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EXECUTIVE CORRESPONDENCE



**Metropolitan Transportation Authority**

State of New York

DEC 29 2015

OFFICE OF THE STATE COMPTROLLER  
THOMAS P. DINAPOLI  
COMPTROLLER

December 10, 2015

Honorable Andrew M. Cuomo  
Governor of New York State  
NYS State Capitol Building  
Albany, NY 12224

Honorable Thomas P. DiNapoli ✓  
Office of the State Comptroller  
59 Maiden Lane, 31<sup>st</sup> Floor  
New York, NY 10038

RE: Response to Report #2014-S-6 – Contract Participation of Minority-and Women-Owned Business Enterprises

Gentlemen:

On September 10, 2015, the Office of the State Comptroller issued the above referenced audit report. As required by Section 170 of the Executive Law, I am providing you with the attached response which addresses the recommendations contained in the report.

A copy of the final audit report is attached for your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "TFP", with a horizontal line extending to the left and a vertical line extending downwards.

Thomas F. Prendergast  
Chairman and Chief Executive Officer

Attachment

c: Donna M. Evans, MTA Chief of Staff

*The agencies of the MTA*

MTA New York City Transit  
MTA Long Island Rail Road

MTA Metro-North Railroad  
MTA Bridges and Tunnels

MTA Capital Construction  
MTA Bus Company



## Metropolitan Transportation Authority

State of New York

**Date** December 10, 2015

**To** Thomas Prendergast, Chairman and CEO

**From** Michael J. Garner, Chief Diversity Officer *MYZ*

**Re** 90-Day Response to the New York State Office of Comptroller Audit Report Concerning Contract Participation of Minority- and Women-Owned Business Enterprises, Report No. 2014-S-6

On August 4, 2015, the Office of State Comptroller ("OSC") released the final report, "Contract Participation of Minority- and Women-Owned Business Enterprises," which was the result of an audit conducted at the Metropolitan Transportation Authority ("MTA"). In accordance with Section 170 of the Executive Law, within ninety days of the release of the final report, we are required to provide OSC of our progress to date with respect to the five recommendations contained in the above mentioned audit report. The audit covered MTA's State-funded (and not federally-funded) contracts.

As noted in MTA's prior audit response, the Comptroller's report was not aligned with the basic premises of the State's MWBE Program, and the laws, rules and sound operational practices that govern and support this Program. As a result, the audit mischaracterized MTA's compliance with Article 15-A and made recommendations that were not supported by existing law or regulation.

### Program Participation Goals

#### Recommendation 1:

*Document reasons for setting an annual goal for MWBE participation that is lower than the 28.92 percent statewide goal, as required by State regulation.*

The MTA disagrees with the conclusion reached by the OSC in its audit report that for State fiscal years 2011-2012, 2012-2013, and 2013-2014 MTA was required by the law and State regulation to set a 28.92 percent MWBE participation goal in alignment with the statewide goal, or document why this goal could not be set. As we stated in our response, OSC misread and misapplied relevant sections of Article 15-A of the New York State Executive Law that govern the MTA MWBE Program. MTA is not required by law to adopt the statewide MWBE goals of 28.92 per cent, nor is it required to offer an explanation for not setting a lower goal. MTA is only required to consider the statewide goal when applying this number to the MTA procurement and contracting context, which is markedly different from the statewide procurement and contracting

context. This, however, is a moot point because the MTA has set a 30 percent MWBE participation goal for State fiscal year 2015-2016. This goal exceeds the 28.92 percent goal.

Recommendation 2:

*Set appropriate annual goals for MWBE participation in MTA contracts by individual industry. Document the methodology used to set those goals and, if applicable, explain why goals are lower than the industry-specific targets stated in the law.*

As stated above, MTA is not required to set a specific MWBE goal (e.g., 28.92%), however, a review of MTA's 2014-2015 and 2015-2016 MWBE goals will show that we have already implemented the recommendation of setting goals by individual industry. We have streamlined our goal setting process, and we set goals by individual categories, e.g., construction, construction consultants, service consultants, and commodities. We also document the methodology used to set these goals. By way of comparison, MTA's MWBE goal has doubled from 15 percent in State fiscal year 2011-2012 to 30 percent in State fiscal year 2015-2016.

Recommendation 3:

*Include all constituent agencies in the annual goal plan with proper adjustment for amounts that are not available for the MWBE Program.*

MTA does not have to implement this recommendation because MWBE goal plans already include specific expenditures for MTA's constituent agencies. The New York State Department of Economic Development ("DED") reviews and approves MTA's list of exemptions and exclusions (amounts not available for MWBE goals). After exclusion of these items, the remaining budget numbers are based on projected expenditures, broken down by the above mentioned categories.

**Reporting Program Results**

Recommendation 4:

*Ensure payments are going to MWBEs that have performed work on MTA contracts and amounts reported to DED represent amounts actually paid to certified MWBE contractors/subcontractors.*

MTA does not have to implement this recommendation because it already ensures that payments are verified and confirmed before they are reported to DED. We conduct subcontractor payment verifications when a contract is 30%, 60% and 90% complete. MTA is also acquiring the B2G Contract Compliance System, which is currently being used by New York State. This system has

a mechanism requiring MWBE subcontractors to verify payments that they receive from prime contractors.

**Recommendation 5:**

*Periodically, on a risk-based analysis, visit projects to ensure there is sufficient documentation to support the payment reported on the 15A.3 Form.*

MTA does not have to implement this recommendation because we have already hired additional staff and significantly increased visits to our project sites. On average 40 site visits are conducted every month. From January through October 2015, over 330 site visits have been conducted. MTA also works closely with its independent monitors, who conduct site visits on some of MTA's largest construction projects, and on projects where previous violations have been noted.

**Conclusion**

MTA has had an exemplary record in regard to its MWBE Program. We have and will continue to identify and implement process improvements to the Program so as to better serve our clients and the citizens of New York State.



**New York State Office of the State Comptroller**  
**Thomas P. DiNapoli**

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**Division of State Government Accountability**

# **Contract Participation of Minority- and Women-Owned Business Enterprises**

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## **Metropolitan Transportation Authority**

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## Executive Summary

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### Purpose

To determine if the Metropolitan Transportation Authority established annual participation goals for minority- and women-owned business enterprises; met these goals; and accurately reported its results to the Department of Economic Development.

### Background

Article 15-A of the New York State Executive Law (Law) requires State agencies and public authorities to promote the participation of minority- and women-owned business enterprises (MWBEs) in their contracts. Specifically, pursuant to the Law and regulations set forth by the Department of Economic Development (DED), State agencies and public authorities must establish annual goals for such participation, make a "good faith" effort to achieve their goals, and report quarterly on their level of participation to DED. The Metropolitan Transportation Authority (MTA) reported to DED total contract expenditures of \$1.1 billion for State fiscal year 2011-12, \$1.2 billion for fiscal year 2012-13, and \$1.2 billion for fiscal year 2013-14. MTA reported MWBE utilization of \$158.6 million (14.4 percent), \$260.7 million (21.7 percent), and \$283.4 million (23.6 percent) for the same periods, respectively. MTA's Department of Diversity and Civil Rights (DDCR) is responsible for administering the MWBE program and the Disadvantaged Business Enterprise (DBE) program, a similar program for federally funded contracts.

In 2011, OSC issued a report (2010-S-9) on MWBE reporting by the MTA and found that the Authority had not shown its goals were reasonable; consistently fell short of reaching its goals; did not accurately report the results of its efforts; and, in fact, overstated the extent of MWBE participation in its procurements. In that report, OSC made six recommendations to improve MTA's compliance with the Law. In their September 23, 2010 response, MTA officials agreed with our recommendations and stated that they had taken "the necessary steps toward addressing those programmatic weaknesses and implemented corrective measures to ensure improvements within our program."

In April 2015, the MTA Office of the Inspector General (MTA OIG) released a report on compliance monitoring in the DBE program based on a review of a sample of federally funded contracts. That audit followed up on previous reviews that linked instances of fraudulent activity and violations with weaknesses in compliance monitoring. The MTA OIG found that DDCR oversight fell short of its own monitoring requirements and, by failing to fulfill two key tasks – payment verification and on-site investigations – made the MTA more vulnerable to fraud.

This audit covers State-funded (and not federally funded) contract payments.

### Key Findings

Despite MTA's agreement with the recommendations in OSC's 2011 report and their assurances that corrective action would be taken, many of the conditions identified in our initial audit still exist. In particular, weaknesses in controls over MWBE reporting continue and have resulted in inaccurately reported MWBE utilization numbers as well as an increased risk of fraud. The

unreliability of MWBE utilization data results in a questionable baseline for managing a critical program and assessing the Agency's performance. Until management takes decisive steps to address these weaknesses, neither the public nor MTA management can depend on this data as a reliable source of information. Key findings include:

- DDCR uses self-reported information from prime contractors to support the MWBE subcontractor utilization numbers that it reports to DED. However, DDCR often could not support amounts reported to DED as MWBE participation. We reviewed 128 payments totaling \$42.7 million and found there was no documentation to support MWBE participation for 30 payments, totaling \$13.9 million. In addition, for 37 payments (totaling about \$21.5 million), the documentation DDCR had did not match the payments it reported to DED. Specifically, 11 payments were under-reported by a total \$5.9 million, and 26 were over-reported by a total \$14.2 million. All told, over 50 percent of the sampled payments were either unsupported or inaccurately reported.
- To determine if reported payments were in fact received by MWBEs, we sent confirmation letters to 102 MTA prime and subcontractors for 274 payments. We received responses to 53 of the 102 letters, covering 142 payments totaling \$38.7 million. Of those 142 payments, only 66 (46.5 percent), totaling \$13.9 million, matched the amounts reported by DDCR. In one response to a reported payment of \$2.8 million, the subcontractor stated that its share of the total \$2.8 million transaction was only \$140,244, representing a 5 percent commission. The remaining \$2.66 million was paid to the company that provided the goods. That company is not an MWBE. In another instance regarding two reported payments totaling \$147,654, the respondents stated they have not received any payments for the sampled contract from the MTA since 2007.

### **Key Recommendation**

- Ensure all reported payments made to MWBEs are documented and support that an MWBE performed the work and was paid for such work.

### **Other Related Audits/Reports of Interest**

Metropolitan Transportation Authority: Minority and Women's Business Enterprise Reporting (2010-S-9)

Dormitory Authority of the State of New York: Contract Participation of Minority - and Women - Owned Business Enterprises (2014-S-7)

**State of New York  
Office of the State Comptroller**

**Division of State Government Accountability**

September 10, 2015

Mr. Thomas Prendergast  
Chairman and Chief Executive Officer  
Metropolitan Transportation Authority  
347 Madison Avenue  
New York, NY 10017

Dear Mr. Prendergast:

The Office of the State Comptroller is committed to helping State agencies, public authorities, and local government agencies manage their resources efficiently and effectively. By so doing, it provides accountability for tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities, and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is a report of our audit entitled *Contract Participation of Minority- and Women-Owned Business Enterprises*. This audit was performed pursuant to the State Comptroller's authority as set forth in Article X, Section 5 of the State Constitution and Section 2803 of the Public Authorities Law.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this report, please feel free to contact us.

Respectfully submitted,

*Office of the State Comptroller  
Division of State Government Accountability*

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 This report is also available on our website at: [www.osc.state.ny.us](http://www.osc.state.ny.us)

## Background

The Metropolitan Transportation Authority (MTA) is a public benefit corporation providing transportation services in and around the New York City metropolitan area. The MTA has six constituent agencies: NYC Transit (Transit), MTA Bus Company, MTA Capital Construction, the Long Island Rail Road (LIRR), Metro-North Railroad, and Bridges and Tunnels. The MTA also has a headquarters, which provides administrative support. The MTA is governed by a 23-member Board of Directors, whose members are appointed by the Governor with the advice and consent of the State Senate.

Article 15-A of the New York State Executive Law (Law) and Parts 140-145 of the Regulations (Regulations) of the Commissioner of the Department of Economic Development (DED) require State agencies and public authorities to promote the participation of minority- and women-owned business enterprises (MWBEs) in State contracts. Specifically, State agencies and public authorities are to establish annual goals for such participation, make a “good faith” effort to achieve their goals, and report quarterly on their level of participation to DED. The MTA reported to DED total contract expenditures of \$1.1 billion for State fiscal year 2011-12, \$1.2 billion for fiscal year 2012-13, and \$1.2 billion for fiscal year 2013-14. MTA reported MWBE utilization of \$158.6 million (14.77 percent), \$260.7 million (21.55 percent), and \$283.4 million (22.95 percent) for the same periods, respectively. MTA’s Department of Diversity and Civil Rights (DDCR) is responsible for administering the MWBE program and the Disadvantaged Business Enterprise (DBE) program, a similar program for federally funded contracts.

DED Regulations require State agencies and State authorities to submit the annual MWBE goal plan on or before January 15. The plan must include the prospective goals for the inclusion of certified MWBEs in overall agency expenditures, specifically including each of the following contracting categories: construction, construction related professional services, non-construction related professional services, and commodities. The Law set forth a statewide annual goal for MWBE participation of 28.92 percent effective July 2010.

To determine the amount available for MWBE goals, State agencies and public authorities are allowed to reduce their projected total budget by exemptions and exclusions to determine the “Available Budget for Agency Goals.” Exemptions include personal services, debt service, travel reimbursements, utilities, Office of General Services centralized services, sole source contracts, postage, telephones, staff benefits, operating transfers, certain rentals and repairs, and special departmental charges (such as unemployment insurance and tuition reimbursement). Exclusions are items that have been identified by agency procurement management and DED as offering no procurement opportunities for MWBEs. They include goods/materials or services that have been determined to offer no MWBE prime or subcontracting opportunities.

The “Monthly MBE/WBE Participation Report” (15A.3 Form) is prepared by prime contractors. The 15A.3 Form includes payments made to MWBE subcontractors and payments to the prime contractor if it is an MWBE; it is signed by an authorized representative stating that it is “... truthful, accurate, complete and not misleading.” DDCR uses the 15A.3 Form to report subcontractor

utilization payment information to DED. In addition, payments to prime contractors for non-capital contracts are supported by records maintained at MTA's Business Service Center (BSC). In order for a Capital Payment request to be processed, it must be supported by affidavits from prime contractors that certify which subcontractors performed the work or supplied goods, and by affidavits from subcontractors stating they have performed the work.

DDCR conducts "on-site investigations" to verify that work committed to MWBE contractors/subcontractors is actually done by such contractors/subcontractors, and to investigate any problems. In addition, the MTA constituent agency responsible for the project has a Construction Manager/Project Manager who is responsible for ensuring, on a daily basis, that only authorized contractors are working at the site. DDCR is supposed to conduct on-site investigations when the MWBE contractor or subcontractor is on site.

The MTA holds MWBE outreach events and conferences for the purpose of attracting new contractors/subcontractors. The events and conferences provide prospective contractors/subcontractors with information on how to do business with the MTA and its operating agencies. For example, the LIRR conducted a "Discretionary Procurement" Outreach Event aimed at small, minority- and women-owned businesses on February 28, 2013 and another information procurement event at Suffolk Community College on April 19, 2013.

In 2011, OSC issued a report (2010-S-9) on MWBE reporting by the MTA and found that the Authority had not shown its goals were reasonable; consistently fell short of reaching its goals; did not accurately report the results of its efforts; and, in fact, overstated the extent of MWBE participation in its procurements. In that report, OSC made six recommendations to improve MTA's compliance with the Law. In their September 23, 2010 response, MTA officials agreed with our recommendations and stated that they had taken "the necessary steps toward addressing those programmatic weaknesses and implemented corrective measures to ensure improvements within our program." However, the results of this audit show that several of the problems identified in the initial audit still persist.

In April 2015, the MTA Office of the Inspector General (MTA OIG) released a report on compliance monitoring in the DBE program based on a review of a sample of federally funded contracts. That audit followed up on previous reviews that linked instances of fraudulent activity and violations with weaknesses in compliance monitoring. The MTA OIG found that DDCR oversight fell short of its own monitoring requirements and, by failing to fulfill two key tasks – payment verification and on-site investigations – made the MTA more vulnerable to fraud.

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## Audit Findings and Recommendations

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The MTA has set annual MWBE participation goals and reported them to DED; however, the MTA's annual goal plan did not always include all of its constituent agencies. For example, for the 2011-12 fiscal year, the MTA did not include MTA Headquarters (MTAHQ) or the Metropolitan Suburban Bus Authority (LI Bus) in its goal plan. In fiscal years 2011-12 and 2012-13, MTA-Capital Construction was not in the goal plan, but its MWBE participation was included in the MTA's utilization report to DED. In addition, the MTA did not explain why its annual goal did not meet the 28.92 percent statewide annual goal set forth in the Law, as required by the Regulations.

DDCR uses self-reported information from prime contractors to support the MWBE subcontractor utilization numbers that it reports to DED. However, even using this limited standard of support, DDCR had no such documentation to support 30 payments (totaling \$13.9 million) that were reported to DED as MWBE participation from April 2011 to December 2013. In addition, for 37 payments (totaling about \$21.5 million), the information in this documentation did not match the payments reported.

We also found weaknesses in DDCR's monitoring of prime contractors' reported payments to MWBE subcontractors. DDCR's Standard Operating Procedures require it to obtain verification directly from subcontractors that they have been paid. Consistent with the findings of the MTA OIG for federal payments, we found no evidence that DDCR verifies subcontractor payments for State-funded projects. Therefore, to verify MWBE payments (as reported to DED), we sent confirmation letters to MTA prime contractors and subcontractors. We received responses to 53 of the 102 letters, and the 53 responses corresponded with 142 payments. Of the 142 payments, only 66 (46.5 percent), totaling \$13.9 million, matched the amounts reported by DDCR. In one response to a reported payment of \$2.8 million, the subcontractor stated that its share of the total \$2.8 million transaction was only \$140,244, representing a 5 percent commission. The remaining \$2.66 million was paid to the company that provided the goods. That company is not an MWBE.

In addition, DDCR did not follow its own procedures that require site visits and inspections to ensure that MWBE subcontractors are actually performing the work listed in the prime contractors' Utilization Plan. These control weaknesses could limit the MTA's ability to ensure accurate reporting of MWBE participation and raise the potential for fraud.

### Program Participation Goals

The Law sets the overall statewide MWBE participation goal at 28.92 percent, effective July 2010, and it further breaks down the goal by industry, as shown in Table 1.

**Table 1: MWBE Statewide Goals by Industry**

| Type of Industry                           | MBE Goal (Percent) | WBE Goal (Percent) | Total MWBE Goal (Percent) |
|--------------------------------------------|--------------------|--------------------|---------------------------|
| Construction                               | 14.34              | 8.41               | 22.75                     |
| Construction Related Professional Services | 13.21              | 11.32              | 24.53                     |
| Non-Construction Related Services          | 19.60              | 17.44              | 37.04                     |
| Commodities                                | 16.11              | 10.93              | 27.04                     |
| All Industries                             | 16.53              | 12.39              | 28.92                     |

In contrast, MTA set its annual MWBE goals for the three fiscal years ended March 31, 2014 considerably lower, as detailed in Table 2.

**Table 2: MTA MWBE Annual Goals**

| Fiscal Year | MBE Goal (Percent) | WBE Goal (Percent) | Total MWBE Goal (Percent) | Actual MWBE Reported (Percent) |
|-------------|--------------------|--------------------|---------------------------|--------------------------------|
| 2011-12     | 10.00              | 10.00              | 20.00                     | 14.4                           |
| 2012-13     | 10.00              | 10.00              | 20.00                     | 21.7                           |
| 2013-14     | 10.43              | 9.91               | 20.34                     | 23.6                           |

In each of its annual goal plans, the MTA set an overall MWBE goal and separate MWBE goals for the industries listed in the Law. However, the MTA did not demonstrate to DED why it could not attain the 28.92 percent statewide goal stated in the Law. If an agency establishes a goal lower than the one stated in the Law, the agency is required by the Regulations to provide an explanation.

Table 3 presents the MTA's participation goals by industry compared with the target percentages stated within the Law. As the table illustrates, the MTA's goals were less (and sometimes significantly less) than those set forth by the Law. Further, DDCR officials could not clearly explain how the individual industry goals were derived.

**Table 3: MWBE Participation Goals by Percentage  
of Total Value of Procurement**

| Industry                                            | Law<br>(Percent) | MTA Annual Goal<br>Plan 2011-12 and<br>2012-13 (Percent) | MTA Annual Goal<br>Plan 2013-14<br>(Percent) |
|-----------------------------------------------------|------------------|----------------------------------------------------------|----------------------------------------------|
| Construction                                        | 22.75            | 20.00                                                    | 22.72                                        |
| Construction Related<br>Professional Services       | 24.53            | 20.00                                                    | 20.00                                        |
| Non-Construction Related<br>Services                | 37.04            | 5.00                                                     | 17.50                                        |
| Commodities                                         | 27.04            | 5.00                                                     | 11.86                                        |
| Overall Agency Total Dollar<br>Value of Procurement | 28.92            | 20.00                                                    | 20.35                                        |

In determining its goal for the 2011-12 fiscal year, the MTA did not include MTAHQ and LI Bus, which provided busing on Long Island through a Lease and Operating Agreement with Nassau County. DDCR explained that MTAHQ was not included that year because it did not have the technical capability to accurately forecast upcoming procurements and opportunities for MWBE participation. Also, DDCR did not include LI Bus because its lease with Nassau County expired on December 31, 2011. However, the goal plan for the 2011-12 fiscal year was prepared in January 2011, therefore, it is unclear why the anticipated expenditures for the nine months the MTA continued to operate LI Bus were not included in the goal setting. These exclusions were likely material because in the next fiscal year, MTAHQ's budget was \$522.5 million and its anticipated MWBE participation was \$97.5 million.

For fiscal years 2011-12 and 2012-13, the MTA did not include MTA Capital Construction (MTACC) although actual expenditures for this constituent agency were reported in the utilization report. In response to preliminary findings, DDCR officials said that "an overwhelming number" of MTACC projects are federally funded and therefore fall under the federal DBE program. Further, the response stated, "some MTACC projects might be locally funded but those projects are not solicited or awarded by MTACC but by other MTA agencies which hold the contract." DDCR did not provide any documentation to support these assertions. It also did not provide auditors with the breakdown by agency for expenses and available budget goals for fiscal year 2013-14. Therefore, it is unclear which agencies are included.

Since the MTA prepares its goal plan as one agency and submits it to DED as one entity, it should ensure that all of its constituents' expenditures, exclusions, exemptions, and "Available Budget for Agency Goals" are included when setting the goal. This will help ensure that the MTA's plan is consistent every year and fully complies with DED requirements.

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### *Exemptions and Exclusions*

In 2011-12, Transit indicated to DDCR that its "Available Budget for Agency Goals" was \$1.16 billion. However, the MTA excluded nearly \$1 billion from that amount, and consequently, the DDCR reported a participation goal for Transit of \$156.1 million for 2011-12. In contrast, for the 2012-13 and 2013-14 fiscal years, Transit's "Available Budgets for Agency Goals" were \$1.25 billion and \$1.42 billion, respectively, and DDCR reported these amounts without adjustment. According to DDCR officials, the exclusion of nearly \$1 billion in 2011-12 was due to multi-year contracts that were in effect prior to October 7, 2010. DDCR officials further stated that this was the result of verbal instruction from senior MTA officials, and therefore, there was no documentation to support the large one-time exclusion.

We also questioned some of the items that were exempted, such as "background investigations" for \$220,000, "exterminating services" for \$80,000, and "operators for monitoring and security services" for \$1.1 million. DDCR's explanation was that these items presented "no subcontracting opportunities for MWBEs." However, there was no documentation to support this statement. Moreover, as of February 28, 2014, there were 18 certified MWBE pest-control companies serving New York City, indicating that this item presented a good MWBE contracting opportunity.

### **Recommendations**

1. Document reasons for setting an annual goal for MWBE participation that is lower than the 28.92 percent statewide goal, as required by State regulation.
2. Set appropriate annual goals for MWBE participation in MTA contracts by individual industry. Document the methodology used to set those goals and, if applicable, explain why goals are lower than the industry-specific targets stated in the Law.
3. Include all constituent agencies in the annual goal plan with proper adjustment for amounts that are not available for the MWBE program.

### **Reporting Program Results**

After the award of a contract, prime contractors with MWBE goals must complete a 15A.3 Form by the 15th of each month to report actual participation by MWBE subcontractors during the preceding month. According to DDCR, the 15A.3 Form is the basis for payments reported by MTA to DED for MWBE subcontractor participation. We therefore requested 15A.3 Forms from DDCR to support 128 payments, totaling \$42,690,049, reported to DED.

Based on the forms provided, only 47 percent of the payments, accounting for 17 percent of the dollars sampled, were adequately supported, as follows:

| Description                                              | Number of Payments | Percent of Payments | Total               | Percent       |
|----------------------------------------------------------|--------------------|---------------------|---------------------|---------------|
| Correctly Reported                                       | 61                 | 47.66               | \$7,280,038         | 17.05         |
| No Supporting Documentation                              | 30                 | 23.44               | 13,946,713          | 32.67         |
| Reported Payment Did Not Match Supporting Documentation* | 37                 | 28.91               | 21,463,298          | 50.28         |
| <b>Total</b>                                             | <b>128</b>         | <b>100.00</b>       | <b>\$42,690,049</b> | <b>100.00</b> |

\* Note: Of the 37 payments, 11 were less than the amounts reported by a total of \$5.9 million, and 26 were more than the amounts reported by a total of \$14.2 million. Thus, there was a net over-reporting of \$8.3 million.

For an additional 20 prime contractor payments totaling \$3.18 million, we reviewed the MTA's Business Service Center's records. Prime contractor payments (unlike payments to subcontractors), are paid directly by the MTA, and therefore, records of these payments are maintained by the BSC. We determined there were two duplicate payments, which resulted in an overstatement of \$167,876. In addition, another reported payment of \$221,189 was only partially supported, which overstated the amount reported by \$64,026.

In total, of the 148 sampled payments that were reported to DED, 70 totaling \$35.8 million were either unsupported or inaccurately reported, based on the paperwork submitted by the contractor.

### *Payment Confirmation*

In addition to obtaining 15A.3 Forms from contractors, DDCR's Standard Operating Procedures require it to obtain verification directly from subcontractors that they have been paid. Consistent with the findings of the MTA OIG for federal payments, we found no evidence that DDCR verifies subcontractor payments reported for state participation. Therefore, to verify reported payments to DED, we sent letters to 102 LIRR and Transit MWBE prime and subcontractors to confirm they received a total of 274 payments. We received responses to 53 of the 102 letters. These responses covered 142 payments, totaling \$38.7 million. Of these 142, only 66 (or 46.5 percent), totaling \$13.9 million, matched the amounts reported by DDCR. The amount that did not match totaled \$24.7 million.

In a response to a reported payment of \$2.8 million, a subcontractor stated its share of the total \$2.8 million payment it received was only \$140,244, representing a 5 percent commission. The remaining \$2.66 million was paid to the company that provided the goods. That company is not an MWBE. The subcontractor's explanation was that its only contribution to the project was to obtain batteries from another source and pass them to the prime contractor. This indicates that the MWBE amount reported to DED was overstated by \$2,659,756 (\$2,800,000 - \$140,244).

In another instance, regarding two reported payments totaling \$147,654, the respondents stated they have not received any payments for the sampled contract from the MTA since 2007. In addition, for three reported payments totaling \$41,914, the prime contractor stated that it has placed bids with the MTA. However, the contractor has never received contract awards and, therefore, has not performed any work or received any payments. We concluded that weakness in pertinent DDCR program controls contributes to inaccurate reporting of MWBE participation. Moreover, it may inhibit the agency from deterring and detecting fraud.

To determine whether the MWBEs performed the work they were reportedly paid for, we visited 13 locations to review records documenting 69 quarterly payments totaling \$29.5 million. We reviewed 15A.3 Forms, Certified Payrolls, and Daily Shift Reports (a list of all the contractor employees who are on site on any given day) – critical documents, according to Transit procurement officials, that MTA or consultant construction/project managers maintain as evidence of work performed. Of the 69 reported payments, we found that 17, totaling \$9.9 million, were missing at least one piece of the required documentation or the documentation did not support the reported payment to the contractors/subcontractors.

In addition to the visits, we reviewed documentation submitted with the Capital Payment Vouchers, including all the documents necessary to approve payments to the prime contractors. One of the main documents is the Affidavit Certifying Payment to Laborers, Subcontractors, and Suppliers of Materials and Services (Affidavit). The Affidavit lists each of the subcontractors on site that performed work or supplied materials or services. Payment documents also include an Affidavit from each subcontractor certifying that they worked on the project for that month.

Our review of 80 Capital Payment Vouchers and Affidavits from primes and subcontractors (15 were from prime contractors; 65 were from subcontractors) determined that for 10 payments there were no Affidavits for subcontractors. Capital Payment officials stated that this is most likely because the subcontractor was a supplier. However, when we looked at the prime contractor's Affidavit, the subcontractor was not listed as a supplier.

We noted a lack of communication between DDCR and Capital Payments staff regarding processing of capital payment voucher requests. The documents required to support payments include information that could also be used by DDCR to verify that the MWBE actually performed the work. However, DDCR did not utilize this information to verify that the work committed to MWBEs was, in fact, done by them and payment was made.

### *On-Site Investigations*

DDCR project managers are required to make site visits to ensure subcontractors are actually performing the work listed in their prime contractor's Utilization Plan. We examined the on-site investigation files for nine contracts. Seven of them had utilization plans that had a total of 105 subcontractors. Our review raised concerns about whether DDCR is ensuring the work committed to MWBEs is being done by those subcontractors. We determined that DDCR conducted its investigations when only 11 (10.5 percent) of these subcontractors were on site. For two contracts there was no utilization plan. DDCR conducted its on-site investigation when two subcontractors were on-site.

DDCR officials stated they are unable to visit all of the sites when subcontractors are present because there are only six managers responsible for monitoring over 3,000 contracts. In their review of federal projects, the MTA OIG similarly found that in 71 percent of the cases examined, DDCR compliance managers apparently never conducted inspections. When the MTA OIG interviewed three DDCR managers as part of its audit, the managers said that site visits had largely ceased early in 2013. The MTA OIG report states that site visits “provide a visible and tangible deterrent to fraud.” As a result of the way DDCR conducts investigations, there is less assurance that work committed to MWBE subcontractors is actually done by them.

## Recommendations

4. Ensure payments are going to MWBEs that have performed work on MTA contracts and amounts reported to DED represent amounts actually paid to certified MWBE contractors/subcontractors.
5. Periodically, on a risk-based analysis, visit projects to ensure there is sufficient documentation to support the payment reported on the 15A.3 Form.

## Audit Scope and Methodology

The objectives of our audit were to determine if the Metropolitan Transportation Authority established annual participation goals for minority- and women-owned business enterprises; met these goals; and accurately reported its results to the Department of Economic Development. The audit covered the period April 1, 2011 to December 31, 2014.

To accomplish our objectives, we interviewed DDCR officials to gain a general understanding of the MWBE program and to obtain an understanding of the internal controls related to the program. We conducted interviews with officials at LIRR and Transit. We also reviewed DDCR’s Standard Operating Procedures for the MWBE program, Article 15-A of the New York State Executive Law, and Sections 141-145 of the Regulations of the Commissioner of the Department of Economic Development. We reviewed the MTA’s annual goal plans for the 2011-12, 2012-13, and 2013-14 fiscal years, as well as utilization (payments made to MWBE contractors) that was reported to DED.

We sampled 159 payments totaling \$58.8 million from LIRR and Transit reported to DED from the utilization reports. We reviewed 15A.3 Forms or BSC backup for all of them. We visited 13 sites to review backup documentation to support 69 of these payments. We also sent confirmation letters to 102 contractors/subcontractors for 274 reported quarterly payments totaling \$87,415,460 (which were judgmentally selected from a population of 7,112 payments totaling \$295,874,365). The 274 reported payments were selected from the ten contractors/subcontractors that were paid the highest total dollar amounts, and we selected the highest, a middle, and a lowest payments to those contractors. We then selected the highest individual payments to ten contractors/subcontractors. Finally, we chose the highest, a middle, and a low

payment for the ten contractors/subcontractors that were paid the greatest number of payments.

We sampled nine of the 19 on-site investigations conducted by DDCR for LIRR and Transit for the period spanning from first quarter of 2010 to the last quarter in 2013.

As is our practice, we notified MTA officials at the outset of the audit that we would be requesting a representation letter in which management provided assurances, to the best of their knowledge, concerning the relevance, accuracy, and competence of the evidence provided to the auditors during the course of the audit. The representation letter is intended to confirm oral representations made to the auditors and to reduce the likelihood of misunderstandings. In this letter, agency officials assert that, to the best of their knowledge, all relevant financial and programmatic records and related data have been provided to the auditors. Agency officials further affirm that either the agency has complied with all laws, rules, and regulations applicable to its operations that would have a significant effect on the operating practices being audited, or that any exceptions have been disclosed to the auditors.

For this audit, we found it necessary to modify our standard representation letter because DDCR management did not provide access to employees, computer systems, and original documentation, with the exception of on-site investigation files. DDCR also did not provide documents in a timely manner, and as a result we had to make numerous requests to MTA. MTA officials provided a representation letter, however, they changed the letter to remove the statement regarding the lack of access to staff and original records.

We conducted our 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.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions, and public authorities, some of whom have minority voting rights. These duties may be considered management functions for the purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these functions do not affect our ability to conduct independent audits of program performance.

## **Authority**

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This audit was performed pursuant to the State Comptroller's authority under Article X, Section 5 of the State Constitution and Section 2803 of the Public Authorities Law.

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## Reporting Requirements

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We provided a draft copy of this report to MTA officials for their review and formal comment. Their comments were considered in preparing this final report and are attached in their entirety at the end of this report. In their response, MTA officials disagreed with our findings and did not address the recommendations. Our rejoinders to certain MTA comments are included in the reports' State Comptroller's Comments.

Within 90 days after final release of this report, as required by Section 170 of the Executive Law, the Chairman and Chief Executive Officer of the Metropolitan Transportation Authority shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where recommendations were not implemented, the reasons why.

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## Contributors to This Report

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### Vision

A team of accountability experts respected for providing information that decision makers value.

### Mission

To improve government operations by conducting independent audits, reviews and evaluations of New York State and New York City taxpayer financed programs.

## Agency Comments

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**Thomas F. Prendergast**  
Chairman and Chief Executive Officer



### Metropolitan Transportation Authority

State of New York

August 4, 2015

Ms. Carmen Maldonado  
Audit Director  
The Office of the State Comptroller  
Division of State Government Accountability  
59 Maiden Lane - 21<sup>st</sup> Floor  
New York, NY 10038-4651

**Re: Draft Report #2014-S-6 (Contract Participation of Minority- and Women-Owned Business Enterprises)**

Dear Ms. Maldonado:

This is in reply to your letter requesting a response to the above-referenced draft report.

I have attached for your information the comments of Michael J. Garner, MTA Chief Diversity Officer, which address this report.

Sincerely,

A handwritten signature in black ink, appearing to read "T.F. Prendergast", with a horizontal line extending to the right.

Thomas F. Prendergast  
Chairman and Chief Executive Officer

c: Donna M. Evans, MTA Chief of Staff  
Michael J. Garner, MTA Chief Diversity Officer  
Michael J. Fucilli, Auditor General, MTA Audit Services

#### Attachments

*The agencies of the MTA*

MTA New York City Transit  
MTA Long Island Rail Road

MTA Metro-North Railroad  
MTA Bridges and Tunnels

MTA Capital Construction  
MTA Bus Company

# Memorandum



## Metropolitan Transportation Authority

State of New York

**Date** August 4, 2015

**To** Thomas F. Prendergast, Chairman and Chief Executive Officer

**From** Michael J. Garner, MTA Chief Diversity Officer *MJG*

**Re** New York State Comptroller's Request for Response to the Audit Report  
"Contract Participation of Minority and Women Owned Business Enterprises"  
2014-S-6

The Department of Diversity and Civil Rights ("DDCR") disagrees with the assertions made in the subject audit. As stated by the Office of the State Comptroller, the basic premise of the audit was to determine if the MTA established annual goals, met those goals and accurately reported against them. The key findings and recommendations are out of alignment with these basic premises. In fact, the report misstates matters of law in an effort to support the findings.

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| *            |
| Comment<br>1 |

Under my direction, I assert that the department has in fact established appropriate goals and complied with the legal requirements to report against those established goals. The findings provide no substantive value to the program and do not give MTA credit for the measures we have taken to greatly increase economic opportunity for Minority and Women-owned Business Enterprises ("MWBEs") and are purely administrative in nature.

|              |
|--------------|
| *            |
| Comment<br>2 |

The law authorizes the creation of a Division of Minority and Women's Business Development (the "Division") that administers, coordinates and implements a statewide MWBE Program. The Division certifies small businesses as MWBEs and thus verifies their ownership and control by minority groups and/or women. The Division guides state agencies and public authorities in their awarding of procurement opportunities to MWBEs. The Division also assists MWBEs and other small businesses in business development and in getting their fair share of state contracts. The Division also maintains an active list of all certified MWBEs. This list is used by agencies and prime contractors in determining the availability of MWBEs, and then locating these businesses in achievement of MWBE contract goals. The Division has promulgated rules and regulations that govern the setting of an agency or public authority's annual overall goal for MWBE participation, specific goals on state contract, total or partial waiver of these goals, the procedures for submission and approval of MWBE utilization plans, monitoring of goal compliance through the life of the contract, and reporting of MWBE participation and goal compliance to New York State.

See State Comptroller's Comments, Page 20.

There is no required goal explicitly established by law. Agencies and authorities are required to make "reasonable efforts" to set a goal of 28.92% utilization; the number is not absolute. Moreover the goal is aspirational and not mandatory. We comply with all aspects of the law.

\*

Comment  
3

MTA sets annual goals that are agency-specific and, in accordance with 5 NYCRR Part 141, are based on weighted percentages of MWBE availability by procurement category. In addition, DDCR has effective controls to monitor compliance of MWBE utilization. Our process includes conducting effective compliance audits and appropriate site visits as we deem necessary, and DDCR staff has performed 277 site visits from June 2014 through June 2015. To ensure the strongest MWBE verification process possible, MTA is transitioning to the B2GNow Contract Compliance System used by agencies and authorities throughout the State. In addition to technological solutions, DDCR emphasizes to MTA contractors the importance of reporting all payments made to subcontractors each month. DDCR also verifies those payments at 30%, 60% and 90% of contract completion. Lastly, when an MWBE firm supplies material, the total cost of the material and the commission earned by the firm are properly reported as an MWBE payment.

\*

Comment  
4

Regarding MTA's utilization reporting, we provided supportive back-up documentation of previous payments as reported to ESD. The OSC audit relied on documents other than MTA's official reports (Form 15A.3) to show MWBE utilization. Our own research indicates that in many instances the data that we reported to ESD is supported by the Form 15A.3s that we received from prime contractors. OSC's findings and recommendations regarding MTA's utilization reporting stem from and are supported by calculations by OSC auditors that we cannot authenticate.

\*

Comment  
5

### Conclusion

MTA DDCR has a rich history and a visible commitment to diversity and inclusion and encourages MWBE utilization in its procurements. Under the leadership of Governor Andrew Cuomo as well as the leadership that you and the MTA Board have provided, over the last six years we have made great strides in increasing participation of MWBEs in MTA procurement activities. To achieve this, DDCR is conscientious in the preparation of its program goals and the reporting of program results. MTA exceeded its MWBE goal.

Our efforts included persuading the New York State Legislature to amend the Public Authorities Law on or about July 15, 2010, to allow for the creation and implementation of the MTA's Small Business Mentoring Program. To date, the results have been \$131 million in contract value awarded through the program and 85% of all contracts were awarded to NYS certified MWBEs. Further, our banking partner for the Small Business Mentoring Program, Carver Federal Savings Bank, has closed a total of 69 loans, totaling \$11 million, and our surety bonding consultant, Willis of New York, has assisted 7 firms in obtaining surety bonding totaling \$36 million. We are committed to increasing economic opportunity for MWBEs, and we are dedicated to ensuring compliance with the State's requirements.

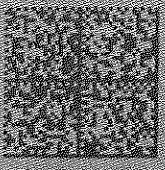
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## State Comptroller's Comments

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1. The report accurately states the applicable provisions of the law as they relate to the audit's findings and conclusions. Further, DDCR does not identify the specific matters of law that it believes were misstated. Because it is unclear what provisions of the law DDCR officials are referring to, we cannot comment further as to this assertion.
2. DDCR's summary dismissal of our findings as "purely administrative in nature" is indicative of DDCR's lack of understanding of the importance of the issues raised by the audit. The audit found that over 50 percent of the sampled MWBE payments reported to DED by DDCR were either unsupported or inaccurately reported. In addition, when confirmation letters were sent to MTA prime and subcontractors, only 47 percent of respondents stated that the information reported by DDCR was accurate. The lack of accurate reporting undermines the positive steps taken by the State and DDCR to increase MWBE participation. Decision makers and the public cannot be confident that MWBE program improvements have had their desired impact when so much of the data that underlies management decisions is either inaccurate or not supported.
3. The audit report does not dispute DDCR's statement of the law. However, as noted in the report, DED regulations state that if an agency establishes a participation goal lower than the prescribed statewide goal (28.92 percent overall), the agency must provide an explanation to DED. As we noted in the report, the MTA did not provide the required explanation.
4. We are pleased that DDCR has increased activities to monitor compliance. We note that the 277 site visits conducted from June 2014 to June 2015, cited by DDCR, reflects a significant increase over the 119 visits conducted from January 2011 to September 2013 that DDCR reported during the audit. We also note that DDCR staff monitors over 3,000 contracts.
5. The MTA's statement is puzzling. We provided detailed results to the MTA on several occasions during our audit. In fact, the amounts in the audit report were based on records provided by the MTA that were obtained from DDCR, BSC, or Capital Payments. In addition, we conducted site visits and performed other audit steps to obtain MWBE participation data due mostly to the extremely long time it took DDCR to produce records to support the information it reported to DED.

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**Metropolitan Transportation Authority**

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