

Department of Health and Human Services

**OFFICE OF  
INSPECTOR GENERAL**

**APPROPRIATIONS FUNDING  
FOR NATIONAL INSTITUTE OF ALLERGY  
AND INFECTIOUS DISEASES CONTRACT  
N01-AI-30068  
WITH PPD DEVELOPMENT, LP**

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Inspector General**

**September 2012  
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# ***Office of Inspector General***

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## EXECUTIVE SUMMARY

### BACKGROUND

The National Institute of Allergy and Infectious Diseases (NIAID) is 1 of 27 institutes and centers of the National Institutes of Health (NIH), an agency of the Department of Health and Human Services (HHS). The NIH Office of the Director sets policy and plans, manages, and coordinates NIH-wide programs and activities. Like all Federal agencies, NIAID is required to comply with appropriations statutes when acquiring supplies and services with appropriated funds.

An agency may obligate appropriations for goods and services when (1) the purpose of the obligation or expenditure is authorized, (2) the obligation occurs within the time limits for which the appropriation is available, and (3) the obligation and expenditure are within the amounts provided by Congress.

Federal statutes limit the purpose for which an agency may use appropriations to “the objects for which the appropriations were made except as otherwise provided by law” (31 U.S.C. § 1301(a)). A fiscal year appropriation may be obligated only to meet a legitimate, or bona fide, need arising in, or in some cases arising prior to but continuing to exist in, the appropriation’s period of availability (31 U.S.C. § 1502(a)). Congress determines the amount of funding available to an agency for the purchase of goods and services by enacting appropriations. The Antideficiency Act prohibits an agency from obligating or expending those funds in advance of or in excess of an appropriation unless specifically authorized by law (31 U.S.C. § 1341(a)(1)).

The Comptroller General has held that “the question of whether to charge the appropriation current on the date the contract is made, or to charge funds current at the time the services are rendered, depends on whether the services are ‘severable’ or ‘entire’ [nonseverable].” When services are continuing and recurring, they are severable, and the agency must fund the contract with fiscal year appropriations from the year in which services are provided, unless otherwise authorized by statute. When services are for a single outcome or effort, they are nonseverable and therefore chargeable to the fiscal year in which the contract is awarded, even though performance may extend into subsequent fiscal years.

On September 30, 2003, NIAID awarded contract N01-AI-30068 (the Contract), totaling \$48.4 million, to PPD Development, LP, in Wilmington, North Carolina. NIAID estimated the funds needed for the 5-year Contract as follows: \$9.9 million of fiscal year 2003 funds for program year 1, \$9.3 million of fiscal year 2004 funds for program year 2, \$9.5 million of fiscal year 2005 funds for program year 3, \$9.8 million of fiscal year 2006 funds for program year 4, and \$10.0 million of fiscal year 2007 funds for program year 5. (Annual funding amounts do not total \$48.4 million because of rounding.) On July 30, 2007, NIAID modified the Contract to increase funding for program years 4 and 5 and extend the period of performance to 7 years at an additional cost of \$49.7 million. NIAID estimated the funds needed as follows: \$4.4 million for program year 4, \$15.3 million for program year 5, \$15.0 million for program year 6, and \$15.0 million for program year 7. The Contract requires the contractor to provide clinical trial management support services to the Division of Microbiology and Infectious Diseases. Although the Contract statement of work may contain some nonseverable elements, we

determined that the Contract is a severable service contract because it calls for continuing, recurring tasks and does not provide for a single outcome at the Contract conclusion.

From November 2008 through February 2009, an HHS internal review group called the “Tiger Team” assessed 176 HHS contracts, including 21 NIH contracts. The Contract was 1 of the 21 NIH contracts assessed. For 17 of the 21 contracts, the Tiger Team identified instances in which contract funding was not consistent with the current HHS Acquisition Regulation or appropriations law. The Tiger Team report did not identify its concerns or quantify funding errors by contract.

## **OBJECTIVE**

Our objective was to determine whether NIAID funded the Contract in compliance with the purpose, time, and amount requirements specified in appropriations statutes.

## **SUMMARY OF FINDINGS**

NIAID funded the Contract in compliance with the purpose requirements of the appropriations statutes. However, NIAID did not comply with the time and the amount requirements specified in the statutes. NIAID violated both the bona fide needs rule and the Antideficiency Act.

NIAID violated the bona fide needs rule when it recorded expenditures against the wrong fiscal years. Although NIAID properly obligated the Contract estimate for program year 1, the obligation exceeded the actual expenditures by \$7.3 million. NIAID failed to deobligate the unneeded fiscal year 2003 funds remaining from program year 1. Instead, NIAID inappropriately used the remaining fiscal year 2003 funds for program year 2 expenditures. Subsequently, NIAID recorded expenditures for each program year against funds obligated for one or more previous program years. NIAID may not use funds remaining from any program year for costs incurred in subsequent program years and should record expenditures for each program year against the appropriate fiscal year appropriations. Because fiscal year 2003 appropriations are canceled, the \$7.3 million must be deobligated and returned to the Treasury.

Because it recorded expenditures on a first-in-first-out basis against inappropriate fiscal year funds, NIAID failed to identify and properly obligate funds for its bona fide need in succeeding programs years. As a result, NIAID violated the bona fide needs rule for program years 2 and 5, by obligating a total of \$31.0 million that exceeded the bona fide needs: \$12.8 million of fiscal year 2004 funds for program year 2 and \$18.2 million of fiscal year 2007 funds for program year 5. Because fiscal year 2004 appropriations are canceled, the \$12.8 million must be deobligated and returned to the Treasury.

NIAID violated the Antideficiency Act by obligating funds in advance of an appropriation. NIAID may also have violated the Antideficiency Act by obligating significantly less of appropriate fiscal year funds in program years 3, 4, and 6 than required by either the Contract estimate or the actual expenditures incurred.

NIAID must resolve these bona fide needs rule violations and address the potential Antideficiency Act violations by deobligating \$12.8 million of fiscal year 2004 funds and \$18.2 million of fiscal year 2007 funds. Further, NIAID must obligate sufficient funds to cover

incurred expenditures as follows: \$15.9 million of fiscal year 2005 funds for program year 3, \$4.3 million of fiscal year 2006 funds for program year 4, and \$10.3 million of fiscal year 2008 funds for program year 6. Fiscal year 2005 and 2006 funds are no longer available; however, NIAID may be able to fund the deficiencies for program years 3 and 4 by using current fiscal year appropriations provided the conditions of 31 U.S.C §§ 1553 and 1554 are met. If NIAID does not have sufficient current fiscal year appropriations or the amount exceeds the lesser of 1 percent of the current appropriation or the unexpended balance of the closed appropriations, it will violate the Antideficiency Act. NIAID may still be able to obligate sufficient fiscal year 2008 funds for program year 6. However, if NIAID does not have adequate fiscal year funds available, it will violate the Antideficiency Act for that year as well.

## **RECOMMENDATIONS**

Our recommendations to address NIAID's funding violations and other financial management issues are presented in the body of the report.

## **NATIONAL INSTITUTES OF HEALTH COMMENTS AND OFFICE OF INSPECTOR GENERAL RESPONSE**

In written comments on our draft report, NIH concurred with the findings and agreed that the Contract is severable and should have been funded with the appropriation that was current when the services were performed. NIH said that HHS reported the Antideficiency Act violation as required by 31 U.S.C. § 1351.

NIH stated that, effective May 1, 2010, the Contract was modified to ensure that it was funded appropriately by recording expenditures against fiscal year 2010. NIH did not concur with our recommendations to correct the improper funding for the first 6 program years of the Contract. NIH stated that the Contract had expired and was being closed. NIH further stated that, in accordance with the HHS corrective action plan, "payment for contract performance conducted before May 1, 2010, remain recorded against appropriations initially charged." Until NIH makes these adjustments, HHS cannot report the appropriate amount of the Antideficiency Act violation. Therefore, we continue to recommend that NIH record the correct Contract obligations and expenditures against the appropriate fiscal year funds.

NIH's comments are included in their entirety as Appendix B.

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## INTRODUCTION

### BACKGROUND

The National Institute of Allergy and Infectious Diseases (NIAID) is 1 of 27 institutes and centers of the National Institutes of Health (NIH), an agency of the Department of Health and Human Services (HHS). The NIH Office of the Director sets policy and plans, manages, and coordinates NIH-wide programs and activities. Like all Federal agencies, NIAID is required to comply with appropriations statutes when acquiring supplies and services with appropriated funds.

### Federal Appropriations Statutes

An agency may obligate appropriations for goods and services when (1) the purpose of the obligation or expenditure is authorized, (2) the obligation occurs within the time limits for which the appropriation is available, and (3) the obligation and expenditure are within the amounts provided by Congress.

Federal statutes limit the purpose for which an agency may use appropriations to “the objects for which the appropriations were made except as otherwise provided by law” (31 U.S.C. § 1301(a)). A fiscal year appropriation may be obligated only to meet a legitimate, or bona fide, need arising in, or in some cases arising prior to but continuing to exist in, the appropriation’s period of availability (31 U.S.C. § 1502(a)). Unless otherwise specified in the appropriation, the period of availability for most funds is the fiscal year for which the appropriation is made.

The Comptroller General has held that “the question of whether to charge the appropriation current on the date the contract is made, or to charge funds current at the time the services are rendered, depends on whether the services are ‘severable’ or ‘entire’ [nonseverable].”<sup>1</sup> When services are continuing and recurring, they are severable, and the agency must fund the contract with fiscal year appropriations from the year in which services are provided, unless otherwise authorized by statute.<sup>2</sup> When services are for a single outcome or effort, they are nonseverable and therefore chargeable to the fiscal year in which the contract is awarded, even though performance may extend into subsequent fiscal years.

Congress determines the amount of funding available to an agency by enacting appropriations to cover programs, projects, purchases, and services needed by the agency during the period for which the funds are made available. The Antideficiency Act prohibits an agency from obligating or expending funds in advance of or in excess of an appropriation unless specifically authorized by law (31 U.S.C. § 1341(a)(1)). The Antideficiency Act requires agencies to report violations to the President and to Congress, with a copy to the Comptroller General (31 U.S.C. § 1351). Office of Management and Budget (OMB) Circular A-11, *Preparation, Submission and Execution of the Budget*, part 4, § 145, prescribes the methodology for this reporting.

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<sup>1</sup> As cited in GAO-04-261SP, *Appropriations Law*, Vol. I, p. 5-23.

<sup>2</sup> The Federal Acquisition Streamlining Act of 1994 (FASA), P.L. No. 103-355, provides certain exceptions to the bona fide needs rule.



## Agency Funding Flexibilities

### *Federal Acquisition Streamlining Act of 1994*

Statutory authority provided by the FASA allows agencies, including HHS, some flexibility in the use of fiscal year appropriations when funding severable services contracts. However, the FASA also establishes certain requirements relating to these funding flexibilities. Pursuant to FASA §§ 1072 and 1073 (codified at 41 U.S.C. §§ 254c and 253l<sup>3</sup>), agencies may use fiscal year appropriations to purchase severable goods and services through special contracting methods.

Implementing these provisions of the FASA, the Federal Acquisition Regulation (FAR), parts 32.703-3 and 37.106, states:

[Agencies] may enter into a contract, exercise an option, or place an order under a contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the contract awarded, option exercised, or order placed does not exceed one year (10 U.S.C. 2410a and 41 U.S.C. 253l). Funds made available for a fiscal year may be obligated for the total amount of an action entered into under this authority.

Implementing 41 U.S.C. § 254c, FAR part 17.1 provides policies and procedures for the use of multiyear contracting and authorizes the award of incrementally funded severable service contracts for multiple performance periods crossing fiscal years for up to 5 program years. If the awarding agency funds the contract incrementally, the FAR limits funding to 5 program years. The Comptroller General has clarified the funding of multiyear contracts under 41 U.S.C. § 254c:

To take advantage of FASA, the agency must either (1) obligate the full amount of the contract to the appropriation current at the time it enters into the contract, or (2) obligate the costs of the first year of the contract plus termination costs. Of course, if the agency elects to obligate only the costs of the individual years for each year of the contract, the agency needs to obligate the costs of each such year against the appropriation current for that year.<sup>4</sup>

### *Options*

Agencies also fund severable service contracts by awarding a 1-year contract with renewable options. The continuation of the contract beyond the first program year is at the sole discretion of the agency. An option does not become an obligation until the agency exercises the option. When the agency exercises the option, it reflects the bona fide need of that fiscal year and must charge funds from that fiscal year appropriation. FAR part 17.2 prescribes the policies and procedures for the use of options.

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<sup>3</sup> The provisions cited as 41 U.S.C. §§ 253l and 254c in this report were revised and recodified as 41 U.S.C. §§ 3902 and 3903, respectively (P.L. No. 111-350, Jan. 4, 2011), which provide substantially similar requirements. We have referenced the provisions as they were in effect at the time the contract was signed.

<sup>4</sup> As cited in GAO-06-382SP, *Appropriations Law*, Vol. II, p. 6-53.

## *Incremental Funding*

Agencies also incrementally fund severable service contracts, including those with multiple periods of performance, by identifying the period of performance and ceiling amount in the “Estimated Cost and Fixed Fee” (Article B.2) provisions of the contract and through the routine contract modification process. FAR subpart 32.7 describes the basic requirements for contract funding and prescribes procedures for using limitation of cost or limitation of funds clauses. Under these provisions, agencies obligate funds in increments of 1 year or less and define the period of performance related to the amount obligated. When additional funds are required or become available, agencies issue a contract modification that obligates the additional funds, increases the period of performance covered, and increases the contract ceiling. An agency may incrementally fund a contract only with appropriations that are available for the specific period of performance or work.<sup>5</sup>

### **National Institute of Allergy and Infectious Diseases Contract Award**

On September 30, 2003, NIAID awarded contract N01-AI-30068 (the Contract), totaling \$48.4 million, to PPD Development, LP, in Wilmington, North Carolina. NIAID estimated the funds needed for the 5-year Contract as follows: \$9.9 million of fiscal year 2003 funds for program year 1, \$9.3 million of fiscal year 2004 funds for program year 2, \$9.5 million of fiscal year 2005 funds for program year 3, \$9.8 million of fiscal year 2006 funds for program year 4, and \$10.0 million of fiscal year 2007 funds for program year 5.<sup>6</sup> On July 30, 2007, NIAID modified the Contract to increase funding for program years 4 and 5 and extend the period of performance to 7 years at an additional cost of \$49.7 million. NIAID estimated the funds needed as follows: \$4.4 million for program year 4, \$15.3 million for program year 5, \$15.0 million for program year 6, and \$15.0 million for program year 7. The Contract requires the contractor to provide clinical trial management support services to the Division of Microbiology and Infectious Diseases. Although the Contract statement of work may contain some nonseverable elements, we determined that the Contract is a severable service contract because it calls for continuing, recurring tasks and does not provide for a single outcome at the Contract conclusion.

### **Departmental Review of National Institutes of Health Contracts**

In 2008, HHS management formed an internal review group of program, contract, and financial personnel called the “Tiger Team.” From November 2008 through February 2009, the Tiger Team assessed 176 HHS contracts, including 21 NIH contracts. The Contract was 1 of the 21 NIH contracts assessed. For 17 of the 21 contracts, the Tiger Team identified instances in which contract funding was not consistent with the current HHS Acquisition Regulation (HHSAR) or

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<sup>5</sup> See also HHS Acquisition Policy Memorandum 2010-01, *Guidance Regarding Funding of Contracts Exceeding One Year of Performance* (June 28, 2010), which was issued subsequent to the award of the Contract.

<sup>6</sup> NIAID estimated funds on a program year basis. “Program year” defines each of the five 12-month funding and operating periods starting September 30 of each fiscal year, beginning on September 30, 2003, with the award of the Contract. Extending fiscal year appropriations for a period of up to 12 months is permitted by 41 U.S.C. § 253l. We used these funding estimates as a statement of NIAID’s bona fide need for each program year. Annual funding amounts do not total \$48.4 million because of rounding.

appropriations law.<sup>7</sup> The Tiger Team report did not identify its concerns or quantify funding errors by contract.

## **OBJECTIVE, SCOPE, AND METHODOLOGY**

### **Objective**

Our objective was to determine whether NIAID funded the Contract in compliance with the purpose, time, and amount requirements specified in appropriations statutes.

### **Scope**

We reviewed all obligations and payments made under the Contract during fiscal years 2003 through 2008 (program year 1 through the first 9 months of program year 6). Although we identified two Contract modifications that obligated fiscal year 2010 funds for program year 7, we did not review or address the appropriateness of those obligations for this report. At the time of our review, NIAID had not recorded expenditures for program year 7. We are awaiting a decision from the Government Accountability Office regarding the appropriateness of similar funding of another contract. That issue will be addressed in a report summarizing our reviews of the 21 NIH contracts.

We did not review NIAID's internal controls because our objective did not require such a review. Procedures for awarding the Contract were outside the scope of this review. Therefore, we performed this review as if NIAID had followed the appropriate award procedures.

We performed our fieldwork at NIAID in Bethesda, Maryland.

### **Methodology**

To accomplish our objective, we:

- reviewed appropriations and acquisition laws and regulations and Contract requirements;
- reviewed the Tiger Team report;
- reviewed Contract file documentation, including the statement of work, to determine the nature of the products or services to be provided;
- analyzed the Contract using program years; and
- analyzed funding documents and payment invoices to determine what appropriations were obligated, recorded, and expended.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions

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<sup>7</sup> *Funding Multiple Year Contracts: Tiger Team Summary Report*, July 29, 2009.

based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

## **FINDINGS AND RECOMMENDATIONS**

NIAID funded the Contract in compliance with the purpose requirements of the appropriations statutes. However, NIAID did not comply with the time and the amount requirements specified in the statutes. NIAID violated the bona fide needs rule when it recorded expenditures against the wrong fiscal years and obligated funds in excess of its bona fide need. NIAID violated the Antideficiency Act when it obligated funds in advance of an appropriation and may have violated the Antideficiency Act by obligating funds in excess of an appropriation. If NIAID cannot resolve its bona fide needs rule violations by obligating sufficient appropriations from appropriate fiscal years, it will further violate the Antideficiency Act.

### **FUNDING VIOLATIONS**

#### **Bona Fide Needs Rule Violations**

Federal statutes limit the time for which an appropriation may be used. A fiscal year appropriation may be obligated only to meet a legitimate, or bona fide, need arising in, or in some cases arising prior to but continuing to exist in, the appropriation's period of availability (31 U.S.C. § 1502(a)). Bona fide needs may involve transactions that cover more than 1 fiscal year, depending on the nature of the services involved.

Severable services are continuing and recurring in nature. A contract for severable services must reflect a bona fide need identified for each program year.

#### *Expenditures Recorded Against the Wrong Fiscal Years*

NIAID did not adjust the estimated need for each program year or obligate appropriate fiscal year funds to meet current bona fide needs. Rather, it used obligated funds on a first-in-first-out basis to record expenditures as they were invoiced, regardless of the program year for which the work was performed or the funds were obligated.

NIAID properly obligated the Contract estimate of \$9.9 million for program year 1 using fiscal year 2003 appropriations. NIAID's actual expenditures for program year 1 were only \$2.5 million. However, NIAID failed to deobligate the unneeded \$7.3 million (\$9.9 million less \$2.5 million) of fiscal year 2003 funds.<sup>8</sup> Instead, NIAID inappropriately used those funds for program year 2 expenditures. For program years 2 through 6, NIAID inappropriately recorded expenditures totaling \$40.7 million against the wrong fiscal year funds: \$7.3 million incurred for program year 2 against fiscal year 2003 funds, \$20.1 million incurred for program years 3 and 4 against fiscal year 2004 funds, \$2.9 million incurred for program year 4 against fiscal year 2005 funds, and \$10.4 million incurred for program years 3 and 6 against fiscal year 2007 funds.<sup>9</sup>

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<sup>8</sup> Amounts reflect the effect of rounding.

<sup>9</sup> NIAID paid a retroactive rate increase for program year 3 using funds available at the time the rate increase was invoiced but should have used funds available for program year 3 for which the increase was paid.

Appendix A shows the actual expenditures correctly and incorrectly recorded against fiscal year appropriations obligated for each program year.

NIAID may not use funds remaining from any program year for costs incurred in subsequent program years. To remedy these errors, NIAID will need to reverse those expenditures that were recorded against the wrong fiscal year funds and record them against fiscal year appropriations obligated for the program year in which the expenditure occurred.

To resolve its bona fide needs violations, NIAID will have to obligate \$15.9 million for program year 3, \$4.3 million for program year 4, and \$10.3 million for program year 6 using appropriate fiscal year funds.

#### *Obligation in Excess of the Bona Fide Need*

In fiscal year 2003, when it awarded the 5-year, \$48.4 million severable service Contract, NIAID estimated its cost for each program year. In fiscal year 2007, when NIAID added work and extended the Contract to 7 program years, NIAID estimated its cost for the work beginning in program year 4 and continuing for program years 5 and 6. However, NIAID obligated more than its bona fide need in some program years:

- For program year 2, which began on September 30, 2004, NIAID estimated that it needed \$9.3 million. However, it obligated a total of \$23.8 million of fiscal year 2004 appropriations: an initial increment of \$9.3 million in June 2004 and three increments totaling \$14.5 million in September 2004 that improperly funded the Contract for more than a 12-month period.<sup>10</sup>
- For program year 5, which began on September 30, 2007, NIAID estimated that it needed \$25.3 million (\$10.0 million for original work plus \$15.3 million for new work); however, it obligated a total of \$34.5 million of fiscal year 2007 appropriations: an initial increment of \$12.4 million in July 2007 and a subsequent increment of \$22.1 million in September 2007 that improperly funded the Contract for more than a 12-month period.

NIAID's expenditures for each program year did not correspond to the amount estimated in the Contract. However, NIAID did not modify its estimates or adjust its obligations to reflect its actual bona fide need. Rather, it obligated amounts that did not correspond to the Contract estimate for any year after program year 1 and in some years obligated less than its actual expenditures. Table 1 compares the Contract estimates and the amounts obligated to the actual expenditures for each program year as recorded at the time of our review.

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<sup>10</sup> NIAID issued three Contract modifications in September 2004 obligating fiscal year 2004 funds: \$8.5 million on September 24 and \$3.4 million and \$2.6 million on September 30.

**Table 1. Comparison of Obligated Amounts to Bona Fide Needs**

| <b>Program Year</b> | <b>Fiscal Year Funds</b> | <b>Contract Estimate</b> | <b>Amount Obligated</b> | <b>Actual Expenditures</b> |
|---------------------|--------------------------|--------------------------|-------------------------|----------------------------|
| 1                   | 2003                     | \$9,877,517              | \$9,877,517             | \$2,548,793                |
| 2                   | 2004                     | 9,283,180                | 23,839,543              | 11,074,761                 |
| 3                   | 2005                     | 9,510,615                | 2,930,403               | 18,874,211                 |
| 4                   | 2006                     | 9,752,458                | 11,744,831              | 16,066,375                 |
| 4                   | 2007 <sup>a</sup>        | 4,362,868                | 12,363,668 <sup>b</sup> | 2,863,260                  |
| 5                   | 2007 <sup>a</sup>        | 15,344,497               |                         | 22,125,937                 |
|                     | 2007                     | 9,968,524                |                         |                            |
| 6                   | 2008 <sup>a</sup>        | 15,030,153               | 3,388,782               | 10,268,902 <sup>d</sup>    |

<sup>a</sup> Contract modification 10 authorized additional funding to cover a funding shortfall for program year 4, anticipated growth for program year 5, and a 2-year extension to the Contract (program years 6 and 7).

<sup>b</sup> Contract modification 10 did not identify separate obligations for program years 4 and 5.

<sup>c</sup> Program year 5 expenditures included work identified in the original award and new work identified in Contract modification 10.

<sup>d</sup> We estimated, on the basis of the \$10.3 million incurred and recorded for the first 9 months, that total expenditures for program year 6 would be \$13.7 million.

The FAR, parts 32.703-3 and 37.106, allows for the use of annual funds beyond the end of the fiscal year only “if the period of the contract awarded, option exercised, or order placed does not exceed one year.” Therefore, NIAID’s methods of obligating funds in excess of the bona fide needs for program years 2 and 5, and extending the use of those funds after their period of availability, violated the bona fide needs rule and statutory authority relating to availability of fiscal year funds.

After NIAID corrects the expenditure-recording errors described earlier in this report, it will need to remedy these bona fide needs rule violations by deobligating fiscal year appropriations that were obligated in excess of the agency’s bona fide needs as follow: \$12.8 million (\$23.9 million less \$11.1 million) of fiscal year 2004 funds for program year 2 and \$18.2 million (\$31.6 million<sup>11</sup> less \$13.4 million) of fiscal year 2007 funds for program year 5. Because fiscal year 2004 appropriations are canceled, the \$12.8 million must be deobligated and returned to the Treasury.

<sup>11</sup> We estimate that NIAID expended \$2.9 million of the \$34.5 million (\$12.4 million plus \$22.1 million) of fiscal year 2007 funds for work performed in program year 4, leaving \$31.6 million (\$34.5 million less \$2.9 million) for program year 5.

## **Antideficiency Act Violations**

Congress determines the amount of funding available to an agency by enacting appropriations to cover programs, projects, purchases, and services needed by the agency during the period for which the funds are made available. The Antideficiency Act prohibits the agency from obligating or expending any amount in advance of or in excess of an appropriation unless specifically authorized by law (31 U.S.C. § 1341(a)(1)). The Antideficiency Act requires agencies to report violations to the President and to Congress, with a copy to the Comptroller General (31 U.S.C. § 1351). OMB Circular A-11, part 4, § 145, prescribes the methodology for this reporting.

Pursuant to 31 U.S.C. §§ 1551-1553, the statutes governing the closing of accounts,<sup>12</sup> after fiscal year appropriations expire they remain available to record, adjust, and liquidate obligations properly chargeable to the appropriation account for up to 5 years. After 5 years, the appropriation account is closed and the balance is canceled.

Pursuant to 31 U.S.C. § 1553(b), if fiscal year funds are no longer available because an account has been closed, an agency may charge the obligation to the current fiscal year appropriation account available for the same purpose. The amount charged to the current fiscal year appropriation account may not exceed the lesser of 1 percent of the current appropriation or the unexpended balance of the closed appropriation.

Pursuant to 31 U.S.C. § 1554, after the close of each fiscal year, the head of each agency must submit to the President and the Secretary of the Treasury a report on adjustments made to appropriation accounts during the year, including any adjustments to obligations pursuant to section 1553.

### *Obligations in Advance of an Appropriation*

NIAID's obligation of fiscal year appropriations for a period that exceeded 12 months constituted an obligation of funds in advance of an appropriation and thus violated the Antideficiency Act. NIAID obligated fiscal year appropriations to fund the Contract using the initial award and 13 modifications. Table 2 shows the number of months for each funding modification issued by NIAID.

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<sup>12</sup> Each agency has an account, maintained by the Department of the Treasury, that tracks the amount of funds available for use. That account is credited with funds appropriated in the agency's budget and reduced by expenditures made by the agency to perform the tasks for which the credit was given.

**Table 2. National Institute of Allergy and Infectious Diseases Contract Funding Periods**

| <b>Funding Action</b> | <b>Effective Date</b> | <b>Funded-Through Date</b> | <b>Months</b> | <b>Amount Obligated</b> |
|-----------------------|-----------------------|----------------------------|---------------|-------------------------|
| Award                 | 09/30/03              | 09/29/04                   | 12.0          | \$9,877,517             |
| 1                     | 06/25/04              | 09/29/05                   | 15.0          | 9,283,180               |
| 2                     | 09/24/04              | 08/29/06                   | 23.0          | 8,559,554               |
| 3                     | 09/30/04              | 12/29/06                   | 25.0          | 3,367,644               |
| 4                     | 09/30/04              | 03/29/07                   | 30.0          | 2,629,165               |
| 5                     | 09/29/05              | 07/29/07                   | 22.0          | 2,930,403               |
| 6                     | 06/13/06              | 07/29/07                   | 13.5          | 300,000                 |
| 7                     | 06/30/06              | 08/29/07                   | 14.0          | 1,331,197               |
| 8                     | 09/29/06              | 09/29/08                   | 24.0          | 10,113,634              |
| 10                    | 07/30/07              | 03/30/08                   | 8.0           | 12,363,668              |
| 11                    | 09/29/07              | 07/29/09                   | 22.0          | 22,125,937              |
| 13                    | 09/29/08              | 12/29/09                   | 15.0          | 3,388,782               |
| 15                    | 03/16/10 <sup>a</sup> | 05/31/10                   | 2.5           | 5,400,000               |
| 17                    | 07/20/10 <sup>a</sup> | 05/31/10                   |               | 4,100,000               |

<sup>a</sup> NIAID did not issue a funding modification for the period December 30, 2009, through March 15, 2010. In addition, NIAID did not issue a funding modification for the period June 1, 2010, through July 19, 2010, even though the effective date for modification 17 came after the funded-through date.

For 10 of the 13 funding modifications, NIAID obligated funds for periods that exceeded 12 months. For all modifications, except modifications 15 and 17, the funded period overlapped the previous funding period. Using fiscal year appropriations for a period that exceeded 12 months constituted an obligation of funds in advance of an appropriation and thus violated the Antideficiency Act.

#### *Obligations in Excess of an Appropriation*

NIAID continued to use fiscal year funds remaining from each program year to fund the Contract after the expiration of these funds' availability. As shown in Table 1, for all years after program year 1, NIAID did not properly fund its estimated bona fide needs. In addition, NIAID did not fund its actual expenditures for program years 3, 4, and 6, resulting in potential Antideficiency Act violations. Table 3 identifies the estimated over/under obligation amounts using the amounts actually obligated and expended in each program year as recorded at the time of our review.



**Table 3. Estimated Over/(Under) Obligation Amounts**

| <b>Program Year</b> | <b>Fiscal Year Funds</b> | <b>Amount Obligated</b> | <b>Actual Expenditures</b> | <b>Over/(Under) Obligated</b> |
|---------------------|--------------------------|-------------------------|----------------------------|-------------------------------|
| 1                   | 2003                     | \$9,877,517             | \$2,548,793                | \$7,328,724                   |
| 2                   | 2004                     | 23,839,543              | 11,074,761                 | 12,764,782                    |
| 3                   | 2005                     | 2,930,403               | 18,874,211                 | (15,943,808)                  |
| 4                   | 2006                     | 11,744,831              | 16,066,375                 | (4,321,544)                   |
|                     | 2007                     | 34,489,605              | 2,863,260                  | 18,202,672                    |
| 5                   | 2007                     |                         | 13,423,673                 |                               |
| 6                   | 2008                     | 3,388,782               | 10,268,902                 | (6,880,120)                   |

At the time of our review, NIAID had incurred and recorded expenditures totaling \$10.3 million for only the first 9 months of program year 6. We estimated that total expenditures would be \$13.7 million, leaving program year 6 underobligated by approximately \$10.3 million (\$13.7 million less \$3.4 million).

NIAID should record total obligations and expenditures for each program year against the appropriate fiscal year appropriations. This includes obligating \$15.9 million for program year 3 and \$4.3 million for program year 4. Fiscal year 2005 and fiscal year 2006 funds are no longer available to record the needed obligations. However, NIAID may be able to fund the deficiency by using \$20.2 million (\$15.9 million plus \$4.3 million) of current fiscal year appropriations provided the conditions of 31 U.S.C. §§ 1553 and 1554 are met. If NIAID does not have \$20.2 million of current fiscal year appropriations available or the amount exceeds the lesser of 1 percent of the current appropriation or the unexpended balance of the closed appropriations, it will violate the Antideficiency Act.

In addition, NIAID must obligate \$10.3 million (\$6.9 million for the first 9 months plus an estimated \$3.4 million for the last 3 months) of fiscal year 2008 funds for program year 6. If NIAID does not have funds available to make the needed adjustments, it will violate the Antideficiency Act for those years.

**CAUSES OF FUNDING VIOLATIONS**

Generally, the Tiger Team report attributed funding violations to:

- widespread misunderstanding of appropriations laws because of conflicting HHSAR guidance over the past 25 years;
- the use of incremental funding in ways that were not consistent with the current HHSAR and appropriations law; and
- the need for additional training and a broader understanding of appropriations law among acquisition, budget, and program staff.

The Tiger Team did not identify the specific reasons for funding violations for each contract reviewed. HHS management corrected the conflicting guidance in HHSAR 332.702(a) and reissued the HHSAR on December 20, 2006.

## **RECOMMENDATIONS<sup>13</sup>**

We recommend that NIAID:

- record expenditures for each program year against the appropriate fiscal year appropriations by
  - reversing \$7.3 million of program year 2 expenditures improperly recorded against fiscal year 2003 obligations and recording \$7.3 million against fiscal year 2004 obligations,
  - reversing \$18.9 million of program year 3 expenditures improperly recorded: \$18.7 million against fiscal year 2004 obligations and \$0.2 million against fiscal year 2007 obligations and recording \$2.9 million against fiscal year 2005 obligations (made available below) and \$15.9 million against current fiscal year funds because additional fiscal year 2005 funds are no longer available,<sup>14</sup>
  - reversing \$1.4 million of program year 4 expenditures improperly recorded against fiscal year 2004 obligations and \$2.9 million of program year 4 expenditures improperly recorded against fiscal year 2005 obligations and recording \$4.3 million against current fiscal year funds because additional fiscal year 2006 funds are no longer available, and
  - reversing \$10.3 million in expenditures for the first 9 months of program year 6 improperly recorded against fiscal year 2007 obligations and recording approximately \$13.7 million (estimated expenditures for program year 6) against fiscal year 2008 funds;
- deobligate \$7.3 million of fiscal year 2003 funds and return those canceled funds to the Treasury;
- resolve its bona fide needs violations by
  - deobligating \$12.8 million of fiscal year 2004 funds and returning those canceled funds to the Treasury,
  - deobligating \$18.2 million of fiscal year 2007 funds,

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<sup>13</sup> The obligation and deobligation amounts included in the recommendations represent only the difference between the amounts actually obligated and the total expenditures for each program year at the time of our review because the costs estimated in the Contract significantly differed from the amounts actually needed for each program year as evidenced by expenditures.

<sup>14</sup> Numbers do not add up because of rounding.

- obligating \$10.3 million (estimate) of fiscal year 2008 funds needed to cover actual and estimated expenditures incurred in program year 6, and
- obligating \$20.2 million of current fiscal year funds because \$15.9 million of fiscal year 2005 funds and \$4.3 million of fiscal year 2006 funds are no longer available;
- report an Antideficiency Act violation for obligating fiscal year funds in advance of an appropriation for all program years reviewed, if not previously reported;
- report an Antideficiency Act violation if \$10.3 million (estimated) of fiscal year 2008 funds, sufficient fiscal year 2009 funds, and \$20.2 million of current fiscal year funds are unavailable, if not previously reported; and
- report, in accordance with 31 U.S.C. § 1554, any adjustment to the Contract using current fiscal year appropriations.

#### **NATIONAL INSTITUTES OF HEALTH COMMENTS AND OFFICE OF INSPECTOR GENERAL RESPONSE**

In written comments on our draft report, NIH concurred with the findings and agreed that the Contract is severable and should have been funded with the appropriation that was current when the services were performed. NIH said that HHS reported the Antideficiency Act violation as required by 31 U.S.C. § 1351.

NIH stated that, effective May 1, 2010, the Contract was modified to ensure that it was funded appropriately by recording expenditures against fiscal year 2010. NIH did not concur with our recommendations to correct the improper funding for the first 6 program years of the Contract. NIH stated that the Contract had expired and was being closed. NIH further stated that, in accordance with the HHS corrective action plan, “payments for contract performance conducted before May 1, 2010, remain recorded against appropriations initially charged.” Until NIH makes these adjustments, HHS cannot report the appropriate amount of the Antideficiency Act violation. Therefore, we continue to recommend that NIH record the appropriate Contract obligations and expenditures against the correct fiscal year funds.

NIH’s comments are included in their entirety as Appendix B.

# **APPENDIXES**

**APPENDIX A: TOTAL FISCAL YEAR OBLIGATIONS AND EXPENDITURES INCURRED AND RECORDED  
FOR CONTRACT N01-AI-30068 FOR EACH PROGRAM YEAR**

| <b>Program Year</b>           | <b>FY 2003<sup>a</sup></b> | <b>FY 2004</b>      | <b>FY 2005</b>     | <b>FY 2006</b>      | <b>FY 2007</b>          | <b>FY 2008</b>     | <b>FY 2009</b> | <b>FY 2010</b>     | <b>Expenditures Incurred by Program Year</b> |
|-------------------------------|----------------------------|---------------------|--------------------|---------------------|-------------------------|--------------------|----------------|--------------------|--|
| <b>1</b>                      | <b>2,548,793</b>           |                     |                    |                     |                         |                    |                |                    | <b>\$2,548,793</b>                           |
| <b>2</b>                      | 7,328,724                  | <b>\$3,746,037</b>  |                    |                     |                         |                    |                |                    | <b>\$11,074,761</b>                          |
| <b>3</b>                      |                            | 18,702,365          | <b>\$0</b>         |                     | \$171,846               |                    |                |                    | <b>\$18,874,211</b>                          |
| <b>4</b>                      |                            | 1,391,141           | 2,930,403          | <b>\$11,744,831</b> | <b>2,863,260</b>        |                    |                |                    | <b>\$18,929,635</b>                          |
| <b>5</b>                      |                            |                     |                    |                     | <b>13,423,673</b>       |                    |                |                    | <b>\$13,423,673</b>                          |
| <b>6</b>                      |                            |                     |                    |                     | 10,268,902 <sup>b</sup> | <b>\$0</b>         |                |                    | <b>\$10,268,902</b>                          |
| <b>7</b>                      |                            |                     |                    |                     |                         |                    | <b>\$0</b>     |                    | <b>Unknown</b>                               |
| <b>Unexpended Obligations</b> |                            |                     |                    |                     | 7,761,924               | 3,388,782          |                | \$9,500,000        | <b>\$20,650,706</b>                          |
| <b>Total Obligations</b>      | <b>\$9,877,517</b>         | <b>\$23,839,543</b> | <b>\$2,930,403</b> | <b>\$11,744,831</b> | <b>\$34,489,605</b>     | <b>\$3,388,782</b> | <b>\$0</b>     | <b>\$9,500,000</b> | <b>\$95,770,681</b>                          |

<sup>a</sup> FY = Fiscal Year

<sup>b</sup> Represents expenditures incurred for approximately 9 months (September 30, 2008, through June 30, 2009).

Legend:

- Expenditures incurred and correctly recorded against the correct fiscal year obligations.
- Expenditures incurred in a program year incorrectly recorded against fiscal year obligations of other program years.
- Estimated expenditures incurred and recorded against the correct fiscal year obligations for which invoices do not identify original and new work.
- Fiscal year obligations not yet expended at the time of our review.

APPENDIX B: NATIONAL INSTITUTES OF HEALTH COMMENTS



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

National Institutes of Health  
Bethesda, Maryland 20892

JUL 4 2012

TO: Daniel R. Levinson  
Inspector General, HHS

FROM: Director, National Institutes of Health

SUBJECT: NIH Response to Draft Office of Inspector General Report, *Appropriations Funding for the National Institute of Allergy and Infectious Diseases Contract N01-AI-30068 With PPD Development, LP (A-03-10-03116)*

Attached is the National Institutes of Health's response to the draft Office of Inspector General's report entitled, *Appropriations Funding for the National Institute of Allergy and Infectious Diseases Contract N01-AI-30068 With PPD Development, LP (A-03-10-03116)*.

Should you have questions or concerns regarding our comments, please contact Meredith Stein in the Office of Management Assessment at 301-402-8482.

A handwritten signature in black ink that reads "Francis S. Collins".

Francis S. Collins, M.D., Ph.D.

Attachment

**GENERAL COMMENTS ON THE DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS) OFFICE OF INSPECTOR GENERAL DRAFT REPORT ENTITLED, APPROPRIATIONS FUNDING FOR NATIONAL INSTITUTE OF ALLERGY AND INFECTIOUS DISEASES CONTRACT N01-AI-30068 WITH PPD DEVELOPMENT, LP (A-03-10-03116)**

The National Institutes of Health (NIH) appreciates the review conducted by the Office of Inspector General (OIG) and the opportunity to provide clarifications on this draft report. We respectfully submit the following comments:

The NIH concurs that National Institute of Allergy and Infectious Diseases (NIAID) Contract N01-AI-30068 was for severable services and that under Federal appropriations law, the appropriation that was current when the services were performed should have been charged. Accordingly, NIH agrees that a violation of the Antideficiency Act has occurred with respect to this contract.

On July 14, 2011, the Secretary of Health and Human Services reported this and other Department-wide violations of the Antideficiency Act in accordance with section 1351 of Title 31, United States Code. As described in the Secretary's report, the Department is working to ensure that new obligations are funded in full compliance with appropriations law, regulations, and Department policy. The report also noted that "if additional funds are required to be expended to fulfill an obligation that was already recorded to an improper account, the Department will continue to make payment from the appropriation initially charged because at this time our judgment is that doing otherwise would have serious programmatic repercussions." The Secretary's report summarized the corrective actions the Department has and will continue to take to address the violations, including: mandating training in appropriations law for all staff involved in the acquisition process; revamping existing contract funding guidance; revising HHS Acquisition Regulations (HHSAR) provisions regarding contract funding; and issuing a detailed and extensive Acquisition Policy Memorandum explaining how the new HHSAR guidance should be applied.

At the agency level, NIH has mirrored the Department's risk mitigation approach by implementing the Department's expanded acquisition guidance; arranging for and conducting in-house appropriations law instruction; and providing ongoing assistance to the acquisition, budget, program, and finance communities to ensure business practices align with appropriations law and HHS policy.

In accordance with HHS guidance, NIAID Contract N01-AI-30068 was modified effective May 1, 2010, to ensure that the remaining contract performance was funded appropriately and in accordance with all applicable laws and regulations. The contract expired on September 29, 2010, and is in the process of being administratively closed. Payment for contract performance conducted after May 1, 2010, was recorded against the proper fiscal year appropriation (FY 2010). In accordance with the corrective action plan described in the Secretary's report, payments for contract performance conducted before May 1, 2010, remain recorded against the appropriations initially charged.