

## **II. Brief Background and Investigation Parameters**

The Whistleblower identified several common practices within CAM that violated appropriations law.

1. Obligations in Excess of Appropriations
  - a. Breaking up Nonseverable Services into separate tasks and funding these individual tasks as discrete tasks throughout the contract period.
  - b. Incrementally funding Nonseverable Services.
2. Funding actions in advance of an Appropriation (Bona-Fide Needs violations)
  - a. Improper use of multiyear funds (cross fiscal years after the period of availability).

While the investigation was limited to the National Assessment of Education Progress (NAEP), the allegations apply to all contracts for nonseverable services that exceed one year.

The investigator states that the "Whistleblower alleges that CAM has improperly structured non-severable research studies as multiyear contracts to incrementally fund the contracts." The Whistleblowers allegations are set forth in the Investigative Report Introduction. Utilizing multiyear authority on contracts that did not qualify as multiyear was one method utilized that violated 41 U.S.C. § 3903(a); *see also*, 48 C.F.R. § 17.1). Also alleged was that "CAM routinely structures contracts for research studies to split components of the project into separate tasks and funds each task incrementally." In fact, beginning in 2014, some contracts did both.

## **III. Relevant Statutes and Regulations**

Additional pertinent statutes include:

20USC§3475(b). Specifically, "Notwithstanding any other provision of this chapter, no authority to enter into contracts or to make payments under this subchapter shall be effective except to such extent or in such amounts as are provided in advance under appropriation Acts."

31 U.S.C. § 3903(a)(4) makes a "certifying official," a role performed by each contracting officer at the Department of Education, responsible for "repaying a payment made to a contractor that is (A) illegal, improper, or incorrect because of an inaccurate or misleading certificate; (B) prohibited by law; or (C) that does not represent a legal obligation under the appropriation involved."

It should be noted that GAO consistently identifies performing a study/preparing a report as a nonseverable service throughout its caselaw. It also uses a study and report as an example of nonseverable services in the Red Book where they state: "As a final thought, there is a fairly simple test that is often helpful in determining whether a given service is severable or nonseverable. Suppose that a service contract is to be performed half in one fiscal year and half in the next. Suppose further that the contract is terminated at the end of the first fiscal year and is not renewed. What do you have? In the case of a window-cleaning contract, you have half of your

windows clean, a benefit that is not diminished by the fact that the other half is still dirty. What you paid for the first half has not been wasted. These services are clearly severable. Now consider a contract to conduct a study and prepare a final report, as in 65 Comp. Gen. 741 (1986). If this contract is terminated halfway through, you essentially have nothing. The partial results of an incomplete study, while perhaps beneficial in some ethereal sense, do not do you very much good when what you needed was the complete study and report.” GAO, Principles of Federal Appropriations Law, ch. 5, § B.5

Clearly the process to collect data, manage the process, report on progress and all the steps required to get to where the report is submitted are part of the nonseverable nature of the report/study. Simply put, if the report/study was not a requirement, would the other requirements/stages be procured? If the answer is no, it is nonseverable.

#### **IV. Conduct of Investigation**

The investigators did not interview the CFO/SPE that in 2016, directed 2 and 4 in a meeting that included the CFO, myself, #2, #4 and the CFOs assistant, to immediately begin fully funding the Department’s nonseverable service contracts. Notably, #4 stated that she was the SPE in the meeting and the CFO corrected her stating that he was the acting SPE. This position had been recently vacated by #3. Although this individual identified herself as the SPE from 2013-2017, that is not correct.

DBAL states that it has reviewed a sample of NAEP contracts, pertinent statutes and regulations and decisions. There is no mention of what contracts were reviewed or whether they adhered to the statute or CAM Policy. Attachment A to the Report contained a list of 12 orders and 6 contracts. As these are the only procurements identified anywhere, I can only conclude that these were the only actions reviewed.

#### **V. Findings and Conclusions**

##### **A. Allegation 1**

The investigators split the investigation into two separate periods. The allegations apply to all the Department nonseverable contracts issued by CAM in 2008 and thereafter. It would apply to all contracts since the Department’s inception, but records prior to 2008 have likely passed their retention period and 2008 was the first time a contract in violation was identified.

The approximately 200 contracts provided to the investigators were self-reported by the Contracting Officers when asked to provide a list of all nonseverable service contracts that were being incrementally funded actions identified by the Whistleblower on the Department’s FY19 Acquisition Plan for the Institute of Education Sciences that were incrementally funded. These contracts were all issued in FY19 and prior.

##### ***2008-2012***

There appears to have been no investigation into this period other than to ask Interviewers if there was an internal policy during this period.

A list of 200 contracts for nonseverable services that were being incrementally funded that were awarded between 2008 and the point that OSC assistance was requested in 2019 was provided to DBAL. This list was provided, in significant part, by the Contracting Officer's responsible for them. Nearly all these contracts were to conduct studies/perform evaluations that culminated in a Final Report to the Department. These contracts, except for one that required annual reporting, were for a single report to be provided after several years that included preparation, training, recruiting participants (schools, parents, teachers and or students), data gathering and analysis. The Whistleblower did not provide an analysis of the funds applied to these contracts as the assumption was that DBAL would review the contracts to determine whether funds were obligated from the appropriate fiscal year and whether the Department had obligated the full amount for the nonseverable services at the time of award to be able to respond to OSCs inquiry and that the investigator would not rely on data provided by the Whistleblower.

Interestingly, all the contracts identified in Attachment A of the report are from this period except for one contract issued on March 4, 2013, yet there are no findings on whether these contracts were funded properly.

#### No-Year Funds:

All funding utilized for FY08 contracts and thereafter were either multi-year (2 year) or annual.

#### Review of contracts

There is no analysis by the Department to determine if the contracts issued during this period, were severable or nonseverable; if severable, were they fully funded or were they funded from fiscal years outside of the appropriate fiscal year since this was the purpose of the report.

DBAL provides a list of 18 contracts/orders as Attachment A. Of these, 3 were funded with Annual appropriations, 14 were funded with 2-year (multi-year) funds and 1 was not able to be located as it was a task order under a larger contract vehicle. (2008 contracts were still physical files and I was not able to conclusively identify funding in the accounting system that applied to this task).

While these contracts were for studies to be completed, the phases/tasks required to be performed to ultimately complete the study were identified individually and priced separately based on the nature of the task, management at a fixed price, training data collectors on a cost basis, etc. Breaking the work into individual tasks did not change the nature of the work being performed, nor does it authorize incremental funding of the contract, and none qualified to use "multiyear contracting authority" as there was still only a single year's need being purchased. The simplest method that can be used to determine if a need can stand alone and provide value to the Government is to determine if we would purchase the task if the need for the study did not exist. The Government would not need to have a contractor manage the process, would not need to train people to gather data, would not need to recruit schools, parents, students to participate and would

not need to gather data in the absence of the Government's need for the study. Therefore, all the contracts are for a single bona-fide need and were required to be funded at the time the contract is entered. By not fully funding these Nonseverable contracts at the time of award, CAM violated the Adequacy of Appropriation Act, 41 U.S.C. § 11, and 16 of the 17 violated the Anti Deficiency Act, 31 U.S.C. § 1341, upon modification of the contract to add additional funds.

As stated, three of the nonseverable contracts utilized annual appropriations and violated the Adequacy of Appropriations Act upon award. The total amount obligated to these three contracts over their term was \$13,822,752.08. Of the total, \$9,009,244.08 was funded from the fiscal years following the contract award, contrary to the Anti Deficiency Act. This represents 65.18% of the funds utilized under those contracts.

14 of the nonseverable contracts utilized multiyear appropriations to award and violated the Adequacy of Appropriations Act upon award. The total amount obligated to these 17 contracts over their term was \$35,401,230.84. Of the total, \$8,018,978.93 was funded from the fiscal years following the contract award, in violation of the Anti-Deficiency Act. This represents 22.65% of the funds utilized under those contracts. While utilizing multiple year funding may delay Anti Deficiency Act violation, it does not prevent it. (Attachment 1) These contracts were not reviewed to determine the individual obligations and whether multiyear funds were used to pay for subsequent FY performance. It is assumed that the funds obligated against contract lines that crossed fiscal year were used to pay for both fiscal years even though at the time of obligation the funds were in the last year of their 2 year availability.

For just the subset of contracts identified by the Investigators, more than \$17 million in funds were misappropriated to fund requirements of a prior year rather than the legitimate needs of the year they were appropriated.

### ***2013 - 2019***

The investigator provides no examples of the contracts reviewed where the finding was the funding was from the correct fiscal year or that the numerous studies were funded in full at the time of award. It is unclear where the information the findings come from other than from the interviews with leadership that was responsible for ensuring statutes and regulations are followed. The only contemporaneous documentation set forth in the report are the policies, not contracts, approval memos, emails, etc.

Findings cited regarding the workgroup are partly accurate:

The workgroup determined that CAM was improperly funding nonseverable service contracts and that multiyear contracting authority did not provide authority to incrementally fund CAM's nonseverable contracts. It also identified for leadership more than 100 contracts that were funded incrementally and therefore had violated the Antideficiency Act (Attachment 2) Specifically the workgroup was tasked to answer 3 questions (which are basically a repeat of the questions posed to the Office of General Counsel 4 years prior):

1. Can multi-year contracting authority be used for non-severable requirements?

The workgroup found that a “non-severable requirement is a requirement of 1 year, not multiple years and therefore cannot rely on multi-year contracting authority. Multi-year contracting authority is improper to use for non-severable requirements and is a violation of the Bonafide Needs Rule under current statutes, regulations and cases.” Note that the workgroup was speaking specifically to CAM’s Nonseverable services which were studies and evaluations that took place over a period of 3 or more years and at time of the awards, it was not know if an additional study would be required or when. Thus we could not procure 2 or more fiscal year’s needs.

2. Can non-severable contracts be incrementally funded?

The workgroup found that “Based on the collective research of the work group, we were able to conclude that it is, in fact, impermissible to incrementally fund non-severable services.”

3. Does multiple year funding allow for expenses to be covered beyond the period of availability and if so, for how long?

The workgroup found, “Minus statutory exception, funds are only available for bona fide needs that arise during the appropriations period of availability.”

Additionally, as of March 1, 2013, the Workgroup had identified 107 active contracts that were for Nonseverable services and were being incrementally funded.

Investigator states that “Since August 2013, CAM has made good faith efforts to fund new procurement for services, including research study contracts, based on the procedures articulated in the 2013 Memorandum.

If this was true, no whistle would have been blown.

Although training had been provided to CAM staff that supported IES and to IES, contract ED-IES-14-C-0119 (Attachment 3), for a single nonseverable service to conduct a statutorily required study (Early Childhood Longitudinal Study, Kindergarten Class of 2010-2011), it is broken down into the tasks required to ultimately deliver the study including project management, school recruitment, student recruitment, procedure development, etc. None of these would have been procured in the absence of the need to conduct the study and none have value on their own. Yet this contract was issued and provided no funding for the actual collection of data. This contract provided \$900,000 at award when the contract cost for the nonseverable service was anticipated to total more than \$19 million. Yet this was reviewed by CAM’s policy group prior to award. Breaking down a nonseverable service into the individual tasks was promoted as being consistent with the final column in the contract funding policy. “Divide the contract line items into severable and non-severable services, and fund each appropriately using one of the stated methods for funding severable or non-severable services.” If actually reviewed, the investigator would have seen that all contracts for nonseverable services have been broken down this way so not fully funding them at time of award could be justified.

All multiyear contracts that were entered into after establishing the policy were approved by #2 as the Director of Contracts. Attachment 4 provides an example of an approved multiyear authority for a single nonseverable service contract EDIES15O5016 for the Middle Grades Longitudinal Study of 2017. All tasks, as set forth in the document are in support of and dependent on gathering the 6<sup>th</sup> and 7<sup>th</sup> grade data, therefore represent a single undertaking. The requirement is broken down into tasks that ultimately allow for the collection of that data, including management, field test validation, operation field test, sample design and ultimately data collection. Approval of this action directly conflicts with the idea that CAM made a “good faith effort.” Had it done so, the Director would not have approved any multiyear requests for single nonseverable services as to utilize the authority, there must be at least 2 years requirements. This contract, like the rest, break down the steps to get to the final product and fund them separately, rather than meeting the statutory requirements. Had training been provided to staff, they would have known to require full funding and that incremental funding was not authorized, as would their group managers. And this was consistent, not a one off. Certainly, if leadership did not mean for these contracts to identify the tasks within the nonseverable services to be funded in this way, they would not have been consistently approved in violation of the ADA and other statutes.

Additionally, all new contract awards are reviewed by CAM’s policy group prior to award. Yet this group continued to allow single nonseverable services to be procured under Multiyear authority and/or to leave unquestioned nonseverable services that were being funded based on the tasks required to deliver the study rather than fully fund the requirement as set forth in the Investigator’s citations in the Response.

In 2016, when reviewing a modification that was incrementally funding contract EDIES13C0022, I emailed the Group Manager that she could not fund a 3-year-old requirement with current funds and I received a response that leadership had a meeting in 2013 and decided that all NAEP and REL contracts would continue to be incrementally funded. (Attachment 5) This was a determination by CAM management that the Department would disregard the bona fide needs rule with relation to all NAEP and REL requirements.

The following contracts from 2015 and 2016 were verified in 2016 to be incrementally funded nonseverable service contracts: EDIES15O5016, EDIES15C050, EDIES15C0022, EDIES15C0024, EDIES15C0026, EDIES15C0027, EDIES15C0046, EDIES15C0048, EDIES15O5016, EDIES16C0016, EDIES16C0017, EDIES16C0021. Additionally, 10 Regional Educational Laboratory contracts. Were all awarded as multiyear contracts knowing that they were violating ADA and ignoring the Adequacy of Appropriations Act and Antideficiency Act.

Upon learning that there was a decision made to circumvent Congress and fund contracts as leadership saw fit, I escalated the issue to the CFO.

On October 28, 2016 the Acting Chief Financial Officer (CFO)/SPE (Deputy Chief Financial Officer/SPE #3 had recently departed), pulled #2 and #4 into a meeting we were having about appropriations and asked them to explain what they believed gave them the authority to incrementally fund nonseverable services with funds outside of the year of the bona fide need. #4 tried to say that Nonseverable services fell under multiyear authority. The CFO disagreed and directed #2, the Director of Contracts to fully fund all nonseverable services, but he wasn’t going

to have them go back and correct existing contracts. (It should be noted that while individual #4 claims to have been the SPE between 2013 – 2017, in fact, the individual was never the Department of Education's SPE, but assisted the Deputy CFO (who was the SPE) who had recently left the Department at the time of this meeting). Upon learning in 2018 that they had disregarded the direction of the Acting CFO, this situation was brought to OSC.

#### Conclusion:

It is not clear how the Respondent reached its conclusion. If the respondent relied on review of the contracts, it is clear that all NAEP contracts testimony rather than allowing the actions taken under the contracts to speak for themselves, If contracts are reviewed for funding, as identified above, the Investigator would find that all NAEP and most other nonseverable contracts continue to violate statute to this day.

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

Any contract that is funded from the incorrect year, Allegation 1, and makes payment from that account are a violation of 31 USC 1502(a), the *bona fide* need rule, Allegation 2.

#### Conclusion Regarding Allegation 2

Rather than determining whether payments were made from the accounts which were used to improperly fund nonseverable services under the contracts issued between 2009 and the time of its response, which is a given if a nonseverable service is funded from multiple fiscal year accounts, DBAL contradicts its finding in Allegation 1 above. In fact, of the 18 contracts identified in in Attachment A of the Department's response to OSC File No. DI-19-5088, 16 of those contracts violate both the Antideficiency Act and *bona fide* needs rule, 1 was not able to be analyzed and 1 was incrementally funded with multiyear funds so. The contracts are analyzed in Attachment 1.

If a contract was funded from incorrect accounts which the investigator found to be the case, although it is much more that the investigator admits, If a payment is made from those accounts, the finding for Allegation 2 must be in the affirmative. If all contracts follow the percentages from the analysis in Attachment 1, the amounts paid from incorrect fiscal year funds is significant and common for our nonseverable services.

#### Recommended Corrective Actions:

1. CAM cease improperly funding contracts;
2. CAM correct its policy to eliminate areas of confusion;
3. As the study contracts are discretionary, while the studies are statutory, the timing and frequency of the studies are up to the Department, properly plan the procurements; staggering them so that full funding can be achieved under the current appropriations;
4. Request authorization specific to the Department that would allow incremental funding;
5. Ensure staff understand funding obligations and their exposure under 31 U.S.C. § 3903(a)(4).

# Attachment 1



Review of Funding for Contracts provided in response Attachment A

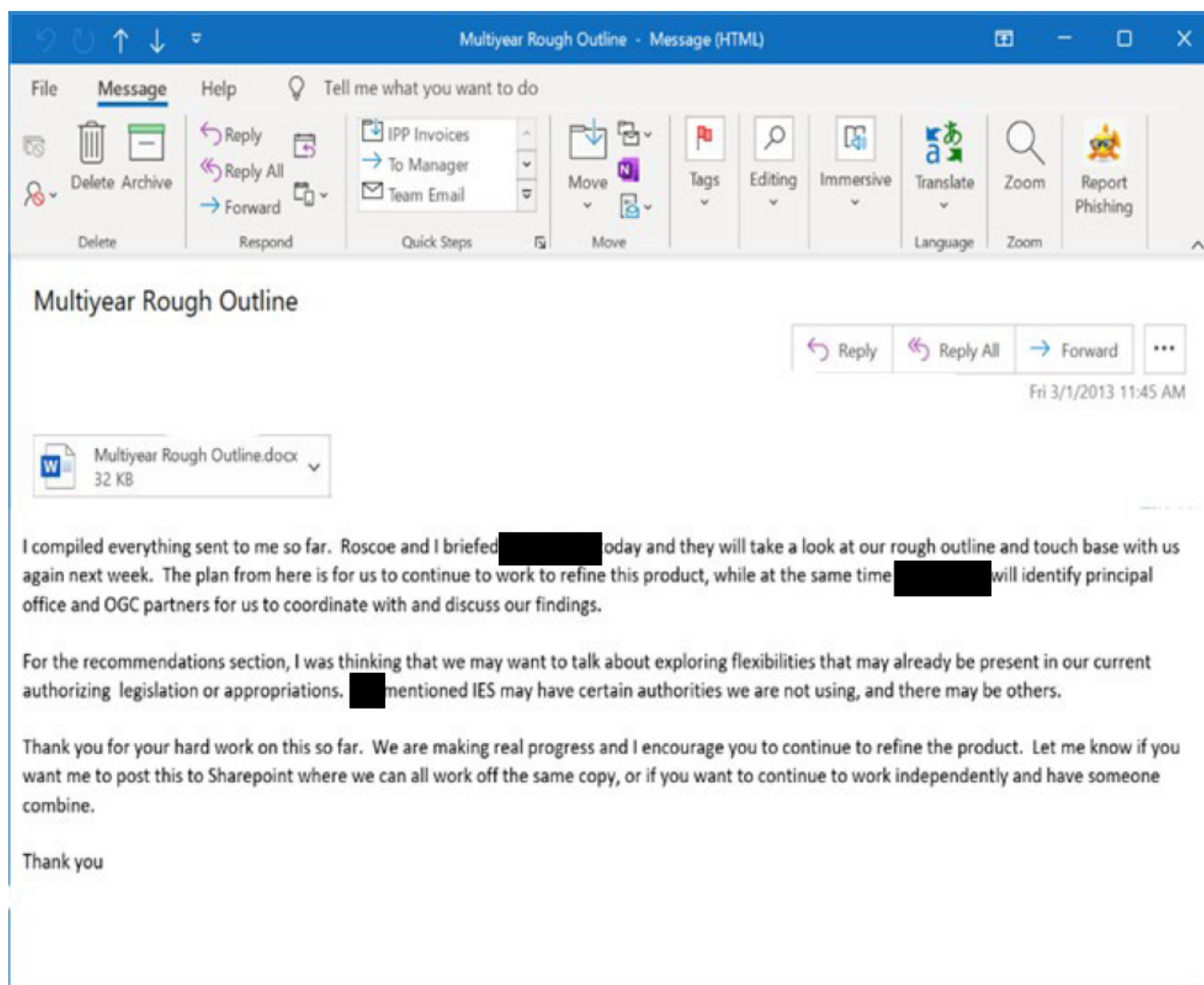
Contract Number	Description of Services	Date of Award	Total Contract Value	funds type	obligation	
ED04CO0025 /0018	Evaluation of the Carol M. White Physical Education Program	9/26/2008	\$2,042,194.58	A 2008	\$378,274.00	
				A 2009	\$390,000.00	\$390,000.00
				A 2010	\$395,000.00	\$395,000.00
				A 2011	\$394,210.00	\$394,210.00
				A 2012	\$389,143.43	\$389,143.43
				A 2014	\$95,567.15	\$95,567.15
ED04CO0025/0022	Study of Turnaround Schools	9/21/2009	\$7,864,792.50	A 2009	\$2,935,234.00	
				A 2010	\$2,873,125.00	\$2,873,125.00
				M 2009/2010	\$661,416.00	\$661,416.00
				A 2012	\$1,131,952.00	\$1,131,952.00
				M 2012/2013	\$263,065.50	\$263,065.50
ED04CO0040/0008	Teacher Incentive Fund Evaluation	9/15/2009	\$3,915,765.00	A 2008	\$1,500,000.00	
				A 2009	\$1,413,328.00	\$1,413,328.00
				A 2010	\$673,092.00	\$673,092.00
				A 2011	\$329,345.00	\$329,345.00
					\$13,822,752.08	\$9,009,244.08
ED04CO0025/0021	Approaches to Measuring Teacher Quality and Effective Professional Development	9/21/2009	\$1,257,767.94	M 2008/2009	\$750,456.00	
				M 2009/2010	\$474,974.80	
				M 2010	\$28,704.00	\$28,704.00

				A 2011	\$3,633.14	\$3,633.14
ED04CO0121/0006	Evaluation of the Implementation of the Carl D. Perkins Career and Technical Education Action of 2006	9/19/2008	\$3,714,843.88	M 2007/2008	\$2,126,601.14	
				M 2008/2009	\$1,547,388.69	
				NY 2010	\$40,854.05	\$40,854.05
EDCFO10A0021/0001	Evaluation of the Education for Homeless Children and Youth Program	9/2/2010	\$254,756.00	M 2010	\$149,537.00	
				M 2011	\$105,219.00	\$105,219.00
EDCFO10A0066/0002	Promoting Teacher Effectiveness in Adult Education	6/29/2011	\$2,632,029.63	M 2010/2011	\$975,000.00	
				M 2011/2012	\$893,504.63	
				M 2012/2013	\$763,525.00	\$763,525.00
EDCFO10A0072/0001	Designing Instruction for Career Pathways	9/13/2010	\$3,634,101.00	M 2009/2010	\$1,597,061.49	
				M 2010/2011	\$1,003,520.00	
				M 2011/2012	\$1,033,519.51	\$1,033,519.51
EDCFO10A0072/0002	Student Achievement in Reading (STAR) - Based Reading Instruction	6/2/2011	\$1,783,231.18	M 2010/2011	\$600,000.00	
				M 2011/2012	\$591,616.00	
				M 2012/2013	\$591,615.18	\$591,615.18
EDCFO10A0110/0001	21st Century Community Learning Centers: Practitioner Guides	7/29/2011	\$2,117,770.00	M 2010/2011	\$1,000,000.00	
				M 2011/2012	\$1,117,771.00	
EDCFO10A0117/0001	Promoting College and Career-Ready Standards in Adult Basic Education	8/5/2011	\$2,375,416.12	M 2010/2011	\$906,680.30	
				M 2011/2012	\$734,370.00	
				M 2012/2013	\$734,365.82	\$734,365.82
EDPEP12O0005	FY 11 Promise Neighborhoods grantees TA to produce 2012-13	12/16/2011	\$2,549,233.00	M 2011/2012	\$952,968.00	
				M 2012	\$618,271.00	

	data file December 2011 to March 2014			M 2013/2014	\$244,252.00	\$244,252.00
				M 2014	\$211,729.00	\$211,729.00
				M 2014/2015	\$230,764.00	\$230,764.00
				M 2015	\$291,249.00	\$291,249.00
EDVAE10C0039	National Adult English Language Learning Professional Development Network	7/29/2010	\$2,278,747.55	M 2009/2010	\$1,080,000.00	
				M 2010/2011	\$609,374.00	
				M2011/2012	\$589,373.55	\$589,373.55
EDVAE12C0044	Open Education Resources to Support Adult Math and Science Learning	6/29/2012	\$1,530,637.00	M 2011/2012	\$709,247.11	
				M 2012/2013	\$821,389.89	
EDVAE12C0051	Research for Career and Technical Education	7/23/2012	\$8,693,618.00	M 2011/2012	\$2,961,206.84	
				M 2012/2013	\$3,229,422.71	
				M 2013/2014	\$2,502,988.45	\$2,502,988.45
EDVAE12O0021	Electronic Toolkit for Effective Teaching	6/29/2012	\$1,269,859.54	M 2011/2012	\$400,000.00	
				M 2012/2013	\$677,281.31	
				M 2013/2014	\$192,578.23	\$192,578.23
EDVAE13C0009	Adult Education and Immigrant Integration	3/4/2013	\$1,309,219	M 2012/2013	\$400,000.00	
				M 2013/2014	\$454,610.00	
				M 2014/2015	\$454,609.00	\$454,609.00
					\$35,401,230.84	\$8,018,978.93

Note: unable to locate data on EDPEP11O0089/TO11 in Finance or contracting system.

# Attachment 2



## 1. Introduction ([REDACTED])

Our research group convened in early FY2013 to look into 3 core questions related to how we fund our contracts and meet our customers' needs. These questions are: (1) can multiyear contracting authority be used for non-severable requirements?; (2) can non-severable contracts be incrementally funded?; and (3) does multiple year funding allow for expenses to be covered beyond the period of availability and if so, for how long?

These questions formed the core of our research under this project and the second section of this memo offers the research group's answers to each of these questions. To begin answering these questions, we first turned to background sources and reference materials for guidance. We reviewed the GAO Redbook, Federal Acquisition Streamlining Act (FASA) and the bona fide needs rule. We reviewed GAO decisions and federal court decisions implicated in answering these questions in order to determine the legal landscape shaping these issues.

We devoted time early on to reviewing Health and Human Services (HHS) acquisition materials publically available on their website. HHS made a lot of acquisition materials (checklists, guidance, and hypothetical scenarios) available on the web. Some of this material was initially supportive of allowing non-severable contracts to be incrementally funded, however, we learned in early 2013 that HHS is in the process of finalizing a revamped acquisition policy. We spoke with a contact, [REDACTED], at HHS Acquisitions, who indicated that previous acquisition positions supported by HHS could no longer be relied on in light of these revisions (which have not been made public outside of HHS as of yet). As of today, we are still waiting for access to HHS' revised acquisition policies, which we believe we will receive at some point, however, we do not have a determined time frame for when this will occur. Based on our exchanges with [REDACTED], we have reason to anticipate that HHS' policy related to severability and funding of non-severable contracts will be changed from previous HHS guidance in this area. As a result, any of HHS' previously published guidance has to be treated as invalid and cannot be relied upon to support our research conclusions.

The answers which follow indicate our conclusions based on all of the research we conducted, excluding HHS policy positions, which we can no longer hold as reliable. We have also provided an analysis of the contracts/requirements impacted by our findings, as well as recommendations for next steps.

## 2. Findings and Analysis (for each of the 3 original questions posed) ([REDACTED])

### a. **Question 1 - Can multiyear contracting authority be used for non-severable requirements?** ([REDACTED])

Multi-year contracting authority may not be used for non-severable requirements. Non-severable requirements are requirements that by their very nature cannot be separated for performance by individual year (B-241415, Jun 8 1992, 71 Comp.Gen. 428). For this reason, the need for these services is determined to arise in the year in which the non-severable services originate. For this reason, non-severable requirements must be charged in full to the fiscal year in which the need arises and not from the funds current when services are rendered (*Id.*) According to FAR 17.103, multi-year contracts buy more than 1 year's requirements of a product or service without establishing and having to exercise an option for each program year first. A non-severable requirement is a requirement of 1 year, not multiple years and therefore cannot rely on multi-year contracting authority. Multi-year contracting authority is improper to use for non-severable requirements and is a violation of the Bonafide Needs Rule under current statutes, regulations and cases.

### b. **Question 2 - Can non-severable contracts be incrementally funded?** ([REDACTED])

Based on the collective research of the work group, we were able to conclude that it is, in fact, impermissible to incrementally fund non-severable services. I will address the rationale behind our conclusion by explaining some of the fundamental topics that we discussed, including:

- the funding process

- the importance of the bona fide needs rule
- the difference between severable and non-severable services
- the nature of incremental funding
- the impact of the Antideficiency Act
- the inclusion of the Limitation of Funds clause in a contract

I will also focus my analysis section on various FAR clauses, statutes, and GAO decisions that allowed us to reach our interpretation of this conclusion. I will also briefly discuss the importance and nature of statutory interpretation, where I will specifically focus on three main concepts including: the last in time rule, the plain meaning rule, and agency interpretation. Our intention is to structure the three responses in a similar format, so as to make it easier to create the final memo. Once we have our preliminary draft, we can compare our responses to ensure that the responses flow accordingly. Below is a preliminary draft of my outline that I had put together.

1. I will first define a few key terms that will be helpful to those reading the memo. These terms will include the following:
  - Non-severable v. severable
  - Incremental funding
  - Bona fide needs rule
  - Antideficiency Act
2. Next, I will lay out a number of applicable rules. I will include FAR clauses, GAO decisions, and statutes including some of the following:
  - 31 U.S.C. § 1301
  - 31 U.S.C. § 1341(a)
  - 31 U.S.C. § 11
  - 31 U.S.C. § 1502(a)
  - Repeal of 42 U.S.C. § 2459(a)
  - 48 C.F.R. 32.703-3
  - B-233243, Aug. 3, 1989
  - B-237180, Jan. 19, 1990
  - B-317139, June 1, 2009
  - B-213141, Mar. 29, 1984
  - B-235678, July 30, 1990
  - FAR 52.232-18
  - FAR 32.703-3
  - FAR 32.705-1
3. I will also briefly discuss rules applicable to Statutory Intent. Particularly the following 3 items:

- Last in Time Rule: On occasions when two statutory provisions are just irreconcilable the GAO resolves this issue by applying the “last-in-time” rule of construction—that is, we presume that the later-enacted statute represents Congress’s current expression of the law (i.e., Congress’s “last word”).
- Plain Meaning Rule: By far the most important rule of statutory construction is this: You start with the language of the statute. Countless judicial decisions reiterate this rule. E.g., *Carcieri v. Salazar*, 555 U.S. 379, 129 S. Ct. 1058 (2009); *BedRoc Limited, LLC v. United States*, 541 U.S. 176 (2004); *Lamie v. United States Trustee*, 540 U.S. 526 (2004).
- Agency Interpretation of Statutes: If the agency position can be said to be reasonable or to have a rational basis within the statutory grant of authority, it should stand, even though the reviewing body finds some other position preferable. See, e.g., *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232 (2004); *Barnhart v. Thomas*, 540 U.S. 20 (2003); *Yellow Transportation, Inc. v. Michigan*, 537 U.S. 36 (2002);

4. The analysis will follow this section and will discuss some of the following items:

- The bona fide needs rule was developed by the accounting officers of the United States to implement one of the oldest fiscal statutes, now codified at 31 U.S.C. sect. 1502(a), which provides that "an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability." As this statute has been interpreted and applied, an appropriation is available only to fulfill a genuine or bona fide need of the time period of availability of the appropriation. 73 Comp. Gen. 77 (1994).
- The general rule is that a nonseverable service is considered a bona fide need at the time the agency orders the service and, therefore, should be charged to an appropriation current at the time the agency enters into the contract. B-305484, June 2, 2006, at 6--7; 65 Comp. Gen. 741, 743 (1986).
- A nonseverable service is one that requires the contractor to complete and deliver a specified end product (for example, a final report of research). 65 Comp. Gen. at 743--744.
- Severable services, which are recurring in nature, are bona fide needs at the time the service is completed, and obligations for severable services should be charged to appropriations current at that time. B-287619, July 5, 2001, at 6.
- A severable service is a recurring service or one that is measured in terms of hours or level of effort rather than work objectives. B-277165, Jan. 10, 2000, at 5; 60 Comp. Gen. 219, 221--22 (1981).
- Whether a contract is for severable or nonseverable services affects how the agency may fund the contract; severable services contracts may be incrementally funded,



while nonseverable services contracts must be fully funded at the time of the award of the contract. 73 Comp. Gen. 77; 71 Comp. Gen. 428 (1992).

- 48 C.F.R. 32.703-3(a) A contract that is funded by annual appropriations may not cross fiscal years, except in accordance with statutory authorization (e.g., 41 U.S.C. 11a, 31 U.S.C. 1308, 42 U.S.C. 2459a, 42 U.S.C. 3515, and paragraph (b) of this subsection), or when the contract calls for an end product that cannot feasibly be subdivided for separate performance in each fiscal year (e.g., contracts for expert or consultant services).
- Repeal of 42 U.S.C. § 2459(a), which stated, “(a) Authorization; limitations for uses of capital nature There are authorized to be appropriated such sums as may be necessary to carry out this chapter, except that nothing in this chapter shall authorize the appropriation of any amount for (1) the acquisition or condemnation of any real property, or (2) any other item of a capital nature (such as plant or facility acquisition, construction, or expansion) which exceeds \$250,000. Sums appropriated pursuant to this subsection for the construction of facilities, or for research and development activities, shall remain available until expended.”

**c. Does multiple year funding allow for expenses to be covered beyond the period of availability and if so, for how long? ( )**

Minus statutory exception, funds are only available for bona fide needs that arise during the appropriations period of availability. Multiple year appropriations are available for bona fide needs for a definite period in excess of one fiscal year. Supplies are a bona fide need of the FY in which the agency needs or consumes them. Services are a bona fide need of the FY in which they are performed. Non-Severable services contracts are a bona fide need of the year services begin, even if crossing fiscal years.

The Federal Acquisition Streamlining Act’s exception for expenditure for severable services beyond the period of availability, up to 12 months, does not apply to multiple year appropriations. However, multiple year funds may be used to fund multiyear contracts in the same manner as annual funds, provided the bona fide need rule is adhered to.

**3. Impact on Contracts ( )**

**ESCG**

1. Data was taken from the FY13 AP are 212 IES Actions for FY13, but this number is reduced to 178 actions once the cancelled actions and IAA’s are removed
  - a. 12 cancelled
  - b. 20 IAA
2. Thus far, I’ve identified approximately 51 contracts (broken out by-IES Center) that are incrementally funded, multi-year contracts with non-severable service. This number includes

new FY13 actions (in-progress, have just been awarded), re-competed actions, mod increments for existing contracts). The number of actions is based on my count to-date.

- a. NCES (Sylvia) – 19 contracts/26 actions
- b. NCEE – (Roni) 18 contracts/ 23 actions
- c. NCES/Elementary/Secondary/P-Secondary (Deila) - 6 contracts/11 actions
- d. NCERS (Michele) – 8 contracts/24 actions

### **PCG**

There are 56 incrementally funded, non-severable contracts for OPEPD and OVAE, as administered by PCG. The Total Estimated Value of these contracts is \$147,433,076.70 . OPE, OII, OELA, OESE, and OSERS did not have any non-severable, incrementally funded contract.

### **OCG**

The Workload Report and FY 13 Acquisition Plan for OCG was reviewed, but it appears that the incrementally funded actions were for severable services. Given the nature of OCG's work this seems logical.

#### **4. Impact on Budget ( [REDACTED] )**

To obtain a preliminary assessment of the budgetary impact in fiscal year (FY) 2013 of a change in the Department's policy regarding the funding of contracts for non-severable services, we examined the FY 2013 spending plans. For most programs in the Department, Principal Offices are required to propose a plan for the obligation of likely appropriations for non-formula grant programs. The spending plans do not include detailed information for the Statistics or Assessment programs in the IES account, which support a number of data collection contracts that may support non-severable activities. The spending plans also do not include information on contracts that would be supported with administrative funds. For these reasons, the following estimate of potential budgetary impact is incomplete and we intend to supplement it with information from the acquisition planning process. Based on the activities Principal Offices included in their FY 2013 spending plans, the Department could obligate as much as \$34 million to incrementally or partially fund contracts awarded in previous fiscal years for non-severable services. For these contracts, we estimate that there are at least \$33 million in out-year costs that Program Offices have not planned to support with FY 2013 funds. The information available in the FY 2013 spending plan on prior year obligations is incomplete but indicates that at least \$28 million has already been obligated for these contracts. Because it is not clear how much of that amount was obligated using funds available at the time of award to support non-severable services, we would need to rely upon acquisition plans or other contract documents to refine this estimate if the Department determines that additional funds should have been obligated using appropriations that were available at the time these contracts were awarded.

In FY 2013, Principal Offices also proposed to spend \$11.5 million to support new contracts that would appear, at least in part, to support non-severable services. Most of these contracts have not yet been awarded yet, so the Department has not determined the full cost of these awards. In most instances in which the costs for more than one fiscal year were estimated, the planned FY 2013 amount represents

less than the full award amount. The Department has also not yet determined whether some or all of these contracts could be broken into severable activities that could be funded incrementally through multi-year contracts. Based on the estimates that Principal Offices were able to include in the spending plan, if these activities cannot be broken into severable components, the Department would require as much as \$15.4 million in additional FY 2013 funds to fully fund these activities at the time of award. Because some of the new proposed contract actions in the spending plan did not include estimates of out-year costs, this amount is likely to be higher.

The Administration's proposal for the reauthorization of the Elementary and Secondary Education Act (ESEA) would provide the authority to set aside up to 5 percent of the funds appropriated for programs authorized under the Act and would allow the Department to pool these funds and use them to support evaluation, analysis, and technical assistance activities within and across programs. If enacted, this authority would expand our capacity to fully fund non-severable evaluation activities in programs for which the current ESEA evaluation authority provides insufficient funding in any given fiscal year to support evaluations of sufficient breadth and rigor to provide a meaningful estimate of program effect and impact. Existing or planned contracts for non-severable evaluation activities supported under authorities, such as the Perkins Act or the Workforce Investment Act, would not be affected by the Administration's evaluation proposal for ESEA.

## 5. Options and Recommendations on how to proceed ( [REDACTED] )

- a. Rework requirements to make requirements severable, rather than non-severable where possible. Look for ways to work with program offices to break program requirements into limited severable pieces.
- b. Speak to ED appropriations team/Office of Legislation and Congressional Affairs about the possibility of including language in ED's appropriations bills to allow incremental funding of some non-severable requirements, for example IES studies.
- c. Request different appropriations amounts for different programs/studies in order to accommodate the need to fully fund non-severable requirements now.
- d. Engage in a cooperative dialogue with the program offices to explain our analysis and evaluation of our multiyear research and efforts we can take to minimize the impact/resolve their concerns.
  - i. Is there an opportunity to piggyback off of the reconsideration/spending impacts caused by the potential sequester to buffer the impact of our other proposed funding changes on the program offices?
- e. Create robust sample acquisition hypothetical scenarios as guidance for how to manage specific acquisitions for CAM and the program offices. (See prior HHS samples for ideas.)

## 6. Sources Used and Compiled for Reference / Glossary ( [REDACTED] )

### *A Glossary of Terms Used in the Federal Budget Process*

One-Year Authority. Budget authority available for obligation only during a specific fiscal year that expires at the end of that fiscal year. It is also known as "fiscal year" or "annual" budget authority.

Multiple-Year Authority (Multiyear). Budget authority available for a fixed period of time in excess of 1 fiscal year. This authority generally takes the form of 2-year, 3-year, and so forth, availability but may cover periods that do not coincide with the start or end of a fiscal year. For example, the authority may be available from July 1 of one fiscal year through September 30 of the following fiscal year, a period of 15 months. This latter type of multiple-year authority is sometimes referred to as “forward funding.” (For a distinction, *see* Advance Appropriation; Advance Funding. *See also* Full Funding.)

#### **41 U.S.C.2531**

##### **(a) Authority**

The head of an executive agency may enter into a contract for procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract period does not exceed one year.

##### **(b) Obligation of funds**

Funds made available for a fiscal year may be obligated for the total amount of a contract entered into under the authority of subsection (a) of this section.

#### **FAR 32.703-3 Contracts crossing fiscal years.**

(a) A contract that is funded by annual appropriations may not cross fiscal years, except in accordance with statutory authorization (*e.g.*, [41 U.S.C. 11a](#), [31 U.S.C. 1308](#), [42 U.S.C. 2459a](#), [42 U.S.C. 3515](#), and paragraph (b) of this subsection), or when the contract calls for an end product that cannot feasibly be subdivided for separate performance in each fiscal year (*e.g.*, contracts for expert or consultant services).

(b) The head of an executive agency, except NASA, may enter into a contract, exercise an option, or place an order under a contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the contract awarded, option exercised, or order placed does not exceed one year ([10 U.S.C. 2410a](#) and [41 U.S.C. 2531](#)). Funds made available for a fiscal year may be obligated for the total amount of an action entered into under this authority.

Apart from the extended period of availability, multiple year appropriations are subject to the same principles applicable to annual appropriations and do not present any special problems. 5-7

5-39 – An agency may enter into a multiyear contract with fiscal year appropriation (or for a term exceeding the period of availability of a multiple year appropriation) only if it has specific authority to do so. B-171277, Apr 2. 1971

If an agency does not have specific multiyear contracting authority but enters into a multiyear contract solely under authority of multiple year or no-year appropriation, the full contract amount must be obligate at the time of contract award. 5-39 B-195260, July 11, 1979.

The FASA exception implemented by FAR 32.703-3(b), [Contracts crossing fiscal years](#), only applies to annual appropriations. HHS



# Attachment 3

U.S. DEPARTMENT OF EDUCATION

Contract for the Fifth-  
Grade Round of the Early  
Childhood Longitudinal  
Study, Kindergarten Class  
of 2010-11 (ECLS-K:2011)

Attachment A - Performance Work Statement

National Center for Education Statistics

3/31/2014

The PWS is written in four sections. The first section provides an overview of the data collection and general goals of the work to be done under this contract. The second section describes the core tasks associated with this work and delineates the specifications of the tasks and associated deliverables. The third section describes a set of optional tasks and study supplements. The fourth section delineates the specifications of the tasks and associated deliverables.

## **I. Introduction and Overview**

### **I.A.1 Purpose of Study**

The National Center for Education Statistics (NCES), Institute of Education Sciences (IES), United States Department of Education (“the Department”) requires the design and conduct of data collection for the fifth-grade year<sup>1</sup> of the Early Childhood Longitudinal Study, Kindergarten Class of 2010-11 (ECLS-K:2011). The purpose of the ECLS-K:2011 is to provide important information on children’s early learning and development, transition into kindergarten, and progress through the elementary grades, building upon knowledge acquired from the previous Early Childhood Longitudinal Study, Birth Cohort (ECLS-B) and Early Childhood Longitudinal Study, Kindergarten Class of 1998-99 (ECLS-K<sup>2</sup>) studies. Data from the ECLS-K:2011 cohort will yield policy-relevant information by (1) providing current data on the cohort of students who were in kindergarten in 2010-11 and their progress through the elementary grades, (2) providing data relevant to emerging policy-related domains not measured fully in the prior studies, and (3) allowing cross-cohort comparisons of the educational experiences of children attending school before and after the advent of new federal laws and policies. Appendix A discusses some of the specific issues in education policy that the proposed design of the ECLS-K:2011 will address.

The ECLS-K:2011 collects data about the child and the child’s school, classroom, teacher(s), regular before- and after-school care providers, and family. These data shall be collected directly from the child, the child’s parents/guardians, teachers, and school administrators. The ECLS-K:2011 will directly assess children in reading, mathematics, science, and executive functioning, as well as measure height and weight. The ECLS-K:2011 also includes a questionnaire administered directly to children. The methods of data collection will include computer assisted two-stage adaptive testing of children to allow comparability with ECLS-K, physical measurements (i.e., children’s height and weight), paper-and-pencil questionnaires, and computer assisted telephone and in-person interviews (CAI).

The ECLS-K:2011 began following a cohort of kindergartners (and kindergarten-aged children in ungraded schools or classrooms) in the fall of the 2010-2011 school year. Data were collected in both the fall and spring of the children’s kindergarten year. The children and the children’s parents, teachers, regular before- and after-school care providers, and schools/school

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<sup>1</sup> Study convention is to refer to the waves of data collection by the grade level of the majority of the study’s students at the time of data collection (e.g., the fifth-grade wave is the spring 2016 collection). However, the study will follow all children who participated in the kindergarten year regardless of their grade level in later rounds of data collection. Therefore, the study will include students who have been retained at some point prior to the wave of interest, students who are on grade level, and students who have been advanced to a higher grade.

<sup>2</sup> Throughout this document, reference is made to the Early Childhood Longitudinal Study, Kindergarten Class of 1998-99. For ease of presentation, it is referred to as the ECLS-K. The main study discussed in this performance work statement is referred to as the ECLS-K:2011.



administrators participated in the study in the kindergarten year. In the kindergarten collections of this study, data were collected from approximately 18,300 students and their parents, approximately 3,500 teachers, and approximately 1,000 school administrators. Follow-up collections for the full sample are being conducted annually in the spring, beginning with spring 2012. In the fall of 2011, when most sample children were in first grade, data were collected for children attending schools in a 30 percent subsample of the original 90 primary sampling units. The same subsample was included in a fall 2012 collection, when most students were in second grade.

Because of the complexity of the ECLS-K:2011, the Department is executing the study through a series of overlapping contracts. The first contract focused on the kindergarten-year collection (study design, data collection, and the production of study data files and documentation) and included field test activities to facilitate timely fielding of the first- and second-grade collections (i.e., development of reading, math, and science assessments that could be used in the kindergarten, first-, and second-grade collections).

The second of the ECLS-K:2011 contracts focuses on the national data collections for the fall and spring of the first- and second-grade years. Apart from conducting the first- and second-grade collections, this contract also covers the release of the resulting data. In addition, it includes work to field test parent, teacher, and school administrator questionnaires for the first- and second-grade collections, and a field test of a computerized executive function assessment. It also includes work to track children from kindergarten into first grade and from first grade into second grade. Lastly, it includes work to collect hearing evaluation data from a subsample of children in the fall second-grade collection.

The third of the ECLS-K:2011 contracts focuses on the national data collections for the spring collections of the third- and fourth-grade years. Apart from conducting the third- and fourth-grade collections, that contract also covers the release of the resulting data. In addition, it includes work to field test parent, teacher, and school administrator questionnaires for the fourth-grade collection, and a field test of the direct cognitive assessments and questionnaire administered to the study children in the third-, fourth-, and fifth-grade data collection rounds. It also includes work to track children from second to fourth grade. Lastly, it includes work to collect hearing evaluation data in third grade from the same subsample of children who had their hearing evaluated in the fall second-grade collection.

The work being solicited through this performance work statement (PWS) is for one national data collection, to be conducted with the full study sample in the spring of 2016 when most study children are expected to be in fifth grade. This work includes production of the direct cognitive assessments to be administered to the study children, a child questionnaire, a parent interview, questionnaires for school staff (general classroom teachers, special education teachers, and school administrators) and potentially a before- and after-school care provider questionnaire or interview. Hearing evaluations may also be conducted. It is expected that the vast majority of items included in the data collection instruments will have been tested and/or used in past rounds of the ECLS-K:2011, so the design work will consist of selecting and compiling existing items, rather than developing new items. The contract also covers the production of data and study

documentation for the fifth-grade round. Included in the data collection work are tracking activities to locate children for the fifth-grade collection.

The following summarizes the primary activities covered by this performance work statement (PWS): 1) recruit students, families, and schools in order to continue following the progress of the cohort as it moves from fourth grade into fifth grade; 2) develop the fifth-grade direct child assessment, parent interview, child questionnaire, teacher questionnaires, and school administrator questionnaire; 3) plan the fifth-grade (spring 2016) data collection; 4) create a restricted-use data file and associated documentation; 5) create a public-use data file and associated documentation; and 6) update child locating information (e.g., home address and telephone number, last school attended). National data collection itself is included as an optional task to the contract, which would be exercised in December 2015 as long as approval for the collection is received from the U.S. Office of Management and Budget (OMB). The data collection optional task is described in section III of this PWS.

The contractor shall use procedures, instruments, and questionnaire items similar to those used in the ECLS-K, the ECLS-B, and the kindergarten through fourth-grade collections of the ECLS-K:2011, with updates and improvements made as necessary. Information about these studies can be found on the NCES web site at <http://nces.ed.gov/ecls>. All activities under this contract shall be completed and delivered within 48 months of the award date.

The work will be monitored by NCES within the Institute of Education Sciences of the U.S. Department of Education.

#### I.A.2. Legislation

The Longitudinal Studies program at NCES is authorized by law under Title 20, USC, Section 9543a, 2006:

*The Statistics Center shall collect, report, analyze, and disseminate statistical data related to education in the United States and in other nations, including --*

*(7) conducting longitudinal and special data collections necessary to report on the condition and progress of education;*

#### I.A.3. Program Overview

The ECLS-K:2011 is the third cohort longitudinal study of young children supported by NCES. Information about the two prior studies (ECLS-K and ECLS-B) can be found at <http://nces.ed.gov/ecls>. Materials on the site provide examples of the work needed for this contract except the direct assessments. Examples of the direct assessments and associated materials will be provided to offerors separately upon request. Additionally, offerors may want to reference the description of the ECLS-K:2011 assessments available online at <http://nces.ed.gov/ecls/assessments2011.asp>.

1. It is estimated that the total value to the Government for full performance of this contract is \$19,397,730.

(a) For the Cost Plus Fixed fee Tasks, it is estimated that the total cost to the Government for the full performance of this contract is \$18,180,226, of which sum of \$17,531,653 represents the Cost-Reimbursable amount, and \$648,573 represents the possible Fixed Fee amount.

(b) For the Fixed-Price Tasks, the total Fixed-Price is \$1,217,504.

**Summary Table of Tasks by Contract Type (Years 1-4)**

<b>Base/Core Tasks (Years 1-4)</b>	<b>FP \$</b>	<b>CR \$</b>
Task 1	\$ 365,023	
Task 2	\$ 18,605	
Task 3	\$ 201,271	
Task 4a		\$ 962,671
Task 4b		\$ 186,249
Task 5	\$ 38,483	
Task 6	\$ 103,489	
Task 7	\$ 87,509	
Task 8		\$ 455,424
Task 9		\$ 2,865,305
Task 10		\$ 3,466,276
Task 11	\$ 372,498	
Subtotal CORE Tasks	\$1,186,878	\$ 7,935,925
<b>Optional Tasks (Years 1-4)</b>		
Optional Task 1		\$ 6,040,379
Optional Task 2a		\$ 152,908
Optional Task 2b		\$ 279,286
Optional Task 3a	\$ 16,985	\$ 23,363
Optional Task 3b		\$ 68,848
Optional Task 4a		\$ 710,967
Optional Task 4b.1		\$ 503,865
Optional Task 4b.2		\$ 233,830
Optional Task 5a	\$ 13,641	\$ 947,653
Optional Task 5b		\$ 882,774
Optional Task 6		\$ 140,124
Optional Task 7*		\$ 260,304

Subtotal Optional Tasks	\$ 30,626	\$10,244,301
Grand Total	\$1,217,504	\$18,180,226

**Grand Total Value** **\$19,397,730**

\*six-month extension

2. The table below sets forth the totals by task for the entire contract amount as follows:

Base/Core Tasks (Years 1-4)	Description	FP \$	CR \$	Total Obligated Amount (Year 1)	Funding
Task 1	Project Management	\$ 365,023		\$144,685	12-months
Task 2	Sample Design Specifications	\$ 18,605		\$18,605	12-months Fully funded
Task 3	Sample Locating System	\$ 201,271		\$180,836	12-months
Task 4a	Locate and Recruit Schools		\$ 962,671	\$138,184	12-months
Task 4b	Locate and Recruit Child Gift		\$ 186,249	\$0	
Task 5	Regulatory Information Management System (RIMS) Department of Education (Department) / Office of Management and Budget (OMB) Forms Clearance Package	\$ 38,483		\$38,483	12-months Fully funded
Task 6	ECLS-K:2011 Assessment Battery and Administration Procedures	\$ 103,489		\$103,489	12-months Fully funded
Task 7	Non-assessment Instruments and Procedures	\$ 87,509		\$87,509	12-months Fully funded
Task 8	Production/Acquisition of Instruments and		\$ 455,424	\$152,568	12-months

# Attachment 4



**UNITED STATES DEPARTMENT OF EDUCATION**

***Office of the Chief Financial Officer  
Contracts and Acquisitions Management***

**MEMORANDUM**

DATE: May 7, 2015

TO: [REDACTED] Head of the Contracting Activity  
Contracts and Acquisitions Management

THROUGH: [REDACTED], Chief of the Contracting Office  
Education Sciences Contracts Group

FROM: [REDACTED], Contracting Officer  
Education Sciences Contracts Group

SUBJECT: Justification for Use of Multi-year Contracting for the “Conduct of the Middle Grades Longitudinal Study of 2016-17 (MGLS:2017), 6th & 7th Grade”

**1. IDENTIFICATION:**

- Agency: U.S. Department of Education
- Contracting Activity: Contracts and Acquisitions Management

**2. NATURE AND/OR DESCRIPTION OF THE ACTION BEING APPROVED:**

The Department of Education (Department) intends to award a contract to fulfill the requirement for a longitudinal data collection of middle grades students in grades 6 through 8. The Middle Grades Longitudinal Study of 2017 (MGLS:2017), will collect data on academic achievement in mathematics and reading, student executive function, socioemotional functioning, middle school experiences, out of school activities, and family background of a nationally representative sample of 6th graders selected in 2016-17, with additional focus on students in three disability categories. Data will be collected from students, their parents, teachers and school administrators via web-based instruments, with phone and in-person interview as backup. This contract covers two field test data collections in 2016 and two nationally-representative full-scale data collections in 2017 and 2018. This contract follows on previous contracts such as the Early Childhood Longitudinal Study to develop and field national data collections for students in K12 general education schools. This data collection is timed to fit the multi-cohort sequence of K-12 longitudinal studies that consists of the Early Childhood Study of 2011 (ECLS-K:2011-2016), MGLS:2017-2019, and the High School Longitudinal Study of 2020 (HSLs:2020-2024).

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*Our Mission is to promote student achievement and preparation for global competitiveness by  
fostering educational excellence and ensuring equal access*

The Independent Government Cost Estimate (IGCE) for the contract is \$34,755,809 (Base Contract Tasks \$32,088,744, Optional Tasks \$2,408,337, One Acquisition Solution for Integrated Services (OASIS) Contract Access Fee \$258,728). There are multi-year, non-severable and severable tasks (Task 1; Task 2; Task 3; Task 4; Task 5; Task 6; Task 7; Task 8; and, Optional Tasks 9-13) which will be funded by program period over the life of the contract.

Please note that the definition of “program period” in this contract varies from 6 months to 12 months as follows:  
Period 1 = July-Dec 2015; Period 2 = Jan-Dec 2016; Period 3 = Jan-Dec 2017; Period 4 = Jan-Dec 2018; Period 5 = Jan-June 2019.

The National Center for Education Statistics (NCES), within the Institute of Education Sciences (IES), is funded with two-year appropriations. The initial program period funding is approximately \$4,394,919 in Fiscal Year 2015. This multi-year justification pertains to the base contract tasks, optional tasks, and the renewal option period.

### 3. **DESCRIPTION OF SUPPLIES OR SERVICES REQUIRED TO MEET THE AGENCY'S NEEDS:**

The Middle Grades Longitudinal Study of 2017 (MGLS:2017) requires data collection efforts that include 1) conducting an item validation field test using content developed in the design contract; 2) conducting an operational field test of the recruitment protocols and operational assessments and instruments in order to test the proposed methodology and procedures on the target populations, to assure valid and reliable test administration protocols for the national study as it moves from 6th to 7th grade, and to develop the tracking sample 12 months in advance of the 7th grade collection to learn about patterns of school moving and the challenges in updating addresses for the main study students; 3) recruiting students, families, and schools in order to establish the national data collection cohort, including samples of students in at least three of the IDEA disability categories; 4) planning and conducting the sixth- and seventh-grade direct student assessments, parent questionnaire, student questionnaire, mathematics teacher questionnaires, special education teacher questionnaires, school administrator questionnaire, facilities observation and school records abstract; 5) producing public- and restricted-use data release files, data documentation, and methodology reports; and 6) updating student locating information. While Steps 1 through 3 are a feature of this first time effort to collect longitudinal data on middle school students, Steps 4 through 6 are required each time a data collection is employed. As such, the contractor will require 48 months in order to collect data and release data files. Many of these tasks and subtasks must be performed simultaneously and across - periods in order to conduct a given study. Therefore, due to the nature of the work, it is necessary for the contract to extend beyond 12 months.

Both severable and non-severable tasks are shown in the tables below. For non-severable tasks, the overlaps are iterative and inter-dependent spanning across periods.

#### **Base Contract Tasks, Severable**

<b>Task Description</b>	<b>Contract Period of Occurrence</b>
Task 4 Test Battery	Period 2

#### **Base Contract Tasks, Non-Severable**

<b>Task Description</b>	<b>Contract Period of Occurrence</b>
Task 1 Management	Periods 1 - 5

Task 2 Item Validation Field Test	Periods 1 - 2
Task 3 Operational Field Test	Periods 1 - 2
Task 5 Sample Design	Periods 1 - 2
Task 6 Sample Locate Sys.	Periods 1 - 3
Task 7 6th Grade Data Collection	Periods 1 - 4
Task 8 7th Grade Data Collection	Periods 3 - 5

#### **Optional Tasks, Severable**

<b>Task Description</b>	<b>Contract Period of Occurrence</b>
Optional Task 9 Freshening of Disabilities Sample	Period 3
Optional Task 10 Field Test Change Request OMB Package	Period 1

Optional Task 11 Interim Field Testing of Items Using Tracking Sample	Period 3
Optional Task 13 Sampling Plan and Sample	Period 1

#### **Optional Tasks, Non-Severable**

<b>Task Description</b>	<b>Contract Period of Occurrence</b>
Optional Task 12 Extra Day in Field	Periods 2 - 4

The above tasks are inter-dependent since earlier tasks are necessary for subsequent tasks and often overlap, in their execution. These base/core tasks and five optional tasks will be carried out over 48 months of the base contract. Many of these tasks require more than 12 months to complete or the twelve month period can cross fiscal years. Moreover, the project is an extremely complex undertaking that requires consistency and coordination over time to ensure that the government requirements are met. During the 48 month duration of this contract, the tasks required must overlap and build on one another in order to meet the Department's needs. For example, it is anticipated that Periods 1 and 2 will be spent preparing, then administering the field tests, analyzing data from the field tests and using those results to prepare the assessments and questionnaires for use in the third period of the contract when the first round of the study is to begin, establishing procedures for full-scale data collection, submitting the Office of Management and Budget (OMB) package for data collection, and meeting with the Technical Review Panel (TRP) to provide guidance on the final instrument and data collection procedures. Periods 2 and 3 involve work that leads up to the full-scale 6<sup>th</sup> Grade data collection in Period 3. Periods 3 and 4 focus on preparations for and performance of the 7<sup>th</sup> Grade data collection, followed immediately by data cleaning and preparation. In Period 5, data files and documentation for the 6<sup>th</sup> and 7<sup>th</sup> Grade rounds will be released, along with the final reports.

These Period 5 task activities may continue into the renewal option period due to possible delays resulting from the lengthy data review in the publication process. Optional Tasks apply for the most part to various periods described above and do not cover more than one period each with the exception of Optional Task 12.



SUMMARY OF TOTAL CONTRACT COST/PRICE BY PROGRAM PERIOD						
BASE CONTRACT (TASKS 1-8)	<u>Period 1</u>	<u>Period 2</u>	<u>Period 3</u>	<u>Period 4</u>	<u>Period 5</u>	<u>Total</u>
	\$4,338,305	\$6,714,336	\$14,792,479	\$5,855,682	\$387,941	\$32,088,744
OPTIONAL (TASKS 9-13)	\$56,614	\$342,704	\$1,638,351	\$370,668	\$0	\$2,408,337
<i>Renewal Option: Tasks 8.7 and 8.8*</i>	\$ 0	\$ 0	\$ 0	\$1,133,496	\$265,040	\$1,398,536
<b>GRAND TOTAL PROGRAM PERIOD</b>	<b>\$4,394,919</b>	<b>\$7,057,040</b>	<b>\$16,430,830</b>	<b>\$6,226,350</b>	<b>\$387,941</b>	<b>\$34,497,081</b>
<i>One Acquisition Solution for Integrated Services (OASIS) Contract Access Fee (CAF)**</i>						\$258,728
<b>GRAND TOTAL PROGRAM PERIOD WITH CAF</b>						<b>\$34,755,809</b>

***\*Renewal Option line (in italics) is a subset of the Base Contract line (1<sup>st</sup> row) and thus, is not part of the Grand Total Program Period calculation.***

***\*\*If a General Service Administration (GSA) - OASIS competition, the CAF applies in addition to the GrandTotal Program Period calculation.***

Additionally, this contract is comprised of IT and non-IT portions and requires consistent, continuation of work without severing or interruption which would significantly diminish quality, outcomes, and increase the total time required to collect data and release products of thisprocurement.

In the event of a contract cancellation, the procedures detailed under the Federal Acquisition Regulations (FAR) clause 52.217-2 Cancellation Under Multi-year Contracts will be used. However, in accordance with FAR 17.106-1(c) Cancellation Procedures, the cancellation ceilingis \$0 in this solicitation. In determining the cancellation ceiling, the Contracting Officer (CO) estimated the nonrecurring costs to be incurred by an average prime contractor, which would be amortized over the duration of this multi-year requirement. Nonrecurring costs may include costs such as plant relocation, special tooling, initial spoilage, and pilot runs [FAR 17-106- 1(c)(2)]. The CO deems that the MGLS:2017 requirement does not have nonrecurring costs.

The total estimate of the nonrecurring costs was then compared to the IGCE, which did not include the aforementioned costs, to arrive at the dollar amount of \$0. During solicitation, offerors can propose cancellation costs within their proposal, if any. The Government will thennegotiate these costs.

In accordance with FAR 52.217-2 Cancellation Under Multi-year Contracts, except for cancellation under this clause or termination under the Default clause, any reduction by the COin the requirements of the contract shall be considered a termination under FAR 52.249-2 Termination for Convenience of the Government.

The cancellation ceiling of \$0 will be included in the solicitation's cancellation clause.

#### 4. **DETERMINATIONS:**

- *Method of Contracting:* The acquisition will be a Full and Open Competition under OASIS.
- *Type of Contract:* The contract is anticipated to be a Hybrid contract with fixed-price and cost-reimbursement tasks. (For more details, please refer to the High-Risk contracting analysis for this procurement.)
- *Cancellation Procedures:* Cancellation procedures will be in accordance with FAR Clause 17.106-1(c).
- *Cancellation Ceilings:* In accordance with FAR Clause 17.106-1(d), Cancellation ceilings may be revised with offerors in the competitive range and changed prior to contract award.
- *Payment of Cancellation Charges:* If cancellation occurs, the Government's liability will be determined by the terms of the contract.
- *Pre-solicitation/Vendor Collaboration Meeting:* A pre-solicitation/vendor collaboration meeting was held on March 16, 2015.
- *Payment Limit:* The Government's payment obligation will be limited to an amount available for contract performance in accordance with the provisions of FAR Clause 17.106-1(g).
- *Termination Payment:* In accordance with FAR Clause 17.106-1(h), if the contract is terminated for the convenience of the Government, the Government's obligation shall not exceed the amount specified for contract performance, plus the cancellation ceiling.

5. **OPTIONS:**

The base contract is 48 months with eight (8) base/core tasks and five (5) optional tasks. At the Department's discretion, the optional tasks and renewal option period may be exercised.

6. **CONGRESSIONAL NOTIFICATION:**

The total cancellation ceiling amount is anticipated to be less than \$12.5 million; therefore, Congressional notification is not required. The IGCE for the contract is \$34,755,809 (Base Contract Tasks \$32,088,744, Optional Tasks \$2,408,337, One Acquisition Solution for Integrated Services (OASIS) Contract Access Fee \$258,728).

7. **CONTRACT CLAUSES:**

The contract will include all clauses required under FAR 17-109, including FAR Clause 52.217-2, Cancellation under Multi-year Contracts.

8. **RECOMMENDATION AND APPROVAL:**

In accordance with FAR 17.105-1, it is determined that:

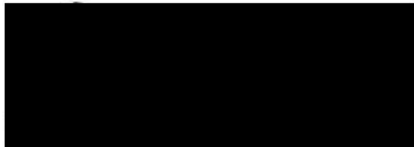
- 17.105-1(a)(1) - *The need for the services is reasonably firm, and continuing over the period of the contract.* The contractor shall collect data as part of the Middle Grades

Longitudinal Study of 2017 (MGLS:2017) based largely on administrative data and student, parent and teacher interviews. Historical data supports that continuity is needed over 48 months. MGLS:2017 is similar to NCES's other school-based longitudinal studies in this respect. The other similar studies include: ECLS-K, ECLS-8, ECLS-K:2011, HSLS:2009, ELS:2002, followed through 2012; NELS:88, followed through 2000; HS&B, followed through 1986 (senior cohort) and 1992 (sophomore cohort); and NLS:72, followed through 1986. The contractor shall prepare MGLS:2017 data for dissemination through NCES data tools, restricted-use files, and reports.

- 17.105-1(a)(2) - A Multi-year contract will serve the best interests of the United States by encouraging fit and open competition OR promoting economy in administration, performance, and operation of the agency's programs. The use of a multi-year contract is needed and will broaden and encourage competition on General Service Administration's (GSA) One Acquisition Solution for Integrated Services (OASIS) Indefinite Quantity Indefinite Delivery Contract, as offerors will have the opportunity to compete for the entire longitudinal study. The use of other special contracting methods may limit competition through constraints on the amount of tasks/activities executed and funding constraints such as, fully funding at time of award with no possibility of annual program funding. Additionally, administrative burden is reduced with the awarding one multi-year contract resulting in the MGLS data collection having continuity in operations and performance.

Therefore, the Contracting Officer recommends that a multi-year contract is necessary and appropriate for this acquisition.

RECOMMENDED:



Contracting Officer

6/1/15 /J-/c9DtS

Date

ENDORSED:

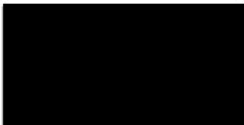


Education Sciences Contracts Group  
Chief of the Contracting Office (f/-r!,,h 11..f\_:j)

5/28/2015

Date

APPROVED:



Head of the Contracting Activity

5/28/15

# Attachment 5

## Price, Roscoe

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**From:** [REDACTED]  
**Sent:** Friday, September 23, 2016 8:47 AM  
**To:** OCFO Contract Review Board  
**Cc:** [REDACTED]  
**Subject:** RE: GM Review ED-IES-13-C-0022 Mod 0009 (ModChg)-NAEP WTDOM

[REDACTED],

Thanks for your feedback. The NAEP and the RELSs were the only two contracts that were authorized to continue with incremental funding of non-severable work after the multiple round-table discussions with OGC, CAM, the SPE's office, IES, etc. after the most recent GAO case was released regarding funding service contracts. Specifically, OGC believed that there was either a loophole in the NAEP legislation that allowed us to continue funding the requirement as-is and/or an argument that our interpretation of the legislation at the time of award in combination with our previous practice of funding service contracts incrementally (prior to the last GAO finding) would be our justification for continuing to fund NAEP incrementally. As a result of these meetings, it was noted that a multi-year authority was approved, and the recommendation was to incrementally fund NAEP by program/contract year using current year funding.

[REDACTED]

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**From:** OCFO Contract Review Board  
**Sent:** Thursday, September 22, 2016 2:52 PM  
**To:** [REDACTED]  
**Cc:** [REDACTED]  
**Subject:** RE: GM Review ED-IES-13-C-0022 Mod 0009 (ModChg)-NAEP WTDOM

The CRB has completed its review and has one comment that must be addressed.

This contract should have been written in a way such that the data collection for each fiscal year was broken out separately, starting at some specific point in time and ending at another so that these could be funded separately from the whole. B.4 and the way that funding is provided on the modification does just the opposite. I couldn't find specifics on the deliverables and their start and end dates, even broken out in large chunks.

This modification utilizes FY16 funds. These funds can be utilized to fund a change to the contract, but not to fund the original requirement which was issued in FY13. The contract is written as a whole, specifically stating that the ceiling of the base period is \$51M in B.4 and funding on the modification simply identifying cost reimbursement tasks as what is funded.

Incremental funding does not change when the bona-fide need of a requirement is nor the fact that all funding for the requirement must come from the year the bona-fide need is identified. In this case, FY13. Each increment should come from FY13 funds unless there is specific language in our appropriation for this specific requirement providing funds in a different year. I have been looking, but have not found it yet.

If you have any questions, please contact me, but you should also seek guidance from OGC.

Respectfully,

[REDACTED]

[REDACTED] CPCM, PMP  
U.S. Department of Education  
Office of the Chief Financial Officer  
Contracts and Acquisition Management  
550 12th Street, SW, Suite 7172  
Washington, DC 20202  
Work (202) 302-0582

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**From:** [REDACTED]  
**Sent:** Thursday, September 22, 2016 10:47 AM  
**To:** OCFO Contract Review Board  
**Cc:** [REDACTED]  
**Subject:** FW: GM Review ED-IES-13-C-0022 Mod 0009 (ModChg)-NAEP WTDOM

CRB,

The attached review is ready for review. The electronic file is located at the link attached below. Please let us know if you have any questions and thanks in advance for your review.

[REDACTED]

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**From:** [REDACTED]  
**Sent:** Friday, September 16, 2016 3:00 PM  
**To:** [REDACTED]  
**Cc:** [REDACTED]  
**Subject:** GM Review ED-IES-13-C-0022 Mod 0009 (ModChg)-NAEP WTDOM

[REDACTED],

The subject action is ready for GM review. As with the SDC mod, this mod incorporates changes as a result of the shift to digital based assessments.

<I:\All Contracts\FY11 - FY15\2013 Contract Files\ED-IES-13-C-0022 NAEP WTDOM\Section II\Mod 0009 PWS change>

Thanks,