

**AUDIT OF SBA'S ADMINISTRATION OF THE
PROCUREMENT ACTIVITIES OF ASSET SALE
DUE DILIGENCE CONTRACTS AND TASK ORDERS**

AUDIT REPORT NUMBER 4-16

MARCH 17, 2004

This report may contain proprietary information subject to the provisions of 18 USC § 1905 and must not be released to the public or another agency without permission of the Office of Inspector General.

**AUDIT OF SBA'S ADMINISTRATION OF THE
PROCUREMENT ACTIVITIES OF ASSET SALE
DUE DILIGENCE CONTRACTS AND TASK ORDERS**

Table of Contents

	Page
EXECUTIVE SUMMARY	i
INTRODUCTION	
A. Background	1
B. Objectives and Scope	2
AUDIT RESULTS	
Finding 1: SBA Did Not Follow Proper Procurement Practices Which Resulted In Asset Sale Due Diligence Contracts and Task Orders That Did Not Benefit Small Businesses.....	3
Finding 2: Contractors Did Not Receive Impartial, Fair and Equitable Treatment	15
Finding 3: Discussions Were Not Held for Due Diligence Contracts and Task Orders	18
Finding 4: SBA's Acquisition Planning and Monitoring Requires Improvement.....	20
Finding 5: OPGM Did Not Always Comply with Procurement Policies and Procedures	22
Finding 6: Due Diligence Contracts and Task Orders Were Not Properly Reported to the Federal Procurement Data System.....	27
Finding 7: SBA Did Not Follow Proper Procedures for FOIA Requests	28
Finding 8: An Effective SOP Is Outdated	30
Finding 9: Use of the Federal Supply Schedule to Procure Due Diligence Services Is Not in SBA's Best Interest	31
Finding 10: A Complaint About SBA Was Unsupported	33



**U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF INSPECTOR GENERAL
WASHINGTON, D.C. 20416**

Audit Report
Issue Date: March 17, 2004
Number: 4-16

To: Lewis Andrews
Associate Deputy Administrator for Management and Administration

Frank J. Lalumiere
Acting Associate Deputy Administrator for Government Contracting and Business
Development

Ronald E. Bew
Associate Deputy Administrator for Capital Access

Thomas A. Dumaresq
Chief Financial Officer

Delorice P. Ford
Assistant Administrator for Hearings and Appeals

From: Robert G. Seabrooks [FOIA ex. 6]
Assistant Inspector General for Auditing

Subject: Audit of SBA's Administration of the Procurement Activities of Asset Sale Due
Diligence Contracts and Task Orders

Attached is a copy of the subject audit report. The findings in this report are the conclusions of the Office of Inspector General's Auditing Division. The recommendations are subject to review and implementation of corrective action in accordance with existing Agency procedures for audit follow-up resolution.

Please provide your management decision for each recommendation addressed to you within 30 days from the date of this report using the attached SBA Forms 1824, Recommendation Action Sheet.

Should you or your staff have any questions, please contact Robert Hultberg, Director, Business Development Programs Group, at (202) 205-[FOIA ex. 6].

Attachments

EXECUTIVE SUMMARY

SBA's Asset Sale Program was initiated in Fiscal Year (FY) 1999 to sell SBA's owned loan portfolio at the direction of the Office of Management and Budget (OMB). For each asset sale, SBA procured a due diligence contractor to perform a comprehensive review of loan portfolios and provide complete and accurate information to potential investors. As of December 1, 2003, SBA procured due diligence services for eight asset sales using seven contract/task order awards.

In March 2002, the Office of Inspector General (OIG) received an anonymous complaint that alleged SBA's contracting practices for procuring due diligence services may cost the taxpayers an extra \$270 million. The complaint portrayed that if the same due diligence contractor were used for all SBA asset sales, SBA would save taxpayers \$270 million. When the OIG began gathering background information to evaluate the complaint, other contracting issues were noted. Therefore, the OIG initiated an audit to evaluate the complaint as well as SBA's procurement activities related to the due diligence awards.

The objectives of the audit were to determine if (1) SBA followed proper pre-award procurement methods, (2) SBA awarded contracts and task orders in accordance with policies and procedures, (3) SBA performed post award duties in accordance with policies and procedures, (4) SBA responded to Freedom of Information Act (FOIA) requests in accordance with policies and procedures, (5) SBA's use of the General Services Administration's (GSA) Federal Supply Schedule (FSS) was in SBA's best interest, and (6) the allegation presented in the complaint was supported.

Our audit found that SBA did not always follow proper pre-award procurement methods; and award contracts and task orders, perform post award duties and respond to FOIA requests in accordance with applicable policies and procedures. We also found that the use of the FSS to procure due diligence services was not in SBA's best interest because it did not ensure SBA received the best value with regards to the cost and quality of services. Additionally, our audit found that the allegation presented in the complaint was unsupported.

We concluded that procurement practices for SBA's asset sale due diligence contracts and task orders did not benefit small businesses because SBA:

- Did not assure that SBA's small business regulations on subcontracting were complied with and in at least two of the seven awards, the 50 percent rule was violated. Additionally, documentation provided by the due diligence contractors showed that of \$147,083,302 in revenue received by the contractors, \$81,590,521 or 55.5 percent was paid to subcontractors, imaging specialists, third party report vendors, computer database/module contractors and independent contractors, including potentially "other than small" businesses;
- Did not question an improper teaming arrangement;
- Did not support its intent to make due diligence awards to small, 8(a) businesses for one due diligence task order; and
- Solicited only one company for a due diligence task order in violation of regulations.

Our audit also found that SBA did not:

- Ensure contractors received impartial, fair and equitable treatment;
- Conduct discussions with offerors when necessary;
- Perform and document acquisition planning and monitoring in accordance with requirements;
- Always comply with other procurement policies and procedures;
- Properly report contracts and task orders to the Federal Procurement Data System (FPDS);
- Follow required procedures in handling FOIA requests; and
- Ensure revised procedures were issued when its existing Standard Operating Procedure (SOP) became outdated.

Additionally, our audit found that GSA's evaluations and determinations of responsibility of the due diligence contractors were unreliable and that SBA was overcharged by three of its contractors. Furthermore, we found that the allegation presented in the complaint about SBA was unsupported because feedback from bidders obtained by SBA's asset sale Transaction Financial Advisors did not support that SBA would have saved taxpayers \$270 million if one due diligence contractor were used for all SBA asset sales.

As a result of the above, we made 30 recommendations to correct the identified procurement and other contract administration deficiencies and questioned \$1,690,838 in overcharges to SBA.

Responsible SBA officials provided responses to the draft report. The Assistant Administrator for Administration (AA/A) generally disagreed with 5 of the 10 findings and 4 of the 23 recommendations addressed to him. The AA/A, however, did not provide comments on the remaining findings and recommendations addressed to him. These recommendations will be resolved during the audit resolution process. The Acting Associate Administrator for Government Contracting and Acting Assistant Administrator for Policy, Planning and Liaison generally agreed with the findings and recommendations addressed to him. The Acting Assistant Administrator for Portfolio Management and the Assistant Administrator for Hearings and Appeals generally agreed with the recommendations addressed to them. The Chief Financial Officer agreed with one of the recommendations addressed to him and requested that the wording of the other recommendation be revised. The responses are summarized and analyzed at the end of each finding and are included as Attachments 1 through 5.

INTRODUCTION

A. Background

At the direction of OMB, SBA's Asset Sale Program was initiated in FY 1999 to sell SBA's owned loan portfolio. For each asset sale, SBA procured a due diligence contractor to perform a comprehensive review of loan portfolios and provide complete and accurate loan information to potential investors. As of December 1, 2003, SBA procured due diligence services for eight asset sales using seven contract/task order awards. The due diligence awards for the eight sales totaled \$186,071,301. Actual payments for these awards totaled \$147,083,302.

SBA desired to issue the due diligence awards to small businesses participating in SBA's 8(a) program. In doing so, SBA awarded 8(a) contracts to procure the due diligence services for asset sales 1 through 3 and used a small business set-aside FSS to procure services from "small" firms for asset sales 4 through 8. For the latter, SBA targeted businesses on the schedule who were participants in SBA's 8(a) program. The due diligence contractors were subject to SBA's small business regulations, including subcontracting limitations. Accordingly, the contractors were required to perform at least 50 percent of the personnel costs of the contracts or task orders with their own employees.

The asset sale due diligence contracts and task orders were funded from a non-budgetary financing account that was reimbursed from the asset sale proceeds upon receipt of the proceeds. In accordance with the General Accounting Office's (GAO) Appropriations Law, the funds used to procure due diligence services were determined to be appropriated funds. Therefore, SBA's procurement and contract administration activities with regards to the due diligence contracts and task orders were subject to Federal Acquisition Regulations (FAR) and other governing federal procurement regulations. The Office of Procurement and Grants Management (OPGM) was responsible for procuring and administering the due diligence awards and the Asset Sales Program Office within SBA's Office of Financial Assistance coordinated SBA's asset sales. The latter cited program officials served as Contracting Officer's Technical Representatives (COTR) for the due diligence contracts and task orders.

In March 2002, the OIG was notified by Senator Bond, Ranking Member of the Senate Committee on Small Business and Entrepreneurship, of serious allegations with regard to SBA's asset sale due diligence contracts and task orders. The allegations appeared to implicate the contracting practices at SBA and involve over \$250 million of taxpayers' funds. Additionally, the OIG was informed of an allegation that SBA was retaliating against one of the due diligence contractors who had filed a bid protest with GAO related to the awards of the due diligence task orders for asset sales 7 and 8. This allegation included a claim that SBA did not properly handle FOIA requests related to this matter. The OIG received an anonymous complaint entitled, *"Procurement Run Amok: Mismanagement in the Small Business Administration's Procurement of Financial Services - A Case for Reform"* that provided a basis for the claim that SBA's contracting practices for procuring asset sale due diligence services may cost the taxpayers an extra \$270 million.

B. Objectives and Scope

The objectives of the audit were to determine if (1) SBA followed proper pre-award procurement methods, (2) SBA awarded contracts and task orders in accordance with policies and procedures, (3) SBA performed post award duties in accordance with policies and procedures, (4) SBA responded to FOIA requests in accordance with policies and procedures, (5) SBA's use of the GSA FSS was in SBA's best interest, and (6) the allegation presented in the complaint was supported. Our audit was limited to a review of SBA's asset sale due diligence contracts and task orders awarded from FY 1999 through FY 2002.

To accomplish the audit objectives, we reviewed the OPGM contract files and documentation maintained by the Asset Sales Program Office, the Office of General Counsel (OGC), the Office of the Chief Financial Officer (OCFO), and the Freedom of Information/Privacy Act (FOI/PA) Office within SBA's Office of Hearings and Appeals (OHA). We also reviewed GSA's contract files and documentation obtained from the due diligence contractors. Interviews were conducted with SBA officials from OPGM, the Asset Sales Program Office, OGC, OCFO, the Office of Business Development, the Office of Government Contracting, the Office of Policy, Planning and Liaison, and with officials from GSA, GAO, and OMB. Interviews were also conducted with the due diligence contractors.

Labor information was obtained from the due diligence contractors in order to determine compliance with SBA's small business regulations on subcontracting. The data provided by the contractors was not verified and validated.

Fieldwork was performed in Washington, DC from October 2002 to December 2003. The audit was conducted in accordance with Government Auditing Standards.

AUDIT RESULTS

Finding 1: SBA Did Not Follow Proper Procurement Practices Which Resulted In Asset Sale Due Diligence Contracts and Task Orders That Did Not Benefit Small Businesses

SBA did not conduct sufficient analyses and take steps to assure SBA's small business regulations were complied with and the interests of small businesses were protected for the asset sale due diligence contracts and task orders. Specifically, SBA did not:

- Assure that SBA's small business regulations on subcontracting were complied with. Therefore, two due diligence contractors (sales 1 and 5) violated the 50 percent rule and two other contractors (sales 7 and 8) may have violated the 50 percent rule by having other businesses perform more than 50 percent of the cost of personnel on the projects. These other businesses may have included "other than small businesses."
- Question an improper teaming arrangement (sale 4) and as a result, awarded a due diligence task order to an ineligible business.
- Support its intent to make due diligence awards to small, 8(a) businesses for one due diligence task order (sale 6).
- Solicit all eligible contractors in accordance with GSA's ordering procedures and as a result, did not ensure all small business contractors received impartial, fair and equitable treatment or that the best value was obtained for one due diligence task order (sale 5).

Additionally, GSA's evaluations and responsibility determinations of the contractors who performed due diligence services for sales 4 through 8 were inadequate and unreliable and, consequently, SBA's use of GSA's FSS to procure due diligence services did not ensure the selected contractors could perform SBA's requirements without violating small business regulations. SBA should know how to use FSS to benefit small businesses, yet, it did not take steps to protect the interests of small businesses in procuring due diligence services for SBA's asset sales. SBA's errors in awarding the due diligence contracts and task orders demonstrated a lack of knowledge of, or disregard for, its own regulations designed to protect the interests of small businesses.

Specific questionable practices found for each sale are summarized in the following table and discussed in detail below.

Summary of Questionable Procurement Practices for SBA's Due Diligence Contracts and Task Orders by Each Sale

Sale #	Subcontracting Red Flags	Violation of 50% rule	Potential violation of 50% rule	Affiliation not questioned	Improper Teaming Arrangement not questioned	SBA's Award Intent Unsupported	Improper solicitation
1	X	X					
2			X				
3			X				
4			X		X		
5	X	X					X
6			X			X	
7	X		X	X			
8	X		X	X			

Red flags of Subcontracting and Teaming Violations in Proposals Were Not Questioned

SBA did not conduct sufficient analyses and take steps to assure that SBA's small business regulations on subcontracting were followed. Proposals of the successful contractors for four of the seven due diligence awards contained red flags of possible subcontracting violations that were not questioned by contracting specialists. Proposals of two of these due diligence contractors also contained indications that the contractors were affiliated with their ostensible subcontractors, yet the contractor/subcontractor relationships were not questioned. An SBA contracting specialist also did not question an improper teaming arrangement disclosed in another due diligence contractor's proposal. As a result, SBA may have awarded due diligence contracts and task orders that were primarily conducted by "other than small" contractors, contrary to its intention and the mission of SBA to help small businesses. SBA also awarded a due diligence task order to a contractor who had an improper teaming arrangement and was therefore, ineligible for the award.

- **Violations of SBA's 50 Percent Rule**

SBA desired to issue the due diligence awards to small businesses participating in SBA's 8(a) program. In doing so, SBA awarded 8(a) contracts to procure the due diligence services for asset sales 1 through 3 and used a small business set-aside FSS to procure services from small firms for asset sales 4 through 8. SBA targeted businesses on the schedule who were participants in SBA's 8(a) program. SBA did not, however, conduct sufficient analyses and take steps to assure that SBA's small business regulations on subcontracting were followed. As a result, two of the seven due diligence awards (sales 1 and 5) were in violation of the 50 percent rule, and two of the awards (sales 7 and 8) may have been in violation of the 50 percent rule due to the prime contractors not being able to complete the due diligence requirements without exceeding subcontracting limitations. Additionally, the other businesses who completed requirements may have included "other than small businesses." Evidence in the proposals of the successful due diligence contractors for asset sales 1, 5, 7 and 8 indicated that subcontracting limitations would be exceeded, yet, red flags were not questioned by the contracting specialists.

13 CFR 125.6 states that in order to be awarded a small business set-aside contract or an 8(a) contract for services, the small business concern must agree to perform at least 50 percent of the cost of the contract incurred for personnel with its own employees. The contractors' FSS contracts contained FAR clauses 52.219-6, "Notice of Total Small Business Set-Aside" and 52.219-14, "Limitations on Subcontracting." These clauses state that (1) offers are solicited only from small business concerns and that any award resulting from the solicitation will be made to a small business concern; and (2) the offeror agrees that in performance of a contract for services, at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern. FAR Part 1.6 requires contracting officers to ensure all requirements of regulations are met before entering into a contract. Additionally, it requires contracting officers to ensure compliance with the terms of the contract. Therefore, it was the responsibility of the contracting specialists to question potential contract violations and monitor the contractors' compliance with 13 CFR 125.6 and FAR clause 52.219-14 (the 50 percent rule).

The proposal of the successful contractor who received the due diligence contract for asset sale 1 stated a subcontractor would be providing approximately half of the technical and administrative project staff and performing approximately 49 percent of the due diligence and sales support requirements. Additionally, the imaging component of the contract, which was noted by Asset Sale Program officials to be a very important element of SBA's contract requirements, was also to be subcontracted. The Technical Evaluation Panel (TEP) noted the accepted prime contractor for asset sale 5 was heavily dependant on a subcontractor. Finally, the accepted proposal for asset sale 7 showed that only one of sixteen proposed key persons was a prime contractor employee and the accepted proposal for asset sale 8 showed that only three of nineteen proposed key persons were prime contractor employees. Based on the above, we concluded that the contractors' proposals contained red flags that subcontracting limitations were going to be exceeded that should have been questioned by the contracting specialists. The contracting specialists for the due diligence contracts and task orders for asset sales 1, 5, 7 and 8 stated, however, that the subcontracting information presented in the contractors' proposals did not raise red flags that subcontracting limitations would be exceeded.

We requested support from the successful prime due diligence contractors to determine whether at least 50 percent of the cost of the contract performance incurred for personnel was expended for employees of the prime contractors. We found that the contractors did not consider labor performed by imaging specialists and "third party report vendors" (vendors who performed appraisals, bankruptcy searches, broker price opinions, drive by evaluations, environmental reviews, etc.) in determining their compliance with the 50 percent rule. Additionally, two of the contractors did not consider the labor performed by subcontractors who provided computer databases and modules used for due diligence in determining their compliance with the 50 percent rule. Explanations provided by the contractors included the following: (1) when a system is purchased, the labor for tailoring, testing and maintaining the system is part of the cost of the system; (2) the product was offered by the subcontractor at a fixed price per page and a major element of the cost was the proprietary software, while minimum labor cost included was greatly dependent on the technology being employed; (3) there were only a few companies with the required imaging experience and they were large businesses; (4) the required third party reports were highly specialized reports that required the use of licensed professional employees and, therefore, the reports are akin to commercial "off-the-shelf" software; (5) the use of third

party reports was required under the task order and, therefore, should not be included in calculating compliance with the 50 percent rule; and (6) due diligence contractors are not privy to labor rates, or any labor or non-labor costs of the third party report vendors, making it impossible to calculate compliance with the 50 percent rule.

There is no documentation in the contract files to show that the 50 percent rule was considered during proposal review or monitored after contract award for any of the asset sale due diligence awards. There is also no support that the contracting specialists determined whether or not the labor of the third party report vendors, imaging specialists, and computer database/module contractors (the "other parties") should be considered in calculating the contractors' compliance with subcontracting limitations. Officials from SBA's Office of Policy, Planning and Liaison within the Office of Government Contracting and Business Development, the office responsible for interpreting the 50 percent rule, stated that if OPGM had requested an interpretation of the 50 percent rule as it pertains to due diligence contracts, they would have worked with OGC to determine if the labor of the "other parties" should have been considered in calculating compliance with the 50 percent rule. Without such determination, we concluded that the contracting specialists had no valid basis to determine the due diligence contractors' compliance with the 50 percent rule.

Even without considering the labor contributed by the "other parties," however, we determined that at least two of the due diligence contractors violated the 50 percent rule. The due diligence contractors for asset sales 1 and 5 only performed 38 and 39 percent, respectively, of the cost of labor incurred for due diligence tasks (primarily file review and data maintenance) with their own employees. Additionally, if the due diligence contractor for asset sale 8 had performed in accordance with its proposal, it also would have violated the 50 percent rule. We obtained a subcontracting agreement which showed that the prime contractor would supply only 33 $\frac{1}{3}$ percent of the personnel and fund only 33 $\frac{1}{3}$ percent of the cost of personnel for the due diligence task order for asset sale 8. Accordingly, if this agreement had been followed, the contractor would have clearly violated the 50 percent rule. The contractor explained, however, that one of its subcontractors dropped out of the project and that the prime contractor hired individuals to compensate for the planned participation of the subcontractor. Accordingly, the prime contractor stated that it complied with the 50 percent rule.

Since there was no determination made as to whether the labor of the "other parties" should have been included for assessing compliance with the 50 percent rule, we considered the effect on the contractors' compliance had this labor both been included and excluded. As noted above, the due diligence contractors for asset sales 1 and 5 violated the 50 percent rule whether the labor of the "other parties" should have been considered or not. We further calculated from data supplied by the contractors that the prime contractors for asset sales 7 and 8 completed 57 and 51 percent, respectively, of the cost of labor incurred for due diligence tasks with their own employees if "other parties" were excluded. While these contractors did not supply labor costs for "other parties," it is reasonable to assume that the prime contractors would have been in violation of the 50 percent rule if the labor of the "other parties" had been considered. Payments to "other parties" totaled \$6,479,353 for sale 7 and \$2,926,797 for sale 8. The tasks to be completed by the third party report vendors included appraisals, bankruptcy searches, broker price opinions, drive by evaluations, environmental reviews, title reports, etc. The required

reports were highly specialized and required the use of licensed professionals. Accordingly, the bulk of the costs incurred for such tasks would have been for personal service labor. Additionally, although the information provided by the due diligence contractor for the other four asset sales showed that between 68 and 84 percent of the cost of the labor incurred for the due diligence tasks was completed with its own employees, there is no assurance that this contractor would have complied with the 50 percent rule for these awards as well if the labor of the "other parties" had been considered.

As a result of the above, it is clear that the red flags in the proposals should have been questioned and an interpretation of the labor to be considered to determine the due diligence contractors' compliance with the 50 percent rule should have been requested. As neither was done, there is no assurance that the due diligence awards complied with SBA's small business subcontracting requirements. Documentation provided by the due diligence contractors showed that of \$147,083,302 in revenue received by the contractors, \$81,590,521 or 55.5 percent was paid to subcontractors, imaging specialists, third party report vendors, computer database/module contractors and independent contractors, including potentially "other than small" businesses.

- **Contractor and Subcontractor Affiliation not Questioned**

As noted above, the proposals of the contractors awarded due diligence task orders for asset sales 7 and 8 showed that a minimal number of proposed key personnel were prime contractor employees. These proposals also showed that the subcontractors (1) had the expertise and requisite backgrounds necessary to complete the projects, (2) were to perform primary and vital requirements, and (3) were unusually relied upon by the prime contractors. However, the contractor/subcontractor relationships still were not questioned by the contracting specialist.

13 CFR 121.103 states that a contractor and subcontractor are treated as joint venturers and are considered to be affiliated if the ostensible subcontractor will perform primary and vital requirements of a contract or if the prime contractor is unusually reliant upon the ostensible subcontractor. 13 CFR 121.104 and 121.106 states that SBA counts the receipts or employees of the prime contractor and any affiliates when determining the size of a contractor. 13 CFR 121.404 states that a contractor's size is determined as of the date it self-certifies its size in writing.

For task orders to FSS contracts, the self-certification date has been determined to be the date the small business certified its size to obtain its FSS contract. When an FSS is established, future affiliations are unknown. However, unless specifically required by an ordering agency, a contractor is not required to recertify its size for individual task orders (see section below entitled, "Issuance of One Due Diligence Task Order Did Not Support SBA's Intent to Make Due Diligence Awards to Small, 8(a) Businesses"). This creates a loophole that may allow small business schedule contractors who affiliate with other businesses and become "other than small" to receive small business task orders that they would no longer qualify for. Accordingly, SBA may have awarded the due diligence task orders for asset sales 7 and 8 to "other than small" contractors.

- **Questionable Contractor Teaming Arrangement**

SBA also did not question a teaming arrangement with an imaging specialist that was disclosed in the proposal of the successful due diligence contractor for asset sale 4 to ensure the contractor was in compliance with contract requirements. In its proposal, the contractor disclosed an “exclusive teaming arrangement,” and stated that its teaming partner decided not to bid or be available to any other contractor for SBA and other government agency due diligence engagements. We obtained documentation of the teaming partner’s written commitment to the prime contractor, which included a statement that they wanted to make certain the companies did not compete against each other and were exclusive partners. The teaming partner also requested to have its name on the bill of services.

FAR Part 9.6 defines teaming as when a potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified government contract or acquisition program. Agencies are required to recognize the integrity and validity of contractor team arrangements provided the arrangements are identified and company relationships are fully disclosed in an offer. GSA’s Multiple Award Schedules Program Owners Manual prohibits schedule contractors from teaming with non-schedule contractors. FAR Part 1.6 requires contracting officers to ensure compliance with the terms of the contract.

The teaming partner was not on the FSS used by SBA to procure the due diligence services and although SBA contracting officials were aware of GSA’s prohibition against schedule contractors teaming with non-schedule contractors, they did not question the proposed arrangement. As a result, the prime contractor teamed with a non-schedule contractor for the due diligence task order for asset sale 4 in violation of GSA’s policies and, therefore, was ineligible for the award.

Issuance of One Due Diligence Task Order Did Not Support SBA's Intent to Make Due Diligence Awards to Small, 8(a) Businesses

While not required, it is reasonable that SBA would make task order awards to 8(a) program participants on an FSS in support of the 8(a) program. The purpose of SBA's 8(a) program is to assist small, disadvantaged businesses through business development. SBA did not technically do anything wrong in the award of the due diligence task order for asset sale 6, however, SBA could have met its intent of supporting small, 8(a) businesses if it had asked for certifications of size for the due diligence task order. Not doing so resulted in SBA awarding the due diligence task order for asset sale 6 to an 8(a) contractor who would have been considered large if SBA requested a current size certification for the task order or used an 8(a) procurement. This was done while SBA claimed that its due diligence awards supported the 8(a) program.

Documentation in the contract files for the due diligence task orders for asset sales 4 through 8 showed it was SBA's intent to procure services from due diligence firms that were on GSA's small business set-aside Financial Asset Services (621-3) FSS and were also 8(a) certified firms. In order to be awarded an 8(a) contract, in accordance with 13 CFR 124.501, an 8(a) firm is required to certify it is a small business under the North American Industry Classification

System (NAICS) code assigned to each 8(a) contract. SBA, however, did not award 8(a) contracts for the due diligence services for asset sales 4 through 8 and simply targeted 8(a) companies on the FSS. The company that was awarded the task order for asset sale 6 had outgrown the size standard and, therefore, would have been considered a large business if SBA requested a current size certification for the task order or used an 8(a) procurement.

According to 13 CFR 121.404, a company who certified it was small to obtain an FSS contract remains small for all task orders issued pursuant to the contract, for the life of the contract, unless an ordering agency requires the contractor to recertify its size for an individual task order. SBA did not require re-certifications of size for the due diligence task orders. SBA was aware that the NAICS code related to due diligence had a corresponding size standard of \$6 million, however, SBA ignored the possibility that those 8(a) firms on the FSS may have been large. The contracting specialist for the due diligence task orders stated that if the size standard was considered, companies that received one due diligence award would be ineligible for future awards. The contracting specialist stated that they needed to be mindful of the number of eligible companies for future awards.

As a result, for asset sale 6, SBA awarded a due diligence task order to an 8(a) contractor that they knew had become a large business for due diligence services because it had outgrown the \$6 million size standard that would have been applicable if an 8(a) contract was used or if SBA had requested a current size certification for the task order. In accordance with 13 CFR 121.104, the size of a contractor is determined by taking the average annual receipts of a firm reported to the Internal Revenue Service for its last three completed fiscal years. SBA knew the contractor had outgrown the \$6 million size standard at the time they were soliciting contractors for the due diligence task order for asset sale 6 because SBA previously awarded this contractor two due diligence contracts totaling \$53 million that were concluded within the contractor's last three completed fiscal years. These two contracts alone would have made this contractor a large business for the NAICS code at the time the due diligence task order for asset sale 6 was solicited. Additionally, prior to SBA's award for asset sale 6, an SBA District Office determined that this contractor outgrew the size standard for all NAICS codes in its approved business plan except one.

As a result of the above, SBA undermined the intent of the 8(a) program to assist the business development of small, disadvantaged businesses by awarding the sale 6 task order to a business that would have been considered large if an 8(a) contract were used, while giving the appearance it was supporting the 8(a) program. In responding to a GAO protest of the sale 6 due diligence contractor, SBA stated that it reserved the entire due diligence portion of the Asset Sale Program for current 8(a) program participants in order to provide the maximum practicable opportunity for participation of small, disadvantaged businesses in Federal contracting. As noted above, SBA awarded the due diligence task order via the FSS to a contractor it knew would no longer be considered a small, disadvantaged business for true small business set aside or 8(a) due diligence procurements.

Solicitation for One Due Diligence Task Order Was Not in Compliance with Procedures

SBA's solicitation for the due diligence task order for asset sale 5 was in violation of

GSA's ordering procedures, the Competition In Contracting Act (CICA) and the FAR. As a result, SBA did not ensure all small business contractors received impartial, fair and equitable treatment for this award and that the task order was awarded to the best value due diligence contractor.

SBA only solicited one firm for asset sale 5, documenting that similar services were solicited four to five months earlier for asset sale 4, and that the solicitation for sale 5 was therefore based on adequate competition previously received. Five due diligence contractors were solicited for asset sale 4 from FSS 621-3 and three contractors submitted offers in response to the solicitation. Two of the contractors were determined to be acceptable, while the third contractor was determined to be unacceptable. The top ranked contractor was awarded the due diligence task order for asset sale 4. SBA decided not to award consecutive task orders to the same contractor and therefore, the asset sale 4 contractor was determined to be ineligible for award of the due diligence task order for asset sale 5. Accordingly, the only other acceptable offeror for sale 4 was the due diligence contractor solicited for sale 5. This contractor was awarded the sale 5 due diligence task order.

The sale 5 due diligence award was reviewed and approved by OGC, however, the following comments were made.

[FOIA ex. 5]

[FOIA ex. 5]. To the contrary, there were at least three additional schedule contractors who could have been solicited. [FOIA ex. 5], however, did not overcome SBA's obligation to comply with GSA, CICA and FAR requirements. SBA's solicitation and [FOIA ex. 5] disregarded the requirements of GSA's ordering procedures.

GSA's ordering procedures required SBA to provide requests for proposals (RFP) to three schedule contractors that appeared to offer the best value, and to additional schedule contractors that offered services that would meet the agency's needs. Accordingly, if SBA wanted to solicit only one contractor, it would have been required to ensure other than competitive procedures under the CICA were allowed to be used based on the circumstances surrounding this solicitation. SBA did not comply with the GSA ordering procedures, and the other than competitive procedures of the CICA did not apply because the circumstances for asset sale 5 did not meet the criteria for using other than competitive procedures. As a result, there is no assurance that SBA awarded the due diligence task order for asset sale 5 to the best value contractor.

Additionally, the contracting officials did not ensure all contractors received impartial, fair and equitable treatment as required by FAR Part 1.6. According to the contracting specialist for the due diligence task orders for asset sales 4 and 5, she and the Director of OPGM discussed whether the solicitation of only one contractor was proper. She further stated that the Director discussed the situation with GSA and GSA was "flexible." However, there was no documentation in the contract file to support this statement and a GSA representative informed us that she believed SBA's solicitation was improper. As a result, SBA violated GSA's ordering

procedures, the CICA and the FAR.

GSA's Evaluations and Determinations of Responsibility Were not Reliable

GSA's evaluations and responsibility determinations of the due diligence contractors were inadequate and unreliable and, as a result, SBA's use of GSA's FSS to procure due diligence services did not ensure the selected contractors could perform SBA's requirements without violating the terms of their FSS contracts and SBA's small business regulations (see details and related recommendations under Finding 9). SBA relied on GSA's inadequate evaluations and determinations of responsibility when awarding the due diligence task orders. Using an inadequately developed FSS in combination with SBA making significant errors in awarding the due diligence contracts and task orders did not ensure small businesses benefited from the due diligence awards and that SBA received the best value due diligence services for SBA's asset sales.

Recommendations:

We recommend that the Associate Deputy Administrator for Management and Administration:

- 1A. Revise current procedures to require offerors for 8(a) and small business set-aside contracts, and offerors for task orders to small business set-aside FSS contracts, to provide information in their proposals to clearly support the amount of personnel costs to be subcontracted.
- 1B. Ensure the amount of subcontracting is reviewed and documented in the contract file for awards of 8(a) and small business set-aside contracts and task orders to small business set-aside FSS contracts.
- 1C. Revise procedures to ensure contracting officials carefully review proposals for task orders to FSS contracts and question any language that indicates contractors are not complying with requirements of their FSS contracts, including subcontracting limitations and restrictions on teaming.
- 1D. Develop and implement procedures to monitor contractor compliance with the 50 percent rule when applicable.
- 1E. Obtain an interpretation from the Office of Policy, Planning and Liaison on whether or not the labor of third party report vendors, imaging specialists and computer database/module contractors should be considered in determining if due diligence contractors comply with the 50 percent rule and ensure the interpretation received is applied to all future due diligence awards.
- 1F. Based on the implementation of recommendation 1E, refer any potential contract violations to GSA for appropriate action, as it appears the contractors did not comply with the terms and conditions of their FSS contracts with regards to subcontracting and

teaming.

- 1G. Require FSS contractors classified as small businesses to certify their size for FSS task orders exceeding \$500,000 to ensure the contractors fit within applicable size standards.
- 1H. Ensure GSA ordering procedures are fully complied with for task orders to FSS contracts.
- 1I. Ensure all sole source requirements of the FAR are complied with when only one contractor is solicited.
- 1J. Take appropriate action to ensure the contracting officials involved in the decision to solicit only one contractor for the due diligence task order for asset sale 5 follow proper procedures for future solicitations.

We recommend that the Associate Deputy Administrator for Government Contracting and Business Development:

- 1K. Revise SBA guidelines to clarify what type of labor should be considered in determining compliance with the 50 percent rule and how interpretations of the 50 percent rule requirements should be requested.

SBA Management's Response:

The Office of Administration (OA) generally disagreed with finding 1 and three related recommendations (1G, 1I and 1J) in our draft report. OA did not provide comments on recommendations 1A, 1B, 1C, 1D, 1E, 1F, and 1H. The Office of Government Contracting/Policy, Planning and Liaison (GC/PPL) agreed with recommendation 1K.

OA believes it did not award any contract or FSS task order which violated the 50 percent rule. Additionally, OA stated that the 50 percent rule applies to the overall annual performance of a contractor in which they report to GSA for GSA schedule requirements and not to individual procurements using the schedule. OA also stated it does not believe an improper teaming arrangement existed for asset sale 4 and referred us to their July 13, 2002 response to our June 19, 2002 Draft Action Memorandum.

Issuance of One Due Diligence Task Order Did Not Support SBA's Intent:

OA disagreed with the section of our draft finding 1 entitled, "Issuance of One Due Diligence Task Order Undermined the Intent of SBA's 8(a) Program." OA stated there is no regulatory requirement to have a size certification when ordering against the GSA schedule and companies solicited were listed as small on the GSA schedule prior to each solicitation. OA stated that the contracting specialist for the due diligence task orders indicated she did not state that SBA disregarded the applicable size standard to protect the number of eligible firms for future due diligence awards. OA also disagreed with the sentence, "Additionally, prior to SBA's award for asset sale 6, an SBA District Office determined that this contractor outgrew the size standard for all NAICS codes in its approved business plan except one." OA stated the order

was not an 8(a) procurement and that OPGM confirmed the contractor was a current 8(a) participant. OA disagreed that SBA undermined the intent of the 8(a) program to assist the business development of small, disadvantaged businesses by awarding the sale 6 task order to a large business, while giving the appearance it was supporting the 8(a) program. OA stated it fully supports all small business programs and awards 50 percent or more of its procurement dollars to small businesses. OA also disagreed that SBA awarded a due diligence task order to a contractor it knew was no longer a small, disadvantaged business in accordance with the applicable NAICS code, stating there was no self certification requirement for these orders. Although OA stated recommendation 1G was not based on any regulatory requirement, it also stated that it is considering requiring small businesses to self-certify small business GSA schedule purchases with an estimated value exceeding \$500,000.

OA also disagreed that SBA's solicitation for the due diligence task order for asset sale 5 was in violation of GSA's ordering procedures, the CICA, and the FAR. OA stated the contracting officer awarded the due diligence task order for asset sale 5 based on competition and in the best interest of the Government and the award did not violate GSA, CICA or FAR requirements. OA disagreed there was no assurance that SBA awarded the due diligence task order to the best value contractor.

As an overall concern, OA questioned the applicability of some of the cited requirements, e.g., subcontracting limitations, teaming arrangements, etc., and in that regard stated it found no basis to conclude the particular procurement actions in question were small business set-asides. OA's response is included in its entirety as Attachment 1.

With regard to recommendation 1K, GC/PPL agreed to review the CFR and the FAR, and work with the 8(a) program office to determine if further clarification and guidance is required to address issues relative to the application of the 50 percent rule as it relates to the 8(a) program and all small business set-asides. GC/PPL's response is included in its entirety as Attachment 2.

OIG Evaluation of Management's Response:

OA generally disagreed with finding 1 and recommendations 1G, 1I and 1J in our draft report. OA did not provide comments on the other seven recommendations addressed to it for finding 1 and accordingly, these recommendations will be resolved during the audit resolution process. GC/PPL's planned actions are responsive to recommendation 1K.

OA did not provide support for its statement that it did not award a due diligence contract that violated the 50 percent rule. As a result, we found no basis to revise our conclusion that the due diligence award for asset sale 1 violated the 50 percent rule. OA also did not provide support that the 50 percent rule applies to the overall annual performance of a contractor in which they report to GSA for GSA schedule requirements and not to individual procurements using the schedule. According to an OGC official, a contractor must perform at least 50 percent of all orders combined under an FSS contract at any given point in time. Each due diligence contractor performed only one task order at a time under their 621-3 FSS contracts. Therefore, we believe our conclusions that the due diligence task order for asset sale 5 violated the 50 percent rule and that the due diligence task orders for asset sales 7 and 8 may have violated the 50 percent rule are valid.

OA did not provide support for why it believes an improper teaming arrangement did not exist for asset sale 4. Our June 19, 2002, Draft Action Memorandum pertained only to the due diligence task orders for asset sales 7 and 8. Based on OA's July 13, 2002, response to that memorandum, we determined that the relationships between the prime contractors and subcontractors for asset sales 7 and 8 were not teaming arrangements. Therefore, the issue of improper teaming for those sales became moot. The issue presented herein relates to an "exclusive teaming arrangement" that was disclosed in the successful offeror's proposal for asset sale 4. We obtained substantiating evidence from the due diligence contractor that the relationship between the prime contractor and subcontractor constituted a teaming arrangement. This arrangement violated GSA's policies and was not questioned by SBA. The issue presented herein is unrelated to the issue presented in our Draft Action Memorandum and therefore, our finding remains unchanged.

Issuance of One Due Diligence Task Order Did Not Support SBA's Intent:

It appears that OA misunderstood the section of our draft finding 1 entitled, "Issuance of One Due Diligence Task Order Undermined the Intent of SBA's 8(a) Program." We understand there is no regulatory requirement to request a size certification when ordering against the GSA schedule and that the order was not an 8(a) procurement. We revised the title of this section to, "Issuance of One Due Diligence Task Order Did Not Support SBA's Intent to Make Due Diligence Awards to Small, 8(a) Businesses." We also revised the language of the finding to make it clear that SBA was not required to request a size certification and that the procurement was not an 8(a) procurement. Further, we added a statement in the finding that SBA did not technically do anything wrong in the award of the due diligence task order for asset sale 6. The point of our finding is that SBA stated it reserved due diligence awards for small, disadvantaged businesses and made it clear that its intent was to award due diligence task orders to 8(a) firms on the 621-3 FSS, yet it awarded a task order to a company that outgrew the \$6 million size standard that would have been applicable if an 8(a) procurement was used or if SBA had requested a current size certification for the task order. This procurement practice was not in the best interest of small businesses, nor supportive of the 8(a) program, as the company awarded the due diligence task order for asset sale 6 would not have been considered a small, disadvantaged business if an 8(a) procurement were used. As the procuring activity for the Small Business Administration, OPGM's procurement practices should be consistent with the interests of small businesses (emphasis added). Accordingly, we believe that the implementation of recommendation 1G will help protect the interests of small businesses for future awards made pursuant to GSA schedule contracts. Based on OA's response, we revised recommendation 1G to apply only to task orders exceeding \$500,000.

We removed the sentence regarding the contracting specialist's statement about disregarding the size standard. The sentence about the District Office's determination is an accurate statement of fact and therefore, was not removed or revised. We continue to believe that SBA undermined the intent of the 8(a) program and do not believe that SBA's awarding of 50 percent or more of its procurement dollars to small businesses refutes this position. However, we revised this sentence and the last sentence that OA disputed to make it clear that the task order awards were not 8(a) procurements and that SBA was not required to request certifications

of size for the task orders.

OA provided no basis for its statement that the contracting officer's due diligence award for sale 5 was based on adequate competition and did not violate GSA's policies. Our finding specifically cites a GSA requirement that RFPs be provided to three schedule contractors. SBA only provided the RFP to one schedule contractor. Since OA did not cite a procurement regulation that allows contracting officers to make an award based on the competition of a previous procurement, we continue to support our position and believe that recommendations 1I and 1J are valid. We also continue to support our conclusion that there was no assurance that SBA awarded the due diligence task order to the best value contractor.

We believe this report provides a clear basis for why subcontracting limitations and teaming arrangement requirements, etc., would apply to the due diligence contracts and task orders. As clearly explained above, SBA awarded 8(a) contracts to procure the due diligence services for asset sales 1 through 3 and used a small business set-aside FSS to procure services from "small" firms for asset sales 4 through 8. For both 8(a) contracts and small business set aside contracts, contractors are subject to SBA's small business regulations, including subcontracting limitations. Subcontracting limitations also apply to orders placed pursuant to a small business set-aside FSS as the contractors have the responsibility to comply with the terms and conditions of their FSS contracts and contracting officers are required to ensure all requirements of regulations are met before entering into a contract. The teaming arrangement requirements would have applied to the due diligence task orders even if they were not awarded pursuant to a small business set-aside FSS because it is a GSA requirement that applies to all orders awarded pursuant to an FSS. Accordingly, we continue to support our finding and believe that our recommendations are valid.

Finding 2: Contractors Did Not Receive Impartial, Fair and Equitable Treatment

The contracting specialist for the due diligence task orders did not ensure all due diligence contractors received impartial, fair and equitable treatment. A debriefing was not conducted timely and therefore, one contractor did not receive timely feedback for consideration in its preparation of future proposals. Additionally, a clarification of ambiguous solicitation language was not provided to all potential offerors in accordance with regulations. As a result, there was confusion among the offerors regarding the solicitation requirements and SBA was required to conduct debriefings and respond to a protest that resulted from the confusion.

Debriefing Was Not Conducted in Accordance with the FAR

SBA did not conduct a debriefing in accordance with the FAR. The due diligence task order for asset sale 4 was awarded on December 15, 2000. An unsuccessful offeror submitted a written request for debriefing that was received by OPGM on or about December 22, 2000. In accordance with the FAR, the debriefing should have been conducted on or about December 27, 2000, but was not conducted until July 18, 2001. The initial delay was caused by the COTR being on extended sick leave until the end of January 2001. The contracting specialist

provided general information about the evaluation process to the contractor via phone in the beginning of January, however, the contractor stated that he still wanted an in-person debriefing upon the COTR's return to work. Accordingly, the contracting specialist agreed to contact the contractor upon the COTR's return.

The COTR returned to work at the end of January and documentation in the contract file shows that a debriefing was planned for January 30, 2001. The contracting specialist, however, did not conduct the debriefing, stating in an e-mail that OPGM wished to issue the RFP for the due diligence task order for asset sale 5 before conducting the debriefing. After the issuance of the RFP for sale 5, the contracting specialist consulted with the Director of OPGM who recommended that she not contact the contractor to schedule a debriefing and consider her previous phone conversation with the contractor the debriefing. The phone conversation, however, did not meet all requirements of the FAR. The contracting officials' delay in conducting the debriefing and consideration of the phone conversation as an acceptable debriefing were direct violations of the FAR.

FAR Part 15.506 states that to the maximum extent possible, debriefings should occur within five days after receipt of a written request. At a minimum, the debriefing information should include (1) the evaluation of significant weaknesses or deficiencies in the offeror's proposal; (2) the overall cost or price and technical rating; (3) the overall ranking of offerors; (4) the rationale for award; and (5) reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed. FAR Part 1.6 requires contracting officers to ensure contractors receive impartial, fair and equitable treatment. SBA did not comply with this federal regulation.

The contractor eventually re-requested the debriefing and it was conducted on July 18, 2001. However, if the debriefing was conducted in accordance with the FAR, the contractor would have had information to assist in the preparation of a competitive proposal for future awards. Therefore, if the contractor was given the opportunity to compete for the due diligence task order for asset sale 5, they may have been a successful offeror. The contracting specialist for the due diligence task orders for asset sales 4 and 5 stated that she was attempting to eliminate the contractor wanting to submit an offer for sale 5 because the contractor's proposal was not up to par. SBA's actions, however, did not ensure all contractors received impartial, fair and equitable treatment.

Information Was Not Properly Disclosed by A Contracting Specialist

SBA did not properly disclose solicitation information to all potential offerors in accordance with the FAR and SBA's SOP 00 11 1, "Small Purchases, Contracts, Grants, and Cooperative Agreements." SBA received an e-mail from a potential offeror eleven days before proposals were due for the due diligence task orders for asset sales 6, 7 and 8, asking if SBA would accept volume pricing discounts if a contractor were awarded multiple task orders. In response to the potential offeror, SBA clarified that a contractor could not be awarded task orders for consecutive sales; i.e. a contractor could not begin a new sale if it was still closing out a previous sale. The contractor's question and SBA's response were not provided to the other potential offerors.

FAR Part 15.201 states that when specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, the information shall be made available to the public as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage. SOP 00 11 1 states that when necessary to clarify ambiguities, or correct mistakes or omissions, an appropriate amendment to the solicitation shall be furnished in a timely manner to all companies receiving the solicitation.

The contracting specialist stated she did not view the solicitation language as ambiguous and believed she was simply reminding the contractor of the requirements. We found, however, that the contracting specialist released other contractor inquiries with the respective SBA responses, including reminders of requirements, to all potential offerors. Additionally, the disclosed information may have affected the preparation of the offerors' cost proposals and therefore, should have been provided to all potential offerors. As a result of the above, an ambiguity in the solicitation was not clarified and there was confusion among the offerors as to whether or not they could receive multiple awards. The contractor who received clarification was the only offeror to submit a proposal focusing on one single sale. Additionally, SBA was required to respond to debriefing requests from offerors who wanted to know why they did not receive more than one award, and one offeror filed an agency and GAO protest regarding this matter.

Recommendations:

We recommend that the Associate Deputy Administrator for Management and Administration:

- 2A. Ensure debriefings are conducted in accordance with the FAR.
- 2B. Take appropriate action to ensure contracting officials involved in the decision to postpone the debriefing related to the due diligence task order for asset sale 4 conduct future debriefings in accordance with requirements.
- 2C. Ensure contracting officials provide all potential offerors with any contractor questions and respective SBA answers that clarify ambiguities in the solicitation or contain information necessary for the preparation of proposals in accordance with the FAR and SOP 00 11 1.

SBA Management's Response:

OA disagreed the debriefing was not conducted in accordance with the FAR and stated that OPGM conducted a verbal debriefing by phone and, in turn, satisfied the requirements of FAR Part 15.506. OA further disagreed information was not properly disclosed by a contracting specialist and stated that SBA won the protest on this issue.

OIG Evaluation of Management's Response:

We continue to support our position that the contracting specialist's phone conversation with the contractor did not meet the debriefing requirements of FAR Part 15.506. As stated above, during the phone conversation, the contracting specialist only provided general information about the evaluation process and did not provide (1) the evaluation of significant weaknesses or deficiencies in the offeror's proposal; (2) the overall cost or price and technical rating; and (3) reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed as required by FAR Part 15.506. Accordingly, we believe recommendations 2A and 2B are valid.

We also continue to support our position that information was not properly disclosed by a contracting specialist and believe recommendation 2C is valid. Specific information about a proposed acquisition that would have been necessary for the preparation of proposals was disclosed to one potential offeror, and therefore, should have been made available to all potential offerors in accordance with FAR Part 15.201. Additionally, by providing the information, SBA clarified an ambiguity in the solicitation for that potential offeror, but did not provide the same information to all potential offerors in accordance with SOP 00 11 1. The protest was filed against SBA to challenge the due diligence awards for asset sales 7 and 8 due to the ambiguity of the solicitation language with regard to whether or not a contractor could receive multiple awards. We believe the filing of the protest against SBA was an effect of SBA's non-compliance with the FAR and SOP 00 11 1 in clarifying the ambiguity and providing additional solicitation information to only one potential offeror. The outcome of the protest, however, did not determine whether or not the contracting specialist improperly disclosed information and was completely unrelated to the facts presented in our finding.

Finding 3: Discussions Were Not Held for Due Diligence Contracts and Task Orders

SBA did not hold discussions with offerors for the due diligence contracts for asset sales 1, 2 and 3 as required by the FAR. Additionally, SBA did not hold discussions with offerors for the due diligence task orders for asset sales 6, 7 and 8, although it was in SBA's best interest to do so. By not holding discussions, SBA could not ensure best value was obtained for the due diligence contracts and task orders.

SBA did not hold discussions with offerors for the due diligence contracts for asset sales 1, 2 and 3 even though the respective solicitations did not state that SBA intended to make the awards without discussions. FAR Part 15.306 states that an award may be made without discussions if the solicitation states that the Government intends to evaluate proposals and make the award without discussions. The contracting specialist for the due diligence contracts for asset sales 1, 2 and 3 stated that he was unaware of the regulation change in the FAR that required a statement to be included in the solicitation if discussions were not intended. As a result of discussions not being held for the due diligence contract for asset sales 2 and 3, protests

were filed. The protests were eventually dismissed or withdrawn and SBA added the appropriate clause to all future solicitations for due diligence services.

Discussions also were not held for the due diligence task orders for asset sales 6 through 8. The solicitation for these task orders stated that SBA reserved the right to award the task orders without discussions and therefore, SBA was not required to hold discussions. However, we determined that discussions would have been in the best interest of SBA and therefore, should have been held. OPGM awarded task orders to two contractors with significant weaknesses that were not addressed prior to award. The TEP noted that the successful due diligence contractor for asset sale 7 had the following weaknesses: there was no contingency plan for staff and the project director lacked prior experience. Additionally, one TEP member questioned who was in charge and considered this offeror's staffing plan to be partially non-responsive. The TEP also noted that the proposal of the successful due diligence contractor for asset sale 8 failed to mention three of the due diligence requirements, contained a non specific timeline, and did not explain the need for co-managers.

FAR Part 15.306 states that the primary objective of discussions is to maximize the Government's ability to obtain best value. FAR Part 15.306 and SOP 00 11 1 state that discussions are held to advise the offerors of significant weaknesses and deficiencies found in proposals. Offerors are given the opportunity to satisfy the Government's requirements, attempt to resolve uncertainties, resolve suspected mistakes and resubmit proposals.

The contracting specialist for the due diligence task orders for asset sales 6 through 8 stated that discussions were not necessary because SBA knew that the contractors would complete the task orders satisfactorily since the due diligence community is so small and the due diligence contractors borrow each others employees. She further stated that OPGM generally does not have time to hold discussions and is always in a time crunch. Holding discussions allows agencies to resolve weaknesses and uncertainties in contractors' proposals to ensure that the government obtains the best value.

Recommendation:

- 3A. We recommend that the Associate Deputy Administrator for Management and Administration develop and implement procedures for determining when discussions should be held based on the complexity of contract requirements and require clear documentation to support reasons for not holding discussions.

SBA Management's Response and OIG's Evaluation:

OPGM reserved the right to review this section further and accordingly, recommendation 3A will be resolved during the audit resolution process.

Finding 4: SBA's Acquisition Planning and Monitoring Requires Improvement

Acquisition planning and contractor performance evaluations were not performed and documented for the asset sale due diligence contracts and task orders in accordance with the FAR. SBA must develop and implement planning and monitoring procedures in accordance with the FAR. Acquisition planning ensures that agency needs are met in an efficient and effective manner and contractor performance evaluations provide relevant information for future award decisions.

Planning Was Not Performed and Documented in Accordance with the FAR

We found no assurance that planning was performed and documented for the asset sale due diligence contracts and task orders in accordance with the FAR. Although Asset Sale Program Officials informed us that planning meetings were held in which SBA's Asset Sale Program as a whole was discussed, there was no documentation in the files to support that planning for the due diligence contracts and task orders was conducted in accordance with the FAR. The contracting specialists for the due diligence contracts and task orders stated that SBA does not do acquisition planning and that OPGM usually becomes aware of a procurement need at the time a Form 2, "Requisition for Supplies, Services, and Federal Assistance," is submitted by a program office.

FAR Part 7.102 states that the purpose of planning is to ensure that the Government meets its needs in the most effective, economical and timely manner. FAR Part 4.803 states that the contract file normally includes acquisition planning information, if applicable.

We determined that SBA does not have planning procedures that generally meet the requirements of FAR Parts 7.103, 7.104 and 7.105 and therefore, must revise its planning system. SOP 00 11 1 lacks procedures regarding (1) when acquisition planning should begin; (2) the formation of a planning team; (3) involvement of the contracting officer in planning; (4) when more formality in the planning process should be required based on complexity and cost of acquisitions, including when written acquisition plans should be required; (5) the preparation of written acquisition plans; and (6) ensuring full and open competition is used. The contracting specialists for the due diligence contracts and task orders agreed that planning policies and procedures should be developed and implemented. Without thorough planning procedures, SBA cannot ensure agency needs are being met in the most effective, economical and timely manner.

Monitoring Was Not Performed or Documented in Accordance with the FAR

Although SBA officials stated they performed periodic monitoring of the due diligence contractors through surprise visits to the due diligence facility, the visits were not adequately documented and there was no documentation that interim and contract completion evaluations were performed in accordance with the FAR. SOP 00 11 1 does not contain policies regarding requirements for the content and format of contractor evaluations.

FAR Part 42 states that the content and format of performance evaluations shall be established in accordance with agency procedures and should be tailored to the size, content, and complexity of the contractual requirements. FAR Part 42 also requires agencies to prepare interim evaluations as specified by the agency for contracts with periods of performance exceeding one year. Additionally, agencies are required to prepare an evaluation of contractor performance at the time the contract is completed for each contract in excess of \$100,000. Performance evaluations are used to support future award decisions. Without standard monitoring procedures, SBA cannot ensure officials are aware of their monitoring responsibilities and are consistently reviewing contractor performance.

Recommendations:

We recommend that the Associate Deputy Administrator for Management and Administration:

- 4A. Develop and implement planning procedures in accordance with FAR Part 7 and issue a procedural notice to ensure SBA program officials are aware of procurement planning requirements.
- 4B. Ensure written acquisition plans are prepared for all future asset sale due diligence contracts and task orders due to the complexity and cost of due diligence acquisitions.
- 4C. Develop and issue agency procedures regarding the content, format, and retention of all required contractor performance evaluations in accordance with the FAR to ensure SBA program officials are aware of evaluation requirements.

We recommend that the Associate Deputy Administrator for Capital Access:

- 4D. Maintain suitable records of observations and performance problems related to the asset sale due diligence contracts and use these records to prepare required contractor evaluations.

SBA Management's Response:

OA disagreed with the draft report sentence, "Additionally, OPGM views their involvement in planning to be customer service and therefore, does not document planning in the contract files." OA stated that OPGM does not document all questions asked by a program office, however, considers acquisition planning a formal process and will include any related information in the contract file. OA did not provide comments on recommendations 4A, 4B, and 4C.

The Acting Assistant Administrator for Portfolio Management concurred with recommendation 4D and stated suitable records will be maintained if due diligence contractors

are hired for additional asset sales. The Office of Portfolio Management's response has been included in its entirety at Attachment 3.

OIG Evaluation of Management's Response:

OA's response did not refute the fact that we found no assurance that planning was performed and documented for the asset sale due diligence contracts and task orders in accordance with the FAR. OA did not provide support that related planning information was included in the contract files for the due diligence contracts and task orders. We continue to believe our recommendations are valid; however, we removed the sentence that OA disagreed with from the report.

The Office of Portfolio Management's planned actions are responsive to recommendation 4D.

Finding 5: OPGM Did Not Always Comply with Procurement Policies and Procedures

The following minor non-compliance issues were identified: SBA did not (1) offer 8(a) due diligence contracts to an SBA district office in accordance with requirements, (2) properly review a Technical Evaluation Panel's (TEP) technical evaluation report, (3) prepare a negotiation memorandum for one due diligence contract, (4) obtain a legal sufficiency review for one due diligence contract, (5) obtain OGC's legal sufficiency approval prior to verbally notifying three due diligence contractors of award, (6) award one due diligence contract for the correct amount, (7) prepare post award conference reports in accordance with the FAR, and (8) maintain contractor general files in accordance with the FAR. As a result, (1) there is no assurance that the due diligence contracts for asset sales 1 through 3 would have been accepted by the SBA district office; (2) the technical evaluation report for the due diligence task orders for asset sales 6, 7 and 8 did not include all required information; (3) there was no negotiation memorandum in the file to support the rationale, judgments, authorities and decisions by which the due diligence contract for asset sale 1 was awarded; (4) there is no assurance that the legal sufficiency of one award was approved; (5) the contractors could have started work and incurred expenses prior to the dates anticipated by SBA for three due diligence awards; (6) a contract was awarded for approximately \$6.8 million more than it should have been; (7) post award conference reports were inadequate; and (8) contractor information is not easily attainable.

8(a) Contract Offers

The 8(a) due diligence contracts for asset sales 1 through 3 were not offered to an SBA district office as required. 13 CFR 124.502, FAR Part 19.804-2 and the Partnership Agreement between SBA and OPGM require SBA to offer 8(a) procurements to an SBA district office for acceptance. The contracting officer is required to indicate his or her formal intent to award a procurement requirement as an 8(a) contract and the offer is sent to the SBA district office in the agency's jurisdiction. The contracting specialist for the due diligence contracts for asset sales 1 through 3 was unaware of this requirement and agreed that 8(a) procurements should be offered to an SBA district office. As a result of the above, there is no assurance that the due diligence

contracts for asset sales 1 through 3 would have been accepted if they were properly offered to the SBA district office.

Incomplete Technical Evaluation Report

The contracting specialist for the due diligence task orders for asset sales 6, 7 and 8 did not ensure all required items were addressed in the TEP's technical evaluation report in accordance with SOP 00 11 1. SOP 00 11 1 requires the contracting specialist to review the TEP's technical evaluation report to ensure all required items are sufficiently addressed. SOP 00 11 1 requires that the technical evaluation report identify each proposal as acceptable, unacceptable or capable of improvement to the point of acceptability, and be signed by all members of the TEP. The technical evaluation report for due diligence task orders for asset sales 6, 7 and 8 did not identify each proposal as acceptable, unacceptable or capable of improvement and was not signed by each member of the TEP. The contracting specialist did not provide a reason for why the report was not signed by each member of the TEP, but agreed it should have been. Additionally, she was unaware of the requirement that the proposals be identified as acceptable, unacceptable or capable of improvement. As a result, the technical evaluation report did not include all required information to be used by the contracting specialist during source selection.

One Negotiation Memorandum was not Prepared

A negotiation memorandum was not prepared for the due diligence contract for asset sale 1. SOP 00 11 1 requires that a negotiation memorandum be prepared for each negotiated procurement and states that source selection information should be documented in the memorandum. The contracting specialist for the due diligence contract for asset sale 1 stated that a memorandum setting forth the reasons for selection was not necessary because the results of the technical and cost proposals clearly indicated which bidder was the best value to the government. As a result, there was no negotiation memorandum in the file to support the rationale, judgments, authorities and decisions by which the due diligence contract for asset sale 1 was awarded.

A Legal Sufficiency Review was not Prepared for One Due Diligence Contract

There was no documentation in the contract file for the due diligence contract for asset sale 1 to support that a legal sufficiency review was requested and completed. Accordingly, there is no assurance that the legal sufficiency of the contract was approved by OGC prior to award. SOP 00 11 1 requires OPGM to forward proposed contracts to OGC for legal review before award. FAR Part 4.8 requires that all contractual actions be documented in the contracting office's files. The contracting specialist stated that a legal sufficiency review would have been completed and was unsure why there was no supporting documentation in the contract file.

Inappropriate Verbal Notifications of Award

Verbal notifications of award were given for three of the seven awarded asset sale due

diligence contracts and task orders prior to completion of OGC's legal sufficiency review. SOP 00 11 1 states that before award, the proposed contract shall be forwarded to OGC for legal review. The contracting specialist stated that OPGM may allow a contract to become effective prior to the completion of the legal sufficiency review if they do not anticipate any problems. As a result of the above, the contractors could have started work on these task orders and incurred expenses prior to the dates anticipated by SBA.

Improper Award Amount for One Due Diligence Contract

The due diligence contract for asset sales 2 and 3 was awarded at the government estimate amount of \$49 million rather than at the contractor's negotiated bid amount of approximately \$42.2 million. Accordingly, the contract was awarded for approximately \$6.8 million more than it should have been. The contracting specialist for the due diligence task orders for asset sales 4 through 8 stated that the due diligence award amounts should have been equal to the accepted negotiated bid amounts. The contract was reported to be a firm fixed price contract and therefore should have been awarded at the negotiated bid amount. Additionally, all other due diligence contracts and task orders were awarded at the negotiated bid amounts. As a result of the above, the contractor could have incurred costs above its negotiated bid amount without a formal modification to the contract. Additionally, funds were over-obligated and unavailable for other agency purposes.

Post Award Conference Reports Were Not Prepared in Accordance with the FAR

The contract files for the due diligence contracts and task orders did not contain post award conference reports. The statement of work for the due diligence contracts and task orders required post award conferences to be conducted. FAR Part 42.503 states that the contracting officer who decides that a post award conference is needed is responsible for preparing a summary report of the conference that covers all items discussed, including areas requiring resolution, controversial matters, the names of the participants assigned responsibility for further actions, and the due dates for the actions. FAR Part 4.8 requires that a copy of the post award conference report be maintained in the contract file. The contracting specialists stated that the kick off meeting and post award conference agendas maintained in the files would suffice as the post award conference reports required by the FAR. We concluded, however, that the agendas did not cover all items required by the FAR.

Contractor General Files Were Not Maintained

SBA did not establish contractor general files containing information about contractors' management systems, past performances and capabilities in accordance with the FAR. FAR Part 4.801 requires contracting offices to establish a file such as a contractor general file; including documents related to the contractor in a general way with regards to management systems, past performance, and capabilities. Preparation of such files will allow contracting officers to easily obtain general information about contractors' management systems, past performance and

capabilities.

Recommendation:

5A. We recommend that the Associate Deputy Administrator for Management and Administration ensure contracting officials receive training to ensure:

- 8(a) procurements are offered to an SBA field office in accordance with requirements.
- Contracting specialists review technical evaluation reports to ensure all required items are addressed in accordance with SOP 00 11.
- Negotiation memorandums are prepared for all negotiated contracts in accordance with SOP 00 11.
- Legal sufficiency reviews are documented in accordance with SOP 00 11 and the FAR.
- Verbal notifications of award are not given prior to the completion of OGC's legal sufficiency reviews.
- Fixed price contract award amounts are equal to accepted negotiated bid amounts.
- Post award conference reports are prepared and maintained in accordance with the FAR.
- Contractor general files are established in accordance with the FAR.

SBA Management's Response:

OA specifically disagreed with four of the eight sections under this finding. For the section entitled, "8(a) Contract Offers," OA stated that SBA headquarter offices participated in the planning of the Basic Ordering Agreement (BOA) used for asset sales 1 through 3 and furnished a list of eligible 8(a) firms. Therefore, OA stated that the contracting specialist felt he had satisfied the offering requirement. OA also disagreed with the sentence, "The contracting specialist for the due diligence contractors for asset sales 1 through 3 was unaware of this requirement and agreed that 8(a) procurements should be offered to an SBA district office."

For the section entitled, "Incomplete Technical Evaluation Report," OA stated that SOP 00 11 1 is out of date and the revised SOP that is in the agency clearance process will rely heavier on the FAR. OA stated that there is no requirement in the FAR for a determination of acceptable, unacceptable, or capable of improvement.

For the section entitled, "Inappropriate Verbal Notifications of Award," OA stated that it believes it has the right to verbally authorize a contract when it deems it necessary in the best interest of the Government and stated that only the award for sale 7 was verbally approved.

OA disagreed with the section entitled, "Post Award Conference Reports Were Not Prepared in Accordance with the FAR," and believes the kick-off meeting and post award conference minutes as well as the lessons learned report serves this requirement.

OIG Evaluation of Management's Response:

13 CFR 124.503(g) states that each order to be issued under a BOA is an individual contract and the procuring activity must offer, and SBA must accept, each task order under a BOA. There is no basis for OA's position that the headquarter offices' participation in the BOA planning would satisfy the requirement of offering the orders to an SBA district office. Furthermore, we did not remove the sentence that OA disputed because an e-mail between the contracting specialist and the auditors clearly supports this statement. We continue to support our position related to the 8(a) contract offers.

We continue to support our position that the technical evaluation report did not include all required information to be used by the contracting specialist during source selection. Revised SOP 00 11 2 was submitted to the OIG for clearance on January 8, 2004 and still contained the requirement that the technical evaluation report identify each proposal as acceptable, unacceptable, or capable of improvement to the point of acceptability. We believe this requirement is important and should not be removed from the SOP as it ensures the contracting officer clearly understands the conclusions of the TEP to be considered during source selection.

We continue to support our position that verbal notifications of award were given for three asset sale due diligence task orders prior to completion of OGC's legal sufficiency review. We did not conclude whether OA has the right to make verbal notifications of award (emphasis added). The issue is that the verbal notifications of award occurred prior to OGC's completion of its legal sufficiency reviews in violation of SOP 00 11 1. OA provided no basis for its statement that only the award of asset sale 7 was verbally approved. A note found in the contract files for the due diligence task orders for asset sales 6, 7 and 8 showed that all three awards were verbally approved.

We continue to support our position that the contract files for the due diligence contracts and task orders did not contain post award conference reports. FAR Part 42.503 states that post award conference summary reports must cover all items discussed, including areas requiring resolution, controversial matters, the names of the participants assigned responsibility for further actions, and the due dates for the actions. There were no kick-off meeting and post award conference "minutes" maintained in the contract files and the "agendas" for these meetings did not cover the items required by the FAR. Additionally, lessons learned reports are unrelated to post award conferences as these reports are prepared at the completion of each sale and post award conferences are held during SBA's initial preparations for each sale.

Finding 6: Due Diligence Contracts and Task Orders Were Not Properly Reported to the Federal Procurement Data System

Only two of the seven awarded due diligence contracts and task orders and one of three modifications were reported to the FPDS in accordance with the Federal Procurement Data Center's (FPDC) Reporting Manual. As a result, incomplete data was used to measure and assess (1) the impact of federal procurement on the nation's economy, (2) the extent to which small businesses and disadvantaged firms are sharing in federal procurement, (3) the impact on

full and open competition in the acquisition process, and (4) other procurement policies. Furthermore, resulting reports and statistics were inaccurate and unreliable.

The FPDC Reporting Manual requires agencies to report all contract actions using appropriated funds to the FPDS. Based on a review of GAO's Appropriations Law and discussions with GAO and OMB officials, we found that the asset sale due diligence contracts and task orders and related modifications were awarded using appropriated funds. Accordingly, all due diligence awards and related modifications should have been reported to the FPDS.

Based on discussions with SBA officials, it appears that there is a misunderstanding of what funds constitute appropriated and non-appropriated funds. As a result, approximately \$154.7 million of awards and modifications were not reported to the FPDS for FYs 1999 through 2002, and the resulting FPDS data was inaccurate and unreliable. In its 2004 Budget Request and Performance Plan, SBA noted limitations of the FPDS. Specifically, SBA noted problems with incorrect data entries and that final FPDS data is not available until about six months after the end of the fiscal year. In April 2003, GSA awarded a \$24.3 million contract to revamp the FPDS and improve the accuracy and timeliness of FPDS data.

Recommendations:

- 6A. We recommend that the Chief Financial Officer in conjunction with the Associate Deputy Administrator for Capital Access, Associate Deputy Administrator for Management and Administration, and the General Counsel determine the proper nature of funds in all future SBA asset sale contracts and task orders before issuing a solicitation for such contracts and task orders.
- 6B. We recommend that the Chief Financial Officer in conjunction with the Associate Deputy Administrator for Capital Access and the Associate Deputy Administrator for Management and Administration ensure the appropriate SBA officials are aware that the proceeds from SBA's asset sales are appropriated funds and should be treated in accordance with rules and regulations applicable to appropriated funds.
- 6C. We recommend that the Associate Deputy Administrator for Management and Administration ensure future asset sale due diligence contracts are reported to the FPDS.
- 6D. We recommend that the Associate Deputy Administrator for Government Contracting and Business Development notify the Office of Federal Procurement Policy of the deficiency discussed above and recommend that periodic quality assurance reviews be conducted by GSA to ensure the accuracy and reliability of FPDS data.

SBA Management's Response:

OCFO disagreed with our draft recommendation 6A stating that it would be very difficult

to provide a one-size-fits-all Information Notice on fund types. OCFO further stated that even GAO recognizes that defining the term non-appropriated funds may pose some challenges. Additionally, OCFO stated that future asset sales will likely use a new GSA operated process. OCFO recommended that the OIG rephrase recommendation 6A to state, "We recommend that OCFO work with the Office of Capital Access, OA and OGC to determine the proper nature of funds in all future SBA asset sale contracts before issuing a solicitation for such contracts."

With regard to recommendation 6B, OCFO agreed to work with the appropriate offices to ensure that SBA officials know the proper characterization and treatment of any future asset sale proceeds. OCFO's response is included in its entirety as Attachment 4.

OA did not provide comments on recommendation 6C.

For recommendation 6D, GC/PPL agreed to advise the Administrator, Office of Federal Procurement Policy and the Director of GSA's FPDC of the OIG's finding for their review and action.

OIG Evaluation of Management's Response:

We understand OCFO's concern with providing a one-size-fits-all Information Notice on fund types and have revised recommendation 6A accordingly. OCFO's planned actions are responsive to recommendation 6B and GC/PPL's planned actions are responsive to recommendation 6D. We believe recommendation 6C is valid.

Finding 7: SBA Did Not Follow Proper Procedures for FOIA Requests

The Asset Sales Program Office and OPGM did not handle FOIA requests in accordance with procedures. The Asset Sales Program Office did not respond to a FOIA request within the required timeframe and did not properly request a timeframe extension. On January 8, 2002, the Asset Sales Program Office received a FOIA request from a due diligence contractor. In accordance with FOIA, the Asset Sales Program Office was required to respond to the request on or about February 6, 2002. The program office, however, did not respond until February 14, 2002, and stated they were invoking an extension due to the extensive amount of data collection and analysis required. The program office stated they would respond to the FOIA request as expeditiously as possible. A response, however, was never sent. As a result, the due diligence contractor who made the FOIA request believed they were being retaliated against by SBA. FOIA states that the agency shall determine within twenty working days after receipt of a FOIA request whether the agency will comply with the request and will immediately notify the requester of its decision. FOIA also states that if an agency is unable to process the request in the time allotted, it will request the submitter to narrow their scope or allow a time frame extension.

Additionally, OPGM did not document a FOIA request and the related response in accordance with procedures. OPGM received a FOIA request from a due diligence contractor on February 11, 2002, and released the requested information on February 12, 2002. OPGM,

however, did not record the FOIA request in its FOIA log and there was no documentation to support that OPGM's response was forwarded to the FOI/PA office in accordance with requirements. SOP 40 03 2, "Disclosure of Information," requires program offices to provide a weekly FOIA log to the FOI/PA office. The SOP also requires that a copy of each response to a FOIA request be sent to the FOI/PA office. The response could not be located in OPGM or the FOI/PA office's files. As a result, information regarding this FOIA request and response were not readily available for our review and would not be available if additional inquiries were made.

The information included in this finding and the related recommendation are not intended to imply any wrong doing on behalf of the FOI/PA office within OHA. The FOI/PA office is primarily responsible for deciding all administrative appeals involving the disclosure or nondisclosure of requested data. However, it also serves as a support function for SBA's program offices for advice on the implementation of FOIA. Recommendation 7A was made to the Assistant Administrator for Hearings and Appeals because FOI/PA is also responsible for educating SBA components as to their responsibilities under FOIA and we determined that this recommendation would be helpful to address the deficiencies noted in this finding.

Recommendation:

- 7A. We recommend that the Assistant Administrator for Hearings and Appeals ensure SBA officials with FOIA responsibilities receive training on properly responding to FOIA requests on an annual basis, with the first training session being held no later than 6 months from the issue date of this report.

SBA Management's Response:

OHA concurred with recommendation 7A and stated that they have developed in coordination with the Office of Chief Information Officer, the Online FOIA training to ensure all employees are trained and current on the requirements of FOIA and the Privacy Act (PA). The completion of the course will be mandatory for all employees and the deployment and implementation of the training will proceed well within the recommended timeframe. OHA further stated that it has developed a web-based tracking system for all FOIA and PA requests. The system will be implemented and all FOIA contacts and back up staff will be trained by the end of March 2004. This training will be mandatory for all assigned FOIA contacts. OHA's response is included in its entirety as Attachment 5.

OIG Evaluation of Management's Response:

OHA's planned actions are responsive to recommendation 7A. Based on the written response received from OGC, follow-up discussions, and an October 14, 2003 revision to 13 CFR 102, the section of draft finding 7 entitled, "SBA Improperly Released Business Information," and related recommendations were removed from the report.

Finding 8: An Effective SOP Is Outdated

OPGM has been using a draft SOP as standard procedures for over five years because the effective SOP is outdated. The effective SOP (SOP 00 11 1) was issued in February 1985 and was last updated in April 1994. Draft SOP 00 11 2 was issued for clearance in August 1998, however, it never completed the clearance process. OPGM did not take appropriate actions to ensure the SOP made it through the clearance process. Additionally, OPGM did not issue a procedural notice to Contracting and Grant Administration staff to suspend the provisions of SOP 00 11 1 and outline the interim policies to be followed prior to the issuance of the revised SOP.

SOP 00 23 5, "SBA Directives Management System," states that each clearing official should attempt to complete the review within five working days. The originating office may indicate on SBA Form 58, "Record of Clearance and Approval," how long the review period should be and there is a statement on the Form 58 that "concurrence is assumed if not returned by the deadline." Every page of an SOP must have the effective date printed on the bottom left corner which indicates the date on which implementation of the SOP instruction should begin. SOP 00 23 5 continues that a procedural notice is to be used to outline the particular steps involved in implementing a specific policy and to temporarily suspend provisions of permanent directives. Without obtaining the necessary clearances for the draft SOP, OPGM cannot assure they are following the appropriate procedures that will be approved by SBA officials.

On December 17, 2002, the OIG issued a memorandum to the Office of Administration recommending that the Assistant Administrator for Administration take appropriate actions to ensure draft SOP 00 11 2 is reviewed, updated as necessary, cleared by the appropriate approving officials and issued within a reasonable timeframe in accordance with SOP 00 23 5. Draft SOP 00 11 2 was provided to the OIG for clearance on June 19, 2003. On July 9, 2003, the OIG provided numerous comments and non-concurred with the issuance of SOP 00 11 2 as written because the SOP did not incorporate key FAR requirements.

SOP 00 11 2 was re-issued for clearance on January 8, 2004. The revised SOP addressed many of the OIG's July 9, 2003 comments; however, did not address other comments that according to OA would have considerably delayed the issuance of the SOP. These comments related to using GSA schedules, enforcing subcontracting limitations, committing and obligating funds, monitoring contracts, and ratifying unauthorized contract actions. OA determined it would be best to issue the revised SOP without addressing these comments that would require significant drafting and expanding of the language in the SOP. OA, however, agreed to incorporate policies to address these comments over the next several months.

Recommendation:

- 8A. We recommend that the Associate Deputy Administrator for Management and Administration issue draft SOP 00 11 2 as soon as possible, incorporate policies to address the outstanding items described above within six months of the issuance of this report and ensure future directives are cleared and issued within a reasonable timeframe.

SBA Management's Response and OIG's Evaluation:

OA did not provide comments on this finding or recommendation 8A. Based on the written response received from OGC and SBA's effort in addressing OIG's recommendation in Advisory Memorandum 3-28 on problems with SBA's directives system, draft recommendation 8B was removed from the report.

Finding 9: Use of the Federal Supply Schedule to Procure Due Diligence Services Is Not in SBA's Best Interest

Use of the FSS to procure due diligence services is not in SBA's best interest because GSA's inadequate evaluations and determinations of responsibility may have allowed SBA to award due diligence task orders to contractors who were unable to perform SBA's requirements without violating the terms of their FSS contracts and SBA's small business regulations. Additionally, three due diligence contractors charged SBA higher prices than those approved by GSA for their FSS contracts and as a result, SBA was overcharged as much as \$4,577,261.

GSA's Evaluations and Determinations of Responsibility Were not Reliable

GSA's evaluations and responsibility determinations were deficient for the due diligence contractors awarded task orders by SBA off of FSS 621-3. The contractors were evaluated by GSA on an acceptable/unacceptable basis. A standard evaluation checklist was used to evaluate each proposal, which stated that an unacceptable rating under any evaluation factor would result in the offeror being determined technically unacceptable. In evaluating one proposal, an evaluator questioned the contractor's ability to complete task orders without relying on a subcontractor. Although the evaluator did not specifically note that the contractor's plan of accomplishment was unacceptable, she noted that the contractor failed to meet all four of the elements under the plan of accomplishment technical evaluation factor. Accordingly, the auditors determined that the evaluator believed the contractor had an unacceptable plan of accomplishment, and was therefore, technically unacceptable. The second evaluator, however, determined the contractor to be acceptable. Although the GSA contracting officer for FSS 621-3 stated that a third evaluation would be completed under these circumstances, there was no documentation in GSA's file to support that this occurred. It appears that the contract award was made without consideration of whether or not the contractor would be able to perform task order requirements without exceeding the subcontracting limitation of its FSS small business set-aside contract.

Documentation in GSA's contract files showed that GSA assigned an estimated contract value of only \$125,000 to FSS contracts that were used by SBA to procure due diligence task orders ranging from approximately \$23 to \$31 million. In determining responsibility of the due diligence contractors, GSA reviewed the contractors' financial statements and since the award could be cancelled, funds were not obligated, start up expenses were expected to be limited and the contractors were not debarred, it was concluded that the contractors met all elements of responsibility. For one of the due diligence contractors, GSA even noted that financing appeared

shaky, however, still determined the contractor to be responsible.

Each contractor was awarded an FSS contract under which unlimited dollar value task orders could be placed. We question how determinations of responsibility could be made for an unlimited task order amount at the time the FSS contracts were awarded when FAR Part 9.1 requires that in order to be determined responsible, a prospective contractor must (1) have adequate financial resources to perform the contract or the ability to obtain them, (2) be able to comply with the performance schedule, (3) have the necessary organization, experience, accounting and operational controls, and technical skills or the ability to obtain them, (4) have the necessary production, technical equipment and facilities or the ability to obtain them, and (5) be otherwise qualified and eligible to receive an award under applicable laws and regulations. These elements of responsibility appear to be items that would only be known at the task order level, yet, ordering agencies are not required to make a separate determination of responsibility. Therefore, a thorough determination of responsibility was never made of the due diligence contractors awarded task orders by SBA.

GSA does not fund contracts and does not have a policy on assigning estimated contract values to FSS contracts. If an estimated contract value closer to the amount of the average SBA due diligence task order had been assigned, GSA's responsibility determinations may have been handled differently. As a result of the above, SBA relied on GSA's inadequate evaluations and determinations of responsibility when awarding the due diligence task orders and accordingly, may have awarded task orders to contractors who were unable to perform SBA's due diligence requirements without violating the terms of their FSS contracts.

Due Diligence Contractors Overcharged SBA

The due diligence contractors for asset sales 5, 7 and 8 charged SBA higher prices than those approved by GSA for their FSS contracts. The due diligence contractor for asset sale 5 overcharged SBA between \$799,732 and \$976,729 for Broker Price Opinions, the due diligence contractor for asset sale 7 overcharged SBA between \$510,079 and \$1,324,011 for appraisals and labor hour categories and the due diligence contractor for asset sale 8 overcharged SBA between \$381,026 and \$2,276,521 for loan file reviews and credit reports.

GSA requires FSS contractors to charge ordering agencies no more than the prices on their approved FSS price lists. These price lists are posted on GSA's website for ordering agencies to reference. In accordance with FAR Part 8.4, SBA should have used the contractors' price lists to ensure it was ordering items listed on the FSS. The contracting specialist for the due diligence task orders stated she did not review the contractors' price lists and was not aware

that the contractors were overcharging SBA for certain items. As a result, SBA was overcharged between \$1,690,838 and \$4,577,261.

Recommendations:

We recommend that the Associate Deputy Administrator for Government Contracting

and Business Development:

- 9A. Notify GSA of the deficiencies discussed above and recommend that policies and procedures for contractor evaluations and responsibility determinations be improved to ensure small contractors are able to perform task order requirements without violating the terms of their FSS contracts.

We recommend that the Associate Deputy Administrator for Management and Administration:

- 9B. Consider discontinuing use of the FSS to procure due diligence services for SBA's asset sales due to the deficiencies discussed above.
- 9C. Ensure contracting officials are reviewing the GSA approved price lists when issuing task orders to FSS contracts to ensure SBA is not being overcharged and ordered items are on the FSS.
- 9D. Seek recovery of at least \$1,690,838 for amounts overcharged by referring the overcharging matter to the GSA contracting officer for FSS 621-3 (now 520-3) for appropriate action.

SBA Management's Response:

GC/PPL agreed to advise the Administrator of the Office of Federal Procurement Policy and the Director of GSA's FPDC of the OIG's finding for their review and action. OA did not provide comments on recommendations 9B, 9C, and 9D.

OIG Evaluation of Management's Response:

GC/PPL's planned actions are responsive to recommendation 9A and recommendations 9B, 9C and 9D will be resolved during the audit resolution process.

Finding 10: A Complaint About SBA Was Unsupported

A complaint about SBA argued that using different due diligence contractors for asset sales, rather than a programmatic contractor (one contractor for multiple sales), would lead to additional costs to the taxpayers. The complaint portrayed that if the due diligence contractor for asset sales 1 through 4 and 6 also performed the due diligence services for asset sales 5, 7 and 8, SBA would save taxpayers \$270 million. The basis for this claim was the twelve cent per dollar difference in the rate of return between asset sale 4 and 5, as sale 5 was the first sale for which a different due diligence contractor was used. It was projected that the same difference in the rate of return would occur for asset sales 7 and 8. Additionally, the complaint argued that a \$3 million discount would have been obtained if this due diligence contractor was also awarded the due diligence task orders for asset sales 7 and 8.

The audit found that the allegation was unsupported. For each asset sale, SBA procures a Transaction Financial Advisor (TFA). At the completion of each asset sale, the TFA provides SBA a "Lessons Learned" document that includes the results of its post-sale survey of bidders and potential bidders. We reviewed the feedback from bidders obtained by the TFAs for asset sales 4 and 5 to determine if the quality of due diligence services impacted the investors' bid amounts and resulted in a lower rate of return for sale 5. The bidder feedback did not support the allegation and indicated that the quality of due diligence on both sales was high. The bidder feedback, however, provided an indication of why the rate of return may have been lower for sale 5. Some investors complained about the open auction bid method used for this sale and stated that this method may not have allowed SBA to maximize its recovery. Additionally, some investors stated they would have bid higher if this method was not used and some complained they were unable to get their bids in on time. Our audit also found that SBA justified and maintained clear support for its decision to use separate due diligence contractors for asset sales rather than one contractor for multiple asset sales. SBA's rationale was based on problems experienced and the inflexibility of using one contractor for overlapping sales. Based on the above, we concluded that the allegation was unsupported and no further action was necessary to address this allegation.



MEMORANDUM

Date: February 20, 2004

To: Robert G. Seabrooks
Assistant Inspector General for Auditing

From: Darryl K. Hairston
Assistant Administrator for Administration

Subject: Audit of SBA's Administration of the Procurement Activities of Asset Sale Due Diligence Contracts and Task Orders

This is in response to your memorandum of December 30, 2003, subject as above. The Office of Administration offers the following comments regarding the report.

Finding 1: SBA Did Not Follow Proper Procurement Practices Which Resulted In Asset Sale Due Diligence Contracts and Task Orders That Did Not Benefit Small Businesses

Comments

Bullet #1 - The Office of Administration (OA) disagrees with the finding for Bullet #1. The Office of Procurement and Grants Management (OPGM) believes that it did not award any contract or FFS task order which violated the 50 percent rule. For GSA schedule requirements, the 50% rule applies to the overall annual performance of a contractor in which they report to GSA and not to individual procurements using the schedule.

Bullet #2 - OA disagrees with the finding for Bullet #2. OPGM does not believe that improper teaming arrangements exist. We will like to reference our July 13, 2002 response to your action memorandum dated June 19, 2002, copy attached.

Bullet #3 - OA disagrees with the finding for Bullet #3. There is no regulatory requirement to have a size certification when ordering against the GSA schedule for a contract which is awarded and administered by GSA. In addition, the GSA schedule was checked prior to each

solicitation for the size status of each company. All the companies were listed as small businesses.

Bullet #4 - OA disagrees with the finding for Bullet #4. In accordance with FAR 1.602-2, the contracting officer awarded Asset Sale #5 based on competition and in the best interest of the Government. Additionally, the award of Asset Sale #5 did not violate any GSA, CICA or FAR requirement.

Issuance of One Due Diligence Task Order Undermined the Intent of SBA's 8(a) Program

Comments

Page 9, paragraph 1 - OA disagrees with the sentence, "The contracting specialist for the due diligence task orders stated that SBA disregarded the applicable size standard to protect the number of eligible firms for future due diligence awards." The contracting specialist has indicated that she did not make this statement. Further, OPGM checked with SBA's Business Opportunity Specialist to verify that this contractor still had 8(a) status.

Page 9, paragraph 2 - OA disagrees with the sentence, "Additionally, prior to SBA's award for asset sale 6, an SBA District Office determined that this contractor outgrew the size standard for all NAICS codes in its approved business plan except one." OPGM confirm through the BOS that the contractor was a current 8(a) participant. Again, this order was not an 8(a) procurement.

Page 9, paragraph 3 - OA disagrees with the sentence, "As a result of the above, SBA undermined the intent of the 8(a) program to assist the business development of small, disadvantaged businesses by awarding the sale 6 task order to a large business, while giving the appearance it was supporting the 8(a) program." OPGM fully supports all small business programs. This is demonstrated by OPGM's annual procurement achievement of awarding 50 % or more of its procurement dollars to small businesses. In addition, SBA Asset Sales #4 through #8 were awarded utilizing the GSA schedule and not the SBA 8(a) program.

Page 9, paragraph 3 - OA disagrees with the sentence, "As noted above, SBA awarded a diligence task order to a contractor it knew was no longer a small, disadvantaged business in accordance with the applicable NAICS code." There was no self-certification requirement in these orders instead SBA relied on the contractor's certification at the time of offer on the

underlying GSA schedule.

Page 10, paragraph 4 - OA disagrees with the sentence, "As a result, there is no assurance that SBA awarded the due diligence task order for asset sale 5 to the best value contractor."

Recommendations

Recommendation 1G - This recommendation is not based on any regulatory requirement. However, The Office of Government Contracting is working with GSA to implement a more frequent small business certification. OPGM is considering requiring small businesses to self-certify small business set-aside GSA schedule purchases with an estimated value exceeding \$500K.

Recommendation 1I - OA has complied with, and will continue to comply with, all sole source requirements. However, OPGM did not award any Asset Sales requirement as sole source procurement.

Recommendation 1J - This recommendation is invalid since no award for the Asset Sale program was awarded as sole source procurement.

Finding 2: Contractors Did Not Receive Impartial, Fair and Equitable Treatment

Comments

Debriefing Was Not Conducted in Accordance with the FAR

OA disagrees with this finding. OPGM conducted a debriefing by phone and, in turn, satisfying the requirement of FAR 15.506.

Information Was Not Properly Disclosed by a Contracting Specialist

OA disagrees with this statement. OA refers your office to all the documentation on the GAO protest on this issue. SBA won this protest.

Recommendations

Recommendation 2B - OA disagrees with this recommendation. A "verbal" debriefing was conducted. There is no violation of the FAR.

Finding 3: Discussions Were Not Held for Due Diligence Contracts and Task Orders

Recommendation 3A - OPGM reserves the right to review this section further.

Finding 4: SBA's Acquisition Planning and Monitoring Requires Improvement

Comments

Planning Was Not Performed and Documented in Accordance with the FAR

Page 16 - OA disagrees with the sentence, "Additionally, OPGM views their involvement in planning to be customer service and therefore, does not document planning in-the contract files." OPGM does not document all questions asked by a program office. However, OPGM considers acquisition planning as a formal process and will include any related information in the contract file.

Finding 5: OPGM Did Not Always Comply with Procurement Policies and Procedures

Comments

Page 17 - OA disagrees with the findings of number 5.

8(a) Contract Offers - OA held intensive planning discussions with OGC, OFA and Government Contracting before solicitation of the Basic Ordering Agreements which were the basis for Asset Sales #1 through #3. In addition, OA disagrees with the statement, "The contracting specialist for the due diligence contracts for asset sales 1 through 3 was unaware of this requirement and agreed that 8(a) procurements should be offered to an SBA district office." The cited contract specialist was a GS-14 and was well aware of this requirement. Since SBA headquarter offices participated and furnished a listing of the eligible 8(a) firms, he felt that this satisfied the offering requirement.

Incomplete Technical Evaluation Report - SOP 00 11 1 is out of date. OA is in the process of obtaining agency approval of its new and revised SOP. In this SOP, OA relies heavier on the FAR since the change in procurement regulations is constant. As a result, there is no requirement in FAR for a determination of acceptable, unacceptable and capable of improvement.

Inappropriate Verbal Notifications of Award - OA believes that it has the right to verbally authorize a contract when it deems it necessary in the

best interest of the Government. Additionally, only the award of Asset Sale 7 was verbally approved.

Post Award Conference Reports Were Not Prepared in Accordance with the FAR- OA disagrees with this statement and believes that the kick-off meeting and the post award conference minutes as well as the lessons learned report serves this requirement.

While we have responded to the concerns and issues set forth in the Draft Audit Report, I question the applicability of some, e.g., subcontracting limitations, teaming arrangements, etc. In this regard, I can find no basis to conclude that the particular procurement actions in question were small business set asides.

[FOIA Ex. 6]

Darryl K. Hairston
Assistant Administrator for
Administration

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

DATE 26 FEB 2004

TO: Robert G. Seabrooks
Assistant Inspector General for Auditing

FROM: Barry S. Meltz
Acting Associate Administrator for
Government Contracting

THRU: Frank J. Lalumiere
Acting Associate Deputy Administrator for
Government Contracting and Business Development

SUBJECT: Audit of SBA's Administration of the Procurement Activities of Asset
Sale Due Diligence Contracts and Task Orders

FOIA Ex. 6

The Office of Government Contracting/Office of Policy, Planning and Liaison (GC/OPPL) has reviewed the Audit Report of the Assistant Inspector General (IG) for Audits on the above subject. We would like to take this opportunity to respond to specific recommendations directed to GC/OPPL. We believe SBA's regulations provide sufficient guidance on determining compliance with the 50 Percent Rule (Limitations on Subcontracting). However, they may require additional clarification on their application to contracting actions.

Finding 1. SBA Did Not Follow Proper Procurement Practices Which Resulted In Asset Sale Due Diligence Contracts and Task Orders That Did Not Benefit Small Businesses.

Specific Finding: Violations of SBA's 50 Percent Rule

Recommendation 1K: Revise SBA guidelines to clarify what type of labor should be considered in determining compliance with the 50 percent rule and how interpretations of the 50 percent rule requirements should be requested.



GC/OPPL Response:

SBA's Regulations 13 Code of Federal Regulation (CFR)

SBA's 8(a) regulation at 13 CFR 124.510(a) - *What percentage of work must a Participant perform on an 8(a) contract?*, refers to the provisions of 13 CFR 125.6 -- *Prime contractor performance requirements (limitations on subcontracting)*, as guidelines for the contracting officer to use when determining compliance with what is now commonly referred to as the "50% rule." The guidelines in 13 CFR 125.6 are used to determine 50% Rule compliance for the 8(a) Program as well as other small business programs. 13 CFR 125.6 contains statutory language found in subsections 8(a)(14) and 15(o) of the Small Business Act and also defines terms used to determine the percentage of small business performance for set-aside contracts. As stated in 13 CFR 125.6(c) addressing the 50% Rule, "compliance will be considered as an element of responsibility and not a component of size eligibility."

Responsibility refers to the bidder's capacity to perform all contract requirements, and is determined not at bid opening, but at any time prior to award based on any information received by the agency up to that time. Once a contract has been awarded, compliance or non-compliance with its terms becomes an issue of contract performance, not responsibility. We believe that the Audit Report discusses situations dealing with post award situations, not preaward situations where compliance would be an issue of responsibility. In post award situations, the contracting officer has means available to correct unacceptable performance.

It should be noted that 13 CFR 125.6(g) also contains a provision that permits the percentage of performance requirements for small business to be shared by small business team members where the total estimated cost of the contract exceeds certain thresholds. This may or may not apply to the contracts addressed in the Audit Report. In addition, in situations where the contract is awarded through the 8(a) Program, 13 CFR 124.510(c) contains guidelines for use on indefinite delivery/indefinite quantity 8(a) contracts to determine if the percentage of performance requirement is being met and at what interval to determine compliance. Again, this may or may not apply to the contracts under audit if there is an issue involving the percentage of performance.

GC/OPPL Action:

1. GC/OPPL will review 13 CFR 124 in conjunction with the 8(a) Program office to determine if further clarification and guidance is required to address the issues raised in the Audit Report as it relates to the 8(a) Program.
2. GC/OPPL will review 13 CFR 125.6 and appropriate subparts of the FAR to determine if further clarification and guidance is required to address issues relative to the application of the 50 Percent Rule as it relates to all small business set-asides.

Finding 6. Due Diligence Contracts and Task Orders Were Not Properly Reported to the Federal Procurement Data System

Recommendation 6D: - We recommend that the Associate Administrator for Government Contracting notify the Office of Federal Procurement Policy of the deficiency discussed above and recommend that periodic quality assurance reviews be conducted by GSA to ensure the accuracy and reliability of FPDS Data.

GC/OPPL Response: Once finalized, we will advise the Administrator, Office of Federal Procurement Policy and the Director of the General Services Administration's Federal Procurement Data Center of the IG's finding, for their review and action.

Finding 9. Due Diligence Contractors Overcharged SBA

Specific Finding: *GSA's Evaluations and Determinations of Responsibility Were not Reliable.*

Recommendation 9A: - Notify GSA of the deficiencies discussed above and recommend that policies and procedures for contractor evaluation and responsibility determination be improved to ensure small contractors are able to perform task order requirements without violating the terms of their FSS contracts.

GC/OPPL Response: Once finalized, we will advise the Administrator, Office of Federal Procurement Policy and the Director of the General Services Administration's Federal Procurement Data Center of the IG's finding, for their review and action.

Thank you for the opportunity to comment on this Audit Report. If you have any questions, please contact Barry Meltz, Acting Associate Administrator for Government Contracting at 205-677-7019 FOIA Ex. 4



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

Date: January 30, 2004

To: Robert G. Seabrooks
Assistant Inspector General for Auditing
FOIA Ex. 4

From: James W. Hammerley
Acting Assistant Administrator for Portfolio Management

Subj: Audit of SBA's Administration of the Procurement Activities of Asset Sale Due Diligence Contracts and Task Orders

The audit made the following recommendations to the Acting AA/PM:

4D. Maintain suitable records of observations and performance problems related to the asset sale due diligence contracts and use of these records to prepare required contractor evaluations.

After speaking to the auditor, I understand that the fact that this office conducted the reviews is not in question. The concern that the IG is raising is that there is not a suitable written record of the activities that were conducted. We concur with the recommendation and agree that suitable records will be maintained if due diligence contractors are hired for additional asset sales.

6B We recommend that the Chief Financial Officer in conjunction with the Assistant Administrator for Portfolio Management and the Assistant Administrator for Administration ensure the appropriate SBA officials are aware that the proceeds from SBA's asset sale are appropriated funds and should be treated in accordance with rules and regulations application to appropriated funds.

We will work with the Chief Financial Officer and the Assistant Administrator for Administration to ensure that SBA officials know the proper characterization of the funds received from the proceeds of any future asset sales.

SBA IS AN EQUAL OPPORTUNITY EMPLOYER AND PROVIDER





U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

Date: FEB 27 2004

To: Robert G. Seabrooks
Assistant Inspector General for Auditing

From: Thomas A. Dumaresq
Chief Financial Officer **FOIA Ex. 6**

Subject: OIG Draft Audit #4-XX: Audit of SBA's Administration of the Procurement Activities of Asset Sale Due Diligence Contracts and Task Orders – OCFO response to the Draft Report

This draft audit report, dated December 30, 2003, included two recommendations for the OCFO. Our responses to the recommendations follow.

IG Recommendation

6A. We recommend that the Chief Financial Officer issue an information notice to ensure the necessary SBA officials have a clear understanding of what funds constitute appropriated and non-appropriated funds and the proper procedures for handling both types of funds.

OCFO Response

The OCFO disagrees with this recommendation. Our analysis and reasoning follow.

First, we do not believe that any procurement issues arising from the asset sale contracts were caused by confusion over the difference between appropriated and non-appropriated funds. However, even if this were the case, with an agency with as many programs and activities as SBA has, and with the various and complex guidance provided by GAO, OMB, and other legal sources, it would be very difficult to provide a simple, one-size-fits-all Information Notice on the topic for SBA management and staff. Even the GAO recognizes that “defining the term ‘non-appropriated funds’ may pose some challenges...” IV Principles of Federal Appropriations Law, Ch. 17, p. 17-223 (Red Book). In addition, since the determination of whether funds are non-appropriated or not is fact-based, simplified advice would have to mention that it was general only and specific advice would need to be obtained on every matter. This reality renders this topic inappropriate for an Information Notice. See SOP 00-23-5, SBA Directives Management System, Ch. 3, sec. 29(e) (definition of “Information Notice.”)

SBA IS AN EQUAL OPPORTUNITY EMPLOYER AND PROVIDER

In addition, we understand that SBA, like other Federal Agencies, will soon execute an interagency agreement with the General Services Administration ("GSA") to administer the government-wide asset sales program. As one of the President's 24 E-Government Quicksilver Initiatives, this new process will transform the asset sales process. Since any future asset sales will likely use the new GSA operated process, issuance of an Information Notice regarding future asset sale procurements seems moot.

Therefore, instead of issuance of an Information Notice, we recommend that IG recommendation #6A be either removed or rephrased as follows: "We recommend that OCFO work with OCA, OA, and OGC to determine the proper nature of funds in all future SBA asset sale contracts before issuing a solicitation for such contracts."

IG Recommendation

6B. We recommend that the Chief Financial Officer in conjunction with the Assistant Administrator for Portfolio Management and the Assistant Administrator for Administration ensure the appropriate SBA officials are aware that the proceeds from SBA's asset sales are appropriated funds and should be treated in accordance with rules and regulations applicable to appropriated funds.

OCFO Response

OCFO will work with the appropriate offices to ensure that SBA officials know the proper characterization and treatment of any future asset sales proceeds.

CONCLUSION

Thank you for this opportunity to reply to the report on the secondary market program. I will be glad to answer any questions that you may have on this response.



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

Attachment 5
Page 1 of 1

DATE: January 30, 2004
TO: Robert G. Seabrooks
Assistant Inspector General for Auditing
THRU: Stephen D. Galvan
Chief Operating Officer
FROM: Delorice Price Ford FOIA Ex. 6
Assistant Administrator Hearings and Appeals
SUBJECT: Audit of SBA's Administration of the Procurement Activities of Asset Sales Due
Diligence Contracts and Task Orders

This is in response to your request for comments on the draft audit report on SBA's administration of the procurement activities of asset sales due diligence contracts and task orders. The Office of Hearings and Appeals (OHA) concurs with your proposed recommendation for the Assistant Administrator to:

Ensure SBA officials with FOIA responsibilities receive training on properly responding to FOIA requests on an annual basis, with the first training session being held no later than six months from the issue date of this report..

To date, we have developed in collaboration with the Office of Chief Information Officer (OCIO), the Online Freedom of Information Act (FOIA) to ensure that all employees are trained and current on the requirements of FOIA and the Privacy Act (PA). The training will be posted on SBA's Yes Page at <http://yes.sba.gov/> and will be accessed from the Training Room. More specifically, it is designed to provide employees with a basic understanding for FOIA and the specific procedures for processing routine FOIA requests. Due to the Agency's statutory obligation and because of the often sensitive and complex nature of FOIA requests, completion of the course will be mandatory for all employees. OHA staff will provide one-on-one assistance on an as-needed basis. The deployment and implementation of this system will proceed well within the recommended timeframe, as we are in the final stages of clearance with the Office of General Counsel.

We have also developed a web-based tracking system for all FOIA and PA requests received by the Agency nationwide. The system allows users to enter FOIA and PA request data and to track and update each step of processing from receipt to final determination. In addition, the system also has reporting capabilities to create management reports and end-of-year statistics for the Annual FOIA report to the Department of Justice. The system will be implemented and all FOIA contacts and back-up staff will be trained by the end of March 2004. It should be noted that this training will be mandatory for all assigned FOIA contacts.

Should you or your staff have any questions, please don't hesitate to contact me or Lisa Babcock at (202) 401-¹ FOIA Ex. 6

REPORT DISTRIBUTION

<u>Recipient</u>	<u>No. of Copies</u>
Deputy Associate Deputy Administrator for Management and Administration.....	1
Assistant Administrator for Administration.....	1
Director, Office of Procurement and Grants Management	1
Associate Administrator for Government Contracting	1
Assistant Administrator for Policy, Planning and Liaison.....	1
Assistant Administrator for Policy and Research	1
Deputy Associate Deputy Administrator for Capital Access.....	1
Assistant Administrator for Portfolio Management.....	1
Deputy Chief Financial Officer.....	1
Director, Freedom of Information/Privacy Act Office.....	1
General Counsel.....	3
Deputy General Counsel	1
United States General Accounting Office.....	1
Office of the Chief Financial Officer Attention: Jeff Brown	1