



Office of Inspector General

Audit Report

Audit Report on the National Association of Minority Contractors

Report Number: 1999 - 00213

August 23, 1999

**Inspector General Division
Conducting the Audit:**

**Mid-Atlantic Audit Division
Philadelphia, PA**

Program Offices Involved:

**Office of Small and
Disadvantaged Business
Utilization
Washington, D.C.**

**Grants Administration
Division
Washington, D.C.**



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL
MID-ATLANTIC DIVISION
1650 Arch Street
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August 23, 1999

MEMORANDUM

SUBJECT: Audit Report on the
National Association of Minority Contractors
Grant Number X-824519-01
Report Number: 1999 - 00213

FROM: Carl A. Jannetti *Carl A. Jannetti.*
Divisional Inspector General for Audit
Mid-Atlantic Division (3AI00)

TO: Jeanette L. Brown, Director
Office of Small and Disadvantaged Business Utilization (1230A)

Gary M. Katz, Director
Grants Administration Division (3903R)

Attached is our audit report on the Environmental Protection Agency (EPA) grant number X-824519-01 awarded to the National Association of Minority Contractors (NAMC). The audit was performed because of an anonymous Hotline complaint received by the Office of Inspector General (OIG) alleging poor grantee performance and a mismanagement of EPA grant funds. The grant was awarded by EPA's Office of Small and Disadvantaged Business Utilization (OSDBU). The purpose of our audit was to: determine whether NAMC performed the required work; evaluate the adequacy of OSDBU's oversight; and identify any mismanagement of EPA funds.

This audit report contains findings that describe problems the OIG has identified and corrective actions the OIG recommends. This audit report represents the opinion of the OIG. Final determinations on matters in this report will be made by EPA managers in accordance with established EPA audit resolution procedures. Accordingly, the findings contained in this report do not necessarily represent the final EPA position.

RESULTS-IN-BRIEF

Although NAMC completed only a small portion of the work required by the grant it received, OSDBU allowed NAMC to draw down all of the \$750,000 in grant funds resulting in a mismanagement of EPA funds. This occurred in part because OSDBU did not adequately monitor NAMC's performance under the grant.

In the middle of the project, EPA approved an amendment to the grant allowing NAMC to replace conferences with needs assessments. According to EPA Order 5700.1, for this work to be performed under a grant, EPA can receive only incidental benefit from the grantee's efforts. Because the work plan indicated that needs assessments would be done at states and EPA regions, before approving the work plan, Agency personnel should have determined how much benefit EPA would receive from the NAMC work. Also, had EPA adequately monitored NAMC's work, it would have realized that NAMC conducted needs assessments primarily at EPA regions and that EPA received more than incidental benefit from this work. As a result, EPA allowed NAMC to inappropriately conduct contract work under the grant because NAMC's work benefitted EPA.

RECOMMENDATIONS

We recommend the Director of OSDBU require her staff to manage grant projects in accordance with the EPA Assistance Administration Manual. To that end, OSDBU project officers should ensure recipients comply with the terms of the agreement, and that the draw down of federal funds is proportional to the recipients' rate of progress.

We recommend the Director of OSDBU monitor recipients' work to ensure that contract work is not completed under a grant.

AGENCY COMMENTS AND OIG EVALUATION

OSDBU partially concurred with our first recommendation whereby it agreed to implement procedures to better ensure recipients comply with the terms of the agreement. However, OSDBU contends that it can not implement the second part of the recommendation which is to ensure the draw down of funds is proportional to the recipient's rate of progress. In addition, OSDBU disagreed with several important aspects of the finding such as whether there was a misuse of grant funds and the adequacy of OSDBU's oversight of NAMC.

OSDBU and Grants Administration Division (GAD) agreed with the intent of our draft finding entitled *EPA Should Have Awarded A Contract Instead Of A Grant*, but contend that the draft report did not accurately characterize the scope of work for the grant. OSDBU responded that the decision to include needs assessments as part of the grant was appropriate for grant funding. OSDBU acknowledged that the actions it took may have inadvertently contributed to NAMC's misunderstanding of their legal relationship with EPA. However,

they maintained that the approved amendment was proper for grant funding and that EPA only received incidental benefit from NAMC's work.

Based on EPA's response to the draft report and the results of our exit meeting, we made the appropriate modifications to our report and recommendations. We summarized the comments received from EPA and NAMC after the findings. However, our position remains unchanged on the report findings and we do not agree that EPA only received incidental benefit from NAMC's needs assessment work. To the contrary, EPA received most of the benefits derived from NAMC's needs assessment work. This occurred because OSDBU did not adequately monitor NAMC's work.

Both EPA and NAMC's responses included comments pertaining to the financial part of our audit work. These matters, relating to the allowability of costs, will be addressed in a separate financial report to be issued at a later date.

ACTION REQUIRED

This report contains recommendations to the Directors of OSDBU and GAD. We designated the Director, OSDBU, as the primary action official because OSDBU was the EPA office responsible for monitoring NAMC's performance. As the primary action official, the Director, OSDBU should take the lead in coordinating the Agency's response.

In accordance with EPA Order 2750, the Director, OSDBU is required to provide us with a written response to the audit report within 90 days of the audit report date. The response should address all recommendations, and include milestone dates for corrective actions planned, but not completed. Should the action official consider a position that differs from our recommendations, we would appreciate the opportunity to discuss management's position.

We have no objection to the further release of this report to the public. If you or your staff have any questions regarding this report, please contact me or Patrick Milligan at (215) 814-5800.

Attachment

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PURPOSE

This audit was initiated because of an anonymous OIG Hotline complaint alleging NAMC's poor performance and a mismanagement of grant funds. The purpose of our audit was to assess:

- ◆ NAMC's performance under the grant,
- ◆ the adequacy of OSDBU's oversight of NAMC, and
- ◆ whether there was a mismanagement of grant funds.

BACKGROUND

NAMC is a nonprofit trade association established in 1969 to address the needs and concerns of minority contractors, with a particular focus on assisting those businesses involved in the construction industry. To carry out its mission, NAMC provides assistance to minority contractors mainly through training and outreach. NAMC currently has about 5,000 members and conducts three annual membership conferences. Since 1986, NAMC received \$4.6 million through EPA grant awards.

In 1995, Congress earmarked \$500,000 for OSDBU to oversee two activities: 1) monitor states' efforts to assist minority firms in obtaining contracting opportunities; and 2) perform outreach on environmental justice activities. Congress mandated that these activities be carried out by a nonprofit minority organization that has experience with OSDBU's culturally diverse programs. On September 25, 1995, OSDBU awarded NAMC the \$500,000 in earmarked funds. NAMC was required to conduct five state studies and ten opportunity exchange conferences covering all ten EPA regions. The grantee had from October 1, 1995 to March 31, 1997 to complete the project.

The state studies were to assess the adequacy of each state's program for making contracting opportunities available to small and disadvantaged contractors. The exchange conferences were to inform minority contractors of impending contracting opportunities. For the grant work plan, OSDBU allowed NAMC to follow its proposal verbatim. NAMC awarded the Minority Business Enterprise Legal Defense and Education Fund (MBELDEF) a \$161,000 contract to perform the five state studies. With assistance from consultants, NAMC was to conduct the ten conferences.

On January 9, 1997, three months prior to the expiration of the project, NAMC proposed to perform additional work. Specifically, NAMC proposed doing five additional state studies and two needs assessments at EPA regions. These assessments were intended to determine what EPA and the states needed to do to ensure that it provided ample contracting

opportunities to minority businesses. On March 12, 1997, OSDBU awarded NAMC a \$250,000 increase to perform this additional work.

SCOPE AND METHODOLOGY

We conducted an audit of NAMC's performance and reviewed EPA's award and administration procedures. The scope of our work was limited to activities conducted by NAMC under the grant, and on EPA's program management aspects of the grant as they related to the program office, OSDBU. We also conducted a financial audit of the costs claimed by NAMC under this Assistance Agreement.

We performed our audit in accordance with the *Government Auditing Standards* (1994 Revision) issued by the Comptroller General of the United States. However, we did not follow all of the elements of the planning standards in Chapter 6 because we initiated this audit as a result of an OIG Hotline allegation. Instead, our work focused on confirming the Hotline issues raised in the complaint. The audit included tests of the program records and other auditing procedures we considered necessary. Other than the issues discussed in this report, no other significant program management issues came to our attention that warranted expanding the scope of our performance audit.

Our review of NAMC's internal controls was limited to assuring compliance with federal criteria and with NAMC's policies and procedures. Also, we reviewed the Single Audit Reports prepared by NAMC's independent auditors for fiscal years 1993 through 1996. This last audit included an assessment of NAMC's internal control structure for the period ended March 31, 1996. Because of the inherent limitations in any system of internal controls, errors or irregularities may occur and not be detected. Except for the issues discussed in this report, nothing came to our attention that would cause us to believe that internal control review procedures pertaining to our program management audit were inadequate.

To accomplish our audit we reviewed EPA's policies and procedures for administering grants and the requirements specified in the grant agreement. We used EPA Order 5700.1 titled *Policy for Distinguishing Between Assistance and Acquisition*, the Code of Federal Regulations Part 30, and the Assistance Administration Manual as criteria for conducting this review. Also, we interviewed program officials from EPA Headquarters, NAMC and their contractor MBELDEF.

Our audit began on July 7, 1998 and ended on November 30, 1998. We conducted our audit at EPA Headquarters, NAMC, and MBELDEF. We reviewed records maintained by the Agency, NAMC, and MBELDEF. These records included the grant application, the grant agreement, amendments, progress reports, deliverables, and other project files. We also reviewed NAMC's compliance with the program and financial reporting requirements of the grant.

We issued the draft report on March 12, 1999. OSDBU submitted a consolidated response on May 26, 1999, which included comments from OSDBU, GAD, and NAMC. We included all of the responses as Appendix 1 to this report. Because NAMC's response was voluminous, we did not include the exhibits that were provided with its response. These exhibits are on file in our office and available upon request. NAMC's response included comments on financial issues described in the draft report. Our evaluation of these comments will be included in a financial report which we will issue separately. We conducted an exit conference with OSDBU, GAD, and the EPA's Office of General Counsel on June 7, 1999.

PRIOR AUDIT COVERAGE

An EPA OIG audit report, *Special Review on Assistance Agreements Administered by the Office of Small and Disadvantaged Business Utilization* (E3FMP2-03-0364-3400017), issued on January 25, 1993 addressed topics similar to those discussed in this report.

OSDBU ALLOWED NAMC FULL PAYMENT FOR LIMITED WORK

Although NAMC completed only a small portion of the work required by the grant it received, OSDBU and GAD allowed NAMC to draw down all of the \$750,000 in grant funds that EPA provided. OSDBU also approved time extensions that nearly doubled the length of the project, but resulted in NAMC completing no additional work. EPA's Assistance Administration Manual (the Manual) requires that project officers perform sufficient oversight of the grantee by ensuring:

- ◆ projects are on schedule,
- ◆ the grantee complies with the grant deliverables, and
- ◆ EPA receives a complete final product.

Also, the Manual authorizes the award official to withhold payment for noncompliance. If the project officer is dissatisfied with a grantee's performance, it can request the award official to withhold payment.

In 1993, we performed an audit of OSDBU grants awarded to NAMC totaling about \$1.6 million. NAMC was to provide training to prepare minority businesses to enter the environmental field. We found that OSDBU did not adequately monitor NAMC's performance and NAMC provided ineffective training. At that time, we recommended that OSDBU perform sufficient oversight of grant projects, and ensure OSDBU project officers are adequately trained to effectively oversee the grantee.

Five years later, we again found OSDBU performed poor oversight of the current assistance agreement, and that inadequate work was performed by NAMC. OSDBU did not adequately monitor NAMC's performance, and did not recommend that GAD withhold grant funds when NAMC failed to perform sufficient work. As a result, there was a mismanagement of EPA funds. OSDBU needs to hold the grantee accountable for the grant funds, perform sufficient oversight, and recommend GAD withhold funds when sufficient work was not completed.

NAMC's Performance Was Inadequate

The type and amount of work OSDBU required NAMC to perform, and the time frames in which to complete the work went through several changes during the 33-month project period. The following schedule of grant deliverables shows revisions to the project and the status of work at the end of the project period.

Schedule of Deliverables Required By:

	Original \$500,000 Grant		Grant Amendment \$250,000 March 97	Deliverables for \$750,000 as of June 98	
	As of Sept. 95	As of Jan. 97*		Required	Completed
Conferences	10	3	0	3	2
State Studies	5	5	5	10	3
Needs Assessments	0	4	2	6	0

* OSDBU approved an informal change in work, replacing seven conferences with four needs assessments. The number of State studies remained the same.

To meet the original grant requirements, NAMC planned each conference to be a full day in length, with a projected audience of about 200 minority contractors. The implementation plan included a schedule of the cities selected, proposed dates for the conferences, and topics that would be addressed.

By October 1996, or within the first 12 months of the original 18-month project period, OSDBU allowed NAMC to draw \$498,500 of the \$500,000 EPA awarded under the grant. However, at that time, NAMC completed only one of the ten conferences, and instead of the expected full day conference, NAMC filled only a two-hour time slot. NAMC participated in a second two-hour conference six months later, in March 1997.

We do not believe EPA received what it paid for under the grant because NAMC could not have provided the same quantity and quality of information to minority contractors in two hours as it should have in a full day conference. Moreover, MBELDEF completed only three of the five state studies contracted for, yet NAMC paid MBELDEF \$161,000. This was the full value of the contract awarded to MBELDEF to perform the state studies.

Near the end of the original project period, NAMC changed the scope of work to do four needs assessments instead of seven conferences. OSDBU approved this change even though it did not meet the intent of the original grant and cost substantially less to perform. On March 12, 1997, OSDBU awarded NAMC an additional \$250,000 to conduct two more needs assessments and five more state studies, even though NAMC completed only a small portion of the work required under the original award. NAMC again contracted MBELDEF to conduct the second set of five studies for \$165,000, or approximately \$33,000 per study. The remaining \$85,000 was for NAMC to perform two needs assessments and to monitor MBELDEF's work.

Within six months of EPA awarding the amendment, \$230,000 of the \$250,000 had been expended by NAMC, yet it had completed no needs assessments or state studies. Between March 1997 and June 1998, NAMC initiated some work, but did not provide EPA with any of the required final products, thereby providing no value to the minority contracting community for the \$250,000 it received. Specifically, NAMC gathered data for three state studies that were not completed, and held two meetings with EPA officials regarding needs assessments.

Project Status

At the close of the project, the OSDBU Project Officer said she did not have a clear understanding of what work was required or completed. In total, EPA received three state studies and two inadequate conferences for \$750,000. OSDBU approved three time extensions for a total of 15 months, however, the extensions resulted in no more conferences or studies. NAMC still had not completed either the eight conferences or the six needs assessments, as well as seven state studies.

Lax Oversight Resulted In Mismanagement of EPA Grant Funds

OSDBU received progress reports during the first 12 months of the original project and was aware that the project was not near completion. In evaluating whether to award NAMC the \$250,000 amendment, OSDBU did not consider NAMC's poor performance under the original grant. The amendment significantly reduced outreach coverage from ten EPA regions to three by replacing conferences with needs assessments. NAMC officials described the needs assessments as a half-day meeting with EPA regional officials. We believe that for a needs assessment, NAMC would expend significantly less than what a full day conference would cost. Furthermore, EPA's lax oversight regarding the needs assessments resulted in contract work being performed under the grant. This is discussed further in the next finding.

Besides not completing the required work, NAMC did not comply with the cost sharing requirements of the grant it received from EPA. Again, OSDBU took no action to ensure NAMC complied with the grant terms. The grant agreement EPA executed with NAMC required it to fund the project with about \$40,000 of its own money. However, NAMC only incurred costs equal to the funds provided by EPA, and did not fund the project with any of its own money as required by Chapter 14 of EPA's Assistance Administration Manual.

Recommendation

We recommend the Director of OSDBU require her staff to manage grant projects in accordance with the EPA Assistance Administration Manual. To that end, OSDBU project officers should ensure recipients comply with the terms of the agreement, and that the draw down of federal funds is proportional to the recipients' rate of progress.

NAMC RESPONSE

From the very beginning of the grant, there were inordinate and sometimes inexplicable delays in moving the project forward, especially in generating correspondence from OSDBU to the regions and the states. Also, there were delays in the subsequent replies and scheduling of the various site visits, needs assessments, and other contacts. Therefore, NAMC requests that the IG recommendation include the opportunity to complete the remaining work with no additional EPA funds needed.

As of the time the IG's audit commenced in July 1998, four state studies, one conference and four needs assessments remained to be completed. MBELDEF has completed three state reviews in full and substantially completed three others, needing only the data analysis and report. NAMC has instructed MBELDEF to complete the analysis and prepare a report for the additional three states and submit it to EPA as soon as possible. It is anticipated that this report will be submitted within the next few weeks. NAMC had also completed two needs assessments. The fact that no minutes or reports were written for those needs assessment meetings does not impact the fact that they took place. As in the case of the conferences, the deliverable was the event itself.

With cost sharing, there is no requirement that the grantee contributions spread over the life of the project and it is common practice for grantee contributions to be utilized at the end of grants after direct grant funds have been expended.

OIG EVALUATION

We did find some evidence of delays, however, not to the extent NAMC contends. Moreover, if NAMC did experience delays in excess of one year which prevented it from holding conferences and performing state studies, all \$750,000 should not have been drawn down.

We disagree with NAMC regarding work that needs to be completed. As depicted in our report, seven studies (not four) and six needs assessments (not four) still need to be completed. Additionally, in NAMC's April 22, 1999 response to the draft report, they anticipated the final report for three additional state studies would be completed and submitted to EPA within the next few weeks. As of August 17, 1999, four months later, OSDBU still had not received the report. Moreover, we disagree that the deliverable for the needs assessments was solely the event itself. It is not sufficient that a meeting took place. At a minimum, there needs to be a written record of what was discussed and how this information will benefit minority contractors.

During the audit, NAMC personnel stated they and MBELDEF had incurred cost share expenditures and were to provide us with documentation. In response to our draft report,

NAMC has changed its position and contends the cost share was to be incurred at the end of the project period after all EPA funds had been spent. We disagree and believe EPA should have required NAMC to expend its initial cost share before awarding the \$250,000 amendment. Moreover, NAMC could have demonstrated a good faith commitment by incurring some cost share expenditures during the course of the project period, particularly when it realized much of the work would not be completed.

AGENCY RESPONSE

OSDBU partially concurred with our first recommendation whereby it agreed to implement procedures to better ensure recipients comply with the terms of the agreement. To ensure grants are managed in accordance with the *EPA Project Officer Training Manual*, OSDBU officials implemented a project officer checklist in August 1998. Based on a discussion with the OIG, this checklist was updated in February 1999. OSDBU has also: established an automated system to track the status of grants, scheduled staff members for project officer training, and began a review to determine if project officer responsibilities should be reassigned.

The OSDBU Director does not agree that project officers can ensure the draw down of funds is proportional to the recipient's rate of progress. The Director further explained that the Government made a conscious policy decision to allow recipients to draw down payments in advance under the Automated Clearing House (ACH) method. One of the unintended consequences of the policy choice is situations described in the Draft Report where the recipient is able to draw down funds at a rate greater than its progress towards completion of the assisted activity. Also, under current assistance regulations and the terms and conditions for ACH, OSDBU's project officers do not routinely receive payment or financial status information that can be used in conjunction with recipient progress reports. Absent a change in Government wide policy, however, OSDBU can only recommend to GAD that payments be withheld or that the Agency impose a special term and condition when specific circumstances indicate the need for the project officer to have authority to deny payment requests.

The draft audit report states, in bold letters, that "Negligent Oversight by OSDBU Resulted in Misuse of EPA Grant Funds." This conclusory statement is unsupported by the facts and is unnecessarily pejorative. The report states that funds were misused, but it does not state how the funds were misused. The draft audit does not appear to dispute that NAMC actually incurred the costs charged to the grant. NAMC has offered to complete the project without additional funds from EPA, and on this basis, argues that the vast majority of the \$636,069 will be eligible costs under the agreement. Absent additional information indicating that NAMC spent the funds for improper purposes, it appears that if NAMC completes the grant work no funds will have been misused.

Regarding oversight of NAMC, the Project Officer generally understood what was required under the scope of work, but felt that she would have to review her files to describe the work in detail and address the amount of work actually completed.

For Headquarters awards, the servicing financial management center reviews the recipient's Final Financial Status Report to assure the recipient did, in fact, meet any cost sharing requirement. Therefore it was not appropriate to state that OSDBU took no action to ensure compliance.

Regarding whether EPA considered NAMC's poor performance before awarding a \$250,000 amendment, OSDBU did consider the grantee's poor performance, but both OSDBU and GAD decided to approve no-cost extensions and award the funding increase based on NAMC's assurances that the project would be completed.

Concerning the criteria used in the report, GAD officials replied that the Assistance Administration Manual is dated and that we should cite the *EPA Project Officer Training Manual* as the guidance for managing assistance agreements. Also, the Agency has not made a final decision on whether to accept NAMC's proposal to complete the activities provided for in the grant at no cost to EPA.

OIG EVALUATION

Both EPA and NAMC's responses included comments pertaining to the financial part of our audit work. These matters, relating to the allowability of costs, will be addressed in a separate financial report.

OSDBU's actions to improve project management should result in better recipient performance. However, regarding the project officer's monitoring of draw downs, we do not agree that draw down information is unavailable to the project officers. Part of the project officer training guidance toward effective grant administration requires attention to draw downs. GAD's grant specialists can provide project officers with a report on draw down information. Recently, the project officers also have access to draw down information through the EPA Intranet.

At no time during the project period did the OSDBU Project Officer request draw down information. Had she requested this information and compared it to NAMC's rate of progress, she could have recommended to GAD that payments be withheld until sufficient work had been completed. We are not recommending that project officers receive authority to deny payment requests. If project officers are dissatisfied with a grantee's performance during the project period, they need only employ existing procedures by recommending to GAD to withhold payment.

After considering OSDBU's response, we still maintain that the funds were misused because all of the grant money was drawn down, yet a substantial amount of work had not been completed. This constitutes a misuse of funds in our minds because so little of the grant requirements were completed. As for OSDBU's oversight, the Project Officer did have her file when we met, however, she could not provide us with an account of what work was required, completed or still remained. Had the OSDBU Project Officer adequately monitored NAMC's performance throughout the project period, she would have realized that NAMC had not contributed any of its cost share. Moreover, the OSDBU Project Officer could have discussed with NAMC its plans to meet the cost share obligation before awarding the \$250,000 amendment.

With respect to whether EPA considered NAMC's poor performance before awarding the amendment, there was no documentation regarding NAMC's assurances that the project would be completed. Moreover, if NAMC did provide assurances to OSDBU, it would not have been prudent for OSDBU to accept the assurances considering NAMC's past performance.

The *EPA Project Officer Training Manual* is more current and may be the more appropriate guidance for project officers to follow. However, GAD has not officially implemented it as the criteria to follow. Also, the Training Manual is written and formatted for classroom instruction, not as Agency policy. GAD needs to officially implement the Training Manual before the Assistance Administration Manual can be superceded. In any event, the issues and requirements in the Assistance Administration Manual are still valid and provide a basis for adequate grants administration.

We do not agree with granting NAMC a no-cost time extension to complete the work required under the grant. NAMC has drawn down all of the EPA grant funds and has still not completed a large portion of the work. It is not reasonable to expect that NAMC could deliver a timely, quality product when all of the grant funds have been expended.

EPA ALLOWED NAMC TO CONDUCT CONTRACT WORK UNDER A GRANT

In the middle of the project, EPA approved an amendment to the grant allowing NAMC to replace conferences with needs assessments. The work plan defined a needs assessment as a consultation providing assistance and developing strategies for EPA and states. However, the needs assessment work that NAMC completed mostly involved EPA, not the states. According to EPA Order 5700.1, for this work to be performed under a grant, EPA can receive only incidental benefit from the grantee's efforts. Because the work plan indicated that needs assessments would be done at states and EPA regions, before approving the work plan, Agency personnel should have determined how much benefit EPA would receive from the NAMC work. Also, had EPA adequately monitored NAMC's work, it would have realized that NAMC conducted needs assessments primarily at EPA regions and that EPA received more than incidental benefit from this work. As a result, EPA allowed NAMC to inappropriately conduct contract work under the grant because NAMC's work benefitted EPA. Moreover, there was no evidence that OSDBU or GAD evaluated the proposed amendment to assess whether the work should be funded as a grant or a contract.

In the proposed amendment, NAMC stated it had already performed one needs assessment which it defined as a meeting with EPA regional officials. The attendees of the first needs assessment were NAMC and EPA personnel (including the Project Officer). NAMC could not have intended states to be the principal beneficiary because there were no state personnel at the meeting. In addition, OSDBU correspondence to another EPA Region recommended that Regional officials meet with NAMC to ascertain the areas of support the Region needed to expand and augment its efforts. Again, there was no mention of states in the OSDBU memorandum.

EPA Order 5700.1 (the Order) provides that EPA should award grants when the work will principally benefit the public. The ten conferences that NAMC was originally required to perform were properly funded through a grant because the conferences were to provide benefit to the public. Minority contractors would benefit from learning about how and where to improve their chances of receiving federally-funded contracts.

Conversely, the Order states that surveys, studies, and research which gather specific information desired by the Agency for its direct benefit must be funded through a contract. However, the work plan approved by EPA made no distinction between the benefit to be received by EPA or the states. According to the Order, OSDBU was required to make the initial determination on whether the work should have been funded as a grant or a contract. However, OSDBU officials said they did not consider whether NAMC's proposed change in the scope of work should have been funded as a contract.

Before approving the amendment, OSDBU should have instructed NAMC to revise the work plan to indicate that the states would be the primary beneficiary of the work. Because the work plan was not revised, the Project Officer needed to more diligently monitor NAMC's performance to ensure needs assessments focused on states. However, there was no evidence that the Project Officer performed oversight to ensure the needs assessments predominantly benefitted the states.

Chapter 15 of EPA's Assistance Administration Manual requires that GAD process applications for formal amendments in the same manner as initial grant applications. GAD uses a checklist for reviewing initial grant applications that does address the issue of contract versus grant; however, they said that they do not complete this checklist for amendments. Our review confirmed GAD's assertion because for NAMC's amendment, we found no documentation that GAD conducted a review of the proposed amendment.

Recommendations

We recommend the Director of OSDBU monitor recipients' work to ensure that contract work is not completed under a grant.

We recommend the Directors of GAD and OSDBU require their staffs to evaluate whether work proposed under grants and subsequent amendments, should be obtained by grant or contract. These reviews should be performed and documented to ensure compliance with EPA Order 5700.1.

AGENCY RESPONSE

Both OSDBU and GAD agreed with the intent of our draft finding entitled *EPA Should Have Awarded A Contract Instead Of A Grant*, but argued that the draft report did not accurately characterize the scope of work for the grant. OSDBU believed that the decision to include needs assessments as part of the grant was within the range of discretion accorded by legal and policy standards. GAD stated that the statement of work for the amendment appears to constitute work that is appropriate for grant funding. OSDBU acknowledged that the actions it took may have inadvertently contributed to NAMC's misunderstanding of their legal relationship with EPA. However, they maintained that the approved amendment was proper for grant funding and that EPA only received incidental benefit from NAMC's work.

OIG EVALUATION

We have revised our description of the scope of work. However, we do not agree that EPA only received incidental benefit from NAMC's needs assessment work. To the contrary, EPA received most of the benefits derived from NAMC's needs assessment work. This

occurred because OSDBU did not adequately monitor NAMC's work. As a result, our position that this work should have been funded by a contract remains unchanged.

APPENDIX 1
RESPONSES TO THE DRAFT REPORT

EPA's Response



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SMALL AND DISADVANTAGED
BUSINESS UTILIZATION

May 26, 1999

MEMORANDUM

SUBJECT

Minority Contractors

FROM:

A handwritten signature in black ink, appearing to read "Jeannette H. P.", is written over a horizontal line.

Office of Small and Disadvantaged Business Utilization

TO:

Carl A. Jannetti
Division Inspector General for Audit
Mid-Atlantic Division

This is in response to your request for comments on the subject draft report. The draft report designates the Director, Office of Small and Disadvantage Business Utilization (OSDBU) as the primary action official for the subject Draft Audit Report (Draft Report). OSDBU worked with the Grants Administration Division (GAD) and the Office of General Counsel (OGC) to develop a consolidated response to the draft report. We appreciate your staffs courtesy in providing extensions of time to respond fully to the draft report, and look forward to working with you in resolving this matter.

As you requested, we have addressed the factual accuracy of the draft audit report and have indicated our concurrence or nonconcurrence with each finding and proposed recommendation. Our response is Attachment 1 to this memo. Additionally, counsel for the National Association of Minority Contractors (NAMC) submitted a response to the draft report dated April 22, 1999, which we include as Attachment 2.

Any questions or comments on this response should be addressed to David Sutton, Deputy Director, OSDBU. David may be reached on (202) 260-4471.

Attachments

OFFICE OF SMALL AND DISADVANTAGED BUSINESS UTILIZATION AND GRANTS ADMINISTRATION DIVISION RESPONSE TO DRAFT AUDIT REPORT No. E6DEA8-03-0025 (Dated March 12, 1999).

I. ADDITIONAL FACTS.

A. The principal purpose of EPA financial assistance to NAMC for Needs Assessments.

The March 12, 1997 amendment to the NAMC agreement did not authorize NAMC to perform needs assessments that “were intended to determine what EPA needed to do to ensure that it provided ample contracting opportunities to minority businesses ” as asserted at p. 1 of the Draft Report. The Draft Report contends that “[t]he work plan described needs assessments as a consultation with EPA regional officials to discuss what EPA must do to ensure minority contractors receive a sufficient amount of contracting opportunities.” Draft Report, p. 8. In fact, NAMC’s January 9, 1997 work plan for the needs assessments focused on consultation between NAMC and both EPA-regional and state environmental officials “to determine how best to provide further assistance through the OPEX program to the states and regions in question; and development of state and/or region-specific strategies for implementation in subsequent OPEX program years.” (1/9/97 NAMC proposal at 3.0.).

The acronym “OPEX” refers to NAMC’s disadvantaged business outreach and opportunity exchange conferences relating to utilization of disadvantaged businesses by states in procurement under EPA grant programs. Therefore, the intent of EPA’s financial assistance for this activity was to help NAMC meet the needs of the states and the disadvantaged business community served by NAMC’s OPEX conferences, rather than the Agency’s needs. These activities are appropriately carried out under an assistance agreement.

B. OSDBU’s alleged negligence.

The draft audit report states on p. 6, in bold letters, that “Negligent Oversight by OSDBU Resulted in Misuse of EPA Grant Funds.” This conclusory statement is unsupported by the facts and is unnecessarily pejorative. It is apparently based on the following inaccurate factual assertions.

1. “Although NAMC completed only a small portion of the work required by the grant it received, OSDBU allowed NAMC to draw down all of the \$750,000 in grant funds that EPA provided.” Draft report at p. 1.

Under the grant’s terms and conditions, NAMC was paid under the Automated Clearing

House (ACH) method of payment. Under this method, the project officer (PO) and the grants management officer (GMO) do not see the payment requests either before or after payments are made. The recipient sends the requests directly to the servicing finance office and the requests do not include any supporting financial documentation. Therefore, OSDBU did not have access to information that would enable it to monitor the rate at which NAMC drew down grant funds.

2. “At the close of the project, the OSDBU project officer stated that she did not have a clear understanding of what work was required or completed.” Draft report at p. 6.

The Project Officer generally understood what was required under the NAMC scope of work, but felt that she would have to review her files to describe the work in detail and address the amount of work actually completed.

3. “OSDBU received three progress reports during the first 12 months of the project and was aware that the project was not near completion. In evaluating whether to award NAMC the \$250,000 amendment, OSDBU did not consider NAMC’s poor performance under the original grant.” Draft report at p. 6.

OSDBU did consider that NAMC was behind in completing the work, but OSDBU/GAD granted NAMC no- cost extensions and the funding increase based on assurances from NAMC that the work would be completed.

4. “Besides not completing the required work, NAMC did not satisfy the cost sharing requirements of the grant it received from EPA. OSDBU took no action to ensure NAMC provided the required cost share.”

The required cost share for this project was 5%, but it is the recipient’s responsibility to meet its cost sharing requirement as it draws down the EPA grant through the ACH. For Headquarters awards, the servicing financial management center reviews the recipient’s Final Financial Status Report (SF 269) to assure the recipient did, in fact, meet any cost sharing requirement. Therefore, it was not appropriate to state that OSDBU took no action to ensure compliance.

5. Misuse of Grant Funds.

The Draft report demonstrates that NAMC did not complete the work it agreed to perform

Attachment 1

under the grant despite drawing down all of the funds obligated for the project.¹ However, the Draft audit does not appear to dispute that NAMC actually incurred the costs charged to the grant. NAMC has offered to complete the project without additional funds from EPA, and on this basis, argues that the vast majority of the \$636,069 that the Draft Report recommends that the Agency disallow will be eligible costs under the agreement. Absent additional information indicating that NAMC spent the funds it obtained under the grant for improper purposes, it appears that if NAMC completes the grant work no funds will have been misused. We will, of course, verify individual items of cost when the final audit report is issued.

C. Technical Suggestions for the Audit. The Director, GAD has the following suggestions.

Page 4, first paragraph– It would be preferable to replace this reference to the Assistance Administration Manual (as well as those following) with “Project Officer’s Training Manual”. The PO training manual is the most current guidance available for managing assistance agreements.

Pg 4, second paragraph–The report states that the Manual authorizes the project officer to withhold payment. Only the award official can withhold payment (see 40 CFR 30.902).

Pg 4, third paragraph–The report states that funds were misused, but it does not state how the funds were misused. If they were used for project expenses, this does not appear to be a misuse as we understand the term. If the funds were misused, the report needs to make clear how they were inappropriately used.

Pg 4, third paragraph–The report states that OSDBU should only approve draw downs if sufficient work is completed. Project Officers do not have an opportunity to approve or disapprove draw downs. They can monitor draw downs and work with the Award Official to stop or delay payments.

Pg 5, last paragraph to Page 6–A grant is not a contract, so its principal purpose is to benefit the recipient and its constituents, not EPA. The sentence that states “thereby providing no value to the Agency” should be removed. The recipient is to carry out **its** project, not the Agency’s and the Agency is not to be the principal beneficiary. It seems to us the report implies that the award should be annulled in accordance with 40 CFR 30.904 (a)(5) because it failed to meet the project purpose. If that is the case, you should revise it to reflect that approach. On the other hand, if the work the recipient did with the funds was for the work under the grant, then the report should question the costs based on reasonableness or other problems, or explain how the funds were used.

¹ NAMC’s response does not take issue with this conclusion.

Pg 11, second paragraph–We do not agree that because the time sheets were nearly identical, the time keeping system was inadequate, nor do we believe that time sheets need to be signed daily to meet the intent of OMB Circular A-122.

Pg 11, third paragraph–We do not agree that the fact that NAMC allows its employees a one hour lunch is necessarily unacceptable. If that practice is consistent with NAMC’s personnel practices in other cases, it would be inappropriate to disallow this cost.

II. FINDINGS AND RECOMMENDATIONS

Finding: OSDBU Allowed NAMC Full Payment For Limited Work

Additional Facts. As discussed above, neither the OSDBU PO nor the GAD Grants Specialist received “real time” information on the rate at which NAMC drew down funds. This situation is not limited to OSDBU project officers. The Government made a conscious policy decision to allow recipients to draw down payments in advance under the ACH method. This decision struck a balance which gave greater weight to the recipient’s need for immediate access to funds to carry out grant supported activities than to agencies’ ability to compare draw downs with progress towards completion of the funded activity. One of the unintended consequences of the policy choice is situations described in the Draft Report where the recipient is able to draw down funds at a rate greater than its progress towards completion of the assisted activity.

Recommendation:

The Director, Office of Small and Disadvantaged Business Utilization should require her staff to manage grant projects in accordance with the EPA Assistance Manual. To that end, OSDBU project officers should ensure recipients comply with the terms of the agreement, and that the draw down of funds is proportional to the recipient’s rate of progress.

OSDBU Position:

The Director, OSDBU partially concurs with this recommendation. The Director agrees that grant projects should be managed in accordance with the EPA Project Officer Training Manual and that project officers should ensure recipients comply with the terms of the agreement. (It is GAD’s position that the training manual is the Agency’s most current guidance with respect to Project Officers’ roles and responsibilities. The Assistance Manual is similar, but dated.) However, under the current Government-wide assistance regulations and standard

Attachment 1

Agency terms and conditions for ACH, OSDBU's POs do not routinely receive payment or financial status information which can be used in conjunction with recipient progress reports to ensure that draw downs are proportional to the recipient's rate of progress .

The Director agrees that additional procedures that would allow OSDBU to implement the OIG's recommendation are desirable. Absent a change in Government wide policy, however, OSDBU can only recommend to GAD that payments be withheld or that the Agency impose a special term and condition when specific circumstances indicate the need for the PO to have authority to deny payment requests that are not proportional to the recipient's rate of progress.

To ensure grant projects are managed in accordance with the EPA Project Officers training Manual, the Director, OSDBU has taken the following steps:

- Implemented a project officer checklist in August 1998. Based on discussions with the Auditors, this checklist was updated in February 1999 and a copy was provided to the auditors.
- Established an automated system to track the status of OSDBU grants in August 1998.
- Scheduled staff members for project officer training to be held June 2-3, 1999.
- Began a review of office responsibilities to determine whether project officer duties should be reassigned. This action should be completed by June 30, 1999.
- Began a review of OSDBU's remaining four grants. OSDBU expects to complete this review by June 30, 1999. All four grantees are paid under the "Advance Payment" method. Under this method of payment, recipients draw down funds on an as needed basis. However, as was the case with the NAMC grant, these requests for payment do not come to the project officer for approval.

OSDBU has a new Director and a new Deputy. Both individuals recognize and have reemphasized the importance of grants management and will continue to monitor operations to ensure grants are managed in accordance with EPA regulations and guidance and the EPA Project Officers Training Manual. In situations where Project Officers determine that grantees are not in compliance with grant terms and conditions, OSDBU will work with GAD and OGC to determine whether payments can/should be withheld, the agreement terminated, or special terms and conditions imposed.

Recommendation:

The Director of the Grants Administration Division should adjust the allowable costs in accordance with the IG's determination and require NAMC to repay EPA \$636,069.

GAD Position:

The Director, GAD is not taking any action with respect to allowing or disallowing costs in response to this draft audit report. GAD will work with the recipient and the appropriate EPA offices in determining the actions that should be taken with respect to the costs when the final audit report is issued.

The Agency has not made a final decision on whether to accept NAMC's proposal to complete the activities provided for in the grant at no cost to EPA. However, we are considering their proposal. In view of the number of changes in the MBE/WBE environment since the inception of this grant, there is an even greater need for this work to be done. Therefore, we are immediately beginning a dialogue with the regions to determine which states could benefit most from the additional work. It is necessary for us to move out on this immediately to make sure we don't contribute to additional delays and to complete the project as soon as possible. We would like to meet with you to discuss this issue as soon as possible, preferably during the second week of June 1999. Please contact David Sutton at (202) 260-4471 to let him know when you would be available to have this discussion.

Finding: EPA Should Have Awarded A Contract Instead of A Grant for the Needs Assessments that NAMC performed.

Additional Facts: As discussed above, the principal purpose of the needs assessment activity was to obtain information that would enable NAMC to conduct OPEX conferences that were responsive to the interests of disadvantaged businesses and states. EPA did derive some indirect or incidental benefits from the needs assessment activity. However, the Agency's "Policy for Distinguishing Between Assistance and Acquisition" EPA Order 5700.1 (3/22/94) states "...there may be cases where EPA expects to derive some incidental use or benefit from funded activities. Such incidental use or benefit does not preclude an award of assistance when the principal purpose is public support or stimulation. For such cases, an assistance vehicle may still be appropriate. . . If an expenditure will produce a benefit or use that is not direct, a contract is not required." EPA Order 5700.1, p. 6 (emphasis in original). EPA Order 5700.1 also recognizes that the unique role that state officials have as partners with the Agency through shared operational responsibilities for environmental efforts. EPA Order 5700.1, p. 8.

Recommendation:

Evaluate whether work proposed under grants should be obtained by grant or contract. These reviews should be performed to ensure compliance with EPA Order 5700.1.

OSDBU Position:

The Director, OSDBU concurs with the intent of this recommendation, however the Director contends that OSDBU's decision to include needs assessments as part of the grant was within the range of discretion accorded by legal and policy standards. The Draft Report does not accurately characterize the scope of work for the grant. It does not provide evidence sufficient to conclude that the needs assessments were principally for EPA's direct use or benefit. OGC and GAD concur with this position.

Project officers are aware of the requirement to evaluate work to make sure it should be obtained by grant or contract and will continue to make the evaluations on all future awards. Notwithstanding OSDBU's disagreement with the findings in the Draft Report, the Director recognizes that NAMC and, its sub-awardee, MBELDF, may have misunderstood the nature of their legal relationship with EPA while carrying out the grant. The Director acknowledges that actions taken by OSDBU may have inadvertently contributed to the misunderstandings. Although the Agency has not made a final decision on whether to accept NAMC's proposal to complete the activities provided for in the grant at no cost to EPA, if the proposal is accepted, OSDBU will make it clear that any activities NAMC undertakes to complete the agreement must directly benefit minority businesses and states rather than EPA.

The Director, GAD, also concurs with the intent of the recommendation, but does not agree the Grants Specialist was mistaken in approving the amendment. It is the Director's view that the statement of work for the amendment appears to constitute work that is appropriate for support of grant funding and consistent with the requirements of the Federal Grant and Cooperative Agreement Act. It is GAD policy that specialists review amendments to assure any change in the scope of project is not for the direct use and benefit of EPA. It may be, if the grants specialist indicated differently, that the specialist was not considering the case where the amendment would change the work plan's scope.

NAMC's Response

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April 22, 1999

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VIA HAND DELIVERY

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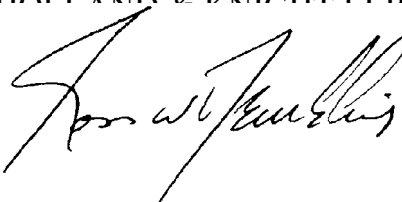
**Re: Draft Report of Audit on EPA Grant Awarded to the
National Association of Minority Contractors Grant
Number X-824519-01 Draft Report Number E6DEA 8-03-0025**

Dear Ms. Brown:

On behalf of the National Association of Minority Contractors ("NAMC"), I am hereby forwarding the written comments of NAMC to the above-captioned Draft Report. These comments are submitted to you and your office as directed by Carl A. Jannetti, Divisional Inspector General for Audit, Mid-Atlantic Division in his March 12, 1999 letter forwarding the draft report.

Please feel free to contact me or Samuel A. Carradine should you have any questions or concerns regarding this submission.

Sincerely yours,

HOLLAND & KNIGHT LLP


RWD/kh
Enclosure
FCH1 #10273 v1

Ms. Jeanette Brown

April 22, 1999

Page 2

cc: Carl A. Jannetti (w/encl.)
Divisional Inspector General for Audit
U.S. Environmental Protection Agency
1650 Arch Street
Philadelphia, PA 19103-2029

Comments on Draft Report Number E6DEA 8-03-0025 (March 12, 1999)
(Grant Number X-824519-01)

The National Association of Minority Contractors (“NAMC”), together with its subgrantee, the Minority Business Enterprise Legal Defense and Education Fund (“MBELDEF”) is pleased to provide its comments on Draft Report Number E6DEA 8-03-0025 (“Draft Report”) issued by the Mid-Atlantic Division of the Office of Inspector General (“IG”). For the reasons set forth below, NAMC believes that certain of the findings of the Draft Report are based on a mistaken or incomplete view of the performance of the grant by NAMC and MBELDEF. Moreover, the Draft Report fails, on several significant occasions, to consider fully the impact of the EPA's program office mission requirements and the collateral impact on the grant performance requirements. Consequently, NAMC respectfully contends that the final recommendation contained in the draft report is unfounded. NAMC, together with MBELDEF, continues to be ready, willing, and able to fully complete the grant, in full conformity with the expectations of the EPA program office and with the Congressional mandate that authorized and funded the grant.

The comments contained herein are provided in five parts: a **Background** section, which includes a discussion and clarification of the work that has been performed to date by NAMC and its subgrantee, MBELDEF and the tasks that are yet to be completed; a discussion of **Scheduling and Other Performance Impact Problems** that have caused delays in completion of the tasks, a discussion of **The Legal Framework** around which the grant is structured, which has implications for the interpretation of work requirements, work completed, and the rationale for being allowed to complete the work; a **Summary Recommendation by NAMC** with justifications as to why and how the work might be completed; and a last section on **Specific Findings, Cost Questions and NAMC Responses**.

BACKGROUND

In September, 1995, NAMC submitted a grant proposal to the EPA's Office of Small and Disadvantaged Business Utilization entitled “A Proposal To Conduct Compliance Monitoring, Outreach and Opportunity Exchange (OPEX) Conferences Related to State Utilization of DBES For EPA-Granted Procurement.” NAMC submitted the proposal in response to the mandates of the House Appropriations Subcommittee set forth in House Report No. 103-555. In this Report, the Appropriations Subcommittee earmarked funds to be used as follows:

\$500,000 for OSDDBU's environmental justice and monitoring efforts. The Committee directs that these funds be split between activities for monitoring of states' eight percent goal efforts and outreach of environmental justice activities to be carried out by a non-profit

minority organization with a proven track record with OSDBU's minority programs. House Report 103-555 (accompanying H.R. 4624) (FY 95 appropriation) June 22, 1994 at page 49.

In its proposal, NAMC outlined its intended collaboration with the MBELDEF to meet the Congressional mandates of this program. The proposal set forth the experience and expertise that both organizations had for this endeavor, thereby establishing that the work would be done by a “non-profit minority organization with a proven track record with OSDBU's minority programs.” The proposal also noted that NAMC had been a grantee to EPA for five years and had successfully provided training for over 2,000 minority and women contractors and their employees in a variety of complex environmental subjects, including asbestos abatement, lead-based paint abatement, underground storage tank removal and installation, radon mitigation and hazardous waste removal/Superfund health and safety. Additionally, as part of these grants, NAMC conducted trade fairs in which numerous prime contractors could network with disadvantaged business enterprises (DBEs) that had completed the training. This networking fostered the goals of one of OSDBU's primary missions -- to introduce the large companies and DBEs to each other for joint venture and subcontracting opportunities.

NAMC's submission also set forth the proposed budgets of both NAMC and MBELDEF. (Copies of the proposed budgets are set forth at Appendix A, attached hereto). OSDBU awarded the grant on September 25, 1995 incorporating, fully and without change, NAMC's proposal.

As originally awarded, the grant envisioned that NAMC would conduct Outreach Activities and Opportunity Exchange (“OPEX”) conferences in each of EPA's ten regions (“OPEX I”). Additionally, there were to be five in-depth state studies. The original 18 month project period extended from October 1, 1995 through March 31, 1997. In early, 1996, EPA made changes to these tasks. Seven of the ten OPEX conferences were replaced by four needs assessments. The number of state studies remained unchanged (“OPEX II”). While this change in the work was not formally issued by an amendment to the Grant, there does not appear to be any dispute by the I.G. that this change indeed had been made. (*See* page 4 of the Draft Report at footnote *).

By Amendment No. 1 to the Grant dated January 30, 1997, the project period was extended by six months - from March 31, 1997 through September 30, 1997. Prior to September 30, 1997, the grant period was again extended to June 30, 1998.

On March 12, 1997, OSDBU increased the funding for the Grant by \$250,000. This funding was to support two additional needs assessments and five more state studies. Significantly, despite the 50% increase of needs assessments and 100%

more state studies than originally contemplated, the project period was not extended at that time.

From the very beginning of the grant, there were inordinate and sometimes inexplicable delays in moving the project forward, especially in generating correspondence from EPA to the regions and the states and in the subsequent replies and scheduling of the various site visits, needs assessments, and other contacts. Although the grant was signed on September 25, 1995, it was not until early February of 1996 that the states for the first round of compliance monitoring had been preliminarily identified. Letters were sent by EPA/OSDBU to state environmental offices in the District of Columbia, New York, Oregon and Kansas on March 12, 1996, indicating that they had been selected for compliance monitoring by the NAMC/MBELDEF team and copies of these letters were sent to the appropriate Regional Administrators. As late as September 25, 1996, more than one year after the grant had been signed, initial letters from Leon Hampton of EPA/OSDBU were going out to Regions II, VII, and VIII indicating that NAMC would be contacting them regarding setting up a needs assessment meeting. Because of staffing changes in the New York region (Region II), NAMC was not able to contact the appropriate person to schedule a meeting until November of 1996, and the actual meeting did not occur until July 1997. In the case of the District of Columbia, neither NAMC or EPA have been able to determine the appropriate office within District government with whom we might meet to discuss the OPEX grant and EPA's desire to include the District as one of the locales for a compliance monitoring effort.

We should point out that the compliance monitoring activities under the OPEX grant did not necessarily meet with enthusiasm by the state environmental agencies, especially for those states who were well below meeting their utilization goals. It is therefore understandable that there might have been some foot dragging by the states on the various approvals and scheduling associated with this effort and this did play a part in the delays.

As of the time the I.G.'s audit commenced in July, 1998, four state studies, one conference and four needs assessment remained to be completed. In the case of the state compliance monitoring reviews, MBELDEF has completed three state reviews in full and substantially completed three others, needing only the data analysis and report. NAMC has instructed MBELDEF to complete the analysis and prepare a report for the additional three states and provide it to NAMC for submission to EPA as soon as possible. It is anticipated that this report will be submitted within the next few weeks. NAMC had also completed two needs assessments and, upon EPA/OSDBU approval, are in position to conduct two more needs assessments immediately.

The following summary recounts those tasks that were assigned to MBELDEF under OPEX I & II, those tasks that have been completed to date and those tasks that are not yet completed.

ASSIGNED TASKS FOR OPEX I & II

The following tasks were assigned to MBELDEF under each of its State Compliance Reviews for implementation of the Grant:

1. Initiate contact with state environmental protection agency personnel identified by U.S. EPA.
2. Send document request to state environmental protection agency.
3. Schedule and conduct site visits at state offices to review and collect documents.
4. Schedule and conduct interviews of state personnel responsible for program implementation.
5. Conduct interviews of prime contractors and MBE/WBE subcontractors.
6. Conduct contract file analysis of sample state environmental contracts.
7. Draft written report summarizing findings and recommendations for the states under review for the current round of OPEX Compliance Reviews (i.e., OPEX I or OPEX II).

TASKS COMPLETED TO DATE FOR OPEX I & II

As of the date of this memorandum, MBELDEF has undertaken and completed the following tasks for states identified by U.S. EPA under OPEX I and OPEX II Compliance Reviews:

1. Initiated Contacts With State Personnel
 - A. OPEX I (Florida, Louisiana, and Ohio)
 - B. OPEX II (New Jersey, North Dakota, Texas)

2. Sent Document Requests
 - A. OPEX I (Florida, Louisiana, and Ohio)
 - B. OPEX II (New Jersey, North Dakota, and Texas)

3. Completed Site Visits and Document Collection
 - A. OPEX I (Florida, Louisiana, and Ohio)
 - B. OPEX II (New Jersey, North Dakota, and Texas)

4. Interviewed State Personnel Responsible for Program Implementation
 - A. OPEX I (Florida, Louisiana, and Ohio)
 - B. OPEX II (New Jersey, North Dakota, and Texas)

5. Completed Interviews of Prime Contractors and MBE/WBE Subcontractors
 - A. OPEX I (Florida, Louisiana, and Ohio)
 - B. OPEX II (New Jersey, North Dakota, and Texas)

6. Completed Contract File Analysis
 - A. OPEX I (Florida, Louisiana, and Ohio)
 - B. OPEX II (none)

7. Completed Draft Reports
 - A. OPEX I (Florida, Louisiana, and Ohio)
 - B. OPEX II (none)*

[*The Draft Report for OPEX II States is on hold pending direction from EPA as to which States are to be included in the analysis for this round of Compliance Reviews.]

UNFINISHED TASKS FOR OPEX II

All tasks for OPEX I have been completed by MBELDEF. The following tasks under OPEX II Compliance Reviews are not yet completed by MBELDEF:

1. The State of New Jersey
 - A. Contract File Analysis
 - B. Drafting of Report
2. The State of North Dakota
 - A. Contract File Analysis
 - B. Drafting of Report
3. The State of Texas
 - A. Contract File Analysis
 - B. Drafting of Report
4. The State of Colorado
 - A. All seven tasks outlined in first section of this memorandum.
5. The State of Tennessee
 - A. All seven tasks outlined in first section of this memorandum.

SCHEDULING AND OTHER PERFORMANCE IMPACT PROBLEMS

There were numerous modifications by the EPA to the list of states originally designated for Compliance Reviews under OPEX I and OPEX II. Moreover, there were a number of states that were targeted for these Compliance Reviews that, for a variety of reasons, were withdrawn, added back to the list, and withdrawn again as subjects for the Compliance Reviews.

It is critically important to appreciate the adverse impact caused by the delay in identification of participating states and the associated projects. The needs assessments and conference sites were driven by the decisions on which states would have state studies. For no needs assessments or conferences would be conducted in those states in which a state study was to be conducted. In the absence of clear identification of states matched with the project to be conducted the entire project was necessarily delayed.

That is precisely what occurred during this grant. The identification of where the state studies would be conducted were on critical path. Delays in this identification delayed everything. Likewise, the states in which a needs assessment would be conducted traveled on a parallel critical path. If the needs assessment states could be identified, such state would not have a state study. But again, any

delay in the clear identification of either the state study or needs assessment location delay everything scheduling is similar to a construction project's critical path method (CPM) of planning and management. This method organizes and schedules the numerous interrelated separate small tasks that make up a complex project. Some of the tasks may be done at any time during a given period without having any effect on completion of the entire project. Some tasks, however, must be performed on schedule and in sequence else the entire project will be delayed. These latter tasks are on the "critical path." Any delay of work along the critical path will adversely affect the entire project.

There was a lack of cooperation from Colorado and the District of Columbia in scheduling initial site visits, interviews with state personnel, and document review. For example, the District of Columbia was initially projected as a subject for Compliance Review in the first round of OPEX I. However, the District Government failed to communicate with the EPA and identify contact persons for the District's environmental protection offices that had possession of crucial contract files. Consequently, this Compliance Review was postponed to OPEX II. These problems with the District Government remain unresolved and this Compliance Review remains impossible to complete for reasons beyond the control of NAMC, MBELDEF, or the EPA.

Similarly, there were significant delays as EPA sought to establish initial contacts with some of the states to facilitate initial site visits by NAMC/MBELDEF. These delays were caused by various circumstances, most notably, apparent lack of cooperation with EPA by state administration officials.

As a result, NAMC's and MBELDEF's planned allocation of manpower was severely impacted. The overall efficiency in scheduling of tasks suffered greatly. Staff that had initially been trained and dedicated to this project subsequently left or were assigned to other projects. Due to the increased length of this project, labor and overhead costs for this project soared far above what had initially been projected in the budget submitted for this project. NAMC and MBELDEF both had to retain personnel and consultants to be available for the completion of this project, even though the project was not continuing at the desired pace.

THE LEGAL FRAMEWORK

At the outset, it is essential to appreciate that a grant is fundamentally different from a procurement contract in a variety of ways relevant to this matter. Pursuant to the Federal Grant and Cooperative Agreement Act, a grant instrument is required to be used when

- (1) the principal purpose . . . is to transfer a thing of value to the . . . recipient to carry out a public purpose of support

or stimulation authorized by a law of the United States. . . .; 2)substantial involvement is not expected between the executive agency and the . . . recipient when carrying out the activity contemplated in the agreement.

31 U.S.C. § 6304.

This is in contrast to a procurement contract, which is to be used when

(1) the principal purpose . . . is to acquire (by purchase, lease, or barter) property or services for the direct use of the United States Government; or (2) the agency decides in a specific instance that the use of a procurement contract is appropriate.

31 U.S.C § 6303.

Thus, with a procurement contract, there is a mutual exchange of benefits -- the Federal Government's funds for the contractor's services or products. There is no similar mutuality of benefit exchange in a grant. The Federal Government does not receive a direct benefit in return for the funding; rather, the benefit flows away from the Government to the grant recipient for the broader stimulation and support of the public purpose fostered by the grant program.

Grant funds are, of course, not without some rules imposed by the Government. The Draft Report quite correctly identifies those governing principles that are applicable to the subject grant. It is important to note, however, that the various cost principles are subject to considerably more flexibility than procurement contract cost principles. For example, where a grantee has not kept adequate records, evidence of satisfactory progress on the grant may nevertheless justify a limited “presumption of regularity” since by inference the grantee must have incurred some allowable expenses. B-186166, August 26, 1976.

Indeed, the U.S. Comptroller General has noted that

It consistently has been held with reference to Federal grant funds, that when such funds are granted to and accepted by the grantee, the expenditure of such funds by the grantee for the purposes and objects for which made [is] not subject to the various restrictions and limitations imposed by Federal statute or our decisions with respect to the expenditure, by Federal departments and establishments, of appropriated moneys in the absence of a condition of the grant specifically providing to the contrary.

43 Comp. Gen. 697, 699 (1964).

The request that NAMC, together with MBELDEF, be permitted to continue performance of the grant by completing the four state studies, one conference and four needs assessments is in the best interests of the EPA as well as the minority business community - the true beneficiaries of this grant program. The very core of NAMC's mission precisely parallels the Congressional mandate articulated in the grant legislation to monitor and promote the EPA OSDBU's minority programs. Depriving the NAMC of the opportunity to complete its important work under the grant, by requiring a repayment of over \$636,000 would be a disservice to this mandate and the missions of OSDBU and NAMC.

Granting NAMC the opportunity to continue the grant performance would not be inconsistent with appropriate grant management. Indeed, the Comptroller General has approved crediting indebtedness arising from disallowed grant costs by crediting the indebtedness against allowable indirect grant costs. This has been accomplished by requiring the recipient to document that it was expending the amount of earned costs on approved program grants, thus maintaining the agreed-upon performance level. See, for example, B-186166, August 26, 1976.

Moreover, it must be emphasized that NAMC does not seek additional grant funds to complete performance, only the opportunity to perform using the funds already provided. In those cases in which a grantee has not received the full funding before the disallowance of costs, the granting agency typically withholds the release of the funds, subject to further performance.

The theory behind withholding is that where a grantee has misapplied grant funds, or in other words, where a grantee's costs are disallowed, the grantee has in effect, spent its own money and not funds from the grant. Withholding may be viewed as the determination that an amount equal to the disallowed costs remains available for expenditure by the grantee and is therefore carried over into the new budget period.

Principles of Federal Appropriations Law,(2nd ed.) GAO/OGC-92-13, page 10-92.

There can be no question that the recording of time on a daily or more frequent basis is the most desirable from a strict accounting standpoint. Likewise, no question has been (or could be) raised that the personnel costs were not, in fact, incurred. As was noted above, the Comptroller General has approved a “presumption of regularity” in the face of inadequate records, where, as here, there is a clear inference that the grantee must have incurred the costs. B-186166, supra. Consistent with this presumption of regularity, the costs are indeed supported.

By its nature, the determination of reasonable costs is largely a factual one. The Draft Report does not specify what it is about those costs that lead to the allegation of unreasonableness, other than to tie the payments to the amount of work performed under the grant.

The Draft Report further alleges that certain costs are not allocable under the principles set forth in OMB Circular A-122. Reference to the definition of an allocable cost in the Circular reveals that the I.G. has misinterpreted the nature of allocability in the grant context. The Circular provides that

- a. A cost is allocable to a particular cost objective, such as a grant, contract, project, service or other activity, in accordance with the relative benefits received. A cost is allocable to a Federal award if it is treated consistently with other costs incurred for the same purpose in like circumstances and if it:
 - (1) Is incurred specifically for the award.
 - (2) Benefits both the award and other work and can be distributed in reasonable proportion to the benefits received, or
 - (3) Is necessary to the overall operation of the organization, although a direct relationship to any particular cost objective cannot be shown.
- b. Any cost allocable to a particular award or other cost objective under these principles may not be shifted to other Federal awards to overcome funding deficiencies, or to avoid restrictions imposed by law or by the terms of the award.

OMB Circular A-122, §4. Allocable costs.

It is clear that the definition does not require any degree or quality of performance of the grant to be considered allocable; rather, what is necessary is that there is a connection or relationship to the grant. The “benefits received” element of § 4(2) is often the critical focus of the inquiry. A U.S. Court of Claims decision considering the definition of allocability in the narrower procurement contract cost context, explained that

The requirement of “benefit” may have a more or less general scope depending upon the type of expense. Also, the scope may be conditioned by policy considerations . . . [The regulation] allows allocation if the cost “benefits both

the contract and other work” . . . or "is necessary to the overall operation of the business" [§ 4(3)]. . . These conditions are in the disjunctive, but for certain costs, they feed back and should be read as complementing each other. For example -- franchise taxes are necessary to the overall operation of the business if their payment is a prerequisite to “doing business.” The obvious benefit results from this fact. Additionally, as a matter of policy, it is fair to spread such a tax around to all customers . . . Again, benefit follows from the broad necessity, and no burden is imposed on the contractor to prove a specific relationship to the contract. . .

Lockheed Aircraft Corp. v. U.S., 375 F.2d 786 (Ct.Cl. 1967) (emphasis supplied).

Additionally, the I.G.'s views with respect to MBELDEF's costs and related justification and support needlessly obscures and otherwise ignores several significant points. First, and foremost, MBELDEF was not a “contractor” but rather a subgrantee. Thus, the I.G.'s reliance on traditional procurement rules is misplaced. Moreover, MBELDEF's budget and costs were included in the original grant proposal by NAMC where the relationship between the two organizations for performing the grant was detailed. (A copy of this proposal, containing MBELDEF's budget and rates is attached as Exhibit A.) EPA’s acceptance of the grant proposal was without reservation. With the full disclosures and acceptance by EPA of the costs and nature of the MBELDEF work, the I.G.'s concerns are fully put to rest.

In the present case, NAMC does not look to a release of withheld grant funding. The various extensions of the project period and changes in the work clearly suggests that there was no particular deadline for the final completion of the grant. Allowing the completion as outlined below will not adversely affect any EPA program or policy initiatives. In fact, completion would only serve to achieve the goals and expectations of this grant.

SUMMARY RECOMMENDATION BY NAMC

The objective of the OPEX grant is to increase identification and access of contracting opportunities to small and disadvantaged contractors in the environmental services area. The effort was to be in concert with NAMC's activities in environmental training of small and disadvantaged contractors and would determine support requirements and innovative approaches to increasing contractor access, as well as raise the level of public awareness and knowledge of environmental contracting opportunities. This objective was deemed important enough for the House Appropriations Subcommittee to earmark funds in FY 1995

for its implementation. In the more than three years that have transpired, in the wake of the Adarand decision, Federal agencies have had to modify and adapt their small and disadvantaged business programs to Adarand's narrow tailoring mandate. As a result, the objective of OPEX has become increasingly important as opportunities for contracting have diminished significantly.

In addition, because of cutbacks in grant funding and a leveling off of membership funds and other means of support, NAMC and MBELDEF are in precarious financial positions. Both organizations are working diligently to improve negative fund balances, while continuing to provide the legal assistance, training and other services that their constituencies need and deserve in this more challenging contracting environment. Having to absorb the level of indebtedness suggested by the IG Draft Report, without the opportunity to complete the work and mitigate the financial exposure, would effectively immobilize these organizations and deprive the minority contractor community of two of its most vocal advocates and service providers. Between them, NAMC and MBELDEF have over 50 years of dedicated service to minority business development. They were chosen for this OPEX effort because the objective of OPEX coincides with the missions of these organizations. The public good would be therefore ill-served if they are deprived of the opportunity to work out of the situation with OPEX through completion of the grant tasks.

Therefore, NAMC respectfully requests that the IG recommendation include the opportunity for NAMC to complete the remaining work as outlined in these comments. Although no additional EPA funds would be required, completion of the work would involve the active participation of the EPA/OSBDU office, especially in identifying the states for the remaining compliance reviews, the regions and states for the remaining needs assessments, and the locale for the remaining conference. Once these sites have been identified and regional and state approvals are obtained to go forward, we would be able to complete all remaining tasks and present the reports on this work within a 90-day period.

SPECIFIC IG FINDINGS, COST QUESTIONS AND NAMC RESPONSES

The specific items of costs questioned in the Draft Report are addressed below. The Draft Report findings and explanation are set forth in *italics*, with the NAMC response following.

Deliverables

(See Background discussion on work completed, work remaining and reasons for delay in completion.)

Conferences

The IG Draft Report questions the two hour participation of OPEX individuals in the two conferences that were held, as opposed to a full day of OPEX activity. The IG Draft Report fails to realize that these conferences were in fact full days or more and NAMC/OPEX staff were involved in the planning and logistics of the full conferences, including identifying other resources and identifying major environmental contractors with whom the minority contractors might meet to discuss possible contracting opportunities. The direct OPEX portion of the agenda was understandably brief because it merely involved outlining to the conference participants how the OPEX effort worked and how they might avail themselves of the individuals and resources that were assembled at the conferences. In addition to the overall planning, NAMC staff and Board members participated in other aspects of the conferences. For example, an NAMC Board member led the session on Partnering at the Hartford, Connecticut conference and his involvement and participation was a direct result of OPEX viewing partnering as an important aspect of minority contractors more effectively availing themselves of environmental contracting opportunities. In fact, after the Hartford conference, the OPEX Project Director received a letter from the EPA Regional Administrator commending the efforts of NAMC, highlighting the fact that over 200 individuals participated in the conference, and expressing a desire to work with NAMC in the future. (See November 6, 1996 Region I Administrator's Letter, attached as Exhibit B.)

Value to EPA of Work Performed

The IG Draft Report raises the issue of the utility of the state compliance review work performed for EPA if it is not in the form of a final report. Even in its interim stages, the state studies have had utility for EPA. For example, at OSDBU's Annual MBE/WBE Conference held on December 9, 1996, the NAMC/MBELDEF team was able to present findings from its first round of studies to OSDBU representatives from around the country. We also made a presentation on the political climate for MBE/WBE programs in the post-Adarand environment and provided a review of the revised EPA guidelines for state programs that these OSDBU representatives would be responsible for monitoring.

Although the IG Draft Report acknowledges that four needs assessments were substituted for seven conferences as deliverables under the OPEX grant, the report does not acknowledge that the meetings that were held with regional EPA staff in Philadelphia and with regional and state environmental officials in New York constitute needs assessments in fulfillment of the task requirements. EPA/OSDBU representatives from these regions, as well as the EPA/OSDBU OPEX Project Officer were in attendance at these meetings. NAMC takes the position that these meetings were in fact the needs assessments in that discussions took place with respect to what the situation was in these locations, what issues were

important to enhancing small and disadvantaged contractor opportunity, and what options for support were available through EPA/OSDBU. In the case of the New York meeting, we were also able to report on the findings of state studies that had already been conducted under the grant as well as the experience in outreach and public awareness gained from the two OPEX conferences in which NAMC had been involved. The fact that no minutes or reports were written for those meetings does not impact the fact that they took place. As in the case of the conferences, the deliverable was the event itself and NAMC served as convener and facilitator for these meetings, thereby fulfilling its grant obligation in these two instances.

NAMC Cost Sharing

NAMC acknowledges that at the time the IG initiated its audit of OPEX no cost sharing dollars had been expended by NAMC or its sub-grantee MBELDEF. NAMC also acknowledges that the amount of cost sharing requirement under the grant was approximately \$40,000. However, by June of 1998 when the last extension of OPEX was about to expire, there was no indication that EPA/OSDBU was dissatisfied with NAMC's performance, nor was there any indication that a further no-cost extension would not be granted. The EPA/OSDBU had on many occasions acknowledged that there were delays on the project that were outside the control of either EPA/OSDBU or NAMC/MBELDEF. This was the logic that had prevailed in the previous two extensions and the circumstances had not changed greatly as of June, 1998. NAMC/MBELDEF was in the process of completing the reports on three state studies and scheduling needs assessments for Mississippi and Alabama at the time of the EPA/IG audit. There was every indication that NAMC/MBELDEF would complete these state study reports, conduct the needs assessments and schedule the additional state studies, needs assessments and the conference that was required. NAMC was also aware that since direct EPA dollars under the grant had been exhausted, the cost sharing dollars of NAMC/MBELDEF would come into play at this point to help in covering labor, travel and other costs associated with completing the project. With cost sharing, there is no requirement that the grantee contributions spread over the life of the project and it is common practice for grantee contributions to be utilized at the end of grants after direct grant funds have been expended.

1. Personnel Costs:
 - a. \$116,305 unsupported.

We believe that for time sheets to show reasonable estimates of actual hours, the estimates should be made daily or shortly after the actual work is performed and should not be based on a predetermined, consistently applied percentage of the employee's time.

NAMC RESPONSE:

The time sheets that were submitted to NAMC on a bi-weekly basis accurately reflect the daily work efforts on OPEX and other NAMC activities. Had the time been recorded on a daily basis as opposed to bi-weekly, our position is that there would be no difference in the time allocations for the given days. The time sheets accurately reflect annual leave, sick leave, holidays, etc., as well as time charged to the various NAMC projects and other NAMC activities. The vast majority of the labor charged under OPEX was for Samuel Carradine, OPEX Project Director. Contrary to the IG Draft Report, in examining the 64 time sheets in which Mr. Carradine had OPEX charges, there were daily variations in OPEX hours in 13 of the time sheets. In addition, for the remaining 51 time sheets, the OPEX levels of effort were the same each day for a given time sheet, but varied from one time sheet to the other, depending on the extent of OPEX activity, with a 4 hour daily effort being the most common (19 time sheets). NAMC therefore contends that \$116,305 in personnel costs are supported by the time sheets.

NAMC acknowledges that an estimated \$116,305 in Personnel costs were deemed ineligible because the work has not been completed. It is our understanding that should the work be completed at no additional costs to EPA, these ineligible costs could then be deemed eligible.

- b. \$116,305 ineligible.

This amount is considered ineligible because the costs were not reasonable or allocable in accordance with OMB Circular A-122. The Circular provides a cost is reasonable if it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the costs. Moreover, the Circular states that a cost is allocable to a grant in accordance with the relative benefits received. We do not consider it reasonable to pay NAMC the full authorized grant payments while they completed only a small portion of the work required by the grant.

- c. \$14,538 ineligible.

In addition to these expenditures being ineligible for the reasons stated above, we also questioned \$14,538 (1/8th of the personnel costs) as ineligible because NAMC employees were paid for a one-hour lunch during an eight-hour work day. A paid lunch was considered an employee benefit and the hours were billed directly to the NAMC projects. OMB Circular A-122 states that a cost is allocable to an award if it both, benefits the award and is necessary to the overall operation of the organization. We believe the lunch policy does not benefit the EPA grant and is not necessary for the overall operation of the organization.

NAMC RESPONSE:

Of the \$14,538 in personnel costs deemed ineligible because they represented paid lunch hours, the IG Draft Report does not reflect actual NAMC policy and practice. The NAMC Statement of Personnel Policy does not specifically speak to lunch hours but states unequivocally that the work week consists of 40 hours. It further states that there is a flexible work schedule with the work day to commence between 8:00 am and 9:30 am. (A copy of the relevant portion of this Personnel Policy is attached as Exhibit C.) In practice, each employee puts in 8 hours of work, exclusive of time taken for lunch. For example, an Administrative Assistant worked from 8:00 am to 5 pm and took a one-hour lunch. The OPEX Project Director generally works from 9:30 am to 6:30 pm and takes one hour for lunch. NAMC therefore contends that \$14,538 should be reinstated as eligible costs under Personnel.

Burden Rates

For the three Fiscal Years in which there were OPEX costs, the provisional rates applied by NAMC were 25% for Fringes and 48% for Overhead. However, for each of these Fiscal Years, the actual rates based on end-of-year financial statements were somewhat higher. If actual rates are applied, the allowable personnel costs to NAMC under OPEX would increase. Calculations of these actual rates were provided to the IG by our accountant, but were not utilized in the subsequent calculations. NAMC requests that actual burden rates be utilized in calculating the loads on personnel for fringes and overhead.

2. Contractual Expenditures:

a. \$340,667 ineligible.

- (1). *\$229,517. MBELDEF estimated that each state study would cost \$32,000 to complete. NAMC paid MBELDEF \$325,517 although MBELDEF completed only 3 of the 10 studies required. Therefore, we accepted \$96,000 (\$32,000 X 3) and considered the remaining \$229,517 as ineligible because the cost was unreasonable and unallocable in accordance with OMB Circular A-122.*

In addition to completing only three state studies, MBELDEF gathered data at another three states but had not compiled the information into a report. Therefore, the cost was not allocable to the grant because the raw data, in and of itself, does not benefit the grant. In accordance with OMB Circular A-122, these costs were considered ineligible.

- (2). *\$18,735. The conference consultant was budgeted to receive \$18,000 or \$1,800 per conference. NAMC paid the consultant \$22,335 although only 2 of the required 10 conferences were conducted. Therefore, we accepted \$3,600 (\$1,800 X 2) and considered the remaining \$18,735 as ineligible. OMB Circular A-122 states that a cost is allocable to a grant in accordance with the relative benefits received. We do not consider it reasonable that NAMC paid the conference consultant \$22,335 to coordinate two conferences, considering that \$18,000 was intended to pay for all ten conferences.*
- (3). *We considered the \$92,282 paid to four consultants ineligible. Two consultants were under contract for only part of the period, and we determined that the consulting services provided were generally not allocable to the grant. For example, one consultant was paid \$78,093 to provide legal services to NAMC. Originally, the consultant completed time sheets. Then NAMC paid him \$2,000 every two weeks as a retainer. In total, the consultant was paid \$64,000 (\$2,000 X 32 payments) in this manner. On 32 invoices the consultant indicated that 4% to 80% of his effort was classified as "Other NAMC." NAMC's Executive Director explained these "Other NAMC" hours were not grant related and were erroneously charged to the grant. We calculated that more than \$21,000 was mischarged in this manner. Additionally, there was no support to show the remaining effort was allocable to the grant.*

For the remaining two consultants, there were no consulting agreements executed between NAMC and the consultants as required by OMB Circular A-122. Without the required consulting agreements, NAMC had no support indicating what consulting services were provided. In particular, we could not determine what portion of the services, if any, were allocable to the grant. The Circular provides that to determine the allowability of costs, some of the relevant factors are:

- ◆ Adequacy of the contractual agreement for the service (e.g., description of the service, estimate of time required, the rate of compensation, and termination provisions).*
- ◆ The nature and scope of the services rendered in relation to the service required.*

- ◆ *The qualifications of the individual rendering the service and the customary fees charged.*

In addition, the consulting costs are ineligible because NAMC did not procure the consultants in accordance with 40 CFR 30.45, which requires grantees to use and document in its procurement files some form of cost or price analysis for every procurement. Price analysis may be accomplished by the comparison of price quotations submitted, market prices, and similar indicia. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability and allowability. When procuring the consultants, NAMC did not consider cost or perform a price analysis. Without a cost or price analysis, EPA has no assurance that the consulting expenditures were reasonable and allowable.

NAMC RESPONSE:

NAMC acknowledges that an estimated \$229,517 in Contractual Expenditures were deemed ineligible by the IG Draft Report because the work has not been completed. However, we feel that credit should be given for the completion of an additional three state studies (the report for which will be sent to EPA shortly) at this time, leaving the ineligible costs for this category at \$130,207 (utilizing an actual per study cost of \$32,551.70 as opposed to the approximation of \$32,000 in the IG Draft Report). It is our understanding that should the work be completed at no additional costs to EPA, these ineligible costs could then be deemed eligible.

NAMC acknowledges that an estimated \$18,735 in Conference Consultant costs were deemed ineligible because the work has not been completed. Once needs assessments were substituted for conferences, this consultant began to assist the OPEX Project Director in preparing for these needs assessments. Utilizing the parameter of \$1,800 for each conference and \$3,150 for each needs assessment (utilizing the 4 needs assessments for 7 conferences ratio), NAMC contends that \$9,900 should be deemed eligible costs in this category since 2 conferences and 2 needs assessments were conducted, leaving ineligible costs of \$12,435. It is our understanding that should the remaining conference and needs assessment work be completed at no additional costs to EPA, at least \$8,100 of these ineligible costs could then be deemed eligible.

For the consultant that was paid \$78,093, NAMC acknowledges that approximately \$21,000 in charges were for “Other NAMC” activities. However, approximately 50% of the remaining \$57,000 should be deemed eligible because the consultant performed useful work in support of the grant. In addition to participating in the initial planning for the grant, this consultant participated in the drafting of the state

study survey materials, contributed to the presentation to OSDBU representatives in December of 1996, with a special emphasis on the legal and legislative fallout of the Adarand decision, and continued to monitor these issues in preparation for utilization in the compliance monitoring reviews, the needs assessments and presentation at OPEX conferences. The consultant personally presented the information at the Hartford conference and provided the Conference Consultant with a briefing for use during the Seattle conference. Using the parameters of work completion ratios that have been applied in the IG Draft Report and elsewhere in these responses, NAMC calculates that \$28,939 of this consultant's costs should be deemed eligible. It is our understanding that should the OPEX work be completed at no additional costs to EPA, of the remaining \$49,154 in ineligible costs for this consultant, at least \$28,061 could then be deemed eligible. In addition, this consultant brought specialized knowledge of Federal procurement, affirmative action laws and legislation, and regulatory/compliance procedures to the grant that was cost-beneficial. Given this level of relevant capability, the consulting costs were deemed reasonable. Furthermore, the resumes and rates of the key consultants were presented to the EPA/OSDBU as part of the original NAMC OPEX proposal and their participation was implicitly accepted by EPA/OSDBU by their incorporating the NAMC proposal in total as the Scope of Work for the OPEX grant.

For the remaining two consultants, their roles were to provide administrative support to OPEX. Administrative support was originally included as a personnel line item. However, it was determined that due to the fact that OPEX would not be an on-going effort beyond the grant period, this support would be contracted for. In one instance, a letter of agreement was presented to the individual consultant for signature and this letter indicated the fact that 50% of her administrative support was to be for OPEX. Subsequent payments to the consultant had cost allocations that reflected this percentage. Therefore, NAMC contends that approximately 50% of the OPEX-related costs of this administrative support be deemed eligible based on the level of work completed. It is our understanding that should the OPEX work be completed at no additional costs to EPA, the remaining 50% of OPEX-related costs for administrative support could then be deemed eligible.

- (4). *NAMC mistakenly overpaid \$133 to a hotel in connection with the conference held in Hartford, Connecticut.*

NAMC RESPONSE:

NAMC acknowledges the ineligible overpayment of \$133 to a hotel.

- b. \$24,146 unsupported.

NAMC RESPONSE:

At this time, NAMC acknowledges the unsupported costs of \$24,146 in contractual expenditures. However, we are continuing to research the issue and hope, at some point, to be able to provide supportive documentation for these expenditures.

NAMC did not provide receipts for these expenditures, as required by 40 CFR 30.21.

3. Telephone Charges:

NAMC RESPONSE:

NAMC acknowledges the \$1,487 in unsupported telephone expenditures. NAMC also acknowledges that an estimated \$10,039 in Telephone costs were deemed ineligible because the work has not been completed. It is our understanding that should the work be completed at no additional costs to EPA, these ineligible costs could then be deemed eligible.

We considered \$1,487 of \$21,565 incurred for telephone expenditures unsupported because NAMC did not provide receipts as required by 40 CFR 30.21. Moreover, we considered \$10,039 or 50% of the remaining telephone expenditures as ineligible because the costs were not reasonable and allocable in accordance with OMB Circular A-122. We do not consider it reasonable to pay NAMC the full authorized grant payments while they completed only a small portion of the work required by the grant.

4. Travel Expenditures:

- a. \$9,520 ineligible.

[T]here was no indication how any of the following travel benefited the grant and thus were not allocable to the grant.

<i>NAMC Conference</i>	<i>\$5,943</i>
<i>Oakland, CA</i>	<i>2,662</i>
<i>NAMC's Corporate Lawyer</i>	<i>863</i>
<i>Brownfields Conference</i>	<i>27</i>
<i>American Bar Association</i>	<i>25</i>
<i>Total</i>	<u><i>\$9,520</i></u>

OMB Circular A-122 requires that travel costs must benefit the grant in order for these costs to be allocable.

NAMC RESPONSE:

Of the \$9,520 in Travel expenditures that were deemed ineligible, NAMC contends that least \$5,970 was directly beneficial to the grant. The \$5,943 in NAMC conference costs covered the OPEX personnel who traveled to the conference to make a major presentation on OPEX for the more than 300 contractors in attendance. One of the acknowledged objectives of the OPEX grant is to “raise the level of public awareness and knowledge of environmental contracting opportunities.” Again, the reason NAMC was selected for this grant is that we have a built-in constituency that is prepared to avail themselves of these opportunities. Over the years, NAMC has trained and certified more than 3,000 minority contractors in various areas of environmental services contracting and it is this target group that we are attempting to reach as part of our OPEX efforts. The NAMC conference was a logical and opportune occasion for such outreach. Likewise, the OPEX Project Director was invited to attend a Brownfields conference and serve on a panel in order to provide an overview of NAMC's activities with EPA/OSDBU, including OPEX. Also in attendance at this conference were the now-Director of OSDBU and the OPEX Project Officer. The \$27 in OPEX cost of this conference was a proportional allocation of expenses.

NAMC contends that the \$6,575 in unsupported travel be allowed because receipts for such travel were provided, the nature of the travel was indicated, and it was clear that the travel was related to NAMC OPEX activity.

- b. \$6,575 unsupported.

NAMC did not maintain documentation such as travel reports, as required by 40 CFR 30.21.

5. Other Expenditures:

- a. \$4,388 ineligible.
 - (1). *\$4,192. When procuring a computer for \$3,246, office furniture for \$524, and office supplies for \$422, NAMC did not perform the cost or price analysis required by 40 CFR 30.45. Instead, they selected the vendors based on past experiences and recommendations. Therefore, we considered these expenditures as ineligible.*

NAMC RESPONSE:

NAMC contends that \$3,246 in a computer purchase deemed ineligible be allowed because the selection of the vendor was the result of a cost analysis that

included comparing the computer cost from the ultimate vendor (Gateway) with comparable direct mail vendors (Dell) and area retail stores (Office Depot, Staples). In addition to having the best price, Gateway had far and above the best service, with free, 24 hour toll-free technical support. In the case of office furniture and office supplies, a similar cost analysis had been done prior to these purchases. The office furniture purchase was for an additional desk that NAMC had already determined was a quality product because it was the same as other office furniture that had been purchased over the past several years. The Office Manager examined various office furniture catalogues before purchasing from the least expensive vendor. Likewise, office supplies were ordered in a similar manner. NAMC therefore contends that \$524 and \$422 in office furniture and office supplies, respectively, be deemed eligible under the OPEX grant.

APPENDIX 2 - DISTRIBUTION

HEADQUARTERS

Office of Inspector General - Headquarters (2410)
Assistant Administrator, Office of Administration and Resources Management (3101)
Director, Office of Policy and Resources Management, OARM (3102)
Director, Office of Grants and Debarment (3901R)
Audit Liaison, OARM (3102)
Comptroller (2731)
Deputy Associate General Counsel, Finance and Operations Law Office (2377A)
Agency Audit Follow up Official (2710)
Agency Audit Follow up Coordinator (2724)
Audit Liaison, Grants Administration Division (3903R)
Associate Administrator for Congressional and Intergovernmental Relations (1301)
Associate Administrator for Communications, Education, and Media Relations (1701)

OTHER

National Association of Minority Contractors