



THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

July 14, 2011

The Honorable Gene L. Dodaro
Comptroller General of the United States
441 G. Street, NW
Washington, D.C. 20548

Dear Mr. Dodaro:

This letter is to report a series of violations of the Antideficiency Act, as required by section 1351 of Title 31, United States Code (U.S.C.).

Summary of Violations

Multiple instances of violation of 31 U.S.C. § 1341(a) at the appropriation level occurred in a variety of Department of Health and Human Services (HHS) accounts, and one violation occurred at the apportionment level. The violations occurred in prior, multiple fiscal years, up to and including 2010. In general, the violations encompass improper incremental and forward funding practices, as well as the obligation of expired funds.

Factors Leading to Violations

There was a substantial lack of understanding throughout the Department of the legal limits on funding contracts; in particular, contracts that required effort or deliverables over a period of several years. This problem was compounded because earlier iterations of the HHS Acquisition Regulation (HHSAR) Subpart 332.7 (Contract Funding) provided guidance regarding various methods of funding contracts, and the guidance did not completely align with legal restrictions on the use of appropriated funds. Although amended from time to time, generally speaking, that HHSAR guidance was Departmental policy for over 20 years and provided an imperfect framework by which its agencies budgeted and allocated funds from annual appropriations and structured contracts.

In recent years, the Department amended the HHSAR to improve its contract funding coverage. However, in 2008, the HHS Senior Procurement Executive (SPE) became aware that despite such revisions, various agencies within the Department might still be funding contracts improperly. As a result, the SPE sponsored a multi-disciplinary, HHS-wide "Tiger Team" to review HHS contracts to determine whether problems with contract funding still persisted and if additional guidance was necessary.

The Tiger Team reviewed 176 multiple-year, high dollar value contracts across the Department which were candidates for heightened concern. The results of the review indicated that several agencies were, in many cases, funding contracts using unauthorized incremental or forward

funding practices. In July 2009, the SPE shared the results of the Tiger Team with senior management, HHS' Heads of Contracting Activity, and leadership within the Offices of Finance, Budget, the Inspector General (OIG), and the General Counsel (OGC). The SPE also disseminated draft acquisition guidance regarding funding of multiple-year contracts to the HHS acquisition community at large.

In August 2009, to closely examine the results of the Tiger Team review, HHS contracted for an independent assessment of the same contracts reviewed by the HHS Tiger Team. This independent assessment confirmed that about half of the contracts identified as problematic by the Tiger Team appeared to be improperly funded. In parallel with this independent assessment, the OIG conducted an audit of National Institutes of Health's use of appropriated funds for the same contracts reviewed by the HHS Tiger Team. The OIG is in the process of completing its reviews.

Once the independent assessment was complete, the Office of the Assistant Secretary for Financial Resources requested that the OGC assess whether any of the apparent deviations from appropriation laws and regulations identified by the Tiger Team, the independent assessment, and OIG constituted reportable Antideficiency Act violations. The OGC assessment identified instances of unauthorized incremental and forward funding practices. Additional OGC assessments into other contracts revealed the obligations of expired funds and an obligation in excess of an apportionment.

The enclosed summary chart provides detailed information about contracts that, as a result of this review process and OGC's legal assessment, HHS found violative of the Antideficiency Act. Furthermore, the information provided in the enclosed chart represents and categorizes the three main types of improper contract funding practices that occurred at HHS during the time period specified in this report: forward funding, incremental funding, and a combination of the two. Two additional types of violation, "use of expired funds" and "obligation in excess of an apportionment," also occurred. We explain each type of improper funding practice and the resultant Antideficiency Act violations which they cause in turn, as follows:

Forward Funding

As used in this letter and the corresponding attachments, "forward funding" refers to the obligation of annual (or multiple-year) appropriations to procure severable services which represent a *bona fide* need for a future year for which no appropriation has been made.

The Antideficiency Act (Act) 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)). In addition, the Act 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)).

As a general rule, severable services are the *bona fide* need of the fiscal year in which they are performed. For obligation purposes, except in accordance with express statutory authority, severable services are charged to the appropriation available at the time the services are performed. Thus, in a contract for severable services, base and option periods are funded out of the appropriation available at the time of contract award or option exercise. However, such funds are available for up to twelve months, in accordance with the statutory exception at 41 U.S.C. § 3902, which permits agencies to obligate funds current at the time of contract award to fund a severable services contract and cross fiscal years, provided the performance period does not exceed one year.

The contracts referenced on the attachment as “forward funded” all suffered from the same defects. That is, agencies obligated annual appropriations to cover performance in excess of twelve months and additionally in some instances, to use current year appropriations to fund contract performance that would not begin until a subsequent fiscal year. As noted, these types of “forward funding” are problematic, as annual funds obligated on a contract for severable services are only available for twelve months after obligation (*i.e.*, after contract award or option exercise). Thus, on these contracts, annual funds were used not only to fund the *bona fide* need for the year in which the obligation was made, but also to fund the *bona fide* need of future fiscal years. As a result, agencies obligated the government to acquire severable services for future fiscal years in which no appropriation had yet been made, and thus obligated funds *in advance* of appropriations which could be used for such services. In addition, agencies also obligated funds to acquire severable services in an amount that exceeded and could be charged to the annual appropriation in question.

Incremental Funding

As used in this letter and the corresponding attachments, “incremental funding” refers to the obligation of two or more annual appropriation accounts to procure services during a performance period, which should have been fully funded using only the initial annual appropriation. When the violation identified refers only to “incremental funding,” it refers to the obligation of two or more annual appropriation accounts to procure non-severable services.

The Antideficiency Act 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)).

Agencies must fund contracts for non-severable services with funds available for obligation at the time the contract is awarded. This is because non-severable services represent an entire undertaking and a *bona fide* need of the year in which the obligation is made. Thus, contracts for non-severable services may not be severed, unless pursuant to express statutory authority (e.g. 41 U.S.C. § 3903.)

The contracts referred to in the attachment as “incrementally funded” refer to contracts for non-severable services which were not fully funded from funds available for obligation at the time of award. Rather, such contracts were funded incrementally (*i.e.*, out of annual appropriations from successive fiscal years). Thus, agencies did not obligate sufficient funds for these contracts at the time of award, and obligated funds in succeeding fiscal years, which were not available to fund the requirement in question.

Incremental Funding and Forward Funding

We note that in some cases the attachment refers to contracts that were both “forward” and “incrementally” funded. This category refers to contracts in which agencies made an obligation with annual funds to procure severable services in excess of twelve months, and did not fully fund the increment that was contracted for at the time of execution.

Use of Expired Funds

For the purposes of this letter, this category refers to a very specific set of obligations made after the resolution of bid protests. On a limited number of contracts, one agency awarded contracts at the end of a fiscal year using annual appropriations and such contracts were protested by disappointed offerors at the Government Accountability Office (GAO).

Pursuant to 31 U.S.C. § 1558, annual funds “available to the agency for a contract at the time a protest is filed in connection with . . . award of such a contract would otherwise expire, such funds shall remain available for obligation for 100 days after the date on which the final ruling is made on the protest.”

After final rulings were made on these protests by GAO, the agency made contract awards in accordance with the disposition of the protests in the following fiscal year with the prior year funds. However, the agency awarded new contracts outside the 100 day limit set by 31 U.S.C. § 1558 (which would have otherwise allowed use of the expired funds). As a result, the agency obligated funds which were not available at the time that award was ultimately made.

Obligation in Excess of an Apportionment

For the purpose of this letter, this category refers to the award of a contract for non-severable services which was not fully funded at award. One agency awarded a contract for a non-severable service, but erroneously treated the requirement as a severable service and structured the contract to include a base and option periods. Consequently, the requirement was not fully funded at award. Because the obligation for a non-severable service was incurred upon award of the contract, the entire amount of the task should have been recorded as the amount obligated on that date. Since the Department recorded an obligation in an amount less than the total amount of the task, the Department must adjust its records to reflect the actual obligation that occurred upon award. As adjusted, the Department's records will reflect that, on the date of award, an obligation was incurred in excess of the amount that had been apportioned.

Organizational Responsibility for the Violations

Since the problems were systemic, the Department has concluded that responsibility for the violations cannot fairly be attributed to specific individuals. In addition, the Department found no evidence that the violations were committed willfully and knowingly.

Corrective Actions

We have shared the results of the Tiger Team review across HHS and across the functional disciplines involved in the acquisition process (*i.e.*, budget, program, contracting, and finance). In addition, the Department revamped its existing contract funding guidance, revised its HHSAR provisions regarding contract funding, and issued a detailed and extensive Acquisition Policy Memorandum to explain how contracting officials should apply the new HHSAR guidance. Further, the Department has provided technical assistance to Heads of Contracting Activity and their staff, conducted continuous education and outreach sessions across the Department, shared pertinent legal advice with the acquisition community, and identified, tailored, and adopted best practices from other federal agencies.

At the agency level, our Heads of Contracting Activity have mirrored the Department's cross-functional risk mitigation approach by: issuing local procedural guidelines to implement our expanded acquisition guidance; conducting or arranging for local appropriation law training; and working closely with their agency budget, program, and finance communities to align business practices with appropriation laws and regulations.

In coordination with HHS' budget, program, contracting, and finance offices, the Department will ensure that all new contracts awarded in fiscal year (FY) 2011 (and beyond) are properly funded in compliance with laws and regulations. Moreover, if additional funds are required to be obligated to complete an existing contract awarded prior to FY 2011 beyond obligations already recorded, the proper appropriation will be obligated and the contract will be restructured, or

terminated, as needed to ensure that there are no further violations of the Antideficiency Act. If additional funds are required to be expended to fulfill an obligation that was already recorded to an improper account, the Department will continue to make payment from the appropriation initially charged because at this time our judgment is that doing otherwise would have serious programmatic repercussions.

Including some of the actions stated above, HHS has taken the following corrective actions to safeguard against future violations:

- 1) Improved the process for review and approval of appropriation-related acquisition regulations and guidance, including closer consultation with OGC and budget/finance officials. Recently, the Department reorganized its management structure to more closely align acquisition, budget, and financial management activities. (November 2009)
- 2) Revised the HHSAR coverage on contract funding, based on consultation with OGC and the acquisition community, to make it consistent with applicable laws and regulations and easier to understand. In addition, HHS issued an Acquisition Policy Memorandum regarding funding of contracts exceeding one year of performance, which provided detailed guidance regarding pertinent HHSAR coverage. (Drafted/coordinated starting June 2009 – issued June 2010)
- 3) Developed and implemented an appropriation law decision tree for use by the HHS budget, program, acquisition, and finance communities. (June 2010)
- 4) Enhanced HHS' standard Acquisition Plan template to: (a) ensure that program and contracting officials are actively considering appropriation issues as early as possible in the acquisition cycle; and (b) reinforce the need for proper, informed funds review and certification. (October 2010)
- 5) Developed an on-line Appropriation Law course tailored to the HHS environment, which serves as the basis for future instructor-led training. (February 2011)

As discussed above, the deficiencies were caused by a combined lack of understanding throughout the Department of the legal limits on funding contracts and the failure of the Department's guidance to clearly set forth the legal parameters of funding contracts, or in some instances, the misapplication of the Department's guidance. To ensure this does not happen again, the Department is also taking the following steps:

- 1) Sharing successful appropriation-related business practices, adopting quality assurance procedures, and providing technical assistance across the Department to ensure full compliance with appropriation law. (July 2009 – ongoing)

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- 2) Developing an HHS-wide, web-enabled appropriation law decision tree with links to applicable guidelines. (Underway, and will be completed July 2011)
- 3) Conducting procurement management and internal control reviews to validate full compliance with appropriation laws and regulations. (March 2010 – ongoing)

I was extremely concerned that these violations of appropriation law had occurred as a function of long-standing problems cited above. Rest assured that my commitment to the proper and lawful funding of contracts has been made clear to senior managers across HHS. Identical letters are being sent to the President, President of the Senate, and Speaker of the House of Representatives.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathleen Sebelius". The signature is written in a cursive, flowing style.

Kathleen Sebelius

Enclosure

HHS Violations of 31 USC 1341(a)

HHS Agency	Title of the Appropriation or Fund Account	Fiscal Year	Contract Number	Date of Contract Award	Total Value of Contract Award	Value of Portion with ADA Issues	Description of ADA Issue
AHRQ	Healthcare Research and Quality	2004	290-04-0005	8/1/2004	\$27,793,999	\$5,184,690	Forward Funding
AHRQ	Healthcare Research and Quality	2004	290-04-0012	9/30/2004	\$6,202,337	\$1,350,000	Incremental Funding
AHRQ	Healthcare Research and Quality	2004	290-04-0020	9/30/2004	\$3,813,716	\$60,000	Forward Funding
AHRQ	Healthcare Research and Quality	2004	290-04-0021	9/30/2004	\$7,411,326	\$4,047,828	Forward Funding
AHRQ	Healthcare Research and Quality	2005	290-05-0015	9/30/2005	\$24,314,149	\$84,149	Incremental Funding
AHRQ	Healthcare Research and Quality	2006	HHSA290200600009C	9/26/2006	\$27,778,058	\$5,239,956	Forward Funding
AHRQ	Healthcare Research and Quality	2006	HHSA290200600002C	9/27/2006	\$9,713,299	\$3,190,103	Incremental Funding
AHRQ	Healthcare Research and Quality	2006	HHSA2902006000025C	9/27/2006	\$9,671,973	\$3,630,064	Forward Funding
AHRQ	Healthcare Research and Quality	2007	HHSA290200710005C	7/11/2007	\$22,545,290	\$3,722,305	Forward Funding
AHRQ	Healthcare Research and Quality	2007	HHSA290200710024C	9/25/2007	\$17,541,200	\$300,000	Forward Funding
AHRQ	Healthcare Research and Quality	2007	HHSA290200710057I	8/4/2007	\$11,307,305	\$203,077	Forward Funding
ASPE/PSC	General Department Management	2010	HHSP23320095642WC	9/30/2010	\$9,073,961	\$6,448,961	Obligation in Excess of Apportionment
CDC	Disease Control, Research, and Training	2006	HHSD200200618797C/200-2006-18797	8/31/2006	\$9,751,578	\$4,435,193	Forward Funding
CDC	Disease Control, Research, and Training	2006	HHSD200200619096C/200-2006-19096	9/15/2006	\$3,046,520	\$1,898,275	Incremental Funding
NIH	National Institute of Allergy and Infectious Diseases	2003	00266200309D266030068	9/30/2003	\$98,139,454	\$54,746,316	Forward Funding
NIH	National Institute of Allergy and Infectious Diseases	2005	00266200109D266015416	9/30/2006	\$355,251,758	\$159,939,931	Forward Funding
NIH	National Institute of Allergy and Infectious Diseases	2005	HHSN2662005000022C (NO1-AI-500022)	7/15/2005	\$244,524,657	\$67,561,617	Forward Funding
NIH	National Institute of Child Health and Human Development	2005	HHSN275200503395C (NO1-HD-53395)	9/28/2005	\$114,374,356	\$8,676,785	Forward Funding
NIH	National Institute of Allergy and Infectious Diseases	2006	HHSN2662006000011C	9/14/2006	\$56,889,147	\$38,574,776	Forward Funding
NIH	National Institute of Allergy and Infectious Diseases	2006	HHSN2662006000015C	9/27/2006	\$49,806,823	\$30,028,652	Incremental Funding
NIH	National Institute on Drug Abuse	2007	HHSN271200700009C	7/7/2007	\$27,086,505	\$15,938,325	Forward Funding
NIH	National Library of Medicine (NIDDK)	2007	HHSN2672007000014C	9/14/2007	\$169,426,868	\$79,024,601	Forward Funding
NIH	National Institute of Allergy and Infectious Diseases	2008	HHSN272200800013C	2/29/2008	\$54,792,673	\$18,858,073	Forward Funding
NIH	National Institute of Child Health and Human Development	2002	HHSN275033345 (NO1-HD-33345)	10/30/2002	\$164,700,000	\$15,500,000	Forward Funding
NIH	National Cancer Institute	2006	HHSN261200622012C	9/1/2006	\$51,590,181	\$1,100,000	Incremental Funding
NIH	National Institute of Allergy and Infectious Diseases	2003	HHSN266030052 (NO1-AI-30052)	9/30/2003	\$71,292,000	\$31,317,827	Incremental Funding
NIH	National Heart, Lung and Blood Institute	2008	HHSN268200700012C	8/28/2008	\$3,460,652	\$2,723,161	Incremental Funding
NIH	National Cancer Institute	2008	HHSN26120080001E	9/24/2008	\$5,254,137,266	\$758,189,865	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2002	00283200202D283029025	2/22/2002	\$94,758,310	\$580,618	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2002	00283200209D283029026	9/12/2002	\$112,617,859	\$11,174,000	Forward and Incremental Funding
SAMHSA	Substance Abuse and Mental Health Services	2003	HHSS270200300049	9/29/2003	\$45,663,201	\$8,845,585	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2003	00270200309C0002270036000/27003600C	9/29/2003	\$36,257,856	\$9,810,187	Incremental Funding
SAMHSA	Substance Abuse and Mental Health Services	2003	00280200309C0003280031600/28003160C	9/30/2003	\$13,607,970	\$3,024,190	Forward and Incremental Funding
SAMHSA	Substance Abuse and Mental Health Services	2003	00280200309C0002280033600/28003360C	9/30/2003	\$15,781,244	\$580,618	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2004	HHSS283200400022C	12/15/2003	\$255,590,276	\$5,775,061	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2004	HHSS277200406091C	7/12/2004	\$70,630,545	\$22,805,080	Incremental Funding
SAMHSA	Substance Abuse and Mental Health Services	2004	HHSS270200404049C	9/22/2004	\$19,718,521	\$148,734	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2004	HHSS270031000HSS2700011/27003100C	9/29/2004	\$20,568,543	\$1,290,910	Forward and Incremental Funding
SAMHSA	Substance Abuse and Mental Health Services	2004	HHS280034200HSS28000002/28003420C	9/30/2004	\$22,888,752	\$9,840	Incremental Funding
SAMHSA	Substance Abuse and Mental Health Services	2004	HHSS280020500HSS28000002/28002050C	9/30/2004	\$12,512,405	\$250,000	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2005	HHSS270200500134C	9/15/2005	\$20,303,191	\$675,000	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2007	HHSS283200700030I/HHSS28300001T	8/1/2007	\$49,091,609	\$9,820,743	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2007	HHSS283200700020I/HHSS28300002T	9/4/2007	\$4,515,175	\$2,253,444	Forward Funding
SAMHSA	Substance Abuse and Mental Health Services	2009	HHSS283200700003I/HHSS28300002T	7/6/2009	\$76,252,618	\$14,272,629	Use of Expired Funding
SAMHSA	Substance Abuse and Mental Health Services	2009	HHSS277200800004C	9/1/2009	\$61,209,189	\$9,322,894	Use of Expired Funding
SAMHSA	Substance Abuse and Mental Health Services	2009	HHSS270200800003C	9/8/2009	\$6,313,391	\$2,148,702	Use of Expired Funding
SAMHSA	Substance Abuse and Mental Health Services	2009	HHSS283200700003I/HHSS28342001T	9/15/2009	\$19,691,868	\$4,569,545	Use of Expired Funding