



May 26, 2010

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

FROM: /Joseph E. Vengrin/
Deputy Inspector General for Audit Services

SUBJECT: Appropriations Funding for National Institutes of Health Contract
HHSN292-03-D-0107 (Call Order Number NJE37991) With Gilbane Building
Company (A-03-10-03101)

The attached final report provides the results of our review of appropriations funding for National Institutes of Health contract HHSN292-03-D-0107 (call order number NJE37991) with Gilbane Building Company.

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. Please refer to report number A-03-10-03101 in all correspondence.

Attachment

Department of Health & Human Services

**OFFICE OF
INSPECTOR GENERAL**

**APPROPRIATIONS FUNDING FOR
NATIONAL INSTITUTES OF HEALTH
CONTRACT HHSN292-03-D-0107
(CALL ORDER NUMBER NJE37991)
WITH GILBANE BUILDING COMPANY**



Daniel R. Levinson
Inspector General

May 2010
A-03-10-03101

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.

INTRODUCTION

BACKGROUND

The Office of Research Facilities Development and Operations (ORF) is a component of the Office of the Director 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, ORF 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 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: “[t]he 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). The Office of Management and Budget Circular A-11, *Preparation, Submission and Execution of the Budget*, pt. 4, § 145, prescribes the methodology for this reporting.

Office of Research and Facilities Contract Award

On September 26, 2005, ORF awarded contract HHSN292-03-D-0107, call order number NJE37991 (the Contract), totaling \$3.9 million, to Gilbane Building Company, located in Bethesda, Maryland. The Contract required Gilbane to supply material and mechanical work associated with the renovation of NIH laboratories and offices. Subsequently, ORF issued four change orders totaling \$94,588 in fiscal year 2006 and one change order for \$178,248 in fiscal year 2007 for additional material and mechanical work.

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 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 ORF 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 2005 through 2007. We did not review ORF’s internal controls because our objective did not require such a review.

We performed our fieldwork at ORF in Bethesda, Maryland, during September 2009.

Methodology

To accomplish our objective, we:

- reviewed appropriations and acquisition laws and regulations and Contract requirements;

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

- 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.

RESULTS OF AUDIT

ORF funded the Contract in compliance with the purpose, time, and amount requirements specified in appropriations statutes. ORF had a bona fide need for the items and appropriately funded the Contract and the fiscal year 2007 modification with appropriations from fiscal years 2005 and 2007, respectively. ORF also properly funded the four fiscal year 2006 modifications with no-year appropriations.