UNITED STATES DEPARTMENT OF EDUCATION

THE DEPUTY SECRETARY

October 18, 2021

Henry J. Kerner
Special Counsel
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, DC 20036-4505

Re: OSC File No. DI-19-5088

Dear Mr. Kerner:

The enclosed report is in response to your October 29, 2019, letter to the U.S. Department of Education (ED) regarding a whistleblower disclosure alleging ED's Contracts and Acquisition Management (CAM) division violated federal contracting laws and regulations by improperly structuring and funding contracts for research studies. The Secretary has delegated to me the authority to review and sign written reports of investigation prepared in response to referrals from the Office of Special Counsel (OSC) regarding whistleblower disclosures; to submit these reports of investigations to OSC; and to take actions as a result of the investigation pursuant to 5 U.S.C. §§ 1213(d) and (f)(2).

In your October 29, 2019, letter, you asked ED to investigate whether:

- CAM has entered into non-severable research study contracts without ensuring the availability of adequate appropriations, in violation of the Antideficiency Act and other federal laws.

- CAM violates federal law by paying for research study services using appropriations from incorrect appropriation accounts, including using expired funds.

The enclosed report sets forth the findings of ED's investigation.

Sincerely,

Cindy Marten

Cindy Marten

Enclosures

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

Report of Investigation to the
U.S. Office of the Special Counsel (OSC)
OSC File No. DI-19-5088

Report Date: October 18, 2021

I. Introduction

Pursuant to the U.S. Office of Special Counsel's (OSC) letter dated October 29, 2019, the U.S. Department of Education (ED or Department) investigated the whistleblower claims filed against its office of Contracts and Acquisition Management (CAM).[1] ED's Office of the General Counsel's (OGC) Division of Business and Administrative Law (DBAL) conducted the investigation. [redacted],[2] (Whistleblower) claims that since at least 2008, CAM's contract structuring and process of funding research study services violates federal contracting laws. Specifically, the Whistleblower made the following allegations:

1. CAM has entered non-severable research study contracts without ensuring the availability of adequate appropriations, in violation of the Anti-deficiency Act and other federal laws.

2. CAM violates federal law by paying for research study services using appropriations from incorrect appropriation accounts, including using expired funds.

II. Brief Background and Investigation Parameters

ED was established, in part, "to promote improvements in the quality and usefulness of education through federally supported research, evaluation, and sharing of information[.]" 20 U.S.C. § 3402(4). As such, ED pilots a number of research studies, many of which are conducted by its Institute of Education Sciences (IES).[3] IES serves as the statistics, research, and evaluation arm of the Department and provides scientific information on education from early childhood through postsecondary study. *See About IES: Connecting Research, Policy and Practice*, https://ies.ed.gov/aboutus/ (last visited May 15, 2020); *see also U.S. Department of Education Principal Office Functional Statements – Institute of Education Sciences*, https://www2.ed.gov/about/offices/list/om/fs_po/ies/intro.html#2 (last modified July 13, 2015). CAM is responsible for the solicitation, award, administration, and closeout for most ED

[1] CAM is a business unit within ED's Office of Finance and Operations (OFO), Office of Acquisition Management. On or around January 6, 2019, several Department offices were reorganized. Prior to the reorganization, CAM was located in the Department's Office of the Chief Financial Officer (OCFO).
[2] Pursuant to OSC's October 29th letter, [redacted] consented to the release of his name.
[3] Other offices within ED that conduct research studies, include, but are not limited to, the Office of Planning, Evaluation and Policy Development (OPEPD) and the Office of Career, Technical, and Adult Education (OCTAE) (OCTAE was formerly the Office of Vocational and Adult Education (OVAE)).

contracts.[4] Therefore, CAM is responsible for procuring research study contracts for IES and most ED offices that require procurement of research study services and reports.

The Whistleblower alleges that CAM has improperly structured non-severable research studies as multiyear contracts to incrementally fund the contracts. In his disclosure, the Whistleblower did not identify specific research study contracts or services he believes are in violation of federal contracting laws. In DBAL's interview of and subsequent communications with the Whistleblower, he confirmed that his allegations were focused more on CAM's general practice in funding research study contracts, as opposed to, how any one particular research study was funded. Nevertheless, he provided DBAL a list of over 200 contracts he believes CAM improperly structured and/or funded. *See* Attachment A. Since 2008, IES alone has awarded approximately 193 research study contracts. *See* IES Funding Opportunities, https://ies.ed.gov/funding/grantsearch/index.asp (last visited May 15, 2020).[5] Due to the massive number of research study contracts potentially implicated by the Whistleblower's allegations, it was not feasible for DBAL to investigate all of CAM's research study contracts awarded since 2008. However, many of the individuals interviewed as part of this investigation believe the Whistleblower's allegations are related to the Department's National Assessment of Educational Progress (NAEP) contracts. The Whistleblower confirmed that he believes the NAEP contracts have been improperly structured and funded. As a result, DBAL focused on the Department's NAEP contracts in the latter stages of its investigation of the Whistleblower's allegations. Pursuant to 20 U.S.C. § 9622, IES is required to carry out, through grants, contracts, or cooperative agreements, a NAEP that includes, among other things, a national research study every two years on 4th and 8th grade students' achievements in reading and mathematics. *See* 20 U.S.C. § 9622(b)(2)(B). Therefore, the Department must procure services every other year to satisfy its NAEP duties. The findings and conclusions stated in this report are primarily predicated on DBAL's investigation and interviews into CAM's structuring of the NAEP contracts.[6]

III. Relevant Statutes and Regulations

The Secretary of the U.S. Department of Education is authorized to make, enter into, and perform contracts with public agencies and private organizations and persons, and to make payments, by way of advance or reimbursement, as he or she may determine necessary or appropriate to carry out the functions of his or her position or the Department. *See* 20 U.S.C § 3475. Further, the Secretary may delegate his or her functions to officers and employees of the Department. *See* 20 U.S.C. § 3472. As such, CAM has been delegated authority to perform all functions related to acquisitions, including the award and management of procurement contracts. *See* DOA No. EL/ELC/102, dated April 25, 2008; *available* at https://www2.ed.gov/about/offices/list/om/docs/delegations/elelc102.doc.

Federal law further dictates how and when a federal agency can enter a contract with another party. Specifically, the Adequacy of Appropriations Act states an agency can only enter a

[4] CAM is not responsible for some simplified acquisitions, General Services Administration (GSA) schedule orders within ED, or contracts and acquisitions for ED's Office of Federal Student Aid (FSA).
[5] Filter the search by contracts and year.
[6] The investigation into ED's NAEP contracts was primarily related to the Whistleblower's first allegation.

contract when it has authority to do so either by "law or . . . an appropriation adequate to its fulfillment." 41 U.S.C. § 6301(a). In the absence of specific statutory language stating otherwise, how much of its funds an agency can obligate to a contract is determined by the Anti-deficiency Act (ADA). For example, the ADA prohibits a federal agency from incurring obligations in excess of its appropriated funds or entering a contract or obligation for the payment of money before an appropriation is made, unless otherwise authorized by law. *See* 31 U.S.C. § 1341(a)(1)(A) and (B). In general, there are three (3) types of appropriations:

(1) **Annual appropriations** (*also called fiscal year or 1-year appropriations*): These are appropriations made for a specified fiscal year and are only available for obligation during the fiscal year for which they were made. In the absence of an express provision stating otherwise, all appropriations are presumed to be annual appropriations.

(2) **Multiple year appropriations**: These are appropriations that are available for obligation for a specific period in excess of one fiscal year. Other than being available for more than one fiscal year, multiple year appropriations are subject to the same conditions as annual appropriations.

(3) **No-year appropriations**: These are appropriations that are available for obligation without a fiscal year limitation. A no-year appropriation is funding that does not expire and remains available for the agency to use until the funds are expended.

See Gov't Accountability Office, *Principles of Federal Appropriations Law (GAO Redbook)*, 3rd ed., ch. 5, § A.2, GAO-04-261SP (2004[7]), *available* at https://www.gao.gov/assets/210/202437.pdf. Federal agencies are required to report violations of the ADA to the President, Congress, and Comptroller General. *See* 31 U.S.C. §§ 1351, 1517(b).

The *bona fide* needs rule governs the timing of when an agency can use its appropriated funds. The *bona fide* needs rule states that appropriations made for a fixed duration may only be used for expenses properly incurred during that time. *See* 31 U.S.C. § 1502(a). The U.S. Government Accountability Office (GAO) has explained the *bona fide* needs rule requires "that an agency may obligate its fiscal year appropriation only to meet a legitimate, or *bona fide*, need arising in the fiscal year for which the appropriation was made." *U.S. Small Bus. Admin.-Indefinite-Delivery Indefinite-Quantity Contract Guaranteed Minimum*, B-321640, 2011 CPD ¶ 184 at 2 (Sept. 19, 2011). Generally, for a contract for services, an agency's need to obligate funds from an annual or multiple year appropriation arises in the fiscal year in which the services are rendered under the contract. *See e.g., Funding for Air Force Cost Plus Fixed Fee Level of Effort Contract*, B-277165, 2000 CPD ¶ 54 at 2 (Jan. 10, 2000). However, there are instances where the services provided by a contract cannot be separated for performance by fiscal year. The Comptroller General has held that "[t]he question whether to charge the services to the appropriation current on the date of contract award or to charge the appropriation current on the date the services are rendered turns on whether the services are severable or non-severable." *Id.*

[7] An update to supplement Chapter 5 was published in 2015. *See* https://www.gao.gov/assets/670/668991.pdf.

The determining factor for whether services are severable or non-severable "is whether they represent a single undertaking designed to meet an immediate need of the agency." *Incremental Funding of Multiyear Contracts*, B-241415, 71 Comp. Gen. 428, 430 (June 8, 1992). Severable services are those that are continuing and recurring in nature and provide a benefit to the Government when the services are provided. *See e.g., Funding for Air Force Cost Plus Fixed Fee Level of Effort Contract*, B-277165, 2000 CPD ¶ 54 at 2 (Jan. 10, 2000). For severable services, "[a]n agency receives the full value of the service every time it is performed." *Dep't of Health & Human Servs.-Multiyear Contracting & the Bona Fide Needs Rule*, B-322455, 2013 WL 4398954 at *3 (Aug. 16, 2013). Therefore, "the cost of addressing such needs are charged under the *bona fide* needs rule to the appropriation current at the time services are provided." *Severable Servs. Contracts*, B-317636, 2009 CPD ¶ 89 at 2 (Apr. 21, 2009). Conversely, a "non-severable service is one that requires the contractor to complete and deliver a specified end product." *Fin. Crimes Enf't Network-Obligations Under A Cost-Reimbursement, Non-severable Servs. Contract*, B-317139, 2009 CPD ¶ 158 at 4 (June 1, 2009). Moreover, for a non-severable service contract, "[t]he agency does not receive the full value of the service until the contract is fully performed." *Dep't of Health & Human Servs.-Multiyear Contracting & the Bona Fide Needs Rule*, B-322455, 2013 WL 4398954 at *3 (Aug. 16, 2013). As such, the entire cost of a non-severable services contract is a *bona fide* need of the fiscal year in which the contract is entered, regardless of whether performance extends into future fiscal years. *See Incremental Funding of U.S. Fish and Wildlife Service Research Work Orders*, B-240264, 73 Comp. Gen. 77 (Feb. 7, 1994). In summary, a contract for severable services does not need to be fully funded during the fiscal year the contract was entered, whereas a contract for non-severable services does.

There are several statutory exceptions to the *bona fide* needs rule that allow agencies more flexibility in using appropriated funds. For example, civilian agencies may enter a one-year contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year. *See* 41 U.S.C. § 3902(a). In doing so, the agency may obligate the total amount of the contract with appropriated funds available at the time the contract is entered. *See* 41 U.S.C. § 3902(b).

Multiyear contracting authority is another statutory exception to the *bona fide* needs rule. "[A] multiyear contract is a contract for the purchase of property or services for more than one, but not more than five (5) program years." 41 U.S.C. § 3903(a);[8] *see also,* 48 C.F.R. § 17.1. A Federal civilian agency may enter a multiyear contract if it determines:

> (A) the need for the property or services is reasonably firm and continuing over the period of the contract; and (B) a multiyear contract will serve the best interests of the Federal Government by encouraging full and open competition or promoting economy in administration, performance, and operation of the agency's programs.

[8] Also known as the Federal Acquisition Streamlining Act of 1994 (FASA).

41 U.S.C. § 3903(b)(2).[9] This multiyear contracting authority allows agencies to decide whether to fully fund a contract up front or fund a contract by fiscal year plus cancellation costs. 41 U.S.C § 3903(b)(1). Notably, the Comptroller General has stated that "41 U.S.C. § 3903 authorizes executive agencies to obligate fiscal year appropriations to enter into a multiyear contract to acquire either non-severable or severable services for the needs of up to five years." *Dep't of Health & Human Servs.-Multiyear Contracting & the Bona Fide Needs Rule*, B-322455, 2013 WL 4398954 at *1 (Aug. 16, 2013).

IV. Conduct of Investigation

To investigate the Whistleblower's allegations, DBAL interviewed the following individuals:

1. [redacted], the Whistleblower.
2. [redacted],
3. [redacted],
4. [redacted],
5. [redacted].
6. [redacted]
7. [redacted];
8. [redacted];
9. [redacted];
10. [redacted];

[9] Additionally, funds must be available and obligated for the contract, for the full period of the contract or for the first fiscal year in which the contract is in effect, and for the estimated costs associated with a necessary termination of the contract. *See* 41 U.S.C. 3903(b)(1).

[10] All years are approximations.

11. [redacted].

DBAL also reviewed CAM's policies, procedures, memorandums, as well as, other documents obtained from the Whistleblower, ED employees, and ED databases. Additionally, DBAL reviewed a sample of NAEP contracts, all pertinent contracting and/or research study statutes and regulations, as well as relevant decisions issued by the U.S. Comptroller General.

V. Findings and Conclusions

Below are DBAL's findings and conclusions. DBAL **substantiates** an allegation when its findings support the claim. DBAL **does not substantiate** an allegation when its findings show that the claim was either unfounded or there is insufficient evidence to confirm the veracity of the allegation.

A. Allegation 1: CAM has entered into non-severable research study contracts without ensuring the availability of adequate appropriations, in violation of the Antideficiency Act and other federal laws. "According to the whistleblower, there are two main ways CAM has used to circumvent the requirement to fully fund research studies up front: (1) breaking up the contracts into smaller pieces; and (2) using multiyear contracting authority."[11]

2008 – 2012

None of the individuals interviewed that worked with or in CAM between 2008 to 2012 could recall any specific CAM policy or consistent practice pertaining to structuring non-severable research study contracts as multiyear contracts. Further, DBAL found no evidence of any articulable CAM policy addressing how to fund research study and/or services contracts covering this period. Additionally, except for the NAEP contracts discussed below, none of the individuals interviewed could recall any specific information to either support or refute the Whistleblower's allegations relating to funding non-severable research study contracts during this period.

Notably, the NAEP statute authorized $107,500,000 in appropriations for NAEP contracts for Fiscal Year (FY) 2003, and such sums as may be necessary for each of the five (5) succeeding fiscal years, to remain available until expended. *See* 20 U.S.C. § 9624. Accordingly, through FY 2008, ED had no-year appropriation authority to fund NAEP contracts.[12] *See* 20 U.S.C. § 9624(b). Circumstantial evidence indicates that from FY 2003 through FY 2008, CAM's practice was to structure the NAEP contracts as incrementally funded multiyear contracts.[13] Under such no-year appropriation authority, CAM did not need to structure the NAEP contracts

[11] OSC's October 29th letter, p. 2.

[12] No-year appropriation is usually identified by appropriation language such as "to remain available until expended." GAO, Principles of Federal Appropriations Law, 3rd ed., 2004 rev., ch. 5, § A.4.a.3, GAO-04-261SP (Washington, DC: January 2004); *see also* 40 Comp. Gen. 694, 696 (1961).

[13] Although, it may be unnecessary, it is not improper for an agency to use multiyear contracting authority when it has no-year appropriation authority. *See* GAO, Principles of Federal Appropriations Law, ch. 5, § B.8.b; *see also Federal Emergency Management Agency – Authority to Rent Space in District of Columbia*, B-195260, Jul. 11, 1979, 1979 WL 12324. CAM's reasoning for structuring NAEP contracts as multiyear contracts through FY 2008 was not the subject of this investigation.

as multiyear contracts in order to avoid a violation of the *bona fide* needs rule because such funds were available until expended. However, the interviewees' testimony establishes that CAM continued this practice unabated until 2013. Even though beginning in FY 2009 the appropriations for NAEP contracts were multiple year (*i.e., 2-year*) appropriations. *See Omnibus Appropriations Act, 2009*, PL 111-8, March 11, 2009.

2013 - 2019

In October 2012, CAM's senior management created a workgroup to review whether multiyear contracting authority can be used for non-severable services and whether contracts for non-severable services can be incrementally funded.[14] The workgroup included employees from CAM (*including the Whistleblower*), IES, and ED's then-Office of Planning, Evaluation, and Policy Development's (OPEPD) Office of Budget Service (Budget Service).[15] The workgroup convened between October 2012 through March 2013. The workgroup reviewed previous contracts administered by CAM and identified several research study contracts as being improperly structured as multiyear contracts. Ultimately, the workgroup reached a consensus on how research study contracts should be funded. On August 28, 2013, based on the workgroup's findings and with concurrence from OGC, CAM issued a Funding Service Contracts Memorandum (2013 Memorandum). *See* Attachment B. The 2013 Memorandum explained the difference between severable and non-severable services and discussed legal funding options for each type of service contract. The procedures articulated in the 2013 Memorandum were incorporated into CAM's Acquisition Procedures Manual (APM), Chapter 32.703. *See* Attachment C.

After the 2013 Memorandum was issued, CAM and OGC trained staff on how to properly structure and fund service contracts. The trainings emphasized the need to separate non-severable and severable tasks, which are often funded differently. Additionally, after issuing the 2013 Memorandum, CAM reviewed its then-active contracts to determine whether the contracts complied with the policy articulated in the 2013 Memorandum. For contracts not in compliance with the 2013 Memorandum, CAM divided them into two groups – (1) contracts that were expiring soon (*i.e.*, that year or next year) or (2) contracts that had several years remaining.[16] For contracts that were expiring soon, CAM decided not to modify the funding structure of those contracts. For contracts that had several years remaining, CAM did attempt to either modify or cancel the contracts and then fund them in accordance with the 2013 Memorandum. CAM did not report ADA violations, if any, to the President, Congress, or Comptroller General. Notably, DBAL found no evidence that CAM or the workgroup concluded at any time that the then-current contracts not in compliance with the 2013 Memorandum violated the ADA or other federal procurement laws.

Since August 2013, CAM has made good faith efforts to fund new procurements for services, including research study contracts, based on the procedures articulated in the 2013 Memorandum. In order to fund non-severable service contracts, the 2013 Memorandum

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[14] The workgroup also reviewed the use of multiple year funding beyond the period of availability.

[15] Some Department Offices were reorganized in 2019, including the Office of Budget Service, which is now part of ED's Office of Finance and Operations (OFO).

[16] The exact methodology by which the different contracts were organized could not be recalled by those interviewed. To the extent to which they could recall events, such representations are provided for herein.

distinguishes between services that are a: (i) *bona fide* need of one year or (ii) *bona fide* need of more than one year, regardless of how long the services take to be completed. *See* Attachment B, p. 2. The 2013 Memorandum states the following: [redacted] *Id*. The APM further clarifies this distinction:

[redacted]

See Attachment C, n.1. Since August 2013, it has been CAM's policy that non-severable services that are the *bona fide* need of a single year must be fully funded at the time the contract is entered into with funds currently available for obligation. *See* Attachments B and C. Conversely, non-severable services that have a bona fide need of more than one year can be funded either by:

1. Fully funding each non-severable portion of the work as the need arises with funds from the fiscal year in which the need occurs. Use optional tasks to separate non-severable portions of the work from each other; or

2. Using multiyear contracting authority to:

    a. Fully fund the entire contract at the time it is entered into for up to five years with funds currently available for obligation, or

    b. Incrementally fund the contract by program year, plus cancellation costs.[17]

See id. In June 2018, CAM's Performance Logistics Group (PLG) provided additional guidance and examples to CAM staff regarding funding service contracts. *See* Attachment D.

The guidance also provided information in the situation where both severable and non-severable services were to be provided. *See* Attachments B, p. 2; C, p. 4; and D, p. 3. In such situations, the contract line items are to be divided into severable and non-severable services, and each such service should be independently analyzed and funded using the appropriate methods as discussed above. *See id*.

The Whistleblower alleges that when a research study contract, like the NAEP contracts, results in one final report, the entire contract represents a single non-severable unit and a *bona fide* need

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[17] [redacted]
The term "program year" first appears in FASA, which also does not define the term. *See* 41 U.S.C. § 3903(a).

of only one year. As such, the Whistleblower believes that research study contracts should be fully funded at the time they are entered into and multiyear contracting authority is not applicable. However, according to current and former CAM employees, it is possible to break up services for the NAEP contracts into separate non-severable and severable portions. The NAEP contracts may provide for discrete tasks such as providing a pilot study, item development, data collection, and data analysis, which provide their own value to the Department. Thus, CAM believes only each non-severable portion of a research study contract is required to be fully funded during the FY in which the service is needed; whereas the severable services can be funded when the services are performed. Further, where a research study contract contains the needs of more than one year for non-severable services, CAM believes each non-severable service can be funded at the time of the need through the use of optional tasks in a multiple year contract or through multiyear contracting authority, instead of funding the entire research services contract at the time of award. *See* Attachments B, C, and D. Therefore, pursuant to its policy, CAM may incrementally fund each non-severable portion of a research study contract by program year.[18]

An agency has broad discretion to use multiyear contracting authority for both severable and non-severable services. *See Dep't of Health & Human Servs.-Multiyear Contracting & the Bona Fide Needs Rule*, B-322455, 2013 WL 4398954 (Aug. 16, 2013). In *Department of Health & Human Services*, GAO clarified whether an agency may use multiyear contracting authority to fund a statutorily required report to Congress. *See id.* at 2. The Comptroller General stated that if an agency is required to produce a report annually to Congress for the next five years, it could fully fund the contract upfront using multiyear contracting authority and fund each report by fiscal year, utilizing either optional tasks through a multiple year contract or by multiyear contracting authority. *See id.* at 5. However, GAO found that non-severable service contracts may not be funded on an incremental basis without statutory authority. *See Incremental Funding of Multiyear Contracts*, B-241415, 71 Comp. Gen. 428 (June 8, 1992); *see also Fin. Crimes Enf't Network-Obligations Under A Cost-Reimbursement, Non-severable Serv. Contract*, B-317139 (June 1, 2009).

Whether ED may use multiyear contracting authority to fund the NAEP contract is contingent on three requirements: (i) the existence of the needs of more than one year, *see* 41 U.S.C. § 3903(a); (ii) the existence of available funds that are obligated for either the full contract or the first fiscal year plus estimated termination costs, *see* 41 U.S.C § 2902(b)(1); and (iii) an agency determination that the need for the services are reasonably firm and continuing over the period of the contract and the best interests of the government are served by encouraging full and open competition or by promoting economy in the administration, performance, and operation of the NAEP program. *See* 41 U.S.C. § 3903(b)(2).

If the sole requirement of a NAEP contract is for the contractor to produce one comprehensive biennial report, then that NAEP contract represents the need of only one year and must be fully funded at the time the contract is awarded.[19] In the alternative, if a NAEP contract represents the needs of more than one year and, for example, requires more than a single report or otherwise

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[18] [redacted]

[19] Each report is associated with the need of one year, but the need recurs every two years.

includes other severable and/or non-severable services and the best interests of the government are served by encouraging full and open competition or by promoting economy in the administration, performance, and operation of the NAEP program, multiyear contracting may be used.

A review the NAEP statute demonstrates that ED is not just required to produce a single biennial report. Rather, the statute requires, among other things, for ED to produce: (1) a national assessment in reading and mathematics for fourth and eighth graders every two years, 20 U.S.C. § 9622(b)(2)(B); (2) a national assessment in reading and mathematics for twelfth graders in regularly scheduled intervals, 20 U.S.C. § 9622(b)(2)(C); and (3) state assessments of student achievement in reading and mathematics for fourth and eighth graders, 20 U.S.C. § 9622(b)(3)(A). Thus, ED produces separate national and state data reports for both the subjects of reading and mathematics for grades four and eight. *See The Nation's Report Card*, https://www.nationsreportcard.gov/ (last accessed May 15, 2020).[20] Additionally, there is not a single contract to carry out the entire NAEP, but instead a consortium of contractors tasked with fulfilling various aspects of the NAEP. Given the continuing and multifaceted nature of NAEP, between 2013-2019, CAM interpreted the NAEP statute as requiring ED to produce more than a single report every two years. As such, ED took the position that the NAEP contracts constitute non-severable and severable services that were the need of more than one (1) year. Based upon the policy articulated in the 2013 Memorandum, CAM purportedly used multiyear contracting authority to structure and fund the NAEP contracts.

Notwithstanding the fact that IES is required to carry out the NAEP pursuant to 20 U.S.C. § 9622, all interviewees confirmed that historically, IES's multiple year appropriations are insufficient to fully fund, at the time of award, the NAEP contracts necessary to meet IES's statutory requirements. As a result, although CAM enters into contracts to fulfill NAEP statutory requirements, CAM fails to fully fund and/or incrementally fund by year with cancellation costs, the NAEP contracts at the time of award. Instead, CAM typically obligates funding for the NAEP contracts incrementally based upon adjustments to priorities that impact financial requirements of the NAEP contracts. For example, the uncertainty and flux in state, district, and school participation in nonmandatory studies that affect sample sizes and data collection costs may require the obligation of additional funding to one NAEP contract and the deobligation of excess funding from another.

2019 – Present

[redacted].

Conclusions Regarding Allegation 1

The testimonial evidence demonstrates that CAM did not have an articulable policy for funding research study contracts until August 2013, when CAM established the 2013 Memorandum with

[20] This information also is collected and reported on for specific districts/cities, as well.

the advice and concurrence of OGC. The 2013 Memorandum properly requires all non-severable services to be fully funded at the time of need. DBAL also finds that CAM's use of multiyear contracting authority to fund research study contracts, in and of itself, is not in violation of federal procurement laws. An agency's determination of whether services are severable, and/or whether multiyear contracting authority is appropriate, is primarily based on an agency's interpretation of the need of the services and the interests of the Government. In general, DBAL finds that CAM has made good faith efforts to comply with the 2013 Memorandum following its adoption. CAM also periodically asked for advice from OGC to confirm or modify, as necessary, its policies.

Nevertheless, although no determination was ever made after the 2013 Memorandum whether any then-current research study contracts were in violation of the ADA or other federal procurement laws, it is likely that one or more of such contracts was not funded properly. At least one interviewee recalled some contracts that should have been revised pursuant to the 2013 Memorandum, but were not modified. Upon discovery of such contracts, CAM did not attempt to discern whether the contracts were in violation of federal procurement laws. Based on the preponderance of evidence, DBAL concludes that there were some contracts awarded prior to August 2013 that were not in compliance with the 2013 Memorandum and therefore, likely in violation of federal procurement laws.

With respect to the NAEP contracts, DBAL finds that CAM awarded some NAEP contracts in excess of IES's annual appropriations and incrementally obligated funds to the contracts as opposed to fully funding the contract at the time of award or obligating the amount needed to incrementally fund the contract by year and include cancellation costs. The use of multiyear contracting authority does not permit non-severable services to be funded incrementally absent other statutory authority. Moreover, the evidence demonstrates that, with respect to the NAEP contracts, CAM is in violation of its own policies based upon its practice of partially funding non-severable services.

Of note, the funding of the NAEP contracts do not appear to be representative of CAM's general contracting practices since August 2013. CAM employees did express that the funding of the NAEP contracts are outliers due to the size and nature of their requirements.

Based upon the interviews conducted and a review of a sampling of NAEP contracts, DBAL **partially substantiates** the Whistleblower's first allegation. Specifically, DBAL finds that, with respect to some NAEP research study contracts, CAM entered into contracts without ensuring the availability of adequate appropriations at the time of award. DBAL also **partially substantiates** the Whistleblower's first allegation, with respect to some non-NAEP research study contracts awarded prior to August 2013, based upon a finding that CAM entered into such contracts without ensuring the availability of adequate appropriations at the time of award. This finding is based upon CAM's determination that: (1) prior to August 2013, some of the of the non-NAEP research contracts were improperly structured and (2) CAM failed to modify or restructure, at least some of the then-current improperly structured non-NAEP contracts following its adoption of the policies and procedures for properly structuring multiyear contracts stated in the 2013 Memorandum. *See* Attachment B. Based upon the interviews and review of a sample of contracts, DBAL **does not substantiate** the Whistleblower's allegations related to

violations of the Anti-Deficiency Act, as the sample contracts reviewed and interviews did not provide preoponderant evidence to support the allegation. Additionally, DBAL found no evidence that CAM improperly funded non-NAEP research study contracts awarded after August 2013 and as a result, DBAL **does not substantiate** the Whistleblower's allegations for non-NAEP research study contracts post-August 2013.

B. Allegation 2: CAM violates federal law by paying for research study services using appropriations from incorrect appropriation accounts, including using expired funds.[21]

As part of its investigation, DBAL contacted members of CAM and Budget Service to discuss ED's process for selecting appropriation accounts and obligating funds to contracts. ED's Budget Service prepares, with approval of the U.S. Office of Management and Budget (OMB), funding apportionments that provide specific amounts available for each program in accordance with the relevant appropriations' statute. At the beginning of each fiscal year, ED's Principal Offices work with CAM to develop an Acquisition Plan that discusses anticipated requirements for that fiscal year. Budget Service also reviews the Acquisition Plan to confirm that funding is available to fulfil an office's anticipated needs. Upon a Principal Office's request, Budget Service makes funding available for obligation by allotting funds to the Principal Office consistent with the appropriation statute and approved funding apportionments. Budget Services' financial system contains checks to ensure that allotment requests do not exceed the amounts available. Additionally, Budget Service tracks allotments on backup spreadsheets that compare amounts requested by Principal Offices to amounts still available. Principal Offices monitor spending accounts and confirm to CAM that program funds are available. CAM cannot obligate funds to a contract unless those funds are first available within the spending account.

Agencies may obligate expired funds to contracts in limited circumstances. For example, expired funds may be used to pay legitimate costs that were incurred for the time period when the funds were available for obligation. *See* 31 U.S.C § 1553(a). Expired funds cannot generally be used to fund an agency's current needs or otherwise be repurposed for a different program activity. In instances when ED may properly use expired funds, the Principal Office submits a written request to Budget Service with sufficient documentation validating that use of the expired account is appropriate. CAM and Principal Offices are unable to use appropriation accounts with expired funds without explicit approval from Budget Service. Budget Service confirmed internal controls built into the apportionment and allotment systems and was not aware of any circumstances under which funds were misappropriated to IES research study services.

Conclusion Regarding Allegation 2

After a reasonable inquiry into CAM's practices and a review of a sample of research study services contracts, DBAL **does not substantiate** the Whistleblower's second allegation. DBAL did not obtain any documents or other supporting information to indicate that CAM improperly

[21] DBAL has found CAM, at a minimum, entered NAEP contracts without ensuring the availability of adequate appropriations at the time of award which inherently means they improperly used appropriated funds. The focus of DBAL's investigation into this allegation was on the accounts being used and, in particular, the possible improper use of expired funds.

funded research study contracts using incorrect appropriation accounts, including expired funds. Further, CAM and Budget Service utilize several internal controls to minimize misappropriation of funds.

VI. Recommendations

Based on the findings and conclusions stated above, the Department plans to implement the following recommendations:

1. Conduct regular training of CAM and IES employees regarding federal procurement laws and CAM's current policies.

2. Reevaluate the use of multiyear contracting authority for funding and structuring future NAEP contracts. Request from Congress statutory authority to incrementally fund NAEP contracts.

ATTACHMENT A

PCG Incrementally Funded Non-Severable Service Active Contracts 4/6/2013

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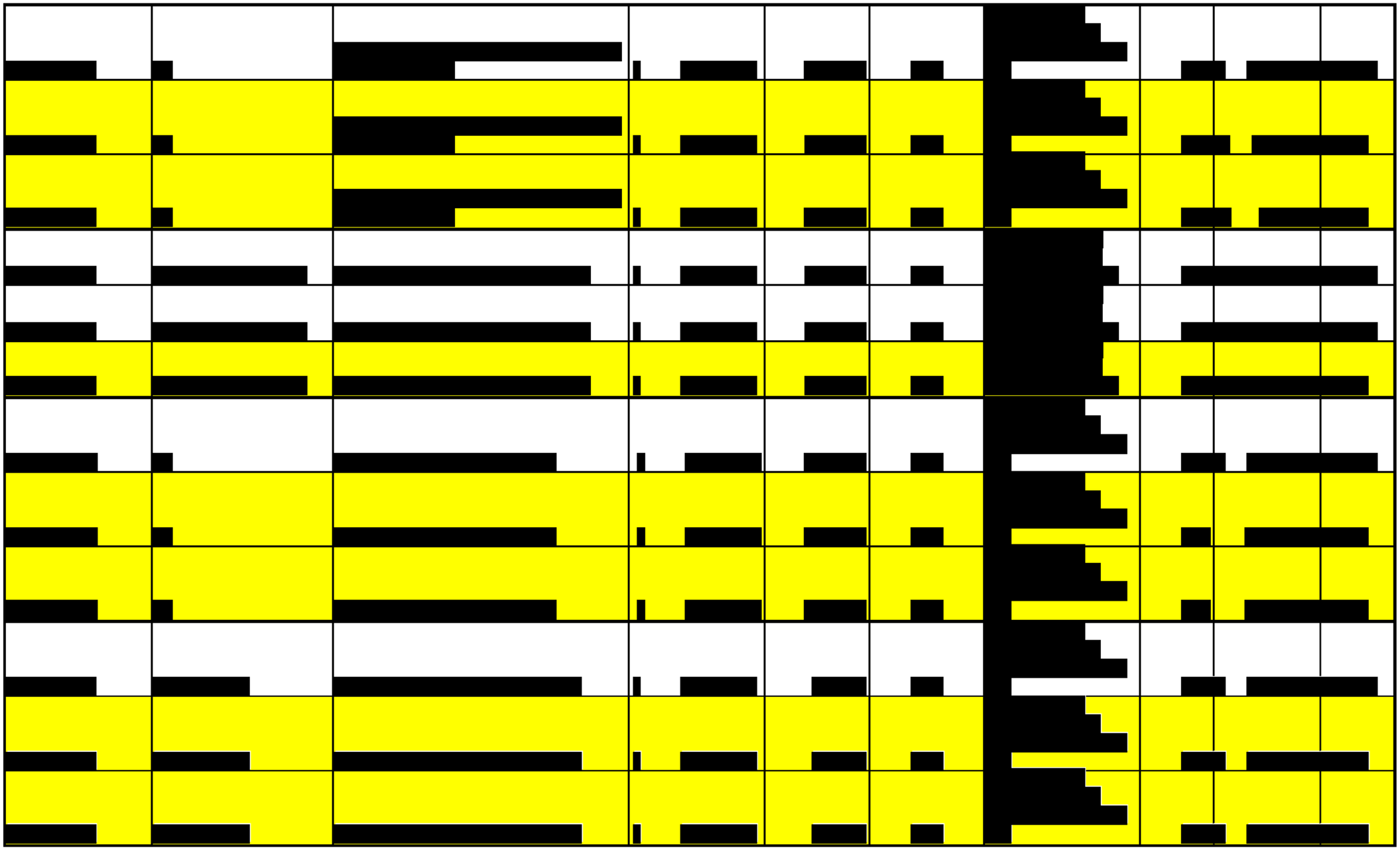

ATTACHMENT B

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ATTACHMENT C

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