

Department of Health and Human Services

**OFFICE OF
INSPECTOR GENERAL**

**CMS DID NOT IDENTIFY ALL
FEDERAL MARKETPLACE CONTRACT COSTS
AND DID NOT PROPERLY VALIDATE
THE AMOUNT TO WITHHOLD
FOR DEFECT RESOLUTION
ON THE PRINCIPAL
FEDERAL MARKETPLACE CONTRACT**

*Inquiries about this report may be addressed to the Office of Public Affairs at
Public.Affairs@oig.hhs.gov.*



Daniel R. Levinson
Inspector General

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The designation of financial or management practices as questionable, a recommendation for the disallowance of costs incurred or claimed, and any other conclusions and recommendations in this report represent the findings and opinions of OAS. Authorized officials of the HHS operating divisions will make final determination on these matters.

EXECUTIVE SUMMARY

CMS did not accurately identify all obligations and expenditures related to the Federal marketplace. Generally, contractors invoiced and CMS paid Federal marketplace contracts correctly; however, CMS did not properly validate the amount to withhold for work to correct defects on the principal Federal marketplace contract.

WHY WE DID THIS REVIEW

The Affordable Care Act (the ACA) established health insurance exchanges (commonly referred to as “marketplaces”) to allow individuals and small businesses to shop for health insurance in all 50 States and the District of Columbia (States). For each State that elects not to establish and operate its own marketplace (State marketplace), the ACA requires the U.S. Department of Health and Human Services (the Department) to operate a marketplace (i.e., the Federal marketplace) within the State. Beginning on October 1, 2013, the Federal marketplace offered private insurance plans, known as qualified health plans, and enrolled individuals in those plans through its HealthCare.gov Web site (the Web site) or through other means. However, consumers experienced significant problems accessing the Web site, including slow response times, errors that dropped the consumer out of the enrollment process, and unplanned outages that made enrollment either difficult or impossible.

The Centers for Medicare & Medicaid Services (CMS), through its Center for Consumer Information and Insurance Oversight, relied extensively on contractors to create and operate the Federal marketplace. Among others, CMS contracted with CGI Federal, Inc., for the Web site and other functions supporting the federally facilitated marketplace (FFM); Quality Software Services, Inc., for the Federal Data Services Hub; and IDL Solutions, Inc., for the Multidimensional Insurance Data Analytics System.

The problems that consumers experienced raised concerns about the Department’s oversight of the contractors involved in the development, implementation, and operation of the Federal marketplace. We received requests from the Department and Congress to review the work performed by contractors and CMS’s payment for, and management and oversight of, the Federal marketplace. This audit is part of a broader portfolio of Office of Inspector General reviews examining various aspects of marketplace operations, including payment accuracy, eligibility verification, management and administration, and data security.

Our objectives were to determine:

- whether CMS accurately identified obligations and expenditures as being related to the development, implementation, and operation of the Federal marketplace and
- whether CMS paid contractor invoices in accordance with Federal regulations and contract requirements.

BACKGROUND

A marketplace is designed as a one-stop shop at which individuals are provided information about health insurance options, are evaluated for eligibility for a qualified health plan, and are enrolled in the plan of their choice. Also, individuals can determine whether they are eligible for financial assistance through insurance affordability programs. Each marketplace must certify that its plans meet certain participation standards and cover a core set of benefits. CMS and the States share responsibilities for core functions of State-Federal partnership marketplaces. As of October 1, 2013, 36 States, including 7 State-Federal partnership marketplaces, used the Federal marketplace. Fifteen States, including the District of Columbia, had established separate State marketplaces.

CMS identified 62 contracts that it had awarded through March 31, 2014, to 35 different contractors to develop, implement, and operate the Federal marketplace.

Federal Requirements

The Federal Acquisition Regulation (FAR) (48 CFR chapter 1) and the Department of Health and Human Services Acquisition Regulation (HHSAR) (48 CFR chapter 3) provide a framework for awarding contracts, for conducting management and oversight of contractor performance, and for paying contractor invoices.

The Contract Disputes Act establishes the requirements for resolving contract disputes when a contracting officer withholds payment.

HOW WE CONDUCTED THIS REVIEW

We reviewed the 62 contracts that CMS identified as awarded for the development, implementation, and operation of the Federal marketplace to determine the contract requirements for the processing and payment of contractor invoices. We reviewed and validated all obligation and expenditure transactions processed by CMS and other Departmental agencies from August 31, 2009, through March 31, 2014, for the 62 contracts to ensure that the portion CMS identified as being related to the development, implementation, and operation of the Federal marketplace was accurate and complete and to assess the sufficiency and appropriateness of the data.

WHAT WE FOUND

CMS did not accurately identify all obligations and expenditures related to the Federal marketplace. For 6 of the 62 contracts, CMS recorded \$24,336,404 of obligations and \$22,885,725 of expenditures in the Healthcare Integrated General Ledger Accounting System (HIGLAS) but did not identify them as being related to the Federal marketplace. Specifically, CMS either recorded some transactions in HIGLAS without the necessary project codes or recorded transactions related to Federal marketplace work using project codes that CMS did not identify in HIGLAS as being related to the Federal marketplace. Consequently, CMS is unable to accurately account for and report to interested stakeholders the amount spent on the development, implementation, and operation of the Federal marketplace.

Generally, contractors invoiced and CMS paid Federal marketplace contracts correctly. Although CMS withheld fixed fees that CGI Federal identified as being related to defect resolution and rework, CMS did not validate the accuracy of the amount (\$267,420). CGI Federal did not agree that the work was related to correcting defects or rework, and CMS had not made a final decision about the fixed-fee payment that it withheld. At the time of our review, CGI Federal had not filed a certified claim under the Contract Disputes Act.

WHAT WE RECOMMEND

We recommend that CMS:

- include all relevant contract costs when it identifies total obligations and expenditures related to the design, development, and operation of the Federal marketplace and
- review all charges submitted by CGI Federal for the FFM contract and make a final determination on the appropriate amount to withhold for correcting defects by validating the \$267,420 withheld for the fixed fee.

CMS COMMENTS AND OUR RESPONSE

In written comments on our draft report, CMS agreed with our recommendation that all relevant costs should be identified but said that the additional obligations and expenditures identified by the audit “were not for services directly related to the operation of the Federal Marketplaces, but rather were services for the broader implementation of [the ACA], including support for Medicaid technology systems and existing CMS data systems.”

CMS stated that our recommendation related to dispute resolution for withheld fees was not applicable because the draft report inaccurately described the content of the cited clause from the FAR. CMS also disagreed with our characterization of the Contract Disputes Act in resolving the withholding of payments to contractors. CMS stated that our recommendation related to hours worked to correct defects was not applicable because the regulations for withholding funds applied only to the fixed fee.

In response to CMS’s comments, we clarified our interpretation of the FAR “Inspection of Services—Cost Reimbursement” clause, the HHSAR “Withholding of Contract Payments” clause, and the contractor’s relief under the Contract Disputes Act. We modified our recommendations accordingly; however, after reviewing CMS’s comments, we maintain that our findings and recommendations, as modified, are valid.

The scope of our review was not limited to “contracts that supported the IT portion of the FFM or www.healthcare.gov.” We asked CMS to identify all contracts awarded for the development of the Federal marketplace and the Web site. Further, we used the criteria that CMS itself established to identify Federal marketplace-related costs in its HIGLAS system for the 62 contracts that CMS identified. However, contractor invoices for the six contracts we questioned did not identify charges by service performed or by separate funding obligation.

We have modified our recommendation related to the payment for work to correct defects to reflect CMS’s comments regarding the resolution of fees withheld for rework on one contract.

As clarified in the report, the Government “may require the contractor to perform the services again in conformity with contract requirements, for no additional fee” (FAR clause is at 48 CFR § 52.246-5). CMS made a determination that the work performed by CGI Federal was defective and withheld a portion of the fixed fee. Further, we clarified that, in accordance with the contract requirements, CMS did not have the authority to withhold costs related to correcting defective work.

With better contract management and oversight of the FFM contract, CMS may have identified contractor problems and prevented the need for defect resolution and the associated charges. Cost reimbursement contracts place the risk of performance on the Government. Consequently, the burden was on CMS to manage the contract, ensure that the contractor delivered the system ordered, and prevent the need for rework and defect resolution. After the launch, even though CMS, CGI Federal, and Quality Software Services, Inc., entered into a Joint Operating Agreement for purposes of setting forth the procedure for correcting defects, neither that agreement nor any modification to the FFM contract provided additional protections against paying for charges related to “rework” on the deficient system.

CMS also sent technical comments on the draft report under separate cover, and we made changes, as appropriate.

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INTRODUCTION

WHY WE DID THIS REVIEW

The Affordable Care Act (the ACA)¹ established health insurance exchanges (commonly referred to as “marketplaces”) to allow individuals and small businesses to shop for health insurance in all 50 States and the District of Columbia (States). Each State can have an individual marketplace and a Small Business Health Options Program marketplace.

For each State that elected not to establish and operate its own marketplace (State marketplace), the ACA required the U.S. Department of Health and Human Services (the Department) to operate a marketplace (i.e., the Federal marketplace) within the State.² Beginning on October 1, 2013, the Federal marketplace offered private insurance plans, known as qualified health plans, and enrolled individuals in those plans through its HealthCare.gov Web site (the Web site) or through other means.³ However, consumers experienced significant problems accessing the Web site, including slow response times, errors that dropped consumers out of the enrollment process, and unplanned outages that made enrollment either difficult or impossible.

The Centers for Medicare & Medicaid Services (CMS) relied extensively on contractors to create and operate the Federal marketplace.⁴ Among others, CMS contracted with CGI Federal, Inc., for the Web site and other functions supporting the federally facilitated marketplace (FFM); Quality Software Services, Inc., for the Federal Data Services Hub (the Hub); and IDL Solutions, Inc., for the Multidimensional Insurance Data Analytics System (MIDAS).

The problems that consumers experienced during the troubled launch of the Federal marketplace raised concerns about the Department’s oversight of the contractors involved in its development, implementation, and operation. The Office of Inspector General (OIG) received requests from the Department and Congress to review the work performed by these contractors and CMS’s management and oversight of the Federal marketplace.

This report addresses oversight of the invoicing process: whether CMS properly identified the costs attributed to Federal marketplace work and whether the payment process allowed for

¹ The Patient Protection and Affordable Care Act, P.L. No. 111-148 (March 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010, P.L. No. 111-152 (March 30, 2010), is known as the Affordable Care Act.

² For this audit, we did not review State marketplace contracts.

³ Individuals who chose not to use the Web site enrolled in the Federal marketplace by mail, using a paper application, or by telephone, using the Federal marketplace call center.

⁴ CMS operates the Federal marketplace through its Center for Consumer Information and Insurance Oversight. Initially, the Department established the Office of Consumer Information and Insurance Oversight (OCIIO) within the Office of the Secretary. In early 2011, the Office of the Secretary transferred the function to CMS; we include in this report the activities initiated by OCIIO and other Department offices, particularly the Program Support Center that awarded three Federal marketplace contracts and paid invoices submitted before the transfer to CMS’s Center for Consumer Information and Insurance Oversight. When we refer to CMS contracts in this report, we include contracts awarded by the Program Support Center that were transferred to CMS.

timely monitoring of delays and overbilling. This audit is part of a broader portfolio of OIG reviews examining various aspects of marketplace operations, including payment accuracy, eligibility verification, management and administration, and data security.⁵

OBJECTIVES

Our objectives were to determine:

- whether CMS accurately identified obligations and expenditures as being related to the development, implementation, and operation of the Federal marketplace and
- whether CMS paid contractor invoices in accordance with Federal regulations and contract requirements.

BACKGROUND

The Affordable Care Act

The ACA provides Americans access to health care by creating new health insurance marketplaces, enforcing rights and protections for those individuals who apply for insurance, and providing financial assistance through insurance affordability programs for people who cannot afford insurance. To do this, the ACA requires the establishment of a health insurance marketplace within each State. The Department is required to operate a Federal marketplace within each State that elects not to establish its own State marketplace. CMS is responsible for the development, implementation, and operation of the Federal marketplace for the Department.

The Federal Marketplace

A marketplace is designed to serve as a one-stop shop at which individuals are provided information about health insurance options, are evaluated for eligibility for a qualified health plan, and are enrolled in the plan of their choice. Also, individuals can determine whether they are eligible for financial assistance through insurance affordability programs. Each marketplace must certify that its plans meet certain participation standards and cover a core set of benefits.

CMS works with States to establish State and State-Federal partnership marketplaces and to oversee their operations. For States that elect not to establish and operate a State marketplace, CMS operates the Federal marketplace within the State. CMS and the States share responsibilities for core functions of State-Federal partnership marketplaces. As of October 1, 2013, 36 States, including 7 State-Federal partnership marketplaces, used the Federal marketplace. Fifteen States, including the District of Columbia, had established separate State marketplaces.

⁵ The [OIG Work Plan, Appendix A](#), for fiscal year 2015 summarizes new and ongoing reviews and activities, including ACA reviews that OIG plans to pursue with respect to Department programs and operations during the current fiscal year and beyond. In addition, OIG has issued several reports on marketplace issues related to the ACA. (See the ACA Reviews Web page, accessible at <http://oig.hhs.gov/reports-and-publications/aca/>.)

Contracts for the Federal Marketplace

CMS relied, and continues to rely extensively, on contractors to develop, implement, and operate the Federal marketplace. As of March 31, 2014, CMS had identified 62 contracts that it had awarded to 35 different contractors to develop, implement, and operate the Federal marketplace, which includes the Web site, the FFM, the Hub, and MIDAS:

- The Web site provides consumers online access to the Federal marketplace and is supported by several systems, including the FFM and the Hub.
- The FFM processes data provided by the user through the Web site and manages eligibility and enrollment, health care plan management, and financial management functions of the Federal marketplace.
- The Hub enables the Federal marketplace and the State marketplaces to access information from several Federal agencies, allowing marketplaces to verify consumers' application information in near real-time.
- MIDAS provides a central repository to capture, organize, aggregate, and analyze information obtained through the Federal marketplace and other CMS programs.

Additional contracts provide, but are not limited to, cloud computing, enterprise architecture and operational support, health insurance oversight, information technology security, and quality assurance testing.

The launch of the Federal marketplace raised serious concerns about the Department's management and oversight of these contracts, including the selection and oversight of the contractors that played a significant role in the development, implementation, and operation of the Federal marketplace. To address these concerns, CMS brought in a team of information technology specialists from across the industry to assist CGI Federal and oversee repairs to the Federal marketplace. In January 2014, CMS hired a new contractor, Accenture Federal Services, LLC, to replace CGI Federal and complete the Federal marketplace. We included this contract in our review.

See Appendix A for a detailed list of contracts awarded or modified in support of the Federal marketplace.

Healthcare Integrated General Ledger Accounting System

The Healthcare Integrated General Ledger Accounting System (HIGLAS) is CMS's core accounting system that records transactions for the financial management of CMS's health programs. CMS records funding sources and amounts, as well as expenditures and other financial information, in HIGLAS. HIGLAS records codes from contracts and contract modifications that identify each transaction by contract number, requisition number, and project

code.⁶ The project code number is also embedded in the requisition number, which combines several financial data fields. For each contractor invoice, CMS records in HIGLAS the relevant codes and the amounts to be paid to ensure that funds are charged to the specific contract funding source for the work invoiced.

Federal Requirements

The Federal Acquisition Regulation (FAR) (48 CFR chapter 1) is the primary regulation for use by all Federal Executive agencies in their acquisition of supplies and services with appropriated funds. The supplemental Department of Health and Human Services Acquisition Regulation (HHSAR) (48 CFR chapter 3) provides the regulatory framework for conducting acquisitions across the Department. Both provide a framework for awarding contracts, for conducting management and oversight of contractor performance, and for paying contractor invoices.

The Contract Disputes Act (41 U.S.C. § 7103) establishes requirements for resolving contract disputes.

Contracting Officer's Representatives

Contracting officers, appointed by the agency head, are the only individuals authorized to enter into, administer, or terminate contracts (FAR, 48 CFR § 1.602). Contracting officers appoint contracting officer's representatives to assist in the technical monitoring and administration of a contract (FAR, 48 CFR § 1.604). The contracting officer works with the contracting officer's representative to ensure satisfactory contractor performance and to validate compliance with all terms and conditions of the contract, including the review and payment authorization of contractor invoices (HHSAR, 48 CFR subpart 342.70).⁷

Review and Payment Authorization of Contractor Invoices

The FAR states that payment will be based on the receipt of a proper invoice and satisfactory contract performance and defines the information that must be included on each invoice (48 CFR § 32.905). After the invoice is validated for completeness and certified for payment by the contracting officer's representative and the contracting officer, a copy must be forwarded to the payment office by the fifth working day after acceptance or approval (FAR, 48 CFR § 32.905 and HHSAR, 48 CFR § 342.7001).

The FAR and HHSAR permit a contracting officer to withhold payment when the contractor fails to perform or deliver required work or services (FAR, 48 CFR § 46.305 and HHSAR, 48 CFR § 342.7003-1(a)). If services do not conform to contract specifications, the contracting officer may require the contractor to perform the services again or may withhold payment of any invoice or voucher submitted. If the contracting officer and the contractor cannot reach resolution, the contractor may file a claim under the Contract Disputes Act.

⁶ HIGLAS also identifies, among other things, the Treasury symbol, fund code, allotment code, allowance code, and object class that identify the funding source.

⁷ The HHSAR refers to a contracting officer's representative as a contracting officer's technical representative.

See Appendix B for a summary of relevant Federal requirements referenced in this report.

HOW WE CONDUCTED THIS REVIEW

We reviewed the 62 contracts that CMS identified as awarded for the development, implementation, and operation of the Federal marketplace to determine the contract requirements for the processing and payment of contractor invoices. Of the 62 contracts, 24 provided services exclusively in support of the Federal marketplace. The remaining 38 provided services primarily for CMS computer systems and ancillary support for the Federal marketplace.⁸

We reviewed and validated all obligation and expenditure transactions⁹ processed by CMS and other Departmental agencies from August 31, 2009, through March 31, 2014, for the 62 contracts to ensure that the portion CMS identified as being related to the development, implementation, and operation of the Federal marketplace was accurate and complete and to assess the sufficiency and appropriateness of the data.

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

See Appendix C for the details of our scope and methodology.

FINDINGS

CMS did not accurately identify all obligations and expenditures related to the Federal marketplace.¹⁰ For 6 of the 62 contracts, CMS recorded \$24,336,404 of obligations and \$22,885,725 of expenditures in HIGLAS but did not identify them as being related to the Federal marketplace. Specifically, CMS recorded some transactions in HIGLAS without the necessary project codes or recorded transactions related to Federal marketplace work using project codes that CMS did not identify in HIGLAS as being related to the Federal marketplace. Consequently, CMS is unable to accurately account for and report to interested stakeholders the amount spent on the development, implementation, and operation of the Federal marketplace.

Generally, contractors invoiced and CMS paid Federal marketplace contracts correctly. Although CMS withheld fixed fees that CGI Federal identified as being related to defect resolution and rework, CMS did not validate the accuracy of the amount (\$267,420). CGI Federal did not agree that the work was related to correcting defects or rework, and CMS had not

⁸ Departmental agencies awarded several of these contracts before the ACA was enacted in 2010.

⁹ Obligations represent funds set aside to cover a legal commitment to pay for contractor goods and services. Expenditures represent the payment of funds to a contractor.

¹⁰ We did not audit Federal marketplace obligations and expenditures that were published by CMS. Rather, we audited obligation and expenditure transactions provided by CMS for the 62 contracts it identified as related to the Federal marketplace using a methodology that CMS used to identify Federal marketplace transactions.

made a final decision about the fixed-fee payment that it withheld. At the time of our review, CGI Federal had not filed a certified claim under the Contract Disputes Act.

CMS DID NOT IDENTIFY ALL OBLIGATIONS AND EXPENDITURES RELATED TO THE FEDERAL MARKETPLACE

CMS did not accurately identify all obligations and expenditures related to the Federal marketplace. As of March 31, 2014, CMS had identified all financial transactions recorded in HIGLAS that CMS said were related to the Federal marketplace. The transactions included obligations totaling \$835,739,773 and expenditures totaling \$558,099,235. However, for 6 of the 62 contracts, CMS recorded 14 obligation transactions and 69 expenditure transactions in HIGLAS but did not identify them as being related to the Federal marketplace. We estimated that if CMS had identified these transactions as being related to the Federal marketplace, total obligations would have been at least \$860,076,177 and total expenditures would have been at least \$580,984,960. As a result, CMS underreported \$24,336,404 of obligations and \$22,885,725 of expenditures related to the Federal marketplace.

Consequently, CMS is unable to accurately account for and report to interested stakeholders the amount spent on the development, implementation, and operation of the Federal marketplace.

Some Transactions Not Properly Identified as Being Related to the Federal Marketplace in CMS's Accounting System

For 5 of the 62 contracts that we reviewed, CMS recorded \$18,426,644 of obligations and \$17,844,487 of expenditures in HIGLAS but did not identify them as being related to the Federal marketplace.

When an invoice is received, CMS procedures require that it record the expenditure transactions in HIGLAS using the relevant codes that identify the work for which the transactions are made and the funds that CMS has obligated for the work. To identify Federal marketplace work in HIGLAS, CMS uses a list of 28 common accounting numbers and project code combinations (Federal marketplace codes).¹¹ We reviewed all transaction records in HIGLAS for the contracts and used the Federal marketplace codes to verify the completeness of the obligations and expenditures that CMS identified as being related to Federal marketplace work. For 5 contracts, HIGLAS records included 69 transactions (10 obligations and 59 expenditures) that had common accounting numbers associated with the Federal marketplace but that CMS did not identify as being related to the Federal marketplace because the project code fields were blank.¹²

¹¹ For four of these combinations, CMS noted that not all transactions were related to the Federal marketplace but did not identify how CMS differentiated between Federal marketplace and non-Federal marketplace transactions.

¹² CMS said that these transactions were recorded in the accounting system used before HIGLAS, in which the project code was not separately entered.

We identified the project code from the requisition number and contract documentation and determined that the transactions were for Federal marketplace work.¹³ For example, one contract included requisition number “8881723109.” Embedded within the requisition number, which was included in HIGLAS and the contract, was project code “7231” that in combination with common accounting number “5992630” was one of the Federal marketplace codes identified by CMS as being related to the Federal marketplace.

After we advised CMS that we were reporting this omission, CMS officials stated that “[t]he requisitions in question supported general ACA IT [information technology] development and planning, and were funded early in the ACA implementation process. Due to the broad scope of work and the support of IT functionality outside of Healthcare.gov, CMS is not comfortable labeling these specific actions as directly building or supporting Healthcare.gov.” However, the contract and invoice documentation did not support CMS’s statement. Using the Federal marketplace codes, we determined that these transactions totaling \$18,426,644 in obligations and \$17,844,487 in expenditures were related to the Federal marketplace.

Fixed Fee Not Identified as Being Related to the Federal Marketplace in CMS’s Accounting System

For 1 of the 62 contracts that we reviewed, CMS recorded in HIGLAS 14 transactions for the contract’s fixed fee, with obligations totaling \$5,909,760 and expenditures totaling \$5,041,238, but did not identify those transactions as being related to the Federal marketplace. We reviewed contract and invoice documentation that showed that fixed-fee transactions were calculated as 6.75 percent of the charges for hours worked. All charges for hours worked and most of the fixed fees for the contract were identified as being related to the Federal marketplace. However, these 14 fixed-fee transactions were not. Consequently, \$5,909,760 of obligations and \$5,041,238 of expenditures were not identified in HIGLAS as being related to the Federal marketplace.

CMS DID NOT PROPERLY VALIDATE THE AMOUNT TO WITHHOLD FOR DEFECT RESOLUTION

Federal Requirements

The FAR (48 CFR §§ 16.301-1 and 16.306) defines cost-plus-fixed-fee contracts as a type of cost-reimbursement contract under which the contractor receives payment for allowable costs incurred and a fixed fee that is negotiated on award. Also, the FAR requires the contracting officer to include the standard “Inspection of Services—Cost Reimbursement” clause¹⁴ in cost-reimbursement service contracts, including cost-plus-fixed-fee contracts (48 CFR § 46.305). That clause specifies that if the service does not conform to contract specifications, the contracting officer requires the contractor to correct the defects in conformity with the contract

¹³ For all 69 transactions, the project code was embedded in the requisition number recorded in HIGLAS, but CMS did not use the requisition number to identify Federal marketplace transactions.

¹⁴ The clause is in the FAR (48 CFR § 52.246-5) and is incorporated by reference in the contract.

requirements, for no additional fee, or terminate the contract for default. Also, the HHSAR (48 CFR § 342.7003-1(a)) requires the contracting officer to include the standard “Withholding of Contract Payments” clause¹⁵ in cost-reimbursement contracts. That clause specifies that payment of any invoice can be withheld for failure to perform or deliver required work. Accordingly, the contracting officer may choose to withhold payment for the work or require the contractor to redo the work.

If the contractor does not agree with the contracting officer’s decision to withhold payment, the contractor may file a written certified claim under the Contract Disputes Act.¹⁶ When a claim is filed, the contracting officer must issue a written decision identifying the amount and reasons for withholding payment.¹⁷ Contractors can appeal the final determination only after they have received the formal written decision.

CMS Did Not Validate the Amount of the Fixed Fee Withheld To Correct Defects

From October 2013 through February 2014, which was after the launch of the Federal marketplace, CGI Federal submitted monthly invoices for the FFM contract totaling \$56.1 million. Generally, for all invoices submitted for the FFM contract, CGI Federal calculated the amount of its fixed-fee charges as 6.75 percent of the charges associated with the hours worked.¹⁸ Of the \$56.1 million invoiced, approximately \$3.5 million was for the fixed fee. CMS withheld \$267,420 of the fixed fee that was identified as being related to defect resolution and rework. However, CMS did not validate the amount and told CGI Federal that it did not consider its action to withhold the \$267,420 to be the contracting officer’s final decision.

The remaining \$52.6 million, invoiced for the 5 months from October 2013 through February 2014, was for charges associated with hours worked. We calculated that CMS paid approximately \$4 million to CGI Federal for charges associated with the hours worked to correct defects by dividing the \$267,420 of fixed fees that CMS withheld by 6.75 percent.

The fixed-fee amounts that were withheld for five invoices submitted from October 2013 through February 2014 were calculated by either CMS or CGI Federal.

- The contracting officer’s representative for the FFM contract questioned whether the amount that CGI Federal billed on the October 2013 invoice included charges for correcting defects. CMS estimated that the invoice included \$50,000 in fixed-fee charges related to correcting defects. CMS withheld the \$50,000 and instructed CGI Federal to

¹⁵ The clause is in the HHSAR (48 CFR § 352.242-73) and is incorporated by reference in the contract.

¹⁶ For claims of more than \$100,000, the contractor must certify, among other things, that (1) the claim is made in good faith and (2) the supporting data are accurate and complete to the best of the contractor’s knowledge and belief (41 U.S.C § 7103(b)). The disputed amount between CMS and CGI Federal exceeds the \$100,000 threshold.

¹⁷ “Each claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer” (41 U.S.C. § 7103(a)(3)). In most situations, a decision is required in 60 days or less (41 U.S.C. § 7103(f)).

¹⁸ CGI Federal did not include some subcontractor costs when it calculated the fixed-fee charge included on the FFM contract invoices.

identify, on subsequent invoices, the total charges, including fixed-fee charges, associated with the hours worked to correct defects.

- For the November 2013 through January 2014 invoices, CGI Federal charged a total of \$34.6 million for work performed. CGI Federal separately identified the total charges, including fixed-fee charges, associated with the hours worked to correct defects. CMS withheld \$208,226 for the fixed-fee related to correcting defects.
- For February 2014, CGI Federal charged a total of \$8.2 million for work performed. It is unclear whether CGI Federal or CMS identified the total number of hours and the related charges for the hours associated with correcting defects. Nevertheless, CMS withheld \$9,194 for the fixed-fee related to correcting defects.

Although CMS withheld \$267,420 of the fixed fee that was identified as being related to defect resolution and rework, CMS did not validate the amount withheld and paid CGI Federal the balance of the invoice charges. The invoices did not identify details necessary to support the charges, such as the employees' names, hours worked by each employee, and the employees' hourly rates. The total amount of the fixed fee to withhold, whether higher or lower, is dependent on the contracting officer's final decision of the dollar value of charges associated with the hours worked to correct defects.

CMS stated that the charges for the hours worked to correct defects was allowable and that the "Inspection of Services" clause required it to withhold only the fixed fee associated with those charges.

CMS Has Not Made a Final Decision on Payments To Withhold for Defect Resolution

CGI Federal did not agree with CMS that the October 2013 through February 2014 invoices included charges for correcting defects. In response to CMS's request to identify the charges that related to correcting defects, CGI Federal identified charges associated with the hours worked for the "defect resolution process" and the associated fixed-fee charge. However, CGI Federal stated that the charges were related to "the system issues being resolved under the JOA [Joint Operating Agreement] defect resolution process" that it stated were "not the result of any failure by CGI Federal to perform under the Task Order." Further, CGI Federal said that because the work had not been tested, the charges could not be considered as related to work associated with correcting defects. At the time of our review, CMS had not withheld payments for the hours worked for defect resolution, and CGI Federal had not filed a certified claim under the Contracts Dispute Act for the withheld fees.

RECOMMENDATIONS

We recommend that CMS:

- include all relevant contract costs when it identifies total obligations and expenditures related to the design, development, and operation of the Federal marketplace and

- review all charges submitted by CGI Federal for the FFM contract and make a final determination on the appropriate amount to withhold for correcting defects by validating the \$267,420 withheld for the fixed fee.

CMS COMMENTS AND OFFICE OF INSPECTOR GENERAL RESPONSE

CMS COMMENTS

In written comments on our draft report, CMS agreed with our recommendation that all relevant costs should be identified but said that the additional obligations and expenditures identified by the audit “were not for services directly related to the operation of the Federal Marketplaces, but rather were services for the broader implementation of [the ACA], including support for Medicaid technology systems and existing CMS data systems.”

CMS stated that our recommendation related to dispute resolution for withheld fees was not applicable because the draft report inaccurately described the content of the cited clause from the FAR. CMS agreed that the matter of the withheld fees needed to be negotiated and finalized but said that it had already started discussions with the contractor. CMS also disagreed with our characterization of the Contract Disputes Act in resolving the withholding of payments to contractors. CMS stated that our recommendation related to hours worked to correct defects was not applicable because the regulations for withholding funds applied only to the fixed fee.

CMS’s comments are included in their entirety as Appendix D.

OFFICE OF INSPECTOR GENERAL RESPONSE

In response to CMS’s comments, we clarified our interpretation of the FAR “Inspection of Services—Cost Reimbursement” clause, the HHSAR “Withholding of Contract Payments” clause, and the contractor’s relief under the Contract Disputes Act. We modified our recommendations accordingly; however, after reviewing CMS’s comments, we maintain that our findings and recommendations, as modified, are valid.

The scope of our review was not limited to “contracts that supported the IT portion of the FFM or www.healthcare.gov.” We asked CMS to identify all contracts awarded for the development of the Federal marketplace and the Web site. Further, we used the criteria that CMS itself established to identify Federal marketplace-related costs in its HIGLAS system for the 62 contracts that CMS identified.

However, contractor invoices for the six contracts we questioned did not identify charges by service performed or by separate funding obligation. Generally, CMS allocated invoice charges and expended funding obligations on a “first-in, first-out” basis. Contractor charges were expended against an obligation until the obligation was fully expended; then expended against the next available obligation. When contracts were funded by obligations from multiple sources at the same time, the contractor charges were expended proportionately against those multiple obligations until they were fully expended. Therefore, neither CMS nor the contractor could distinguish charges by funding source.

We have modified our recommendation related to the payment for work to correct defects to reflect CMS’s comments regarding the resolution of fees withheld for rework on one contract.

As clarified in the report, the Government “may require the contractor to perform the services again in conformity with contract requirements, for no additional fee” (FAR clause is at 48 CFR § 52.246-5). CMS made a determination that the work performed by CGI Federal was defective and withheld a portion of the fixed fee. Further, we clarified that, in accordance with the contract requirements, CMS did not have the authority to withhold costs related to correcting defective work.

With better contract management and oversight of the FFM contract, CMS may have identified contractor problems and prevented the need for defect resolution and the associated charges.¹⁹ Cost reimbursement contracts place the risk of performance on the Government. Consequently, the burden was on CMS to manage the contract, ensure that the contractor delivered the system ordered, and prevent the need for rework and defect resolution. After the launch, even though CMS, CGI Federal, and Quality Software Services, Inc., entered into a Joint Operating Agreement for purposes of setting forth the procedure for correcting defects, neither that agreement nor any modification to the FFM contract provided additional protections against paying for charges related to “rework” on the deficient system.

CMS also sent technical changes on the draft report under separate cover, and we made changes, as appropriate.

OTHER MATTERS

ACCOUNTING TRANSACTIONS WERE MISSING OR INCORRECTLY POSTED

For two of the contracts we reviewed, we identified errors that did not relate to the Federal marketplace. For one contract, CMS did not record 11 transactions in HIGLAS, including 10 deobligation transactions totaling \$1,143,385 and 1 obligation transaction for \$900. The transactions were 15 to 32 months old. For another contract, CMS posted an obligation for a contract modification totaling \$88,847 to the wrong contract document number. We attributed these incorrect transactions to human error. When we brought them to the attention of CMS officials, they corrected the transactions in HIGLAS. On the basis of our limited review, we could not determine the extent to which similar errors may exist in HIGLAS.

OTHER INVOICING OBSERVATIONS

This report addresses oversight of the invoicing process, including whether the contract required contractors’ invoices to identify any delays or inability to complete the work required by the contract and whether any fixed fees, award fees, or performance-based payments were paid to contractors. Although we did not have any related findings, we are including information about what we learned because of the interest in this topic:

- The FAR does not require contractor invoices to identify any contractor delays or inability to complete the work in accordance with contractual requirements, and none of the invoices submitted for the 62 contracts related to the Federal marketplace included

¹⁹ See *CMS Did Not Always Manage and Oversee Contractor Performance for the Federal Marketplace as Required by Federal Requirements and Contract Terms* (A-03-14-03001).

such information. Our scope did not include a review of other methods that contractors could use to report such information.

- Eight contracts included provisions for award fees, and CMS made the payments for five of them during our audit period.²⁰ Nothing in the award-fee determination letters suggested that the award fees paid were inappropriate. For the five contracts, no award fee was paid for some line items.
- The FAR allows, but does not require, Federal agencies to use performance-based payments for certain fixed-price contracts and task orders when the contracting officer and contractor agree on the payment terms (FAR, 48 CFR § 32.1003). None of the contracts in this review included provisions for performance-based payments.

²⁰ The other three contracts were not yet eligible to receive incentive payments.

**APPENDIX A: OBLIGATIONS AND EXPENDITURES FOR FEDERAL MARKETPLACE
CONTRACTS AS OF MARCH 31, 2014**

Table 1: Contracts and Task Orders Awarded Exclusively for the Federal Marketplace

Award Date	Contractor Name	Contract/Task Order Number	Obligations	Expenditures
05/20/2011	DEDE Inc. dba Genova Technologies	HHSM500-2005-00001B B0018	\$3,266,077	\$3,156,044
07/25/2011	Heitech Services Inc.	HHSM500-2011-00027U	1,424,380	1,396,872
09/30/2011	CGI Federal Inc.	HHSM500-2007-00015I T0012	203,454,453	194,594,993
09/30/2011	Quality Software Services Inc.	HHSM500-2007-00024I T0007	99,658,836	77,887,450
04/24/2012	DEDE Inc. dba Genova Technologies	HHSM500-2012-00021B B0003	7,579,256	6,628,929
05/15/2012	Turningpoint Global Solutions LLC	HHSM500-2012-00008	5,748,814	4,401,116
06/08/2012	Carahsoft Technology Corp.	HHSM500-2013-00249G	39,979	39,979
06/08/2012	DEDE Inc. dba Genova Technologies	HHSM500-2012-00021B B0006	1,110,327	1,110,327
08/02/2012	Creative Computing Solutions Inc.	HHSM500-2012-00097G	11,972,974	9,184,566
09/07/2012	Quality Technology Inc.	HHSM500-2012-00123G	13,199,916	11,298,782
09/14/2012	Booz Allen & Hamilton Inc.	HHSM500-2011-00011B B0003	12,498,850	8,140,831
09/18/2012	Global Tech Inc. dba Eglobaltech	HHSM500-2012-00154G	1,307,031	951,671
09/24/2012	Corporate Executive Board	HHSM500-2012-00186G	373,474	373,474
09/25/2012	Blast Design Studio Inc.	HHSM500-2012-00080C	197,635	197,635
04/08/2013	CGI Federal Inc.	HHSM500-2013-00236G	12,648,328	11,397,274
04/15/2013	Scope Infotech Inc.	HHSM500-2013-00109C	1,094,967	1,003,720
05/03/2013	Global Tech Inc. dba Eglobaltech	HHSM500-2013-00046U	2,349,754	1,083,267
06/07/2013	Carahsoft Technology Corp.	HHSM500-2012-00066G	238,349	238,349
06/12/2013	Global Tech Inc. dba Eglobaltech	HHSM500-2013-00052U	2,405,205	1,125,578
06/21/2013	HP Enterprise Services LLC	HHSM500-2013-00014I T0003	77,561,786	26,513,046
09/20/2013	The Mitre Corporation	HHSM500-2012-00008I T0015	5,591,641	2,295,660
11/22/2013	Global Tech Inc. dba Eglobaltech	HHSM500-2014-00083U	1,975,916	740,968
12/30/2013	Four LLC	HHSM500-2014-00347G	4,850,000	4,850,000
01/03/2014	Accenture Federal Services LLC	HHSM500-2014-00191C	45,000,000	-
			\$515,547,948	\$368,610,531

Table 2: Contracts and Task Orders Awarded for Both the Federal Marketplace and Other Than the Federal Marketplace

Award or Modification Date	Contractor Name	Contract/Task Order Number	Obligations	Expenditures
04/01/2011	Terremark Federal Group, Inc.	HHSP233-2011-00177G	\$50,375,124	\$37,686,346
07/06/2011	The Mitre Corporation	HHSP233-2010-00138W	1,975,024	1,899,481
08/12/2011	Innosoft Corporation	HHSM500-2011-00071C	2,103,114	1,464,777
01/27/2012	Science Applications International	HHSM500-2007-00020I T0001	10,870,013	6,467,867
02/06/2012	The Mitre Corporation	HHSM500-2009-00021U	2,761,533	2,649,112
04/03/2012	Quality Software Services, Inc.	HHSP233-2010-00588G	199,364	35,848
04/15/2012	CGI Federal, Inc.	HHSM500-2010-00157G	11,022,422	11,009,575
06/01/2012	The Mitre Corporation	HHSM500-2011-00014U	550,000	535,997
06/07/2012	CGI Federal, Inc.	HHSM500-2007-00015I T0011	7,922,182	6,661,855
06/14/2012	Quality Software Services, Inc.	HHSM500-2007-00024I T0010	38,510,666	17,290,327
07/03/2012	Heitech Services, Inc.	HHSM500-2012-00074G	3,781,653	2,779,532
07/15/2012	Spherecom Enterprises, Inc.	HHSM500-2011-00001B B0003	2,941,411	2,088,031
07/18/2012	Northrop Grumman Information	HHSM500-2007-00014I T0006	2,911,828	2,648,239
08/02/2012	Government Acquisitions, Inc.	HHSM500-2012-00014U	3,442,756	3,442,756
08/02/2012	Lockheed Martin Services, Inc.	HHSM500-2009-00002U	19,724,700	17,273,184
08/08/2012	Onix Network Corp.	HHSM500-2012-00103G	44,340	44,340
08/15/2012	Quality Software Services, Inc.	HHSM500-2007-00024I T0008	41,684,784	12,074,891
08/31/2012	Deloitte Consulting, LLP	HHSM500-2012-00016G	670,486	670,486
09/11/2012	Spherecom Enterprises, Inc.	HHSM500-2011-00001B B0001	1,436,417	684,095
09/17/2012	CGI Federal, Inc.	HHSM500-2007-00015I T0007	20,928,862	15,928,862
09/21/2012	Fedresults, Inc.	HHSM500-2012-00038G	3,801,526	3,801,526
09/26/2012	L and M Policy Research, LLC	HHSM500-2010-00015I T0002	1,494,238	580,000
09/26/2012	The Mitre Corporation	HHSM500-2011-00036U	6,477,310	6,153,688
09/27/2012	DEDE, Inc. dba Genova Technologies	HHSM500-2012-00021B B0013	6,390,739	4,963,816
09/27/2012	IDL Solutions, Inc.	HHSM500-2007-00023I T0001	31,770,557	13,793,360
02/27/2013	Maricom System Incorporated	HHSM500-2007-00025I T0005	14,393,226	5,172,849
03/13/2013	DEDE, Inc. dba Genova Technologies	HHSM500-2012-00021B B0007	674,192	674,192

Award or Modification Date	Contractor Name	Contract/Task Order Number	Obligations	Expenditures
03/28/2013	Protelecom, LLC	HHSM500-2009-00005I T0014	65,500	65,500
05/15/2013	DEDE, Inc. dba Genova Technologies	HHSM500-2012-00021B B0008	3,627,003	2,115,837
06/20/2013	DEDE, Inc. dba Genova Technologies	HHSM500-2012-00021B B0019	1,642,651	907,707
08/01/2013	Heitech Services, Inc.	HHSM500-2013-00275G	3,655,525	599,801
08/15/2013	Blue Canopy Group, LLC	HHSM500-2013-00054U	1,159,863	99,602
09/03/2013	Blast Design Studio, Inc.	HHSM500-2013-00153C	392,700	196,350
09/12/2013	Protelecom, LLC	HHSM500-2009-00005I T0015	53,490	20,422
09/13/2013	Aquilent, Inc.	HHSM500-2013-00074U	14,505,811	5,080,022
09/20/2013	DEDE, Inc. dba Genova Technologies	HHSM500-2012-00021B B0020	1,302,384	-
09/25/2013	Spann & Associates, Inc.	HHSM500-2013-00334G	3,000,000	-
12/31/2013	Affigent, LLC	HHSM500-2014-00087U	1,928,431	1,928,431
			\$320,191,825	\$189,488,704
	Grand Total		\$835,739,773	\$558,099,235

APPENDIX B: FEDERAL REGULATIONS

FEDERAL ACQUISITION REGULATION

The FAR, 48 CFR § 1.602, General Information about the Authority and Responsibilities of Contracting Officers

This section describes the authority and responsibilities, including limitations of contracting officers' authority, which are received from the appointing authority.

The FAR, 48 CFR § 1.604, General Information about Contracting Officer's Representatives

This section describes the role of the contracting officer's representative and outlines documentation requirements related to the delegation of authority received from the contracting officer.

The FAR, 48 CFR § 16.301-1, Cost-Reimbursement Contracts

This section explains that cost-reimbursement contracts pay allowable costs to the extent prescribed by the contract. The contract includes an estimate of expected costs for obligating funds. Contracting officers must approve costs that exceed this cost ceiling.

The FAR, 48 CFR § 16.306, Cost-Plus-Fixed-Fee Contracts

This section explains that a cost-plus-fixed-fee contract pays allowable costs plus a negotiated fee that is fixed at the start of the contract. The fixed fee does not vary with actual costs, but may be adjusted if there are changes in the work to be performed under the contract.

The FAR, 48 CFR § 32.905, Payment Documentation and Its Process

This section states that “[p]ayment will be based on receipt of a proper invoice and satisfactory contract performance.” It also defines the information that must be included on the invoice for it to be considered for payment. After the invoice is certified for payment, the agency receiving official forwards a certified invoice to the payment office by the fifth working day after acceptance.

The FAR, 48 CFR § 32.1003, Criteria for Use of Performance-Based Payments

This section describes the criteria for contracting officers using performance-based payments for individual orders and contracts. The contractor may use performance-based awards for fixed-price contracts, orders, or line items, and the contracting officer and the contractor must agree on the terms of the performance-based payment.

The FAR, 48 CFR § 46.305, Cost-Reimbursement Service Contracts

This section requires the contracting officer to include the standard FAR clause “Inspection of Services—Cost Reimbursement” (48 CFR § 52.246-5) in all cost-reimbursement contracts.

The FAR, 48 CFR § 52.246-5, Inspection of Services—Cost Reimbursement

This clause, required by the FAR, 48 CFR § 46.305, “Cost Reimbursement Service Contracts” details the Government responsibility to inspect and accept services provided by contractors. In part, the clause states:

(d) If any of the services performed do not conform with contract requirements, the Government may require the Contractor to perform services again in conformity with contract requirements, for no additional fee. When the defects in services cannot be corrected by reperformance, the Government may—

- (1) Require the Contractor to take necessary action to ensure that future performance conforms to contract requirements; and
- (2) Reduce the fee payable under the contract to reflect the reduced value of the services performed.

HHS ACQUISITION REGULATION

The HHSAR, 48 CFR subpart 342.70, Contract Monitoring

This subpart describes the Department’s operating concepts related to contract monitoring and describes the joint roles and responsibilities of the contracting officer and the contracting officer’s representative.

The HHSAR, 48 CFR § 342.7001, Contract Monitoring Responsibilities

The contracting officer works jointly with the contracting officer’s representative to ensure satisfactory contractor performance and validates the completeness of the contractor invoice before payment. This section identifies the responsibilities of the contracting officer and the contracting officer’s representative to monitor contracts. The contracting officer is the only person authorized to modify the contract and must confirm all modifications in writing.

The HHSAR, 48 CFR § 342.7003, Withholding of Contract Payments

This section requires the contracting officer to include the standard HHSAR clause “Withholding of Contract Payments” (48 CFR § 352.242-73) in all cost-reimbursement contracts.

The HHSAR, 48 CFR § 352.242-73, Withholding of Contract Payments

This clause, required by the HHSAR, 48 CFR § 342.7003, “Withholding of Contract Payments” details the circumstances under which the Government can withhold payments because the contractor does not submit required reports when due or fails to perform or deliver required work. The clause states:

Notwithstanding any other payment provisions of this contract, failure of the Contractor to submit required reports when due or failure to perform or deliver required work, supplies, or services, may result in the withholding of payments under this contract unless such failure arises out of causes beyond the control, and

without the fault or negligence of the Contractor as defined by the [the HHSAR, 48 CFR § 352.249-14] clause entitled “Excused Delays” or “Default,” as applicable. The Government will immediately notify the Contractor of its intention to withhold payment on any invoice or vouchers submitted.

CONTRACT DISPUTES ACT

41 U.S.C. § 7103, Decision by Contracting Officer

This section states that the contracting officer must decide on the Federal Government’s claims against a contractor, that the decision must be the subject of a written decision by the contracting officer, and that the decision must be issued within a reasonable time.

APPENDIX C: AUDIT SCOPE AND METHODOLOGY

SCOPE

We reviewed the 62 contracts that CMS identified as awarded to 35 different contractors from March 23, 2010, through March 31, 2014 (the audit period), for the development, implementation, and operation of the Federal marketplace, including the Web site, the Hub, and other related computer systems, to implement the comprehensive health insurance reforms required by the ACA. Of the 62 contracts, 24 provided services exclusively in support of Federal marketplace projects. The remaining 38 provided a mix of services for other CMS computer systems projects and Federal marketplace projects.²¹ For the audit period, CMS identified \$2.1 billion that had been obligated and \$1.7 billion that had been expended on all of these 62 contracts, of which it estimated that \$835.7 million had been obligated and \$558.1 million had been expended in support of Federal marketplace projects.

We limited our review of internal controls to those in place for receipt, review, approval, and payment of contractor invoices because our objective did not require an understanding of all internal controls over the CMS processes related to Federal marketplace contracts. We performed a limited review of all obligation and expenditure data recorded for the 62 contracts to ensure that the amounts identified by CMS included all obligations and expenditures related to Federal marketplace projects.

We conducted our audit from January through November 2014 and performed fieldwork at CMS in Baltimore, Maryland.

METHODOLOGY

To accomplish our objective, we:

- reviewed applicable laws, regulations, and guidance pertaining to the billing and payment for contractor services;
- reviewed the 62 contracts and task orders, including the statements of work, contract clauses, and contract modifications, to identify the purpose and type of contract, period of performance, appropriation and funding data, and invoice submission requirements;
- reviewed all obligation data recorded in HIGLAS for the 62 contracts and verified that obligation transactions were supported by the contract or contract modification;
- reviewed all expenditure data recorded in HIGLAS for the 62 contracts and verified that the transactions were supported by contractor invoices and authorized for payment;
- verified the obligation and expenditure amounts that CMS identified as being related to Federal marketplace projects;

²¹ Of these 38 contracts, 22 were awarded for nonmarketplace work but added modifications for Federal marketplace projects, and 16 were awarded for Federal marketplace work but added modifications for nonmarketplace projects.

- reviewed contractor invoices to determine whether contractors identified any delays or inability to complete any of the contract work within established timelines;
- reviewed contracts and task orders to determine whether payments could be withheld when contracts did not fulfill their contract work requirements;
- reviewed contracts and task orders to determine whether they included provisions for performance-based payments; and
- identified award-fee payments made for contracts or task orders that included a provision for an award fee and then reviewed award-fee payments, including award-fee determinations.

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

APPENDIX D: CMS COMMENTS



DEPARTMENT OF HEALTH & HUMAN SERVICES

Centers for Medicare & Medicaid Services

JUN - 9 2015

200 Independence Avenue SW
Washington, DC 20201

To: Daniel R. Levinson
Inspector General
Office of the Inspector General

From: Andrew M. Slavitt
Acting Administrator
Centers for Medicare & Medicaid Services

Subject: CMS Did Not Identify All Costs and Did Not Always Pay Contractor Invoices Correctly for the Federal Marketplace (A-03-14-03002)

The Centers for Medicare & Medicaid Services (CMS) appreciates the opportunity to review and comment on the Office of the Inspector General's (OIG) draft report. CMS is committed to providing effective management and oversight of contracts including those for the Health Insurance Marketplaces, thereby acting as a good steward of tax payer dollars.

The Marketplaces play a critical role in achieving one of the Affordable Care Act's (ACA) core goals: reducing the number of uninsured Americans by providing affordable, high-quality health insurance. During Open Enrollment for 2015, about 11.7 million Americans selected plans through the Marketplaces. On March 31, 2015, about 10.2 million consumers had "effectuated" coverage which means those individuals paid for Marketplace coverage and still have an active policy on that date. Nearly 8.7 million (85 percent) consumers nationwide and 6.4 million consumers in the 34 states with Federally-facilitated Marketplaces received an average premium tax credit of \$272 per month to make their premiums more affordable throughout the year.

CMS has implemented several initiatives to improve the management of Marketplace contracts focusing on clear lines of authority, prioritization of requirements and deliverables, and metric-driven quality reviews. These include implementing a strong management structure, which focuses priorities and provides clear direction, adopting a strict process for reviewing and approving all Marketplace requirements, and designating specific staff that is responsible for coordination and integration among CMS and various contractors. In addition, CMS has issued formal guidance that lays out the roles and responsibilities for each member of the acquisition workforce community, and has established a standardized Contracting Officer Representative (COR) Appointment Memorandum that will provide CORs, and their managers, with better guidance about their respective acquisition team roles and responsibilities. CMS is committed to improving the management of the Marketplace to ensure that this investment will serve consumers for years to come.

CMS takes seriously its commitment to track and report accurate financial data related to contracts, including Marketplace contracts. CMS' financial statements are audited each year

under the annual Chief Financial Officers' (CFO) audit performed by the HHS Office of Inspector General (OIG) and Ernst & Young, LLC, an independent certified public accounting firm. CMS has received a clean, unqualified audit opinion from our auditors for the past 16 fiscal years, indicating that CMS' financial statements were presented fairly, in all material respects, in conformity with generally accepted accounting principles.

In addition, CMS includes all relevant contract costs when it identifies and reports total obligations and expenditures related to the design, development, and operation of the Federal Marketplace and has accurately recorded those costs in the Healthcare Integrated General Ledger Accounting System (HIGLAS). CMS has implemented multiple internal systems to report the most accurate and timely information available on these costs.

OIG Recommendation

The OIG recommends that CMS include all relevant contract costs when it identifies total obligations and expenditures related to the design, development, and operation of the Federal Marketplace.

CMS Response

CMS agrees that all relevant contract costs should be included when reporting total obligations and expenditures related to the design, development and operation of the Federal Marketplaces, and did so when reporting these amounts to the OIG. However, CMS does not concur with the OIG's finding that CMS should have included \$24,336,404 of obligations and \$22,885,725 of expenditures, as these transactions were not for services directly related to the operation of the Federal Marketplaces, but rather were services for the broader implementation of the Affordable Care Act (ACA), including support for Medicaid technology systems and existing CMS data systems.

Several contracts that directly supported the Federally-Facilitated Marketplaces (FFM) also had tasks within them that supported the State-Based Marketplaces (SBMs). For these contracts, CMS did not include these obligations and expenditures since these funded actions related to State models or were for contracts supporting broader ACA implementation. Those obligation transactions that specifically supported the SBMs or broader ACA implementation were not included in the transaction list provided to the OIG. The OIG requested funding data for contracts that supported the IT portion of the FFM or www.healthcare.gov. Based on this request, the services that supported the SBMs or broader ACA implementation do not qualify as FFM-related and were thus excluded, per the scope of the OIG's review. As a result, the obligations and expenditures for services related to SBM activities or broader ACA implementation were not, and should not have been, included in the reporting of total costs for the Federal Marketplace.

OIG Recommendation

The OIG recommends that CMS review all charges submitted by CGI Federal for the FFM contract and determine an appropriate amount to withhold for correcting defects, including the cost of hours worked and the related fixed fees.

CMS Response

We note that this recommendation is not applicable. The draft report inaccurately describes the content of the cited clause from The Federal Acquisition Regulation (FAR). The report states:

The FAR (48 CFR§46.305) requires the contracting officer to include the standard "Inspection of Services- Cost Reimbursement clause in cost-reimbursement service contracts including cost-plus-fixed-fee contracts. *That clause specifies that if the service does not meet contract requirements the contractor must correct the defects at no additional cost to the government.* [Emphasis added]

However FAR 52.246-5 actually provides, in pertinent part:

(d) If any of the services performed do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, for *no additional fee.* [Emphasis added]

This clause authorizes CMS to require the contractor to re-perform services that do not meet contract requirements for no additional fee. However, CMS is still obligated to pay all allowable costs associated with the re-performance of these services and cannot disallow the costs for correcting defects, including the costs of hours worked. In accordance with FAR 52.246-5, CMS has already withheld the fee associated with this re-work.

OIG Recommendation

The OIG recommends that CMS issue a formal decision on withholding the fixed-fee payments so that CGI Federal has the opportunity to dispute that decision.

CMS Response

We note that this recommendation is not applicable. CMS agrees that this matter needs to be negotiated and finalized and we have started discussions with the contractor to resolve the matter through mutual agreement.

However, the draft report inaccurately describes the dispute resolution process. Our contractor is always free to file a certified claim that would initiate the Contract Disputes Act process in accordance with FAR 33.206(a). The contractor has not done so. Once the contractor has filed a certified claim, then the Contracting Officer would be obligated to issue a written Contracting Officer's Decision in accordance with FAR 33.211. The Contractor is also free to appeal should the Contracting Officer fail to issue a timely written decision in accordance with FAR 33.211(f) and (g). The contractor's ability to dispute CMS's actions is not being impacted by a wait for a written Contracting Officer's Decision.

CMS' policy, which aligns with the FAR, is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level, and that reasonable efforts should be made to resolve controversies prior to the submission of a claim (see FAR 33.204). Given that we have not exhausted efforts to achieve a mutual agreement on this matter, and the contractor has not submitted a certified claim, it is premature to expect CMS to issue a formal written Contracting Officer's Decision at this time.