



## MEMORANDUM

To: Kathleen Patterson, Auditor, Office of the District of Columbia Auditor (ODCA)

From: Kristi C. Whitfield, Director, Department of Small and Local Business Development (DSLBD)

CC: Ruth Werner, Auditor-in-Charge (ODCA); Julie Lebowitz, Deputy Auditor (ODCA); Lorenzo McRae, General Counsel (DSLBD); Ronnie Edwards, Deputy Director Compliance and Enforcement (DSLBD); Tyrone Hankerson, Compliance and Enforcement Manager (DSLBD); and Melissa Resil, Certifications Manager (DSLBD)

Date: June 24, 2021

Re: DSLBD Response to ODCA's Preliminary Audit Report Concerning Purported "Weakness Cited in Monitoring Lottery Contract CBEs"

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In response to ODCA's draft report ("Preliminary Audit Report")<sup>1</sup> regarding the audit of the Office of the Chief Financial Officer's ("OCFO") Office of Lottery and Gaming's ("OLG") current lottery contract (CFOPD-19-C-041 or "lottery contract"), as it concerns DSLBD's (or the "Department") relevant oversight of certified business enterprise ("CBE") law, the Department appreciates the opportunity to address certain ODCA assertions and findings, amend the record as necessary, and provide a nuanced response with appropriate context. This memorandum, therefore, serves as DSLBD's official response to ODCA's claims, methodology, and recommendations.

### **EXECUTIVE SUMMARY**

DSLBD supports the role and mission of ODCA in assuring accountability among District of Columbia ("D.C." or "District") agencies in their performance and stewardship in upholding laws, regulations, and policies. To that end, the Department is pleased to have cooperated in ODCA's audit by providing all requested information and documentation in the Department's possession. However, in light of ODCA's Preliminary Audit Report, it is

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<sup>1</sup> ODCA provided its draft report to DSLBD on, or about, June 10, 2021. Because the report was in draft form, ODCA advised DSLBD that the report could be revised during the review process. Hence, the Final Audit Report may be different in tone and substance from the Preliminary Audit Report to which DSLBD is hereby responding.



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apparent that ODCA based some assertions, findings, and recommendations on an incomplete record, misunderstanding of agencies' practices (and lottery contract terms), and/or strained interpretations of District laws. Most baseless is ODCA's erroneous and inflammatory assertion that DSLBD allowed the prime contractor (or beneficiary) of OCFO/OLG's lottery contract to violate the law by using a subcontractor as a fiscal agent.

ODCA's claims are misdirected at DSLBD. Foremost, DSLBD has no authority under District law to intervene in OCFO/OLG's contract with the beneficiary (or any other procuring agency contract) whereby DSLBD would dictate who the beneficiary engages as subcontractors and for what purpose. OCFO/OLG accepted the beneficiary's use of a subcontractor to fulfill some of its administrative and fiscal duties, including paying CBEs. Moreover, even if DSLBD had such authority, ODCA provides no evidence of any District law preventing a beneficiary from engaging a subcontractor to act as a fiscal agent and perform accounting services such as to pay the beneficiary's bills. Contrary to ODCA's claim and recommendation, there is ample evidence in District law and case law of fiscal agents being permitted and used, even by D.C. government.<sup>2</sup> DSLBD's role is to monitor the subcontracting plan and CBE agreement, ensuring that CBEs are compliant with the CBE Act and being paid in accordance with the terms of the agreement and compensated for their work.

DSLBD also is concerned with ODCA's misconception that the CBE law requires the Department to monitor onsite work performed by CBEs on thousands of District contracts covering a multitude of types of goods/services (valued at approximately \$3.9 billion)<sup>3</sup> that are procured by eighty-eight (88) monitored District agencies. The District's procuring agencies are the actual managers of their respective contracts, in part, because they have established the necessary performance standards and articulated the expected outcomes of their proposed contracts. DSLBD, on the other hand, works with these subject matter procuring experts to ensure that CBEs are being used and that both CBEs and beneficiaries are complying with CBE law, which the procuring agency is also bound to uphold. Specifically, the CBE Act calls for coordination with the contracting officer (an extension of the subject matter expert procuring agency) in determining whether a CBE is performing a commercially useful function.<sup>4</sup> DSLBD has historically interpreted this law as an acknowledgement that it has to rely on the District's procuring subject matter experts—who are in the field/onsite ensuring that their goods/services are being provided—as a significant Department resource in its CBE monitoring efforts. Moreover, ODCA's premise seems to be that only DSLBD is, or should be, concerned with supporting

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<sup>2</sup> See *infra* Response to Recommendation 8 and FN 28.

<sup>3</sup> This dollar amount is based on the value of all District contracts that DSLBD is currently monitoring, per the QuickBase Management Software application (i.e., a low-code application development platform used by DSLBD).

<sup>4</sup> See D.C. Official Code § 2-218.13(e).



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CBEs and monitoring their District contracts. But in fact, across agencies, the District and its personnel are committed to contracting with and building capacity, expertise, and growth in our local business community as well as ensuring integrity in the CBE program.

Despite these mistaken assumptions and purported findings, and some others that lack nuance or context, DSLBD agrees, in part, with some recommendations, and hopes that ODCA’s Final Audit Report reflects corrections to its preliminary findings and that its recommendations result in improvements to District laws and regulations, as needed. The Department addresses this in detail below. As part of DSLBD’s ongoing management over the CBE program and initiatives under the Department’s stewardship, DSLBD had already identified some areas for refinement and has made efforts toward implementing them. Some of these proposals also are addressed below.

Further, DSLBD’s ongoing efforts are incorporated in the Department’s day-to-day governance and managerial policies at the agency level without the necessity of amending laws and regulations. The act or manner of governing is not written in exhaustive, minute detail through legislation; or in other words, legislation is not governance. Throughout the Mayor’s tenure, DSLBD has strengthened the CBE program, advocated for the CBE community, and found innovative ways to help local District businesses.<sup>5</sup> Moreover, the Mayor’s commitment to building capacity among CBEs, bolstered by DSLBD’s ongoing refinement of its mission-focused and adept management, has resulted in record annual growth in CBE participation and spend in District contracting over the past five years—from \$476,437,024 in small business enterprise (“SBE”) spend in Fiscal Year 2015 to \$1,064,192,244 in Fiscal Year 2020.<sup>6</sup> Thus, contrary to certain claims in ODCA’s Preliminary Audit Report, there is ample evidence that DSLBD is meeting its mission to support the development, economic growth, and retention of District-based businesses as

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<sup>5</sup> DSLBD is meeting its mandate with integrity, hard work, and creative thinking. There are a plethora of efforts that support this assertion including, but not limited to: (1) issuing and collecting fines for violations of the CBE law by beneficiaries—which this is the first Mayor to implement this action; (2) establishing requirements to conduct site visits/spot checks for all CBEs at least once per year since 2019 as a means of confirming continuing eligibility; (3) coordinating successfully with procuring agencies to de-bundle large District contracts with, for example, the Office of Lottery and Gaming (for lottery retail enhancement, warehousing of instant tickets, and a mobile vendor), Department on Aging and Community Living (for food related services), and Department of Public Works (vehicle leasing); (4) creating and publishing “The Greenbook,” a DSLBD publication (which also includes an online format with an interactive dashboard) which increased transparency and showed where District money was being spent (allowing CBEs to target procurement opportunities and leverage certain data and information to be more competitive); (5) reducing the total dollar value of approved waivers from \$238,232,062 in Fiscal Year 2017 to \$165,161,540 in Fiscal Year 2020; (6) providing fully automated compliance processes which focus, in part, on transparency and accountability; (7) drafting, distributing, and circulating monthly newsletters which highlight opportunities for CBEs (such as grants, training, and local business openings in the District); and (8) publishing revoked CBEs on DSLBD’s website.

<sup>6</sup> See The Greenbook publications since 2015.



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well as the Department’s goals of extending economic prosperity to local business owners, their employees, and the communities they serve.<sup>7</sup>

ODCA’s Executive Summary and Audit Results Sections of its Preliminary Audit Report contain eight preliminary recommendations concerning DSLBD. For ease in tracking DSLBD’s comments, the rest of this memorandum is organized by ODCA’s recommendations and responds in kind to assumptions and assertions made therein. Regarding the format, DSLBD will restate the recommendation; note whether the Department agrees; and discuss claims that may need clarification, context, or correction. In addition, per ODCA’s request, DSLBD will opine on a timeframe for implementation (to the extent this is possible through a unilateral act of DSLBD), and when appropriate, the Department will note whether an alternative solution exists.

## **RECOMMENDATIONS AND RESPONSES**

### **1. The D.C. Council should amend the law to clearly define “managerial functions” and “independently controlled, owned, and operated.”**

DSLBD agrees with this recommendation to the extent that neither phrase is defined in the law presently but acknowledges that both phrases are important. The D.C. Council should amend the law to clearly define the phrase “independently controlled, owned, and operated,” which Council implemented in November 2020. Earlier in 2020, the Mayor took the initiative to strengthen the criteria that business enterprises needed to become local business enterprises (“LBE”) (also known as a CBEs) and, among other actions, proposed a definition for “independently owned and operated” via the Mayor’s *Supporting Local Business Enterprises Amendment Act of 2020* (which was introduced in Council Period 23 on September 29, 2020 and then reintroduced as *Supporting Local Business Enterprises Amendment Act of 2021* during Council Period 24 on January 27, 2021).<sup>8</sup>

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<sup>7</sup> See generally D.C. Official Code § 2-218.13(a) (stating the goals, responsibilities, and overall function of the Department).

<sup>8</sup> Following the bill re-introduction in Council Period 24 on January 27, 2021, DSLBD drafted amendments to Council on, or about, April 15, 2021. That draft proposes that “independently owned, operated, and controlled” mean that a business enterprise manages and controls its day-to-day operations without being subject to control, restriction, modification, or limitation by another business enterprise(s) or a not-for-profit business(es) that has or may have ownership and/or financial interest in the business enterprise. A business enterprise shall be rebuttably presumed not to be independently owned, operated, and controlled if another business enterprise(s) or a not-for-profit(s) owns or controls, or has the power to control, 50% or more of the voting stock or interest in the business enterprise.



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As noted, the Council has not defined “managerial functions” either. DSLBD, however, has not suggested a definition in the recent proposed amendments, in part, because “managerial functions” is a quotidian phrase used universally across all industries to mean the planning, staffing, organizing, directing, coordinating, and overall controlling of a business’ activities. Nonetheless, DSLBD does not have an issue with defining this phrase, but critical clarifications or corrections need to be addressed given some ODCA assertions made in the Preliminary Audit Report. Specifically, pursuant to a review of communications from ODCA, DSLBD was not asked to “provide evidence of how the LBE requirement of managerial functions in the principal office is evaluated and confirmed.”<sup>9</sup> DSLBD would have eagerly provided an explanation of how “managerial functions” has been applied. But to be clear, although the law does not define the phrase, and the regulations do not address it to the extent recommended by the ODCA, DSLBD has aptly interpreted its meaning based on prevailing business applications and instituted a process to effectively carry out the Department’s functions.

To that point, in order for DSLBD to approve a business enterprise as an LBE during the application process, the Certification Division must evaluate and confirm the business enterprise’s managerial functions. These methods include, but are not limited to: (1) reviewing the submitted application and supplemental documentation, (2) conducting a site visit whereby a Certification Division Specialist visits the business (or does a virtual visit during the COVID-19 pandemic) and requires the chief executive officer (“CEO”) and/or highest-level managers to demonstrate their respective managerial functions for the business, i.e., the staffing, planning, organizing, directing, coordinating, and overall controlling of the business’ activities. For example, the Certification Division Specialist requests that the CEO and/or highest-level managers demonstrate how records are kept, bills are paid, payroll is conducted, and other managerial functions of the business are performed at the principal office. Certification Division staff would also inquire about the extent of other office locations and the specific functions that are performed at those respective places. Depending on the Certification Division Specialist’s findings, additional analysis is conducted as needed. Further, after application approval, when the Compliance

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<sup>9</sup> Without being asked specifically, on, or about, January 13, 2020—in response to ODCA’s December 20, 2019 engagement letter—DSLBD submitted (in addition to other documents) the Certification Division’s Standard Operating Procedures (“SOP”) which addresses the certification evaluation process. The Department then subsequently provided a working draft of revised SOPs that reflected enhancements to the District Enterprise System (or “DES”). (The DES streamlines the processes within the Department’s business areas—i.e., Certification, Compliance, Grants Management, and Business Opportunities—and integrates collaboration between DSLBD’s external users—i.e., the D.C. government and D.C. community.) In addition, on, or about, July 23, 2020, DSLBD provided ODCA with the training deck and handouts which the manager has provided to Certification Division staff. These materials included information about how DSLBD confirms eligibility for the full LBE category, which includes determining whether the CEO and highest-level managers are performing their managerial functions in the principal office of the business.



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and Enforcement Division (“Compliance Division”) does spot checks—which are typically random, unannounced visits to a certified business’s principal office—Compliance Division staff observe or document proof that the management functions of the business are carried out in the principal office located in the District. This may include re-demonstrating that the CEO’s and/or highest-level manager’s office is in the District, and is supported locally, which would re-confirm the Certification Division Specialist’s findings that the CEO or highest-level manager performs his/her duties in the District.

Of the businesses that ODCA inquired about, only one is a veteran-owned business enterprise (“VOB”), and ODCA made observations about its supposed inability to assess DSLBD’s review process for such enterprises. Again, pursuant to DSLBD’s review of communications from ODCA, DSLBD was not asked to provide evidence of how “the VOB requirement of one or more veterans controlled the management and daily operations was evaluated and confirmed.” To be clear, DSLBD evaluates and confirms the managerial functions of VOBs. In addition to the Certification Division’s review of the application for the minimum LBE threshold, processing of all requisite accompanying documentation, conducting a site visit, and confirming the ownership of the VOB,<sup>10</sup> the Department specifically requires Form DD 214, the complete and thorough verification document of a service member’s proof of military service (or other such document depending on the branch of the military) when evaluating the applicant’s eligibility for the VOB sub-designation. DSLBD examines Form DD 214 to determine if the majority owner(s) of the business have been discharged honorably and meet part of the VOB requirement. The VOB inquired about here, District Services Management (“DSM”), is an LBE that is owned by one individual who is both the highest-level manager, and the veteran responsible for the control and management of daily operations. DSLBD reviewed this documentation for DSM when it was initially certified.

The timeframe to implement the recommended law changes (i.e., defining the aforementioned phrases) depends on Council. As noted, Mayor Bowser proactively introduced amendments to make some important changes in 2020 and DSLBD is awaiting mark-up of the amendments that were reintroduced in 2021. The Department looks forward to working with Council to make prudent changes to the CBE Act.

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<sup>10</sup> The CBE Act requires that the VOB is not less than 51% owned and operated by one or more veterans, in case of any publicly owned business; not less than 51% of the stock of which is owned by one or more veterans; and one or more veterans control the management and daily operations. *See* D.C. Official Code § 2-218.38.



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**2. DSLBD should clearly identify in the DCMR and Standard Operating Procedures (“SOP”) how each relevant section of the D.C. Code is examined and reviewed and what supporting documentation is necessary to determine if the business meets the criteria for certification.**

DSLBD agrees that the DCMR and SOPs could identify and list how relevant sections of the District Code are examined and what supporting documentation is necessary to determine if a business meets the criteria for certification. But it should be noted that changes to the CBE Act are pending, and as a result, changes to the DCMR and SOPs should follow. Also, DSLBD recently made comprehensive updates to the DCMR to reflect the 2014 statutory amendments. These were published in Vol. 67/29 of the D.C. Register on July 10, 2020, and the proposal addressed numerous concerns.<sup>11</sup> Following the publishing of this rulemaking, DSLBD had introduced comprehensive legislation to amend the CBE Act (as discussed as part of DSLBD’s response to ODCA’s Recommendation 1). The changes to the law would require that the 2020 proposed rulemaking undergo further substantive amendments. Hence, as a result, and for procedural efficacy and efficiency, DSLBD prioritized working with Council to make statutory changes first, understanding that rulemaking changes would immediately follow.

Aside from this procedural background concerning what DSLBD has done to push relevant changes, the Department needs to address certain claims in ODCA’s Preliminary Audit Report. In particular, ODCA asserts that DSLBD did not provide evidence that it complied with the law in certifying and recertifying six (6) of the seven (7) CBEs.<sup>12</sup> DSLBD has reviewed communications from ODCA and was not asked to provide evidence to support compliance with SBE, LBE, and VOB (which the latter is discussed above in DSLBD’s response to Recommendation 1).

To be clear, DSLBD does not just rely on information submitted by an applicant to confirm LBE status or that of a sub-designation. Depending on the set of facts unique to an applicant, the validation and evaluation process is multifold whereby DSLBD:

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<sup>11</sup> The proposed rulemaking would extend the certification period from two (2) years to three (3) years, provide guidance on shared work spaces, allow for a sworn affidavit for no material change recertification procedures, provide additional guidance on demonstrating that the CEO and highest-level managers perform functions in the principal office, and provide guidance on how affiliation with another business is reviewed by the Department. In addition, the proposed rulemaking addressed changes to the Small and Local Business Opportunity Commission, subcontracting requirements for government-assisted project and associated subcontracting plans, penalties and enforcement mechanisms, the Small Business Capital Access Fund, equity development participation, and implements Council review procedures under the D.C. Code.

<sup>12</sup> The recertification claim is addressed in DSLBD’s response to Recommendation 3.





1. reviews the application and supplemental documentation;
2. conducts a site visit;
3. speaks with the CEO, highest-level manager, and other employees on site;
4. visits other business locations in the metropolitan area, if known to exist;
5. conducts research including, but not limited to, on the web for the business name, CEO, highest-level manager, and conflicting certifications in other jurisdictions;
6. consults with the Office of Tax and Revenue regarding tax issues and reviews relevant tax documents; and
7. coordinates with, and/or reviews the online databases and files of, other government agencies such as the Department of Consumer and Regulatory Affairs to confirm licenses, registration, and ownership information reported.

With respect to a timeframe for changes to the regulations and to some extent SOPs, DSLBD is prepared to act as quickly as possible. Any such changes would be contingent on approved amendments to the CBE Act. Once Council approves them, it may realistically take six (6) to nine (9) months for implementation, which entails drafting the revisions, obtaining legal sufficiency, posting proposed rules for notice and comment, digesting and responding to the comments, possibly re-promulgating proposed rules, and getting executive approval.

**3. DSLBD should ensure sufficient resources are allocated to the Certification Division and Compliance Division so that same-day self-recertification eligibility can be checked within the timeframe DSLBD establishes.**

In principal, DSLBD agrees that the Department should have sufficient resources; however, there are issues with the premise of ODCA's recommendation. First, for clarification, recertifications are a matter solely performed within the Certification Division, not within the Compliance and Enforcement Division (i.e., the monitoring and enforcement arm of DSLBD). Second, DSLBD is not statutorily obligated to follow-up same day self-recertification within a particular time period.

With respect to the second point, the Department initially established a six (6) month timeline and input that in its internal SOPs. However, DSLBD is reviewing the timeline and scope of the recertification processes given that only the Certification Division



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is tasked with this responsibility.<sup>13</sup> The Certification Division presently has five (5)<sup>14</sup> full-time employees (including the manager). There are only two staff members (a Senior Business Certification Analyst and a Program Analyst) who handle the desk review processing which concerns the recertification process.<sup>15</sup> In addition to desk reviews, both analysts handle a number of other tasks including, but not limited to, reviewing CBE applications before manager review, responding to applicants' inquiries, making CBE presentations to District agencies, drafting and implementing strategic initiatives, training new staff, monitoring various Certification Division reporting, and performing general administrative tasks for the Certification Division.

Also, the pandemic has required that District agencies become more flexible in how they conduct daily operations – both internally and with the public. DSLBD continues to explore new ways to maximize internal operations to best serve our small and local businesses, which includes reevaluating the allocation of time that staff spend on various tasks. As such, the Department is considering modifying the review period and amending the SOPs accordingly. Notwithstanding these likely internal changes, the Department has the added assurance that the Compliance Division has the ability to perform spot checks and revoke CBEs. The timeframe for this internal review and implementation is three (3) to six (6) months.

**4. The D.C. Council should amend the law to clearly state what is required when a business is reporting a material change.**

DSLBD agrees with the recommendation but provides further discussion for context. Presently, the CBE Act defines a material change in a business as being related to

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<sup>13</sup> DSLBD's District Enterprise System has different recertification review times than what is in the Preliminary Audit Report: (1) Veterans Services Corporation's self-recertification was approved on August 7, 2020, and DSLBD completed the desk review on September 9, 2020; (2) M. Jones & Companies LLC's self-recertification was approved on May 4, 2020, and DSLBD completed the desk review on August 3, 2020; (3) Octane LLC's self-recertification was approved on November 11, 2019, and DSLBD completed the desk review on September 30, 2020; (4) Goldblatt Martin Pozen LLP's self-recertification was approved on May 4, 2020, and DSLBD completed the desk review on August 3, 2020; (5) District Services Management's self-recertification was approved on January 7, 2019, and DSLBD completed a desk review on November 25, 2019; (6) Potomac Supply Company LLC's desk review was not required during the audit period as the business was certified as a new CBE on May 20, 2019; and (7) SBC LLC's desk review was not required during the audit period as the business became a CBE in 2016 and recertified on December 17, 2019.

<sup>14</sup> A sixth person is supposed to start on June 21, 2021.

<sup>15</sup> Other Department staff are not trained on desk reviews or the inter-workings of the Certification Division. Further, during the period under audit, there were staff departures in the Certification Division with two (2) leaving and three (3) new employees coming on board. The changes in personnel, which necessitated training and oversight, slowed the desk review process.





“ownership, address, or size, if certified as a SBE.” As noted previously, DSLBD has been proactive in identifying areas of the CBE Act that should be clarified or improved. The changes to the law that the Mayor provided Council suggested expanding the definition of a material change to include a change in: (1) a business’s ownership; (2) the address of the business’s principal office; (3) the business's size, if the business is certified as a SBE; and, more expansively, (4) any other characteristic of the business that affects whether the business continues to qualify for certification under a CBE category under which the business enterprise is certified.

Last, a relevant assertion in ODCA’s Preliminary Audit Report needs to be corrected. The CBE Act does not require that more than 50% of an LBE’s owners be District residents. That is merely one of four factors that a business may satisfy to qualify as an LBE under the law.<sup>16</sup>

The timeframe to implement the recommended law changes depends on Council. As noted, DSLBD, through the Mayor, proactively introduced amendments to make some of the recommended changes in 2020, and the Department is awaiting mark-up of the amendments reintroduced in 2021. After Council passes the amendment, it should be effective immediately.

**5. DSLBD should clearly identify in the DCMR what is required for recertification when a business is reporting a material change.**

DSLBD will consider whether this is possible without a statutory change, while continuing to work with Council to strengthen the CBE law by closing any loopholes or ambiguities that exist.

Thus, given the lack of clear legislative intent in this area, DSLBD has not violated any provision of the law<sup>17</sup> nor has it run afoul of the spirit of the law. The Department’s recertification process historically has not been a replica of the certification process, given that such businesses have certain unexpired documentation on file. The Department’s practices require that the CBE report and attest to all material changes, as defined by law,

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<sup>16</sup> Under present CBE law, the LBE applicant can demonstrate one of the following: (1) more than 50% of the employees of the business enterprise are residents of the District; (2) the owners of more than 50% of the business enterprise are residents of the District; (3) more than 50% of the assets of the business enterprise, excluding bank accounts, are located within the District; or (4) more than 50% of the business enterprise’s gross receipts are District gross receipts. *See* D.C. Official Code § 2-218.31.

<sup>17</sup> The Preliminary Audit Report portends that DSLBD erred by limiting documentation to those supporting the material change for the recertification of SBC, but ODCA fails to show how present practices are not supported by the CBE Act.



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and the Department reviews and confirms those changes and supporting documentation. Specifically, the Certification Division checks the submitted application which is assigned to a Business Certification Specialist. The specialist reviews the application and supporting documents to determine what material change has occurred. If the application is deficient (unclear or incomplete), an email is sent to the business that details what items are deficient and/or raises questions the specialist has related to the submitted documents. Once a final determination is rendered by the specialist, the application is reviewed by their assigned analyst and the manager before the application is approved or denied. This process is detailed in the Certification Division's SOPs.

With respect to a timeframe, the Department will consider whether it has the regulatory authority to fill in gaps in the law, or whether Council should provide more clarity, with implementation to follow.

**6. The D.C. Council should amend the law to delineate the respective responsibilities of the contracting agency and DSLBD to ensure CBEs are performing work.**

To the contrary of ODCA's interpretations, DSLBD believes that there is no ambiguity between what the Department's and procuring agencies' respective responsibilities are in ensuring that subcontractors (including CBEs) perform their contractually designated work. DSLBD does not procure and is not the manager of District contracts. The Department coordinates with the procuring subject matter expert who is most knowledgeable about the goods/services it solicited. Before the District pursues any efforts of amending the laws for the reasons espoused by ODCA, the Council and interested parties would need to review current law to weigh the necessity and import of ODCA's recommended changes to the relevant laws. Such changes likely would reach beyond the CBE Act to include other laws affecting procurement practices and impacting numerous District agencies.

The Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*) ("PPRA") makes clear the responsibilities of an agency with procurement authority subject to the PPRA, even if independent from the Chief Procurement Officer's authority. For example, it is the procuring agency that is responsible for determining performance eligibility for a contractor to perform work on a given project as well as establishing performance standards and expected outcomes of the proposed contract – particularly in this case when the contract is over \$1 million and subject to Council approval.<sup>18</sup> In addition, the PPRA requires a procuring agency to uphold all

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<sup>18</sup> See D.C. Official Code § 2-352.02(c)(5).



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provisions in the CBE Act, including ensuring that all contractors (including CBEs) are performing adequately on a District-funded project.<sup>19</sup> Specifically, it states that the purpose and policy of the PPRA is to “[support] the free enterprise system and the certified business enterprise program as set forth in subchapter IX-A of Chapter 2 of this title [§ 2-218.01 *et seq.*], and its implementing rules.”<sup>20</sup>

Furthermore, by way of supporting and comparative analysis, the District’s Chief Procurement Officer has many noteworthy responsibilities pursuant to District law: these include, in part, to: (1) review, monitor, and audit the procurement activities of the District; (2) prepare, establish, and implement a periodic review process for the evaluation of contractors who provide goods or services to the District; and (3) establish procedures for the inspection, testing, and acceptance of goods, services, and construction.<sup>21</sup> For the lottery contract, OCFO/OLG should be procuring in accordance with these same sensibilities.<sup>22</sup> It should go without saying that the procuring agency, the contracting officer, and the contracting officer’s technical representative are most knowledgeable and informed about the contract and the goods/services required therein.

Accordingly, DSLBD relies on the procuring agency’s subject matter expertise and is informed by its direct working relationship with the beneficiary and subcontractors. Specifically, DSLBD, in coordination with the agency contracting officer, shall have the authority, in reviewing participation by CBEs, to disregard participation by a CBE when it serves no commercially useful function in the performance of a contract.<sup>23</sup> Hence, the CBE Act, at present, demonstrates how DSLBD should glean certain information by “coordinating” with the contracting officer. Given that the contracting agency is “in the field” and literally sees all aspects of the project or contract, it is best able to obtain more information and make observations about the day-to-day inter-workings of the contract.

Further, as an important note, DSLBD’s Compliance Division monitors the lottery contract within its “Agency Compliance” sub-unit. Presently, there are four (4) Compliance Division Specialists that monitor eighty-eight (88) District agencies’ contracts including related CBE expenditures and reporting.<sup>24</sup> The number of contracts per agency range from as little as just a few to hundreds. This is in addition to their other assigned duties such as

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<sup>19</sup> See D.C. Official Code § 2–351.01(2).

<sup>20</sup> See D.C. Official Code § 2–351.01(2).

<sup>21</sup> See D.C. Official Code § 2-352.04 (6)-(7) and (11).

<sup>22</sup> Notwithstanding the creation of the Office of Contracting and Procurement, which shall be administered by the Chief Procurement Officer (“CPO”), the Office of the Chief Financial Officer (as well as some other District agencies) shall not be subject to the authority of the CPO, but shall conduct procurements in accordance with the provisions of this chapter. See D.C. Official Code § 2–352.01(b).

<sup>23</sup> See D.C. Official Code § 2-218.13(e).

<sup>24</sup> Given DSLBD’s constrained personnel budget, the Department is not currently positioned to expand the members of the Compliance Division.





reviewing and responding to waiver requests, agency budgeting expenditure analysis and review, processing special exception requests, conducting site visits/spot checks, trainings (including across District agencies and with the CBE community), sports wagering analysis and review, data reporting for the Director and in response to Council requests, attending pre-bid/proposal meetings, and monitoring public-private development projects. Specifically, the Compliance Division Specialist who oversees the lottery contract monitors twenty-four (24) agencies and their respective multitude of contracts, processes sports wagering CBE applications, assists in responding to relevant FOIAs, provides trainings related to subcontracting and CBE requirements, and is an advisor on the team building the District Enterprise System (or “DES”). Thus, expanding the role or concept of DSLBD’s involvement in oversight of agency contracts—that is mandating that Compliance Division Specialists are onsite inspecting CBE work and learning the fundamentals of thousands of contracts across just as many industries/disciplines—is infeasible.

Regarding ODCA’s recommendation for further delineation of responsibilities, much more input from all involved and affected is warranted before a timeframe for amended laws could be provided, presuming the Council believes such action is even prudent and necessary.

**7. DSLBD should update the DCMR and finalize the Compliance Division’s SOPs to include responsibilities for reviewing and monitoring CBE participation on District government contracts.**

DSLBD agrees that it should update the DCMR once the Council amends the CBE Act and will consider what clarifications it may undertake even if Council does not act; meanwhile, inter-agency cooperation and coordination is an ongoing process. The Compliance Division continues to work toward finalizing its SOPs. But to be clear, the clarifications made above for Recommendation 6 (concerning delineating responsibilities between DSLBD and the procuring agencies) still stand and are incorporated herein by reference. Further, as the basis for this recommendation, ODCA erroneously asserts that “DSLBD approved and applied credit toward the statutory 35% CBE requirement on the OCFO/OLG contract for work not performed by two CBEs, VSC and Octane.” This does not accurately portray DSLBD’s actions or monitoring of the lottery contract. For completeness, the record regarding this claim is fully corrected below in the last response to Recommendation 8.



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The SOPs should be updated by December 2021.<sup>25</sup> Further, analysis of areas where regulations can be promulgated in advance of legislation will continue to be undertaken by the Department during Council Period 24 pursuant to procedures outlined in section 2372 of the CBE Act; however, it should be noted that any finalized rulemakings, by statute, are still wholly dependent on Council review and approval. For other regulations requiring Council clarification, the timetable is up to the Council.

**8. DSLBD should ensure beneficiaries pay CBEs from their own business account, and only award credit toward the 35% CBE goals for payments made by the beneficiary.**

This recommendation may appear to be innocuous, but it contains inherent misunderstandings. DSLBD is not a party to the procuring agency’s contract with the beneficiary, and the Department is not responsible for, nor does it have any authority under the law, to direct beneficiaries on the fiscal management of their respective contracts. The basis for this recommendation is flawed, lacks context, fails to articulate a valid legal basis, and mischaracterizes DSLBD’s actions. DSLBD disagrees with the premise of this recommendation and seeks to clarify the record as it relates to ODCA’s unfounded claims that DSLBD purportedly: (1) allowed Intralot to violate the law by using DC09 LLC (“DC09”) as a fiscal agent to pay CBEs and (2) approved and applied credit toward the CBE requirement for the OCFO/OLG contract for work not performed. These accusations are erroneous and inflammatory and are addressed below accordingly.

Use of a Fiscal Agent (DC09 LLC)

District law states, in part, that a beneficiary must include in the (1) subcontracting plan the “price to be paid by the beneficiary to each subcontractor” and (2) quarterly reporting the “price to be paid by the beneficiary to the subcontractor under the subcontract.”<sup>26</sup> However, this does not render a direct obligation for the beneficiary to pay the subcontractor without deviation or without an intermediary from its own account. Such an obligation is not found in District law. District procurement practices permit an intermediary (e.g., a general contractor) to pay the beneficiary’s subcontractors. Insinuating that DSLBD allowed a party to violate District law is inaccurate, excessive, and unreasonable.

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<sup>25</sup> The District Enterprise System (“DES”) is slated to be completed in September 2021, and the respective SOPs will incorporate some aspects of that system.

<sup>26</sup> See D.C. Official Code §§ 2-218.46(d)(1)(2)(D) and (i)(1)(A).





In roughly January 2020, Intralot informed DSLBD that DC09 would be its fiscal agent. By that point, DC09 had been added as a non-CBE subcontractor to OCFO/OLG’s contract for the purpose of being a fiscal agent.<sup>27</sup> As the fiscal agent, Intralot would provide the relevant monies to DC09, which in turn would pay all the subcontractors, except for VSC, and maintain certain accounting. Further, the Compliance Division reviewed certain bank statements, wire transfer transcripts, and Vendor Verification Forms (“VVF”), among other information, to confirm DC09 payments to the relevant CBE subcontractors. In this review, the records reflected payments to the CBE vendors present on the subcontracting plan (except for VSC who Intralot paid without use of the intermediary).

Government agencies (federal and local) recognize and use fiscal agents, fiscal sponsors, and fiscal intermediaries. ODCA has not identified, nor has DSLBD found, any District law that prohibits vendors on a government contract from using such a tool in the administration of their respective services or programs. In fact, the District has referenced them in some laws.<sup>28</sup> Further, many, if not most, development projects that the District engages with a developer (i.e., the beneficiary) have arrangements whereby the general contractor hires and pays the subcontractors (including CBE subcontractors). Additionally, courts, under the common law of agency, recognize and acknowledge the use of fiscal agents in fiduciary relationships as a standard and accepted practice in the area of commercial law for the handling of accounting, payments, disbursements and other fiscal matters in the course of doing business.<sup>29</sup> Thus, asserting that DSLBD has allowed Intralot to violate the law by using a fiscal agent to pay subcontractors, including CBEs, is a gross misstatement.

Further, ODCA’s conclusion concerning the use of fiscal agents does not reflect the lawful governmental and business practices recognized under the common law of agency.

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<sup>27</sup> Interestingly, ODCA has made no finding about DC09 as it relates to OCFO/OLG adding it as a subcontractor for the purpose of being Intralot’s fiscal agent, even though it alleges that DSLBD has permitted unlawful activity when Intralot paid the CBE subcontracts through its fiscal agent.

<sup>28</sup> See, e.g., Credit Union Act of 2020” D.C. Code §26-503.01(9) (empowering a District union to act as a fiscal agent for, and receive payments on, share and deposit accounts from a government unit); National Capital Revitalization Corporation (NCRC) Act of 1998, D.C. Act 12-355, Section 16 (7) (empowering the NCRC to use fiscal agents to aid the Corporation in carrying out the purposes of the act); Water and Sewer Authority Establishment and Department of Public Works Reorganization Act of 1996, Title II Sec. 203(4) (empowering the Authority to engage fiscal agents); D.C. Code Division I, Title 10, Subtitle IV, Chapter 12. Washington Convention and Sports Authority, Subchapter I, Part B §10-1202.03(4) (empowering the Authority to engage fiscal agents in carrying out the purposes of the act); and Designated Appropriation Allocations Emergency Amendment Act of 2008, Section 2(e)(1) amending the Fiscal Year 2009 Budget Support Act of 2008, (D.C. Act 17-419) (which required organizations that could not meet the submission requirements for a grant to designate a nonprofit organization which does meet the criteria, “to serve as its fiscal agent or fiscal sponsor”).

<sup>29</sup> In *Johnson v. the District of Columbia*, 144 A.3d 1120, at 1124, n4 (D.C. 2016), the D.C. Court of Appeals for the D.C. Circuit recognized the engagement of “fiscal agents” as a valid governmental practice.



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Such agency is defined as “the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.”<sup>30</sup> A “fiscal” agent generally is defined as “[a]n agent acting for a public body in reference to its financial affairs; [or a]n agent invested with the funds and the conduct of the financial affairs of another person, business, association, society, or club.”<sup>31</sup> Moreover, general rules of agency hold that the principal is bound by the acts of its agent and can get the benefit of such acts as if it had done them itself. The acts of the agent shall, for all legal purposes, be considered to be the acts of the principal. Therefore, Intralot’s use of DC09 as its fiscal agent to pay Intralot’s CBE subcontractors is in effect a payment made by Intralot. DSLBD asserts that the CBE Act, in this respect, has not been violated, nor would the Department knowingly permit a violation.

Notwithstanding this, Intralot is in the process of removing DC09 as the fiscal agent.<sup>32</sup>

Ultimately the District wants the CBE subcontractors to receive money (directly or indirectly) from the beneficiary for work performed on the project.<sup>33</sup> DSLBD does not believe any changes to the law are necessary as it relates to beneficiaries paying CBE subcontractors. Beneficiaries should continue to be able to abide by standard business practices and use agents, who act on their behalf, to pay their subcontractors (just as developers use general contractors to pay subcontractors). Preventing this lawful practice may have unintended consequences for a variety of District projects and practices.

#### Only Award CBE Credit for Work Performed by CBEs

The basis of this ODCA recommendation mischaracterizes DSLBD’s actions and processes. DSLBD did not, and does not, provide “credit” for work not performed by CBEs. The audit was conducted in real time while compliance and monitoring efforts were underway by the Department, as opposed to when the project was completed, and the Department’s work was done. DSLBD does not automatically apply “credit” without

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<sup>30</sup> See Restatement of the Law, Agency 3d, § 1.01, American Law institute (ALI).

<sup>31</sup> See Ballentine’s Law Dictionary at 478 (3<sup>rd</sup> ed. 1969).

<sup>32</sup> In response to the May 4, 2021 letter from DSLBD to Intralot outlining and reiterating concerns, Intralot has determined that it is best for it to work towards discontinuing the use of DC09 and committed to such in writing.

<sup>33</sup> The Preliminary Audit Report asserts that DSLBD has claimed collecting invoices to validate payments to CBEs is emphatically not a part of the Department’s monitoring process. To be clear, DSLBD does not require invoices to be provided with the submission of the Quarterly Reports, and District law does not require this information either. However, collecting invoices may become a part of the process when there are inconsistencies with the information provided in the VVFs (which require attestation), and DSLBD needs further verification that purported payments are accurate. See, e.g., *infra* FN 34.



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verification, and data collected towards the goal is not finalized until: (i) the project is completed and expenditures are verified through a final report; or (ii) DSLBD reports the data (e.g., via an agency's fiscal year closeout).

While monitoring the lottery contract and providing information to ODCA, DSLBD learned that CBE expenditure for two vendors was misreported.<sup>34</sup> At the close of third quarter of Fiscal Year 2020, Intralot submitted the required Quarterly Report with accompanying VVFs. Upon initial receipt of the information in reports and forms, it was consistent and did not appear to contain discrepancies. Therefore, DSLBD entered the data into the QuickBase Agency Portfolio Management and Subcontracting Compliance System application, which resulted in Intralot trending positively towards meeting its required ~55% CBE expenditure goal. *It is important to note that this entry merely was an accounting of data and information submitted by Intralot; thus, DSLBD did not (and does not) award credit without validation.* Moreover, DSLBD does not provide credit for any expenditures until a project is completed or for an agency's fiscal year closeout. Hence, DSLBD's review was not finalized. This was simply data entry, as the QuickBase Agency Portfolio Management and Subcontracting Compliance System application is not sophisticated software that allows for entries with multiple descriptions. In other words, data is entered as a placeholder until it is vetted in greater detail and/or updates are provided. At this point, the data collected in the QuickBase application is not credited nor finalized. Further, in a letter to Intralot (dated May 4, 2021), DSLBD reiterated to Intralot that "credit [would] only be given for the portion of the subcontract performed, at every tier, by a SBE/CBE using its own organization and resources." DSLBD provided this communication after thoroughly performing due diligence including, but not limited to, (1) the Compliance Division fully vetting materials (such as Quarterly Reports, VVFs, invoices, bank statements, wire confirmations, subcontract agreements, and relevant correspondence), (2) Compliance Division staff engaging in several communications with the beneficiary and relevant subcontractors to discuss the Department's concerns, and (3) DSLBD's Office of the General Counsel conducting discussions with Intralot's counsel.<sup>35</sup>

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<sup>34</sup> ODCA had access to lottery contract invoices through the Procurement Automated Support System (known within the District as "PASS") and provided certain payment information to the Department on, or about, September 16, 2020. Based on this information, DSLBD, in its continued monitoring efforts, cross-referenced and identified discrepancies with information previously submitted to DSLBD. In light of the discrepancies, DSLBD also requested and now receives invoices directly from the beneficiary to support the Quarterly Report submissions. It should be noted that the PASS system is used by District procuring agencies to maintain invoicing and payments to vendors. Given that DSLBD does not have procurement authority, the Department has never been provided access to PASS.

<sup>35</sup> In DSLBD's enforcement work (as with other District agencies) there is often back-and-forth communication with the relevant party before DSLBD has enough evidence and information to make a determination, impose fines or penalties, or make other significant determinations. Subsequent information and data received after a report or form is filed may be clarifying or fill a void and change the status of acknowledged payments.



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To the contrary of the Preliminary Audit Report, as of the third quarter of Fiscal Year 2020, DSLBD only has accounted for \$714,349.82 in CBE expenditure.<sup>36</sup>

Furthermore, the Preliminary Audit Report asserts that it is “clear VSC did not and cannot perform the work outlined in the subcontract agreement with only two employees.” By implication, ODCA appears to claim that DSLBD and OCFO/OLG have not monitored the subcontract. Such an assertion lacks context and seems misguided. To be clear, VSC’s subcontracting agreement is for oversight, supervision, and management of the lottery IT contract for operations.<sup>37</sup> As DSLBD understands it, to date, the contract has roughly twenty-six (26) people.<sup>38</sup> Reportedly, all of these people report to VSC and are being managed by the CBE, even though only six (6) of them are VSC employees. Further, it is important to note that the lottery contract effectively commenced in October 2019,<sup>39</sup> but the app did not launch (i.e., open to receive revenue) until roughly the end of May 2020. Hence, the lottery contract’s revenue was not received until the end of June 2020, and VSC began reporting (via VVFs) in July 2020. The fact that VSC gradually increased its staff after major events is not surprising,<sup>40</sup> and that it staffed up to roughly 25% of the personnel on the contract, in context, appears to be a significant percentage.

Moreover, according to Intralot and based on communications with OLG, COVID-19 and the stop work order issued by D.C. Superior Court negatively impacted the lottery contract and the amount of services needed. The once-in-a-lifetime pandemic, which essentially shrunk aspects of the District’s economy exponentially, impacted sales and the amount of work available. Interestingly, in the Preliminary Audit Report, ODCA notes the percentage paid toward subcontracting plan amounts as a sign of ineffective monitoring. However, the Preliminary Audit Report draws attention to this observation without noting the revenue the lottery contract has generated. Citing the amount paid to subcontractors without examining the lottery contract’s revenue is not a complete and thorough calculation. The lottery contract amount is not a guaranteed sum, but is a not-to-exceed amount, and the subcontracts are percentage-based contracts with not-to-exceed amounts as well. As previously noted, COVID-19 impacted sales, and the lottery contract got off to a slow start (launching in May 2020). Thus, the lottery contract’s revenues are a fraction

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<sup>36</sup> Of the \$714,349.82 that has been accounted for as of the third quarter of Fiscal Year 2020, approximately \$136,090 was paid to Octane and \$73,152.55 was paid to VSC.

<sup>37</sup> Per discussions with OLG, the Department understands that Intralot, on the other hand, handles the development, technical operations of the sports book, and risk management.

<sup>38</sup> Reportedly, the contract is approved for 28 positions and there are two vacancies.

<sup>39</sup> This is when judicial temporary restraining orders were lifted.

<sup>40</sup> DSLBD also provided ODCA communications from January – May 2020 demonstrating that VSC was performing work on the lottery contract while trying to execute a subcontracting agreement and get paid from Intralot. That correspondence, in part, is another example demonstrating that DSLBD supported and pushed for the development, economic growth, and retention of District-based businesses counter to certain claims by ODCA’s Preliminary Audit Report.



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of original projections (reportedly between a third and a half of those projections), which impacts the amount that CBEs can ultimately earn on this contract. Moreover, Intralot has until the fifth year (not the first three quarters of the contract) to meet its goal, adjust, or be fined for failure to meet its goal.



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