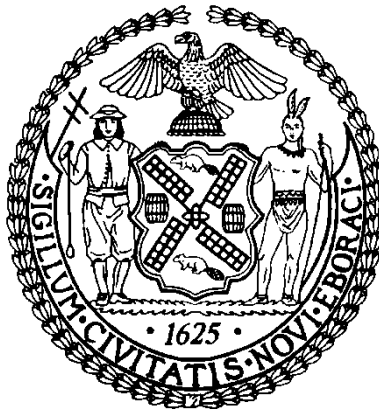


**CITY OF NEW YORK
OFFICE OF THE COMPTROLLER**

**John C. Liu
COMPTROLLER**

MANAGEMENT AUDIT

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



**Audit Report on the Department of Parks and
Recreation's Monitoring of Subcontracts
Covered by Local Law 129**

ME10-143A

December 22, 2010

<http://comptroller.nyc.gov>



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 Department of Parks and Recreation (Parks) to determine whether it complied with Local Law 129 with regard to monitoring the use of Minority- and Women-owned Business Enterprises (M/WBEs) by vendors that were awarded contracts in which M/WBE subcontractor participation goals had been established. We audit programs such as this to determine whether City agencies are effectively monitoring contractors to ensure that they comply with the terms of their agreements.

While there is evidence of some monitoring by Parks, the audit determined that the agency needs to enhance this monitoring to be better able to determine whether the established M/WBE subcontracting goals have actually been met by the prime contractors. The audit found that Parks does not review the prime contractors' records to verify payments to M/WBE subcontractors and is therefore unable to determine whether the M/WBEs are receiving the appropriate level of payments. Furthermore, there is little evidence that Parks contacts the M/WBE subcontractors to verify the extent of their use by the prime contractors.

This audit makes six recommendations, including that Parks should: more effectively monitor the use of M/WBEs by prime contractors by contacting M/WBEs to confirm their level of participation, by reviewing subcontracting plans and actual payments to subcontractors more closely, and by auditing the contractors' books and records.

The results of the audit have been discussed with Parks 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.

Sincerely,

A handwritten signature in blue ink, appearing to read "John C. Liu".

John C. Liu

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

**Audit Report on the Department of Parks and
Recreation's Monitoring of Subcontracts
Covered by Local Law 129**

ME10-143A

AUDIT REPORT IN BRIEF

This audit determined whether the Department of Parks and Recreation (Parks) complied with Local Law 129 with regard to monitoring the use of Minority- and Women-owned Business Enterprises (M/WBEs) by vendors that were awarded contracts in which M/WBE subcontractor participation goals had been established. The scope period covered by this audit was Fiscal Years 2007 through 2010.

Local Law 129 established the City's M/WBE Program. This law, enacted in 2005, responded to a study commissioned by the City Council that found that 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. 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).

Parks's principal mission is to assure that the parks, beaches, playgrounds, stadia, marinas, recreational facilities, gardens, malls, squares, and public spaces of the City are clean, safe, and attractive for the health and enjoyment of the people. According to the City's *Agency Procurement Indicators* report, from Fiscal Year 2007 through Fiscal Year 2010 Parks awarded a total of 304 contracts (valued at \$673,400,236) with M/WBE subcontractor participation goals.

Audit Findings and Conclusions

Parks is in partial compliance with the provisions of Local Law 129 relating to its monitoring of the use of M/WBEs by vendors that were awarded contracts with M/WBE subcontractor participation goals. While there is evidence of some monitoring by Parks, the agency needs to enhance this monitoring to be better able to determine whether the established M/WBE subcontracting goals have actually been met by the prime contractors.

Parks does require vendors awarded contracts with M/WBE participation goals to submit a Subcontractor Approval Form to report the subcontractors they anticipate using and a Subcontractor Compliance Form to report the payments they make to each subcontractor. Parks resident engineers observe subcontractor activity at the construction sites and note this activity on daily and weekly reports. When reviewing contractors' payment requests, Parks resident engineers complete a checklist to record the extent to which the contractor has achieved its M/WBE goal based on the information presented by the contractor. Parks, however, does not review the prime contractors' records to verify payments to M/WBE subcontractors and is therefore unable to determine whether the M/WBEs are receiving the appropriate levels of payment. In addition, there is little evidence that Parks contacts the M/WBE subcontractors to verify the extent of their use by the prime contractors. By not performing these steps, Parks cannot fully assess whether the prime contractors are achieving the M/WBE participation goals specified in the contracts nor can Parks accurately ascertain whether it is effectively contributing to the City's use of certified M/WBEs, as was intended by Local Law 129.

Audit Recommendations

To address these issues, the audit recommends, among other things, that Parks:

- More effectively monitor the use of M/WBEs by prime contractors by contacting M/WBEs identified in utilization plans to confirm their level of participation, by more closely reviewing subcontracting plans and actual payments to subcontractors, and by auditing the contractors' books and records.
- Initiate enforcement actions against those prime contractors that do not comply with the M/WBE provision of their contracts.
- Ensure that prime contractors only indicate on the Subcontractor Compliance Form their actual payments to subcontractors.

Agency Response

In its response, Parks disputed some of the audit's findings but generally agreed to implement or continue to implement the audit's recommendations.

INTRODUCTION

Background

Local Law 129 established the City's M/WBE Program. This law, enacted in 2005, responded to a study commissioned by the City Council that found that 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 Code¹, 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.

Parks maintains a municipal park system of more than 29,000 acres. The agency's principal mission is to assure that the parks, beaches, playgrounds, stadia, marinas, recreational facilities, gardens, malls, squares, and public spaces of the City are clean, safe, and attractive for the health and enjoyment of the people. According to the *Agency Procurement Indicators* report, from Fiscal Year 2007 through Fiscal Year 2010 Parks awarded a total of 304 contracts (valued at \$673,400,236) with M/WBE subcontractor participation goals. All of these contracts were for construction-related services.

It is the responsibility of Parks to set target subcontracting percentages (TSP)² 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 Parks's TSP and M/WBE participation goals. If the bidder anticipates that it will not subcontract at the target level Parks has specified, it must seek a waiver of the TSP from the Mayor's Office of Contract Services (MOCS).

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

² 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.

Parks has an M/WBE Officer, who is responsible for monitoring the activities of its contracting offices and contractors to ensure compliance with Local Law 129 and for generating and maintaining effective procedures to track progress and communicate results.

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 Parks has complied with Local Law 129 with regard to monitoring the use of M/WBEs by vendors that were awarded contracts in which M/WBE subcontractor participation goals have been established.

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. This audit was conducted in accordance with the audit responsibilities of the City Comptroller as set forth in Chapter 5, §93, of the New York City Charter.

The audit scope period was Fiscal Years 2007 through 2010.

To obtain an understanding of the requirements for agencies to monitor the use of M/WBEs by vendors awarded contracts with M/WBE participation goals, we reviewed Local Law 129 and an October 19, 2006 MOCS memorandum on the “Implementation of Local Law 129—M/WBE Subcontracting Program Administration.”

We also reviewed Parks’s M/WBE Utilization Plans submitted to DSBS for Fiscal Years 2007 through 2010. In addition, we reviewed the *Agency Procurement Indicators* reports released by MOCS for Fiscal Years 2007 through 2009 and the Fiscal Year 2009 *New York City Minority and Women-Owned Enterprise Program City-Wide Progress Report* released by DSBS for information specific to Parks.

To obtain a general overview of Parks’s responsibility to monitor contractor and vendor activities to ensure compliance with Local Law 129, we interviewed the agency’s M/WBE Officer. To understand the process of determining the TSP of a contract, we met with the Agency Chief Contracting Officer for Parks. In addition, to obtain an understanding of the

monitoring of subcontractors on construction-related projects, we met with the Deputy Chief of Construction, a Borough Director, and a Resident Engineer. We also met with the Systems and Analysis Unit to understand its role in the monitoring of the contractors' compliance with Local Law 129.

We obtained a list from Parks consisting of 306 prime contracts (valued at \$674,636,122) with M/WBE goals that were awarded from Fiscal Year 2007 through Fiscal Year 2010.³ We sorted these prime contracts by value and identified those contracts valued at \$2 million or more. We then sorted these contracts by their end dates (the anticipated dates the contracts would end) and identified those contracts with end dates of July 31, 2010, or earlier. From the group of 35 contracts that met these two criteria, we excluded five contracts that had M/WBE subcontractor participation goals of less than 20 percent and four contracts that had less than \$100,000 in total anticipated spending on M/WBE subcontractors (determined by multiplying the TSP by the M/WBE percent goal and the value of the contract). For the remaining 26 contracts, totaling approximately \$123 million, we looked at each contract's payment history on the City's Financial Management System (FMS) to determine if there was a revised end date of Fiscal Year 2010 or later and if at least 80 percent of the contract value had been paid by August 2010. We found that six prime contracts, awarded to five different contractors and totaling approximately \$30 million, met the above criteria. For our review, we selected four prime contracts—awarded to four different contractors—that met these criteria. The four prime contracts we selected totaled approximately \$13 million in value.

We reviewed Parks's files for the four sampled contracts to determine the prime contractors' proposed M/WBE utilization plans included in their bid responses and to determine whether any full or partial waivers of the TSPs were requested and granted to the prime contractors. We also reviewed other contract and payment documents submitted by the prime contractors, such as Form 44, on which prime contractors report the payments they make to each subcontractor (including M/WBEs) to determine whether the contractors submitted the required documents. Lastly, to obtain an understanding of the recording of subcontractor data in the FMS Contract Goal Line (CTGL) table, we reviewed the training manual for contract processing issued by the Financial Information Services Agency (FISA).

We visited the four prime contractors and reviewed their records relating to payments to subcontractors. We reviewed agreements between the prime contractors and the subcontractors, invoices submitted by subcontractors, canceled checks of payments made to subcontractors, and the general ledgers. We determined whether the subcontractors used for the four sampled contracts were certified M/WBEs. We also analyzed the proposed TSP and M/WBE goals versus the actual results to determine whether the prime contractors met the goals proposed to Parks in their utilization plans. Finally, we compared contractor results as reported on Form 44 and in FMS to actual results based on records in the contractors' files.

³ As noted above, according to the *Agency Procurement Indicators* report published by MOCS, from Fiscal Year 2007 through Fiscal Year 2010 Parks awarded a total of 304 contracts (valued at \$673,400,236) with M/WBE participation goals.

Discussion of Audit Results

The matters covered in this report were discussed with Parks officials during and at the conclusion of this audit. A preliminary draft report was sent to Parks officials on November 1, 2010, and discussed at an exit conference held on November 17, 2010. On November 29, 2010, we submitted a draft report to Parks officials with a request for comments. We received a written response from Parks on December 14, 2010. In its response, Parks disputed some of the audit's findings but generally agreed to implement or continue to implement the audit's recommendations.

Parks's dispute with this audit report primarily relates to our conclusion that it only partially complied with Local Law 129 provisions pertaining to the monitoring of M/WBE subcontracting. Parks believes that it substantially complied with the provisions and its response identifies a number of steps that it has taken to implement Local Law 129. Many of these steps had already been mentioned in our report and others relate to M/WBE actions Parks has taken that were beyond the scope of this audit. While Parks has complied with certain provisions of the law as they relate to M/WBE subcontracting, we believe that more needs to be done to ensure that it is actively monitoring how well its contractors are actually performing with regard to meeting M/WBE subcontracting goals.

Parks's written response is included as an addendum to this report.

FINDINGS AND RECOMMENDATIONS

Parks is in partial compliance with the provisions of Local Law 129 relating to its monitoring of the use of M/WBEs by vendors that were awarded contracts with M/WBE subcontractor participation goals. While there is evidence of some monitoring by Parks, the agency needs to enhance this monitoring to be better able to determine whether the established M/WBE subcontracting goals have actually been met by the prime contractors.

Parks does require vendors awarded contracts with M/WBE participation goals to submit a Subcontractor Approval Form to report the subcontractors they anticipate using and a Subcontractor Compliance Report (Form 44) to report the payments they make to each subcontractor. In addition, Parks resident engineers observe subcontractor activity at the construction sites and note this activity on daily and weekly reports. When reviewing contractors' payment requests, Parks resident engineers complete a Resident's Payment Processing Checklist (Form 34) to record the extent to which the contractor has achieved its M/WBE goal based on the information presented by the contractor on Form 44. Parks, however, does not review the prime contractors' records to verify payments to M/WBE subcontractors and is therefore unable to determine whether the M/WBEs are receiving the appropriate levels of payment. In addition, there is little evidence that Parks contacts the M/WBE subcontractors to verify the extent of their use by the prime contractors. By not performing these steps, Parks cannot fully assess whether the prime contractors are achieving the M/WBE participation goals specified in the contracts nor can Parks accurately ascertain whether it is effectively contributing to the City's use of certified M/WBEs, as was intended by Local Law 129.

Parks Monitoring of Contractor Compliance with M/WBE Participation Goals Needs Improvement

Parks needs to improve its monitoring of the use of M/WBEs by prime contractors awarded contracts with M/WBE participation goals.

According to the law, for contracts with established participation goals, the agency M/WBE officer is required to monitor each contractor's compliance with its utilization plan by appropriate means, including but not limited to inspecting job sites, contacting M/WBEs identified in the plan to confirm their participation, and auditing the contractor's books and records. However, we determined that Parks does not have sufficient procedures in place to fully verify M/WBE participation. In the absence of such procedures, Parks is unable to accurately determine the extent to which contractors are actually providing subcontracting work to M/WBEs and whether M/WBEs are receiving the appropriate payments.

Prime contractors are required to complete Subcontractor Approval Forms to show the subcontractors that the prime contractor anticipates using. The Subcontractor Approval Form also shows whether the subcontractor is a certified M/WBE, the approximate value of the subcontract, the start and end dates of the subcontract and the estimated payment amounts. However, it is Parks's responsibility to verify actual use of M/WBEs, not just the prime

contractor's intent to use them. To its credit, Parks created and uses Form 44 by which it requires prime contractors to periodically report its payments to subcontractors, including M/WBEs. In addition, Parks resident engineers observe subcontractor activity at the construction sites and note this activity on daily and weekly reports. Furthermore, when reviewing contractors' payment requests, Parks resident engineers complete Form 34 to record the extent to which the contractor has achieved its M/WBE goal based on the information presented by the contractor on Form 44. However, Parks provided little evidence that they attempt to verify the information provided on Form 44. There is no evidence that subcontractors are contacted to verify that their levels of participation in a project have been accurately reported by the contractors on Form 44. Parks reported to us that they occasionally contact M/WBEs during various meetings at DSBS. We requested documentation of these meetings or of any other contacts made with the M/WBEs; however, none was provided.

In addition, when we asked Parks officials whether they audit the prime contractor's books and records to verify M/WBE participation, we were told that the Engineering Audit Unit and the Accounting Unit review certain supporting documentation for every payment request received from the contractors. However, Parks provided no evidence of actual audits having been performed, as required by Local Law 129. Without such audits, which should include reviews of subcontractor invoices and of canceled checks from the contractors to subcontractors, it is unlikely that Parks can identify prime contractors that are not using or paying M/WBEs as planned or reported. It is clear that the intent of the law was not to have agencies base the M/WBE utilization by the contractors primarily on the information submitted by the prime contractor, as the law specifically requires the agencies to verify M/WBE participation. It is therefore important for Parks to perform additional steps to verify contractor use of M/WBEs.

Furthermore, in its Fiscal Year 2009 and 2010 Agency M/WBE Utilization Plans submitted to DSBS, Parks indicated that it intends to monitor contractor compliance with submitted utilization plans for contracts with established M/WBE participation goals. However, we found that Parks needs to enhance its monitoring of prime contractor compliance. In addition, we found that Parks does not prepare or generate summary reports on its efforts concerning M/WBE subcontracting.

On June 9, 2010, we initially requested from Parks the standard operating procedures that the agency uses to ensure contractor compliance with M/WBE subcontracting requirements. However, we were not provided with a portion of these procedures (which were dated January 2010) until October 19, 2010. At the exit conference on November 17, 2010, Parks provided us with its full set of procedures. Parks's inability for more than five months to provide us with its full set of procedures gives us limited assurance that the agency actually had these procedures at the time of our request. Additionally, we received no evidence that the agency had procedures for the entire period covered by our audit (July 2006 to June 2010). Parks informed us that they had not provided these procedures to us earlier because they needed to be revised. We must note, however, that the revisions had still not yet been completed when we received the procedures in October and November. It is important that Parks update its written procedures in a timely manner so that its personnel have detailed instructions on overseeing contractor compliance with all aspects and requirements of Local Law 129.

According to Local Law 129, the contractor is required to submit with its bid or proposal a utilization plan indicating its TSP and a description of the type and dollar value of the work designated for participation by M/WBEs. In addition, the contractor must submit within 30 days of the issuance of notice to proceed on the contract a list of the subcontractors it intends to use. It must also submit with each voucher for payment the total amount that was paid to each subcontractor, including each M/WBE. If total payments to M/WBEs are for less than the amount specified in the contractor's utilization plan, the agency is required to take appropriate action for noncompliance.

Our initial analysis revealed that the contractors in our sample did not achieve the overall subcontracting and M/WBE goals they proposed to Parks in their utilization plans. Parks officials stated that within the last three years it has initiated enforcement action against only one contractor that did not meet its goals. However, as shown in Table I below, the overall subcontracting and M/WBE payment goals were not met for three of the four contracts we reviewed. Our review found no evidence that any enforcement action (ranging from entering into an agreement with the contractor to address the noncompliance to terminating the contract) was taken in response to the inability of these prime contractors to meet their goals.

Table I
Subcontracting and M/WBE Goals

Contract #	As per Prime Contractor's Utilization Plan			As per Prime Contractor's Records			
	Subcontracting Goal	M/WBE Goal	M/WBE % Proposed	Subcontracting Amount Paid	Subcontract Payments as a Percent of Goal	M/WBE Payments	M/WBE Payments as Percent of Goal
20090037601	\$2,299,162	\$735,732	32%	\$446,438	19%	\$424,725	58%
20090023363	\$552,689	\$176,860	32%	\$204,383	37%	\$111,523	63%
20080042596	\$608,263	\$194,644	32%	\$403,173	66%	\$187,403	96%*
20090020216	\$684,917	\$219,174	32%	\$719,866	105%	\$265,998	121%
Totals	\$4,145,031	\$1,326,410	32%	\$1,773,860	43%	\$989,649	75%

* Work had not been completed by this contractor as of date of our review.

As can be seen in Table I, above, for the sampled contracts, three of the four prime contractors only achieved between 19 and 66 percent of their subcontracting payment goals and between 58 and 96 percent of their M/WBE payment goals (the first three contracts listed in Table 1). After we discussed these findings with Parks officials, the agency provided additional materials. For contract #20090037601, Parks provided evidence that the M/WBE subcontracting goal had been modified. Of concern, however, is the timeliness of this modification, which occurred subsequent to our review. Below is a timeline of certain key events related to this contract:

6/4/2009 – Contract award date. Project related to the construction of ballfields at three playgrounds.

- 8/19/2009 – Contractor informs Parks that it intends to meet its M/WBE goal by securing M/WBE subcontractors to perform tree service, electrical, fencing, and trucking work.
- 1/18/2010 – Contractor notifies Parks in writing that it will most likely not be able to meet M/WBE participation goal. Primary reasons given: 1) subcontracting goal established by Parks included trucking, which does not qualify as an M/WBE subcontracting service⁴ and 2) contractor unable to find M/WBE subcontractor for synthetic turf work. (Note: contractor had not indicated this as one of the areas for M/WBE subcontracting in its August 19, 2009 correspondence.)
- 4/9/2010 – Parks responds to January 18, 2010 letter from contractor. Parks emails contractor asking whether the contractor had been able to secure other M/WBE subcontractors or had at least documented its efforts to do so.
- 4/12/2010 – Contractor emails Parks stating that it planned to use an M/WBE subcontractor to perform landscaping work in an effort to address some of the M/WBE shortfall. Contractor states that it has been unable to secure an M/WBE subcontractor to perform the synthetic turf portion of the project but provides no documentation to show its efforts to do so.
- 6/10/2010 – Contract work certified by Parks Resident Engineer as complete.
- 8/16/2010 – Contractor submitted formal M/WBE subcontracting modification request, citing the above-stated reasons. Contractor states that the landscaping work awarded to an M/WBE subcontractor to address some of the M/WBE shortfall amounted to \$12,130. (Contractor provided supplemental information relating to its modification request on August 19, 2010.)
- 8/24/2010 – Audit team notified Parks that contract was selected for audit testing purposes.
- 10/19/2010 – After completing analysis, audit team met with Parks to discuss audit findings. Findings include failure of contractor to meet M/WBE participation goal.
- 10/20/2010 – Parks submitted contractor’s modification request to MOCS, recommending that it be approved. The primary reason given was that the TSP was overstated due to the inclusion of subcontracting synthetic turf work that was valued in excess of \$1 million.
- 10/26/2010 – Modification approved by MOCS. Total anticipated subcontracts and M/WBE participation goals reduced to \$835,161 and \$267,251, respectively.

As shown in the timeline above, Parks was notified as early as January 2010 that the contractor would have trouble meeting the M/WBE goals, yet there is little evidence that the agency took action until we met with officials to discuss this contract nine months later. Had Parks acted on the contractor’s January 18, 2010 correspondence in a more timely manner, it might have been in a better position to work with the contractor to encourage an expanded use of other subcontractors and M/WBEs to help make up the difference. By waiting until well after the project was completed to act on the modification request, Parks was unable to influence the contractor to expand subcontractor and M/WBE opportunities on this contract.

⁴ According to a MOCS’s October 19, 2006 memorandum to City agencies, trucking services “are not covered by any M/WBE subcontractor participation goals.”

In its January 18, 2010 and August 16, 2010 letters to Parks, the contractor stated that it was unable to secure an M/WBE subcontractor to install synthetic turf for an anticipated cost of \$1,116,990. Instead, the contractor did the work itself, which involved installing synthetic turf on four ballfields at three separate playgrounds. The contractor provided no documentation showing its efforts to secure a subcontractor to perform this work. Parks and MOCS ultimately granted the M/WBE goal modification request based primarily on the fact that the subcontract for synthetic turf installation would have exceeded the \$1 million threshold covered by Local Law 129.

In its August 19, 2009 letter to Parks, the contractor stated that it would meet its M/WBE goal by subcontracting the tree service, electrical, fencing, and trucking work only. (It did not identify the synthetic turf installation as one of the areas to be subcontracted to an M/WBE.) Since the contractor fell short of its subcontracting goals in each of these areas, the contractor might have been able to make up for the shortfall in a substantial way by subcontracting the synthetic turf installation for the ballfield(s) at one or two of the three playgrounds covered by the contract. Parks, however, neither suggested this option to the contractor nor required any documentation from the contractor to show that it had indeed tried to secure an M/WBE synthetic turf installation subcontractor.

The timing of Parks's determination that the synthetic turf subcontracting should be subtracted from the contractor's \$2.3 million subcontracting goal (and that, correspondingly, 32% of this amount should be subtracted from the M/WBE goal for this contractor) is questionable. The contractor's utilization plan lists six services for which subcontractors would be sought. These included exterminator, surveyor, electrical, fencing, synthetic turf, and pruning services. The plan, however, did not indicate how the \$2.3 million in subcontracting work would be distributed among these services. Considering the fact that the contractor's commitment to use subcontractors to perform \$2.3 million of the work on this contract was a factor considered by Parks in awarding the contract, Parks had leverage with the contractor to encourage it to seek other ways to achieve its subcontracting and M/WBE goals without exceeding the \$1 million threshold in reference to the installation of synthetic turf. By waiting until after the project was complete to review this issue, Parks lost any opportunity to exercise such leverage.

Parks Response: "As the auditors acknowledge on page 3, footnote 2, of the Report, a TSP represents '*...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.*' The turf subcontract fell outside of those industries and, as such, should not have been used in calculating the TSP."

Auditor Comment: Parks contends that subcontracts for the synthetic turf installation should not have been used in calculating the TSP. It must be noted, however, that Parks established the TSP *before* it solicited bid responses and before the contractor identified the synthetic turf installation as one of the services for which it would seek subcontracts. In its response to Parks's request for bids for this contract, it was the contractor, not Parks, who specifically identified the synthetic turf installation as one of six services for which it would seek subcontracts "in amounts below \$1 million." The contractor's bid also included an estimate that the installation work would cost a total of \$1,317,874. It

therefore appears that the contractor intended to either subcontract only a portion of the synthetic turf installation or engage in subcontracts (in amounts below \$1 million) with a number of vendors.

Parks Response: “Despite the improper inclusion of the synthetic turf subcontract in the TSP, the prime contractor made every effort to identify a certified M/WBE to perform the required synthetic turf subcontract work, however, there are no MBEs or WBEs Certified within the tri-state area to perform synthetic turf installation, according to the ‘Online Directory of Certified Businesses.’ Although the auditors state that Parks had limited contact with the prime contractor, there were numerous telephone calls and memos rebutting that conclusion.”

Auditor Comment: As we previously noted, although the contractor identified synthetic turf installation as a construction service that it would subcontract, it did not identify this service as one that it would subcontract to meet its M/WBE goal. Accordingly, the contractor’s statement that it could not find an M/WBE company to perform this work should not have been accepted by Parks because the contractor could have awarded the work to a non-M/WBE company and taken a major step towards meeting its overall subcontracting goal.

Additionally, although Parks asserts that there were “numerous telephone calls and memos” between Parks and the contractor, two e-mail messages were the only evidence Parks provided of contact related to M/WBE participation that occurred between the contractor’s January 2010 letter to Parks indicating that it was experiencing difficulty meeting its M/WBE participation goal and its August 2010 letter formally requesting a M/WBE goal modification. On April 12, 2010, the contractor e-mailed Parks further discussing its difficulty meeting its M/WBE participation goal. In its April 19, 2010 response, Parks asked the contractor whether it had “been able to secure other MBE subcontractors” and whether it had “documented [its] efforts” and stated that MOCS would need to approve “any revision to the MBE goal.” According to the evidence provided by Parks, the next contact on this issue did not occur until after the project was completed.

Parks Response: “The draft audit report inaccurately characterizes the process that led up to this modification request. The Report inaccurately states that ‘*In its August 19, 2009 letter to Parks, the contractor stated that it would meet its M/WBE goals by subcontracting the tree service, electrical, fencing, and trucking work only. ...*’

“In fact, the contractor’s letter of August 19th stated that the electrical work had been eliminated and therefore was not necessary.”

Auditor Comment: Parks confuses the August 19, 2009 letter in which the contractor stated how it would meet its M/WBE goal with the August 19, 2010 letter in which the contractor provided supplemental information related to its request for an M/WBE subcontractor goal modification.

Parks Response: “The Report suggests that the values listed in Table I for contract # 20090037601 were not changed to reflect the approved M/WBE modification due to ‘questionable’ factors relating ‘...to the timeliness of certain key events related to this contract.’ Parks vigorously protests the apparent implication that the timing of this modification approval should call its substance into question.”

Auditor Comment: For all the reasons we state above, we continue to believe that Parks did not handle this goal modification request appropriately. By reviewing the contractor’s goal modification request months after the project was completed, Parks eliminated the possibility of successfully encouraging the contractor to find other opportunities to meet the subcontractor and M/WBE goals for this contract. Instead, Parks requested and received approval to modify the TSP, which likewise reduced the M/WBE payment goal. As stated earlier, the contracting agency establishes the TSP (upon which the M/WBE payment goal is based); it is up to the contractor to identify the services it will subcontract to meet this goal. If a contractor selects a service that an agency later deems to be ineligible, the agency can work with the contractor to select another service (or services) to make up the difference.

In another case, the contractor for contract 20090023363 paid an unapproved vendor for work reportedly completed by an approved subcontractor. This contractor certified that it paid an approved subcontractor (not an M/WBE) \$117,859 for safety surface installation. Our review of the contractor’s records, however, reveals no payments to this vendor. Instead, we identified payments to another vendor that was not reported to Parks and was not an approved subcontractor. According to the prime contractor, the unapproved vendor, which supplied the safety surface material, in turn paid the approved subcontractor, which installed the safety surface. The prime contractor provided no evidence, however, that the unapproved vendor paid the approved subcontractor. As a result, these payments are not included in Table I above. We must also note that this contractor paid \$41,309⁵ for trucking services to help it meet its M/WBE participation goal, and this was incorrectly accepted by Parks (as explained in footnote 4 above). This amount was also not included in Table I.

Parks Response: “There was some ambiguity at that time regarding whether or not trucking could be defined as a construction industry subcontract. Therefore, Parks allowed this contractor to utilize two trucking M/WBEs. During a meeting with MOCS in early May 2009, it was clarified that trucking work (to and from the construction site) is not considered to be construction industry work, and hence, cannot be counted towards an M/WBE subcontracting goal. An internal directive was issued by Parks stating the above towards the end of May 2009. Prior to the clarification however, the work had already been performed.”

Auditor Comment: As stated in the report, MOCS had clearly (and unambiguously) informed City agencies in an October 19, 2006 memorandum that trucking services “are

⁵ In its response, Parks states that the contractor only paid \$40,459 for trucking services. However, the contractor provided us with canceled checks for trucking services that totaled \$41,309. Apparently, Parks was unaware of one payment of \$850 to the subcontractor for trucking services that represents the difference between the two amounts.

not covered by any M/WBE subcontractor participation goals.” According to Parks, MOCS clarified during a May 2009 meeting that trucking services performed at a construction site could be counted toward the M/WBE goal while trucking to and from the site could not. However, since Parks states that this trucking service was performed prior to the May 2009 meeting, the 2006 memorandum excluding all trucking services from M/WBE subcontracting was still in effect at that time. In addition, Parks did not furnish any evidence that the trucking services provided on this contract would have even met this new exception.

For the four sampled contracts, Parks set a goal that 32 percent of monies paid to subcontractors should go to M/WBEs. While meeting this requirement, three of the four contractors fell short of the dollar amounts expected to be spent on M/WBE subcontractors by between 4 and 42 percent (the first three contracts listed in Table 1). This occurred because the M/WBE payment goals are related to the subcontracting payment goals. The less that subcontracting payment goals are actually achieved, the less likely it is that the payments to M/WBE subcontractors will achieve expected levels. This is so even if the goal is met for a certain percentage of the amount spent on subcontractors to have been spent on M/WBE subcontractors.

Our analysis of the payments made to M/WBE subcontractors revealed discrepancies between the payments as reported by the prime contractors on Form 44 and the payments as recorded in the prime contractors’ files. For two of the four contracts, the payment amounts indicated on Form 44 exceeded the payment amounts indicated on records in the contractors’ files, as shown in Table II, below.

Table II
Overstatement of Payments to M/WBE Subcontractors

Contract #	Payments to M/WBEs according to Form 44	Payments to M/WBEs according to Contractors’ Records as of Date of Last Form 44	Discrepancy	Additional Payments to M/WBEs subsequent to Date of Last Form 44	Total Payments to M/WBEs	Remaining Discrepancy
20090023363	\$113,581	\$32,505	\$81,076	\$79,018	\$111,523	\$2,058
20080042596	\$198,257	\$184,663	\$13,594	\$2,740	\$187,403	\$10,854
Totals	\$311,838	\$217,168	\$94,670	\$81,758	\$298,926	\$12,912

As can be seen in Table II, the total M/WBE subcontractor payments reported to Parks for these two sampled contracts was \$311,838; however, based on our review of the prime contractors’ records, which included a review of invoices, canceled checks, and general ledgers, we determined that the actual M/WBE subcontractor payments totaled \$217,168 as of the date of the last Form 44 filed by each prime contractor. The prime contractors made additional payments to M/WBE subcontractors after the date of the last Form 44 they filed with Parks, as indicated in

Table II. The Form 44 statements were inaccurate in that the contractors appeared to have included some anticipated payments to the M/WBE subcontractors even though Form 44 asks for information on actual payments to subcontractors. Of the \$94,670 that had not been paid out as of the date of the last Form 44 statements, \$12,912 was still outstanding after we accounted for all subsequent payments that we were able to verify as being made on the M/WBE subcontracts.

In summary, Parks should be compiling an accurate list of M/WBE subcontractor payments based not just on information received from the prime contractors on Form 44, but also on its review of the prime contractors' records and its communication with M/WBE subcontractors. This would allow Parks to accurately determine the value of the payments to M/WBE subcontractors and whether anticipated payment levels for M/WBE subcontractors are being achieved.

Recommendations

Parks should:

1. Update written procedures in a timely manner to ensure that agency personnel are clearly aware of their oversight responsibilities concerning contractor compliance with Local Law 129.

Parks Response: "Parks agrees with this recommendation and has had various written procedures since LL 129 took effect. Parks considers the development of a procedures manual to be good business practice to ensure uniformity. In January 2010, Parks distributed a current manual to all personnel involved in construction procedures (including references to LL129) in January 2010. A directive regarding trucking has since been distributed and has been incorporated into the written procedures manual. Similar changes or updates in protocol regarding LL 129 will be distributed in a similar and timely manner to applicable Parks personnel and incorporated into the written procedures manual as well."

2. More effectively monitor the use of M/WBEs by prime contractors by contacting M/WBEs identified in utilization plans to confirm their level of participation, by more closely reviewing subcontracting plans and actual payments to subcontractors, and by auditing the contractors' books and records.

Parks Response: "Although Parks has established that it *does* closely monitor all subcontractors utilized by a prime for a given contract by virtue of the extensive documentation prepared and required for applicable contracts and the presence of on-site Resident Engineers, Parks will, on an appropriate sampling basis, survey M/WBEs by telephone to ensure that they are receiving payments that have been recorded on Form 44, which contains an attestation from the prime contractor regarding payments to subcontractors. Additionally, Parks will, on a spot check basis, request proof of payment from prime contractors as an additional step to verify payments to M/WBEs, and will also audit LL 129 compliance issues, as appropriate, in Agency audits of prime contractors."

3. Initiate enforcement actions against those prime contractors that do not comply with the M/WBE provision of their contracts.

Parks Response: “Parks has done so and will continue to initiate enforcement actions, as appropriate, against prime contractors that do not comply with the M/WBE provision of their contract. Parks is in constant contact with all subs as previously mentioned.”

4. Review requests from prime contractors for M/WBE goal modifications in a timely manner.

Parks Response: “Parks has done so and will continue to review requests from prime contractors for M/WBE goal modifications in a timely manner.”

5. Ensure that prime contractors only indicate on Form 44 their actual payments to subcontractors.

Parks Response: “Although Form 44 already contains the language that the contractor is attesting to payments made “*under penalty of perjury*,” Parks will strengthen the language to reduce contractor misunderstanding of the form. Additionally, Parks will request proof of payment, on a spot check basis, in addition to Form 44.”

Parks Data on Anticipated Use of Subcontractors Are Unreliable

The anticipated subcontractor amounts reported by Parks in FMS are not supported by Parks’s records. For the four sampled contracts, Parks reported in FMS that the prime contractors estimated that they would engage in subcontracts valued at \$2,587,658. Our review of Parks supporting documentation, however, revealed that prime contractors anticipated engaging in subcontracts valued at only \$1,503,164, a 42 percent decrease.

Payments recorded in FMS are those made to the prime contractors. FMS does not capture payments to subcontractors, as these payments are not made by the contracting agency but rather by the prime contractors. However, anticipated subcontractor amounts are entered by Parks in the FMS Contract Goal Line (CTGL) table. According to the FISA contract processing training manual, the CTGL table contains subcontractor specific information that is provided by the prime contractor. A CTGL record is intended 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 or 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.

The information entered in the CTGL table is provided by the prime contractor on a Subcontractor Approval Form. For the four sampled contracts, however, we identified discrepancies between the subcontract amounts entered in the CTGL table by Parks and the amounts noted by the prime contractors on the Subcontractor Approval Forms available in Parks’s contract files. The discrepancies in the subcontractor amounts are shown in Table III, below.

Table III
Discrepancies between Subcontractor Amounts Recorded in FMS
And Subcontractor Amounts per Subcontractor Approval Forms

Contract #	Anticipated Subcontractor Amounts in FMS CTGL Table		Anticipated Subcontractor Amounts as per Subcontractor Approval Forms	Difference between Recorded CTGL Amounts and Subcontractor Approval Form Amounts
	Recorded Amounts	Auditor-Adjusted Amounts*		
20090037601	\$20,160	\$20,160	\$832,254	-\$812,094
20090023363	\$320,329	\$320,329	\$265,150	\$55,179
20080042596	\$1,004,916	\$696,735	\$175,000	\$829,916
20090020216	\$1,242,253	\$1,242,253	\$230,760	\$1,011,493
Totals	\$2,587,658	\$2,279,477	\$1,503,164	\$1,084,494

*In a few instances, Parks entered actual payment amounts rather than anticipated payments.

As can be seen in Table III, the total subcontractor amount, including M/WBEs, recorded by Parks in the CTGL table for the four sampled contracts was \$2,587,658. Based on our review of Parks’s contract files, however, the prime contractors had submitted Subcontractor Approval Forms that showed anticipated spending on subcontractors totaling only \$1,503,164, a 42 percent decrease. Based on a comparison of the data recorded in the CTGL records and on the Subcontractor Approval Forms, Parks is overreporting overall anticipated subcontractor use for these contracts.

Recommendation

6. Parks should ensure that its FMS CTGL data on anticipated payments to subcontractors are consistent with the anticipated payments noted by its prime contractors on Subcontractor Approval Forms.

Parks Response: “Parks notes, as detailed above, that there are many valid business reasons – e.g., cuts to the projects’ scopes, success at obtaining lower than initially estimated pricing, etc. – why anticipated subcontract amounts may properly differ from actual payment amounts.

“Parks agrees with the recommendation that accurate data on anticipated subcontracting is important, however, and has centralized the FMS CTGL duties to the Systems and

Analysis Unit to maximize efficiency. This was done in February of 2010 (prior to the commencement of the audit). Parks's current practices adequately and appropriately ensure the accuracy of the *anticipated* subcontract amounts in FMS, 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 MOCS has been negotiating with 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."

Other Matter

Parks Procurement Data Reported by MOCS

The data upon which MOCS bases its public reporting of M/WBE subcontractor participation goals and the use of M/WBE subcontractors by the City reflect anticipated rather than actual amounts. The actual payments to M/WBE subcontractors on contracts with established M/WBE goals are not publicly reported.

FMS is the source for the M/WBE subcontracting information used by MOCS for Local Law 129 reporting. MOCS generally relies on the information that agencies enter in the CTGL table in FMS to report on the use of M/WBE subcontractors by the City. As noted previously, the subcontractor amounts recorded in the CTGL table are based on the approximate anticipated value of the subcontracts. It is not intended that information on actual payments to subcontractors should be entered in the CTGL table. To determine the extent to which the anticipated subcontractor payments differed from the actual payments for the four sampled contracts, we compared the total anticipated subcontractor and M/WBE subcontractor amounts entered in FMS by Parks to the actual payments identified from our review of the prime contractors' files. The differences in the subcontractor amounts are shown in Table IV, below.

Table IV
Subcontractor Amounts Recorded in FMS and
Subcontractor Payments per Prime Contractor Records

Contract #	Anticipated Amounts as per FMS CTGL Table		Actual Amounts as per Prime Contractor Records	
	Total Subcontractor Amounts	M/WBE Subcontractor Amount	Total Subcontractor Amount	M/WBE Subcontractor Amount
20090037601	\$20,160	\$12,160	\$446,438	\$424,725
20090023363	\$320,329	\$196,759	\$204,383	\$111,523
20080042596	\$1,004,916	\$590,762	\$403,173	\$187,403
20090020216	\$1,242,253	\$505,760	\$719,866	\$265,998
Totals	\$2,587,658	\$1,305,441	\$1,773,860	\$989,649

As can be seen in Table IV, the total subcontractor amount recorded by Parks in the CTGL table for the four sampled contracts was \$2,587,658; however, based on our review of the prime contractors' records, we determined that the actual subcontractor payments totaled only \$1,773,860. The M/WBE subcontractor amount recorded by Parks in the CTGL screen for the four sampled contracts was \$1,305,441; however, based on our review of the prime contractors' records, we determined that the actual M/WBE subcontractor payments totaled only \$989,649.

Regarding the percentage of subcontracting dollars that went to M/WBEs, Parks performed better than anticipated for the four contracts. The agency anticipated that about 50 percent (\$1,305,441 out of \$2,587,658) of the subcontractor payments would go to M/WBEs, but actually about 56 percent (\$989,649 out of \$1,773,860) went to M/WBEs. Regarding the total payments made to M/WBE subcontractors, Parks performed worse than anticipated, down from \$1,305,441 to \$989,649, a 24 percent decrease. For the four contracts in our sample, as shown in Table IV above, total subcontractor payments were down from an anticipated \$2.6 million to an actual \$1.8 million. Since an M/WBE payment goal is based on the total subcontractor payment goal for the contract, a shortfall in achieving the total subcontractor payment amount would make it less likely that the M/WBE payment goal would be met. This is true even if the M/WBE percentage goal (percentage of the amount spent on subcontractors that was spent on M/WBE subcontractors) is achieved or exceeded.



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December 14, 2010

H. Tina Kim
Deputy Comptroller, Office of the Comptroller
1 Centre Street, Room 1100
New York, N.Y. 10065

**RE: Audit Report on the Department Parks and Recreation's Monitoring of Subcontractors
Covered by Local Law 129, ME10-143A, dated November 29, 2010**

Dear Deputy Comptroller Kim,

Thank you for allowing the New York City Department of Parks & Recreation ("Parks" or "the Agency") to comment on the above referenced New York City Comptroller's ("Comptroller") Draft Audit Report ("Report") on Parks' monitoring of subcontractors covered by Local Law 129 ("LL 129" or "the Law"). Parks appreciates the professionalism exhibited by the Comptroller's team during the course of this audit. Parks is further pleased that some important changes were made to the Report based on our suggestions and comments at the Exit Conference.

Notwithstanding the above, the Report does not adequately reflect the Agency's compliance efforts to follow the many requirements of LL 129 nor does the Report accurately reflect the fact that Parks surpassed the Minority and Women Owned Business Enterprises ("M/WBE") goals included in the audit sample. Specifically, the Report understates the proportion of payments made to M/WBEs as a percent of the Agency's M/WBE goal. Indeed, in the sample of capital contracts selected by the auditors, Parks achieved 120% of its MWBE goal, not 75% as suggested in the Report. The following response highlights Parks' demonstrated efforts to comply with LL 129 and addresses the Report's findings and recommendations.

Thank you and your staff for the time and effort devoted toward completing the Report.

Sincerely,

Robert L. Garafola

Cc: Adrian Benepe (Commissioner, Parks), Liam Kavanagh (Deputy Commissioner, Parks), Therese Braddick (Deputy Commissioner, Parks), George Davis (Mayor's Office), Marla Simpson (MOCS), Frank DiCola (Parks)

INTRODUCTION

Local Law 129 Background and Parks' Achievements

In 2005, the City Council enacted LL 129 to encourage the use of M/WBEs for City contracts valued at less than \$1 million dollars. LL 129 took effect in July 2006 and provided a "ramp-up" period of three years to allow agencies to initiate and improve upon their compliance efforts. LL 129 applies to both expense and capital projects, although the Report focuses on capital projects, sampling four contracts. The period covered by the audit, FY07-FY10, approximates the "ramp up" period under LL 129.

LL 129 requires agencies to establish Target Subcontracting Percentages ("TSP") based on historical knowledge of the type of work typically subcontracted. The TSP is intended to be an estimate of the amount of relevant subcontracting work under \$1 million dollars. The TSP is used to determine a percentage and dollar amount anticipated to be awarded to M/WBE vendors.

Since the Law took effect, Parks has worked closely with the Mayor's Office of Contract Services ("MOCS") and the Department of Small Business Services ("SBS") to implement procedures and protocols for achieving the goals of LL 129. Since the enactment of LL 129, Parks has:

- 1) Coordinated and/or attended 12 outreach sessions and seminars for potential M/WBEs for capital projects and 16 such events for potential M/WBEs for expense projects (since April 2007).
- 2) Registered over 300 capital contracts that cumulatively had TSPs of over \$147 million and awarded over \$33 million to M/WBEs.
- 3) Created "Form 44" which identifies all payments to subcontractors (including M/WBEs) actually working on each construction project. This form is signed by the owner/president of the prime contractor as an attestation under penalty of perjury.
- 4) Received the "Agency of the Year" award from SBS in 2010 with respect to its strides made with LL 129 during 2009.
- 5) Participated in training classes (some in conjunction with MOCS and SBS) that included all personnel involved with the M/WBE program and other aspects of the procurement process overall. In January 2010, Parks conducted its own "Training and Refresher Course" attended by over 100 Resident Engineers. At that time the current construction manual, which included M/WBE guidelines, was distributed. In October 2010, over 140 construction personnel were trained by SBS regarding LL129 and its utilization by Parks.
- 6) Continued its outreach efforts by attending the Hispanic Business to Business ("HBB") seminar hosted by HBB (November 2010).
- 7) Centralized the duties of Financial Management System ("FMS") entries to maximize efficiency (February 2010).
- 8) Conducted two meetings with contractors to discuss the status of their work and underutilization of their M/WBE goals (2010).
- 9) Ensured that the M/WBE Officer reviews the quarterly SBS reports to monitor Agency progress and conducts informal meetings with both the Capital and Expense Agency Chief Accounting Officers (ACCOs). Additionally, Parks' M/WBE Officer, along with the Deputy Commissioner for Capital Projects and the agency's ACCOs, has attended formal meetings with SBS.
- 10) Developed Utilization Plans for M/WBE percentages that mirror those set forth by SBS citywide goals, even though the Agency is not required to do so.

Parks strongly believes that these proactive measures illustrate our strong commitment to the City's efforts under LL 129 and our commitment to assist M/WBEs in doing business with Parks.

PARKS' RESPONSE TO REPORT FINDINGS

The New York City Comptroller's findings are indicated below by Page # and Paragraph # as they appear in the Report, with Parks' response immediately following.

FINDING:

Parks Monitoring of Contractor Compliance with M/WBE Participation Goals Needs Improvement

Page 7—Paragraph 1: *"Parks is in partial compliance with the provisions of Local Law 129 relating to its monitoring of the use of M/WBEs by vendors that were awarded contracts with M/WBE subcontractor participation goals."*

Page 7 - Paragraph 4: *"...the agency M/WBE Officer is required to monitor each contractor's compliance with its utilization plan by appropriate means... However, we determined that Parks does not have detailed procedures in place to verify M/WBE participation."*

Parks maintains that it is in substantial compliance with the provisions of LL 129 regarding monitoring of prime contractors with participation goals.

The Agency M/WBE Officer utilizes the Agency Chief Contracting Officer, Deputy Chief of Construction, Borough Directors of Construction and Resident Engineers to monitor prime contractor compliance. The Resident Engineers are in frequent contact with prime contractors and all subcontractors, including M/WBEs. Parks monitors each contract via the reporting forms used by Resident Engineers. No subcontractor work can begin until all of the subs listed on the Subcontractor Approval Form are verified and approved, and M/WBE subcontractors, if applicable, are certified. The Resident Engineers monitor performance according to estimated completion schedules, verify that work is being performed according to plans, obtain payroll reports (which contain names of workers, hours worked, and wages paid), and monitor subcontracting performance and utilization. Additionally, our capital staff performs routine desk reviews of payroll records, payment requisitions and required certificates from prime contractors in a measure to ensure that prime contractors fulfill all of their obligations to the City.

The following forms create a reliable system of checks and balances:

- 1) Schedule B-Subcontractor Utilization Form: Contains the affirmation of the prime contractor accepting the agency's TSP and M/WBE utilization percentage.
- 2) Contractor's List of Subcontractors: Submitted by the prime contractor for all contracts within 30 days of issuance of the Notice to Proceed and indicating the list of subcontractors (M/WBE or otherwise) that it anticipates using during the first 12 months of the contract term. For multi-year contracts, an updated list is required each year. Parks also performs a preliminary review to ensure M/WBE certification.
- 3) Subcontractor Approval Form: Submitted by the prime contractor indicating the name of the subcontractors (M/WBE or otherwise), the anticipated dollar amount to be paid to the subcontractor, and signed by the contractor indicating that he has notified the subcontractors of the relevant requirements. This form also contains a section asking the prime to identify whether the prospective subcontractor is a certified M/WBE (a designation which is then verified by Parks). In addition, Parks ensures that a VENDEX check is performed for each subcontractor submitted by the prime for approval by Parks. A final approval by Parks is signed after all conditions are met.
- 4) Form 44: Identifies all subcontractors (including name, address, and telephone number) that have been paid by the prime contractor. The prime contractor attests to the validity under penalty of perjury.

- 5) **Form 39-1:** Indicates the prime contractor's payment summary and amount due. This form also refers to Form 44 as a cross check. It also contains the percentage of work completed, contract time in terms of days and time elapsed. It is reviewed and signed by the Resident Engineer and the prime contractor.
- 6) **Form 34:** This form, signed by the Resident Engineer, indicates a status of M/WBE payments with year-to-date achievements. This process verifies the M/WBE worksite activity.

If an M/WBE subcontractor is not being paid, utilized correctly, or has any other complaints as to its dealings with the prime contractor, such issues are brought to the attention of the on-site Resident Engineer. This information is then passed to the Borough Director of Construction and ultimately the Deputy Chief of Construction, evidencing multiple levels of review.

Additionally, the Subcontractor Approval Unit ("SAU"):

- 1) Reviews the utilization plan submitted by the prime contractor.
- 2) Reviews the list of subcontractors intended for use during the first 12 months of the contract from the prime contractor who is required to submit the list within 30 days of receipt of the notice to proceed.
The SAU:
 - a) Identifies the M/WBE subcontractors and how goals are going to be met
 - b) Confirms if the listed M/WBE subcontractors are certified with SBS. If not, the prime contractor and construction staff are notified. No subcontractors are approved until revised list is provided.
 - c) If a subcontractor is only certified in the NYS MBE program, they are encouraged to contact SBS to obtain certification with SBS.
 - d) Performs a VENDEX, DOI, and/or Vendor Name Check on all subcontractors.
 - e) New subcontractors are requested by SAU to submit their W-9 Form. Without this form, they cannot be approved.

Parks employs monitoring forms, oversees the use of subcontractors and M/WBEs, and maintains ongoing contact with subcontractors and M/WBEs. Therefore, Parks disagrees with the finding that it "...does not have sufficient procedures in place to verify M/WBE participation." During the inspection of the project files, the auditors reviewed all of these documents, and, additionally, on October 20, 2010 accessed the daily, weekly and monthly reports. Therefore, Parks also disagrees with the audit finding that this is not considered "regular contact with sub contractors."

Page 7 - Paragraph 5: *"Prime contractors are required to complete Subcontractor Approval Forms to show subcontractors that the prime contractor anticipates using... However, it is Parks' (sic) responsibility to verify actual use of the M/WBEs, not just the prime contractor's intent to use them."*

As discussed above, a separate Subcontractor Approval Form is utilized by the prime contractor for each anticipated subcontractor it submits to Parks for approval. This form contains the anticipated subcontractor name, description of the anticipated subcontract work, approximate dollar value of the subcontract award as well as the approximate start/end dates for the subcontract. In addition, this form asks the prime contractor to indicate whether the subcontractor is a certified M/WBE (a designation which is then verified by Parks). Depending on the circumstances, an approved subcontractor may be paid less or more than originally anticipated by the prime and identified on the Subcontractor Approval Form or they may not be used at all. LL 129 does not impose inflexible requirements for the use of every subcontractor initially identified, but rather, contemplates changes as the construction projects proceed. Many of the subcontractors submitted for approval also appear on the initial subcontractor list submitted by the prime to Parks. As discussed above, for

both one-year and multi-year contracts, §6-129(i)(6) requires the prime to submit to Parks, within 30 days of issuance of the Notice to Proceed, a list of subcontractors that it anticipates using during the first 12 months of the contract term. LL 129 does not require the prime to submit a list of all subcontractors it anticipates using during the life of the contract (for multi-year contracts), recognizing that the needs for certain work may change as the project progresses. Therefore, a Subcontractor Approval Form is not required for all subcontractors identified on the prime contractor's initial list if those subcontractors are not eventually utilized by the prime. As referenced above, Parks utilizes the applicable forms throughout the life of the contract, as well as the on-site monitoring of the project by Resident Engineers, to verify the actual use of and payments made to M/WBE subcontractors by the prime contractor.

Page 8 - Paragraph 1: *"...Parks provided little evidence that subcontractors are contacted to verify that their levels of participation in a project have been accurately reported by the contractors on Form 44."*

Although the auditors acknowledge that Resident Engineers regularly note subcontractor work, the Report erroneously concludes that there is no evidence of verification. The Resident Engineers, who are on the project site regularly, report the work that was performed, and by whom, via the weekly report which summarizes the daily reports. If a prime contractor or subcontractor is not present as scheduled, the reason for that absence is indicated on the daily report. The weekly report identifies the approved subcontractors that were working, what work was performed, and contains check-off boxes indicating participation (badges worn and sign-in sheets provided). Form 34 is used, among other things, to identify the status of M/WBE goals. Form 39-1 is used to further identify the percent of work completed, percent of time elapsed (for proposed contract duration) and it annexes Form 44 (subcontractor compliance report). Form 39-1 is signed by both the Resident Engineers and the contractor. Form 44 is signed by the contractor, under penalty of perjury, that the information is accurate. These forms are completed each time the prime contractor submits a request for payment and all of the above-referenced procedures are strong indicators of regular contact with both the contractor and subcontractors.

Page 8 - Paragraph 4: *"On June 9, 2010, we initially requested from Parks the standard operating procedures that the agency uses to ensure contractor compliance with M/WBE subcontracting requirements. However, we were not provided with these procedures (which were dated January 2010) until October 19th, 2010..."*

The standard operating procedures ("SOP") were distributed to all construction personnel in January 2010. This comprehensive SOP covers all construction procedures, not only those pertaining to M/WBEs. Auditors were given sign-in sheets and the PowerPoint presentation from this meeting. Although procedures were in place prior to the formalized SOPs, as anticipated by LL 129, Parks used the three year "ramp-up" period to compile and test its procedures and protocols, and continues to modify the SOP as needed. The entire manual, along with sign-in sheets containing over 100 names of attendees from the training session, was distributed to the auditors at the Exit Conference. The corrections noted have been made and will be distributed as an addendum to the manual.

Page 9 - Paragraph 1: *"If total payments to M/WBEs are for less than the amount specified in the contractor's utilization plan, the agency is required to take appropriate action for noncompliance."*

As discussed later in this response, the Agency does take action as necessary, when noncompliance occurs. However, not every change in the amount of subcontracting (either overall or for M/WBEs) in fact reflects noncompliance. As a Capital project progresses we may determine that a certain service is no longer needed, and that decision may have an unanticipated impact on the prime contractor, if that particular service had been intended as an M/WBE subcontract. Furthermore, it should be noted that M/WBE subcontractor

participation goals are just that – goals -- not rigid benchmarks. LL 129 requires good faith efforts in all cases, but recognizes that full achievement will not occur in all cases.

Page 9 - Paragraph 2: *“Parks officials stated that within the last three years it has only initiated action against one contractor that did not meet its goals....Our initial review found no evidence that any action (ranging from entering into an agreement with the contractor to address the noncompliance to terminating the contract) was taken in response to the inability of the prime contractors to meet their goals.”*

Parks disagrees with this finding. During the audit period, Parks initiated two actions for contractors not meeting their goals:

- 1) **Contract # CNYG-407M.** Parks determined that the contractor was not meeting its M/WBE goals. Parks held a meeting on August 13, 2010 with this contractor (who was represented by counsel) wherein it was given an opportunity to respond to the issues regarding its utilization of M/WBE subcontractors. Parks recommended to MOCS that money be withheld in the amount of the M/WBE shortfall, and that a caution be entered into VENDEX, which would be considered in determining responsibility for any subsequent award that the contractor may seek to obtain. Parks is still discussing the appropriate enforcement action to take in consultation with MOCS and the New York City Law Department.
- 2) **Contract # M098-107M.** Parks held a meeting with the contractor on August 24, 2010 after a review of the Resident Engineers' form 39-1 (dated June 2010) indicated that the contractor was far behind schedule. In addition, Parks followed-up by letter dated September 3, 2010 reminding the contractor of its commitment to meeting the applicable M/WBE goals. Since the contractor is still working at the site, Parks has not taken any official enforcement actions with respect to this contract since the contractor still has the ability to meet its M/WBE goals and, based on the August 24, 2010 meeting, has indicated an intention to do so. Parks will continue to monitor this contractor's performance.

Furthermore, an M/WBE modification request was made for contract #20090037601. This request, and the subsequent grant of said M/WBE modification request by Parks, as approved by MOCS, is discussed in more detail below.

Page 9 - Paragraph 2 (and Table I): *“[T]hree of the four prime contractors only achieved between 19 and 66 percent of their subcontracting payment goals and between 58 and 96 percent of their M/WBE payment goals.”*

Parks strongly disagrees with this finding. The Agency maintains, and has supplied, the relevant information to the auditors, that two of the four contracts sampled far exceeded their goals. In addition, Parks expects the prime contractor to meet or exceed its M/WBE participation goals once the pending work is completed on the third sampled contract (which involved work that was, and remains, incomplete at the time of this audit). Thus, as further detailed below three out of the four contracts reviewed have or will have achieved their goals. Finally, the prime contractor in the fourth sampled contract achieved 86% of its goal, not the 63% as the Report indicates. As a result, this brings the Agency's total M/WBE achieved goals for the four sampled contracts to 120% and not 75% as stated in the Report. These achieved goals and our ongoing site monitoring and documentation review, illustrate Parks' substantial compliance with the Law.

In addition, Parks believes the figures provided in Table I of the report are inaccurate, and especially for contract #20090037601, are inconsistent with LL 129, which requires that legal effect be given to an approved M/WBE modification.

Contract #20090037601

As discussed above, the M/WBE modification request by the contractor for contract #20090037601 was approved by Parks and MOCS in accordance with LL 129. The initial TSP established by Parks for this contract improperly included a subcontract for the installation of a synthetic turf field with an anticipated cost of over \$1.5M. As the auditors acknowledge on page 3, footnote 2, of the Report, a TSP represents "...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." The turf subcontract fell outside of those industries and, as such, should not have been used in calculating the TSP. Despite the improper inclusion of the synthetic turf subcontract in the TSP, the prime contractor made every effort to identify a certified M/WBE to perform the required synthetic turf subcontract work, however, there are no MBEs or WBEs Certified within the tri-state area to perform synthetic turf installation, according to the "Online Directory of Certified Businesses." Although the auditors state that Parks had limited contact with the prime contractor, there were numerous telephone calls and memos rebutting that conclusion.

The prime contractor notified Parks that it could not find an M/WBE subcontractor to install the synthetic turf in January 2010, six months after the contract was awarded; it should be noted in addition, that the cost of the work identified by the contractor at that time appeared to exceed the \$1 million dollar threshold to which the M/WBE goals may legally apply. However, the prime contractor also identified substitute subcontract work not originally contemplated by the prime to offset the shortfall in meeting its participation goals. On April 12, 2010, the contractor indicated that it planned to use an M/WBE landscaper to make up some of the shortfall. On August 16th, the prime contractor requested a modification pursuant to LL 129. On August 18th, Parks followed up and requested additional information, and on August 19th, the contractor responded.

The draft audit report inaccurately characterizes the process that led up to this modification request. The Report inaccurately states that "*In its August 19, 2009 letter to Parks, the contractor stated that it would meet its M/WBE goals by subcontracting the tree service, electrical, fencing, and trucking work only. Since the contractor fell short of its subcontracting goals in each of these areas, the contractor might have been able to make up for the shortfall in a substantial way by subcontracting the synthetic turf installation for at least one of the three ball fields covered by the contract...*"

In fact, the contractor's letter of August 19th stated that the electrical work had been eliminated and therefore was not necessary. It provided information to document final costs vs. proposed costs for M/WBEs. For example, in its letter of August 16th, the contractor had indicated that fencing would cost less than the engineer's estimate, that tree service was reduced for the same reasons, and that a landscaping M/WBE would be utilized as a replacement in an effort to make up a small percentage of the potential M/WBE shortfall. The contractor could not have utilized an M/WBE for one of the ballfields, as the auditors apparently are claiming it should have, because there are no M/WBEs synthetic turf installers certified to do business with the City within the tri-state area.

Based on its good faith efforts, the contractor's modification request was consistent with LL129. This modification was ultimately approved by Parks and MOCS for the reasons stated above. Despite our explanation of this modification to the auditors at the Exit Conference and related request to modify the applicable values in the table, Table I still has not been changed by the auditors to reflect the new and correct TSP of \$835,160 and corresponding M/WBE participation goals of \$267,251, as per the approved modification. Based on the correct figures, this contract should reflect achievement of 159% of the M/WBEs goal as evidenced by documented M/WBE payments of approximately \$424,725.

The corrected table below (**Table 1 Amended**) displays the Subcontracting Goals, M/WBE Goals, M/WBE Payments, and M/WBE Payments as a Percentage of Goals for each of the four contracts reviewed by the

auditors. The values cited in the Report (un-shaded columns) are directly compared with the values used by Parks (shaded columns) to show that Parks in fact achieved 120% of its M/WBE goals – not 75% as stated by the auditors. All values highlighted in bold reflect what Parks believes are the correct amounts for subcontracting and M/WBE goals, taking into account the modification for contract #20090037601 approved by the Mayor's Office of Contract Services (MOCS) as per the requirements of LL 129:

Table I Amended
Payments as a Percentage of M/WBE Goals: Modifications Pursuant to LL 129

Column A	Column B	Column C	Column D	Column E	Column F	Column G	Column H	Column I
Contract Number (#)	Subcontracting Goal (Per Auditors)	Subcontracting Goal (Per Parks)	M/WBE Goal (Per Auditors)	M/WBE Goal (Per Parks)	M/WBE Payments (Per Auditors)	M/WBE Payments (Per Parks)	M/WBE Payments as a Percentage of Goal (Per Auditors)	M/WBE Payments as a Percentage of Goal (Per Parks)
20090037601	\$2,299,162	\$835,160	\$735,732	\$267,251	\$424,725	\$424,725	58%	159%
2008042596*	\$608,263	\$608,263	\$194,644	\$194,644	\$187,403	\$187,403	96%	96%
20090023363	\$552,689	\$552,689	\$176,860	\$176,860	\$111,523	\$151,982	63%	86%
20090020216	\$684,917	\$684,917	\$219,174	\$219,174	\$265,998	\$265,998	121%	121%
Total:	\$4,145,031	\$2,681,029	\$1,326,410	\$857,929	\$989,649	\$1,030,108	75%	120%

* This project has not been completed. Parks anticipates that this Contractor will meet or exceed its M/WBE Goal

The Report suggests that the values listed in Table I for contract #20090037601 were not changed to reflect the approved M/WBE modification due to "questionable" factors relating "... to the timeliness of certain key events related to this contract." Parks vigorously protests the apparent implication that the timing of this modification approval should call its substance into question. Clearly, both Parks and the contractor made significant efforts to try to find qualifying M/WBEs and to make the initial contract structure work, however the TSP had been calculated incorrectly. For example, Parks followed up with telephone calls and with a memo to the contractor on April 19, 2010. After it became clear that an M/WBE would not be found for the planned work, the prime contractor requested a modification on August 16, 2010, eight days before it had knowledge that this contract would be selected in the sample. This modification request was initiated by the contractor, reviewed by Parks and subsequently forwarded to MOCS for final approval.

Because this is now a properly documented and approved modification, Table I should be amended to properly reflect the modified data and indicate that this contractor has achieved 159% of M/WBE goal.

Contract #20090023363

The auditors' total of \$111,523 on contract #20090023363 paid to M/WBEs excludes payments to two trucking firms of \$41,309 (this figure appears in the Report on page 11, paragraph 4). It is unclear how the auditors arrived at that figure. The actual canceled checks to these firms total \$40,459 (forwarded to the auditors). Parks disagrees with the auditors' tally of M/WBE payments of \$111,523. Parks maintains that it should be \$151,982, for total achievement of 86%, not 63% as indicated by the auditors.

This contract was registered in February 2009, during the "ramp up" period. There was some ambiguity at that time regarding whether or not trucking could be defined as a construction industry subcontract. Therefore, Parks allowed this contractor to utilize two trucking M/WBEs. During a meeting with MOCS in early May 2009, it was clarified that trucking work (to and from the construction site) is not considered to be construction industry work, and hence, cannot be counted towards an M/WBE subcontracting goal. An internal directive was issued by Parks stating the above towards the end of May 2009. Prior to the clarification however, the work had already been performed. The contractor paid the two trucking M/WBEs \$40,459. The total of \$40,459 represents the difference between the auditor's figures and Parks' numbers. Parks maintains that this contractor achieved 86% of its goal, as that goal was then understood by Parks and

the contractor; Parks has forwarded the actual canceled checks from the contractor to the auditors and requests that these payments be included in Table I.

Contract #20080042596

Parks agrees with the Report's finding that the contractor has achieved 96% of its M/WBE participation goals for contract #20080042596. Although the Report acknowledges that the contract is not complete, it fails to credit the fact that Parks has a very reasonable expectation that this contractor will meet or exceed its participation goals by the time the contract is closed.

Contract #20090020216

Parks agrees with the Report's finding that the contractor has achieved 121% of its M/WBE participation goals for contract #20090020216.

PARKS' RESPONSE TO SPECIFIC RECOMMENDATIONS

The Comptroller's recommendations are listed below in the same order as they appear in the Report, with Parks' response immediately following.

Recommendations

Parks should:

- 1) *Update written procedures in a timely manner to ensure that agency personnel are clearly aware of their oversight responsibilities concerning contractor compliance with Local Law 129.*

Parks Response: Parks agrees with this recommendation and has had various written procedures since LL 129 took effect. Parks considers the development of a procedures manual to be good business practice to ensure uniformity. In January 2010, Parks distributed a current manual to all personnel involved in construction procedures (including references to LL129) in January 2010. A directive regarding trucking has since been distributed and has been incorporated into the written procedures manual. Similar changes or updates in protocol regarding LL 129 will be distributed in a similar and timely manner to applicable Parks personnel and incorporated into the written procedures manual as well.

- 2) *More effectively monitor the use of M/WBE's by prime contractors by contacting M/WBEs identified in the utilization plans to confirm their level of participation, by more closely reviewing subcontracting plans and actual payments to subcontractors, and by auditing the contractor's books and records.*

Parks Response: Although Parks has established that it *does* closely monitor all subcontractors utilized by a prime for a given contract by virtue of the extensive documentation prepared and required for applicable contracts and the presence of on-site Resident Engineers, Parks will, on an appropriate sampling basis, survey M/WBEs by telephone to ensure that they are receiving payments that have been recorded on Form 44, which contains an attestation from the prime contractor regarding payments to subcontractors. Additionally, Parks will, on a spot check basis, request proof of payment from prime contractors as an additional step to verify payments to M/WBEs., and will also audit LL 129 compliance issues, as appropriate, in Agency audits of prime contractors.

- 3) *Initiate enforcement actions against those prime contractors that do not comply with the M/WBE provision of their contracts.*

Parks Response: Parks has done so and will continue to initiate enforcement actions, as appropriate, against prime contractors that do not comply with the M/WBE provision of their contract. Parks is in constant contact with all subs as previously mentioned.

- 4) *Review requests from prime contractors for M/WBE goal modifications in a timely manner.*

Parks Response: Parks has done so and will continue to review requests from prime contractors for M/WBE goal modifications in a timely manner.

- 5) *Ensure that prime contractors only indicate on Form 44 their actual payments to subcontractors.*

Parks Response: Although Form 44 already contains the language that the contractor is attesting to payments made “*under penalty of perjury.*” Parks will strengthen the language to reduce contractor misunderstanding of the form. Additionally, Parks will request proof of payment, on a spot check basis, in addition to Form 44.

- 6) *Parks should ensure that its FMS CTGL data on anticipated payment to subcontractors are consistent with the anticipated payments noted by its prime contractors on the Subcontractor Approval Forms.*

Parks Response: Parks notes, as detailed above, that there are many valid business reasons – e.g., cuts to the projects’ scopes, success at obtaining lower than initially estimated pricing, etc. – why anticipated subcontract amounts may properly differ from actual payment amounts.

Parks agrees with the recommendation that accurate data on anticipated subcontracting is important, however, and has centralized the FMS CTGL duties to the Systems and Analysis Unit to maximize efficiency. This was done in February of 2010 (prior to the commencement of the audit). Parks’ current practices adequately and appropriately ensure the accuracy of the *anticipated* subcontract amounts in FMS, 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 MOCS has been negotiating with 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.