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June 8, 2006

Honorable Byron Brown, Chairman  
Buffalo Joint Schools Construction Board  
2<sup>nd</sup> Floor, City Hall  
65 Niagara Square  
Buffalo, New York 14202

Report Number: 2005M-102

Dear Mr. Brown:

In 1998, the City of Buffalo and the Buffalo City School District established the Joint Schools Construction Board (JSCB) to manage a ten-year, five-phase capital program (Project) for school buildings. In June 2002, the JSCB contracted with Louis P. Ciminelli Management Co., Inc. (Ciminelli) to act as Program Provider. Currently, Phase I is substantially complete, and Phase II is underway.

In addition to constructing new schools or rehabbing existing buildings, State and local officials had other objectives when they authorized the Project, namely to improve employment opportunities for minorities and women in the construction trades workforce in the Buffalo area. For example, minorities are 10.5 percent of current union membership, while minorities are 46 percent of the population in the City of Buffalo and 18 percent in Erie County.

Pursuant to our audit authority in Article V, Section 1 of the State Constitution and Section 34 of the General Municipal Law, we conducted an examination to determine whether the diversity goals of the Project were being adequately pursued and achieved. The examination period was July 1, 2004 to October 4, 2005. This report of examination letter contains our findings and recommendations. We discussed the findings and recommendations with appropriate officials and considered their comments in preparing this report. The response letter to our draft report can be found in Appendix A.

### **Summary of Examination Results**

The goal of achieving 35 percent minority and 10 percent female membership in the construction trade unions within the first five years of the Project cannot possibly be accomplished given the actual performance to date and the plans in place to address this issue in the future. As recommended in our prior report (Progress Report on the Buffalo Joint Schools Construction Board: Financing, Reconstruction and Diversity Goals) the JSCB needs to play a greater role in ensuring that its diversity

plan is successfully implemented. The JSCB and Ciminelli are not actively using all the means available to them to pursue full implementation of the workforce and business development diversity goals.<sup>1</sup>

### **Overall Workforce and Business Diversity Percentages are Good, but Many Contractors Did Not Comply with the DDP Rules**

Ciminelli is required by its contract with the JSCB (known as the “Comprehensive Program Packaging and Development Services Provider”, or PPDS Agreement) to implement and comply with the “Development and Diversification Plan for Workforce and Businesses (DDP)” to ensure minority and women participation in the project, and to implement policies and procedures designed to achieve equal employment opportunities and affirmative action goals. The DDP, which is part of the PPDS, represents a statement to the community of a dedicated effort to provide current employment and career training opportunities in the construction trades. The plan requires all contractors, suppliers or professional service firms providing goods or services to the Project (contractors) to comply with the following workforce diversity goals:

- **Workforce Diversity and Development:** The DDP requires each contractor to ensure that the workforce which it engages to perform work for the Project includes 23 percent minority and 7 percent female representation.
- **Business Diversity and Development:** The DDP requires each contractor, supplier, or professional services firm to engage minority-owned business enterprises (MBE’s) and women-owned business enterprises (WBE’s) to perform 25 percent and 5 percent, respectively of each contract/purchase order.

To demonstrate compliance with workforce and business diversity goals, all contractors are required to provide to an independent Compliance Monitor, designated by the JSCB, a monthly workforce census report, weekly certified payroll records, and a monthly report indicating what portion of their contract has been sub-let to identified M/WBE’s and how much has been paid to each M/WBE to date.

The Compliance Monitor issues a monthly report to the JSCB on contractor compliance. The DDP also provides the following remedies to be used by the JSCB in the event that contractors fail to comply with the minority/women workforce and business goals through the duration of the project: 1) summoning the contractor for a hearing; 2) withholding contract payments pending resolution of the hearing; 3) assessing liquidated damages; 4) withholding, suspending, canceling or terminating the contract or purchase order; and 5) identifying the contractor as “non-responsive” for future contracts on the Project.

As reported by the Compliance Monitor in its August 2005 report, the minority and women workforce percentages for Phase 1 were 22.19 percent and 7.25 percent respectively; and the MBE and WBE percentages were 25.37 percent and 10.42 percent, respectively. However, since the report shows that 58 of 76 1<sup>st</sup> tier contractors did not meet the required minority and/or women workforce development goals and 66 of 76 did not meet the required minority and/or women owned business development goals, it is

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<sup>1</sup> Under a Master Construction Agreement, entered into among the City of Buffalo City School District, the JSCB and Ciminelli, the JSCB has assigned and transferred to the District those rights and obligations arising under the terms of the PPDS Agreement, which is discussed infra, to the extent necessary for the District to implement the Master Construction Agreement. To the extent that any finding or recommendation herein is addressed to the JSCB, but relates to a right or obligation assigned and transferred to the District, it should be presumed that the finding or recommendation applies equally to the District.

apparent that the overall compliance with any of these goals has been due to a handful of contractors that have overcome the shortfalls of many of the other contractors. For example,

- 11 contractors had less than 12 percent minority employees while 16 contractors had from 30 to 77 percent minority employees;
- 19 contractors had less than 4 percent women employees, while 4 contractors had from 29 to slightly over 60 percent women employees;
- 9 contractors had no MBEs, and 15 more had less than 15 percent MBEs; 5 contractors had more than 35 percent MBEs; and
- 18 contractors had no WBE's, and 6 more contractors had less than 2 percent of WBEs while 6 contractors had more than 15 percent.

### **Final Audit of Phase 1 M/WBE Utilization Rates**

The Compliance Monitor attempted to conduct an audit of supporting documentation to verify the information pertaining to M/WBE utilization reported by all Phase 1 contractors. The compliance monitor indicated at the August 2, 2005 JSCB meeting that very few contractors had responded to its information requests. Although the JSCB subsequently instructed the Compliance Monitor to complete the audit and instructed Ciminelli to assist in the effort to get all contractors to comply; as of September 15, 2005, 40 of the 80 contractors had still not responded to the documentation requests for the audit. Eventually, the final audit of compliance with the M/WBE utilization rates of 25% and 5%, respectively, was completed and a report was released in December 2005. The report, which includes M/WBE statistics for Phase 1 architects, construction contractors, and professional service providers, indicated that overall utilization rates slightly exceeded the project diversity goals (26.79% MBE, 7.33% WBE). However, the December 2005 report indicated that 22 businesses, which held Phase 1 contracts totaling nearly \$20 million, did not report any payments to any certified minority and women owned business enterprises. Despite these inconsistent results, the JSCB has not called any contractors in for a hearing or taken any other action to obtain contractor compliance with the diversity goals.

### **Union Diversity Goals Are Not Being Achieved**

In accordance with a provision in the PPDS agreement, and at the “behest and direction of the JSCB”, Ciminelli entered into a project labor agreement (PLA) with the Building and Construction Trades Council of Buffalo (the Unions) in July 2003. The PLA was subject to the review and approval of the JSCB, and once approved it became “the policy of the JSCB that the construction work covered by [the PLA should] be contracted to contractors agreeing to execute and be bound by the terms of [the PLA]”.

The agreement's goal is to increase union membership to 35 percent minority and 10 percent women members within the first five years of the project.<sup>2</sup> The Unions also agreed to enrollment goals for apprenticeship classes of 25 percent minority and 10 percent women. However, these goals for the apprenticeship classes are obviously inadequate to achieve the total membership goals since the current membership of minorities and women is approximately 10.5 percent and 2.3 percent respectively. To

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<sup>2</sup> During Phase 1, the unions claimed to have interpreted this to be a requirement to adopt a plan within five years, as opposed to meeting membership goals within five years. The PLA was amended to require that each union submit, by April 15, 2005, a plan to achieve the membership goals within the first five years of the project. Ten of 19 unions have submitted plans and we comment on them later in this report.

increase enrollment to 35 percent and 10 percent, new members would have to significantly exceed 35 percent and 10 percent minorities and women, respectively.

Each union is required, at least annually, to provide to Ciminelli a census report of its members, which includes the number of minority and women members and their status as apprentice or journeyman. While the 2005 census reports provided to us did not include any information from two unions, the other 17 unions reported total membership of 7,179, of which 755 (10.5 percent) were minority and 166 (2.3 percent) were women. This is significantly short of the minority and women membership levels set in the PLA and shows little progress since the 2003 census showed 8.9 percent minority and 2.0 percent women membership. The unions would need to add at least 1,758 minorities and 552 women within the next three years to meet the goals<sup>3</sup>. To put this into perspective, since the current pre-apprenticeship training programs, which were developed to help prepare and qualify individuals for union membership and for working on JSCB projects, produce an average of 6 graduates a month, it would take 32 years to produce enough new union members to achieve the diversity goals, if all the training graduates were minorities and women<sup>4</sup>. That of course is not happening since of the 799 apprentices reported in the 2005 census, 21.8 percent were minorities and 8.01 percent women. While the apprentice percentages have increased from 17.17 and 5.83 percent in 2003, they are still significantly behind the interim goal for apprenticeship classes (25 and 10 percent, respectively), and as noted above, even if those goals were met, they are grossly insufficient to meet the ultimate goals for union membership (35 and 10 percent).

Given the lack of progress, the unions will fall far short of meeting the diversity goals set in the PLA. Nine unions have not submitted any plan to achieve the membership enrollment goals and of the 10 unions that had submitted plans as of September 2005, none of the plans included specific steps to achieve the membership goals at any time during the project. Ciminelli, as project manager, has not been successful in obtaining plans from the other nine unions and has not required modifications to existing plans that would improve the progress towards meeting the goals. Furthermore, we found no indication that the JSCB has required additional action by Ciminelli.

### **Contracts for Training Programs Have Lagged**

On October 1, 2001, the JSCB contracted with Career Path to identify, plan and facilitate the workforce needs and business opportunities of the Program. Since the contract ended in May, 2004, the JSCB requested and Ciminelli agreed to execute a contract with, and provide funding to Career Path. Contract negotiations languished and as of October 4, 2005, an executed Career Path contract still did not exist. Career Path helps facilitate training and job referrals. Without a contract, Career Path has been unable to appropriately perform its assigned duties, including oversight of the training program, and monitoring and reporting on the status of tasks assigned by the JSCB to various parties. We were informed subsequent to the completion of our audit that a contract was executed in December, 2005, which covers the period January 1, 2005 to December 31, 2007.

Furthermore, in the project labor agreement, contractors agreed to contribute \$.10 per trade or craft hour worked on the project to fund the operation of the building trades' pre-apprenticeship training center, where trainees would eventually become members of various local trade unions and achieve journeyman

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<sup>3</sup> JSCB Officials indicated that the NYS Department of Labor limits the number of apprenticeships a union can add each year, based on the amount of work that the unions can demonstrate will be available during the applicable time period.

<sup>4</sup> The pre-apprenticeship training programs are not a prerequisite for otherwise qualified candidates. The unions use other methods to recruit minority and female members, including Job Fairs, High School Career Days, Community Outreach programs, and attempts to organize non-union shops on the job sites.

status. However, the building trades' pre-apprenticeship training center was closed down, with approximately \$600,000 in unpaid debts, after the first year of operation. Only 180 students graduated from the program during its term of operation, of which only 93 are reported as remaining employed in the construction trades.

Currently, the Buffalo-Niagara Jobs Initiative (BNJI) was created to start a new training program. The first class began May 3, 2005 and new sessions begin every month. A recent report detailing the 3 sessions started in May, June and July indicated that of a total of 38 who enrolled, 19 completed the program, consisting of three women and fifteen minorities. One graduate has attained union membership, and six have been placed in other employment opportunities. Assuming that pre-apprenticeship class participants would be indentured into the unions to increase minority and women membership, we note that to date only 1 of 19 has become a union member. More importantly, even if all 19 graduates (3 month total) could be indentured, using the monthly average of 6 graduates and the total new membership goal of 2,310, it would take approximately 385 classes, or 32 years to train the number of apprentices needed to reach the membership goals of the PLA. Thus, it is evident that the current training program will not achieve the goals for women and minorities.

In addition, the JSCB requested and Ciminelli agreed to execute a contract with, and provide funding to the BNJI to continue the new training program. The contract was to be in place in February 2005. However, we were informed subsequent to the completion of our audit that a contract was executed in December, 2005, which covers the period August 1, 2005 to December 31, 2007. The failure to execute necessary contracts on a timely basis can impede efforts to improve training.

Our previous report provided comprehensive recommendations on how to improve oversight of the DDP goals, including: making use of sanctions for contractors not complying with the goals, adding performance reporting to JSCB monthly meetings, articulating specific plans to reach the ultimate goals for union membership, and improving and fully integrating the training efforts with the diversity goals. Unfortunately, the Board has not acted on these recommendations.

## **Recommendations**

The JSCB needs to take immediate action, within its contractual rights and consistent with law, to enforce and achieve its workforce and business development and diversity goals. Specifically:

1. The JSCB should ensure that Ciminelli requires all unions to submit a plan for achieving their membership diversity goals, as required. These plans should include specific steps that will be taken to achieve the membership goals. JSCB and Ciminelli should review the plans to determine if they will achieve the goals and require improvements to any plans that aren't adequate
2. The JSCB should utilize the various mechanisms available to it, as set forth in the DDP and consistent with law, in the event that contractors fail to maintain the workforce goals through the duration of the Project. These mechanisms include:
  - a. summoning the contractor for a hearing;
  - b. withholding contract payments pending resolution of the hearing;
  - c. assessing liquidated damages;
  - d. withholding, suspending, canceling or terminating the contract; and
  - e. identifying the bidder as "non-responsive" for future contracts on the project.

3. JSCB should review reports from the Compliance Monitor monthly and meet with any contractors not complying with the diversity goals. These meetings should review the actions taken by the contractor to comply with the diversity goals and develop defined corrective action plans.
4. JSCB should create a corrective action plan for Ciminelli that addresses the diversity goals and includes specific timeframes for implementation.
5. A strong and significantly expanded training program should be developed and implemented as soon as possible that is capable of producing graduates who are ready to enter union apprenticeships. To achieve this goal, the JSCB should ensure that training contracts are executed in a timely manner. This training program should be fully integrated with the Project to ease the transition from the training program into union membership and employment. The training plan should have clearly defined goals for each individual union and should include mechanisms for monitoring participants in each phase of the training continuum. JSCB should periodically review training outcomes and recommend corrective action if participants in the training programs are not achieving union membership and employment.

The JSCB has the responsibility to initiate corrective action. Pursuant to Section 35 of the General Municipal Law, which describes the process of creating a corrective action plan, the JSCB should prepare a plan of action that addresses the recommendations in this report and forward the plan to our office within 90 days. We encourage the JSCB to make this plan available for public review. Refer to the attached document for additional information on filing a corrective action plan. Our Office is available to assist you upon request. If you have any further questions, please contact our Buffalo Regional Office at (716) 847-3647.

Sincerely,



Steven J. Hancox  
Assistant Comptroller  
Division of Local Government Services and  
Economic Development

## **APPENDIX A**

### **RESPONSE FROM JSCB OFFICIALS**

The JSCB response to this examination can be found on the following pages.



CITY OF BUFFALO  
OFFICE OF THE MAYOR

BYRON W. BROWN  
MAYOR

May 17, 2006

Mr. Steven J. Hancox  
Assistant Comptroller  
Division of Local Government Services and  
Economic Development  
Office of the State Comptroller  
110 State Street  
Albany, New York 12236

Dear Mr. Hancox:

We are writing in response to the draft report on the audit you conducted to determine whether the diversity goals of the ten-year, five-phase capital program to reconstruct Buffalo City Schools (Program) were being adequately pursued and achieved.

It has been our strategy, consistent with the contractual structure of the Program, to look to L.P. Ciminelli Inc. as the District's prime contractor to achieve the goals on a Program-wide basis by means of race-neutral outreach, training and assistance programs and a flexible and discretionary subcontract-by-subcontract approach. As demonstrated by the compliance monitor's final report, that strategy proved successful in achieving compliance with the goals and an unprecedented level of minority participation in Phase I of the Program.

We are committed to the diversification objectives of the Program and we will continue to work with L.P. Ciminelli Inc. to develop and implement outreach, training and assistance programs as effectively as possible. We appreciate your recommendations to advance those objectives.

We also request correction of certain errors in the draft report.

1. Footnote No. 1 at pages 1 and 2 recognizes that the JSCB has transferred its rights and obligations, insofar as relevant to this discussion, to the District. It then states, however, that the report's findings and recommendations are to apply equally to the District. This implies that the JSCB and the District share those rights and obligations, when in fact they belong solely to the District.



Mr. Steven J. Hancox  
May 17, 2006  
Page Two

2. At page 2, the draft report indicates, that based on the August 2005 report from the Compliance Monitor, the Program was not in compliance with the diversification and business development goals. This report was incomplete and was ultimately superseded by the Compliance Monitor's final December, 2005 compliance audit, which did find that the diversification and business development goals for the Program were attained.

3. With respect to the description of the Compliance Monitor's final audit which appears on page 3 of the draft report, the penultimate sentence reflects a significant misunderstanding regarding the reporting of compliance with the diversification and business development goals. That sentence indicates that businesses holding approximately \$20 million in contracts in Phase I did not report any payments to certified minority and women-owned business enterprises. This is not accurate. In fact, the businesses involved did report compliance with the required diversification and business development goals for the project utilizing the DDP form required by the JSCB for this purpose. During the latter stages of Phase I, the Compliance Monitor determined that for final compliance audit purposes, it would only count the diversification and business development information for subcontractors which provided both the DDP form and copies of the front and back side of canceled checks evidencing payment to the minority and women-owned businesses identified on the DDP form. While the rationale for this decision was sound, it overlooked the fact that under the terms and conditions of the Program Providers agreements with the various subcontractors, the subcontractors were only required to submit the DDP form, not the requested backup information. Therefore, to the extent the subcontractors complied with this project closeout requirement, they did so on a voluntary basis. Even though some of the subcontractors did not provide the requested backup documentation for their DDP forms and were therefore assumed to have zero M/WBE participation, the Compliance Monitor was nevertheless able to determine that the diversification and business development goals for Phase I of the Project were, in fact, exceeded. At the December 2005 JSCB meeting, the Compliance Monitor stated publicly that if all of the subcontractors had supplied the requested backup for their DDP forms, the diversification and business development compliance numbers for the project would have been even higher.

4. The draft report's discussion of union goals under the PLA seems to assume that achievement of those goals is solely through the Program. The union goals are industry-wide, and they should be pursued on an industry-wide basis, as well as through the Program.


Mr. Steven J. Hancox  
May 17, 2006  
Page Three

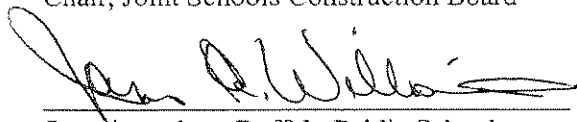
5. In the last paragraph of page 4, the draft report states that because of the delay in negotiation of the contract, Career Path was unable to perform its duties. This is not accurate. For Phase II of the project, Career Path was a voluntary initiative undertaken by the Program Provider and paid for entirely out of the Program Provider's funds. Career Path is not a requirement of the Program and is not mandated by any contractual obligation between the Program Provider and either the JSCB or the District. Nonetheless, Career Path continued to perform its duties throughout an admittedly protracted negotiation of a new contract (in which there were delays on both sides). Indeed, Career Path's chief spokesperson commendably vowed on several occasions to continue their efforts with or without a contract.

Please consider this our formal response to your audit findings and include it as an appendix to your final audit report.

Thank you for your consideration of this response.

Sincerely,

  
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Mayor, City of Buffalo  
Chair, Joint Schools Construction Board

  
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Superintendent, Buffalo Public Schools  
Vice-Chair, Joint Schools Construction Board