

# AUDIT REPORT

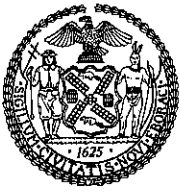


CITY OF NEW YORK  
OFFICE OF THE COMPTROLLER  
BUREAU OF MANAGEMENT AUDIT  
**WILLIAM C. THOMPSON, JR., COMPTROLLER**

## **Audit Report on the Administration of The Minority- and Women-owned Business Enterprise Program by the Department of Small Business Services**

*MD09-062A*

**October 8, 2009**



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

WILLIAM C. THOMPSON, JR.  
COMPTROLLER

**To the Citizens of the City of New York**

Ladies and Gentlemen:

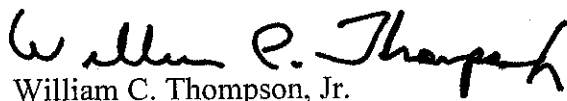
In accordance with the responsibilities of the Comptroller contained in Chapter 5, §93, of the New York City Charter, my office has conducted an audit to determine whether the Department of Small Business Services (DSBS) has complied with key provisions of Local Law 129 and §6-129 of the Administrative Code.

DSBS runs the Minority and Women-owned Business Enterprise (M/WBE) Program, newly created when Local Law 129 of 2005 was put into effect. The intent of Local Law 129 is to address the impact of discrimination and avoid favoritism in the City's procurement process by providing more opportunities for certified M/WBEs to bid on public contracts, to increase their capacity, and to contribute to the City's economy. Audits such as this provide a means of ensuring that City agencies are complying with City laws.

The results of our audit, which are presented in this report, have been discussed with DSBS officials, and their comments have been considered in preparing this report.

I trust that this report contains information that is of interest to you. If you have any questions concerning this report, please e-mail my audit bureau at [audit@comptroller.nyc.gov](mailto:audit@comptroller.nyc.gov) or telephone my office at 212-669-3747.

Very truly yours,

  
William C. Thompson, Jr.

WCT/ec

**Report:** MD09-062A  
**Filed:** October 8, 2009

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

**Audit Report on the Administration of the Minority- and  
Women-owned Business Enterprise Program by the  
Department of Small Business Services**

**MD09-062A**

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**AUDIT REPORT IN BRIEF**

The mission of the Department of Small Business Services (DSBS) is to make it easier for businesses in New York City to form, do business, and grow. It is tasked to provide direct assistance to business owners, foster neighborhood development in commercial districts, link employers to a skilled and qualified workforce, and promote economic opportunity for minority- and women-owned businesses.

DSBS also runs the Minority and Women-owned Business Enterprise (M/WBE) Program, newly created in December 2005 when Mayor Bloomberg signed Local Law 129 into effect. This law was enacted in response to a disparity study commissioned by the New York City Council. It was found that there was a significant disparity in contracting opportunities afforded to certain M/WBE groups in the procurement of construction, professional services, standard services, and goods. Local Law 129 was intended to address the disparities revealed by the study. As stated in the law, DSBS “shall administer, coordinate, and enforce a citywide program established by local law for the identification, recruitment, certification and participation in city procurement of minority and women owned business enterprises.”

On November 2, 2006, DSBS entered into an agreement with Miller<sup>3</sup> Consulting, Inc. (Miller<sup>3</sup>) to conduct an Availability/Disparity Study (disparity study) to update the findings of the 2005 City Council disparity study. As of May 1, 2009, DSBS officials informed us that the final report had not been received and that they are continuing to work with the contractor on an appropriate extension of the time frame for concluding the study.

**Audit Findings and Conclusions**

DSBS did not comply with the key provisions of Local Law 129 and §6-129 of the Administrative Code related to its monitoring of City agencies’ M/WBE utilization and how well agencies met their goals. As a result, DSBS cannot fully assess the M/WBE program’s effectiveness in increasing the participation of M/WBEs in the City’s procurement process. The agency generally complied with key provisions only with regard to outreach, training, counseling, and certification. DSBS stated it was not able to fully comply with provisions

related to auditing M/WBE contracts due to the low number of qualifying contracts in effect during the audit period.

Although DSBS received the M/WBE utilization plans from all City agencies required to prepare them, there is little evidence that DSBS reviewed the plans in a timely manner or that it met with the City agencies that did not meet their goals to determine the causes of noncompliance and to discuss possible remedies. We acknowledge that outreach, certification, training, and counseling are important steps toward ensuring that M/WBEs are in a position to compete for the opportunity to conduct business with the City. However, the fundamental goal of the program is to increase M/WBE *participation* in the City's procurement process, not merely to give these companies an *opportunity* to compete. By failing to adequately monitor agencies' compliance with M/WBE utilization goals, DSBS cannot fully assess the program's overall effectiveness in this area and recommend improvements where necessary.

We also noted two significant internal control weaknesses that should be immediately rectified—(1) DSBS did not adequately discuss, document, and follow up with the contractors and the contracting agencies regarding the results of its audits of contracts with M/WBE subcontracting goals and (2) DSBS did not conduct client assessments for 16 percent (115) of the newly certified M/WBEs in Fiscal Year 2008.

### **Audit Recommendations**

Based on our findings, we make seven recommendations, including that DSBS should:

- Immediately meet with all agencies not meeting their goals to discuss ways that they could improve, and document the results of those meetings.
- At least annually review and document its review of the utilization of M/WBEs by the agencies subject to the local law requirements to determine if they are meeting the goals stated in their M/WBE utilization plans.
- Meet and document its meetings with the agencies that are not achieving their M/WBE utilization goals to determine the reason(s) the goals are not being met and whether the agencies are making all reasonable efforts to do so. In addition, based on the results of these meetings, DSBS should determine whether any common factors exist among the agencies that may need to be addressed.
- Establish a system whereby audit findings are followed up with contractors (both prime and subs as appropriate) and contracting agencies in a timely manner.

### **DSBS Response**

DSBS officials generally agreed with the audit's seven recommendations but claimed that it already performs the tasks identified in three of them.

## **INTRODUCTION**

### **Background**

The mission of the Department of Small Business Services (DSBS) is to make it easier for businesses in New York City to form, do business, and grow. It is tasked to provide direct assistance to business owners, foster neighborhood development in commercial districts, link employers to a skilled and qualified workforce, and promote economic opportunity for minority- and women-owned businesses.

DSBS also runs the Minority and Women-owned Business Enterprise (M/WBE) Program, newly created in December 2005 when Mayor Bloomberg signed Local Law 129 into effect. This law was enacted in response to a disparity study commissioned by the New York City Council. That study, released in January 2005, found that M/WBEs do not receive a fair share of City contracts. It was found that there was a significant disparity in contracting opportunities afforded to certain M/WBE groups in the procurement of construction, professional services, standard services, and goods. Local Law 129 was intended to address the disparities revealed by the study. As stated in the law, DSBS “shall administer, coordinate, and enforce a citywide program established by local law for the identification, recruitment, certification and participation in city procurement of minority and women owned business enterprises.”

Local Law 129 was enacted so City agencies would be provided the incentive and opportunity to procure more goods and services from certified M/WBEs. The law’s intent is to address the impact of discrimination in the City’s procurement process and avoid favoritism in the procurement process by providing more opportunities for certified M/WBEs to bid on public contracts, to increase their capacity, and to contribute to the City’s economy. The law includes citywide M/WBE utilization goals, subcontractor goals, accountability and enforcement mechanisms, continual program review, and other initiatives.

According to §1304(a) of the New York City Charter, the Division of Economic and Financial Opportunity (DEFO) within DSBS is responsible for enhancing the ability of M/WBEs to compete for City contracts, enhancing City agencies’ awareness of such business enterprises, and ensuring their meaningful participation in City procurement. As part of its responsibilities under Local Law 129, DSBS is required to:

- Establish and operate a centralized program for the certification of minority- and women-owned business enterprises,
- Create, maintain, and periodically update a directory of certified minority- and women-owned business enterprises for use by City agencies and contractors,
- Conduct, coordinate, and facilitate technical assistance and educational programs for certified minority- and women-owned businesses,
- Periodically review the compliance of City agencies with the provisions of the local law, including the participation of minority- and women-owned businesses in City procurement, and

- Audit at least five percent of all contracts with established M/WBE utilization plans and five percent of all contracts awarded to certified minority- and women-owned businesses to assess their compliance with the local law.

Section 6-129(d) of the Administrative Code established citywide contracting participation goals (M/WBE utilization goals) for the use of certified M/WBEs. There are participation goals set for certain race and gender groups under the following four contract types valued at under \$1 million—Construction, Professional Services (including architectural and engineering services), Standard Services, and Goods. (See Appendix I for a complete list of the citywide contracting M/WBE participation goals for contracts valued at less than \$1 million.)

To qualify for certification in the M/WBE program, a company must be an ongoing independent business that is at least 51 percent owned, operated, and controlled by a U.S. citizen(s) or permanent resident alien(s) who is a member of a recognized minority group<sup>1</sup> or a woman. The ownership of the business must be bona fide and continuing, and the business must have been active for least one year. Owners must demonstrate the authority to control business decisions independently. In addition, the business must have a real and substantial business presence in the geographic market for the City of New York, which it can demonstrate by having its principal place of business within the City or the eight surrounding counties,<sup>2</sup> or by having a significant tie to the City’s business community (i.e., by having conducted business in the City, having derived 25 percent or more of gross receipts from business conducted in the City, or possessing a license issued by the City, etc.).

All applicants seeking M/WBE certification status must submit a completed, notarized application to DSBS. Applicants can use either: (1) the Standard M/WBE Application for certification or (2) a simplified certification application called the Fast Track application if they are currently certified by any one of the following organizations:

- New York City School Construction Authority
- The Port Authority of New York and New Jersey
- Women President’s Educational Organization
- New York & New Jersey Minority Supplier Development Council, Inc.
- New York State Department of Economic Development, Division of Minority & Women’s Business Development

If qualified to submit the Fast Track application, the applicant is required to submit a copy of the certification letter from one of the above-listed entities. However, applicants who submit the Standard M/WBE Application for certification must provide all appropriate supporting documentation, including:

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<sup>1</sup> According to the DSBS Standard M/WBE Application, a “minority” is a person who identifies him or herself as Black, Hispanic (being of Mexican, Puerto Rican, Dominican, Cuban, Central American or South American descent), Asian-Pacific (origins in the Far East, Southeast Asia, or the Pacific Islands), Asian-Indian (origins in the Indian subcontinent), Native American or Alaskan Native.

<sup>2</sup> The eight surrounding counties consist of Nassau, Putnam, Rockland, Suffolk, and Westchester counties in New York, and Bergen, Hudson, and Passaic counties in New Jersey.

- resumes for each person with ownership interest or holding any managerial positions,
- current financial statements, business tax returns for the previous three years,
- proof of U.S Citizenship or Permanent Resident Alien Status,
- proof of ethnicity for each person with ownership interest,
- lease agreements or proof of ownership for business site(s),
- copies of licenses, permits, or certificates required to operate the business, and
- copies of two or more contracts or invoices completed within the previous three years and applicable within the five boroughs.

All companies interested in renewing their M/WBE certification, regardless of the type of certification application used, must submit a completed, notarized Standard M/WBE Recertification Application, along with all appropriate supporting documentation.

On November 2, 2006, DSBS entered into an agreement with Miller<sup>3</sup> Consulting, Inc. (Miller<sup>3</sup>) to conduct an Availability/Disparity Study (disparity study) to update the findings of the 2005 City Council disparity study. The term of this agreement was 28 months, commencing on October 1, 2006 and extending to January 31, 2009. As part of the study, Miller<sup>3</sup> was hired to analyze the availability rates of M/WBEs and complete a disparity analysis based on M/WBE utilization in City procurement during Fiscal Years 2005 through 2007. The contractor was also responsible for analyzing City procurement policies and practices with respect to barriers, if any, to M/WBE participation and disparities in M/WBE utilization. The final report of this study was to be provided to DSBS by January 31, 2009, or a new date, as extended by DSBS. As of May 1, 2009, DSBS officials informed us that the final report had not been received and that they are continuing to work with the contractor on an appropriate extension of the time frame for concluding the study.

### **Objective**

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

### **Scope and Methodology**

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. 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 was Fiscal Year 2008.



To achieve the audit objective, we reviewed Local Law 129 and §6-129 of the Administrative Code.

We requested and obtained from DSBS officials the agency organization chart, including the DEFO and Certification Unit. To gain an understanding of relevant policies, procedures, and regulations governing the M/WBE program, we reviewed and used as criteria the following documents:

- Chapter 11, “Division of Economic and Financial Opportunity,” of Title 66 of the Rules of the City of New York,
- Memorandum from the Mayor’s Office of Contract Services on M/WBE Subcontracting Participation Goals and Waivers,
- Flowchart, “Unit Relationships: How DEFO Serves Certified and Non-Certified Businesses” that illustrates how a business owner applying for certification is assisted and routed through each unit within DEFO,
- “Certification Flowchart” that illustrates the application review and certification determination processes,
- Memorandum from the Associate Director to the Director of the Certification, “M/WBE Certification Procedures Overview,”
- M/WBE Certification Approval Form that is used by the Certification Unit personnel to document the application review and certification decision,
- Letter templates for the first and second notices of deficiency submitted to applicants detailing any lacking documentation that is needed to complete the application submission,
- Overview package for M/WBE “1,2,3 – Fast Track” certification procedures, and
- Overview package of the Client Assessment Process performed by the Procurement Initiatives Unit for newly certified firms.

To obtain an understanding of the administration of the M/WBE program by DSBS, the certification process, and the goals and objectives of the program, we interviewed the following DSBS officials:

- First Deputy Commissioner of the Financial Management & Administration Division and DEFO,
- Deputy Commissioner of DEFO,
- Assistant Commissioner of DEFO Operations, and
- Director of Certification.

We subpoenaed from DSBS and Miller<sup>3</sup> all draft and final reports or findings of the disparity study that were prepared by Miller<sup>3</sup> in connection with its contract.

### **M/WBE Program Outreach**

To obtain an understanding of the outreach performed by DSBS to promote the M/WBE program, including the methods, frequency, and level of the outreach, we interviewed the Director and Associate Director of External Affairs. We reviewed magazine and newspaper

advertisements, brochures, and various publication articles on the M/WBE program that DSBS provided to us. In addition, we reviewed a list of all events attended by the External Affairs unit during Fiscal Year 2008. To verify the accuracy of the list, we traced all the events identified on four randomly selected biweekly reports<sup>3</sup> of events that occurred during Fiscal Year 2008 to the provided list.

### **Training and Seminars**

To obtain an understanding of the training seminars, workshops and networking events offered by DSBS and determine their frequency, we reviewed a DSBS provided list of all training seminars and workshops provided to noncertified and certified M/WBEs and City agencies, as well as all networking events that occurred during Fiscal Year 2008. To verify the accuracy of the list and to determine the level of attendance, we reviewed the supporting documentation (e.g., brochures, advertisements, and attendance records) for a sample of 17 (20%) of the 82 training seminars, workshops, and networking events included on the list. We judgmentally selected the sample based on the relevance of the subject matter of the training events.

### **Counseling Provided to Certified M/WBEs**

To obtain an understanding of the counseling services provided to certified M/WBEs, we interviewed the Director and Associate Director of the Procurement Initiatives Unit and the Director of Capacity Building. In addition, we reviewed the Procurement Initiatives Unit Database used by the counselors to record all service activities provided to the certified businesses. To verify the counselors' initial contact with newly certified businesses and to determine their satisfaction with the program and the information received from the counselors, we interviewed representatives of 19 of the 35 newly certified businesses referred to the Procurement Initiatives Unit during November 2008 for which Client Assessments were identified as being completed. We attempted to interview representatives from all 35 of the newly certified businesses, but were unable to reach representatives from 16 of them.

### **M/WBE Application Review**

To determine whether DSBS's application review process was adequate, we reviewed application files for a randomly selected sample of 35 certification applications, consisting of 27 Standard M/WBE Applications and 8 Fast Track applications (from the 891 certification applications identified on the manual intake log for the period of July 1, 2007 through June 30, 2008) and a random sample of 15 recertification applications (from the 331 recertification applications identified on the manual intake log for the period of July 1, 2007 through June 30, 2008). Of the 50 applications (35 certification and 15 recertification) reviewed, we identified 40 that were certified, 5 that were rejected (because applications were incomplete), and 5 that were denied M/WBE certification.

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<sup>3</sup> The External Affairs Unit prepares biweekly reports identifying the events attended, including the name, date, time, topic of the event, and DSBS's role at the event (whether the unit made a presentation and/or whether it set up a table at the event).

We determined whether all 50 applications were processed in a timely manner and included an M/WBE Certification Approval Form (Approval Form)<sup>4</sup> when required. We reviewed the Approval Forms to determine whether proper approvals were obtained in making the certification decision. For the 40 applications that resulted in certifications, we determined whether the applications were complete, notarized, and included the required supporting documentation. In addition, we determined whether the businesses were properly included in the directory of certified M/WBEs maintained by DSBS.

For the five applications that were rejected because applications were incomplete or lacking required documents, we determined whether the required deficiency notices were sent to the applicants in a timely manner. For the five applicants who were denied M/WBE certification, we determined whether the required denial letters were sent to the applicants in a timely manner and whether the letters included the reason for denial and the procedures for filing an appeal. In addition, we determined whether the denied applicants submitted an appeal and reviewed the case files. If there was an appeal, we determined whether the appeal was appropriately reviewed by DSBS's Counsel and a decision made and sent by letter to the applicant.

### **Audits**

To determine whether DSBS audited at least five percent of all contracts with established M/WBE subcontracting utilization plans and five percent of all subcontracts awarded to certified M/WBEs, we reviewed the list of Fiscal Year 2008 contracts with subcontracting goals that were selected for audit by DSBS and compared it with the list of Fiscal Year 2008 contracts with subcontracting goals. We requested and attempted to review supporting documentation of the audits of the contracts selected by DSBS as evidence of the audits' initiation, but DSBS provided no documentation. DSBS officials informed us that the audits were not yet completed and further verification of the audits' findings and follow-up with some of the audited agencies needed to be performed. We also requested and reviewed audit documentation for the four audits of contracts with subcontracting goals that were completed by DSBS as part of its pilot test program, as indicated in the Preliminary Report, "FY 2008 Compliance Information (July 1–December 31, 2007)."

### **Agency M/WBE Utilization Plans**

We reviewed the Fiscal Year 2006 purchase amounts made by each City agency to identify those agencies that made purchases in excess of \$5 million and were therefore required to submit Fiscal Year 2008 utilization plans to DSBS indicating the agency's participation goals of M/WBEs for the year.<sup>5</sup> According to the Fiscal Year 2006 purchase amounts, there were 23

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<sup>4</sup> The M/WBE Certification Approval Form is used by the Certification Unit to document the M/WBE application review and certification determination for the Standard M/WBE Applications and Recertification Applications. This form is not required for Fast Track applications.

<sup>5</sup> According to Local Law 129, on April 1 of each year, each agency with procurements in excess of \$5 million during the fiscal year ending June 30 of the preceding calendar year must submit an agency utilization plan for the fiscal year commencing in July of the year when such a plan is submitted to the commissioner. Therefore, City agencies that made procurements in excess of \$5 million during Fiscal Year 2006 are required to submit an agency utilization plan in April 2007 for Fiscal Year 2008.

agencies with procurements exceeding \$5 million and were therefore required to submit a Fiscal Year 2008 agency utilization plan. We requested and reviewed all agency utilization plans from DSBS to determine whether DSBS received all required plans. To determine whether DSBS monitors the utilization of certified M/WBEs by City agencies that were required to submit an agency utilization plan, we requested documentation from DSBS indicating that DSBS compared the utilization plans for each City agency with their actual M/WBE utilization rates for Fiscal Years 2007 and 2008. To provide further evidence of DSBS's monitoring of City agency utilization of M/WBEs and to determine whether DSBS communicated with those agencies not achieving the goals identified on their plans, we requested documentation supporting such DSBS communications and their results. We also reviewed and calculated the agencies' utilization of M/WBEs during Fiscal Year 2008 and compared the amounts the agencies spent to their utilization plans to verify the accuracy of DSBS calculations and to determine the total number of goal categories achieved by the agencies.

### **Discussion of Audit Results**

The matters covered in this report were discussed with DSBS officials during and at the conclusion of this audit. A preliminary draft report was sent to DSBS officials and discussed at an exit conference held on July 1, 2009. On September 1, 2009, we submitted a draft report to DSBS officials with a request for comments. We received a written response from DSBS officials on September 23, 2009. In their response, DSBS officials generally agreed with the audit's seven recommendations but claimed that it already performs the tasks identified in three of them. However, DSBS officials stated, "the Report includes a number of assumptions and statements that demonstrate a fundamental lack of understanding of Local Law 129 of 2005." The DSBS response states:

The Comptroller decided to conduct this audit during the three-year period of time explicitly designated in the law itself as the time frame when agencies are to be evaluated not merely on the goal numbers, but on the "steps . . . taken to initiate and ramp up their efforts to comply with the requirements." We don't question the Comptroller's prerogative in doing so, but it is inconsistent with the scheme of LL 129 to claim that agencies are not in compliance . . . while ignoring the fact that the audited time frame—Fiscal Year 2008—is the second year of that three-year ramp up period. . . . The City Council, the Mayor and SBS clearly understood at the time LL 129 was adopted in December 2005 that agencies could not attain the stated goals from a standing start.

The audit was specifically conducted during the three-year ramp-up period in order to determine whether DSBS adequately administered the program and made sufficient efforts to gather information necessary to assess the effectiveness of the program and make an informed decision about whether any revisions to the law are necessary. It was very important that DSBS monitor and evaluate the agencies' M/WBE utilization during the ramp-up period to identify the successes and whether improvement is needed. The ramp-up period was also an important time for DSBS to assess whether the agencies were making good faith efforts to increase their M/WBE utilization.

DSBS also stated in its response that the report failed to address the impact of the industries and procurement methods excluded from Local Law 129 and that “the Report grossly overstates both the supposed non-compliance by agencies, and the claim that SBS failed to monitor them.” Since the audit’s objective was to determine whether DSBS complied with the key provisions of Local Law 129, we included only those industries and methods covered by the law. We were expecting that DSBS would have identified the agencies that did not meet their utilization goals and assessed whether adequate steps were taken by these agencies to increase their M/WBE participation. However, DSBS was unable to provide any documentation to that effect. DSBS further states:

It is evident that the efforts of the City are paying off. During the first three years that LL 129 has been in effect, certified companies have been awarded over \$1 billion in prime and sub-contracts. The number and dollar value of contract awards to certified companies have increased each year of the program and interest in the program, as evidenced by new certifications and the recertification rate, continues to increase.

DSBS’s response is misleading. DSBS appears to be stating that all of these contracts were covered by Local Law 129, which is not true. To be certified as an M/WBE, a company has to demonstrate that it is an ongoing independent business that is at least 51 percent owned, operated, and controlled by a U.S. citizen(s) or permanent resident alien(s) who is a member of a recognized minority group or a woman. However, not all contracts awarded to certified M/WBEs fall under Local Law 129. As stated previously, the law pertains only to certain M/WBE groups and industries for which *statistically significant disparities in contracting opportunities were found*. Consequently, M/WBE groups and industries for which significant disparities were *not* found—such as Asian-American-owned firms in the construction industry—are not covered by Local Law 129. In addition, contracts and subcontracts valued at \$1 million or more were found not to have any of the noted disparities and are therefore not covered by Local Law 129. However, DSBS’s argument relies on the inclusion of procurements not covered by the Local Law. It is disingenuous for DSBS to claim compliance with a law intended to address specific and significant disparities in contracting opportunities by including contracts that were excluded in Local Law 129 because they represented areas found to be without disparities. It is worth noting that DSBS does not identify the dollar amount of contracts in areas where such disparities *were* found and are therefore subject to Local Law 129.

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

## FINDINGS AND RECOMMENDATIONS

DSBS did not comply with the key provisions of Local Law 129 and §6-129 of the Administrative Code related to its monitoring of City agencies' M/WBE utilization and how well agencies met their goals. As a result, DSBS cannot fully assess the M/WBE program's effectiveness in increasing the participation of M/WBEs in the City's procurement process. The agency generally complied with key provisions only with regard to outreach, training, counseling, and certification. DSBS stated it was not able to fully comply with provisions related to auditing M/WBE contracts due to the low number of qualifying contracts in effect during the audit period. We also noted two internal control weaknesses that should be rectified.

DSBS performs outreach promoting the M/WBE program, coordinates and conducts training events for noncertified and certified M/WBEs and City agencies, and provides technical assistance to certified M/WBEs. In addition, DSBS created a centralized program for the certification of M/WBEs, adequately processed the sampled M/WBE certification and recertification applications, and maintains a directory of certified M/WBEs posted on its Web site.

However, DSBS is not adequately monitoring how well City agencies are meeting their M/WBE utilization goals. Although DSBS received the M/WBE utilization plans from all City agencies required to prepare them, there is little evidence that DSBS reviewed the plans in a timely manner or that it met with the City agencies that did not meet their goals to determine the causes of noncompliance and to discuss possible remedies. We acknowledge that outreach, certification, training, and counseling are important steps toward ensuring that M/WBEs are in a position to compete for the opportunity to conduct business with the City. However, the fundamental goal of the program is to increase M/WBE *participation* in the City's procurement process in a manner consistent with local and State procurement law, not merely to give these companies an *opportunity* to compete. By failing to adequately monitor agencies' compliance with M/WBE utilization goals, DSBS cannot fully assess the program's overall effectiveness in this area and recommend improvements where necessary.

In addition to the above, we noted the following two significant weaknesses that should be rectified:

- DSBS did not adequately discuss, document, and follow up with the contractors and the contracting agencies regarding the results of its audits of contracts with M/WBE subcontracting goals.
- DSBS conducts client assessments of newly certified M/WBEs in order to target subsequent DSBS technical assistance. These assessments were not performed for 16 percent (115) of the newly certified businesses in Fiscal Year 2008.

These issues are discussed in detail in the following sections of this report.

### **DSBS Performs Outreach to Promote the M/WBE Program**

DSBS promoted the M/WBE program, its benefits to M/WBEs, and the successes of those businesses certified under the program. During Fiscal Year 2008, the DSBS External Affairs Unit sponsored and/or attended a total of 223 events, including 205 events that took place throughout the five boroughs. These events included:

- The Fifth Annual National Minority Business Council Women's Conference, in which DSBS staff discussed the services provided by DSBS, emphasizing the benefits of certification.
- Department of Design and Construction's Fourth Annual Tradeshow and Networking Event, in which DSBS staff discussed Local Law 129 and presented the benefits of certification.
- The Caribbean-American Chamber of Commerce and Industry's Special Economic Development Conference, which focused on doing business with the government and private sectors, certification, and procurement opportunities.

DSBS has also been featured in and has advertised the M/WBE program in numerous publications, including *Crain's New York Business*, *The Network Journal*, *Minority Commerce Weekly*, *The New York Enterprise Report*, and *New York Construction*.

In addition, to assist in its outreach efforts, DSBS has created the M/WBE Leadership Association in which it has partnered with 14 community-based organizations that serve minority- and women-owned businesses. Members include the 100 Black Men New York, Inc., Asian Women in Business, Caribbean American Chamber of Commerce & Industry, the Greater Harlem Chamber of Commerce, and New York Women's Chamber of Commerce. As stated on the DSBS Web site, the goals of the community-based organizations that make up the M/WBE Leadership Association are to support the growth of M/WBEs and to educate the business owners about the certification process and the keys to success in government contracting. They do so through local outreach and marketing, workshops, networking events, and one-on-one assistance. During Fiscal Year 2008, the M/WBE Leadership Association reported that it hosted or co-sponsored a combined total of 197 workshops and events, conducted 251 marketing events through direct mailings and e-mails reaching over 490,000 recipients, and provided technical assistance for more than 1,400 business owners, including assistance with M/WBE certifications for 867 businesses.

### **DSBS Provides Training Services**

DSBS provides numerous training seminars, workshops, and networking events throughout the year for certified and potential M/WBEs and to City agencies. According to §1304(e)(3) of the City Charter, DSBS is required to conduct, coordinate and facilitate technical assistance and education programs. Based on our review of the listing of training seminars,

workshops, and networking events during Fiscal Year 2008, we identified 82 events coordinated or offered by DSBS, consisting of:

- 65 training seminars and workshops directed to noncertified and certified M/WBEs,
- 9 training workshops on M/WBE program administration directed to City agencies and prime contractors, and
- 8 networking events directed mainly to certified M/WBEs

As part of the training seminars and workshops, DSBS offers M/WBE certification workshops to noncertified firms to highlight the benefits of certification and to provide guidance to the attendees on how to complete the certification application correctly. In addition, DSBS also provides application document review sessions that allow applicants the opportunity to review the M/WBE documentation checklists with DSBS personnel to ensure completeness of their application submissions.

DSBS has also launched a series of quarterly workshops during Fiscal Year 2008 called “I’m Certified, Now What?!” that are designed for newly certified M/WBEs. This workshop provides DSBS the opportunity to provide guidelines and tips on how certified M/WBEs can succeed in doing business with the City. Agency procurement representatives also participate at these workshops to provide their perspective on how they look for vendors. The workshop is followed by networking with the buyers.

To assist business owners in preparing competitive proposals and to provide guidance in Request-for-Proposals (RFP) procedures, customary evaluative measures, and common pitfalls to avoid when responding to an RFP, DSBS offered the “How to Respond to an RFP” training seminar twice during Fiscal Year 2008. In addition, DSBS provided a monthly class, “Selling to Government,” to provide an introduction to government contracting at the City, State, and federal levels, and to equip businesses with the necessary knowledge to pursue contracting opportunities successfully.

### **DSBS Offers Counseling Services**

DSBS offers counseling services to certified M/WBEs through its Procurement Initiatives Unit. According to §1304(e)(3) of the City Charter, DSBS is required to conduct, coordinate and facilitate technical assistance and education programs. Newly certified M/WBEs are assigned to a procurement counselor based on the businesses’ industry type.<sup>6</sup> These procurement counselors are the certified businesses’ primary contacts within DSBS and are the individuals to whom the businesses should reach out for assistance.

The procurement counselors are required to contact the newly certified companies generally within one month following their certification date to perform a client assessment. This client assessment has two purposes—(1) to establish a one-on-one relationship between the newly certified companies and their individual procurement counselors, and (2) to create a

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<sup>6</sup> There is at least one procurement counselor for each of the following four industry types: standard services, professional services (including architectural and engineering services), goods, and construction.



mechanism to collect information on each new client's needs. The procurement counselors assess each client's needs, offer guidance on the City's procurement processes, and refer clients, as appropriate, to more specialized services offered by DEFO, DSBS, and other agencies. The client assessments provide the background information needed for the procurement counselors to provide targeted assistance, including the identification of the services in which the client is most interested.

All assistance provided by the procurement counselors, including the client assessment, is captured within the Procurement Initiatives Unit Database. During our review of the database, we found that during Fiscal Year 2008, counselors offered some form of assistance to 754 certified businesses (e.g., guidance with the City, State, or federal procurement processes, provision of a bid notice, or request for debriefing after unsuccessful bid) or referral (e.g., to training classes and workshops, to another City agency, or for bid preparation assistance). In total, these 754 businesses received at least one form of assistance in 2,683 instances and at least one referral in 2,127 instances.

However, as will be discussed later in the report, DSBS is not ensuring that all client assessments are being performed. Of the 707 newly certified businesses referred to the Procurement Initiatives Unit during Fiscal Year 2008 (as identified by the assignment month within the Procurement Initiatives Unit Database), only 592 (84%) assessments were completed,<sup>7</sup> as of January 2009.

### **DSBS Established and Operates a Centralized Program For the Certification of M/WBEs**

In accordance with §1304(e)(6)(a) of the City Charter, DSBS established and operates within DEFO the Certification Unit to process M/WBE certification applications. The Certification Unit reviews the certification applications and supporting documentation to ensure that the applicants are qualified under the requirements of Local Law 129 to become a certified M/WBEs, and maintains a directory of all certified M/WBEs on the DSBS Web site.

Certification applications are assigned to a certification analyst (analyst) on a rotation basis so that the analyst cannot anticipate, determine, or request a particular case. This allows the analyst to be free from any outside interference in terms of persuasion and reduces the risk of corruption.

To determine whether the Certification Unit adequately processed the applications in a timely manner, application files for a random sample of 50 of the 1,222 applications<sup>8</sup> received during Fiscal Year 2008 were reviewed. Of these 50 applications, we identified 40 that were certified, 5 that were rejected (because applications were incomplete), and another 5 that were denied M/WBE certification. Our examination disclosed that all 50 applications were adequately processed in a timely manner and an Approval Form documenting the certification decision was used when required.

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<sup>7</sup> The 592 client assessments that were completed include six businesses that chose not to participate.

<sup>8</sup> The 1,222 applications consist of 891 certification applications and 331 recertification applications.

We also determined that a signed, completed, and notarized application and the required supporting documentation were submitted by all 40 of the 50 applicants that received certification. In addition, we verified that these 40 businesses were included in the directory of certified M/WBEs maintained by DSBS. For the five applications that were rejected because applications were incomplete or lacked documents, we determined that deficiency notices were sent to these applicants in a timely manner and identified the required information or documentation needed to complete the application submission. DSBS provided the businesses with the opportunity to submit the missing information or documents, but ultimately rejected the applications for a lack of response by the applicants.

Furthermore, we determined that denial letters were sent in a timely manner to the five applicants denied certification. The denial letters appropriately included the reason for the denial and the procedures for filing an appeal, as required. Only one of the five applicants submitted an appeal. We reviewed the case file for this applicant and verified that the appeal was reviewed by DSBS's Counsel and that a decision letter was sent to the applicant documenting the final certification determination.

#### **DSBS Did Not Adequately Monitor the Utilization of Certified M/WBEs by City Agencies**

DSBS did not adequately monitor the utilization of certified M/WBEs by City agencies. According to §1304(e)(4) of the City Charter, DSBS is required to periodically review the compliance of City agencies with the provisions of the local law, including the participation of M/WBEs in City procurement. Although DSBS received M/WBE utilization plans for Fiscal Year 2008 purchases from all City agencies required to prepare them, DSBS does not adequately monitor the *actual* utilization of certified M/WBEs by City agencies to ensure that they are complying with their plan.

To determine whether DSBS performed analyses of actual utilization of M/WBEs by City agencies, on September 18, 2008, and October 31, 2008, respectively, we requested from DSBS officials their Fiscal Year 2007 and Fiscal Year 2008 comparisons of the actual utilization rates of M/WBEs by City agencies with the agencies' submitted utilization plans. We initially received an e-mail response regarding our request on January 28, 2009, from DSBS's First Deputy Commissioner of the Financial Management & Administration Division and DEFO, who did not provide the comparisons, but stated:

The Procurement Indicators Report for Fiscal Years 2007 and 2008 contain the reported M/WBE utilization by agency, industry and ethnicity. Utilization is only measured for companies awarded contracts that are certified by SBS. Other M/WBEs that are awarded contracts are unable to be counted for utilization purposes. Further, not all agencies make purchases in every industry category. By our calculations, in FY 2007, 35 agencies with Local Law 129 spending met a total of 32 goal categories and in FY 2008, 33 agencies with Local Law 129 spending met a total of 28 categories.

On January 28, 2009, we again asked DSBS officials to share with us the analysis that was done to show that 35 agencies met 32 goal categories in Fiscal Year 2007 and 33 agencies met 28 categories in Fiscal Year 2008. It was not until March 17, 2009—more than five months after our initial requests—that the comparisons for Fiscal Years 2007 and 2008 were provided to us.<sup>9</sup> Therefore, we question whether these analyses were performed prior to our request.

Moreover, although these comparisons supported the DSBS calculations provided to us on January 28, 2009, the comparisons did not include a review of the subcontract utilization goals but rather of prime contract utilization only. In addition, DSBS’s analysis of professional services did not include architectural and engineering services as called for in the law. As a result, one agency was erroneously reported as achieving its goal, and another agency as not achieving its goal.

According to our analysis of the Fiscal Year 2008 agency purchases from M/WBEs, of the 23 agencies that were required to submit an agency utilization plan (which are listed in Appendix II of the report), we determined that only 12 agencies met a total of 21 (9%) prime contract utilization goals of the 241 applicable goal categories.<sup>10</sup> The total value of the prime contracts<sup>11</sup> (valued between \$5,000 and \$1 million) entered into by these agencies was \$369,417,386. Based on the participation goal percentages for the 23 agencies in the four industry categories, the total target amount for contracts with M/WBEs covered by the local law requirements was \$107,816,905; the actual value of contracts with M/WBEs totaled \$14,882,561, 14 percent of the total goal amount. (The goal categories and citywide agency participation goal amounts established by Local Law 129 are listed in Appendix I of the report.)

**DSBS Response:** “By looking solely at whether an agency had over \$100,000 worth of a given type of procurement, the Report ignores some fairly obvious realities. A prime contract awarded to an MWBE can only be counted toward a goal for one group. The fact that an agency procured only a single contract in a given category and that contract happened to be worth \$500,000 does not mean that the agency even theoretically could have achieved four different gender/ethnic subgroup goals for that contract. Only by looking at the number of procurements, not simply the dollar value, can a fair understanding be reached as to whether or not an agency is making substantial progress towards the goals.”

**Auditor Comment:** We must note that we used the criterion of \$100,000 for those agencies that did not submit a utilization plan and did so only because DSBS had no

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<sup>9</sup> The DSBS comparisons included City agencies that were not required to submit an agency utilization plan. During Fiscal Year 2007 and 2008 there were only 22 and 23 City agencies that were required to submit utilization plans, respectively, yet DSBS’s comparisons included 35 and 33 agencies, respectively. Our analysis only included those agencies required to submit a utilization plan to determine whether DSBS met with the agencies that did not meet their goals.

<sup>10</sup> For agencies that were required to submit an agency utilization plan, we used the following criteria in performing our analysis—(a) we excluded agencies from certain industry categories in which goals were set but purchases were not made and (b) we included agencies in certain industry categories in which no goals were set but made a significant amount of purchases (a total value of at least \$100,000).

<sup>11</sup> The prime contracts value consists only of construction, professional services, standard services and goods contracts, which are subject to Local Law 129 requirements.

criterion of its own. Furthermore, the use of this criterion resulted in the inclusion of only four agencies covering five goal categories, and each of these agencies made at least five purchases totaling in excess of \$400,000 in the reported industry categories.

With respect to subcontracting goals, 10 of the 23 agencies required to submit agency utilization plans had subcontracts in construction and professional services awarded on prime contracts with M/WBE goals totaling \$36,932,104 for the year. Our analysis determined that 7 agencies met a total of 12 (33%) subcontract utilization goals of the 36 applicable goal categories.<sup>12</sup> Based on the participation goal percentages for these agencies, the total target amount for subcontracts with M/WBEs was \$11,490,272; the actual value of subcontracts with M/WBEs totaled \$11,232,961, 98 percent of this amount. However, this percentage is misleading. For those categories in which subcontracting goals were met, agencies far exceeded the goals in those categories, raising the overall utilization amount. The fact remains that the utilization goals were not met in two-thirds of the subcontracting goals categories. (See Appendix III of the report comparing the M/WBE participation goals and actual M/WBE utilization during Fiscal Year 2008 for the 23 Agencies that were required to submit an agency utilization plan.)

**DSBS Response:** “Where the Report in several places characterizes various agencies as not having ‘met’ the applicable goals, it is treating the goals of Local Law 129 as if they were inflexible quotas, rather than recognizing the actual standard that SBS is legally obligated to follow in evaluating agency performance—the standard which honors the difference between quotas and goals—namely, whether the agency has made ‘substantial’ or ‘adequate’ progress toward meeting its goals.”

**Auditor Comment:** Nowhere in this report do we state that the goals are “inflexible quotas.” Nonetheless, agencies are to be evaluated, at least in part, on whether they are meeting their goals. DSBS itself acknowledges this fact earlier in its response. Further, although DSBS states that it is required to determine whether agencies are making “substantial” or “adequate” progress toward meeting their utilization goals, it provided us no evidence that it performs this evaluation, nor has it identified the measure it would use to determine whether adequate progress was made.

**DSBS Response:** “In the subcontract area, the Report’s analysis is also flawed. The Fiscal Year 2008 data it quotes apparently comes from Appendix K-3 to MOCS Fiscal 2008 Annual Procurement Indicators report, but the Report ignores what that same report—and common sense—indicates. Most of the subcontracts for Fiscal Year 2008 prime contracts would not have yet been approved during that same fiscal year, but will, in fact, be approved over the life of those contracts, some of which will last for many years. Therefore, one cannot fairly measure whether the subcontracting goals for such contracts will be met simply by analyzing one fiscal year’s data.”

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<sup>12</sup> Twenty-one of the 23 agencies that were required to submit an agency utilization plan had no prime contracts with subcontracts in at least one of the industry categories covered by the local law and were therefore not included in our analysis.

**Auditor Comment:** Although DSBS claims that subcontracting utilization goals cannot be measured by analyzing one fiscal year's worth of data, the agency *specifically requested* that we include such an analysis in this report. Further, DSBS contradicts itself later in its response when, in response to recommendations #1, #2, and #3, it claims that annual and semi-annual reports it has filed show that agencies are meeting Local Law 129 goals for subcontracts. It must be noted, however, that the DSBS calculations are based on anticipated, not actual, subcontracting work. There is no guarantee that subcontractors would receive all of the anticipated amounts, or even that they would perform the subcontracting work.

We inquired whether DSBS addressed these issues with the agencies that did not meet their utilization plans and requested documentation to support these discussions. DSBS officials stated that although they met with the agencies, there was no formal process in place at the time concerning these discussions and that no documentation was maintained. However, the First Deputy Commissioner then stated that it might be a good idea for them to formalize the process and that they would discuss the matter. As there was no evidence that DSBS met with any of the agencies not meeting the goals established within their utilization plans, DSBS cannot demonstrate that these discussions took place. It is important for DSBS to document these discussions and the agencies' explanations for not meeting their goals. This record would allow DSBS to investigate the identified causes and determine whether there are common problems throughout the agencies that need to be addressed.

As stated earlier, the M/WBE program encompasses a number of key components that are intended to increase the ability of M/WBEs to compete for city contracts. Outreach, certification, training, and counseling are all vital to the success of the program, and we found that DSBS is complying with the local law with respect to these areas. However, these components are simply the tools to help accomplish what is arguably the program's primary goal, which is to increase M/WBE participation in the City's procurement process. It appears that the authors of the law recognized the need to measure progress and established the monitoring component. The monitoring not only tracks how well agencies are meeting M/WBE utilization goals but, in a larger sense, reveals how effective the above-stated tools (e.g., certification, training) are in increasing M/WBE participation in City procurements. Consequently, it is vital that DSBS comply with the monitoring provisions of the local law and perform its analysis in a timely manner so that it can assess the City's overall effectiveness in meeting M/WBE program goals and recommend changes if needed.

According to §6-129(h) of the Administrative Code, each agency is directly accountable for the goals set forth in its utilization plan, and each agency is to make all reasonable efforts to meet the participation goals established in its agency utilization plan. Furthermore, as stated in §6-129(f)(ix), the designated agency M/WBE officer is responsible for monitoring the agency's procurement activities to ensure compliance with its agency utilization plan and progress towards the participation goals as established in the plan. To ensure accountability, DSBS and the Mayor's Office of Contract Services (MOCS) stated in the Fiscal Year 2008 Annual Report that the local law requires that DSBS and MOCS report M/WBE utilization by agency, industry, ethnicity, and gender, and that the reported information has served as a tool to help agencies monitor their individual progress towards meeting their M/WBE goals. However, relying solely

on self-monitoring by the agencies is inadequate to ensure that they will make all reasonable efforts to meet the participation goals established in their agency utilization plans.

To help achieve participation goals, among other methods, the local law requires that agencies encourage M/WBEs to have their names included on their bidders' lists, seek prequalification where applicable, and compete for City business as contractors and subcontractors. In addition, the local law encourages agencies to advertise their procurement opportunities and send written notice of specific procurement opportunities to minority and women business organizations. Further, agencies are required to examine their internal procurement policies, procedures, and practices and, where practicable, address any elements that may be negatively affecting the participation of minority- and women-owned businesses in City procurement. It is important for DSBS to review and verify the steps taken by the agencies and ensure that they are making all reasonable efforts to meet their participation goals.

The findings discussed in this report were also identified by the contractors completing the current DSBS disparity study. The preliminary findings of the study identified some areas where significant improvements could be made that would enable M/WBEs to actively participate in City procurements. One such area is DSBS oversight of the implementation of M/WBE utilization plans of individual City agencies. The study found that oversight is limited. DSBS's focus overemphasizes certification and technical assistance while underemphasizing monitoring and enforcement. That is, DSBS is not significantly involved in monitoring and enforcing of M/WBE utilization plans by agencies and contractors. ACCOs<sup>13</sup> who were interviewed as part of the study expressed a need for DSBS to become more familiar with the procurement needs of their individual agencies and to introduce capable M/WBEs to contracting officers and prime contractors.

If DSBS is not meeting with the agencies that are not achieving their utilization goals, it cannot determine whether the agencies are making all reasonable efforts to do so and, as previously mentioned, DSBS will not be able to determine whether there is a common factor preventing the City agencies from meeting their utilization plans. At the exit conference, DSBS officials informed us that they misunderstood our multiple requests and stated that they did in fact meet with the agencies and provided us with documentation they felt supported these meetings. However, the major part of the documentation did not reflect specific discussions and meetings with those agencies that did not achieve the utilization goals submitted in their agency utilization plan. One document did list meetings with agencies' ACCOs that DSBS claims took place between July and October 2008 to review Fiscal Year 2008 utilization. Although in some instances the list indicates that the meetings were held "to discuss M/WBE Utilization," there is no indication that the meetings took place as a result of agencies' not meeting their plans' utilization goals, nor was there specific reference to the participation goals that the agencies had not met. Moreover, as the utilization analysis was not provided to us until more than five months after our initial request, we question whether DSBS was even aware of the agencies that had not met their goals prior to these meetings.

***DSBS Response:*** "The Report's claim that SBS failed to monitor agencies' supposed non-compliance with prime contract goals assumes that there was, in fact, non-

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<sup>13</sup> Agency Chief Contracting Officers

compliance occurring, which is not the case, given LL 129's scheme which recognizes the need for a ramping up period. The assumption that agencies were not in compliance, moreover, is premised on two equally faulty assumptions: first, that non-attainment of the goals is the equivalent of non-compliance with LL 129; and second, that agencies, if doing all that the law permits them to do, could have 'met' the stated goals."

**Auditor Comment:** There is nothing in the law that exempted DSBS from monitoring how well agencies achieved their utilization goals during the three-year ramping up period. Additionally, there is nothing in the law that states that agencies are exempted from trying to meet their goals during that period. Consequently, we determined whether agencies complied with, or met, their utilization goals. We are puzzled by DSBS's comment that the report's findings are based on an assumption that agencies could have met the stated goals when the agencies themselves submitted their goals, presumably because *the agencies* felt them to be achievable. (Local Law 129 contains a provision that allows agencies, with an explanation, to submit goals that differ from those contained in the law.) Furthermore, evaluating the attainability of the goals was outside the scope of this audit. Rather, we determined whether agencies met their goals and, for those that did not, whether DSBS followed up to determine the causes.

### **Recommendations**

DSBS should:

1. Immediately meet with all agencies not meeting their goals to discuss ways that they could improve, and document the results of those meetings.
2. At least annually review and document its review of the utilization of M/WBEs by the agencies subject to the local law requirements to determine if they are meeting the goals stated in their M/WBE utilization plans.
3. Meet and document its meetings with the agencies that are not achieving their M/WBE utilization goals to determine the reason(s) the goals are not being met and whether the agencies are making all reasonable efforts to do so. In addition, based on the results of these meetings, DSBS should determine whether any common factors exist among the agencies that may need to be addressed.

**DSBS Response:** "SBS takes exception to this finding. We certainly share the Comptroller's objective of accountability, and already perform the tasks identified in the recommendations pertaining to this finding. In fact, at every step of the way, we have met with the agencies, not only to discuss their progress, but also to solicit their input as to what SBS might do in order to improve their ability to succeed. As noted above, the applicable LL 129 standard for Fiscal Year 2008 is 'substantial progress' not whether the goals are 'met.'

"Since its effective date, SBS has been meeting regularly with agencies, including those that have not yet attained the aspirational goals for prime contracts. SBS annually

reviews those agencies' utilization and suggests ways for each agency to improve its performance.

“As documented, SBS and MOCS have had continuous contact with agencies to ensure that the agencies understood the requirements of the law and carried out effective steps to implement the program and increase utilization. And, to date, as detailed in the annual and semi-annual reports filed pursuant to LL 129 (and provided to the Comptroller), agencies are, in fact, attaining the LL 129 goals for subcontracts. Going forward, now that the ramping up period has concluded, SBS will implement enhanced tools for reviewing performance with agencies.

“With the close of the ramp-up period, SBS and MOCS are increasing scrutiny of agency actions to ensure they are doing all they can to implement the provisions of the law and using all available tools to do so.”

***Auditor Comment:*** Although DSBS claims that it already performed the tasks stated in the recommendations, they provided little, if any, evidence that it had done so. As stated previously, it took more than five months and repeated requests for DSBS to provide us with its analyses of actual M/WBE utilization by City agencies. It is apparent that DSBS performed these analyses subsequent to our requests. Without the results of the analyses, DSBS would not have been able to identify the agencies that did not meet their goals and would not have been able to determine whether the agencies were taking all reasonable steps to increase M/WBE participation.

In addition, in two separate e-mails to DSBS as well as multiple meetings, including our meeting to discuss the audit concerns, we questioned whether DSBS met with or contacted agencies that did not meet the goals in their utilization plans and whether they had any documentation to support it. At no time prior to the exit conference did DSBS provide any relevant document or inform us that any such documentation was available. As previously stated, although DSBS provided us with documentation at the exit conference that it felt supported these meetings, only one of the documents made reference to meetings that DSBS claimed took place with agencies' ACCOs to review Fiscal Year 2008 utilization. However, this document did not indicate that the meetings took place as a result of agencies' not meeting the utilization goals in their plans, nor was there specific reference to the participation goals that the agencies had not met. Furthermore, the document did not include an assessment by DSBS of the activities taken by agencies to increase their M/WBE participation. DSBS is therefore unable to demonstrate that it discussed utilization goals with agencies that did not meet the participation goals stated in the law.

DSBS has stated that now that the ramp-up period is over it will implement enhanced monitoring tools. However, DSBS should have been doing this all along. As DSBS described in its own response, the ramp-up period is the time agencies are to be evaluated not merely on the goals, but on the steps they have taken to comply with the law. Therefore, during this period it would have been especially important for DSBS to assess whether agencies were making all reasonable efforts to meet their participation goals and, when necessary, to provide recommendations for improvement.



### **DSBS Does Not Have Adequate System in Place to Follow-up on Audit Findings**

During the period that we reviewed, DSBS conducted four pilot audits of prime contracts with M/WBE subcontracting goals to assess compliance with the local law requirements. However, DSBS does not have a system in place whereby the results of their audits are communicated to the appropriate agencies and auditees and followed up. As a result, it is more likely that issues of noncompliance identified during audits will remain uncorrected.

According to §6-129(e)(10) of the Administrative Code, DSBS, in consultation with MOCS, is required to audit at least five percent of all construction and professional service contracts for which M/WBE subcontracting utilization plans are established, and five percent of the subcontracts awarded to M/WBEs to determine whether they are in compliance with participation goals set by the agencies in accordance with Local Law 129.

According to the Preliminary Report, “FY 2008 Compliance Information (July 1–December 31, 2007),” DSBS developed an audit process to evaluate five percent of all contracts with subcontracting goals and five percent of all subcontracts awarded to M/WBEs during the first half of Fiscal Year 2008. DSBS officials informed us that they did not conduct any audits of contracts prior to Fiscal Year 2008 as there were very few contracts underway that were covered by the local law.

To test the process it developed, during Fiscal Year 2008, DSBS conducted four pilot audits of prime contracts with M/WBE subcontracting goals that were awarded in Fiscal Year 2007. At the time the pilot audits were initiated, DSBS reported that there were 74 registered contracts with M/WBE subcontracting goals. However, DSBS stated that it was unable to select the required five percent of the M/WBE subcontracts as the available subcontracts were not sufficiently underway. To verify that the audits were performed, we reviewed the audit documentation maintained by DSBS and the summary of findings for each of the four pilot audits.

In reviewing the findings for each audit, we identified several noncompliance issues that were discovered by DSBS. Examples of issues identified include the following:

- A prime contractor adjusted the subcontracting requirements of a contract without notifying the agency,
- No proof of payment to a subcontractor was provided by the prime contractor for two contracts, and
- A prime contractor did not meet its subcontracting goals.

When we questioned DSBS officials about whether they notified the audited agencies and prime contractors of these issues, they told us that there was no correspondence between DSBS and the audited agencies regarding the audit findings, but that the work performed by the DSBS staff was summarized in a memo to file. DSBS also responded that the agencies reviewed the criteria used by DSBS audit staff and that there was dialogue about the documentation required for the agencies to be in compliance.

Although DSBS claims that the audited agencies reviewed the audit criteria and were aware of the documentation required for compliance with the local law, it is also important that DSBS, during and at the conclusion of the audits, discuss, and document all issues with the audited agency officials. If the agency officials are not made aware of the audit's outcome, there is no assurance that they will be aware of the noncompliance issues identified, and there is no assurance that they will rectify issues. Audits not only ascertain whether contractors are meeting contractual M/WBE provisions, but also ensure that contractors are aware that the City is actively monitoring their compliance with these regulations. If findings of noncompliance are not followed up with contractors and contracting agencies, contractors are more likely to assume that these issues are not of importance and are therefore less likely to make efforts to come into compliance. Over time, this will significantly compromise the City's efforts to ensure that the program is meeting its goal of increasing M/WBE participation in City procurements.

DSBS officials informed us that they hired an independent CPA firm to conduct the required audits of Fiscal Year 2008 contracts, which are presently underway. We reviewed the contract between DSBS and the CPA firm and verified that the audit scope adhered to the local law requirements, including the required number of contracts to be audited. In reviewing the number of contracts and subcontracts selected by DSBS for audit and comparing it with the number of contracts with subcontracting goals, we determined that DSBS appropriately selected the required number of contracts with subcontracting goals. In addition, we verified that DSBS appropriately selected the CPA firm from the New York City Comptroller's pre-qualified list of CPA firms.

### **Recommendations**

DSBS should:

4. Formally notify the agencies of the findings contained in the pilot audits.
5. Establish a system whereby audit findings are followed up with contractors (both prime and subs as appropriate) and contracting agencies in a timely manner.

**DSBS Response:** "SBS agrees with these recommendations and has begun implementation."

### **Other Issue**

#### **Client Assessments Not Completed for All Newly Certified Businesses**

DSBS is not ensuring that client assessments are being completed for all newly certified M/WBEs. Although it is not a required provision of Local Law 129, according to DSBS officials and as outlined in DSBS's *Baseline Client Assessment*, it is the practice of the Procurement Initiatives Unit to generate a report listing the businesses that were newly certified within the previous month and to assign these newly certified businesses to a procurement counselor. Once assigned, the procurement counselors will call their new clients to complete the client assessment

and inform them of any assistance available to them. However, as previously mentioned, of the 707 newly certified businesses referred to the Procurement Initiatives Unit during Fiscal Year 2008 (as identified by the assignment month within the Procurement Initiatives Unit Database), only 592 (84%) assessments were completed<sup>14</sup> (as of January 2009).

Client Assessments for the remaining 115 newly certified businesses were either not completed or not started (as of January 2009), as follows:

- 44 businesses were nonresponsive (meaning that the counselor attempted at least two calls but not more than three calls, and received no response from the business within one week of the previous call),
- 40 client assessments were pending (meaning that at least one call attempt was made), and
- 31 client assessments had not yet started; these 31 newly certified businesses were assigned to the Procurement Initiatives Unit during February 2008 through June 2008).

It is important for the counselors to contact the newly certified businesses, not only to complete the client assessment, but to introduce themselves as their counselor and to make the newly certified businesses aware of the assistance available to them. As was discussed previously, the client assessment is necessary to help the procurement counselors get to know their clients. The client assessments include the background information needed by the procurement counselors to determine which services or programs would most benefit the businesses so that they can provide targeted assistance to the clients.

We asked DSBS officials whether any correspondence (such as a letter or e-mail) was sent to those nonresponsive businesses to notify them of the available counseling services offered by DSBS. DSBS officials informed us that an “M/WBE business is sent a letter upon certification that, among other things, notifies them a procurement counselor will be contacting them.” This letter also includes a statement informing the business owner to contact the Director of Capacity Building if a procurement counselor does not contact them within 45 days from the date of the letter.

However, this certification letter referred to by DSBS officials was not used during Fiscal Year 2008. In fact, DSBS officials informed us that this revised letter was not put into use until November 2008. There was no mention of a procurement counselor contacting the business owners in the prior certification letter that was used during Fiscal Year 2008. Therefore, DSBS should send a letter or e-mail to the nonresponsive business owners that were certified prior to November 2008 (the date when the revised certification letter was put into use) notifying them of the available counseling services and to identify their assigned counselor and the counselor’s telephone number. This communication would provide the business owners with the necessary information if they choose to take advantage of the services provided by DSBS.

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<sup>14</sup> The 592 client assessments that were completed include 6 businesses that chose not to participate.

***DSBS Response:*** “The initial certification letter cited in the audit report informs newly certified firms about the benefits of certification and outlines the role of their procurement counselor. As the report noted, the letter directs the reader to contact a Director if they do not hear from their procurement counselor within 45 days. However, the report is incorrect in stating this letter was only put in place November 2008. It has been used since 2006. The November version of the letter to which the report refers simply reflected a change in program management, adding a new Assistant Commissioner to be copied.”

***Auditor Comment:*** DSBS’s contention that the current letter has been used since 2006 is contradicted by our review of its files. We sampled 35 certification applications processed during Fiscal Year 2008 and made copies of the initial certification letters for those that were approved. The letters did not indicate that applicants would be contacted by a procurement counselor, nor did the letters direct the applicants to contact a Director if they did not hear from a procurement counselor. In addition, at the meeting to discuss the audit concerns on April 15, 2009, the Assistant Commissioner of DEFO confirmed that the letter was revised in November 2008 to include this language and to copy an additional Assistant Commissioner.

### **Recommendations**

DSBS officials should:

6. Immediately perform client assessments for those businesses cited in the report as pending and not started.
7. Send a letter or e-mail notifying the nonresponsive business owners that were certified prior to November 2008 (the date when the revised certification letter was put into use) of their assigned procurement counselor and the services offered by DSBS.

***DSBS Response:*** “We concur with the Comptroller that reaching out to newly certified companies is beneficial to certified firms. . . . In fact, all 115 M/WBEs noted in the Report have been contacted, and 55% of these certified firms have taken advantage of additional program services.”

**List of the Citywide Contracting Participation Goals for Minority- and Women-owned Businesses  
For Contracts Valued Less Than \$1 Million**

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**For construction contracts under \$1 million:**

<b>Race/gender group:</b>	<b>Participation goal:</b>
Black Americans	12.63% of total annual agency expenditures on such contracts
Asian Americans	No Goal Established
Hispanic Americans	9.06% of total annual agency expenditures on such contracts
Caucasian Females	No Goal Established

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**For professional services contracts under \$1 million:**

<b>Race/gender group:</b>	<b>Participation goal:</b>
Black Americans	9% of total annual agency expenditures on such contracts
Asian Americans	No Goal Established
Hispanic Americans	5% of total annual agency expenditures on such contracts
Caucasian females	16.5% of total annual agency expenditures on such contracts

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**For standard services contracts under \$1 million:**

<b>Race/gender group:</b>	<b>Participation goal:</b>
Black Americans	9.23% of total annual agency expenditures on such contracts
Asian Americans	No Goal Established
Hispanic Americans	5.14% of total annual agency expenditures on such contracts
Caucasian females	10.45% of total annual agency expenditures on such contracts

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**For goods contracts under \$1 million:**

<b>Race/gender group:</b>	<b>Participation goal:</b>
Black Americans	7.47% of total annual agency expenditures on such contracts
Asian Americans	5.19% of total annual agency expenditures on such contracts
Hispanic Americans	4.99% of total annual agency expenditures on such contracts
Caucasian females	17.87% of total annual agency expenditures on such contracts

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**For construction subcontracts under \$1 million:**

<b>Race/gender group:</b>	<b>Participation goal:</b>
Black Americans	12.63% of total annual agency expenditures on such subcontracts
Asian Americans	9.47% of total annual agency expenditures on such subcontracts
Hispanic Americans	9.06% of total annual agency expenditures on such subcontracts
Caucasian Females	No Goal Established

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**For professional services subcontracts under \$1 million:**

<b>Race/gender group:</b>	<b>Participation goal:</b>
Black Americans	9.00% of total annual agency expenditures on such subcontracts
Asian Americans	No Goal Established
Hispanic Americans	5.00% of total annual agency expenditures on such subcontracts
Caucasian females	16.5% of total annual agency expenditures on such subcontracts

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Source: §6-129 of the Administrative Code

**Appendix II****List of Agencies That Made Procurements in Excess of \$5 Million during Fiscal Year 2006  
And Were Required to Submit an Agency Utilization Plan Covering Fiscal Year 2008**

	<b>Agency Name</b>	<b>Total Value of Fiscal Year 2006 Procurements</b>
1	Administration for Children's Services	\$1,831,381,259
2	Department for the Aging	\$139,836,378
3	Department of Buildings	\$8,593,838
4	Department of Citywide Administrative Services	\$1,010,984,130
5	Department of Correction	\$29,429,273
6	Department of Design & Construction	\$704,022,186
7	Department of Environmental Protection	\$1,279,884,540
8	Department of Finance	\$12,726,913
9	Department of Health and Mental Hygiene	\$749,489,797
10	Department of Homeless Services	\$304,387,106
11	Department of Housing Preservation & Development	\$54,944,196
12	Department of Information Technology & Telecommunications	\$693,477,482
13	Department of Juvenile Justice	\$10,008,295
14	Department of Parks & Recreation	\$310,538,169
15	Department of Probation	\$6,713,826
16	Department of Sanitation	\$734,338,368
17	Department of Small Business Services	\$786,883,162
18	Department of Transportation	\$602,916,132
19	Department of Youth & Community Development	\$373,062,351
20	Fire Department	\$114,915,500
21	Human Resources Administration	\$1,310,464,555
22	Law Department	\$22,139,483
23	Police Department	\$65,947,168

Source: Mayor's Office of Contract Services, "Fiscal Year 2006 Agency Procurement Indicators."

**Comparison of the Total Fiscal Year 2008 M/WBE Participation Goals and the Actual M/WBE Utilization for Contracts Covered under Local Law 129 for the 23 Agencies That Were Required to Submit an Agency Utilization Plan**

	<b>Black Americans</b>	<b>Asian Americans</b>	<b>Hispanic Americans</b>	<b>Caucasian females</b>	<b>All Four M/WBE Categories</b>
<b>Total Value of Construction Prime Contracts: \$92,106,089</b>					
Participation Goal (% of total expenditures on such contracts)	12.63%	No Goal	9.06%	No Goal	
Participation Goal (\$)	\$11,632,999		\$8,344,812		\$19,977,811
Actual Usage (\$)	\$96,213		\$1,042,500		\$1,138,713
Actual Usage (%)	0.10%		1.13%		
<b>Total Value of Professional Services Prime Contracts: \$43,537,843</b>					
Participation Goal (% of total expenditures on such contracts)	9.00%	No Goal	5.00%	16.50%	
Participation Goal (\$)	\$3,918,406		\$2,176,892	\$7,183,744	\$13,279,042
Actual Usage (\$)	\$1,036,646		\$40,000	\$785,031	\$1,861,677
Actual Usage (%)	2.38%		0.09%	1.80%	
<b>Total Value of Standard Services Prime Contracts: \$79,217,567</b>					
Participation Goal (% of total expenditures on such contracts)	9.23%	No Goal	5.14%	10.45%	
Participation Goal (\$)	\$7,311,781		\$4,071,783	\$8,278,236	\$19,661,800
Actual Usage (\$)	\$1,589,537		\$357,951	\$1,855,162	\$3,802,650
Actual Usage (%)	2.01%		0.45%	2.34%	
<b>Total Value of Goods Prime Contracts: \$154,555,887</b>					
Participation Goal (% of total expenditures on such contracts)	7.47%	5.19%	4.99%	17.87%	
Participation Goal (\$)	\$11,545,325	\$8,021,451	\$7,712,339	\$27,619,137	\$54,898,251
Actual Usage (\$)	\$1,089,830	\$1,802,357	\$1,505,888	\$3,681,446	\$8,079,521
Actual Usage (%)	0.71%	1.17%	0.97%	2.38%	
<b>Total Value of Prime Contracts of the Four Industry Categories: \$369,417,386</b>					
Participation Goal (\$)	\$34,408,511	\$8,021,451	\$22,305,826	\$43,081,117	\$107,816,905
Actual Usage (\$)	\$3,812,226	\$1,802,357	\$2,946,339	\$6,321,639	\$14,882,561

	<b>Black Americans</b>	<b>Asian Americans</b>	<b>Hispanic Americans</b>	<b>Caucasian females</b>	<b>All Four M/WBE Categories</b>
<b>Total Value of Construction Subcontracts Awarded on Prime Contracts with M/WBE Goals: \$34,239,559</b>					
Participation Goal (% of total expenditures on such subcontracts)	12.63%	9.47%	9.06%	No Goal	
Participation Goal (\$)	\$4,324,456	\$3,242,486	\$3,102,104		\$10,669,046
Actual Usage (\$)	\$2,166,296	\$5,664,835	\$1,858,050		\$9,689,181
Actual Usage (%)	6.33%	16.54%	5.43%		
<b>Total Value of Professional Services Subcontracts Awarded on Prime Contracts with M/WBE Goals: \$2,692,545</b>					
Participation Goal (% of total expenditures on such subcontracts)	9.00%	No Goal	5.00%	16.50%	
Participation Goal (\$)	\$242,329		\$134,627	\$444,270	\$821,226
Actual Usage (\$)	\$633,000		\$801,280	\$109,500	\$1,543,780
Actual Usage (%)	23.51%		29.76%	4.07%	
<b>Total Value of Construction &amp; Professional Services Subcontracts Awarded on Prime Contracts with M/WBE Goals: \$36,932,104</b>					
Participation Goal (\$)	\$4,566,785	\$3,242,486	\$3,236,731	\$444,270	11,490,272
Actual Usage (\$)	\$2,799,296	\$5,664,835	\$2,659,330	\$109,500	11,232,961

Source: Mayor's Office of Contract Services, "Fiscal Year 2008 Agency Procurement Indicators."





**Small Business  
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September 23, 2009

Mr. John Graham  
Deputy Comptroller  
Office of the Comptroller  
One Centre Street  
New York, New York 10007-2341

Re: Draft Audit Report on the Administration of the Minority and Women-owned Business Enterprise Program by the Department of Small Business Services. MD09-062A.

Dear Mr. Graham:

This letter represents the New York City Department of Small Business Services (SBS) response to the recommendations contained in the Draft Audit Report (Report) issued by the Office of the New York City Comptroller (Comptroller) on September 1, 2009 regarding the administration of the Minority & Women-owned Business Enterprise (M/WBE) Program.

We will detail our responses to the specific recommendations in the body of this letter, however, the Report includes a number of assumptions and statements that demonstrate a fundamental lack of understanding of Local Law 129 of 2005 (LL 129) and the substantial body of federal constitutional law and New York State competitive bidding law that form the context in which LL 129 – and SBS’ efforts to administer it – must be viewed. Thus, at the outset, we would like to correct these assumptions and statements, in order to then offer a more accurate picture of past and future administration of this program.

**The Report Ignores LL 129’s Explicit Inclusion of a 3-Year “Ramp Up” Period**

The Comptroller decided to conduct this audit during the three-year period of time explicitly designated in the law itself as the time frame when agencies are to be evaluated not merely on the goal numbers, but on the “steps [they] have taken to initiate and ramp up their efforts to comply with the requirements.” We don’t question the Comptroller’s prerogative in doing so, but it is inconsistent with the scheme of LL 129 to claim that agencies are not in compliance, much less that SBS is failing to monitor their non-compliance, while ignoring the fact that the audited time frame – Fiscal Year 2008 – is the second year of that three-year ramp up period.

That is not a minor or irrelevant distinction. The City Council, the Mayor and SBS clearly understood at the time LL 129 was adopted in December 2005 that agencies could not attain the stated goals from a standing start. Most of the contracts registered by agencies in the first year of the program (Fiscal Year 2007), and a smaller, but significant, portion of those registered in Fiscal Year 2008, were not covered by the program, as they were solicited before its July 1, 2006 effective date. While today we have more than 2250 certified companies, as of July 1, 2006, too few companies were certified as M/WBEs to afford the kind of robust competition that has to occur in order for there to be any real chance for agencies to attain goals for prime contracts that depend on competitive sealed bids for their awards. And, of the companies that were certified, many had never bid at all for City contracts, much less done so successfully.

These challenges are why, as LL 129 contemplated, SBS, together with the Mayor's Office of Contract Services (MOCS), developed a comprehensive implementation strategy for the ramping up period. This strategy was designed to: certify more companies; train City agency procurement staff and prime contractors on the provisions of the new law; match vendors with contract opportunities; provide capacity-building services to certified firms; and release comprehensive baseline data to the agencies and to the public, to ensure accountability. All of these steps are necessary to build the foundation for the City to make progress toward meeting the goals established in the law. As the Report concedes, SBS performed those activities extensively and well.

The Comptroller's finding that SBS does not adequately monitor the utilization of certified M/WBEs simply ignores the structure of the law itself and the documentation submitted to the Comptroller. Holding agencies accountable during the statutory three year "ramp up" period meant ensuring that agencies were taking the steps outlined in LL 129 to obtain the desired long-term result of increasing M/WBE participation in the City's procurement process. These include but are not limited to, being proactive about outreach activities, encouraging eligible businesses to apply for certification and to become listed on agencies' bidders lists, advertising contract opportunities, and other steps outlined in LL 129 §129(h). The way to ultimately get there is by doing precisely all the tasks the Comptroller notes that the SBS did and did well – perform outreach, provide training, offer counseling, and establish a certification program. We conducted each of those activities, working closely with the purchasing agencies every step of the way.

### **The Report Misconstrues the Legal Significance of the LL 129 Participation Goals**

In several places, the Report repeats its characterization of the LL 129 program, "the fundamental goal of the program is to increase M/WBE *participation* in the City's procurement process, not merely to give these companies an *opportunity* to compete." (Emphasis in original.) While it goes without saying that one aim of the program is to increase participation, that aim can only be pursued within the bounds of the law – both LL 129 itself and applicable federal and state law.

In fact, the "fundamental goal" of the LL 129 program is stated in the text of the law itself: "The program established pursuant to this section is intended to address the impact of discrimination on the city's procurement process, and to promote the public interest in avoiding fraud and favoritism in the procurement process, increasing competition for city business, and lowering contract costs."

The citywide participation goal numbers are not rigid benchmarks that each agency must either attain or be judged non-compliant for falling short. Rather, they are what they are called – “goals” – and the consequences of non-attainment depend on the reasons for that fact. The difference is significant. In the context of programs for minority and women owned businesses, it has been clear at least since the seminal case of J. A. Croson Corp. v. City of Richmond that courts disfavor “rigid quotas” under which a fixed number must be achieved, but, where justified by a demonstrated need to address discrimination, will uphold “goals” requiring good-faith effort to come within a range established by the goal itself.

Where the Report in several places characterizes various agencies as not having “met” the applicable goals, it is treating the goals of Local Law 129 as if they were inflexible quotas, rather than recognizing the actual standard that SBS is legally obligated to follow in evaluating agency performance – the standard which honors the difference between quotas and goals – namely, whether the agency has made “substantial” or “adequate” progress toward meeting its goals. See §§ 6-129(1)(2) and (m).

Moreover, the Report fails to recognize the different ways LL 129 treats goals for prime contracts awarded by City agencies and subcontracts awarded by prime contractors. Under LL 129, the City can – and does – require successful prime contract winners to achieve subcontractor participation goals established with respect to particular procurements, except where a contractor demonstrates its inability to achieve a goal after having made all reasonable, good faith efforts to do so.

City agencies’ ability to pursue participation goals for awards to prime contractors is also circumscribed by State procurement law. Under General Municipal Law (GML) § 103, agencies must, for the overwhelming majority of the contracts covered by LL 129, accept the lowest responsible bid and may not give a bidder preference because of its M/WBE status. See generally, Associated General Contractors of America v. New York State Thruway Authority, 88 N.Y.2d 56 (1996); Matter of Seabury Construction Corp. v. Department of Environmental Protection of the City of New York, 160 Misc. 2d 87 (Sup. Ct. NY Co. 1994)(invalidating a City rule providing a preference for MWBE bidders). Even for work not covered by GML § 103, such as professional services contracts, agencies may not incorporate into their contracts social policy goals that are unrelated to the goals of the State procurement laws. See GML § 104-b. In this context, the Citywide goals for awards to prime contractors must therefore be viewed as aspirational, and agencies’ performance evaluated in terms of their efforts to make progress toward achieving the goals in light of the limited tools available to them for that purpose.

Contrary to the Report’s claims, SBS has vigorously monitored agencies at all times, and the Commissioner has, in each of the two annual reports required to date, made the required finding concerning such agencies’ substantial progress. These efforts are more fully detailed in the response below.

**The Report Fails to Address the Impact of Excluded Industries and Procurement Methods**

LL 129 has its origins in a City Council-sponsored study that found disparities in some categories of contracting opportunities given to minority and women-owned businesses. As the U.S. Supreme Court has interpreted the Equal Protection Clause, a government may establish goals for utilization of MWBEs only where there is strong basis in evidence for the conclusion that such remedial action is necessary; this evidence is generally in the form of a statistically significant disparity between the availability of such firms and their utilization in government procurement.

The Council's study did not find significant disparities for all groups in all industries, did not document *any* disparity for contracts or subcontracts valued at one million dollars or more, and did not document any disparity in subcontracts for two of the four industry categories. Therefore the City's MWBE program establishes *no* goals for participation at or above one million dollars (at either the prime or subcontract level), and establishes goals only for those groups and industries for which statistically significant disparities were found. Specifically, there was no disparity found and therefore, there are no goals for: Asian-Americans and women in construction prime contracts, or for women in construction subcontracts; Asian-Americans in professional services prime contracts or subcontracts; Asian-Americans in standard services prime contracts; or for *any* subgroup in standard services or goods subcontracts.

Further, LL 129 excludes from its goals provisions all contracts entered into by certain procurement methods – i.e., emergency procurements, intergovernmental procurements, interagency and government-to-government procurements, and sole source procurements. See, §§ 6-129(q) (iii)-(vi). In addition, LL 129 excludes all procurements wherein state or federal funding restrictions either preclude the imposition of local goals or override local goals by imposing analogous state or federal goals. See §§ 6-129(q)(i)-(ii). LL 129 also treats micropurchases and small purchases distinctly – e.g., for obvious reasons no subcontract goals apply. See § 6-129(k) and (q)(vii).

Equally importantly, by ignoring or glossing over the very small proportion of the prime contract portfolio that is, in fact, subject to LL 129 in each of the 23 agencies required to submit utilization reports, the Report grossly overstates both the supposed non-compliance by agencies, and the claim that SBS failed to monitor them. This is especially disappointing, inasmuch as we would have presumed that the Comptroller, as the City's financial officer, would agree that it is important to consider the statistical significance of data the Report claims to describe. By looking solely at whether an agency had over \$100,000 worth of a given type of procurement, the Report ignores some fairly obvious realities. A prime contract awarded to an MWBE can only be counted toward a goal for one group. The fact that an agency procured only a single contract in a given category and that contract happened to be worth \$500,000 does not mean that the agency even theoretically could have achieved four different gender/ethnic subgroup goals for that contract. Only by looking at the number of procurements, not simply the dollar value, can a fair understanding be reached as to whether or not an agency is making substantial progress toward the goals. Given that for each industry sector the law establishes separate goals for at least two, and sometimes up to four, minority and gender groups, and that the goals range in size from 4.99% to 17.87%, it is difficult to imagine how, strictly from a mathematical perspective,

any agency can be said to have failed to attain the LL 129 goals if it procured a very small number of contracts in the relevant category.

The Report also treats the small purchase universe as though the citywide goals apply in the same manner as for contracts above \$100,000, although as noted above, the small purchase category is exempt and is referenced differently in LL 129. See §§ 6-129(k) and (q)(vii).

In short, the Report's claim that SBS failed to monitor agencies' supposed non-compliance with prime contract goals assumes that there was, in fact, non-compliance occurring, which is not the case, given LL 129's scheme which recognizes the need for a ramping up period. The assumption that agencies were not in compliance, moreover, is premised on two equally faulty assumptions: first, that non-attainment of the goals is the equivalent of non-compliance with LL 129; and second, that agencies, if doing all that the law permits them to do, could have "met" the stated goals.

LL 129 also specifically provides for subcontracting targets on construction and professional service contracts. Agencies that identify these contracts require that prospective bidders commit to meeting these goals. Bids received without these commitments, or a granted waiver, are deemed non-responsive and the bid rejected. To ensure that prime contractors understand their obligations, SBS, MOCS and representatives from various contracting agencies have provided prime contractors with training on the details and new reporting requirements of Local Law 129 as well as lists of certified M/WBEs and many opportunities to network with them.

However, in the subcontract area, the Report's analysis is also flawed. The Fiscal Year 2008 data it quotes apparently comes from Appendix K-3 to MOCS Fiscal 2008 Annual Procurement Indicators report, but the Report ignores what that same report – and common sense – indicates. Most of the subcontracts for Fiscal Year 2008 prime contracts would not have yet been approved during that same fiscal year, but will, in fact, be approved over the life of those contracts, some of which will last for many years. Therefore, one cannot fairly measure whether the subcontracting goals for such contracts will be met simply by analyzing one fiscal year's data.

Meanwhile, as with the relevant universe of prime contracts, the universe of subcontracts to which LL 129 applies – particularly if viewed in the context of a single year's worth of approvals – is also quite small. Only ten of the 23 agencies even had prime contracts that generated any covered subcontracts and, with the exception of DDC and DPR (which together approved 532 construction subcontracts), the entire universe of approved subcontracts for all other agencies in both of the industries was a grand total of 70. Rote application of the goal percentages to any agency that had an aggregate number of prime contracts with more than \$100,000 worth of subcontracts quickly leads to the absurd. For example, DCAS approved five construction subcontracts. Two went to African-American firms, and the total value of those two represented 38% of the DCAS construction subcontract value, far exceeding the applicable M/WBE goal percentage of 12.6%. Likewise, HPD approved as its only professional services subcontract for the entire year an award to a Hispanic-American firm, thereby attaining a 100% utilization rate for a category with a 5% goal percentage. By the Comptroller's definition, DCAS apparently "failed" to meet the goal for Hispanic-American firms and HPD "failed" to meet the goals for

African-American or women-owned firms, even though they exceeded goals in other categories. That conclusion is meaningless, and not consistent with LL 129.

**SBS Has Administered the M/WBE Program Aggressively, Within the Bounds of the Law**

Since 2002, SBS has worked aggressively to develop the City's M/WBE program through wide-ranging initiatives that provide multiple services to certified companies, purchasing agencies, and prime contractors. In 2003 and 2005, Mayor Michael R. Bloomberg signed Executive Orders to provide greater incentives for eligible companies to certify and for City agencies to increase utilization of M/WBE vendors. Upon the adoption of LL 129, SBS implemented a comprehensive implementation plan for the ramp up period (Fiscal Years 2007 through 2009).

It is evident that the efforts of the City are paying off. During the first three years that LL 129 has been in effect, certified companies have been awarded over \$1 billion in prime and sub-contracts. The number and dollar value of contract awards to certified companies have increased each year of the program and interest in the program, as evidenced by new certifications and the recertification rate, continues to increase.

During these first three years, it was necessary to accomplish several challenging and unique tasks, including, but not limited to, promulgation of rules to implement the law's new provisions, the first time creation of utilization plans for City agencies, and subcontractor utilization rules. The Law Department drafted and implemented changes to the City's standard construction contract and developed bid solicitation notices to require subcontractor utilization by prime contractors on contracts subject to LL 129. SBS, MOCS, and the Financial Information and Services Agency (FISA) worked together to enable the collection and analysis of the comprehensive data required by LL 129. To reduce obstacles for small construction firms seeking to win City contracts, the limit for the City's payment guarantee (in lieu of a bond) was increased from \$250,000 to \$500,000 and the Procurement Policy Board (PPB) promulgated a rule to increase opportunities for M/WBEs on small purchases, up to \$100,000, by preventing agencies from adding additional non-M/WBE vendors to these solicitations.

These efforts have lead to a rejuvenated City program that has seen a consistent increase in demand. As amply noted in the Report, once in the program, companies are trained on how to do business with the City and offered one-on-one technical assistance to respond to specific bids or request for proposals. Companies in the program are given marketing assistance and displayed on the City's Online Directory of Certified Businesses, [www.nyc.gov/buycertified](http://www.nyc.gov/buycertified). This searchable Directory is a public listing that provides valuable information on each company's products and services, past clients, and links to the company's website. The City has also created capacity building programs, including a seven-course construction management series available for free to certified firms. Invitation-only networking events, including our annual City-wide Procurement Fair, bring agency buyers together with certified companies. Finally, companies have access to comprehensive business assistance services provided through NYC Business Solutions, a suite of services managed by SBS that includes incentive information, access to financing, free legal guidance, workforce training grants, recruiting services, help navigating government regulations and more.

In addition to working with and developing the capacity of our certified vendors, SBS also works closely and comprehensively with the City's procurement personnel to help them increase their agencies' utilization of M/WBEs on contract opportunities. Through regular training sessions at the City's Procurement Training Institute, and working individually with agencies, purchasing staff are trained on using the Online Directory, reviewing utilization plans; identifying contracts with potential M/WBE subcontracting opportunities and hosting networking events specifically designed for an agency's purchasing needs.

The public now receives comprehensive and detailed data on City procurement and M/WBE utilization through semi-annual reporting, which breaks out M/WBE utilization by agency, contract size, and all gender, ethnicity, and industry categories the law provides. No other jurisdiction in the nation provides the same degree of utilization information for such a high volume of government spending.

We appreciate that the Report recognizes the numerous accomplishments of the City's team in performing outreach to promote the M/WBE Program; providing training services and technical assistance to certified companies; offering counseling on procurement to certified companies; and establishing and operating a centralized program for the certification of M/WBEs. As explained above, all of these components have been critical to the successful launch of a multi-year effort to increase utilization.

### **SBS Responses to Specific Findings of the Report**

#### **Monitoring Utilization of Certified M/WBEs by City Agencies:**

Recommendation 1: SBS should immediately meet with all agencies not meeting their goals to discuss ways that they could improve, and document the results of those meetings.

Recommendation 2: SBS should annually review and document its review of the utilization of M/WBEs by the agencies subject to the local law requirements to determine if they are meeting the goals stated in their M/WBE utilization plans.

Recommendation 3: SBS should meet and document its meetings with the agencies that are not achieving their M/WBE utilization goals to determine the reason(s) the goals are not being met and whether the agencies are making all reasonable efforts to do so. In addition, based on the results of these meetings, DSBS should determine whether any common factors exist among the agencies that may need to be addressed.

**SBS Response:** As discussed with Comptroller's audit team during the exit conference, SBS takes exception to this finding. We certainly share the Comptroller's objective of accountability, and already perform the tasks identified in the recommendations pertaining to this finding. In fact, at every step of the way, we have met with the agencies, not only to discuss their progress, but also to solicit their input as to what SBS might do in order to improve their ability to succeed. As noted above, the applicable LL 129 standard for Fiscal Year 2008 is "substantial progress" not whether the goals are "met." LL 129 explicitly recognized that

substantial groundwork was required in order to meaningfully address disparity, and that this was a task that would occur over the course of a multi-year process. As explained earlier in this response, during the ramping up period, agency accountability meant laying a strong foundation to ensure each agency had the tools and training to meet new program requirements, is taking all steps necessary to increase competition, and is actively engaging M/WBEs by notifying them of procurement opportunities. SBS has been keeping close tabs on agencies' efforts in these areas.

To the extent that the Report recommends that SBS meet with agencies for these purposes, SBS agrees that meetings are important and began holding such meetings even before LL 129 took effect. Since its effective date, SBS has been meeting regularly with agencies, including those that have not yet attained the aspirational goals for prime contracts. SBS annually reviews those agencies' utilization and suggests ways for each agency to improve its performance. Specifically, SBS provided extensive documentation to the Comptroller concerning meetings with agencies, including:

- Initial outreach meetings with over 20 agencies held between January and March 2006, 3-6 months before the new law took effect;
- The first four training sessions held in April 2006 on how to complete the new utilization plan templates;
- The first two training sessions (FY2007) on subcontractor program administration;
- Three electronic surveys SBS conducted to gather data on agency outreach activities and solicit their feedback on program administration challenges;
- M/WBE Program presentations at eight monthly Agency Chief Contracting Officer (ACCO) meetings 2006-2008;
- 76 follow-up meetings with various agencies FY2007-FY2009 where agency utilization is discussed; and
- 16 additional training sessions and networking events in FY2008.

As documented, SBS and MOCS have had continuous contact with agencies to ensure that the agencies understood the requirements of the law and carried out effective steps to implement the program and increase utilization. And, to date, as detailed in the annual and semi-annual reports filed pursuant to LL 129 (and provided to the Comptroller), agencies are, in fact, attaining the LL 129 goals for subcontracts. Going forward, now that the ramping up period has concluded, SBS will implement enhanced tools for reviewing performance with agencies.

With the close of the ramp-up period, SBS and MOCS are increasing scrutiny of agency actions to ensure they are doing all they can to implement the provisions of the law and using all available tools to do so. We will also continue to encourage agencies to develop their own tools, the best of which can be replicated at other agencies. Finally, we will continue to recognize that meeting goals is a combined effort of agency action and prospective M/WBE contractors' ability to meet the demands of the City's complex procurement system and deliver quality goods and services at competitive prices.

To do this, we have engaged in an intensive strategic planning project to improve each operational area of the program that has been developed during the initial implementation of



Local Law 129. A number of the resulting change initiatives involve agency participation. These efforts include:

- A scalable customer relationship management system for both M/WBE vendors and City buyers, allowing for more regular contact with each group and interactions that address specific individual needs.
- Obtaining more comprehensive and detailed information on M/WBE vendors to better market their goods and services to agency buyers.
- The establishment of an Account Manager team for more frequent contact with agencies to understand what they are purchasing and how they are procuring it.
- Technology improvements to better match our growing pool of M/WBE companies with appropriate procurement opportunities
- Targeted strategies for increasing M/WBE utilization within each contract size and procurement method
- Agency progress reports to be published this fall to provide greater detail on each agency's performance and its efforts to increase M/WBE utilization while simultaneously identifying specific challenges the agency faces.
- Agencies, if any, that are determined not to be making substantial progress through this process may be subject to further actions, which can include:
  - More frequent reporting concerning procurement activity
  - Mandatory notifications to SBS and MOCS prior to solicitation for contracts;
  - A reduction of contract processing authority delegated by the mayor; or
  - Tailoring a specific remediation/monitoring program of actions.

Outreach, certification, training, and counseling are important steps toward ensuring that M/WBEs are in a position to compete for the opportunity to conduct business with the City. At the same time, particularly as regards prime contracts, City agencies must conduct their procurements in accordance with New York State competitive bidding laws. Thus, the fundamental goal of the program is to increase M/WBE participation in the City's procurement process, consistent with constitutional requirements and State procurement law.

#### **Follow-up on Audit Findings:**

Recommendation 4: SBS should formally notify the agencies of the findings contained in the pilot audits.

Recommendation 5: SBS should establish a system whereby audit findings are followed up with contractors (both prime and subs as appropriate) and contracting agencies in a timely manner.

**SBS Response:** SBS agrees with these recommendations and has begun implementation.

Section 6-129(e)(10) of Local Law 129 requires that a certain number of prime contracts with subcontracting goals be subject to audit by SBS. During Fiscal Year 2007, the first year of the program, the procurement process for contracts with subcontractor utilization requirements began for the first time. The bidding process for construction contracts takes substantial time

and even after prime contracts are awarded, there is still considerable time required to initiate the projects and actually award subcontracts. Working together with MOCS, SBS established an audit protocol for such contracts. In the first year, this protocol was used to test the process on the small sample of contracts available so early in the new law's implementation. In the second year, Fiscal Year 2008, to provide a more substantive audit process, SBS contracted with an M/WBE audit firm to assist in carrying out a programmatic audit.

There were no substantial findings in the initial pilot audits done for FY 2007. Audits of 11 contracts and 12 subcontracts that were completed for FY2008 contained findings for agencies and their prime contractors. These findings have been shared with the relevant agencies, and in some cases we found that new procedures were needed to address them. As we begin the round of audits for FY 2009, we will further strengthen the process in accordance with the Comptroller's recommendations.

It should be noted that LL 129 expressly authorizes the Comptroller, as well, to perform audits of this type, however to SBS' knowledge, no such audits have been done.

#### **Client Assessment Completion:**

Recommendation 6: SBS should immediately perform a client assessment for those businesses cited in the report as pending and not started.

Recommendation 7: SBS should send a letter or e-mail notifying the nonresponsive business owners that were certified prior to November 2008 (the date when the revised certification letter was put into use) of their assigned procurement counselor and the services offered by SBS.

SBS Response: We concur with the Comptroller that reaching out to newly certified companies is beneficial to certified firms and are pleased that the Comptroller recognizes the value of the program SBS has created. In fact, all 115 M/WBEs noted in the Report have been contacted, and 55% of these certified firms have taken advantage of additional program services.

SBS has continually worked to enhance communications from SBS to our certified vendors and obtain better and more comprehensive data about them in order to enhance their profiles posted on our public Online Directory of Certified Businesses. Accordingly, the information cited in the audit regarding companies that had not received full client assessment services is no longer relevant in light of changes and improvements SBS has made to this system since FY 2008.

Rather than the follow-up telephone call system described in the report, SBS employs multiple communication channels to maintain contact with newly certified M/WBE vendors. In addition to communication that occurs through the client assessment process, they are sent letters, e-mail blasts, notification of bidding opportunities and invitations to training and events.

The initial certification letter cited in the audit report informs newly certified firms about the benefits of certification and outlines the role of their procurement counselor. As the report noted, the letter directs the reader to contact a Director if they do not hear from their procurement

counselor within 45 days. However, the report is incorrect in stating this letter was only put in place in November 2008. It has been used since 2006. The November version of the letter to which the report refers simply reflected a change in program management, adding a new Assistant Commissioner to be copied.

Training sessions provide much of the same guidance that an initial call with a counselor would, but in an interactive setting with networking opportunities. For example, SBS' quarterly "I'm Certified, Now What?" workshop, co-hosted with a panel of City buyers, gives newly certified companies a detailed overview of how to get started pursuing government contracts. In between these quarterly sessions for certified firms, they can also access our monthly public "Selling to Government" workshop, which covers similar material. These workshops are very well-attended.

We have also recently created an e-newsletter, the first issues being delivered in May and August 2009. The newsletter is sent to a wide audience of vendors and City agencies, including all certified companies with email addresses. The newsletter includes the kind of information typically provided by a procurement counselor.

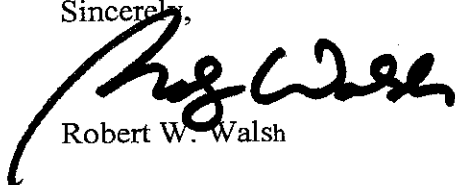
In FY 2009, we added an outbound e-mail process as the procurement counselors' first step to educating newly certified firms about SBS' services. In addition, the next version of the M/WBE certification application and supporting system will capture answers to most of the key questions that have been asked in the original client assessment process. Until then, counselors have been instructed to prioritize their monthly assessments by first reaching out to firms for which we have no e-mail address and those that have data issues or inconsistencies with their selected commodity codes, company descriptions, or reported work experience. Obtaining better information on certified vendors will ensure they receive more targeted bidding opportunities. We also see that by enabling our staff to prioritize their activities in this fashion, we free up more time for client follow-up and direct assistance on specific contracting issues.

As we conclude the third year of implementation of LL 129, we are transitioning our operating procedures from the ramp-up phase to ensure proper long-term scalability and management. Re-evaluating the purpose of the client assessment and how it will be conducted is one part of this larger effort to better leverage technology. Our goal is to meet the mandates of this program and the needs of our M/WBE firms well into the future.

We believe that this response fully addresses the recommendations made in your audit. SBS anticipates continued growth in the number of companies in the M/WBE program and are confident in our ability to assist these companies in navigating the government procurement process to become competitive and successful City vendors.

We appreciate the cooperation of the staff of the Comptroller's audit team in conducting this audit and we look for continuing collaboration with your office in finding additional ways to assist our certified companies.

Sincerely,



Robert W. Walsh