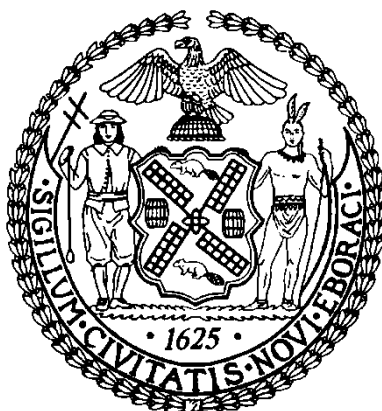


**CITY OF NEW YORK  
OFFICE OF THE COMPTROLLER**

**John C. Liu  
COMPTROLLER**

**FINANCIAL AUDIT  
H. Tina Kim  
Deputy Comptroller for Audit**



**Audit Report on the Compliance of the  
Department of Design and Construction with the  
Minority- and Women-Owned Business  
Enterprise Program**

*FR10-141A*

**December 22, 2010**



THE CITY OF NEW YORK  
OFFICE OF THE COMPTROLLER  
1 CENTRE STREET  
NEW YORK, N.Y. 10007-2341

John C. Liu  
COMPTROLLER

**To the Residents of the City of New York:**

My office has audited the effectiveness of the New York City Department of Design and Construction in monitoring contractors to ensure that they comply with the key provisions of the Minority-and Women-Owned Business Enterprise (M/WBE) Program. We audit entities such as Design and Construction as a means of ensuring agency compliance with City laws.

The audit found that the Department has partially complied with key provisions of Local Law 129 and §6-129 of the Administrative Code, but has not complied with the provisions that pertain to monitoring the agency's activities to ensure that the agency utilization plans are effectively carried out. Thus, the Department does not monitor the actual participation of M/WBE prime contractors and subcontractors that were awarded contracts with utilization goals. The Department does not review the records of prime contractors to verify that payments were made to M/WBE subcontractors, does not perform job site inspections, and does not contact M/WBE subcontractors to verify their participation. By failing to adequately monitor compliance with agency utilization goals, the Department cannot fully assess whether prime contractors have complied with contract requirements, are providing business to certified M/WBEs, and are achieving the utilization goals specified in the contracts.

The audit recommends that Design and Construction should: adequately monitor the actual participation of M/WBE prime contractors and subcontractors; develop written procedures to comply with the requirements of Local Law 129; ensure that contract files contain the names, addresses, or contact numbers of M/WBE subcontractors on the Subcontractor Information on Request for Payment forms; ensure that contractors submit subcontractor lists in a timely manner; ensure that all prime contractor and subcontractor complaints are investigated and followed up on in a timely manner; and establish controls to ensure that the information recorded in FMS pertaining to M/WBE anticipated subcontract amounts is accurate.

The results of the audit have been discussed with Design and Construction officials, and their comments have been considered in preparing this report. Their complete written response is attached to this report.

If you have any questions concerning this report, please e-mail my audit bureau at [audit@Comptroller.nyc.gov](mailto:audit@Comptroller.nyc.gov).

Sincerely,

A handwritten signature in blue ink, appearing to read "JCL".

John C. Liu

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*The City of New York  
Office of the Comptroller  
Financial Audit*

**Audit Report on the Compliance of the  
Department of Design and Construction with the  
Minority- and Women-Owned Business Enterprise Program**

**FR10-141A**

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**AUDIT REPORT IN BRIEF**

We performed an audit on the Department of Design and Construction's compliance with the key provisions of the Minority- and Women-Owned Business Enterprise (M/WBE) Program that was established under Local Law 129 in 2005. The aim of the program is to promote the utilization of M/WBE firms for contract and subcontract opportunities valued at less than \$1 million.

The agencies overseeing City prime contracts that have M/WBE subcontracting goals (set by the agency) are required to monitor the compliance of the prime contractors with their plans to use subcontractors and M/WBEs (i.e., their utilization plans). Local Law 129 requires agency M/WBE officers to monitor contractor compliance by appropriate means, including inspecting jobsites, contacting M/WBEs identified in utilization plans to confirm their participation, and auditing contractors' books and records.

The Department of Design and Construction (Department) manages the design and construction of new and renovated City facilities such as firehouses, libraries, and courthouses. According to the Agency Procurement Indicators reports, which are published by the Mayor's Office of Contract Services and contain information about M/WBE utilization, the Department awarded 316 prime contracts totaling \$3,081,816,027 for which the Department established M/WBE subcontracting participation goals during Fiscal Years 2007 through 2010.

**Audit Findings and Conclusions**

The Department has partially complied with key provisions of Local Law 129 and §6-129 of the Administrative Code. Specifically, the Department has designated an executive officer to act as the agency M/WBE officer, created agency utilization plans, and ensured that prime contractors select M/WBE subcontractors from a pre-qualified list established and verified by the Department of Small Business Services.

Despite these steps, the Department has not complied with the provisions of Local Law 129 that pertain to monitoring the agency's activities to ensure that the agency utilization plans are effectively carried out. Thus, the Department does not monitor the actual participation of

M/WBE prime contractors and subcontractors that were awarded contracts with utilization goals. The Department does not review the records of prime contractors to verify that payments were made to M/WBE subcontractors, does not perform job site inspections, and does not contact M/WBE subcontractors to verify their participation. By failing to adequately monitor compliance with agency utilization goals, the Department cannot fully assess whether prime contractors have complied with contract requirements, are providing business to certified M/WBEs, and are achieving the utilization goals specified in the contracts. Without this information, the Department cannot ascertain whether the program is effectively contributing to the City's use of certified M/WBEs as intended by Local Law 129. These problems can be attributed to the Department's failure to establish and implement written procedures to ensure compliance with the law.

Furthermore, the data that is publicly reported by the Mayor's Office of Contracts about M/WBE subcontractor participation goals is based on anticipated rather than actual numbers of M/WBE subcontracts. Accordingly, this information cannot be used to accurately assess the actual results of the Department's M/WBE program.

### **Audit Recommendations**

This report makes a total of six recommendations. The Department should:

- Adequately monitor the actual participation of M/WBE prime contractors and subcontractors that were awarded contracts with M/WBE utilization goals.
- Develop written procedures to comply with the requirements of Local Law 129 to ensure that prime contractors are utilizing and paying M/WBE subcontractors.
- Ensure that contract files contain the names, addresses, or contact numbers of M/WBE subcontractors on the Subcontractor Information on Request for Payment forms.
- Ensure that contractors submit subcontractor lists in a timely manner.
- Ensure that all prime contractor and subcontractor complaints are investigated and followed up on in a timely manner.
- Establish controls to ensure that the information recorded in FMS pertaining to M/WBE anticipated subcontract amounts is accurate.

### **Agency Response**

In its response, Department officials contended that they were already complying with five recommendations. For two of these recommendations ("Adequately monitor the actual participation of M/WBE prime contractors and subcontractors" and "ensure that contract files contain the names, addresses, or contact numbers of M/WBE subcontractors"), the Department agreed to implement additional compliance measures. The Department agreed with our recommendation to develop written procedures to comply with the requirements of Local Law 129.

## INTRODUCTION

### Background

Local Law 129 established the City's Minority- and Women-owned Business Enterprise Program. This law, enacted in 2005, responded to a study commissioned by the City Council that found there was a significant disparity in contracting opportunities afforded to certain M/WBE groups in City procurement. Local Law 129 was intended to address the disparities revealed by the study. It details certification, contract-participation goals, technical assistance, and administrative procedures to promote the utilization of M/WBE firms for contract and subcontract opportunities valued at less than \$1 million. Subcontractor participation goals are set for certain groups in two industry classifications: Black Americans, Hispanic Americans, and Caucasian females for professional services and Black Americans, Asian Americans, and Hispanic Americans for construction services. Firms obtain M/WBE certification through the Department of Small Business Services (DSBS).

The agencies overseeing City prime contracts that have M/WBE subcontracting goals (set by the agency) are required to monitor the compliance of the prime contractors with their plans to use subcontractors and M/WBEs (i.e., their utilization plans). Local Law 129 requires agency M/WBE officers to monitor contractor compliance by appropriate means, including inspecting job sites, contacting M/WBEs identified in utilization plans to confirm their participation, and auditing contractors' books and records. If a contractor has been found to have violated any provision of the contract that implements Section 6-129 of the Administrative Code<sup>1</sup>, the contracting agency can take such action against the contractor as requiring the contractor to cure the violation, withholding payment or reimbursement, or assessing actual and consequential damages.

The Department manages the design and construction of new and renovated City facilities such as firehouses, libraries, and courthouses. According to the Agency Procurement Indicators reports, which are published by the Mayor's Office of Contract Services and contain information about M/WBE utilization, the Department awarded 316 prime contracts totaling \$3,081,816,027 for which the Department established M/WBE subcontracting participation goals during Fiscal Years 2007 through 2010.

It is the responsibility of the Department to set target subcontracting percentages (TSP)<sup>2</sup> and M/WBE participation goals for contracts before issuing requests for bids. A bidder is then required to complete a Subcontractor Utilization Plan, which requires that the bidder indicate the expected percentage of the total contract value that the contractor anticipates will be subcontracted, taking into account the Department's TSP and M/WBE participation goals. If the bidder anticipates that it will not subcontract at the target level the Department has specified, it must seek a waiver of the TSP from the Mayor's Office of Contract Services (MOCS).

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<sup>1</sup> Section 6-129 of the Administrative Code formally established the M/WBE program as a City program.

<sup>2</sup> The target subcontracting percentage is the percentage of the total contract value that the agency anticipates will be awarded to subcontractors in amounts under \$1 million for construction and professional services.

Department officials responsible for overseeing Local Law 129 and the M/WBE program are the M/WBE Officer, Agency Chief Contracting Officer, Deputy Agency Chief Contracting Officer, and Contract Manager. In accordance with program rules, the Department and Mayor's Office of Contract Services publishes an annual report to the City Council that provides information and steps that the Department has taken to comply with the terms of the program.

In accordance with Local Law 129, DSBS (in conjunction with MOCS) publishes an annual report to the City Council providing compliance information on the M/WBE program. This annual report, together with the Agency Procurement Indicators reports published by MOCS, provides information and data required by Local Law 129. The annual report provides a summary of program activity and steps agencies have taken to comply with the requirements of the law. The Agency Procurement Indicators reports contain prime contractor utilization figures for City-certified M/WBEs.

### **Objective**

The objective of this audit was to determine whether the Department of Design and Construction complied with the key provisions of Local Law 129 and §6-129 of the Administrative Code.

### **Scope and Methodology**

We conducted this 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 except for the scope limitation caused by the failure of one of the Department's prime contractors to provide us with access to its books and records. This limitation prevented us from obtaining sufficient, appropriate evidence to determine whether certain M/WBE subcontractors for that prime contractor (Core Contracting of New York LLC, whose contract totaled \$5,330,000) were actually utilized and paid, and whether the Department monitored the contractor to ensure that it complied with the utilization plan. (This issue is discussed in greater detail in the balance of this report section). This audit was performed in accordance with the audit responsibilities of the City Comptroller as set forth in Chapter 5, §93, of the New York City Charter.

The scope of this audit was Fiscal Years 2007 through 2010.

We reviewed the following documents:

- Local Law 129 and §6-129 of the Administrative Code
- Comptroller's audit report (#MD09-062A, dated October 8, 2009) entitled *Audit Report on the Administration of the Minority-and Women-owned Business Enterprise Program by the Department of Small Business Services*.

- M/WBE utilization plans submitted to the Department of Small Business Services for Fiscal Years 2007 through 2010.
- Agency Procurement Indicators reports prepared by the Mayor's Office of Contract Services for Fiscal Years 2007 through 2010.
- Fiscal Year 2009 "New York City Minority and Women-Owned Enterprise Program City-Wide Progress Report" prepared by the Department of Small Business Services.

To understand the Department's internal controls for overseeing the M/WBE program, we reviewed the Department's organizational chart and interviewed the Department's Agency Chief Contracting Officer, Deputy Agency Chief Contracting Officer, Director of Internal Audit and the Agency M/WBE officer. We also conducted a walk-through of operations on June 4, 2010, to understand the Department's procedures for carrying out the M/WBE program. We documented our understanding of the operations in memoranda. In addition, we reviewed contracts, bid proposals, and a list of M/WBE subcontractors from the Department of Small Business Services to determine whether the Department utilized properly certified M/WBE subcontractors.

We obtained from Department officials a list of prime contracts dated June 4, 2010, with M/WBE subcontracting goals that were awarded in Fiscal Years 2007 to 2010. We also obtained a list of the subcontracts associated with the prime contracts. We matched the two lists (prime contracts and subcontracts) and ascertained the total number and value of prime contracts with M/WBE subcontracting goals for each Fiscal Year.

Based on the results of the above noted match, we were able to determine by M/WBE category and industry the number of subcontracts awarded in Fiscal Years 2007 to 2010. We compared our figures for anticipated M/WBE subcontracts with the Department's M/WBE utilization plans submitted to the Department of Small Business Services for Fiscal Years 2007 through 2009 to determine the Department's adherence to its utilization plans. We then compared the Department's utilization plans for Fiscal Years 2007 through 2009 to the procurement indicators published by the Mayor's Office of Contract Services with M/WBE subcontracting goals for the same period.

During Fiscal Years 2007 through 2010, the Department awarded 2,142 prime contracts totaling \$3,985,809,237, of which 244 contracts totaling \$2,665,645,023 were anticipated to utilize M/WBE subcontractors. Of the 244 prime contracts, 144 contracts totaling \$1,506,549,309 had associated subcontracts with M/WBE subcontractors that totaled \$40,391,326.<sup>3</sup> Of the 144 prime contracts, 86 contracts totaling \$1,054,579,722 were substantially complete as of June 2010.

We reconciled the 86 contracts with the Department's utilization plan and the contractors' lists of anticipated M/WBE subcontractors and found that 29 contracts totaling \$74,238,456 would fulfill the Department's M/WBE goals; 57 contracts totaling \$980,341,266 would not fulfill at least

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<sup>3</sup> The total value of all subcontracts was \$175,218,929.



one or more of the M/WBE categories established in the Department's utilization plan.<sup>4</sup> We also tested the reliability of the Department's utilization plan by comparing and reconciling the numbers of prime contracts in the Fiscal Year 2008 plan with a list of contracts obtained from the Department of Small Business Services.

In order to determine whether the Department is effectively monitoring the Department's M/WBE utilization goals,<sup>5</sup> we selected for review a random sample of 10 prime contracts totaling \$55,766,001: five contracts, totaling \$11,193,920 were selected from the 29 contracts for which contractors anticipated fulfilling M/WBE utilization goals, and five contracts totaling \$44,572,081 were selected from the 39 contracts that did not meet specific M/WBE goals for a particular category.<sup>6</sup> We reviewed the Department's file documentation for the 10 sampled contracts, which contained 33 associated subcontracts totaling \$5,442,061.

Additionally, we undertook a detailed review of the prime contractors' records by selecting a sample of four of the 10 prime contractors that had been awarded five contracts totaling \$46,995,321. However, as noted above, one of the four sampled contractors (Core Contracting of New York, LLC) denied us access to its books and records prior to our scheduled visit.<sup>7</sup> We brought this problem to the attention of Department officials through e-mails and telephone conversations. They in turn contacted Core Contracting and notified company officials that "you are contractually obligated to submit to a review of your books and records." Despite this effort, Core Contracting did not reschedule a visit by our auditors. Accordingly, we have no assurance that Core Contracting has utilized M/WBE subcontractors or has made all required payments to subcontractors.

As a result of the above noted scope limitation, we were able to review the books and records of only three of the respective contractors to ensure that associated M/WBE subcontractors were utilized and paid, and to examine any evidence of monitoring by the Department.<sup>8</sup>

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<sup>4</sup> Of the 57 contracts, 39 contained utilization goals for specific categories (i.e., race, gender) of the M/WBE program. The remaining 18 contracts contained only "unspecified" M/WBE utilization goals.

<sup>5</sup> We understand that the Department's utilization goals are not mandatory, and as stipulated in Section i of Local Law 129, "such goals may be greater than, less than or the same as the relevant citywide goal or goals . . ."

<sup>6</sup> We subsequently found that one contract was solicited by the Department and administered by the Department of Environmental Protection, which became responsible for M/WBE subcontracting.

<sup>7</sup> The prime contract with Core Contracting totaled \$5,330,000 with associated subcontracts totaling \$57,000, of which \$3,000 were for M/WBE subcontractors.

<sup>8</sup> The three contractors had four contracts totaling \$41,665,321. Associated with the \$41.6 million in contracts were \$6.4 million in subcontracts, of which \$1.13 million was awarded to M/WBE subcontractors according to Department records.

## **Discussion of Audit Results**

The matters covered in this report were discussed with Department officials during and at the conclusion of this audit. A preliminary draft report was sent to Department officials on November 5, 2010, and discussed at an exit conference held on November 17, 2010. On November 26, 2010, we submitted a draft report to Department officials with a request for comments. We received written comments from the Department on December 10, 2010.

Department officials contended that they were already complying with five recommendations. For two of these recommendations (“adequately monitor the actual participation of M/WBE prime contractors and subcontractors” and “ensure that contract files contain the names, addresses, or contact numbers of M/WBE subcontractors”), the Department agreed to implement additional compliance measures. The Department agreed with our recommendation to develop written procedures to comply with the requirements of Local Law 129.

The Department’s full response is included as an addendum to this report.

## **FINDINGS AND RECOMMENDATIONS**

The Department has partially complied with key provisions of Local Law 129 and §6-129 of the Administrative Code. Specifically, the Department has designated an executive officer to act as the agency M/WBE officer, created agency utilization plans, and ensured that prime contractors select M/WBE subcontractors from a pre-qualified list established and verified by the Department of Small Business Services.

Despite these steps, the Department has not complied with the provisions of Local Law 129 that pertain to monitoring the agency's activities to ensure that the agency utilization plans are effectively carried out. Thus, the Department does not monitor the actual participation of M/WBE prime contractors and subcontractors that were awarded contracts with utilization goals. The Department does not review the records of prime contractors to verify that payments were made to M/WBE subcontractors, does not perform job site inspections, and does not contact M/WBE subcontractors to verify their participation. By failing to adequately monitor compliance with agency utilization goals, the Department cannot fully assess whether prime contractors have complied with contract requirements, are providing business to certified M/WBEs, and are achieving the utilization goals specified in the contracts. Without this information, the Department cannot ascertain whether the program is effectively contributing to the City's use of certified M/WBEs as intended by Local Law 129. These problems can be attributed to the Department's failure to establish and implement written procedures to ensure compliance with the law.

Furthermore, the data that is publicly reported by the Mayor's Office of Contracts about M/WBE subcontractor participation goals is based on anticipated rather than actual numbers of M/WBE subcontracts. Accordingly, this information cannot be used to accurately assess the actual results of the Department's M/WBE program.

These matters are discussed in the following sections.

### **The Department Does Not Adequately Monitor Program Compliance**

The Department does not adequately monitor the agency's M/WBE program to ensure that it complies with its utilization plan and does not monitor the actual participation of M/WBE prime contractors and subcontractors that were awarded contracts with M/WBE utilization goals. Consequently, of 244 prime contracts for which the Department had M/WBE utilization goals for either prime contractors or subcontractors, only 144 contracts had associated subcontracts that contained M/WBE goals. Of the remaining 100 prime contracts, 21 were each valued at less than \$1 million. Only three of these contracts were awarded to M/WBE contractors.

Establishing anticipated utilization goals for M/WBE subcontractors without an effective method for enforcing the actual participation of M/WBE subcontractors is an internal control weakness in the Department's oversight of the M/WBE program. Our review of the sampled files showed that the Department attempted to ensure that it complied with program rules during the contract solicitation phase. However, the Department did not "seek to ensure substantial progress toward the attainment of these goals" as required under the program. Section 6-129 f.(viii) of

Local Law 129 states that “for contracts for which utilization goals have been established,” the agency is responsible for “monitoring each contractor’s compliance with its utilization plan by appropriate means, which shall include, but need not be limited to, job site inspections, contacting MBEs and WBEs identified in the plan to confirm their participation, and auditing the contractor’s books and records.”

There was no evidence in the sampled files to show that Department officials contacted the M/WBE subcontractors listed in contractor utilization plans to confirm their participation and to ascertain whether M/WBE subcontractors had been paid. Moreover, there was no evidence that Department officials conducted job site inspections or audits of contractor books and records.<sup>9</sup> File documentation shows that the Department was vigilant in attempting to ensure that contractors included M/WBE subcontractors in their utilization plans. However, we found that after contracts were awarded, the Department did not monitor the actual utilization and participation of M/WBE subcontractors unless an M/WBE subcontractor filed a complaint about a contractor. We partly attribute these problems to the Department’s failure to establish and implement written procedures to ensure that it complies with the provisions of the Local Law.

The Department’s Director of Internal Audit asserted that the auditing requirement of the Local Law was an optional—not mandatory—procedure.<sup>10</sup> Nevertheless, the Director contended that the Department’s policy since Fiscal Year 2009 was to audit contractor records and to review each contract that was 50 percent complete. We cannot, however, attest to the implementation of this policy as the documentation provided was not adequate to substantiate the policy.

### **Utilization Goals Not Attained**

The Department is falling short of attaining its goals for the utilization of M/WBE subcontractors by prime contractors. Our review of the sampled contract payment files indicated the following:

- For two contracts, M/WBE utilization goals were achieved;
- For five contracts, M/WBE utilization goals ranged between 14 to 77 percent of the anticipated amount of the contracts;
- For two contracts, no M/WBE subcontracts were awarded;

See Table I on page 10 for a list of the contracts.

In addition, our review found that actual payments to M/WBE subcontractors fell short of the subcontract anticipated utilization amounts. The total anticipated utilization value of M/WBE subcontracts associated with the seven contracts was \$1,162,254. Of this amount, only

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<sup>9</sup> Some files contained reports of audits and job site inspections that were conducted by the Department’s Engineering Audit Office as part of its routine activities as required by Comptroller’s Directive #7. However, these audits and inspections were not specifically directed at monitoring compliance with the Department’s M/WBE program.

<sup>10</sup> However, at the exit conference, the Director acknowledged that the auditing requirement was, in fact, mandatory.

\$803,499 (66.74 percent) had been paid to the M/WBE subcontractors once the contracts were substantially complete. Local Law 129, §6-129 i.(8), states that “if payments made to, or work performed by, MBEs or WBEs are less than the amount specified in the contractor’s utilization plan, the agency shall take appropriate action in accordance with subdivision o of this section, unless the contractor has obtained a modification of its utilization plan.” However, there was no file evidence to indicate that Department officials were aware of this deficiency or had taken steps to ensure that the M/WBE subcontractors were paid.

**Table I**  
**Differences among Utilization Goals,**  
**Values of M/WBE Subcontracts, and Amounts Paid to M/WBE Subcontractors,**  
**as noted in Department Records (as of 11/23/2010)**

Contract Number	M/WBE Percentage Subcontracting Goal	Total M/WBE Subcontracting Goal (a)	Value of M/WBE Subcontract (b)	Difference b/t M/WBE Goal and Value of MWBE Subcontract	Was Subcontract Goal Met	Amount of Subcontract Paid To Date (c)	Difference b/t Subcontract Value and Payment (b - c) = d	Percentage of M/WBE Subcontract Goal Met (c/a)	Did Payment Meet M/WBE Subcontract Goal
20080012868	35% Category 1	\$ 25,775.24	\$ 31,000.00	\$ (5,224.76)	Yes	\$ 58,528.15	\$ (27,528.15)	227.07%	Yes
20080022123	40% Category 2	\$ 214,800.00	\$ 225,000.00	\$ (10,200.00)	Yes	\$ 225,000.00	\$ -	104.75%	Yes
20080033793	40% Category 2	\$ 21,320.00	\$ 3,000.00	\$ 18,320.00	No	\$ 3,000.00	\$ -	14.07%	No
20080034169	50% Category 1	\$ 34,114.34	\$ -	\$ 34,114.34	No	\$ -	\$ -	-	No
20090019235	30% Category 1	\$ 10,970.31	\$ 29,254.00	\$ (18,283.69)	Yes	\$ -	\$ 29,254.00	0.00%	No
20070032032	30% Category 3	\$ 41,811.75	\$ 30,000.00	\$ 11,811.75	No	\$ 28,025.17	\$ 1,974.83	67.03%	No
20070036724	30% Category 4	\$ 520,800.00	\$ 600,000.00	\$ (79,200.00)	Yes	\$ 398,946.00	\$ 201,054.00	76.60%	No
20070027463	15% Category 2	\$ 7,302.75	\$ -	\$ 7,302.75	No			-	No
	15% Category 4	\$ 7,302.75	\$ -	\$ 7,302.75	No			-	No
20080043053	25% Category 2	\$ 123,000.00	\$ 124,000.00	\$ (1,000.00)	Yes	\$ 60,000.00	\$ 64,000.00	48.78%	No
	20% Category 5	\$ 98,400.00	\$ -	\$ 98,400.00	No	\$ -	\$ -	0.00%	No
	20% Category 4	\$ 98,400.00	\$ 120,000.00	\$ (21,600.00)	Yes	\$ 30,000.00	\$ 90,000.00	30.49%	No
<b>Totals</b>		<b>\$ 1,203,997</b>	<b>\$ 1,162,254</b>	<b>\$ 41,743.14</b>	<b>96.53%</b>	<b>\$ 803,499</b>	<b>\$ 358,755</b>	<b>66.74%</b>	

**Department Response:** “As discussed with the auditors and as we have fully documented, we appreciate the corrections with respect to Table 1 on page 10. It should be noted that the documentation included payments made to the M/WBE subcontractors on contract # 20070032032 totaling \$39,458 and therefore this contract would have been in compliance with LL 129 guidance.”

**Auditor Comment:** After the exit conference, the Department provided us with checks pertaining to two contracts (nos. 20070032032 and 20080012868) that were awarded to the same prime contractor. Our review found that some of the checks were applied to more than one contract. Accordingly, for contract no. 20070032032, we authenticated only those checks that were not already used to make payments for contract no. 20080012868. Consequently, contract no. 20070032032 was not M/WBE compliant as the Department contended.

We also noted that none of nine sampled contract files contained the addresses or contact numbers of M/WBE subcontractors on the Subcontractor Information on Request for Payment forms, as required by Local Law 129, §6-129 i.(7). This information is required for the Department to verify that M/WBE subcontractors are actually working on the project and are

being paid for the work performed. Ensuring that contractors comply with this requirement would have enabled the Department to more effectively monitor the use of M/WBE subcontractors.

Furthermore, the actual value of awarded M/WBE subcontracts reported in the Mayor’s Office of Contract Services Agency Procurement Indicators Report is much less than the amounts that were anticipated to be awarded according to the Department’s utilization plan and with the amounts recorded in Department records. According to the Department’s utilization plan, for Fiscal Years 2007 and 2008, 100 M/WBE subcontracts totaling \$24,753,051 were to be awarded by prime contractors.<sup>11</sup> In fact, for the two fiscal years, our review of Department files indicated that 159 M/WBE subcontracts totaling \$22,061,597 were awarded—an amount that is 15 percent less than the amount noted in the utilization plan. In contrast, however, the procurement indicators showed that 102 M/WBE subcontracts totaling only \$8,732,325 were awarded in those years, an amount that is 144 percent less than the amount noted in the utilization plan. (See Table II below.)

**Table II**  
Comparisons of the Department’s Utilization Plans, Department Records, and Agency Procurement Indicators: FY 2007 and FY 2008

Fiscal Year	Projected M/WBE Subcontracts Reported on DDC M/WBE Utilization Plan		M/WBE Subcontracts Reported on DDC Data Files		Percentage Decrease/Increase from Utilization Plan to Data Files		Subcontracts Awarded Reported on MOCS Agency Procurement Indicators		Percentage Decrease/Increase from Utilization Plan to Procurement Indicators	
	Total Contract Count	Total Dollar Value	Total Contract Count	Total Dollar Value	% Change in Contract Count	% Change in Dollar Value	Total Contract Count	Total Dollar Value	% Change in Contract Count	% Change in Dollar Value
2007	44	\$ 7,165,581	49	\$ 7,258,156	11%	1%	23	\$ 739,372	-48%	-90%
2008	56	\$ 17,587,470	110	\$ 14,803,441	96%	-16%	79	\$ 7,992,953	41%	-55%
<b>Total</b>	<b>100</b>	<b>\$ 24,753,051</b>	<b>159</b>	<b>\$ 22,061,597</b>	<b>108%</b>	<b>-15%</b>	<b>102</b>	<b>\$ 8,732,325</b>	<b>-7%</b>	<b>-144%</b>

Clearly, there are large and incongruous statistical differences regarding the utilization of M/WBE subcontractors as shown in the utilization plans, information contained in the Department’s files, and the information reported to the Mayor’s Office of Contract Services for the Agency Procurement Indicators Report.

**Recommendations**

The Department should:

1. Adequately monitor the actual participation of M/WBE prime contractors and subcontractors that were awarded contracts with M/WBE utilization goals. In this regard, the Department should conduct job site inspections, contact M/WBE

<sup>11</sup> The FY2009 and FY 2010 Procurement Indicators lacked information about the number and amounts of awarded M/WBE subcontracts to be utilized.

subcontractors to confirm their participation, and audit the books and records of contractors to ensure that payments are being made to M/WBE subcontractors.

**Department Response:** “The Department recognizes the benefits of further documenting procedures regarding compliance with LL 129 and will do so. Moreover, DDC does currently monitor program compliance via the following business practices and processes:

- a. Each Request for Approval of Subcontractor (RFAS) prior to commencement of subcontract work is checked against the List of Subcontractors (LOS). Such cross-referencing actions assists DDC in tracking, at the onset, whether a given contractor is taking steps to meet the M/WBE participation goals initially established in its utilization plan submission. In addition, subcontractor invoiced for payments are again matched against the LOS and RFAS to understand which of the subcontractors anticipated for use by the contractor were actually utilized as of the date of invoicing.
- b. DDC sends a letter to each M/WBE subcontractor identified by the contractor on the LOS as an alert of the M/WBE’s potential participation in the specific project at issue. DDC will, in addition, conduct additional telephone outreach to verify M/WBE subcontractors’ actual participation in work, on a spot check basis.
- c. The Department already has in place procedures that allow for the review of progress compliance as follows:
  - i. M/WBE compliance is an agenda topic at all monthly progress meeting. Because of the presence of DDC field staff at these jobs, DDC does, in fact, conduct “on-site” observation of M/WBE participation. When non-compliance is noted by field staff, a member of the ACCO Office of Contract Opportunity (OCO) is then invited to attend monthly meetings to facilitate compliance.
  - ii. At the 50 percent project completion, OCO staff reviews vendor compliance (compliance is determined from the total amounts paid to M/WBEs as noted in each prime contractor’s payment requisition) and takes steps with the contractor until compliance is reached. Steps include referring the contractor to the Department of Small Business Service (SBS) to obtain additional M/WBE subcontractors, reviewing outstanding work to determine where additional M/WBEs can be utilized and reviewing the contractor’s outreach program to determine where improvement can be made.”

**Auditor Comment:** While we agree that the Department takes preliminary steps to ensure that contractors attain M/WBE participation goals, there was no evidence that the Department carried out steps to monitor the actual participation of M/WBE prime contractors and subcontractors.

Specifically, the Department contends that subcontractors invoiced for payments are “again matched against the LOS and RFAS to understand which of the subcontractors anticipated for use by the contractor were actually utilized as of the date of invoicing.”

However, when we reviewed the “Subcontractor Information on Request for Payment” forms (subcontractor payment forms) contained in the Department’s files, the forms contained only the name of the subcontractor, value of the subcontract, amount previously paid in prior payment requests, and the amount to be paid for work included in that particular payment request. There was no evidence that any match was performed to determine which subcontractors initially anticipated for use were actually utilized. In addition, there was no evidence in the Department’s files to substantiate any telephone outreach to verify M/WBE subcontractors’ actual work participation. If such a match and outreach are indeed made, Department officials should ensure that it is documented and maintained in its files.

Additionally, the Department contends that its staff conducted “on-site” observations of M/WBE participation. However, when reviewing the “Inspector’s Report—General” and the “Engineering Audit Officer’s Payment Audit Reports” contained in the Department’s files, we found that these reports documented the progress of overall projects rather than the progress or participation of M/WBE subcontractors. Accordingly, if Department staff do in fact, conduct on-site observations of M/WBE participation, this practice should be documented and maintained in Department files.

Finally, the Department contends that vendor compliance is reviewed at 50 percent project completion and that steps are taken to ensure such compliance. However, we were not provided with evidence to support this assertion. Department officials informed us during the audit that they maintain meeting minutes pertaining to 50 percent completion and provided us with documentation that purported to substantiate this practice. But the documentation (an e-mail about a 50 percent completion meeting) pertained only to a single contractor. If, as the Department contends, these meetings constitute normal practice, written meeting minutes should be regularly maintained in Department files.

2. Develop written procedures to comply with the requirements of Local Law 129 to ensure that prime contractors are utilizing and paying M/WBE subcontractors.

**Department Response:** “The Department will formalize its procedures with respect to payment and utilization of M/WBE subcontractors.”

3. Ensure that contract files contain the names, addresses, or contact numbers of M/WBE subcontractors on the Subcontractor Information on Request for Payment forms.

**Department Response:** “The Department will modify the Subcontractor Information on Request for Payment to also include the addresses and contact numbers for M/WBE firms. However, it should be noted that, information on subcontractors such as addresses, contact names and phone numbers is already captured and is readily available from multiple sources including, the LOS document, the RFAS form, the Agency’s automated tracking system of all approved subcontractors, the Financial Management System (FMS) and the SBS’ online certified lists.”



**Auditor Comment:** Required information about subcontractors may indeed be available in disparate documents as the Department points out. Nevertheless, Local Law 129 clearly requires that this information be available in a comprehensive and recognizable manner. Thus, according to §6-129 i.(7):

“for each contract for which a utilization plan has been submitted, the contractor shall, with each voucher for payment . . . submit statements . . . which shall include, but not be limited to, the total amount paid to subcontractors (including subcontractors that are not MBEs or WBEs); the names addresses and contact numbers of each MBE or WBE hired as a subcontractor pursuant to such plan as well as the dates and amounts paid to each MBE or WBE.”

## **Other Problems with Program Compliance**

### **Subcontractor Lists Not Submitted**

Local Law 129, §6-129 i.(6), states that “for each contract for which a utilization plan has been submitted, the contracting agency shall require that within thirty days of the issuance of notice to proceed, the contractor submit a list of persons to which it intends to award subcontracts within the next twelve months.” Despite this stipulation, seven of nine sampled prime contractors did not submit to the Department lists of proposed subcontractors within the required 30 days. In these cases, the lists were submitted between 60 and 184 days after notices-to-proceed were issued. The file for one additional contractor lacked any list of proposed subcontractors; one file contained a list of proposed subcontractors but did not contain the notice-to-proceed. Timely submission of the proposed subcontractor list is a vital step towards ensuring that the Department attains its M/WBE utilization goals.

### **Recommendation**

4. The Department should ensure that contractors submit subcontractor lists in a timely manner.

**Department Response:** “The Department already requires and provides timely written notices to prime contractors with respect to submitting the LOS within the 30 days after issuance of the Notice to Proceed (NTP) and subsequently each year after. The LOS reflects anticipated M/WBEs to be utilized in the next 12 upcoming months. In fact, this language is included in the NTP letter itself as well as the Notice of Prospective Contractors (issued with the initial solicitation package). In instances where the vendor does not submit the LOS within the prescribed 30 days, the agency withholds the approval of any subcontractors (MWBE or non-MWBE) on our RFAS forms until the LOS is submitted thereby precluding work from proceeding.”

**Auditor Comment:** We acknowledge that in the early stage of procurement, the Department makes a conscious effort to ensure that contractors are responsive to M/WBE

program goals and that the Department takes steps to ensure that listed subcontractors are in fact registered M/WBEs.

Nevertheless, we found that subcontractor lists were not submitted timely. Accordingly, the Department should take additional measures to ensure the submission of the lists within the required 30 days.

### **Deficient Complaint Investigation**

For two of 10 sampled contract files that contained written complaints by M/WBE subcontractors, there was no evidence to indicate that the Department responded effectively and promptly to the complaints. In one case, a subcontractor contended that it was not paid by the prime contractor, which had already been paid by the Department. There was no file documentation to indicate that the Department responded to the complaint or conducted an investigation of this matter. In the second case, the prime contractor declined to utilize the subcontractor despite its having been approved by the contractor for project work. In this instance, the file contained documentation of a Department investigation but lacked information about the complaint's resolution.

For one additional sampled file, there was no evidence to indicate how the Department responded to a written complaint by a prime contractor. In this instance, the contractor made legitimate attempts to employ an MBE subcontractor that ultimately were unsuccessful. The contractor subsequently asked the Department for permission to substitute another minority contractor. However, the file lacked documentation about the situation's resolution.

Section 6-129 o.(1) of Local Law 129 states, "any person who believes that a violation of the requirements of this section, rules promulgated pursuant to its provisions, or any provision of contract that implements this section or such rules, including, but not limited to, any contractor utilization plan, has occurred may submit a complaint in writing to the division, the city chief procurement officer and the comptroller. Such complaint shall be signed and dated. The division shall promptly investigate such complaint and determine whether there has been a violation."

### **Recommendation**

5. The Department should ensure that all prime contractor and subcontractor complaints are investigated and followed up in a timely manner. All pertinent documentation about complaints and the results of investigations should be maintained in the Department's files.

**Department Response:** "The Department continues to properly investigate and resolve complaints with respect to LL 129 requirements. These activities include verifying the complaint with the subcontractor and collecting all relevant documentation; contacting the prime contractor to discuss the complaint and collecting all appropriate documents; informing project management of the complaint; involving SBS when appropriate; holding meeting of all parties in an effort to resolve the situation; and advising M/WBE

firms of their further options if resolution is not obtained. In the future, the Department will secure and maintain adequate documentation, including telephone logs, and any written correspondence, to show the steps that are taken for all complaints. It should be noted that the cited complaints were all fully and appropriately resolved; however, the agency acknowledges that full documentation was not properly maintained.

The audit cited a complaint involving a prime contractor substituting one M/WBE to replace another M/WBE firm, the Department contends that this is neither a complaint nor a deficiency, as the prime has every right to change subcontractors as conditions and circumstances change.”

***Auditor Comment:*** The Department’s position that a prime contractor seeking to substitute an M/WBE subcontractor has “every right to change subcontractors” is reasonable, but not warranted in the cited case. In this instance, the prime contractor was to award 30 percent of the contract work to a particular category of M/WBE subcontractor. Documentation indicates that the prime contractor made legitimate attempts to fulfill this requirement without success. The contractor subsequently contacted the Department to request permission to substitute an M/WBE subcontractor of a different category—not simply a different subcontractor as the Department contends. The request was denied by the Department, and consequently, the prime contractor could not attain the subcontracting goal. While the Department contends this was neither a complaint nor a deficiency, its failure to provide guidance or permission to the prime contractor resulted in its own M/WBE subcontracting goals not being attained for this contract.

### **Other Matters**

#### **Department’s Procurement Data Reported by MOCS**

The data upon which the Mayor’s Office of Contracts bases its public reporting of M/WBE participation goals and the use of M/WBE subcontractors by the City reflects anticipated rather than actual amounts. The City’s Financial Management System (FMS) records only payments to prime contractors and does not show payments made by contractors to subcontractors. However, anticipated payments to subcontractors that are based on subcontract amounts are recorded in the FMS Contract Goal Line (CTGL) table. The CTGL table contains subcontractor specific information that is provided by the prime contractor. A CTGL record is designed to capture (among other things) the subcontractor, subcontractor start date, and total cumulative anticipated payments to be made to a subcontractor under a prime contract. If a record needs to be modified (e.g., the total anticipated amount increases, the subcontractor is not used), FMS allows the user to make changes in the CTGL record. In such cases, a modified record is created and assigned a sequence number (original record is numbered “1”). No records are deleted; the original record and all modified records remain in the system, providing an audit trail of the original record and all subsequent changes. Only the most recently modified record, however, is considered the valid (current) record.

As noted above, the subcontractor amounts recorded in the CTGL table are based on the approximate anticipated value of the subcontracts; FMS is not designed to record the actual payments made to subcontractors. Estimated subcontractor amounts recorded by the Department in the CTGL table is the data that the Mayor’s Office of Contracts is reporting on. Accordingly, it is important for the Department to accurately record the subcontractor data into FMS. However, we found that the subcontractor amounts are not always accurate.

For the four sampled prime contracts, we identified discrepancies among the subcontractor amounts recorded in the FMS CTGL table by the Department, the information in the Department’s records, and the information contained in the actual payments identified from our review of the prime contractors’ files. The discrepancies in total subcontractor amounts are listed in Table III below. As reflected in Table III, contractors’ records indicate that actual subcontractor payments were higher than those shown in the CTGL table and the Department’s records. In addition, since the total of all actual subcontracting amounts exceed the amounts recorded in the FMS CTGL table, the actual amount of M/WBE subcontracting should increase correspondingly; however, this was not done, as seen in Table IV on page 18.

**Table III**  
Discrepancies among Subcontractor Amounts  
Recorded in FMS CTGL, Department Records, and in Prime Contractor Records

<b>Contract #</b>	<b>Total Anticipated Subcontractor Amounts in FMS CTGL Table (Current Record Amounts)</b>	<b>Total Anticipated Subcontractor Amounts in DDC Records</b>	<b>Actual Subcontractor Payments per Prime Contractor Records</b>
20070032032	\$ 69,500	\$ 126,500	\$ 1,277,038
20070036724	\$ 1,367,150	\$ 1,584,650	\$ 3,656,945
20080012868	\$ 1,113,283	\$ 1,113,283	\$ 310,406
20080022123	\$ 811,020	\$ 1,117,350	\$ 1,505,521
<b>Totals</b>	<b>\$ 3,360,953</b>	<b>\$ 3,941,783</b>	<b>\$ 6,749,910</b>

Furthermore, according to information contained in FMS CTGL, the anticipated amounts of subcontracts to be paid to M/WBE subcontractors for the four sampled prime contracts totaled \$2,275,043. However, our review of the books and records for the four sampled prime contracts showed that the actual amount of payments to these subcontractors totaled only \$1,599,228—a figure that is 70 percent of the M/WBE subcontractor amount recorded on the FMS screen. (See Table IV.) One contractor surpassed the M/WBE subcontracting amount listed on the FMS screen by paying 320 percent of the recorded amount to M/WBE subcontractors and one contractor came close to meeting the goal by paying 97 percent of the FMS recorded amount. However, for the remaining two contracts, M/WBE subcontractors were only paid 23 percent and seven percent of each recorded subcontract amount. There was no file documentation to support these significant discrepancies.

**Table IV**  
Differences between M/WBE Subcontractor Amounts  
Recorded in FMS and in Prime Contractor Records

<b>Contract #</b>	<b>M/WBE Subcontractor Amount per FMS CTGL</b>	<b>Actual Amount Paid to M/WBEs per Contractor Records</b>	<b>% of FMS Amount Actually Paid to M/WBEs</b>
20070032032	\$ 139,000	\$ 31,805	23%
20070036724	\$ 123,000	\$ 393,674	320%
20080012868	\$ 867,373	\$ 58,528	7%
20080022123	\$ 1,145,670	\$ 1,115,221	97%
<b>Totals</b>	<b>\$ 2,275,043</b>	<b>\$ 1,599,228</b>	<b>70%</b>

Thus, it is our conclusion that the information that was reported in FMS and publicly reported by the Mayor’s Office of Contracts (e.g., in the Agency Procurement Indicators Reports) cannot be used to ascertain whether the Department’s prime contractors are meeting their M/WBE subcontracting goals.

As previously mentioned, the Department must monitor the books and records of prime contractors to accurately gauge payments to M/WBE subcontractors and determine whether the M/WBE utilization goals it established are being achieved. The Department should provide this information to the Mayor’s Office of Contract Services to ensure that the public is obtaining accurate statistics about M/WBE subcontractor payments and the degree to which M/WBE target subcontracting percentages are achieved.

**Recommendation**

6. The Department should establish controls to ensure that the information recorded in FMS pertaining to M/WBE anticipated subcontract amounts is accurate.

**Department Response:** “The Department’s current practices adequately and appropriately ensure the accuracy of the *anticipated* subcontract amounts, as of the point in time when those estimates are required to be made. As described above, variations between the anticipated amounts and the actual amounts can occur for a number of valid business reasons, and do not in every instance reflect noncompliance with LL 129. The current configuration of FMS does not allow the agency to capture actual payments to subcontractors, M/WBEs or otherwise. We understand that the Mayor’s Office of Contract Services (MOCS) has been negotiating with Financial Information Services Agency (FISA) for upgrades to the FMS system that would allow agencies to more easily use the subcontractor data screens and capture more of the relevant information. FISA had initially indicated that these upgrades would be included in the rollout of FMS/3, delivered in January 2010. However, according to the latest status reports from FISA, no

changes to the subcontractor data entry system are scheduled to be released before July 2011.”

***Auditor Comment:*** We disagree with the Department’s contention that its “current practices adequately and appropriately ensure the accuracy of the anticipated subcontract amounts.” For four sampled contracts, our review of anticipated subcontract amounts showed that information contained in FMS differed from the anticipated subcontract amounts contained in the Department’s records by \$580,830. Therefore, the Department must establish more rigorous controls for recording anticipated subcontract amounts.



DAVID J. BURNEY, FAIA  
Commissioner

December 10, 2010

H. Tina Kim  
Deputy Comptroller  
NYC Office of the Comptroller  
1 Centre Street  
New York, NY 10007

Re: NYC Comptroller's Draft Audit Report on the Compliance of the Department of Design and Construction with the Minority – and Women-Owned Business Enterprise Program  
FR10-141A

Dear Ms. Kim:

The Department of Design and Construction (DDC) appreciates the City Comptroller efforts with respect to this audit of Department's Minority and Women Owned Business Enterprise Program.

As discussed with the auditors and as we have fully documented, we appreciate the corrections with respect to Table 1 on page 10. It should be noted that the documentation included payments made to the M/WBE subcontractors on contract # 20070032032 totaling \$39,458 and therefore this contract would have been in compliance with LL 129 guidance.

Following is each recommendation contained in the draft audit and the Department's response to them:

"The Department should..."

1. "Adequately monitor the actual participation of M/WBE prime contractors and subcontractors that were awarded contracts with M/WBE utilization goals. In this regard, the Department should conduct job-site inspections, contact M/WBE subcontractors to confirm their participation, and audit the books and records of contractors to ensure that payments are being made to M/WBE subcontractors."

*Agency Response:* The Department recognizes the benefits of further documenting procedures regarding compliance with LL 129 and will do so. Moreover, DDC's does currently monitor program compliance via the following business practices and processes:



- a. Each Request for Approval of Subcontractor (RFAS) prior to commencement of subcontract work is checked against the List of Subcontractors (LOS). Such cross-referencing actions assists DDC in tracking, at the onset, whether a given contractor is taking steps to meet the M/WBE participation goals initially established in its utilization plan submission. In addition, subcontractor invoiced for payments are again matched against the LOS and RFAS to understand which of the subcontractors anticipated for use by the contractor were actually utilized as of the date of invoicing.
  - b. DDC sends a letter to each M/WBE subcontractor identified by the contractor on the LOS as an alert of the M/WBE's potential participation in the specific project at issue. DDC will, in addition, conduct additional telephone outreach to verify M/WBE subcontractors' actual participation in work, on a spot check basis.
  - c. The Department already has in place procedures that allow for the review of progress compliance as follows:
    - i. M/WBE compliance is an agenda topic at all monthly progress meeting. Because of the presence of DDC field staff at these jobs, DDC does, in fact, conduct "on-site" observation of M/WBE participation. When non-compliance is noted by field staff, a member of the ACCO Office of Contract Opportunity (OCO) is then invited to attend monthly meetings to facilitate compliance.
    - ii. At the 50% project completion, OCO staff reviews vendor compliance (compliance is determined from the total amounts paid to M/WBEs as noted in each prime contractor's payment requisition) and takes steps with the contractor until compliance is reached. Steps include referring the contractor to the Department of Small Business Service (SBS) to obtain additional M/WBE subcontractors, reviewing outstanding work to determine where additional M/WBEs can be utilized and reviewing the contractor's outreach program to determine where improvement can be made.
2. "Develop written procedures to comply with the requirement of Local Law 129 to ensure that prime contractors are utilizing and paying M/WBE subcontractors"

*Agency Response:* The Department will formalize its procedures with respect to payment and utilization of M/WBE subcontractors.

3. "Ensure that contract files contain the names, addresses, or contact numbers of M/WBE subcontractors on the Subcontractor Information on Request for Payment forms."

*Agency Response:* The Department will modify the Subcontractor Information on Request for Payment to also include the addresses and contact numbers for M/WBE firms. However, it should be noted that, information on subcontractors such as addresses, contact names and phone numbers is already captured and is readily available from multiple sources including, the LOS document, the RFAS form, the Agency's automated tracking system of all approved subcontractors, the Financial Management System (FMS) and the SBS' online certified lists.





4. "Ensure that contractors submit subcontractor lists in a timely manner."

*Agency Response:* The Department already requires and provides timely written notices to prime contractors with respect to submitting the LOS within the 30 days after issuance of the Notice to Proceed (NTP) and subsequently each year after. The LOS reflects anticipated M/WBEs to be utilized in the next 12 upcoming months. In fact, this language is included in the NTP letter itself as well as the Notice of Prospective Contractors (issued with the initial solicitation package). In instances where the vendor does not submit the LOS within the prescribed 30 days, the agency withholds the approval of any subcontractors (MWBE or non-MWBE) on our RFAS forms until the LOS is submitted thereby precluding work from proceeding.

5. "Ensure that prime contractors and subcontractor complaints are investigated and followed up in a timely manner. All pertinent documentation about complaints and the result of investigations should be maintained in the Department's file."

*Agency Response:* The Department continues to properly investigate and resolve complaints with respect to L.L. 129 requirements. These activities include verifying the complaint with the subcontractor and collecting all relevant documentation; contacting the prime contractor to discuss the complaint and collecting all appropriate documents; informing project management of the complaint; involving SBS when appropriate; holding meeting of all parties in an effort to resolve the situation; and advising M/WBE firms of their further options if resolution is not obtained. In the future, the Department will secure and maintain adequate documentation, including telephone logs, and any written correspondence, to show the steps that are taken for all complaints. It should be noted that the cited complaints were all fully and appropriately resolved; however, the agency acknowledges that full documentation was not properly maintained.

The audit cited a complaint involving a prime contractor substituting one M/WBE to replace another M/WBE firm, the Department contends that this is neither a complaint nor a deficiency, as the prime has every right to change subcontractors as conditions and circumstances change.

6. "Establish controls to ensure that the information recorded in FMS pertaining to M/WBE anticipated subcontract amounts is accurate."

*Agency Response:* The Department's current practices adequately and appropriately ensure the accuracy of the *anticipated* subcontract amounts, as of the point in time when those estimates are required to be made. As described above, variations between the anticipated amounts and the actual amounts can occur for a number of valid business reasons, and do not in every instance reflect noncompliance with L.L. 129. The current configuration of FMS



does not allow the agency to capture actual payments to subcontractors, M/WBEs or otherwise. We understand that the Mayor's Office of Contract Services (MOCS) has been negotiating with Financial Information Services Agency (FISA) for upgrades to the FMS system that would allow agencies to more easily use the subcontractor data screens and capture more of the relevant information. FISA had initially indicated that these upgrades would be included in the rollout of FMS/3, delivered in January 2010. However, according to the latest status reports from FISA, no changes to the subcontractor data entry system are scheduled to be released before July 2011.

Sincerely,

A handwritten signature in black ink, appearing to read "David Burney". The signature is fluid and cursive, with a long horizontal stroke at the end.

David Burney