



October 31, 2011

TO: Francis S. Collins, M.D., Ph.D.
Director
National Institutes of Health

FROM: /Daniel R. Levinson/
Inspector General

SUBJECT: Appropriations Funding for National Institute of Allergy and Infectious Diseases
Contract HHSN272-2008-00013C With The EMMES Corporation
(A-03-10-03115)

The attached final report provides the results of our review of appropriations funding for National Institute of Allergy and Infectious Diseases contract HHSN272-2008-00013C with The EMMES Corporation.

Section 8L of the Inspector General Act, 5 U.S.C. App., requires that the Office of Inspector General (OIG) post its publicly available reports on the OIG Web site. Accordingly, this report will be posted at <http://oig.hhs.gov>.

If you have any questions or comments about this report, please do not hesitate to call me, or your staff may contact Kay L. Daly, Assistant Inspector General for Audit Services, at (202) 619-1157 or through email at Kay.Daly@oig.hhs.gov. We look forward to receiving your final management decision within 6 months. Please refer to report number A-03-10-03115 in all correspondence.

Attachment

Department of Health and Human Services

**OFFICE OF
INSPECTOR GENERAL**

**APPROPRIATIONS FUNDING FOR
NATIONAL INSTITUTE OF
ALLERGY AND INFECTIOUS DISEASES
CONTRACT HHSN272-2008-00013C
WITH THE EMMES CORPORATION**



Daniel R. Levinson
Inspector General

October 2011
A-03-10-03115

Office of Inspector General

<http://oig.hhs.gov>

The mission of the Office of Inspector General (OIG), as mandated by Public Law 95-452, as amended, is to protect the integrity of the Department of Health and Human Services (HHS) programs, as well as the health and welfare of beneficiaries served by those programs. This statutory mission is carried out through a nationwide network of audits, investigations, and inspections conducted by the following operating components:

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Section 8L of the Inspector General Act, 5 U.S.C. App., requires that OIG post its publicly available reports on the OIG Web site.

OFFICE OF AUDIT SERVICES FINDINGS AND OPINIONS

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

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)). Federal statutes also limit the time during which an appropriation is available. 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 March 1, 2008, NIAID awarded contract HHSN272-2008-00013C (the Contract), totaling \$54.8 million, to The EMMES Corporation in Rockville, Maryland. NIAID estimated the funds needed for the 7-year Contract as follows: \$6.8 million of fiscal year 2008 funds for program year 1, \$7.2 million (rounded up) of fiscal year 2009 funds for program year 2, \$7.5 million of fiscal year 2010 funds for program year 3, \$7.8 million of fiscal year 2011 funds for program year 4, \$8.1 million of fiscal year 2012 funds for program year 5, \$8.5 million of fiscal year 2013 funds for program year 6, and \$8.9 million fiscal year 2014 funds for program year 7. The Contract requires the contractor to provide research support services to extramural clinical research programs by establishing and managing a Statistical and Data Coordinating Center for Clinical Research in Infectious Diseases. We determined that the Contract is a severable service contract because it calls for continuing, recurring tasks (statistical consulting, computer services, Web site development and operation, and training) 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 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 by obligating funds in advance of an appropriation. The initial contract action obligated fiscal year 2008 funds for a period of approximately 14 months (March 1, 2008, through April 30, 2009). Subsequent modifications obligated fiscal year 2008 and 2009 funds through May 31, 2011. Because the Contract was for severable services, NIAID should have obligated only those fiscal year 2008 funds needed for program year 1 (March 1, 2008, through February 28, 2009) and only those FY 2009 funds needed for program year 2 (March 1, 2009, through February 28, 2010).

Additionally, NIAID violated the bona fide needs rule by obligating more funds than it needed for program year 1 and using those funds to pay for costs incurred after program year 1. NIAID estimated that it would require \$6.8 million for program year 1 but obligated \$23.7 million of fiscal year 2008 appropriations. NIAID inappropriately recorded expenditures incurred after program year 1 against fiscal year 2008 funds. Those expenditures must be recorded against fiscal year funds available for the program years in which they were incurred. Using the funding estimates provided in the Contract, NIAID must resolve the bona fide needs rule violation by deobligating \$16.9 million (\$23.7 million less \$6.8 million) of fiscal year 2008 funds that were obligated in excess of the agency’s bona fide need for program year 1 and obligating the appropriate fiscal year funds for the program years in which the services were provided. If NIAID does not have adequate fiscal year funds available, it will violate the Antideficiency Act for these fiscal years as well.

Furthermore, although NIAID estimated that it would require \$6.8 million for program year 1, at the time of our audit, it had expended only \$4.9 million. NIAID may not use the remaining funds for costs incurred in subsequent program years. Rather, NIAID will need to deobligate an additional \$1.9 million (\$6.8 million less \$4.9 million) of fiscal year 2008 appropriations if it is determined that they are no longer needed during their period of availability.

RECOMMENDATIONS

We recommend that NIAID:

- record the correct obligation for each program year against the appropriate fiscal year appropriations by:
 - deobligating \$16.9 million of fiscal year 2008 funds,
 - obligating \$7.2 million of fiscal year 2009 funds, and
 - obligating the appropriate fiscal year funds for subsequent program years;
- record expenditures for each program year against the appropriate fiscal year appropriations by:
 - reversing \$2.5 million of fiscal year 2008 expenditures,
 - recording \$2.5 million of fiscal year 2009 expenditures, and
 - recording expenditures against the appropriate fiscal year funds for subsequent program years;
- report an Antideficiency Act violation for obligating fiscal year 2008 funds in advance of an appropriation;
- report an Antideficiency Act violation if adequate fiscal year 2009 and appropriate subsequent year funds are unavailable to cover obligations for subsequent program years; and
- return funds that were not required for program year 1 by deobligating \$1.9 million of fiscal year 2008 funds if it is determined that they are no longer needed during their period of availability.

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 would report the violation as required by 31 U.S.C. § 1351.

Based upon comments made by NIH, we have made some technical corrections to our initial report. NIH did not address our recommendations to correct the improper funding for the first 2 program years of the Contract. Until NIH makes these adjustments, HHS cannot report the correct amount of its Antideficiency Act violation. Therefore, we continue to recommend that NIH record the correct Contract obligations and expenditures against the correct fiscal year funds.

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

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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].”¹ 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.² 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.

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

² 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 253l³), 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.⁴

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.

³ 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. 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.

⁴ 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.⁵

National Institute of Allergy and Infectious Diseases Contract Award

On March 1, 2008, NIAID awarded contract HHSN272-2008-00013C (the Contract), totaling \$54.8 million, to The EMMES Corporation in Rockville, Maryland. NIAID estimated the funds needed for the 7-year Contract as follows: \$6.8 million of fiscal year 2008 funds for program year 1, \$7.2 million⁶ of fiscal year 2009 funds for program year 2, \$7.5 million of fiscal year 2010 funds for program year 3, \$7.8 million of fiscal year 2011 funds for program year 4, \$8.1 million of fiscal year 2012 funds for program year 5, \$8.5 million of fiscal year 2013 funds for program year 6, and \$8.9 million fiscal year 2014 funds for program year 7.⁷ The Contract requires the contractor to provide research support services to extramural clinical research programs by establishing and managing a Statistical and Data Coordinating Center for Clinical Research in Infectious Diseases. We determined that the Contract is a severable service contract because it calls for continuing, recurring tasks (statistical consulting, computer services, Web site development and operation, and training) 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

⁵ 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.

⁶ Amount rounded up.

⁷ In this Contract, NIAID estimated funds on a fiscal year basis. However, for purpose of this audit, we reviewed the obligation and expenditure of fiscal year funds on a program year basis. “Program year” defines each of the seven 12-month funding and operating periods starting March 1 of each fiscal year, beginning on March 1, 2008, with the award of the Contract. We used the funding estimates in the Contract as a statement of NIAID’s bona fide need for each program year.

appropriations law.⁸ 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 2008 and 2009. 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 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.

⁸ *Funding Multiple Year Contracts: Tiger Team Summary Report*, July 29, 2009.

FINDINGS AND RECOMMENDATIONS

NIAID funded the Contract in compliance with the purpose requirements of 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 by obligating funds in advance of an appropriation. The initial contract action obligated fiscal year 2008 funds for a period of approximately 14 months (March 1, 2008, through April 30, 2009). Subsequent modifications obligated fiscal year 2008 and 2009 funds through May 31, 2011. Because the Contract was for severable services, NIAID should have obligated only those fiscal year 2008 funds needed for program year 1 (March 1, 2008, through February 28, 2009) and only those fiscal year 2009 funds needed for program year 2 (March 1, 2009, through February 28, 2010).

Additionally, NIAID violated the bona fide needs rule by obligating more funds than it needed for program year 1 and using those funds to pay for costs incurred after program year 1. NIAID estimated that it would require \$6.8 million for program year 1 but obligated \$23.7 million of fiscal year 2008 appropriations. NIAID inappropriately recorded expenditures incurred after program year 1 against fiscal year 2008 funds. Those expenditures must be recorded against fiscal year funds available for the program years in which they were incurred. Using the funding estimates provided in the Contract, NIAID must resolve the bona fide needs rule violation by deobligating \$16.9 million (\$23.7 million less \$6.8 million) of fiscal year 2008 funds that were obligated in excess of the agency's bona fide need for program year 1 and obligating the appropriate fiscal year funds for the program years in which the services were provided. If NIAID does not have adequate fiscal year funds available, it will violate the Antideficiency Act for these fiscal years as well.

Furthermore, although NIAID estimated that it would require \$6.8 million for program year 1, at the time of our audit, it had expended only \$4.9 million. NIAID may not use the remaining funds for costs incurred in subsequent program years. Rather, NIAID will need to deobligate an additional \$1.9 million (\$6.8 million less \$4.9 million) of fiscal year 2008 appropriations if it is determined that they are no longer needed during their period of availability.⁹

FUNDING VIOLATIONS

Bona Fide Needs Rule Violation

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. In fiscal year 2008, when it awarded the \$54.8 million severable service Contract, NIAID estimated its cost for each program year.

⁹ Deobligated funds may be retained as unobligated balances in the agency's expired fiscal year account until the account is closed, however, and are available for adjustments in accordance with 31 U.S.C. § 1553(a).

NIAID estimated that it needed \$6.8 million for program year 1. However, NIAID obligated a total of \$23.7 million of fiscal year 2008 appropriations, including an initial increment of \$8.2 million in March 2008 that improperly funded the Contract through April 2009 and a Contract modification that allotted an additional increment of \$15.5 million in September 2008 and improperly funded the Contract through May 2011. In addition, NIAID incorrectly recorded expenditures totaling \$2.5 million, incurred for program year 2, against fiscal year 2008 funds.

The FAR 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 need for program year 1 and extending the use of those funds after program year 1 violated the bona fide needs rule and statutory authority relating to availability of fiscal year funds.

To remedy these bona fide needs rule violations, NIAID will need to deobligate \$16.9 million (\$23.7 million less \$6.8 million) of fiscal year 2008 appropriations that were obligated in excess of the agency’s bona fide need for program year 1 and used to pay expenses incurred after program year 1 and properly obligate the fiscal year funds available for the program years in which the services were provided.

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.

NIAID’s obligation of fiscal year 2008 appropriations for a period that exceeded 12 months constituted an obligation of funds in advance of an appropriation and thus violates the Antideficiency Act. In addition, NIAID estimated that it would require \$7.2 million for program year 2 beginning March 1, 2009, but did not obligate any fiscal year 2009 appropriations to program year 2. Instead, NIAID recorded expenditures for program year 2 against fiscal year 2008 obligations. The use of fiscal year 2008 appropriations for services provided after program year 1 further evidences NIAID’s obligation in advance of an appropriation, which violates the Antideficiency Act. NIAID must record obligations using fiscal year funds available at the beginning of each program year. If adequate fiscal year funds are no longer available, NIAID will incur additional Antideficiency Act violations.

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, more than 14 months before NIAID awarded the Contract.

UNLIQUIDATED OBLIGATIONS

Agencies are required to establish internal controls “that reasonably ensure that obligations and costs comply with applicable law” (31 U.S.C. § 3512(c) and OMB Circular A-123).¹⁰ HHS financial management policy¹¹ requires its operating divisions to review and analyze open obligations (including unliquidated obligations) quarterly to determine whether outstanding balances can be deobligated. Obligations, especially from prior years, should be deobligated when, among other reasons, the recorded estimate needs to be reduced to reflect the actual obligation and the payment is an amount less than the original obligation.

NIAID estimated that it would require \$6.8 million for program year 1, beginning March 1, 2008. The EMMES Corporation had submitted invoices each month that were consistent in amount, and NIH had paid all invoices submitted during program year 1. However, at the time of our audit, NIAID had expended only \$4.9 million and may not use the remaining funds for costs incurred in subsequent program years. NIAID should record expenditures for each program year against the appropriate fiscal year appropriations and deobligate funds that are no longer needed during their period of availability. Consequently, NIAID should deobligate \$1.9 million (\$6.8 million less \$4.9 million) of fiscal year 2008 appropriations if it is determined that they are no longer needed during their period of availability.

RECOMMENDATIONS

We recommend that NIAID:

- record the correct obligation for each program year against the appropriate fiscal year appropriations by:
 - deobligating \$16.9 million of fiscal year 2008 funds,
 - obligating \$7.2 million of fiscal year 2009 funds, and
 - obligating the appropriate fiscal year funds for subsequent program years;

¹⁰ OMB Circular A-123, *Management’s Responsibility for Internal Control*, December 21, 2004 (as revised).

¹¹ *Interim Open Obligation Review and Closeout Policy* (PM-2008-5, June 25, 2008).

- record expenditures for each program year against the appropriate fiscal year appropriations by:
 - reversing \$2.5 million of fiscal year 2008 expenditures,
 - recording \$2.5 million of fiscal year 2009 expenditures, and
 - recording expenditures against the appropriate fiscal year funds for subsequent program years;
- report an Antideficiency Act violation for obligating fiscal year 2008 funds in advance of an appropriation;
- report an Antideficiency Act violation if adequate fiscal year 2009 and appropriate subsequent year funds are unavailable to cover obligations for subsequent program years; and
- return funds that were not required for program year 1 by deobligating \$1.9 million of fiscal year 2008 funds if it is determined that they are no longer needed during their period of availability.

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 would report the violation as required by 31 U.S.C. § 1351.

Based upon comments made by NIH, we have made some technical corrections to our initial report. NIH did not address our recommendations to correct the improper funding for the first 2 program years of the Contract. Until NIH makes these adjustments, HHS cannot report the correct amount of its Antideficiency Act violation. Therefore, we continue to recommend that NIH record the correct Contract obligations and expenditures against the correct fiscal year funds.

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

APPENDIX



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

National Institutes of Health
Bethesda, Maryland 20892

JUN 19 2011

TO: Daniel R. Levinson
Inspector General, HHS

FROM: Director, National Institutes of Health

SUBJECT: Response to OIG Draft Report, *Appropriations Funding for the National Institute of Allergy and Infectious Diseases Contract HHSN272-2008-00013C with the EMMES Corporation (A-03-10-03115)*

Attached are the National Institutes of Health's comments on the Office of Inspector General's draft report entitled, *Appropriations Funding for the National Institute of Allergy and Infectious Diseases Contract HHSN272-2008-00013C with the EMMES Corporation (A-03-10-03115)*.

We appreciate the opportunity to review and comment on this important topic. We have provided general comments that address the findings and recommendations in the draft report. 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, appearing to read "Francis S. Collins".

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

Attachment

GENERAL COMMENTS ON THE DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF INSPECTOR GENERAL DRAFT REPORT ENTITLED, APPROPRIATIONS FUNDING FOR THE NATIONAL INSTITUTE OF ALLERGY AND INFECTIOUS DISEASES CONTRACT HHSN272-2008-00013C WITH THE EMMES CORPORATION (A-03-10-03115)

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

Summary of OIG Findings:

- The National Institute of Allergy and Infectious Diseases (NIAID) did not comply with the time and the amount requirements specified in the appropriations statutes. NIAID estimated that it would require \$6.8 million for the first 12-month period of performance but obligated \$23.7 million of fiscal year 2008 appropriations. Because the contract was for severable services, NIAID should have obligated only those fiscal year 2008 appropriated funds needed for the first 12-month period of performance. NIAID obligated \$16.9 million (\$23.7 million less \$6.8 million) in violation of the *bona fide* needs rule and violated the Antideficiency Act.
- NIAID estimated that it would require \$6.8 million for the first 12-month period of performance; however, at the time of the audit, it had expended only \$4.9 million. NIAID should not have used the remaining funds for costs incurred in subsequent fiscal years.

Summary of OIG Recommendations:

1. NIAID should record the correct obligation for each period of performance against the appropriate fiscal year appropriations by:
 - deobligating \$16.9 million of fiscal year 2008 funds,
 - obligating \$7.2 million of fiscal year 2009 funds, and
 - obligating funds for subsequent periods of performance correctly.
2. NIAID should record expenditures for each period of performance against the appropriate fiscal year appropriations by:
 - reversing \$2.5 million of fiscal year 2008 expenditures,
 - recording \$2.5 million of fiscal year 2009 expenditures, and
 - recording expenditures for subsequent periods of performance correctly.
3. NIAID must report an Antideficiency Act violation for expending fiscal year 2008 funds in advance of an appropriation.
4. NIAID must report an Antideficiency Act violation if adequate fiscal year 2009 and subsequent year funds are unavailable to cover obligations for subsequent periods of performance.

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5. NIAID should return funds not required for the first period of performance by deobligating \$1.9 million of fiscal year 2008 funds if it is determined that they are no longer needed during their period of availability.

NIH Comments:

The NIH concurs that NIAID Contract HHSN272-2008-00013C is a severable services contract and that under Federal appropriations law the appropriation that was current when the services were performed should have been charged. The NIH concurs with OIG's findings as summarized above. Accordingly, NIH understands that the Department of Health and Human Services (HHS) will report the violation as required by 31 U.S.C. § 1351. NIH further understands that the HHS report will identify the proposed actions taken to correct the systemic problems within HHS which led to this and other violations.