OFFICE OF INSPECTOR GENERAL

Catalyst for Improving the Environment

Audit Report

EPA Needs to Compete More Assistance Agreements

Report No. 2005-P-00014

March 31, 2005

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Abbreviations

CFR	Code of Federal Regulations
EPA	Environmental Protection Agency
OGC	Office of General Counsel
OIG	Office of Inspector General
ORD	Office of Research and Development
Order	EPA Order 5700.5, *Policy for Competition in Assistance Agreements*

U.S. Environmental Protection Agency
Office of Inspector General

2005-P-00014
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At a Glance

Catalyst for Improving the Environment

EPA Needs to Compete More Assistance Agreements

What We Found

EPA Order 5700.5 (Order) was a positive step in promoting competition; however, it did not promote competition to the maximum extent possible. The Order applied to only $161 million of more than $835 million of discretionary grants awarded in 2003. Program offices awarded many assistance agreements noncompetitively, some of which seemed inconsistent with the Order's requirements. These conditions occurred because the Order overemphasized exemptions and justifications for not competing assistance agreements. Also, EPA staff misunderstood some requirements. As a result, EPA did not ensure that it awarded discretionary grants to the most qualified recipients or for the most innovative projects, thus potentially diminishing the Agency's efforts to accomplish its mission.

The competitions reviewed were generally fair and open when measured against the provisions contained in the Order. Program offices broadly advertised the competitions and selected recipients based on published criteria. However, EPA would benefit from additional policy on conflicts of interest and documentation requirements.

In January 2005, EPA replaced the original Order with EPA Order 5700.5A1. The revised order included numerous procedural changes and incorporated many of our recommendations. However, the Agency disagreed with key recommendations directed at increasing the number of assistance agreements subject to competition.

What We Recommend

We continue to recommend that the Acting Assistant Administrator for the Office of Administration and Resources Management increase the number of assistance agreements subject to competition by eliminating certain exemptions and a justification for not competing.

Why We Did This Review

Grants management has been a significant challenge for EPA for several years. At the recommendation of the Office of Inspector General, EPA issued an Order requiring some grants to be competed. To evaluate EPA's progress, we assessed whether (1) the Order promoted competition, and (2) the competitions were fair and open.

Background

EPA issued Order 5700.5, *Policy for Competition in Assistance Agreements*, effective October 1, 2002. The Order established EPA's policy: *"to promote competition in the award of assistance agreements to the maximum extent practicable."* The Order also established criteria stating when competition for grants is needed and the process for competing the grants.

For further information, contact our Office of Congressional and Public Liaison at (202) 566-2391.

To view the full report, click on the following link:

www.epa.gov/oig/reports/2005/20050331-2005-P-00014.pdf

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

OFFICE OF
INSPECTOR GENERAL

March 31, 2005

MEMORANDUM

SUBJECT: EPA Needs to Compete More Assistance Agreements
Report No. 2005-P-00014

FROM: *Michael A. Rickey* /S/
Director for Assistance Agreement Audits

TO: David J. O'Connor
Acting Assistant Administrator for
Administration and Resources Management

This is our final report on the effectiveness of EPA Order 5700.5, *Policy for Competition in Assistance Agreements*. This report contains findings and recommendations to help EPA compete more assistance agreements. The report represents the opinion of the OIG. Final determination on the findings in this report will be made by EPA managers according to established procedures.

After considering your response to the draft report, we revised our draft findings and recommendations. However, we disagree with your position not to eliminate certain exemptions and a justification. We have included your response and our comments in Appendix C.

Action Required

In accordance with EPA Order 2750, you are required to provide a written response within 90 days of the final report date. Your response must address recommendation numbers 2-2(a) and (b), 2-3, and 2-5. All other recommendations were satisfactorily addressed in revised EPA Order 5700.5A1.

For corrective actions planned but not completed by the response date, please describe the actions that are ongoing and proved a timetable for completion. Where you disagree with a recommendation, please provide alternative actions for addressing the reported finding.

We appreciate the efforts of EPA officials and staff in working with us to develop this report. If you or your staff have any questions regarding this report, please contact me at (312) 886-3037 or Randy Holthaus at (214) 665-6620.

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Chapter 1
Introduction

Purpose

One of EPA's top management challenges has been to effectively use assistance agreements to accomplish its mission. Congress, the Office of Management and Budget, and the EPA Office of Inspector General have expressed concerns about EPA's policies and procedures regarding competition in awarding assistance agreements. In response to these concerns, EPA developed Order 5700.5, *Policy for Competition in Assistance Agreements* (Order), which took effect on October 1, 2002, the beginning of fiscal year 2003.

We conducted this audit to evaluate the effectiveness of the Order. Specifically, we answered three questions:

- Did the Order support the Agency's policy to promote competition to the maximum extent practicable?
- Were the competitions fair and open to ensure that no applicant received an unfair competitive advantage?
- Was the data in the Integrated Grants Management System accurate and properly capturing the actual level of competition?

Background

In fiscal year 2003, EPA awarded $4.4 billion in assistance agreements. This amount was more than half of the Agency's 2003 budget of $7.6 billion. As assistance agreements are the primary vehicle through which EPA delivers environmental and human health protection, they are an integral part of how the Agency accomplishes its mission.

EPA assistance agreements can be divided into two groups: non-discretionary and discretionary (see box). Non-discretionary assistance agreements are generally awarded via formula, as prescribed by law or

Nondiscretionary assistance agreements - Congress directs awards to prospective recipients who meet specific eligibility criteria, often awarded on the basis of formulas prescribed by law or Agency regulation.

Discretionary - EPA has the legislative authority to independently determine the assistance recipients and funding levels.

Source: Government Accountability Office Report GAO-04-459, March 2004

regulation, and are not competed. EPA does not determine the recipients or funding levels for those awards. In contrast, discretionary assistance agreements are possible to compete, and EPA has the ability to determine the recipients and level of funding. According to our estimate, EPA awarded discretionary funds of at least $835 million in 2003, as shown in Table 1 (see Appendix A for details on calculating this estimate). EPA generally made those awards to State, local, and tribal governments; nonprofit organizations; and universities.

Table 1: 2003 EPA Assistance Awards (in millions)

Total Awards	$ 4,436
Estimated Nondiscretionary Awards	$ 3,601
Estimated Discretionary Awards	$ 835

EPA may also amend agreements to change any component of the original award. EPA awards two types of amendments: incremental and supplemental. Incremental awards are predetermined additions to approved funding levels with no change to the scope of work. Supplemental awards are unanticipated additions to funding that may affect the original scope of work. The chief difference between the two is that incremental amendments are anticipated at the time of original award with the amount set, and supplemental amendments are not.

The Order provided competition and documentation requirements for assistance agreements. Contained within the Order was a policy statement that read:

> It is EPA policy to promote competition in the award of assistance agreements to the maximum extent practicable. When assistance agreements are awarded competitively, it is EPA policy that the competitive process be fair and open and that no applicant receive an unfair competitive advantage.

In this report, we draw a distinction between the policy statement and the Order. When we refer to the "policy statement," we refer specifically to EPA's stated policy to compete assistance agreements to the maximum extent practicable. When we refer to "the Order" we refer to EPA Order 5700.5 as a whole, which includes the policy statement, as well as the competition and documentation requirements for assistance agreements.

The Order also established a new position called the Grants Competition Advocate. The Competition Advocate is responsible for overseeing implementing the Order, evaluating its effectiveness, and developing guidance to help EPA staff carry out the Order.

In March 2003, the Competition Advocate published the *Grants Competition Advocate Guidance for Implementation of EPA Order 5700.5,* which took effect on October 1, 2003. That document offered information regarding awarding assistance agreements and amendments in various situations.

Scope and Methodology

To accomplish our objectives, we reviewed the provisions and overall design of the Order. We also reviewed 75 assistance agreements awarded by Headquarters and 8 of the 10 Regions to determine whether the awards were made in accordance with the Order. Lastly, we reviewed the Integrated Grants Management System to determine if it properly represented the actual level of competition and if EPA categorized assistance agreements correctly. We performed this audit in accordance with *Government Accounting Standards,* issued by the Comptroller General of the United States. We conducted our fieldwork from March 2004 to August 2004. See Appendix B for details on the scope and methodology.

Results In Brief

EPA needs to find ways to compete more assistance agreements. One of the primary purposes of the Federal Grant and Cooperative Agreement Act of 1977 was to encourage competition in awarding grants. Many Government agencies use competition to award grants. A Web search of Federal grant opportunities showed about 400 competitive grant opportunities were available on March 23, 2005.

EPA's Order did not promote competition to the maximum extent practicable. The Order covered only $161 million, about 19 percent, of an estimated $835 million of discretionary funds awarded in fiscal year 2003, mostly because the Order exempted funds that either were or could have been competed. Also, some justifications to award agreements noncompetitively seemed inconsistent with the Order and may not have been appropriate. EPA awarded 79 percent of amendment dollars without competition. These conditions occurred because the Order overemphasized exemptions and justifications for not competing grants, and staff misinterpreted some of the requirements. As a result, EPA did not ensure that it used discretionary funds for the most innovative projects or the most qualified recipients; thus potentially diminishing the Agency's efforts to accomplish its mission.

Open competitions were generally fair and open when measured against the provisions contained in the Order. We reviewed 38 competitively awarded

assistance agreements and found that program offices could show that the process used to select recipients met the Order's requirements. We identified some areas where EPA could improve the Order. These improvements included documenting that reviewers are free from conflicts of interest, clarifying who is responsible for maintaining competition documentation, and identifying the specific information that must be sent to the grants management offices.

The codes used to capture competition data in EPA's Integrated Grants Management System were generally accurate. The accuracy of this competition data is important because EPA uses the information to measure progress in achieving competition goals and report results to Congress.

The Order was a positive step in promoting competition for assistance agreements. In January 2005, EPA revised the Order incorporating some of the recommendations in this report; however, additional changes are still needed. We continue to recommend that the Acting Assistant Administrator for the Office of Administration and Resources Management increase the number of assistance agreements subject to competition by eliminating certain exemptions and one justification for not competing.

Chapter 2
EPA Order 5700.5 Did Not Maximize Competition

EPA Order 5700.5 did not promote competition to the maximum extent possible. The Order covered only $161 million, about 19 percent, of the estimated $835 million of discretionary funds awarded in 2003. The Order did not cover the remaining $674 million. When awarding noncompetitive assistance agreements, some of the justifications seemed inconsistent with the Order and may not have been appropriate. EPA awarded 79 percent of amendment dollars without competition, and in some cases also used justifications that may not have been consistent with the Order. These conditions occurred because the Order overemphasized exemptions and justifications for not competing assistance agreements, and EPA staff misinterpreted some of the Order's requirements. As a result, EPA did not ensure it awarded discretionary funds for the most innovative projects or to the most qualified recipients, thus potentially diminishing the Agency's efforts to accomplish its mission.

Though the Order needed improvements in some areas, it was a positive step in fostering awareness of the need for competition. EPA developed the Order to establish requirements for competitively awarding assistance agreements, and published it with the intention of making improvements once EPA evaluated implementation.

The Order Did Not Maximize Competition

The Order did not promote competition to the maximum extent possible as its design and emphasis were contrary to EPA's stated policy. The Order promoted exemptions and justifications–requiring competition only after those two options were exhausted. As a result, EPA awarded less than 19 percent of discretionary funds competitively under the Order. The limited amount of funds that were competed potentially diminished EPA's ability to protect human health and the environment.

EPA did not design the Order in a way that emphasized competitive awards. The Order detailed numerous situations where assistance agreements could be awarded noncompetitively before it provided a general description of the process and provisions for open competition.

When we interviewed 31 project officers regarding the Order, most were uncertain that it increased competition. According to some project officers, the

Order only increased the administrative responsibilities and requirements, not the number of assistance agreements competed.

EPA's overemphasis on exemptions and justifications also was reflected in the guidance document issued to support the Order. The guidance did not contain any information on how to conduct an open competition. The primary focus of the guidance was on the procedures required for exemptions and justifications to support noncompetitive awards. The Competition Advocate subsequently provided some direction on the Internet regarding competition.

The Order's emphasis on noncompetitive awards resulted from an apparent attempt by EPA to limit using exemptions and justifications. Senior managers from the Office of Administration and Resources Management stated that the focus on exemptions and justifications was intended to restrict their use, rather than facilitate noncompetitive award. The emphasis and design of the Order, however, took the primary focus off of fair and open competition and provided numerous circumstances where assistance agreements could be awarded noncompetitively.

Broad Exemptions Limited Competitions

The exemptions provided in the Order were broad and limited competition unnecessarily. EPA exempted from the provisions of the Order some assistance programs funded with discretionary money, and some where federal regulations either authorized, or required, competition.[1] EPA also excluded certain groups from competition without a compelling reason. As a result, the Order limited competition to only $161 million of the estimated $835 million in discretionary funds (see Table 2). The Agency provided many of the exemptions based on past practices in awarding assistance for programs.

Table 2: EPA Discretionary Funds Under the Order (in millions)

Estimated Discretionary Funds Awarded (See Appendix A)	$ 835
Discretionary Funds Subject to the Order	$ 161
Estimated Discretionary Funds Exempt from the Order	$ 674

EPA exempted a broad group of environmental programs and assistance recipients from the Order, as shown in Table 3. The largest exemption category

[1] There was no indication that EPA did not compete programs required to be competed by law or regulation.

was for over 40 pollution abatement and control programs under 40 Code of Federal Regulations (CFR) Part 35. Under this exemption, EPA correctly excluded from competition some of its largest pollution abatement and control assistance programs. For example, EPA excluded the nondiscretionary formula grants for the Clean Water and Drinking Water State Revolving Funds; these grants totaled over $2 billion, or almost half of the $4.4 billion awarded in 2003.

Table 3: Programs Exempt From EPA Competition Order

- Assistance awards to State, interstate, and local agencies and, if applicable, Tribes and Intertribal consortia under the following programs: programs subject to 40 CFR Part 35, including direct assistance awards from the State Revolving Funds for the District of Columbia, the Territories, excluding Puerto Rico; Wastewater Operator Training grants under section 104(g)(1), Chesapeake Bay Agreement management mechanism implementation and ecosystem monitoring under section 117(e), and BEACH grants under Section 406 of the Clean Water Act; Expense Reimbursement grants under Section 300g-8(d) of the Safe Drinking Water Act; Leaking Underground Storage Tank Trust Fund Cooperative Agreements; Oil Spill Trust Fund grants; Clean Air Act Section 103 Grants for PM2.5 Monitoring Network grants, National Air Toxins Monitoring Pilots, and Regional Haze Programs; Interstate Commission grants under Section 106 of the Clean Air Act; and State and Tribal response program grants under Section 128(a) of the Comprehensive Environmental Response, Compensation, and Liability Act.
- Other programs available only to Indian Tribes and Intertribal Consortia.
- Programs that have standards and procedures for competition established by regulation or rule.
- Assistance awards in response to an action from Congress (earmarks).
- Senior Environmental Employment Program Cooperative Agreements.
- Assistance awards to foreign governments and to United Nations agencies.
- Other assistance programs approved by the Assistant Administrator for the Office Administration and Resources Management.

However, 40 CFR Part 35 also includes pollution abatement and control programs that were fully or partially funded with discretionary money, and in some cases required competition. For example, both the Underground Storage Tank Program (40 CFR 35.330) and the National Estuary Program (40 CFR 35.9000) are funded with discretionary money, whereby EPA has the ability to specify the recipient and dollar amount of the grant. Some assistance programs under 40 CFR Part 35 already require States and tribes to compete, including Pollution Prevention State Grants (40 CFR 35.342), Water Quality Cooperative Agreements (40 CFR 35.362), and Toxic Substances Compliance Monitoring (40 CFR 35.712). Therefore, it was not necessary to exempt all pollution control and abatement programs.

The Order limited competition by exempting grants that can be competed to specific groups. For example, the Order exempts all programs available only to Indian Tribes and Intertribal Consortia, including General Assistance Program grants and most environmental program grants. However, in Region 10, Indian Tribes and intertribal consortia compete for General Assistance Program grants because, in the past, funding requests exceeded the amount of funds available. Also, Region 9 awards air grants to Tribes using a competitive process that, according to a Region 9 project officer for the air program, substantially complies with the competition Order's requirements. By exempting all grants to Indian Tribes, EPA unnecessarily limited the amount of assistance that could have been competed.

The Order exempted all programs that have standards and procedures for competition established by rule or regulation. A major program included as part of this exemption is the Brownfields Assessment and Cleanup program. This program was competed, but was exempt from the Order because the law identified specific criteria that were to be used in awarding the grants. The Agency exempted programs like Brownfields because it did not want the Order to contradict the law or regulations. However, nothing in the Order conflicted with the requirements in the Brownfields law. Therefore, all programs with standards and procedures for competition in rule or regulation did not need to be exempted from the Order. Because EPA treated some competitions as exempt from the Order, the Agency under reported to Congress the amount of funds awarded competitively by $139 million.

EPA exempted programs from competition based on past practices, rather than evaluating whether competition was possible. For example, EPA's rationale for the Indian Environmental General Assistance Program exemption was, in part, that "EPA has historically used an allocation method." EPA exempted other discretionary programs from competition because it believed they were not possible to compete. By reducing the amount of funds required to be competed, EPA missed the opportunity to promote innovation and cost savings.

Some Justifications Seemed Questionable

EPA used justifications to award $30 million, of the $161 million subject to the Order, without competition. Many of these justifications did not seem to fulfill the requirements of the Order and may not have been appropriate. Many of these justifications may not have been appropriate because project officers misinterpreted the Order and grants management offices did not provide adequate oversight. When EPA does not adequately justify its reasons for not competing assistance agreements, it may raise the question of bias for particular recipients.

The Order specified circumstances where program offices could justify awarding individual assistance agreements noncompetitively. To support a justification not to compete, the Order required that (1) the assistance agreement meet at least one of several specific criteria, and (2) program offices provide a detailed justification in the decision memorandum explaining why competition was not appropriate. A decision memorandum is an internal EPA document containing the objectives, recommendation, and justification for funding an assistance proposal.

Table 4: Justifications Used to Support Noncompetition

Justifications	Frequency Used	Questionable Justification
Only one responsible source to conduct the project	12	6
Project is of compelling urgency or national security	1	0
Justified by Statute or Executive Order	2	1
Recipient represents a co-regulator/co-implementor	14	12
To fund an unsolicited, unique proposal	1	1
Competition was not in the public interest	1	0
Did not require a justification[2]	6	0
Totals	37	20

Program offices' use of justifications were questionable in some cases. We reviewed over half of the assistance agreements that were awarded noncompetitively based on a justification. In 20 of the 37 examples reviewed, program offices used justifications that seemed inconsistent with the Order and awarded assistance agreements without competition (see Table 4). For example, EPA Region 1 awarded a $105,000 grant to the New England Interstate Water Pollution Control Commission [3] noncompetitively. The Funding Recommendation stated that the project title was Safe Drinking Water Act Training Grant. The justification for this award, as provided in the Funding Recommendation, stated that there was "compelling evidence of unique and/or superior qualifications to the extent no other source could fulfill the

[2] In some instances, EPA used a justification for not competing an award when the program or recipient was exempt from competition.

[3] The New England Interstate Water Pollution Control Commission is a nonprofit interstate agency that serves and assists its member states by coordinating and supporting water management and protection activities. The member States are: Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont.

project/program objective." We did not find such compelling evidence in the file. However, we did find a letter from the State of Maine dated prior to the date of award that identified the recipient, the amount of funding, and the projects the State wanted to fund, a portion of which was training. We do not agree that when a State selects a recipient for funding the recipient is necessarily the only responsible source. We found no evidence in the file to support why this assistance could not be competed.

Fourteen of the examples reviewed used the justification: *"The award is to an organization that represents the interests of co-regulators or co-implementors (State, Tribal, or Local Governments) in the execution of national environmental programs."* EPA's use of this justification seemed inconsistent with the Order in 12 of the 14 cases. For example, EPA made three noncompetitive awards totaling about $1 million to the Northeast States for Coordinated Air Use Management[4]. The awards funded special studies, training, and outreach activities. According to the project officer, this recipient met the Order's definition of an organization that represents the interests of a co-regulator. However, the project officer did not describe how the grant activities met the Order's requirement, "in the execution of national environmental programs." In our opinion, the recipient was not directly performing environmental program activities. Therefore, these awards were incorrectly excluded from competition using the co-regulator justification.

Many EPA project officers interpreted the "co-regulator/co-implementor" justification to signify that competition was not required when the assistance recipient was an organization that represents the interests of co-regulators or co-implementors, regardless of the type of activities being funded. Senior officials from the Office of Grants and Debarment, however, clarified that this justification is intended to apply only when the organization was assisting with the implementation of a national environmental program.

In some cases EPA's actions might suggest a bias or preference for certain recipients. The Order required that program offices determine through research, contacting organizations, pre-solicitation conferences, meetings or notices, or similar means, that there was only one responsible source that could adequately perform the work. When this justification was used, EPA program offices did not fully support this justification in half of the cases. For example, EPA's Office of Research and Development (ORD) awarded two assistance agreements

[4] The Northeast States for Coordinated Air Use Management is an interstate association whose purpose is to exchange technical information, and promote cooperation and coordination of technical and policy issues regarding air quality control among the member states. To accomplish this purpose, the organization sponsors air quality training programs, participates in national debates, assists in exchange of information, and promotes research initiatives. The member States are Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.

noncompetitively using this justification, but did not document or conduct the proper analysis:

- ORD awarded $240,000 to the American Chemical Society to provide administrative and technical support of an annual conference over a three year period. The justification used was that there was only one responsible source; however, the decision memo stated that other organizations could be considered to host the workshop, and that the other organizations were "quite capable of serving as conference organizers."

- ORD also awarded $100,000 to Pennsylvania's Department of Environmental Protection to identify and address environmental concerns at both the regional and watershed planning levels. The decision memorandum stated that the cooperative agreement was responding to a request for funding from the recipient, and that the recipient was "uniquely qualified." The decision memorandum also stated that the reviewers "very helpfully suggested specific names of individuals and organizations with whom Pennsylvania Department of Environmental Protection could partner as it embarks on its project."

One component missing from nearly all justifications was a detailed explanation of why competition was not appropriate. Section 8.b. of the Order required this explanation to be documented in the decision memorandum. Rather than assessing the possibility to compete, project officers generally used justifications if the recipient met any of the criteria contained in the Order under Section 8.a. By not adequately documenting justifications, the grants management office did not have sufficient information to assess the appropriateness of the justification, as required by the Order.

EPA Awarded Many Amendments Without Clear Justifications

EPA's use of justifications to award supplemental amendments without competition was questionable in some instances. This occurred because the Order's requirements for amendments lacked detail, were difficult to understand, and placed substantial emphasis on noncompetitive awards. As a result, EPA competed only 21 percent of funds awarded through supplemental amendments in 2003.

In 2003, EPA awarded $10 million in amendments, $8 million of which was awarded noncompetitively. We reviewed 15 of the 23 noncompetitive amendments. The Order required program offices to provide justifications for noncompetitive supplemental amendments. Those justifications were required to

detail the Order's criteria that was applicable to the award, as well as the reason competition was not appropriate.

Of the 15 noncompetitive supplemental amendments reviewed, EPA awarded 7 with questionable justifications. In some instances, project officers added funds and additional projects to existing assistance agreements because it was easier than awarding a new assistance agreement. For example, EPA awarded a noncompetitive amendment over $400,000 to Southeastern States Air Resource Managers[5], a nonprofit organization. This amendment was to fund air pollution training to State and local employees. The project officer told us that because the organization was made up of senior members of State and local environmental organizations from throughout the southeastern States, the amendment was justified for noncompetitive award. She also stated that this recipient was routinely awarded similar amendments because it was more efficient than awarding a new assistance agreement. The justification used to award the $400,000 amendment did not comply with the Order's requirements and the award should have been competed.

EPA used questionable justifications to award amendments without competition because the Order lacked detail and was difficult to understand. Project officers informed us that they did not have a good understanding of when the Order required competition in the award of amendments. The Order's Appendix required amendments that include a change in the scope of the project to be competed. However, no definition was contained in the Order to describe what constitutes a change in the scope of work (e.g., change in project dates, change in funding, change in tasks, etc.). Rather than describing situations where amendments should be competed, the Order placed substantial emphasis on situations where amendments could be awarded noncompetitively.

Conclusion

EPA Order 5700.5 documented the Agency's stated policy to promote fair and open competition, in awarding assistance agreements, to the maximum extent possible. However, the provisions contained in the Order did not facilitate fulfilling the Agency's policy. Instead, the Order limited using competition in awarding discretionary funds. The Order emphasized exemptions and justifications, requiring competition only after those two options were exhausted. Also, the Order lacked detail and was difficult to understand. As a result, only a

[5] The Southeastern States Air Resource Managers, Inc. is a nonprofit corporation whose purpose is to engage in, coordinate, and monitor efforts regarding air pollution management among eight States in the southeastern region of the United States: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.

limited amount of the discretionary funds available for competitive award were competed under the Order. The absence of competition in assistance agreements reduced the potential for new and innovative ideas in EPA programs and therefore, potentially reduced the Agency's effectiveness in protecting human health and the environment. Further, using questionable or unsupported justifications to award agreements and amendments to the same recipients without competition may raise the question of bias or preference for certain recipients.

Recommendations

We recommend that the Acting Administrator for the Office of Administration and Resources Management:

2-1 Revise the Order to emphasize that EPA should first seek ways to compete assistance agreements before it decides that competition is not possible.

2-2 Increase competition for assistance programs by eliminating blanket exemptions for (a) 40 CFR Part 35 programs where EPA uses discretionary funds and competition is practicable, (b) programs available only to Indian Tribes and Intertribal Consortia, and (c) programs where competition is already required.

2-3 Increase competition by eliminating the justification for organizations that represent the interests of State, tribal, or local governments.

2-4 Clarify the requirements for using noncompetitive justifications by improving definitions and providing examples.

2-5 Revise the sections of the Order addressing amendments to provide clarity by defining what constitutes a change in scope of an agreement.

Agency Response and OIG Comments

Except for the exemption for programs where competition was already required [recommendation 2-2(c)], EPA generally did not concur with our findings and recommendations to increase competition by eliminating exemptions and justifications (recommendations 2-2(a) and (b), and 2-3). EPA substantially agreed with the remaining recommendations, and addressed them when it revised the competition Order. The one exception pertains to Recommendation 2-5. EPA needs to provide an additional example clarifying that an amendment is outside the scope of the original agreement if it authorizes funds to continue the project into a new time period.

EPA's position is that competition may not be practicable for all assistance awards due to contervailing policy consideration and other relevant factors. Based on further discussions with EPA, we agree that other factors limit EPA's ability to compete grants for the Senior Environmental Employee Program and awards to foreign governments, and have revised our report. However, we continue to believe that competition is practicable for awards of discretionary funds to States and Tribes. Agency priorities and programmatic needs can be addressed through the evaluation criteria used during the competition process. Competition does not preclude eligible recipients from receiving funding, and can be used to determine levels of funding based on merit and through a transparent process.

EPA agreed that the Order did not clearly describe the circumstances under which the co-regulator justification was to be used, and made substantial changes for using the co-regulator justification when it issued its revised Order in January 2005. However, the additional controls did not address the fundamental problem with the co-regulator justification, which is the meaning of the phrase "in the execution of national environmental programs." In our view, EPA's interpretation of the phrase allows any activity performed by an organization representing the interests of a co-regulator to be exempt from competition, thereby exempting a specific group of recipients from competition without sufficient reason.

We continue to believe that EPA needs to increase the pool of discretionary grants that are subject to competition and therefore needs to eliminate some exemptions and a justification. Continuing to award funds to the same recipients when competition is possible may create the appearance of bias or favoritism. Further, EPA must vigorously pursue all opportunities to compete assistance agreements to meet one of the goals of the Federal Grant and Cooperative Agreement Act and its own competition policy.

EPA's entire response and our detailed comments are included in Appendix C.

Chapter 3
Competitions Were Fair and Open, But EPA Can Enhance the Order

Competitions were generally fair and open when measured against the provisions contained in the Order. We reviewed 38 competitively awarded assistance agreements and found that program offices could articulate and demonstrate the process used to select recipients. However, we identified some opportunities where the Order could be enhanced to increase transparency and accountability. When using a fair and open process to award assistance agreements, EPA increased the likelihood that it funded the recipient best qualified for the project and best suited to support the Agency's mission to protect human health and the environment.

Competitions Complied With the Order

Competitions appeared to be fair and open because they generally met the requirements of the Order. We determined that program offices fulfilled the Order's requirements and maintained required documentation to demonstrate the process used to select recipients. When EPA competitively awarded assistance agreements in accordance with the Order, the Agency widely advertised funding opportunities, increased objectivity in the selection of recipients, and added transparency to the selection process.

We reviewed 38 assistance agreements that were awarded competitively. We considered these competitions to be fair and open when program offices demonstrated that they met the three primary criteria established in the Order:

- Published an announcement soliciting proposals as described in the Order.
- Established through written procedures an objective and unbiased process for reviewing and evaluating applications.
- Selected recipients according to reviewer recommendations.

In all 38 cases, the announcements included all the required information and were published either in the Federal Register or on an EPA website generally 60 days before the application deadline. The announcements provided the criteria against which applicants would be measured.

In all instances, the program offices developed written procedures to review, evaluate, and select applications for funding. We believe that the selection

criteria were unbiased because they did not appear to exclude eligible applicants. There was evidence that the program offices used the criteria to evaluate and select successful applicants.

EPA personnel selected successful applicants based on reviewer recommendations, as required by the Order. Although not required, nearly all of the competitions examined used a review panel. In each case, the decision memorandum or funding recommendation documented that EPA officials selected the successful applicants.

The Order required program offices to maintain documentation of reviewing and evaluating applications. Program offices were to maintain score sheets, ranked lists or lists of qualified applications, and written evaluations. Initially, some project officers did not provide this documentation to us. In many of these instances, someone other than the project officer was maintaining the required documentation. In three instances, EPA told us that the documentation was at another Federal agency.

When using a fair and open process to award assistance agreements, EPA increased the likelihood that it funded the recipient best qualified for the project and best suited to support the Agency's mission to protect human health and the environment.

Documentation Requirements Need Clarification

EPA needs to clarify documentation requirements to increase transparency and accountability by (1) documenting that reviewers are free from conflicts of interest, (2) defining who should maintain required competition documentation and where it should be maintained, and (3) identifying what specific information must be forwarded to grants management offices for review.

The Order required the competition process to ensure that individual reviewers were free from conflicts of interest. However, the Order did not require documentation for this assurance. Instead of providing a signed document stating that reviewers were free from a conflict of interest, some program offices stated that they "relied on reviewers to self-disclose" if they had any conflicts with regard to an applicant. Another stated that the Agency's Annual Ethics Training was sufficient to ensure that no conflicts existed. We believe that having reviewers sign a statement that they are free from conflicts has at least two advantages: it serves as a record that EPA took steps to ensure that the competition process was fair and unbiased, and signing a document reminds the reviewer of the importance of this issue and increases accountability.

The Order does not state who is responsible for maintaining required documentation or where the documentation should be maintained. The absence of these procedures increases the risk that the records may be misplaced or lost.

The Order required grants management offices to review funding packages and ensure that the requirements of the Order were satisfied. Once recipients were selected, little to none of the competition information was forwarded with the funding packages. Without the competition information, grants management offices could not provide sufficient oversight. This situation occurred because the Order did not specify what information program offices should forward to grants management offices.

Additional Concern

We also identified a concern as the Agency moves forward with its Integrated Grants Management System. This system supports the new electronic documentation that will replace the current decision memorandum. The new electronic documentation includes mostly check-boxes to indicate that a task was completed. The competition section only provides the manner of award (i.e., competitive, noncompetitive award) and it does not require the narrative explanations often provided in decision memoranda.

Our concern is that assistance agreement award documentation will be adversely reduced under the Integrated Grants Management System. We believe that grants management offices need more, not less, information to provide effective oversight of competitive awards. As the Agency moves forward with the new system, it should consider the requirements of the Order and the available information in the system as they both apply to competitive awards.

Conclusion

When awarding assistance agreements through open competition, EPA generally complied with the provisions contained in the Order. The Order provided three main components: announcing the funding opportunity, establishing a written review and evaluation process, and selecting the recipient by EPA personnel. Program offices were able to demonstrate that they performed these three components during competitions. Though we have determined that the competitions complied with the requirements of the Order, we also identified some opportunities where the Order could be enhanced.

Recommendations

We recommend that the Acting Administrator for the Office of Administration and Resources Management:

3-1 Define what constitutes a conflict of interest when evaluating and awarding competitive assistance agreements.

3-2 Require all reviewers for each competition, including reviewers outside of EPA, to certify in writing that they are free from conflicts of interest.

3-3 Clarify where competition documentation should be maintained and who is responsible for maintaining this documentation.

3-4 Clarify what information must be contained in or accompany the decision memorandum when sent to the grants management offices for review.

3-5 Reinforce grants management offices responsibilities for assuring compliance with the Order.

Agency Response and OIG Comments

EPA concurred with the findings and addressed our recommendations in the revised Order. No further action is needed on these recommendations.

Chapter 4
Integrated Grants Management System Accurately Captured Competition Data

The competition codes used to categorize methods of awarding assistance agreements in EPA's Integrated Grants Management System were generally accurate. The system is an EPA database used for reporting and decision making. EPA used the system to measure progress in achieving competition goals and report results to Congress. For those reasons, the system must be accurate and properly capture the actual level of competition.

Of the 75 assistance agreements we reviewed, we identified 3 coding errors. These three errors were not significant in terms of whether the assistance agreements were competed. The errors indicated that the awards were made using noncompetitive justifications, when they should have been coded as exemptions. These errors did not materially impact competition data or the reporting of such.

Discretionary Assistance Awarded in 2003

A uniform Government definition for discretionary and nondiscretionary assistance does not exist and EPA's Integrated Grants Management System did not classify assistance agreements as discretionary or nondiscretionary. In a recent report[6], the Government Accountability Office offered the following definitions regarding EPA assistance.

> *Nondiscretionary grants* support water infrastructure projects, such as the drinking water and clean water state revolving fund programs, and continuing environmental programs, such as the Clean Air Program for monitoring and enforcing Clean Air Act regulations. For these grants, Congress directs awards to one or more classes of prospective recipients who meet specific eligibility criteria; the grants are often awarded on the basis of formulas prescribed by law or agency regulation...EPA awarded these grants primarily to states or other governmental entities.
>
> *Discretionary grants* fund a variety of activities, such as environmental research and training. EPA has the discretion to independently determine the recipients and funding levels for these grants...EPA awarded discretionary grants primarily to nonprofit organizations, universities, and government entities.

Since EPA's Integrated Grants Management System did not track these classifications, the amount of discretionary funds for all grant programs must be estimated. EPA estimated discretionary funds of $656 million for 2003.

We believe that some funds EPA identified as nondiscretionary should have been classified as discretionary. For example, EPA identified several programs as nondiscretionary where the regulations require that EPA award the grants through a competitive process. As part of the competitive process, EPA has the discretion to decide who will receive the grant and the amount of the grant. Therefore, we believe that assistance programs that are required to be competed should be classified as discretionary.

A second situation where EPA has discretion is when the legal authority does not specifically state that competition is required, but uses language that clearly allows discretion and, therefore, the possibility to compete. For example, the Toxic Substances and Control Act gives Regional Administrators discretion in awarding funds for State Indoor Radon Grant Program Support. In

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[6] *Grants Management: EPA Needs to Strengthen Efforts to Address Persistent Challenges*, GAO-03-846, August 29, 2003

this case, the Act provides criteria for the Regional Administrator to use in prioritizing applications. Specifically, Section 306(e) of the Act states, "*the Administrator shall support eligible activities contained in State applications with the full amount of available funds. In the event that State applications for funds exceed the total funds available in a fiscal year, the Administrator shall give priority to activities or projects proposed by States based on each of the following criteria:"* (the Act goes on to list the applicable criteria). The provisions cited above allow EPA to exercise discretion when awarding assistance programs; therefore, we believe that funds for assistance programs under such authority should be classified as discretionary.

When calculating discretionary awards for 2003, EPA erroneously included deobligations. Deobligations represent assistance awarded in the current or prior period that are no longer needed for a specific project. EPA told us that deobligations were incorrectly included with the discretionary data due to an unexpected programming error. By including the deobligations, EPA understated the amount of discretionary funds awarded in 2003.

Table 5 represents our estimate of the discretionary funds awarded for 2003. To develop the table, we reviewed electronic spreadsheets provided by EPA detailing the funds it classified as discretionary and non-discretionary. We believe that our estimate is low because some programs are both discretionary and nondiscretionary. The regulations for some programs state that EPA is to award funds based on an allotment, and allows additional funds to be awarded competitively. We did not attempt to classify these types of programs because of the difficulty and likelihood for error.

Table 5: Revised Estimate of 2003 Discretionary Awards

CFDA Number	Program Name	Discretionary Funds Reported as Non-discretionary	Note
66.926	General Assistance Programs for Indian Tribes	$45,125,625	1
66.700	Consolidated Pesticide Compliance Monitoring	14,317,958	2
66.463	Water Quality Cooperative Agreements	13,461,545	3
66.461	Wetlands Protection State Development Grants	11,668,959	3
66.804	Underground Storage Tank Program Support	8,369,893	4
66.032	State Indoor Radon Grant Program Support	7,705,992	5
66.708	Pollution Prevention Incentives for States	4,714,343	3
66.701	Toxic Substances Compliance Monitoring Program	2,712,333	3
Discretionary Funds Classified as Nondiscretionary		108,076,648	
Deobligations		71,404,527	6
Amount EPA Classified as Discretionary		656,295,374	
OIG Estimate of Discretionary Awards in 2003		**$835,776,549**	

Source: EPA's Office of Grants and Debarment

Note 1: Federal Regulations, under 40 CFR 35.548, limit these awards to tribes or intertribal consortiums, do not require awards through allotments or formula, and do not require awards to all tribes. The regulation does specify minimum and maximum amounts but allows discretion of funding within these parameters. Region 10 competes General Assistance Program grants.

Note 2: The Federal Insecticide, Fungicide, and Rodenticide Act, Section 23(a), provides authority for awarding grants for this program and does not provide specific allotments. Furthermore, 40 CFR 35.232(b) states, "*Final allotments are negotiated between each state and the appropriate Regional Administrator*."

Note 3: Title 40 CFR, Part 35 provides that grants for these programs are to be competed:

- Water Quality Cooperative Agreements - 40 CFR 35.360 - "*EPA will award Water Quality Cooperative Agreement funds through a competitive process in accordance with national program guidance.*"

- Wetlands Protection State Development Grants - 40 CFR 35.382 - "State Wetlands Development Grants are awarded on a competitive basis."

- Pollution Prevention Incentives for States - 40 CFR 35.342 - "EPA Regions award Pollution Prevention State Grants to State programs through a competitive process in accordance with EPA guidance."

- Toxic Substances Compliance Monitoring Program - 40 CFR 35.312 - "*EPA will award Toxic Substances Control Act Compliance Monitoring grant funds to States through a competitive process in accordance with national program guidance.*"

Note 4: Federal Regulations, under 40 CFR 35.330, state, "*The Administrator allots State Underground Storage Tank Grant funds to each EPA regional office. Regional Administrators award funds to States based on their programmatic needs and applicable EPA guidance.*" The law or regulation provides no specific allotments.

Note 5: The Toxic Substances Control Act, Section 306(d) and (e) provide the authority for awarding grants to this program. Section 306(e) gives discretion to Regional Administrators for awarding grants under this program. Section 306(e) states, "*The Administrator shall support eligible activities contained in State applications with the full amount of available funds. In the event that State applications for funds exceed the total funds available in a fiscal year, the Administrator shall give priority to activities or projects proposed by States based on each of the following criteria:*".

Note 6: Deobligations represent assistance awarded in the current or prior period that are no longer needed for a specific project. EPA told us that deobligations were incorrectly included with the discretionary data due to an unexpected programming error. By including the deobligations, EPA understated the amount of discretionary funds awarded in 2003.

Appendix B

Scope and Methodology

To accomplish our objectives, we reviewed EPA Order 5700.5, *Policy for Competition in Assistance Agreements.* We reviewed the Order to assess its design and determine the requirements for EPA officials and staff. We also examined several other EPA documents associated with assistance agreements and Agency objectives including *EPA's Grants Management Plan, EPA's Fiscal Year 2003 Annual Report*, and *EPA's FY 2003 Competition Statistics Report.*

We interviewed EPA officials and staff, including the Directors of the Office of Grants and Debarment and Grants Administration Division and the Grants Competition Advocate. We also used a questionnaire during interviews with project officers in Headquarters and some EPA Regions. We reviewed project officer files and separate documentation supporting awarding the assistance agreements and amendments we selected.

We obtained access to EPA's Integrated Grants Management System. We reviewed the system to quantify funds that were subject to EPA Order 5700.5 in fiscal year 2003 and the percentage of those funds that were competed. EPA's Integrated Grants Management System, however, did not track funds awarded as discretionary or non-discretionary. Therefore, we developed an estimate of discretionary funds EPA awarded in fiscal year 2003 to compare to the total funds that were subject to the Order.

In developing our estimate of discretionary funds, we reviewed electronic spreadsheets provided by EPA detailing the funds it classified as discretionary and non-discretionary. We researched the Code of Federal Regulations to determine if it allowed any discretion in awarding grants under any of the programs EPA reported to be non-discretionary. Because it was not practical to review the funding of each individual assistance agreement, we focused on assistance programs awarded over $1 million where we determined that the entire program was funded at EPA's discretion.

We reviewed the categorization of assistance agreements in the Integrated Grants Management System and determined the method to code awards and produce reports. We reviewed the categories provided in the system to determine if it properly represented the actual level of competition and that awards were categorized correctly. Our reliance on the Integrated Grants Management System and testing was limited to competition data.

We sampled assistance agreements that met the following criteria: (1) were not exempt from the Order; (2) over $75,000; (3) awarded between the dates of October 1, 2002, and March 16, 2004; and (4) one of three categories: openly competed awards, justified noncompetitive awards, and noncompetitive amendments. We did not review managed competitions because the Competition Advocate indicated that it may be removed from the next version of the Order. We removed simplified competitions because the Agency used this category to describe competitions that were solicited prior to the Order's effective date. We did not include a discussion

addressing amendments coded as openly competed as no distinct issues pertaining to this type of award were found.

On March 16, 2004 we randomly selected 38 openly competed and 22 noncompeted awards from the Integrated Grants Management System to determine whether the awards were made in accordance with the Order. In addition, we judgementally selected 15 amendments that EPA awarded noncompetitively (see Table 6).

Table 6: Distribution of Assistance Agreements Reviewed

Category	Total	HQ	1	2	3	4	5	6	7	8	9	10
Competed New Awards	38	29	0	0	0	2	3	0	3	0	0	1
New Awards, Not Competed	22	15	1	1	0	1	1	0	0	0	1	2
Amendments Not Competed	15	5	3	0	0	0	3	2	0	0	1	1
Total By Region	75	49	4	1	0	3	7	2	3	0	2	4

During our audit we assessed EPA's internal controls over the input of competition data into the Integrated Grants Management System and the implementation of the competition policy. We did not identify significant deficiencies in internal controls, but recommendations for improvement are identified in Chapter 3.

We performed this audit in accordance with *Government Accounting Standards,* issued by the Comptroller General of the United States. We conducted our fieldwork from March 2004 to August 2004.

Prior Audit Coverage

- *EPA's Competitive Practices for Assistance Awards*, EPA Office of Inspector General, Report No. 2001-P-00008, May 21, 2001

- *Grants Management: EPA Needs to Strengthen Efforts to Address Persistent Challenges*, Government Accountability Office, Report No. GAO-03-846, August 29, 2003

Appendix C

Agency Response

January 21, 2005

MEMORANDUM

SUBJECT: Response to Office of Inspector General Draft Audit Report, "EPA Needs to Compete More Assistance Agreements "

FROM: David J. O'Connor /for/ *Howard F. Corcoran*
Acting Assistant Administrator
Office of Administration and Resources Management

TO: Michael A. Rickey
Director for Assistance Agreement Audits
Office of the Inspector General

This provides the response of the Office of Administration and Resources Management (OARM) to the Office of Inspector General's (OIG) draft audit report (Report) entitled "EPA Needs to Compete More Assistance Agreements" (Report No. 20005-XXXXX, dated November 15, 2004). The objective of the Report was to evaluate the effectiveness of EPA Order 5700.5, Policy for Competition in Assistance Agreements (Competition Policy or Order).

I. BACKGROUND

In response to concerns raised by Congress, the Office of Management and Budget (OMB), and the OIG, EPA issued its first-ever comprehensive policy on assistance agreement competition, EPA Order 5700.5, which went into effect on October 1, 2002. The Order was designed to eliminate the perception of preferential treatment in the award of assistance agreements, particularly in assistance agreements awarded to non-profit organizations, and help ensure that EPA funds high priority projects at the least cost to the taxpayer. In concurring in the Order, OMB described it as a "strong step in the right direction that should increase competition." The OIG also concurred in the Order. The Report describes the Order as a "positive step in promoting competition for assistance agreements."

The Competition Policy required EPA to compete assistance agreements to the maximum extent practicable. It established policies and procedures for the competition of assistance agreement awards and amendments, a $75,000 competition threshold (subject to future adjustment), criteria for exemptions and exceptions from competition, documentation and evaluation requirements, and the position of a Grants Competition Advocate (GCA) responsible

for overseeing implementation of the Competition Policy and conducting an effectiveness review. As noted on page 5 of the Report, the effectiveness review contemplated that, based on experience, the Agency would make changes to the Order to further enhance competition.

The Report evaluates the effectiveness of the Competition Policy in its first two years of operation. In developing the Report, the OIG reviewed the provisions and design of the Competition Policy and examined 75 assistance agreements awarded by headquarters and regional offices. The OIG also reviewed the Integrated Grants Management System (IGMS) to determine whether it properly captured the actual level of competition and if EPA categorized assistance agreements correctly.

The Report is divided into four chapters and several appendices focusing on three main subject areas: (1) whether the Order maximized competition for assistance agreements; (2) whether competitions were fair and open; and (3) whether IGMS accurately captured competition data. With respect to the first item, the Report concludes that while the Competition Policy was a "positive step in promoting competition," it did not promote competition to the maximum extent practicable. Regarding the second item, the Report notes that the "competitions reviewed were generally fair and open when measured against the provisions contained in the Order," but recommends enhancements to improve the quality of competitions and competition documentation. With respect to IGMS, the Report concludes that "the competition codes used to categorize methods of awarding assistance agreements in EPA's Integrated Grants Management System were generally accurate." Based on these findings, the Report presents a number of recommendations for my consideration.

II. PROGRESS TO DATE IN ASSISTANCE AGREEMENT COMPETITION

Before addressing the Report's findings and recommendations, I believe it is appropriate to underscore the progress that EPA has made, and continues to make, in developing a strong competition program. I also believe that the OIG should recognize this progress in the final Report.

A. Grants Management Plan Targets and "Getting to Green" Award

Goal 2 of EPA's Grants Management Plan, "Promote Competition in the Award of Grants", establishes two performance measures to assess progress. These measures include the percentage of new grants subject to the Competition Policy that are competed and the percentage of new grants to non-profit recipients subject to the Competition Policy that are competed. For both fiscal years (FY) 2003 and 2004, EPA exceeded the measures established in the Plan. Specifically, in FY 2003, EPA competed approximately 85% of all new grants, and 75% of all new grants to non-profit recipients, subject to the Competition Policy. Similarly, in FY 2004, EPA competed approximately 90% of all new grants, and 85% of all new grants to non-profit recipients, subject to the Competition Policy. Moreover, in recognition of EPA's successful implementation of the Competition Policy in FY 2003, the Agency received in August 2003 a "Getting to Green" award from OMB under the President's Management Agenda.

OIG comment: EPA's goal emphasized competition for those grants subject to the Order. The primary focus of this audit was to determine if EPA promoted competition to the maximum extent practicable. To accomplish this objective, we considered all grants not just those subject to the Order.

B. Effectiveness Review

As discussed in Section I, and to ensure continuous improvement, EPA included in the Competition Policy a provision requiring the GCA to conduct an effectiveness review. The GCA conducted the review in the first half of 2004. It focused on the conduct of competitions, the adequacy of justifications for non-competitive awards, compliance with documentation requirements, and other competition-related matters. It also included an assessment of whether I should adjust the $75,000 competition threshold established by the Competition Policy for fiscal years after 2004. EPA provided a copy of the effectiveness review report to the OIG, OMB, and Congress in the summer of 2004.

The GCA found that improvements and refinements were necessary to several aspects of the Competition Policy. Accordingly, the GCA proposed several significant changes to the Competition Policy which were intended to maximize the quantity and effectiveness of assistance agreement competitions at EPA and improve the quality of non-competitive justifications and other competition-related documentation.

First, in order to increase the number of assistance agreement competitions, the GCA proposed to substantially reduce the $75,000 competition threshold to subject millions of additional dollars of discretionary funds to competition.

Second, the GCA recommended allowing simplified competitions where a limited amount of funding was available, and the elimination of managed competition, which was a competitive technique authorized by the Competition Policy but rarely used and criticized by Congress.

Third, the GCA's review revealed that while some justifications for non-competitive awards were well-written and clearly articulated and justified the basis for making a non-competitive award, in many other cases the justifications were incomplete and did not sufficiently document and support the decision to make a non-competitive award. To address these weaknesses, the GCA recommended clarifying the circumstances under which a non-competitive award may be made and imposing additional documentation, review, and approval requirements for non-competitive justifications.

Fourth, the GCA concluded that the Competition Policy needed to clearly articulate and emphasize the need to prepare and maintain competition-related documentation, particularly documentation relating to the evaluation of proposals and selection decisions.

Fifth, the GCA determined that the coverage in the Competition Policy on the competition of amendments was complex and confusing to Agency personnel.

Sixth, the Competition Policy provided that competition-related disputes be resolved in accordance with the regulations in 40 C.F.R. §30.63 and 40 C.F.R. Part 31, Subpart F. However, these provisions were not designed for the resolution of competition-related disputes. To rectify this, the GCA recommended that the Agency develop competition-specific dispute provisions.

Finally, the GCA concluded that the Competition Policy needed to expand its coverage to include subjects such as conflicts of interest and communications/negotiations with applicants.

C. Revised Competition Policy

On January 11, 2005, EPA approved a revised competition policy, EPA Order 5700.5 A1 (see Attachment A), which went into effect on January 15, 2005 (Revised Policy). The Revised Policy incorporates all of the major recommendations from the GCA's effectiveness review and satisfactorily resolves the one issue-resolution comment offered by the OIG during the directives clearance process. It also provides a comprehensive set of policies and procedures for assistance agreement competitions from the planning stages to disputes filed by unsuccessful applicants. Moreover, as discussed in more detail in Sections III and IV of this response, I believe that it addresses many of the findings and recommendations of the Report.

The Revised Policy is intended to increase the number and effectiveness of competitions conducted by EPA. Successful implementation, however, will require accountable management by the Agency's Grants Management Offices (GMOs), Senior Resource Officials (SROs), and Headquarters and Regional program offices, Agency-wide training of project officers and grants specialists, as well as vigorous oversight by the GCA. The GCA will continue to work and cooperate with the OIG on competition-related matters and keep the OIG informed as the Agency moves forward with the Revised Policy.

III. OARM COMMENTS

A. Overview

The findings and recommendations in the Report focus on three main areas. First, Chapter 2 contends that the Order did not maximize competition because competition exemptions were too broad, non-competitive justifications were inappropriately used, and amendments were not properly competed. While I agree that EPA should promote competition in the award of assistance agreements to the maximum extent practicable, I do not agree with many of the Report's findings and recommendations in this Chapter particularly those relating to competition exemptions for State, Tribal and other environmental programs. Moreover, while I share the OIG's concerns with the proper use and documentation of non-competitive justifications and the Order's coverage on amendments, I do not agree that non-competitive

awards were inappropriately made as often as the Report suggests or that the co-regulator and unsolicited proposal exceptions should be eliminated. Also, I believe that the Revised Policy addresses many of the OIG's concerns with non-competitive justifications, especially those based on the co-regulator and one-responsible source criteria, and with amendments.

Second, Chapter 3 of the Report concludes that assistance agreement competitions were fair and open but EPA could enhance the competition policy to improve the quality of competitions. I largely agree with all of the findings and recommendations in this Chapter.

Third, Chapter 4 of the Report states that IGMS accurately captured competition-related data. OARM will continue to monitor IGMS to ensure that it maintains its effectiveness in collecting competition-related information.

B. Comments on Chapter 2, EPA Order 5700.5 Did Not Maximize Competition.

Chapter 2 states that the Order did not promote competition to the maximum extent possible because it was designed to over-emphasize exemptions and non-competitive justifications, and contained broad exemptions from competition for a wide range of environmental programs. It also concludes that non-competitive justifications were inappropriately used and amendments were mistakenly awarded non-competitively.

1. Competition Standard (page 5)

Section 4 of the Competition Policy required EPA to promote competition "to the maximum extent practicable". This is the proper standard for evaluating the effectiveness of the Competition Policy. Pages 5 and 12 of the Report, however, use a different standard, namely whether EPA promoted competition "to the maximum extent possible". There is a difference between the two standards. See e.g., Section 211(c)(4)(C) of the Clean Air Act, 42 U.S.C. §7545(c)(4)(C). As interpreted by EPA, the "maximum extent practicable" standard recognizes that competition may not be feasible for all assistance awards or programs due to countervailing policy considerations or other relevant factors. The final Report should be revised to reflect this standard.

OIG comment: We did not use a different standard to evaluate the competition Order. We used the dictionary and related EPA sources to define the term "practicable." Commonly used dictionaries provide a similar meaning for "practicable" and "possible." For example, The Random House College Dictionary provides the following definition: *practicable - 1. capable of being done, effected, or put into practice with the available means; feasible. 2. capable of being used.* The word "possible" is listed as a synonym.

EPA has also used the terms "practicable" and "possible" interchangeably in its guidance documents for competition. For example, Section A.1. of the Grant Competition Advocate Guidance for Implementation of EPA Order 5700.5 states that headquarters or regional program offices' competition procedures must promote competition to the "maximum extent possible." Also, the grant competition Intranet site states that program office procedures for grant competitions must be consistent with EPA Order 5700.5 and promote competition to the "maximum extent possible."

In its response, EPA defined the "maximum extent practicable" standard to include instances where competition may not be feasible due to countervailing policy considerations or other relevant factors. EPA has neither discussed such policy considerations or other relevant factors in the Order nor addressed the impact that these factors would have on reducing competition.

2. Design of Competition Policy Inhibited Competition (pages 5-6)

The Report claims that the structure of the Competition Policy inhibited competition because it placed the discussion of non-competitive justifications and awards before a general description of the competition process. OARM respectfully submits that this comment elevates form over substance and obscures the larger issue of whether the competition exemptions in the Order improperly limited competition. I do not believe that the design, structure, or organization of the Competition Policy had a major influence on the amount of discretionary funding that was awarded competitively. Determinations by project officers on whether and how to compete were based on their understanding of the requirements of the Order as a whole and not on whether a particular provision on non-competitive awards preceded a section on competitive requirements. In any event, the Revised Policy addresses the OIG's drafting concern by describing the use of competitive processes before discussing non-competitive justifications and competition exceptions.[7]

[7] Competition exemptions are discussed in the "Applicability" section which properly belongs in the beginning of the Revised Policy.

3. Broad Exemptions Limited Competition (pages 6-8 and Appendix A)

This part of the Report states that the Competition Policy considered awards under programs that had statutory/regulatory competition requirements, such as the Brownfields Assessment and Cleanup Program, as exempt awards resulting in EPA under-reporting to Congress the amount of funds awarded competitively by $139 million. It also contends that the Order contained broad exemptions from competition for certain programs funded with discretionary money that could have been competed.

i. Brownfields and other Exempt Awards

OARM does not believe that the Order's characterization of Brownfields and other programs with preexisting competition requirements as "exempt" is a major issue. This is because all of these programs, regardless of how they were labeled, were in fact competed according to their requirements. In an abundance of caution, OARM included this exemption in the Order so as not to adversely affect programs that were already competing under a statutory/regulatory framework. As experience has shown that adverse effects are unlikely, we have made clear in the Revised Policy that these programs must be competed like others unless prohibited by, or inconsistent with, statute or regulation.

In addition, I strongly disagree with the first two sentences of the next to last paragraph on page 8 of the Report which state that: "EPA exempted programs from competition based on past practices, rather than evaluating whether competition was possible. Senior managers in EPA's Office of Administration and Resources Management told us that the Order was written under an "old culture" where many assistance agreements were not competed." These statements are inaccurate and I request that they be deleted from the Report. First, in determining whether a program should be exempt from competition, OARM did not rely on past practices, but rather on whether an exemption made sense, taking into account policy considerations and other relevant factors. Second, the Competition Policy was not written under an "old culture". To the contrary, it reflected a dramatic shift from the "old culture"of non-competitive awards to a new culture of competition, a shift that is reinforced by the Revised Policy.

ii. Exemptions from Competition

The Report suggests that programs funded with discretionary money are always practicable to compete and thus should not be exempted from competition. However, whether a program is funded with discretionary money is not the sole determinant for deciding the feasibility of competition. Other factors, such as EPA's relationship with States and Tribes, Congressional intent, and program effectiveness and structure, must also be considered. For the seven discretionary program areas identified in the Report which the OIG believes were improperly exempted, OARM consulted with the relevant program office to determine whether competition was practicable. As described below, and based on that consultation, the Agency continues to believe that these programs should be exempted from competition.

OIG comment: The OIG continues to believe that it is feasible to compete many discretionary grant programs, including those that support the development of State programs, such as Underground Storage Tank and State Indoor Radon. In its report *Innovating for Better Environmental Results*, EPA calls for a strengthening of its innovation partnership with States and Tribes and fostering innovation in its own culture and organizational systems. Competition of discretionary grants to States would strengthen innovation with States and Tribes and the innovation culture within the agency.

A key component of the competition process is the evaluation of grants based on a uniform set of criteria that is specific to the grant program. The evaluation criteria can reflect Agency priorities and programmatic needs. Through the evaluation criteria, EPA can encourage States and/or Tribes to develop programs that meet environmental goals using innovative methods and tools that enhance environmental problem-solving. EPA's position seems to be that if a competitive process is used, States and/or Tribes may not receive funding. Competition does not necessarily preclude eligible recipients from receiving funding. Competition can be used to determine levels of funding based on merit and in a transparent process.

Competition of discretionary grants to States and Tribes will require a cultural shift, one that Congress and EPA have acknowledged is needed. In a March 2004 hearing on grants management, the Chairman for the Senate Committee on Environment and Public Works stated that a major cultural shift is only the beginning of a number of reforms needed to create a culture of accountability at EPA. At the hearing, EPA's Acting Administrator for Administration and Resources Management acknowledged that increased use of competition is one of a number of major mindsets that the Agency is trying to change.

Underground Storage Tank Program

Awards under this program are authorized by Section 2007(f)(2) of the Solid Waste Disposal Act, 42 U.S.C. §6916(f)(2), which is implemented by regulations at 40 C.F.R.§35.330. Grants are used to assist States in developing and implementing State underground storage tank release detection, prevention and correction action programs. Grant funds help ensure that States have qualified personnel to conduct inspections and other technical work. The implementing regulations provide that awards will be made to States by allotment "based on their programmatic needs and applicable EPA guidance." 40 C.F.R. § 35.332. As a threshold matter, EPA would need to change the regulations to award these agreements competitively.

The statutory language authorizing these awards does not prohibit nor require that the awards be made competitively and the legislative history does not appear to contain any discussion regarding competition for these awards. However, Congressional findings and

objectives under the 1984 amendments to the Solid Waste Disposal Act stress the importance of improving relations between EPA and the States and developing a viable Federal-State partnership. Competition would not further these objectives.

It is questionable whether competition under this continuing environmental program would be in the best interests of the EPA or the States. The award allocation approach contained in the regulations allows States to plan their programs on the basis of a stable source of Federal funding. EPA regions periodically adjust the amount of funds the Agency provides to States based on the region's assessment of State needs and the funding priorities established in programmatic guidance. The guidance is developed in consultation with States, an approach that is consistent with the Congressional priority of developing a viable Federal-State partnership.

The Agency believes that competing these awards is not practicable, since it would jeopardize the States' ability to adequately plan and carry out their underground storage tank detection, prevention, and enforcement programs and undermine the EPA-State relationship.

OIG comment: The OIG disagrees with EPA's conclusion that the implementing regulations would need to change to award these grants competitively. Title 40 CFR 35.332 states in full, "*The Administrator allots State Underground Storage Tank grant funds to each EPA regional office. Regional Administrators award funds to States based on their programmatic needs and applicable EPA guidance."* Nothing in the regulation precludes or limits EPA's ability to compete this program.

State Indoor Radon Grant Program (Appendix A)

State Indoor Radon Grants are authorized by Section 306 of the Toxic Substances Control Act (TSCA) and implemented by regulations at 40 C.F.R. §35.290. TSCA Section 306 was enacted to address growing concerns about the health risks posed by exposure to radon. These grants are awarded to States to assist them with the development and implementation of programs that assess and mitigate radon and that aim to reduce radon health risks. The regulations provide that funds will be allotted to States based on the criteria in EPA guidance in accordance with sections 306(d) and (e) of TSCA. Therefore, at a minimum, the regulations would have to be changed to move from an allotment system to competition for the award of these grants.

Significantly, TSCA Section 306(e) states in pertinent part that: "The Administrator shall support eligible activities contained in State applications with the full amount of available funds...." This provision is inconsistent with the notion of competition, since it strongly suggests that as long as a State complies with the requirements of the law, it is entitled to receive funding to the extent funding is available.

Neither the applicable statute, regulations, nor legislative history specifically mentions

competing these grants. However, both the law and legislative history clearly recognize that radon is a national health problem and that the grant program is intended to assist States in the development of radon programs in order to reduce radon-related health risks. Based on this and the specific language in Section 306(e), the Agency does not believe it is practicable to compete these grants.

OIG comment: We disagree that Section 306(e) is inconsistent with the notion of competition. This section states:

> ... In the event that State applications for funds exceed the total funds available in a fiscal year, the Administrator shall give priority to activities or projects proposed by States based on each of the following criteria: (1) The seriousness and extent of the radon contamination problem to be addressed. (2) The potential for the activity or project to bring about reduction in radon levels. (3) The potential for development of innovative radon assessment techniques, mitigation measures as approved by the Administrator, or program management approaches which may be of use to other States. (4) Any other uniform criteria that the Administrator deems necessary to promote the goals of the grant program and that the Administrator provides to States before the application process.

The use of specific criteria in evaluating grant applications is a key component of competition.

In addition, Section 306(d) states:

> ... the Administrator shall give preference for grant assistance under this section to States that have made reasonable efforts to ensure adoption, by the authorities which regulate building construction within that State or political subdivisions within States, of the model construction standards and techniques for new buildings developed under section 304.

The law does not limit the Administrator's ability to use the criteria referenced in the Act to develop a competition process to review applications.

Consolidated Pesticide Compliance Monitoring Program (Appendix A)

FIFRA Section 23(a) authorizes EPA to enter into cooperative agreements with States and Tribes to implement and/or develop pesticide programs. These cooperative agreements fund three separate pesticide programs: (1) the pesticide cooperative agreement enforcement program; (2) the pesticide implementation program; and (3) the pesticide applicator certification and training program. Implementing regulations (40 CFR §§35.230, 35.240, and 35.250) establish an allocation formula for the distribution of funding; therefore, at a minimum, requiring competition would involve a regulatory change.

The statute, regulations and legislative history for these cooperative agreements do not specifically address competition. However, the cooperative agreements are designed to assist States and Tribes in assuming primary enforcement responsibility for pesticide programs. If there was competition and some States and Tribes failed to receive funding, EPA would have to assume primary enforcement responsibility over those areas, a result that could lead to State/Tribal disinvestments in pesticide programs. This would interfere with the purpose of the cooperative agreements and disrupt EPA's national compliance monitoring and enforcement strategy for ensuring compliance with FIFRA requirements. Under these circumstances, it is not practicable to compete these agreements.

With respect to the pesticide applicator certification and training program, the law, FIFRA Section 23(a)(2), authorizes EPA to enter into cooperative agreements "to assist States (and Tribes) in developing and administering State programs...to train and certify applicators consistent with the standards the Administrator prescribes." It also provides that funds will be appropriated to fund "50 percent of the anticipated cost to each State or Indian tribe...of conducting training and certification programs....If funds sufficient to pay 50 percent of the costs for any year are not appropriated, the share of each State and Indian tribe shall reduced in like proportion in allocating available funds." This language strongly implies that an allocation method, rather than competition, is to be used to distribute funding, and that Congress intended that each State and Indian tribe interested in operating a training and certification program be awarded a portion of the funds appropriated for that purpose. Consequently, the Agency does not believe it is practicable to compete these funds.

OIG comment: We agree that the allocation method for the pesticide applicator certification and training program is prescribed in the law. However, the law does not specify any method for distributing funds for the pesticide enforcement program and the pesticide implementation program. In fact, the regulations state that the Regional Administrator will negotiate final allotments with the States for those two programs.

National Estuary Program (page 7)

The National Estuary Program (NEP) regulations at 40 C.F.R. §35.9000 et seq. and authorizing legislation at 33 U.S.C.§1330 (Section 320 of the Clean Water Act) state that EPA allocates funds to eligible entities to develop a Comprehensive Conservation and Management Plan (CCMP) for an estuary.

Under the NEP, EPA periodically solicits voluntary nominations from Governors to propose estuaries for inclusion in the NEP and request a management conference to develop a CCMP for the estuary. EPA then uses a set of criteria to determine which nominations will be accepted. Once EPA designates an estuary, funding is typically provided to the entity identified by the State in its nomination package to oversee CCMP development. Awarding these funds non-competitively to this entity makes sense, not only because of the entity's identification in the nomination package, but also because of its involvement in the designation process and CCMP development with affected Federal, State and local government agencies. Competition is not practicable in these circumstances, since it would undermine the intergovernmental coordination and collaboration that is at the heart of the NEP.

OIG comment: A key component of competition is criteria for evaluating applications. EPA is already using criteria to evaluate nominations. Conducting this process based on the provisions in the Order would provide accountability and transparency regarding EPA's selection of nominations.

Indian Environmental General Assistance Program (pages 7-8)

The Report questions why awards under the Indian Environmental General Assistance Program (GAP) were exempted from competition based on the assumption that Region 10 formally competed these awards among Indian tribes and inter-tribal consortia. This assumption is inaccurate and should not be relied upon as a basis for recommending that the American Indian Environmental Office (AIEO) compete GAP funds under the Competition Policy.

My staff discussed this matter with Region 10 and AIEO. It appears that Region 10 did use procedures with competitive-like characteristics to help screen Tribal applicants. Under these procedures, the Region established a specific set of criteria to ensure that each Tribe receiving funding could properly manage grants and successfully develop environmental program capacity. This allowed the Region to make more consistent and defensible decisions as to funding levels and needs. However, these criteria were not used to compare the merits of one proposal against the other, which would typically be the case in a formal competition.

Further, EPA has historically used an allocation method based on region-specific needs to distribute GAP funds to Tribal governments. Having a predictable allocation methodology to distribute base funding amounts allows each Region to maintain consistent funding agreements

with Tribal governments that support the long-term development of environmental management capacity, fulfilling the purposes and objectives of the Indian Environmental General Assistance Program Act of 1992, 42 U.S.C. § 4368b. The law and its legislative history indicate that the purpose of the GAP is to: correct serious deficiencies in Federal efforts to assist Tribal governments in assuring environmental quality on Indian lands; assist them in developing their capacities to establish environmental protection programs; and enable them to develop the technical, legal, and administrative infrastructure necessary for effective environmental regulation. Moving from an allocation to a competitive approach would not facilitate achievement of the purposes of the law and would impede Tribal efforts to develop the necessary capacities.

In addition, requiring AIEO to distribute GAP funds by competition would affect EPA's legal relationship with Tribal governments. EPA recognized the uniqueness of this relationship by issuing, and recently reaffirming, its 1984 policy on the "Administration of Environmental Programs on Indian Reservations." This policy directs EPA to: work with Tribal governments on a government-to-government basis; provide grants and other assistance to Tribal governments similar to what is provided to States; and reduce impediments to working directly and effectively with Tribal governments on reservation programs. Imposing competition between Tribes would be inconsistent with both the policy and the Agency's trust responsibility.

This recognition of unique Tribal needs extends to the full range of assistance agreement programs listed under 40 CFR Part 35. In establishing Subpart B regulations for Tribes, EPA recognized that Tribes did not have access to the same stable funding sources available to States under Subpart A, which handicapped their efforts to perform long-term environmental planning. As programs for State capacity building have largely been administered on an allocation basis, Tribes should be afforded similar treatment.

While it may be practicable for some regions to use competitive-type techniques in limited circumstances, the Agency does not believe that full application of the Competition Policy to GAP funding will benefit Tribes. Requiring all Tribes and intertribal consortia to compete for funds to support basic program capacity under formal competitive processes would be problematic, jeopardizing the Agency's ability to further the objectives of the GAP law, comply with the Indian Policy and the trust responsibility, and ensure environmental protection across Indian lands.

Although the exemption for GAP funding should be retained, I recognize that there may be variability in how individual regions distribute some GAP funding and that questions exist whether limited use of competitive elements is consistent with the purposes of the GAP. OARM will raise these issues to AIEO for further discussion.

OIG comment: The benefits of competing grants to Tribes are similar to those for competing grants to States. Full and open competition provides transparency and consistency in the method used to distribute funds. Furthermore, it provides accountability and assurance that funds are used in the most effective manner to further the Agency's mission. A strong competition policy promotes the cultural shift needed for EPA to break from its historical allocation methods for distributing funds to Tribes.

In its regulations, EPA has already recognized the benefits for competing some grants to Tribes. For example, Water Quality Cooperative Agreements to Tribes and Intertribal Consortia are regulated under 40 CFR Part 35, Subpart B. The funding provisions for this program state, "*EPA will award water quality cooperative agreement funds through a competitive process in accordance with national program guidance.*"

Senior Environmental Employment Program (page 8)

The Report states that EPA exempted the Senior Environmental Employment (SEE) Program from competition because "EPA officials believed that competition would not result in a diverse workforce", and that exempting the SEE program is inconsistent with EPA policy to compete to the maximum extent practicable.

While the impact on diversity is an important issue, OARM would like to clarify that there are other, more fundamental reasons, for not competing the SEE program.

Specifically, OARM believes that competing SEE awards would not markedly improve services or reduce program costs. This is primarily because the largest expense of the SEE program is enrollee wages, which are the same for each organization that receives an award and would not be changed by competition. In addition, administrative costs under cooperative agreements are limited to 15% and all SEE recipients have the same reporting requirements and use similar recruiting sources to obtain eligible enrollees. Accordingly, it is unlikely that competition would lower administrative costs, or result in enhanced services since the same enrollees will be doing the work whether it is for the same or different organizations.

OIG comment: After meeting with the Agency, we have deleted the finding and recommendation pertaining to the SEE program.

Assistance Agreement Awards to Foreign Governments and International Organizations (page 13)

Although not specifically discussed in the Report, Recommendation 2-2 on page 13

advocates eliminating the exemption for awards to foreign governments and United Nations and similar international organizations.

In developing the Competition Policy in 2002, OGD benchmarked with other agencies and determined that this exemption was appropriate. In response to the Report, staff from the Office of International Affairs and Office of General Counsel (OGC) contacted both the Department of State and the United States Agency for International Development (US AID) to inquire whether they compete awards to foreign governments and international organizations. Department of State officials stated that they do not compete awards to foreign governments or international organizations. In addition, US AID's policy is not to compete awards to public international organizations. As EPA's policy is consistent with that of other agencies, I believe it is appropriate to retain this exemption from competition.[8]

OIG comment: We have deleted the recommendation pertaining to grants to foreign governments and international organizations.

As described above, there are legitimate reasons for retaining the seven exemptions from competition cited in the Report. [9] Nonetheless, if the circumstances justifying these exemptions change, the Agency will make appropriate modifications to the Revised Policy. In this regard, OARM will raise with the Performance Partnership Steering Committee whether and to what extent competitive opportunities can be enhanced in State grants.

4. EPA Inappropriately Used Justifications (pages 8-11)

This section of the Report claims that many non-competitive justifications for award were inappropriately used, poorly documented, and failed to meet the requirements of the Competition Policy because project officers misinterpreted the Competition Policy and GMOs failed to provide adequate oversight. Table 4 of the Report on page 9 contends that 20 of the 37 non-competitive justifications reviewed by the OIG were misused, especially those based on the "one responsible source," and "co-regulator/co-implementor" criteria. The Report specifically discusses a few of these justifications and the OIG provided the GCA with further information on many of the questioned non-competitive justifications[10].

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[8] The Revised Policy retains this exemption but added language to clarify its applicability. See Section 6.c(5).

[9] OARM recommends that the OIG, before issuing the final Report, meet jointly with OGD and the offices that administer the seven program areas to gain a better understanding of the Agency's position.

[10] By letter dated November 30, 2004, the OIG provided the GCA with supplementary information pertaining to the questioned justifications.

After reviewing some of the non-competitive justifications, I agree that a better job could have been done in preparing them and ensuring that they sufficiently documented the rationale justifying the award. However, I do not agree that non-competitive awards were inappropriately made as often as the Report suggests or that an inadequate justification meant that EPA had bias for a particular recipient as suggested on pages 9 and 13 of the Report. While it is true that some non-competitive justifications did not demonstrate the proper basis for a non-competitive award, that does not necessarily mean that the award itself was improper or the result of bias. In some cases, there may have been other factors not included in the justification demonstrating the propriety of the award or the justification may have referred to the wrong criteria.

For example, on page 9, the Report criticizes a Region One non-competitive award to the New England Interstate Water Pollution Control Commission. The funding recommendation indicates that this award was not competed based on "compelling evidence of unique and/or superior qualifications to the extent no other source could fulfill the project/program objective." No further explanation or documentation presenting the "compelling evidence" of unique qualifications was provided. I agree that this justification was not adequate and that it should have demonstrated why the recipient was the only responsible source possessing the unique qualifications to perform the project. Region One also agrees that this was an inadequate justification and stated that it was the wrong basis for not competing the award. However, despite citing the wrong criteria, Region One believes that the award could have been justified under the "co-regulator" exception from competition. This is because the award was to a co-regulator to assist the State of Maine in providing training on Safe Drinking Water Act programs in Maine. I ask that you consider the Region's position in your final report.

In claiming that EPA's actions suggested a bias or preference for certain recipients, the Report points to two non-competitive awards made by the Office of Research and Development (ORD) based on the "one responsible source" criterion. Allegations of bias are a serious matter and should not be made lightly. Although I agree that the justifications for these awards were not sufficiently compelling, I do not think that the justifications, in and of themselves, support a claim of bias.

More specifically, with respect to the award to the American Chemical Society (ACS) referenced on page 11 of the Report, I agree that the justification in the decision memorandum was insufficient and did not show that the ACS was the only responsible source. In fact, the justification states that the ACS was selected because they were the most "appropriate" organization to do the work, which is clearly not the correct standard to be used.[11] The justification in the decision memorandum also implies that other organizations might be capable of doing the work. However, despite these deficiencies, the SRO for ORD has informed us in writing

[11] The Revised Policy, in Section 12.a(2), specifically rejects this as a basis to justify an award based on "one responsible source."

that ORD believed that ACS was the only organization with the capability and qualifications to do the work required under the agreement.

The Report also questions ORD's non-competitive award to the Pennsylvania Department of Environmental Protection. I agree that the justification for this award could have better explained how the recipient had unique qualifications to meet the one responsible source criterion. Nonetheless, I understand the position of the ORD SRO that the award was justified because the recipient was uniquely qualified to conduct research on environmental issues affecting Pennsylvania based on its knowledge and experience with state environmental issues.

Further, page 11 of the Report maintains that almost all non-competitive justifications failed to include a detailed explanation of why competition was not "possible" as required by the Competition Policy and that Project Officers generally used justifications "if the recipient met any of the criteria contained in the Order under Section 8.a." In fact, what Section 8.b of the Competition Policy required is that a non-competitive award be supported by a "detailed justification in the award decision memorandum explaining why competition is inappropriate", not why competition is not possible. Moreover, in my opinion, if the justification properly demonstrated the applicability of one of the non-competitive criteria, that would be tantamount to compliance with Section 8.b.

i. Co-regulator/Co-implementor Awards

Basis for Co-regulator Exception

The Report criticizes the use of the "co-regulator/co-implementor" exception from competition and recommends that it be eliminated as a basis for making a non-competitive award. Section 8.a(5) of the Competition Policy provided that a non-competitive award could be made when:

> The award is to an organization that represents the interests of co-regulators or co-implementors (State, Tribal or Local governments) in the execution of national environmental programs. (The membership of such organizations is generally composed of officials of the co-regulator or co-implementor entities, e.g., State or Tribal program directors or commissioners.)

While I agree that the Competition Policy did not clearly describe the circumstances under which the co-regulator exception was to be used, I disagree with the recommendation to eliminate it. Fundamentally, it is a legitimate exception when used properly and the Agency needs to have the flexibility to award grants to co-regulator organizations without competition under certain circumstances. These organizations play a critical role in representing the interests of their State, Tribal and Local government members in the execution of national or regional environmental programs. The Agency must be able to communicate with these organizations on an ongoing basis regarding potential changes in national and regional policies, programs, and guidelines. It must also be able to provide them financial assistance quickly to ensure State and Tribal representation

in the decision making process, something that would be difficult to do in a competitive environment.

For example, EPA historically uses part of its State and Tribal Assistance Grant (STAG) appropriation for Clean Air Act Section 105 continuing environmental program grants under the "associated program support cost" authority in STAG to fund national and regional projects and programs for the **"**common use" of state and local air pollution control agencies. As discussed in House Report 106-674 relating to EPA's Fiscal Year 2001 appropriation act, Congress expects EPA to obtain the concurrence of state and local agencies when funding these projects and programs. The Agency obtains the input of these numerous agencies by working closely with co-regulator organizations such as the Secretariat for the State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials (STAPPA-ALAPCO) and the Northeast States for Coordinated Air Use Management (NESCAUM). Necessary communications with organizations representing state and local air pollution control agencies could not take place efficiently and effectively if competitive grant announcements were used for these projects and programs.

Moreover, the co-regulator exception is based on the Agency's long-standing "co-regulator and co-implementor" interpretation of the Federal Grants and Cooperative Agreement Act (FGCAA) in EPA Order 5700.1, POLICY FOR DISTINGUISHING BETWEEN ASSISTANCE AND ACQUISITION (March 22, 1994). That Order provides in pertinent part:

> As a general rule, an assistance agreement may not be used to support a conference or other services, the principal purpose of which is to provide advice, recommendations, or other information for EPA's direct use in developing or changing guidance, regulations, etc. Thus, for example, an office or laboratory cannot award an assistance agreement to a trade association or consulting firm to arrange and conduct a conference of EPA officials and members of the regulated community if the principal purpose is to enable EPA to obtain the views of the regulated community on a proposed new policy or changes in an existing one.
>
> . . . An exception to this general rule is assistance to associations of State officials who implement EPA programs. An assistance agreement may be used to provide funding to an association of State officials or agencies to hold a conference among its members and EPA officials to discuss issues in the implementation of a Federal effort that the States implement on a day-to-day basis under a formal delegation or as partners with EPA in a coordinated, national effort. Although EPA does derive benefits from such a conference and may subsequently decide to adopt recommendations or use information provided by the State officials at the conference, the principal purpose of the agreement is not to acquire services for the direct benefit or use of the Federal Government. The principal purpose is to support the association in helping its State members participate in developing the policies that they will carry out. State officials and agencies are in the unique role of sharing operational responsibility with EPA for implementation of environmental

> efforts. EPA may issue the guidance and regulations, but the States are at least equal partners in implementing them. They need, and clearly benefit from, an opportunity to discuss the policies they will be implementing before EPA adopts those policies. The same is also true of Tribal governments that are also partners of EPA in implementing EPA efforts.

The Agency has extended this interpretation of the FGCAA to include training courses as well as studies and research that relate to joint Federal/State/Tribal/Local environmental protection efforts. The co-regulator exception in the Competition Policy was intended to be applied consistent with the "co-regulator and co-implementor" interpretation of the FGCAA.

Questioned Co-regulator Justifications and Corrective Actions Taken by OARM

Page 10 of the Report states that the co-regulator justification was misused in 12 out of 14 cases reviewed by the OIG. It asserts that many project officers interpreted the criteria to apply when the recipient was an organization that represented the interests of co-regulators/co-implementors regardless of the nature of the work to be performed under the agreement. In developing the Competition Policy, OARM intended that the co-regulator exception be used only when the co-regulator/co-implementor entity was performing co-regulator/co-implementor type of work in the execution of national environmental programs. In retrospect, however, it is evident that the language in the Competition Policy was unclear and it is possible that project officers could have reasonably applied the exception solely on the basis that the recipient was a co-regulator/co-implementor organization.

At the GCA's request, OGC prepared an analysis (see Attachment B) of the co-regulator awards cited by the OIG to determine whether the work under the agreements was "in the execution of national environmental programs."[12] OGC's analysis concludes that the awards were not inappropriately made because the work was "in the execution of national environmental programs". This illustrates that reasonable minds may differ on whether, and how often, the co-regulator/co-implementor criteria may have been inappropriately applied, and how it was or should have been interpreted.

To address this issue, the Revised Policy makes substantial improvements and clarifications to the co-regulator criteria by:

> (1) establishing three explicit conditions that have to be met in order to use the exception (Section 12.a(4));
> (2) requiring the Lead Agency Official to approve all non-competitive justifications using the exception (Section 12.d);

[12] The supplementary information provided by the OIG to the GCA identified 13 awards that allegedly inappropriately used the co-regulator exception.

(3) requiring Grants Management Offices to closely scrutinize co-regulator justifications and raise any issues or questions to the GCA (Sections 12.d and 19.d); and
(4) requiring the GCA to review and approve justifications for non-competitive co-regulator/co-implementor awards exceeding $250,000 (Section 12.d).

I believe that these measures, particularly the additional oversight and quality control mechanisms, will result in proper use of the co-regulator exception. They should be acknowledged in the Report.

OIG comment: In its response, EPA stated that the Office of General Counsel (OGC) reviewed the co-regulator justifications in the report and concluded that each was "in the execution of national environmental programs." EPA further stated that OGC's conclusion illustrates how reasonable people may differ on how to interpret and apply the co-regulator criteria. In our report, we identified this lack of clarity as the primary reason why EPA staff misunderstood the co-regulator justification. The Order did not provide any definition of what is meant by the phrase "in the execution of national environmental programs." Because we believe all activities that EPA supports should relate to environmental programs, we concluded the phrase was too broad and did not limit any activity. Therefore, this justification essentially allows a group of organizations to be exempt from competition. This situation contradicts EPA's policy to compete to the maximum extent practicable.

EPA stated that the co-regulator exception is based in part on EPA Order 5700.1, *Policy for Distinguishing Between Assistance and Acquisition.* This Order simply addressed when it is appropriate to use an assistance agreement as opposed to a contract to further EPA's mission. The Order identified funding to associations of State officials who implement EPA programs as an example of when it may use an assistance agreement rather than a contract. Therefore, Order 5700.1 does not provide a basis for excluding organizations that support co-regulators from competition.

EPA also stated the co-regulator exception was based on EPA's longstanding interpretation of the Federal Grant and Cooperative Agreement Act, and the exception in the Order was intended to be applied consistently with the co-regulator interpretation of the Act. We found no reference in the Act that defines co-regulators/co-implementors or provides a basis for not competing grants to representatives of States. In fact, one of the primary purposes of the Act was to "encourage competition in making grants and cooperative agreements."

Although EPA has revised the Order to add controls over the use of justifications, it has not addressed the fundamental problem with the co-regulator justification. EPA has not clarified the meaning of the phrase "in the execution of national environmental programs." In our view, EPA's interpretation of the current phrase allows any activity performed by an organization representing the interests of a co-regulator to be exempt from competition. Further, we believe that there are sufficient reasons already available in the event that competition is not practicable. For example, in one of the two cases where we did not contest the co-regulator justification, we determined that competition was not practicable because this program was actually exempt from competition. Therefore, we maintain that the co-regulator justification is not necessary and should be eliminated.

Improved Controls for Non-Competitive Justifications

OARM agrees with the OIG that program offices did not use justifications appropriately in all cases. This is attributable in part to the lack of clarity/specificity in the language of the non-competitive exceptions in the Competition Policy. In addition, it was reasonable to expect that in the first years of implementation of the Competition Policy (which emphasized a new way of doing business) that there would be interpretation and implementation issues regarding non-competitive awards, as well as some honest mistakes and growing pains experienced in carrying out the new policy. I believe, however, that two years of experience with the Competition Policy, together with the improvements made by the Revised Policy, will facilitate proper application and use of the non-competitive exceptions and result in well prepared, defensible and complete non-competitive justifications.

More specifically, the Revised Policy addresses and corrects the non-competitive justification problems identified in both the Report and the GCA's effectiveness review report in several ways. First, the Revised Policy more clearly articulates the requirements for making and justifying non-competitive awards, particularly those based on the "one responsible source" and "co-regulator/co-implementor" criteria which the Report suggests were frequently misused (See Section 12.a of the Revised Policy). Second, it imposes additional GCA (and Lead Agency Official) review and approval requirements for many non-competitive justifications, and strengthens the documentation requirements for justifications by describing the required content of non-competitive justifications (Sections 12.c and 12.d of the Revised Policy). Third, it expressly requires GMOs to review non-competitive justifications for awards and directs them not to make the award if the justification is insufficient (Section 19.d of the Revised Policy).

5. EPA Inappropriately Awarded Many Noncompetitive Amendments (pages 11-12)

This section of the Report states that EPA inappropriately awarded assistance agreement amendments because the Competition Policy's amendment provisions "lacked detail, were difficult to understand, and placed substantial emphasis on noncompetitive awards." I agree that the Competition Policy's coverage on assistance agreement amendments was difficult to understand and apply. However, this has been corrected in the Revised Policy which streamlines and simplifies the amendment coverage, and clearly describes the different types of assistance agreement amendments and when, and under what conditions, they must be competed.

It is important to realize, however, that based on the nature of the work to be performed under an amendment, it may not be practicable to compete it. In such situations, competition could be meaningless and cause an unnecessary expenditure of time and resources for EPA and applicants alike. I believe that we have captured this standard in the Revised Policy which generally provides in Section 13.c that supplemental funding amendments must be competed unless two conditions are met: (1) the additional work to be covered by the amendment is within

the scope of work[13] of the agreement; and (2) it is demonstrated that the additional work is integrally related to, and necessary for, the satisfactory completion of the original agreement so that only the recipient has the capability to perform the additional work in a cost effective manner. If these conditions can be satisfied, I do not believe it is in the best interests of the EPA or applicants to compete the work under the amendment. Conversely, if the work to be performed under an amendment is outside of the scope of work of the agreement, then it must be competed in accordance with the Revised Policy.

C. Comments on Chapter 3-Competitions Were Fair and Open, But EPA Can Enhance the Order (pages 14-17)

1. Competitions Complied With The Order (pages 14-15)

I am pleased with the conclusion reached in this part of the Report that "competitions appeared to be fair and open because they generally met the requirements of the Order," and that "program offices fulfilled the Order's requirements and maintained documentation to demonstrate the process used to select recipients." I also agree with the Report's statement on page 14 that, "[W]hen EPA competitively awarded assistance agreements in accordance with the Order, the Agency widely advertised funding opportunities, increased objectivity in the selection of recipients, and added transparency to the selection process." Please be assured that OARM will continue to monitor the assistance agreement competition process to ensure that competitions are conducted in a fair and open manner, funding opportunities are widely advertised through the use of the fedgrants.gov website and other means, and that selection decisions result from an objective and unbiased review of proposals consistent with the criteria established in the announcement.

2. Documentation Requirements Need Clarification (pages 15-16)

Despite the Report's finding that competitions were properly conducted and were fair and open, it identified "some opportunities where the Order could be enhanced to increase transparency and accountability." Specifically, on page 15 the Report finds that:

> EPA needs to clarify documentation requirements to increase transparency and accountability by (1) documenting that reviewers are free from conflicts of interest, (2) defining who should maintain required competition documentation and where it should be maintained, and (3) identifying what specific information must be forwarded to grants management offices for review.

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[13] The Report also states that the Competition Policy lacked any discussion of what constituted a change in the scope of work. This has been addressed in Section 13.d of the Revised Policy which identifies factors to be considered in determining whether an amendment is within or beyond scope. Further guidance will be issued by the GCA if necessary.

I agree with each of these findings and they are each addressed in the Revised Policy as follows.

First, the Report recommends that EPA require that reviewers sign a statement that they are free from conflicts of interest. I agree with this recommendation and it is covered by Section 9.a of the Revised Policy.

Second, the Report states that the Competition Policy should identify who is responsible for maintaining competition-related documentation. I agree and this is specifically addressed in Section 15 of the Revised Policy which references the EPA Record Schedules that apply to competition-related documentation.

Third, the Report suggests that GMOs should be provided with additional award selection information in order for them to provide better oversight of the competition process. I agree and Sections 9.f, 19.a(1), and 19.d(1) of the Revised Policy address this. These sections impose a new requirement that Program Offices include documentation with the funding package that demonstrates the basis and rationale for the selection decision and that the GMOs review this before making a competitive award. If the documentation is insufficient, then GMOs are instructed not to make the award. In addition, Section 19.d(2) requires GMOs to review justifications for non-competitive awards and reject those that do not support the decision to make a non-competitive award.

3. Additional Concern (page 16)

The Report expresses a concern that as EPA moves forward with IGMS, less award documentation will be produced and provided to GMOs. I believe that this concern is addressed by the measures discussed in the preceding paragraph requiring the submission of award selection information to the GMOs.

B. Comments on Chapter 4-Integrated Grants Management System Accurately Captured Competition Data (page 18)

The Report concludes that IGMS accurately captured competition data. We will continue to monitor the effectiveness of IGMS in collecting competition information and refine and improve it as necessary. This will include enhancements to the IGMS electronic funding recommendation.

IV. RESPONSE TO RECOMMENDATIONS

OIG comment: The recommendations for Chapter 2 in the final report have been revised and renumbered.

The Report contains a number of recommendations directed to the Assistant Administrator for OARM. OARM's response to each recommendation is outlined below.

Recommendation 2-1: Revise the Order to emphasize that EPA should first seek ways to compete assistance agreements before it decides that competition is not possible.

OARM Response: In the Revised Policy, the sections on how to prepare announcements and conduct competitions precede the section on non-competitive justifications and exceptions from competition. In addition, the GCA's competition training manual has detailed guidance on how to conduct an effective competition.

Recommendation 2-2: Revise the Order to increase competition for assistance agreements including:

- Limiting the blanket exemption for all 40 CFR Part 35 programs to exclude (1) those programs or instances where EPA uses discretionary funds and competition is practicable, and (2) where competition is already required.

- Eliminating the blanket exemption for (1) programs available only to Indian Tribes and Intertribal Consortia, (2) programs that have standards and procedures for competition established by regulation or rule, (3) Senior Environmental Employment Program cooperative agreements, and (4) awards to foreign governments and to United Nations agencies

- Limiting justifications to (1) assistance amounts less than competition threshold, (2) unusual or compelling urgency, (3) interests of national security, (4) lack of competition or sole source, (5) recipient identified by Federal statute, executive order, or international agreement, and (6) other reasons approved by the Lead Agency Program Official and the Grants Competition Advocate.

OARM Response: OARM has taken steps to increase competition for assistance agreements by reducing the competition threshold of $75,000 to $15,000. This will potentially open millions of additional dollars to competition.

OIG comment: Based on awards made in 2003, decreasing the threshold from $75,000 to $15,000 would have increased the dollars competed by an estimated $8 million dollars.

With respect to the first item, as discussed above, the fact that a program may be funded with discretionary money is not the sole factor in deciding whether competition is practicable; other relevant policy factors must be considered. OARM does not believe that it is practicable to

compete the vast majority of State/Tribal Part 35 grants; therefore, the exemption for these programs should be retained. OARM will, however, raise this issue to the Performance Partnership Steering Committee. On the second point, under Sections 6.b and 6.c of the Revised Policy, awards that are competed by statute or regulation (e.g., Brownfields, Water Quality Cooperative Agreements) will no longer be considered exempt awards.

On the second area, as already explained, OARM does not agree that the exemptions for awards to Indian Tribes and Intertribal Consortia, Senior Environmental Employment Cooperative Agreements, and awards to foreign governments or United Nations agencies, should be eliminated.

The final point advocates eliminating the co-regulator/co-implementor and unsolicited proposal exceptions from competition. OARM disagrees with this recommendation. As demonstrated in our comments, the co-regulator/co-implementor exception is legitimate and serves a valuable purpose when properly used and applied. While I agree that the description of it in the Competition Policy was not clear and contributed to implementation issues, these concerns have been remedied in the Revised Policy (Section 12.a(4)) and additional quality control mechanisms have been instituted to ensure proper use of the exception (Section 12.d).

The Report did not contain any detailed discussion justifying the elimination of the unsolicited proposal exception. This exception, which is recognized in Federal procurement and by other agencies, is a legitimate competition exception and will be retained. However, to alleviate any concerns over potential misuse, the Revised Policy requires GCA approval of all justifications using this exception.

Recommendation 2-3: Clarify the requirements for using noncompetitive justifications by improving definitions and providing examples.

OARM Response: OARM agrees with this recommendation and Section 12 of the Revised Policy clarifies and further explains the requirements for using non-competitive justifications. For example, Section 12.a(2) makes clear that being the "best" or "most appropriate" source is not a basis for using the "one responsible source" exception from competition. Section 12.c describes the required content of non-competitive justifications. Section 12.d imposes additional non-competitive justification review and approval responsibilities on the GCA and Lead Agency Officials to minimize any potential misuse of the exceptions.

Recommendation 2-4: Revise the sections of the Order addressing amendments to provide clarity by defining what constitutes a change in the scope of an agreement.

OARM Response: OARM largely agrees with this recommendation. Section 13 of the Revised Policy clarifies the amendment coverage and provides factors to consider in determining whether an amendment is within the scope of work of an agreement. However, because scope issues are essentially fact specific, I believe that it is more appropriate to provide the factors to consider in assessing whether an amendment is within scope rather than attempting to define what is a change in scope.

Recommendation 3-1: Define what constitutes a conflict of interest when evaluating and awarding competitive assistance agreements.

OARM Response: OARM agrees with this recommendation and the Revised Policy includes specific conflicts of interest coverage in Sections 9 and 10.

Recommendation 3-2: Require all reviewers for each competition, including reviewers outside of EPA, to certify in writing that they are free from conflicts of interest.

OARM Response: OARM agrees with this recommendation and it is contained in Sections 9.a and 10 of the Revised Policy.

Recommendation 3-3: Clarify where competition documentation should be maintained and who is responsible for maintaining this documentation.

OARM Response: OARM agrees with this recommendation and Section 15 of the Revised Policy addresses documentation requirements including those imposed under applicable EPA Record Schedules.

Recommendation 3-4: Clarify what information must be contained in or accompany the decision memorandum when sent to the grants management offices for review.

OARM Response: OARM agrees with this recommendation and Sections 9.f, 12, 19.a, and 19.d of the Revised Policy address and clarify what information must be included in or attached to the decision memorandum or funding recommendation submitted to GMOs.

Recommendation 3-5: Reinforce grants management offices responsibilities for assuring compliance with the Order.

OARM Response: Although OARM generally agrees with this recommendation, it should be noted that GMOs are not the only offices who have responsibility for ensuring compliance with the Revised Policy. SROs, Program Offices, the GCA, OGD, OARM, and other offices involved with assistance agreement competitions all have responsibilities for ensuring compliance with the requirements of the Revised Policy. Sections 18 and 19 of the Revised Policy identify the respective responsibilities of the various offices. GMO responsibilities are set forth in Section 19.d. In addition, OGD's Roles and Responsibilities document will be updated to reflect the new responsibilities imposed on offices by the Revised Policy.

V. CONCLUSION AND COMMITMENT

It is clear that the findings and recommendations in the Report reflect longstanding OIG concerns regarding the Agency's efforts and practices in competing assistance agreements and the need to maximize both the effectiveness and quantity of assistance agreement competitions. I

believe, as OMB and the OIG do, that the Competition Policy was a strong and positive step in that direction, and also that the Revised Policy continues forward progress in this area.

Please be assured that the Director of OGD, and the GCA, will aggressively monitor compliance with the Revised Policy to make sure that it is effectively and efficiently implemented and will provide guidance and training to Agency personnel as necessary to facilitate its successful implementation. I also stand ready to work with the OIG and the Agency's SROs to strengthen the Agency's assistance agreement competition policies and procedures.

Thank you for the opportunity to comment on the Report. If you have any questions about OARM's comments, please contact Howard Corcoran, Director, OGD at (202) 564-1903, or Bruce Binder, GCA, at (202) 564-4935.

Attachments

cc: Nikki Tinsley
Assistant Administrators
Regional Administrators
Deputy Regional Administrators
Senior Resource Officials
Grants Management Officers
Junior Resource Officials
Luis Luna
Bruce Binder
Lenee' Morina
Richard Kuhlman
Howard Corcoran
Randy Holthaus
Matt Simber
James Drummond

ATTACHMENT A

EPA provided the revised Order...see http://intranet.epa.gov/ogd/compet/order/5700_5.pdf

ATTACHMENT B

OGC ANALYSIS ON THE USE OF CO-REGULATOR NON-COMPETITIVE JUSTIFICATIONS

OIG comment: During our audit, we interpreted the Order's phrase "in the execution of national environmental programs" to mean directly performing work for a national environmental program. For example, if a State uses grant funds to issue or enforce water permits, we believe it is executing a national environmental program. The Office of General Counsel seems to have redefined the co-regulator justification. OGC's analysis shows the use of a broader standard by introducing the term "relate." OGC's standard was "the questioned activities do *relate* to the execution of a national environmental program."

The fact that OGC used a different interpretation and disagreed with our conclusions on co-regulator justifications provides further support that the standard is ambiguous. Because all activities that EPA supports should relate to the execution of environmental programs, we concluded that the phrase, as interpreted by OGC, would not limit any activity. The standard essentially allows a group to be exempt from competition without a compelling reason. Although EPA has added requirements in the revised Order for using the co-regulator justification, it still has not clearly defined the types of activities that can be funded through organizations representing co-regulators.

OGC stated in footnote 2 of its analysis that the OIG "apparently agrees" that the recipients for these awards qualified as co-regulator entities. We do not agree that any of the recipients were co-regulators. The Order defines co-regulators as States, tribes, or local governments. The recipients of these awards were non-profit organizations.

According to the supplementary information to the Report provided by the OIG to the GCA, the Agency misapplied the co-regulator exception on 13[1] occasions based on the OIG's conclusion that the "funded activities were not for the execution of a national environmental program"[2]. OGC agrees with the OIG and OARM that the co-regulator criteria in the Competition Policy was not clear enough and EPA Program Offices could have provided better justifications in their decision memoranda for using the co-regulator exception-- the Revised Policy should address these concerns. As noted in OARM's response to the Report, Section 12.a(4) of the Revised Policy clarifies the co-regulator criteria to focus on both the characteristics of the organization receiving the award and the activities it will carry out under the agreement.

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[1] The supplementary information identified 13 awards that allegedly inappropriately used the co-regulator exception.

[2] The OIG apparently agrees that the entities that received the questioned awards qualified as co-regulator entities.

Nevertheless, OGC reviewed the documentation relating to the 13 awards and respectfully disagrees with the OIG's conclusion in all 13 cases that the activities under the agreements did not relate to the "execution of national environmental programs". OGC believes that based on the Agency's consistent interpretation of the Federal Grants and Cooperative Agreement Act as reflected in EPA Order 5700.1, Policy For Distinguishing Between Assistance And Acquisition (March 22, 1994), the questioned activities do relate to the "execution of national environmental programs." Specifically:

1. Grant Action 83146601-0, Environmental Council of the States (ECOS). The membership of ECOS is comprised of State environmental commissioners. Phase I of the award provided funding to ECOS to compile new data on State environmental compliance efforts and to produce a joint accomplishments report with EPA. In Phase II, ECOS would look at compliance measures and determine through surveys and facilitated discussion groups of States what compliance measures are effective. States with delegated enforcement authorities execute their environmental compliance programs under Federal standards. Even in cases in which States do not have delegated enforcement authorities, the States and EPA work as partners in national efforts to promote compliance with environmental laws. The activities funded by this agreement relate to the execution of a national environmental program and meet the standards for the co-regulator exception in the Competition Policy.

2. Grant Action 83118101-0, Association of State Drinking Water Administrators (ASDWA). The membership of ASDWA is comprised of state officials responsible for State drinking water programs in which States have "primacy" or primary regulatory responsibilities. The award at issue was to assist States in carrying out their responsibilities under the 1996 Safe Drinking Water Act and to incorporate security considerations into State drinking water protection programs. Because the activities funded by this agreement further the State's role in execution of the national safe drinking water program they relate to the execution of a national environmental program and meet the standards for the co-regulator exception in the Competition Policy.

3. Grant Action 83086301-0, ECOS. The membership of ECOS is comprised of State environmental commissioners. This award enabled ECOS to support State participation in EPA's budgeting process, strategic environmental planning initiatives and in the development of annual performance measures and goals. As discussed in the "Justification for the Award of Assistance" section of the Decision Memorandum for this agreement, joint Federal/State fiscal planning is critical to successful execution of a wide range of national environmental programs. The activities funded by this agreement relate to the execution of a national environmental program and meet the standards for the co-regulator exception in the Competition Policy.

4. Grant Action 83138001-0, STAPPA-ALAPCO. The membership of STAPPA-ALAPCO is comprised of State, territorial and local government air pollution control officials. In addition to States and tribes, local governments are also co-regulators and co-implementors of the Federal Clean Air Act. This grant enabled STAPPA-ALAPCO and its members to actively participate in efforts to coordinate Federal/State/Local implementation of the CAA through training meetings and workshops and to develop studies necessary to establish consolidated positions on national

issues. STAPPA-ALAPCO facilitated communications between EPA and state and local air pollution control agencies that were necessary for the successful execution of the national air pollution control program. The activities funded by this agreement relate to the execution of a national environmental program and meet the standards for the co-regulator exception in the Competition Policy.

5. Grant Action 83097101-0, National Tribal Environmental Council (NTEC). The membership of NTEC is comprised of tribal environmental officials. As explained in the Decision Memorandum, Tribes are co-implementors of CERCLA when hazardous substance contamination occurs on tribal lands. EPA funded NTEC to conduct research into hazardous substance issues that impact tribal lands and to provide the results of that research to the Tribes. In addition, the agreement provided funding to build the capacity of tribal governments by training tribal officials in the use of innovative and alternative treatment technologies for response actions on tribal lands. Both activities relate to the execution of a national environmental program by the Federal and tribal governments and therefore the activities funded by this agreement meet the standards for the co-regulator exception in the Competition Policy.

6, 7, and 8. Grant Actions 98160901-2, 98160901-3, 98160901-4,[14] NESCAUM. NESCAUM is comprised of representatives of the States in the Clean Air Act 184 Ozone Transport Region which includes Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and the District of Columbia. These grants provided base funding for NESCAUM to coordinate member State efforts to implement the national air pollution control program in the aforementioned states as well as additional funding for Air Quality of Life and Mobile Source Public Education and outreach in these states. At the request of the NESCAUM member states, EPA funded NESCAUM with State and Tribal Assistance Grant (STAG) funds taken from allotments for the States under CAA 105 air pollution control grants. In addition, according to Region 1, the statement the OIG attributed to the project officer "that these awards were a means for the states to buy technical help cheaply" is not an accurate representation of the views he expressed to the OIG. Moreover, coordination of state efforts and achieving economies of scale in technical analyses through regional organizations such as NESCAUM is an important means by which EPA and the States can efficiently execute the national air pollution control program. The activities funded by these agreements relate to the execution of a national environmental program and meet the standards for the co-regulator exception in the Competition Policy.

[14] Region One stated that they disagree with the OIG's statement on page 10 of the Report that, "[A]ccording to the project officer, these activities were not part of a national environmental program." The project officer recalls discussing whether the awards were part of a national "assistance program", not whether they were part of a national environmental program for purposes of the co-regulator exception. The project officer believes the OIG misunderstood his comments.

9 and 10. Grant Actions 82956901-2 and 82956901-3, ECOS. These two actions provided supplemental funding to ECOS under a 5 year cooperative agreement to support state and tribal participation in the Forum on State and Tribal Toxics Action (FOSTTA) that EPA competitively awarded in 2001. The term of this agreement extends to 2007. However, EPA did not fund the ECOS cooperative agreement incrementally and the OIG is correct that the supplemental funding actions would have been subject to competition if the "co-regulator" exception was not available. FOSTTA is a means of executing a national environmental program because it is a mechanism for EPA's Office of Pollution Prevention and Toxics (OPPT) and state and tribal leaders to collaborate and coordinate on issues affecting Federal/State/Tribal regulatory and non-regulatory programs on toxics and pollution prevention. As discussed above, ECOS is comprised of state environmental commissioners and represents state interests in the formulation and execution of national environmental programs. ECOS received initial funding of its FOSTTA work based on a "partnership" proposal that included provisions for a sub-grant from ECOS to the National Tribal Environmental Council (NTEC), which is comprised of tribal environmental officials. Because the ECOS cooperative agreement also includes financial assistance to NTEC to ensure that tribal interests are effectively represented in FOSTTA, EPA properly awarded supplemental funding to ECOS under the "co-regulator" exception since funding went to two organizations representing State and Tribal environmental officials.

States and Tribes undertake their own toxics and pollution prevention programs under Federal regulations and technical guidance. FOSTTA is currently organized into three separate projects. The *Chemical Information and Management Project* (CIMP) focuses primarily at this time on the state and tribal role in implementing the national High Production Volume (HPV) Challenge Program. The CIMP effort focuses on how baseline chemical toxicity and ecological effects data can be made more accessible. The *Pollution Prevention Project* is focusing on improving collaboration at federal, state, and tribal levels on the development and implementation of pollution prevention (P2) programs. The *Tribal Affairs Project* is focusing its attention on the Tribes role in addressing emerging chemicals of concern, green buildings/green procurement, and chemical risk assessment. The ECOS supplemental funding amendments meet the test of facilitating state and tribal involvement in the execution of national environmental programs.

11. Grant Action 82915001-2, ECOS. As discussed above, ECOS is comprised of state environmental commissioners and represents state interests in the formulation and execution of national environmental programs. This supplemental funding action is part of a grant that supports state participation in ECOS's joint Federal/State Information Management Workgroup (IMWG) which since 1997 has facilitated state involvement in the development of a cohesive national environmental information system. The IMWG is continually working towards developing and implementing an environmental information system that is designed to provide both Federal and State regulators, as well the public, with access to information needed to document environmental performance, understand environmental conditions, and make sound decisions. Over the past two years, the IMWG has been involved in the development and implementation of the Environmental Exchange Network which is a national information technology initiative by EPA's Office of Environmental Information to integrate Federal and state environmental data systems. This

supplemental funding enabled ECOS to facilitate state participation in the implementation of the Environmental Exchange Network.

Because the Exchange Network is a national environmental program that furthers effective Federal/State environmental protection efforts, and ECOS represents State interests in promoting integration of Federal and State environmental information systems, this action qualified for an exception from competition under the co-regulator exception. However, as the OIG noted, OEI did not cite Section 8.a.5. of the Competition Policy to justify this action. Rather, OEI justified it on the basis of compelling evidence of ECOS's unique or superior qualifications and concluded that no other source could fulfil the projects objectives. OEI also referred to the general statement in the Order that grants that support "the ongoing functions of our state, tribal or local government partners" are not subject to competition. Neither justification cited by OEI was appropriate for this action. OGC and OARM will work with OEI to ensure that it only funds ECOS non competitively for activities that fall under the revised standard for the co-regulator exception or another applicable exception in the Revised Policy.

12. Grant Action 98952901-7, Western States Air Resources Council (WESTAR). WESTAR is similar to NESCAUM in that it is a multi-jurisdictional organization comprised of the directors of state air pollution control agencies. It promotes the exchange of information between EPA and state programs that co-regulate and co-implement the national air pollution control program. In this case, WESTAR used the supplemental funds to provide training, policy support, and technical assistance to its member states on issues relating to air pollution control programs that States carry out under EPA regulations, guidance and policies. The grant action at issue was also funded with STAG appropriations that were allotted to the western states for use under CAA Section 105 continuing environmental program grants. (The WESTAR grant itself is funded under CAA Section 103). As discussed in OARM's comments, Congress intends for EPA to use STAG funds for "common use" projects only with the consent of the States whose CAA 105 funding allotments finance the grant to the co-regulator organization. WESTAR state air program directors establish the budget for the grant and participate in the development of the work plan. The activities funded by this agreement relate to the execution of a national environmental program and meet the standards for the co-regulator exception in the Competition Policy.

13. Grant Action 97437101-2, Southeast Association of Local Air Quality Management Agencies, Metro 4, Inc. (SESARMET4). This organization is comprised of state and local air pollution control officials. Under the CAA, both State and local governments are co-regulators and co-implementors of the national air pollution control program. State and local governments execute their respective air pollution control programs under EPA regulations, guidance and policies. SESARMET4 used the funds at issue to provide training to state and local employees of air pollution control agencies on the causes, effects and extent of air pollution. In circumstances similar to the WESTAR and NESCAUM cases, some of the funds EPA used to finance this grant action came from STAG funds allotted to States as well as county governments for CAA 105 continuing air pollution control programs. As discussed above, Congress intends for EPA to use STAG funds for "common use" projects only with the consent of the States (and in this case local governments) whose CAA 105 funding allotments finance the grant to the co-regulator

organization. The activities funded by this agreement relate to the execution of a national environmental program and meet the standards for the co-regulator exception in the Competition Policy.

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