



June 10, 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 N01-AI-15416 With the University of California at San Francisco
(A-03-10-03120)

The attached final report provides the results of our review of appropriations funding for National Institute of Allergy and Infectious Diseases contract N01-AI-15416 with the University of California at San Francisco.

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 Lori S. Pilcher, Assistant Inspector General for Grants, Internal Activities, and Information Technology Audits, at (202) 619-1175 or through email at Lori.Pilcher@oig.hhs.gov. We look forward to receiving your final management decision within 6 months. Please refer to report number A-03-10-03120 in all correspondence.

Attachment

Department of Health & Human Services

**OFFICE OF
INSPECTOR GENERAL**

**APPROPRIATIONS FUNDING
FOR NATIONAL INSTITUTE OF
ALLERGY AND
INFECTIOUS DISEASES
CONTRACT N01-AI-15416
WITH THE UNIVERSITY OF CALIFORNIA
AT SAN FRANCISCO**



Daniel R. Levinson
Inspector General

June 2011
A-03-10-03120

Office of Inspector General

<http://oig.hhs.gov>

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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 U.S. Department of Health & 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 may 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 was awarded, even though its performance may extend into subsequent fiscal years.

On September 30, 2001, NIAID awarded contract N01-AI-15416 (the Contract), totaling \$134.8 million, to the University of California, San Francisco, California (the university). The Contract requires the university to support the research efforts of the Collaborative Network for Clinical Research on Immune Tolerance. We determined that the Contract is a nonseverable service contract because it represents a single undertaking (to plan and guide the advancement of overall research in certain areas) and provides for a single outcome (to produce a technical report summarizing the research and suggesting future areas of research). During fiscal year 2005, a no-cost modification extended the Contract to September 30, 2007. In addition, during fiscal year 2007, NIAID made a modification totaling \$220.5 million for additional nonseverable services that extended the Contract through April 30, 2014, and increased the total Contract amount to \$355.3 million. We determined that the Contract modification is for nonseverable

services because although it includes additional tasks, it continues the work of the original Contract.

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 requirements and amount requirements specified in the statutes. NIAID initially funded only \$35.3 million of the \$134.8 million Contract obligation with fiscal year 2001 appropriations. NIAID obligated a total of \$99.5 million in violation of the bona fide needs rule: \$19.5 million of fiscal year 2002 appropriated funds, \$22.4 million of fiscal year 2003 appropriated funds, \$23.4 million of fiscal year 2004 appropriated funds, \$22.7 million of fiscal year 2005 appropriated funds, and \$11.5 million of fiscal year 2006 appropriated funds. Because the Contract was for nonseverable services, NIAID was required to record the full amount of the Contract using fiscal year 2001 appropriated funds. By not doing so, NIAID potentially violated the Antideficiency Act.

In addition, when it awarded a fiscal year 2007 Contract modification for nonseverable services, NIAID initially funded only \$40.3 million of the \$220.5 million contract obligation with fiscal year 2007 appropriations. NIAID obligated a total of \$58.2 million in violation of the bona fide needs rule (\$48.8 million of fiscal year 2008 appropriated funds and \$9.4 million of fiscal year 2009 appropriated funds), and NIAID planned to obligate an additional \$122.0 million of future years’ appropriated funds. By not recording the full obligation using fiscal year 2007 appropriations, NIAID potentially violated the Antideficiency Act.

To remedy the bona fide needs rule violations, NIAID will need to deobligate all fiscal year 2002 through 2006 appropriations obligated for the base Contract and all appropriations after fiscal year 2007 obligated for the Contract modification. To remedy a potential Antideficiency Act violation, NIAID would have needed to record an obligation of \$99.5 million (\$134.8 million less \$35.3 million) using fiscal year 2001 appropriations for the base Contract. However, because fiscal year 2001 funds are no longer available to record the obligation, NIAID may be able to fund the deficiency by using \$99.5 million of current year appropriations provided the conditions of 31 U.S.C. §§ 1553 and 1554 are met. If NIAID does not have \$99.5 million of current fiscal year appropriations or the amount exceeds the lesser of 1 percent of the current appropriation or the unexpended balance of the closed appropriation, it will violate the Antideficiency Act.

To remedy a potential further Antideficiency Act violation, NIAID will need to record an obligation of \$180.2 million (\$220.5 million less \$40.3 million) using fiscal year 2007 appropriations for the Contract modification. If NIAID does not have \$180.2 million of fiscal year 2007 appropriations available, it will further violate the Antideficiency Act.

RECOMMENDATIONS

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

NATIONAL INSTITUTES OF HEALTH COMMENTS

In written comments on our draft report, NIH agreed that a bona fide needs violation and an Antideficiency Act violation had occurred but did not agree with our characterization of the Contract as a nonseverable service contract or the nature of the bona fide needs violation. NIH did not address our recommendations to correct the obligation of funds for prior Contract years.

Specifically, NIH stated that the Contract was for severable services and that it violated the bona fide needs rule because it obligated the Government to acquire severable services in advance of appropriations that could be used for such services, even if the bona fide need had been properly identified and the exception (allowed under 41 U.S.C. § 2531) were applicable. NIH said that HHS would report an Antideficiency Act violation as required by 31 U.S.C. § 1351 and that NIAID had modified the Contract to ensure that remaining contract performance was funded appropriately. NIH's comments are included in their entirety as the Appendix.

OFFICE OF INSPECTOR GENERAL RESPONSE

While the Contract may contain severable elements, we maintain that, on balance, the Contract is nonseverable. We determined that the Contract was overall nonseverable based on the language describing the tasks included in the statement of work. Although some services are continuing and recurring clinical support services, the Contract requires the university to guide and plan the overall direction of research and to make specific suggestions (in the final technical report deliverable) for the advancement of research. Further, NIH did not properly fund the obligation under any of the allowable funding methods for severable service contracts, including the exception claimed under 41 U.S.C. § 2531.

Although NIH said that it must report an Antideficiency Act violation, it did not address our recommendation to correct the improper funding 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 NIAID record the obligation for the base Contract by using \$99.5 million of current fiscal year appropriations provided the conditions of 31 U.S.C. §§ 1553 and 1554 are met. If NIAID does not have \$99.5 million of current fiscal year appropriations available or the amount exceeds the lesser of 1 percent of the current appropriation or the unexpended balance of the closed appropriation, it must report the Antideficiency Act violation. In addition, NIAID will need to record an obligation of \$180.2 million using fiscal year 2007 appropriations to correct funding for the Contract modification or, if funds are not available, report a further Antideficiency Act violation. NIAID

will also need to deobligate funds appropriated for other years. We have modified our recommendations to identify the funding adjustments necessary by fiscal year.

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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 U.S. Department of Health & 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 was made.

Bona fide needs may involve transactions that cover more than 1 fiscal year, depending on the nature of the services involved: “The general rule is that the fiscal year appropriation current at the time the contract is made is chargeable with payments under the contract, although performance thereunder may extend into the ensuing fiscal year” (23 Comp. Gen. 370, 371 (1943)).¹ Multiyear contracting authority provided by statute is an exception to the bona fide needs rule.

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].”² When services are continuing and recurring, they are severable, and the agency may fund the contract with separate subsequent fiscal year appropriations. A contract for a single outcome or effort is chargeable to the fiscal year in which it was awarded, even though its performance may extend into subsequent fiscal years. The Comptroller General has explicitly held that incremental funding (i.e., other than full funding) of nonseverable service contracts violates the bona fide needs rule without statutory authority (71 Comp. Gen. 428 (1992)).

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

¹ As cited in GAO-04-261SP, *Appropriations Law*, Vol. I, p. 5-24.

² As cited in GAO-04-261SP, *Appropriations Law*, Vol. I, p. 5-23.

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.

National Institute of Allergy and Infectious Diseases Contract Award

On September 30, 2001, NIAID awarded contract N01-AI-15416 (the Contract), totaling \$134.8 million, to the University of California, San Francisco, California (the university). The Contract requires the university to support the research efforts of the Collaborative Network for Clinical Research on Immune Tolerance. We determined that the Contract is a nonseverable service contract because it represents a single undertaking (to plan and guide the advancement of overall research in certain areas) and provides for a single outcome (to produce a technical report summarizing the research and suggesting future areas of research). During fiscal year 2005, a no-cost modification extended the Contract to September 30, 2007. In addition, during fiscal year 2007, NIAID made a modification totaling \$220.5 million for additional nonseverable services that extended the Contract through April 30, 2014, and increased the total Contract amount to \$355.3 million. We determined that the Contract modification is for nonseverable services because although it includes additional tasks, it continues the work of the original Contract.³

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 appropriations law.⁴ 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.

³ On the whole, we characterized the Contract modification as nonseverable because the revised statement of work continues the original work of the Contract. Although the modification may include severable services, it does not provide sufficient information to distinguish these services clearly.

⁴ *Funding Multiple Year Contracts; Tiger Team Summary Report*, July 29, 2009.

Scope

We reviewed all obligations and payments made under the Contract during fiscal years 2001 through 2009. We did not review NIAID's internal controls because our objective did not require such a review.

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; 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.

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 amount requirements specified in the statutes. NIAID initially funded only \$35.3 million of the \$134.8 million Contract obligation with fiscal year 2001 appropriations. NIAID obligated a total of \$99.5 million in violation of the bona fide needs rule: \$19.5 million of fiscal year 2002 appropriated funds, \$22.4 million of fiscal year 2003 appropriated funds, \$23.4 million of fiscal year 2004 appropriated funds, \$22.7 million of fiscal year 2005 appropriated funds, and \$11.5 million of fiscal year 2006 appropriated funds. Because the Contract was for nonseverable services, NIAID was required to record the full amount of the Contract using fiscal year 2001 appropriated funds. By not doing so, NIAID potentially violated the Antideficiency Act.

In addition, when it awarded a fiscal year 2007 Contract modification for nonseverable services, NIAID initially funded only \$40.3 million of the \$220.5 million contract obligation with fiscal year 2007 appropriations. NIAID obligated a total of \$58.2 million in violation of the bona fide needs rule (\$48.8 million of fiscal year 2008 appropriated funds and \$9.4 million of fiscal year 2009 appropriated funds) and planned to obligate an additional \$122.0 million of future years' appropriated funds. By not recording the full obligation using fiscal year 2007 appropriations, NIAID potentially violated the Antideficiency Act.

To remedy the bona fide needs rule violations, NIAID will need to deobligate all fiscal year 2002 through 2006 appropriations obligated for the base Contract and all appropriations after fiscal year 2007 obligated for the Contract modification. To remedy a potential Antideficiency Act violation, NIAID would have needed to record an obligation of \$99.5 million (\$134.8 million less \$35.3 million) using fiscal year 2001 appropriations for the base Contract. However, because fiscal year 2001 funds are no longer available to record the obligation, NIAID may be able to fund the deficiency by using \$99.5 million of current year appropriations provided the conditions of 31 U.S.C. §§ 1553 and 1554 are met. If NIAID does not have \$99.5 million of current fiscal year appropriations or the amount exceeds the lesser of 1 percent of the current appropriation or the unexpended balance of the closed appropriation, it will violate the Antideficiency Act.

To remedy a potential further Antideficiency Act violation, NIAID will need to record an obligation of \$180.2 million (\$220.5 million less \$40.3 million) using fiscal year 2007 appropriations for the Contract modification. If NIAID does not have \$180.2 million of fiscal year 2007 appropriations available, it will further violate the Antideficiency Act.

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. A contract for nonseverable services must reflect a bona fide need identified in the fiscal year in which the agency awards the contract, although the contract's performance may extend into subsequent fiscal years. An agency must fully fund a nonseverable service contract by obligating funds representing the entire amount of the contract from appropriations available during the fiscal year in which the agency awards the contract.

In fiscal year 2001, NIAID awarded the 5-year nonseverable service Contract and incurred an obligation totaling \$134.8 million based on an existing bona fide need. However, NIAID recorded only \$35.3 million of the obligation with fiscal year 2001 appropriations. Subsequently, NIAID improperly recorded obligations of \$19.5 million using fiscal year 2002 appropriated funds, \$22.4 million using fiscal year 2003 appropriated funds, \$23.4 million using fiscal year 2004 appropriated funds, \$22.7 million using fiscal year 2005 appropriated funds, and \$11.5 million using fiscal year 2006 appropriated funds. However, NIAID did not have a bona fide need after fiscal year 2001. To remedy the violation, NIAID will need to deobligate the \$99.5 million improperly obligated after fiscal year 2001.

In addition, during fiscal year 2007, NIAID extended the Contract through April 30, 2014, an additional 7 years, and incurred an obligation totaling \$220.5 million based on an existing bona fide need. However, NIAID recorded only \$40.3 million of the obligation with fiscal year 2007 appropriations. Subsequently, NIAID improperly recorded obligations of \$48.8 million using fiscal year 2008 appropriated funds and \$9.4 million using fiscal year 2009 appropriated funds

and planned to obligate \$122 million with future years' appropriated funds. However, NIAID did not have a bona fide need after fiscal year 2007. To remedy the violation, NIAID will need to deobligate the \$58.2 million (\$48.8 million plus \$9.4 million) obligated with fiscal years 2008 and 2009 appropriations and any additional funds improperly obligated after fiscal year 2009.

Potential Antideficiency Act Violation

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

Pursuant to 31 U.S.C. §§ 1551-1553, the account⁵ closing statutes, after fiscal year appropriations expire, they remain available to record, adjust, and liquidate obligations properly chargeable to the appropriation account for up to 5 years. After 5 years, the appropriation account is closed and the balance is canceled.

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

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

NIAID should have recorded the full fiscal year 2001 obligation for \$134.8 million at the time of the Contract award. Instead, NIAID recorded only \$35.3 million of the obligation with fiscal year 2001 appropriations. Because fiscal year 2001 funds are no longer available to record the obligation, NIAID may be able to fund the deficiency by using \$99.5 million (\$134.8 million less \$35.3 million) of current fiscal year appropriations provided the conditions of 31 U.S.C. §§ 1553 and 1554 are met. If NIAID does not have \$99.5 million of current fiscal year appropriations available or the amount exceeds the lesser of 1 percent of the current appropriation or the unexpended balance of the closed appropriation, it will violate the Antideficiency Act.

In addition, NIAID should have recorded the full fiscal year 2007 obligation for \$220.5 million at the time the Contract was modified. Instead, NIAID recorded only \$40.3 million of the obligation with fiscal year 2007 appropriations. To remedy this potential Antideficiency Act

⁵ Each agency has an account, maintained by the Department of the Treasury, that tracks the amount of funds available for use. That account is credited with funds appropriated in the agency's budget and reduced by expenditures made by the agency to perform the tasks for which the credit was given.

violation, NIAID will need to record an obligation of \$180.2 million (\$220.5 million less \$40.3 million) using fiscal year 2007 appropriations. If NIAID does not have \$180.2 million of fiscal year 2007 appropriations available, it will further violate the Antideficiency Act.

CAUSES OF FUNDING VIOLATIONS

Generally, the Tiger Team report attributed funding violations to:

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

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

RECOMMENDATIONS

We recommend that NIAID:

- deobligate \$19.5 million of fiscal year 2002 appropriations and return the canceled funds to the Treasury;
- deobligate \$22.4 million of fiscal year 2003 appropriations and return the canceled funds to the Treasury;
- deobligate \$23.4 million of fiscal year 2004 appropriations and return the canceled funds to the Treasury;
- deobligate \$22.7 million of fiscal year 2005 appropriations and return the canceled funds to the Treasury;
- deobligate \$11.5 million of fiscal year 2006 funds;
- record the remaining \$99.5 million of the \$134.8 million Contract obligation against current fiscal year appropriations;
- report an Antideficiency Act violation if sufficient current fiscal year appropriations are not available;
- report, in accordance with 31 U.S.C. § 1554, the adjustment to the Contract using current fiscal year appropriations;

- deobligate \$48.8 million of fiscal year 2008 funds;
- deobligate \$9.4 million of fiscal year 2009 funds;
- deobligate appropriations for subsequent fiscal years NIAID may have obligated for the contract modification after our audit;
- record the remaining \$180.2 million of the \$220.5 million contract obligation against fiscal year 2007 funds; and
- report an additional Antideficiency Act violation if fiscal year 2007 funds are not available.

NATIONAL INSTITUTES OF HEALTH COMMENTS AND OFFICE OF INSPECTOR GENERAL RESPONSE

In written comments on our draft report, NIH agreed that an Antideficiency Act violation had occurred but did not concur with our findings and recommendations regarding the characterization of the Contract as a nonseverable service contract. NIH did not address our recommendations to correct the obligation of funds for prior Contract years. Nevertheless, NIH said that HHS would report an Antideficiency Act violation. We have summarized NIH's comments, along with our responses, below. NIH's comments are included in their entirety as the Appendix.

National Institutes of Health Comments

NIH did not concur with our characterization of the Contract as a nonseverable service contract. NIH stated, "The overall purpose of the contract is to continuously identify and review opportunities for meritorious research in the area of immune tolerance, make recommendations to NIAID, and provide ongoing support to other organizations conducting clinical trials and related research." Further, NIH stated that the statement of work "describes severable services because the contractor is providing ongoing support to numerous studies and is not responsible for a single nonseverable deliverable." NIH concluded that because the Contract and its modification did not have a defined end product at the time of award, "these were severable services contracts."

However, NIH stated that it had violated the bona fide needs rule because: "In this instance, at award, FY01 [fiscal year 2001] funds were used for a need of FY01 – FY03 beyond the one year permitted by the exception [41 U.S.C. § 2531], even if the *bona fide* need had been properly identified and the exception were applicable."

In addition, NIH stated: "NIAID violated this statute [Antideficiency Act] because it obligated the Government to acquire severable services in an amount that exceeded and could be charged to the available FY01 appropriation and other fiscal year appropriations." NIH said that HHS would report the violation as required by 31 U.S.C § 1351 and that "NIAID has modified the contract to ensure that remaining contract performance is funded appropriately and in accordance with all applicable laws and regulations."

Office of Inspector General Response

While the Contract may contain severable elements, we maintain that, on balance, the Contract is nonseverable. We determined that the Contract was overall nonseverable based on the language describing the tasks included in the statement of work. Although some services are continuing and recurring clinical support services, the Contract requires the university to guide and plan the overall direction of research and to make specific suggestions (in the final technical report deliverable) for the advancement of research. Further, NIH did not properly fund the obligation under any of the allowable funding methods for severable service contracts, including the exception claimed under 41 U.S.C. § 2531.

Although NIH said that it must report an Antideficiency Act violation, it did not address our recommendation to correct the improper funding 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 NIAID record the obligation for the base Contract by using \$99.5 million of current fiscal year appropriations provided the conditions of 31 U.S.C. §§ 1553 and 1554 are met. If NIAID does not have \$99.5 million of current fiscal year appropriations available or the amount exceeds the lesser of 1 percent of the current appropriation or the unexpended balance of the closed appropriation, it must report the Antideficiency Act violation. In addition, NIAID will need to record an obligation of \$180.2 million using fiscal year 2007 appropriations to correct funding for the Contract modification or, if funds are not available, report a further Antideficiency Act violation.

NIAID will also need to deobligate funds appropriated for other years. We have modified our recommendations to identify the funding adjustments necessary by fiscal year.

APPENDIX

APPENDIX: NATIONAL INSTITUTES OF HEALTH COMMENTS



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

National Institutes of Health
Bethesda, Maryland 20892

APR 13 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 N01-AI-15416 With the University of California at San Francisco* (A-03-10-03120)

Attached are the National Institutes of Health's revised comments on the Office of Inspector General's draft report entitled, *Appropriations Funding for the National Institute of Allergy and Infectious Diseases Contract N01-AI-15416 With the University of California at San Francisco* (A-03-10-03120).

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 (HHS) OFFICE OF INSPECTOR GENERAL (OIG) DRAFT REPORT ENTITLED, APPROPRIATIONS FUNDING FOR NATIONAL INSTITUTE OF ALLERGY AND INFECTIOUS DISEASES CONTRACT N01-AI-15416 WITH THE UNIVERSITY OF CALIFORNIA AT SAN FRANCISCO (A-03-10-03120)

The National Institutes of Health (NIH) appreciates the review conducted by OIG and the opportunity to provide clarifications on this draft report. We respectfully submit the following general comments. We are not submitting any technical comments to the draft report.

OIG Findings:

- NIAID did not comply with the time requirements and may not have complied with the amount requirements specified in Federal appropriations law. NIAID awarded a contract in 2001 but initially funded only \$35.3 million of the \$134.8 million contract obligation with fiscal year 2001 appropriations. NIAID obligated a total of \$99.5 million in violation of the *bona fide* needs rule:
 - \$19.5 million of fiscal year 2002 appropriated funds;
 - \$22.4 million of fiscal year 2003 appropriated funds;
 - \$23.4 million of fiscal year 2004 appropriated funds;
 - \$22.7 million of fiscal year 2005 appropriated funds; and
 - \$11.5 million of fiscal year 2006 appropriated funds.
- Because the OIG report concluded that the contract was for nonseverable services, it found that NIAID was required to record the full amount of the contract using fiscal year 2001 appropriated funds and that by not recording the full obligation using fiscal year 2001 appropriations, NIAID potentially violated the Antideficiency Act.
- When NIAID executed a fiscal year 2007 contract modification for nonseverable services, it initially funded only \$40.3 million of the \$220.5 million contract obligation with fiscal year 2007 appropriations. NIAID obligated a total of \$58.2 million in violation of the *bona fide* needs rule (\$48.8 million of fiscal year 2008 appropriated funds and \$9.4 million of fiscal year 2009 appropriated funds). By not recording the full obligation using fiscal year 2007 appropriations, NIAID potentially violated the Antideficiency Act.

OIG Recommendations:

- NIAID should record the remaining \$99.5 million of the \$134.8 million contract obligation against fiscal year 2001 funds and deobligate funds appropriated for years other than fiscal year 2001 for the base contract;
- NIAID should record the remaining \$180.2 million of the \$220.5 million contract modification against fiscal year 2007 funds and deobligate funds appropriated for years other than fiscal year 2007; and

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- NIAID must report Antideficiency Act violations if fiscal year 2001 and 2007 funds are not available.

NIH Comments:

NIH does not concur with the OIG's findings that the base contract and fiscal year 2007 modification are nonseverable and, therefore, does not concur with the recommendations based upon those findings. NIH believes that the base contract and modification should be properly characterized as severable services.

A nonseverable contract is one that cannot feasibly be subdivided into separate tasks. For example, this contract would be nonseverable if it required the contractor to "Test drug A on population B for three years and submit a report." However, as specifically illustrated below, the statements of work (SOW) in both the base contract and the 2007 modification set forth numerous severable services that the contractor is to perform on an ongoing basis over the term of the contract, and are, therefore, severable, rather than nonseverable. The Government Accountability Office (GAO) describes a "nonseverable" contract as follows:

[W]here the service provided constitutes a specific, entire job with a defined end-product that *cannot feasibly be subdivided* for separate performance in each fiscal year, the task should be financed entirely out of the appropriation current at the time of award, notwithstanding that performance may extend into future years. Thus a nonseverable contract is essentially a single undertaking that cannot feasibly be subdivided.¹

Neither the NIAID base contract nor the 2007 modification had a "defined end-product" at the time of award. Neither was established to conduct a specific research project or clinical trial. Instead, the contractor is to establish and participate in various committees and networks to identify and support meritorious research projects performed by NIH, other Government agencies, and private sector companies. In short, these were severable services contracts. Further, the base contract and the 2007 modification not only *can* "feasibly be subdivided," they *have* been subdivided into numerous short-term tasks that independently provide value to the Government. Based on GAO's definition, NIAID Contract N01-AI-15416 and the 2007 modification are for severable services.

The GAO developed the following test to determine whether services are severable or nonseverable:

¹ *Funding for Air Force Cost Plus Fixed Fee Level of Effort Contract*, B-277165, Jan. 10, 2000 (citations omitted) (emphasis added).

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[T]here is a fairly simple test that is often helpful in determining whether a given service is severable or nonseverable. Suppose that a service contract is to be performed half in one fiscal year and half in the next. Suppose further that the contract is terminated at the end of the first fiscal year and is not renewed. What do you have? In the case of a window-cleaning contract, you have half of your windows clean, a benefit that is not diminished by the fact that the other half is still dirty. What you paid for in the first half has not been wasted. These services are clearly severable.²

The SOW in NIAID Contract N01-AI-15416 describes severable services because the contractor is providing ongoing support to numerous studies and is not responsible for a single nonseverable deliverable. Although the contractor must submit various reports, these are merely status reports and summaries of the severable services that were performed during the specified reporting periods. The overall purpose of the contract is to continuously identify and review opportunities for meritorious research in the area of immune tolerance, make recommendations to NIAID, and provide ongoing support to other organizations conducting clinical trials and related research. The purpose is described in Article B.1 of the base contract as follows: “to support the Collaborative Network for Clinical Research on Immune Tolerance.” Toward this end, the base contract SOW requires the contractor to perform the following severable services (described in Parts A-D):

- Base Contract SOW, Part A (Kidney and Islet Transplantations). Part A describes the initial set-up phase of the contract in which the contractor must “establish the Collaborative Network for Clinical Research” (para. 1.), “develop and implement the scientific agenda” (para. 2.), “develop a plan for scientific management of the Network” (para. 3.), and “establish and manage an executive committee” (para. 6.). Once this preliminary work is completed, the contractor is to support 8-15 clinical trial sites (para. 4.) and support “clinical trials sponsored by other Federal and private sector organizations and companies” (para. 5.). The language in Part A indicates that this is not a nonseverable contract for a particular study but a contract to provide a wide range of severable services in support of many studies.
- Base Contract SOW, Part B (Development and Validation of Tolerance Assays). Part B requires the contractor to establish and manage a Tolerance Assay Group that will “design and conduct studies as an integral part of Network-sponsored clinical trials . . . as well as clinical trials . . . sponsored by other Federal and private organizations and companies.”
- Base Contract SOW, Part C (Autoimmune Diseases). Part C follows the pattern of Parts A and B and also requires the contractor to set up a scientific agenda to identify

² GAO, *Principles of Federal Appropriations Law*, Jan. 2004, v.1, p. 5-28.

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promising research projects (para. 1.), support clinical trials conducted at between 8-13 sites (para. 2.), and participate in the Network Executive Committee to provide “scientific leadership and direction for the overall governance of the Network” (para. 4.).

- Base Contract SOW, Part D (Asthma and Allergic Diseases). Part D follows the pattern of Parts A thru C and requires the contractor to perform oversight and management functions in support of numerous clinical trials.

In all four Parts (A-D) of the SOW, it is significant to note that, at the time of award, there was no “specific, entire job with a defined end-product,” as GAO requires as a precondition of nonseverability.³ Essentially, the contract was for clinical trial support based on needs that were not specifically known at the time of award. Each time a promising study was identified, or a trial was initiated, or a recommendation was made, the Government received services that had value that was independent of any final deliverable. This is the essence of severability under applicable GAO case law.

The SOW pertaining to the 2007 modification continued the work specified in Parts A-D and added the following severable tasks:

- Overview Item III (Nonclinical Research and Candidate Drug Development). The SOW states that “[s]uch activities *may* include proof-of-principle studies, production, pharmacokinetics and pharmacodynamics studies and nonclinical toxicity studies.” The open-ended nature of these tasks indicates that the modification was not for “a specific, entire job with a defined end-product,” which GAO considers to be a critical element of nonseverability.
- Overview Item VI (Bioinformatics, Data Collection, and Validation). This task requires the contractor to maintain a secure database to support various research projects on an ongoing basis.
- Overview Item VII (Collaboration With Clinical Research Programs and Organizations). This task requires the contractor to “collaborate, including information sharing, with other NIH-sponsored clinical research programs, private organizations, and companies....”
- Overview Item VIII (Project Management). This task (described on page 21 of the SOW) requires the contractor to perform a variety of severable tasks such as oversight, communicating with the NIAID Project Officer, and submitting status updates (para. A.);

³ *Funding for Air Force Cost Plus Fixed Fee Level of Effort Contract*, B-277165, Jan. 10, 2000.

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Financial Management (para. B.); and Subcontract Execution, Management and Reporting (para. C.).

Applying GAO's test of severability (above), if one were to terminate the contract or the modification midway through the performance period, the Government would have received the benefit of completed elements of performance; e.g., the contractor would have identified meritorious projects, prepared plans and agendas, attended meetings, maintained a secure database, collaborated with others, and managed numerous projects. As GAO stated above: "What you paid for in the first half has not been wasted. These services are clearly severable."

Since NIAID Contract N01-AI-15416 and the 2007 modification should be properly characterized as severable, it would have been inappropriate to fully fund them at award. As a general rule, severable services are the *bona fide* need of the fiscal year in which they are performed. Thus, generally speaking, agencies must obligate the appropriation that is current when the services are performed. However, 41 U.S.C. § 2531 provides an exception to this general rule and allows agencies using annual appropriations to obligate funds current at the time of contract award to fund a severable services contract that crosses fiscal years, provided the performance period does not exceed 1 year. In this instance, at award, FY01 funds were used for a need of FY01 – FY03 beyond the one year permitted by the exception, even if the *bona fide* need had been properly identified and the exception were applicable.

The Antideficiency Act (ADA) prohibits, in pertinent part, an officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose in advance of appropriations made for such purpose, unless the contract or obligation is authorized by law, 31 U.S.C. § 1341(a)(1)(B). NIAID violated this statute because it obligated the Government to acquire severable services in FY01 – FY10 *in advance* of appropriations which could be used for such services.

The ADA also prohibits, in pertinent part, making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund *in excess* of the amount available in the appropriation or fund unless authorized by law. 31 U.S.C. § 1341(a)(1)(A). NIAID violated this statute because it obligated the Government to acquire severable services in an amount that exceeded and could be charged to the available FY01 appropriation and other fiscal year appropriations.

Finally, even if the contract were viewed as nonseverable in nature, as concluded by OIG, NIH agrees that the ADA would be violated because the FY01 account is closed and funds are no longer available to adjust the under recorded obligation. Moreover, under this view, even if sufficient funds are available in the current appropriation, as provided by 31 U.S.C. §

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1553(b), NIH understands that the Department would still report the violation given its nature.

Accordingly, NIH agrees that a violation of the ADA has occurred with respect to this contract. 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 HHS' report will include a statement of the actions taken to address systemic problems within HHS which led to this and other violations. NIAID has modified the contract to ensure that the remaining contract performance is funded appropriately and in accordance with all applicable laws and regulations.