



July 5, 2016

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

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

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

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

Senator Liz Krueger  
Ranking Minority Member  
Senate Finance Committee  
Legislative Office Building, Room 617  
Albany, New York 12247

Hon. Thomas P. DiNapoli  
Comptroller  
Office of the New York State Comptroller  
110 State Street, 15<sup>th</sup> Floor  
Albany, New York 12236

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

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

Assemblyman Brian Kolb  
Assembly Minority Leader  
Legislative Office Building, Room 933  
Albany, New York 12248

Assemblyman Bob Oaks  
Ranking Minority Member  
Assembly Ways and Means Committee  
NYS Assembly  
Capitol Building, Room 444  
Albany, New York 12248

Dear Sir/Madam:

In accordance with the provisions of Section 170 of the Executive Law, we are hereby submitting to your Office a copy of Empire State Development's ("ESD") response regarding recommendations for corrective action set forth in the Office of the New York State Comptroller's audit of ESD's Minority- and Women-Owned Business Enterprises Program.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

Benson V. Martin  
Director of Compliance

Enclosure

July 5, 2016

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

RE: 90-Day Response to the New York State Office of Comptroller Audit Report 2014-S-13 Concerning Selected Aspects of the Minority- and Women-Owned Business Enterprises Program

Dear Comptroller DiNapoli:

On April 4, 2016, the Office of the State Comptroller ("OSC") released the final report, "Selected Aspects of the Minority- and Women-Owned Business Enterprises Program," which was the result of an audit conducted of Empire State Development's ("ESD") Minority- and Women-Owned Business Enterprises ("MWBE") Program. OSC commenced this audit of the Division of Minority and Women's Business Development ("Division") to determine whether ESD's Department of Economic Development ("DED") properly certified and/or recertified MWBEs and properly processed New York State agencies' and authorities' annual goal plans and utilization reports. In accordance with Section 170 of the Executive Law, within ninety days of the release of the final report, ESD is advising our progress to date with respect to OSC's nine recommendations contained in the final report.

#### **I. Background**

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

After reviewing New York State's MWBE program, the Director recommended and then implemented state-of-the-art online certification and utilization platforms that electronically archive application materials. Specifically, after a Request for Proposal was issued in October

2011, ESD hired an outside vendor who started developing the platforms in 2012; the platforms became operational in 2013. These platforms enabled the Division to become more efficient while comporting with best practices. Instead of focusing on the Division's processes and procedures after the implementation of the platforms, OSC chose to focus mostly on the Division's processes and procedures prior to the implementation of the platforms. Consequently, OSC's audit findings and recommendations are based on outdated information and processes and procedures that were revamped prior to OSC conducting this audit.

## **II. Recommendations**

As noted in ESD's prior audit response, OSC's audit findings reflect a lack of understanding of the program's relevant laws, regulations, practices and procedures. As a result, OSC's findings and recommendations are fundamentally flawed and need to be corrected.

The recommendations are below:

### **Recommendation #1:**

***Review and take appropriate action when advised of the sale or transfer of a certified MWBE to another owner. Update the MWBE directory as appropriate.***

Division staff already reviews and takes appropriate action when advised of the sale or transfer of a certified MWBE to another owner. Moreover, we continue to update the MWBE directory as appropriate. Staff properly monitors MWBE vendor information and comports with all statutory and regulatory obligations in this respect.

MWBE regulations require certified MWBEs to notify the Division within thirty days of any material change in status. A change of address or ownership which results in the loss of MWBE-status would qualify as a material change in status. Besides fulfilling its regulatory obligations, a certified MWBE vendor is incentivized to notify ESD of a material change in status to avoid being subjected to potential civil or criminal actions.

The regulations do not require ESD to repeatedly inquire whether a certified MWBE vendor had a material change. Again, the regulations place the onus on the MWBE vendor to notify ESD of a material change – a logical requirement because vendors are in the best position to monitor when there has been a material change.

**Recommendation #2:**

***Develop and implement formal mechanisms to periodically verify that certified MWBEs are at their address of record.***

OSC's recommendation is unnecessary because ESD has already implemented formal mechanisms to verify that certified MWBEs are at their address of record. MWBE regulations require certified MWBEs to notify the Division within thirty days of any material change in status. A change of a business address would qualify as a material change in status.

Efforts to be proactive and ensure that the NYS Certified MWBE Directory is always current have been underway since the migration onto our online New York State Contract System. Having the information online has made it substantially easier for MW clients, certification staff, NYS agencies and their prime contractors to communicate with each other. In addition to the shared information used by all stakeholders in the certification and procurement process, periodic communications are easily generated through the system to remind and provide firms the opportunity to confirm their business profile, telephone number, contact person, emails and assigned industry codes. This communication ensures that each firm's public profile most accurately represents its goods and services. Step-by-step instructions for updating a vendor profile are available both on the New York State Contract System and ESD's website as well.

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

**Recommendation #3:**

***Formally require and remind agencies to submit goal plans timely.***

ESD does not have to implement this recommendation because 5 NYC.RR Part 141.4(c) provides that each state agency or authority shall submit its goal plans on or before January 15th each year, or at such time determined by the Director. Agencies are notified in the third quarter of each fiscal year that this deadline is approaching and are reminded during standing and recurring monthly calls hosted by ESD with all agencies and authorities. Those meetings are attended by MWBE liaisons and procurement officers for all State agencies and authorities.

Moreover, ESD agency services analysts regularly remind all agencies and authorities that goal plans are due months in advanced of the deadline, and remind them that we will not be extending the deadline for such submission. Our online New York State Contract System also notifies agencies and authorities at least forty-five days prior to the submission deadline.

**Recommendation #4:**

***Ensure that agencies' exempted and excluded contracts and expenditures comply with Division regulations to facilitate maximum MWBE participation.***

Again, ESD does not have to implement this recommendation because ESD already ensures that agencies' and authorities' exempted and excluded contracts and expenditures comply with Division regulations to facilitate maximum MWBE participation. Division policy sets categories for exemptions and exclusions. Analysts review the exemptions and exclusions by confirming whether they fall within the policy-prescribed categories. Verification is already part of analysts' review on ESD's online certification and utilization platform, which was implemented in January 2013. Further, as part of an analyst's goal plan review, the analyst periodically reviews the policy-prescribed exemption and exclusion categories to determine whether these categories are still valid. When necessary, these categories are amended.

**Recommendation #5:**

***Document analysts' verifications of the amounts exempted/excluded.***

The Division, via the use of our online New York State Contract System, verifies the amounts submitted as exempted or excluded on agencies' goal plans. The system provides the categories that are appropriate for exemption or exclusion to the agencies, and the agencies submit their exempted or excluded expenditure descriptions into our online New York State Contract System based on such categories. The analysts then review these submissions for appropriateness based on protocol and require agencies and authorities to clarify any exempted or excluded submission which does not fit the protocol or remove such spend from exemption or exclusion.

**Recommendation #6:**

***Ensure agencies explain year-over-year variances of 25 percent or more in amounts exempted/ excluded.***

As a matter of established protocol, ESD analysts are required to secure explanations for year-over-year variances of more than twenty percent, a more stringent threshold than recommended within the OSC report. This evaluation is already part of analysts' review on ESD's online certification and utilization platform.

**Recommendation #7:**

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

Nothing in the law requires that ESD report individual agencies' and authorities' annual utilization in its annual MWBE report. However, ESD regularly includes all agencies and authorities that are statutorily required to report their MWBE utilization in its annual MWBE reports to the Governor. In some instances, where State agencies are operationally centralized, we aggregate their reportable MWBE expenditures.

**Recommendation #8:**

***Require analysts to obtain all mandatory and other applicable documents before certifying applications. Further, document the reasoning for any waiver of mandatory or required documents.***

All analysts are required to obtain all mandatory and other applicable documents before certifying applicants. Documentation necessary to prove a particular element of certification can vary greatly depending on the specific business, and documents which are listed as "required" are accompanied by a proviso that addresses applicability to each industry.

ESD's online certification platform requires that a note be posted indicating the reasoning for the waiver of documentation per applicant.

**Recommendation # 9:**

***Improve record-keeping and archiving systems to ensure that pertinent files and records can be easily retrieved and accessed.***

Archived MWBE certification files were stored in three different locations in two cities, which included the State Archives in Albany. Retrieving documents was sometimes difficult. Recognizing this difficulty, particularly for archived files stored prior to January 2013, ESD took affirmative steps to rectify this issue. Commencing in January 2013, in order to remedy the



prior record retention concerns, ESD began archiving all certification application materials electronically.

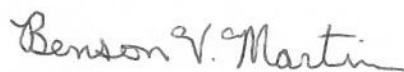
In June 2015, ESD contacted organizations which provide technical assistance to MWBEs seeking certification and notified them that the old paper applications were being discontinued and new paper applications would need to be requested from ESD. This new protocol was shared with partner associations, groups and stakeholders throughout the State to assist with public notification efforts.

While paper applications remain available, if needed, the intent of this effort is to discourage the submission of paper applications and encourage electronic submissions. Submission of electronic applications and supporting documentation will reduce the likelihood that such submissions are lost or misplaced and will automatically electronically archive all submissions.

### **III. Conclusion**

ESD has an exemplary record in regard to its MWBE Program. As a result of our efforts, the State's overall utilization rate went from 10.28% in January 2011 to 23.23% currently. Staff continues to identify and implement process improvements to the Program so as to better serve our clients and the citizens of New York State.

Yours truly,

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

Benson V. Martin  
Director of Compliance

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