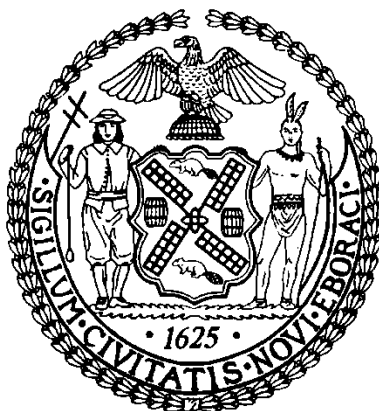


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A Compilation of Audits of The Minority and Women-Owned Business Enterprises Program

7R11-087S

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The City of New York
Office of the Comptroller
IT Audit and Research

**A Compilation of Audits of
The Minority and Women-Owned
Business Enterprises Program**

7R11-087S

REPORT IN BRIEF

Enacted in 2005, Local Law 129 (LL129) established the City's Minority- and Women-owned Business Enterprise (M/WBE) Program. This law responded to a study commissioned by the New York City Council, which found that there was a significant disparity in contracting opportunities afforded to certain M/WBE groups in the City's procurement of goods and services. To address the disparities revealed by the study, LL129 details certification, contract participation goals, technical assistance, and administrative procedures to promote the utilization of M/WBE firms for contract and subcontract opportunities valued at less than \$1 million. Subcontractor participation goals are set for certain groups in two industry classifications: Black Americans, Hispanic Americans, and Caucasian females for professional services and Black Americans, Asian Americans, and Hispanic Americans for construction services.

Findings and Conclusions

Audits of the M/WBE program by the City Comptroller's Office found a common theme in the administration of the program: The lack of compliance with key provisions of LL 129 concerning agency monitoring of M/WBE participation goals of vendors to ensure that subcontractor utilization goals are achieved. The City Comptroller's Office has completed four audits of the M/WBE program. The objective of the initial audit was to determine whether Department of Small Business Services (DSBS) complied with the key provisions of Local Law 129 and §6-129 of the Administrative Code. This included the monitoring by DSBS of City agencies' M/WBE utilization and whether DSBS determined if agencies met their subcontractor utilization goals. The other three audits were each of individual City agencies [the Department of Design and Construction (DDC), the Department of Housing Preservation and Development (HPD) and the Department of Parks and Recreation (Parks)] and their monitoring of subcontractor utilization goals covered under the M/WBE program.

Our central finding as to the lack of adequate and effective monitoring of compliance by both DSBS and the agencies we audited is troubling, given that the M/WBE program is still in its infancy. A program of this importance, just recently launched, should be rigorously monitored

from its inception to ensure it is being properly and effectively implemented as intended by LL 129, the City Charter and the City's Administrative Code. The failure to properly monitor implementation of the program jeopardizes the ultimate goal of the M/WBE program: To increase M/WBE participation in the City's procurement process in a manner consistent with local and State procurement law. As concerning is the statistics reported by the Mayor's Office of Contracts (MOCS) of the program. We found them to be an unreliable means by which to effectively measure the success of the program as defined by LL 129.

Recommendations

As previously mentioned and clearly documented in all the audits conducted by the Comptroller's Office, the lack of effective monitoring of the program at the agency and oversight level must be improved. In that regard, DSBS in consultation with MOCS should formulate and institute uniform procedures in the effective monitoring of the program that are consistent with the provisions contained in LL 129 that each agency must follow. This would include:

- Ensuring audits of prime contractors' books and records are performed to verify the use of and payments made to subcontractor M/WBE firms by prime contractors;
- Collecting and reporting data on actual payments made to M/WBE subcontractors by prime contractors instead of planned goals;
- Ensuring agencies initiate enforcement actions against those prime contractors that do not comply with the M/WBE provision of their contracts;
- Requiring agencies to ensure that prime contractors submit complete and accurate subcontractor lists in a timely manner;
- Requiring agencies to conduct job-site inspections, and contact M/WBE subcontractors to confirm their participation in the project;
- Establishing controls to ensure that the information recorded in FMS pertaining to M/WBE anticipated subcontract amounts is accurate.

INTRODUCTION

Background

Enacted in 2005, Local Law 129 (LL129) established the City’s Minority- and Women-owned Business Enterprise (M/WBE) Program. This law responded to a study commissioned by the New York City Council, which found that there was a significant disparity in contracting opportunities afforded to certain M/WBE groups in the City’s procurement of goods and services. To address the disparities revealed by the study, LL129 details certification, contract participation goals, technical assistance, and administrative procedures to promote the utilization of M/WBE firms for contract and subcontract opportunities valued at less than \$1 million. Subcontractor participation goals are set for certain groups in two industry classifications: Black Americans, Hispanic Americans, and Caucasian females for professional services and Black Americans, Asian Americans, and Hispanic Americans for construction services.

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

M/WBE Certification through the New York City Department of Small Business Services

Companies obtain M/WBE certification through the New York City Department of Small Business Services (DSBS). As codified in the City Charter, one of the primary duties of the Commissioner of DSBS is “the enhancement of economic development and financial opportunity for minority and women owned business enterprises....”¹ As stated in the LL129, 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.”

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 group² or a woman. The ownership of the business must be bona fide and continuing, and the business must have been active for at least one year. Owners must demonstrate the authority to control business decisions independently. The business must also have a real and a substantial business presence in the geographic market for the City of New York. The business must demonstrate

¹ §1301 of the City Charter.

² 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.

this presence by having its principal place of business within the City or the eight surrounding counties,³ or by having a significant tie to the City's business community.⁴

According to §1304(a) of the 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.

Agency Monitoring of Compliance of Prime Contractors with Subcontractor Utilization Plans

M/WBE subcontracting goals may only be set for subcontracts that are valued at below one million dollars. M/WBE subcontracting goals also apply only to subcontracts for Construction, Professional Services (including architectural and engineering services), Standard Services, and Goods. Subcontractor participation goals are established for individual contracts. To establish these participation goals, the City agency letting the contract first determines the percentage of the prime contract that is likely to be subcontracted for those types of work where the subcontract's dollar value will fall under the one million dollar threshold. When this calculation, known as the "target subcontracting percentage" (TSP), is determined, the agency establishes the appropriate M/WBE goals. The agency can then apply those goals to the dollar value of the TSP, using the estimate of the value of the prime contract about to be put out for bid. A bidder is then required to complete a Subcontractor Utilization Plan, in which the bidder must stipulate its expected percentage of the total contract value that it anticipates will be subcontracted, taking into account the agency's set TSP and M/WBE subcontractor participation goals.

City agencies overseeing prime contracts that have M/WBE goals are required to monitor the compliance of the prime contractors with their Subcontractor Utilization Plans. Local Law

³ 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.

⁴ 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.

129 requires agency M/WBE officers to monitor contractor compliance by appropriate means, including job-site inspections, contacting M/WBEs identified in the plan to confirm their participation, and by auditing the contractor's books and records. If it has been determined that a company has violated any provision of the contract that implements Section 6-129 of the Administrative Code, the respective City agency letting the procurement can take punitive action against the company. Such action may require the company to cure the violation, the City agency may withhold payment or reimbursement from the company, or it may assess actual and consequential monetary damages for non-compliance.

Audits Conducted by the City Comptroller's Office

Audits of the M/WBE program by the City Comptroller's Office found a common theme in the administration of the program: The lack of compliance with key provisions of LL 129 concerning agency monitoring of M/WBE participation goals of vendors to ensure that subcontractor utilization goals are achieved. The City Comptroller's Office has completed four audits of the M/WBE program. The objective of the initial audit was to determine whether DSBS complied with the key provisions of Local Law 129 and §6-129 of the Administrative Code. This included the monitoring by DSBS of City agencies' M/WBE utilization and whether DSBS determined if agencies met their subcontractor utilization goals. The other three audits were each of individual City agencies [the Department of Design and Construction (DDC), the Department of Housing Preservation and Development (HPD) and the Department of Parks and Recreation (Parks)] and their monitoring of subcontractor utilization goals covered under the M/WBE program.

The audit of DSBS concluded that it did not monitor City agencies' M/WBE utilization and the extent to which agencies met their subcontractor utilization goals. As a consequence, during that time DSBS could not fully assess the program's effectiveness with increasing M/WBE participation in the City's procurement process. Despite the fact that DSBS received the M/WBE utilization plans from all City agencies required to prepare them, the auditors found limited evidence that DSBS reviewed the plans in a timely manner. The auditors also noted there was limited documentation to substantiate that DSBS met with the City agencies that were not achieving their M/WBE utilization goals. As a consequence, DSBS could not determine the reasons for noncompliance with LL 129. Therefore it could not provide these agencies with the required corrective action needed to ensure full compliance with LL 129. The audit of DSBS covered the period of Fiscal Year 2008 (July 1, 2007 through June 30, 2008), and it was released on October 8, 2009.

Our three audits of agency monitoring of vendors that were awarded contracts with M/WBE subcontractor utilization goals uncovered a general lack of monitoring or a lack of effective and adequate monitoring of the program. By not adequately monitoring prime contractors' compliance with its established M/WBE participation goals, these agencies cannot fully assess whether the prime contractors are:

- In compliance with the contract requirements;
- Providing business to certified M/WBEs; and,

- Achieving the subcontractor participation goals specified in the contracts.

As a consequence, these agencies could not adequately determine whether the established subcontracting goals were met by the prime contractors. We also noted that these agencies generally did not review the prime contractors' records to verify payments made to subcontractors. DDC and HPD generally did not conduct job-site inspections, and none of the agencies contacted the M/WBE subcontractors to verify their use by the prime contractor. As a result, the agency in question could not ensure that prime contractors were indeed using and paying the M/WBE subcontractors, as required. The general weaknesses in monitoring we identified provide uncertainty as to whether the ultimate goal of LL 129 is effectively achieved. Without this information, there is no assurance if agencies are effectively contributing to the City's use of certified M/WBEs, as was intended by Local Law 129.

HPD

HPD did not maintain a list of the contracts subject to LL 129 subcontracting requirements. Thus it was unable to adequately track these contracts to determine whether the established subcontracting utilization goals have been met by the prime contractors. HPD did not review the prime contractors' records to verify payments made to subcontractors and it also did not perform job-site inspections or contact the M/WBE subcontractors to verify their use. In addition, HPD did not ensure that certain key documents required by the LL 129 (e.g., list of subcontractors) are being submitted by the prime contractors. These noncompliance issues are the result of the failure of HPD management to establish and to institute detailed procedures to ensure compliance with LL 129. The scope period of the audit was Fiscal Years 2007 through 2010 (July 1, 2006 through June 30, 2010). This audit was released on October 27, 2010.

DDC

DDC did not review the records of prime contractors to verify that payments were made to M/WBE subcontractors. It did not perform job-site inspections or audits of contractor books and records. DDC also did not contact M/WBE subcontractors to verify their participation. Certain documentation indicated that the Department did attempt to ensure that contractors included M/WBE subcontractors in their utilization plans. But after these contracts were awarded, DDC did not monitor the actual utilization and participation of M/WBE subcontractors. Monitoring was only initiated by DDC when an M/WBE subcontractor filed a complaint about a contractor. By not adequately monitoring compliance with agency utilization goals, DDC cannot fully assess whether prime contractors are providing business to certified M/WBEs or if they are achieving the utilization goals specified in their contracts. These noncompliance issues consequently resulted from the Department's failure to establish and to implement written procedures to ensure that it complies with the provisions of LL 129. The scope period of the audit was Fiscal Years 2007 through 2010 (July 1, 2006 through June 30, 2010). This audit was released on December 22, 2010.

Parks

The auditors determined that Parks does not have detailed procedures in place to verify M/WBE participation. Parks did not review the prime contractors' records to verify payments to M/WBE subcontractors. The auditors noted that the Department's resident engineers did observe subcontractor activity at the construction sites and they did keep track of subcontractor work on daily and weekly reports. However, Parks provided no evidence that it contacts the M/WBE subcontractors to verify the extent to which they have been used by the prime contractors. In the absence of a proper review and analysis, Parks was unable to determine the extent to which contractors were providing subcontracting work to M/WBEs and whether M/WBEs are receiving the appropriate payments.

The auditors disclosed that three out of four contractors in their sample did not achieve the overall subcontracting and M/WBE goals they proposed to Parks in their utilization plans when their contracts were executed. Contractors must submit with each voucher for payment, the total amount paid to each subcontractor, including each M/WBE. If total payments to M/WBEs are for less than the amount specified in the contractor's utilization plan, the agency is required to take appropriate action for noncompliance. Parks officials stated that within the last three years it has only initiated action against one contractor that did not meet its goals and was deemed to be non-responsive. However, the auditors discovered that the overall subcontracting and M/WBE payment goals were not met for three of the four contracts they reviewed. But the auditors found no evidence that any action (ranging from entering into an agreement with the contractor to address the noncompliance to terminating the contract) was taken by Parks in response to the inability of these prime contractors to meet their goals. The scope period of the audit was Fiscal Years 2007 through 2010 (July 1, 2006 through June 30, 2010). This audit was released on December 22, 2010.

Mayor's Office of Contracts (MOCS)

The data that is publicly reported by the Mayor's Office of Contracts about M/WBE subcontractor participation goals is based on anticipated rather than actual number of M/WBE subcontracts. The actual payments to M/WBE subcontractors on contracts with established M/WBE goals are not publicly reported. Accordingly, publically reported data cannot be used to accurately assess the actual results of the City's M/WBE program.

The City's Financial Management System is the source for the M/WBE subcontracting information used by MOCS for Local Law 129 reporting. According to the FISA contract processing training manual, the Contract Goal Line (CTGL) table contains subcontractor specific information that is provided by the prime contractor. A CTGL record is intended to capture (among other things) the subcontractor, subcontractor start date, and total cumulative anticipated payments to be made to a subcontractor (including M/WBEs) under a prime contract. If a record needs to be modified (e.g., the total anticipated amount increases, the subcontractor is not used), FMS allows the user to

make changes in the CTGL record. In such cases, a modified record is created and assigned a sequence number (original record is numbered “1”). No records are deleted; the original record and all modified records remain in the system, providing an audit trail of the original record and all subsequent changes. Only the most recently modified record, however, is considered the valid (current) record.

MOCS generally relies on the information that agencies enter in the CTGL table in FMS to report on the use of M/WBE subcontractors by the City. The subcontractor dollar figures recorded in the CTGL table are based on the approximate anticipated value of the subcontracts. It is not intended that information on actual payments to subcontractors be entered in the CTGL table. If this is the case, the information contained in FMS and relied upon by MOCS to report on and measure the success of the M/WBE program is not appropriate for this purpose. In that regard, the annual statistics reported on M/WBE utilization by MOCS should not be used as a management tool to measure the success of the M/WBE program.

Our central finding as to the lack of adequate and effective monitoring of compliance by both DSBS and the agencies we audited is troubling, given that the M/WBE program is still in its infancy. A program of this importance, just recently launched, should be rigorously monitored from its inception to ensure it is being properly and effectively implemented as intended by LL 129, the City Charter and the City’s Administrative Code. The failure to properly monitor implementation of the program jeopardizes the ultimate goal of the M/WBE program: To increase M/WBE participation in the City’s procurement process in a manner consistent with local and State procurement law. As concerning is the statistics reported by MOCS of the program. We found them to be an unreliable means by which to effectively measure the success of the program as defined by LL 129.

Recommendations

As previously mentioned and clearly documented in all the audits conducted by the Comptroller’s Office, the lack of effective monitoring of the program at the agency and oversight level must be improved. In that regard, DSBS in consultation with MOCS should formulate and institute uniform procedures in the effective monitoring of the program that are consistent with the provisions contained in LL 129 that each agency must follow. This would include:

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- Collecting and reporting data on actual payments made to M/WBE subcontractors by prime contractors instead of planned goals;
- Ensuring agencies initiate enforcement actions against those prime contractors that do not comply with the M/WBE provision of their contracts;

- Requiring agencies to ensure that prime contractors submit complete and accurate subcontractor lists in a timely manner;
- Requiring agencies to conduct job-site inspections, and contact M/WBE subcontractors to confirm their participation in the project;
- Establishing controls to ensure that the information recorded in FMS pertaining to M/WBE anticipated subcontract amounts is accurate.