



October 17, 2011

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

FROM: /Daniel R. Levinson/
Inspector General

SUBJECT: Appropriations Funding for *Eunice Kennedy Shriver* National Institute of Child Health and Human Development Contract HHSN275-03-3345 With Westat, Inc. (A-03-10-03106)

The attached final report provides the results of our review of appropriations funding for National Institute of Child Health and Human Development contract HHSN275-03-3345 with Westat, Inc.

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-03-10-03106 in all correspondence.

Attachment

Department of Health and Human Services

**OFFICE OF
INSPECTOR GENERAL**

**APPROPRIATIONS FUNDING FOR
EUNICE KENNEDY SHRIVER
NATIONAL INSTITUTE OF
CHILD HEALTH AND
HUMAN DEVELOPMENT
CONTRACT HHSN275-03-3345
With Westat, Inc.**



Daniel R. Levinson
Inspector General

October 2011
A-03-10-03106

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 *Eunice Kennedy Shriver* National Institute of Child Health and Human Development (NICHD) 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, NICHD 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 is awarded, even though its performance may extend into subsequent fiscal years.

On November 1, 2002, NICHD awarded contract HHSN275-03-3345 (the Contract), totaling \$164.7 million, to Westat, Inc. (Westat), in Rockville, Maryland. The Contract required Westat to establish an international pediatric and perinatal HIV studies network-coordinating center to maintain, coordinate, and manage a network of clinical research centers. We determined that, although the Contract statement of work may contain severable elements, on balance the Contract was nonseverable because it provided for a single outcome (a comprehensive report and the related overall study data) at the conclusion of the 5-year contract. NICHD subsequently made five modifications to the Contract that increased the total Contract amount by \$16.2 million to \$180.9 million.

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 NICHD funded the Contract in compliance with the purpose, time, and amount requirements specified in appropriations statutes.

SUMMARY OF FINDINGS

NICHD funded the Contract in compliance with the purpose requirements of appropriations statutes. However, NICHD did not comply with the time and amount requirements specified in the statutes. NICHD initially funded only \$31.0 million of the \$164.7 million contract obligation with fiscal year 2003 appropriations. NICHD obligated a total of \$133.7 million in violation of the bona fide needs rule: \$33.2 million of fiscal year 2004 appropriated funds, \$33.3 million of fiscal year 2005 appropriated funds, \$33.5 million of fiscal year 2006 appropriated funds, and \$33.7 million of fiscal year 2007 appropriated funds. Because the Contract was for nonseverable services, NICHD was required to record the full amount of the Contract using fiscal year 2003 appropriated funds. By not doing so, NICHD potentially violated the Antideficiency Act.

To remedy the bona fide needs rule violation, NICHD will need to deobligate the fiscal year 2004 through 2007 appropriations and would have needed to obligate \$133.7 million (\$164.7 million less \$31.0 million) using fiscal year 2003 appropriations. However, because 2003 funds are no longer available to record the obligation, NICHD may be able to fund the deficiency using \$133.7 million of current fiscal year appropriations provided the conditions of 31 U.S.C. § 1553 are met. If NICHD does not have \$133.7 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, NICHD will violate the Antideficiency Act.

NICHD correctly funded five Contract modifications for additional work totaling \$16.2 million using appropriated funds available at the time it awarded the modifications.

RECOMMENDATIONS

We recommend that NICHD:

- deobligate \$33.2 million of fiscal year 2004 funds and return the canceled funds to the Treasury;
- deobligate \$33.3 million of fiscal year 2005 funds and return the canceled funds to the Treasury;
- deobligate \$33.5 million of fiscal year 2006 funds;
- deobligate \$33.7 million of fiscal year 2007 funds;

- record the remaining \$133.7 million of the \$164.7 million contract obligation against current fiscal year appropriations;
- report an Antideficiency Act violation if sufficient current year appropriations are not available; and
- report, in accordance with 31 U.S.C. § 1554, the adjustment to the Contract using current fiscal year appropriations.

NATIONAL INSTITUTES OF HEALTH COMMENTS

In written comments on our draft report, NIH agreed that a bona fide needs violation had occurred and admitted violating the Antideficiency Act. NIH did not agree with our characterization of the Contract as a nonseverable service contract or the nature of the bona fide needs violation and, therefore, did not concur with the audit recommendation to correct the funding of the Contract.

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. However, NIH said that HHS had reported the Antideficiency Act violation as required by 31 U.S.C. § 1351 and that the Contract had been completed and was in the process of being administratively closed. NIH did not say that it had made or planned to make any corrections to the Contract funding.

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

OFFICE OF INSPECTOR GENERAL RESPONSE

While the statement of work may contain severable elements, we maintain that, on balance, the Contract is nonseverable. We determined the Contract was nonseverable because it was focused on an end product—the comprehensive report and the related item, “data tapes,” containing the study data. Further, NIH stated that the Contract was for severable services but admitted that it did not properly fund the obligation under any of the allowable funding methods for severable services contracts.

NIH admitted violating the bona fide needs rule and the Antideficiency Act and stated that HHS has reported an Antideficiency Act violation. However, NIH failed to identify any actions, taken or planned, to correct the improper funding of the Contract as either a nonseverable or severable services contract. Until NIH takes corrective action, HHS cannot report the correct amount of its Antideficiency Act violation.

We have modified our recommendations to identify by fiscal year the adjustments necessary to properly fund a nonseverable service contract. As noted in the modified recommendations, NICHD must record the \$133.7 million against current fiscal year funds (provided the amount does not exceed the lesser of 1 percent of the current appropriation or the unexpended balance of the closed appropriation) and must report the adjustment pursuant to 31 U.S.C. § 1554.

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INTRODUCTION

BACKGROUND

The *Eunice Kennedy Shriver* National Institute of Child Health and Human Development (NICHD) 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, NICHD 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.

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 is 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). The 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 Child Health and Human Development Contract Award

On November 1, 2002, NICHD awarded contract HHSN275-03-3345³ (the Contract), totaling \$164.7 million, to Westat, Inc. (Westat), in Rockville, Maryland. The Contract required Westat to establish an international pediatric and perinatal HIV studies network-coordinating center to maintain, coordinate, and manage a network of clinical centers. These clinical centers, under subcontracts with Westat, conducted research on the treatment, prevention, diagnosis, epidemiology, and natural history of HIV infection and disease in pediatric, adolescent, and maternal patient populations. We determined that, although the Contract statement of work may contain some severable elements, on balance the Contract was nonseverable because it provided for a single outcome (a comprehensive report and the related overall study data) at the conclusion of the 5-year contract.

NICHD made five modifications to the Contract that increased the total amount of the Contract by \$16.2 million to \$180.9 million. These modifications added additional work and used appropriated funds available at the time of the modifications: \$1.8 million in fiscal year 2003, \$1.2 million in fiscal year 2004, \$4.5 million in fiscal year 2005, \$4.9 million in fiscal year 2006, and \$3.8 million in fiscal year 2007. In addition, during fiscal year 2007, a no-cost modification extended the Contract to February 29, 2008.

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 NICHD funded the Contract in compliance with the purpose, time, and amount requirements specified in appropriations statutes.

³ The original contract number was N01-HD-3-3345.

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 2003 through 2007. We did not review NICHD's internal controls because our objective did not require such a review.

We performed our fieldwork at NICHD 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

NICHD funded the Contract in compliance with the purpose requirements of appropriations statutes. However, NICHD did not comply with the time and amount requirements specified in the statutes. NICHD initially funded only \$31.0 million of the \$164.7 million contract obligation with fiscal year 2003 appropriations. NICHD obligated a total of \$133.7 million in violation of the bona fide needs rule: \$33.2 million of fiscal year 2004 appropriated funds, \$33.3 million of fiscal year 2005 appropriated funds, \$33.5 million of fiscal year 2006 appropriated funds, and \$33.7 million of fiscal year 2007 appropriated funds. Because the Contract was for nonseverable services, NICHD was required to record the full amount of the Contract using fiscal year 2003 appropriated funds. By not doing so, NICHD potentially violated the Antideficiency Act.

To remedy the bona fide needs rule violation, NICHD will need to deobligate the fiscal year 2004 through 2007 appropriations and would have needed to obligate \$133.7 million (\$164.7 million less \$31.0 million) using fiscal year 2003 appropriations. However, because 2003 funds are no longer available to record the obligation, NICHD may be able to fund the deficiency using \$133.7 million of current fiscal year appropriations provided the conditions of 31 U.S.C. § 1553 are met. If NICHD does not have \$133.7 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, NICHD will violate the Antideficiency Act.

NICHD correctly funded five Contract modifications for additional work totaling \$16.2 million using appropriated funds available at the time it awarded the modifications.

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 nonseverable service contracts 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 2003, NICHD awarded the 5-year nonseverable service Contract and incurred an obligation totaling \$164.7 million based on an existing bona fide need. However, NICHD recorded only \$31.0 million of the obligation with fiscal year 2003 appropriations. Subsequently, NICHD improperly recorded obligations of \$33.2 million using fiscal year 2004 appropriated funds, \$33.3 million using fiscal year 2005 appropriated funds, \$33.5 million using fiscal year 2006 appropriated funds, and \$33.7 million using fiscal year 2007 appropriated funds. However, NICHD did not have a bona fide need after fiscal year 2003. To remedy the violation, NICHD will need to deobligate the \$133.7 million improperly obligated after fiscal year 2003 and would have needed to obligate \$133.7 million (\$164.7 million less \$31.0 million) using fiscal year 2003 appropriations. However, because 2003 funds are no longer available to record the obligation, NICHD may be able to fund the deficiency using \$133.7 million of current fiscal year appropriations provided the conditions of 31 U.S.C. § 1553 are met.

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

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.

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-year appropriation account available for the same purpose. The amount charged to the current fiscal year appropriation may not exceed 1 percent of the current appropriation or the unexpended balance of the closed appropriations.

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.

NICHD should have recorded the full fiscal year 2003 obligation for \$164.7 million at the time of the Contract award. Instead, NICHD recorded only \$31.0 million of the obligation with fiscal year 2003 appropriations. Because fiscal year 2003 funds are no longer available to record the obligation, as noted above, NICHD may be able to fund the deficiency by using \$133.7 million of current fiscal year appropriations provided that the conditions of 31 U.S.C. § 1553 are met. If NICHD does not have \$133.7 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.

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 it on December 20, 2006, more than 4 years after NICHD awarded the Contract.

RECOMMENDATIONS

We recommend that NICHD:

- deobligate \$33.2 million of fiscal year 2004 funds and return the canceled funds to the Treasury;

- deobligate \$33.3 million of fiscal year 2005 funds and return the canceled funds to the Treasury;
- deobligate \$33.5 million of fiscal year 2006 funds;
- deobligate \$33.7 million of fiscal year 2007 funds;
- record the remaining \$133.7 million of the \$164.7 million contract obligation against current fiscal year appropriations;
- report an Antideficiency Act violation if sufficient current year appropriations are not available; and
- report, in accordance with 31 U.S.C. § 1554, the adjustment to the Contract using current fiscal year appropriations.

NATIONAL INSTITUTES OF HEALTH COMMENTS

In written comments on our draft report, NIH agreed that a bona fide needs violation had occurred and admitted violating the Antideficiency Act. NIH did not agree with our characterization of the Contract as a nonseverable service contract or the nature of the bona fide needs violation and, therefore, did not concur with the audit recommendations to correct the funding of the Contract.

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. However, NIH said that HHS had reported the Antideficiency Act violation as required by 31 U.S.C. § 1351 and that the Contract had been completed and was in the process of being administratively closed. NIH did not say that it had made or planned to make any corrections to the Contract funding.

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

OFFICE OF INSPECTOR GENERAL RESPONSE

While the statement of work may contain severable elements, we maintain that, on balance, the Contract is nonseverable. We determined the Contract was nonseverable because it was focused on an end product—the comprehensive report and the related item, “data tapes,” containing the study data. Further, NIH stated that the Contract was for severable services but admitted that it did not properly fund the obligation under any of the allowable funding methods for severable services contracts.

NIH admitted violating the bona fide needs rule and the Antideficiency Act and stated that HHS has reported an Antideficiency Act violation. However, NIH failed to identify any actions, taken or planned, to correct the improper funding of the Contract as either a nonseverable or severable services contract. Until NIH takes corrective action, HHS cannot report the correct amount of its Antideficiency Act violation.

We have modified our recommendations to identify by fiscal year the adjustments necessary to properly fund a nonseverable service contract. As noted in the modified recommendations, NICHD must record the \$133.7 million against current fiscal year funds (provided the amount does not exceed the lesser of 1 percent of the current appropriation or the unexpended balance of the closed appropriation) and must report the adjustment pursuant to 31 U.S.C. § 1554.

APPENDIX

APPENDIX: NATIONAL INSTITUTES OF HEALTH COMMENTS



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

National Institutes of Health
Bethesda, Maryland 20892

AUG 5 2011

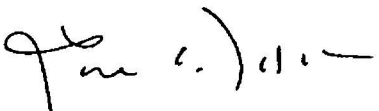
TO: Daniel R. Levinson
Inspector General, HHS

FROM: Director, National Institutes of Health

SUBJECT: Response to OIG Draft Report, *Appropriations Funding for Eunice Kennedy Shriver National Institute of Child Health and Human Development Contract HHSN275-03-3345 With Westat (A-03-10-03106)*

Attached are the National Institutes of Health's comments on the Office of Inspector General's draft report entitled, *Appropriations Funding for Eunice Kennedy Shriver National Institute of Child Health and Human Development Contract HHSN275-03-3345 With Westat (A-03-10-03106)*.

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.


for 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 EUNICE KENNEDY SHRIVER NATIONAL INSTITUTE OF CHILD HEALTH AND HUMAN DEVELOPMENT CONTRACT HHSN275-03-3345 WITH WESTAT (A-03-10-03106)

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

Summary of OIG Findings:

- The *Eunice Kennedy Shriver* National Institute of Child Health and Human Development (NICHD) did not comply with the time requirements and may not have complied with the amount requirements specified in Federal appropriations statutes. NICHD awarded contract HHSN275-03-3345 on November 1, 2002. NICHD initially funded only \$31 million of the \$164.7 million contract obligation with fiscal year 2003 appropriations. NICHD obligated a total of \$133.7 million in violation of the *bona fide* needs rule as follows:
 - \$33.2 million of fiscal year 2004 appropriated funds;
 - \$33.3 million of fiscal year 2005 appropriated funds;
 - \$33.5 million of fiscal year 2006 appropriated funds; and
 - \$33.7 million of fiscal year 2007 appropriated funds.
- Because the contract was for nonseverable services, NICHD was required to record the full amount of the contract using fiscal year 2003 appropriated funds. By not recording the full obligation using fiscal year 2003 appropriations, NICHD potentially violated the Antideficiency Act.

Summary of OIG Recommendations:

- NICHD should record the remaining \$133.7 million of the \$164.7 million contract obligation against fiscal year 2003 funds and deobligate funds appropriated for years other than fiscal year 2003.
- NICHD must report an Antideficiency Act violation if fiscal year 2003 funds are not available.

NIH Comments:

NIH does not concur with OIG's findings that the contract is for the performance of nonseverable services and, therefore, does not concur with the recommendations based upon those findings.

NICHD Contract HHSN275-03-3345 was for continuous and recurring clinical trial support services that NICHD needed on a year-to-year basis. The NICHD contract was a multiple year contract covering the needs of more than one fiscal year. More specifically, it was a five-year

GENERAL COMMENTS ON THE DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF INSPECTOR GENERAL DRAFT REPORT ENTITLED: APPROPRIATIONS FUNDING FOR EUNICE KENNEDY SHRIVER NATIONAL INSTITUTE OF CHILD HEALTH AND HUMAN DEVELOPMENT CONTRACT HHSN275-03-3345 WITH WESTAT (A-03-10-03106)

contract for the performance of severable services that NICHD needed during the year in which the contract was awarded and in each of the subsequent fiscal years covered by the contract. The NICHD appropriation that was available for obligation at the time of contract award was an annual appropriation and properly available for obligation only for the *bona fide* needs of that fiscal year. The NICHD appropriations for those services needed in each of the subsequent four years of the contract had not yet been made when the contract was awarded. Consequently, NICHD violated the Antideficiency Act when it awarded a contract that obligated NICHD appropriations not yet made, as prohibited by 31 U.S.C. § 1341(a)(1)(B).

NIH concurs that a violation of the Antideficiency Act occurred with respect to this contract. The Department of Health and Human Services (HHS) has reported the violation as required by 31 U.S.C. § 1351 based on its finding that NIH awarded a multiple year contract for severable services and legally obligated the government to pay for services needed in future years before NIH had received an appropriation to pay for those future services. The HHS report has identified the proposed actions taken to correct the systemic problems within HHS which led to this and other violations. It is significant to note that this contract has been completed and is in the process of being administratively closed. Final payment was made on April 29, 2008.