



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

Division of State Government Accountability

Contract Participation of Disadvantaged Business Enterprises and Minority- and Women-Owned Business Enterprises

New York State Thruway Authority



Report 2014-S-76

June 2016

Executive Summary

Purpose

To determine whether the New York State Thruway Authority is monitoring its contractors to ensure they are actively working to reach participation goals for minority- and women-owned business enterprise (MWBE) and disadvantaged business enterprise (DBE) programs, is accurately reporting MWBE and DBE participation in its contracts, and has controls in place to detect or prevent MWBE and DBE fraud. The audit covers the period January 2013 through December 2014.

Background

The New York State Thruway Authority (Authority) is responsible for overseeing the 570-mile highway system and 524-mile canal system in the State. For contracts involving State money, the Authority must comply with New York State Executive Law (Law), set MWBE goals, monitor its contractors, and report to the Department of Economic Development (DED) how much was paid to all contractors and how much was paid to MWBEs, so that its MWBE utilization rate can be calculated. For contracts involving federal money, including the current New NY Bridge project (the Tappan Zee Bridge replacement), the Authority must comply with federal regulations that require it to set DBE goals, monitor its contractors, and report to the New York State Department of Transportation (NYSDOT) how much was paid to all contractors and how much was paid to DBEs so that its DBE utilization rate can be calculated. From January 2013 through December 2014, the Authority reported to DED a total of \$137.1 million in MWBE payments out of \$324 million in eligible contract expenses, for an overall MWBE utilization rate of 42 percent. The Authority also reported to NYSDOT a total of \$73.5 million in DBE payments out of \$1.2 billion in eligible contract expenses, for a federal DBE utilization rate of 6 percent.

Key Findings

- The Authority has not accurately reported its MWBE utilization to DED, primarily because it has adopted practices that significantly skew its figures and result in over-reporting. For example, the Authority consistently reports only a portion of its eligible contract expenses to DED, thereby overstating its MWBE utilization rate. Further, the Authority did not make adjustments for payments to MWBE prime contractors who, in turn, paid other MWBE contractors as subcontractors, resulting in a double-counting of payments.
- We estimate that the actual MWBE utilization rate that the Authority achieved over the two-year period was, at best, about 18 percent, excluding its work on the New NY Bridge project, which is not subject to MWBE requirements. If eligible payments from that project were to be included, the utilization rate would further decline to below 9 percent.
- For fiscal years 2011-12 through 2014-15, the Authority set its overall annual MWBE goals at 20 percent, without explaining, as required by DED regulations, why it was not able to attain the Statewide goal of 28.92 percent specified in the Law. For fiscal year 2015-16, the Authority increased its overall annual MWBE goal to 30 percent, though it still has not explained how it plans to change its practices to meet these higher goals.
- The Authority did set its federal DBE goal for the New NY Bridge in line with the regional goal set by NYSDOT and has accurately reported its DBE utilization to NYSDOT.

- The Authority needs to better develop and implement strategies for detecting and preventing MWBE fraud on its contracts. The Authority has established some procedures that increase the likelihood of uncovering DBE fraud in the New NY Bridge project. However, it has yet to implement any controls for other projects, even though it recently increased its expectations for MWBE participation substantially across many areas, which would tend to increase the risk of such fraud on other contracts.

Key Recommendations

- Develop annual Authority MWBE goals based on factors such as history and potential contract opportunities.
- Work with DED to correct errors in past MWBE utilization reporting.
- Ensure that all MWBE utilization and all associated eligible contract expenses are reported to DED.
- Develop and implement strategies for detecting and preventing MWBE fraud schemes in Authority contracts.

Authority Response

In responding to our draft report, Authority officials detailed at length their efforts to encourage MWBE participation. However, their response generally avoided the core issue of inaccurate and often inflated MWBE utilization reporting. Further, the Authority's response did not meaningfully address the report's recommendations.

Other Related Audits/Reports of Interest

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

[Department of Corrections and Community Supervision: Selected M/WBE Purchases by Various Facilities \(2013-S-30\)](#)

State of New York
Office of the State Comptroller

Division of State Government Accountability

June 30, 2016

William Finch
Acting Executive Director
New York State Thruway Authority
200 Southern Boulevard
Albany, NY 12209

Dear Mr. Finch:

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

Following is a report of our audit entitled *Contract Participation of Disadvantaged Business Enterprises and Minority- and Women-Owned Business Enterprises*. This audit was performed pursuant to the State Comptroller's authority as set forth in Article X, Section 5 of the State Constitution and Section 2803 of the Public Authorities Law.

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

Respectfully submitted,

Office of the State Comptroller
Division of State Government Accountability

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Background

The New York State Thruway Authority (Authority) is a public benefit corporation created by the State Legislature in 1950 to build, operate, and maintain the Thruway System, a 570-mile system of highways crossing New York State. The New York State Canal Corporation, a subsidiary public corporation of the Authority, was created by the State Legislature in August 1992 to accept jurisdiction and control over the 524-mile New York State Canal System from the State.

Article 15-A of the New York State Executive Law (Law) was established to promote economic opportunities for minority- and women-owned business enterprises (MWBEs) and to eliminate barriers to their participation in State contracts. The Director of the Division of Minority and Women's Business Development at the Department of Economic Development (DED) is responsible for overseeing the Statewide MWBE program. DED is also responsible for the certification of small businesses that qualify as MWBEs. Businesses may be certified as a minority-owned (MBE) or a women-owned (WBE) business enterprise or as both. As of February 2015, DED had certified 7,808 of New York State's approximately 2 million small businesses as MWBEs.

Under the Law, State agencies and public authorities must establish annual goals for MWBE participation in their contracts (expressed as a percentage of total contract spending after exemptions and exclusions), make a good faith effort to achieve those goals, and report quarterly on amounts paid to certified MWBEs (referred to as utilization) to DED. Authority and agency goals are set on a State fiscal year basis, and are due to DED by January 15 of each year. Enacted in July 2010, the Law set forth a Statewide annual goal for MWBE participation in State contracts of 28.92 percent. Prior to 2015, an agency or authority could set its goal lower than 28.92 percent as long as it provided a justification to DED for why it was unable to reach the Statewide goal.

The Authority is allowed certain exemptions and exclusions for contracts where MWBE utilization is not possible. Exemptions are by category of contract spending, such as personal services, travel expenses, and utilities. Preferred source and New York State Office of General Services (OGS) centralized contracts are also considered exempt unless the contract has MWBE utilization. Exclusions are determined on a contract-by-contract basis, where the Authority determines that there are no procurement opportunities for MWBEs either as prime contractors or subcontractors. If and when MWBE vendors are identified, the contract is no longer classified as excluded.

At the federal level, Title 49 (Transportation), Section 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs), of the Code of Federal Regulations (49 CFR 26) seeks to create a level playing field for disadvantaged business enterprises (DBEs). In New York State, the State Department of Transportation (NYSDOT), the Niagara Frontier Transportation Authority, the Metropolitan Transportation Authority, and the Port Authority of New York and New Jersey are authorized to certify businesses as DBEs. An online unified certification directory is maintained by the four agencies. As of January 2015, there were 1,908 DBEs certified in New York State. NYSDOT administers the DBE program for bridge and highway construction in the State, including reporting DBE results to the U.S. Department of Transportation. NYSDOT also sets regional DBE goals, which are the minimum expected for a federally funded project in that region.

The criteria for federal DBE certification are different than the criteria for State MWBE certification. As a result, a business may be certified as one, the other, or both. Projects that receive federal grants are exempt from MWBE requirements, because they are subject to federal requirements. Because they are exempt, the total expenses are not included in annual goals for MWBE. The Authority's New NY Bridge project (the replacement for the Tappan Zee Bridge) is the Authority's largest federally funded project and its DBE utilizations are reported to NYSDOT.

Two units within the Authority are responsible for setting goals and reporting on MWBE utilization: the Office of Purchasing for commodities and non-construction-related services and the Compliance Unit for construction and construction-related professional services. The Authority has appointed a Diversity Compliance Officer to oversee the DBE program at the New NY Bridge. Between January 1, 2013 and December 31, 2014, the Authority reported 3,254 MWBE utilization amounts totaling \$137.1 million out of \$324 million in expenses to DED and 1,190 DBE utilization amounts totaling \$73.5 million out of \$1.2 billion in expenses to NYSDOT for the New NY Bridge.

Audit Findings and Recommendations

Based on our reviews of selected MWBE utilization amounts reported to DED, the Authority has not accurately reported its MWBE utilization. While we found instances of both under- and over-reporting of utilization, the Authority's practices significantly skew its figures and serve to inflate its MWBE utilization. For example, we found that the Authority consistently reports only a portion of the eligible total expenditures for contracts with MWBE utilization, which makes the MWBE payments appear to be a higher percentage of the total spent than they actually were.

Overall, we estimate that, for the two-year period ending December 31, 2014, the Authority's utilization rate was, at best, 18 percent, excluding its work on the New NY Bridge project, which is not subject to MWBE requirements. This is less than half the 42 percent that would be calculated based on the data it reported to DED. If eligible payments from the New NY Bridge project were to be included, the utilization rate would further decline to below 9 percent. In contrast, based on our reviews of selected DBE utilization amounts reported to NYSDOT, we concluded that the Authority has accurately reported its DBE utilization for the New NY Bridge project.

Although the Authority operates on a calendar year basis, the Law requires MWBE goals to be set on a State fiscal year basis. For fiscal years 2011-12 through 2014-15, the Authority set its overall annual MWBE goals at 20 percent, which is lower than the Statewide participation goal of 28.92 percent. While the Authority is not required by the Law to set its goal at 28.92 percent, DED regulations did require the Authority to provide an explanation for a lower goal, which the Authority did not consistently provide. The Authority provided brief explanations in its fiscal year 2011-12, 2012-13, and 2013-14 plans for two industries where it had set no goals, but no explanation for any industries where it had set lower goals than the Law set forth nor for setting its overall goal at only 20 percent.

In a November 2014 report on fraud and misuse in MWBE programs issued by the New York County District Attorney's Office, the Grand Jury of the Supreme Court of the State of New York identified three major fraud schemes that commonly occur with MWBE procurement. For each of these fraud schemes, the work is not done by a certified MWBE but the prime contractor submits invoices claiming it was. We found the Authority needs to better develop and implement strategies for detecting and preventing MWBE fraud in its contracts. On the other hand, we found the Authority's monitoring of its DBE program to be adequate.

MWBE Program

Setting MWBE Program Participation Goals

The Law divides the overall Statewide goal of 28.92 percent into four main categories (by industry) and between MBE and WBE, as shown in Table 1.

Table 1

Type of Industry	MBE Goal (Percent)	WBE Goal (Percent)	Total MWBE Goal (Percent)
All Industries	16.53	12.39	28.92
Construction	14.34	8.41	22.75
Construction-Related Professional Services	13.21	11.32	24.53
Non-Construction-Related Services	19.60	17.44	37.04
Commodities	16.11	10.93	27.04

In its annual goal plans, the Authority has set goals for most of the categories required by the Law, and further subdivided those goals between prime contractors and subcontractors, as shown in Table 2.

Table 2

Authority Goal Percent Per Fiscal Year										
Type of Industry (Prime/Sub)	2011-2012		2012-2013		2013-2014		2014-2015		2015-2016	
	MBE	WBE	MBE	WBE	MBE	WBE	MBE	WBE	MBE	WBE
All Industries	13.00	7.00	13.00	7.00	12.10	7.90	12.59	7.41	18.00	12.00
Prime Contractors:										
Construction	Unknown	Unknown	Unknown	Unknown	-	-	-	-	Unknown	Unknown
Construction-Related Professional Services	Unknown	Unknown	Unknown	Unknown	-	-	-	-	Unknown	Unknown
Non-Construction Related Services	4.00	7.00	4.00	7.00	7.00	13.00	7.00	13.00	6.00	9.00
Commodities	4.00	7.00	4.00	7.00	7.00	13.00	7.00	13.00	6.00	9.00
Subcontractors:										
Construction	13.00	7.00	13.00	7.00	13.00	7.00	13.00	7.00	18.00	12.00
Construction-Related Professional Services	13.00	7.00	13.00	7.00	13.00	7.00	13.00	7.00	18.00	12.00
Non-Construction Related Services	-	-	-	-	-	-	-	-	6.00	9.00
Commodities	-	-	-	-	-	-	-	-	6.00	9.00

Note: Dashes denote where the Authority did not set a goal at all.

For fiscal years 2011-12 through 2014-15, the Authority set its overall annual MWBE goals at 20 percent, which is lower than the Statewide goal of 28.92 percent. The Authority's subgoals – by individual industry and type – were often lower than those set forth in the Law. Further, for construction and construction-related professional services, the Authority's goals for prime contractors were “unknown,” though the Authority did have goals for its subcontractors in these categories. Authority officials did not provide DED with an explanation of what “unknown” means.

The Authority explained in its goal plans that the procurement of commodities and consultant services necessary for the Authority's operation does not lend itself to subcontractors. The goal plan also stated that the Authority had issues with MWBEs either not responding to canvassing for procurement opportunities or responding to canvassing but not the subsequent invitations to

bid. However, the Authority did not explain in its goal plans why the goals for construction and construction-related professional services were lower than stated in the Law, as required by DED regulations in effect at the time. Officials told us they did not include the required explanation because, at the time, they mistakenly believed that the MWBE goal set forth in the Law was only 20 percent until fiscal year 2015-16, when it increased to 30 percent. In fact, the Law established an overall Statewide goal of 28.92 percent, which has remained constant since 2010.

On October 1, 2014, the Governor announced his expectation that State agencies and authorities reach 30 percent MWBE participation in their contracts, slightly more than the goal set forth in the Law. As a result, the Authority set its fiscal year 2015-16 goal to 30 percent, primarily by setting goals for industries that previously had no goal (as shown in Table 2). The Authority did not explain what additional efforts it intends to make to achieve these goals.

The two units that oversee the Authority's MWBE program have different approaches to setting goals. Prior to fiscal year 2015-16, the Office of Purchasing set its goals at what it considered achievable and provided explanations where goals were below the rates set by the Law. Starting in fiscal year 2015-16, the Office of Purchasing increased its goals significantly – including setting goals for industries that previously had none – without providing any rationale for the increase. The Compliance Unit, on the other hand, focuses on ensuring that the individual contracts have achievable goals (based on the Authority's evaluation of the work to be done and the availability of MWBEs qualified to perform that work) and on monitoring that the contractors make a good faith effort to reach those goals, rather than developing a methodology for setting annual goals.

Certain contracts are excluded from coverage under the Law because there are few MWBEs in those industries. To help MWBEs obtain opportunities to participate in State contracts (which is the intent of the program), the Authority sets goals for those contracts, as a way of encouraging the prime contractors to search for and work with MWBE companies. These contract goals are set on a contract-by-contract basis, at what the Authority considers achievable.

Because the Authority believed its MWBE goals were in compliance with the provisions of the Law, it made no effort to identify the reasons for lower-than-expected MWBE participation and, as a result, did not identify appropriate actions needed to increase MWBE participation in its contracts. By increasing its goals for fiscal year 2015-16 without analyzing its relevant MWBE participation history, the Authority continues to lack an evidence-based strategy to significantly adjust MWBE participation in its contracts. Instead, the Authority's goals appear to have simply been set to be in line with the new Statewide expectations. Without such a strategy, the Authority may find it difficult to promote business development and obtain MWBE participation at significantly higher levels. Further, setting goals that may be unachievable opens the program to a higher risk of fraud, which may in turn unintentionally take opportunities away from precisely those businesses that the program was meant to help.

Recommendation

1. Develop the Authority's annual MWBE goals (overall and by industry) based on factors such as history and potential contract opportunities.

Reporting MWBE Program Participation Results

When reporting quarterly to DED on MWBE utilization, the Authority must report all payments made to certified MWBEs during that quarter. It must also report the total of all eligible payments made on contracts that were not exempt or excluded during that same time so that the MWBE utilization rate (MWBE payments as a percentage of all eligible payments) can be calculated. Contracts exempted in the goal plan are generally not included when reporting program results. If the Authority has obtained MWBE participation on an exempted contract, it can choose to include both the MWBE utilization and the total contract expenditures.

According to NYSDOT policy guidance, federally funded contracts are subject to DBE requirements, and as such are exempt from MWBE requirements. In addition to DBE utilization reported to NYSDOT, the Authority has also reported MWBE utilization on federal projects to DED. While the prime contractor must meet the federal requirements to have a DBE goal and track DBE participation, the contract also requires the prime contractor to report MWBE utilization to the Authority.

Construction and Construction-Related Professional Services

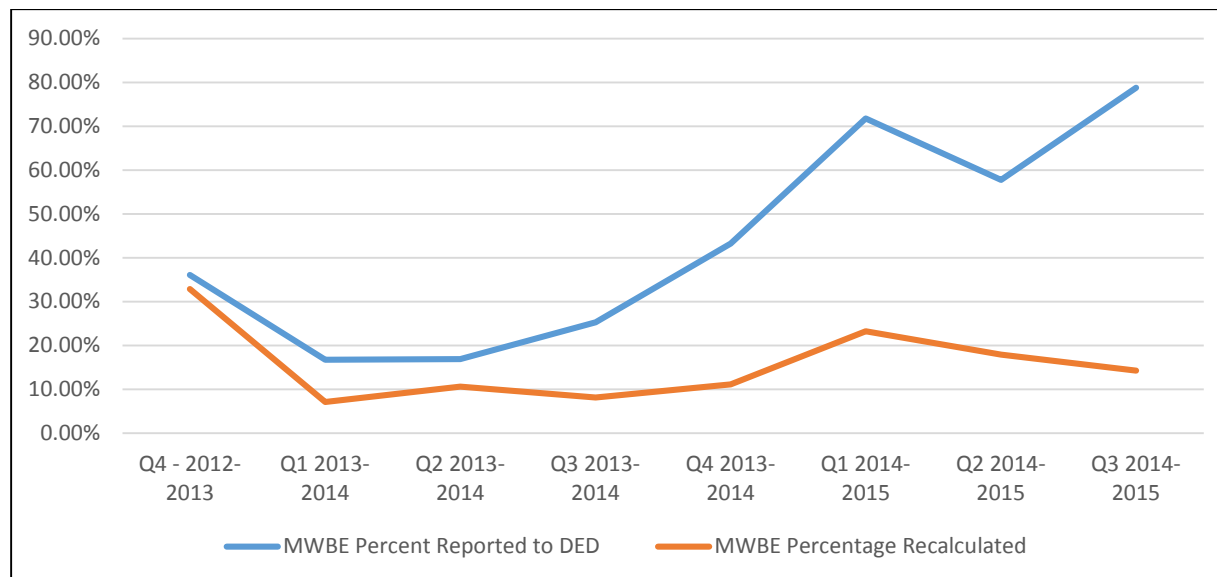
During the period January 1, 2013 through December 31, 2014, for construction and construction-related professional services contracts, the Compliance Unit reported \$134.1 million in MWBE utilization to DED out of \$278.1 million in eligible expenses, for an MWBE utilization rate of 48 percent. Of the \$134.1 million in MWBE utilization reported, \$63.6 million, or 47 percent, was from the New NY Bridge. The Compliance Unit calculates its MWBE utilization based on three sources: payments made by the Authority to its MWBE prime contractors, payments reported by prime contractors as having been made to MWBE subcontractors, and a report that identifies MWBE subcontractors working on the New NY Bridge. The Compliance Unit calculates its eligible expenses by determining its total contract expenses, and then subtracting contract expenses for exempted and excluded contracts. Each quarter, the Compliance Unit reports each individual MWBE utilization and the total eligible expenses for that quarter to DED.

We found that the MWBE utilization reported to DED by the Compliance Unit is neither complete nor accurate. We identified 15 MWBE utilizations totaling \$559,972 that had been reported twice. These were payments made by an MWBE prime contractor to an MWBE subcontractor. The Compliance Unit receives information on payments to prime contractors and payments to subcontractors from two different sources, and does not make any adjustments. As a result, these amounts were reported once as a payment to the prime contractor and once as a payment to the subcontractor, and the Authority therefore reported more in MWBE utilization than had actually been paid. We also identified 173 MWBE utilizations totaling \$6.4 million that had been reported to DED twice for the quarter ending March 31, 2013. After this quarter's MWBE utilization had been reported to DED, the Compliance Unit discovered an error. In the process of correcting the error, the Compliance Unit submitted its report twice rather than replacing its earlier report with the revised report.

We also found that the Authority routinely reports MWBE utilization for exempt or excluded contracts without also reporting the associated total contract expenses, as DED regulations call

for. We identified 45 contracts whose total contract expenses were not reported to DED even though MWBE utilization totaling \$89.3 million for these contracts was reported. As a result, the Authority significantly overstated its MWBE utilization rate. The following graph shows the MWBE utilization by quarter as reported by the Authority to DED compared with what we calculate the MWBE utilization rate would have been had exempt or excluded contracts not been reported.

Impact by Quarter of Reporting MWBE Utilization for Exempt and Excluded Contracts



The single largest of these contracts was the New NY Bridge, which had \$63.6 million in MWBE utilization. To be consistent with DED regulations, the Authority should have either not reported these MWBE utilizations or also included the \$1.2 billion in total expenses for the New NY Bridge project in its total eligible payments. Similarly, the Authority should have reported the total expenses for the other contracts rather than only reporting the MWBE utilization to DED. The Authority could not provide any guidance or regulations that permit this practice.

Because such a large portion of the Authority's MWBE utilization comes from the New NY Bridge, we attempted to reconcile the MWBE utilizations reported by the Authority with MWBE payments recorded by the prime contractor, but were not able to do so. We found a variety of problems in the total MWBE utilization reported to DED, including amounts not reported at all, amounts not reported correctly, and amounts reported multiple times. The report that the Compliance Unit uses to calculate MWBE utilization is generated from a system designed for tracking DBE utilization, which is of limited use for MWBE data purposes. For example, contractors who are MWBEs but not DBEs (because they either don't meet the requirements of the federal program or haven't applied for certification) won't be included in the report, and the Compliance Unit has no way to identify such contractors or the payments made to them.

Commodities and Non-Construction-Related Services

During the period January 1, 2013 through December 31, 2014, for commodities (goods and services) and non-construction-related services contracts, the Office of Purchasing reported \$3 million in MWBE utilization out of \$45.9 million in eligible expenses, for an MWBE utilization rate of approximately 7 percent.

We found that the Office of Purchasing generally reports complete and accurate MWBE utilization to DED. For example, when the Office of Purchasing reports MWBE utilization for exempt and excluded contracts, it usually reports the associated total contract expenses. We did find one exception, involving an MWBE utilization of about \$26,000 that was reported to DED while its total contract expenses were not. This was for a centralized OGS contract, which typically has no MWBE involvement and is therefore normally considered to be exempt. However, per guidance from DED, if a centralized contract does have MWBE involvement, both the MWBE utilization and the total contract expenses should be reported. We also identified just over \$23,000 in MWBE utilization that had not been reported to DED at all for the quarter ending March 31, 2013. When preparing its report for that quarter, the Office of Purchasing accidentally truncated several lines from the report. Due to the lack of edit checks or other controls, staff did not discover this error.

Recommendations

2. Work with DED to determine how best to correct the errors in MWBE utilization reporting and develop mechanisms for preventing these types of errors in the future.
3. Decide whether to not report MWBE utilization for exempt and excluded contracts (including the New NY Bridge) to DED or to report both MWBE utilization and all associated contract expenses for such contracts.
4. Work with the New NY Bridge's prime contractor to accurately determine MWBE utilization that should have been reported and correct the MWBE utilization reported to DED.

Monitoring MWBE Program Participation

The Authority is responsible for establishing a system of internal controls to monitor, oversee, and manage its MWBE program. As the primary units overseeing the Authority's MWBE program, the Compliance Unit and the Office of Purchasing are responsible for ensuring compliance with the Law and DED regulations, including monitoring MWBE participation in contracts and developing strategies to detect and prevent fraud.

In a November 2014 report on fraud and misuse in MWBE programs issued by the New York County District Attorney's Office, the Grand Jury of the Supreme Court of the State of New York identified three major fraud schemes that commonly occur with MWBE procurement. For each of these fraud schemes, the work is not done by a certified MWBE but the prime contractor submits invoices claiming it was. Given the higher MWBE expectation of 30 percent called for in October 2014, there is an increased risk of contractors attempting MWBE fraud rather than providing additional opportunities for those the Law is intended to benefit.

Construction and Construction-Related Professional Services

The Compliance Unit oversees all aspects of the Authority's MWBE program as it relates to construction and construction-related professional services contracts. The Compliance Unit is involved in setting the goals for each contract, monitoring those contracts to ensure the goals are met, and detecting and preventing MWBE fraud on those contracts.

Prior to a contract being awarded, the Authority determines whether and to what extent opportunities exist for MWBE participation, based on the nature of the work to be performed and the location of that work. If no MWBE participation is anticipated, the Compliance Unit will seek a waiver for this contract, to classify it as excluded. If MWBE participation is anticipated, the Authority sets MWBE goals in terms of both a percentage of the total contract amount and a set dollar amount. After the contract is awarded, the contractor must set its goals and identify subcontractors in its plan. Until those goals are set, the contractor is not eligible to receive a mobilization payment, which is an up-front payment of 4 percent of the contract total to help get the project started.

The Compliance Unit monitors the MWBE utilization for each contract to ensure the MWBE goals set for that contract are being met. The Compliance Unit may seek a waiver for the contract after it has begun if the contractor is making a good faith effort but is not able to obtain the necessary level of MWBE participation. At the end of the contract, the Compliance Unit calculates the actual MWBE utilization rate (based on the payments made to MWBE contractors and the total contract payments) and compares it with the MWBE goal for that contract. The Compliance Unit then notifies the contractor whether it has met (or even exceeded) its MWBE goal and, if not, what other documentation the contractor must provide the Authority.

We found the Authority to be inconsistent with its calculation of the actual MWBE utilization rate for its contracts. The final rate should be calculated based on the actual contract expenses, not the original contract value. One contract we reviewed had an original contract value of \$3.2 million and an MWBE goal of 18 percent, or \$576,000. The contract was subsequently amended and had actual contract payments of \$46.2 million. The contractor paid MWBE subcontractors a total of \$2.4 million during the course of the contract. The Authority, which had never set any MWBE goals for the amendments, calculated the final MWBE utilization rate based on the original contract value, which resulted in a 75 percent MWBE utilization rate. When calculated using the actual contract expenses, however, the MWBE utilization rate is just over 5 percent. The Authority should have either applied the 18 percent MWBE goal to the entire contract or, if the additional work was substantially different, set separate MWBE goals for each supplemental agreement, based on the nature and location of the work and on the availability of MWBE subcontractors to perform that work. According to Authority officials, control over this contract was transferred to NYSDOT for part of the work, which complicated determining who was responsible for ensuring MWBE goals were updated. At the end of the contract, however, it was the Authority that determined whether the MWBE goals had been met and notified the contractor that it had not only met but exceeded the MWBE goal of 18 percent.

The Authority has on-site project managers who, as part of their oversight of the construction work,

review who is performing the work. However, the Compliance Unit has primary responsibility for the Authority's MWBE program. For its monitoring, the Compliance Unit relies mainly on monthly reports from the prime contractors and follows up with contractors when those reports are not submitted on time. The Compliance Unit also has procedures that require it to conduct site visits. However, of 31 contracts we reviewed, only five had evidence of site visits conducted by the Compliance Unit between January 1, 2013 and December 31, 2014. Further, those site visits dealt with equal employment opportunity, discrimination issues, and training requirements. The only aspect of the MWBE program addressed during these site visits was whether an MWBE was working on site the day of the visit. According to Authority officials, site visits have been cut back due to limited availability of staff and a reduced travel budget. Authority officials also indicated that records of some visits may not have been formally documented and retained in the contract files, and that calendars listing visits had been discarded.

Based on our audit work, it appears that the Compliance Unit needs to strengthen its monitoring to detect and prevent fraud schemes, especially given the greater risk presented by the higher MWBE expectation. The Compliance Unit's site visits are too limited in scope to detect MWBE fraud as the Compliance Unit does not determine who did the work, information that could then be compared with other records to ensure the person doing the work is actually employed by an MWBE. The Unit also needs to improve its record keeping for visits. Further, the Unit does not currently conduct many site visits, reducing the likelihood that it will detect fraud. In the absence of such efforts, contractors may not believe they would be caught and so might be more likely to engage in MWBE fraud.

Commodities and Non-Construction-Related Services

The Office of Purchasing oversees all aspects of the Authority's MWBE program as it relates to commodities and non-construction-related services contracts. The Office of Purchasing is involved in setting the goals for each contract, monitoring those contracts to ensure the goals are met, and detecting and preventing MWBE fraud on those contracts.

Prior to fiscal year 2015-16, the Authority purchased its commodities and non-construction-related services directly rather than through subcontractors. Because it contracted with and purchased from the MWBEs directly, the risk of MWBE fraud schemes such as those identified in the November 2014 Grand Jury report was low. The Office of Purchasing, therefore, focused more on setting achievable goals for its contracts and less on monitoring through reports and site visits. However, starting in fiscal year 2015-16, the Office of Purchasing set MWBE goals for subcontractors as well as prime contractors, to meet the higher MWBE expectation announced in October 2014. This could increase the risk of MWBE fraud schemes, and the Office of Purchasing should re-evaluate its processes and determine what changes will be needed to ensure it detects and prevents these fraud schemes.

Recommendations

5. Develop and implement strategies for detecting and preventing MWBE fraud schemes in Authority contracts, such as those schemes identified by the November 2014 report from the

Grand Jury of the New York State Supreme Court.

6. Verify MWBE contractor presence during all site visits, and document these visits in the contract files.
7. Set goals for each contract amendment or other changes and monitor the contractor's compliance based on the related goals and total related contract expenditures, consistent with DED regulations.

DBE Program

Setting DBE Program Participation Goals

NYSDOT, which administers the federal DBE program for bridge and highway construction in the State, sets regional goals and also approves contract goals. The NYSDOT goal for the Hudson Valley region, where the New NY Bridge is being built, is 8 percent. This is the minimum acceptable DBE goal for a project in that region. The contract between the Authority and the prime contractor for the New NY Bridge, Tappan Zee Constructors, LLC (TZC), sets the DBE goal at 10 percent. The contract is for \$3.14 billion, and so the total DBE goal is \$314 million. TZC has created a schedule of how much of the total estimated expenses for each work area is anticipated to be done by a DBE subcontractor and, where known, the subcontractor expected to perform the work.

Reporting DBE Program Participation Results

To track actual DBE utilization, the Authority requires TZC to report payment information (date, amount, payee, and DBE status) for all levels of subcontractors. TZC reports on payments made to all subcontractors, not just those certified as DBEs. TZC pays the first level of subcontractors (First Tier) directly; First Tier subcontractors pay their own subcontractors (Second or Third Tier) and submit supporting documentation to TZC. TZC enters payments to Second and Third Tier subcontractors and adjusts the amounts to the upper-level tiers appropriately, so that it does not report a payment more than once. On a monthly basis, TZC verifies the payment information for all levels of subcontractors – including adjusting the totals paid to First or Second Tier DBE subcontractors to avoid double-counting of payments – before submitting its reports to the Authority.

From January 1, 2013 through December 31, 2014, TZC was paid approximately \$1.2 billion (just under 37 percent of the current contract value) and paid 82 certified DBEs approximately \$73.5 million (about 24 percent of its DBE goal of \$314 million, based on the current contract value). We tested transactions totaling \$10.6 million. Based on our limited testing, the Authority has correctly reported its DBE utilization to NYSDOT and has only claimed payments made to certified DBE subcontractors. The Authority and TZC are monitoring the DBE utilization by the subcontractors working on the New NY Bridge and tracking against the planned DBE goal of 10 percent set for this project.

Monitoring DBE Program Participation

As the prime contractor for the New NY Bridge, TZC is responsible for monitoring progress toward the DBE goals, including verifying that DBE subcontractors are actually doing the work. The Authority has appointed a Diversity Compliance Officer for the New NY Bridge project, who is an Authority employee working on site at the project offices and reviewing the work done by TZC.

In addition to TZC and the Authority, three contracted firms assist with monitoring DBEs on the New NY Bridge project: one that works for and reports to the Authority and two that work for and report to TZC. Each week, the Authority's contractor conducts on-site Commercially Useful Function (CUF) interviews, while one of TZC's subcontractors conducts off-site CUF interviews. The second TZC subcontractor acts as a liaison. The CUF interviews are primarily intended to determine whether the work being done by the person being interviewed adds value to the project. The Authority's Diversity Compliance Officer uses the CUF interviews to verify that the work is being done by certified DBEs.

TZC also has on-site field engineers who monitor the work on a daily basis, with regular visits by the Authority's Diversity Compliance Officer and other employees. The on-site field engineers have a daily schedule showing which subcontractors (by firm name) are slated to be working that day and a separate log of the actual individuals who are working on site. The Authority's Diversity Compliance Officer and other employees have access to both the daily schedule and the separate log.

We determined that the Authority has established an appropriate level of controls over the DBE monitoring and reporting for the New NY Bridge, including hiring a Diversity Compliance Officer specifically for the bridge project. These efforts are more likely to detect and help deter DBE fraud schemes similar to the MWBE fraud schemes identified in the November 2014 Grand Jury report.

Audit Scope and Methodology

Our audit determined whether the New York State Thruway Authority is monitoring its contractors to ensure they are actively working to reach MWBE and DBE goals, is accurately reporting MWBE and DBE participation in its contracts, and has controls in place to detect or prevent MWBE and DBE fraud. Our audit covers the period from January 1, 2013 through December 31, 2014.

To accomplish our objectives and assess related internal controls, we reviewed relevant State laws; relevant New York Codes, Rules and Regulations; guidance from DED regarding the implementation of the Law; relevant federal regulations; NYSDOT guidance on the implementation of federal regulations; and the Authority's policies and procedures for tracking and reporting MWBE utilization and DBE utilization. We also interviewed officials from the Authority's Compliance Unit, the New NY Bridge Compliance Unit, Office of Purchasing, and Office of Finance as well as TZC employees. We reviewed the quarterly MWBE utilization reports the Authority submitted to DED and the DBE utilization submitted to NYSDOT for the New NY Bridge project for our audit period.

We selected two judgmental samples of MWBE and DBE utilization amounts reported by the Authority, both based on the dollar amounts and the number of payments made to contractors and subcontractors. Our MWBE utilization sample was drawn from the quarterly reports the Authority submitted to DED between January 1, 2013 and December 31, 2014, and consisted of 50 MWBE utilization amounts totaling \$7.9 million out of the 3,254 MWBE utilization amounts totaling \$137.1 million reported during that period. Our DBE utilization sample was drawn from the payment information reported by TZC for the New NY Bridge project, and consisted of 50 DBE utilization amounts totaling \$10.6 million out of the 1,190 DBE utilization amounts totaling \$73.5 million reported to NYSDOT between January 1, 2013 and December 31, 2014. For each utilization amount in our two samples, we reviewed the supporting documentation maintained by the Authority or by TZC to determine if the amount reported by the Authority to DED (for MWBE utilization) and NYSDOT (for DBE utilization) was complete and accurate. We also verified that the contractors with utilization were certified MWBE or DBE contractors.

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

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

Authority

This audit was performed pursuant to the State Comptroller's authority as set forth in Article X, Section 5 of the State Constitution and Section 2803 of the Public Authorities Law.

Reporting Requirements

A draft copy of this report was provided to Authority officials for their review and formal comment. A complete copy of the Authority's response is attached at the end of this report. Our rejoinders to specific Authority comments are embedded in the Authority's response.

In responding to our draft report, Authority officials focused primarily on their efforts to encourage MWBE participation. Our report, however, did not address this matter. Rather, the audit's core findings, as detailed extensively in the report, were the large and persistent differences between

the MWBE participation amounts reported to DED and the actual amounts supported by the Authority's records. Unfortunately, the Authority's response generally avoided its persistent over-reporting of MWBE participation and did not meaningfully address the report's recommendations.

Within 90 days after final release of this report, as required by Section 170 of the Executive Law, the Chair of the New York State Thruway Authority shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where recommendations were not implemented, the reasons why.

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Vision

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

Mission

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

Authority Comments and Comptroller Comments



ANDREW M. CUOMO
Governor

**Thruway
Authority** | **Canal
Corporation**

JOANNE M. MAHONEY
Chair

ROBERT L. MEGNA
Executive Director

October 14, 2015

Mr. John Buyce, Audit Director
Office of the New York State Comptroller Division of State Accountability
110 State Street
Albany, New York 12201

Dear Mr. Buyce:

This letter is in response to the NYS Office of the State Comptroller's ("OSC") Draft Audit Report 2014-S-76 ("Audit Report"), which assesses the New York State Thruway Authority's and Canal Corporation's ("Thruway") contract participation of Disadvantaged Business Enterprises ("DBE") and Minority and Women Business Enterprise ("MWBE") for the period January 2013 through December 2014. The Audit Report is fundamentally flawed because OSC repeatedly misinterpreted the law and regulations governing the state's MWBE program. Because OSC's understanding of MWBE law and regulations is the foundation upon which the Audit Report's findings and recommendations are built, the findings should be called into doubt.

Comptroller's Comment: *The audits by the Office of the State Comptroller's Division of State Government Accountability are performed according to generally accepted government auditing standards. Among many requirements, those standards require auditors to understand the provisions of laws and regulations relevant to their audit objectives. As detailed in the report, the auditors understood the laws and regulations prescribing how the Authority was to set its MWBE participation goals and report its MWBE utilization. Moreover, we stand by the report's conclusions and recommendations.*

Introduction

Thruway has been diligent in its efforts to increase MWBE participation in all aspects of its business. Our track record for initiating opportunities for MWBE businesses in the heavy highway and bridge industries are second to none. Continuous outreach efforts and face-to-face meetings with potential MWBE businesses have served to increase our capacity pool and allow business growth from subcontractor/sub-consultant status to prime contractor/consultants. Based on the 2010 enhancement to Executive Law 15-A, Thruway has continued to take a proactive position in affording the maximum amount of opportunity to certified MWBEs by:

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- a. continuing to solicit MWBEs throughout the State regarding contracting and procurement opportunities;
- b. continuing to involve itself with legislative and community business representatives to brainstorm and work to improve business opportunities for MWBEs;
- c. continuing to develop stronger contract language to facilitate contractors' compliance with the new legislation of Article 15-A; and
- d. revising our Procurement Procedure (100-1-01) in November 2010 in order to proactively extend the maximum amount of opportunities to MWBE firms throughout New York State in the area of commodities and non-engineering personal services. These revisions outline specific steps that a procurement professional may take to ensure that MWBEs are given an opportunity to participate in all Thruway contracts.

Thruway would like to acknowledge the positive findings included in the Audit Report related to the monitoring and accurate recordkeeping of the DBE Program Participation goals, participation results, and monitoring of the New NY Bridge. This project is the largest infrastructure project in the country and has been a focus of Thruway throughout the audit period to-date.

We welcome the opportunity for OSC to conduct a comprehensive and rigorous review of Thruway's MWBE program as such a review can be helpful to the State, the Thruway, Thruway's vendors and the MWBE community in effecting an even more robust MWBE program. This, however, has not happened yet. In order to produce a useful and effective Audit Report, OSC must fully understand and appreciate the facts, law and context in which Thruway's MWBE program operates. In that vein, we would like to assist OSC by pointing out factual and legal errors within OSC's Audit Report that fundamentally undermine the report.

Comptroller's Comment: *The audits by the Office of the State Comptroller's Division of State Government Accountability are performed according to generally accepted government auditing standards. Among many requirements, those standards require auditors to understand the provisions of laws and regulations relevant to their audit objectives. As detailed in the report, the auditors understood the laws and regulations prescribing how the Authority was to set its MWBE participation goals and report its MWBE utilization. Moreover, we stand by the report's conclusions and recommendations.*

OSC Does Not Fully Understand MWBE Laws and Regulations Regarding Goal Plans

OSC found that Thruway's annual MWBE goals were set at 20%, without explaining, as required by New York State Department of Economic Development ("OED") regulations, why Thruway was not able to attain the statewide goal of 28.92%. This finding shows OSC's lack of understanding of the MWBE goal plan process. Thruway has complied with all applicable laws and regulations regarding goal plans.

Comptroller's Comment: *The Authority seems intent on setting up a series of straw man arguments. The agency in its response repeatedly puts forward legal positions that it claims OSC has taken, such as:*

- *"... the 20 percent goal set by Thruway was a hard target";*
- *The MWBE utilization goal of 28.92% is mandatory;*
- *The Law required the Authority to include a rationale for increasing its goals; and*

- *“Thruway’s justification for setting its MWBE utilization goals at less than the statewide aspiration goals was legally insufficient.”*

However, OSC has not advanced any of these positions. Disappointingly, the Authority appears more focused on arguing these imaginary disagreements than addressing the serious issues raised in the audit.

First, OSC erroneously maintains that the 20% MWBE goal set by Thruway was a hard target rather than an aspirational goal. When Thruway submitted its Goal Plans, we believed that the 20% goal was attainable based on the information that we had at the time. Moreover, during the relevant years, our projections comported with Executive Law 15-A and its associated regulations because we used good faith efforts in the execution of our due diligence in establishing goals.

Comptroller’s Comment: *We question the Authority’s assertion of due diligence. As noted on page 9 of the report, the Authority increased its MWBE participation goals for the 2015-16 year without analyzing its participation history, and therefore, it lacked an evidence-based strategy to significantly adjust such participation.*

Our due diligence consists of the following MWBE goal setting procedures: for construction and construction consultant contracts mandated by Executive Law Article 15-A, Thruway uses OED Directory of Certified Firms based on the items of work. An e-mail blast and fax is sent to all identified MWBEs in the geographical location requesting a response of availability to participate on the contract. A review of similar historical data is performed to determine the previous assigned MWBE goals and attainments. For procurements falling under the discretionary authority of the 2010 enhancements to Executive Law Article 15-A, all commodity-based procurements and non-engineering personal services are reviewed before a formal bidding process begins to determine MWBE availability. Where applicable, a canvas is conducted of certified MWBEs in the line-of-business regarding their availability to perform or provide the specific goods or services needed. Depending on the responses, Thruway has, on several occasions, chosen to solicit bids from certified MWBEs. When the analysis is meaningful, Thruway considers the aspirational goal of 20% and the 2010 Disparity Study.

Second, OSC mistakenly refers to the statewide MWBE utilization goal of 28.92% as mandated by law. This is incorrect and is not supported by Article 15-A of the New York State Executive Law. This goal is purely aspirational. Article 15-A does not mandate that agencies achieve 28.92% MWBE utilization. It mandates that agencies make reasonable efforts to achieve 28.92% MWBE utilization. OSC fails to acknowledge this critical distinction. If the 28.92% MWBE utilization was mandated and not aspirational, Executive Law 15-A would promulgate a quota and not a system narrowly-tailored to redress past and present discrimination in State contracting. That would be patently unconstitutional. The statewide MWBE system is not a quota. It is a system of laws and procedures designed to encourage economic activity in a fair manner.

Comptroller’s Comment: *We did not use the term “mandate” in our report. Rather, as discussed in the Background (page 5), Audit Findings and Recommendations (page 7), and Setting MWBE Program Participation Goals (page 9) sections of our report, the Law set the goal of 28.92 percent for the State as a whole, but left it up to each agency and public authority to set its own individual goals. The regulations in effect for our audit period required any agency or public authority that set its goals at less than 28.92 percent to explain why; however, the Authority did not. We note*

that DED repealed this requirement for the 2015-16 year and thereafter.

Third, OSC erred in finding that Thruway developed annual goal plans without considering past history and potential opportunities. Thruway did, in fact, consider past history and potential opportunities when it developed its annual goals. OSC is incorrect in its contention that Thruway is required under the law to provide a rationale for increasing its MWBE utilization goals in any given year. The law has no such requirement. Each year, Thruway reassesses the potential for MWBE opportunities in its projected contracts, and based on these assessments, Thruway creates its yearly Goal Plans.

Comptroller's Comment: *Our report does not state that the Law required the Authority to include a rationale for increasing its goals. Rather, it states that the Authority was unable to provide auditors with any analysis or explanation (other than the Executive's current expectation of 30 percent MWBE participation) of how or why such a large increase in its goals was reasonable and attainable.*

Fourth, OSC incorrectly contends that Thruway's justification for setting its MWBE utilization goals at less than the statewide aspirational goals was legally insufficient. This is contrary to both law and fact. Executive Law Article 15-A requires each agency to structure procurement procedures for contracts made directly or indirectly to MWBEs in accordance with the findings of the 2010 Disparity Study to reduce the disparity between MWBE availability and utilization. Further, Section 141.2 regarding annual State agency-specific goals requires that each State agency develop and adopt agency-specific goals in accordance with Section 313(1-b) of the Executive Law and that agency-specific goals shall be reflected in the State agency's master goal plan and any subsequent updates to the master goal plan for the inclusion of certified MWBEs with justification for such goals. As stated previously, Thruway has fully comported with this statute by following its goal setting procedures.

Comptroller's Comment: *Our report does not state or otherwise imply that "Thruway's justification for setting its MWBE utilization goals at less than the statewide aspirational goals was legally insufficient." Rather, the pertinent regulations in effect during our audit period required the Authority to provide DED with an explanation for the lower goal. As noted in the report, the Authority did not consistently comply with this requirement.*

OSC Correctly Found That Thruway Complied With DBE Laws

Thruway agrees with OSC's findings in the Audit Report which reported that Thruway has (i) established an appropriate level of controls over the DBE monitoring and reporting for the New NY Bridge Project and (ii) correctly reported its DBE utilization to DOT and has only claimed payments made to certified DBE subcontractors. Although we appreciate this acknowledgement from OSC, this in no way detracts from our opposition to OSC's other Audit Report findings.

Comptroller's Comment: *The audit staff and procedures that were employed to conclude that the Authority's controls over DBE utilization were appropriate were also employed for the other observations and conclusions made in the report.*

OSC Alleged That Thruway Has a Significant Risk of MWBE Fraud Without Any Basis

OSC found that Thruway needs to better develop and implement strategies for detecting and preventing MWBE fraud on its contracts. This finding has no legitimate basis.

First, OSC has not found any evidence of fraud in Thruway's MWBE program. Instead, OSC references a November 2014 report on fraud and misuse in MWBE programs by the New York County District Attorney's Office that is unrelated to Thruway's MWBE program. This report does not discuss Thruway or Thruway's MWBE program at all.

Comptroller's Comment: *Our report does not state or otherwise imply that the Authority had MWBE-related problems similar to those identified by the New York County District Attorney's Office. Instead, we note that a report by the Grand Jury of the Supreme Court of the State of New York identified several fraud schemes on construction projects in New York City that can occur with any similar MWBE procurement.*

Second, OSC recommends that Thruway adopt recommended best practices which were issued by the New York County District Attorney's Office in November 2014 that were the result of a confidential investigation. Notably, OSC has not stated whether it reviewed the processes or evidence that were used to create these recommended best practices to ensure their effectiveness. While the prevention of fraud in MWBE programs is always a good thing, OSC has not shown that the adoption of these recommended best practices is necessary or helpful. Furthermore, OSC is taking these unvetted best practices that were issued in November 2014 and criticizing Thruway for not applying them from January 2013 through December 2014.

Comptroller's Comment: *Our report does not recommend that the Authority adopt any organization's "best practices." Rather, we point out that greater expectations for MWBE participation inherently increase the risk of certain fraud scenarios. As we report on page 16, the Authority put internal controls in place to detect such schemes for the New NY Bridge project. We therefore recommend that the Authority be proactive, and develop and implement similar strategies to address this increased risk for commodity contracts and projects pertaining to the remainder of the Thruway and Canal systems.*

Third, the fraud schemes discussed in the November 2014 report involve pass-through entities, i.e., the submission of invoices to an agency by prime contractors that falsely represent that work was performed by MWBEs as subcontractors. OSC suggests that as part of monitoring its MWBE program, Thruway needs to develop strategies for detecting and preventing these fraud schemes and that Purchasing, as the overseer of MWBE participation in commodities contracts, is responsible for developing and implementing those strategies. However, MWBE utilization on commodity contracts is almost entirely achieved through contracts held directly with the MWBEs as prime contractors and not as subcontractors. Purchase orders issued by Thruway for commodity purchases from MWBE are issued directly to the MWBE. Upon delivery and invoice by the MWBE, payment is made by Thruway directly to the MWBE firm. Therefore, the pass-through fraudulent scheme that OSC discussed cannot happen here. Finding the potential for fraud where none exists, continues to reveal OSC's lack of understanding of Thruway's MWBE practices.

Comptroller's Comment: *Our observations in general pertain to all forms of MWBE procurement, and thus are not limited to commodities. Further, as noted in the report, the Authority's Office of*

Purchasing set MWBE goals for subcontractors as well as prime contractors for the 2015-16 year, to meet the Authority's significantly higher overall MWBE utilization goal. We question why the Authority would establish utilization goals for MWBE subcontractors if no payments have been or will be made to them.

OSC Does Not Fully Understand Thruway's Utilization Reporting

OSC found that Thruway has not accurately reported its MWBE utilization to OED. However, OSC's analysis of Thruway's utilization is fundamentally flawed. As a result, OSC's conclusions regarding Thruway's utilization are suspect.

First, it is important to note that Thruway's FY 2014-15 MWBE utilization numbers are not official yet and are subject to change. Consequently OSC is using unvetted data in its analysis of Thruway's MWBE Program. Throughout the course of this audit, Thruway informed OSC that it was using unvetted utilization numbers in its analysis and that OSC's conclusions based on these numbers would be suspect. OSC, however, disregarded our advice and continued to use unvetted data in its analysis.

Comptroller's Comment: *The data we audited was the data the Authority reported to DED, less than half of which related to 2014-15. In fact that data was "unvetted," we question why Authority officials submitted such data to DED and, therefore, whether the Authority has sufficiently complied with the applicable Law and regulations. Further, Authority officials provided no indication when their "vetted" data would be available for review by DED or by any other oversight authority*

Second, OSC analyzed Thruway's MWBE utilization numbers using calendar years not fiscal years. This was improper because Thruway's projected and actual MWBE utilization numbers are reported in fiscal years from April 1st through March 31st annually, not calendar years as is the scope of the audit. This is significant because projects and utilization numbers can vary greatly from year-to-year. In using calendar years and not fiscal years, OSC is essentially comparing apples to oranges in its analysis of Thruway's utilization reporting. Thruway informed OSC that using calendar years was improper shortly after OSC commenced this audit. Third, Thruway reports its MWBE utilization in one-year periods, not two years as OSC has done. Again, Thruway informed OSC of this fact early during the audit but OSC continued to use two calendar years in its analysis.

Comptroller's Comment: *The Authority is required to accurately report its MWBE utilization to DED each quarter, and our audit period included the eight consecutive quarters from January 2013 through December 2014. Because our analyses were done by individual quarter as well as the entire audit period as a whole, variations among quarters had comparatively less meaning. It was largely irrelevant which 12- or 24-month period was analyzed. For the four quarters we examined that comprise the 2013-14 fiscal year, the Authority reported an overall MWBE utilization rate of 23.5 percent to DED. This was included in DED's annual Statewide report. However, the actual rate was only 14.6 percent – fully one-third less than the "vetted" rate the Authority reported. Further, as shown in the graph on page 11, the Authority consistently over-reported its MWBE utilization rates during each of the eight quarters we audited.*

In short, OSC's alleged MWBE utilization numbers are not comparable to Thruway's numbers because they use very different methods of calculations.

Conclusion

Throughout the course of this audit, Thruway has worked to increase OSC's understanding of our MWBE program. The Audit Report reflects the fact that OSC has continued to misunderstand the MWBE laws, regulations, procedures and practices. As a result, OSC issued an Audit Report with questionable findings.

Comptroller's Comment: *The audits by the Office of the State Comptroller's Division of State Government Accountability are performed according to generally accepted government auditing standards. Among many requirements, those standards require auditors to understand the provisions of laws and regulations relevant to their audit objectives. As detailed in the report, the auditors understood the laws and regulations prescribing how the Authority was to set its MWBE participation goals and report its MWBE utilization. Moreover, we stand by the report's conclusions and recommendations.*

Thank you for the opportunity to respond to your Final Draft Report.

Sincerely,



Robert L. Megna
Executive Director