

September 1999

HUD EEO INVESTIGATION

Contracting and Process Irregularities in HUD's Investigation of the IG



G A O

Accountability * Integrity * Reliability



B-282123

September 8, 1999

The Honorable Fred Thompson
Chairman, Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

In February 1998, the Deputy Assistant Inspector General (IG) for Investigation for the U.S. Department of Housing and Urban Development (HUD) filed an Equal Employment Opportunity (EEO) complaint with HUD's Office of Departmental EEO. The complaint alleged that HUD's IG, Susan Gaffney, had discriminated against him because of his race. On December 14, 1998, you requested that we assist the Committee in reviewing matters concerning that EEO complaint. Specifically, you asked that we determine (1) whether HUD had awarded contracts concerning the EEO complaint to outside firms in accordance with applicable government standards and (2) whether HUD's actions were justified when it deviated from its standard EEO process by contracting with firms not on the General Services Administration's (GSA) schedule of contractors.¹

Results in Brief

HUD's awarding of contracts to two law firms to investigate the Deputy Assistant IG's EEO complaint deviated from HUD's standard EEO investigation process and did not comply with the requirements of the Federal Acquisition Regulation (FAR). From February 12, 1998, to August 5, 1998, HUD followed its standard EEO process of reviewing the complainant's allegations for acceptance, contracting with a GSA-schedule firm to investigate the accepted allegations, and conducting the investigation. On August 5, 1998, however, HUD officials put the investigation on hold. On that same day, HUD deviated from its normal EEO process and requested proposals from a limited number of non-GSA-

¹GSA directs and manages the Federal Supply Schedule program, which provides federal agencies with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying. GSA issues Federal Supply Schedules containing information necessary for ordering. Ordering offices then place delivery orders directly with schedule contractors for the supplies and services they require. (48 C.F.R. § 8.401)

schedule firms to conduct this same investigation. HUD violated the FAR when it failed to synopsise this requirement in the *Commerce Business Daily* (CBD) and inappropriately limited the competition to seven firms. HUD awarded contracts to two law firms on August 26, 1998. Its last-minute amendment to the Request for Quotations (RFQ) to accommodate a joint proposal from the two firms and other actions by HUD officials contributed to an appearance that HUD manipulated the procurement process in order to direct the contract awards to the two firms. Although the usual cost for any type of EEO investigation at HUD is approximately \$3,000, these contracts totaled about \$100,000.

The significant role played in this procurement by Harold Glaser, then Deputy General Counsel for Programs and Regulations, was also extraordinary. Mr. Glaser took the lead in suspending the GSA-schedule firm's investigation and contracting with the non-GSA-schedule firms. His actions included compiling the list of potential contractors, contacting the Deputy Assistant IG's counsel to request an extension of time to complete the investigation, evaluating the proposals, reviewing the investigative plan, and consulting with the firms during the investigation.

HUD officials told us that they deviated from the standard EEO process for a number of reasons, including their perception of an environment of pervasive racial discrimination in the Office of the Inspector General (OIG) and the high rank and unique positions of both the Deputy Assistant IG and IG Gaffney. The justifications HUD provided for deviating from its usual EEO process were largely subjective and therefore difficult to assess. However, information we found substantially contradicts several factors cited as justifications for HUD's deviation.

Certain HUD officials served to impede our investigation. Specifically, HUD insisted on having an outside attorney present as "agency counsel" during interviews of HUD employees and prevented us from interviewing several HUD employees who may have possessed information critical to our investigation. While we would have preferred to have access to these individuals, we were able to gather sufficient information by employing other procedures.

Introduction

HUD's Standard EEO Process

Both Sandra Chavis, Director of HUD's Office of Departmental EEO, and Sandra Hobson, Director of HUD's EEO Division (within the Office of Departmental EEO), explained to us the steps that are involved in handling any EEO complaint. According to the two directors, the first step in HUD's EEO process is the filing of an informal complaint by an employee. One or more EEO counselors are then assigned to the case in this initial stage. Their job includes advising the complainant concerning the EEO process, reviewing each of the allegations in the complaint, and attempting to resolve them. If any allegation in an informal complaint cannot be resolved at this stage, the complainant may file a formal complaint.²

If a formal complaint is filed, it is reviewed within the Office of Departmental EEO, which informs the complainant of the allegations it has accepted for investigation. The next step, according to Ms. Chavis, is to contract with an appropriate firm on the GSA schedule for an investigation. The investigation must be completed within 180 days of the formal complaint filing date unless the complainant agrees to an additional 90 days. After the investigation, Ms. Chavis, as Director of the Office of Departmental EEO, renders a final agency decision concerning the case, which may be appealed to the Equal Employment Opportunity Commission (EEOC) or a district court. A complainant may file a civil action in a district court if HUD has not issued a final agency decision after 180 days from the time that the formal complaint was filed.

Chronology of Subject Complaint and Contracting Events

On November 12, 1995, IG Gaffney appointed an African-American male as the OIG's Deputy Assistant IG for Investigation. The Deputy Assistant IG subsequently applied and was not accepted for the position of Assistant IG for Investigation. On December 9, 1997, the IG selected a white male, who had served as Associate Counsel to the IG, for the position. That same day the Deputy Assistant IG learned that he would not receive a Senior Executive performance-based bonus.

²According to Ms. Chavis, only the allegations that the counselors have received, reviewed, and attempted to resolve become part of the formal investigation.

On January 14, 1998, the Deputy Assistant IG filed an informal complaint, alleging that he was discriminated against because of his race when he was not selected for the position of Assistant IG for Investigation, when he was not awarded a Senior Executive performance-based bonus, and when management treated him disparately in work assignments. The complaint further alleged that these actions were part of a pattern and practice of discrimination in the OIG involving many aspects of employment. On February 12, 1998, after attempts to resolve the informal complaint through counseling had failed, the Deputy Assistant IG filed a formal complaint. On May 15, 1998, Ms. Hobson accepted the first two allegations in the complaint for investigation but rejected the third because the Deputy Assistant IG had declined to complete the counseling process for this allegation.³

Following its standard process, on May 26, 1998, HUD contracted for a formal investigation of the two accepted allegations with a GSA-schedule investigative firm, Counter Technology Inc. (CTI), for \$2,700. HUD's usual cost for any EEO investigation is approximately \$3,000. Ms. Chavis and Ms. Hobson told us that because they had believed this to be a high-profile case, they contracted with CTI, a firm that had a record of providing HUD with high-quality investigative reports. Additionally, Ms. Hobson insisted that CTI assign its best investigator. CTI began its investigation by June 11, 1998, and proceeded, with an approved investigative plan, to schedule and conduct interviews of pertinent individuals. CTI fully expected to complete the investigation by August 11, 1998, HUD's 180-day deadline for issuing a final agency decision.

However, in the middle of July 1998, the General Counsel asked Howard Glaser, then HUD's Deputy General Counsel for Programs and Regulations and now Counsel to the Secretary, to review a request from IG Gaffney for legal representation in the EEO investigation. Mr. Glaser told us that in responding to the IG's request he had asked Ms. Chavis and Ms. Hobson about the status of the investigation. According to Mr. Glaser, they told him that no investigator had been assigned and no investigation was underway. Mr. Glaser stated that he became very concerned because at this time the 180-day deadline for completing the investigation was only 10 or 20 days

³On Sept. 25, 1998, Ms. Chavis informed the Deputy Assistant IG's attorney that HUD had reversed its earlier decision and accepted all of the complainant's allegations for investigation.

away. Mr. Glaser told us that he had reported this information to HUD's Deputy Secretary, Saul N. Ramirez, Jr.

After Mr. Glaser contacted Deputy Secretary Ramirez to discuss the complaint, Mr. Ramirez asked Ms. Hobson about the status of the case.⁴ According to Deputy Secretary Ramirez, she told him that no investigation was underway. Deputy Secretary Ramirez told us that he called a meeting with Mr. Glaser, Ms. Hobson, and Ms. Chavis.⁵ He recalled that the meeting had focused on the high level of the officials involved and the timeliness of the EEO process, among other matters. At this meeting, Deputy Secretary Ramirez decided to deviate from the normal process and hire a non-GSA-schedule firm to investigate the complaint. According to Mr. Ramirez, Mr. Glaser recommended the decision, Ms. Chavis concurred with the decision, and Ms. Hobson disagreed.

We were unable to determine whether Mr. Glaser or Deputy Secretary Ramirez knew that CTI was already investigating the complaint when they decided to hire a non-GSA-schedule firm. They told us that Ms. Chavis and/or Ms. Hobson had informed them that no investigation was underway when they first inquired about the status of the EEO case, even though this information was incorrect. Moreover, both officials said Ms. Chavis and Ms. Hobson were in the meeting in which the decision was made to hire a non-GSA-schedule firm; and yet, here again, they did not learn that an investigation was underway. Instead, Mr. Glaser told us that he learned sometime after the non-GSA-schedule firms had begun their investigation that a CTI investigator had been assigned to the case and that he immediately directed the EEO office to suspend CTI's contract. Deputy Secretary Ramirez, on the other hand, told us that it was later on the day that the meeting was held with Mr. Glaser, Ms. Hobson, and Ms. Chavis that Ms. Hobson told him for the first time that HUD had contracted with a GSA-schedule contractor a few days earlier but that HUD had already terminated the contract. The CTI investigation, however, was put on hold on August 5, 1998—after the meeting at which the hiring of a non-GSA-

⁴Deputy Secretary Ramirez told us that he first became aware of the Deputy Assistant IG's complaint in the summer of 1998 when he received a copy of the complaint in the normal course of business. His next involvement occurred when he was contacted by Mr. Glaser.

⁵We asked Deputy Secretary Ramirez to check his calendar to ascertain the exact date of the meeting, but he was unable to find the meeting scheduled on his calendar. He was able to tell us only that the meeting had occurred in the summer of 1998.

schedule firm was decided upon and well before those firms began their investigation. The CTI contract was thereafter terminated.

When we attempted to determine what Ms. Hobson and Ms. Chavis had told Deputy Secretary Ramirez and Mr. Glaser about the status of the investigation, HUD officials refused to allow us to reinterview Ms. Hobson and Ms. Chavis. Mr. Glaser told us, however, that it made no difference when he learned of the CTI investigation because HUD officials had decided that they wanted to contract with a more credible outside investigator.

Once the decision was made to procure the services of a non-GSA-schedule contractor, Mr. Glaser became deeply involved in the reprocurement of the investigative services. Mr. Glaser told us that he wanted to issue a sole-source contract to Deval Patrick or someone of similar stature. Mr. Patrick, a partner with the firm Day, Berry & Howard, LLP, had previously served as an Assistant Attorney General in the U.S. Department of Justice's Civil Rights Division and had gained national recognition as chairman of Texaco Inc.'s Equality and Fairness Task Force, formed as part of the 1996 settlement of a race discrimination suit brought by Texaco's African-American employees. However, on the advice of HUD procurement personnel, Mr. Glaser decided to conduct a limited competition.

To do this, Mr. Glaser contacted the Deputy Assistant IG's lead attorney sometime before August 11, 1998, the original deadline of the EEO complaint investigation, and asked if he would agree to a 90-day extension to complete the EEO investigation. During the conversation, Mr. Glaser stated that HUD was contracting with Mr. Patrick to conduct the investigation. The lead attorney agreed verbally to the extension.⁶ Mr. Glaser also wrote a Statement of Work (SOW), tailored after the standard GSA-schedule EEO investigation SOW, specifically adding a requirement that an attorney conduct the investigation. Mr. Glaser then contacted Kumiki Gibson, an attorney with Williams & Connolly who had worked as a trial attorney in the Justice Department's Civil Rights Division and as Counsel to Vice President Albert Gore, Jr., and asked her to provide a list of potential contractors. Mr. Glaser developed a source list based on this conversation. Despite the fact that the SOW called for an attorney to conduct the investigation, the final list of seven sources included only two

⁶On Aug. 12, 1998, the complainant's lead attorney agreed in writing to an Aug. 11, 1998, formal request from HUD's EEO Division for a time extension to complete the investigation.

law firms, Mr. Patrick's and Ms. Gibson's. The other sources on the list were investigative and accounting firms. Mr. Glaser provided the list to HUD procurement personnel to prepare an RFQ⁷ to each firm, which was issued on August 5, 1998. It required all proposals to be submitted by August 11, 1998.

HUD received a proposal from Decision Strategies/Fairfax International on August 10, 1998, and Day, Berry & Howard, LLP on August 11, 1998. Day, Berry & Howard, LLP's proposal was expressly contingent upon the award of a separate contract to Ms. Gibson and Williams & Connolly. Because the RFQ called for only one contractor, that same day the HUD Contracting Officer signed an amendment,⁸ allowing HUD to award separate contracts for portions of the SOW and extending the time for receipt of proposals to August 12, 1998. HUD received Williams & Connolly's proposal on August 12, 1998. Although the proposals of Williams & Connolly and Day, Berry & Howard, LLP were conditioned upon dividing the tasks in the SOW between the two firms, neither proposal described how the tasks were to be divided. By a letter dated August 20, 1998, 8 days after the extended time for receipt of proposals, Ms. Gibson informed HUD that Williams & Connolly would focus on specific incidents or acts of alleged discriminatory conduct and Day, Berry & Howard, LLP would focus on alleged systematic problems, such as discriminatory practices. Mr. Glaser and two other HUD officials evaluated the three proposals and recommended awarding separate contracts to Williams & Connolly and Day, Berry & Howard, LLP.

On August 26, 1998, HUD awarded purchase orders to Williams & Connolly in the amount of \$49,875 and to Day, Berry & Howard, LLP in the amount of \$48,000. Mr. Glaser told us that he reviewed the investigative plan and spoke with the investigators concerning various issues during the investigation. Despite his deep involvement in the formation and administration of these contracts, Mr. Glaser denied being the Government Technical Representative (GTR) and referred to his role as such as a myth. After IG Gaffney testified before your Committee concerning Mr. Glaser's involvement in the EEO process, Mr. Glaser instructed that the contract be

⁷Although HUD identified the solicitation as a Request for Quotations, HUD and the offerors referred to their responses as proposals.

⁸Although the amendment was signed on Aug. 11, 1998, its effective date was Aug. 10.

modified to remove his name as the GTR and to substitute Ms. Chavis's name in that role.

Upon learning of the contracts with outside law firms for the EEO investigation, IG Gaffney sent two letters to the EEOC—dated September 1, 1998, and September 2, 1998—requesting that EEOC assume responsibility for the subject EEO complaint. As the basis for her request, the IG accused senior HUD management of misconduct in hiring outside firms to investigate the EEO complaint and in creating an environment in which she was unable to obtain a fair investigation regarding that complaint. EEOC denied this request on September 11, 1998. IG Gaffney renewed her request on September 15, 1998. On October 28, 1998, HUD contracted with Donald Bucklin of Squire, Sanders & Dempsey, in the amount of \$100,000, to assist HUD in defending against the Deputy Assistant IG's EEO complaint. Among other tasks, Mr. Bucklin was to prepare a report defending HUD's handling of the EEO investigation. On November 10, 1998, the EEOC again denied IG Gaffney's request that EEOC assume responsibility for the EEO investigation. On December 23, 1998, Mr. Bucklin issued his report, which concluded that HUD's contracting procedures for the outside investigators were appropriate and consistent with federal acquisition law and regulations.⁹

On December 29, 1998, Deputy Secretary Ramirez referred the subject EEO case to EEOC for final decision. As impetus, the referral letter cited what HUD considered to be inappropriate intervention in that agency's decision-making process by a HUD OIG audit of the EEO complaint process and by our investigation. On January 29, 1999, EEOC declined the referral, stating that despite HUD's request, EEOC does not draft final agency decisions because it is an appellate body concerning such decisions.

On April 20, 1999, based on HUD's failure to issue a final agency decision, the Deputy Assistant IG filed suit in the District Court for the District of Columbia. The Deputy Assistant IG alleged in his complaint that the EEO investigation had been completed in December 1998. On June 28, 1999, a HUD official confirmed that the investigation was complete but told us that

⁹In reviewing HUD's contracting procedures relative to the Deputy Assistant IG's EEO complaint, we reviewed Mr. Bucklin's report. We found that the report contained factual errors and incorrect legal citations. See *HUD: Review of Bucklin Report Prepared to Assist HUD in Defending Against EEO Complaint by HUD's Deputy Assistant Inspector General* (GAO/OSI-99-16R, Aug. 3, 1999).

because HUD is no longer required to issue a final agency decision, the report will not be finalized.

FAR Violations in HUD Purchase Orders for EEO Investigation of IG

The Competition in Contracting Act (CICA) (41 U.S.C. § 253 (a)(1)(A) (1994)) requires full and open competition in government procurements. A few exceptions to this requirement are authorized by 41 U.S.C. section 253 (c)(3)(C); FAR section 6.3. Before awarding a contract using noncompetitive procedures, an agency must prepare a written Justification and Approval (J&A) containing sufficient facts and rationale to justify the specific exemption relied upon. (41 U.S.C. § 253 (f)(3); FAR § 6.303-2)

HUD's J&A for limiting the competition to seven offerors cites the expert exception to full and open competition (41 U.S.C. § 253(c)(3)(C); FAR § 6.302-3(a)(2)(iii)) as authority for limiting competition and not synopsis in the CBD. However, HUD did not present in its J&A, or in its subsequent submission to us, any justification for concluding that the contractors should be considered experts for the purpose of the expert exception to full and open competition.

The expert exception to full and open competition was added to CICA by section 1055 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. No. 103-355, § 1055, 108 Stat. 3243, 3265 (1994)) to allow agencies to acquire the services of an expert for any current or anticipated litigation or dispute.¹⁰ Neither the statute nor its legislative history defines the term "expert" or indicates any reason for the addition of the exception, and CICA is similarly silent. While the FAR provides a few examples of the services an expert might provide, neither it nor any other section of the FAR defines the term "expert."

In the only judicial or GAO decision interpreting the expert exception to full and open competition, the Comptroller General sustained a bid protest against the U.S. Air Force, finding that a sole-source contract to an incumbent litigation-support contractor was not justified by the expert exception to full and open competition. (*SEMCOR, Inc.; H.J. Ford Associates, Inc.*, B-279794, B-279794.2, B-279794.3 July 23, 1998.) After considering several definitions of the term "expert" proposed by the

¹⁰An expert exception to full and open competition for armed services acquisitions was also added to CICA by the Federal Acquisition Streamlining Act of 1994 (Pub. L. No. 103-355, § 1005, 108 Stat. 3243, 3254 (1994)).

parties—as well as 31A Am. Jur. 2d at 19-20, 61-65, Expert and Opinion Evidence, sections 1, 55-58—the Comptroller General concluded the following:

“For the purpose of the exception ... experts may be individuals who possess special skill or knowledge of a particular subject, that may be combined with experience, which enables them to provide opinions, information, advice, or recommendations to those who call upon them.”

Regardless of whether the investigation of the Deputy Assistant IG's EEO complaint constituted a current or anticipated litigation or dispute, we do not believe that the services provided by the law firms here meet this definition. While providing legal advice could qualify an individual as an expert, it is not at all clear how much of the work performed for HUD involved this service. Indeed, HUD hired the law firm of Squire, Sanders & Dempsey exclusively to provide “expert services to the Department officials and attorneys to assist in the defense of claims asserted” in the EEO case brought by the Deputy Assistant IG. Furthermore, there is no reason to believe that EEO investigators possess the special skill or knowledge that would render them experts for the purpose of the CICA exception, since it is reasonable to conclude that many competent providers of such services exist and that such investigations are commonplace. Accordingly, we believe that HUD could not properly rely upon the expert exception to limit competition in this procurement.

In a March 9, 1999, memorandum to us, HUD maintained that even if it improperly relied upon the expert exception, HUD properly conducted the procurement using the simplified acquisition procedures of FAR part 13. While the simplified acquisition procedures allow limited competition for contracts with an anticipated value of less than \$100,000, FAR section 5.101(a)(1) requires that agencies synopsisize contract actions with an anticipated value in excess of \$25,000 in the CBD. HUD argues that because synopsis in the CBD can add up to 45 days to the procurement process, its urgent need for the services would have justified an exception to the synopsis requirement.

FAR section 5.202(a)(2) provides an exception to the requirement for synopsis in situations of unusual or compelling urgency where the government would be seriously injured if the agency complies with the requirement. We do not believe that sufficient urgency existed to justify an exception to the synopsis requirement.

HUD prepared the J&A for this procurement on August 4, 1998, 6 days before the deadline for completing the investigation. The J&A explains the urgency of the procurement as follows:

“It is also crucial that the investigation be accomplished in a timely manner in view of the potential consequences (i.e. the integrity of the Department in fulfilling its [sic] mission) of having a highly visible individual (the HUD IG) charged with ‘allegations’ and no action being taken immediately by the Department.”

This explanation ignores the fact that HUD contracted with an investigative firm through GSA's multiple-award-schedule contract on May 26, 1998, to conduct the EEO investigation. After receiving HUD's approval of its investigative plan, that firm began conducting interviews with the expectation of completing the investigation within the 180-day limit. As HUD had processed the complaint in a timely fashion, no urgent requirement existed to contract with another investigator; and HUD cannot justify its failure to synopsise on that basis.

Deputy Secretary Ramirez stated that he was unaware of these facts in the summer of 1998 when he decided to hire a law firm to conduct the investigation. Moreover, Deputy General Counsel Glaser informed us that, for several reasons, including his perception of an environment of pervasive racial discrimination in the OIG and the need for a more credible investigator, HUD would have hired another contractor regardless of whether he and Deputy Secretary Ramirez knew that another firm had begun the investigation. Assuming these statements are true, Deputy Secretary Ramirez's tardy decision, which was based on facts known to HUD since February 1998, did not create a compelling urgency that would allow HUD to deviate from procurement procedures.

An agency may not avoid competition requirements, such as synopsis of proposed contract actions, on the basis of a lack of advance acquisition planning. (10 U.S.C. § 2304(f)(5)(A); FAR § 6.301(c)(1).) FAR section 7.101 defines acquisition planning as the following:

“[T]he process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency need in a timely manner and at a reasonable cost.”

The Deputy Assistant IG filed his EEO complaint on February 12, 1998, placing HUD on notice of the need for an investigation to be completed within 180 days. Cognizant that this was a high-profile case, the Director of HUD's EEO Division handpicked an investigative firm off the GSA schedule. Coordination with Deputy Secretary Ramirez in a timely fashion would have enabled the agency to decide whether the EEO Director's selection of a GSA firm was appropriate. Since Deputy Secretary Ramirez claimed, however, that he was not aware of the complaint until the summer of 1998, when he received a copy in the normal course of business, HUD officials did not engage in proper advance planning. HUD therefore created the urgency on which it now relies. Given these circumstances, we do not believe that HUD has shown a reasonable basis for avoiding competition requirements.¹¹

Deviations From Standard Procedures

The decision to use non-GSA-schedule firms to conduct the EEO investigation was a significant deviation from HUD's standard EEO process. Ms. Chavis told us that she was shocked that HUD spent approximately \$100,000 on this investigation when the typical EEO investigation, including those against Senior Executive Service (SES) members, costs approximately \$3,000. She also informed us that other high-ranking HUD officials had filed EEO complaints since the Deputy Assistant IG's complaint and that HUD assigned GSA-schedule contractors to investigate each of these complaints. In a separate case, according to Ms. Chavis, one complainant specifically requested the same type of investigation that the Deputy Assistant IG had received.

The degree of involvement in this matter by Mr. Glaser is equally extraordinary. As Mr. Glaser acknowledged during our interview, he is widely perceived as Secretary Andrew Cuomo's "right-hand man" and his "hammer." In his position as Deputy General Counsel for Programs and Regulations, Mr. Glaser had served as the GTR for legal service contracts but had had no responsibility for EEO or procurement matters. Nonetheless, he took the lead in terminating the CTI contract and contracting with Mr. Patrick and Ms. Gibson, to include compiling the list of potential contractors, contacting the Deputy Assistant IG's counsel to request an extension of time to complete the investigation, evaluating the

¹¹Each of the reasons advanced by Deputy Secretary Ramirez and Deputy General Counsel Glaser for contracting with the law firms existed at the time HUD contracted with the GSA-schedule firm on May 26, 1998.

proposals, reviewing the investigative plan, and consulting with the firms during the investigation.

Both Ms. Hobson and Ms. Chavis told us that Mr. Glaser's involvement in this investigation was unprecedented. According to Ms. Chavis, she was so concerned by Mr. Glaser's order to terminate the CTI contract that she met with Deputy Secretary Ramirez to confirm the independence of her office. The Deputy Assistant IG's attorney told us that he had never before been contacted by an agency's Office of General Counsel, rather than the EEO office, to request an extension of an EEO investigation. Mr. Glaser had so clearly taken control of the investigation that the Contracting Officer listed Mr. Glaser, rather than a representative of the EEO office, as the GTR.

HUD's Justifications for Deviating From Standard Procedures

HUD officials acknowledged that the contracting and investigative procedures employed in this case deviated from HUD's usual EEO process but insisted that the deviation was justified for a number of reasons. HUD officials told us that they deviated from the normal process because of their perception that there is an environment of pervasive racial discrimination in the OIG. Those officials told us that a contributing factor to this perception is that HUD headquarters is staffed predominantly by African-Americans, that HUD serves a predominantly minority clientele, and that minorities have been traditionally underrepresented in the OIG. According to the officials, this perception was reinforced by recent congressional and mayoral complaints against the IG for racial bias in the OIG's selection of three cities with African-American mayors as sites for HUD's Urban Fraud Initiative.¹² HUD officials told us that it was their understanding that the OIG had an excessive number of EEO complaints when compared with other HUD entities. However, they did not specify the number of complaints upon which they were relying. These officials also referred to a recent meeting with members of the OIG staff who had complained about discrimination problems in the OIG. The officials further stated that they had taken these concerns seriously.

HUD officials further told us that they had no choice but to contract for an outside investigator with unquestionable credentials to conduct the EEO investigation. They felt this was necessary in part because of the persons

¹²To combat fraud involving HUD funding, HUD mortgage insurance, and public housing in urban areas, the HUD OIG, with assistance from the U.S. Department of Justice, developed the HUD Urban Fraud Initiative.

involved and the serious nature of the allegations. They noted that the complainant is the Deputy Assistant IG for Investigation, a member of the SES, and the highest-ranking African-American official in OIG. For further support, they stated that the allegations involve a presidentially appointed member of the SES who they feared would retaliate against OIG employees for participating in the EEO process. In support of their position, they also asserted that the allegations are broad in scope, focusing not only on discrete personnel actions but also on the environment in the OIG, which was described by the complainant as containing pervasive racism. HUD officials additionally told us that HUD's African-American employees wanted a credible outside investigator and would judge the senior management's commitment to equal opportunity by how this case was handled.

Many of the justifications HUD provided to us for deviating from its usual EEO process are subjective in nature and therefore difficult to assess. Moreover, some of the justifications HUD presented to us appear to be based on only the speculation of the HUD officials. For example, Deputy Secretary Ramirez's perception that the OIG had an environment of pervasive racial discrimination was based solely on what he had heard and read in the newspapers. Although his perception had existed for some time prior to the Deputy Assistant IG's complaint, he admitted that he had never inquired of HUD employees if such conditions existed nor had HUD's Office of Departmental EEO told him that the OIG had extensive problems concerning EEO issues. Indeed, when we inquired, we found that the OIG did not have an excessive number of EEO complaints, which contradicted what Mr. Glaser and others had told us. Additional information we found substantially contradicted several other factors cited as justifications for HUD's actions.

Not an Excessive Number of EEO Complaints in the OIG

Mr. Glaser expressed concern about the high number of EEO complaints by employees in the OIG especially when compared with the number of complaints in other HUD units. He cited this as a factor supporting the choice to contract with non-GSA-schedule law firms. Mr. Glaser added that during Secretary Cuomo's tenure (1997-present), HUD's Office of General Counsel, with about half as many EEO complaints as the OIG, was a good basis for comparison when considering the two offices' relative size and personnel composition.

The Director of HUD's EEO Division provided us data indicating that the rate of EEO complaints filed by OIG employees was equal to or below that

of HUD's overall filing rate for 3 of the 5 fiscal years, including the most recent 3 years, since IG Gaffney was sworn in in 1993. Further, since the IG's confirmation, the OIG's rate of complaint filing had never been the highest in HUD and had always been much lower than that of HUD's Office of the Secretary. Indeed, the OIG's rate of EEO complaint filings was never twice that of the Office of General Counsel during Secretary Cuomo's administration. In fiscal year 1998, it was lower than that of the Office of General Counsel. See table 1.

Table 1: EEO Complaints Filed as a Percentage of Total Employees in Units

Unit	FY 94	FY 95	FY 96	FY 97	FY 98
Region 1	0.2	a			
Region 2	0.2	a			
Region 3	0.4	a			
Region 4	1.0	a			
Region 5	0.9	a			
Region 6	1.7	a			
Region 7	0.8	a			
Region 8	0.4	a			
Region 9	1.1	a			
Region 10	0.5	a			
Office of the Secretary	5.0	7.5	8.8	10.3	17.5
Field Management	30.0	0.9	0.0	0.6	0.3
Community Planning and Development	1.2	0.7	0.2	2.5	1.0
Office of General Counsel	1.9	1.4	0.6	1.4	1.3
Office of Legislative and Congressional Relations	0.0	0.0	0.0	0.0	6.7
Government National Mortgage Association	0.0	0.0	1.6	0.0	1.8
Office of Housing	3.9	1.3	1.0	1.5	1.7
Office of Public and Indian Housing	1.7	1.4	1.4	2.3	1.2
Office of Fair Housing and Equal Opportunity	10.4	5.1	2.8	6.3	3.5
Policy Development and Research	0.0	0.0	0.0	0.0	1.0
Administration	1.3	0.7	1.0	1.8	0.9
Office of Inspector General	2.2	2.0^a	1.0	1.7	1.1
Office of the Chief Financial Officer	1.6	0.3	0.0	0.0	0.0

Continued

Unit	FY 94	FY 95	FY 96	FY 97	FY 98
Office of Lead Based Paint	0.0	0.0	4.0	10.7	4.3
HUD as a whole	1.4	1.4	1.0	2.0	1.5

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Note: Percentages are based on the number of unit employees at the end of the fiscal year and the number of complaints filed in the unit during the fiscal year.

^aIn 1995, part way through fiscal year 1995, HUD began counting its regional employees (for reporting purposes) as part of the headquarters-based units in which they functioned. The OIG, however, had always counted its employees as headquarters-based; none had been included in previous regional figures.

Source: GAO analysis of HUD data.

Further, according to Ms. Hobson, OIG did not have a problem regarding the number of EEO complaints. Nor had the OIG come to her office's attention as having racial discrimination problems. According to Ms. Hobson, she also believed that the EEO Division had not made a finding of racial discrimination against IG Gaffney in the previous 5 years.

Justice and PCIE Found No Basis for Complaints of Racial Bias in Urban Fraud Initiative City Selection

Both Mr. Glaser and Stephen Carbury, HUD's Chief Procurement Officer, stated that the negative publicity surrounding IG Gaffney's selection of Baltimore, San Francisco, and New Orleans as sites for HUD's Urban Fraud Initiative was a factor in breaking with normal HUD contracting and investigative procedures and contracting with non-GSA-schedule law firms. The three cities had African-American mayors; and in March 1998, a U.S. Representative asked the President's Council on Integrity and Efficiency (PCIE)¹³ to investigate whether a pattern of racial bias in the OIG had led to the cities' selection.¹⁴ In April 1998, the National Conference of Black Mayors and the U.S. Conference of Mayors called on the Congress and others to authorize an inquiry into the matter.

¹³Established by executive order in 1981, PCIE is an interagency council charged with promoting integrity and effectiveness in federal programs. Its membership consists primarily of presidentially appointed and Senate-confirmed IGs. The chairman of PCIE is the Deputy Director for Management of the Office of Management and Budget. Among its other members is an official of the Federal Bureau of Investigation (FBI), designated by the Director of the FBI.

¹⁴In his letter to PCIE, Representative Elijah Cummings, when asking for an investigation, also indicated his concern about the lack of minorities in key positions within the HUD OIG and HUD itself. HUD officials also raised this and similar congressional concerns as supporting their decision to select non-GSA-schedule firms.

As part of its normal process, PCIE initially presented the complaint it received against IG Gaffney to the Department of Justice's Public Integrity Section. PCIE requested a determination of whether the complaint, if proved, would constitute prosecutable violations of federal criminal law. Prior to HUD's award of the contracts to the non-GSA-schedule firms, the Justice Department determined that there was insufficient information to warrant a criminal investigation. This conclusion was subsequently reported to PCIE. Further, PCIE's Integrity Committee,¹⁵ after a thorough administrative review of the complaint, concluded in January 1999 that the complaint was not substantiated. It found no evidence to support the allegations of racial bias related to the selection of the three cities.

While HUD officials could not have known that PCIE would conclude that the complaint was unsubstantiated when they awarded the contracts, they could have learned that Justice had already determined that there was insufficient information to warrant a criminal investigation. HUD officials also could have known that the HUD OIG's Diversity Liaison Group supported the Urban Fraud Initiative and IG Gaffney's selection of the three selected cities when the group met in April 1998. The group, made up of minority and nonminority OIG employees, reaffirmed its support for the Urban Fraud Initiative and for the OIG's independence to make its own decisions, when it met later in April 1998 with the Chairman and members of the Subcommittee on Veterans Affairs, HUD, and Independent Agencies, House Committee on Appropriations.

Not Permitted to Determine Authenticity of Reported OIG Staff Discussions of Discrimination Problems

According to Mr. Glaser, about seven OIG employees came to Samuel Hutchinson, HUD's Associate General Counsel for Human Resources, and him asking to be removed from the OIG because of the office's racial climate and their treatment by managers. Mr. Glaser did nothing to address the issue. He cited this meeting and a meeting between those OIG staff and the Chairman of a congressional committee to complain about the OIG's racial climate as factors in deviating from HUD's usual EEO process to investigate the subject EEO complaint. Mr. Hutchinson repeatedly recommended that we speak with these and other OIG employees to hear their views about the OIG's racial climate. Yet when we requested to speak with the OIG staff who had reportedly spoken with Mr. Hutchinson,

¹⁵The Integrity Committee, whose chairperson is PCIE's FBI representative, is responsible for receiving, reviewing, and referring for investigation allegations of wrongdoing against IGs and Deputy IGs.

Mr. Glaser, and members of Congress, our request was denied; and we were told that they all wished to remain anonymous.

Unique Positions of Persons Involved and Seriousness of the Allegations

HUD officials also stated that their deviation from normal procedures was justified by the positions of the persons involved in the complaint and the nature of the allegations. The combination of the Deputy Assistant IG's position as the highest-ranking African-American in the OIG, the IG's unique position within the agency, and the serious nature of the allegations did make this a high-profile case. However, we found that HUD had previously handled other high-profile cases that shared many of the same characteristics without resorting to such extraordinary measures.

High Profile

HUD officials cited the high profile, unique nature of this case as a reason for hiring a non-GSA-schedule investigator. However, Ms. Chavis and Ms. Hobson recognized early on that the case had a high profile and had already taken steps to ensure that it was handled by a high-quality investigator. Thus, HUD selected an investigative firm with a record of providing high-quality investigative reports and requested the firm's best investigator. According to Ms. Hobson, she was comfortable with the ability of the firm and the investigator. We found nothing to suggest that the actions of HUD's EEO professionals were not adequate to address the seriousness of this complaint.

Senior Positions of Persons Involved

HUD officials also cited the senior positions of those involved in the subject EEO complaint as a factor in going outside HUD's EEO procurement norm. The complainant, in an SES position as the Deputy Assistant IG for Investigation, was the highest-ranking African-American in the OIG. The official who allegedly discriminated against him, IG Gaffney, held a presidentially appointed SES position as head of the OIG. However, this was not the first time that HUD had dealt with an EEO complaint involving SES employees. In fact, two other HUD SES employees filed EEO complaints against other HUD SES officials during the same period as the subject complaint. The usual GSA-schedule investigators were assigned to their complaints.

No Indication That IG Would Retaliate

HUD officials referred to IG Gaffney's ability to retaliate against OIG employees who participate in the EEO process as another reason for using a non-GSA-schedule firm. They also voiced concern that the employees'

fears of retaliation would have a chilling effect on their willingness to participate in the EEO investigation.¹⁶

This was not the first EEO complaint in which IG Gaffney was alleged to have discriminated against employees. According to a HUD OIG summary, between her appointment in 1993 and the subject EEO complaint in February 1998, IG Gaffney was named eight times in formal EEO complaints.¹⁷ HUD's Office of Departmental EEO did not take any special precautions in these complaints to protect the complainants or witnesses against retaliation or intimidation by the IG. Nor did we find evidence that IG Gaffney had retaliated against these employees. OIG's rate of complaints, which approximates that of HUD as a whole (see table 1), suggests that OIG employees are not afraid to use the EEO process. Moreover, when we assessed the minutes of an April 27, 1998, meeting between members of the Subcommittee on Veterans Affairs, HUD, and Independent Agencies, House Committee on Appropriations, and representatives of the OIG's 27-member Diversity Liaison Group, we found that the group had commented frankly about the OIG's minority recruiting, diversity, racial climate, and work environment. This too suggests that OIG employees feel free to speak their minds without fear of retaliation or intimidation by the IG.

We also found no evidence that a non-GSA-schedule firm was better equipped than a GSA-schedule firm to protect employees against retaliation. Moreover, title VII specifically protects employees from retaliation by employees for participating in the EEO process,¹⁸ and we found no evidence that this statutory provision was inadequate to protect employees from retaliation by the IG.

¹⁶On Oct. 19, 1998, OIG initiated an audit into the procurement of EEO investigative services by HUD's Office of Procurement and Contracts (OPC). Although HUD officials have cited this action as an example of IG Gaffney's abuse of her auditing power, it was an inquiry into the procurement of the EEO investigative services rather than an attempt to discourage HUD or OIG employees from participating in the EEO investigation. Moreover, OPC personnel do not appear to have been intimidated by IG Gaffney as they refused to provide the documents requested by the OIG team and promptly reported the incident to HUD management, who requested a PCIE investigation.

¹⁷As of July 19, 1999, four of the eight complaints had been dismissed and the dismissals upheld after appeal; two complaints had been settled; one complaint had been dismissed with the dismissal appealed to the EEOC; and no final agency decision had been reached regarding the eighth complaint, with the case thus ongoing.

¹⁸42 U.S.C. § 2000e-3(a) (1994).

Scope and Methodology

We conducted our investigation between December 1998 and March 1999. During that time, we interviewed HUD senior management officials, HUD procurement officials, HUD EEO officials, and senior officials of the HUD OIG. We also interviewed employees of EEOC and the complainant's attorneys. In addition, we reviewed documents, contracts, and statistical data pertinent to the scope of our investigation.

We requested an interview with the Secretary of HUD, Andrew Cuomo. Our request was denied. In addition, senior HUD management denied our requests to conduct initial and follow-up interviews of other pertinent HUD personnel, citing its ongoing EEO investigation, and insisted that Mr. Bucklin, acting as agency counsel, attend interviews of other HUD employees. Mr. Bucklin disrupted an interview with Deputy Secretary Ramirez by constantly objecting to our questions and taking breaks to confer with the Deputy Secretary outside of our presence. Although Gail Laster, HUD's General Counsel, wanted to talk with us without Mr. Bucklin present, HUD officials refused. Further, HUD officials requested that we interview a group of OIG employees who, the officials said, had complained about the OIG's racial climate. However, when we asked to do so, we were informed that the individuals wished to remain anonymous.

As agreed with your office, unless you announce its contents earlier, we plan no further distribution of this report until 30 days after the date of this letter. At that time, we will send copies of this report to interested congressional committees and make copies available to others upon request. If you have questions about our investigation, please contact me or Ronald Malfi at (202) 512-6722. John Ryan was a key contributor to this case.

Sincerely yours,



Robert H. Hast
Acting Assistant Comptroller General
for Special Investigations

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