

# Office of General Services

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## Monitoring of Construction Management

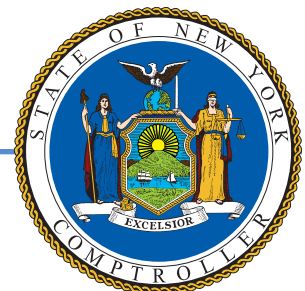
Report 2020-S-42 | December 2021

OFFICE OF THE NEW YORK STATE COMPTROLLER

Thomas P. DiNapoli, State Comptroller

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Division of State Government Accountability



# Audit Highlights

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## Objectives

To determine if the Office of General Services (Office) is adequately monitoring construction management contracts to ensure they meet the terms and requirements, and if the oversight and administration costs associated with carrying out this function are supported and related. The audit covered construction management contracts that were active between April 2015 and July 2020 and additional information provided by the Office through August 2021.

## About the Program

The Office facilitates the work of State agencies through the provision of architectural, engineering, and construction management services for buildings statewide. To achieve its mission, the Office's Design & Construction Group (D&C) provides State agency clients a full range of architectural, engineering, contracting, and construction management services, including managing projects' schedules, costs, quality, safety, scope, and function.

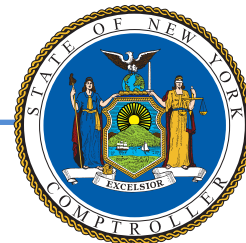
Construction contracts are managed by D&C staff or construction management consultants who fulfill all or portions of D&C's responsibilities to complete the Office's construction projects. After completing the bid process for services, the construction management consultant with the highest score is awarded the construction management contract, and must adhere to the contract, which includes compliance with the Office's minority- and women-owned business enterprise (MWBE) participation goals. Between April 1, 2015 and March 31, 2020, there were a total of 3,238 ongoing construction contracts with a value of approximately \$3.3 billion and 25 active construction management contracts assigned to construction projects valued at approximately \$308 million.

## Key Findings

- For the five projects we audited, we determined that, generally, the Office adequately monitors construction management contracts to ensure that the terms and requirements are met, and that costs are supported and related; however, we identified several areas that need improvement.
- One construction management consultant's bid proposal, for a contract valued at approximately \$1.8 million, did not meet the criteria outlined in the Request for Proposals (RFP), yet this was not reflected in the Office's evaluation and scoring.
- Three of the five construction management consultants used a State-certified women-owned business enterprise (WBE) and claimed credits toward each of their contracts' MWBE goals. However, the WBE subcontracted out all of its approved services to an independent contractor (non-MWBE) and therefore the WBE did not provide a commercially useful function. As a result, the \$207,316 paid to the WBE should not have been claimed as credits toward the MWBE goals.

## Key Recommendations

- Continue efforts to revise the RFP templates and requirements to ensure all information required to validate proposal submissions is obtained.
- Verify the accuracy of the information in the proposals submitted to the Office.
- Develop and implement a process to ensure that MWBE subconsultant payments claimed to meet MWBE participation goals are for MWBE work that has served a commercially useful function.



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## Office of the New York State Comptroller Division of State Government Accountability

December 30, 2021

Jeanette Moy  
Acting Commissioner  
Office of General Services  
Corning Tower, 41st Floor  
Albany, NY 12242

Dear Acting Commissioner Moy:

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 the 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 *Monitoring of Construction Management*. This audit was performed pursuant to the State Comptroller's authority under Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance 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,

*Division of State Government Accountability*

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# Glossary of Terms

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<b>Term</b>	<b>Description</b>	<b>Identifier</b>
CUF	Commercially useful function	<i>Key Term</i>
D&C	Design & Construction Group within the Office of General Services	<i>Division</i>
DCNet	D&C's information system	<i>System</i>
ESD	Empire State Development	<i>Agency</i>
Law	New York State Executive Law Article 15-A	<i>Law</i>
MWBE	Minority- and women-owned business enterprise	<i>Key Term</i>
NYSCS	New York State Contract System	<i>System</i>
Office	Office of General Services	<i>Auditee</i>
PLA	Project Labor Agreement	<i>Key Term</i>
RFP	Request for Proposals	<i>Key Term</i>
WBE	Women-owned business enterprise	<i>Key Term</i>

# Background

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The Office of General Services (Office) was established in 1960 to provide essential support services for the operations of State government. Since then, the Office has grown significantly in scope and complexity. The Office facilitates the work of State agencies through the provision of architectural, engineering, and construction management services for buildings statewide. One component of its mission is to design and build facilities for State agencies and public authorities. To achieve that mission, the Office operates the Design & Construction Group (D&C), which is a 300-person organization with approximately 100 licensed professional engineers and registered architects on staff. D&C provides State agency clients a full range of architectural, engineering, contracting, and construction management services, including the management of a construction project's schedule, cost, quality, safety, scope, and function.

D&C is generally responsible for managing the Office's construction contracts. However, as needed, they may be managed by either D&C staff or a combination of D&C and construction management consultant staff, or may be contracted out completely to a construction management consultant, which assumes most of D&C's responsibilities. If the Office determines that a construction management consultant is needed, the Office solicits bids through a Request for Proposals (RFP). The RFP specifies the nature of the project as well as requirements. For each proposal, the Office completes a Cost and a Technical Review, including an assessment of the bidder's experience; personnel; planning and execution; and minority- and women-owned business enterprise (MWBE), small business, and subcontracting goals. The Office selects the top three firms for further evaluation and recommends awarding the contract to the highest-ranking firm.

Pursuant to Article 15-A of the New York State Executive Law (Law) – intended to promote economic opportunities for MWBEs and eliminate barriers to their participation in State contracts – State agencies are required to establish goals for MWBE participation in their contracts. Accordingly, construction contracts and construction management contracts contain specific MWBE utilization goals and related requirements. To count toward the Office's overall MWBE participation goal, the MWBE must perform a commercially useful function (CUF) – that is, a useful role proportionate to the payment received for the work – and may not act as a pass-through or unnecessary participant.

The Office monitors construction projects through D&C's enterprise web application (DCNet), which contains contract documents, project schedules and timelines, cost data, and meeting details. Its Office of Business Diversity is responsible for MWBE contract compliance, which it monitors through the New York State Contract System (NYSCS).

During the period April 1, 2015 through March 31, 2020, the Office's inventory of contracts included 3,238 ongoing construction contracts valued at \$3.3 billion and 25 active construction management contracts valued at approximately \$308 million.

# Audit Findings and Recommendations

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Based on our analysis of a sample of five construction management contracts, valued at \$63.8 million, we determined that, generally, the Office adequately monitors construction management consultants to ensure they adhere to its policies and procedures related to the contract's terms and requirements for construction, and that the oversight and administration costs charged to State agencies associated with carrying out this function were supported and related. However, we identified some areas of oversight that need improvement: the Office's process for reviewing bid proposals and consultants' MWBE goals.

The Office's process for evaluating proposals does not ensure that only bids that have met all requirements in the RFP are advanced for further review. For example, one contract in our sample, valued at approximately \$1.8 million, did not meet specific experience requirements outlined in the RFP. However, this was not reflected in the scoring of this particular bidder.

In addition, the Office does not verify its construction management consultants' reporting of MWBE claims. This gap in oversight enabled three construction management consultants to claim a total of \$207,316 in MWBE payments for services that were actually performed by a non-MWBE independent contractor – a pass-through that is in opposition to the spirit and intent of the Law. For two other contracts, the consultants overstated \$50,539 in MWBE utilization that was unsupported by their documentation. State agencies' MWBE utilization data are reported to Empire State Development (ESD) as well as the Executive and other stakeholders; because the data is the basis for decision-making strategies to increase MWBE participation, accuracy of the reported data is critical.

## Proposal Evaluation

For the five construction management contracts in our sample, we reviewed the RFPs and winning proposals to determine if the Office's scoring to assess proposals was proper. We found one proposal that did not meet the specific experience requirements of the RFP.

Pursuant to the RFP, the bidder was required to provide details to support that they completed five construction projects as a construction manager within the prior 5 years, including a minimum of two projects with Project Labor Agreements (PLAs). In this section of the proposal, the bidder did not provide completion dates to support that the 5-year requirement was met for the two projects included with PLAs. Dates that we found cited elsewhere in the proposal – and that went undetected by the Office – indicate that the two projects were more than 8 years old. Despite not meeting all the required criteria, the proposal was scored as if it did and ultimately was the winning proposal.

In response to our finding, Office officials acknowledged that the evaluators might have been unaware of the completion dates at the time of their review. They also indicated that their evaluators do not always verify the project completion dates when evaluating proposals, and attributed the oversight to an assumption by evaluators that projects included on proposals have occurred within the prior 5 years. However,

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we also note that, despite citing a specific time range requirement in the RFP, the Office does not require project completion dates to be included.

Notably, Office officials re-reviewed the other proposals submitted for this contract and determined that others also contained project dates that were outside the 5-year requirement, which confirms that our singular finding is not an isolated incident. During the course of the audit, Office officials stated that they revised their RFP template to require construction project completion dates where necessary.

## MWBE Compliance

### Commercially Useful Function

ESD's Division of Minority and Women's Business Development oversees the statewide MWBE program, and has established specific requirements for State agencies to follow to ensure that certified MWBEs have opportunities for participating in contracts, as intended under the Law. Accordingly, the Office establishes specific MWBE participation goals and related requirements for every construction management contract. Among other criteria, in order for MWBE subconsultant payments to count toward the consultant's MWBE participation goal, the MWBE subcontractor's work must constitute a commercially useful function (CUF); that is, a MWBE must perform a useful role proportionate to the payment received for work, and may not act as a pass-through or unnecessary participant.

We reviewed the MWBE documentation associated with the five construction management contracts in our sample. For three contracts, the consultants subcontracted with a State-certified women-owned business enterprise (WBE subconsultant) for scheduling services. However, we determined that the approved WBE subconsultant did not provide the services and instead subcontracted them to an independent contractor. This subcontractor was also the WBE subconsultant's spouse and, for one of the contracts in our sample, was previously a vice president of the bid-winning construction management firm.

According to documentation submitted by the construction management consultant, the subcontractor provided scheduling services and submitted invoices and supporting time sheets, using personal letterhead, to the WBE subconsultant, who in turn submitted this documentation, along with her own invoice, to the construction management consultant for payment. In addition to circumventing the MWBE requirements, the construction management consultant claimed, and the Office allowed, these payments – which totaled \$207,316 for the three contracts – to count toward the contracted MWBE goals.

We found that the documentation showing that the scheduling services were provided solely by a non-MWBE subcontractor is readily available. However, the Office of General Services' Office of Business Diversity does not use it to verify how consultants use MWBEs or whether MWBE work is properly reported and appropriately applied to contract goals. In addition, neither the Office of Business Diversity nor D&C evaluate whether an MWBE is providing a CUF based on the



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MWBE's contractually established role, as ESD's Division of Minority and Women's Business Development requires. Pass-through arrangements, such as the one discussed here, that go undetected defy the spirit and intent of the Law.

## Overstated MWBE Utilization

We compared the Office of Business Diversity's MWBE compliance reports to expense documentation from the D&C's Division of Contract Management to determine if the expenses claimed for subconsultant MWBE credit were supported.

Of four construction management contracts reviewed,<sup>1</sup> we found two contracts with subconsultant MWBE credit claimed – totaling \$50,539 – that was not supported by contract expense documentation. According to Office officials, although they monitor MWBE compliance through the NYSCS, the responsibility for accurate reporting of MWBE payments falls on the construction management consultant and the subconsultant when reporting to the NYSCS. The NYSCS sends automated electronic notifications to the subconsultants to validate the amounts reported monthly. In turn, the subconsultant confirms or disputes the amount the construction management consultant reported as paid to the subconsultant. If the amount is not disputed, no additional confirmation is required, and this is the amount claimed for the period.

This process relies on confirmation from the construction management and MWBE subconsultants, and does not include any review of documentation by the Office to identify the actual services provided by the MWBE subconsultants. While documentation that contains this level of detail is submitted to D&C by the construction management consultant, the two units do not communicate to facilitate such a review. By relying solely on its consultants' and subconsultants' confirmation, and not also performing a review of its own, the Office has limited assurance that the MWBE utilization information that it reports to ESD – and that ultimately is disseminated to the Executive and other decision makers throughout the State – is accurate and contributing to appropriate, informed decision making.

Office officials responded that the amount overstated across the four contracts versus the amount claimed during that period (error rate) is below 1%, and if the error rate becomes material, they will revisit controls associated with the reporting process. We acknowledge that the error rate in our sample is low; however, the Office does not have any process in place to determine what the error rate is and whether it is material. In addition, the Office already has documentation in its possession to assess compliance.

## Project Oversight

Overall, for the five construction management contracts in our sample, we found that, generally, the Office adequately monitors construction management consultants

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<sup>1</sup> After conducting reviews of four contracts, Office officials informed us that they do not reconcile MWBE credits to supporting documents. Therefore, we did not attempt to reconcile the fifth contract in our sample.

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to ensure they adhere to its policies and procedures related to the construction contracts. We found that the oversight and administration costs charged to State agencies associated with carrying out this function were supported and related. However, we identified one project in our sample of contracts that experienced significant delays and cost increases. However, we determined these factors were beyond the construction management consultant's and D&C's control, such as limited access within the high-security facility, redesign requests from the State agency client, reimbursement claims paid to the prime contractors due to work delays, and work site shutdown during the COVID-19 pandemic. Resultant change orders increased the construction value by approximately \$5.7 million (\$17.6 million to \$23.3 million) and extended the project completion date by more than 3 years from the original estimated completion date.

We also tested the five projects to determine if the oversight and administration costs associated with carrying out this function were supported and related. D&C's oversight and administration costs are charged to State agency clients through monthly invoices consisting of staff time and overhead charges, contract administration fees, and consultant costs (if utilized). We reviewed D&C's project cost summaries and monthly invoices to the State agency clients, and found that the costs passed on were supported, related, and consistently applied for all five projects in our sample.

## Recommendations

1. Continue efforts to revise the RFP templates and requirements to ensure all information required to validate proposal submissions is obtained.
2. Verify the accuracy of the information in the proposals submitted to the Office.
3. Develop and implement a process to ensure that MWBE subconsultant payments claimed to meet MWBE participation goals are for MWBE work that has served a commercially useful function.
4. Ensure the amounts claimed on MWBE compliance reports reflect the actual payments made to MWBE subconsultants.

# Audit Scope, Objectives, and Methodology

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The objectives of our audit were to determine if the Office is adequately monitoring construction management contracts to ensure they meet the terms and requirements, and if the oversight and administration costs associated with carrying out this function are supported and related. The audit covered construction management contracts that were active between April 2015 and July 2020 and additional information provided by the Office through August 2021.

To accomplish our objectives and assess the related internal controls, we interviewed Office officials and reviewed relevant laws, policies and procedures, contracts, work order data, MWBE utilization plans and compliance reports, contract and project expenses, certified payrolls, invoices, time sheets, project cost summaries, work orders, change orders, biweekly progress meetings and reports, training reconciliations, and construction management plans. In addition, we also reviewed RFPs, proposals, and the associated scoring documents for the contracts in our sample. We became familiar with and assessed the Office's internal controls as they relate to the monitoring of construction management contracts for compliance with contract terms and requirements and ensuring that costs associated with carrying out this function were supported and related.

D&C's information system, DCNet, contains contract documents, project schedules and timelines, cost data, and meeting details. The Office uses this system, along with its shared network drive, to capture construction activity, including awarding, designing, managing, and implementing construction projects. Specifically, the systems are used in tandem to store contract bidding, scoring, and award documents; Engineer-in-Charge daily journals, progress meeting notes, and reports; construction timelines, delays, and adjustments; change order and emergency contract documentation; material cost information; and payroll costs. This information was integral to our efforts to evaluate the Office's efforts to monitor construction managers. As such, we requested read-only access to these systems during a meeting on August 13, 2020 to assess the controls in place, to determine the accuracy and completeness of the data, and to conduct audit tests related to construction management.

Six weeks later, on September 22, 2020, Office officials initially refused our request for access on the grounds that they do not provide DCNet access to external entities but rather provide requested information. We subsequently met with Office officials to discuss obtaining read-only access to these systems, at which time they stated that read-only access was not possible and offered electronic observation as an alternative. According to Office officials, we would be allowed to review the information, which the Office would simultaneously send electronically. Read-only access is standard on information systems, and we are aware of several external parties that have (or had) some level of access to DCNet: State agencies with Office construction projects, vendors with Office contracts, Office consultants, and even certain Office of the State Comptroller employees. When pressed, Office officials stated that, while they could give us read-only access, they would not because they would not be able to restrict our access to items that they deemed were out of our audit scope. We suggested that Office officials review our usage logs – which are

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also standard on information systems – to ensure we stayed within our scope. Office officials rebuffed our proposal, asserting that logs were not maintained. They later acknowledged that logs were maintained but stated the logs were too cumbersome for them to review and monitor our activity.

As a result, we were not granted access to DCNet. Due to the system complexities claimed by Office officials and the pandemic, we agreed to the Office’s proposed alternative testing. Therefore, much of our audit work was done on data provided to us by the Office – a restriction that prevented us from being able to fully test the accuracy and completeness of the data. This limits the overall conclusion we are able to draw about the Office’s monitoring of construction managers. Had we been granted access to DCNet, we might have found additional information for the contracts in our sample that hadn’t been provided to us by the Office – and which might have led us to expand our testing and ultimately to arrive at a different conclusion on these matters.

Additionally, the Office’s delay – of more than 14 weeks – in responding to our questions about RFPs further raised our concerns, in this case clarification related to the scoring and evaluation of bids for a project in our sample. Through our testing, we determined that certain employment forms were often submitted late, not submitted at all, and/or not adequately retained by the Office. For one contract in our sample, we requested all of these forms on October 20, 2020 and received nine forms on November 3, 2020. For the nine forms received, all were dated after the submission date of May 15 of the required year and therefore late. Three of the nine forms were dated after the audit team’s initial request, indicating they may have been created and submitted in response to our request. We followed up for the remaining outstanding forms on November 24, 2020 and finally received them on January 15, 2021, approximately 11 weeks after the initial request. We concluded that all of these forms were either submitted to the Office late or prepared, obtained, and dated after our original request for the documents. Due to the length of time and follow-up efforts required to obtain these forms, we made one request for all forms for each of the remaining four construction management contracts in our sample. In this instance, we were provided an email sent on December 22, 2020 (one week after the audit team’s request) to the construction management consultant requesting the forms. Two of the six forms provided for this contract were dated and submitted after the audit team’s request (December 15, 2020). Since we were not given access to the Office’s systems, we have concerns about the authenticity of the audit evidence.

We assessed the reliability of the work order listing generated from the Office’s DCNet system, contract listing, and non-work order contract amounts, and found them to be accurate, complete, and sufficiently reliable. However, in light of the aforementioned issues, our ability to independently conduct this audit – direct inspection or observation of records – was limited. In accordance with generally accepted government auditing standards, we have disclosed this information to avoid misleading readers of this report.

We selected a judgmental sample of five construction management contracts (one term contract – for use wherever and whenever the Office needs construction

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management services – and four stand-alone contracts) valued at \$63.8 million from the total population of 29 contracts that were active during the period April 1, 2015 through March 31, 2020. Of the 29 construction management contracts, 25 were assigned projects, valued at approximately \$308 million, corresponding to 878 work orders, and four, valued at \$11.8 million, did not utilize work orders. We excluded the four construction management contracts not assigned to work orders as the Office has discontinued the use of that type of contract. We selected the five contracts based on geographic location, State agency client, completion status, amount of funds spent, contract value, and contract type (term or standard contract). For each of the five construction management contracts, we judgmentally selected one individual construction project associated with each construction management contract (five unique construction projects). The construction projects were selected based on value and association with one of the five construction management contracts.

We tested the five selected contracts to determine whether: (1) payments made reconciled with and were supported by invoices and time sheets; (2) required annual employment forms and quarterly training reports were submitted timely; (3) all MWBE and service disabled veteran-owned business payments claimed reconciled to supporting documentation were used appropriately; and (4) established contract goals were met. Two contracts contained numerous work orders, one due to the nature of the contract (term) and the other due to size (\$31 million in work orders). For those reasons, we only reviewed one project for the term contract to determine if it was supported and, in the case of the \$31 million contract, only 10 payments within one project to determine if the expenses were supported by time sheets. We also reviewed the RFPs for each of the five contracts to determine if the winning proposal submitted met the established criteria and was selected in accordance with the Office's policies. We tested the selected projects to determine if they followed the construction procedures manual as required by the contracts, including holding biweekly meetings and attendance by key consultant and D&C personnel at those meetings, and obtaining the necessary approvals for work orders and change orders. Additionally, we reviewed project cost summaries and monthly invoices to the State agency clients for each project to determine if the oversight and administration costs associated with carrying out this function were supported, related, and consistently applied. None of the samples selected for our audit testing were projected or intended to be projected across the population.

# Statutory Requirements

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## Authority

The audit was performed pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law.

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. These duties could be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our professional judgment, these duties do not affect our ability to conduct this independent performance audit of the Office of General Service's oversight and administration of construction management contracts.

## Reporting Requirements

We provided a draft copy of this report to Office officials for their review and written comment. Their comments were considered in preparing this final report and are attached in their entirety at the end of it. Office officials generally agreed with the report's recommendations and indicated actions they are taking to implement them. Our State Comptroller's Comments addressing certain remarks are embedded within the Office's response.

Within 180 days after final release of this report, as required by Section 170 of the Executive Law, the Commissioner of the Office of General Services 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.

# Agency Comments and State Comptroller's Comments

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Office of  
General Services

**KATHY HOCHUL**  
Governor

**JEANETTE M. MOY**  
Acting Commissioner

November 24, 2021

Honorable Thomas P. DiNapoli  
Comptroller  
Office of the State Comptroller  
110 State Street, 15<sup>th</sup> Floor  
Albany, NY 12236

RE: Response to Draft Audit Report 2020-S-42

Comptroller DiNapoli:

Thank you for the opportunity to respond to the Monitoring of Construction Management draft audit report (the "Report") issued by the Office of the State Comptroller ("OSC"). On behalf of the Office of General Services ("OGS") and in accordance with the provisions of Executive Law § 170, I write to provide confirmatory information concerning OGS's responses to OSC's findings and recommendations outlined in the Report.

OGS appreciates that the audit found that, generally, OGS's Bureau of Design & Construction Group (D&C) adequately monitors construction management consultants to ensure they adhere to its policies and procedures related to the contract's terms and requirements for construction, and that the oversight and administration costs charged to State agencies associated with carrying out this function were supported and related. In addition, as described below, we plan to enhance our controls in some areas that need improvement.

**State Comptroller's Comment** – The Office's statement is misleading. As we made explicitly clear throughout the audit, our conclusion that "generally, the Office adequately monitors construction management contracts" applies only to the five projects we audited. As discussed in the report, the Office imposed restrictions on our access to additional essential information – an audit impairment that prevented us from forming an overall conclusion on this topic.

## Responses to Audit Findings

### Proposal Evaluation

The Report states that one proposal out of five tested did not meet the criteria outlined in the Request for Proposals (RFP). One construction management consultant's bid proposal, for a contract valued at approximately \$1.8 million, did not contain the specific experience requirements in the RFP, yet this was not reflected in the Office's evaluation and scoring.

OGS Response: OGS agrees that in the case of the RFP described in the Report, the reviewers failed to ensure that all the projects with PLAs identified by bidders had been completed within the previous five years. Evaluation and scoring of “Best Value” proposals take numerous factors into consideration during the bid review that is conducted by a team of individuals, who independently score submissions to ensure that each proposal is evaluated fairly on its merits.

Based on the draft audit report, OGS conducted its own internal scoring review and determined that four of the reviewers had deducted points on the experience rating for the bidder in question. We also confirmed that regardless of additional point deductions for not meeting the PLA timeframe requirement, the outcome of the project award would have been the same. Based on this Finding, the OGS RFP template and review procedures are being updated to ensure that dates are specifically requested in the RFP and that the reviewers look for this required information.

**State Comptroller’s Comment** – Contrary to the Office’s determination that four reviewers deducted points on the experience rating of the bidder in question, our review of the scoring record found it did not include the basis for point deductions. Moreover, the bid documents did not provide the dates that would enable a reviewer to determine if the experience occurred within the 5-year period required by the proposal request. However, we are encouraged that the Office is updating its RFP template and review process to ensure that dates are included.

#### MWBE Compliance

*Commercially Useful Function* - Three of the five construction management consultants used a State-certified, women-owned business enterprise (“WBE”) and claimed credits towards each of their contracts’ MWBE goals. However, because the WBE subcontracted out all of its approved services to an independent (non-MWBE), the Report suggests that the WBE did not provide a commercially useful function. Moreover, as a result, the \$207,316 paid to the WBE should not have been claimed as credits toward the MWBE goals. Further, the Report states that OGS’s Office of Business Diversity (“OBD”) does not verify how consultants use MWBEs or whether MWBE work is properly reported and appropriately applied to contract goals.

OGS Response: OGS follows all legal requirements and published guidance related to MWBE goals and adamantly disagrees with the finding that the OBD does not evaluate whether an MWBE is providing a Commercial Useful Function (“CUF”) as an indicative occurrence. With regard to whether a particular MWBE has performed a CUF, as defined by the NYS Division of Minority and Women’s Business Development, OGS follows the published guidance, which states that a certified MWBE subconsultant classified to perform the services, having subbed out those services to a non-MWBE firm classified to perform the same services even though owned by the spouse, may cause a red flag to be raised but is not automatically indicative of a CUF violation or intentional circumventing of the spirit of Article 15-A. In this instance, OGS investigated the matter and found that the MWBE firm contracted to perform the services participated in project meetings, supervised the sub-sub-consultant performing services, and confirmed the information being provided for the project.

**State Comptroller’s Comment** – We stand by our conclusion that the WBE did not provide a CUF. Contrary to the Office’s statement, the documentation that the Office provided to us did not show that



the WBE participated in project meetings, supervised the sub-sub-consultant, or confirmed the information provided for the project.

With regard to the payments credited toward the MWBE goals, OGS acknowledges that the payments reported to the New York State Contracting System (“NYSCS”) by the consultant firms may have been overstated and should only have included the portion of the payments earned by the MWBE firm as part of the labor multiplier. OGS D&C and OBD have since updated their procedures to ensure prime consultants enter all second tier subconsultants and their relationship to first tier MWBE subconsultants within the NYSCS to ensure an appropriate goal credit is applied to MWBE firms performing a CUF.

*Overstated MWBE Utilization* - Of the four construction management contracts reviewed, the audit team found two contracts with subconsultant MWBE credit claimed – totaling \$50,539 – that was not supported by contract expense documentation. The Report asserts that while OGS D&C receives documentation of the services provided by MWBE consultants, it does not coordinate with OGS OBD confirm the accuracy of the documentation.

OGS Response: OGS disagrees that its D&C and OBD units do not take sufficient steps to verify the reporting of MWBE claims by construction management consultants. OGS adheres to statutory requirements related to MWBE contracting and reporting. The NYSCS was developed in part to maintain open transparency to all parties involved, and to a large extent, the risk mitigation strategies for overreporting MWBE utilization have been transferred from the State to the prime and subcontractors using NYSCS.

OGS ensures prime contractors set up their contracts properly in NYSCS and follows up on all inaccuracies reported by subcontractors. NYSCS auto-generates electronic notifications monthly to subcontractors to validate amounts reported. In general, subcontractors have an inherent interest in confirming overpayment inaccuracies reported in NYSCS in cases where the subcontractor has not, in fact, received payment for work performed. Of course, there is a minor risk that subcontractors may not dispute inaccuracies where the subcontractor received all payments that were due and owing but the prime simply made an error when reporting, as well as a minor risk that subcontractors may confirm overreported payments in error.

The aggregate \$50,539 in overstated utilization cited in the Report occurred over the course of the period February 2016 through April 2020. This represents a 0.71% overrepresentation of the utilization credits claimed on the four contracts OSC examined. Based on this error rate, we believe the current process provides reasonable assurance for the accuracy of MWBE utilization reporting in all material respects and that decision makers are not at any material risk of making a bad decision based on this variance. Should the error rate become material, OGS will revisit controls associated with this reporting process.

**State Comptroller’s Comment** – As we state on page 8 of the report, the Office does not have an internal control or mechanism in place to determine the error rate of MWBE utilization. As a result, it cannot measure the risk associated with overstating MWBE utilization and determine materiality. We do not support the Office’s position of waiting until it’s too late and the error rate becomes material before it revisits controls associated with this reporting process.

### **Responses to Recommendations**

OSC Recommendation 1: Continue efforts to revise the RFP templates and requirements to ensure all information required to validate proposal submissions is obtained.

OGS Response: OGS has revised the RFP template to ensure that proposal requirements are clear, complete, and accurate. This effort includes requiring beginning and completion dates of services/projects and increasing the number of firms invited to interviews if scoring is within an established number of points from the highest score.

OSC Recommendation 2: Verify the accuracy of the information in the proposals submitted to the Office.

OGS Response: In addition to the improvements noted in response to Recommendation 1, OGS has implemented additional methods to verify accuracy of information. These include the use of checklists, additional proposer review by OGS, and updates to instructions to evaluators.

OSC Recommendation 3: Develop and implement a process to ensure that MWBE subconsultant payments claimed to meet MWBE participation goals are for MWBE work that has served a commercially useful function.

OGS Response: OGS procedures have been updated to ensure prime consultants have entered all second-tier subconsultants and their relationships to first-tier MWBE subconsultants within the NYSCS to help ensure that only appropriate goal credit is applied on the contract.

OSC Recommendation 4: Ensure the amounts claimed on MWBE compliance reports reflect the actual payments made to MWBE subconsultants.

OGS Response: OGS believes that by the implementing procedural changes identified in response to Recommendation 3, and through ongoing monitoring of any discrepancies by the OBD through the NYSCS, OGS will continue to maintain an error rate of less than 1%.

**State Comptroller's Comment** – We disagree with the Office's position. The updated procedural changes have no bearing on MWBE payment reconciliations and will not result in the ability to determine and measure the MWBE utilization error rate, as discussed in the above Comptroller's Comment. Moreover, while the Office's response also offers assurance in the form of "ongoing monitoring" by its Office of Business Diversity, this office does not perform any monitoring.

### **Response to Audit Scope, Objectives, and Methodology Clarifications**

*Access to DCNet* - In remarking on OGS's refusal to grant OSC read-only access to DCNet, the Report indicates on page 10 that "we are aware of several external parties that have (or had) some level of access to DCNet." That is true, but those parties were either contract auditors hired by OGS (working under contractual obligations to keep such data private) or agencies that had restricted authority to view limited data (on particular projects) within DCNet. None of those situations is comparable to the access requested by OSC.

The Report further indicates that the lack of access to DCNet prevented the audit team “from being able to fully test the accuracy and completeness of the data [which] limits the overall conclusion we are able to draw about the Office’s monitoring of construction managers.” While OGS respects OSC’s need to obtain sufficient, appropriate evidence upon which to base its findings, OGS disagrees with this characterization. To accommodate OSC’s needs, OGS proposed a solution that OSC accepted, which allowed the auditors, in real-time, to observe and direct the navigation of OGS employees to view any section of DCNet and related document database (“V-drive”) relevant to the audit scope. At no time did OGS decline OSC’s navigational directions. At OSC’s direction, OGS captured screen shots in DCNet and downloaded related documentation in DCNet and the V-drive and then uploaded the files into the OSC FTP site. OSC auditors were able to confirm that OGS provided information to OSC without any adjustment or change. Additionally, OGS made paper records available to OSC in a secluded office for examination, scanning and/or copying. By always following all OSC’s navigational directions in DCNet and providing full access to the paper records, OGS provided the auditors with unrestricted access to the records.

**State Comptroller’s Comment** – The Office disagrees with our conclusion that we had limited access to electronic records and states that it provided auditors with unrestricted access to its records during the course of our audit. The determination regarding access is a decision made by the auditors using their professional judgment and in accordance with generally accepted government auditing standards. We disclose this information to avoid misleading the readers of this report.

Further, the Office’s response states that it has granted access to other external parties, including contract auditors hired by the Office or agencies who had restricted authority to view limited data. We would remind the Office that the Comptroller is constitutionally and statutorily mandated as State Auditor to conduct such audits, which invariably require access to agency data. Data privacy concerns could have been addressed at any time during the audit through a memorandum of understanding or a non-disclosure agreement.

As our report notes on page 10 – and which the Office did not challenge in its response to either the preliminary findings or the draft report – Office officials’ final position regarding access to electronic records during the audit was that “while they could give us read-only access, they would not because they would not be able to restrict our access to items that they deemed were out of our audit scope.”

We ultimately agreed to the Office’s proposed solution in the interest of proceeding with the audit and avoiding further delay – with the Office’s understanding that this process would result in a transparency issue that would be disclosed in the report. Office officials accepted this condition and inquired whether it would be considered an audit scope impairment. At that time, we informed them that it had not risen to that level but may be trending in that direction.

The Office also states that we were able to confirm it provided information without any adjustment or change. This is not the case as we were unable to independently review documentation. Along with the delays in providing documentation that should have been readily available, this raises concerns about the authenticity of the audit evidence, the audit environment, and the transparency of the Office.

*Consultant Services Contractor’s Annual Employment Report (OSC Form B)* - The second paragraph on page 11 of the Report notes that “certain employment forms were often submitted late, not submitted at all, and or not adequately retained by the Office.” The forms at issue are the Employment Report Form Bs. As OGS explained to the audit team throughout the audit process, OGS emails a fillable Form B, directions, and filing instructions to all consultant firms on March 31 reminding them of their responsibility to report by May 15 for the preceding fiscal year. OGS also sends a second reminder on or about May 1. This year, OGS also issued

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a third round of reminder notifications. OGS's ability to enforce consultant compliance is hindered by the lack of provisions in the State Finance Law and the *Guide to Financial Operations* to compel consultant compliance or impose consequences for noncompliance. OGS will continue to send reminders to the consultants. OGS will also improve controls over filing Form B upon receipt. It is noteworthy that subsequent to OSC's issuance of updated *Contract Advisory 16* on April 16, 2021, in which OSC first provided the option for vendors to email completed Form Bs, vendor reporting compliance improved.

The Report also suggests that because some forms were submitted to OGS after being requested by the audit team, the "authenticity" of such forms is somehow in question. As noted above, while OGS diligently reminds consultants to submit the forms on a timely basis, it is a fact of life that some consultants fail to submit the forms by the due date. In this case, the audit team's request for Form Bs prompted OGS to once again request missing forms from the consultants, so it should not be surprising that some of the forms submitted by consultants were dated after the audit team's request. We fail to see how that set of facts calls into question the "authenticity" of the forms.

In addition, OGS requests one minor clarification and notes one inconsistency in the Report:

- On page 5 in the second paragraph of the Background Section, fifth sentence, the Report notes that OGS completes a Technical Review of each proposal. We believe it is important to note that OGS also completes a Cost Review, and we therefore respectfully request that the sentence be revised to read: "For each proposal, the Office completes a Cost Review and a Technical Review, including . . . ."
- In the third paragraph on page 6, the Report states that overstated MWBE utilization was \$50,529, but in the second paragraph on page 8, the value is stated as \$50,539. OSC may wish to confirm the number and correct the discrepancy.

**State Comptroller's Comment** – [The report has been revised to address these matters.](#)

We thank you for the consideration of our responses. If there are any questions, kindly do not hesitate to contact our offices.

Sincerely,  
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