

GAO

April 1987

# SMALL BUSINESS ACT

## Agriculture's Disadvantaged Business Advocate Not Reporting to Proper Management Level



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**Resources, Community, and  
Economic Development Division****B-222903.3**

April 6, 1987

The Honorable Richard E. Lyng  
The Secretary of Agriculture

Dear Mr. Secretary:

14. In letters dated January 14 and May 2, 1986, the Chairman, House Committee on Small Business, requested that we review 13 agencies to determine their compliance with Section 15(k) of the Small Business Act. In subsequent discussions, the Chairman's office defined the primary concern as the agencies' compliance with Section 15(k)(3), which describes the required reporting level for each agency's Director, Office of Small and Disadvantaged Business Utilization (OSDBU). The Department of Agriculture was one of the departments selected.

To determine if the Department of Agriculture was in compliance with the Small Business Act, Section 15(k)(3), we interviewed officials in the Department's General Counsel's Office and the Director of Small and Disadvantaged Business Utilization and reviewed organizational charts, a description of the Director's responsibilities, the Director's performance evaluation, and management instructions concerning the establishment of OSDBU (now part of the Office of Advocacy and Enterprise), its mission, reporting level, and current operations. To determine the required reporting relationship for the Director we also reviewed the Small Business Act and its legislative history. We did not evaluate the effectiveness of Agriculture's OSDBU programs. Our work was performed from March through August 1986 at Agriculture's Washington, D.C., headquarters and was done in accordance with generally accepted government auditing standards.

**The Director, OSDBU,  
Must Report to the  
Agency Head or  
Deputy**

The Small Business Act requires each federal agency with procurement powers to establish an OSDBU and requires that the agency head appoint a Director for this office. Section 15(k)(3) requires that the Director shall be responsible only to and report directly to the agency head or deputy. Other provisions of the act describe the Director's duties and responsibilities.

The legislative history of Section 15(k) of the Small Business Act shows that Congress intended to mandate a direct reporting relationship between the Director of Small and Disadvantaged Business Utilization

and the agency head or deputy. A 1978 report by the Senate Select Committee on Small Business noted that officials who were responsible for advocating small business participation in federal procurements often did not hold high enough positions in the agency to be effective.

The purpose of Section 15(k)(3) is to provide the Director immediate access to the agency's top policymakers and thus maximize the Director's effectiveness as an advocate of small and disadvantaged businesses.

## Agriculture Is Not in Compliance With the Law

The Department's OSDBU was established on July 11, 1979, with its Director responsible to and reporting to the Assistant Secretary for Administration, not to the Secretary or Deputy Secretary. However, on June 3, 1982, by departmental regulation, now codified as 7 C.F.R. §2.25(i)(1) (1986), the Assistant Secretary for Administration was deemed, for procurement related to small and disadvantaged business utilization, to be the Deputy Secretary.

On March 15, 1985, the Secretary of Agriculture established the Office of Advocacy and Enterprise which is headed by a Director who, in addition to having various other duties, also serves as the Director of Small and Disadvantaged Business Utilization. The Director continues to be responsible only to and report directly to the Assistant Secretary for Administration.

We conclude that because the Director of Small and Disadvantaged Business Utilization does not report to the Secretary of Agriculture or his deputy, the Director's reporting level is not in compliance with the Small Business Act, Section 15(k)(3). The fact that the Department deemed, by regulation, the Assistant Secretary for Administration to be the Deputy Secretary for the purposes of Section 15(k) does not fulfill the requirements of the Small Business Act. There is no statutory authority for any department or agency to deem, by regulation, one of its officials to be another official.

## Agency Comments

In a November 20, 1986, letter commenting on a draft of our report, Agriculture disagreed with our conclusion that the Department was not in compliance with the Small Business Act, Section 15(k)(3). In general, Agriculture contends that the Secretary's broad powers allow him to assign the performance of his functions as he feels appropriate and that

the current structure gives harmony to all of the Department's legal authorities and Section 15(k)(3) of the Small Business Act.

We disagree. Section 15(k)(3) of the act is a specific statutory restriction on the otherwise broad powers of the Secretary. The requirements of the act cannot be affected or superseded by departmental regulation. Agriculture's comments and our responses are included in appendix I.

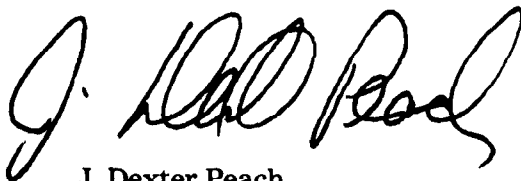
## Recommendations

To bring Agriculture into compliance with Section 15(k)(3) of the Small Business Act, we recommend that the Secretary of Agriculture require the Director of Small and Disadvantaged Business Utilization to be responsible only to and report directly to the Secretary or Deputy Secretary.

As you know, 31 U.S.C. 720 requires the head of a federal agency to submit a written statement on actions taken on our recommendations. This statement must be submitted to the Senate Committee on Governmental Affairs and the House Committee on Government Operations not later than 60 days after the date of this report. A similar statement must also be submitted to the Senate and House Committees on Appropriations with the agency's first request for appropriations made more than 60 days after the date of this report.

As arranged with the Chairman's office, we are sending copies of this report to the Chairman, House Committee on Small Business; the Director, Office of Management and Budget; and other interested parties upon request.

Sincerely yours,



J. Dexter Peach  
Assistant Comptroller General

# Comments From the Department of Agriculture

Note GAO comments supplementing those in the report text appear at the end of this appendix



DEPARTMENT OF AGRICULTURE  
OFFICE OF ASSISTANT SECRETARY FOR ADMINISTRATION  
WASHINGTON, D.C. 20250

NOV 20 1986

Mr. J. Dexter Peach  
Director  
Resources, Community, and Economic Development Division  
Room 4915  
U.S. General Accounting Office  
441 G Street, N.W.  
Washington, DC 20548

Dear Mr. Peach:

This is in response to your request for comments from the U.S. Department of Agriculture (USDA) on the General Accounting Office (GAO) draft report entitled "SMALL BUSINESS ACT: Agriculture's Disadvantaged Business Advocate Does Not Report To The Proper Management Level."

The draft report states on page 2 that "[t]he purpose of section 15(k)(3) is to provide the Director [of the Office of Small and Disadvantaged Business Utilization] immediate access to the agency's top policy makers and thus maximize the Director's effectiveness as an advocate of small and disadvantaged businesses." We agree with GAO that this is the purpose of that section of the Small Business Act, and USDA is committed totally to the achievement of that purpose. We disagree, however, with the notion raised by GAO that USDA is not in compliance with section 15(k)(3).

Section 15(k)(3) establishes an Office of Small and Disadvantaged Business Utilization (OSDBU) in each Federal agency having procurement powers. The section requires that the management of OSDBU be vested in an officer or employee of each agency who is to be designated as a Director of OSDBU, and further provides that the Director "be responsible only to, and report directly to, the head of such agency or to his deputy." As correctly noted in the GAO report, the Secretary of Agriculture has provided:

[i]n compliance with [the Small Business Act], the Assistant Secretary for Administration shall be the deputy to the Secretary for procurement related to small and disadvantaged business utilization. 7 C.F.R. 2.25(i).

Thus, the Director of OSDBU in USDA reports to the Assistant Secretary for Administration.

The propriety of this placement is best viewed in the light of the organic authorities of USDA. The Secretary of Agriculture is authorized to:

Appendix  
Comments From the Department  
of Agriculture

Mr. J. Dexter Peach

2

. . . make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Agriculture of any function of the Secretary . . . . Section 4(a) Reorgan. Plan No. 2 of 1953, 18 F.R. 3219 (1953), reprinted in 7 U.S.C. 2201 at note.

See comment 1

Consistently, with the flexibility envisaged in the Secretary's broad authority to assign the performance of his functions, Congress provided for the establishment of assistant secretaries without fixed portfolios of duties. Instead, Congress authorized generally that the assistant secretaries perform such duties "as may be assigned" by the Secretary. See, for example, 7 U.S.C. 2212.

Thus, it is evident that, as a general matter, the Secretary enjoys broad authority to manage the multi-varied functions of USDA. It does not seem to us that section 15(k)(3) abrogates that broad authority. The courts have held that statutes should be read in harmony, and that repeals by implication of statutes are not favored. See, for example, Morton v. Mancari, 417 U.S. 535, 549 (1974). Applying this principle to section 15(k)(3) and the USDA organic authorities, we believe that the statutes can be harmonized.

See comment 2

Section 15(k)(3) is written in terms of the Director reporting directly to the "head of [the] agency or his deputy." It is noteworthy that the subsection is not crafted in terms of the "deputy head of the agency" or in terms of his "first assistant." Thus, the section does envision a measure of flexibility with respect to the designation of a deputy. The objective of section 15(k)(3), assuring senior level attention, also is being fulfilled because the Secretary has assigned the function to a presidential appointee who has been confirmed by the Senate. Indeed, there probably is a better chance of the statutory objective being achieved because if the function was assigned to the Deputy Secretary, the Director of OSDDBU would be facing far greater competition for the Deputy Secretary's attention. Moreover, the Secretary has not abandoned his authority with respect to the Director of OSDDBU:

See comment 3.

No delegation of authority by the Secretary or a general officer contained in this part or elsewhere shall preclude the Secretary from exercising any of the authorities so delegated.  
7 C.F.R. 2.11.

See comment 4.

See comment 5

There is nothing in section 15(k) that requires the Director of OSDDBU to have as his responsibilities only those that are enumerated in that section. Thus, USDA can without question be in literal compliance with section 15(k)(3) by designating the Assistant Secretary for Administration as the Director of OSDDBU along with his other duties, and then designate

**Appendix  
Comments From the Department  
of Agriculture**

Mr. J. Dexter Peach

3

the current Director as the Deputy Director. USDA has not chosen that path because it believes that such a path is one that has form, but no real substance compared with the route it has taken. We think that the current organization gives harmony to all the USDA legal authorities and section 15(k), and at the same time assures that the objectives of increasing the participation of small and disadvantaged businesses in the operations and activities of USDA are better achieved.

Thank you for providing us with the opportunity to comment on the draft report.

Sincerely,



JOHN J. FRANKE, JR.  
Assistant Secretary  
for Administration

cc:  
Richard D. Long, OIG

See comment 3



The following are GAO's comments on the Department of Agriculture's letter dated November 20, 1986.

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## **GAO Comments**

1. There is no statutory authority for Agriculture, or any other agency to deem, by regulation, one of its officials to be another official. Section 15(k)(3) is a specific statutory restriction on the otherwise broad powers of the Secretary. The regulation in question, 7 C.F.R. Section 2.25(i)(1) (1986), confuses the concept of delegation of authority to an officer or employee with the concept of the statutory investiture of authority.
2. We disagree with Agriculture's reading of the act. The term "deputy" in Section 15(k)(3) plainly means the deputy head of an agency, which in this case is the Deputy Secretary of Agriculture.
3. Whether or not there is a better way of achieving the act's objectives than the one enacted by Congress is not, in our opinion, relevant to the issue discussed in this report. Agriculture is required to comply with the act as it is now written.
4. The Secretary's broad powers to delegate or exercise authority are not at issue. The requirements of Section 15(k)(3) cannot be affected or superseded by departmental regulation, in this case 7 C.F.R. Section 2.11 (1986).
5. If the Assistant Secretary for Administration was designated the Director, OSD/BU, having the reporting relationship described in Section 15(k)(3), the Department would be in compliance with the act.

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