

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Community Medical and Dental Care, Inc.
Docket No. A-13-72
Decision No. 2556
January 30, 2014

DECISION

Community Medical and Dental Care, Inc. (CMADC) appealed a determination by the Health Resources and Services Administration (HRSA) disallowing \$398,482 in costs CMADC charged to a HRSA grant award. The award was made to CMADC for “Physical Plant and IT Capacity Expansion” under the Capital Improvement Program (CIP) authorized by the American Recovery and Reinvestment Act of 2009 (ARRA). Based on documentation CMADC submitted to HRSA in response to an audit report, HRSA determined that CMADC had expended: (1) \$23,050 of CIP funding for exterior building work without receiving required State Historic Preservation Office approval; (2) \$3,210 of CIP funding for unallowable routine maintenance; (3) \$291,380 of CIP funding for unallowable employee salaries and fringe benefits; (4) \$34,564 for a construction project that was not completed before the project period end date; and (5) \$46,278 of CIP funding for an Electronic Dental Record (EDR) system and phone equipment that HRSA did not approve.

For the reasons stated below, we uphold the disallowance in part and reverse it in part.

Background

1. The CIP award

CMADC is a non-profit, community-based organization that operates health centers in Monsey and Spring Valley, New York. CMADC provides primary and specialty care services (including dental services) to medically underserved individuals and is funded primarily by patient service revenues, federal grants, and state funds.

HRSA is an operating division (OPDIV) of the federal Department of Health and Human Services (HHS) that, among other things, administers certain grants to health centers. Title VIII of ARRA authorized (1) \$500 million for grants to health centers authorized under section 330 of the Public Health Service Act; and (2) \$1.5 billion for grants for

construction, renovation, and equipment, and for the acquisition of health information technology systems, for health centers receiving operating grants under section 330, as amended. Consequently, HRSA awarded grants to such health centers for purposes such as enabling grantees to increase services at existing sites and to address spikes in demand to serve uninsured persons; enabling grantees to carry out alteration/repair/renovation projects, construction projects, health information technology and other equipment purchases; and supporting grantees (selected through a competitive review) to address significant and pressing capital improvement needs, including modernization, renovation, and construction. HRSA Br. at 2.

CMADC submitted an application for ARRA funding in 2009 for activities that included the renovation of existing space at its Monsey, New York facility, expansion into additional space in the same building, and information technology (IT) improvements. On June 25, 2009, HRSA issued a CIP award in the amount of \$789,385 to CMADC for “Physical Plant and IT Capacity Expansion” for the period from June 29, 2009 through June 28, 2011 (which was both the budget period and the project period for the award). HRSA Ex. 2. CMADC subsequently requested and received HRSA’s approval for a no-cost extension of the budget/project period to March 31, 2012, with a revised budget. HRSA Ex. 8; CMS Ex. 3, App. at 2.

2. *The general terms and conditions of the award*

The Notice of Award (NoA) for the grant provided that the award was subject to various terms and conditions, including grant administration requirements at 45 C.F.R. Part 74, the requirements of the *HHS Grants Policy Statement* applicable to the grant based on recipient type and purpose and award, and other terms and conditions specific to the grant award, to the CIP program, or to ARRA awards. HRSA Ex. 2. at 2-3.

Part 74 requires a recipient of federal funds to have a financial management system that provides “[r]ecords that identify adequately the source and application” of funds for grant activities, as well as “[a]ccounting records, including cost accounting records, that are supported by source documentation.” 45 C.F.R. § 74.21(b)(2), (7). Non-profit organizations such as CMADC must also comply with the cost principles in Office of Management and Budget Circular A-122, now codified at 2 C.F.R. Part 230. Section A.2.g. of Appendix A to Part 230 provides generally that costs must be reasonable, allocable to the award, and adequately documented. Based on these requirements, the Board has repeatedly held that a “grantee has the burden of documenting the existence and allowability of its expenditures of federal funds.” *Suitland Family & Life Dev. Corp.*, DAB No. 2326, at 2 (2010) (citation omitted). “Once a cost is questioned as

lacking documentation, the grantee bears the burden to document, with records supported by source documentation, that the costs were actually incurred and represent allowable costs, allocable to the grant.” *Northstar Youth Servs., Inc.*, DAB No. 1884, at 5 (2003).

We also note that the NoA here specifically provided that, to maximize the transparency and accountability of funds authorized under ARRA and as required by Part 74, “recipients agree to maintain records that identify adequately the source and application of ARRA funds.” HRSA Ex.2, at 5.

For some types of costs, a specific type of documentation is required. For example, for salaries and wages to be allowable under an award, grantees must maintain personnel activity reports that reflect the distribution of activity of each employee whose compensation is charged, in whole or in part, directly to federal awards. 2 C.F.R. Part 230, App. B, § 8. This requirement reflects the more general principle that a “cost is allocable to a particular cost objective, such as a grant, contract, project, service, or other activity, in accordance with the relative benefits received.” *Id.*, App. A, § A.4. For purposes of allocating costs, the cost principles distinguish between direct costs (“those that can be identified specifically with a particular final cost objective, i.e., a particular award, project, service, or other direct activity of an organization”) and indirect costs (“those that have been incurred for common or joint objectives and cannot be readily identified with a particular final cost objective”). *Id.*, App. A, §§ B.1. and C.1.

Indirect costs are categorized as “Administration” or “Facilities” costs. “Operation and maintenance” expenses are a type of “Facilities” cost and are generally allocated among benefitting cost objectives through use of an indirect cost rate, although they may in some circumstances be charged on a square footage or other allocation basis. *Id.*, App. A, § D.

In addition, to charge some types of costs to an award, a grantee must have “prior approval,” which means “securing the awarding agency's permission in advance” *Id.*, § 4.b. “Generally this permission will be in writing, but “[w]here an item of cost requiring prior approval is specified in the budget of an award, approval of the budget constitutes approval of that cost.” *Id.* The NoA for the CIP award specified that requests for prior approval “must be submitted to the Grants Management Officer (GMO)” and that “[o]nly responses signed by the GMO are considered valid.” HRSA Ex. 2, at 10.

Below, we set out additional or more detailed terms and conditions of the CIP award to CMADC that apply to specific cost items that HRSA disallowed.

3. *The audit and disallowance*

To determine whether CMADC was complying with federal financial requirements, the HHS Office of the Inspector General (OIG) conducted an audit of CMADC covering the period from March 2008 through June 28, 2011. The OIG auditors found generally that—

CMADC did not meet select HRSA financial performance measures. In addition, CMADC claimed Federal grant expenditures totaling \$2,999,659 that was not separately accounted for. Specifically, CMADC commingled expenditures in its accounting system with other operation payments and did not maintain personnel activity reports for employees who worked on HRSA grants. Therefore, we could not determine whether these costs were allowable. CMADC claimed these costs because of deficiencies in its internal controls and because CMADC officials were unaware of Federal requirements relating to (1) the accounting of Federal expenditures and (2) maintaining personnel activity reports that reflect the distribution of activity for each employee whose compensation is charged, in whole or in part, directly to Federal awards.

HRSA Ex. 3, at 4. Of the \$2,999,659 in costs questioned by the OIG, \$575,652 related to the CIP award.

In December 2012, HRSA sent a copy of the audit report to CMADC and requested a corrective action plan detailing CMADC's actions to correct the deficiencies identified in the report. HRSA Ex. 4. CMADC responded in a letter dated January 10, 2013. HRSA Ex. 5. HRSA then informed CMADC more specifically about what documentation it expected CMADC to provide, and CMADC responded by submitting a corrective action plan and documentation that included "copies of invoices, receipts, contracts, purchase orders, position descriptions, and other explanatory materials." HRSA Br. at 4.

After reviewing the documentation, HRSA determined that CMADC had provided documentation to support \$177,170 of the \$575,652 in questioned costs, but HRSA disallowed the remaining questioned costs on the grounds stated on page one above. CMADC appealed, disputing HRSA's findings with respect to each of the five categories of costs that HRSA disallowed.¹ We address each of these five categories in our analysis below.

¹ As HRSA states on page 7 of its brief, Board review of a HRSA disallowance is de novo. Thus, contrary to what HRSA suggests on page 15 of its brief, the Board does not simply review HRSA's determination to determine whether it is reasonable and supported by substantial evidence.

Analysis

A. We uphold the disallowance of \$23,050 of CIP funding for the HVAC system and window tinting.

HRSA disallowed \$23,050 of CIP funding HRSA found was for the costs of exterior building work and a HVAC system that CMADC incurred without receiving required State Historic Preservation Office (SHPO) approval. On appeal, CMADC argues that no such approval was required. CMADC acknowledges that it spent \$18,250 “for the replacement of a non-working air conditioning unit on the roof above the newly rented and renovated space.” Notice of Appeal at 1. According to CMADC, however, it was not obligated to obtain SHPO approval. CMADC asserts that there “was no change in the outer appearance of the building” because there “was previously an air conditioning unit on the roof” and because “the air conditioning unit is not visible from the street.” *Id.* In addition, CMADC charged the award \$4,800 for window tinting, but asserts that no SHPO approval was needed because “[a]ll tinting was performed on the inside of the windows in lieu of window treatment such as shades or curtains and no exterior work was done on these windows.” *Id.*

In response, HRSA cited to the NoA as requiring CMADC to consult **with HRSA** about whether SHPO approval was required. HRSA explained that federal agencies have a responsibility to ensure that grantees meet the requirements of the National Historic Preservation Act (NHPA). HRSA Br. at 8. Thus, the NoA provided that, within 60 days of the award issue date, CMADC should “[p]lease consult with your Project Officer to determine if a SHPO consultation is required for your proposed Alteration/Repair/Renovation Project” and “[i]f it is determined that a consultation is necessary, funds in this award cannot be drawn down from the Payment Management System (PMS) until the requirements of Section 106 of the Historic Preservation Act are met.” HRSA Ex. 2, at 2. The NoA also stated that the funds were restricted and could not be drawn down until the grantee satisfied certain requirements, including the need to consult with “your Program Contact” to determine if the scope of the proposal requires “additional compliance” with section 106 of the NHPA. *Id.* at 3. According to HRSA, CMADC failed to check with HRSA officials about whether the improvements at issue needed approval from the SHPO. HRSA Br. at 8-10.

HRSA also contends:

- As part of the assurances the grantee agrees to in the standard application form as a condition of its award, the grantee agrees that it “[w]ill assist the awarding agency in assuring compliance with Section 106 of the NHPA of 1966, as amended (16 U.S.C. § 470), EO 11593 (identification and protection of historic properties), and the Archeological and Historic Preservation Act of 1974 (16 U.S.C. §§ 469a-1 et seq.).”

- The grant application contains a section for “Historic Preservation Considerations” but CMADC did not indicate a “Yes” to any of the relevant considerations. (CMADC checked the “No” box in response to the questions in that section, including questions about whether the project facility was 50 years or older, whether the facility was architecturally, historically, or culturally significant, and whether the project included any renovation/modification to the exterior of the facility. HRSA Ex. 12, at 17.)
- Pursuant to the regulation at 36 C.F.R. § 800.1, HRSA was required to initiate section 106 consultation, with approval by the SHPO, based on information that CMADC was required to provide to HRSA in a timely manner, but did not.

HRSA Br. at 8-9.

In support of its position that consultation with and approval **by the SHPO** was required prior to the installation of the air-conditioning system on the roof and the tinting of the windows, HRSA relies on the following:

- Section 106 of the NHPA (16 U.S.C. § 470f), which provides that the “head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State . . . shall, prior to the approval of the expenditure of any Federal funds on the undertaking . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [and] shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking.”
- Guidance HRSA provided to grantees regarding what was considered to be an “undertaking” under section 106, indicating that the term includes: “1) all new construction and expansion projects; 2) alteration and renovation projects where exterior changes to the building façade or surroundings may be made (including roof, windows, and parking lots), and 3) projects where interior renovations may be made to a building that is over fifty (50) years old, or is historically, architecturally, or culturally significant.

HRSA Br. 8-9.

HRSA asserts that CMADC “now acknowledges that work involving the exterior of the building was in fact undertaken” and that this work was a change in the scope of the project (since the application indicated that no exterior work would be done) for which prior approval by HRSA was required, but not obtained. *Id.* at 9.

We note that, while CMADC acknowledged that the air-conditioning unit was put on the building roof, CMADC did not concede that this was an “exterior change to the building façade or surroundings” under the NHPA guidance. Instead, CMADC asserts that placement of the new air conditioning unit on the roof was not a change at all since the new unit simply replaced a unit that was already there. Also, CMADC does not concede that the window tinting was an exterior change to the building façade, arguing instead that it was merely an interior change. Thus, contrary to what HRSA suggests, CMADC does not concede that it did exterior work to the building requiring SHPO approval. We also note that HRSA does not assert that the building is over fifty years old or is historically, architecturally, or culturally significant or otherwise included in or eligible for inclusion in the National Register of Historic Places. According to the *HHS Grants Policy Statement* at I-20 to I-21, consultation pursuant to section 106 of NHPA is required “[i]f the undertaking will have an adverse effect **on a historic property**,” and the purpose is “to develop either a memorandum of agreement or a programmatic agreement detailing the steps necessary to avoid, minimize, or mitigate the adverse effects.” (Emphasis added.)

We need not decide here, however, whether SHPO approval was required or whether the project was an “undertaking” that would have an adverse effect on a historic property that required HRSA or CMADC to initiate the consultation process under section 106 of the NHPA. Because some expertise is required in making those judgments, the terms of the grant award required CMADC to consult with HRSA regarding whether any additional steps to ensure NHPA compliance were required. CMADC does not assert that it engaged in any such timely consultation, with either the Project Officer or the Program Contact. CMADC’s failure to comply with the award terms by consulting with HRSA about whether its plans were subject to the section 106 process jeopardized HRSA’s ability to ensure compliance with the NHPA.

Accordingly, we uphold the disallowance of the \$23,050 for the HVAC system and window tinting.

B. We reverse the disallowance \$3,210 of CIP funding HRSA said was for cleaning services that were routine maintenance.

HRSA disallowed \$3,210 of CIP funding that HRSA found was expended for cleaning services that constituted unallowable routine maintenance.

CMADC argues that the total amount of the invoices from Cleaning Depot for the services is \$2,680.65 and not \$3,210. Notice of Appeal at 1. CMADC explains:

The discrepancy apparently arose because invoice # 1463 had an invoice amount of \$295 and a running balance of \$824.15 instead of \$295, overstating the total amount for cleaning services by \$529.35.

Id. at 1. In support, CMADC included in Appendix A to its Notice of Appeal four invoices from Cleaning Depot with dates ranging from December 16, 2010 through January 31, 2011. According to CMADC, the costs were not for routine maintenance, as HRSA found.

With respect to the **amount** charged for cleaning services, HRSA responds:

Based on the invoices submitted by CMADC, HRSA identified a total of \$3,210 in documentation related to the cleaning services. See HRSA Exhibit 7, lines 9-12. HRSA maintains that this amount is accurate, as there is no evidence showing the \$3,210 is overstated. Therefore, all of the costs CMADC expended for cleaning services should be considered unallowable.

HRSA Br. at 11.

A comparison of the spreadsheet on which HRSA relies with the actual invoices in Appendix A to the Notice of Appeal indicates that HRSA's calculation included the amount of \$824.15 from invoice # 1463. As CMADC asserts, that invoice identifies the \$824.15 as the "Customer Total Balance" as of January 31, 2011 and the amount due from that invoice as only \$295. HRSA points to nothing showing that CMADC in fact charged to the CIP award payments to Cleaning Depot in excess of \$2,680.65.

With respect to whether the expenditures for the services rendered by the Cleaning Depot are **allowable**, HRSA states:

The Funding Opportunity Announcement (FOA) for all CIP grants, updated May 28, 2009, clearly states that Operating costs are not allowable expenses under CIP grants. Appendix 3 of the FOA describes Operating costs as including "[i]ndirect expenses such as general department operations and maintenance." Cleaning is also considered to be a routine operational cost under the section 330 grant guidelines, and the allowable cost principles under the section 330 grant apply to the CIP grant as well.

HRSA Br. at 10-11 (footnote omitted, emphasis in original).

CMADC asserts that the cleaning in question was not routine maintenance, but was related to the construction and renovation. Notice of Appeal at 2. CMADC explains:

The existing space that was re-modeled underwent plastering of walls, painting, sizing, cutting and installing new trim on walls and doors, removal of old ceiling tiles and tracks and replacement of new ceiling tiles and tracks, replacement of all lighting fixtures with energy savings fixtures, and restructuring locations of

heating and air conditioning ducts for energy savings. As a result of the construction work done in these rooms, we had to have the floors professionally stripped and waxed and the waiting room chairs professionally cleaned. Without the renovation taking place, we would not have needed this service.

Id. CMADC also argued that the Department of Health and the Occupational Health and Safety Administration would “never allow us to occupy the altered\renovated space before removing debris, dust residue from sheetrock, painting, etc.” and would “consider that a thorough detailed cleaning of floors and chairs would be a mandated part of the renovation before the site is used for patient services.” Reply Br. at 2.

HRSA does not cite to any specific guideline or cost principle in support of its apparent position that all costs for cleaning services are considered routine maintenance expenses that must be treated as indirect costs. Although the NoA does not specifically make section 330 grant guidelines applicable to the CIP grant, the Funding Opportunity Announcement for CIP grants said that section 330 grant guidelines would apply to a CIP award. HRSA Br. at 10 and n.5 (website address for the announcement). We could find no guideline that addresses cleaning services at that website given for the section 330 guidelines in the announcement, however. Moreover, although the cost principles for non-profit organizations apply to both section 330 grants and to CIP grants, as HRSA suggests, we see nothing in those cost principles that precludes a grantee from ever charging the types of services at issue here as a direct cost of a project.

Those cost principles define “operation and maintenance expenses” as “those that have been incurred for the administration, operation, maintenance, preservation, and protection of the organization's physical plant” including “expenses normally incurred for such items as: janitorial and utility services; repairs and ordinary or normal alterations of buildings, furniture and equipment; care of grounds; maintenance and operation of buildings and other plant facilities” 2 C.F.R. Part 230, App. A., § D.3.b.(3).

The services at issue are described as follows on the invoices from Cleaning Depot (which indicates the company provides “New Residential Construction Cleaning”):

- “Heavy Duty Stripping & Scrubbing Applying Sealer & Applying Super High Gloss, moving furniture in & out. Exam Room #2 and Exam room #5 dental room #1 Hallways Lobbys Lunch room. Total of 1000 sq ft.”
- “Cleaning and Shampooing 56 office chairs.”
- “Heavy Duty Stripping & Scrubbing Applying Sealer & Applying Super High Gloss moving furniture & toys in & out. In “Mentel (sic) depot. Approximate Total of 1230 sq ft 12/24/10”

- “Cleaning and Shampooing 22 office chairs.”
- “Bathroom tiles washed and scrubbed Sanitizing and disinfecting in main lobby”
- “Heavy Duty Stripping & Scrubbing Applying Sealer & Applying Super High Gloss, moving furniture in & out. 3 Exam rooms in “Dental depot” Total of 300 sq ft. 12/27/10”
- “Heavy Duty Stripping & Scrubbing Applying Sealer & Applying Super High Gloss, moving furniture in & out. Exam room #1 Plus front office . . . Reception Area . . . Swipe Room . . . Total of 300 sq ft.
- “Windows Cleaned Outside”
- “Cleaning machines in Dental depot”

Notice of Appeal, App. A.

The Monsey facility was rented, rather than owned, by CMADC. HRSA Ex. 12. Neither the auditors nor HRSA made any specific finding that these costs were not incurred at the completion of various stages of the renovation project and instead were incurred according to the schedule under which CMADC (or its landlord) ordinarily would perform the type of activities described on the invoices as part of routine maintenance. Nor did the auditors or HRSA find generally that the services at issue here were not readily identifiable to the renovation of the existing space, as CMADC contends. Instead, HRSA relies for the disallowance only on its description of the services as “cleaning.” We recognize that routine maintenance could in some circumstances include services of the type described on the invoices from Cleaning Depot. In the particular context here, however, we find that the documentation submitted by CMADC is sufficient to establish that the expenditures were not for routine janitorial services or other cleaning or maintenance costs that CMADC would normally incur as part of its operations in order to maintain the rented facility in good condition and that would ordinarily be charged as indirect costs. Instead, the services are readily identifiable as direct costs of the CIP project since the need for the services was created by the activities that CMADC describes related to renovation of the existing space and by the nature of the facility as a healthcare provider, rather than by normal wear and tear on the floors or by the need for routine, periodic cleaning of the furniture, bathrooms, or equipment.

Accordingly, we reverse the disallowance of the \$3,210 that HRSA said was for cleaning services.

C. We uphold the disallowance of \$291,380 of CIP funding for unallowable employee salaries and fringe benefits.

HRSA disallowed \$291,380 of CIP funding for employee salaries and fringe benefits and associated indirect costs. HRSA found that CMADC failed to obtain required prior approval to use its own staff for project management, rather than hiring a Project

Manager. HRSA's disallowance letter stated that a "change in scope to include the use of in-house staff was never approved." HRSA ltr. of Apr. 19, 2013, at 3.

In response to CMADC's question about what authority HRSA had for requiring prior approval, HRSA quoted the following provision from the section on Construction and Modernization of Facilities in the *HHS Grants Policy Statement*:

If the grantee's own construction and maintenance staffs are used in carrying out modernization activities (i.e., force account), the associated costs are allowable provided the grantee can document that a force account is less expensive than if the project were competitively bid and can substantiate all costs with appropriate receipts for the purchase of materials and certified pay records for the labor involved. This requires OPDIV prior approval.

HHS Grants Policy Statement at II-100. As used in the *HHS Grants Policy Statement*, the term "modernization" includes alteration and renovation. *Id.* at II-98.

HRSA asserted that the CIP application that CMADC submitted to HRSA on June 2, 2009, "clearly indicates that it planned to hire an external contractor to complete the CIP project." HRSA's Response to Request for Identification of Requirement at 3. Specifically, HRSA's response said, "under the 'Timeline' for the project, CMADC stated that the construction bidding would be completed and a contractor would be selected by October 23, 2009." *Id.* HRSA also pointed out that CMADC's application did not mention that CMADC was considering using in-house staff to complete the project construction. Therefore, HRSA concluded, HRSA's decision to disallow \$291,380 in costs for employee salaries and fringe benefits that were used to pay for in-house labor without prior approval by HRSA is "justified and supported by the grant requirements." *Id.*

CMADC contests HRSA's assertion that CMADC needed to have requested a change in scope to use in-house labor for the CIP project. According to CMADC, even though the proposal stated that CMADC would look for a general contractor, it also referred to the fact that CMADC intended to use its own staff "to perform the work." CMADC Br. at 1. CMADC points out that the "Project Management" section of the grant application stated: "The project manager will work with the project architect, contractors, and equipment suppliers, and will be the point of contact for all contractual matters relating thereto." *Id.* CMADC asserts:

This is exactly what our in-house person did. He worked with the contractors such as plumbers, electricians, carpenters, painters, etc., and his staff, was on-site at all times overseeing the project, and dealt with all the vendors for equipment and construction supplies. He ensured that the work did not disrupt our operation and planned each task of each contractor around the health center schedule.

Id.

We agree with HRSA that the CIP grant application indicated that the construction work and management of the construction would be done by outside contractors, not in-house staff. CMADC takes the statement from the “Project Management” section of the application out of context. That section states:

A dedicated project team has been assembled to develop and implement this major undertaking. Each team member brings distinct and purposeful skills to the project and the team includes the following individuals who will meet regularly to monitor all project activities: [M.H.], President and CEO, CMADC [C.A.], Chief Financial Officer, CMADC [C.B], Systems Engineer (MIS)[,] Dr. [J.A.], Medical Director, CMADC Project Manager, CMADC General Counsel, CMADC External Architect Consultant (to be determined)[,] Project Management Consultant (to be determined)[,] Construction Management Consultant (to be determined)[.] The CMADC alteration and renovation project will be under the administrative oversight of a Project Management Consultant, who will perform as the project manager. The project manager will work with the project architect, contractors, and equipment suppliers, and will be the point of contact for all contractual matters relating thereto. The project manager will report to CMADC’s President/CEO, [M.H.]. The CMADC Board of Directors Executive Committee will provide policy oversight for the project with monthly project implementation status reports from [M.H.].

HRSA Ex. 12, at 10. In context, the reference to the “project manager” in the last sentence is clearly a reference to the “Project Management Consultant” who was yet to be determined and who was to “perform as the project manager.”

The application did identify M.H., the President/CEO, as “the individual at the health center who will be responsible for managing this project” under “Contact Information.” *Id.* In context, however, this clearly referred to M.H.’s role in monitoring the project as part of the project team and providing status reports to the Board’s Executive Committee, which is different from the role the application describes for the Project Management Consultant. Neither the proposed budget nor the approved budget contained any line item for salaries and wages. *Id.* at 12; HRSA Ex. 2, at 1.

Moreover, under “Timeline,” CMADC’s application included other steps consistent with use of contracted services, rather than in-house staff. HRSA Ex. 12, at 9. For example, the timeline included “Construction bidding completed, contractor selected – 10/23/09.” *Id.* The use of the singular word “contractor” suggests the selection of a general contractor through a competitive bidding process.

We also note that none of the individuals identified on the salary report that CMADC submitted in support of the costs is M.H. or any other individual specifically identified in the CIP application as a member of the project team that would monitor the project on behalf of CMADC. Instead, CMADC's Chief Fiscal Officer clarified in an email to HRSA that one of the individuals identified on the salary report (J.F.) was the "crew chief and the others were the laborers." HRSA Ex.10, 11th page. Another email from M.H., the President/CEO, refers to "the in-house construction staff for our CIP project." *Id.* at 14th page. In other words, it appears that the salaried individuals were not in a project management role, but were actually carrying out the modernization activities. Thus, CMADC not only needed prior approval for the expenditures, but needed to show that it would be less expensive to use its own staff to do the work than if the project were competitively bid, as originally planned.

HRSA asserts that it learned about CMADC's use of the in-house staff only after CMADC had filed the Bonding Insurance Certification on October 22, 2012, six months after the original project period ended. HRSA Br. at 12, citing HRSA Ex. 9. Even if HRSA should have known from the CIP application that CMADC would incur some costs for its staff involved in the project (despite the zero funding in the budget for salaries and wages), however, we would find the costs to be unallowable.

The audit report found that CMADC staff did not keep time and attendance records to show how much of staff time was spent on activities of its various projects. As mentioned above, such records are required by the applicable cost principles. Specifically, unless a substitute system has been approved in writing by the cognizant agency, a grantee must have a system for supporting distribution of salaries and wages meeting the following requirements:

- (2) Reports reflecting the distribution of activity of each employee must be maintained for all staff members (professionals and nonprofessionals) whose compensation is charged, in whole or in part, directly to awards. . . . Reports maintained by non-profit organizations to satisfy these requirements must meet the following standards:
 - (a) The reports must reflect an after-the-fact determination of the actual activity of each employee. Budget estimates (i.e., estimates determined before the services are performed) do not qualify as support for charges to awards.
 - (b) Each report must account for the total activity for which employees are compensated and which is required in fulfillment of their obligations to the organization.
 - (c) The reports must be signed by the individual employee, or by a responsible supervisory official having first-hand knowledge of the activities performed by the employee, that the distribution of activity represents a reasonable estimate of the actual work performed by the employee during the periods covered by the reports.

2 C.F.R. Part 230, App. B, § 8.m.

CMADC submitted what it says are “certified pay records to account for the CIP funds expended for the in-house labor as required per HHS regulations and page 8 of our grant application that is referenced above.” CMADC Br. at 1. The attached salary report lists salary, wages, and fringe benefit amounts for five individuals for the years 2009 through 2012 for a “Grand Total” of \$344,279.75 and an “Amount Paid by Grant” of \$291,380 (and HRSA Exhibit 11 contains the documents for CMADC’s Payroll Journal supporting the salary amounts listed on the report). Yet, CMADC submitted no documentation showing how it decided what part of those payments was allocable to the CIP award, much less any reports that account for all of the crew chief’s and laborers’ time, as required.

Thus, we conclude that CMADC did not have required approval to use in-house labor for the project and, in any event, did not adequately document the costs of the in-house labor. Accordingly, we uphold the disallowance of \$291,380 charged to the CIP award for the salaries and wages of the crew chief and laborers.

D. We uphold the disallowance of \$34,564 for construction project materials purchased at the end of project period.

HRSA disallowed \$34,564 for construction project materials HRSA found were for a project that was not completed before the project period end date. HRSA found that the invoices submitted by CMADC revealed four separate purchases that took place on March 29, 2012, two days before the end of the extended project period. HRSA Br. at 13, citing HRSA Ex. 7, lines 36-39.

CMADC asserts that the materials were “purchased for the part of the project that the landlord had committed to completing.” Notice of Appeal at 2. CMADC also points out that the “purchase was completed during the [award] period.” *Id.*

HRSA points out that the NoA stated:

These funds are awarded for the two-year project period shown on this [award notice]. . . . Grantees are expected to finalize plans for implementing approved CIP projects consistent with a timeline that will assure that all funds are obligated prior to the project period end date.

HRSA Ex. 2, at 4. In addition, the administrative requirement at 45 C.F.R. § 74.28 provides that, “[w]here a funding period is specified, a recipient may charge to the award only allowable costs resulting from obligations incurred during the funding period” and any approved pre-award costs.

It appears that CMADC did timely **obligate** the funds since CMADC had either received the materials (and been billed for them) or completed the purchase order for the materials before March 31, 2012, the end of the extended project period. The term “obligations” is defined for purposes of Part 74 to mean “the amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period.” 45 C.F.R. § 74.2. But, as HRSA points out, whenever a grantee obligates funds right at the end of a funding period, that action raises a question about whether the costs are allocable to the grant award at issue, that is, whether they benefitted that award.

The only description of the materials that we have is on HRSA Exhibit 7, a spreadsheet apparently prepared by HRSA, which indicates that three of the items were supported by invoices and one by a purchase order. The three items supported by invoices are listed on the spreadsheet as \$10,359.00 for “Affordable – Doors, Windows, Trim,” \$14,066.88 for “Ramapo Lighting and Electric,” and \$3,914 for “H.Hecht – Drywall Materials.” The remaining item is \$6,224.42 for “ACA – Building materials.” HRSA Ex. 7.

CMADC submitted with its request for a no-cost extension of CIP funding a project timeline for expansion into new space. That timeline included the following: “October 31-November 18, 2011: Installation of Doors”; “November 21-December 16, 2011: Sheetrock Installation”; “January 9-January 27, 2012: Installation of lighting, outlets, receptacles, switches”; and “January 30-February 24, 2012: Painting, flooring and trim.” HRSA Ex. 8, 2d page. The only activity planned for the period February 27-March 31, 2012 was furnishing of exam rooms. *Id.* This timeline undercuts CMADC’s assertion that the materials were needed to complete the project. For example, since the timeline called for installation of the lighting in the expanded space to be completed by January 27, 2012, one would have expected that CMADC would have purchased and been billed for the needed lighting materials before the end of March. Yet, CMADC merely asserts that its landlord committed to completing the project, without providing any detail regarding what steps had been completed prior to the end of the project period, as compared to the planned timeline, and what steps had not yet been completed. Nor did CMADC submit any evidence to show that its landlord had in fact committed to complete the planned project and that, in doing so, the landlord did in fact use the materials at issue for the purposes for which the CIP funding was awarded.

Thus, we conclude that CMADC has not sufficiently documented that the materials at issue were allocable to the CIP project that was approved by HRSA. Accordingly, we uphold the disallowance of \$34,564 for construction materials.

E. We uphold the disallowance of \$2,274 for the phone equipment and reverse the disallowance of the \$44,004 of CIP funding HRSA identified as expended for an Electronic Dental Record system that HRSA said it did not approve.

HRSA disallowed \$46,278 of CIP funding, of which it identified \$44,004 as expended for an Electronic Dental Record (EDR) system and \$2,274 for phone equipment. HRSA disallowed the costs on the basis that HRSA did not approve them.

CMADC does not specifically dispute the disallowance of the charge for the phone equipment, but disputes HRSA's determinations that CMADC charged the CIP award \$44,004 for an EDR system and that the system was not approved. Notice of Appeal at 3. CMADC asserts that it charged only \$31,780 to the CIP award for the EDR system (which was related to the Monsey site) and that HRSA erroneously found that \$12,224 related to the Spring Valley site was charged to the CIP award. *Id.* CMADC also asserts that, in its re-budgeting process, it specified an amount for "miscellaneous software and licensing." *Id.* In support, CMADC submitted Appendix B to the Notice of the Appeal, which includes a spreadsheet that CMADC says shows the charge of \$31,780 to the CIP award, and an invoice from Dentrax, with arrows pointing to the items CMADC says it charged to the CIP award. CMADC also submitted as Appendix C to the Notice of Appeal a copy of the Budget Justification, as revised on June 22, 2011, which refers to "miscellaneous software and licensing" as part of the justification for budgeting \$424,548 for Equipment.

According to HRSA, during the re-budgeting process it approved expenditures for an Electronic Medical Records (EMR) system, but not an EDR system. HRSA Br. at 14. HRSA does not explain why it thinks this distinction is critical or provide any other reason for finding the purchase of the EDR software to be outside the scope of the project. Nor does HRSA respond to CMADC's assertion regarding the amount it charged to the CIP award.

Absent any evidence to the contrary, we accept CMADC's explanation that it charged to the CIP award only those amounts it identified on Appendix C as amounts charged to that award, which total \$31,780. We also reject HRSA's claim that those costs were outside the scope of the approved project.

We note that the original application form asked CMADC to identify the "[p]rojected number of providers using the EHR or enhanced HIT system as a result of this project." HRSA Ex. 3, at 8. Thus, the application form used the acronyms for the broader terms "Electronic Health Record" and "Health Information Technology," rather than the more limiting term "Electronic Medical Record." Appendix 1 to the Funding Opportunity Announcement for the CIP program contains definitions and examples of a project for "HIT purchase" and "Certified EHR-related purchase." An HIT purchase could include

software services that are “designed for or support the use by health care entities or patients for the electronic creation, maintenance, access, or exchange of health information” such as “[e]nhancements necessary to interface between HIT/EHR and other electronic systems.” A “Certified EHR-related purchase” refers to “computer software that providers use to track all aspects of patient care.”

In its application for CIP funding, CMADC described itself as providing “primary and oral health care” to residents of Rockland County, New York. HRSA Ex. 3, at 3. CMADC proposed among other things to “upgrade IT support hardware needed to make optimal use of CMADC EHR system (GA Centricity System)” and make productivity enhancements “to the dental program with the adoption of new digital X-Ray system that will be interfaced with the center’s primary care EHR system, GE Centricity.” *Id.* at 11. The project title included “IT Capacity Expansion.” *Id.* at 13. The only use of EMR in the original project application is in the description part of the list of equipment, which describes the following items: “EMR Custom Content, Citrix, Network Oper. Environm” and “EMR Production Servers, Routers, Switches,” both of which are identified by type of equipment as “HIT/EHR.” *Id.* at 11. While the original list of equipment did not specifically include software for dental records, it did include \$85,015 for the “Digital Dental X-Ray Equip w/ 6 Sensors” that the application said would be “interfaced” with the EHR system. *Id.* at 13. The description of the software CMADC purchased included a “two-way” interface with “Medical.” Notice of Appeal, App. B, at 1.

While the budget justification for the extension request referred to purchase of IT equipment for EMR, such as computers, it also separately referred to “miscellaneous software and licensing.” Notice of Appeal, App. C. In addition, CMADC’s description of the project when requesting the extension states that the “project includes purchase of hardware and software for Electronic Health Records (EHR),” rather than limiting the description to EMR, and refers to the need for additional time to “complete whatever purchases need to be made to transition and implement EHR at our facility.” HRSA Ex. 8, at 1. Given HRSA approval of the extension and the general statements about one of the purposes of the CIP awards being to improve IT capacity, CMADC could reasonably think that purchase of the EDR software was within the scope of the approved project.

Accordingly, we reverse the disallowance of \$44,004 for the costs of the dental record software, but uphold the disallowance of \$2,274 for the phone equipment.

Conclusion

For the reasons stated above, we uphold the disallowance of \$351,268 and reverse the disallowance of \$47,214.

_____/s/
Leslie A. Sussan

_____/s/
Constance B. Tobias

_____/s/
Judith A. Ballard
Presiding Board Member