

Final Audit Follow-up

As of January 31, 2014



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City Auditor**

Compliance with the City's MBE Program Policy and Federal DBE Policy for Selected Capital Construction Projects (Report #1202 issued February 6, 2012)

Report #1415

April 2, 2014

Summary

This is the fourth and final follow-up on the Audit of Compliance with the City's Minority Business Enterprise (MBE) Program Policy and Federal Disadvantaged Business Enterprise (DBE) Policy for Selected Capital Construction Projects (Report #1202, issued February 6, 2012). All eight action plan steps from the audit report were due to be completed no later than December 31, 2013. Three steps were completed in prior follow-up periods. As of January 31, 2014, Economic & Community Development (ECD) has completed two additional steps. Because the most significant steps have now been completed (major revisions to the MBE policy), responsibility for completion and resolution of the remaining three steps has been turned over to management.

In May 2011, the MBE Office expressed concern that a prime contractor may have misrepresented the extent of use of MBE subcontractors on at least one City capital construction project during the bidding phase, construction phase, and final reporting phase. To determine the extent that misrepresentations may have also involved additional prime contractors, the Office of the City Auditor was asked to audit additional City capital construction projects with prime contractors that had been awarded City contracts.

We concluded in our initial audit (Report #1202) that four of five prime contractors and five of 13 subcontractors incurred 13 violations of three City MBE policies. Of those 13 violations, four resulted in the assessment of fines on two prime contractors and two MBE subcontractors. These violations were related to prime contractors including ineligible

payments to MBE subcontractors in their MBE participation as reported on the Project Completion Affidavits (Affidavit). Specifically, the prime contractors included in their MBE participation (1) fees and/or commissions for additional subcontracts (sub-subcontracts) that should not have been included and (2) a broker's fee or commission to engage in a sub-subcontractual agreement with the sole intent of collecting a broker's fee or commission and not performing any of the direct labor or service activities specified in the contract. These violations are further described on page three of this report.

Management developed eight action plan steps to address the recommendations in Audit Report #1202. Each action plan step and the step's current status is summarized below. Detailed descriptions of the status of each action plan step addressed during this follow-up period are provided in Table 1 beginning on page four of this report.

- 1) ECD management will re-evaluate the MBE program and policies and revise accordingly to clearly describe program goals and objectives and compliance requirements, and define terms used in the policy critical to understanding and implementing the MBE Program. *[This step was completed during this follow-up period.]*
- 2) ECD management will re-evaluate and revise the MBE policies to define program intent and the types of services that are eligible for participation in the MBE Program, specifically as it relates to "MBE general contractors" as appropriate. *[This step was completed during this follow-up period.]*
- 3) ECD management will consider prior audit report recommendations in future management actions to address the issues and make improvements in the City's MBE Program. *[This step was completed during a previous follow-up period.]*

- 4) City management will work with participants of the MBE Program, both prime contractors and MBE subcontractors, to define what constitutes success, and to develop measures to assess and report the program's level of success. ***[This step is in progress and responsibility for ensuring its completion and resolution has been turned over to management.]***
- 5) The MBE Office will work with Public Works Inspection staff to implement monitoring procedures during the construction phase and at the end of each project to ensure that program participants are performing the work as reported. ***[This step was completed during a previous follow-up period.]***
- 6) The MBE Office will work with the City Attorney's Office to increase the level of penalties for submitting false information and to develop two separate Affidavits, one for prime contractors and one for MBE/DBE subcontractors to complete with the information necessary to determine compliance with the MBE/DBE policies. ***[The level of penalties for submitting false information has been increased, but one single Affidavit is still used and submitted by both the prime contractor and the subcontractor. This step is partially completed and responsibility for ensuring its completion and resolution has been turned over to management.]***
- 7) ECD management will consider prior recommendations in their future management actions to address the issues and make improvements in the City's MBE Program. ***[This step was completed during a previous follow-up period.]***
- 8) The MBE Office will develop and provide training opportunities on the City's MBE policies and their application. ***[This step is in progress and responsibility for ensuring its completion and resolution has been turned over to management.]***

The two steps related to the revision of the MBE program and policies (steps 1 and 2 above) were completed in January 2014, when the City Commission approved revisions to the MBE program and policy. The revised policy has been renamed the "Minority/Women/Small Business Enterprise (MWSBE) Opportunity and Participation Policies and Procedures." The intent of the MWSBE

Program is to provide for representative utilization of MWSBE enterprises in all aspects of the City's procurement activity, eliminate institutional and procedural barriers which would prohibit active participation in the City's procurement opportunities, provide opportunities to enhance MWSBE chances for successful participation in the City's purchasing and contracting program, and provide public information on the opportunities available for doing business with the City.

Responsibility for ensuring the completion and resolution of the three remaining steps that are in progress or partially completed (steps 4, 6, and 8) has been turned over to management. We provided an audit comment for each of the three remaining action plan steps. These comments are intended to provide management with additional guidance regarding the original audit report recommendations and the new MWSBE policy.

We appreciate the cooperation and assistance provided by key staff from the City Attorney's Office, ECD, and the MWSBE Office (formerly the MBE Office) during this audit follow-up.

Scope, Objectives, and Methodology

We conducted this audit follow-up in accordance with the International Standards for the Professional Practice of Internal Auditing and Generally Accepted Government Auditing Standards. Those standards require we plan and perform the audit follow-up to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit follow-up objectives.

Original Report #1202

The scope of report #1202 was in response to the City Manager's request to determine compliance with the City's MBE Program Policies and federal DBE Program regulations on applicable City projects. To do this, we judgmentally selected and tested 24 City construction projects completed and/or in progress between March 2003 and August 2011 to determine:

- a. Whether the amounts reported as paid to MBE subcontractors on the Affidavits signed by both the prime contractors and MBE subcontractors

and submitted to the City were accurate, eligible, and in compliance with City MBE Policy Section 16.5.74.e.

- b. For DBE projects, whether the amounts reported as paid to the DBE subcontractor on the Affidavits signed by both the prime contractors and subcontractors and submitted to the City were accurate, eligible, and in compliance with federal regulations 49 CFR 26.55.

The scope of the original audit was to determine if the selected Affidavits were accurate and claimed MBE/DBE participation amounts were eligible. We did not examine the City’s bid proposal process related to those 24 projects to determine if the bids were properly awarded based on eligible MBE/DBE participation percentages.

Report #1415

This is our fourth and final follow-up on action plan steps identified in audit report #1202. The purpose of this follow-up is to report on the progress and status of efforts to complete all action plan steps established in the initial audit, for which each was due for completion by December 31, 2013. To determine the status of the action plan steps, we reviewed relevant documentation, interviewed staff, and attended selected City Commission meetings.

Background

In May 2011, the MBE Office expressed concern that a prime contractor may have misrepresented the extent of use of MBE subcontractors on at least one City capital construction project during the bidding phase, construction phase, and final reporting phase. To determine the extent that misrepresentations may have also involved additional prime contractors, the Office of the City Auditor was asked to audit additional City capital construction projects with prime contractors that had been awarded City contracts.

We judgmentally selected five prime contractors and the related MBE subcontractors for 21 completed capital construction projects and three projects in progress and reviewed 31 Project Completion Affidavits (Affidavits). Prime contractors and MBE subcontractors submitted signed Affidavits at the end of projects to certify the amounts paid to MBE or DBE subcontractors, the amount of work performed by the MBE or DBE subcontractor, and the amounts

the MBE or DBE subcontractor further subcontracted out to other businesses.

Our audit results showed the following key violations and/or issues:

- 1) One violation was due to a prime contractor, M of Tallahassee, Inc., including ineligible amounts paid to an MBE subcontractor when the MBE subcontractor did not perform any work other than providing assistance in procurement of essential personnel, equipment, materials or supplies required for performance of the subcontract. The only amounts that were eligible to be counted toward MBE participation were the fees for making the purchases, not the costs of the materials or services themselves. [Note: City management notified and fined M of Tallahassee \$10,000 for this violation and enhanced monitoring on future projects. M of Tallahassee paid the fine in October 2011 and was permitted to continue to bid on and be awarded City contracts. Construction Support Southeast, Inc. (MBE subcontractor) was fined \$9,134 in January 2012 for this violation. As of February 20, 2014, the MWSBE Office (formerly the MBE Office) reported that Construction Support Southeast, Inc. (CSS) had not yet paid the fine. Until CSS pays the fine, the City will not directly contract with CSS or allow prime contractor payments to CSS count toward MWSBE participation.
- 2) Two violations were due to a prime contractor, Allen’s Excavation, Inc. (Allen’s), including ineligible amounts paid to an MBE subcontractor solely to increase the MBE participation. The ineligible amounts were comprised of a broker’s fee/commission paid to the MBE subcontractor for work that was further subcontracted to a non-MBE business [Note: City management notified and fined Allen’s \$25,000 for these violations and enhanced monitoring on future projects. Allen’s paid the fine in October 2011 and was permitted to continue to bid on and be awarded City contracts. Unique Concrete Construction, Inc. (MBE subcontractor) was fined \$3,578 in January 2012 for this violation and subsequently paid the fine.]
- 3) Forty-five percent (45%) of the MBE/DBE Affidavits we tested on 21 completed projects were inaccurate due to ineligible amounts included in MBE/DBE participation.

- 4) Ten violations were due to three prime contractors (Allen’s; North Florida Asphalt, Inc.; and Sandco, Inc.) directly purchasing materials for MBE subcontractors and including that amount in their reported MBE participation.
- 5) Two violations were due to two prime contractors (Allen’s and North Florida Asphalt) directly purchasing materials for DBE subcontractors and including that amount in their reported DBE participation.

- Improve accountability by separating the information being certified by the prime contractor and the subcontractor at the end of a project.
- Implement higher level penalties for prime contractors and MBE/DBE subcontractors that submit false Affidavits.
- 6) Provide additional training opportunities for prime contractors and MBE/DBE subcontractors to better understand the program and requirements.
- 7) Review and implement prior audit recommendations related to program administration. Many issues identified in the initial audit report would have already been addressed if those prior audit recommendations had been previously implemented (see previous Audit Reports #0501 “Inquiry into Compliance with the City Minority Business Enterprise Policy by M of Tallahassee, Inc., and its Subcontractors: Construction Support Southeast and Duggar Excavating, Inc.” dated October 21, 2004; and Report #1110 “Audit of the City’s Vendor Incentive Programs” dated May 6, 2011).

Previous Conditions and Current Status

In report #1202, we provided recommendations to City management related to areas that should be improved in the City’s MBE and DBE Programs. Those recommendations included:

- 1) Review and revise the MBE policies and procedures, last revised in 1994, to clearly describe compliance requirements and define key terms.
- 2) Define MBE/DBE Program intent and the types of services that are eligible for participation.
- 3) Improve the MBE/DBE Program monitoring during and immediately after each project’s completion.
- 4) Define what constitutes success in the MBE Program and implement ways to measure success.
- 5) Revise the City’s MBE Affidavit to:

Management’s Action Plan to address those recommendations consisted of eight action plan steps. Three steps were completed in prior follow-up periods. The status of the remaining five steps, each due to be completed no later than December 31, 2013 (initial planned completion dates were revised), is provided in Table 1 below.

**Table 1
Action Plan Steps from Audit Report #1202
Due as of December 31, 2013, and Current Status**

Action Plan Steps Due as of December 31, 2013	Current Status
To Clarify MBE Program Policies Related to the MBE Subcontractors and General Contractors	
<ul style="list-style-type: none"> • Re-evaluate the MBE Program and policies and revise accordingly to clearly describe program goals and objectives and compliance requirements and define terms used in the policy critical to understanding and implementing the MBE Program. [Report #1202 Action plan step A.1] 	<ul style="list-style-type: none"> ✓ Completed. ECD management proposed and received approval of a new Minority/Women/Small Business Enterprise (MWSBE) Policy at the January 22, 2014, City Commission meeting. The new policy provides a revised program with an expanded definition of minority (African/Black Americans, Hispanic Americans, Asian Americans, and American Indians), and adds a race-neutral Small Business Enterprise (SBE) component.

	<p>In revising the policy, ECD management defined program goals and objectives and compliance requirements and defined terms used in the policy to better assist businesses and City departments implement and comply with the program. The policy sets participation goals for Minority and Women owned Business Enterprises (MWBE) for the operating budget and the capital budget and sets caps to limit the amount that will be paid over lower bids for MWSBE participation preference. To meet the goals of the SBE component, the City may reserve contracts valued at \$300,000 or less for competition among small businesses.</p> <p><u>Audit Comment:</u> We identified for management’s consideration areas within the new policy for which clarification may be needed and changes made to provide consistency. Specifically:</p> <ul style="list-style-type: none"> • Clarification may be appropriate as to how to apply MWSBE preferences for professional services acquired through the “Request for Proposal” process. • Provisions with the new policy defining a SBE should be made consistent (i.e., one policy section provides SBEs are those businesses at 10 percent of the size standards established by the Small Business Administration while another policy section sets those standards at 11 to 15 percent of those standards.)
<ul style="list-style-type: none"> • Re-evaluate and revise the MBE policies to define program intent and the types of services that are eligible for participation in the MBE Program, specifically as it relates to “MBE general contractors” as appropriate. [Report #1202 Action plan step A.2] 	<p>✓ Completed. Section 16.5.74(e) of the new MWSBE policy provides guidance on how the MWBE participation percentages are to be calculated. Specifically, MWBE participation includes:</p> <ul style="list-style-type: none"> • 100 percent of expenditures paid under a general contract to a certified MWBE subcontractor or manufacturer performing a commercially useful function (defined below). • 60 percent of expenditures paid under a general contract for materials and supplies required under the contract to a certified MWBE supplier. <p>A commercially useful function is defined in the policy as a business that (a) is responsible for the execution of a distinct element of work or services; (b) carries out its obligation by actually performing, managing, and supervising the work involved; (c) performs work that is normal for its business, services and functions; and (d) is not further subcontracting a portion of the work that is greater than that expected to be subcontracted by normal industry practices. A contractor, subcontractor, vendor, or supplier shall not be considered to perform a commercially useful function if the contractor’s, subcontractor’s, vendor’s or supplier’s role is limited to that of an extra</p>

	<p>participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of MWSBE participation.</p> <p>Pursuant to the new policy, a MWBE subcontractor (including a general contractor performing as a subcontractor) performs a commercially useful function only when it conducts at least 51 percent of its subcontracted work (i.e., cannot sub-subcontract out more than 49 percent of the work to another entity). Also, the new policy provides that a MWBE prime contractor must perform at least 30 percent of the contracted work with its own workforce to be counted as MWBE participation.</p>
<ul style="list-style-type: none"> • Consider prior audit report recommendations in future management actions to address the issues and make improvements in the City’s MBE Program. [Report #1202 Action plan step A.3] 	<p>✓ Completed in a prior period.</p>
<p>To Evaluate the Success of the MBE/DBE Programs</p>	
<ul style="list-style-type: none"> • City management work with participants of the MBE Program, both prime contractors and MBE subcontractors, to define what constitutes success, and to develop measures to assess and report the program’s level of success. [Report #1202 Action plan step B.1] 	<p>➤ In progress. Turned over to management to ensure completion and resolution. The MWSBE Office has developed potential performance measures that are currently being considered to periodically assess and evaluate the MWSBE Program. These include:</p> <ul style="list-style-type: none"> • Pre-determined MWSBE participation goals for all City procurement activities (i.e., to be compared to actual participation); • Percent of MWSBE firms that actually receive City contracts; and • Satisfaction of MWSBE Program participants. <p><u>Audit Comment:</u> We recommend that ECD management develop and adopt formal defined performance measures and use those measures to periodically assess and report the level of success of the MWSBE Program.</p>
<p>To Improve Monitoring of the MBE/DBE Programs</p>	
<ul style="list-style-type: none"> • MBE Office work with Public Works Inspection staff to implement monitoring procedures during the construction phase and at the end of each project to ensure that program participants are performing the work as reported. [Report #1202 Action plan step C.1] 	<p>✓ Completed in a prior period.</p>
<ul style="list-style-type: none"> • MBE Office work with the City Attorney’s Office to increase the level of penalties for submitting false information and to develop two separate Affidavits, one for prime contractors and one for MBE/DBE subcontractors to complete with the information necessary to determine compliance with the MBE/DBE policies. [Report #1202 Action plan step C.2] 	<p>➤ Partially completed. Turned over to management to ensure completion and resolution. ECD Management worked with the City Attorney’s Office to revise the Affidavit and insert language to increase the level of penalties for submitting false information. Representatives from the prime contractor and MBE/DBE subcontractor are to sign a single Affidavit that states “under penalties of perjury, the</p>

	<p>undersigned declares that he or she has read the foregoing Certification and that the facts stated in it are true.” ECD management previously reported to us that they decided to use one Affidavit to be signed by both the prime contractor and MBE/DBE subcontractor (instead of separate Affidavits).</p> <p>Subsequent to the approval of the revised MWSBE policy in January 2014, the MWSBE Office staff reported that they are re-considering requiring two Affidavits to be submitted, one from the prime contractor and one from the MBE/DBE subcontractor. They also noted it was their intention to require the subcontractors to certify on the Affidavit both (a) the percentage of work the subcontractor performed on the project and (b) the percentage of work that was sub-subcontracted to other businesses.</p> <p><u>Audit Comment:</u> While we understand that management is considering revisiting and revising the Affidavits, at this point, management is still requiring only one “Final Payment Affidavit” for both prime contractors and MWBE/DBE subcontractors to submit when projects are completed. Therefore, we continue to recommend management revise the process to require separate Affidavits, one from the prime contractor and one from the subcontractor. We also recommend that the process be revised to require MWBE/DBE subcontractors to include on the Affidavit the percentage of work they performed on the project and the percentage of work performed by any sub-subcontractors, as applicable.</p>
<ul style="list-style-type: none"> • Consider prior recommendations in their future management actions to address the issues and make improvements in the City’s MBE Program. [Report #1202 Action plan step C.3] 	<p>✓ Completed in a prior period.</p>
<p>To Provide Training Opportunities for Prime Contractors and MBE/DBE Subcontractors</p>	
<ul style="list-style-type: none"> • MBE Office develop and provide training opportunities on the City’s MBE policies and their application. [Report #1202 Action plan step D.1] 	<p>➤ In progress. Turned over to management to ensure completion and resolution. As reported in previous follow-up reports, the MWSBE Office has provided various trainings since May 2012 with Public Works Inspection staff, Code Enforcement staff, prime contractors, and MBE subcontractors. The revised policy and program was approved by the City Commission in January 2014. ECD management reported that they are working with DMA Procurement Services to revise the City’s bidding instruction and solicitation templates. For departments currently in the solicitation process, the MWSBE Office advised departments to continue following the older MBE policy until new instructions and templates are available.</p>

	<p><u>Audit Comment:</u> We recommend Procurement Services and the MWSBE Office work with departments as they begin new solicitation processes in order to incorporate the new MWSBE policy into the procurement processes as quickly as possible. We also recommend training be provided to department staff on the new revised bidding instructions and solicitation templates as soon as possible.</p>
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Table Legend:

- Issue to be addressed from the original audit

- In progress or partially completed. Turned over to management to ensure completion and resolution.
- ✓ Completed.

Conclusion

As described above, two of the remaining five action plan steps established to address issues identified in our initial audit were completed during January 2014. These two steps were related to (1) re-evaluating and revising the MBE Program and policies and (2) defining program intent and the types of services that are eligible for participation in the MBE Program, specifically as it relates to “MBE general contractors” as appropriate.

The remaining three action plan steps are in progress or partially completed; and responsibility to ensure their completion and resolution has been turned over to management. These three steps relate to (1) defining what constitutes program success, and developing measures to assess and report program success; (2) increasing the level of penalties for submitting false information and developing two separate Affidavits, one for prime contractors and one for MWBE/DBE subcontractors; and (3) developing and providing training opportunities on the City’s revised MWSBE policy and its application in the bidding and solicitation process. We provided audit comments for each of the remaining action plan steps that were turned over to management. These comments are intended to provide management with additional guidance regarding the original audit report recommendations and the new MWSBE policy.

We appreciate the cooperation and assistance provided by key staff from the City Attorney’s Office, ECD, and the MWSBE Office during this audit follow-up.

Appointed Official’s Response

As has been noted, this audit was initiated at the request of the City Manager to investigate potential violations of the City’s MBE Program. Many improvements have been made to the MBE Program since this audit was initiated. The City Commission adopted a revised MBE policy in January 2014 which addressed many of the concerns and recommendations contained in the original audit report. The City Commission has also authorized the purchase and implementation of specialized software that will track and monitor MBE participation on City contracts and purchases. The remaining items in the audit action plan will be addressed as the new MBE policy is implemented and the MBE software is installed. We appreciate the assistance which the City Auditor has provided in helping identify areas for improvement. The Auditor’s input was solicited and contributed to the new MBE policy.

Copies of this audit follow-up #1415 or audit report #1202 may be obtained from the City Auditor’s website (<http://talgov.com/auditing/index.cfm>) or via request by telephone (850 / 891-8397), by FAX (850 / 891-0912), by mail or in person (Office of the City Auditor, 300 S. Adams Street, Mail Box A-22, Tallahassee, FL 32301-1731), or by e-mail (auditors@talgov.com).

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