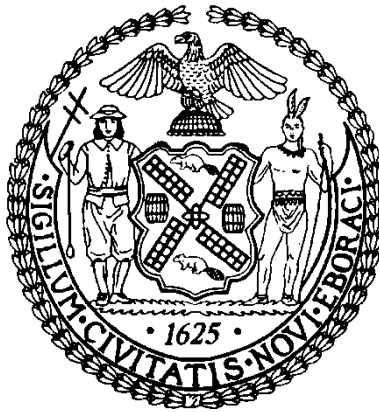


CITY OF NEW YORK OFFICE OF THE COMPTROLLER

**John C. Liu
COMPTROLLER**

MANAGEMENT AUDIT

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



Audit Report on the Monitoring of the Department of Housing Preservation and Development of Subcontracts Covered by Local Law 129

MD10-131A

October 27, 2010



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

John C. Liu
COMPTROLLER

October 27, 2010

To the Residents of the City of New York:

My office has audited the Department of Housing Preservation and Development's (HPD's) monitoring of Minority- and Women-owned Business Enterprise (M/WBE) subcontracts covered by Local Law 129. We audit city agencies such as this as a means of ensuring agency compliance with City laws.

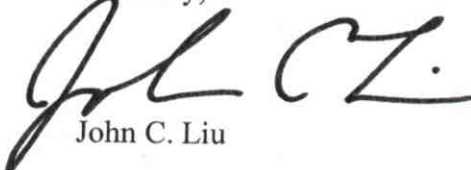
The audit found that HPD is not in compliance with key provisions of Local Law 129 with regard to its monitoring of the use of M/WBEs by vendors that were awarded contracts that have M/WBE subcontractor participation goals. HPD does not maintain a list of the contracts subject to the subcontracting requirements and is therefore unable to determine whether the established M/WBE subcontracting goals have been met. HPD also does not monitor the use of M/WBEs by the prime contractors that were awarded these contracts and does not ensure that contractors submit certain key documents (e.g., list of subcontractors) required by the law. In addition, the City's Financial Management System (FMS) data upon which the Mayor's Office of Contract Services bases its public reporting and the use of M/WBE subcontractors by the City reflects anticipated amounts rather than actual amounts, and the subcontracting data entered by HPD is not always accurate. The actual values of the subcontracts awarded to M/WBEs in contracts with established M/WBE goals are not publicly reported.

The audit makes six recommendations to HPD, including that it maintain a list of contracts subject to the Local Law 129 subcontracting requirements, monitor the use of M/WBEs by prime contractors, ensure that key documents required by the law are submitted by the prime contractors, and establish controls to ensure that the information it enters in FMS pertaining to M/WBE subcontracting is accurate.

The results of the audit have been discussed with HPD 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,



John C. Liu

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Addendum Department of Housing Preservation and Development Response

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

**Audit Report on the Monitoring of the
Department of Housing Preservation and Development
Of Subcontracts Covered by Local Law 129**

MD10-131A

AUDIT REPORT IN BRIEF

Local Law 129 established the City's Minority- and Women-owned Business Enterprise (M/WBE) Program. This law, enacted in 2005, responded to a study commissioned by the New York City Council, which found that there was a significant disparity in contracting opportunities afforded to certain M/WBE groups in the City's 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 goals (set by the agency) are required to monitor the compliance of the prime contractors with their utilization plans. The New York City Department of Housing Preservation and Development (HPD) is the largest municipal developer of affordable housing in the nation. According to the Mayor's Procurement Indicators report, HPD awarded a total of 18 contracts (valued at \$238,686,154) for which HPD set M/WBE subcontractor participation goals during Fiscal Years 2007 through 2009.

The audit determined whether HPD is complying 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.

Audit Findings and Conclusions

HPD is not in compliance with key provisions of Local Law 129 with regard to its monitoring of the use of M/WBEs by vendors that were awarded contracts that have M/WBE subcontractor participation goals. HPD does not maintain a list of the contracts subject to the local law subcontracting requirements and is therefore unable to adequately track these contracts to determine whether the established subcontracting goals have been met by the prime contractors.

In addition, HPD does not monitor the use of M/WBEs by the prime contractors that were awarded contracts having M/WBE participation goals. HPD does not review the prime

contractors' records to verify payments made to subcontractors and also does not perform job-site inspections or contact the M/WBE subcontractors to verify their use. In addition, HPD does not ensure that certain key documents required by the law (e.g., list of subcontractors) are being submitted by the prime contractors. These noncompliance issues and deficiencies can be attributed to HPD management's failure to establish and institute detailed procedures to ensure compliance with the law.

We also found that the City's Financial Management System (FMS) data upon which the Mayor's Office of Contract Services (MOCS) bases its public reporting and the use of M/WBEs by the City reflects anticipated amounts rather than actual amounts. Furthermore, the subcontracting data entered in FMS by HPD is not always accurate. The actual values of the subcontracts awarded to M/WBEs in contracts with established M/WBE goals are *not* publicly reported. In addition, HPD does not maintain accurate records of actual subcontractor utilization (including M/WBE subcontractors). As a result, an accurate measurement of HPD's M/WBE subcontractor use is not known.

Audit Recommendations

Based on our findings, we make six recommendations, including that HPD should:

- Maintain a list of contracts subject to the Local Law 129 subcontracting requirements.
- Monitor the use of M/WBEs by prime contractors and verify payments made to them by, at a minimum, performing job-site inspections, contacting M/WBEs identified in the plan to confirm their participation, and auditing the contractors' books and records.
- Ensure that key documents required by the law are submitted by the prime contractors, including a list of the subcontractors (both M/WBE and non-M/WBE).
- Establish controls to ensure that the information it enters in FMS pertaining to M/WBE subcontracting is accurate.

INTRODUCTION

Background

Local Law 129 established the City's Minority- and Women-owned Business Enterprise (M/WBE) Program. This law, enacted in 2005, responded to a study commissioned by the New York City Council, which found that there was a significant disparity in contracting opportunities afforded to certain M/WBE groups in the City's 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 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 New York City Department of Small Business Services (DSBS).

The agencies overseeing City prime contracts that have M/WBE goals (set by the agency) are required to monitor the compliance of the prime contractors with their utilization plans. Local Law 129 requires agency M/WBE officers to monitor contractor compliance by appropriate means, including job-site inspections, contacting M/WBEs identified in the plan to confirm their participation, and auditing the contractor's 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 HPD can take action against the contractor, such as requiring the contractor to cure the violation, withholding payment or reimbursement, or assessing actual and consequential damages.

The New York City Department of Housing Preservation and Development (HPD) is the largest municipal developer of affordable housing in the nation. HPD has a mission to protect the existing housing stock and expand housing options for New Yorkers, as well as to improve the availability, affordability, and quality of housing in the City. According to the Mayor's Procurement Indicators report, HPD awarded a total of 18 contracts (valued at \$238,686,154) for which HPD set M/WBE subcontractor participation goals during Fiscal Years 2007 through 2009.

It is the responsibility of HPD to set target subcontracting percentages (TSP)² for contracts before sending out the request for bids. A bidder is then required to complete a Subcontractor Utilization Plan, which asks the bidder the expected percentage of the total contract value that the contractor anticipates will be subcontracted, taking into account HPD's set TSP and M/WBE subcontractor participation goals. If the bidder anticipates that it will not subcontract at the target level HPD has specified, it must seek a waiver of the TSP from 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 dollar value that the agency estimates will be awarded to subcontractors in amounts under \$1 million for construction and professional services.

HPD has established an M/WBE Task Force that comprises seven individuals including the M/WBE Officer, Agency Chief Contracting Officer (ACCO), Deputy ACCO, and Director of Contract Registration. The Task Force is responsible for monitoring the activities of agency contracting offices and of 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 illustrating compliance information of 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 and utilization figures for certified subcontractors.

Objective

The objective of this audit was to determine whether HPD is complying 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 except for the inability of HPD to provide a population of all prime contracts for which M/WBE participation goals have been established together with the population of subcontractors applicable to those goals. Lists were subsequently provided by MOCS, which is not the subject of this audit. We do not have sufficient information for us to determine whether we were provided with the complete population applicable to our audit scope nor were we provided a detailed explanation of how the lists were generated. This issue is more fully disclosed in the following paragraphs. 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.

We requested from HPD a list of all contracts in which M/WBE participation goals have been established that were awarded during Fiscal Years 2007 through 2010 (prime contracts), and a list of all subcontracts awarded for the same period by prime contractors of contracts with M/WBE participation goals. The first requested list contained 24 prime contracts, with contract registration dates through October 23, 2009, that had M/WBE participation goals. The second requested list, which should have been a breakdown of the first list of 24 prime contracts, contained only 16 prime contracts with M/WBE participation goals that had a total of 222 subcontracts. We requested an explanation for the discrepancy between the two lists but HPD never provided one.

To obtain an understanding of how HPD generated the two lists, we requested a meeting with HPD personnel responsible for this task. HPD later informed us that these lists were generated by MOCS and instead arranged a meeting between us and MOCS. We met with the MOCS Deputy Director responsible for generating contract information who provided a broad narrative describing how the lists were generated.

In the absence of an alternative source of contract data, it was decided to use the listings provided by MOCS for our audit testing purposes. We were unable to verify the accuracy of this list and do not express an opinion on the accuracy of the data included in these lists, other than the information obtained and verified for the three sampled contracts having M/WBE participation goals and the associated subcontractor payments.

The audit scope was Fiscal Years 2007 through 2010.

To obtain an understanding of the policies, procedures, and regulations governing the monitoring process of the use of M/WBEs by vendors awarded contracts that included M/WBE participation goals, we reviewed and used as criteria Local Law 129. To obtain an understanding of how City agencies are applying Local Law 129, we reviewed a memorandum from MOCS, dated October 19, 2006, with the subject “Implementation of Local Law 129—M/WBE Subcontracting Program Administration.” To obtain an understanding of HPD’s policies and procedures regarding contracts under Local Law 129, we reviewed HPD’s *LL 129 Administration*, a document that provides guidelines on the general administration of the law.

In addition, we reviewed HPD’s M/WBE Utilization Plans submitted to DSBS for Fiscal Years 2007 through 2010. We also 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 HPD. Lastly, to obtain an understanding of the recording of subcontractor data in the Financial Management System (FMS) Contract Goal Line (CTGL) table, we reviewed the training manual for contract processing issued by the Financial Information Services Agency (FISA).

To obtain a general overview of HPD’s M/WBE Task Force responsible for monitoring contractor and vendor activities to ensure compliance with Local Law 129, we interviewed members of the M/WBE Task Force, including the Director of Operations and the Special Counsel for Regulatory Compliance (who is also the M/WBE Officer). To understand the process of determining the TSP of a contract, we met with officials from HPD’s procurement department and the Agency Chief Contracting Officer. In addition, to obtain an understanding of the monitoring of subcontractors, we met with officials from the two main HPD divisions that have contracts with subcontractors: the Division of Maintenance (DOM) and the Division of Alternative Management Programs (DAMP). We also met with personnel from HPD’s Engineering Audit Division (EAD) to understand their responsibilities for monitoring contracts of construction-related projects.

We judgmentally selected three prime contracts, totaling approximately \$43 million, from the list of 16 prime contracts, totaling approximately \$198 million, which was provided by

MOCS. We used the list of 16 contracts rather than the list of 24 contracts because it included a breakdown of the associated subcontracts. Our selection included two contracts for professional services valued at \$42 million and \$1 million and one contract for construction services valued at \$254,444.

We reviewed HPD's files for the three sampled prime contracts to determine the prime contractors' proposed M/WBE participation plan for subcontracts included in the bid responses and to determine whether any full or partial waivers of the target subcontracting percentage were requested and granted to the prime contractors. In addition, we reviewed HPD's files, including contract documents, invoices, and payment packages submitted by the prime contractors for the three selected prime contracts to determine whether the contractors submitted the required documents with each voucher for payment or periodically as required. We also visited the three sampled prime contractors and reviewed their records relating to payments made to subcontractors. We requested for review any agreements between the prime contractors and the subcontractors, invoices submitted by subcontractors, canceled checks of payments made to subcontractors, and bank statements. Next, we reviewed the entries in the FMS CTGL tables for each of the contracts to determine whether all of the subcontractors were appropriately listed. Lastly, we determined whether any of the subcontractors used for the three sampled prime contracts were certified M/WBEs and whether the payments made to the certified M/WBE subcontractors satisfied the participation goals of the contract.

Discussion of Audit Results

The matters covered in this report were discussed with HPD officials during and at the conclusion of this audit. A preliminary draft report was sent to HPD officials and discussed at an exit conference held on September 7, 2010. On September 9, 2010 we submitted a draft report to HPD officials with a request for comments. We received a written response from HPD officials on September 23, 2009. HPD officials did not address one of the audit's six recommendations and generally agreed with the remaining five. For four of the recommendations, HPD officials claim that the agency has already implemented them. It is unclear from their response, however, whether officials are contending that the implementation occurred before or after the performance of our audit.

The full text of the HPD response is included as an addendum to this report.

FINDINGS AND RECOMMENDATIONS

HPD is not in compliance with key provisions of Local Law 129 with regard to its monitoring of the use of M/WBEs by vendors that were awarded contracts that have M/WBE subcontractor participation goals. HPD does not maintain a list of the contracts subject to the local law subcontracting requirements and is therefore unable to adequately track these contracts to determine whether the established subcontracting goals have been met by the prime contractors.

In addition, HPD does not monitor the use of M/WBEs by the prime contractors that were awarded contracts having M/WBE participation goals. HPD does not review the prime contractors' records to verify payments made to subcontractors and also does not perform job-site inspections or contact the M/WBE subcontractors to verify their use. In addition, HPD does not ensure that certain key documents required by the law are being submitted by the prime contractors. By failing to adequately monitor prime contractors' compliance with its established M/WBE participation goals, HPD cannot fully assess whether the prime contractors are in compliance with the contract requirements, are providing business to certified M/WBEs, and are achieving the participation goals specified in the contracts. Without this information, HPD cannot accurately ascertain whether its agency is effectively contributing to the City's use of certified M/WBEs, as was intended by Local Law 129. These noncompliance issues and deficiencies can be attributed to HPD management's failure to establish and institute detailed procedures to ensure compliance with the law.

We also found that the FMS data upon which MOCS bases its public reporting and the use of M/WBEs by the City reflects anticipated amounts rather than actual amounts. Furthermore, the subcontracting data entered in FMS by HPD is not always accurate. The actual values of the subcontracts awarded to M/WBEs in contracts with established M/WBE goals are *not* publicly reported. In addition, HPD does not maintain accurate records of actual subcontractor utilization (including M/WBE subcontractors). As a result, an accurate measurement of HPD's M/WBE subcontractor use is not known.

These issues of noncompliance are discussed in detail in the following sections.

Noncompliance with Local Law 129

HPD does not monitor the use of M/WBEs by the prime contractors that were awarded contracts having M/WBE participation goals. In addition, HPD does not ensure that the prime contractors submit key documents that would assist HPD with monitoring Local Law 129 compliance.

No Monitoring of the Use of and Payments Made to M/WBEs

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, job-site inspections, contacting M/WBEs

identified in the plan to confirm their participation, and auditing the contractor's books and records. However, we determined that HPD does not have any detailed procedures in place to verify M/WBE participation. At a minimum, HPD should be performing the above three steps identified in the law. In the absence of a proper review and analysis, the ability of HPD officials to ascertain whether the contractors are providing subcontracting work to M/WBEs and whether the M/WBEs are receiving the appropriate payments is hampered.

When we asked HPD officials whether job-site inspections are performed and whether they contact the M/WBEs to verify actual M/WBE participation, they informed us that they are "reviewing possible implementation of conducting random on site inspections to better ensure compliance." In addition, HPD officials informed us that they "use the Subcontractors Approval Form to establish participation." These Subcontractor Approval Forms indicate the subcontractors that the prime contractors anticipate using and payments estimated for them. However, it is HPD's responsibility to verify actual use of M/WBEs, not just the prime contractor's intent to use them. HPD reported to us that it "will implement a new protocol of making a telephone call to the M/WBE subcontractors to verify participation." However, in addition to contacting the M/WBEs, HPD should routinely perform job-site inspections to verify that the M/WBEs are actually performing the work, a monitoring task that HPD should have been performing for all applicable contracts since the law went into effect.

In addition, when we asked HPD officials whether they audit the prime contractor's books and records as further verification of M/WBE participation, we were told,

all HPD contracts include a clause giving HPD the right to audit books and records. This clause gives the agency the ability to investigate allegations, misappropriations or disputes that may arise, including fraud, damages or contract violations. If HPD was to receive a complaint from an M/WBE or any other subcontractor, or otherwise become aware of information regarding MWBE compliance which necessitates an audit, HPD will conduct an audit.

However, HPD provided no evidence of actual audits performed, as required by the law. HPD also appears to be relying solely on complaints to initiate such audits. Use of such a passive procedure makes it unlikely that HPD will identify prime contractors that are not using M/WBEs, nor identify M/WBEs that might not have been paid the amounts stated to HPD by the prime contractors. It is clear that the intent of the law was not to have agencies base the M/WBE utilization by the prime contractors solely 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 HPD to perform independent verification of M/WBE use including, at a minimum, the steps clearly identified in the law.

Furthermore, in its Fiscal Year 2009 and 2010 Agency M/WBE Utilization Plan submitted to DSBS, HPD indicated that it intends to monitor contractor compliance with submitted utilization plans for contracts with established M/WBE participation goals. In addition, in the Fiscal Year 2009 Citywide Progress Report, HPD's action plan for steps to improve performance in 2010 states that it will, "Monitor prime contractors with M/WBE subcontractor utilization plans and ensure that certified subcontractors are being used

accordingly.” Although HPD has stated that it will monitor contractor compliance, we found no evidence to show that monitoring is being performed. Therefore, HPD has no assurance that the prime contractors are complying with the contract terms and are providing business to certified M/WBEs and paying the appropriate amounts.

Key Documents Not Provided to or Maintained by HPD

HPD does not ensure that certain key documents required by the law are submitted by the prime contractors. As stated in the law, as well as in the Notice to All Prospective Contractors that HPD includes as part of its bid documents for contracts with M/WBE subcontractor participation goals, a prime contractor bidding on a contract requiring an M/WBE utilization plan must submit the following five items of information:

- a list of persons to which it intends to award subcontracts within the next twelve months to the contracting agency within thirty days of the issuance of notice to proceed [Item #1],
- certified statements with each voucher for payment and/or periodically as the agency may require, which include, but not be limited to, the total amount paid to subcontractors (including subcontractors that are not M/WBEs) [Item #2]; the names, addresses and contact numbers of each M/WBE hired as a subcontractor pursuant to such plan as well as the dates and amounts paid to each M/WBE [Item #3], and
- the total amount paid to the subcontractors (including subcontractors that are not M/WBEs) when submitting its voucher for final payment [Item #4]; and a certified final list which shall include the name, address and contact information of each subcontractor that is an M/WBE hired pursuant to such plan, the work performed by, and the dates and amounts paid to each [Item #5].

During our review of HPD’s files for the three sampled contracts, we determined that these key documents were not always provided to or maintained by HPD. Table I, below, identifies the key documents mentioned above (Items #1 through #5) that we did not observe during our review of HPD’s files for the three sampled contracts.

Table I
Key Documents Not Observed in HPD’s Files for the Three Sampled Contracts

Vendor	Contract #	Contract End Date	Key Documents Not Observed in Files				
			Item #1	Item #2	Item #3	Item #4	Item #5
A	20080030873	06/14/2011	X	X	X	N/A ^a	N/A ^a
B	20080029681	06/14/2010			X	N/A ^b	N/A ^b
C	20090013208	01/11/2010		X	X	X	X
TOTALS			1	2	3	1	1

^a The contract term has not ended and final payment request has not been made. Therefore, these documents would not have been submitted by the vendor at the time of our review.

^b The final payment voucher was not submitted by Vendor B to HPD at the time of our review.

HPD Response: “HPD notes that the finding is based on a survey of only three of the twenty-four contracts selected by the Comptroller’s Management Audit staff. HPD also notes, as did the Management Audit staff, that one of the three contracts was still in progress at the time of the review.”

Auditor Comment: HPD erroneously states that we selected 24 contracts for review. This is incorrect; HPD provided us a listing (generated by MOCS) of 24 contracts with M/WBE subcontractor participation goals from which only 16 included breakdowns of the associated subcontracts. We selected three of the 16 contracts for review. Regarding the contract that was still in progress at the time of our review (contract A from Table I), the items we cite as not being maintained by HPD (numbered 1, 2, and 3 from the table) were required to have already been provided to HPD by the prime contractors and should have been available for our review.

Without knowing all of the subcontractors used by a prime contractor for a particular contract, as well as all payments made to the subcontractors, HPD will be unable to gauge whether the prime contractor is complying with the subcontractor goals in the contract and will be unable to accurately report M/WBE subcontractor utilization. This information would be useful for HPD to determine whether work performed by M/WBEs is in line with that specified in the contractor’s utilization plan, and if the work is not performed, the information will allow HPD to take appropriate action.

Further, although we found evidence of the list of persons that the prime contractors intend to award subcontracts to (Subcontractor Approval Forms) for two of the three vendors (Vendor B and C), we identified two vendors being reported by Vendor C that were not used as subcontractors.

In addition, one of the vendors used as a subcontractor by Vendor C was not a DSBS-certified M/WBE, but was cited by the prime contractor as being a certified M/WBE. When we questioned Vendor C’s President, she told us that she believed the vendor to be an M/WBE as that is what the vendor told her; however she did not verify this claim. It is HPD’s responsibility to verify that vendors being used by its prime contractors are certified M/WBEs. On the Subcontractor Approval Form submitted by Vendor C for this subcontractor, the subcontractor was identified as being an M/WBE, and the form was approved by HPD personnel. We therefore question whether a review of subcontractor certification is always being performed.

Agency Response: “There is not enough information presented in the draft audit to enable HPD to determine whether the subcontractor certification had expired prior to the Management Audit staff review or some lapse of agency protocol, as detailed in HPD’s LL 129 Administration policy and procedures manual, had occurred.”

Auditor Comment: This finding was presented to HPD during the course of audit fieldwork. Had HPD needed further information, it had ample opportunity to request it prior to receiving the draft report. (We received no such request.) In any event, in August 2010, we confirmed with DSBS that the contractor in question had never been certified with the City as an M/WBE.

Recommendations

HPD should:

1. Monitor the use of M/WBEs by prime contractors and verify payments made to them by, at a minimum, performing job-site inspections, contacting M/WBEs identified in the plan to confirm their participation, and auditing the contractors' books and records.

HPD Response: "HPD will, consistent with M/WBE local law requirements, increase its monitoring of prime contractors' use of M/WBEs. HPD will implement a procedure of calling M/WBE subcontractors to verify their performance of work. In addition, HPD will develop an appropriate protocol for spot-check inspections of job-sites. Finally, all HPD contracts covered by LL129 include a clause giving HPD the right to audit books and records. HPD will look to implement audits of books and records in cases where there have been complaints about particular prime contractors or if other irregularities are brought to the Agency's attention."

Auditor Comment: Audits of subcontractor books and records are required by Local Law 129. As stated previously, use of such a passive procedure of auditing books and records only in cases where complaints are made or irregularities are brought to HPD's attention makes it unlikely that HPD will identify prime contractors that are not using M/WBEs or will identify M/WBEs that might not have been paid the amounts stated to HPD by the prime contractors.

2. Ensure that key documents required by the law are submitted by the prime contractors, including a list of the subcontractors (both M/WBE and non-M/WBE).

HPD Response: "HPD ensures that key documents issued by MOCS are inserted into the agency's contract procedure. For each contract subject to LL 129, HPD inserts the 'Notice to All Prospective Contractors' and 'Schedule B' into bid and contract document package. HPD requires that contractors submit 'Schedule B' utilization plan with its bid indicating the percentage of work it intends to subcontract. HPD requires the submission of a Subcontractor Approval Form (SAF) as written agreements between contractors and their subcontractors are proposed. HPD program staff verifies the certified status of each M/WBE contractor at the time of SAF submission."

Auditor Comment: HPD appears to imply that it already complies with this recommendation. We disagree. Although HPD claims that it requires the submission of Subcontractor Approval Forms, we did not see any of these forms for Vendor A. In addition, according to the law, the prime contractors should be submitting a listing of the subcontractors actually used along with the associated payments made to each. As stated previously, without knowing all of the subcontractors used by a prime contractor for a particular contract, as well as all payments made to the subcontractors, HPD will be unable to gauge whether the prime contractor is complying with the subcontractor goals in the contract.

3. Verify the M/WBE certification status of the M/WBE subcontractors intended to be used by the prime contractors.

HPD Response: “HPD verifies the M/WBE status of each subcontractor during review of the Subcontractor Approval Form.”

Auditor Comment: As noted in the report, we identified an instance in which one of the vendors used as a subcontractor was not a DSBS-certified M/WBE.

Other HPD Weaknesses

Contracts Subject to Local Law 129 Not Tracked

HPD does not maintain a list of contracts subject to the Local Law 129 subcontracting requirements. We initially requested from HPD officials a list of contracts with subcontracting goals and a list of subcontracts used on these contracts on March 4, 2010, but were not provided with any lists until May 17, 2010. HPD’s inability for more than two months to provide us with a list that should have been readily available raises significant doubt as to whether the agency actually maintained a list, as HPD officials claimed. We later found out that this list was not generated by HPD, but rather by MOCS. Initially, HPD officials did not inform us that the lists were not generated by HPD personnel or that a list was not maintained independent of the City’s Financial Management System (FMS). It was not until we requested a meeting with HPD to determine the source of the information contained in these lists and the parameters used to compile the lists that we found out that MOCS generated the lists and provided the information to HPD. Based on the above, we have no assurance that HPD officials know which contracts have M/WBE participation goals.

To effectively monitor the contracts with M/WBE subcontracting goals, HPD must maintain a list of the contracts. HPD is well aware at the time of the contracting process whether a contract has an M/WBE subcontracting requirement and should maintain a list of contracts subject to the law. It is the responsibility of the M/WBE officer to track the contracts with subcontracting goals and to ensure that all requirements of the law are followed and goals are being achieved.

Failure to Establish Detailed Procedures to Ensure Compliance with Local Law 129

HPD does not have sufficient written or approved standard operating procedures in place to ensure its compliance with Local Law 129 with regards to the subcontracting requirements, as recommended by Comptroller’s Directive #1, “Principles of Internal Control.” In response to our request for HPD’s policies and procedures over the monitoring of contractors and subcontractors covered by the law, we were provided with two documents—(1) *LL129 Administration*, which provides guidelines of the general administration of the law, and (2) *Notice to All Prospective Contractors* that HPD includes as part of its bid documents for contracts with M/WBE subcontractor participation goals. However, neither of these documents

provides specific details for HPD's personnel in identifying the steps necessary for tracking and monitoring contracts with M/WBE participation goals.

Without detailed standard operating procedures, HPD has no assurance that its personnel know the goals of the agency and their responsibilities in carrying out all aspects and requirements of Local Law 129, and no assurance that it is complying with the law and achieving the goals set forth by the agency.

Recommendations

HPD should:

4. Maintain a list of contracts subject to the Local Law 129 subcontracting requirements.

HPD Response: "HPD maintains a list of contracts subject to Local Law 129 in FMS and is able to track participation of subcontractors in applicable agency contracts. The FMS data is summarized in reports generated by MOCS for its annual Procurement Indicators Report. A list of contracts generated from the same FMS database was provided to the Comptroller's Management Audit staff."

Auditor Comment: Although HPD now contends that it maintains a list of contracts subject to Local Law 129 in FMS, this is not what we found during the course of the audit. As we state in the report, it took HPD over two months to provide us with a listing, and that listing was generated by MOCS, not HPD.

5. Establish detailed procedures for agency personnel to follow to ensure compliance with Local Law 129.

HPD Response: "HPD has in place the internal controls needed to effectively, efficiently and continuously monitor for compliance with LL 129. HPD internal controls includes, as per LL 129, the work of HPD's M/WBE Task Force . . . to implement internal initiatives, monitor agency performance and detail procedural compliance with LL 129. Under the direction of the Task Force, workshops were conducted to train agency staff and the LL 129 Administration policy and procedures manual was distributed. The Task Force established procedures and duties of the ACCO, Legal and agency program offices to implement a uniform subcontractor approval protocol within the agency. The Task Force meets with program offices to discuss business practices and contract opportunities related to LL 129. The Task Force also directs the agency's outreach efforts in accordance with LL 129, including the creation of an agency webpage dedicated to assisting M/WBE firms seeking contract opportunities."

Auditor Comment: HPD's response does not indicate the procedures the agency has in place to track and monitor M/WBE subcontractor use. As previously noted in the report, HPD was unable to demonstrate or provide any evidence of monitoring of M/WBE subcontractor use. As also noted, the Local Law 129 Administration policy and procedures manual that HPD is referring to does not provide specific details for HPD's

personnel in identifying the steps necessary for tracking and monitoring contracts with M/WBE participation goals. Detailed procedures would help to ensure that HPD is complying with the law and achieving the goals set forth by the agency.

Other Issues

Procurement Data Reported by the Mayor's Office of Contracts

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 reflects *anticipated* rather than *actual* amounts. The actual values of the subcontracts awarded to M/WBEs on contracts with established M/WBE goals are *not* publicly reported.

As stated previously, the list of contracts subject to the Local Law 129 subcontracting requirements that we received from HPD was generated by MOCS. After requesting a meeting with HPD to determine the source of the information and the parameters used to compile the lists, HPD arranged for us to meet with MOCS officials. MOCS officials explained that they extract the M/WBE subcontract information from FMS for Local Law 129 reporting.

For the three sampled contracts, HPD set a goal that 31 percent of monies paid to subcontractors should go to M/WBEs. Payments recorded in FMS are payments made directly to the prime contractors only. FMS does not capture payments to subcontractors as these payments are not made by the contracting agency (HPD), but by the prime contractors. The subcontractor amounts are entered by HPD into 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 (including M/WBEs) under a prime contract. If a record needs to be modified (e.g., the total anticipated amount increases, the subcontractor is not used), FMS allows the user to make changes in the CTGL record. In such cases, a modified record is created and assigned a sequence number (original record is numbered "1"). No records are deleted; the original record and all modified records remain in the system, providing an audit trail of the original record and all subsequent changes. Only the most recently modified record, however, is considered the valid (current) record.

As noted above, the subcontractor amounts recorded in the CTGL table are based on the approximate anticipated value of the subcontracts; FMS is not intended to record the actual payments made to subcontractors. Since these estimated subcontractor amounts recorded by HPD in the CTGL table is the data that MOCS is reporting on, it is important for HPD to accurately record the subcontractor data into FMS. However, we found that the subcontractor amounts are not always accurate.

For one of the three sampled contracts, we identified discrepancies between the subcontractor data entered into the CTGL table by HPD in comparison to the information contained in HPD's files and the prime contractors' records. As part of these discrepancies, we

identified a vendor that was recorded in the CTGL table as a subcontractor but was *not* used and vendors that *were* used as subcontractors but not included in the CTGL table. In addition, we found that HPD did not properly enter subcontractor information in the CTGL table, resulting in the anticipated subcontract amounts being understated by approximately 50 percent. For this contract, HPD modified the CTGL records of its subcontractors to reflect various projects assigned to them. Instead of recording the anticipated value of the projects in the CTGL record for each subcontractor as a cumulative amount, HPD recorded the anticipated value of the projects individually. As a result, even though it was anticipated that the two subcontractors would work on a total of seven projects with anticipated payments totaling \$247,248, the CTGL record reflects the anticipated payment for each subcontractor's last project only, valued at \$123,793.

In addition to the above-mentioned discrepancies, we also identified differences between the anticipated payments recorded in FMS and the actual payments as per the prime contractors' files. The disparity understated the subcontracting figures being used and reported by MOCS. The differences in the total subcontractor amounts are listed in Table II, below.

Table II
Differences Identified between Subcontractor Amounts
Recorded in FMS and Prime Contractor Records

Contract #	Total Anticipated Subcontractor Amounts in FMS CTGL Table		Actual Subcontractor Payments per Prime Contractor Records
	Current Record Amounts	Auditors' Adjusted Amounts	
20080030873	\$ 123,793	\$ 247,248*	\$ 733,133
20080029681	\$ 279,280	\$ 279,280	\$ 208,990
20090013208	\$ 34,600	\$ 34,600	\$ 36,314
Totals	\$437,673	\$561,128	\$978,437

*We adjusted the CTGL amounts to include the additional anticipated subcontractor amounts recorded by HPD in the CTGL table for multiple assignments that were not reflected in the current record.

As can be seen in Table II, the total anticipated subcontractor amount (not limited to M/WBEs) recorded by HPD in the CTGL table for the three sampled contracts was \$437,673. After accounting for the additional anticipated subcontractor amounts for the above-referenced contract, the adjusted total subcontractor amount was increased to \$561,128. Moreover, based on our review of the prime contractors' records, we determined that the actual subcontractor payments totaled \$978,437. Table III below illustrates the disparity between the anticipated M/WBE subcontracting amounts reported in FMS for the three sampled contracts and the actual amounts that we found during our review of contractor files.

Table III
Differences Identified between M/WBE Subcontractor Amounts
Recorded in FMS and Prime Contractor Records

Contract #	Anticipated Amounts as per FMS CTGL Table			Actual Amounts as per Prime Contractor Records			M/WBE % Goal met?
	Total Subcontractor Amount	M/WBE Subcontractor Amount	M/WBE %	Total Subcontractor Amount	M/WBE Subcontractor Amount	M/WBE %	
20080030873*	\$ 123,793	\$ 45,805	37%	\$ 733,133*	\$ 435,807*	60%	N/A*
20080029681	\$ 279,280	\$ 279,280	100%	\$ 208,990	\$ 208,990	100%	Yes
20090013208	\$ 34,600	\$ 0**	0%	\$ 36,314	\$ 2,700	7%	No
Totals	\$437,673	\$325,085	74%	\$ 978,437	\$ 647,497	66%	

*Contract is still ongoing; represents monies paid out as of July 12, 2010 (the date of our visit to the prime contractor).

** The only subcontractor identified in the CTGL table as being an M/WBE subcontractor was listed as having a current record amount of \$0.

As shown in Table III, the information recorded by HPD in FMS shows that two contracts have surpassed or are on target to surpass the M/WBE subcontracting goal of 31 percent. For the third contract, HPD inexplicably has no M/WBE subcontractor amount recorded in FMS. The only subcontractor identified as an M/WBE in the CTGL table had anticipated payments totaling \$0. Overall, the actual percentage of subcontracting dollars that were paid to M/WBEs for the three sampled contracts was 66 percent, eight points lower than the percentage based on the figures recorded in FMS. Nevertheless, the amounts paid to M/WBE subcontractors are almost twice the anticipated amounts recorded in FMS. Consequently, since the information being publicly reported is based on anticipated amounts, it cannot be used to determine how much money is actually being paid to HPD's M/WBE subcontractors and how well HPD's prime contractors are meeting their M/WBE subcontracting goals. The differences we identified are compounded by the fact that the information being entered in FMS by HPD is inaccurate. HPD should be compiling an accurate list of subcontractor payments based on information and documentation received from the prime contractors and on its independent verification of the payments, including a review of the prime contractors' books and records and communication with the subcontractors. This would allow HPD to accurately gauge the dollar amount of subcontractor payments made to M/WBE firms and would allow HPD to determine whether the goals it sets are being achieved. In turn, HPD could provide this information to MOCS to enable it to accurately report M/WBE subcontractor payments and the degree to which M/WBE target subcontracting percentages are being achieved.

Recommendation

6. HPD should establish controls to ensure that the information it enters in FMS pertaining to M/WBE subcontracting is accurate.

HPD Response: "HPD notes that the 'prime contractor records' referred to on pages 13-14 refer to payment records maintained by the prime contractors.

"The prime and subcontract data entered into the FMS M/WBE screens are anticipated contract amounts, not actual amounts. Specifically, the prime contract amount used for

all reporting is the ‘Revised Maximum Amount’ from FMS. This value represents the amount the agency can spend for a contract, not the actual amount spent.”

Auditor Comment: HPD has not addressed our recommendation. We are not recommending that HPD ensure that it enters actual subcontractor payment amounts in FMS. We are aware that FMS currently does not have the ability to record actual subcontractor payments. Our concern is that the *anticipated* subcontractor amounts recorded in FMS, which is used by MOCS for M/WBE compliance reporting, were not accurate based on our review of the documents provided by HPD. Since the actual amounts of M/WBE subcontractor use are not being publicly reported at this time, it is important for HPD to ensure that it at least records the anticipated subcontractor amounts in FMS accurately.

September 23, 2010

Tina Kim
Deputy Comptroller for Audits
Office of the New York City Comptroller
1 Centre Street- Room 1100N
New York, New York 10007-2341

**Re: Audit on the Monitoring of the Department of Housing Preservation and
Development of Subcontracts Covered by Local Law 129
Audit Number: MD10-131A**

Dear Ms. Kim:

The following represents the Department of Housing Preservation and Development's response to the recommendations made in your audit on the Monitoring of the Department of Housing Preservation and Development of Subcontracts Covered by Local Law 129.

If you have any additional questions, please call Deputy Commissioner Bernard Schwarz at 863-6610.

Thank you.

Sincerely,


Douglas Apple



Response to “Audit Report on the Monitoring of the Department of Housing Preservation and Development of Subcontracts Covered by Local Law 129” issued by the Office of the Comptroller of the City of New York dated September 9, 2010 (MD10-131A)

Introduction

HPD monitors LL 129 mandates through the work of the agency’s MWBE Task Force, which includes the MWBE Officer, Assistant Commissioner for Procurement/ACCO and the Deputy General Counsel for Contracts. The MWBE Task Force works to implement internal initiatives, monitor agency performance and detail procedural compliance with LL 129. Under the direction of the Task Force, workshops were conducted to train agency staff and the LL 129 Administration policy and procedures manual was distributed. The Task Force established procedures and duties of the ACCO, Legal and agency program offices to implement a uniform subcontractor approval protocol within the agency. The Task Force meets with HPD program offices to discuss business practices and contract opportunities related to LL129. The Task Force also directs the agency’s outreach efforts in accordance with LL 129, including the creation of an agency webpage dedicated to assisting MWBE firms seeking contract opportunities.

The success of HPD’s M/WBE program is recognized. HPD received the 2007 M/WBE Advocate of the Year award from the NYC Department of Small Business Services. The award citation stated: “HPD awarded nearly \$14 million in over 500 contracts with M/WBEs in Fiscal Year ‘07. Within that amount, they’ve awarded close to \$700,000 in small purchases, making them one of the leaders in that category. In addition, they’ve partnered with the M/WBE Program to offer small business courses, participate in local events and provide contractor training... HPD is strengthening the New York City small business community and leveling the playing field for minority and women-owned businesses.”

Notwithstanding the accomplishments of its MWBE program, HPD strives continuously to enhance its compliance of LL129. To this end, the agency recently established a Regulatory Compliance office to promote agency compliance with applicable Federal, State and NYC laws, regulations and executive orders. HPD’s newly created position of Special Counsel for Regulatory Compliance now serves as the MWBE Officer and heads the agency’s MWBE Task Force. The Special Counsel is responsible for coordinating a centralized and collaborative approach to develop and maintain agency-wide internal controls to improve compliance.

Following is a summary of each key findings in the report, as well as recommendations and the Department’s response to them.

Finding:

“... the agency M/WBE officer is required to monitor each contractor’s compliance with its utilization plan by appropriate means, including ... contracting M/WBEs ... to

confirm their participation, and auditing the contractor's books... we determined that HPD does not have any detailed procedures in place to verify M/WBE participation."

Recommendation #1:

"Monitor the use of M/WBEs by prime contractors and verify payments made to them by, at a minimum, performing job-site inspections, contacting M/WBEs identified in the plan to confirm their participation, and auditing the contractor's books and records."

Agency Response:

HPD conducts site inspections to measure overall job progress, monitor adherence to the scope of work and review site conditions. LL 129 appears to envision a Resident Engineer project oversight model, and the Agency does not manage its contracts in this manner. Many of HPD's contracts covered by LL 129 involve building/maintenance code enforcement activities of short duration (often less than one week) performed by specialty trades utilizing a small number of subcontracts. Resource constraints and the exigent nature of the work in question restrict our ability to monitor work on a daily basis.

HPD will, consistent with M/WBE local law requirements, increase its monitoring of prime contractors' use of M/WBEs. HPD will implement a procedure of calling M/WBE subcontractors to verify their performance of work. In addition, HPD will develop an appropriate protocol for spot-check inspections of job-sites. Finally, all HPD contracts covered by LL129 include a clause giving HPD the right to audit books and records. HPD will look to implement audits of books and records in cases where there have been complaints about particular prime contractors or if other irregularities are brought to the Agency's attention.

Finding:

"HPD does not ensure that certain key documents required by the law are submitted by the prime contractors."

Recommendation #2:

Ensure that key documents required by the law are submitted by the prime contractors, including a list of the subcontractors (both M/WBE and non-M/WBE).

Agency Response:

HPD notes that the finding is based on a survey of only three of the twenty-four contracts selected by the Comptroller's Management Audit staff. HPD also notes, as did the Management Audit staff, that one of the three contracts was still in progress at the time of the review.

HPD ensures that key documents issued by MOCS are inserted into the agency's contract procedure. For each contract subject to LL 129, HPD inserts the "Notice to All Prospective Contractors" and "Schedule B" into bid and contract document package. HPD requires that contractors submit "Schedule B" utilization plan with its bid indicating

the percentage of work it intends to subcontract. HPD requires the submission of a Subcontractor Approval Form (SAF) as written agreements between contractors and their subcontractors are proposed. HPD program staff verifies the certified status of each M/WBE contractor at the time of SAF submission.

HPD will implement a requirement as FMS is upgraded that the prime contractor document actual amounts paid to subcontractors in its payment requisitions.

Finding:

"... one of the vendors used as a subcontractor by Vendor C was not DSBS certified M/WBE... It is HPD's responsibility to verify that vendors being used by its prime contractors are certified M/WBEs. On the Subcontractor Approval Form submitted by Vendor C for this subcontractor, the subcontractor was identified as being an M/WBE and the form was approved by HPD personnel."

Recommendation #3:

"Verify the M/WBE certification status of the M/WBE subcontractors intended to be used by the prime contractors."

Agency Response:

HPD verifies the M/WBE status of each subcontractor during review of the Subcontractor Approval Form. There is not enough information presented in the draft audit to enable HPD to determine whether the subcontractor certification had expired prior to the Management Audit staff review or some lapse of agency protocol, as detailed in HPD's LL 129 Administration policy and procedures manual, had occurred.

Finding:

"HPD does not maintain a list of the contracts subject to the local law subcontracting requirements and is therefore unable to adequately track these contracts..."

Recommendation #4:

"Maintain a list of contracts subject to the Local Law 129 subcontracting requirements."

Agency Response:

HPD maintains a list of contracts subject to Local Law 129 in FMS and is able to track participation of subcontractors in applicable agency contracts. The FMS data is summarized in reports generated by MOCS for its annual Procurement Indicators Report. A list of contracts generated from the same FMS database was provided to the Comptroller's Management Audit staff.

Finding:

“HPD does not have sufficient written or approved standard operating procedures in place to ensure its compliance with Local Law 129 with regards to the subcontracting requirements, as recommended by Comptroller’s Directive #1...”

Recommendation #5:

“Establish detailed procedures for agency personnel to follow to ensure compliance with Local Law 129.”

Agency Response:

As noted on page 4, Section 3.1 of Directive #1, “Internal control is a series of actions or activities that exist as a continuing built-in component of an agency's operations. In order to be effective, internal control must be an integral part of the overall management business and control system, and should be similarly supported by a reporting structure including objectives, problem identification and accountability.”

HPD has in place the internal controls needed to effectively, efficiently and continuously monitor for compliance with LL 129. HPD internal controls includes, as per LL 129, the work of HPD’s M/WBE Task Force, headed by the Special Counsel for Regulatory Compliance (who is also the agency’s M/WBE Officer) and including the Assistant Commissioner/ACCO and the Deputy General Counsel for Contracts, to implement internal initiatives, monitor agency performance and detail procedural compliance with LL 129. Under the direction of the Task Force, workshops were conducted to train agency staff and the LL 129 Administration policy and procedures manual was distributed. The Task Force established procedures and duties of the ACCO, Legal and agency program offices to implement a uniform subcontractor approval protocol within the agency. The Task Force meets with program offices to discuss business practices and contract opportunities related to LL129. The Task Force also directs the agency’s outreach efforts in accordance with LL 129, including the creation of an agency webpage dedicated to assisting M/WBE firms seeking contract opportunities.

HPD will review and continue to enhance its LL 129 internal controls.

Finding:

“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 reflects anticipated rather than actual amounts.”

Recommendation #6:

“HPD should establish controls to ensure that the information it enters in FMS pertaining to M/WBE subcontracting is accurate.”

Agency Response:

HPD notes that the “prime contractor records” referred to on pages 13-14 refer to payment records maintained by the prime contractors.

The prime and subcontract data entered into the FMS M/WBE screens are anticipated contract amounts, not actual amounts. Specifically, the prime contract amount used for all reporting is the "Revised Maximum Amount" from FMS. This value represents the amount the agency can spend for a contract, not the actual amount spent. The Maximum Amount is preferred for reporting because it is typically the same as the value on the signed contract and thus most closely reflects the vendor's understanding of the value of the contract. It also has the benefit that it is not dependent on the progress of the contract at the time of reporting, as an expended amount would be. In order to make an apples-to-apples comparison then between prime and subcontract values, it is necessary to use the anticipated subcontract amount when comparing to the Maximum Amount on the prime contract.

In addition, 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 the agencies to more easily use the subcontractor data entry 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 scheduled to be released before July 2011.