



Thruway Authority | Canal Corporation

ANDREW M. CUOMO
Governor

JOANNE M. MAHONEY
Chair

BILL FINCH
Acting Executive Director

September 28, 2016

Honorable Thomas P. DiNapoli
State Comptroller
New York State Office of the State Comptroller
110 State Street
Albany, New York 12201

Dear Comptroller DiNapoli:

On behalf of Chair Mahoney, I am submitting the following response to the Office of the State Comptroller's (OSC) Audit Report 2014-S-76 (Audit Report) titled "Contract Participation of Disadvantaged Business Enterprises (DBE) and Minority- and Women-Owned Business Enterprises (MWBE)" of the New York State Thruway (the Authority) for the period January 2013 through December 2014. In accordance with Section 170 of the Executive Law, within ninety days of the release of the final report, we are advising you of our progress to date with respect to the seven recommendations contained in the report.

The Comptroller's report is based upon a flawed understanding of the State's MWBE Program and the laws, regulations, and sound operational practices that govern and support the program. Because OSC repeatedly misinterpreted the law and regulations governing the State's MWBE program, both the Audit Report's findings and subsequent recommendations are inaccurate and uninformed.

Recommendation 1: Develop the Authority's annual MWBE goals (overall and by industry) based on factors such as history and potential contract opportunities.

Response: Implemented.

For the fiscal years covered by this Audit (January 2013 through December 2014) the Authority set its overall annual MWBE goals at 20 percent, which the auditors noted was less than the statewide goal of 28.92% Executive Law Article 15-A ("Article 15-A"), without explanation. The report fails to acknowledge that under Article 15-A and its supporting regulations, each Authority must complete an Annual Goal Plan for submittal and acceptance from the New York State Department of Economic Development's (DED) Minority and Women's Business Development Division. The Goal Plan is a detailed account of the Authority's financial plan for identifying MWBE business potential in all relevant areas of State business. After submitting its Goal Plan for the period of January 2013 through December 2014, with the requisite explanations provided to DED, the Authority's overall annual goal was set at 20 percent. The Authority met its statutory and regulatory requirements under Article 15-A with its submission and acceptance of its Annual Goal Plans to DED during the term identified by this audit.

The Authority has been and continues to be in compliance with all applicable laws and regulations regarding goal plans and goal setting. During the audit period, goal projections comported with Article 15-A and its associated regulations and the Authority exercised good faith efforts and due diligence in establishing goals as required.

The Authority's due diligence consists of the following MWBE goal setting procedures: for construction and construction consultant contracts mandated by Article 15-A, the Authority uses DED's Directory of Certified Firms based on the items of work. An e-mail blast and fax is sent to all identified MWBEs in the geographical location requesting a response of availability to participate on the contract. A review of similar historical data is performed to determine the previously assigned MWBE goals and attainments. For procurements falling under the discretionary authority of the 2010 enhancements to Article 15-A, all commodity-based procurements and non-engineering personal services are reviewed before a formal bidding process begins to determine MWBE availability. Where applicable, a canvas is conducted of certified MWBEs in the line-of-business regarding their availability to perform or provide the specific goods or services needed. Depending on the responses, the Authority has, on several occasions, chosen to solicit bids from certified MWBEs. When the analysis is meaningful, the Authority considered the aspirational goal of 20% and the 2010 Disparity Study. Contrary to OSC's conclusion, the Authority has and will continue to develop annual MWBE goals based on factors such as history and availability by region and industry, within the context of potential contract opportunities.

Recommendation 2: Work with DED to determine how best to correct the errors in MWBE utilization reporting and develop mechanisms for preventing these types of errors in the future.

Response: Implemented.

The Audit identified 173 MWBE utilizations totaling \$6.4 million that were reported to DED twice for the quarter ending March 31, 2013. Contrary to the characterization in the report, the Authority did not intentionally submit the same utilizations twice. This was a technical issue with the Authority's use of a new automated reporting system that was identified and corrected. All reports after March 31, 2013 have been submitted correctly with no duplications.

Recommendation 3: Decide whether or not to report MWBE utilization for exempt and excluded contracts (including the New NY Bridge) to DED or to report both MWBE utilization and all associated contract expenses for such contracts.

Response: Implemented.

As OSC noted in its findings in the Audit Report, the Authority established an appropriate level of control over the DBE monitoring and reporting of the New New York Bridge (NNYB) Project and correctly reported its DBE utilization to DOT, only claiming payments made to certified DBE subcontractors. Recommendation 3 demonstrates OSC's misunderstanding of the laws and regulations governing DBE and MWBE requirements. The NNYB Project contracts only have DBE requirements, and therefore are reported as such, not as MWBE utilization.

Recommendation 4: Work with the New NY Bridge's prime contractor to accurately determine MWBE utilization that should have been reported and correct the MWBE utilization reported to DED.

Response: Implemented.

The recommendation highlights OSC's failure to understand the Authority's contracts and programs. As stated under Recommendation 3, the NNYB contracts include only DBE goals, not MWBE goals, and therefore are only reported under DBE utilization.

Recommendation 5: Develop and implement strategies for detecting and preventing MWBE fraud schemes in Authority contracts, such as those schemes identified by the November 2014 report from the Grand Jury of the New York State Supreme Court.

Response: Implemented.

The Authority has an excellent track record in our ability to monitor all Construction contracts and Consultant agreements. We work to ensure that all certified MWBE firms on our projects are performing commercially useful functions. We are committed to ensuring that our own internal controls continue to be reflective of best practices for monitoring, detecting and preventing fraud.

Recommendation 6: Verify MWBE contractor presence during all site visits, and document these visits in the contract files.

Response: Implemented.

The Authority has implemented steps to ensure that detailed reviews are documented and contained in all files, as well as field monitor reports which provide clear evidence of our continued record of no reported fraud incidents. The Authority monitors all of our construction projects in the four divisions. The Authority's Compliance Unit maintains a data log on the MWBE firms assigned to the project and ongoing correspondence with the field project managers regarding MWBE utilization and assurance of commercially useful functions. Weekly progress meeting reports provide up to date status of the entire project, along with pending MWBE issues and corrective action plans. The Authority's on-site field project managers and the Compliance Unit Staff actively monitor all projects for fraud. The Authority is steadfast in its resolve to ensure a continued spotless record.

Recommendation 7: Set goals for each contract amendment or other changes and monitor the contractor's compliance based on the related goals and total related contract expenditures, consistent with DED regulations.

Response: Implemented.

As previously stated under Recommendation 1, the Authority has been and continues to be in compliance with all applicable laws and regulations regarding goal plans and goal setting. During the audit period, goal projections comported with Article 15-A and its associated regulations and the Authority exercised good faith efforts and due diligence in establishing goals as required. This is true for both original contracts and contract amendments.

The Authority has and will continue to improve our MWBE program in reporting accurate data to the State and effectively meet the standards as required by Article 15-A.

Sincerely,

Bill Finch

Bill Finch
Acting Executive Director

CC: Honorable Thomas P. DiNapoli, Comptroller of New York State
Senator John J. Flanagan, Temporary President and Majority Leader
Senator John A. DeFrancisco, Deputy Majority Leader for Legislative Operations
Senator Jeffrey D. Klein, Independent Democratic Conference Leader
Senator Catharine M. Young, Chair, Finance Committee
Senator Andrea Stewart-Cousins, Democratic Conference Leader
Senator Liz Krueger, Ranking Democratic Member, Finance Committee
Assemblymember Carl E. Heastie, Speaker
Assemblymember Joseph D. Morelle, Majority Leader
Assemblymember Herman D. Farrell, Jr., Chair, Ways and Means Committee
Assemblymember Brian M. Kolb, Minority Leader
Assemblymember Bob Oaks, Ranking Member, Ways and Means Committee
Mr. John Buyce, Audit Director, Office of the State Comptroller