



April 20, 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 HHSN266-2006-00011C With SRI International (A-03-10-03114)

The attached final report provides the results of our review of appropriations funding for National Institute of Allergy and Infectious Diseases contract HHSN266-2006-00011C with SRI International.

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-03-10-03114 in all correspondence.

Attachment

Department of Health & Human Services

**OFFICE OF
INSPECTOR GENERAL**

**APPROPRIATIONS FUNDING FOR
NATIONAL INSTITUTE OF
ALLERGY AND INFECTIOUS DISEASES
CONTRACT HHSN266-2006-00011C
WITH SRI INTERNATIONAL**



Daniel R. Levinson
Inspector General

April 2011
A-03-10-03114

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 & 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:

Office of Audit Services

The Office of Audit Services (OAS) provides auditing services for HHS, either by conducting audits with its own audit resources or by overseeing audit work done by others. Audits examine the performance of HHS programs and/or its grantees and contractors in carrying out their respective responsibilities and are intended to provide independent assessments of HHS programs and operations. These assessments help reduce waste, abuse, and mismanagement and promote economy and efficiency throughout HHS.

Office of Evaluation and Inspections

The Office of Evaluation and Inspections (OEI) conducts national evaluations to provide HHS, Congress, and the public with timely, useful, and reliable information on significant issues. These evaluations focus on preventing fraud, waste, or abuse and promoting economy, efficiency, and effectiveness of departmental programs. To promote impact, OEI reports also present practical recommendations for improving program operations.

Office of Investigations

The Office of Investigations (OI) conducts criminal, civil, and administrative investigations of fraud and misconduct related to HHS programs, operations, and beneficiaries. With investigators working in all 50 States and the District of Columbia, OI utilizes its resources by actively coordinating with the Department of Justice and other Federal, State, and local law enforcement authorities. The investigative efforts of OI often lead to criminal convictions, administrative sanctions, and/or civil monetary penalties.

Office of Counsel to the Inspector General

The Office of Counsel to the Inspector General (OCIG) provides general legal services to OIG, rendering advice and opinions on HHS programs and operations and providing all legal support for OIG's internal operations. OCIG represents OIG in all civil and administrative fraud and abuse cases involving HHS programs, including False Claims Act, program exclusion, and civil monetary penalty cases. In connection with these cases, OCIG also negotiates and monitors corporate integrity agreements. OCIG renders advisory opinions, issues compliance program guidance, publishes fraud alerts, and provides other guidance to the health care industry concerning the anti-kickback statute and other OIG enforcement authorities.

Notices

THIS REPORT IS AVAILABLE TO THE PUBLIC
at <http://oig.hhs.gov>

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 15, 2006, NIAID awarded contract HHSN266-2006-00011C (the Contract), totaling \$56.9 million, to SRI International in Menlo Park, California. The Contract requires SRI International to facilitate the preclinical development of therapeutic agents. Although the Contract may contain severable elements, we determined that, on balance, the Contract is a nonseverable service contract because it represents a single undertaking and provides for a single outcome (to develop critical biological information and antimicrobial and antitoxin therapeutic agents) at the conclusion of the 5-year 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 may not have complied with the amount requirements specified in the statutes. NIAID funded only \$21.7 million of the \$56.9 million Contract obligation with fiscal year 2006 appropriations. NIAID obligated a total of \$16.8 million in violation of the bona fide needs rule: \$11.6 million of fiscal year 2007 appropriated funds, \$2.4 million of fiscal year 2008 appropriated funds, and \$2.8 million of fiscal year 2009 appropriated funds. NIAID planned to obligate funds appropriated for the following year as well. Because the Contract was for nonseverable services, NIAID was required to record the full amount of the Contract using fiscal year 2006 appropriated funds. By not doing so, NIAID potentially violated the Antideficiency Act.

To remedy the bona fide needs rule violation, NIAID will need to deobligate the fiscal years 2007 through 2009 appropriations and any future-year appropriations obligated after our review. To remedy the potential Antideficiency Act violation, NIAID will need to record an obligation of \$35.2 million (\$56.9 million less \$21.7 million) using fiscal year 2006 appropriations. If NIAID does not have \$35.2 million of fiscal year 2006 appropriations available, it will violate the Antideficiency Act.

RECOMMENDATIONS

We recommend that NIAID:

- deobligate \$11.6 million of fiscal year 2007 funds,
- deobligate \$2.4 million of fiscal year 2008 funds,
- deobligate \$2.8 million of fiscal year 2009 funds,
- deobligate any additional funds appropriated for years other than fiscal year 2006 that NIAID may have obligated for the Contract after our audit,
- record the remaining \$35.2 million of the \$56.9 million Contract obligation against fiscal year 2006 funds, and
- report an Antideficiency Act violation if fiscal year 2006 funds are not available.

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.

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 fiscal years 2006 through 2011 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. However, NIH said that HHS would report the Antideficiency Act violation as required by 31 U.S.C. § 1351 and that NIAID would modify the Contract to ensure that remaining contract performance was funded appropriately. However, NIH did not address our recommendations to correct the obligation of funds for prior Contract years. NIH's comments are included in their entirety as the Appendix.

OFFICE OF INSPECTOR GENERAL RESPONSE

Although the Contract statement of work may contain severable elements, we maintain that, on balance, the Contract is nonseverable because the services are not continuing and recurring. We made this determination based solely on the tasks included in the statement of work. Further, NIH did not properly fund the obligation under any of the allowable funding methods for severable services contracts, including the exception under 41 U.S.C. § 2531.

NIH did not address our recommendation to correct the improper funding of the Contract for the first 4 years of the Contract performance. 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 remaining \$35.2 million Contract obligation against fiscal year 2006 funds and deobligate funds appropriated for other years. We have modified our recommendations to identify the funding adjustments necessary by fiscal year.

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
BACKGROUND	1
Federal Appropriations Statutes.....	1
National Institute of Allergy and Infectious Diseases Contract Award.....	2
Departmental Review of National Institutes of Health Contracts	2
OBJECTIVE, SCOPE, AND METHODOLOGY	2
Objective	2
Scope.....	2
Methodology.....	3
FINDINGS AND RECOMMENDATIONS	3
FUNDING VIOLATIONS	3
Bona Fide Needs Rule Violation	3
Potential Antideficiency Act Violation.....	4
CAUSES OF FUNDING VIOLATIONS	4
RECOMMENDATIONS	5
NATIONAL INSTITUTES OF HEALTH COMMENTS AND OFFICE OF INSPECTOR GENERAL RESPONSE	5
National Institutes of Health Comments.....	5
Office of Inspector General Response	6
APPENDIX	
NATIONAL INSTITUTES OF HEALTH COMMENTS	

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 (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 15, 2006, NIAID awarded contract HHSN266-2006-00011C (the Contract), totaling \$56.9 million, to SRI International in Menlo Park, California. The Contract requires SRI International to facilitate the preclinical development of therapeutic agents. Although the Contract may contain severable elements, we determined that, on balance, the Contract is a nonseverable service contract because it represents a single undertaking and provides for a single outcome (to develop critical biological information and antimicrobial and antitoxin therapeutic agents) at the conclusion of the 5-year Contract.

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.³ 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 2006 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.

³ *Funding Multiple Year Contracts; Tiger Team Summary Report*, July 29, 2009.

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 requirements and may not have complied with the amount requirements specified in the statutes. NIAID funded only \$21.7 million of the \$56.9 million Contract obligation with fiscal year 2006 appropriations. NIAID obligated a total of \$16.8 million in violation of the bona fide needs rule: \$11.6 million of fiscal year 2007 appropriated funds, \$2.4 million of fiscal year 2008 appropriated funds, and \$2.8 million of fiscal year 2009 appropriated funds. NIAID planned to obligate funds appropriated for the following year as well. Because the Contract was for nonseverable services, NIAID was required to record the full amount of the Contract using fiscal year 2006 appropriated funds. By not doing so, NIAID potentially violated the Antideficiency Act.

To remedy the bona fide needs rule violation, NIAID will need to deobligate the fiscal years 2007 through 2009 appropriations and any future-year appropriations obligated after our review. To remedy the potential Antideficiency Act violation, NIAID will need to record an obligation of \$35.2 million (\$56.9 million less \$21.7 million) using fiscal year 2006 appropriations. If NIAID does not have \$35.2 million of fiscal year 2006 appropriations available, it will 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 2006, NIAID awarded the 5-year nonseverable service Contract and incurred an obligation totaling \$56.9 million based on an existing bona fide need. However, NIAID recorded only \$21.7 million of the obligation with fiscal year 2006 appropriations. Subsequently, NIAID improperly recorded obligations totaling \$16.8 million: \$11.6 million using fiscal year 2007 funds, \$2.4 million using fiscal year 2008 funds, and \$2.8 million using fiscal year 2009 funds. However, NIAID did not have a bona fide need in fiscal years 2007 through 2009. To remedy the violation, NIAID will need to deobligate the \$11.6 million fiscal year 2007 appropriation, the \$2.4 million fiscal year 2008 appropriation, the \$2.8 million fiscal year 2009 appropriation, and any future-year appropriations obligated after our review.

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.

NIAID should have recorded the full fiscal year 2006 obligation for \$56.9 million at the time of the Contract award. Instead, NIAID recorded only \$21.7 million of the obligation with fiscal year 2006 appropriations. To remedy the potential Antideficiency Act violation, NIAID will need to record an obligation of \$35.2 million (\$56.9 million less \$21.7 million) using fiscal year 2006 appropriations. If NIAID does not have \$35.2 million of fiscal year 2006 appropriations available, 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 the HHSAR on December 20, 2006.

RECOMMENDATIONS

We recommend that NIAID:

- deobligate \$11.6 million of fiscal year 2007 funds,
- deobligate \$2.4 million of fiscal year 2008 funds,
- deobligate \$2.8 million of fiscal year 2009 funds,
- deobligate any additional funds appropriated for years other than fiscal year 2006 that NIAID may have obligated for the Contract after our audit,
- record the remaining \$35.2 million of the \$56.9 million Contract obligation against fiscal year 2006 funds, and
- report an Antideficiency Act violation if fiscal year 2006 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 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. However, NIH said that HHS would report the 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 that, while the Contract "may contain some indicia of nonseverability, NIH believes that the contract should properly be characterized as a severable services contract." NIH said that the Contract "provides services for pre-clinical development of therapeutic agents identified through NIAID-funded grants and contracts, the private sector, or other sources selected by the NIAID Project Officer" and therefore "...is not a contract for a particular study but a contract to provide a wide range of severable services in support of many studies."

Specifically, NIH stated that the Contract was for severable services, and it violated the bona fide needs rule because: "In this instance, at award, FY [fiscal year] 2006 funds were used for a need of FYs 2006, 2007, and 2008 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 rule [Antideficiency Act] because it obligated the Government to acquire severable services in an amount that exceeded and could be charged to the available FY 2006 appropriations and other fiscal year appropriations.” NIH said that HHS would report the violation as required by 31 U.S.C § 1351 and that “NIAID will modify 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

Although the Contract statement of work may contain severable elements, we maintain that, on balance, the Contract is nonseverable because the services are not continuing and recurring. We made this determination based solely on the tasks included in the statement of work. The Comptroller General has consistently held that nonseverable service contracts must be fully funded at the time of the contract award. 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.

Moreover, NIH did not address our recommendation to correct the improper funding of the Contract for the first 4 years of the Contract performance. 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 remaining \$35.2 million Contract obligation against fiscal year 2006 funds and 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

MAR 4 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 HHSN266-2006-00011C with SRI International* (A-03-10-03114)

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 HHSN266-2006-00011C with SRI International* (A-03-10-03114).

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.


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 HHSN266-2006-00011C WITH SRI INTERNATIONAL (A-03-10-03114)

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. We respectfully submit the following general comments:

OIG Findings:

OIG concluded that the NIH's National Institute of Allergy and Infectious Diseases' (NIAID) contract HHSN266-2006-00011C with SRI International was for nonseverable services, and that NIAID did not comply with the time requirements and may not have complied with the amount requirements specified in the statutes. NIAID funded only \$21.7 million of the \$56.9 million contract obligation with fiscal year 2006 funds; and in violation of the bona fide needs rule, funded the contract with \$11.6 million of fiscal year 2007 appropriated funds, \$2.4 million of fiscal year 2008 appropriated funds, and \$2.8 million of fiscal year 2009 appropriated funds, with plans to obligate funds appropriated for future years as well.

OIG Recommendations:

Accordingly, OIG recommends that NIAID deobligate the fiscal years 2007 through 2009 appropriations and any 2010 or future-year appropriations and record the entire amount of the obligation to the fiscal year 2006 appropriated funds. OIG also advises that if NIAID cannot record the fiscal year 2006 appropriated funds, it would violate the Anti-deficiency Act (ADA), requiring a notification in accordance with 31 U.S.C. § 1351.

Department/Agency Comments:

NIAID Contract HHSN266-2006-00011C "provides services for pre-clinical development of therapeutic agents identified through NIAID-funded grants and contracts, the private sector, or other sources selected by the NIAID Project Officer." This overall statement of the purpose of the contract clearly indicates that this is not a contract for a particular study but a contract to provide a wide range of severable services in support of many studies. Accordingly, while we agree that the contract may contain some indicia of nonseverability, NIH believes that the contract should properly be characterized as a severable services contract.

The 5-year, \$56.9 million contract was awarded on September 15, 2006, for continuing and recurring services that will be performed over six fiscal years. As a general rule, severable services are the *bona fide* need of the fiscal year in which they are performed. For obligation purposes, severable services are to be charged to the appropriation available at the time the services are performed.

Pursuant to the exception available at 41 U.S.C. § 2531, agencies may obligate funds current at the time of contract award to fund a severable services contract and may cross fiscal years, provided the performance period does not exceed 1 year. Using this authority, when acquiring severable services and when annual appropriations are used, the Government's obligation cannot exceed one year. In this instance, at award, FY 2006 funds were used for a need of FYs 2006, 2007, and 2008 beyond the one year permitted by the exception, even if the *bona fide* need had been properly identified and the exception were applicable.

The 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 rule because it obligated the Government to acquire severable services in FYs 2006- 2011 *in advance* of appropriations that 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 rule because it obligated the Government to acquire severable services in an amount that exceeded and could be charged to the available FY 2006 appropriation and other fiscal year appropriations.

Even if the contract were viewed as nonseverable in nature, as concluded by OIG, NIH agrees that the ADA would be violated if sufficient FY 2006 funds are not available to fund the entire effort. Moreover, under this view, even if sufficient FY 2006 funds are available, 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 the HHS report will include a statement of the actions taken to address systemic problems within HHS that led to this and other violations. In addition, NIAID will modify the contract to ensure that remaining contract performance is funded appropriately and in accordance with all applicable laws and regulations.