



OFFICE OF THE INSPECTOR GENERAL
City of Chicago



REPORT OF THE INSPECTOR GENERAL'S OFFICE:

***FOLLOW UP REVIEW OF THE MINORITY AND WOMEN-OWNED
BUSINESS ENTERPRISE PROGRAM***

JUNE 2011

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To the Mayor, Members of the City Council, the City Clerk, the City Treasurer, and the residents of the City of Chicago:

On May 20, 2010, the IGO published a review of the City's Minority and Women-owned Business Enterprise (MWBE) program. The review detailed findings from numerous IGO investigations examining fraud, abuse, and mismanagement in the MWBE program and provided an analysis of how actual participation in the program was substantially less than the participation statistics that the prior administration reported annually to the City Council and the public. Based on those findings, the May 2010 report set out a series of recommendations needed to ensure that the program more effectively achieved its goal of providing economic opportunity to groups in the City historically disadvantaged by discrimination. The accompanying report is a follow-up detailing the state of the program one year later.

In the year since the IGO issued the May 2010 review, the City has taken some positive steps in its administration of the MWBE program. In particular, the Office of Compliance implemented a monitoring system (called C2) that once on line will permit reporting of actual payments to MWBEs, although the accuracy of this payment data will be unverified. Additionally, the Department of Procurement Services (DPS) has developed a three-year buying plan for the City. Unfortunately, most of the fundamental problems identified in the May 2010 review remain unaddressed. In some respects, the problems have grown worse, particularly with the recent departure of the key personnel in the Office of Compliance most responsible for recent improvements to the historically abysmal administration of the program. In the meantime, since the May 2010 review, the IGO has released an additional 16 summary reports of investigations of fraud and abuse in the MWBE program, and has assisted in criminal investigations resulting in three new federal indictments relating to fraud on the MWBE program.

Addressing the problems in the MWBE program the IGO has identified in the attached review will require the commitment and leadership of the new Mayor and City Council. Specifically, the IGO recommends the Mayor and City Council consider the following:

- Redirect its focus away from MWBE certification to monitoring MWBE compliance
- Accurately track and report *actual* payments to MWBEs
- Establish meaningful contract-specific goal setting
- Grant waivers from MWBE goals for construction contracts
- Collect penalties from firms that do not satisfy MWBE requirements
- Increase staffing in MWBE administration
- Return MWBE program administration to DPS

- Make user department contract and project management personnel accountable for the program
- Gather the necessary statistical evidence for the non-construction MWBE program to put it on sound legal footing
- End the Target Market Program

The program's failings result in widespread fraud and abuse. This deprives legitimate firms of opportunity and restricts competition by discouraging firms that do not participate in misconduct. Despite the IGO's work and several high-profile scandals involving the program, the prior administration did not act to effect real reform. The near collapse in the administration of the MWBE program provides the new administration and City Council with a comparatively clean slate from which to work in fixing the program. This follow-up report details changes in the program over the past year, the challenges the program still faces, and what the new administration and City Council must do in rebuilding the program to make it function effectively. We issue this report firm in the belief that the MWBE program can still be a valuable City asset in leveling the playing field for groups historically victimized by discrimination by providing economic opportunities that have not been available to them in the past.

As always, I welcome ideas your ideas comments, suggestions, questions, and criticisms.

Respectfully,



Joseph M. Ferguson
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EXECUTIVE SUMMARY

On May 20, 2010, the IGO published a review of the City's Minority and Women-owned Business Enterprise (MWBE) program (the Review).^{1,2} The Review detailed findings from numerous IGO investigations examining fraud, abuse, and mismanagement in the MWBE program and from an analysis of how actual participation in the program compares to the participation statistics that the prior administration reported annually to the City Council and the public. This follow-up report analyzes how the program has changed over the past year and the challenges it still faces.

A. Findings of the May 2010 Review

Based on a comprehensive analysis of the program's administration and numerous investigations into fraud and abuse of the MWBE program, the Review detailed the following findings:

- Widespread fraud, abuse, and mismanagement, with recent sustained or soon to be sustained investigations into the MWBE program involving contractors awarded over \$1 billion in City contracts since 2003.
- An analysis of construction contracts that ended in 2008 found that actual payments to MWBEs and Disadvantaged Business Enterprises (DBEs)³ were over 15 percent less (more than \$19 million) than the City's publicly reported statistics for the contracts we reviewed. Were the over-reporting for 2008 applied to the over \$2.5 billion in construction contracts reportedly awarded to MWBEs and DBEs since 1995,⁴ actual participation in all the City's *construction* contracts, between 1995 and 2008, has been \$400 million less than the City's publicly reported participation statistics.
- The historical lack of auditing of non-construction participation, the lack of rigor in the auditing process, and the prevalence of fraud and abuse in the program, rendered it likely that actual participation was also significantly lower in non-construction (which comprises 70% of the dollar value of the MWBE participation since 1995) than the publicly reported statistics.

Many of the problems in the MWBE program were attributable to the City's poor administration of the program. Specifically, the administrative deficiencies included:

¹ City of Chicago. Office of Inspector General. "Review of the Minority and Women-owned Business Enterprise Program." May 2010.

http://www.chicagoinspectorgeneral.org/pdf/Report_MWBE-ProgramReview.pdf

² Mayor Harold Washington began an affirmative action program for City contracts in 1985 by executive order. The (MWBE) program was continued through successive mayoral administrations and an ordinance codifying the City's program into law was passed in 1990. The scope of the MWBE program is extremely large. Since 1991, the City has reported over \$9.5 billion in awarded contracts to MWBEs, an average of over \$500 million a year.

³ Disadvantaged Business Enterprises (DBEs) refers to a federal affirmative action contracting program and is only applicable on certain federally-funded contracts.

⁴ From 1995 through 2004 this figure includes DBE awards. From 2005 through 2008 DBE awards are excluded.

- Not collecting, analyzing, or reporting data on actual payments to MWBEs.
- Lack of cooperation between City departments in administering the program.
- Failure to track payments to MWBEs as contracts are performed.
- Mistakes in assessing actual MWBE participation.
- Laxness in determining eligibility for the program.
- Insufficient resources devoted to the program's administration.

Based on those findings, the Review made the following recommendations:

- Track and report actual payments to MWBEs.
- Increase cooperation between City departments to properly administer the program.
- Require more detailed documentation of payments to MWBEs.
- Consider directly paying subcontractors.
- Clearly define and consistently apply MWBE regulations.
- Increase resources for program administration.
- Increase enforcement of penalties for non-compliance with MWBE commitments.

B. Recent Improvements in Program Administration

Since the Review, the City's Office of Compliance (Compliance) has taken positive steps in the administration of the MWBE program. The almost complete implementation of a new web-based MWBE compliance monitoring system called C2 will allow the City to finally report actual payments to MWBEs, although the accuracy of this payment data will be unverified. C2 will also ease the administrative burden on the staff responsible for monitoring MWBE compliance by converting what was a paper-intensive process into an electronic one.

When Compliance took over the MWBE program in October 2009, only two of the over twenty DPS staff members who worked on the program were retained. The Compliance staff that until recently had been working on the program was more competent, better understood the program and its weaknesses, and better applied the program's regulations than the previous employees.⁵

While the Department of Procurement Services (DPS) has recently played a limited role in the program's administration, it has also taken some positive steps that should improve the program. It has developed a three-year buying plan, which should enable user departments⁶ and DPS to better identify MWBE opportunities on City contracts in advance. In turn, this should help prioritize certification activity by indicating what contracting areas the City will be most involved in over the next few years.

C. City Must Still Address the Program's Fundamental Problems

Despite the efforts of Compliance and DPS, the program remains dysfunctional. This stems from a lack of commitment by the Daley administration and the prior City Council to address the program's failings. In its most recent report on MWBE participation, the City claimed "it

⁵ In late May, the IGO learned that the responsibility for the program would be transferred from Compliance to DPS.

⁶ User departments refers to the departments that manage project work performed under contract with the City.

exceeded participation goals for minority-owned (MBE's) [sic] and women-owned (WBE's) [sic] firms, reaching 37% participation for contracts awarded through August 2010."⁷ The City reported these figures knowing full well that these numbers were based on projected MWBE participation rather than on actual payments to MWBEs. Because of the widespread fraud and abuse in the program and the lack of monitoring of MWBE participation as contracts are performed, actual MWBE participation is far less than the statistics the City reports. This longstanding practice of only reporting MWBE participation based on contract awards and not actual payments papered over the program's known problems and knowingly misstated what the program was achieving.

The lack of an overall commitment to confronting the program's deficiencies has left it beset by fraud and abuse and unable to achieve its objectives. The program's major problems and the IGO's recommendations to make it more effective are outlined below:

- The City has failed to accurately track and report actual payments to MWBEs. Once fully implemented C2 will allow the City to track the reported payments going to MWBEs. However, because the *reported* payments to MWBEs often overstate *actual* participation; C2 is insufficient. The City must verify that the payments reported through C2 reflect actual participation and not pass-through payments to noncertified vendors by:
 - Conducting field audits of MWBE participation.
 - Making public the information being reported through C2.
 - Making electronic the lien waiver process for construction contracts.
- The City's prior leadership has placed too much emphasis on the perceived problems in the City's certification of MWBEs. While there have been problems in the City's certification unit, the program's biggest problems stem from the City's failure to monitor compliance with its MWBE goals as contracts are awarded and performed.

The City should consider taking steps to reduce the administrative burden placed on the City's certification staff. Specifically, the City could:

- Stop certifying firms in areas in which the City does not contract.
- Continue to process the applications of all applicants but prioritize its certification activities based on how likely firms are to contract with the City.
- Charge a higher application fee for MWBE certification.

Each of the steps would reduce the workload of the certification unit and in the process free up much-needed resources for goal-setting and monitoring MWBE compliance.

- In the non-construction program, the City does not generally engage in any contract-specific goal setting and generally sets the same participation numbers for every contract

⁷ City of Chicago. "City of Chicago Launches New Way for Businesses to Become Certified MBE/WBE/BEPD Firms." October 7, 2010.

it lets. In the construction program, where contract specific goal setting is required by law, the goal setting process is perfunctory and almost always results in the same MWBE goals being set on each contract. The result is that unrealistically high goals are set on some contracts, which encourages fraud and abuse of the program.

The City lets a wide variety of construction and non-construction contracts and applying the same numerical goals to each contract does not reflect the reality of the opportunity for MWBE participation in the City's contracts. The City must set MWBE participation goals on a contract-specific rather than a program-wide basis.

- Closely related to the lack of contract-specific goal setting is the lack of waivers from the unrealistically high MWBE goals set on the City's construction contracts. The IGO reviewed records of waivers from MWBE goals granted by DPS between 2007 and 2010 and found that the City had a record of granting only a single waiver on all the construction contracts let between 2007 and 2010.⁸ The City must grant waivers from MWBE goals on construction contracts, where appropriate. By seldom granting waivers, the City exposes the program to legal challenges and encourages misconduct by City contractors. This misconduct often results in higher contract costs to the City without obtaining the benefits of increased MWBE participation.
- With minor exceptions, the City has failed to proactively pursue contract and ordinance penalties against City vendors who fail to meet MWBE participation requirements. In the IGO's experience, the vast majority of City vendors know that the City will not pursue MWBE penalties. As part of reforming the MWBE program, there must be consequences for those vendors who fail, without justification, to achieve their promised MWBE compliance. Therefore, the City must be willing to pursue penalties where appropriate.
- In October 2009, the City transferred most of the responsibility for the program to Compliance. The effect of this transfer has been to further distance the MWBE program from the rest of the City's contract management activities. This continues a longstanding problem of only having a small number of employees who are not connected to the City's other contract letting and management functions wholly responsible for the program.

Therefore, the day-to-day certification and contract compliance monitoring activities should be returned to DPS and involve the user departments to a greater extent. Because of DPS's involvement in every stage of the contracting process, it is the most logical place to base the administration of the program. Compliance should still perform oversight of the program, as it would any other City program.⁹

⁸ There was a record of one waiver granted in 2008 for an architecture and engineering contract. Additionally, on a 2011 architecture and engineering contract, the MBE goal was reduced to 10%, from its typical 25%. For purposes of the review of both contract-specific goal setting and the granting of waivers from the MWBE goals, architecture and engineering contracts were considered construction contracts.

⁹ This recommendation was formulated prior to when the IGO learned that the responsibility for the program would be transferred from Compliance back to DPS.

- For many years, the prior administration failed to make the program the responsibility of more than a handful of people in DPS and more recently Compliance. There is no way for the program to succeed if the many other City personnel responsible for letting and managing the City's contracts feel they bear no responsibility for the program. City contract managers in the user departments oversee the day-to-day performance of contracts and thus are better able to see through potential fraud schemes. Therefore, they should be the City's first line of defense against MWBE fraud and abuse.
- The non-construction program contains a number of provisions that federal courts have found unconstitutional, including the court that found the City's construction program unconstitutional in 2004. In particular, the City has never collected statistical evidence of discrimination in non-construction industries. Federal courts have consistently ruled that a government must have evidence of discrimination before implementing a race and gender conscious contracting program. Not only is this a significant potential legal liability for the City, because the constitutional deficiencies of the program are so notorious and ingrained in City policy, it could also subject the City officials charged with administering the program to individual liability. In order to ensure that the non-construction program operates on sound legal footing, the City must gather statistical evidence of discrimination in non-construction industries.
- Even more potentially dangerous from a liability perspective is the Target Market component of the non-construction program, which restricts certain contracts to only MWBEs.¹⁰ Because it restricts competition on the basis of race and gender the Target Market program may be considered a quota program, which has been explicitly rejected by the Supreme Court as unconstitutional. By operating this program the City is exposing itself and its officials to liability. The Target Market program should be ended as soon as possible.

D. Conclusion

The program's failings result in widespread fraud and abuse. This deprives legitimate firms of opportunity and restricts competition by discouraging firms that do not participate in these schemes. Despite the IGO's work and several high-profile scandals involving the program, the prior administration did not take action to effect real reform.

The MWBE program could be a valuable City asset in leveling the playing field in order to provide economic opportunity for groups of people who have been historically discriminated against. But this can only happen if the City commits itself to rooting out the program's problems. The steps recommended above can help produce a more effective program and ensure that minority and women-owned businesses receive the economic opportunity this program aims to provide them.

¹⁰ *Chicago Municipal Code*, sec. 2-92-460 (American Legal 2011).

I. IGO MAY 2010 REVIEW OF THE PROGRAM

On May 20, 2010, the IGO published a review of the City's MWBE program. The Review detailed findings from numerous IGO investigations examining fraud, abuse, and mismanagement in the MWBE program and from an analysis of how actual participation in the program compares to the participation statistics that are reported annually to the City Council and the public.

A. Summary of Review's Findings

The Review detailed that over the past several years, the IGO has conducted numerous investigations examining fraud, abuse, and mismanagement in the MWBE program. The Review revealed broad and pervasive deficiencies in the administration of the City's MWBE program and found that the City cannot determine whether or not the program is achieving its goals. As a result, the program has been beset by fraud and unlawful brokers, and MWBE participation is far less than the publicly reported participation statistics. Specifically, the IGO found that:

- Fraud, abuse, and mismanagement were widespread in the MWBE program. Recent sustained or soon to be sustained IGO investigations into the MWBE program involved contractors that have been awarded over \$1 billion in City contracts since 2003.
- An analysis of construction contracts that ended in 2008 found that actual payments to MWBEs and DBEs were over 15 percent less (more than \$19 million) than the City's publicly reported statistics for the contracts we reviewed. Were the over-reporting for 2008 applied to the over \$2.5 billion in construction contracts reportedly awarded to MWBEs and DBEs since 1995,¹¹ actual participation in all the City's *construction* contracts, between 1995 and 2008, has been \$400 million less than the City's publicly reported participation statistics.
- Non construction contracts comprise the majority (70% of the dollar value) of reported MWBE participation awarded since 1995. For these contracts, due to the historical lack of auditing of non-construction participation, the lack of rigor in the auditing process, and the prevalence of fraud and abuse in the program, it is likely that actual participation was also significantly lower in non-construction than the publicly reported participation.
- Many of the problems in the MWBE program were attributable to the City's poor administration of the program. Specifically, the administrative deficiencies included:
 - Not collecting, analyzing, or reporting data on actual payments to MWBEs.
 - Lack of cooperation between City departments in administering the program.
 - Failure to track payments to MWBEs as contracts are performed.
 - Mistakes in assessing actual MWBE participation.
 - Laxness in determining eligibility for the program.

¹¹ From 1995 through 2004 this figure includes DBE awards. From 2005 through 2008 DBE awards are excluded.

- Insufficient resources devoted to the program's administration.

The City's failure to collect all relevant data, its inconsistent application of the program's rules and regulations, and a lack of cooperation between the user departments and DPS¹² all contributed to the program's poor administration. Despite a lawsuit challenging the program's constitutionality and several high-profile scandals involving the program, these failings were not corrected. The MWBE program requires continuous oversight and analysis, yet the City failed to successfully address the program's problems as they arose.

B. Summary of Review's Recommendations

The Review concluded that to improve the program, first and foremost, the City must collect and report data on actual payments to MWBEs. While better data reporting would help the program better accomplish its goals, the City also needed to improve the administration of the program. The administration needed to rigorously enforce the program's rules and regulations and ensure that participants act in good faith. Specifically, the Review found that the City should:

- Track and report actual payments to MWBEs.
- Increase cooperation between City departments to properly administer the program.
- Require more detailed documentation of payments to MWBEs.
- Consider directly paying subcontractors.
- Clearly define and consistently apply MWBE regulations.
- Increase resources for program administration.
- Increase enforcement of penalties for non-compliance with MWBE commitments.

Going forward, we found the City needed to confront the longstanding problems that plague the program, which is a cornerstone of City economic and social policy. To do this, the Review concluded that the City must engage in rigorous, continuous analysis of how the program is administered and of the program's effectiveness and there must be a commitment from all parts of City government to the program's goals, including, most notably, from the user departments that execute the City's contracts. By doing so, the City could ensure that the program is run effectively and efficiently and that MWBE participants are receiving all the benefits of the program to which they are entitled.

II. THE CURRENT ADMINISTRATION OF THE PROGRAM¹³

Over the last year and a half, a number of changes were made in the program's administration. This section details how the program has been administered and what changes have occurred since May 2010.¹⁴

¹² DPS was the principal program administrator for much of its history. In October 2009, the Mayor transferred most aspects of the program administration and oversight to the Office of Compliance. The analysis period for the Review preceded the transfer.

¹³ This describes the administration of the program prior to the transfer of responsibility for the program from Compliance back to DPS.

¹⁴ For detailed statements from Compliance and DPS on how they have responded to the Review's recommendations, go here:

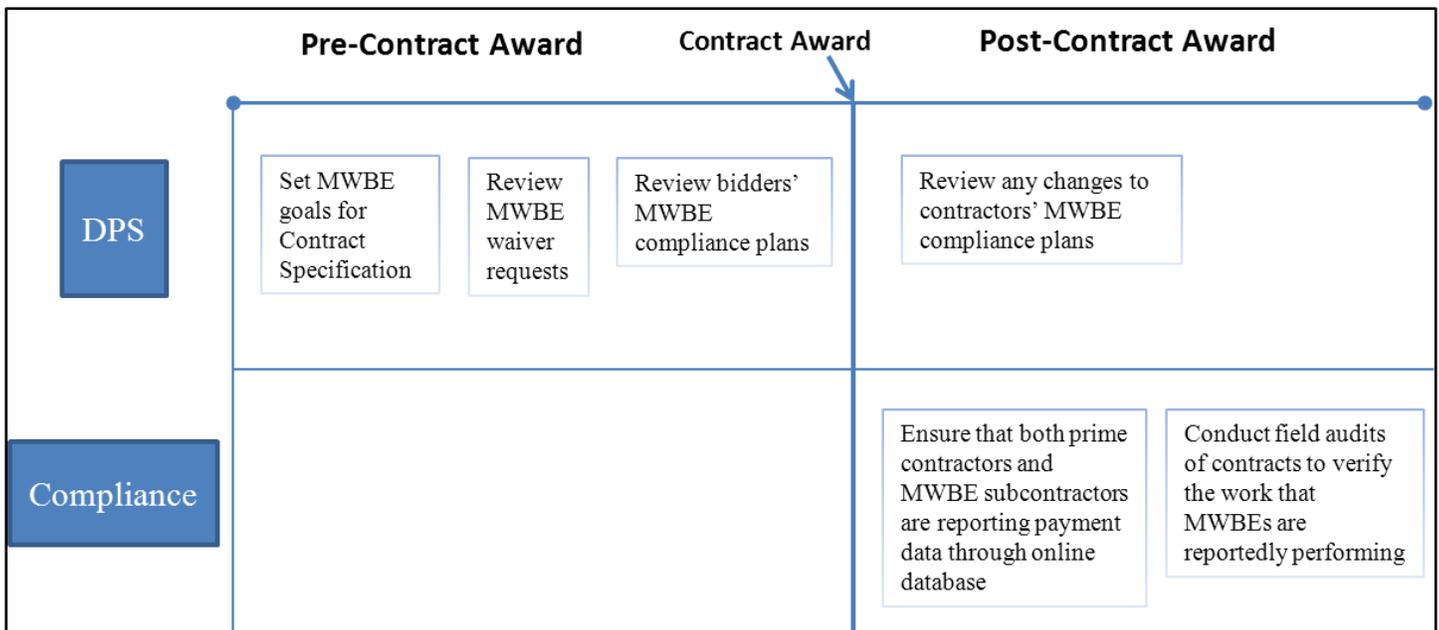
<http://chicagoinspectorgeneral.org/publications-press/program-policy-review/>

A. Separation of Administrative Responsibilities between DPS and Compliance

The administration of the MWBE program has two main components: certification and contract compliance. In October 2009, the City transferred most of responsibilities for the administration of the MWBE program from DPS to Compliance. Since then, Compliance has been responsible for the certification component of the program, which involves certifying new firms and annually verifying the eligibility of the City’s currently 2,500 certified firms.

Contract compliance, the other component of the program, determines whether contractors are meeting MWBE requirements. The responsibility for contract compliance is now divided between DPS and Compliance. DPS is responsible for monitoring pre-contract award compliance, which involves setting MWBE goals on City contracts, approving prime contractors’ compliance plans that detail how contractors plan to achieve MWBE requirements, and deciding on MWBE waiver requests. Additionally, as contracts are performed DPS reviews any changes to a prime contractor’s MWBE compliance plan. Compliance is responsible for monitoring all other post-contract award MWBE compliance, which includes ensuring that all prime contractors and MWBE subcontractors are reporting payments to MWBEs and conducting field audits, when possible. Field audits involve MWBE compliance personnel visiting jobsites to determine if information reported to the City matches up with what they observe occurring on jobsites. The chart below summarizes the different responsibilities of DPS and Compliance as contracts progress.

MWBE Contract Compliance Administration during Contract Lifecycle

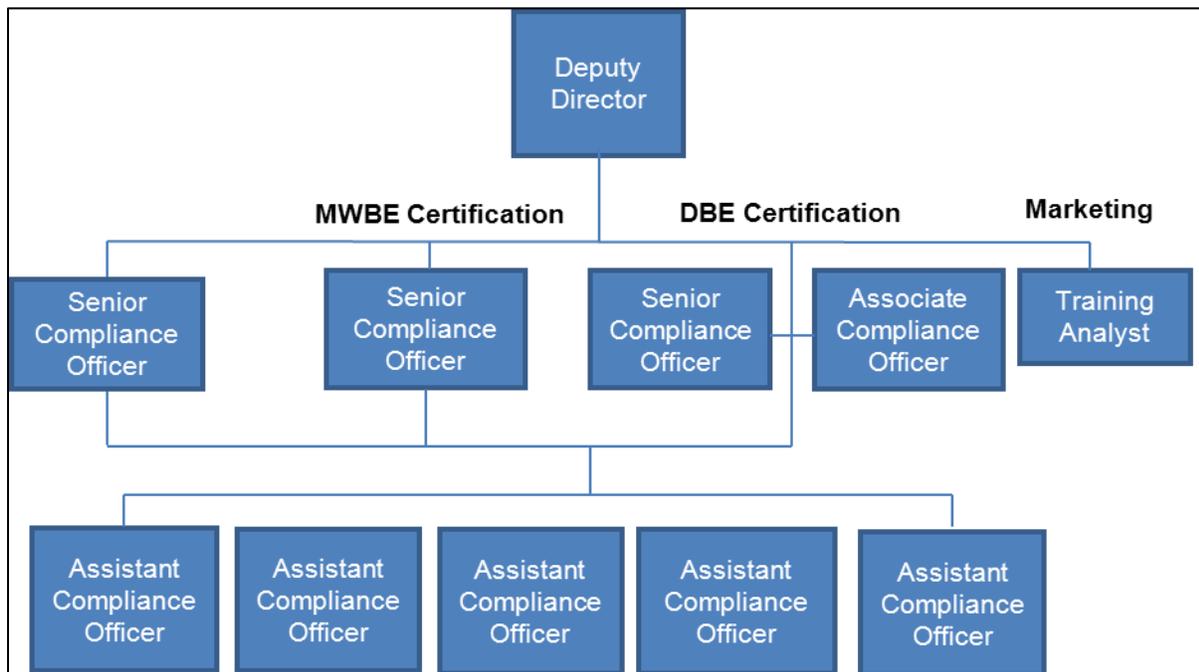


B. Resources Devoted to MWBE oversight in Compliance

At the time of the Review, Compliance was allocated seven positions and a \$500,000 contract budget to fulfill its MWBE administrative duties. The Review concluded that these resources were grossly insufficient “for monitoring the MWBE compliance of 2,000 City contracts and contract modifications that the City lets each year, as well as the certification files of 2,500 firms.”¹⁵ Since the Review was issued, Compliance received four additional budgeted positions to administer the program.

The 2011 Budget authorized 11 positions in Compliance to work on the program. The chart below summarizes the positions and organization of Compliance’s Supplier Diversity unit, which has been responsible for the MWBE program.¹⁶

Organizational Chart of MWBE administration in Compliance



The unit is focused on four activities: monitoring contract compliance with MWBE and DBE goals, administering MWBE certification, administering DBE certification, and marketing the MWBE and DBE programs. As the chart shows, the unit has a senior compliance officer assigned to each function, except for marketing, which is solely performed by a training analyst. Additionally, an Associate Compliance Officer is assigned to DBE certification. The Assistant Compliance Officers assist in the activities of contract compliance, MWBE certification, and DBE certification.¹⁷

¹⁵ Chicago Inspector General. “Review of the MWBE Program.” pg. 57. http://chicagoinspectorgeneral.org/wp-content/uploads/2011/03/Report_MWBE-ProgramReview.pdf

¹⁶ Office of Compliance. “Response to IGO questions.” January 12, 2011.

¹⁷ *Id.*

C. Resources Devoted to MWBE oversight in DPS

DPS has had two staff members currently working on the MWBE program: a Deputy Procurement Officer and a Staff Assistant. They are responsible for part of the administration of MWBE contract compliance. The Deputy's responsibilities include deciding what MWBE goals should be set on non-construction contracts, reviewing user department contract-specific goals requests for construction contracts, determining whether requests for waivers from the goals are justified, and reviewing responsive bidders' compliance plans to determine if bidders have met the MWBE requirements.¹⁸ As contracts progress, the Deputy is responsible for reviewing any requested changes to contractors' MWBE compliance plans.

D. Implementation of the Certification and Compliance System (C2)

Since taking over responsibility for most of the program, the major improvement that Compliance has overseen is the implementation of the Certification and Compliance System (C2) system. According to the City, C2 is an online application that allows the City "to accurately and efficiently record payments made to certified firms and provide access to such data to City departments."¹⁹

Through a connection to the City's Financial Management and Purchasing Systems (FMPS), C2 is alerted once a prime contractor is paid.²⁰ "On a monthly basis all new contracts and all payments made on existing contracts are entered into the C2 system as a direct feed from" FMPS.²¹ Each month C2 automatically generates a notice (via email or fax) to all vendors with City contracts requesting that they report how much of the previous month's payments went to MWBE-certified firms.²² Vendors report this information through C2's online interface using a unique account assigned to each vendor. Once vendors report how much MWBEs have received, C2 automatically notifies the MWBEs that have reportedly been paid and requests that they confirm the reported payments. MWBEs then log on to C2 using their own unique accounts and confirm or refute the reported payments.²³

Prior to C2, the City had conducted MWBE monitoring through a cumbersome paper process. By allowing prime contractors to electronically report how much they have paid their MWBE subcontractors, C2 has greatly streamlined this process. The implementation of C2 is in the process of being completed.

E. New Certification Process

In addition to the almost complete implementation of C2, the other major change to the MWBE program is that the City has begun accepting Professional Declarations of Eligibility to expedite

¹⁸ Department of Procurement Services. "Response to IGO questions." January 26, 2011

¹⁹ Office of Compliance. "Response to IGO questions." January 12, 2011.

²⁰ FMPS is a computer application that processes and records the City's financial transactions.

²¹ Office of Compliance. "Response to IGO Questions." January 12, 2011.

²² *Id.*

²³ For a more detailed description of the C2 contract compliance monitoring process see:

<http://chicagoinspectorgeneral.org/publications-press/program-policy-review/>

certifications for non-construction, non-supplier/distributor MWBEs.²⁴ In this new process that began December 2010, attorneys, licensed Certified Public Accountants (CPAs), or a designated certifying agency can review MWBE applications and attest that applicants meet the requirements of the program.²⁵ Applicant firms are still be required to submit their complete applications to Compliance, which would “conduct audits of all certifications submitted under this program.”²⁶

F. Program Improvements

When Compliance took over the MWBE program, only two of the over twenty DPS staff members who worked on the program were retained.²⁷ The Compliance staff that worked on the program was more competent, better understood the program, and was better applying the program’s regulations than the previous staff. However, some of the staff most responsible for the recent improvements at Compliance have recently left City employment.

While DPS has recently played a limited role in the program’s administration, it has also taken some positive steps. It has developed a three-year buying plan, which should enable user departments and DPS to better identify MWBE opportunities on City contracts in advance. Also, it should help prioritize certification activity by indicating what contracting areas the City will be most involved in over the next few years.

III. CITY MUST STILL ADDRESS THE PROGRAM’S FUNDAMENTAL PROBLEMS

Despite the recent efforts of Compliance and DPS, the program remains dysfunctional. This stems from a lack of commitment by the prior Mayor and the City Council to address the program’s failings. In its most recent report on MWBE participation, the City claimed “it exceeded participation goals for minority-owned (MBE’s) [sic] and women-owned (WBE’s) [sic] firms, reaching 37% participation for contracts awarded through August 2010.” The City reported these figures knowing full well that these numbers were based on projected MWBE participation rather than on actual payments to MWBEs. Because of the widespread fraud and abuse in the program and the lack of monitoring of MWBE participation as contracts are performed, actual MWBE participation is far less than the statistics the City reports. This longstanding practice of only reporting MWBE participation based on contract awards and not actual payments papered over the program’s problems and misstated what the program was achieving.

Additionally, since the Review, the IGO has released an additional 16 summary reports regarding investigations into fraud and abuse of the MWBE program.²⁸ These investigations

²⁴ City of Chicago. “City of Chicago Launches New Way for Businesses to Become Certified MBE/WBE/BEPD Firms.” October 7, 2010.

²⁵ *Id.*

²⁶ *Id.*

²⁷ These 2 staff members remained in DPS to fulfill DPS’s responsibilities for the program.

²⁸ As of June 6, 2011.

IGO sustained cases can either be administrative, criminal, or both. Administrative cases generally involve violations of City rules, policies or procedures and/or waste or inefficiency. For sustained administrative cases, the IGO produces summary reports – a thorough summary and analysis of the evidence and a recommendation for

have further confirmed the existence of many of the same deficiencies we discussed in the Review and identified additional problems in the program's administration.

Including these investigations, since 2005, the IGO has recommended that over 20 companies be decertified and over 65 companies or individuals be debarred for issues related to the MWBE program. Numerous other investigations are on-going. Additionally, IGO investigations to date have also recently led to four federal indictments involving MWBE fraud.²⁹ While the IGO has and will continue to commit considerable resources to the MWBE program, even our most aggressive efforts can catch only a small fraction of the overall fraud.

Despite the IGO's work and several high-profile scandals involving the program, the Daley administration did not take action to effect real reform. The following sections detail the program's major problems and recommend steps the City should take to make the program more effective and ensure that minority and women-owned businesses receive the economic opportunity this program aims to provide them.

A. Program Needs Leadership from Incoming Mayor and City Council

Despite the efforts of Compliance and DPS the program remains dysfunctional. This stems from a lack of commitment by the previous Mayor and City Council to address the program's failings. Absent leadership from the Mayor, the program has floundered and will continue to flounder. The previous Mayor failed to make the program the responsibility of more than a handful of people in DPS and Compliance. There is no way for the program to succeed if the numerous City personnel responsible for letting and managing the City's contracts bear no responsibility for the program. Further, the City's longstanding practice of only reporting MWBE participation based on contract awards and not actual payments has had the effect of papering over the program's problems and misstated what the program was achieving.

The new Mayor and City Council must accept that the program's accomplishments have been overstated since its inception, that the program encourages fraud and abuse, and that these problems have been largely ignored by the prior administration. Then, they must be willing to analyze the program's deficiencies and accurately report to the public what the program is actually achieving. Without a willingness to confront the program's problems, its ineffectiveness and the fraud it inspires are sure to continue.

B. Shift Focus from MWBE Certification to Monitoring MWBE Compliance

The City's leadership has placed too much emphasis on and devoted disproportionate resources to the problems in the City's certification of MWBEs. While there have been problems in the City's certification unit that must be cured, the program's biggest challenges stem from the

disciplinary or other corrective action. These reports are sent to the Office of the Mayor, the Corporation Counsel, and the City departments affected or involved in the investigation.

To read synopses of summary reports in our Quarterly Reports see:

<http://chicagoinspectorgeneral.org/publications-press/quarterly-reports/>

²⁹ See: *United States v. Ritter*, 09-CR-376 (N.D. Ill.); *United States v. Azteca Supply Co.*, 10-CR-80 (N.D. Ill.); *United States v. Brunt*, 11-CR-17 (N.D. Ill.); and *United States v. ICS Cable* 11-CR-0316, 11-CR-0313 (N.D. Ill.).

City's failure to monitor compliance with its MWBE goals as contracts are awarded and performed.

The vast majority of the 2,500 certified MWBEs have never received a City contract. For example, as part of the Review, we analyzed actual MWBE participation in all the City's construction contracts that were closed in 2008. In this set of contracts, MWBE participation was heavily concentrated among a few firms as the top 10 firms received almost 42 percent of the total MWBE payments.

The misplaced emphasis on certification has left the contract compliance component understaffed and its problems unaddressed. The City's leadership needs to recognize that increasing its focus on the problems of monitoring MWBE compliance is a key step to improving the program.

Since 2005, the City has processed the MWBE certification application of any firm that was willing to pay the application fee of \$250. Given the City's dire financial situation and the resources currently allocated to the MWBE program, the City should consider taking steps to reduce the administrative burden this practice places on the City's certification staff. Specifically, the City could:

1. Stop certifying firms in areas in which the City does not contract.³⁰
2. Continue to process the applications of all applicants but prioritize its certification activities based on how likely firms are to contract with the City.
3. Charge a higher application fee for MWBE certification.

Steps 1 and 3 would reduce the number of certification applications the City has to process, while step 2 would simply give the City more time to process applications that are deemed less of a priority. Each of the steps would reduce the workload of the certification unit and in the process free up much-needed resources for goal-setting and monitoring MWBE compliance.

C. Accurately Track and Report Actual Payments to MWBEs

While C2 streamlines the process for how the City collects data regarding actual payments to MWBEs, it does not address the problem of verifying payments to MWBEs. As we concluded in the Review:

“...while C2 will make it easier for prime contractors and subcontractors to report payment data to Compliance, which is now responsible for assessing participation, it will not address the underlying deficiencies in how payments to MWBEs are verified. C2 will still not prevent prime contractors and subcontractors from overstating MWBE participation because Compliance will still be relying on the attestations of prime contractors and subcontractors to

³⁰ For instance, a number of firms are certified as staffing agencies or employment placement firms, even though the City is unlikely to contract with these companies due to the restrictions on City hiring imposed by the *Shakman* consent decree.

verify payments. Thus, the problem of MWBE subcontractors overstating what they have been paid or simply not responding to the City's inquiries is unaddressed by C2."³¹

In particular, C2, will do little to address the problem of pass-throughs.³² C2 does not require participating MWBEs to detail payments to their non-certified subcontractors. As numerous IGO investigations have demonstrated, pass-throughs in which an MWBE subcontracts the majority of its contract to non-certified firms is a primary way firms evade the MWBE participation requirements. As currently configured, C2 does not reveal these situations.

As the IGO recommended in a recent summary report, the City must require contractors, through the C2 system, to detail payments that MWBEs make to 2nd and lower tier subcontractors.³³ Compliance has added the functionality to C2 to enable 2nd tier subcontractor reporting but has not yet required contractors to report this information.

The other major continuing problem with the City's compliance monitoring is the lack of any field monitoring of MWBE participation. Instead, the City's verification system is almost wholly reliant on MWBE subcontractors to verify MWBE participation. However, in various pass-throughs that the IGO has investigated over the last several years, the MWBE-certified firms have been willing participants in fraud or abuses of the program. The lack of independent verification of MWBE compliance through field audits and the reliance on MWBE-certified firms to verify compliance greatly hamper the City's ability to identify and root out obvious abuses of the program.

Recently, Compliance informed the IGO that it was conducting field audits on some construction projects. While this is a positive and necessary step, Compliance does not have the number of employees needed to perform effective monitoring of thousands of City contracts.

To better verify the information reported through C2, the City should take the following steps:

- 1. Conduct Field Audits of MWBE participation*

The City should conduct field audits to determine whether the information being reported through C2 is accurate. Field audits involve MWBE compliance personnel visiting jobsites to determine if information reported to the City matches up with what they observe occurring on jobsites. Rather than having Compliance conduct field audits, the City should instead require contract managers in the user departments, who are responsible for managing all the other parts of contract performance, to perform this function.

³¹ Chicago Inspector General. "Review of the MWBE Program." pg. 45.

http://chicagoinspectorgeneral.org/wp-content/uploads/2011/03/Report_MWBE-ProgramReview.pdf

³² Pass throughs are situations in which an MWBE gets a City contract (or more often gets a subcontract with a prime contractor) to perform a certain service. Instead of providing the service, the MWBE contracts with one or several non-certified firms, which actually perform the work. The MWBEs perform "no commercially useful function" and payments are routed through them to achieve the appearance of MWBE participation.

³³ IGO Case #09-1584.

2. *Make public the information being reported through C2*

Another way to better verify the information being collected through C2 is to make the contract compliance data public. If the contract compliance data is made public, the greater transparency will allow parties outside the City to vet MWBE compliance data. In much the same way bid tabulations are made public so that competing bidders can identify unfair bidding practices of their competitors, making reported MWBE participation transparent would allow contractors to vet the information being reported to the City. Contractors, either MWBE or non-MWBE, have an interest in ensuring that their competitors do not gain unfair advantages and with their knowledge of their competitors and industries may be able to identify pass-throughs and fronts that the City's understaffed compliance monitoring unit does not have the resources to uncover.

3. *Explore making lien waiver process for construction contracts electronic*

A more far-reaching step would be for the City to make the entire lien waiver process electronic. Construction contractors have to submit lien waivers in order to be paid by the City. Currently, this is a paper process in which the City collects signed lien waivers from each subcontractor on a project. While collecting these waivers in paper format, the City also collects the same data contained in these waivers electronically, by having contractors report this payment information through C2's online system. This requires a duplication of effort on the part of contractors and City administrative personnel.

In order to address this, the City should explore implementing an electronic lien waiver process, in which contractors electronically submit and sign their lien waivers via an online system. This would allow the City to collect the data it needs to pay contractors and monitor MWBE compliance just once and in just one format. Collecting this data electronically would streamline the administrative burden of data collection and allow the City to better track and store this data.

D. Establish Meaningful Contract-Specific Goal Setting

Among the changes that must occur for this program to finally function in a legal and effective manner, one of the most important is contract-specific goal setting. Rather than analyzing each industry and prospective contract to learn what MWBE percentages are realistic before goals are set, the City routinely inserts the highest amount authorized by law. In the Review we concluded:³⁴

“By rarely setting contract-specific goals, the City has created situations where unrealistically high goals are applied to some contracts and inadequate goals are applied to others. In establishing unrealistically high goals on some contracts, the City encourages firms to engage in fraud and abuse of the program. By setting goals that are too low on other contracts, the City is not maximizing MWBE participation in some areas. The City lets a wide variety of construction and non-construction contracts and applying the same numerical goals to each contract

³⁴ Chicago Inspector General. “Review of the MWBE Program.” pg. 49.

http://chicagoinspectorgeneral.org/wp-content/uploads/2011/03/Report_MWBE-ProgramReview.pdf

does not reflect the reality of the opportunity for MWBE participation in the City's contracts.”

Based on documents obtained from DPS, this continues to be the case. Prior to 2009, DPS did not comprehensively track contract-specific goal setting for the City's construction contracts. For 2009, 2010, and 2011, it tracked contract-specific goal requests that it received from the user departments. A review of these requests shows that MWBE goals that differ from the standard goals have been requested on nine projects (two, six, and one, in each respective year) in the construction contracting area since 2009. This is out of 77 total projects (39, 31, and 7, in each respective year).³⁵

These figures actually overstate the amount of contract-specific goal setting as the user departments have only requested MWBE goals more than two percentage points away from the ordinance prescribed percentages on two projects since 2009, one in 2010 and one in 2011. Thus, on 77 construction projects over the past two and a half years, on only two have contract-specific goals been requested that differ substantially from the MWBE goals set in the MWBE ordinance.

In conducting this follow-up, the IGO learned that for construction contracts, the user departments are supposed to make contract-specific goal requests which are then reviewed by DPS. In practice, this rarely happens as is reflected in the statistics described above. User departments are charged with analyzing contract specifications to determine the potential subcontracting opportunities on a contract and then analyzing MWBE capacity using the MWBE directory maintained by Compliance.³⁶ In the future, the IGO will be exploring how user departments conduct this analysis.

For non-construction contracts, the City does not track when contract-specific goals are requested, but senior DPS staff has told the IGO that this rarely happens. One recent exception was the City's contract for recycling services, which set an MBE goal of nine percent and a WBE goal of three percent.³⁷

The IGO has consistently recommended that, before setting participation goals on any contract, the City should (1) determine what subcontracting opportunities exist on the contract and (2) verify how much MWBE capacity actually exists in those areas, and then tailor the MWBE participation goal to those determinations. While DPS's procedure for contract-specific goal setting on construction contracts states that the user departments take these steps, the fact that few significant contract-specific goals have been set over the past two and a half years, indicates that this process is not rigorously followed.

³⁵ City of Chicago- Department of Procurement Services. Contract-specific MWBE goal requests 2009-2011. Available here:

<http://chicagoinspectorgeneral.org/publications-press/program-policy-review/>

³⁶ City of Chicago- Department of Procurement Services. "Procedure for MBE/WBE Goal Setting." April 27, 2011.

³⁷ City of Chicago. Specification #91706. pg. 38.

<http://www.cityofchicago.org/content/dam/city/depts/dps/ContractAdministration/Specs/2010/Spec91706.pdf>

E. Grant Waivers from MWBE Goals for Construction Contracts

Closely related to the lack of contract-specific goal setting is the lack of waivers from the unrealistic MWBE goals set on the City's construction contracts. The IGO reviewed records of waivers granted by DPS between 2007 and 2010 and found that the City had a record of granting only a single waiver for any construction contract during that time.³⁸ In 2003, a federal court found that the City's MWBE program as it applied to construction contracts was unconstitutional, in part because it seldom granted waivers from the MWBE goals.³⁹

The lack of waivers is exacerbated by the lack of meaningful contract-specific goal setting. Requiring companies to commit to the highest possible MWBE percentages, without any determination by DPS that adequate MWBE capacity even exists, places the companies in the position of choosing between making commitments that they cannot meet or risking automatic elimination from the bidding process because they have honestly and candidly requested a waiver. The result is that an honest bidder, who may be the most highly qualified and lowest cost, in requesting a waiver risks being eliminated from competition because waivers are not granted when they should be. On the other hand, the dishonest bidder will not ask for a waiver and as a result may be awarded the contract, even though it will be unable to meet the affirmative action contracting goals because MWBE capacity does not actually exist.

The City must grant waivers from MWBE goals on construction contracts, where appropriate. The fact that the City has a record of granting only a single waiver on any construction contract between 2007 and 2010 indicates that the City does not take waiver requests seriously. By seldom granting waivers, the City exposes the program to legal challenges and encourages misconduct by City contractors.

F. Collect Penalties from Contractors that Do Not Meet MWBE Requirements

Another problem is the City's abject failure to pursue and collect penalties for MWBE shortfalls. With minor exceptions, the City has failed to pursue contract and ordinance penalties against City vendors who fail to meet MWBE participation requirements.

The IGO has repeatedly tried – and failed – to get an explanation as to why the City does not aggressively pursue the contract penalties to which it is entitled. Compliance and DPS, as well as a number of large infrastructure departments, have told the IGO that they collect information on MWBE shortfalls as part of the contract close-out process and pass that information along to

³⁸ City of Chicago- Department of Procurement Services. MBE/WBE Waiver Reports 2007 through 2010. Available here:

<http://chicagoinspectorgeneral.org/publications-press/program-policy-review/>

There was a record of one waiver granted in 2008 for an architecture and engineering contract. Additionally, on a 2011 architecture and engineering contract, the MBE goal was reduced to 10%, from its typical 25%. For purposes of the review of both contract-specific goal setting and the granting of waivers from the MWBE goals, architecture and engineering contracts were considered construction contracts.

³⁹ *Builders Association of Greater Chicago v. City of Chicago*, 298 F. Supp.2d 725, (N.D. Ill. 2003).

the Law Department (Law) for Law to collect penalties. Law denied IGO requests relating to advice it provided to DPS not to collect penalties, citing attorney-client privilege.⁴⁰

In the Review, the IGO concluded that there is no evidence that Law pursued MWBE penalties. After the Review was released, at least one newspaper reported that the Corporation Counsel had taken exception with our findings regarding penalties and stated that in fact, the City had collected millions in penalties from front companies.⁴¹

The IGO asked Law for any records showing any such recoveries. In response, Law only provided settlement agreements related to 10 TIF-funded Redevelopment Agreements (RDAs)⁴², one of which had been cancelled in its entirety. The other nine agreements showed that the City had settled \$1.2 million in claims related to not just MWBE but also Equal Employment Opportunity and Chicago Resident Ordinance provisions.⁴³ Even crediting the entire amount of the settlements to MWBE penalties (which the agreements themselves do not make clear), \$1.2 million is several orders of magnitude below the actual penalties the City has suffered related to MWBE fraud. Moreover, none of the settlements related to core City contracts, just RDAs.

In the IGO's experience, the vast majority of City vendors know that the City will not pursue MWBE penalties. As a result, the only real consequence for vendors that defraud the City of monies intended for legitimate MWBEs is the risk of possible investigation by the IGO and decertification, debarment or prosecution if the investigation reveals misconduct. And while the IGO has and will commit considerable resources to the MWBE program, even our most aggressive efforts can only catch a small fraction of the overall fraud.

As part of reforming the MWBE program, there must be consequences for those vendors who, without justification, fail to achieve their promised MWBE compliance. Therefore, the City must pursue penalties where appropriate.

G. Increase Staffing in MWBE Administration

One of the findings of the Review was that after the transfer of most of the administration of the program to Compliance from DPS, Compliance was not given sufficient resources to monitor the program properly.⁴⁴ Compliance was given seven budgeted positions and a small contract

⁴⁰ The IGO has filed suit against the Corporation Counsel, the head of the Law Department over the invocation of attorney-client privilege. It brought suit against the Corporation Counsel to enforce a subpoena requesting documents on an unrelated investigation. Corporation Counsel moved to dismiss the suit, claiming the IGO had no jurisdiction and that the documents requested were protected by the Attorney Client privilege. The trial court agreed, and the IGO appealed. The appellate court reversed and remanded, holding that that the IGO had jurisdiction to sue, but that the record was not sufficiently developed to determine whether the privilege applied. *Ferguson v. Georges*, --- N.E.2d ---, 2011 WL 1679847 (Ill. App. 1st Dist. April 29, 2011).

⁴¹ Spielman, Fran. "Minorities Missed Out on \$19 Million in City Contracts in 08: Audit" *Chicago Sun-Times*. May 20, 2010.

⁴² RDAs details the terms and conditions that TIF recipients agree to adhere to in exchange for receiving TIF dollars.

⁴³ The Equal Employment Opportunity provision concerns goals for what percentage of the workers on a construction contract will be minority and women. The Chicago Resident Ordinance provision is a requirement that a certain percentage of workers on a construction contract be City residents.

⁴⁴ Chicago Inspector General. "Review of the MWBE Program." pg.51

http://chicagoinspectorgeneral.org/wp-content/uploads/2011/03/Report_MWBE-ProgramReview.pdf

budget to oversee almost the entire program, while DPS had over twenty positions when it was fully responsible for the program. We concluded that “given the resources allocated to Compliance in the 2010 budget, the fraud, abuse, and mismanagement that have plagued the program since its inception are all but assured to continue unabated.”⁴⁵

Since the Review, Compliance received four additional budgeted positions to administer the MWBE program. While this was an improvement, it still left Compliance woefully understaffed given its responsibilities. Regardless of where the program is housed, its future success will hinge on whether the City commits to staffing allocations far greater than present levels.

H. Return MWBE Program’s Administration to DPS⁴⁶

In October 2009, the City transferred most of the responsibility for the program to Compliance. The effect of this transfer has been to further distance the MWBE program from the rest of the City’s contract management activities. This continues a longstanding problem of having only a small number of employees, who are not connected to the City’s other contract letting and management functions, wholly responsible for the program.

An additional problem that has developed since most of the MWBE functions have moved to Compliance is the disconnect between the contract compliance component of the program that is administered by DPS and the contract compliance component administered by Compliance. As detailed above, DPS is responsible for monitoring pre-contract award MWBE compliance and reviewing adjustments to a contractor’s MWBE compliance plan as contracts are performed. Compliance is responsible for monitoring the payments that are reported to MWBEs through C2.

A recent IGO investigation found that DPS’s review of MWBE compliance plans is cursory and is simply designed “to confirm that the subcontractors listed by the prime vendor are certified and that the certification documents have been filled-in properly.”⁴⁷ The investigation also revealed little communication between DPS and Compliance even though Compliance uses the MWBE compliance plans that DPS approves as the baseline by which it measures MWBE participation. DPS’s perfunctory review at the front end of the contracting process routinely misses noncompliant, unrealistic or even fraudulent compliance plans, leaving those issues to be sorted well into the contract by Compliance and IGO.

Given the problems caused by splitting MWBE compliance into two separate departments and continuing to keep it disconnected from the other aspects of contract management, the program’s certification and contract compliance monitoring activities should be returned to DPS and involve the user departments to a greater extent. Because of DPS’s involvement in every stage of the contracting process, it is the most logical place to base the administration of the program. However, because the Compliance staff that is now working on the program is more competent, better understands the program, and is better applying the program’s regulations than the previous staff, they should be retained as the program moves back to DPS.

⁴⁵ Chicago Inspector General. “Review of the MWBE Program.” pg.53

http://chicagoinspectorgeneral.org/wp-content/uploads/2011/03/Report_MWBE-ProgramReview.pdf

⁴⁶ This recommendation was formulated prior to the transfer of the program back to DPS.

⁴⁷ IGO Case # 10-1402.

I. Make User Department Personnel Accountable for the Program

In the Review we wrote:

“In order for the MWBE program to improve, it must be better integrated into the City’s contracting process. The program and its various components (certification, contract-specific goal setting, and assessing actual participation) cannot function properly if operated in a vacuum, disconnected from all other aspects of contract administration. Rather, each component of the MWBE program needs to rely on information and expertise from the personnel who let and manage the City’s contracts.”⁴⁸

Specifically we recommended that user departments should monitor and report MWBE compliance during the performance of contracts, project managers should attest that documents submitted by contractors related to MWBE compliance are accurate, and that the City should consider embedding MWBE compliance officers in each department.

Increasing the involvement of user departments in monitoring contract compliance would not eliminate DPS’s role. It would still be responsible for approving compliance plans before contracts are awarded and for approving contract-specific goals. It would also set citywide policies regarding how MWBE participation should be calculated. If MWBE compliance officers were to be embedded in the user departments, they would report to supervisors in DPS.

The City has not implemented any of these recommendations. Outside of their role in the virtually non-existent contract-specific goal setting on construction contracts, contract personnel in the user departments play no role in the administration of the MWBE program. Besides the eleven budgeted positions in Compliance and two positions in DPS, none of the many other City employees responsible for letting and managing City contracts bear responsibility for or are held accountable for compliance with a program that intends to channel hundreds of millions of dollars annually to MWBEs.

The City needs to hold contract personnel in the user departments responsible for the MWBE program. This can only happen if the incoming Mayor directs the commissioners of the user departments to make the program a priority of their department.

J. Gather Statistical Evidence for the Non-Construction MWBE Program

While the MWBE program for construction contracts was changed in 2004 in response to the decision in *Builders Association of Greater Chicago v. City of Chicago*, the non-construction MWBE program has been unchanged since the ordinance authorizing the program was passed in 1990. As a result there are a number of differences between the two programs, which are summarized in the table below.

⁴⁸ Chicago Inspector General. “Review of the MWBE Program.” pg.55
http://chicagoinspectorgeneral.org/wp-content/uploads/2011/03/Report_MWBE-ProgramReview.pdf

Table #1- Differences in the Construction and Non-construction MWBE Programs

	Construction	Non-construction
MBE Goal	24 percent	25 percent ⁴⁹
WBE Goal	4 percent	5 percent
Limit on firm owner's personal net worth	\$2.2 million	None
Limit on firm's annual gross receipts	SBA small business size standards (Generally, \$14 million for specialty trade contractors and \$33.5 million for building and civil construction)	Nearly \$35 million in 2009. Adjusted annually for Inflation
Time period over which to calculate gross receipts	5 years	3 years
Reserve contracts for MWBEs (Target Market)	No	Yes
Goals based on statistical evidence	Yes	No
Sunset Provision	Yes	No

The non-construction program contains a number of provisions that federal courts have found unconstitutional, including the court that found the City’s construction program unconstitutional in 2004. These provisions include the lack of a personal net worth limit and a high gross receipts limit for applicants, the lack of a sunset provision for the ordinance, and, in particular, the failure of the City to ever collect statistical evidence of discrimination in non-construction industries. Federal courts have consistently ruled that a government must have evidence of discrimination before implementing a race and gender conscious contracting program.⁵⁰ This means that the non-construction program likely would be found unconstitutional if challenged in court. Not only is this a significant potential legal liability for the City, because the constitutional deficiencies of the program are so notorious and ingrained in City policy, it could also subject the City officials charged with administering the program to individual liability.

Gathering statistical evidence of discrimination is one of the key components to having an affirmative action government contracting program. In order to ensure that the non-construction program operates on sound legal footing, the City must gather statistical evidence of discrimination in non-construction industries.

⁴⁹ This MBE goal and the WBE goal on the line below are the Citywide MWBE goals for non-construction contracts. The individual contracting goals inserted in the contract language of each non-construction contract are a minimum of 16.9% for MBEs and 4.5% for WBEs.

⁵⁰ Martin, Heather et al. “Documenting Disparity in Minority Contracting: Legal Requirements and Recommendations for Policy Makers.” *Public Administration Review*. May/June 2007.

K. End the Target Market Program

Even more potentially dangerous from a liability perspective is the Target Market component of the non-construction program, which restricts certain contracts to only MWBEs. Because it restricts competition on the basis of race and gender the Target Market program in essence functions as a quota program, the operation of which has been explicitly rejected by the Supreme Court as unconstitutional.⁵¹ By operating this program the City is exposing itself and its officials to liability.

The Target Market program should be ended as soon as possible.

IV. CONCLUSION

The program's failings result in widespread fraud and abuse. This deprives legitimate firms of opportunity and restricts competition by discouraging firms that do not participate in these schemes. Despite the IGO's work and several high-profile scandals involving the program, the prior administration did not take action to effect real reform.

The MWBE program could be a valuable City asset in leveling the playing field in order to provide economic opportunity for groups of people who have been historically discriminated against. But this can only happen if the City commits itself to rooting out the program's problems. The steps outlined above can help produce a more effective program and ensure that minority and women-owned businesses receive the economic opportunity this program aims to provide them.

⁵¹ *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 509 (1989).