting site visits of applicant firms.134 These 3 certification officers and 6 part-time consultants are responsible for maintaining the certification files of the 2,500 currently certified firms as well as scrutinizing and assessing the certifications of new applicants. Compliance is struggling to simply keep up with the volume of work and has no capacity to improve the City’s certification process.135

The interview also revealed that there is one compliance officer now evaluating actual MWBE participation on all City contracts. This compares to the 10 compliance officers in DPS when it was responsible for post-award compliance.136 With 10 compliance officers, DPS could not adequately evaluate actual MWBE participation. By allocating Compliance only a single compliance officer, the administration has effectively eliminated any comprehensive review and/or analysis of actual MWBE participation on City contracts.

134 Interview #5
135 Id
136 Id
Given the resources allocated to Compliance in the 2010 budget, the fraud, abuse, and mismanagement that have plagued the program since its inception are all but assured to continue unabated.

H. **Recommendations to Improve Data Collection and Reporting**

The failings of the program cannot be blamed on a single person or a single department, and therefore no single policy change can fix the program. Rather, what are needed are both a rigorous program administration and a commitment from all parts of the City to the program’s goals. In the following sections, we offer a series of recommendations to help the program better fulfill its mission.

1. **Track and Report Actual Payments to MWBEs**

In the past, DPS reported MWBE participation based on the contracts and subcontracts that are awarded to MWBEs. This data does not reflect the actual payments to MWBEs. As our analysis above shows, there is likely a large discrepancy between the amount of contract dollars awarded to MWBEs and the payments actually made to MWBEs. The statistics that the administration reports to the City Council and the public likely substantially overstate the program’s impact. This creates an inaccurate perception in the City Council and with the public about the amount of money going to MWBEs. Because contract awards are the main criteria by which the program is judged it has lessened the focus on contract monitoring and oversight during the course of contracts.

The C2 system will allow Compliance to more efficiently collect and report payments to MWBEs. However, C2 does not address the underlying deficiencies in how payments to MWBEs are documented. Relying on the data that contractors report through C2, without assessing the validity of this data, will likely result in continued substantial overstatement of the program’s impact.

Compliance must be given the resources necessary to evaluate the accuracy of the reported payments to MWBEs. Only after this data is validated, must it then be reported to the City Council and the public. Collecting and reporting valid data on actual payments will allow the administration, the City Council, and the public to better evaluate the program’s true impact.

2. **File Contract Data Electronically**

Currently, on both construction and non-construction contracts, subcontracting disclosures are made separately, on different documents, and are reviewed by different City officials. The result is often that a MWBE compliance officer, looking solely at Schedule C-1s and Schedule D-1s, believes that a MWBE is self-performing on a contract, whereas the user department (which reviewed the project initially, supervises it as it goes along and authorizes payment) and the DPS contracts officer (who reviewed the project proposals, the bids/proposals, and the EDS) knows that the MWBE is subcontracting to non-certified firms. This blinkered approach should be changed.
In order to better monitor all aspects of the MWBE program, the City must centralize all documents related to subcontractors by developing an electronic filing system for its contracts. With contract monitoring being conducted by multiple people in multiple departments, a single electronic repository for all files relating to each individual contract will streamline the contract monitoring process. An electronic repository would allow DPS and Compliance to better access contract documents and thus allow them to make compliance determinations in a timelier manner. Because the user departments are the prime recipients of contract documents, they should be responsible for electronically filing all documents related to contracts. Documents could either be uploaded to a dedicated website or to a network shared drive to which user departments, DPS, and Compliance have access. A further step would be to centralize a detailed subcontractor disclosure in the C2 system, to ensure that all contract data is transparent and accessible to all personnel involved in administering a contract.

I. **Recommendations to Improve MWBE Administration**

While better data reporting will help the program better accomplish its goals, the City must also improve the administration of the program. In interviewing the DPS officials who previously administered the MWBE program, we have encountered a program that is focused on “pushing paper” rather than on ensuring that the program is achieving its goals. The administration needs to rigorously enforce the program’s rules and regulations and ensure that participants act in good faith. To achieve this, the administration of the program has to be “a hands-on process that requires close scrutiny and instant response to issues before they become major problems.”

1. **Ensure More Detailed Documentation of Payments to MWBEs**

In both construction and non-construction, the documentation that DPS used to audit actual payments to MWBEs was insufficient. While lien waivers in construction provide extensive documentation about who has been paid, IGO investigations and testimony during the Builders trial illustrate the ease with which lien waivers can be used to overstate payments to MWBEs. In non-construction, simply having MWBEs attest to how much they have been paid without additional documentation creates even more potential for abuse.

In both programs, Compliance must at a minimum require canceled checks to verify what MWBEs are actually paid. Canceled checks are harder to manipulate than the lien waivers and attestations that compose the current payment verification process. Requiring contractors to submit cancelled checks to demonstrate payment to MWBE firms would also address the problem of verifying indirect participation. When indirect participation is claimed for the same firm, the check numbers of canceled checks could be reconciled to ensure that the same payment is not being counted twice.

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137 We recognize that there may be some privacy concerns with access to data, but these should be minimal since most of the documents do not contain sensitive information. Also, while this may slightly increase the administrative burden on the user departments, electronically filing all contract documents should require minimal effort.

(A) Direct Payment of Subcontractors

A more far-reaching step would be for the City to directly pay all subcontractors\textsuperscript{139}, which was recommended by the 2004 Task Force that studied the program.\textsuperscript{140} The direct pay of subcontractors would eliminate most of the uncertainty about how much MWBEs are being paid, which, in turn, would decrease the administrative burden on Compliance’s compliance unit.\textsuperscript{141} A further benefit is that this would ensure that MWBEs would get paid faster. This is especially important for MWBEs who often have limited access to credit and are, on average, smaller that their non-MWBE counterparts. Finally, direct payment would have the further benefit of reducing the ability of prime contractors to withhold payments from subcontractors, which is sometimes used as leverage by unsavory prime contractors to induce over-reporting of MWBE participation.

While there are benefits to directly paying subcontractors, there are also potential problems. Paying subcontractors directly could increase the City’s liability by establishing a contractual relationship between the City and subcontractors. It could also increase the administrative burden on the user department’s finance staff and the Department of Finance (DOF) as the City would have to issue more payments.

2. Increase Cooperation Between User Departments, DPS, and Compliance

In order for the MWBE program to improve, it must be better integrated into the City’s contracting process. The program and its various components (certification, contract-specific goal setting, and assessing actual participation) cannot function properly if operated in a vacuum, disconnected from all other aspects of contract administration. Rather, each component of the MWBE program needs to rely on information and expertise from the personnel who let and manage the City’s contracts.

Because user departments are responsible for day-to-day oversight of the City’s contracts, they should play a greater role in the administration of the MWBE program. Greater collaboration between the user departments, DPS, and Compliance would enable the administration to more quickly identify shortfalls in MWBE participation and more accurately assess the validity of MWBE participation. By electronically filing documents related to City contracts discussed in the previous section, the user departments can ensure that Compliance has timely access to the information needed to assess MWBE participation. In addition, the City should consider taking three additional steps.

\textsuperscript{139} In 2000, the City Council passed an ordinance that empowers the City to directly pay subcontractors, but, to the best of our knowledge, the City has not exercised this authority.

\textsuperscript{140} Testimony of Colette Holt. Chicago City Council Budget Committee. April 26, 2004.

\textsuperscript{141} We recognize that there is still potential for abuse as MWBEs could turn around and write checks to non-MWBES. However, this would be less likely than in the current system.
(A) *User Departments Should Monitor and Report MWBE Compliance on an On-going Basis Throughout the Performance of Contracts*

In the past, DPS generally only determined MWBE compliance at the end of contracts. The purpose of the program is to remove barriers to MWBEs receiving City contracts and if deficiencies are uncovered during a contract it may be possible to correct them by having an MWBE perform a greater portion of the work remaining on the contract. By determining compliance at the end of a contract, the City ensures that if a deficiency is discovered it is impossible to rectify because the contract has already been performed.

Therefore, the City must monitor actual MWBE participation on at least a quarterly basis. Multi-stage compliance reporting would be more likely to uncover shortfalls in actual MWBE participation and also identify front companies, brokers, and pass-throughs. According to the City’s procurement manual, the user departments are responsible for monitoring MWBE compliance during contract performance. The user departments receive Certification forms (and lien waivers for construction contracts) with each invoice that detail how much each subcontractor is being paid. The user department should use this information to monitor and report on MWBE participation as contracts are performed.

(B) *Project Managers Should Attest that Documents Submitted by Contractors Related to MWBE Compliance Are Accurate*

The documentation that is currently collected to assess MWBE participation is insufficient, in part, because MWBE compliance officers have difficulty determining whether the representations made by contractors in these documents are accurate. Many of the decisions that need to be made to determine MWBE compliance concern specific details of City contracts. Through the day-to-day management of the contract, user department contract managers are often in the best position to know what work MWBEs are actually performing.

One way to increase the involvement of user department contract managers in assessing MWBE compliance would be to have them certify that, to the best of their knowledge; the documents (lien waivers, Status Reports of MBE/WBE Payments, etc.) that contractors submit to detail MWBE participation accurately reflect the work each subcontractor performed. This requirement will help establish that the user departments are partly responsible for the program’s administration.

(C) *MWBE Compliance Officers Could Be Embedded in Each Department*

A more far-reaching step to increase user department involvement in assessing MWBE participation would be to embed MWBE compliance officers in the major contracting departments. These officers could train contracting personnel on MWBE issues and help them better identify MWBE problems as they arise. Rather than have these MWBE compliance officers report to the user department, these officers could report directly to the head of MWBE compliance in the Compliance department. This would better ensure that the officers all have a uniform understanding of the MWBE regulations and that MWBE administration is standardized.
across departments. In addition, through such deployment, the program officers would become more familiar with department and industry idiosyncrasies that would come to inform contract-based goal setting in the future (see below).

3. Increase Contract-Specific Goal Setting

For construction and non-construction contracts, the City must set MWBE goals on a contract-specific basis. Different City contracts allow for varying degrees of MWBE participation, yet the City generally applies the same contracting goals to every contract. This ignores industry differences in MWBE availability and differences in subcontracting opportunities on different contracts. In order to ensure a program that better conforms to actual MWBE contracting opportunities; the City must set MWBE goals for individual contracts based on the availability and capacity of MWBEs in individual industries.

4. Consistently Apply MWBE Regulations

DPS failed to consistently apply the MWBE program’s rules and regulations to effectively monitor MWBE certification and compliance. Going forward, Compliance must train its staff on clearly defined rules and regulations and interpretive guidance relating to the certification and compliance monitoring aspects of the program. These should include specific rules defining the certification requirements for suppliers, distributors and dealers; a clear definition of what is and what is not subcontracting; and regulations regarding how subcontracting affects participation. Compliance must then rigorously apply these and its previously written rules to the administration of the program.

5. Increase Penalty Collection from Non-compliant Firms

The City has the authority, under both the construction and non-construction ordinances, to collect penalties from firms that do not meet their MWBE commitments. Yet, the City has discontinued the practice of collecting penalties as part of the contract closing process, at which point the City is able to draw against retainage. Instead, the City notifies MWBE subcontractors of their right to seek arbitration to collect the difference between the committed amount and the amount actually paid. In practice, few subcontractors seek arbitration likely due to a desire not to offend prime contractors from whom they will likely seek business in the future.

In order to increase MWBE compliance, the City should systematically collect penalties from firms that do not meet their MWBE commitments. Currently, non-MWBE firms face few consequences for not meeting their participation commitments and thus have less of an incentive to subcontract to MWBEs. By collecting penalties, the City can better enforce the MWBE ordinances and ensure greater MWBE participation.

6. More Resources for MWBE Certification and Compliance

The 2010 Budget provides Compliance with 7 budgeted positions and a $500,000 contract budget to administer the MWBE program. For a unit that is now responsible for monitoring the MWBE compliance of 2,000 city contracts and contract modifications that the City lets each
year, as well as the certification files of 2,500 firms, these resources are clearly not sufficient to adequately administer the program.

If the MWBE program were to be better integrated into the City’s contract management process and the user department’s played a greater role in administering the program, the burden on Compliance could be partially alleviated. While we strongly advocate a greater role for the user departments, even if this were to occur, Compliance would still need greater resources to administer the program properly.

The IGO is aware that given the City’s current budget problems, increasing resources for the MWBE program will be difficult to achieve. However, the MWBE program aims to direct hundreds of millions of dollars to MWBEs each year, and in order to accomplish its goals it will need more resources.

(A) Prioritize Certification for Firms Most Likely To Do Business with the City

Currently, firms certify for the City’s program even though they have little chance of winning City contracts because the City does not often contract for goods or services in the firm’s industry. For instance, 27 firms are certified as staffing agencies or employment placement firms, even though the City is unlikely to contract with these companies due to the restrictions on City hiring imposed by the Shakman consent decree. Given the limited resources devoted to certification in the 2010 budget, Compliance should prioritize its resources so that it processes certifications based on the likelihood of an applicant firm doing business with the City. To do this, Compliance could group applicants by their North American Industry Classification System (NAICS) codes and compare a firm’s NAICS code with the percentage of City contracts that fall into that code. Based on this comparison, Compliance can then separate firms based on their chances of doing business with the City. Compliance should then prioritize the certification applications of firm’s most likely to do business with the City.

7. Responsibilities and Duties of Compliance Staff

More resources alone will not solve the MWBE program’s problems. In the past, DPS viewed the administration of the program as merely “pushing paper”. This view of the program is partly attributable to the fact that DPS had little power to enforce MWBE commitments and because the program seems to receive little support from the rest of City government. Changing this culture will require a more transparent accounting of the program’s results discussed above and a greater commitment to the program’s success.

In 2005, largely in response to the Duff scandal, DPS attempted to institute a “rigorous new certification process” to determine if companies that participate in the program are legitimately controlled by women and minorities. 142 It is clear that this rigorous new process was not fully implemented by DPS. While more information is now required of applicant firms, DPS was

focused on ensuring that firms simply completed all the required documentation rather than assessing the validity of the documentation.

In the future, Compliance’s certification officers must more thoroughly review the legitimacy of applications for the program. Given the numerous front companies and brokers that have plagued the program, the certification unit must be more vigilant when approving firms for the program.

To more accurately assess MWBE participation, Compliance’s compliance unit needs to have a better understanding of the contracts they monitor. In construction, properly auditing MWBE participation requires compliance officers to know what is happening on job sites. They need to know what companies are actually working on-site to be able to validate the information in the lien waivers that companies submit. As we have detailed above, simply relying on lien waivers is not sufficient due to the potential for abuse in the lien waiver process. In non-construction, compliance officers need to more thoroughly verify that MWBEs are receiving the payments that prime contractors report.

8. More Detailed Descriptions of MWBEs’ Scope of Services

The Schedule C-1 forms that detail what services MWBEs will perform omit critical information. We recommend that the City draft new language for its Schedule C-1 form that would require firms to detail, in greater specificity, the services and products to be provided in the contract. We have reviewed hundreds of Schedule C-1 forms that provided inadequate descriptions of complex services to be delivered by MWBEs. These terse descriptions allow prime contractors and subcontractors to operate in a cloud of uncertainty on City contracts. By making it difficult to determine what work contractors are performing, DPS has difficulty assessing whether MWBEs are capable of performing services before contracts are awarded and Compliance struggles to make actual participation determinations.

We recommend that subcontractors submit the same type of documentation they issue when submitting bids or quotes to the prime contractor. This process would help DPS and Compliance better understand the scope of services being provided by MWBEs. While DPS regulations required that copies of contracts between the prime contractor and subcontractors be submitted to DPS, in our review, only a handful of these documents were in DPS’s contract files. Better document collection and a more detailed accounting of the services an MWBE will provide would help ensure that DPS better understands the scope of services MWBEs are supposed to provide and thus can assess whether MWBEs are capable of providing those services. A better understanding of MWBEs’ scope of services will also allow Compliance to more accurately assess MWBE participation.

9. Detail Subcontracting to Non-MWBEs on All Schedule D-1’s

MWBE firms awarded construction contracts as prime contractors are required to disclose on the Schedule D-1 form the amount of the contract that the firm will subcontract to non-certified firms. This disclosure is crucial for accurately determining MWBE participation because generally an MWBE firm is given credit only for the portion of the contract that it actually
However, no such disclosure is required on non-construction contracts. The IGO has encountered numerous examples in which an MWBE firm is awarded a non-construction contract, subcontracted out a substantial portion to non-certified firms, yet the City counted 100% of the contract’s value towards its MWBE participation. The City should require non-construction MWBE prime contractors to make a detailed disclosure on the Schedule D-1s of the percentage of the contract that is being subcontracted to non-certified firms.

10. **Conduct a Rigorous Analysis of the Personal Net Worth of MWBE Applicants**

The IGO recommends two changes to the analysis of MWBE applicants’ personal net worth; one to the rules and one to the program administration. The current MWBE construction program rules state that “only an individual’s share” of “assets jointly held with his or her spouse” count toward a participant’s personal net worth. This regulation creates a loophole in that as long as assets are held in a spouse’s name they are shielded from the personal net worth limitation. Thus, the spouses of Warren Buffet and Donald Trump would be eligible for the program provided that their wealthy spouses simply did not list them as the owner of any of their assets. The rules allow legal technicalities to obscure common sense and tend to benefit the wealthy, sophisticated applicant at the expense of those who cannot afford lawyers and accountants. The rules should be changed to count all assets that Illinois law would attribute to the applicant. Illinois is an “equitable property” state, and starts from the presumption that all assets of a married couple are jointly held. But unlike a community property state, Illinois allows spouses to demonstrate that certain assets have been acquired outside the marriage and have been maintained separately.

If the rule is changed, the program should require that applicants disclose all marital assets and should count 50% of all assets to the applicant, unless a showing is made that the asset was separately acquired and maintained. One way to accomplish this would be to require both spouses to submit statements of personal net worth. Certification officers should also be trained to better understand personal finance and wealth management tools such as trusts, retirement accounts and closely-held corporations.

The other recommendation is that because the City does not have a personal net worth limit for non-construction MWBEs, the City should discontinue its practice of asking those applicants for personal net worth information. Any additional time and resources spent evaluating the personal net worth for MWBE construction applicants would be more than offset by not requesting and evaluating such information for non-construction MWBEs. This would have the additional benefit of alleviating some of the administrative burden on non-construction MWBEs because they would have to submit less information to the City. Finally, the City would benefit because it would not have to maintain and safeguard as much personal, financial information as it does currently.

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143 There is a limited and seldom-seen exception for certified general contractors.

11. Changes to MWBE Regulations

Through the course of our investigations and analysis of actual participation, we have identified one regulation concerning the MWBE program that we recommend be modified. This recommendation is detailed below.

(A) Count the Commission of Brokers as Participation

Our analysis and investigations indicate that the current City policy of excluding brokers from certification has been ineffective in preventing the participation of firms which act as brokers. Through inconsistent application of the MWBE regulations, the City has allowed brokers to become certified as suppliers and participate in the program.

We recommend the City allow brokers to participate in the program but adopt the same approach taken by the state of Illinois and only count a broker’s commission on a contract toward participation goals.\(^{145}\) We recommend a case-by-case analysis to determine what function the MWBE is performing on the contract. If the City determines that a firm is serving as a broker, we recommend that the City count toward participation only the firm’s commission or profit as MWBE participation and not the entire value of the contract. This approach should discourage the use of brokers because they will only provide minimal credit toward the MWBE goals.

J. Conclusion

Our investigations and analysis have revealed that the MWBE program is poorly administered and that the City cannot determine whether or not the program is achieving its goals. Part of the result of this substandard administration is that the program has been beset by fraud and brokers, and MWBE participation is likely far less than the publicly reported statistics.

The City’s failure to collect relevant data, its inconsistent application of the program’s rules and regulations, and a lack of cooperation between the user departments and DPS have all contributed to the program’s poor administration. Despite the Builders lawsuit and several high-profile scandals involving the program, these failings have not been corrected. The MWBE program requires continuous oversight and analysis, yet the City has failed to successfully address the program’s problems as they have arisen.

Going forward, the City must confront the problems that plague the program. To do this, there must be a commitment from all parts of City government to the program’s goals and rigorous, continuous analysis of how the program is administered and of the program’s effectiveness.

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METHODOLOGY

For this program review, we consulted a variety of resources. Many of the findings in this report are based on IGO investigations that have been conducted over the last several years. We conducted interviews with DPS staff and reviewed the regulations and ordinances governing the City’s MWBE program. We reviewed the compliance audits of hundreds of City contracts and the certification files of dozens of MWBEs. Lastly, we talked to academics and researchers in the field, studied the major court decisions, and reviewed much of the academic literature on affirmative action programs in government contracting.
Appendix A - History of Affirmative Action in Government Contracting

Affirmative action in government contracting began in the late 1960s. The Small Business Administration (SBA) was the first part of the federal government to experiment with setting aside contracts for eligible firms. The SBA used existing legislative authority to create Section 8(a) “to direct federal procurement contracts to minority-owned small businesses.” This administrative change was made in response to appeals from the Kerner Riot Commission for special outreach programs to build economic development in the inner cities. However, the program started slowly because although the new regulations stated that the purpose of the program was to direct contracts to the “socially and economically disadvantaged” it did not define this term until 1973. The SBA then defined five groups as presumptively eligible, meaning that people belonging to these groups did not have to prove that they were disadvantaged to qualify for the program. The five groups were “African Americans, American Indians, Spanish Americans, Asian Americans and Puerto Ricans.”


In 1977, the U.S. Congress first approved affirmative action in government contracting. The Public Works Employment Act of 1977 included a provision that mandated that 10 percent of the $4 billion in public works contracts authorized by the Act should go to Minority-Business Enterprises (MBEs). The following year “the Democratic leadership in Congress pushed through a bill that for the first time provided a statutory basis for the SBA 8(a) program.”

2. The Fullilove Decision and the Onset of State and Local Programs

In 1980, soon after affirmative action contracting programs were enacted into federal law, the first significant Supreme Court decision regarding affirmative action in government contracting was handed down. In Fullilove v. Klutznik, a group of contractors argued that the MBE program enacted by the Public Works Employment Act of 1977 violated the Equal Protection Clause of the constitution because it discriminated against non-minorities. The Supreme Court upheld the program on the grounds that “Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination.” Because the race-based preferences of the MBE program were intended to remedy past discrimination, the court concluded that Congress had constitutional authority to enact the program. However, the Court cautioned that “any

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146 United States Senate. Hearing of the Committee on Small Business “The Small Business Administration’s 8(a) Minority Business Development Program.” April 4, 1995
153 Id.
preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.”

Following the Court’s decision in *Fullilove*, “set aside programs proliferated nationwide to include some 36 states and 190 localities by the late 1980s.” Similarly, the federal government continued to expand its affirmative action contracting program. “The Surface Transportation Assistance Act of 1982 contained the first statutory DBE [Disadvantaged Business Enterprise] provision for federal highway and transit programs, requiring that at least 10 percent of the funds provided be expended with DBEs.” This act changed the name of the program from Minority Business Enterprise to Disadvantaged Business Enterprise, but included the same disadvantaged groups as in the earlier program. The DBE classification was expanded to include women in 1987.

3. The *CROSON* Decision and Its Aftermath

In 1989, the Supreme Court decided *City of Richmond v. J.A. Croson Co.*, in which a contractor sued the City of Richmond, Virginia claiming that its minority set-aside program was unconstitutional because it violated the Fourteenth Amendment’s Equal Protection Clause. In its decision, the Court sided with the contractors and “ruled that any affirmative action program implemented by a state or municipal government is subject to strict scrutiny.” Strict scrutiny requires that any government that adopts a program based on racial preferences must first demonstrate a compelling interest in remedying discrimination. The Court rejected Richmond’s use of a general claim of discrimination to establish a compelling governmental interest but rather required that a state or local government must provide evidence of local discrimination in order to justify a program. As an example, the Court stated that “where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.” In addition to demonstrating a compelling interest in remedying discrimination, a government program must be narrowly tailored, “meaning that it did not unduly burden those who do not benefit from the program.”

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In the aftermath of the *Croson* decision, there was “a sharp increase in the number of court cases challenging these programs” and many programs were suspended.\(^{161}\) In 1989, before the decision, there were over 230 affirmative action contracting programs in state and local governments across the country. By 2008, the number had dropped to less than 50.\(^{162}\)

The decision in *Croson* was difficult to reconcile with *Fullilove* because it held state and local affirmative action contracting programs to a different standard than federal programs. That changed in 1996 in the Supreme Court’s decision in *Adarand v. Pena*.\(^{163}\) In this decision, the court overruled *Fullilove*, “which held racial classifications to a less rigorous standard.”\(^{164}\) The Court “concluded that the strict scrutiny standard of review was appropriate for all governmental action based on race.”\(^{165}\)

4. **The 1998 Debate over the Federal DBE Program**

After the decision in *Adarand*, opponents of affirmative action in federal contracts introduced legislation to end the DBE program.\(^{166}\) In 1998, as Congress debated the Transportation Equity Act for the 21st Century (TEA-21), the six-year funding bill for federal highway and transportation programs, the debate centered on the DBE program. “The 1998 debate over DBE legislation was the most thorough in which Congress has engaged since the beginning of the program.”\(^{167}\) Opponents of the program claimed that it was nothing more than a quota and that it discriminated on the basis of race. Proponents countered that the program was flexible and met the criteria set forth by the Supreme Court in *Adarand*. In the end, amendments to eliminate the program were narrowly defeated in both houses and the program was reauthorized with the 10 percent goal intact.\(^{168}\)

Once the DBE program was reauthorized, the Department of Transportation (DOT) adopted new DBE regulations to more narrowly tailor the program to comply with the *Adarand* decision. The changes in these regulations instituted a more rigorous certification process to ensure that only disadvantaged firms were deemed eligible for the program. Also, it instituted a personal net worth limit for program participants, so that wealthy individuals were ineligible for the program. The rule explicitly banned the use of quotas and emphasized that the 10 percent participation of DBEs was a goal.\(^{169}\)


\(^{162}\) Kim, Jin-ah. “City to boost biz deals for minorities, women.” Bay State Banner. May 1, 2008.


\(^{165}\) Id., pg. 84

\(^{166}\) Id., pg. 85


\(^{168}\) Conference of Minority Transportation Officials. Testimony on the US DOT DBE Program. March 26, 2009

5. **Affirmative Action Contracting Programs in the 21st Century**

While the *Croson* and *Adarand* decisions threatened to invalidate all government affirmative action contracting programs, several federal court decisions in their aftermath have upheld the federal DBE program. In *Northern Contracting, Inc. v. the Illinois Department of Transportation* and *Sherbrooke Turf v. Minnesota Department of Transportation*, the federal DBE program was held facially to have met both the compelling interest and narrow tailoring test set out in *Adarand*, and the state’s implementation of the program was held to be narrowly tailored as applied.\(^{170}\) In *Western State Paving v. State of Washington Department of Transportation*, the federal government was held to have a compelling interest in establishing a DBE program, but the state’s implementation of that program was not narrow tailored “because WsDOT did not offer any evidence of discrimination in the Washington state construction industry.”\(^{171}\)

At the local level, two decisions in 2003, *Concrete Works of Colorado, Inc. v. City and County of Denver*\(^{172}\) and *Builders Association of Greater Chicago v. City of Chicago*\(^{173}\), found that both Chicago and Denver had a compelling interest in having an affirmative action contracting program to remedy the past effects of discrimination.\(^{174}\) However, in the *Builders* case, the court found that Chicago’s program was not narrowly tailored and gave the City six months to change its program.\(^{175}\) In 2008, a federal court in North Carolina, upheld that state’s affirmative action contracting program finding that the state had a compelling interest and that the program was narrowly tailored.\(^{176}\)

6. **Disparity Studies**

In response to the *Croson* and *Adarand* decisions, jurisdictions across the country conducted disparity studies to demonstrate that discrimination affected the market for government contracts. Initially, these studies relied heavily on anecdotal evidence of discrimination. This evidence often took the form of interviews with minority and women business owners during which they discussed individual instances of discrimination they had faced.

While courts have considered anecdotal evidence, they have required jurisdictions to also present statistical evidence of discrimination in order to prove a compelling interest. The first step in these studies is often to determine the availability of MWBEs in a jurisdiction. Once availability has been estimated, many studies determine whether MWBEs are being underutilized by calculating a “utilization percentage ratio, or disparity index.”\(^{177}\) The disparity index calculates the percentage of MWBEs in a given area compared to the total number of firms and compares


\(^{171}\) *Id.*, pg. 8.

\(^{172}\) *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F. 3d 950 (10th Cir. 2003).


that to the percentage of government contracts received by MWBEs. The use of the disparity index comes directly from the *Croson* decision, which stated,

“where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”\(^{178}\)

In addition to disparity indices, some studies have used statistical regression analysis to attempt to isolate the effects of race and gender on business ownership. These studies have examined the impact of discrimination by showing that when all other factors are held constant (education, work experience, etc.), there is a penalty attached to being a minority or a woman when predicting business ownership.

In addition to examining whether MWBEs are underutilized, the availability estimates of MWBEs serve as the basis for the numerical goals of an MWBE program. The narrow tailoring requirement of *Croson* and *Adarand* requires a jurisdiction to base availability on MWBEs that are “ready, willing, an able” to contract with government.

(A) Criticisms

Disparity studies have been criticized for not meeting the legal standards required to justify an MWBE program.\(^{179}\) A report by the U.S. Commission on Civil Rights faulted disparity studies for using “obsolete and incomplete data.”\(^{180}\) A General Accounting Office (GAO) review of 14 disparity studies regarding transportation contracts, “found that the limited data used to calculate disparities, compounded by methodological weaknesses, create uncertainties about the studies’ findings.”\(^{181}\)

One of the central criticisms of disparity studies is that they have failed to consider capacity when determining the availability of MWBEs. Generally, disparity studies have relied on counts of firms, giving the same weight to firms of vastly different sizes. One critic observed that, “the qualified-firm counting approach ignores differences in capacity and deems the single-plant firm to be equally available to serve the government as the multiplant firm.”\(^{182}\) Because MWBEs are typically smaller than non-MWBEs, this failure to take into account capacity likely overstates the availability of MWBEs. In turn, overstating the availability of MWBEs will lead to a finding of

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greater MWBE underutilization when examining the percentage of contracts awarded to MWBEs.\textsuperscript{183}

Opponents of the capacity approach argue that “excluding firms from an availability measure based on their ‘capacity’ in a discriminatory market merely affirms the results of discrimination, not remedies them.”\textsuperscript{184} This is because “the capacity argument fails to acknowledge that discrimination has prevented the emergence of ‘qualified, willing and able’ minority firms.”\textsuperscript{185}

Federal courts have disagreed on whether or not disparity studies should consider firm capacity. In \textit{Northern Contracting, Inc. v. the Illinois Department of Transportation}\textsuperscript{186} and \textit{Sherbrooke Turf v. Minnesota Department of Transportation}\textsuperscript{187}, the Seventh Circuit and Eighth Circuit Courts of Appeals, respectively, did not require that disparity studies consider firms’ capacity.\textsuperscript{188} Conversely, in \textit{Western State Paving v. State of Washington Department of Transportation}, a Ninth Circuit Court of Appeals rejected the State of Washington’s disparity statistics because they did “not account for factors that may affect the relative capacity of DBEs to undertake contracting work.”\textsuperscript{189} Similarly, in 2008, the Court of Appeals for the Federal Circuit invalidated a Department of Defense preferential procurement program partly because the disparity studies used to justify the program failed to take into account the capacity of MWBEs.\textsuperscript{190}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{185} \textit{Id.}, pg. 5
\item \textsuperscript{186} Northern Contracting, Inc. v. Illinois Dept. of Transportation, 473 F.3d 715 (7th Cir. 2007).
\item \textsuperscript{187} Sherbrooke Turf, Inc. v. Minnesota Dept. of Transportation, 345 F.3d 964 (8th Cir. 2003).
\item \textsuperscript{189} \textit{Western States Paving v. Washington State Department of Transportation}, 407 F.3d 983, 1000 (9th Cir. 2005).
\item \textsuperscript{190} \textit{Rothe Development Corporation v. Department of Defense}, 545 F.3d 1023, (2008).
\end{itemize}
\end{footnotesize}
APPENDIX B - RESEARCH ON THE IMPACT OF AFFIRMATIVE ACTION IN GOVERNMENT CONTRACTING

While attention has been paid to affirmative action in higher education and employment, comparatively little research has been done on affirmative action in government contracting. Research has in part been limited by the inability of governments to collect relevant data. A discussion of the existing research on the effectiveness of affirmative action contracting programs is discussed below.

1. Research on Benefits

   (A) Increase in Contracts Awarded to MWBEs

   There is evidence that MWBE programs have increased the amount of contracts and subcontracts being awarded to MWBEs. After the implementation of MWBE goals at the federal level, the share of federal contracts going to MWBEs grew dramatically.\(^{191}\) A recent study of the Federal Highway Administration’s DBE program in California found that increased DBE goals led to increased utilization of DBEs.\(^{192}\) Several analyses have shown that after affirmative action contracting programs are discontinued, there are large drops in the utilization of MWBEs. After Richmond ended its MWBE program, the utilization of MWBEs in city contracts dropped from 30 percent to 4 percent. Similarly, Atlanta saw its utilization of MWBEs drop from 35 percent to 14 percent.\(^{193}\) A GAO study of the federal DBE program, as implemented by the 50 states, found that although “limited data prevent a thorough assessment of the impact of the DBE Program…. data provided from the remaining two states indicate that discontinuing the federal and nonfederal programs had a negative impact on minority- and women-owned businesses.”\(^{194}\) These analyses strongly indicate that in the absence of MWBE programs, the share of contracting dollars going to MWBEs significantly decreases.

   (B) Broader Impact on MWBE Economic Development Is Unclear

   Unfortunately, there is little research on how affirmative action contracting programs have impacted the disadvantaged communities they aim to assist. There is some anecdotal evidence that programs have helped produce successful minority-owned firms. A review of the federal government’s affirmative action programs, found that “in 1994, 32 of the largest 100 African American owned firms and 17 of the top 100 Hispanic-owned firms were or had been in the 8(a) program.”\(^{195}\) While this suggests that the SBA Section 8(a) program helped these firms, it does not establish that their success was a result of the program.

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\(^{192}\) Marion, Justin. “Affirmative Action and the Utilization of Minority- and Women-Owned Businesses in Highway Procurement.” February 2009. Note: Interestingly, this study found that increasing goals did not increase the utilization of WBEs.


Empirical studies that have tried to determine the effectiveness of these programs have focused on changes in the self-employment rates of disadvantaged groups. These statistics are thought to be an indication of entrepreneurial activity and one of the central goals of affirmative action in government contracting is to spur business formation in disadvantaged communities. One study found that the gap in self-employment rates between white males and white females in construction, the industry where affirmative action contracting programs are most prevalent, has narrowed substantially over the past 25 years. It also found a lesser narrowing of the gap for African Americans and a slight widening of the gap for Hispanics. While this study points to some improvements in the racial and gender disparities in industries where these programs have been concentrated, they have not isolated the role that affirmative action contracting programs may have played in alleviating these disparities.

A 2009 study attempted to isolate the affect of affirmative action contracting programs on self-employment rates by comparing cities that implemented programs with those that did not. The study found evidence that the implementation of local, big-city affirmative action contracting programs increased the self-employment rates of African Americans men compared to white men during the 1980s. It found that “all of the gains in black self-employment were realized in the industries targeted for set-asides such as construction.” The study offers the strongest academic evidence to date that affirmative action contracting programs increase minority business formation.

2. Research on Costs and Problems

(A) Little Evidence of Increased Cost

Critics of affirmative action contracting programs argue that because the programs restrict competition they increase the cost of government contracting. Only a handful of studies have investigated this criticism empirically. In a 1997 study of set-asides for small businesses (that were not disadvantaged) in Army dredging contracts, researchers found no difference in cost when set-asides were in place. While this study did not look at set asides for MWBEs directly, “it suggests that programs that ostensibly restrict competition do not necessarily result in higher prices.” A more recent study of California’s affirmative action contracting program for minority contractors found “that a road construction project costs the government 5.6 percent less to complete after the elimination of the affirmative action program in California.”

198 Id., pg. 26.
suggests that there may be an increase in costs when an affirmative action government contracting program is in place.

(B) Front Companies and Fraud

Affirmative action contracting programs at all levels of government have been beset by scandals involving front companies. In New York, “in 1984, the State Commission on Investigation concluded that illegitimate MBE contractors outnumbered legitimate ones.” At the federal level in the late 1980s, the Wedtech Corporation, in addition to bribing Congressmen, falsified its minority-owned status in order to win hundreds of millions of dollars in defense contracts. From 2003 to 2008, the federal Department of Transportation’s “Office of the Inspector General (OIG) investigations of DBE fraud have resulted in 49 indictments, 43 convictions, nearly $42 million in recoveries and fines, and 419 months of jail sentences.”

Some researchers have uncovered statistical evidence of front companies in MWBE programs. A 1996 study, found that “those MBEs heavily reliant upon government sales are the youngest subset of MBE’s examined in this study.” The authors hypothesize that this could be explained by the fact “that some of the young MBEs are front companies.” A more recent study on the impact of affirmative action programs in construction indicated that “some white females are fronting firms that are actually being run by their white male spouses.”

(C) Contracts Concentrated among a Few Firms

Critics have lamented that contracts awarded through affirmative action programs are overwhelmingly concentrated in a few participating firms. In a 1981 report on the Section 8(a) program, the GAO found that 31 percent of the program’s contract awards went to only 50 firms. Future GAO reports found that this problem persisted in the Section 8(a) program. By concentrating contracts in a few select firms, the benefits of the program are not widely dispersed. This in turn makes it less likely that the programs’ broader economic development goals are achieved. Additionally, there is some evidence that minority-owned firms that rely heavily on affirmative action programs are more likely to fail than minority-owned firms that receive less government business.

204 Statement of Joel Szabat, Deputy Assistant Secretary for Transportation Policy, U.S. Department of Transportation. Committee on Transportation and Infrastructure, House of Representatives. March 26, 2009.
206 Id.
209 General Accounting Office. “Small Business Administration: 8(a) is vulnerable to program and contractor abuse.” September 1995.
Office of the State Comptroller

Thomas P. DiNapoli
State Comptroller

M/WBE State Audit Review Session

A Review of M/WBE Performance Data, Major Areas for Audit Review, and Technical Assistance Resources Available for State Agency Fiscal Officers and Purchasing Administrators

August 4, 2009
OFFICE OF THE STATE COMPTROLLER
M/WBE AUDIT REVIEW SESSION
AGENDA

Welcome & Session Overview  Mary Louise Mallick
                              Angela Dixon

M/WBE Update  Michael Jones-Bey

Introduction and Overview of Data and Audit Components  Lynn Canton

Performance Data Review  Dave Hancox
                              Jennifer Van Tassel

Review & Discussion of Audit Scope and Protocols  John Buyce

Technical Assistance Resources  Larry Appel
                                  Bruce Girigorie
                                  Scott Clay

Questions & Discussion Period  Angela Dixon

Closing Remarks  Angela Dixon
I appreciate your participation at today’s session on our upcoming review of the Minority- and Women-Owned Business Enterprise (M/WBE) program. It is my intention to conduct these audits in a manner that yields findings and recommendations that can promote the continued improvement of the Statewide performance of this important program.

That is why we have specifically designed this session to provide you with performance data, audit protocols, technical assistance and effective practices that can contribute to your M/WBE efforts and enhance your ability to assess your program. I am also very pleased that colleagues from the Empire State Development Corporation (ESDC) have joined us today to further assist your efforts in this regard.

Through our own OSC internal purchasing practices, strategic investments with emerging managers through the New York State Common Retirement Fund and these M/WBE initiatives, in combination with leadership and support from the Governor and the ESDC, we believe that New York State can go beyond compliance with Article 15-A to achieving the benefits and opportunities associated with this increasingly important aspect of our business community.

I encourage your questions and participation during this session today, and invite you to call upon my designated staff for any further assistance you may require.

Thomas P. DiNapoli
State Comptroller
Michael H. Jones-Bey  
Executive Director  
Division of Minority & Women's Business Development

There are at least two reasons that make today’s meeting regarding the state’s Minority and Women’s Business Enterprise (MWBE) program so compelling:

The first is that article 15A of the Executive law mandates that all state agencies seek MWBE participation on state contracts.

The second reason is that, given the current condition of our state’s economy, support of small businesses are more important than ever. Small businesses account for approximately 50% of our workforce and create 75% of all new jobs. Considering that almost all MWBEs are small businesses it is vital that these businesses be given full opportunities to win contracts, create jobs and generate tax revenues.

I am delighted therefore to co-host this meeting with the New York State Office of the State Comptroller (OSC). Comptroller DiNapoli has not only made diversity a commitment within his own agency, he has also been one of our program’s strongest allies. This meeting represents the latest and most significant collaboration between OSC and the New York State Division of Minority and Women’s Business Development.

You were invited to this meeting because you have the ability to influence your agency’s performance with regard to compliance with article 15A. While overall, the state has recently increased utilization rates for MWBE participation, the majority of state agencies have yet to adequately improve.

It is our intention to remedy this problem with a number of new protocols and resources that should usher in a new era of performance, accountability, and transparency. In the fall of 2009 the OSC and the DMWBD will again reconvene a meeting of state agencies. At that meeting we will host our state’s commissioners to discuss agency performance data, program mandates, and plans to publish individual agency MWBE utilization data.

In the meantime, it is our hope and expectation that you personally will fully embrace this initiative in order to bring your agency fully into compliance with state law and do your part to help revitalize our state’s economy. Members of my staff along with the OSC are available to provide technical assistance to help you build your MWBE program. If you have any questions please call Scott Clay at (518) 292-5347.

Sincerely,

Michael H. Jones-Bey  
Executive Director  
New York State Division of Minority and Women Business Development  
MHJB/sr
OVERVIEW AND PURPOSE
OF THE SESSION

PURPOSE

Today’s session will give State agency personnel the tools needed to improve their agency’s current Minority- and Women-Owned Business Enterprise (M/WBE) program. Office of the State Comptroller (OSC) staff will share the most recent Statewide data on M/WBE performance, as well as audit protocols to be used in upcoming reviews of agency programs. OSC and Empire State Development Corporation (ESDC) staff will also share best practices for running an effective program.

OVERVIEW

Article 15-A of the New York State Executive Law (Executive §§310-318) and State Finance Law §163 (6) were enacted to promote equality of economic opportunity for minority group members and women, and to eradicate barriers that have impeded access by minority- and women-owned business enterprises to State contracting activities.

As the State’s chief fiscal oversight agency, OSC conducts audits of agencies’ M/WBE programs. Previous audits have found that Article 15-A does provide M/WBEs with access to State contract opportunities that they otherwise might not have had. Audits have also found that oversight of the statute’s implementation, application processing, goal setting, utilization, and reporting could be improved in each area.
OSC will be conducting a series of upcoming agency reviews on major elements of an effective M/WBE program. Audit protocols are outlined in the presentation material for today’s session. Agency personnel are encouraged to review the materials contained in this booklet, assess their agency’s program relative to other similar agency programs, share effective practices with colleagues, and seek further guidance from OSC and ESDC on ways to strengthen their agency’s efforts, if necessary.

The Office of the State Comptroller appreciates the support and collaboration of ESDC personnel in developing this session and their ongoing efforts to assess and improve upon the State’s performance under Article 15-A. OSC also appreciates the dedicated efforts of fiscal managers and M/WBE program personnel across State government to improve performance under this important program.

**CONTACT INFORMATION AND FEEDBACK REQUESTS**

Further information on OSC’s M/WBE efforts and contact information for each of the presenters are contained in this booklet. Agencies are encouraged to provide feedback to help us in planning future such sessions. A feedback form is provided and can be submitted at the end of the session, or sent to Stacey Philpott at OSCForum@osc.state.ny.us.
PRESENTATIONS

M/WBE Update
Michael Jones-Bey (ESDC)

M/WBE Accountability
Lynn Canton

Performance Data Review
Dave Hancox
Jennifer Van Tassel

M/WBE Audit Protocols
John Buyce

Technical Assistance
Larry Appel
Bruce Girigorie
Scott Clay (ESDC)
Minority- and Women-Owned Business Initiative

Office of the State Comptroller
August 4, 2009

Minority- and Women-Owned Business Participation

Criteria:
Article 15-A of the New York State Executive Law requires specific State agencies, public authorities, and other entities to establish annual employment and business participation goals for certified minority- and women-owned businesses (M/WBEs) and to make a good faith effort towards achieving those goals. Participation goals are reported as a percentage of total discretionary contract dollars spent.

Note: Due to ongoing long-term contracts, such as construction contracts, ‘Actual Dollars’ may not reflect the actual contract dollars awarded to M/WBEs for the fiscal year even if that fiscal year has ended.
Also note: This metric data is self-reported by the agencies with limited or no external review.

Effect:
State entities must make an effort to expand M/WBE participation in State business to assist the development of M/WBEs.
Summary of Requirements

- Set Goals
- Track Performance
- Report Data
- Make Diligent Efforts

Minority- and Women-Owned Business Participation

**GREEN**: The agency has achieved 100% or more of its goal for the year.

**YELLOW**: The agency has achieved between 70% and 100% of its goal for the year.

**RED**: The agency has achieved less than 70% of its goal for the year, or did not submit goal and/or utilization data for the year.
Participation Results

Percentage of Agencies in Each Status Level - MBE

- Minority-Owned Business Participation
  - SFY 2005–2006: 71% (Red), 23% (Green), 5% (Yellow)
  - SFY 2006–2007: 71% (Red), 22% (Green), 7% (Yellow)
  - SFY 2007–2008: 73% (Red), 23% (Green), 4% (Yellow)
  - SFY 2008–2009: 69% (Red), 22% (Green), 8% (Yellow)
Percentage of Agencies in Each Status Level - WBE

MBE Goal Stratification (FY 08-09)
## Agencies with MBE goals between 0 and 1 percent...

- Albany Port District Commission
- Commission of Correction
- Commission on Public Integrity
- Department of Agriculture & Markets
- Department of Agriculture & Markets – State Fair
- Department of Taxation & Finance
- Division of Military & Naval Affairs
- Division of Probation & Correctional Alternatives
- Division of State Police
- Division of the Lottery
- Financial Control Board – New York City
- Hudson River–Black River Regulating District
- New York State Energy Research and Development Authority
- New York State Olympic Regional Development Authority
- Niagara Frontier Transportation Authority
- Office for Technology
- Office for Technology – Telecommunications
- Office for the Aging
- Office of Alcoholism & Substance Abuse Services
- Office of Homeland Security
- Office of Mental Health
- Office of Real Property Services
- Office of the Medicaid Inspector General
- Parks & Recreation – Natural Heritage Trust

## Agencies with MBE goals between 2 and 5 percent...

- Adirondack Park Agency
- Albany County Airport Authority
- Board of Elections
- Capital District Transportation Authority
- Commission on Quality of Care and Advocacy for Persons with Disabilities
- Consumer Protection Board
- Council on the Arts
- Department of Health
- Department of State
- Division of Alcoholic Beverage Control
- Division of Criminal Justice Services
- Division of Housing & Community Renewal
- Division of the Budget
- Division of Veterans’ Affairs
- Empire State Development Corporation
- Executive Chamber
- Governor’s Office of Employee Relations
- Higher Education Services Corporation
- Insurance Department
- Long Island Power Authority
- New York Convention Center Operating Corporation
- New York State Bridge Authority
- New York State Foundation for Science, Technology and Innovation
- Office of Children & Family Services
- Office of Mental Retardation & Developmental Disabilities
- Office of Temporary & Disability Assistance
- New York Power Authority
- Public Employment Relations Board
- Public Service Commission
- State Education Department
- State Insurance Fund
- State of New York Mortgage Agency
- SUNY Central
- Workers' Compensation Board
Agencies with MBE goals between 6 and 10 percent...

- Battery Park City Authority
- City University Construction Fund
- City University of New York
- Crime Victims Board
- Department of Correctional Services
- Department of Economic Development
- Department of Environmental Conservation
- Department of Labor
- Department of Transportation
- Division of Parole
- Empire State Institute for Performing Arts
- Governor's Office of Regulatory Reform
- Housing Finance Agency
- Metropolitan Transportation Authority
- New York State Thruway Authority
- Office of General Services
- Office of Parks, Recreation, & Historic Preservation
- Office of the State Comptroller
- Racing & Wagering Board
- State University Construction Fund

Agencies with MBE goals above 10 percent...

- Banking Department
- Department of Civil Service
- Department of Motor Vehicles
- Division of Human Rights
- Dormitory Authority of the State of New York
- Hudson River Park Trust
- Roosevelt Island Operating Corporation
MINORITY- AND WOMEN-OWNED BUSINESS INITIATIVE

Office of the State Comptroller
August 4, 2009
MINORITY- AND WOMEN-OWNED BUSINESS PARTICIPATION

**Criteria:** Article 15-A of the New York State Executive Law requires specific State agencies, public authorities, and other entities to establish annual employment and business participation goals for certified minority- and women-owned businesses (M/WBEs) and to make a good faith effort towards achieving those goals. Participation goals are reported as a percentage of total discretionary contract dollars spent. *Note: Due to ongoing long-term contracts, such as construction contracts, ‘Actual Dollars’ may not reflect the actual contract dollars awarded to M/WBEs for the fiscal year even if that fiscal year has ended. Also note: This metric data is self-reported by the agencies with limited or no external review.*

**Effect:** State entities must make an effort to expand M/WBE participation in State business to assist the development of M/WBEs.

**Rating System**
- **GREEN:** The agency has achieved 100 percent or more of its goal for the year.
- **YELLOW:** The agency has achieved between 70 percent and 100 percent goal for the year.
- **RED:** The agency has achieved less than 70 percent of its goal for the year, or did not submit goal and/or utilization data for the year.
Minority-Owned Business Participation – Overall Progress of State Agencies

The graphics below show where New York State as a whole stands in regard to achieving Minority-Owned Business participation goals. The figures are calculated by dividing the average achieved by the average goal for all New York State agencies required to report. For example, in fiscal year 2005-2006, New York State achieved 42 percent of the average of all MBE goals set by State agencies.
Minority-Owned Business Participation – Percent of Agencies

GREEN = 100% or more progress towards goal
YELLOW = 70% to 100% progress towards goal
RED = less than 70% progress towards goal
Women-Owned Business Participation – Outreach Progress of State Agencies

The graphics below show where New York State as a whole stands in regard to achieving Women-Owned Business participation goals. The figures are calculated by dividing the average achieved by the average goal for all New York State agencies required to report. For example, in fiscal year 2005-2006, New York State achieved 66 percent of the average of all WBE goals set by State agencies.
Women-Owned Business Participation – Percent of Agencies

GREEN = 100% or more progress towards goal
YELLOW = 70% to 100% progress towards goal
RED = less than 70% progress towards goal

Women-Owned Business Participation

SFY 2005–2006
GREEN: 32%
YELLOW: 61%
RED: 8%

SFY 2006–2007
GREEN: 28%
YELLOW: 64%
RED: 8%

SFY 2007–2008
GREEN: 34%
YELLOW: 57%
RED: 9%

SFY 2008–2009
GREEN: 34%
YELLOW: 56%
RED: 9%
Office of the State Comptroller
August 4, 2009

M/WBE Audit Protocols

Past Audit Efforts

- Audits undertaken between 2001 and 2004 confirmed that Article 15-A had given M/WBEs access to contracting opportunities that they otherwise may not have had.
- **BUT** Problems existed with
  - Agency goal setting, utilization & reporting
  - Division oversight and M/WBE certification
M/WBE Audit Plan

- Series of focused audits of agency/authority performance, compliance and outreach efforts.
  - Individual audits of a cross-section of entities
    - Selected by both size and sector of government
  - Five targeted areas
  - Identifying best practices and common problems

M/WBE Audit Focus Areas

- Five targeted audit areas
  - Goal setting
  - Performance tracking
  - Data verification
  - Vendor assistance
  - Outreach efforts
Goal Setting

- Criteria: Agencies are directed to make a good faith effort to expand opportunities for M/WBE vendor participation.
  - Is there an established process to set goals?
  - What contributing factors are considered?
  - How do the goals compare to similar agencies?
  - What strategies are put in place to achieve goals?

Performance Tracking

- Criteria: Management needs to have a system that provides complete, accurate and reliable information to enable monitoring and decision making.
  - How is data tracked?
  - What data is captured?
  - Where does the data come from?
  - How is accuracy ensured?
  - How is completeness ensured?
Data Verification

- Criteria: Reported information should be complete, accurate and timely.
  - Does the data recorded by division match agency reports?
  - Does the agency-reported data match any supporting documentation?
  - Is the reported data complete?
  - Was the reporting done timely?

Vendor Assistance

- Criteria: Agencies should work with existing vendors to get them certified for program participation.
  - Does the agency have an inventory of existing vendors?
  - Does the agency make any efforts to determine if vendors may be M/WBE eligible?
  - How does the agency help vendors get certified?
Outreach Efforts

- Criteria: Agencies should seek out new qualifying vendors and encourage them to compete for opportunities.
  - What strategies exist to identify new, qualified vendors?
  - How does the agency reach out to these groups to encourage participation?

What to Expect if your Agency is Selected...

- Each audit should take about 4 to 6 weeks.
- Each agency will receive its own individual audit report.
- You will have an opportunity to submit a response to any findings, which will be included in the final report.
- Results of individual reports might be “rolled up” to form Statewide conclusions and recommendations.
Technical Assistance

Office of the State Comptroller
August 4, 2009

Technical Assistance

Technical Assistance (TA) is designed to provide State agencies and public authorities with support in the following:

- M/WBE program development
- Developing and achieving your goal plan
- Identifying opportunities in the RFP/contracting process
- Identifying opportunities in purchasing using discretionary authority
- Designing an effective compliance program
- Resource information (OSC, ESDC).
M/WBE Program Development

- Developing policies and procedures that facilitate “participation by minority group members and women with respect to State contracts pursuant to Article 15-A
- Designing contract language, forms, tracking and other compliance methods that can be used to ensure contractor compliance, transparency and effective M/WBE program monitoring
- Understanding how federal, State and local laws, rules and regulations impact specific agencies, industries, contractors and/or types of procurements

Methods for Developing and Achieving Your Goal Plans

- Reviewing procurement history
- Identifying opportunities in contracting/discretionary purchasing
- Conducting market analysis of available firms based on service and product needs
Opportunities in the RFP/Contracting Process (OSC)

- Agency and contract specific
- Attachment A (Cover Letter and Material Proposal Acknowledgment form) is a mandatory submission and must be signed by proposers
- Intent:
  - Proposers agree to make good faith efforts in utilization of M/WBEs as subcontractors and suppliers on contracts
  - Assure M/WBE participation goals are applicable to the contract
  - Assigned M/WBE participation goals in amounts at least equal to X% MBE and Y% WBE of the total dollar value of the project

Opportunities in the RFP/Contracting Process (OSC)

- Guarantee proposers respond to participation goals by completing and submitting
  - M/WBE Utilization Plan;
  - Notice of Intent to Participate;
  - Workforce Composition Form; and
  - Request for Waiver (contained in Appendix B of the RFP).

- Contract will be monitored by OSC’s Compliance Officer
Opportunities in Purchasing With Discretionary Authority

- To fulfill M/WBE participation goals in discretionary procurements, agencies must utilize the certified firms in the ESDC database of M/WBEs
- Not subject to State competitive bidding requirements.
- Purchases over $15,000 are required to be advertised in the NYS Contract Reporter (see attachments “Contract Ad Language”)
- Discretionary purchases over $50,000 are subject to OSCs Bureau of Contracts approval
- State agencies have discretion to purchase commodities or services up to $100,000 providing:
  - Purchases from ESDC-certified MWBEs or New York small businesses; or
  - Purchase commodities or technologies that are recycled or remanufactured

Compliance Guidance

- Evaluating M/WBE program processes to ensure requirements and procedures are consistent with Article 15-A
- Contractor compliance monitoring and reviews
- Resolving contractor issues of noncompliance
Compliance Guidance

- Processing waiver requests
- Documentation and demonstration of good faith efforts
- M/WBE requirements during bidding process

To access OSC’s M/WBE site, visit www.osc.state.ny.us, hover your mouse over “OSC Procurements” on the left menu, then choose “M/WBE Information”
Technical Assistance Contacts

- **Bruce M. Girigorie**
  M/WBE Specialist
  bgirigorie@osc.state.ny.us
  Phone: (518) 408-3283

- **Mildred P. Smith**
  Compliance Officer
  comply@osc.state.ny.us
  Phone: (518) 486-1276

- **Email Box**
  mwbe@osc.state.ny.us
ATTACHMENTS

OSC Executive Order on Minority/Women-Owned Business Enterprise Procurements A-1

OSC Executive Order on Equal Opportunity, Non-Discrimination and Affirmative Action A-2

Contract Reporter Ad Best Practice Language A-3

OSC RFP Attachment A A-5

OSC RFP Administrative Information Section A-9

OSC Contracts Appendix B M/WBE and Equal Employment Opportunities Requirements A-11

Article 15-A of the New York State Executive Law: Participation by Minority Group Members and Women with Respect to State Contracts A-21

5 NYCRR Chapter XIV Division of Minority and Women’s Business Development A-37
MINORITY/WOMEN-OWNED BUSINESS ENTERPRISE PROCUREMENTS

WHEREAS, Article 15-A of the New York State Executive Law (Executive Law §§310 – 318) and State Finance Law §163 (6) were enacted to promote equality of economic opportunity for minority group members and women and to eradicate barriers that have unreasonably impeded access by minority and women-owned business enterprises (M/WBEs) to State contracting activities; and

WHEREAS, consistent with the above laws, the Office of the State Comptroller (OSC) has a longstanding and continuing commitment to the participation of M/WBEs in the State's contracting and procurement activities as providers of goods and services. In fact, this commitment is consistent with the underlying purpose of my Executive Order on Equal Opportunity, Non-Discrimination and Affirmative Action; and

WHEREAS, with this Executive Order, I hereby reaffirm that commitment.

NOW, THEREFORE, I, Thomas P. DiNapoli, Comptroller of the State of New York, in consideration of the aforementioned, do hereby order that:

All appropriate OSC employees will take steps to facilitate the fullest possible utilization of M/WBEs, in accordance with the above laws, in the purchasing and contracting activities of OSC, consistent with procedures developed by the OSC Division of Human Resources and Administration.

__________/s/__________
Thomas P. DiNapoli
Comptroller, State of New York

Revised Date: July 29, 2009
Original Date: March 12, 2001
EXECUTIVE ORDER

EQUAL OPPORTUNITY, NON-DISCRIMINATION AND AFFIRMATIVE ACTION

WHEREAS, discrimination based on race, creed or religion, color, national origin, sex (including gender identity or expression), disability, age, marital status, sexual orientation, military or veteran status, genetic predisposition or carrier status is prohibited under State, federal or local law, rule or regulation or executive order; and

WHEREAS, in recent years, the State Human Rights Law, like many similar laws, rules and regulations adopted on the federal, state and local levels, has been expanded by the Legislature to prohibit discrimination against people with disabilities and to require that certain reasonable accommodations be made to afford disabled citizens equal opportunities at work and in places of public accommodation; and

WHEREAS, the underlying purpose behind all of these measures is to ensure that public services are provided and that employment decisions are based upon individual qualifications, merit, and ability and not on prejudice or unlawful bias.

NOW, THEREFORE, I, Thomas P. DiNapoli, Comptroller of the State of New York, in consideration of the aforementioned, do hereby order that:

1. All managers, supervisors and employees within the Office of the State Comptroller or under its jurisdiction to make diligent, good faith efforts to ensure that all persons employed or served by this Office are afforded equal opportunity, without discrimination based upon membership in one of the above classes.

2. The Deputy Comptroller for the Division of Diversity Programs to include this Executive Order in the Diversity and Affirmative Action Plan of the Office of the State Comptroller and to supplement it with a policy statement setting forth in greater detail its requirements.

/s/
Thomas P. DiNapoli
Comptroller, State of New York

Last Revised Date: July 29, 2009
Original Date: March 12, 2001
BEST PRACTICE 1

Agency X intends to purchase (insert project description, i.e., 1,000 widgets), pursuant to its discretionary authority under State Finance Law section 163(6). Interested parties should contact (agency purchasing officer) to discuss this opportunity.

BEST PRACTICE 2

Agency X intends to purchase (insert project description, i.e., 1,000 widgets) pursuant to its discretionary authority under State Finance Law section 163(6), which authorizes purchases without a formal competitive process in certain circumstances, including purchases from New York State small businesses, from businesses certified pursuant to Article 15-A of the New York State Executive Law and, if applicable, from businesses selling commodities or technologies that are recycled or remanufactured. Interested parties should contact (agency purchasing officer) to discuss this opportunity.

BEST PRACTICE 3

Agency X intends to purchase (insert project description, i.e., 1,000 widgets) pursuant to its discretionary purchasing authority under State Finance Law section 163(6). This procurement opportunity is limited to New York State small businesses, businesses certified pursuant to Article 15-A of the New York State Executive Law and, if applicable, businesses selling commodities or technologies that are recycled or remanufactured.
ATTACHMENT A

COVER LETTER
(MANDATORY SUBMISSION: TO BE INCLUDED IN THE TECHNICAL PROPOSAL)
RFP09-01 – Professional Auditing Services for the State's Annual Financial Statements

A. INFORMATION WITH REGARD TO PROPOSER/FIRM:

i. Proposer's Information:

Proposer's Name: ____________________________________________________________

Address: ____________________________________________________________________

City, State, Zip Code: __________________________________________________________

Telephone/Fax Numbers: (_____) (_____) (_____) ________________________________

ii. Primary Contact Person with regard to this Proposal:

Name: _____________________________________________________________________

Telephone/Fax Numbers: (_____) (_____) (_____) ________________________________

Email Address: ______________________________________________________________

iii. Response with regard to Appendix D, Procurement Integrity Guidelines, Paragraph 6:

Name: _____________________________________________________________________

Address: ____________________________________________________________________

City, State, Zip Code: __________________________________________________________

Telephone/Fax Numbers: (_____) (_____) (_____) ________________________________

Email Address: ______________________________________________________________

Place of Principal Employment: ________________________________________________

Occupation: __________________________________________________________________

This individual/organization has a financial interest in the procurement:  □ Yes  □ No

No such individual/organization is authorized to represent the Proposer:  □ Yes  □ No

B. MINIMUM QUALIFICATIONS: Please check the appropriate box.

Note: subcontractors cannot be used to meet minimum qualifications.

i. The Proposer has audited the annual GAAP basis financial statements for a minimum of one State government within the last five years:  □ Yes  □ No*

Name of State government: ___________________________________________________
ii. The Proposer's firm is a Certified Public Accountancy (CPA) firm that is in good standing with the New York State Board for Accountancy, or with the State Board for Accountancy where licensed.

| Yes | No* | State where licensed, if other than New York: __________________________ |

iii. The Proposer's firm has included a copy of the firm's current registration to practice public accounting in New York State:

| Yes | No* |

iv. The Proposer's statement, signed by an authorized signatory, that the firm is independent of OSC in accordance with AICPA and government auditing standards to conduct the proposed audit has been provided.

| Yes | No* |

C. PROPOSER'S ACKNOWLEDGEMENTS: Please check the appropriate box.

i. The Proposal, including the price quoted, is a firm and irrevocable offer for a period of 240 days from the date of submission to OSC.

| Yes | No* |

ii. The Proposer is willing to and capable of performing the Scope of Work and Mandatory Services as outlined in Section 4.0 of the RFP.

| Yes | No* |

iii. The Proposer has read, understands, and accepts the provisions of Appendix A – Standard Clauses for OSC Contracts. Appendix A contains important information related to the contract to be entered into as a result of this RFP. Appendix A will be incorporated, without change or amendment, in the contract entered into between OSC and the successful Proposer. By submitting a response to this RFP, the Proposer agrees to comply with all the provisions of Appendix A.

| Yes | No* |

iv. The Proposer agrees that OSC shall have the right to approve or disapprove, after appropriate review and/or interview(s), any and all subcontractor(s) of the Proposer prior to their performance of services for this engagement.

| Yes | No* |

v. The Proposer is willing to enter into an Agreement substantially in accord with the terms of Attachment B, the Draft Contract, should the Proposer be selected for contract award.

| Yes | No* |

vi. The Proposer will provide OSC with pre- and post-audit access to documents, personnel, and other information necessary to conduct audits upon request during the term of the engagement and for a period of six years thereafter.

| Yes | No* |

vii. The Proposer agrees that all individuals assigned to this relationship are fully capable of providing the services described in this RFP, that if an individual named in the response to this RFP becomes unavailable, the Proposer shall substitute a person of at least equal skill and experience who shall fulfill the same requirements as the person replaced, and that OSC reserves the right to reject any such substitute individual for any legally valid reason.

| Yes | No* |
viii. The Proposer agrees that it shall be fully responsible for performance of work by its staff and by its subcontractor's staff. OSC reserves the right to request removal of any Proposer staff or subcontractor staff if, in OSC's discretion, such staff is not performing in accordance with the Agreement. The Proposer also agrees that any replacement of staff removed from, reassigned or separated from the employ of the Proposer for any reason must match or exceed the former staff member's skill level and experience. Any replacement staff or subcontractor staff must be pre-approved in writing by OSC. □ Yes □ No*

ix. The Proposer agrees to give written notice to OSC prior to engaging in any other professional relationships with OSC during the term of the audit contract resulting from this procurement. □ Yes □ No*

x. The Proposer agrees that the proposal submitted includes a firm corporate commitment to work closely and cooperatively with the State to facilitate the auditing of the new accounting system to ensure reliance on the system and on the transactions processed through the system. □ Yes □ No*

D. Proposal Submissions:

i. The Proposer has attached a copy of the firm's current registration to practice public accounting in New York State. □ Yes □ No*

ii. The Proposer has attached a statement, signed by an authorized signatory, that the firm is independent of OSC in accordance with AICPA and government auditing standards to conduct the proposed audit. □ Yes □ No*

iii. The Proposer has attached a listing of all proposed subcontractors. □ Yes □ No*

iv. The Proposer's Vendor Responsibility Questionnaire has either:

□ been completed and submitted online

OR

□ a paper copy has been attached to the Administrative Proposal documents.

v. All proposed subcontractors anticipated to perform services of $100,000 or more have either:

□ completed and submitted the Vendor Responsibility Questionnaire online

OR

□ included a paper copy with the Proposer's Administrative Proposal documents.

E. The Federal Identification Number of the Proposer is: __________________________________________

*A 'NO' RESPONSE WILL RESULT IN DISQUALIFICATION.
By my signature on this Cover Letter, I certify that I am authorized to bind the Proposer's firm contractually.

Typed or Printed Name of Authorized Representative of the Firm

Title/Position of Authorized Representative of the Firm

Signature/Date
“Administrative Information” Section of RFP:

3.4 Minority & Woman-Owned Business Enterprise Requirements
In accordance with the provisions of Article 15-A of the NYS Executive Law, State Finance Law, and in fulfillment of the Comptroller’s Executive Orders governing Equal Opportunity and Minority and Women-owned Business Enterprise (M/WBE) participation, it is the intention of the Office of the State Comptroller (OSC) to provide real and substantial opportunities for certified Minority and Woman-owned Business Enterprises (M/WBE) on all State contracts. It is with this intention that OSC has assigned M/WBE participation goals to this contract.

Proposers submitting a proposal in response to this Request For Proposals (RFP) agree to make good-faith efforts to promote and assist the participation of certified M/WBEs as subcontractors and suppliers on this project, for the provision of services and materials in an amount at least equal to $X\%$ MBE and $X\%$ WBE of the total dollar value of this project. These participation goals shall be applicable to the contract as a whole and will be monitored by OSC for compliance.

Proposers shall respond to the participation goals established for MBE and WBE participation by completing and submitting Attachment B1 (M/WBE Utilization Plan), Attachment B2 (Notice of Intent to Participate) and Attachment B3 (Workforce Composition Form), contained in Appendix B of this RFP.

Proposers may apply for a partial or total waiver of these requirements by submitting Attachment B4 (Request for Waiver), contained in Appendix B of this RFP, and all required documentation. Waivers will be granted by OSC only where it appears that the Proposer cannot, after a good faith effort, comply with the Minority and Women-owned Business Enterprise participation requirements set forth under this RFP.

“Proposal Requirements/Administrative Proposal” Section of RFP:

6.2.1 M/WBE Requirements
Proposers are encouraged to comply with Minority and Woman-owned Business Enterprises (M/WBE) requirements as stated in Section 3.4. Appendix B delineates the OSC policy regarding opportunities for M/WBE firms, including the expected percentage of participation by such firms. As part of your Administrative Proposal documents, complete and return Appendix B Attachments B1 through B4 in accordance with Section 3.4.

The document attached contains Appendix B with all required forms.
APPENDIX B

M/WBE AND EQUAL EMPLOYMENT OPPORTUNITIES REQUIREMENTS

CONTRACTOR REQUIREMENTS AND OBLIGATIONS UNDER NEW YORK STATE EXECUTIVE LAW, ARTICLE 15-A (PARTICIPATION BY MINORITY GROUP MEMBERS AND WOMEN WITH RESPECT TO STATE CONTRACTS)

In an effort to eradicate barriers that have historically impeded access by minority group members and women in State contracting activities, Article 15-A, of the New York State Executive Law §310–318, (Participation By Minority Group Members and Women With Respect To State Contracts) was enacted to promote equality of economic opportunities for minority group members and women.

The New York State Office of the State Comptroller (“OSC”) has enacted its Executive Orders on Equal Opportunity, Non-Discrimination and Affirmative Action and on Minority- and Women-Owned Business Enterprise Procurements, consistent with the requirements as set forth under the provisions of Article 15-A (the “Article”), incorporated by reference, requiring Contracting Agencies to implement procedures to ensure that the “Contractor” (as defined under Article 15-A, §310.3 shall mean an individual, a business enterprise, including a sole proprietorship, a partnership, a corporation, a not-for-profit corporation, or any other party to a state contract, or a bidder in conjunction with the award of a state contract or a proposed party to a state contract.) complies with requirements to ensure Equal Employment Opportunities for Minority Group Members and Women, in addition to providing Opportunities for Minority and Women Owned Business Enterprises on all covered state contracts.

In keeping with the intent of the Law, it is the expectation of the State Comptroller and the responsibility of all contractors participating in and/or selected for procurement opportunities with OSC, to fulfill their obligations to comply with the requirements of the Article and its implementing regulations.

In accordance with these requirements, the contractor hereby agrees to make every good faith effort to promote and assist the participation of certified Minority and Women-owned Business Enterprises (“M/WBE”) as subcontractors and suppliers on this project for the provision of services and materials in an amount at least equal to the M/WBE goal (included in the procurement document) as a percentage of the total dollar value of this project. In addition, the contractor shall ensure the following:

1. All state contracts, and all documents soliciting bids or proposals for state contracts contain or make reference to the following provisions:

   a. The contractor will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability, or marital status, and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination.

      For purposes of the Article, affirmative action shall mean recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff or termination, and rates of pay or other forms of compensation.

   b. The contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability, or marital status and that such union or representative will affirmatively cooperate in the implementation of the contractor's obligations herein.

   c. The contractor shall state in all solicitations or advertisements for employees, that, in the performance of the State contract, all qualified applicants will be afforded equal employment
opportunities without discrimination because of race, creed, color, national origin, sex, age, disability, or marital status.

2. The contractor will include the provisions of subdivision one of this section in every subcontract as defined under §310.14, except as provided under §312.6 of the Article, in such a manner that the provisions will be binding upon each subcontractor as to work in connection with the State contract.

3. Contractors or subcontractors shall comply with the requirements of any federal law concerning equal employment opportunity, which effectuates the purpose of this section.

4. Contractors and subcontractors shall undertake programs of affirmative action and equal employment opportunity as required by this section. In accordance with the provisions of the Article, the proposer will submit, with their proposal, Workforce Composition (Attachment B3).

5. Certified businesses (as defined under Article 15-A, sections 310.1 means a business verified as a minority or women-owned business enterprise pursuant to section three hundred fourteen of the article.) shall be given the opportunity for meaningful participation in the performance of this contract, to actively and affirmatively promote and assist their participation in the performance of this contract, so as to facilitate the award of a fair share of this contract to such businesses.

6. Contractor shall make a good faith effort to solicit active participation by enterprises identified in the Empire State Development ("ESD") directory of certified businesses, which can be viewed at: [http://www.empire.state.ny.us/Small_and_Growing_Businesses/mwbe.asp](http://www.empire.state.ny.us/Small_and_Growing_Businesses/mwbe.asp).

7. Contractor shall agree, as a condition of entering into said contract, to be bound by the provisions of Article 15-A, §316.

8. Contractor shall include the provisions set forth in paragraphs (6) and (7) above, in every subcontract in a manner that the provisions will be binding upon each subcontractor as to work in connection with this contract.

9. Contractor shall comply with the requirements of any federal law concerning opportunities for M/WBEs, which effectuates the purpose of this section.

10. Contractor shall submit M/WBE Utilization Plan (Attachment 1) as part of their proposal in response to an OSC procurement.

11. The percentage goals established for this RFP are based on the overall availability of M/WBE’s certified in the particular areas of expertise identified under this RFP. These goals should not be construed as rigid and inflexible quotas which must be met, but must be targets reasonably

---

1 Notice – Contractors are provided with notice herein, OSC may require a contractor to submit proof of an equal opportunity program after the proposal opening and prior to the award of any contract. In accordance with regulations set forth under Article 15-A, §312.5, contractors and/or subcontractors will be required to submit compliance reports relating to the contractor’s and/or subcontractor’s program in effect as of the date the contract is executed.

2 Should the contractor identify a firm that is not currently certified as an M/WBE, it should request that the firm submit a certification application to the OSC M/WBE Program Specialist by the deadline for submission of proposals for eligibility determination. OSC will work with ESD to expedite the application; however, it is the responsibility of the contractor to ensure that a sufficient number of certified M/WBE firms have been identified in response to this procurement, in order to facilitate full M/WBE participation.

3 A Utilization Plan, as defined under Article 15-A, shall mean a plan prepared by a contractor and submitted in connection with a proposed state contract. In developing the Utilization Plan proposers should consider the goals and established time frames needed to achieve results which could reasonably be expected by putting forth every good faith effort to achieve the overall prescribed M/WBE participation percentage (%) goals as set forth under the procurement.
attainable by means of applying every good faith effort to make all aspects of the entire Minority and Women-owned Business Program work.

12. Contractor shall ensure that enterprises have been identified (Attachment 2) within the Utilization Plan, and the contractor shall attempt, in good faith, to utilize such enterprise(s) at least to the extent indicated in the plan, as to what measures and procedures contractor intends to take to comply with the provisions of the Article.

13. Contractor shall upon written notification from OSC as to any deficiencies and required remedies thereof, the contractor, within the period of time specified, will submit compliance reports documenting remedial actions taken and other information relating to the operation and implementation of the Utilization Plan.

14. Where it appears that a contractor cannot, after a good faith effort, comply with the M/WBE participation requirements, contractor may file a written application with OSC requesting a partial or total waiver (Attachment 4) of such requirements setting forth the reasons for such contractor's inability to meet any or all of the participation requirements, together with an explanation of the efforts undertaken by the contractor to obtain the required M/WBE participation.

For purposes of determining a contractor's good faith efforts to comply with the requirements of this section or be entitled to a waiver, OSC shall consider at least the following:

a. Whether the contractor has advertised in general circulation media, trade association publications, and minority-focused and women-focused media and, in such event;
   i. Whether or not certified M/WBEs which have been solicited by the contractor exhibited interest in submitting proposals for a particular project by attending a pre-bid conference; and
   ii. Whether certified businesses which have been solicited by the contractor have responded in a timely fashion to the contractor's solicitations for timely competitive bid quotations prior to the contracting agency's deadline for submission of proposals.

b. Whether there has been written notification to appropriate certified M/WBEs that appear in the Empire State Development website, found at: [http://www.empire.state.ny.us/Small_and_Growing_Businesses/mwbe.asp](http://www.empire.state.ny.us/Small_and_Growing_Businesses/mwbe.asp); and

c. Whether the contractor can reasonably structure the amount of work to be performed under subcontracts in order to increase the likelihood of participation by certified M/WBEs.

All required Affirmative Action, EEO, and M/WBE forms to be submitted along with bids and/or proposals for OSC procurements are attached hereto. These forms are to be submitted without change to goals specified in the RFP. All M/WBE firms are required to be certified by Empire State Development (ESD) or must be in the process of obtaining certification from ESD.

**Failure to comply with the requirements of Article 15-A as set forth under this procurement and in conjunction with the corresponding contract, will result in the withholding of associated funds and other enforcement proceedings set forth under Article 15-A.**

**Attachments:**
- Attachment B1 – M/WBE Utilization Plan
- Attachment B2 – Notice of Intent to Participate
- Attachment B3 – Workforce Composition
- Attachment B4 – Request for Waiver
INSTRUCTIONS: All proposers submitting responses to this procurement must complete this M/WBE Utilization Plan and submit it as part of their proposal. The Plan must contain a detailed description of the services to be provided by each Minority and/or Woman-Owned Business Enterprise (M/WBE) identified by the proposer.

<table>
<thead>
<tr>
<th>Proposer Name:</th>
<th>Federal Identification No.:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Address:</td>
<td>Procurement No.:</td>
</tr>
<tr>
<td>City, State, Zip Code:</td>
<td>M/WBE Goals: MBE _____% WBE _____%</td>
</tr>
</tbody>
</table>

1. M/WBE Subcontractors/Suppliers
   - Name, Address, E-mail Address, Telephone No.

2. Classification
   - NYS ESD Certified
     - MBE
     - WBE

3. Federal ID No.

4. Detailed Description of Work (Attach additional sheets, if necessary.)

5. Dollar Value of Subcontracts/Supplies
   - NYS ESD Certified
     - MBE
     - WBE


PREPARED BY (Signature): ____________________________

DATE: ____________________________

NAME AND TITLE OF PREPARER (Print or Type):

Proposer’s Certification Status: MBE WBE

TELEPHONE NO.: ____________________________

E-MAIL ADDRESS: ____________________________

***************FOR OSC USE ONLY***************

SUBMISSION OF THIS FORM CONSTITUTES THE PROPOSER’S ACKNOWLEDGEMENT AND AGREEMENT TO COMPLY WITH THE M/WBE REQUIREMENTS SET FORTH UNDER NYS EXECUTIVE LAW, ARTICLE 15-A. FAILURE TO SUBMIT COMPLETE AND ACCURATE INFORMATION MAY RESULT IN NONCOMPLIANCE AND/OR PROPOSAL DISQUALIFICATION.

UTILITY PLAN APPROVED: YES NO Date: __________

MBE CERTIFIED: YES NO WBE CERTIFIED: YES NO

WAIVER GRANTED: YES NO

Total Waiver: PARTIAL WAIVER

NOTICE OF DEFICIENCY ISSUED: YES NO Date: __________
## NOTICE OF INTENT TO PARTICIPATE

INSTRUCTIONS: A separate Notice of Intent to Participate must be completed by each M/WBE identified on the M/WBE Utilization Plan (Attachment B1). Parts A & C must be completed by the Proposer and Part B must be completed by MBE and/or WBE subcontractors/suppliers. Signed and completed form(s) must by returned as part of your proposal.

### PART A

<table>
<thead>
<tr>
<th>Proposer Name:</th>
<th>Federal Identification No.:</th>
<th>Address:</th>
<th>Telephone No.:</th>
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<td></td>
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<td>City, State, Zip Code:</td>
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</table>

### PART B

THE UNDERSIGNED INTENDS TO PROVIDE SERVICES OR SUPPLIES IN CONNECTION WITH THE ABOVE PROCUREMENT:

<table>
<thead>
<tr>
<th>Name of M/WBE:</th>
<th>Federal Identification No.:</th>
<th>Address:</th>
<th>Telephone No.:</th>
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<td>City, State, Zip Code:</td>
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</table>

DESCRIPTION OF SERVICES OR SUPPLIES:

DESIGNATION:  

- □ MBE Subcontractor  
- □ WBE Subcontractor  
- □ MBE Supplier  
- □ WBE Supplier

### PART C

WAIVER Requested:  

- □ MBE: YES □ NO  
  If YES, submit Attachment B4.  
- □ WBE: YES □ NO  
  If YES, submit Attachment B4.

THE QUALIFICATION OF THE UNDERSIGNED AS A MBE AND/OR WBE IS CONFIRMED (CHECK ONE):

- □ The undersigned is a certified M/WBE by the New York State Division of Minority and Woman-Owned Business Development (MWBD) (copy of certifying letter attached).
- □ The undersigned has applied to New York State’s Division of Minority and Woman-Owned Business Development (MWBD) for M/WBE certification.

THE UNDERSIGNED IS PREPARED TO PROVIDE SERVICES OR SUPPLIES AS DESCRIBED ABOVE AND WILL ENTER INTO A FORMAL AGREEMENT WITH THE PROPOSER CONDITIONED UPON THE PROPOSER’S EXECUTION OF A CONTRACT WITH THE OFFICE OF THE STATE COMPTROLLER.

The estimated dollar amount of the agreement is: $__________________  

Signature of Authorized Representative of M/WBE Firm

Date: __________________________  

Printed or Typed Name and Title of Authorized Representative of M/WBE Firm

OSC M/WBE 102 (Revised 02/15/2007)
INSTRUCTIONS: All proposers submitting responses to this procurement must complete and submit this Workforce Composition Form as part of their proposal.

Proposer Name:  
Federal Identification No.:  

Address:  
Procurement No.:  

City, State, Zip Code:  

Description of Work:  

Enter the total number of incumbents by race, sex, and ethnic group status in each of the EEO – Job Categories identified. See Page 2 for information regarding race/ethnicity identification and protected class group members.

<table>
<thead>
<tr>
<th>EEO – JOB CATEGORY</th>
<th>TOTAL</th>
<th>MALE (M)</th>
<th>FEMALE (F)</th>
<th>WHITE M</th>
<th>BLACK M</th>
<th>HISPANIC M</th>
<th>ASIAN M</th>
<th>NATIVE AMERICAN M</th>
<th>DISABLED M</th>
<th>VETERAN M</th>
<th>DISABLED F</th>
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</tbody>
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PREPARED BY (Signature)  
Date  

PRINTED OR TYPED NAME AND TITLE OF PREPARER  
TELEPHONE NO.  
E-MAIL ADDRESS  

OSC M/WBE 103 (Revised 02/15/2007)
RACE/ETHNIC IDENTIFICATION

Race/ethnic designations as used by the Equal Employment Opportunity Commission do not denote scientific definitions of anthropological origins. For the purposes of this report, an employee may be included in the group to which he or she appears to belong, identifies with, or is regarded in the community as belonging. However, no person should be counted in more than one race/ethnic group. The race/ethnic categories for this survey are:

**White** (Not of Hispanic origin)-All persons having origins in any of the original peoples of Europe, North Africa, or the Middle East.

**Black** (Not of Hispanic origin)-All persons having origins in any of the Black racial groups of Africa.

**Hispanic** - All persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

**Asian or Pacific Islander** - All persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa.

**American Indian or Alaskan Native** - All persons having origins in any of the original peoples of North America, and who maintain cultural identification through tribal affiliation or community recognition.

**PROTECTED CLASS DEFINITIONS**: (These groups are identified as victims of past unlawful discrimination on the basis of race, color, sex, disability, or national origin, who are therefore targeted for affirmative action initiatives to address their under representation in the total work force).

- **BLACK**
  a person, not of Hispanic origin, who has origins in any of the black racial groups of the original peoples of Africa.

- **HISPANIC**
  a person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race.

- **ASIAN & PACIFIC ISLANDER**
  a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands.

- **NATIVE INDIAN (NATIVE AMERICAN/ ALASKAN NATIVE)**
  a person having origins in any of the original peoples of North American, and who maintain cultural identification through tribal affiliation or community recognition.

- **DISABLED INDIVIDUAL**
  any person who:
  - has a physical or mental impairment that substantially limits one or more major life activity
  - has a record of such an impairment; or
  - is regarded as having such an impairment.

- **VIETNAM ERA VETERAN**
  a veteran who served at any time between and including January 1, 1963 and May 7, 1975.

- **WOMEN**
NEW YORK STATE OFFICE OF THE STATE COMPTROLLER
BUREAU OF FINANCIAL ADMINISTRATION
REQUEST FOR WAIVER FORM

INSTRUCTIONS: SEE PAGE 2 OF THIS ATTACHMENT FOR REQUIREMENTS AND DOCUMENT SUBMISSION INSTRUCTIONS.

<table>
<thead>
<tr>
<th>Proposer Name:</th>
<th>Federal Identification No.:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Address:</td>
<td>Procurement No.:</td>
</tr>
<tr>
<td>City, State, Zip Code:</td>
<td>M/WBE Subcontract Goals: MBE _____ % WBE _____ %</td>
</tr>
</tbody>
</table>

By submitting this form and the required information, the company certifies that every Good Faith Effort has been taken to promote M/WBE participation pursuant to the M/WBE requirements set forth under this procurement.

Proposer is requesting a:  
- [ ] Total  
- [ ] Partial  
- [ ] Certification  
- [ ] Conditional

1.  [ ] MBE Waiver – A waiver of the MBE Goal for this procurement is requested.
2.  [ ] WBE Waiver – A waiver of the WBE Goal for this procurement is requested.
3.  [ ] ESD Certification Waiver – A waiver of the requirement that the MBE/WBE be certified by Empire State Development (ESD). (Check here if MBE/WBE is NOT ESD certified.)
4.  [ ] Conditional Waiver – (Attach separate sheet outlining special conditions or extenuating circumstances.)

Prepared By (Signature) ___________________________ Date ____________

Printed or Typed Name and Title of Preparer ___________________________  
Telephone Number ____________  E-mail Address ___________________________

*********************************************************************** FOR OSC USE ONLY **********************************************************************

REVIEWED BY: ___________________________ DATE: ___________________________

M/WBE Certified: [ ]  M/WBE Not Certified: [ ]

Waiver Granted:  
- [ ] YES  
- [ ] NO

- [ ] Total Waiver  
- [ ] Partial Waiver  
- [ ] ESD Certification Waiver  
- [ ] *Conditional Waiver  
- [ ] Notice of Deficiency  
*Comments:

SUBMISSION OF THIS FORM CONSTITUTES THE PROPOSER’S ACKNOWLEDGEMENT AND AGREEMENT TO COMPLY WITH THE M/WBE REQUIREMENTS SET FORTH UNDER NYS EXECUTIVE LAW, ARTICLE 15-A. FAILURE TO SUBMIT COMPLETE AND ACCURATE INFORMATION MAY RESULT IN NONCOMPLIANCE AND/OR PROPOSAL DISQUALIFICATION.

OSC M/WBE104 (Revised 02/15/2007)
REQUIREMENTS AND DOCUMENT SUBMISSION INSTRUCTIONS

When completing the Request for Waiver Form please check all boxes that apply. To be considered, the Request for Waiver Form must be accompanied by documentation for items 1 – 10, as listed below. Copies of the following information and all relevant supporting documentation must be submitted along with the request:

1. A statement setting forth your basis for requesting a partial or total waiver.

2. The names of general circulation, trade association, and M/WBE-oriented publications in which you solicited M/WBEs for the purposes of complying with your participation goals.

3. A list identifying the date(s) that all solicitations for M/WBE participation were published in any of the above publications.

4. A list of all M/WBEs appearing in the NYS Directory of Certified Firms that were solicited for purposes of complying with your M/WBE participation levels.

5. Copies of notices, dates of contact, letters, and other correspondence as proof that solicitations were made in writing and copies of such solicitations, or a sample copy of the solicitation if an identical solicitation was made to all M/WBEs.

6. Provide copies of responses made by M/WBEs to your solicitations.

7. Provide a description of any contract documents, plans, or specifications made available to M/WBEs for purposes of soliciting their bids and the date and manner in which these documents were made available.

8. Provide documentation of any negotiations between you, the Contractor, and the M/WBEs undertaken for purposes of complying with your M/WBE participation goals.

9. Provide any other information you deem relevant which may help us in evaluating your request for a waiver.

10. Provide the name, title, address, telephone number, and e-mail address of contractor’s representative authorized to discuss and negotiate this waiver request.

Note:
Unless a Total Waiver has been granted, Proposers will be required to submit all reports and documents pursuant to the provisions set forth in the procurement and/or contract, as deemed appropriate by OSC, to determine M/WBE compliance.
CHAPTER 18 OF THE CONSOLIDATED LAWS —
EXECUTIVE LAW
ARTICLE 15-A PARTICIPATION BY MINORITY GROUP MEMBERS AND WOMEN WITH RESPECT TO STATE CONTRACTS

§ 310 Exec. Definitions

As used in this article, the following terms shall have the following meanings:

1. “Certified business” shall mean a business verified as a minority or women-owned business enterprise pursuant to section three hundred fourteen of this article.

2. “Contracting agency” shall mean a state agency which is a party or a proposed party to a state contract or, in the case of a state contract described in paragraph (c) of subdivision thirteen of this section, shall mean the New York state housing finance agency, housing trust fund corporation or affordable housing corporation, whichever has made or proposes to make the grant or loan for the state assisted housing project.

3. “Contractor” shall mean an individual, a business enterprise, including a sole proprietorship, a partnership, a corporation, a not-for-profit corporation, or any other party to a state contract, or a bidder in conjunction with the award of a state contract or a proposed party to a state contract.

4. “Director” shall mean the director of the division of minority and women’s business development in the department of economic development.

5. “Large county” shall mean a county having a population in excess of two hundred eighty-five thousand according to the most recent federal decennial census, provided however, that a county having a population in excess of two hundred eighty-five thousand according to the nineteen hundred eighty federal decennial census shall continue to be a large county thereafter notwithstanding a later census showing a population of less than two hundred eighty-five thousand for such county.

6. “Metropolitan area” shall mean a city with a population of one million or more and a county having a population in excess of one million and immediately contiguous to such city.

7. “Minority-owned business enterprise” shall mean a business enterprise, including a sole proprietorship, partnership or corporation that is:

   (a) at least fifty-one percent owned by one or more minority group members;

   (b) an enterprise in which such minority ownership is real, substantial and continuing;
(c) an enterprise in which such minority ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; and

(d) an enterprise authorized to do business in this state and independently owned and operated.

8. “Minority group member” shall mean a United States citizen or permanent resident alien who is and can demonstrate membership in one of the following groups:

(a) Black persons having origins in any of the Black African racial groups;

(b) Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race;

(c) Native American or Alaskan native persons having origins in any of the original peoples of North America.

(d) Asian and Pacific Islander persons having origins in any of the Far East countries, South East Asia, the Indian subcontinent or the Pacific Islands.

9. “Utilization plan” shall mean a plan prepared by a contractor and submitted in connection with a proposed state contract. The utilization plan shall identify certified minority or women-owned business enterprises, if known, that have committed to perform work in connection with the proposed state contract as well as any such enterprises, if known, which the contractor intends to use in connection with the contractor’s performance of the proposed state contract. The plan shall specifically contain a list, including the name, address and telephone number, of each certified enterprise with which the contractor intends to subcontract.

10. “Office” shall mean the division of minority and women’s business development in the department of economic development.

11. “State agency” shall mean (a) (i) any state department, or (ii) any division, board, commission or bureau of any state department, or (iii) the state university of New York and the city university of New York, including all their constituent units except community colleges and the independent institutions operating statutory or contract colleges on behalf of the state, or (iv) a board, a majority of whose members are appointed by the governor or who serve by virtue of being state officers or employees as defined in subparagraph (i), (ii) or (iii) of paragraph (i) of subdivision one of section seventy-three of the public officers law:

(b) the following:

Albany County Airport Authority;

Albany Port District Commission;

Alfred, Almond, Hornellsville Sewer Authority;
Battery Park City Authority;

Cayuga County Water and Sewer Authority;

(Nelson A. Rockefeller) Empire State Plaza Performing Arts Center Corporation;

Industrial Exhibit Authority;

Livingston County Water and Sewer Authority;

Long Island Power Authority;

Long Island Rail Road;

Long Island Market Authority;

Manhattan and Bronx Surface Transit Operating Authority;

Metro-North Commuter Railroad;

Metropolitan Suburban Bus Authority;

Metropolitan Transportation Authority;

Natural Heritage Trust;

New York City Transit Authority;

New York Convention Center Operating Corporation;

New York State Bridge Authority;

New York State Olympic Regional Development Authority;

New York State Thruway Authority;

Niagara Falls Public Water Authority;

Niagara Falls Water Board;

Port of Oswego Authority;

Power Authority of the State of New York;

Roosevelt Island Operating Corporation;
Schenectady Metroplex Development Authority;

State Insurance Fund;

Staten Island Rapid Transit Operating Authority;

State University Construction Fund;

Triborough Bridge and Tunnel Authority.

Upper Mohawk valley regional water board.

Upper Mohawk valley regional water finance authority.

Upper Mohawk valley memorial auditorium authority.

Urban Development Corporation and its subsidiary corporations.

(c) the following only to the extent of state contracts entered into for its own account or for the benefit of a state agency as defined in paragraph (a) or (b) of this subdivision:

Dormitory Authority of the State of New York;

Facilities Development Corporation;

New York State Energy Research and Development Authority;

New York State Science and Technology Foundation.

12. “State assisted housing project” shall mean, for such projects which receive from the New York state housing finance agency, the affordable housing corporation, the housing trust fund corporation or the division of housing and community renewal a grant or loan for all or part of the total project cost:

(a) a “permanent housing project for homeless families” or “project” as defined in subdivision five of section sixty-four of the private housing finance law;

(b) a “project” as defined in subdivision twelve of section one thousand one hundred one of the private housing finance law provided said project is located in a large county and consists of more than twelve residential units at a single site;

(c) “affordable home ownership development programs” or “project” as defined in subdivision eight of section one thousand one hundred eleven of the private housing finance law provided said project is located in a metropolitan area as herein defined and consists of more than twelve residential units at a single site;
(d) a “turnkey/enhanced rental project” or “project” as defined in subdivision two of section one thousand one hundred six-a of the private housing finance law;

(e) “infrastructure improvements” as defined in subdivision two of section one thousand one hundred thirty-one of the private housing finance law, to the extent that such “infrastructure improvements” are applied for in connection with a state assisted housing project as defined in paragraphs (a) through (d) of this subdivision and provided further that the applicant for such infrastructure improvements and for such state assisted housing project are identical.

13. “State contract” shall mean:

(a) a written agreement or purchase order instrument, providing for a total expenditure in excess of twenty-five thousand dollars, whereby a contracting agency is committed to expend or does expend funds in return for labor, services, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency;

(b) a written agreement in excess of one hundred thousand dollars whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; and

(c) a written agreement in excess of one hundred thousand dollars whereby the owner of a state assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project. For the purposes of this article the term “services” shall not include banking relationships, the issuance of insurance policies or contracts, or contracts with a contracting agency for the sale of bonds, notes or other securities.

14. “Subcontract” shall mean an agreement providing for a total expenditure in excess of twenty-five thousand dollars for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon between a contractor and any individual or business enterprise, including a sole proprietorship, partnership, corporation, or not-for-profit corporation, in which a portion of a contractor’s obligation under a state contract is undertaken or assumed, but shall not include any construction, demolition, replacement, major repair, renovation, planning or design of real property or improvements thereon for the beneficial use of the contractor.

15. “Women-owned business enterprise” shall mean a business enterprise, including a sole proprietorship, partnership or corporation that is: (a) at least fifty-one percent owned by one or more United States citizens or permanent resident aliens who are women;

(b) an enterprise in which the ownership interest of such women is real, substantial and continuing;
(c) an enterprise in which such women ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; and

(d) an enterprise authorized to do business in this state and independently owned and operated.

16. “Statewide advocate” shall mean the person appointed by the commissioner to serve in the capacity of the minority and women-owned business enterprise statewide advocate.

17. “Commissioner” shall mean the commissioner of the department of economic development.

§ 311 Exec. Division of minority and women’s business development

1. The head of the division of minority and women’s business development shall be the director who shall be appointed by the governor and hold office at the pleasure of the commissioner. It shall be the duty of the director of the division of minority and women’s business development to assist the governor in the formulation and implementation of laws and policies relating to minority and women-owned business enterprises.

2. The director may appoint such deputies, assistants, and other employees as may be needed for the performance of the duties prescribed herein subject to the provisions of the civil service law and the rules and regulations of the civil service commission. The director may request and shall receive from any department, division, board, bureau, executive commission or agency of the state such assistance as may be necessary to carry out the provisions of this article.

3. The director shall have the following powers and duties:

(a) to encourage and assist contracting agencies in their efforts to increase participation by minority and women-owned business enterprises on state contracts and subcontracts so as to facilitate the award of a fair share of such contracts to them;

(b) to develop standardized forms and reporting documents necessary to implement this article;

(c) to conduct educational programs consistent with the purposes of this article;

(d) to review periodically the practices and procedures of each contracting agency with respect to compliance with the provisions of this article, and to require them to file periodic reports with the division of minority and women’s business development as to the level of minority and women-owned business enterprises participation in the awarding of agency contracts for goods and services;

(e) on January first of each year report to the governor and the chairpersons of the senate finance and assembly ways and means committees on the level of minority and women-owned business enterprises participating in each agency’s contracts for goods and services and on activities of the office and effort by each contracting agency to promote employment of minority group members and women, and to promote and increase participation by certified businesses
with respect to state contracts and subcontracts so as to facilitate the award of a fair share of state contracts to such businesses. The comptroller shall assist the division in collecting information on the participation of certified business for each contracting agency. Such report may recommend new activities and programs to effectuate the purposes of this article;

(f) to prepare and update periodically a directory of certified minority and women-owned business enterprises which shall, wherever practicable, be divided into categories of labor, services, supplies, equipment, materials and recognized construction trades and which shall indicate areas or locations of the state where such enterprises are available to perform services;

(g) to appoint independent hearing officers who by contract or terms of employment shall preside over adjudicatory hearings pursuant to section three hundred fourteen of this article for the office and who are assigned no other work by the office;

(h) notwithstanding the provisions of section two hundred ninety-six of this chapter, to file a complaint pursuant to the provisions of section two hundred ninety-seven of this chapter where the director has knowledge that a contractor may have violated the provisions of paragraph (a), (b) or (c) of subdivision one of section two hundred ninety-six of this chapter where such violation is unrelated, separate or distinct from the state contract as expressed by its terms; and

(i) to streamline the state certification process to accept federal and municipal corporation certifications.

4. The director may provide assistance to certified businesses as well as applicants to ensure that such businesses benefit, as needed, from technical, managerial and financial assistance and other business development programs. In addition, the director may, either independently or in conjunction with other state agencies:

(a) develop a clearinghouse of information on programs and services provided by entities that may assist such businesses; and

(b) review bonding and paperwork requirements imposed by contracting agencies that may unnecessarily impede the ability of such businesses to compete.

§ 311-a Exec. Minority and women-owned business enterprise statewide advocate

1. There is hereby established within the department of economic development an office of the minority and women-owned business enterprise statewide advocate. The statewide advocate shall be appointed by the commissioner with the advice of the small business advisory board as established in section one hundred thirty-three of the economic development law and shall serve in the unclassified service of the director. The statewide advocate shall be located in the Albany empire state development office.

2. The advocate shall act as a liaison for minority and women-owned business enterprises (MWBEs) to assist them in obtaining technical, managerial, financial and other business
assistance for certified businesses and applicants. The advocate shall investigate complaints brought by or on behalf of MWBEs concerning certification delays and instances of violations of law by state agencies. The statewide advocate shall assist certified businesses and applicants in the certification process. Other functions of the statewide advocate shall be directed by the commissioner. The advocate may request and the director may appoint staff and employees of the division of minority and women business development to support the administration of the office of the statewide advocate.

3. The statewide advocate shall establish a toll-free number at the department of economic development to be used to answer questions concerning the MWBE certification process.

4. The statewide advocate shall report to the director and commissioner by November fifteenth on an annual basis on all activities related to fulfilling the obligations of the office of the statewide advocate. The commissioner shall include the unedited text of the statewide advocate’s report within the reports submitted by the department of economic development to the governor and the legislature.

§ 312 Exec. Equal employment opportunities for minority group members and women

1. All state contracts and all documents soliciting bids or proposals for state contracts shall contain or make reference to the following provisions:

   (a) The contractor will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability or marital status, and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination. For purposes of this article affirmative action shall mean recruitment, employment, job assignment, promotion, upgradings, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation.

   (b) At the request of the contracting agency, the contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the contractor’s obligations herein.

   (c) The contractor shall state, in all solicitations or advertisements for employees, that, in the performance of the state contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

2. The contractor will include the provisions of subdivision one of this section in every subcontract, except as provided in subdivision six of this section, in such a manner that the
provisions will be binding upon each subcontractor as to work in connection with the state contract.

3. The provisions of this section shall not be binding upon contractors or subcontractors in the performance of work or the provision of services or any other activity that are unrelated, separate or distinct from the state contract as expressed by its terms.

4. In the implementation of this section, the contracting agency shall consider compliance by a contractor or subcontractor with the requirements of any federal law concerning equal employment opportunity which effectuates the purpose of this section. The contracting agency shall determine whether the imposition of the requirements of the provisions hereof duplicate or conflict with any such law and if such duplication or conflict exists, the contracting agency shall waive the applicability of this section to the extent of such duplication or conflict.

5. The director shall promulgate rules and regulations to ensure that contractors and subcontractors undertake programs of affirmative action and equal employment opportunity as required by this section. Such rules and regulations as they pertain to any particular agency shall be developed after consultation with contracting agencies. Such rules and regulations may require a contractor, after notice in a bid solicitation, to submit an equal employment opportunity program after bid opening and prior to the award of any contract, and may require the contractor or subcontractor to submit compliance reports relating to the contractor’s or subcontractor’s operation and implementation of any equal employment opportunity program in effect as of the date the contract is executed. The contracting agency may recommend to the director that the director take appropriate action according to the procedures set forth in section three hundred sixteen of this article against the contractor for noncompliance with the requirements of this section. The contracting agency shall be responsible for monitoring compliance with this section.

6. The requirements of this section shall not apply to any employment outside this state or application for employment outside this state or solicitations or advertisements therefor, or any existing programs of affirmative action regarding employment outside this state and the effect of contract provisions required by subdivision one of this section shall be so limited.

§ 312-a Exec. Study of minority and women-owned business enterprise programs

1. The director of the division of minority and women-owned business development in the department of economic development is authorized and directed to commission a statewide disparity study regarding the participation of minority and women-owned business enterprises in state contracts since the enactment of this article. The study shall be prepared by an entity independent of the department and selected through a request for proposal process. The purpose of such study is to determine whether there is a disparity between the number of qualified minority and women-owned businesses ready, willing and able to perform state contracts for commodities, services and construction, and the number of such contractors actually engaged to perform such contracts, and to determine what changes, if any, should be made to state policies affecting minority and women-owned business enterprises. Such study shall include, but not be limited to, an analysis of the impact of court decisions regarding the use of quotas and set-asides.
as a means of securing and ensuring participation by minorities and women, and a disparity analysis by market area and region of the state.

2. The director of the division of minority and women-owned business development is directed to transmit the disparity study to the governor and the legislature not later than eighteen months after the effective date of this subdivision, and to post the study on the website of the department of economic development.

§ 313 Exec. Opportunities for minority and women-owned business enterprises

1. The director shall promulgate rules and regulations that provide measures and procedures to ensure that certified businesses shall be given the opportunity for meaningful participation in the performance of state contracts and to identify those state contracts for which certified businesses may best bid to actively and affirmatively promote and assist their participation in the performance of state contracts so as to facilitate the award of a fair share of state contracts to such businesses. Such rules and regulations as they pertain to any particular agency shall be developed after consultation with the contracting agency. Nothing in the provisions of this article shall be construed to limit the ability of any certified business to bid on any contract.

2. Contracting agencies shall include or require to be included with respect to state contracts for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon, such provisions as may be necessary to effectuate the provisions of this section in every bid specification and state contract, including, but not limited to: (a) provisions requiring contractors to make a good faith effort to solicit active participation by enterprises identified in the directory of certified businesses provided to the contracting agency by the office; (b) requiring the parties to agree as a condition of entering into such contract, to be bound by the provisions of section three hundred sixteen of this article; and (c) requiring the contractor to include the provisions set forth in paragraphs (a) and (b) above in every subcontract in a manner that the provisions will be binding upon each subcontractor as to work in connection with such contract. Provided, however, that no such provisions shall be binding upon contractors or subcontractors in the performance of work or the provision of services that are unrelated, separate or distinct from the state contract as expressed by its terms, and nothing in this section shall authorize the director or any contracting agency to impose any requirement on a contractor or subcontractor except with respect to a state contract.

3. In the implementation of this section, the contracting agency shall consider compliance with the requirements of any federal law concerning opportunities for minority and women-owned business enterprises which effectuates the purpose of this section. The contracting agency shall determine whether the imposition of the requirements of any such law duplicate or conflict with the provisions hereof and if such duplication or conflict exists, the contracting agency shall waive the applicability of this section to the extent of such duplication or conflict.

4. (a) Contracting agencies shall administer the rules and regulations promulgated by the director to ensure compliance with the provisions of this section. Such rules and regulations: shall require a contractor to submit a utilization plan after bids are opened, when bids are required, but prior to the award of a state contract; shall require the contracting agency to review
the utilization plan submitted by the contractor within a reasonable period of time as established by the director; shall require the contracting agency to notify the contractor in writing within a period of time specified by the director as to any deficiencies contained in the contractor’s utilization plan; shall require remedy thereof within a period of time specified by the director; may require the contractor to submit periodic compliance reports relating to the operation and implementation of any utilization plan; shall allow a contractor to apply for a partial or total waiver of the minority and women-owned business enterprise participation requirements pursuant to subdivisions five and six of this section; shall allow a contractor to file a complaint with the director pursuant to subdivision seven of this section in the event a contracting agency has failed or refused to issue a waiver of the minority and women-owned business enterprise participation requirements or has denied such request for a waiver; and shall allow a contracting agency to file a complaint with the director pursuant to subdivision eight of this section in the event a contractor is failing or has failed to comply with the minority and women-owned business enterprise participation requirements set forth in the state contract where no waiver has been granted.

(b) The rules and regulations promulgated pursuant to this subdivision regarding a utilization plan shall provide that where enterprises have been identified within a utilization plan, a contractor shall attempt, in good faith, to utilize such enterprise at least to the extent indicated. A contracting agency may require a contractor to indicate, within a utilization plan, what measures and procedures he or she intends to take to comply with the provisions of this article, but may not require, as a condition of award of, or compliance with, a contract that a contractor utilize a particular enterprise in performance of the contract.

(c) Without limiting other grounds for the disqualification of bids or proposals on the basis of non-responsibility, a contracting agency may disqualify the bid or proposal of a contractor as being non-responsible for failure to remedy notified deficiencies contained in the contractor’s utilization plan within a period of time specified in regulations promulgated by the director after receiving notification of such deficiencies from the contracting agency. Where failure to remedy any notified deficiency in the utilization plan is a ground for disqualification, that issue and all other grounds for disqualification shall be stated in writing by the contracting agency. Where the contracting agency states that a failure to remedy any notified deficiency in the utilization plan is a ground for disqualification the contractor shall be entitled to an administrative hearing, on a record, involving all grounds stated by the contracting agency. Such hearing shall be conducted by the appropriate authority of the contracting agency to review the determination of disqualification. A final administrative determination made following such hearing shall be reviewable in a proceeding commenced under article seventy-eight of the civil practice law and rules, provided that such proceeding is commenced within thirty days of the notice given by certified mail return receipt requested rendering such final administrative determination. Such proceeding shall be commenced in the supreme court, appellate division, third department and such proceeding shall be preferred over all other civil causes except election causes, and shall be heard and determined in preference to all other civil business pending therein, except election matters, irrespective of position on the calendar. Appeals taken to the court of appeals of the state of New York shall be subject to the same preference.
5. Where it appears that a contractor cannot, after a good faith effort, comply with the minority and women-owned business enterprise participation requirements set forth in a particular state contract, a contractor may file a written application with the contracting agency requesting a partial or total waiver of such requirements setting forth the reasons for such contractor’s inability to meet any or all of the participation requirements together with an explanation of the efforts undertaken by the contractor to obtain the required minority and women-owned business enterprise participation. In implementing the provisions of this section, the contracting agency shall consider the number and types of minority and women-owned business enterprises located in the region in which the state contract is to be performed, the total dollar value of the state contract, the scope of work to be performed and the project size and term. If, based on such considerations, the contracting agency determines there is not a reasonable availability of contractors on the list of certified business to furnish services for the project, it shall issue a waiver of compliance to the contractor. In making such determination, the contracting agency shall first consider the availability of other business enterprises located in the region and shall thereafter consider the financial ability of minority and women-owned businesses located outside the region in which the contract is to be performed to perform the state contract.

6. For purposes of determining a contractor’s good faith effort to comply with the requirements of this section or to be entitled to a waiver therefrom the contracting agency shall consider: (a) whether the contractor has advertised in general circulation media, trade association publications and minority-focus and women-focus media and, in such event, (i) whether or not certified minority or women-owned businesses which have been solicited by the contractor exhibited interest in submitting proposals for a particular project by attending a pre-bid conference; and

(ii) whether certified businesses which have been solicited by the contractor have responded in a timely fashion to the contractor’s solicitations for timely competitive bid quotations prior to the contracting agency’s bid date; and

(b) whether there has been written notification to appropriate certified businesses that appear in the directory of certified businesses prepared pursuant to paragraph (f) of subdivision three of section three hundred eleven of this article; and

(c) whether the contractor can reasonably structure the amount of work to be performed under subcontracts in order to increase the likelihood of participation by certified businesses.

7. In the event that a contracting agency fails or refuses to issue a waiver to a contractor as requested within twenty days after having made application therefor pursuant to subdivision five of this section or if the contracting agency denies such application, in whole or in part, the contractor may file a complaint with the director pursuant to section three hundred sixteen of this article setting forth the facts and circumstances giving rise to the contractor’s complaint together with a demand for relief. The contractor shall serve a copy of such complaint upon the contracting agency by personal service or by certified mail, return receipt requested. The contracting agency shall be afforded an opportunity to respond to such complaint in writing.

8. If, after the review of a contractor’s minority and women owned business utilization plan or review of a periodic compliance report and after such contractor has been afforded an
opportunity to respond to a notice of deficiency issued by the contracting agency in connection therewith, it appears that a contractor is failing or refusing to comply with the minority and women-owned business participation requirements as set forth in the state contract and where no waiver from such requirements has been granted, the contracting agency may file a written complaint with the director pursuant to section three hundred sixteen of this article setting forth the facts and circumstances giving rise to the contracting agency’s complaint together with a demand for relief. The contracting agency shall serve a copy of such complaint upon the contractor by personal service or by certified mail, return receipt requested. The contractor shall be afforded an opportunity to respond to such complaint in writing.

§ 314 Exec. Statewide certification program

1. The director shall promulgate rules and regulations providing for the establishment of a statewide certification program including rules and regulations governing the approval, denial or revocation of any such certification. Such rules and regulations shall include, but not be limited to, such matters as may be required to ensure that the established procedures thereunder shall at least be in compliance with the code of fair procedure set forth in section seventy-three of the civil rights law.

2. For the purposes of this article, the office shall be responsible for verifying businesses as being owned, operated, and controlled by minority group members or women and for certifying such verified businesses. The director shall prepare a directory of certified businesses for use by contracting agencies and contractors in carrying out the provisions of this article. The director shall periodically update the directory.

2-a. (a) The director shall establish a procedure enabling the office to accept New York municipal corporation certification verification for minority and women-owned business enterprise applicants in lieu of requiring the applicant to complete the state certification process. The director shall promulgate rules and regulations to set forth criteria for the acceptance of municipal corporation certification. All eligible municipal corporation certifications shall require business enterprises seeking certification to meet the following standards:

(i) have at least fifty-one percent ownership by a minority or a women-owned enterprise and be owned by United States citizens or permanent resident aliens;

(ii) be an enterprise in which the minority and/or women-ownership interest is real, substantial and continuing;

(iii) be an enterprise in which the minority and/or women-ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise;

(iv) be an enterprise authorized to do business in this state; and

(v) be subject to a physical site inspection to verify the fifty-one percent ownership requirement.
(b) The director shall work with all municipal corporations that have a municipal minority and women-owned business enterprise program to develop standards to accept state certification to meet the municipal corporation minority and women-owned business enterprise certification standards.

(c) The director shall establish a procedure enabling the division to accept federal certification verification for minority and women-owned business enterprise applicants in lieu of requiring the applicant to complete the state certification process. The director shall promulgate rules and regulations to set forth criteria for the acceptance of federal certification.

3. Following application for certification pursuant to this section, the director shall provide the applicant with written notice of the status of the application, including notice of any outstanding deficiencies, within thirty days. Within sixty days of submission of a final completed application, the director shall provide the applicant with written notice of a determination by the office approving or denying such certification and, in the event of a denial a statement setting forth the reasons for such denial. Upon a determination denying or revoking certification, the business enterprise for which certification has been so denied or revoked shall, upon written request made within thirty days from receipt of notice of such determination, be entitled to a hearing before an independent hearing officer designated for such purpose by the director. In the event that a request for a hearing is not made within such thirty day period, such determination shall be deemed to be final. The independent hearing officer shall conduct a hearing and upon the conclusion of such hearing, issue a written recommendation to the director to affirm, reverse or modify such determination of the director. Such written recommendation shall be issued to the parties. The director, within thirty days, by order, must accept, reject or modify such recommendation of the hearing officer and set forth in writing the reasons therefor. The director shall serve a copy of such order and reasons therefor upon the business enterprise by personal service or by certified mail return receipt requested. The order of the director shall be subject to review pursuant to article seventy-eight of the civil practice law and rules.

4. All certifications shall be valid for a period of three years.

§ 315 Exec. Responsibilities of contracting agencies

1. Each contracting agency shall be responsible for monitoring state contracts under its jurisdiction, and recommending matters to the office respecting non-compliance with the provisions of this article so that the office may take such action as is appropriate to insure compliance with the provisions of this article, the rules and regulations of the director issued hereunder and the contractual provisions required pursuant to this article. All contracting agencies shall comply with the rules and regulations of the office and are directed to cooperate with the office and to furnish to the office such information and assistance as may be required in the performance of its functions under this article.
2. Each contracting agency shall provide to prospective bidders a current copy of the directory of certified businesses, and a copy of the regulations required pursuant to sections three hundred twelve and three hundred thirteen of this article at the time bids or proposals are solicited.

3. Each contracting agency shall report to the director with respect to activities undertaken to promote employment of minority group members and women and promote and increase participation by certified businesses with respect to state contracts and subcontracts. Such reports shall be submitted periodically as required by the director.

§ 316 Exec. Enforcement

Upon receipt by the director of a complaint by a contracting agency that a contractor has violated the provisions of a state contract which have been included to comply with the provisions of this article or of a contractor that a contracting agency has violated such provisions or has failed or refused to issue a waiver where one has been applied for pursuant to subdivision five of section three hundred thirteen of this article or has denied such application, the director shall attempt to resolve the matter giving rise to such complaint. If efforts to resolve such matter to the satisfaction of all parties are unsuccessful, the director shall refer the matter, within thirty days of the receipt of the complaint, to the American Arbitration Association for proceeding thereon. Upon conclusion of the arbitration proceedings, the arbitrator shall submit to the director his or her award regarding the alleged violation of the contract and recommendations regarding the imposition of sanctions, fines or penalties. The director shall either: (a) adopt the recommendation of the arbitrator; or (b) determine that no sanctions, fines or penalties should be imposed; or (c) modify the recommendation of the arbitrator, provided that such modification shall not expand upon any sanction recommended or impose any new sanction, or increase the amount of any recommended fine or penalty. The director, within ten days of receipt of the arbitrator’s award and recommendations, shall file a determination of such matter and shall cause a copy of such determination along with a copy of this article to be served upon the respondent by personal service or by certified mail return receipt requested. The award of the arbitrator shall be final and may only be vacated or modified as provided in article seventy-five of the civil practice law and rules upon an application made within the time provided by section seventy-five hundred eleven of the civil practice law and rules. The determination of the director as to the imposition of any fines, sanctions or penalties shall be reviewable pursuant to article seventy-eight of the civil practice law and rules.

§ 317 Exec. Superseding effect of article with respect to state law

The provisions of this article shall supersede any other provision of state law, which expressly implements or mandates an equal employment opportunity program or a program for securing participation by minority and women-owned business enterprises, concerning action to be taken by any party to a state contract, to which the provisions of this article apply; provided, however, that the provisions of any state law, not as hereinabove superseded, which expressly implement or mandate such programs shall remain unimpaired by the provisions of this article, except that the provisions of any such law shall be construed as if the provisions of subdivisions five, six,
seven and eight of section three hundred thirteen and section three hundred sixteen of this article were fully set forth therein and made applicable only to complaints of violations under such provisions of law occurring on or after September first, nineteen hundred eighty-eight; provided, further, that nothing contained in this article shall be construed to limit, impair, or otherwise restrict any state agency’s authority or discretionary power in effect prior to the enactment of this article to establish or continue, by rule, regulation or resolution, an equal opportunity program or a program for securing participation of minority and women-owned business enterprises with regard to banking relationships, the issuance of insurance policies or contracts for the sale of bonds, notes or other securities; and, provided further, that nothing contained in the immediately preceding proviso shall be construed to create, impair, alter, limit, modify, enlarge, abrogate or restrict any agency’s authority or discretionary power with respect to an equal opportunity program or a program for securing participation of minority and women-owned enterprises.

§ 318 Exec. Severability

If any clause, sentence, paragraph, section or part of this article shall be adjudged by any court of competent jurisdiction to be invalid, the judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part of this article directly involved in the controversy in which the judgment shall have been rendered.
PART 140 DEFINITIONS

140.1. Definitions.

(a) Applicant. A business enterprise which has applied for certification as a bona fide minority or woman-owned business enterprise.

(b) Affirmative Action Program or Equal Employment Opportunity Program. A program involving the implementation of procedures and methods for the identification, recruitment and employment of minority group members and women. The overall result to be sought is to expand the employment opportunities of minority group members and women.

(c) Business enterprise. Any entity, including a sole proprietorship, partnership or corporation which is authorized to and engages in lawful business transactions in accordance with New York law.

(d) Certified business. A business enterprise which has been approved for minority-owned business enterprise or woman-owned business enterprise status subsequent to verification that the business enterprise is owned, operated, and controlled by minority group members or women.

(e) Contract expenditure. Any expenditure by a State agency pursuant to a contract, including but not limited to expenditures made pursuant to a State contract.

(f) Contract scope of work. For purposes of this Subtitle, contract scope of work shall mean:

(1) specific tasks required by the State contract;

(2) services or products which must be provided to perform specific tasks required by the State contract; and

(3) components of any overhead costs billed to a State agency pursuant to the State contract.

(g) Contracting agency. A State agency which is a party or a proposed party to a State contract or, in the case of a State contract described in subdivision (u) of this section, the New York State Housing Finance Agency, Housing Trust Fund Corporation or Affordable Housing Corporation, whichever has made or proposes to make the grant or loan for the State-assisted housing project.

(h) Contractor. An individual, a business enterprise including a sole proprietorship, a partnership, a corporation, a not-for-profit corporation, or any other party to a State contract.
contract, or a bidder in conjunction with the award of a State contract or a proposed party to a State contract.

(i) Day. A State business day unless otherwise specified.

(j) Directory. The directory of certified businesses, prepared by the director, for use by State agencies and contractors in complying with the provisions of Executive Law, article 15-A.

(k) Equal employment opportunities or EEO. A contractor and subcontractor’s conscientious and active efforts to afford employment opportunities to minority group members and women without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

(l) Executive director. The executive director of the New York State Department of Economic Development, Division of Minority and Women’s Business Development.

(m) Goal. The term referring to the aim of ensuring that minority group members and women and certified businesses be given the opportunity for meaningful participation in employment on and in the performance of State contracts, respectively.

(n) Independent hearing officer. An individual from a State agency or public benefit corporation, or other individual who has been appointed by the executive director to hear appeals of decisions denying or revoking certification.

(o) Labor force availability data. Data pertaining to the relevant availability and expected levels of participation of minority group members and women on State contracts. The data are developed by the New York State Department of Economic Development, Division of Minority and Women’s Business Development, and are based upon the most recent census data provided by the New York State Department of Labor, Bureau of Labor Market Information, aggregated by the Division of Minority and Women’s Business Development into Federal occupational categories.

(p) Minority group member. A United States citizen or permanent resident alien who is and can demonstrate membership in one of the following groups:

(1) Black persons having origins in any of the Black African racial groups;

(2) Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American descent of either Indian or Hispanic origin, regardless of race;

(3) Native American or Alaskan native persons having origins in any of the original peoples of North America; or

(4) Asian and Pacific Islander persons having origins in any of the Far East countries, South East Asia, the Indian Subcontinent or the Pacific Islands.

(q) Minority-owned business enterprise. A business enterprise, including a sole proprietorship, partnership or corporation that is:
(1) at least 51 percent owned by one or more minority group members;

(2) an enterprise in which such minority ownership is real, substantial and continuing;

(3) an enterprise in which such minority ownership has and exercises the authority to control and operate, independently, the day-to-day business decisions of the enterprise; and

(4) an enterprise authorized to do business in this State and is independently owned and operated.

(r) New York State Department of Economic Development, Division of Minority and Women’s Business Development or DMWBD. The office responsible for implementing the requirements of article 15-A of the Executive Law. The functions and staff of the New York State Governor’s Office of Minority and Women’s Business Development (Governor’s Office) were transferred to and consolidated with the New York State Department of Economic Development effective April 1, 1992 (L. 1992, ch. 55, April 10, 1992). The name of the Governor’s Office was changed to the Division of Minority and Women’s Business Development.

(s) New York State minority and women-owned business enterprise certification application. The form that the DMWBD requires an applicant to submit for purposes of applying for minority or woman-owned business enterprise status.

(t) State agency.

(1) any State department;

(2) any division, board, commission or bureau of any State department;

(3) the State University of New York and the City University of New York, including all their constituent units except community colleges and the independent institutions operating statutory or contract colleges on behalf of the State;

(4) a board, a majority of whose members are appointed by the Governor or who serve by virtue of being State officers or employees as defined in subparagraph (i), (ii) or (iii) of section 73(1)(i) of the Public Officers Law;

(5) the following: Albany Port District Commission; Battery Park City Authority; (Nelson A. Rockefeller) Empire State Plaza Performing Arts Center Corporation; Industrial Exhibit Authority; Long Island Power Authority; Long Island Rail Road; Manhattan and Bronx Surface Transit Operating Authority; Metro-North Commuter Railroad; Metropolitan Suburban Bus Authority; Metropolitan Transportation Authority; Natural Heritage Trust; New York City Transit Authority; New York Convention Center Operating Corporation; New York State Bridge Authority; New York State Olympic Regional Development Authority; New York State Thruway Authority; Power Authority of the State of New York; Roosevelt Island Operating Corporation; State Insurance Fund; Staten Island Rapid Transit Operating Authority; State University Construction Fund; Triborough Bridge and Tunnel Authority; and

(6) the following only to the extent of State contracts entered into for its own account or for the benefit of a State agency as defined in paragraph (1), (2), (3), (4) or (5) of this
subdivision: Dormitory Authority of the State of New York; Facilities Development Corporation; New York State Energy Research and Development Authority; and New York State Science and Technology Foundation. For purposes of this paragraph, its own account shall mean State contracts executed within the sole discretion of any of the above-named State agencies pursuant to funds expended by them.

(u) State-assisted housing project shall mean projects which receive from the New York State Housing Finance Agency, the Affordable Housing Corporation, Housing Trust Fund Corporation or the Division of Housing and Community Renewal a grant or loan for all or part of the total project cost:

(1) a permanent housing project for homeless families or project as defined in section 64(5) of the Private Housing Finance Law;

(2) a project as defined in section 1101(12) of the Private Housing Finance Law provided said project is located in a large county and consists of more than 12 residential units at a single site. For purposes of this paragraph, large county shall have the same meaning as set forth in section 310(5) of article 15-A of the Executive Law;

(3) affordable home ownership development programs or project as defined in section 1111(8) of the Private Housing Finance Law provided said project is located in a metropolitan area as herein defined and consists of more than 12 residential units at a single site. For purposes of this paragraph metropolitan area shall have the same meaning as set forth in section 310(6) of article 15-A of the Executive Law;

(4) a turnkey/enhanced rental project or project as defined in section 1106-a(2) of the Private Housing Finance Law;

(5) infrastructure improvements as defined in section 1131(2) of the Private Housing Finance Law, to the extent that such infrastructure improvements are applied for in connection with a State-assisted housing project as defined in paragraphs (1) through (4) of this subdivision and provided further that the applicant for such infrastructure improvements and for such State-assisted housing project are identical.

(v) State contract. For purposes of this Subtitle, State contract shall mean:

(1) a written agreement or purchase order instrument, or amendment thereto, providing for a total expenditure in excess of $25,000, whereby a State agency is committed to expend or does expend funds in return for labor, services, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency;

(2) a written agreement in excess of $100,000 whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon;

(3) a written agreement in excess of $100,000 whereby the owner of a State-assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project;
(4) subcontracts as defined in this Part, and any amendments to contracts executed by State agencies prior to July 19, 1988, or September 1, 1988, in the case of contracts awarded by the New York State Department of Transportation, which increase the amount obligated pursuant to the contract to the amounts specified by type of contract in paragraphs (1) through (3) of this subdivision; and

(5) for purposes of paragraphs (1) through (4) of this subdivision, the term services shall not include banking relationships, the issuance of insurance policies or contracts, or contracts with a contracting agency for the sale of bonds, notes or other securities.

(w) Subcontract means an agreement providing for a total expenditure in excess of $25,000 for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon between a contractor and any individual or business enterprise, including a sole proprietorship, partnership, corporation, or not-for-profit corporation, in which a portion of a contractor’s obligation under a State contract is undertaken or assumed, but shall not include any construction, demolition, replacement, major repair, renovation, planning or design of real property or improvements thereon for the beneficial use of the contractor.

(x) Utilization plan. The plan which must be submitted by a contractor to a State agency listing certified minority and women-owned business enterprises which the contractor intends to use in the performance of a proposed State contract, or any components of the contract scope of work which the contractor intends minority and women-owned business enterprises to perform. The plan shall specifically contain a list, including the name, address and telephone number of each certified enterprise with which the contractor intends to subcontract.

(y) Verification. Any act necessary to determine whether a business enterprise is owned, controlled and operated by minority or women principals. Such acts may include, but are not limited to request(s) for documents in addition to the initial application and inspection of the place of business.

(z) Waiver form. The form provided by a State agency, relative to the participation of certified minority and women-owned business enterprises in the performance of State contracts, on which a contractor completes the waiver request provisions or signs a declaration that the contractor is aware of the opportunity to request a waiver but does not wish to make such request at the time.

(aa) Women-owned business enterprise. A business enterprise, including a sole proprietorship, partnership or corporation that is:

(1) at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women;

(2) an enterprise in which the ownership interest of such women is real, substantial and continuing;

(3) an enterprise in which such women ownership has and exercises the authority to control and operate, independently, the day-to-day business decisions of the enterprise; and
(4) an enterprise authorized to do business in this State and which is independently owned and operated.

PART 141 STATE AGENCY RESPONSIBILITIES

141.1. Purpose, scope and applicability.

(a) The purpose of this Part is to standardize information and the manner in which it is reported by State agencies regarding employment of minority group members and women and contracting opportunities for certified minority and women-owned business enterprises in relation to State contracts and to permit fees to be charged for providing copies of the directory of certified minority and women-owned businesses in certain instances.

(b) This Part is applicable to State agencies subject to article 15-A of the Executive Law.

141.2. Agency goal plan.

All State agencies shall prepare an annual agency goal plan for submission to the director. The agency goal plan shall include, but not be limited to the following information:

(a) separate agency goals for participation by certified minority and women-owned business enterprises, expressed as a percentage of aggregate agency expenditures, and a justification for such goals, on a State fiscal year basis or the fiscal year of the State agency, for contract expenditures expected to be made pursuant to:

(1) capital projects appropriations by comprehensive construction program, or the equivalent for State agencies which do not receive capital projects appropriations, by type of contract, including but not limited to those for:

(i) design, planning, construction, renovation, replacement and demolition;

(ii) architectural, engineering, surveying or other personal services;

(iii) machinery, furnishings, and equipment purchase; and

(iv) acquisition of real property and improvements thereon;

(2) all funds appropriations for other than staff salaries, fringe benefits and related expenditures, and travel reimbursement to State agency staff for State business, or the equivalent for State agencies which receive appropriations from other funds and which categorize contracts unrelated to capital expenditures on a different basis, by type of contract, including, but not limited to, those for:

(i) equipment, material and supply purchases;

(ii) certificates of participation; and

(iii) contractual services;

(b) an estimate of the number of State contracts in respect to which separate employment goals will be set by the State agency for minority group members and women by type of
contract expenditure including, but not limited to, those set forth in subdivision (a) of this section;

(c) a description of procedures which will be implemented and actions taken to comply with the requirements of Executive Law, article 15-A, in addition to these regulations;

(d) a list of personnel responsible for implementation of Executive Law, article 15-A which includes their title, a description of their responsibilities, the percentage of their time allocated to implementation of Executive Law, article 15-A, and the State agency organization chart showing lines of authority and reporting between listed personnel and executive staff; and

(e) any other information which the State agency deems relevant or necessary.

141.3. Agency goal plan submission procedure.

(a) The agency goal plan shall be submitted annually in such form as may be required by the director, on October 1st of each year or the first day thereafter starting October 1989.

(b) The director shall notify the State agency in writing as to whether its agency goal plan is accepted or rejected based upon a determination as to whether the requirements of section 141.2 of this Part have been met. If the director rejects an agency goal plan, the notice of rejection shall state the reasons for the rejection and any modifications to the agency goal plan which would render the agency goal plan acceptable.

(c) A State agency shall resubmit its agency goal plan within 30 days of receipt of a notice of rejection incorporating recommended modifications or stating any reasons why modifications recommended by the director cannot be incorporated in the agency, annual goal plan.

(d) The agency goal plan may be, from time to time, amended by the State agency in accordance with the availability of funds to the State agency in a particular fiscal year and, upon amendment, the agency goal plan shall be resubmitted to the director for approval in accordance with subdivisions (b) and (c) of this section.

141.4. Agency compliance reporting.

State agencies shall submit a compliance report in the form and manner required by the director by December 1, 1988, and quarterly thereafter, on the 15th day, or the first day thereafter, of January, April, July and October, of each year. The compliance report may include, but is not limited to, the following information regarding State contracts awarded in the interval since the last compliance report:

(a) the number of State contracts awarded, the maximum dollar amount obligated pursuant to those contracts, and total expenditures pursuant to all such contracts;

(b) the number of State contracts awarded to certified minority or women-owned business enterprises, the maximum dollar amount obligated pursuant to all those contracts, and the total expenditures made pursuant to all such contracts;
(c) the number of State contracts awarded which include a utilization plan for business participation by certified minority or women-owned business enterprises, the maximum amount obligated pursuant to those contracts, and the total expenditures made pursuant to all such contracts;

(d) the number of State contracts awarded upon which a waiver was granted from goals required by the contracts for business participation by certified minority or women-owned business enterprises, and the maximum amount obligated pursuant to those contracts;

(e) the number of State contracts awarded which required goals for employment of minority group members and women;

(f) the number of State contracts awarded for which waivers of employment goals required by the contracts have been granted;

(g) the information required by subdivisions (a) through (f) of this section for the reporting quarter;

(h) a justification of any waivers granted pursuant to subdivisions (d) and (f) of this section; and

(i) an agency determination of whether it is in compliance with its agency goal plan based on information provided in the compliance report or, upon an agency determination that it is not in compliance with its agency goal plan, a description of actions which will be taken to comply with the agency goal plan.

141.5. Directory fees.

(a) State agencies shall provide the directory for inspection free of charge at any location where bid documents or requests for proposals may be obtained or inspected by contractors or prospective bidders on State contracts.

(b) State agencies, contractors or prospective bidders on State contracts awarded pursuant to bid solicitations, requests for proposals, or negotiation, may obtain from the division, a copy of the directory, including updates, for their own use upon payment of an annual fee of $59 for a printed copy of the directory or $23 for the directory on computer diskette.

(c) None of the foregoing shall be construed to prohibit a State agency from including pages from the directory, or a list of standard industry classifications by which certified minority and women-owned business enterprises may be found in the directory, in bid documents, a request for proposal, or a proposed contract to be executed subject to negotiations, for use by a contractor or in structuring work to be performed under a State contract for purposes of meeting certified minority and women-owned business enterprise business participation requirements.

PART 142 REQUIREMENTS AND PROCEDURES REGARDING EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITY GROUP MEMBERS AND WOMEN ON STATE CONTRACTS

142.1. General requirements for State agencies awarding contracts.
(a) State agencies shall revise their annual goal plan submitted pursuant to section 141.3 of this Title to include steps the agency will take to implement and to ensure compliance with the EEO requirements of this Part and may include any proposed modifications to these requirements for approval by the DMWBD. The agency annually shall provide relevant updated information as a part of the agency goal plan submittal process.

(b) The DMWBD shall provide all contracting agencies with the labor force availability data on Federal occupational categories. Contracting agencies shall include relevant portions of such data in all documents soliciting bids or proposals for State contracts or provide the data to contractors within the time frame established by the agency for a contractor’s pre-award submission of an EEO policy statement and staffing plan required by section 142.2 of this Part. The DMWBD shall make efforts to assist contractors in utilizing the data to determine the expected levels of participation of minority group members and women on State contracts. Labor force availability data on specific job titles that fall within the relevant Federal occupational categories are available and, upon request, will be supplied by the DMWBD to the contracting agency.

(c) In relation to the labor force availability data, the DMWBD will provide contracting agencies guidance and assistance in identifying the relevant labor force availability pool of employees based on:

(1) the reasonable recruitment area for the type of job category;

(2) the location of the job; and

(3) consideration for selecting the optimal availability pool.

(d) State agencies shall include in all State contracts and all documents soliciting bids or proposals for State contracts the following language:

(1) Contractors and subcontractors shall undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status. For these purposes, affirmative action shall apply in the areas of recruitment, employment, job assignment, promotion, upgradings, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation.

(2) Prior to the award of a State contract, the contractor shall submit an equal employment opportunity policy statement to the contracting agency within the time frame established by that agency.

(3) The contractor’s EEO policy statement shall contain, but not necessarily be limited to, and the contractor, as a precondition to entering into a valid and binding State contract, shall, during the performance of the State contract, agree to the following:

(i) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, age, disability or marital status, will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination, and shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on State contracts.
(ii) The contractor shall state in all solicitations or advertisements for employees that, in the performance of the State contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

(iii) At the request of the contracting agency, the contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union, or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the contractor’s obligations herein.

(4) Except for construction contracts, prior to an award of a State contract, the contractor shall submit to the contracting agency a staffing plan of the anticipated work force to be utilized on the State contract or, where required, information on the contractor’s total work force, including apprentices, broken down by specified ethnic background, gender, and Federal occupational categories or other appropriate categories specified by the contracting agency. The form of the staffing plan shall be supplied by the contracting agency.

(5) After an award of a State contract, the contractor shall submit to the contracting agency a workforce utilization report, in a form and manner required by the agency, of the work force actually utilized on the State contract, broken down by specified ethnic background, gender, and Federal occupational categories or other appropriate categories specified by the contracting agency.

(e) The contractor shall include the provisions of subdivision (d) of this section in every subcontract in such a manner that the requirements of the provisions will be binding upon each subcontractor as to work in connection with the State contract, including the requirement that subcontractors shall undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination, and, when requested, provide to the contractor information on the ethnic background, gender, and Federal occupational categories of the employees to be utilized on the State contract.

(f) To ensure compliance with the requirements of this Part, a contracting agency shall inquire of a contractor whether the work force to be utilized in the performance of the State contract can be separated out from the contractor’s and/or subcontractor’s total work force and where the work of the State contract is to be performed.

(g) A contracting agency may require the contractor and any subcontractor to submit compliance reports relating to their operations and implementation of their affirmative action or equal employment opportunity program in effect as of the date the State contract is executed.

(h) If a contractor or subcontractor does not have an existing affirmative action program, the contracting agency may provide to the contractor or subcontractor a model plan of an affirmative action program. Upon request, the DMWBD shall provide a contracting agency with a model plan of an affirmative action program.
(i) Upon request, the DMWBD shall provide a contracting agency with information on specific recruitment sources for minority group members and women, and contracting agencies shall make such information available to contractors.

142.2. Bidding and award requirements.

(a) As a precondition to entering into a valid and binding State contract, the contractor shall submit to the contracting agency an EEO policy statement and a staffing plan, as described in section 142.1(d) of this Part. A contracting agency’s approved annual goal plan may specify, with reasons, that the pre-award submission of a staffing plan will not be required for particular contracts.

(b) Prior to the award of a State contract and in the case where the work force to be utilized in the performance of the State contract cannot be separated out from the contractor’s and/or subcontractor’s total work force (for example, certain commodities contracts), the contractor shall submit to the contracting agency, in lieu of a staffing plan, information on the contractor’s and/or subcontractor’s total work force broken down by ethnic background, gender, and Federal occupational categories or other appropriate categories specified by the contracting agency.

(c) A contractor’s failure to submit an EEO policy statement and staffing plan or total work force data shall result in the rejection of the contractor’s bid or proposal, unless the contractor provides the contracting agency with a reasonable justification in writing for such failure (e.g., the failure to submit a staffing plan where a contractor has a work force of 10 employees or less), or makes a commitment to submit an EEO policy statement and a staffing plan or total work force data by a date to be specified by the contracting agency.

(d) The contracting agency shall be responsible for determining the time frames for the pre-award submission of the EEO policy statement and staffing plan or total work force data and for determining whether all bidders or only the lowest responsible bidder(s) or finalists shall be required to submit such documentation.

(e) After the award of the State contract and in the case where the work force to be utilized in the performance of the State contract can be separated out from the contractor’s and/or subcontractor’s total work force, a contracting agency shall require the contractor to submit a work force employment utilization report in a form developed by the DMWBD. The work force employment utilization report form shall be provided to the contractor by the contracting agency at the time of the execution of the contract. The work force utilization report shall include the following information:

1. the total number of employees performing work on the State contract;

2. for commodities, services/consulting, and professional construction consultant contracts (including not-for-profit contracts within those industries), the contractor’s and all subcontractor’s work force on the State contract broken down by specified ethnic background, gender, and Federal occupational categories; and

3. for construction contracts, the hours a contractor’s and all subcontractor’s employees worked on activities related to that contract, and a breakdown of those hours by ethnic background, gender and the construction related job titles that fall within relevant Federal occupational categories.
(f) For construction contracts, a contractor shall submit to the contracting agency a work force utilization report on a monthly basis throughout the life of the contract.

(g) For all other contracts where the work force to be utilized in the performance of the State contract can be separated out from the contractor’s and/or subcontractor’s total work force, the contracting agency shall require a contractor to submit work force utilization reports on a quarterly basis throughout the life of the contract when the contractor’s and/or subcontractor’s work force on the State contract changes. In the case where the contractor’s and/or subcontractor’s work force does not change within the quarterly period, the contractor shall so notify the contracting agency in writing.

(h) After an award of the State contract and in the case where the work force to be utilized in the performance of the State contract cannot be separated out from the contractor’s and/or subcontractor’s total work force, the contractor shall submit to the contracting agency information on the contractor’s and/or subcontractor’s total work force broken down by specified ethnic background, gender, and Federal occupational categories. Such total work force data shall be submitted by the contractor to the contracting agency on a semi-annual basis during the life of the particular State contract or during the course of an extended and ongoing contractual relationship involving various State contracts entered into between the contractor and contracting agency.

(i) For all State contracts that are bid and awarded by the Office of General Services, the Office of General Services shall be solely responsible for requiring contractors to submit work force employment utilization reports and all other required information.

142.3. Compliance.

(a) Contracting agencies shall be responsible for monitoring a contractor’s compliance with the requirements of this Part.

(b) In addition to general monitoring of contracts, contracting agencies shall be responsible for conducting in-depth compliance reviews on selected State contracts during the course of the year and for providing the DMWBD with written compliance review findings on an annual basis. The number of compliance reviews a contracting agency shall conduct will be established in the agency’s approved annual goal plan and may be based upon such factors as the number and type of contracts the agency lets annually.

(c) In determining which contracts should be subject to a compliance review, a contracting agency shall, in part, base its determination on the results of its comparison of the ratios of women and minority group members in a contractor’s work force to the relevant availability and expected levels of participation of minority group members and women on State contracts.

(d) A contracting agency shall notify the contractor in writing of the agency’s intent to conduct a compliance review and of the need for the contractor to submit and/or have available for inspection at the time of the review books, records, payroll records, and other relevant documentation of the contractor’s employment of minority group members and women on a specific State contract for the period to be reviewed.
(e) A contracting agency shall review such documentation thoroughly to determine whether the contractor made conscientious and active efforts to employ and utilize minority group members and women on the State contract. In making its determination, the contracting agency shall evaluate the contractor’s efforts based upon consideration of the following factors:

1. whether the contractor established and maintained a current list of recruitment sources for minority group members and women, and whether the contractor provided written notification to such recruitment sources that the contractor had employment opportunities at the time such opportunities became available;

2. whether the contractor sent letters to recruiting sources, labor unions, or authorized representatives of workers with which the contractor has a collective bargaining or other agreement or understanding requesting their assistance in locating minority group members and women for employment;

3. whether the contractor disseminated its equal employment opportunity policy by including it in any advertising in the news media and, in particular, minority and women news media;

4. whether the contractor notified other contractors and subcontractors with whom it does or anticipated doing business to discuss the contractor’s equal employment opportunity policy;

5. whether internal procedures exist for, at minimum, annual dissemination of the contractor’s equal employment opportunity policy to employees, specifically to employees having any responsibility for hiring, assignment, layoff, termination, or other employment decisions;

6. whether the contractor encourages and utilizes minority group members and women employees to assist in recruiting other employees; and

7. whether the contractor has apprentice training programs approved by the New York State Department of Labor which provide for training and hiring of minority group members and women.

142.4. EEO reporting requirements for contracting agencies.

(a) Contracting agencies shall report to the DMWBD on the information contained in the work force employment utilization reports in a form and manner required by the executive director beginning January 15, 1995 and quarterly thereafter on the 15th day or the 1st day of April, July, October and January of each year. The contracting agency’s report shall include, but is not limited to, the following information regarding the State contracts for which the agency received work force utilization reports on during the preceding quarterly interval:

1. an aggregation, by location of work, of the work forces employed on all State contracts in the industries of commodities, services/consulting, and professional construction consulting broken down by ethnic background, gender and Federal occupational categories;
(2) for construction contracts, an aggregation, by location of work, of the hours worked during the reporting period on activities related to those contracts, and a breakdown of those hours by ethnic background, gender and the construction related job titles that fall within relevant Federal occupational categories; and

(3) a list of all contracts included in the aggregation of data, including Office of the State Comptroller contract number, contract amount and location of work.

(b) Contracting agencies shall submit to the DMWBD on a semi-annual basis copies of the total work force data submitted by contractors in the cases where the work force utilized on a State contract could not be separated out from the contractor’s and/or subcontractor’s total work force.

142.5. Review.

(a) If a contracting agency determines that a contractor or subcontractor is in noncompliance with the requirements of this Part, the contracting agency shall make every effort to resolve the matter and to bring the contractor into compliance with such requirements. If the contracting agency is unsuccessful in its efforts, the contracting agency shall submit a written complaint to the executive director regarding the contractor’s or subcontractor’s noncompliance and shall recommend to the executive director that the executive director review and attempt to resolve the noncompliance matter. The contracting agency shall serve a copy of its complaint upon the contractor or subcontractor by personal service or certified mail, return receipt requested.

(b) For all State contracts that it bids and awards, the Office of General Services shall have the function of determining a contractor’s compliance with the EEO requirements of this Part.

(c) The executive director shall attempt to resolve a noncompliance dispute between the contracting agency and the contractor or subcontractor. If a resolution of the noncompliance dispute is satisfactory to the parties, the parties shall so indicate by signing a document indicating that the matter has been resolved and stating the terms of the resolution.

(d) If the executive director is unable to resolve the noncompliance dispute to the satisfaction of the parties, the executive director shall refer the contracting agency’s complaint, within 30 calendar days of the receipt of the complaint, to the American Arbitration Association for proceedings thereon.

(e) Upon conclusion of the arbitration proceeding, the arbitrator shall submit to the executive director a decision regarding the noncompliance dispute and recommendations regarding the imposition of sanctions, fines or penalties, if appropriate. The executive director shall either:

(1) adopt the recommendations of the arbitrator;

(2) determine that no sanctions, fines or penalties shall be imposed; or

(3) modify the recommendations of the arbitrator, provided that such modification shall not expand upon any sanction recommended, impose any new sanction, or increase the amount of any recommended fine or penalty.
(f) The executive director’s determination that no sanctions, fines or penalties shall be imposed or that the recommendations of the arbitrator shall be modified will be based on mitigating circumstances or new facts that were not before the arbitrator, or any other similar reason the executive director decides is relevant to the determination of the noncompliance matter. The executive director’s reasons for modifying the arbitrator’s decision and/or recommendations shall be provided to the contractor or subcontractor and contracting agency in writing as a part of the executive director’s determination.

(g) The executive director, within 10 business days of receipt of the arbitrator’s decision and recommendations, shall mail a determination of such matter to the contracting agency and shall cause a copy of such determination, along with a copy of Executive Law, article 15-A, to be served upon the contractor or subcontractor by personal service or by certified mail, return receipt requested.

(h) Where the executive director adopts the recommendations of the arbitrator, the decision of the arbitrator shall be final and may only be vacated or modified as provided in article 75 of the Civil Practice Law and Rules upon an application made within the time provided by section 7511 of the Civil Practice Laws and Rules.

(i) Where the executive director determines that no sanctions, fines or penalties shall be imposed or that the recommendations of the arbitrator shall be modified, the determination of the executive director shall be reviewable pursuant to article 78 of the Civil Practice Laws and Rules.

(j) Nothing in this section is meant to diminish or supersede a contracting agency’s authority and responsibility to enforce the requirements of its contracts.

142.6. Applicability.

(a) Pursuant to Executive Law, section 312(3), the requirements of this Part shall not be binding upon contractors or subcontractors in the performance of work or the provision of services or any other activity that are unrelated, separate or distinct from the State contract as expressed by its terms.

(b) Based on the restrictions set forth in the applicability provisions of Executive Law, section 312(6), the requirements of sections 142.3 (compliance) and 142.5 (review) of this Part shall not apply to any employment outside this State or application for employment outside this State or solicitations or advertisements therefor.

(c) Pursuant to Executive Law, section 312(4), in the implementation of the requirements of this Part, the contracting agency shall consider compliance by a contractor or subcontractor with the requirements of any Federal law concerning equal employment opportunity which effectuate the purposes of this Part. The contracting agency shall determine whether the imposition of the requirements herein duplicate or conflict with any such law, and if such duplication or conflict exists, the contracting agency shall waive the applicability of the requirements of this Part to the extent of such duplication or conflict.

(d) In the event that a State contract is entered into on an emergency basis or where an amendment or change order has been added to a State contract providing for a total expenditure in excess of $25,000, the contracting agency may require the contractor to
submit an EEO policy statement and to comply with the post award requirements of this Part during the life of the contract.

(e) The requirements of this Part apply to all documents soliciting bids or proposals for State contracts which are issued on or after the effective date of this Part. The effective date of this Part is September 1, 1994.

PART 143 REQUIREMENTS AND PROCEDURES REGARDING BUSINESS PARTICIPATION OPPORTUNITIES FOR CERTIFIED MINORITIES AND WOMEN ON STATE CONTRACTS

143.1. Purpose, scope and applicability.

(a) The purpose of this Part is to provide standards and criteria for establishing participation goals, to prescribe conditions when good faith efforts to meet such participation goals are required, and to provide procedures for evaluating compliance and resolving disputes related to participation by certified minority and women-owned business enterprises on State contracts.

(b) This Part is applicable to State contracts and amendments thereto, executed by State agencies after the dates set forth in section 143.12 of this Part.

143.2. Establishing contract goals.

(a) State agencies shall establish separate goals for participation of certified minority and women-owned business enterprises on all State contracts. Contractors shall be notified in bid documents, requests for proposals, contract announcements or advertisements or otherwise in writing of the goals established on State contracts. In determining what goals are appropriate in relation to a particular State contract or type of State contract, consideration shall be given to the following factors:

(1) the contract scope of work;

(2) the number and types of certified minority and women-owned business enterprises available in the directory to perform the State contract work, and their availability in the region of contract performance. In determining the region where the State contract is performed the State agency shall consider:

   (i) the location of work as stated in the State contract; and

   (ii) the locations in New York State where the contractor performs the contract scope of work;

(3) the total dollar value of the work required by the State contract, in relation to the dollar value of the components of the contract scope of work;

(4) the relationship of the size and term of a State contract to the size and term of a project for which purpose the State contract is awarded;

(5) the State agency’s ability to identify certified minority and women-owned businesses to meet goals required by the State contract;
(6) the percentage of minority and women-owned businesses by type of business as compared to the known businesses of the same type located in the region where the contract scope of work will be performed;

(7) the known success or failure of minority and women-owned businesses in obtaining participation on State contracts engaged in the types of work as businesses or suppliers required by the contract; and

(8) whether Federal requirements duplicate or conflict with goal requirements established for business participation by certified minority and women-owned businesses on a State contract. If such duplication or conflict exists, the State agency shall waive the applicability of any goal requirements established pursuant to article 15-A of the Executive Law and this Part, to the extent of the duplication or conflict.

(b) A State agency may also consider the following factors in determining what goals are appropriate in relation to a particular State contract or type of contracts:

(1) the ability of the State agency to meet goals for participation by certified minority and women-owned business enterprises established in relation to other similar State contracts or types of contracts in the same region; and

(2) the ability of other State agencies to meet goals for participation by certified minority and women-owned business enterprises established in relation to similar State contracts, or types of contracts performed in the same region.

(c) Conditions for contractor compliance with good faith efforts to meet participation goals. There must be a compelling State interest to support implementation of the provisions of this Part that require good faith efforts by contractors to meet participation goals for use of certified minority business enterprises and a constitutionally sufficient State interest for implementation of such provisions for use of women-owned business enterprises. A compelling State interest includes, but is not limited to, remedying identified invidious racial and ethnic discrimination by the State, resisting being a passive participant in such discrimination by others and prohibiting such discrimination. In regard to compliance with the provisions of this Part which require good faith efforts to meet participation goals, the following rules shall apply:

(1) A certified business enterprise that is owned and controlled by a member or members of a group or groups set forth in section 140.1(p) or (aa) of this Title will be presumptively eligible for use by contractors to show required good faith efforts to meet participation goals if:

(i) the division determines, based upon factual evidence, that it has a firm basis for believing that a compelling State interest exists for groups set forth within section 140.1(p) of this Title or that a constitutionally sufficient State interest exists for the group set forth in section 140.1(aa) of this Title; and if

(ii) the director includes that group or groups on a list published in the State Register.

(2) A certified business enterprise that is owned and controlled by an individual or individuals identified as a member or members of a group or groups set forth in section
140.1(p) or (aa) of this Title, but which group or groups is not on the list published by the director pursuant to paragraph (1) of this subdivision, will also be eligible for use by contractors to show required good faith efforts to meet participation goals if the division determines, based upon factual evidence submitted by the business enterprise, that there is a firm basis for believing that there is a compelling State interest sufficient to justify identification of that minority business enterprise or a constitutionally sufficient State interest to justify identification of that women-owned business enterprise as eligible to show required good faith efforts.

(3) Where a certified business enterprise has been identified pursuant to paragraph (1) or (2) of this subdivision, a contractor is required to make good faith efforts to meet participation goals established with respect to such identified certified business enterprise(s) and the following provisions of this Part shall apply: sections 143.3, 143.4, 143.5, 143.6, 143.7, 143.8, 143.9, 143.10, 143.11, 143.12.

(4) Where a group or business enterprise has not been identified pursuant to paragraph (1) or (2) of this subdivision, contractors will be encouraged, but not required, to make good faith efforts to attain participation goals by utilizing business enterprises that are certified pursuant to Part 144 of this Title and the following provisions of this Part will not apply: sections 143.4, 143.5, 143.6, 143.7, 143.8, 143.9, 143.10.

143.3. Utilization plans.

(a) State agencies shall require contractors to submit utilization plans for achieving goals established for the participation of certified minority and women-owned businesses in relation to a State contract. A form for the utilization plan shall be provided by the State agency to the contractor with:

(1) bid documents where a State contract is awarded pursuant to solicitation of bids;

(2) requests for proposals in the case of State contracts awarded pursuant to a request for proposal; and

(3) proposed contracts where a State contract will be awarded pursuant to negotiation without solicitation of bids or a request for proposals.

(b) The utilization form shall require, at a minimum, the following information of the contractor:

(1) the name, address and telephone number of the contractor;

(2) the Federal identification or social security number of the contractor; and

(3) the names and Federal identification numbers or social security numbers of certified minority and women-owned business enterprises which the contractor intends to use to perform the State contract and a description of the contract scope of work which the contractor intends to structure to increase the participation by certified minority and women-owned enterprises on the State contract, and the estimated or, if known, actual dollar amounts to be paid to and performance dates of each component of a State contract which the contractor intends to be performed by a certified minority or woman-owned business.
(c) The utilization plan form shall require, at a minimum, the following information of State agencies upon execution of a State contract:

(1) the contract number;

(2) the project number, if applicable;

(3) the contract award date;

(4) the estimated date of completion;

(5) the amount obligated under the contract; and

(6) a description of work required by the State contract as provided to the Comptroller of the State, where applicable.

143.4. Submission and review of utilization plans.

(a) In the case of a request for proposals or negotiated State contracts, the time requirements for submitting, reviewing, remedying deficiencies and waiving goals with regard to the utilization plan will vary in accordance with the proposal.

(b) In the case of a bid submission, unless otherwise specified in information, instructions or requirements and any addenda provided to contractors for purposes of soliciting bids or proposals, utilization plans shall be submitted two business days after the contractor receives notice from a State agency that the contractor has submitted a low bid.

(c) The State agency shall review a utilization plan submitted by a contractor and issue a written notice of acceptance or deficiency regarding the utilization plan no later than 20 days after receipt of the utilization plan.

(d) The notice of deficiency regarding the utilization plan shall include the following information:

(1) the name of any minority or women-owned business enterprise which is not acceptable for purposes of complying with goal requirements for certified minority and women-owned business enterprises and the reasons why it is not acceptable;

(2) the contract scope of work as defined in section 140.1(f) of this Title which the State agency has determined can be reasonably structured by the contractor to increase the likelihood of participation by certified minority and women-owned business enterprise for purposes of complying with established agency goal requirements; and

(3) any other facts relevant to the utilization plan.

(e) Unless otherwise specified in information, instructions or requirements and any addenda provided to contractors for purposes of soliciting bids or proposals, a contractor must provide a State agency with a written remedy in response to a notice of deficiency within seven business days of its receipt.
(f) If the contractor’s remedy to a notice of deficiency is not timely provided or if it is found by the State agency to be inadequate, the State agency shall so notify the contractor and request the contractor to submit a waiver form within five business days. Failure to file the waiver form in a timely manner may be grounds for disqualification of the bid. The time requirement of this subdivision shall apply unless otherwise agreed to in writing by the State agency and the contractor.

143.5. Contractor compliance reporting.

State agencies are responsible for determining compliance by contractors with goals established in State contracts.

(a) A State agency may determine that a contractor is complying with goals set forth in a utilization plan if:

(1) the goals are being achieved with certified minority and women-owned business enterprises; or

(2) the determination of compliance is consistent with procedures or actions described in the State agency’s goal plan; or

(3) information made available to the State agency through monitoring, onsite inspections, progress meetings regarding work required by the State contract, review of payrolls or other agency action provides evidence of compliance.

143.6. Contractor compliance reports.

(a) Contractor compliance reports shall be submitted by contractors with respect to State contracts for which goals have been established.

(b) Contractor compliance reports shall be filed at intervals required by information, instructions or requirements pursuant to which bids and proposals have been solicited, or the terms and conditions of a State contract awarded pursuant to negotiation.

(c) A contractor compliance report shall include, but not be limited to the following information:

(1) the name, address and telephone number of each certified minority and woman-owned business enterprise the contractor is using or intends to use to comply with the utilization plan;

(2) a brief description of the contract scope of work to be performed for the contractor by each certified minority and woman-owned business enterprise and the scheduled dates for performance;

(3) a statement of whether the contractor has a written agreement with each certified minority and woman-owned business enterprise, and if requested, copies of such agreements, the contractor is using or intends to use;

(4) the actual total cost of the contract scope of work to be performed by each certified minority and woman-owned business enterprise for the contract; and
(5) the actual amounts of any payments made by the contractor to each certified minority
and woman-owned business enterprise as of the date the compliance report was submitted.

143.7. Waivers.

(a) A State agency shall grant a partial or total waiver of goal requirements established on
a State contract only upon the submission of a waiver form by a contractor, documenting
good faith efforts by the contractor to meet the goal requirements of the State contract,
and consideration of the following factors:

(1) the number and types of certified minority or women-owned business enterprises
located in the region in which the State contract is to be performed;

(2) the total dollar value of the State contract;

(3) the contract scope of work to be performed;

(4) the project size;

(5) the project term;

(6) the availability of other business enterprises located in the region qualified to do the
work to be performed; and

(7) the financial ability of certified minority and women-owned business enterprises
located outside the region to perform the State contract.

(b) Requests for a partial or total waiver of goal requirements established on a State
contract made prior to the award of the contract may be made simultaneously with the
submission of the utilization plan for that State contract. If a contractor is disqualified by a
State agency, the request for a waiver shall be deemed to be moot and the contractor shall
be entitled to the appeals set forth in section 143.9 of this Part.

(c) Requests for a partial or total waiver made subsequent to award of a State contract
may be made at any time during the term of the State contract but prior to the submission
of a request for final payment on that contract.

(d) Forms for requests of a partial or total waiver of goal requirements established on a
State contract, shall include a request for the following information:

(1) the names of general circulation, trade association and minority and women-oriented
publications in which bids were solicited for purposes of complying with goal requirements
established for certified minority and women-owned business enterprise participation;

(2) the dates bid solicitations for certified minority and women-owned business
participation were published in any of the publications named pursuant to paragraph (1) of
this subdivision and the text of the bid solicitation;

(3) a list of certified minority and women-owned business enterprises appearing in the
directory which were solicited in writing to provide bids for purposes of complying with a
State agency’s goal requirements for certified minority and women-owned business enterprise participation;

(4) proof of dates on which such solicitations were made in writing and copies of solicitations made, or a sample copy of the solicitation if an identical solicitation was made of all certified minority and women-owned business enterprises;

(5) copies of responses made by certified minority and women-owned business enterprises to solicitations made by the contractor;

(6) a description of any contract documents, plans or specifications made available to certified minority and women-owned business enterprises for purposes of soliciting their bids, and the dates and manner in which these documents were made available;

(7) documentation of any negotiations between the contractor and certified minority and women-owned business enterprises undertaken for purposes of complying with goal requirements established for minority and women-owned business enterprise participation;

(8) any other information determined relevant by the State agency or the contractor; and

(9) a statement setting forth the contractor’s bases for requesting a partial or total waiver.

143.8. Good faith efforts.

The State agency may consider any criteria it determines relevant, or which the contractor submits, to document the contractor’s good faith efforts, provided that the following criteria, as appropriate, are considered for purposes of determining whether a contractor has documented good faith efforts:

(a) Was a completed, acceptable utilization plan submitted in accordance with applicable requirements to meet goals for participation of certified minority and women-owned business enterprises established in the State contract?

(b) Were advertisements placed in appropriate general circulation, trade and minority and women-oriented publications in a timely fashion?

(c) Were written solicitations made in a timely fashion of certified minority-and women-owned business enterprises listed in the directory of certified businesses?

(d) Were timely responses to any such advertisements and solicitations provided by certified minority and women-owned business enterprises?

(e) Did the contractor attend prebid, preaward, or other meetings, if any, scheduled by the State agency awarding the State contract, with certified minority or women-owned business enterprises which the State agency determined were capable of performing the State contract scope of work, for purposes of complying with goal requirements?

(f) What efforts were undertaken by the contractor to reasonably structure the contract scope of work for purposes of subcontracting with certified minority and women-owned business enterprises?
(g) How many minority and women-owned business enterprises in the directory of certified businesses could perform work required by the State contract scope of work in the region as defined in section 143.2(a)(1)-(2) of this Part?

(h) What actions were taken to contact and assess the financial ability of certified minority and women-owned business enterprises to participate on the State contract, which enterprises are located outside of the region in which the State contract scope of work was or will be performed?

(i) Were relevant plans, specifications or terms and conditions of the State contract, necessary to prepare an informed response to a contractor solicitation, provided in a timely fashion to certified minority or women-owned business enterprises?

(j) What subcontract terms and conditions were offered to certified Minority and women-owned business enterprises, and how do those subcontract terms and conditions compare to those offered in the ordinary course of the contractor’s business and to other subcontractors of the contractor?

(k) Has the contractor made payments for work performed by certified minority-and women-owned business enterprises in a timely fashion so as to facilitate continued performance by certified minority or women-owned business enterprises?

(l) Has the contractor offered to make up any inability to comply with the minority and women-owned business enterprise goals established in a State contract, in other State contracts being performed or to be awarded to the contractor?

143.9. Disqualification of contractors.

(a) Where a State agency disqualifies the bid or proposal of a contractor as being nonresponsible for failure to submit a utilization plan or remedy deficiencies in the utilization plan noticed in accordance with section 143.4 of this Part, and section 313(4)(c) of the Executive Law, or upon a determination that the contractor’s utilization plan does not indicate that the State contract goal requirements for participation of certified minority and women-owned business enterprises will be met and the contractor has failed to document good-faith efforts, the contractor shall be entitled to an administrative hearing before a hearing officer appointed by the State agency.

(b) Such hearing shall be on the record involving all of the grounds for disqualification stated by the State agency. The purpose of the administrative hearing provided in subdivision (a) of this section shall be to review the determination of disqualification of a bid and determination of nonresponsibility.

(c) The hearing officer’s determination shall be a final administrative determination of the State agency. Such final administrative determination shall be reviewable by a proceeding brought pursuant to article 78 of the Civil Practice Law and Rules, provided such proceeding is commenced within 30 days of notice given by certified mail, return receipt requested, rendering such final administrative determination in accordance with the provisions of section 313 of the Executive Law.
Such proceeding shall be commenced in the Supreme Court, Appellate Division, Third Department, and shall be preferred over all other civil causes except election causes, and shall be heard and determined in preference to all other civil business pending therein, except election matters, irrespective of position on the calendar. Appeals taken to the Court of Appeals of the State of New York shall be subject to the same preference.

143.10. Contractor and State agency complaints and arbitration.

(a) Subsequent to the award of a State contract to a contractor, the contractor may file a complaint with the director pursuant to Executive Law, section 316, by personal service or certified mail, return receipt requested, stating the reasons for the complaint, together with a demand for relief provided that the complaint is filed within 20 days following:

(1) the contractor’s receipt of a written determination by a State agency that the contractor is not entitled to a partial or full waiver of the goals established in a State contract for participation by certified minority and women-owned business enterprises, or that the contractor is failing or refusing to comply with goals; or

(2) the date which is 20 days subsequent to the date of the State agency’s receipt of any written request from the contractor for a partial or total waiver of goal requirements for participation by certified minority and women-owned business enterprises, where no written determination has been issued by the State agency.

(b) A State agency may file a complaint with the director, pursuant to Executive Law, section 316, by personal service or certified mail, return receipt requested, accompanied by the State agency determination upon which the complaint is made, together with a demand for relief within 20 days of the State agency determination that the contractor is failing or refusing to comply with goals for participation by certified minority and women-owned business enterprises established in the State contract.

(c) A copy of any complaints filed with the director by the contractor or the State agency shall either be personally served or mailed certified mail, return receipt requested, by the party making the complaint to the party against whom the complaint is being filed.

(d) Upon receipt by the director of a complaint, the party against whom the complaint has been filed shall be provided with an opportunity to respond to the complaint. If within 30 days of receipt of the complaint, the director is unable to resolve the complaint to the satisfaction of the State agency and the contractor, the complaint shall be referred to the American Arbitration Association for resolution in accordance with Executive Law, section 316, and the applicable requirements of article 75 of the Civil Practice Law and Rules.

(e) Upon conclusion of the arbitration proceedings, the arbitrator shall submit to the director his or her award regarding the alleged violation of the contract or the refusal of the State agency to grant a waiver request by the contractor. The award of the arbitrator with respect to an alleged violation of the State contract or the refusal of the State agency to grant a waiver shall be final and may be vacated or modified only as provided by section 75 of the Civil Practice Law and Rules.

(f) Upon conclusion of the arbitration proceedings and the rendition of an award, the arbitrator shall also recommend to the director a remedy, including if appropriate the imposition of sanctions, fines or penalties. The director shall either:
(1) adopt the recommendation of the arbitrator; or

(2) determine that no sanctions, fines or penalties should be imposed; or

(3) modify the recommendation of the arbitrator, provided that such modification shall not expand upon any sanction recommended or impose any new sanction, or increase the amount of any recommended fine or penalty.

(g) The director, within 10 days of receipt of the arbitrator’s award and recommendations, shall issue a determination of such matter and shall cause a copy of such determination along with a copy of this article to be served upon the respondent by personal service or by certified mail, return receipt requested. The determination of the director as to the imposition of any fines, sanctions, or penalties shall be reviewable pursuant to article 78 of the Civil Practice Law and Rules.

143.11. Contract provisions.

(a) State agencies shall include in State contracts provisions stating:

(1) the amount of any goals established in that State contract for business participation by certified minority and women-owned business enterprises, regardless of what goal percentage is established;

(2) that any goal percentages established in a State contract are subject to the requirements of article 15-A of the Executive Law and regulations adopted pursuant thereto; and

(3) that the parties agree as a condition of the State contract, to be bound by the provisions of section 316 of article 15-A of the Executive Law.

143.12. Contracts advertised before effective date of this Part.

Any State contracts advertised before the effective date of this Part, but awarded after that date, that contain requirements regarding the review and submission of utilization plans are subject to the provisions of this Part. However, the time limits set forth in this Part for the review and submission of utilization plans, may be modified by the State agency in accordance with those set forth in the contract documents.

PART 144 STATEWIDE CERTIFICATION PROGRAM

144.1. Purpose, scope and applicability.

(a) The purpose of this Part is to provide criteria and procedures by which the director makes determinations to approve, deny or revoke the minority or woman-owned business enterprise status of applicants and certified business enterprises.

(b) This Part is applicable to the certification of businesses as minority and woman-owned businesses under article 15-A of the Executive Law.

144.2. Eligibility criteria.
The following standards shall be used to determine whether a business enterprise is eligible to be certified as a minority or woman-owned business enterprise.

(a) Ownership. For the purposes of determining whether an applicant should be granted or denied minority or woman-owned business enterprise status, or whether such status should be revoked, the following rules regarding ownership shall be applied on the basis of information supplied in relation to the application:

1. the contribution of the minority group member(s) or woman owner must be proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise;

2. the business enterprise must demonstrate that it is an independent, continuing entity which has been actively seeking contracts or orders and regularly and actively performing business activities;

3. a sole proprietorship must be owned by a minority group member or woman;

4. a partnership must demonstrate that minority group members or women have a 51 percent or greater share of the partnership; and

5. a corporation must have issued at least 51 percent of its authorized voting and all other stock to minority group members or women shareholders.

(b) Control. Determinations as to whether minority group members or women control the business enterprise will be made according to the following criteria:

1. Decisions pertaining to the operations of the business enterprise must be made by minority group members or women claiming ownership of that business enterprise. The following will be considered in this regard:

   i. Minority group members or women must have experience or technical competence in the business enterprise seeking certification.

   ii. Minority group members or women must demonstrate the working knowledge and ability needed to operate the business enterprise.

   iii. Minority group members or women must show that they devote time on an ongoing basis to the daily operation of the business enterprise.

2. Articles of incorporation, corporate bylaws, partnership agreements and other agreements including, but not limited to, loan agreements, lease agreements, supply agreements, credit agreements or other agreements must permit minority group members or women who claim ownership of the business enterprise to make those decisions without restrictions.

3. Minority group members or women must demonstrate control of negotiations, signature authority for payroll, leases, letters of credit, insurance bonds, banking services and contracts, and other business transactions through production of relevant documents.
(c) Additional requirements. The following requirements apply to all applicants seeking minority and women-owned business enterprise status and inclusion in the directory of certified businesses:

(1) documentation may be required to substantiate the claim of membership in a minority group. This documentation may include, but is not limited to: birth certificates, naturalization papers, registration on Indian tribal rolls, and nonresident visas;

(2) an eligible minority group member or woman applicant must be an independent business enterprise. The ownership and control by the minority group member or woman must be real, substantial and continuing and must go beyond the pro forma ownership of business as reflected in the ownership documents. The minority group member or woman owner shall enjoy the customary incidents of ownership and shall share in the risks and profits, in proportion with their ownership interest in the business enterprise;

(3) where the actual management of the business enterprise is contracted out to individuals other than minority group members or women, minority group members and women must demonstrate that they have the ultimate power to hire and fire these managers, that they exercise this power and make other substantial decisions which reflect control of the business enterprise;

(4) applicants are required to conduct business activities for, generally, at least one year prior to the application date. Applicants who have been conducting business activities for less than one year, may not be able to provide sufficient information upon which a certification decision can reasonably be made, and therefore their application may be rejected; and

(5) the division shall not be required to conduct a site visit to the applicant’s place of business where an out-of-state firm possesses certification from an agency in the applicant’s home state which conducts a certification program recognized by the division, or possess certification from an agency located in any other state which conducts a certification program recognized by the division. Evidence of this certification must be submitted to the division. In those instances where an out-of-state applicant does not possess certification from a recognized certification program, the director may request a site visit of the applicant’s place of business to be performed by an employee, agent or representative of the division.

144.3. Continuing minority and woman-owned business enterprise status.

(a) All business enterprises certified as of August 31, 1988, by these State agencies: the Department of Transportation; the Urban Development Corporation; the Department of Environmental Conservation; the Niagara Frontier Transportation Authority; and the Office of General Services, shall be entitled to minority and women-owned business enterprise status until such time as they shall be required to reapply for this status.

(b) Upon approval by the director, business enterprises certified as of August 31, 1988, by these State agencies: New York City Transit Authority, Metropolitan Transportation Authority, Metro-North Commuter Railroad, Long Island Rail Road, Metropolitan Suburban Bus Authority and Triborough Bridge and Tunnel Authority, shall be entitled to continuation of minority or woman-owned business enterprise status until such time as they shall be required to reapply for this status.
144.4. Application intake and verification.

(a) Applications for certification may be obtained from and returned to the division.

(b) The division shall date stamp an application upon receiving it. If an application is received by the division and required documents are missing, questions are unanswered or the application is not properly notarized, the division will notify the applicant within 20 days of the initial date stamped on the application of the status of its application and any deficiency arising from missing documents, unfinished questions or deficiencies in notarization. An applicant may cure the noticed deficiency by providing the division with documents or information requested in the notice of status and deficiency, within 20 days of the date of the notice of status and deficiency.

(c) When the applicant cures a noticed deficiency, pursuant to procedures set forth in subdivision (b) of this section, the division shall have an additional 30 days to advise the applicant of any further deficiency, which deficiency may be cured in accordance with subdivision (b) of this section.

(d) If the applicant does not cure a noticed deficiency, pursuant to procedures set forth in subdivision (b) of this section and the application remains incomplete, for at least 20 days of the date of the notice of deficiency, the applicant shall be notified, in writing, that its application has been rejected and will not be processed.

(e) An applicant may not reapply for certification for at least 90 days of the date of the notice of rejection of its application.

(f) Applicants for certification may be required to consent to inquiries of bonding companies, banking institutions, credit agencies, contractors, affiliates and clients to ascertain the applicant’s eligibility for certification. Refusal to permit such inquiries shall be grounds for rejection of a certification application.

(g) An application shall be deemed complete when a site visit by the division to the applicant’s place of business has occurred, or, in the case of out-of-State firms, when a written notice has been sent to the applicant by the division stating that its application is complete.

(h) An applicant’s refusal to permit an inspection of its place of business shall be grounds for rejection of the application.

(i) An application may be withdrawn by an applicant without prejudice at any time prior to the site visit. Following the withdrawal of an application, the applicant may not reapply for certification for a period of at least 90 days.

144.5. Notice of determination, right to appeal and requests for hearing.

(a) Within 60 days of the site visit, the director shall provide the applicant with written notice of a determination approving or denying certification status.

(b) In the event a determination is made to approve certification by the director, the applicant will be provided with written notice of such determination and will hold minority
or women-owned business enterprise status for two years or until notified of the need to reapply at the director’s request.

(c) In the event a determination is made to deny certification, a written notice of such determination shall be provided to the applicant stating the reason(s) for denial. Such notice shall also state the procedures for filing an appeal before an independent hearing officer.

(d) The applicant may request a hearing to appeal the determination within 30 days of the receipt of the notice of denial. In the event that a request for a hearing is not made within the 30-day period, the director’s determination shall be deemed final and the applicant may not reapply for certification for two years from the date of the written notice denying certification, provided, however, that if the facts and circumstances forming the basis of the denial decision have changed significantly, the applicant may reapply sooner.

(e) The request for a hearing shall state the bases upon which the denial of certification is being appealed and shall be based on information or documents provided with an application and pursuant to a site visit.

(f) Appeals initiated prior to September 1, 1988 and pending thereafter will be decided by the division in accordance with the standards under which certification of the business enterprise was denied or revoked.

144.6. Appeals.

(a) The independent hearing officer shall conduct a hearing based upon information set forth in the request for a hearing relating to the information provided with the certification application and during the site visit. The independent hearing officer may request additional information of the applicant and the division and take other actions necessary to make an informed recommendation in accordance with the Code of Fair Procedure set forth in section 73 of the Civil Rights Law.

(b) The independent hearing officer shall issue a written recommendation to the director to affirm, reverse or modify the original determination. Within 30 days of the receipt of the recommendation by the applicant, the director shall accept, reject or modify the independent hearing officer’s recommendation and set forth in writing the reasons for doing so. The director shall forward a copy of the decision to the applicant by personal service or certified mail, return receipt requested. In the event that the decision is to deny certification, the applicant may not reapply for certification for two years from the date of the original notification of denial of certification, provided, however, that if the facts and circumstances forming the basis of the denial decision have changed significantly, the applicant may reapply sooner.

(c) The order of the director shall be subject to review, pursuant to article 78 of the Civil Practice Law and Rules.

144.7. Procedures for conduct of hearings.

(a) The applicant shall be provided with notice of the date, time and place of their hearing before the independent hearing officer at least 20 days prior to the date of the hearing.

(b) The notice shall include, but not be limited to, the following information:
(1) a statement of the legal authority and jurisdiction pursuant to which the hearing is being held;

(2) where possible, a reference to the specific sections of the statute, regulations and/or standards involved;

(3) a statement of the matters raised and the issue(s) to be determined, provided, however, that nothing shall preclude the consideration at the hearing of relevant issues not raised in the notice, in a manner consistent with the applicant’s right to respond to such issues;

(4) the identity of the independent hearing officer designated to conduct the hearing;

(5) the identity of the individual representing the division in the appeal proceeding; and

(6) the procedure to apply for an adjournment or withdrawal of the applicant’s request for an appeal.

(c) The notice shall be personally served or sent by certified mail, return receipt requested, to all parties to the appeal proceeding.

(d) Limited discovery shall be permitted to an applicant in any appeal proceeding before an independent hearing officer.

(1) The documents to be discovered shall be limited to those which, as of the date of the discovery request, the division has in its possession and intends to introduce in the course of the appeal proceeding.

(2) There shall be no depositions taken of potential witnesses prior to the hearing.

(e) A request for discovery of documents shall be made in writing to the individual representing the division in the appeal proceeding, as set forth in the notice of hearing, with a copy sent to the independent hearing officer designated to conduct the hearing, at least 10 days prior to the date of the hearing.

(1) The request shall set forth the specific documents being requested.

(2) Requested documents which are properly discoverable shall be provided to the applicant or its attorney, if applicable, within 10 days after the receipt of the written request, unless due to the volume of documents being requested, the copying of such documents cannot be completed within such period.

(3) Where the documents cannot be provided within 10 days, written notice of such shall be given to the requester, with a copy to be sent to the independent hearing officer designated to conduct the hearing. Such notice shall state when the requested documents are expected to be provided and the reason(s) for the delay.

(f) The applicant may request recusal of a hearing officer designated to conduct the hearing. Grounds for recusal shall be limited to an actual conflict of interest or an
appearance of impropriety which is of such seriousness that it would prevent fair and
impartial adjudication of the issues.

(g) An applicant requesting recusal of the hearing officer designated to conduct the hearing
must submit a written request to the director, with a copy to be sent to the individual
representing the division in the appeal proceeding.

(h) The request for recusal must be made within 15 days after the receipt of the notice of
hearing, or 10 days prior to the date of the hearing, whichever is earlier.

(i) The request shall include the specific basis for the application for recusal and a
statement setting forth why recusal would be proper under the circumstances.

(j) The director shall respond in writing to any request for recusal within five business days
of receipt of the request. Where recusal is denied, the director shall set forth the reasons
for such denial.

(k) The independent hearing officer shall regulate the course of the hearing, set the time
and place for continued hearings and fix the time for the filing of documents.

(l) The independent hearing officer shall not be bound by technical rules of evidence or
procedure. The hearing officer shall conduct the hearing in such order and manner as he or
she deems appropriate to ascertain the substantial rights of the parties. All parties shall be
accorded full opportunity to present evidence and written and oral argument, provided
however, that the hearing officer may exclude irrelevant or unduly repetitious evidence or
cross-examination from any appeal proceeding.

(m) All testimony shall be under oath or by affirmation, and a record of the proceeding
shall be made.

(n) Any party may appear in person or be represented by another person. The hearing
officer may examine the parties and their witnesses. Any party shall have the right to call
witnesses and examine and cross-examine other parties and their witnesses.

(o) The independent hearing officer may issue subpoenas in the name of the division, at
the request of any party, requiring attendance and giving of testimony by witnesses and the
production of books, papers, documents and other evidence. Any required fees shall be paid
by the party requesting the subpoena.

(p) An adjournment may be directed or granted by a hearing officer in his/her discretion
but only upon a showing of good cause and upon a request made to the hearing officer at
least seven days prior to the scheduled date of the hearing. In such event, he/she shall
explain to the parties the reason for such adjournment. No appeal shall be delayed
unreasonably.

(q) The independent hearing officer will consider an appeal request to be withdrawn under
the following circumstances:

(1) the hearing officer has received a written statement from the applicant, or the
applicant’s authorized representative; stating that the request for a hearing is withdrawn; or
(2) the applicant, or the applicant’s authorized representative, fails to appear at the scheduled appeal hearing.

(r) In the absence, disability or disqualification of an independent hearing officer or for other good cause, an appeal hearing may be transferred to another hearing officer.

144.8. Revocation of minority or woman-owned business enterprise status.

(a) The director shall revoke the minority or woman-owned business enterprise status of a certified business for a period of two years, if it is demonstrated that minority group members or women no longer own and control the business enterprise in accordance with rules set forth in section 144.2 of this Part.

1. A certified business enterprise must notify the division within 30 days of any material change in the information contained in the original application. A material change may include, but are not limited to, any of the following developments: a change in ethnicity, sex, percentage of ownership in the business enterprise, address, officers or services provided by the certified business. If a material change is indicated, a review may be conducted by the division.

(b) The division, upon receiving allegations indicating that a certified business enterprise is no longer entitled to minority or woman-owned business enterprise status, may take the following actions:

1. determine whether the allegation can be substantiated;

2. obtain in writing, if possible, the basis of any allegation from the person or persons making the allegation;

3. notify a certified business in writing upon a determination that its minority or woman-owned business enterprise status is under review by the director and may be revoked. This notice shall specify the bases for such review and any facts specifically at issue;

4. provide the certified business whose minority or woman-owned business enterprise status is under review, with an opportunity to respond in writing to any allegations set forth in notices of certification status review within 20 days of the date of such notice, by personal service or certified mail, return receipt requested; and

5. meet or conduct site visits, as necessary, with minority group members or women claiming ownership and control of the certified business enterprise.

(c) If the minority group members or women claiming ownership of the certified business fail to timely respond in writing to the notice of certification status review, or fail to meet or agree to a site visit, the minority or woman-owned business status of the certified business enterprise shall be revoked by the director.

(d) The director shall notify, in writing, a business of the revocation of its minority or woman-owned business enterprise status within 10 days of revoking such status. The minority group members or women claiming ownership and control of a business which has had its minority or woman-owned business enterprise status revoked, may request a hearing before an independent hearing officer within 30 days of the date of the notice of revocation.
Such hearing shall be conducted in accordance with procedures set forth in section 144.7 of this Part. If a request for a hearing is not made within the 30-day period, the director’s determination shall be final and the business enterprise may not reapply for certification for two years from the date of the notice of revocation provided, however, that if the facts and circumstances forming the basis of the revocation decision have changed significantly, the business enterprise may reapply sooner.

(e) The minority group members or women shall be provided with notice of the date, time and place of their hearing before the independent hearing officer, at least 10 days prior to the date of the hearing.

(f) The independent hearing officer shall conduct a hearing and make a recommendation whether the certified business should retain its minority or woman-owned business enterprise status, or whether such status should be revoked in accordance with subdivision (a) of this section. The independent hearing officer may request additional information of the minority group members or women who requested the hearing or the division, and take other actions necessary to make an informed recommendation in accordance with the Code of Fair Procedures set forth in section 73 of the Civil Rights Law.

(g) The independent hearing officer shall issue a written recommendation to the director to affirm, reverse or modify the original determination. Within 30 days of the written recommendation, the director shall accept, reject or modify the independent hearing officer’s recommendation and set forth in writing the reasons for doing so. The director shall forward a copy of the decision to the business enterprise by personal service or certified mail, return receipt requested. In the event of a decision to revoke the minority or woman-owned business enterprise status of a business enterprise, the business enterprise may not reapply for certification for two years from the date of the original notice of revocation, provided, however, that if the facts and circumstances forming the basis of the revocation decision have changed significantly, the business enterprise may reapply sooner.

(h) The order of the director shall be subject to review, pursuant to article 78 of the Civil Practice Law and Rules.
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General Information

Please answer all questions as completely as possible. If a particular question does not apply to your business operation, write not applicable (NA) in the space provided. Company submitting application must be at least fifty-one percent (51%) owned by one or more minority individuals with U.S. citizenship. Please be sure to read carefully the list of required documentation in the Attachments section and include with your completed application and processing fee of $250.00.

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| 3. Company Address: Street 1:           |
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4. Mailing Address [if different]:

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In the space below, please give a concise description of company's product(s), service(s), or type of construction. If your company offers more than one product/service, list primary product or service first.  [characters left]
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**Primary Point of Contact:**

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<th>Contact First Name</th>
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<tr>
<td>Contact Last Name</td>
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<td>Email</td>
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</table>

**NAICS Codes:** You may refer to, [NAICS.com](http://www.NAICS.com)

* At least one NAICS code is required

<table>
<thead>
<tr>
<th>Code 1</th>
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<td>Code 2</td>
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</table>

### Type of Business:
- [ ] Brokers/Agents (BA)
- [ ] Construction Contractor (CC)
- [ ] Consultant/Professionals (CP)
- [ ] Distributor (DS)
- [ ] Manufacturer (MF)
- [ ] Manufacturers Rep (MR)
- [ ] Service Contractor (SC)

### Type of Legal Business Structure:
* NMSDC's definition of Sole Proprietorship is a company owned/operated 100% by one (1) individual or married couple. Split ownership does not constitute Sole Proprietorship.
- [ ] Corporation
- [ ] Limited Liability Corporation or Company (LLC)
- [ ] Limited Liability Partnership (LLP)
- [ ] General Partnership
- [ ] Sole Proprietorship *

### Date of Business Establishment (mm/dd/yyyy):

### Is your company, parent company, branch or subsidiary currently certified by another NMSDC affiliate council? [if Yes, provide Council Name & Date]
- [ ] No
- [ ] Yes

### Has your firm ever applied for certification before? [if Yes, provide By Whom and Date]
- [ ] No
- [ ] Yes

### Does your firm hold 8(a) certification?
- [ ] No
What are the gross receipts of your company for each of the past three years? (If in business less than one year, provide gross receipts to date)

<table>
<thead>
<tr>
<th>Year Ending</th>
<th>Amount ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td></td>
</tr>
<tr>
<td>2012</td>
<td></td>
</tr>
<tr>
<td>2011</td>
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</tbody>
</table>

Dun & Bradstreet #: 

Number of Employees:  
Full Time:  
Part Time:  

Number of Minority Employees:  

How did you hear about us?  
- Council MBE  
- Event or Presentation  
- Corporate Member  
- Newspaper, Radio, TV  
- Other  

In the previous question, if you selected:  
- Council MBE - please provide name.  
- Corporate member - please provide name.  
- Other - please provide details.
# Ownership Business Information

1. **Type of Acquisition:**
   - Bought Existing Business
   - Started Business
   - Merger or Consolidation
   - Secured a Franchise
   - Other (please specify)

2. **Date when business was acquired, purchased, or secured (mm/dd/yyyy):**

3. Please list each owner, proprietor, partner, officer, member, director and stockholder. The name listed should include Minority Group Members and Non-Minority Group Members.
   * For Ownership Role column,
     - S = Stockholder, Proprietor or partner
     - D = Director and/or Officer

   **NMSDC does not certify non-citizens. For citizenship status (CS) enter 1=By Birth or 2=Naturalized Citizen.**

<table>
<thead>
<tr>
<th>Name</th>
<th>Title</th>
<th>Ethnic Origin</th>
<th>Gender</th>
<th>CS**</th>
<th>Yrs Owned</th>
<th>% Owned</th>
<th>% Votes</th>
<th>Role*</th>
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</thead>
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</tbody>
</table>
4. Are business premises: (check one)
   - Owned
   - Leased
   - Home based

5. Location of additional facilities:
<table>
<thead>
<tr>
<th>Facility</th>
<th>Location Address</th>
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<tbody>
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</tbody>
</table>

6. Geographic Market:
   - Local
   - Regional
   - National
   - International

7. List of contributions of each of the owners:
<table>
<thead>
<tr>
<th>Name</th>
<th>Actual Money($)</th>
<th>Equipment</th>
<th>RealEstate</th>
<th>Expertise</th>
</tr>
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<tbody>
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</tbody>
</table>

8. If license or permit is required to provide product or service, give information as follows.
[This is to determine if the license or permit is owned by the minority applicant.]

<table>
<thead>
<tr>
<th>License Holder</th>
<th>License/Permit Type</th>
<th>License Number</th>
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<tbody>
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</table>

9. Does your company share any resources with any other firm or individual? (office facilities, storage space, equipment, personnel, inventory, financing, etc.) If yes, please identify and explain fully.

- [ ] No
- [ ] Yes

If you answered "yes" to the previous question, please provide your explanation here. If you answered "no", please skip this question.

10. Is any owner, management official or employee of your company associated with any other business?

If yes, explain fully and identify the business or person with whom you have an agreement and attach any written agreement and/or explain any oral or intended agreement.

- [ ] No
- [ ] Yes

If you answered "yes" to the previous question, please provide your explanation here. If you answered "no", please skip this question.
Identify those individuals (owners, non-owners and key employees) who are responsible for the day-to-day operations and policy decision-making, including those with prime responsibilities. Values for "Operation" are as follows:

<table>
<thead>
<tr>
<th>Operation</th>
<th>Name</th>
<th>Title</th>
<th>Ethnic Origin</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial Decisions</td>
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<tr>
<td>Payroll</td>
<td></td>
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<tr>
<td>Signatory on major documents</td>
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<tr>
<td>Personnel Management</td>
<td></td>
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<tr>
<td>Marketing/sales</td>
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<tr>
<td>What jobs firm will undertake</td>
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<tr>
<td>Purchasing of major items</td>
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</tbody>
</table>
Estimating

Supervisor of field operations

1. Is the company bonded?
   - No
   - Yes

2. If you answered "Yes" to the previous question, please list the company name and the dollar amount of each Bonding or Security company.

<table>
<thead>
<tr>
<th>Company Name</th>
<th>Amount</th>
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</table>

3. Does the applicant business have any subsidiaries or affiliates or is it a subsidiary of another concern?
   - No
   - Yes

4. If yes (to prior question), provide the name, address, and telephone number of the subsidiary, affiliate or parent company. Also describe the relationship of the applicant company to the subsidiary, affiliate or parent.

<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
<th>Telephone</th>
<th>Relationship</th>
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5. Does applicant business concern or any person, listed under Ownership, have or intend to enter into any type of agreement with any other concern or person which relates to or affects the on-going administration, management or operations of the
applicant concern? Such agreements include but are not limited to management and joint venture agreements and any arrangement or contract involving the provision of such compensated services as administrative service, marketing, production and other type of compensated services. If yes, add a copy of any written agreement of an explanation of any oral or intended agreement and follow the documentation instructions.

- No
- Yes

1. Is the applicant business and/or owner concern involved in any present or pending lawsuit?

- No
- Yes

2. If you answered "Yes" to the previous question, please provide your explanation here.

References

1. Provide three (3) current customer references:

<table>
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<tr>
<th>Company Name</th>
<th>Address</th>
<th>City</th>
<th>State</th>
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<td>Product/ Service</td>
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<td>Dollar Volume($)</td>
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<td>Buyer</td>
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<td>Product/ Service</td>
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2. Provide two current bank references:

<table>
<thead>
<tr>
<th>Name of Institution</th>
<th>Bank Officer</th>
<th>Bank Officer Title</th>
<th>Address</th>
<th>City</th>
<th>State</th>
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<table>
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<th>Zip</th>
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<table>
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<th>Type of Account</th>
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<th>Credit Line ($)</th>
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<th>Name of Institution</th>
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<table>
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<tr>
<th>Bank Officer</th>
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<table>
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<tr>
<th>Bank Officer Title</th>
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<tr>
<td>Type of Account</td>
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<tr>
<td>Credit Line ($)</td>
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</table>

### Special Business Operations

1. If company is a Distributor, please complete: Average Dollar Value of Inventory:

   ![Average Dollar Value of Inventory](image)

2. If company is a Manufacturer, list up to ten (10) basic equipment and indicate whether equipment is leased or owned:

<table>
<thead>
<tr>
<th>Basic Equipment</th>
<th>Leased/Owned</th>
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</table>

3. If company is a Contractor, please complete the following section:

   ![License #](image)
4. Transportation Information: Operating Status
   - Independent Carrier
   - Insurance Carrier

5. Common carrier operating authorities:
   - Interstate
   - Intrastate

6. List the commodities you normally transport:

7. Commercial/business vehicle(s):
   [Please forward copies of all applicable vehicle title and/or lease agreements with this application.]

<table>
<thead>
<tr>
<th>Vehicles/Equipment</th>
<th>Owned/Leased</th>
<th>Quantity</th>
<th>Registration Number</th>
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<tbody>
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</table>
NOTE: This declaration page must be printed and signed by the proprietor, partners, or president of the company, notarized, and then submitted to the Council by postal mail.

DECLARATION OF CERTIFICATION OF MINORITY STATUS

I (We) have completed and submitted the Minority Business Information System (MBISYS) form as requested by the PA-NJ-DE Minority Supplier Development Council and hereby certify that the information contained herein and all attachments submitted are true and correct and accurate to the best of my (our) knowledge and belief. I (We) understand that this Declaration of Certification and the criteria set forth have been developed according to the guidelines established by the NATIONAL MINORITY SUPPLIER DEVELOPMENT COUNCIL. The certification, when granted, will be for a one (1) year period. I (We) further understand that completion and submission of this form, together with all attachments hereto, is not necessarily the sole criteria for determining certification of minority status by the PA-NJ-DE Minority Supplier Development Council.

I (We) acknowledge that if the Council discovers that a statement has been made herein which the applicant knows to be false, the certification process will be terminated immediately. I (We) agree that all materials submitted with this package shall become the property of the Council.

I (We) further agree that once certified, the continued certification by the PA-NJ-DE Minority Supplier Development Council will be according to the guidelines, rules and regulations of the PA-NJ-DE Minority Supplier Development Council and the NATIONAL MINORITY SUPPLIER DEVELOPMENT COUNCIL and may be amended from time to time. Termination of my (our) status may be based upon, but not necessarily limited to, any one of the following:
1. Cessation of business operation by the minority business concern.
2. Discovery that any false information was knowingly supplied to the PA-NJ-DE Minority Supplier Development Council in the completion of this form or as contained in any attachments submitted.
3. Failure to provide timely notice or withholding of any notice to the PA-NJ-DE Minority Supplier Development Council of the transfer or loss of ownership and/or management and control of the business concern by its minority group members.
4. Failure or refusal to allow the PA-NJ-DE Minority Supplier Development Council and/or its representative access to the company's place of business upon reasonable notice and demand for the purpose of a site visit.
5. Sale, exchange, or transfer of ownership of the minority business concern, if such transfer results in the loss of control and ownership of the business concern by the minority group members.

I (We) understand and agree that the PA-NJ-DE Minority Supplier Development Council reserves the right to request any further and additional information that it may deem necessary to substantiate the information and representations made by the applicant (applicants) for certification. I (We) declare that the company in whose name this application is being submitted is at least fifty-one percent (51%) owned by one or more minority individuals (as defined herein) and such individuals control, operate and manage the company.

The undersigned hereby agrees (agree) to hold PA-NJ-DE Minority Supplier Development Council free and harmless from any and all claims, demands, and damages whatsoever arising out of the presentation of this application and agrees to indemnify and hold PA-NJ-DE Minority Supplier Development Council harmless for any and all liability in connection with the certification of the information contained in this application.

The undersigned hereby declares (declare) under penalty of perjury that all statements made in this application and any attachments hereto are true and correct. I understand that the $250.00 Application Fee is included and non-refundable.

Business Name
Signature of all Proprietor, Partners and President of the Corporation
Please have this form **NOTARIZED**, retain a copy of this form for your files and return the original and the attachments to:

**PA-NJ-DE Minority Supplier Development Council**, The Bourse Building, 111 S. Independence Mall East, Suite 630, Philadelphia, PA 19106

State of ____________________________________________________________

County of __________________________________________________________

On ______________________ 20___, before me, (name) __________________________________________, personally known to me, or proved to me on the basis of satisfactory evidence, to be the person(s) whose name(s) is/are subscribed to the within instrument, and acknowledged to me that he/she they executed in the same in his/her their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) of the entity upon which the person(s) acted, executed the instrument. WITNESS my hand and official seal.

Notary Public _____________________________________________ (Seal)

Commission Expires ____________________________________________

NOTE: Public Law 99-272, the “Consolidated Omnibus Budget Reconciliation Act of 1985,” which amends Section 16 of the Small Business Act, establishes penalties of up to a $50,000 fine or imprisonment of up to five years, or both, for misrepresenting, in writing, the status of any concern or small business owned and controlled by socially and economically disadvantaged individuals (a “DBE”) in order to obtain for oneself or another any prime subcontract to be awarded as a result or in furtherance or any provision of federal law that specifically references Section 8(D) of the Small Business Act for a definition of eligibility.

☐ I acknowledge that I will print a copy of the Declaration of Certification of Minority Status to be signed by the Proprietor, Partners, or President of the Company, notarized, and submitted to the Council by postal mail along with the non-refundable processing fee and required documentation requested in the next section of this application.

Click here to print the Declaration