



Office of Inspector General

Financial Audit Report

Grant No. X-824519-01
Awarded to the
National Association of
Minority Contractors

Report No. 2001-1-00203

September 27, 2001

Region Covered:

Region III

Headquarters

Program Offices Involved:

Grants Administration Division

**Office of Small and Disadvantaged
Business Utilization**

Resource Center

Conducting the Audit:

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

Contributor:

Mark S. Phillips

Abbreviations

EPA: Environmental Protection Agency

MBELDEF: Minority Business Enterprise Legal Defense and Education
Fund

NAMC: National Association of Minority Contractors

OIG: Office of Inspector General

OMB: Office of Management and Budget

OPEX: Outreach and Opportunity Exchange

OSDBU: Office of Small and Disadvantaged Business Utilization




**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL
MID-ATLANTIC DIVISION
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029
(215) 814-5800**

September 27, 2001

MEMORANDUM

SUBJECT: Final Audit Report:
Grant No. X-824519-01 Awarded to the
National Association of Minority Contractors
Report Number: 2001-1-00203

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

TO: Marty Monell, Director
Grants Administration Division (3903R)

As a result of a 1995 grant, the Environmental Protection Agency (EPA) awarded the National Association of Minority Contractors (NAMC) \$750,000 to oversee the monitoring of states' efforts to assist minority firms in obtaining contracting opportunities, and the performing of outreach on environmental justice activities. The grant was managed by EPA's Office of Small and Disadvantaged Business Utilization (OSDBU).

In 1998, the Office of Inspector General (OIG) performed an audit of this grant because of an anonymous Hotline complaint alleging poor grantee performance and mismanagement of EPA grant funds. Consequently, we sought to: (1) determine whether NAMC performed the required work; (2) evaluate the adequacy of OSDBU's oversight; and (3) identify any mismanagement of EPA funds.

On August 23, 1999, we issued an *Audit Report on the National Association of Minority Contractors*, which addressed the first two issues. The report disclosed that although NAMC completed only a small portion of the work required by the grant, OSDBU allowed NAMC to draw down all of the \$750,000 in grant funds.

In that August 1999 report, we did not discuss our financial findings (the third issue) so as to not interfere with an active OIG investigation into this matter.

Subsequently, the investigation ended, and this represents our final financial audit report regarding findings that describe problems OIG has identified and corrective actions OIG recommends. This 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.

ACTION REQUIRED

In accordance with EPA Manual 2750, you are required to provide a final determination on the costs questioned by December 26, 2001. Also, please submit an electronic copy of your response to phillips.mark@epa.gov. Should your position on the questioned costs differ from our recommendation, we would appreciate the opportunity to discuss your position before the determination is issued to NAMC. Please provide us a copy of the final determination when it is issued.

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 Mark S. Phillips at (215) 814-5800. For your convenience, this report will be available at <http://www.epa.gov/oigearth/eroom.htm>.

Executive Summary

Purpose and Prior Audit Coverage

This audit was initiated because of an anonymous OIG Hotline complaint alleging NAMC's poor performance and mismanagement of grant funds. NAMC had received \$750,000 in EPA funds to: (1) monitor states' efforts to assist minority firms in obtaining contracting opportunities; and (2) perform outreach on environmental justice activities.

EPA OIG's prior *Audit Report on the National Association of Minority Contractors* (Report No. 1999-00213), issued August 23, 1999, indicated that EPA allowed NAMC to draw down all of the \$750,000 in grant funds even though it only completed a small portion of the required work. This current report addresses *financial* issues regarding NAMC's specific management of the funds.

Results of Review

We determined that of the \$712,041 in EPA's share of the costs incurred by NAMC under this grant, \$456,873 of those costs were ineligible and \$141,237 were unsupported. Subtracting the \$113,931 in acceptable costs incurred from the \$750,000 paid to NAMC, we concluded that a balance of \$636,069 was due EPA from NAMC.

Recommendations, Responses, and OIG Evaluation

We recommended that EPA adjust the allowable costs and NAMC repay EPA the \$636,069. NAMC disputed some of our conclusions. However, NAMC agreed the work has not been completed and indicated it is willing to complete the grant work at no extra cost to EPA. NAMC contends that once it completes the work, most of the questionable costs will become resolved. EPA is considering whether to give NAMC this extension. However, we do not agree with granting NAMC a no-cost time extension. We do not consider it reasonable to expect that NAMC could deliver a timely, quality product when all of the grant funds have already been expended.

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Introduction

Purpose and Prior Audit Coverage

An audit of the National Association of Minority Contractors (NAMC) was initiated in July 1998 because of an anonymous Hotline complaint received by the Office of Inspector General (OIG) alleging NAMC's poor performance and mismanagement of grant funds under Environmental Protection Agency (EPA) Grant No. X-824519-01. A prior EPA OIG report, *Audit Report on the National Association of Minority Contractors* (Report No. 1999-00213), issued August 23, 1999, discussed several *performance* issues related to the NAMC grant. Specifically, that report disclosed that although NAMC completed only a small portion of the work required by the grant it received, EPA allowed NAMC to draw down all of the \$750,000 in grant funds.

In that prior report, we did not discuss our *financial* findings, so as to not interfere with an OIG investigation active at that time. Since that investigation has ended, we are now publishing the results of the financial part of our review. Specifically, regarding financial issues, we sought to determine whether there was mismanagement of grant funds.

Background

NAMC, located in Washington, DC, 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. 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 EPA's Office of Small and Disadvantaged Business Utilization (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. On September 25, 1995, OSDBU awarded NAMC the \$500,000 under Grant No. X-824519-01. NAMC was required to conduct 5 state studies and 10 Outreach and Opportunity Exchange (OPEX) conferences covering all 10 EPA

regions. The grantee had from October 1, 1995 to March 31, 1997 to complete the project. EPA was to provide 95 percent of the project cost, with NAMC to provide the remaining 5 percent as a match.

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 10 conferences.

On January 9, 1997, 3 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 need to do to ensure that they provide ample contracting opportunities to minority businesses. On March 12, 1997, OSDBU awarded NAMC a \$250,000 increase to perform this additional work, and extended the work period to June 30, 1998.

Scope and Methodology

We conducted a financial audit of the costs claimed by NAMC under this grant. We also audited 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 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. 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 audit.

Our review of NAMC's internal controls was related to costs incurred under the grant. It 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. The last Single Audit Report 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 NAMC's internal controls were inadequate for our purposes.

To accomplish our audit, we reviewed EPA's policies and procedures for administering grants and the requirements specified in the grant agreement. As criteria for conducting this audit, we used the:

- Code of Federal Regulations Part 30,
- Office of Management and Budget (OMB) Circular A-122,
- EPA Order 5700.1, *Policy for Distinguishing Between Assistance and Acquisition*, and
- the Assistance Administration Manual

Also, we interviewed program officials from EPA Headquarters; NAMC; and NAMC's contractor, MBELDEF.

Our audit field work 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 reviewed the costs claimed under the grant to determine the reasonableness, allowability, and allocability of the grantee's expenditures. For each cost claimed, we reviewed source documentation such as invoices, canceled checks, travel reports, bank statements, and time sheets. We also reviewed NAMC's compliance with the program and financial reporting requirements of the grant.

On March 12, 1999, we issued a draft report on both the performance and financial issues. OSDBU submitted a consolidated response on May 26, 1999, which included comments from the OSDBU, the Grants Administration Division, and the NAMC. We include all of those

responses as Appendices to this report. These responses address many of the performance issues that were discussed in the previous performance audit report as well as the financial issues addressed by this current report.

The EPA and NAMC responses applicable to the financial issues are summarized later in this current report, followed by our evaluation of the responses. In addition, NAMC's specific comments to individual notes in the "Analysis of Expenditures to Verify Allowability" section of this report are included after each note, along with our evaluation. Because NAMC's response was voluminous, we did not include the exhibits that were provided with its response; they are available upon request.

We conducted an exit conference with the Grants Administration Division, OSDBU, and EPA's Office of General Counsel on June 7, 1999. That exit conference covered the draft OIG report issued March 12, 1999, that covered both performance and financial matters. However, the final report issued August 23, 1999, only covered the performance matters, due to a pending investigation on the financial aspects. That investigation of the financial matters was recently completed. Since over 2 years had passed, we contacted the Grants Administration, OSDBU, and NAMC on September 13, 2001, to provide an update and discuss our plans to issue a final report on the financial part of the review.

Audit Results

In our opinion, because of matters discussed in the detailed "Analysis of Expenditures to Verify Allowability" section that follows, a portion of the grantee's (NAMC's) claimed costs under EPA Agreement X-824519-01, awarded for the period October 1, 1995 to June 30, 1998, were not eligible under EPA regulations and grant requirements or were not adequately supported in the accounting records.

We determined that of the \$712,041 in EPA's share of the costs incurred by NAMC under the grant reviewed, \$456,873 of the costs were ineligible and \$141,237 were unsupported. Thus, \$113,931 of the costs incurred were considered acceptable. By deducting the acceptable costs from the \$750,000 awarded to NAMC, we concluded that a balance of \$636,069 was due EPA from NAMC.

Recommendation

We recommend that the Director of the Grants Administration Division adjust the allowable costs in accordance with our determination. In particular, NAMC should repay EPA \$636,069.

Overall EPA and NAMC Responses

EPA Responses

Grants Administration Division: The Grants Administration Division is not taking any action with respect to allowing or disallowing costs in response to the draft audit report. The Grants Administration Division will work with NAMC and OSDBU 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, EPA is considering their proposal. Because of the number of changes in the Minority Owned Business Enterprises and Women Owned Business Enterprises environment since the inception of this grant, there is an even greater need for this work to be done.

OSDBU: The draft report demonstrates that NAMC did not complete the work it agreed to perform under the grant despite drawing down all of the funds obligated for the project. However, the draft audit does not 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.

NAMC Response

NAMC believes that certain 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.

OIG Evaluation

We do not think it would be beneficial for NAMC to be afforded the opportunity to complete the work at no additional costs to EPA. 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. We note that the grant period has already been extended three time – finally ending June 1998 – and nothing has happened in the 3 years that have followed. Therefore, we see no reason to think that NAMC will now complete the work.

Regarding specific items of costs questioned in NAMC's detailed response, we have made minor changes based on additional information provided. For specific treatment of each item of costs, see the NAMC responses and OIG evaluations in the "Analysis of Expenditures to Verify Allowability" section that follows.

Analysis of Expenditures to Verify Allowability

**For EPA Agreement X-824519-01, awarded to the
National Association of Minority Contractors
for the period October 1, 1995 to June 30, 1998**

Cost Category	Costs		<u>Costs Questioned</u>		Note
	<u>Incurred</u>	<u>Accepted</u>	<u>Ineligible</u>	<u>Unsupported</u>	
Personnel	\$232,610	\$ 0	\$116,305	\$116,305	1
Contractual	467,280	102,467	340,667	24,146	2
Telephone	21,565	10,039	10,039	1,487	3
Travel	18,783	2,688	9,520	6,575	4
Other	<u>9,279</u>	<u>4,733</u>	<u>4,388</u>	<u>158</u>	5
Total	<u>\$749,517</u>	<u>\$119,927</u>	<u>\$480,919</u>	<u>\$148,671</u>	
EPA Share 95%	\$712,041	\$113,931	\$456,873	\$141,237	
Payments to Date		<u>\$750,000</u>			
Balance Due EPA		<u>\$636,069</u>			

Note 1

We determined that NAMC's personnel costs and related fringe and indirect costs of \$232,610 were not properly supported because the employee time sheets did not represent a reasonable estimate of the actual work performed. In addition, we considered \$116,305 of that amount to also be ineligible. Therefore, the table on the preceding page shows \$116,305 to be ineligible and only the remaining \$116,305 to be unsupported.

We considered all of these costs to be unsupported because OMB Circular A-122 states that employees' personnel activity reports (e.g., time sheets) must reflect a reasonable estimate of actual work performed by the employee during the period covered by the report. NAMC employees completed their time sheets at the end of every 2-week pay period. The NAMC Executive Director acknowledged that the hours on the time sheets are not necessarily accurate on a daily basis, but contended that the total hours for the 2-week period are a good estimate of the actual activity.

We found that the individual time sheets reviewed were nearly identical each pay period. This indicates that the time sheets do not reflect actual activity, but that employees consistently used the same percentages to charge various projects. 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; they should not be based on predetermined, consistently applied percentages.

In addition to these costs being unsupported, we also considered 50 percent, or \$116,305, to be ineligible because the costs were not reasonable or allocable in accordance with OMB Circular A-122. The Circular states 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 it completed only a portion of the work required by the grant. Based on the work completed, we considered the 50 percent estimate to be reasonable.

Amount Ineligible \$116,305

Amount Unsupported \$116,305

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 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.

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.

OIG Evaluation

Our position remains unchanged for all Personnel issues. We still contend that the employee time sheets did not represent a reasonable estimate of the actual work performed.

Note 2 NAMC incurred \$467,280 of contractual expenditures. Of this amount we considered \$340,667 ineligible and \$24,146 unsupported. These costs are summarized in the following table and then discussed in detail:

<u>Issue</u>	<u>Ineligible</u>	<u>Unsupported</u>
a. Studies not completed	\$229,517	
b. Not all conferences conducted	18,735	
c. Consultant costs ineligible	92,282	
d. Hotel overpayment	<u>133</u>	
e. Receipts not provided		<u>\$24,146</u>
Totals	<u>\$340,667</u>	<u>\$24,146</u>

a. *Studies not completed.* 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.

MBELDEF had gathered data at another three states but had not compiled the information into a report. Therefore, we did not consider the studies to be complete or the costs 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.

Amount Ineligible \$229,517

NAMC Response

NAMC acknowledges that an estimated \$229,517 in contractual expenditures were deemed ineligible 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 OIG 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.

OIG Evaluation

Our position remains unchanged. In NAMC's April 1999 response to the draft report, they said they anticipated the final report for three additional state studies would be completed within the *next few weeks*. However, as of September 2001, about *2 ½ years later*, neither the Agency nor NAMC have provided evidence that these reports have been completed.

As stated earlier, we do not believe NAMC should be afforded the opportunity to complete the work at no additional costs to EPA. 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.

- b. *Not all conferences conducted.* A conference consultant was budgeted to receive \$18,000, or \$1,800 per conference, to coordinate the conferences. 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 2 conferences, considering that \$18,000 was intended to pay for all 10 conferences.

Amount Ineligible \$18,735

NAMC Response

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.

OIG Evaluation

We disagree with NAMC regarding the amount of work that needs to be completed. We contend that no needs assessments have been completed versus two. We disagree that the deliverable for a needs assessment was solely a meeting with a region. It is not sufficient that a meeting takes place; at a minimum, there needs to be a written record of what was discussed and how this information will benefit minority contractors. Therefore, our position remains unchanged.

- c. *Consultant costs ineligible.* 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, for one of those two consultants, the consultant was paid \$78,093 to provide legal services to NAMC. Originally, the consultant completed time sheets. Then, NAMC paid the consultant \$2,000 every 2 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 percent to 80 percent of effort was classified as “Other NAMC.” NAMC’s Executive Director said 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.

Amount Ineligible \$92,282

NAMC Response

For the consultant that was paid \$78,093, NAMC acknowledges that approximately \$21,000 in charges were for “Other NAMC” activities. However, approximately 50 percent of the remaining \$57,000 should be deemed eligible because the consultant performed 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 1996, and performed numerous other activities. NAMC calculates that \$28,939 of this consultant's costs should be deemed eligible if the OPEX work was completed. 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 OSDBU and the consultant's participation was implicitly accepted by OSDBU because they incorporated the NAMC proposal in total as the Scope of Work for the 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 OPEX would not be an on-going effort beyond the grant period, thus 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 percent of the consultant's administrative support was to be for OPEX. Therefore, NAMC contends that approximately 50 percent of the OPEX-related costs of this administrative support be deemed eligible based on the work completed. If the OPEX work was completed at no additional costs to EPA, the remaining 50 percent of OPEX-related costs for administrative support could then be deemed eligible.

OIG Evaluation

Our position remains unchanged. Sufficient support has not been provided to show how these charges are allocable to the grant.

- d. *Hotel overpayment.* NAMC mistakenly overpaid \$133 to a hotel in connection with a conference held in Hartford, Connecticut.

Amount Ineligible \$133

NAMC Response and OIG Evaluation

NAMC acknowledges the ineligible overpayment of \$133 to a hotel; therefore, our position remains unchanged.

- e. *Receipts not provided.* We considered \$24,146 in contractual expenditures unsupported. NAMC did not provide receipts for these expenditures, as required by 40 CFR 30.21.

Amount Unsupported \$24,146

NAMC Response

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

OIG Evaluation

Our position remains unchanged. It should be noted that in the more than 2 ½ years since we received NAMC's response to the draft report (April 22, 1999), no further support has been provided.

Note 3 We considered \$1,487 of \$21,565 incurred for telephone expenditures to be unsupported because NAMC did not provide receipts as required by 40 CFR 30.21. Moreover, we considered \$10,039, or 50 percent, 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 portion of the work required by the grant.

Amount Ineligible \$10,039

Amount Unsupported \$1,487

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. If the OPEX work was completed, these ineligible costs could then be deemed eligible.

OIG Evaluation

Our position remains unchanged as no additional support has been provided.

Note 4

NAMC incurred \$18,783 in travel expenditures. Of this amount we considered \$9,520 ineligible and \$6,575 unsupported. We considered the \$9,520 ineligible because there was no indication how any of the following travel benefitted the grant:

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

OMB Circular A-122 requires that travel costs must benefit the grant in order for these costs to be allocable. Additionally, we considered an additional \$6,575 in travel expenditures to be unsupported because NAMC did not maintain documentation, such as travel reports, as required by 40 CFR 30.21.

Amount Ineligible \$9,520

Amount Unsupported \$6,575

NAMC Response

Of the \$9,520 in Travel expenditures that were deemed ineligible, NAMC contends that at 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. 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 OSDBU, including OPEX. Also in attendance at this conference were the present 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 OPEX activity.

OIG Evaluation

Our position remains unchanged. No additional support was provided to show how the \$5,943 for the NAMC conference and the \$27 for the Brownfields Conference were related to the grant. Moreover, we disagree with NAMC's position that receipts supporting the \$6,575 were provided.

Note 5 NAMC incurred \$9,279 of Other Expenditures. Of this amount we considered \$4,388 ineligible and \$158 unsupported, as summarized in the table and the text that follows.

<u>Issue</u>	<u>Ineligible</u>	<u>Unsupported</u>
a. Procurement practices inappropriate	\$4,192	
b. Advertisement questioned	167	
c. Publication double charged	<u>29</u>	
d. Support not provided		<u>\$158</u>
Totals	<u>\$4,388</u>	<u>\$158</u>

- a. *Procurement Practices Inappropriate.* 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.

Amount Ineligible \$4,192

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). Gateway had the best price and 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 cost.

OIG Evaluation

Our position remains unchanged. There was no additional written documentation provided to support that NAMC performed the price and cost analyses described above.

- b. NAMC paid \$167 to a Radio Think Tank for a Youth and Development advertisement in connection with the Million Man March. We considered this cost ineligible because it did not benefit the grant. As a result, in accordance with OMB Circular A-122, this cost was not allocable to the grant.

Amount Ineligible \$167

NAMC Response and OIG Evaluation

NAMC did not address this note in their response; therefore, our position remains unchanged.

- c. *Publication double charged.* NAMC mistakenly double charged \$29 for a publication.

Amount Ineligible \$29

NAMC Response and OIG Evaluation

NAMC did not address this note in their response; therefore our position remains unchanged.

- d. *Support not provided.* We considered \$158 unsupported because NAMC did not provide the supporting records required by 40 CFR 30.21. NAMC did not: indicate how an \$81 bank charge was allocated to the grant; provide documentation to show that \$48 incurred for lunch was for an allowable business meeting; or provide receipts for a \$29 publication.

Amount Unsupported \$158

NAMC Response and OIG Evaluation

NAMC did not address this note in their response; therefore, our position remains unchanged.

Appendix 1

EPA Response to Draft Report



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. The signature is positioned to the right of the "FROM:" label.

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

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

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.

Appendix 2

NAMC Response to Draft Report

Law Offices

HOLLAND & KNIGHT LLP

2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037-3202

202-955-3000
FAX 202-955-5564
<http://www.hlkaw.com>

Atlanta	Orlando
Boca Raton	San Francisco
Fort Lauderdale	St. Petersburg
Jacksonville	Tallahassee
Lakeland	Tampa
Miami	Washington, D.C.
New York	West Palm Beach

April 22, 1999

ROSS W. DEMBLING
202-457-5953

Internet Address:
rdemblin@hklaw.com

VIA HAND DELIVERY

Ms. Jeanette Brown
United States Environmental Protection Agency
Director, Office of Small and Disadvantaged
Business Utilization (OSDBU)
401 M Street, S.W. Mail Code 1230
Washington, D.C. 20460

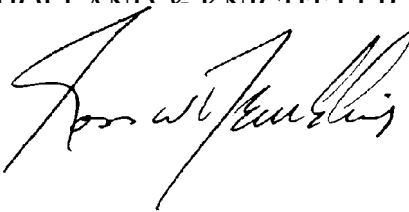
**Re: Draft Report of Audit on EPA Grant Awarded to the
National Association of Minority Contractors Grant
Number X-824519-01 Draft Report Number E6DEA 8-03-0025**

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 OSDBU'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 3

Distribution

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