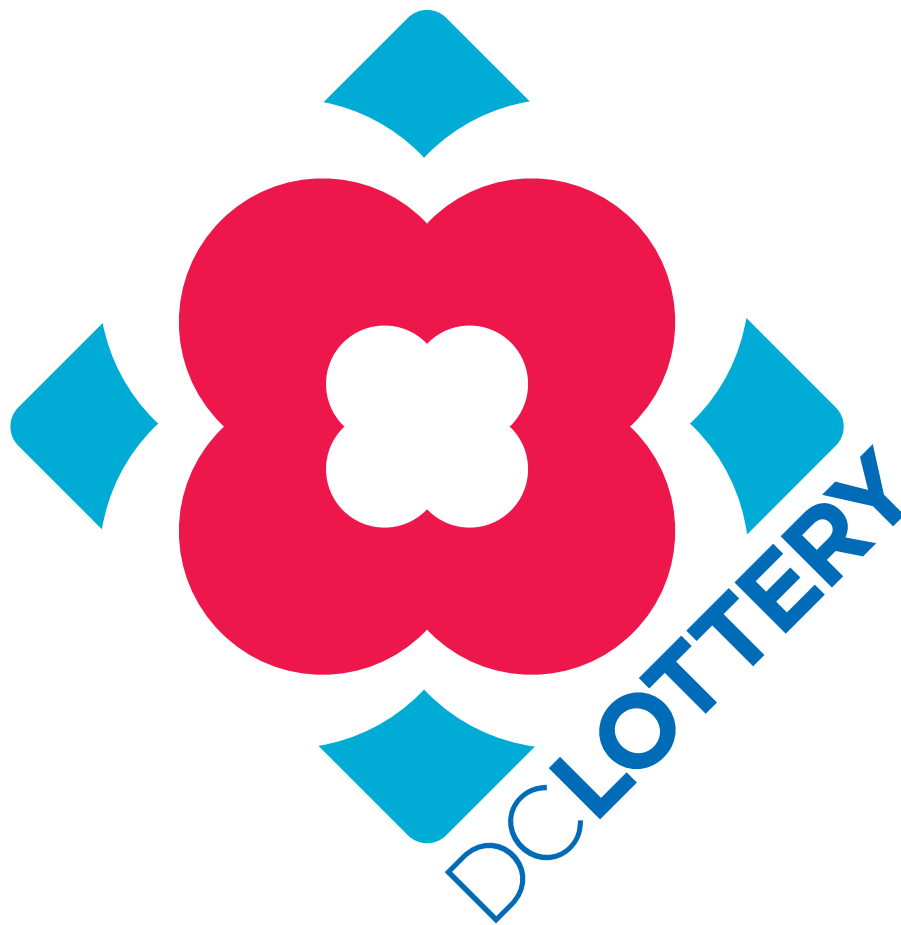


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# Weakness Cited in Monitoring Lottery Contract CBEs

July 7, 2021

A report by the Office of the District of Columbia Auditor



# Table of Contents

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Executive Summary ..... 1

Background .....2

Objectives, Scope, and Methodology ..... 4

Audit Results .....7

Conclusion ..... 20

Agency Comments ..... 21

ODCA Response to Agency Comments..... 44

Summary of Report Recommendations .....47

Appendix A ..... 50

Appendix B ..... 55

# Executive Summary

## Why ODCA Did This Audit

We did this audit in response to a request by D.C. Councilmember Elissa Silverman that ODCA review the compliance with District CBE law with regard to the OLG contract, and to review whether the CBEs associated with the OLG contract meet the definition of small, local businesses as defined by the CBE law. A copy of the request from Councilmember Silverman can be found in Appendix A.

## What ODCA Found

Neither the Department of Small and Local Business Development (DSLBD) nor the Office of Lottery and Gaming (OLG) monitored actual work performed by Certified Business Enterprises (CBEs) on the OLG contract between OLG and Intralot to provide sports wagering and lottery gaming services. Each agency contends it is the responsibility of the other to ensure CBEs are actively participating on the contract and performing meaningful work. A review of D.C. law revealed a lack of relevant guidance regarding CBE oversight. For the OLG contract, we found that DSLBD allowed Intralot to violate the law by using a subcontractor, DC09, to pay CBEs. DSLBD awarded credit toward the 35% CBE participation goal for work not performed by two CBEs. The CBE compliance rate is less than 1% one year into a five- year contract. We also found that OLG did not require Intralot to provide supporting documentation for CBEs and that invoices are not being reviewed by the Contracting Officer Technical Representative (COTR).

For CBE certifications, we found sufficient and appropriate evidence that DSLBD followed D.C. law in processing and approving same-day self-

recertifications. However, DSLBD did not have an appropriate, effectively designed process to validate three CBE certification requirements in the D.C. Code. DSLBD could not provide evidence of how they evaluate and confirm:

- The Local Business Enterprise (LBE) requirement of managerial functions in the principal office.
- The Small Business Enterprise (SBE) requirement of independently owned, operated and controlled.
- The Veteran Owned Business (VOB) requirement of one or more veterans controlled the management and daily operations.

## What ODCA Recommends

- The D.C. Council should amend the law to clearly define “managerial functions” and “independently controlled owned and operated” with language that is measurable and verifiable.
- The D.C. Council should amend the law to delineate the responsibility of the contracting agency and the responsibility of DSLBD to ensure CBEs are performing work.
- DSLBD should ensure contract beneficiaries pay CBEs from their own business account, and only award credit toward the 35% CBE goal for payments made by the beneficiary.
- OLG should comply with the contract terms and not approve invoices without supporting documentation for all work performed, including work performed by CBEs.
- OLG should require the assigned COTR to ensure adherence to terms of the contract.

# Background

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Established in 2005, the Department of Small and Local Business Development (DSLBD) is the D.C. government agency responsible for administering the Certified Business Enterprise (CBE) program. This includes:

- Certifying businesses that meet the criteria outlined in D.C. Code.
- Overseeing the recertification process every three years.
- Overseeing compliance of District agencies and beneficiaries of all government assisted contracts.

CBE businesses receive preferred procurement and contracting opportunities with the D.C. government, including proposal points and a bid percentage price reduction for each CBE category. The CBE certification categories include: Local Business Enterprise (LBE), Small Business Enterprise (SBE), Disadvantaged Business Enterprise (DBE), Development Zone Enterprise (DZE), Resident-Owned Business (ROB), Longtime Resident Business (LRB), Veteran-Owned Business Enterprise (VOB), and Local Manufacturing Business Enterprise (LME)<sup>1</sup>.

The mission of DSLBD is to support "...the development, economic growth, and retention of District-based businesses and promote(s) economic development throughout the District's commercial corridors." DSLBD provides a variety of services and assistance programs to District-based businesses through several divisions and programs. DSLBD also has statutory goals including to stimulate and expand the District's tax base and also extending economic prosperity to local business owners, their employees, and the communities they serve<sup>2</sup>. This audit included a review of certain functions of two divisions within DSLBD: the Certification Division and the Compliance and Enforcement Division.

## **DSLBD's Certification Division (Certification Division)**

The Certification Division oversees the certification and recertification of businesses. Initially, businesses were certified as CBEs for two years, however the recertification was found to be burdensome for businesses and DSLBD. In 2014, the D.C. Council passed legislation that changed the certification period from two years to three years and also allowed for businesses to receive a second or subsequent recertification on the same day they applied if they were not reporting a material change to their business (known as same-day self-recertification) as ways to simplify the recertification process and documentation necessary for recertification.

The Certification Division implemented a process to confirm continued eligibility by businesses that completed the same-day self-recertification, declaring there was no material change to their business in the past three years. Businesses receive an email from DSLBD staff requesting documentation to verify the continued certification in whichever categories they are certified for. This follow-up is not required by law but was instituted by DSLBD to ensure the continued eligibility of certified businesses.

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<sup>1</sup> An additional certification category, D.C. Code §2-218.77, Equity Impact Enterprise became law after the scope of our audit.

<sup>2</sup> D.C. Code § 2-218.13.

## **DSLBD's Compliance and Enforcement Division (Compliance Division)**

The Compliance Division is responsible for ensuring compliance with the 35% CBE participation requirement and CBE utilization and participation by District agencies. All D.C. government contracts of more than \$250,000 require that at least 35% of the contract award amount goes to small business enterprises, unless a waiver is approved by DSLBD. The Compliance Division accomplishes this task by requiring contract beneficiaries to submit a quarterly report and each CBE that received payment during the quarter must submit a DSLBD designed Vendor Verification Form (VVF) which confirms the amount they were paid and who paid them.

## **OLG's contract with Intralot needed to comply with CBE requirements**

The Office of Lottery and Gaming (OLG), which operates under the Office of the Chief Financial Officer (OCFO), signed a multi-year contract CFOPD-19-C-041 for \$215,000,000 with Intralot for Sports Betting/Wagering, Lottery Gaming Systems and Related Services (OLG contract) on July 16, 2019, after receiving approval by the D.C. Council on July 9, 2019<sup>3</sup>. This contract was exempt, by D.C. Council action, from the Procurement Practices Reform Act of 2010, but is required to meet or exceed CBE requirements of at least 35% of the contract award amount being subcontracted to CBEs<sup>4</sup>. As explained in the D.C. Council Committee report, the procurement exemption authorized the OLG to negotiate for a new contract with Intralot, which was the existing vendor. This new contract with Intralot would maintain and modernize existing functions of D.C.'s lottery and also include sports wagering in the city, which was legalized by the Council of the District of Columbia in January 2019<sup>5</sup>.

The following CBEs were listed in the subcontracting plan that was required to be submitted with Intralot's proposal to OLG:

- Veterans Services Corporation (VSC).
- M Jones & Companies LLC (M Jones).
- Octane LLC (Octane).
- Goldblatt Martin Pozen LLP (GMP).
- SBC Corporation (SBC).
- District Services Management (DSM).
- Potomac Supply Company LLC (PSC).

OLG also approved Intralot's use of additional subcontractors who are not CBEs, including DC09, LLC (DC09), NeoPollard Interactive, and INSPIRED Entertainment as long as the subcontractors are subject to every provision of the contract.

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3 Proposed Resolution 23-361, the "Contract No. CFOPD-19-C-041, Sports Wagering, Lottery Gaming Systems and Related Services Approval Resolution of 2019" R23-177, effective from July 9, 2019; 66 DCR 8293.

4 Bill 23-25, the "Sports Wagering Procurement Practices Reform Exemption Act of 2019", D.C. Law 23-1, effective from April 18, 2019; 66 DCR 5539.

5 Bill 22-1071, the "Sports Wagering Lottery Emergency Amendment Act of 2018", A 22-630, effective from January 30, 2019; 66 DCR 1745. And Bill 22-944, the "Sports Wagering Lottery Amendment Act of 2018", D.C. Law 22-312, effective from May 3, 2019; 66 DCR 5807.

# Objectives, Scope, and Methodology

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## Objectives

The objectives of this audit were to:

- Determine whether the Department of Small and Local Business Development (DSLBD) complied with District law in certifying and recertifying the Certified Business Enterprise (CBE) status of the seven CBEs listed on the OLG contract<sup>6</sup>.
- Determine whether DSLBD complied with District law in assessing the compliance with CBE requirements by the beneficiary, Intralot, and CBEs.
- Evaluate how the OLG/ OCFO monitored Intralot's compliance with the OLG contract requirements.

This audit was performed in response to D.C. Councilmember Silverman's request that ODCA review the compliance with District CBE law of a contract between the OLG and Intralot to provide sports wagering and lottery gaming services, and that ODCA review whether the CBEs associated with the OLG contract meet the definition of small, local businesses as defined by CBE law.

## Scope

The scope of this audit was broken into specific time periods based on the different objectives:

- The audit covers all DSLBD actions related to the most recent certification, recertification and/or same-day self-recertification of the seven CBEs, which spans the time period January 1, 2015 through August 31, 2020.
- The audit also covers all DSLBD actions related to assessing the compliance with CBE requirements by the beneficiary, Intralot, and CBEs from July 16, 2019 (contract award date) through August 31, 2020.<sup>7</sup>
- OLG/OCFO audit scope is from July 16, 2019 (contract award date) through August 31, 2020.

## Methodology

For the CBEs listed on the OLG contract subcontracting plan, we:

- Conducted interviews with the Director of the Certification Division.
- Identified the CBE categories that they applied for, as a certification, recertification, material change, and/or same-day self-recertification listed on their applications and noted the year of the application.
- Reviewed applications submitted to DSLBD between January 1, 2015 through August 31, 2020.
- Identified the sections of the D.C. Code, D.C. Municipal Regulations (DCMR) and DSLBD SOPs for each CBE category.

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<sup>6</sup> Contract No. CFOPD-19-C-041, Sports Betting, Lottery Gaming Systems and Related Services.

<sup>7</sup> The OLG contract was signed on July 16, 2019. Intralot did not begin billing for work performed until October 2019.

- Reviewed the supporting documentation that DSLBD collected from the applicants and assessed whether appropriate documentation was collected to show that the applicant was certified in accordance with the applicable D.C. Code, DCMR, and SOP requirements.
- Reviewed DSLBD's CBE Analysis Report and documented how DSLBD made their certification determinations.
- Noted instances when the DCMR or SOPs were silent regarding a section of the D.C. Code.

To determine compliance with the law for CBE requirements on the Intralot contract, we:

- Conducted interviews with the Director of the Compliance Division and staff.
- Identified three sections of the D.C. Code to be reviewed for compliance and monitoring by DSLBD from the contract award date through August 31, 2020.
- Identified any references in the DCMR for DSLBD, references in DSLBD Compliance Division Draft Standard Operating Procedures, and documented any other guidance created and used by DSLBD to conduct compliance and monitoring for each D.C. Code section.
- Identified and reviewed documents that Intralot submitted to DSLBD, including the Subcontracting Plan, Subcontracting Agreements signed by each CBE, Quarterly Reports for the contract, Vendor Verification Forms (VVF) provided by each CBE that was paid, and payment history for each CBE that was paid during each quarter.
- Obtained supporting documentation from Intralot including bank statements and invoices to support work performed by CBEs.
- Identified and reviewed any additional correspondence between DSLBD and the beneficiary, Intralot, to demonstrate DSLBD monitoring and review for compliance with the requirements.
- Obtained quarterly employee reports from the Department of Employment Services (DOES) for all businesses on the OLG contract for the third and fourth quarter of 2019, and the first, second, and third quarters of 2020.
- Determined whether DSLBD was monitoring the contract for compliance with the relevant sections of the D.C. Code.

To evaluate how OLG monitored Intralot's compliance with contract requirements, we:

- Received details of invoices paid by OLG to Intralot via internally generated SOAR inquiries. These reports provided information such as the purchase order number, invoice number, invoice date and payment amount.
- Selected all invoices (23) within the audit period and requested OLG provide evidence of COTR review and supporting documentation for invoices submitted by contractors.
- Reviewed Intralot invoices, PASS review logs, and email correspondence discussing the approval of services and items provided by the beneficiary, Intralot. Invoice amounts and descriptions of items and services provided were also reconciled to SOAR inquiries.
- Conducted additional testing procedures to determine the extent of OLG's monitoring practices for sales invoices submitted by the beneficiary, Intralot. Retailer Activity Sales Summaries were reconciled to monthly sales invoices to confirm the accuracy of reported amounts.
- Recalculated commission earned by Intralot, as evidenced within sample sales invoices.

- Reviewed documentation provided by DSLBD including the beneficiary, Intralot, Quarterly Reports, Vendor Verification Forms, and the payment history for all CBEs paid through the third quarter of FY 2020. CBE payments reported within this documentation were then reconciled to corresponding Intralot invoices.

This report was drafted, reviewed, and approved in accordance with the standards outlined in ODCA's Policies and Procedures.

# Audit Results

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DSLBD did not provide evidence it complied with D.C. law in certifying six of the CBEs listed on the OLG Contract Subcontracting Plan. Specifically, DSLBD did not have an appropriate, effectively designed process to validate three CBE certification requirements in the D.C. Code, including how they evaluate managerial functions performed in the principal office, whether the business is independently owned, operated and controlled, or whether one or more veterans controlled the management and daily operations. Additionally, if a business reports a material change as a part of their recertification, we could not determine if DSLBD complied with the law. However, we did find there was sufficient and appropriate evidence that DSLBD followed D.C. law in processing and approving same-day self-recertifications.

ODCA also found that neither DSLBD nor OLG monitored actual work performed by CBEs which led to CBEs receiving credit for work not performed. OLG did not require the beneficiary, Intralot, to provide supporting documentation for CBEs. In addition, invoices are not being reviewed by the Contracting Officer Technical Representative (COTR). Today D.C. law does not provide adequate relevant guidance regarding CBE oversight. Instead, D.C. law primarily focuses on payment to CBEs.

We are aware of changes DSLBD is currently seeking to implement as a result of this audit. This includes proposing legislation to the D.C. Council, and updates to Chapter 8 of Title 27 of the DC Municipal Regulations.

## **DSLBD did not provide evidence they complied with the law in certifying and recertifying six of the seven<sup>8</sup> CBEs on the OLG contract.**

In order to be certified as a CBE, businesses must meet criteria for each certification category found in the D.C. Code. We reviewed the following categories and these specific requirements that the CBEs on the OLG contract applied for (see Appendix B for a complete list of all requirements, in effect at the time, for each certification category we reviewed).

**Local Business Enterprise (LBE)** certification is required for all applicants. LBE has four D.C. Code requirements<sup>9</sup> a business must meet for certification:

- Has its principal office located physically in the District of Columbia.
- Its chief executive officer and the highest-level managerial employees of the business enterprise perform their managerial functions in their principal office located in the District.
- Owners of more than 50% of the business are residents of the District.
- Is licensed pursuant to D.C.'s General License law.

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8 The seventh CBE (Octane) was only reviewed for same-day self-recertification by DSLBD during our scope and had no material changes reported. We reviewed recertifications of three CBEs before the same-day self-recertification was available (VSC, M Jones, GMP); and reviewed three CBE certifications (DSM, SBC, PSC).

9 The following D.C. Code sections were reviewed: § 2-218.31(1), § 2-218.31(2), Can demonstrate one of the following: § 2-218.31(2A)(B), Can demonstrate one of the following: § 2-218.31(3)(A). See Appendix B for a complete list of all LBE requirements.

**Small Business Enterprise (SBE)** has three D.C. Code requirements<sup>10</sup> a business must meet for certification:

- Is a Local Business Enterprise.
- Is “independently owned, operated, and controlled”.
- Has had averaged annualized gross receipts for the three years preceding certification not exceeding certain limits.

**Disadvantaged Business Enterprise (DBE)** has two D.C. Code<sup>11</sup> requirements a business must meet for certification:

- Owned, operated, and controlled by economically disadvantaged individuals<sup>12</sup>;
- Is a Local Business Enterprise.

**Development Zone Enterprise (DZE)** has one D.C. Code<sup>13</sup> requirement a business must meet for certification:

- Is a Local Business Enterprise with its principal offices located in an enterprise zone designated by D.C.

**Resident Owned Business (ROB)** has one D.C. Code<sup>14</sup> requirement a business must meet for certification:

- Is a Local Business Enterprise with a majority ownership that is subject to personal income tax solely in the District of Columbia<sup>15</sup>.

**Veteran Owned Business (VOB)** has three D.C. Code<sup>16</sup> requirements a business must meet for certification:

- Is a Local Business Enterprise.
- Is not less than 51% owned and operated by one or more veterans.
- One or more veterans control the management and daily operations.

Specifically, DSLBD could not provide evidence of how the LBE requirement of managerial functions in the principal office is evaluated and confirmed. Because certification as an LBE is required for the other certification categories we reviewed, we could not confirm certification for SBE, DBE, DZE, ROB, and VOB.

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10 The following D.C. Code sections were reviewed: § 2-218.32(a)(1)(A), § 2-218.32(a)(2), Can demonstrate § 2-218.32(a)(3)(A) or (B). See Appendix B for a complete list of all SBE requirements.

11 The following D.C. Code sections were reviewed: § 2-218.33(a)(1), § 2-218.33(a)(2)(A). See Appendix B for a complete list of all DBE requirements.

12 D.C. Code § 2-218.02 (7). “Economically disadvantaged individual” is defined as meaning “an individual whose ability to compete in the free enterprise system is impaired because of diminished opportunities to obtain capital and credit as compared to others in the same line of business where such impairment is related to the individual’s status as socially disadvantaged. An individual is socially disadvantaged if the individual has reason to believe that the individual has been subjected to prejudice or bias because of his or her identify as a member of a group without regard to his or her qualities as an individual.”

13 D.C. Code § 2-218.37.

14 D.C. Code § 2-218.35.

15 Definition of “Resident owned business” D.C. Code § 2-218.02(15).

16 D.C. Code Sections § 2-218.38(1), § 2-218.38(2), § 2-218.38(4). We did not evaluate § 2-218.38(3). See Appendix B for a complete list of all VOB requirements.

Additionally, DSLBD could not provide evidence of how the SBE requirement of independently owned, operated, and controlled was evaluated and confirmed, or how the VOB requirement of one or more veterans controlled the management and daily operations was evaluated and confirmed. Otherwise, DSLBD provided sufficient proof businesses met the other requirements we reviewed. Figure 1 shows the six CBEs, whose certification or recertification we reviewed, where DSLBD did not provide evidence to support compliance with the LBE, SBE and VOB (where applicable) and the reason why we could not confirm the certification.

**Figure 1: CBEs DSLBD Did Not Provide Evidence for Certification**

CBE	LBE	SBE	DBE	DZE	ROB	VOB	DSLBD Did Not Provide Evidence to Support
VSC	✓	✓	✓	✓	✓		LBE: "managerial functions in their principal office located in the District" SBE: LBE status; "independently owned, operated and controlled" DBE: LBE status DZE: LBE status ROB: LBE status
GMP	✓	✓		✓	✓		LBE: "managerial functions in their principal office located in the District" SBE: LBE status; "independently owned, operated and controlled" DZE: LBE status ROB: LBE status
M JONES	✓	✓	✓		✓		LBE: "managerial functions in their principal office located in the District" SBE: LBE status; "independently owned, operated and controlled" DBE: LBE status ROB: LBE status
DSM	✓	✓		✓	✓	✓	LBE: "managerial functions in their principal office located in the District" SBE: LBE status; "independently owned, operated and controlled" DZE: LBE status ROB: LBE status VOB: LBE status; "One or more veterans control the management and daily operations"

CBE	LBE	SBE	DBE	DZE	ROB	VOB	DSLBD Did Not Provide Evidence to Support
SBC	✓	✓	✓	✓	✓		LBE: “managerial functions in their principal office located in the District” SBE: LBE status; “independently owned, operated and controlled” DBE: LBE status DZE: LBE status ROB: LBE status
PSC	✓	✓	✓			✓	LBE: “managerial functions in their principal office located in the District” SBE: LBE status; “independently owned, operated and controlled” DBE: LBE status ROB: LBE status

Source: ODCA analysis

DSLBD determines whether the business qualifies for CBE certification and recertification without validating the information claimed by the business. DSLBD is not concerned with managerial functions being performed in the primary business location if they are reviewing proof of residency to confirm that the owner is located in Washington, D.C. Specifically, the Certification Division SOPs require a site visit prior to certification approval unless the business is applying for ROB. However, DSLBD did not do a site visit prior to certification or recertification for any of the six CBEs we reviewed because they were applying for ROB.

Additionally, the D.C. Code does not define “managerial functions” for LBE certification<sup>17</sup>, and does not define or explain “independently owned, operated and controlled” for SBE certification<sup>18</sup>. The municipal regulations for DSLBD have not been updated since 2009 and do not mention or reference how to evaluate: who is performing managerial functions in the principal office or controlling daily operations, or how the business is “independently owned, operated and controlled”.

Without a process for verifying information claimed by an applicant, businesses could be certified or recertified that are not in compliance with the law and potentially take business away from companies who are in compliance with the law. The managerial functions of the businesses could happen somewhere other than specifically or directly at the principal office, or at another location, including a location outside of D.C., or businesses could have outside ownership or control. These businesses could be part of a winning contract and receive preference points and a bid price reduction when they should not have<sup>19</sup>. The

<sup>17</sup> D.C. Code Sections § 2-218.31(2), § 2-218.31(2A)(B), § 2-218.31(3)(A).

<sup>18</sup> D.C Code §2-218.32(a)(2)

<sup>19</sup> The OLG contract was exempt from Bill 18-610, the “Omnibus Procurement Reform Amendment Act of 2010” the Law 18-371 by Bill 23-25, the “Sports Wagering Procurement Practices Reform Exemption Act of 2019”, Law 23-1, effective April 18, 2019 (66 DCR 5539), so preference points and a bid price reduction were not considered in the awarding of this contract.

risk of non-compliance increases if there is no visual check for businesses applying for ROB.

If businesses that do not comply with the law are certified, DSLBD is not meeting the mission of the agency to support the development, economic growth, and retention of District-based businesses or the agency goal of “extending economic prosperity to local business owners, their employees, and the communities they serve.”<sup>20</sup>

## Recommendations

1. The D.C. Council should amend the law to clearly define “managerial functions” and “independently controlled owned and operated” with language that is measurable and verifiable.<sup>21</sup>
2. DSLBD should clearly identify in DCMR and SOPs how each relevant section of the D.C. Code is examined and reviewed and what supporting documentation is necessary to determine if the business meets the criteria for certification.

### **DSLBD conducted its follow up of same-day self-recertifications late, not following its SOPs of six months.**

Certification Division SOPs state that CBEs approved through the same-day self-recertification process are automatically scheduled for a six-month follow-up by DSLBD: This follow-up could include a telephone call, spot check or site visit. Part of the follow-up verification process is a request for businesses to provide a list of items such as taxes, business license, or lease.

DSLBD did not conduct a follow-up within six months for all five of the CBEs (VSC, M Jones, GMP, DSM, Octane)<sup>22</sup> approved for same-day self-recertification who are on the OLG contract<sup>23</sup>.

Follow-up occurred anywhere from eight to 20 months after the same-day self-recertification was approved as noted in Figure 2.

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20 D.C. Code §2-218.13 (a)(1).

21 The D.C. Council sought to clarify “independently owned, operated and controlled” in emergency legislation passed on September 21, 2020 (Act 23-476) and further define the term in emergency legislation passed on June 28, 2021 (Bill 24-318).

22 Two CBEs listed on the Subcontracting Plan did not apply for a same-day self-recertification within the scope of our audit. PSC was certified by DSLBD in 2019 and will expire in 2022. SBC reported a material change that made then ineligible for same-day self-recertification. Octane had two same-day self-recertifications during our scope.

23 DSLBD issued guidance in January 2019 stating that follow up to same-day self-recertification would occur within six weeks of the same-day self-recertification. This timeframe did not match the six months referenced in the Certification Division SOPs.

**Figure 2: Number of Months DSLBD was Late for Follow-Up**

CBE	Months Late
VSC	10
M Jones	8
GMP	17
DSM	2
Octane	20
Octane	No follow-up during audit scope

Source: ODCA Analysis

Follow-up is conducted by the Certification and/or Compliance Division, which have 22 FTEs between them<sup>24</sup> to monitor more than 1,900 CBEs<sup>25</sup> as well as D.C. government agencies, and CBE compliance on contracts (i.e. 35%). The resources allocated to these two divisions may not be sufficient to perform all the functions necessary within the timeframes identified.

Follow-up verification for CBEs that completed a same-day self-recertification is done by the Certification division. When asked for documentation supporting follow-up, DSLBD explained follow-up “is not required by law, but is an effort to ensure all active CBEs continue to qualify” but did not provide specifics for why follow-up was not taking place within the specified timeframe. Without follow-up, DSLBD cannot know if businesses that were recertified are in compliance with the law and those businesses could potentially take business away from companies that are in compliance with the law. Businesses could be misrepresenting their eligibility for certain CBE designations (e.g. ROB) and be selected for a government contract over a business that did meet all requirements.

## Recommendation

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

## We could not determine if DSLBD complied with the law in recertifying SBC when it reported a material change.

D.C. Code allows for a CBE that has no material change in its business status to be recertified for a three-year period the same day they apply to DSLBD. Material change<sup>26</sup> is defined in the D.C. Code as a

<sup>24</sup> According to the Fiscal Year 2021 Budget and Financial Plan, DSLBD’s Certification Division has 6 FTEs and the Compliance Division has 16 FTEs.

<sup>25</sup> DSLBD database of CBE Certified Contractors, see <https://dslbd.secure.force.com/public/> (showing 1,947 records).

<sup>26</sup> D.C. Code § 2-218. 02(13A) defines “Material Change” to mean a change in a business’: (A) Ownership; (B) Address; or (C) Size, if certified as a small business enterprise as defined in § 2-218. 32.

change in a business's ownership, address, or size. Before D.C. law changed to allow for same-day self-recertification, businesses had to meet criteria for each certification category found in the D.C. Code each time they recertified with DSLBD.

SBC reported a material change and was recertifying for the following categories: LBE, SBE, DBE, DZE and ROB. The D.C. Code requirements for these categories are:

**Local Business Enterprise (LBE)** certification is required for all applicants. LBE has four D.C. Code requirements<sup>27</sup> a business must meet for certification:

- Has its principal office located physically in the District of Columbia.
- Its chief executive officer and the highest-level managerial employees of the business enterprise perform their managerial functions in their principal office located in the District<sup>27</sup>.
- Owners of more than 50% of the business are residents of the District.
- Is licensed pursuant to D.C.'s General License law.

**Small Business Enterprise (SBE)** has three D.C. Code requirements<sup>28</sup> a business must meet for certification:

- Is a Local Business Enterprise.
- Is "independently owned, operated, and controlled".
- Has had averaged annualized gross receipts for the 3 years preceding certification not exceeding certain limits.

**Disadvantaged Business Enterprise (DBE)** has two D.C. Code<sup>29</sup> requirements a business must meet for certification:

- Owned, operated, and controlled by economically disadvantaged individuals.
- Is a Local Business Enterprise.

**Development Zone Enterprise (DZE)** has one D.C. Code<sup>30</sup> requirement a business must meet for certification:

- Is a Local Business Enterprise with its principal offices located in an enterprise zone designated by D.C.

**Resident Owned Business (ROB)** has one D.C. Code<sup>31</sup> requirement a business must meet for certification:

- Is a local business enterprise with a majority ownership that is subject to personal income tax solely in the District of Columbia<sup>32</sup>.

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27 The following D.C. Code sections were reviewed: § 2-218.31(1), § 2-218.31(2), Can demonstrate one of the following: § 2-218.31(2A)(B), Can demonstrate one of the following: § 2-218.31(3)(A). See Appendix B for a complete list of all LBE requirements.

28 The following D.C. Code sections were reviewed: § 2-218.32(a)(1)(A), § 2-218.32(a)(2), Can demonstrate § 2-218.32(a)(3)(A) or (B). See Appendix B for a complete list of all SBE requirements.

29 D.C. Code § 2-218.33(a)(1), § 2-218.33(a)(2)(A). See Appendix B for a complete list of all DBE requirements.

30 D.C. Code § 2-218.37.

31 D.C. Code § 2-218.35.

32 Definition of "Resident owned business" D.C. Code § 2-218.02(15).

We could not determine if DSLBD complied with the law in recertifying SBC, which reported a material change and did not qualify for same-day self-recertification. DSLBD required documentation supporting only the material change reported in order to recertify.

DSLBD disagrees with ODCA's interpretation of the law. DSLBD's interpretation of the law outlined in Certification Divisions SOPs is if there is a material change, the business needs only to provide documentation supporting the material change. The DC Council's intent appears only to amend the law when there is not a material change<sup>33</sup>. This implies that the recertification process prior to the same-day self-recertification becoming law would need to be completed. Neither the D.C. Code nor the DCMR clearly state what is required to be submitted to DSLBD for recertification if there is a material change being reported by the CBE. The D.C. Code defines material change but does not address what should be done if there is a material change.

If businesses that report a material change are not going through a full recertification process, they could be recertified without being in compliance with the law and potentially take business away from companies that are in compliance with the law. A material change could affect compliance with, and eligibility for several CBE certification categories, and if all supporting documentation is not received, DSLBD is not able to confirm continued eligibility.

## Recommendations

4. The D.C. Council should amend the D.C. Code to clearly state what is required when reporting a material change.
5. DSLBD should clearly identify in the DCMR what is required for recertification if the business has a material change to report.

## **DSLBD approved and applied credit toward the statutory 35% CBE requirement on the OLG contract for work not performed by two CBEs, VSC and Octane.**

D.C. Code requires at least 35% of the dollar volume of the contract be subcontracted to CBEs<sup>34</sup>. D.C. Code also requires the contract beneficiary<sup>35</sup> to provide quarterly reports to DSLBD that include a description of the goods or services provided by each CBE. DSLBD also requires each CBE to submit a VVF<sup>36</sup> acknowledging they were paid.

The OLG contract with the beneficiary, Intralot, states that OLG shall review and approve all prospective employees, contractors, consultants or other person assigned to provide services. The OLG contract with

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33 Legal Sufficiency Determination issued November 3, 2014 by General Counsel, Council of the District of Columbia and included as Attachment H of the Committee Report for Bill 20-892, the "Small and Certified Business Enterprise Waiver and Recertification Amendment Act of 2014".

34 D.C. Code § 2-218.46(a)(2)(A)

35 D.C. Code § 2-218.02(1B) "Beneficiary" means a business enterprise that is the prime contractor or developer on a government-assisted project.

36 DSLBD explained the VVF was created in response to an IG Audit for CBEs to acknowledge performance of work and confirm receipt of payment. There is no mention of the VVF in the D.C. Code or DCMR.

the beneficiary, Intralot, also states that the contractor shall not subcontract any of the Contractor’s work or services to any subcontractor without the prior, written consent of the Contracting Officer (CO).

DSLBD awarded \$280,000 in credit to VSC, and \$179,090 in credit to Octane toward the 35% CBE requirement on the OLG contract for work not performed by these two CBEs. A review of invoices<sup>37</sup> and VVFs from VSC and Octane show that these CBEs billed Intralot and received payment for work they did not perform with their own resources. VSC’s invoices reference a memorandum of understanding (MOU) with other entities to be paid for work performed on behalf of VSC. Octane’s invoice included supporting documentation that showed work performed by other entities<sup>38</sup>.

VSC’s subcontracting agreement with the beneficiary, Intralot, states VSC will be paid on a monthly basis 51% of the total payment received by the Contractor up to \$109,650,000 over five years and VSC will provide the function of and serve as operations manager for the OLG contract with responsibilities including: Oversight and management of Central System, Integration and conversion, Field Services, Call Center, Budget; Marketing and Advertising, Gaming Product development and implementation. However, VSC only had two employees<sup>39</sup> reported on a payroll document, and on quarterly reports filed with DOES. A year into a five-year contract, it is clear VSC did not and cannot perform the work outlined in the subcontract agreement with only two employees. However, in Fiscal Year 2021 VSC hired five additional employees. Figure 3 below shows each CBE’s subcontracting plan amount and how much they reported to DSLBD as being paid through the third quarter 2020.

**Figure 3: CBE Spending on the OLG Contract**

CBE	Subcontracting Plan Amount	Amount Paid Through 3rd Quarter 2020	% Paid Toward Subcontracting Plan Amount
VSC	\$ 109,650,000	\$ 280,000	0.26%
OCTANE	\$ 3,500,000	\$ 179,090	5.12%
PSC	\$ 3,000,000	\$ 345,086	11.50%
M JONES	\$ 1,250,000	\$ 40,000	3.20%
DSM	\$ 1,200,000	\$ -	0.00%
SBC	\$ 600,000	\$ 66,318	11.05%
GMP	\$ 300,000	\$ 53,704	17.90%
Total	\$ 119,500,000	\$ 964,197	0.81%

Source: ODCA analysis

37 ODCA asked DSLBD to request CBE invoices and any supporting documentation from Intralot. DSLBD has explained to ODCA this is not part of their compliance process.

38 During the course of this audit, ODCA brought these observations to DSLBD’s attention and DSLBD has since reduced the amount of credit given towards the CBE goal.

39 Payroll record shows only two employees during our scope. Five employees were added in at the end of 2020 (one in November, four in December).

DSLBD believes monitoring of work performed is a responsibility of the contracting agency, in this case OLG. If DSLBD is made aware of a concern regarding quarterly reporting on a contract, DSLBD would ask the contract beneficiary for cancelled checks for proof of payment but would not ask for copies of invoices or payroll records.

DSLBD relies on the quarterly reports submitted by the beneficiary, Intralot, and VVFs prepared by each CBE indicating they were paid during the quarter. When the Compliance Division receives quarterly reports, they apply credit toward the contract CBE goal without reviewing the scope of subcontractor agreements. They also do not review information filed with DOES to confirm the CBEs have sufficient employees to perform the duties outlined in their subcontractor agreement and for which payment is received.

D.C. Code provisions focus on CBEs receiving payment and do not focus on actual performance of work. Additionally, there is no mention of contract reporting requirements in the DCMR and DSLBD did not have finalized SOPs for the Compliance Division. Without documentation to support work being performed by CBEs, credit is simply awarded without validation. This increases the risk of fraud and abuse of the CBE program. The OLG contract may appear to meet its CBE spend goal based upon CBEs receiving credit for work they did not perform. In addition, the mission of DSLBD and the goal of the CBE program are not being met when CBEs are not performing the work. DSLBD is not supporting the development, economic growth and retention of District-based businesses or extending economic prosperity to local business owners, their employees, and the communities they serve<sup>40</sup>.

## Recommendations

6. The D.C. Council should amend the law to delineate the responsibility of the contracting agency and the responsibility of DSLBD to ensure CBEs are performing work.
7. DSLBD should update the DCMR and finalize their Compliance Division SOPs to include responsibilities for reviewing and monitoring CBE participation on D.C. government contracts.

## DSLBD allowed Intralot to violate the law by using DC09 to pay CBEs on the OLG Contract.

D.C. Code states the contract beneficiary<sup>41</sup> must provide a quarterly report that includes the amount the beneficiary pays to the CBE under the subcontracting plan<sup>42</sup>.

Intralot did not pay five of the six CBEs listed on the quarterly reports<sup>43</sup> submitted to DSLBD<sup>44</sup> (M Jones, GMP, SBC, PSC, Octane). Intralot only paid one CBE, VSC, listed on the quarterly reports. As shown in

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40 D.C. Code §2-218.13 (a)(1).

41 D.C. Code § 2-218.02(1B) "Beneficiary" means a business enterprise that is the prime contractor or developer on a government-assisted project.

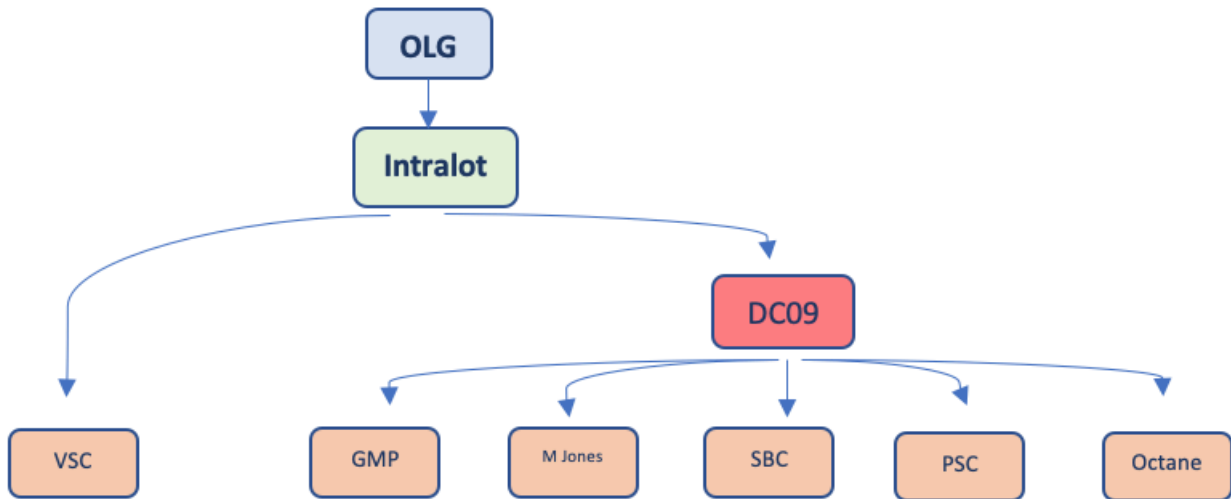
42 D.C. Code § 2-218.46(i)(1)(C).

43 For the FY2020 Quarter 3 Quarterly Report (April, May, June).

44 DSM was not reported as receiving payment during our scope. VSC was paid by Intralot.

Figure 4, an approved subcontractor<sup>45</sup> but not a CBE, DC09, paid the five CBEs listed on the quarterly reports from a DC09 bank account. DC09 is owned 51% by VSC and 49% by Intralot.

**Figure 4: Flow of Money on OLG Contract**



Source: ODCA Analysis

DSLBD believes the law allows Intralot to use DC09 as a fiscal agent to handle the financial aspects of this contract, including paying CBEs. However, DSLBD did not require Intralot to provide the agreement with DC09. ODCA asked DSLBD to request from Intralot a copy of the Fiscal Agent agreement, and also asked OLG, but Intralot refused to provide it because they contend that the agreement is proprietary and confidential.

Without the agreement, we cannot determine Intralot's and DC09's respective responsibilities on the OLG contract. Because VSC is the majority owner of DC09, this makes it hard to track what VSC is responsible for on the contract as a CBE, that is separate from DC09's responsibilities, as a non-CBE.

Since VSC and DC09 are both approved by OLG to be subcontractors, all documents related to the functions and management of the contract should be in the possession of the District agency monitoring contract performance. ODCA understands a contract beneficiary may elect to use an outside entity such as a bookkeeper or accounting firm to manage its finances, but the business contracted by the D.C. government should use its own accounts to pay certified CBEs as directed by law.

## Recommendation

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

<sup>45</sup> Approved by OLG/OCFO.

## **OLG did not ensure work is being completed by CBEs.**

The OLG contract includes specific terms regarding OLG's oversight of the beneficiary, Intralot and approved subcontractors, as well as the role and responsibilities of the OLG COTR working in conjunction with the assigned CO.

The OLG contract assigns responsibilities for general administration to the COTR which includes reviewing and approving invoices for deliverables to ensure receipt of goods and services, and requires OLG to approve all prospective employees, contractors consultants, or other persons assigned to provide services under this contract to ensure sufficient personnel is employed to carry out functions and services in a manner and time prescribed by the contract.

The contract requires OLG to subcontract at least 35% of the dollar volume to CBEs. This entails CBEs performing at least 35% of the contracting effort with its own organization and resources. As discussed above, Intralot is required to report amounts paid to CBEs quarterly, including a description of the goods and services provided. Furthermore, the beneficiary, Intralot, is not allowed to subcontract any work or services to any subcontractor without the prior, written consent of the CO and COTR. According to the appointment of duties memo from the CO to the COTR assigned to this contract, COTR duties are not delegable and should be performed under the direction of the CO. OLG approved 10 subcontractors, including seven CBEs that are subject to every provision of this contract.

Overall, OLG was unable to provide evidence of COTR review for 15 of the 23 invoices submitted by Intralot for the OLG contract during the audit period. Only eight of the invoices reviewed contained evidence of COTR review. ODCA found that members of OLG management, and not the COTR, reviewed and approved Intralot invoices submitted for payment.

Of the 23 Intralot invoices reviewed, totaling \$6,296,388, OLG did not require Intralot to provide supporting documentation for work reported to have been performed by CBEs. Only one invoice out of the 23 reviewed had supporting documentation that showed a CBE's itemized invoices. However, the itemized supporting documentation showed the work was performed by subcontractors that were not approved by OLG. As noted above, Octane used subcontractors to perform work Octane was contracted to perform.

During the first three quarters of FY 2020, OLG paid Intralot \$4,998,160. According to the quarterly reports for the first three quarters of FY 2020, only \$964,197 of the \$4,998,160 was paid to CBEs. OLG did not require the contract beneficiary, Intralot, to provide supporting documentation for \$944,783 of work reported to have been performed by CBEs. This lack of documentation means OLG was not able to ensure the work was actually performed by the CBEs.

DSLBD and OLG have failed to establish clear lines of communication, which has led to a gap in monitoring compliance with the OLG contract. OLG contends that it is DSLBD's responsibility to ensure that CBEs are performing the work. DSLBD takes a contrary view and contends that the contracting agency, OLG, is responsible for reviewing CBE invoices when reviewing and approving invoices for payment.

D.C. law does not specify the responsibilities of the contracting agency or DSLBD to ensure work is being performed by the CBEs.

Failure to review supporting documentation for work performed by CBEs on the OLG contract has led to approved CBEs receiving credit for work they did not perform. OLG's compliance with the 35% CBE requirement is at risk if unapproved subcontractors are completing tasks on behalf of approved CBEs. Without documentation to support tasks completed by CBEs, OLG simply approves payments without validation. Failure to implement and enforce monitoring procedures, including COTR oversight, increases the likelihood of receiving substandard services from beneficiaries, or additional costs due to inabilities and delays. A lack of cost accountability increases the risk of contractor noncompliance with contract terms, including compliance with CBE requirements. As a result, CBEs may be receiving payment despite nonperformance.

ODCA recommendation #6 addressed updating D.C. Code to include the responsibility of the contracting agency and the responsibility of DSLBD to ensure CBEs are performing work. In addition, ODCA recommends the following.

### **Recommendations**

9. OLG should comply with contract terms and the appointment of duties memo from the CO to the COTR and not approve invoices without supporting documentation for all work performed, including work performed by CBEs.
10. OLG should require the assigned COTR to ensure adherence to terms of the contract or appoint personnel best suited to fulfill COTR duties.

# Conclusion

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This audit reviewed one major District of Columbia government contract for compliance with CBE requirements, and our observations raise significant concerns about the lack of monitoring of CBE participation and review of work performed by CBEs on all such contracts. We believe the recommendations made in this report will improve the integrity of the entire CBE program for all District agencies and contracts that require CBE participation. If the findings and recommendations made in this audit are addressed quickly, including a determination of agency responsibility for monitoring work performed by CBEs, it is possible that the CBE participation requirements for the OLG contract could be achieved.

Similarly, amendments to the D.C. Code, DCMR and SOPs for DSLBD could mitigate the risk of businesses not complying with the law and enable DSLBD to confirm continued eligibility.

# Agency Comments

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On June 10, 2021, we sent a draft copy of this report to the Department of Small and Local Business Development (DSLBD) and the Office of the Chief Financial Officer (OCFO) which oversees the Office of Lottery and Gaming (OLG) for review and written comment. DSLBD and OLG each responded with comments on June 24, 2021. Agency comments are included here in their entirety followed by ODCA's response.



## MEMORANDUM

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

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

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

Date: June 24, 2021

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

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

### **EXECUTIVE SUMMARY**

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

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



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

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

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

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

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

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



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

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

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

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

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



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

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

## **RECOMMENDATIONS AND RESPONSES**

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

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

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

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



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

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

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



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

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

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

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



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

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

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

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

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

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





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

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

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

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

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



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

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

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

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

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

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

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





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

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

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

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

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

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

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

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



**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

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

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

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

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

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

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



**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

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

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

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

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

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

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

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

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

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

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





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

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

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

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



**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

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

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

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

Use of a Fiscal Agent (DC09 LLC)

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

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

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





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

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

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

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

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

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



**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

441 4<sup>th</sup> Street, NW, Suite 850N ■ Washington, DC 20001 ■ Ph: 202.727.3900  
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Such agency is defined as “the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.”<sup>30</sup> A “fiscal” agent generally is defined as “[a]n agent acting for a public body in reference to its financial affairs; [or a]n agent invested with the funds and the conduct of the financial affairs of another person, business, association, society, or club.”<sup>31</sup> Moreover, general rules of agency hold that the principal is bound by the acts of its agent and can get the benefit of such acts as if it had done them itself. The acts of the agent shall, for all legal purposes, be considered to be the acts of the principal. Therefore, Intralot’s use of DC09 as its fiscal agent to pay Intralot’s CBE subcontractors is in effect a payment made by Intralot. DSLBD asserts that the CBE Act, in this respect, has not been violated, nor would the Department knowingly permit a violation.

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

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

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

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

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

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

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

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



**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

441 4<sup>th</sup> Street, NW, Suite 850N ■ Washington, DC 20001 ■ Ph: 202.727.3900  
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verification, and data collected towards the goal is not finalized until: (i) the project is completed and expenditures are verified through a final report; or (ii) DSLBD reports the data (e.g., via an agency's fiscal year closeout).

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

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

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



**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

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

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

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

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

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

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

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

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



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



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441 4<sup>th</sup> Street, NW, Suite 850N ■ Washington, DC 20001 ■ Ph: 202.727.3900  
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GOVERNMENT OF THE DISTRICT OF COLUMBIA  
OFFICE OF THE CHIEF FINANCIAL OFFICER

Office of Lottery and Gaming



June 24, 2021

The Honorable Kathleen Patterson  
District of Columbia Auditor  
717 14th St. NW  
Suite 900  
Washington, DC 20005

Re: Weaknesses Cited in Monitoring Lottery Contract CBEs—Management’s Responses to  
Recommendations 9 and 10

Dear Ms. Patterson:

Attached are management’s responses to recommendations 9 and 10 contained in the above referenced audit report. I would like to thank the Office of the District of Columbia Auditor for its collaborative approach and constructive feedback throughout this Audit engagement. The recommendations offer meaningful opportunities to improve OLG’s contract monitoring procedures.

Sincerely,

A handwritten signature in black ink that reads "Ridgely C. Bennett". The signature is fluid and cursive.

Ridgely C. Bennett  
Interim Executive Director

Cc: Mr. Gregory Woods, Auditor-in-Charge

Attachment

## **Weaknesses Cited in Monitoring Lottery Contract CBEs Management's Responses to Recommendations 9 and 10**

### **ODCA's Recommendation 9**

OLG should comply with contract terms and the appointment of duties memo from the CO to the COTR and not approve invoices without supporting documentation for all work performed, including work by CBEs.

### **OLG's Response to Recommendation 9**

OLG agrees with the recommendation in part.

**Supporting Documentation.** OLG applied a reasonable standard of "supporting documentation" it believed to be acceptable (as a result of numerous prior audits) when approving invoices for payment. After having several discussions with ODCA, OLG gained insight into what the ODCA considers to be the expectation for "supporting documentation" relating to CBE participation contracts. ODCA is recommending that OLG apply a standard greater than what OLG has used in the past.

OLG was not provided and did not request invoices from Intralot for sub-contractors whose work was not for reimbursable costs. OLG believes we are currently approving invoices appropriately and in accordance with existing CBE law, which does not require monthly CBE vendor invoices to be submitted. OLG is willing to work with DSLBD and other stakeholders to adhere to all updates made to the D.C. Code.

**Invoice Review.** The COTR is involved in the approval of all Intralot invoices, although different internal subject matter experts (SMEs) are required to verify the invoice amounts and confirm the work was performed. To facilitate the process, meetings, discussions, and email correspondence between the COTR and SMEs are routine prior to invoice payment. Since the commencing of the new gaming system contract, the COTR's approval to pay invoices was given in person (pre-pandemic), via email or Microsoft TEAMS; however, OLG has expanded on its process by requiring the COTR to approve all invoices in PASS. The OLG's Director of Resources Management receives the invoices in PASS and shares them with the appropriate internal SMEs and the COTR for a detailed review and approval in PASS. The COTR approves all invoices in PASS.

**Sub Sub-Contractors.** As outlined in the approved CBE Plan, Octane is primarily responsible for providing end-to-end digital marketing and advertising services for sports betting and online (iLottery) products. A contracted monthly retainer fee for professional services is paid by Intralot to Octane and reimbursed to Intralot by OLG. The monthly retainer fee includes costs for high level branding strategy, concept design and execution. Media placement and the actual items (products) needed to fully develop a concept are considered reimbursable expenses. In addition, marketing industry standard practice includes items such as stock photography and still photography costs, animation fees, talent, and production (tv, radio and digital), and are common

reimbursable expenses. The use of these types of services should not be considered sub-contracting, but rather seen as suppliers and supplies required by marketing agencies to create campaigns. Furthermore, these suppliers/supplies are often not obtained from the same place as needs are dependent on creative concepts, outcomes desired, costs and strategic/creative direction. This model of operation is common for most advertising agencies. Cost estimates for all work performed are pre-approved by OLG's Director of Marketing and Communications.

### **ODCA's Recommendation 10.**

OLG should require the assigned COTR to ensure adherence to terms of the contract or appoint personnel best suited to fulfill COTR duties.

### **OLG's Response to Recommendation 10**

OLG disagrees with the recommendation because it believes that it has already met this requirement. OLG believes the COTR is adhering to the duties and responsibilities outlined in the official Appointment of the Contracting Officer Technical Representative (COTR) Letter (COTR Letter) for Contract CFOPD-19-C-041 for Sports Betting Lottery Gaming Systems and Related Services with Intralot Inc.

At the Request of OLG, the OCFO's Contracting Officer appointed OLG's Chief Operating Officer (COO) to be the COTR. This was done because the contract is integral to OLG's operations and the COO has a full understanding of the Intralot contract and how it impacts OLG's operations. By July 30, 2021, the COTR will meet with the Contracting Officer to make certain that our interpretation of the COTR's responsibilities, as delineated in the COTR Letter, are correct.

# ODCA's Response to Agency Comments

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ODCA appreciates the responses to the draft report provided by DSLBD and OLG and would like to reiterate our appreciation to DSLBD in particular for their cooperation and timely response to all inquiries and requests throughout the audit.

ODCA is pleased DSLBD and OLG agree with most of our recommendations. We note in the report that DSLBD is updating their regulations and standard operating procedures though the drafts have not been finalized. The District of Columbia Municipal Regulations (DCMR) is the official compilation of the rules and regulations issued by the D.C. government. Agency policies and procedures serve as a guide for employees to meet organizational objectives and provide high-quality services and products to the public. Both documents need periodic revision. ODCA shares the hope that the D.C. Council will move forward with changes to clarify and strengthen CBE law including delineating the responsibilities of the contracting agency and of DSLBD to ensure CBEs are performing work. However, ODCA believes there are instances where DSLBD's response to our report has taken items out of context, and ODCA has ample evidence to support the conclusions found in the report. ODCA's report contains five recommendations directed to DSLBD, three directed to the D.C. Council and two directed to the OLG. As noted in our conclusion ODCA believes our observations raise significant concerns about the lack of monitoring of CBE participation and review of work performed by CBEs on D.C. government contracts.

DSLBD stated in their response that ODCA's claims are misdirected at DSLBD regarding the use of a fiscal agent. They also state that their role is to monitor the contract subcontracting plan and CBE subcontracting agreements, ensuring that CBEs are compliant with the 35% CBE participation requirement and are being paid. ODCA's report does not say a fiscal agent is prohibited, but the contract beneficiary should pay the CBEs from their own bank account. DSLBD's Compliance Division receives quarterly reports and copies of VVFs to apply credit toward the CBE requirement. On this contract, DSLBD also received copies of payment history for each CBE paid indicating an entity other than the contract beneficiary was paying CBEs. DSLBD was made aware Intralot was using another entity and should have notified OLG. CBE law, D.C. Code 2-218.46(i)(1)(C) makes specific reference to, "The amount paid by the beneficiary to the subcontractor under the subcontract", which constitutes a requirement and therefore a responsibility exists to ensure that requirement is met.

ODCA's report does not state that DSLBD has a responsibility to "monitor onsite work performed by CBEs". In reviewing the OLG contract we identify that neither DSLBD nor OLG are monitoring actual work performed by CBEs, including receiving and reviewing invoices of CBEs. Each agency contends it is the responsibility of the other, which has led to a gap in ensuring CBEs are performing meaningful work toward the 35% CBE participation requirement of the contract.

DSLBD claims the agency was not asked to provide evidence for how managerial functions was applied or how one or more veterans controlled the management and daily operations. While DSLBD describes methods they use, they provided no evidence that a site visit occurred during the certification process for the businesses we reviewed which were all resident owned businesses (ROB). DSLBD's Certification Division SOPs exempt ROB from requiring a site visit and ODCA confirmed in a January 2020 interview that this is DSLBD's practice. DSLBD also stated that businesses attest to everything they are submitting

with their application for certification and that they rely on the information submitted by the applicant for determining the certification. Further, included in ODCA's engagement letter was a request for "DSLBD policies and procedures, guidance documents, and other written documents governing DSLBD's processes and criteria for certifying and recertifying vendors as CBEs". DSLBD provided a copy of the existing SOPs that DSLBD's Certification Division was operating under and a condensed version of new SOPs that were in the process of being finalized. Additionally, ODCA requested all DSLBD records related to the review and approval of the certification and recertification for all CBEs listed on the Subcontracting Plan for this OLG contract. DSLBD provided copies of documents the CBEs submitted as well as a copy of DSLBD's records of their review of each CBE's application.

According to DSLBD's response, they are not statutorily obligated to conduct follow-up on same-day self-recertification within a particular timeframe. ODCA's report does not state that follow up is statutorily required. ODCA commends DSLBD for identifying the need to establish a follow-up process for the same-day self-recertification. The follow-up serves as a safeguard for confirming the CBEs that self-certified are in fact compliant with the law. DSLBD took issue with the same-day self-recertification follow-up review timeframes in the report as identified in footnote 13 of DSLBD's response but a recheck confirmed the late follow-up based on documentation dating back to 2017 that DSLBD provided.

Further, the report is correct regarding D.C. Code requirements for LBE certification, identifies specific sections of the D.C. Code in footnotes: 10, 11, 16, 26, 27, 28 and provide a complete list of D.C. Code requirements in Appendix B.

ODCA stands by its finding and recommendation regarding the lack of specificity in the D.C. Code to delineate respective responsibilities of the contracting agency and DSLBD. In their response, DSLBD states that "...the PPRA requires a procuring agency to uphold all provisions in the CBE Act, including ensuring that all contractors (including CBEs) are performing adequately on a District-funded project." DSLBD footnotes this requirement to D.C. Code § 2-351.01(2) but there is no such Code section; and we believe DSLBD means D.C. Code § 2-351.01(b)(2) which simply states the purpose of the procurement laws.

DSLBD suggests ODCA errs in asserting that DSLBD approved and applied credit toward the 35% CBE requirement for work not performed by two CBEs. But DSLBD provided multiple printouts of their Subcontracting Compliance System used to track the 35% CBE participation on the OLG Contract and also met with ODCA on September 16, 2020, to answer questions about their review process. An October 2, 2020, printout provided shows credit to VSC for \$280,000 and Octane for \$179,090. A January 25, 2021, printout reversed the credit to VSC and reduced the credit to Octane by \$43,000. It was only after ODCA informed DSLBD of this issue that DSLBD took appropriate action and adjusted amounts credited in their tracking system, which is noted in footnote 37. This reinforces ODCA's point that neither DSLBD nor OLG believe it is their responsibility to monitor work by CBEs while the contract is being performed.

With regard to DSLBD's belief of "unfounded claims" that it allowed Intralot to violate the CBE law by using DC09 as a fiscal agent to pay CBEs, as mentioned above DSLBD's Compliance Division specifically monitors and ensures compliance with the 35% CBE participation requirement. This includes monitoring payments by contract beneficiaries to CBEs. DSLBD receives quarterly reports from beneficiaries indicating the amount paid to each CBE and VVFs from each CBE confirming they received payment. And,

for the OLG Contract, DSLBD also received copies of payment history indicating DC09, who is not the contract beneficiary, was paying CBEs from a DC09 bank account. ODCA concurs that DSLBD is not the contracting agency, but DSLBD has a responsibility to communicate these observations with OLG and ensure they are corrected.

Further, with regard to the use of a fiscal agent, Intralot's ability to pay one CBE who happens to be the majority owner of DC09 who then paid the other CBEs through a DC09 bank account raises concerns about roles and responsibilities of VSC and DC09 on the contract. Without a copy of the fiscal agent agreement it is difficult to track what work VSC, the CBE, is responsible for doing. Neither DSLBD nor OLG required Intralot to provide a copy of the fiscal agent agreement and when ODCA asked DSLBD to get a copy from Intralot, Intralot declined, stating the agreement was proprietary and confidential.

DSLBD claims that ODCA comments on monitoring the VSC subcontract and number of employees lacks context and seems misguided. Yet, the subcontracting plan submitted by Intralot and the subcontracting agreement between Intralot and VSC both state that VSC serves as the Operations Manager for the Lottery & Sports Betting contract and lists responsibilities of VSC. ODCA recognizes that unique events occurred since the contract was awarded such as the lawsuit and COVID-19 pandemic. Nevertheless, the responsibility for managing aspects of the Lottery that do not involve sports betting did not stop at any time. The Lottery has continuously operated and sold tickets, which demonstrates that responsibilities to be performed by VSC, such as management of central system, field services, or call center, for example, were occurring and being managed. By performing this audit early in this contract, ODCA underscores a District goal of maintaining a CBE program that supports and contributes to job creation, a strong city tax base and a much stronger economy.

ODCA is pleased OLG has stated a willingness to work with DSLBD and other stakeholders on implementing any updates to CBE law, has improved their process by requiring the COTR to approve all invoices in PASS, and will review COTR responsibilities with the Contracting Officer.

# Summary of Report Recommendations

Most of the recommendations in this report can be implemented without any additional costs to the agencies and help to advance the goals of DSLBD and OLG, as seen below.

Recommendation	Is There a Cost to the Agency/ Entity to Implement?	Potential to Generate Revenue or Savings to the District?	Specific Agency/Entity or District-Wide Goal Advanced by Recommendation
<p>1. The D.C. Council should amend the law to clearly define “managerial functions” and “independently controlled owned and operated” with language that is measurable and verifiable.</p>	No	No	<p>D.C. Council website, About the Council: The D.C. Council has instituted several measures to ensure that the city government works. D.C. Council committees review the performance of government programs and agencies to ensure they are serving their established purposes and operating under pertinent regulations and budget targets.<sup>46</sup></p>
<p>2. DSLBD should clearly identify in DCMR and SOPs how each relevant section of the D.C. Code is examined and reviewed and what supporting documentation is necessary to determine if the business meets the criteria for certification.</p>	No	No	<p>DSLBD mission to support the development, economic growth and retention of District-based businesses. DSLBD agency goal of “extending economic prosperity to local business owners, their employees, and the communities they serve.”<sup>47</sup></p>
<p>3. DSLBD should ensure that sufficient resources are allocated to the Certification Division and Compliance Division so that same-day self-recertification eligibility can be checked within the timeframe DSLBD establishes.</p>	Yes	No	<p>DSLBD mission to support the development, economic growth and retention of District-based businesses.</p>

<sup>46</sup> About the Council, See: <https://dccouncil.us/about-the-council/>

<sup>47</sup> D.C. Code §2-218.13 (a)(1).

Recommendation	Is There a Cost to the Agency/ Entity to Implement?	Potential to Generate Revenue or Savings to the District?	Specific Agency/Entity or District-Wide Goal Advanced by Recommendation
<p>4. The D.C. Council should amend the D.C. Code to clearly state what is required when reporting a material change.</p>	No	No	<p>D.C. Council website, About the Council: The D.C. Council has instituted several measures to ensure that the city government works. D.C. Council committees review the performance of government programs and agencies to ensure they are serving their established purposes and operating under pertinent regulations and budget targets.<sup>48</sup></p>
<p>5. DSLBD should clearly identify in the DCMR what is required for recertification if the business has a material change to report.</p>	No	No	<p>DSLBD mission to support the development, economic growth and retention of District-based businesses.</p>
<p>6. The D.C. Council should amend the law to delineate the responsibility of the contracting agency and the responsibility of DSLBD to ensure CBEs are performing work.</p>	No	No	<p>D.C. Council website, About the Council: The D.C. Council has instituted several measures to ensure that the city government works. D.C. Council committees review the performance of government programs and agencies to ensure they are serving their established purposes and operating under pertinent regulations and budget targets.<sup>49</sup></p>

48 About the Council, See: <https://dccouncil.us/about-the-council/>

49 About the Council, See: <https://dccouncil.us/about-the-council/>

Recommendation	Is There a Cost to the Agency/ Entity to Implement?	Potential to Generate Revenue or Savings to the District?	Specific Agency/Entity or District-Wide Goal Advanced by Recommendation
7. DSLBD should update the DCMR and finalize their Compliance Division SOPs to include responsibilities for reviewing and monitoring CBE participation on D.C. government contracts.	No	No	DSLBD mission to support the development, economic growth and retention of District-based businesses DSLBD agency goal of “extending economic prosperity to local business owners, their employees, and the communities they serve.” <sup>50</sup>
8. DSLBD should ensure contract beneficiaries pay CBEs from their own business account, and only award credit towards the 35% CBE goal for payments made by the beneficiary.	No	No	DSLBD mission to support the development, economic growth and retention of District-based businesses DSLBD agency goal of “extending economic prosperity to local business owners, their employees, and the communities they serve.” <sup>51</sup>
9. OLG should comply with the contract terms and the appointment of duties memo from the CO to the COTR and not approve invoices without supporting documentation for all work performed, including work performed by CBEs.	No	No	OCFO 2017-2021 Strategic Plan, Strategic Initiative #5, which includes ensuring “timely and accurate payment of valid vendor invoices...”
10. OLG should require the assigned COTR to ensure adherence to terms of the contract or appoint personnel best suited to fulfill COTR duties.	No	No	OCFO 2017-2021 Strategic Plan, Strategic Initiative #4, which includes effectively managing risk to prevent fraud. OCFO 2017-2021 Strategic Plan, Strategic Initiative #7, which is to “Manage a fair and equitable system to Fully Collect District Revenues.”

50 D.C. Code §2-218.13 (a)(1).

51 D.C. Code §2-218.13 (a)(1).

# Appendix A

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COUNCIL OF THE DISTRICT OF COLUMBIA  
1350 PENNSYLVANIA AVENUE, N.W.  
WASHINGTON, D.C. 20004  
SUITE 408

**Elissa Silverman**  
Councilmember, At-Large  
Chair, Committee on Labor and Workforce Development

Office: (202) 724-7772  
Fax: (202) 724-8087  
esilverman@dccouncil.us

September 20, 2019

Kathleen Patterson  
District of Columbia Auditor  
717 14<sup>th</sup> Street NW  
Suite 900  
Washington, DC 20004

Dear Auditor Patterson:

My understanding is that the Office of the D.C. Auditor has a statutory requirement to review the D.C. Lottery's contract performance and compliance with District laws. I ask that as part of your review you audit the contract between D.C. Lottery and Intralot for compliance with our certified business enterprise (CBE) law. Recent reporting in the *Washington Post* has raised questions about whether DC09, the consortium of CBE vendors, and Veterans Services Corp. (VSC), the prime CBE vendor, meets the definition of a small, local business as defined by the CBE law.

As you likely know, D.C. Lottery contracted with Greek gaming concern Intralot to run our lottery. In order to meet the CBE requirement, Intralot contracted with VSC, which received at least 35 percent of the contract. However, the Post's reporting and prior reporting suggests that VSC has no employees and may be controlled in some part by Intralot. If that is the case, it would mean that VSC might not meet the CBE requirement of being individually controlled and operated. If I understand the reporting, there exists a subcontract between VSC and DC09. DC09 is not a CBE, and, while VSC has ownership interest in DC09, Intralot owns 49 percent of that same company. This complicated structure appears to be an end run around the District's contracting laws so that Intralot can retain as much of the contract as possible.

The Department of Small and Local Business Development (DSLBD) requires all CBEs to also qualify as a Local Small Business Enterprise (LSBE). In order to qualify for the LSBE designation, the company must certify that it is independently owned, operated, and controlled. I question whether that is truly the case given the relationship between VSC and Intralot when the two share

ownership in a third company and Intralot is the primary source of income for VSC.

I asked DSLBD Director Kristi Whitfield if Intralot and VSC are in compliance with the CBE requirements. My understanding from Director Whitfield's answer is that DSLBD monitors whether at least 35 percent of the contract goes to a business certified by the agency as a CBE. It is not concerned that the business may be flouting our CBE law, and DSLBD will not be reviewing whether its certification of VSC was appropriate. I think these issues deserve greater scrutiny, and I hope your audit will examine this. This is not the first time allegations have been made that a business has not legitimately met the local and small business definitions for a CBE. It appears that, as long as the CBE self-certifies that it is in compliance with the law, no further review is necessary. I have attached a copy of Director Whitfield's response.

Thanks very much. If you have any questions, please feel free to contact me.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Elissa Silverman". The signature is fluid and cursive, with a small flourish at the end.

Elissa Silverman  
Councilmember, At-Large  
Chair, Labor and Workforce Development Committee



September 16, 2019

Elissa Silverman  
Councilmember, At-Large  
Council of the District of Columbia  
1350 Pennsylvania Avenue, NW, Suite 408  
Washington, DC 20004

Dear Councilmember Silverman,

This is in reply to your August 30, 2019 email highlighting your concerns about Veterans Services Corporation (VSC), an Intralot subcontractor on the recently approved sports betting contract. Below please find my responses to your inquiries.

Sincerely,

Kristi C. Whitfield  
Director

**Is the lottery and sports gaming contract with Intralot in compliance with CBE law? As the Post story again inferred, it appears few jobs are created despite DC09's main partner, VSC, receiving more than half the dollars from the lottery contract.**

Yes, the contract is compliant with the District's CBE laws.

Pursuant to DC Code § 2-218.46(a)(1)(a), Intralot is required to subcontract at least 35% of the dollar volume of its contract to CBEs. Veterans Services Corp. (VSC), along with other CBE companies, is the CBE subcontractor on the contract. According to the representations of VSC and Intralot via vendor verification forms and quarterly reports, Intralot is meeting the goals of the CBE law, and all CBEs associated with this contract are currently in good standing.

Although not a procurement agency, DSLBD actively monitors CBE expenditures on the prime contract (Intralot) level. The Washington Post article you referenced notes that Intralot has a subcontracting agreement with DC09, a joint venture between VSC and Intralot; however, DC09 is not a "certified" joint venture prime contractor as defined by the District's CBE law so DSLBD cannot monitor DC09 in any way. Rather, DSLBD monitors Intralot, as the prime contractor, to ensure that the 35% CBE expenditure is met, in compliance with the CBE law.

We wholeheartedly share your desire that District businesses benefit from its CBE laws. DSLBD will continue to diligently safeguard the CBE law, and support the businesses that have been so certified. To report violations, DSLBD has a 24-hour hotline (202) 727-0019, or complaints can be emailed to [DSLBD.CBEFraud@dc.gov](mailto:DSLBD.CBEFraud@dc.gov).



**Is DSLBD re-examining the CBE certifications of the DC09 partners? These are the firms who were listed in the lottery contract.**

Intralot is meeting the goals of the CBE law, and all CBEs associated with this contract are in good standing. DSLBD will continue to monitor the parties – VSC and Intralot – via vendor verification forms, quarterly reports, and spot checks to ensure compliance.

# Appendix B

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D.C. Official Code for Certified Business Enterprises

## D.C. Official Code for Certified Business Enterprises

### § 2-218.31. Local business enterprises (LBE).

A business enterprise shall be eligible for certification as a local business enterprise if the business enterprise:

1. Has its principal office located physically in the District of Columbia;
2. Requires that its chief executive officer and the highest-level managerial employees of the business enterprise perform their managerial functions in their principal office located in the District;  
(2A) Can demonstrate one of the following:
  - A. More than 50% of the employees of the business enterprise are residents of the District;
  - B. The owners of more than 50% of the business are residents of the District;
  - C. More than 50% of the assets of the business enterprise, excluding bank accounts, are located in the District; or
  - D. More than 50% of the business enterprise's gross receipts are District gross receipts; and
3. Can demonstrate one of the following:
  - A. The business enterprise is licensed pursuant to Chapter 28 of Title [47];
  - B. The business enterprise is subject to the tax levied under Chapter [18] of Title 47; or
  - C. The business enterprise is a business enterprise identified in § 47-1808.01(1) through (5) and more than 50% of the business is owned by residents of the District.

### § 2-218.32. Small business enterprises (SBE).

(a) A business enterprise shall be eligible for certification as a small business enterprise if the business enterprise:

- (1)(A) Is a Local Business Enterprise;
- (2) Is independently owned, operated, and controlled; and
- (3)(A) Is certified by the United States Small Business Administration as a small business concern or meets the definition of a small business concern under the Small Business Act, approved July 18, 1958 (72 Stat. 863; 15 U.S.C. § 631 et seq.); or
- (B) Has had averaged annualized gross receipts for the 3 years preceding certification not exceeding the limits established by rules issued pursuant to § 2-218.72.

(b) A business enterprise that is affiliated with another business enterprise through common ownership, management, or control shall be eligible for certification as a small business enterprise if:

- (1) The business enterprise seeking certification as a small business enterprise is a local business enterprise;
  - (2) The consolidated financial statements of the affiliated business enterprises do not exceed the average annualized gross receipt limits established by subsection (a)(3)(B) of this section; and
  - (3) In the event of a parent-subsidary affiliation, the parent company qualifies for certification as a small business enterprise.
- (c) If a business enterprise seeking certification as a small business enterprise is affiliated only with one or more business enterprises that are in a different line of business, subsection (b) of this section shall not apply, and the business enterprise shall be eligible for certification as a small business enterprise if it meets the requirements of subsection (a) of this section.

**§ 2-218.33. Disadvantaged business enterprises (DBE).**

(a) A business enterprise shall be eligible for certification as a disadvantaged business enterprise if the business enterprise is:

- (1) Owned, operated, and controlled by economically disadvantaged individuals; and
- (2)(A) Is a local business enterprise; or

(b) A business enterprise that is affiliated with another business enterprise through common ownership, management, or control shall be eligible for certification as a disadvantaged business enterprise if:

- (1) The business enterprise seeking certification as a disadvantaged business enterprise is a local business enterprise;
- (2) In the event of a parent-subsidary affiliation, both enterprises meet the requirements of subsection (a) of this section; and
- (3) The business enterprise has annualized gross receipts not exceeding limits as enumerated in rules issued pursuant to § 2-218.72.

**§ 2-218.35. Resident-owned businesses (ROB).** A business enterprise shall be eligible for certification as a resident-owned business if it meets the definition of resident-owned business pursuant to § 2-218.02(15)<sup>52</sup>.

**§ 2-218.37. Local business enterprises with principal offices located in an enterprise zone (DZE).**

A local business enterprise shall be eligible for certification as a local business enterprise with principal offices located in an enterprise zone if its principal offices are located in an enterprise zone as defined by § 2-218.02(8).

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<sup>52</sup> D.C. Code § 2-218.05(15) "Resident-owned business" means a local business enterprise owned by an individual who is, or a majority number of individuals who are, subject to personal income tax solely in the District of Columbia.

**§ 2-218.38. Veteran-owned business enterprises (VOB).**

A business enterprise shall be eligible for certification as a veteran-owned business enterprise if the business enterprise:

1. Is a local business enterprise;
2. Is not less than 51% owned and operated by one or more veterans (as defined in 38 U.S.C. § 101(2));
3. In the case of any publicly owned business, not less than 51% of the stock of which is owned by one or more veterans; and
4. One or more veterans control the management and daily operations.

# About ODCA

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The mission of the Office of the District of Columbia Auditor (ODCA) is to support the Council of the District of Columbia by making sound recommendations that improve the effectiveness, efficiency, and accountability of the District government.

To fulfill our mission, we conduct performance audits, non-audit reviews, and revenue certifications. The residents of the District of Columbia are one of our primary customers and we strive to keep the residents of the District of Columbia informed on how their government is operating and how their tax money is being spent.

**Office of the District of Columbia Auditor**  
**717 14th Street N.W.**  
**Suite 900**  
**Washington, DC 20005**

**Call us:** 202-727-3600

**Email us:** [odca.mail@dc.gov](mailto:odca.mail@dc.gov)

**Tweet us:** [https://twitter.com/ODCA\\_DC](https://twitter.com/ODCA_DC)

**Visit us:** [www.dcauditor.org](http://www.dcauditor.org)



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