

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

National AIDS Education & Services for Minorities, Inc.  
Docket No. A-11-51  
Decision No. 2401  
July 26, 2011

**DECISION**

National AIDS Education & Services for Minorities, Inc. (NAESM), a non-profit organization based in Atlanta, Georgia, appeals an August 11, 2010 decision by an Agency Review Committee of the Centers for Disease Control and Prevention (CDC) to terminate two cooperative agreements under which NAESM received federal funds for human immunodeficiency virus (HIV) prevention activities. CDC, an organization within the U.S. Department of Health and Human Services (HHS), terminated the cooperative agreements based on a finding that NAESM had materially failed to comply with the agreements' terms and conditions.

As we discuss below, the record substantiates CDC's finding that NAESM materially failed to comply with the terms and conditions of the cooperative agreements. That failure is a sufficient ground for termination under the applicable regulations. We therefore sustain CDC's decision to terminate NAESM's cooperative agreements.

The record for our decision includes: (1) NAESM's February 23, 2011 notice of appeal and attached documents, designated by the Board as Appellant Exhibits (App. Exs.) 1 through 19; (2) an April 18, 2011 letter (with attachment) from NAESM to the Board and designated as Appellant Exhibit (App. Ex.) 20; (3) CDC's May 18, 2011 response to the notice of appeal (CDC Response); (4) CDC Exhibits A through N (attached to the CDC Response); and (4) NAESM's June 3, 2011 reply to the CDC Response (NAESM Reply).

**Legal Background**

A non-profit organization (such as NAESM) that receives federal financial assistance pursuant to an HHS grant, cooperative agreement, or other "award" is subject to the requirements in Part 74 of title 45 of the Code of Federal Regulations.<sup>1</sup> 45 C.F.R. § 74.1;

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<sup>1</sup> The term "award" is defined in the regulations to mean "financial assistance that provides support or stimulation to accomplish a public purpose." 45 C.F.R. § 74.2. "Awards include grants and other agreements in the form of money or property in lieu of money, by the Federal Government to an eligible recipient." *Id.*

*Vance-Warren Comprehensive Health Plan, Inc.*, DAB No. 2180, at 2 (2008). The regulations in Part 74 impose on the award recipient various financial, reporting, record-keeping, cash management and other administrative requirements and standards. 45 C.F.R. Part 74, subparts B-E. Those regulations also authorize the awarding agency to terminate an award if the “recipient materially fails to comply with the terms and conditions of [the] award, whether stated in a Federal statute or regulation, an assurance, an application, or a notice of award[.]” 45 C.F.R. § 74.62(a)(3).

The Board is authorized to hear appeals of certain final, written decisions concerning discretionary project grants or cooperative agreements (including a decision to terminate an award for failure to comply with its terms and conditions). 45 C.F.R. Part 16, Appendix A, ¶ C(a)(2).

### **Case Background**

During federal fiscal year 2009 (October 1, 2008 through September 30, 2009), NAESM received federal funding for HIV prevention activities pursuant to three cooperative agreements. *See* CDC Ex. E. (A cooperative agreement is a type of federal award in which the awarding agency has “substantial involvement” in carrying out the funded project. *See* 31 U.S.C. § 6305(2).) According to an independent auditor’s report, CDC funds constituted 70 percent (totaling almost \$1 million) of NAESM’s revenue for fiscal year 2009.<sup>2</sup>

For ease of reference, we refer to NAESM’s cooperative agreements using the CDC program announcement numbers under which the agreements were issued: NAESM’s first cooperative agreement, number U65-PS423706-05, was issued under CDC program announcement 04-019 and will be referred to as the “04-019 award”; the second agreement, number U65-PS423843-05, was issued under CDC program announcement 04-064 and will be referred to as the “04-064 award”; and the third, number U22-PS000473-03, was issued under CDC program announcement 06-618 and will be referred to as the “06-618 award.” (Only the 04-064 and 06-618 awards were terminated by CDC; the 04-019 award expired by its own terms prior to CDC’s termination decision.)

The record shows that on July 16, 2009, CDC notified NAESM by letter that it would make a site visit to NAESM’s Atlanta office in order to “conduct a financial business management review of [NAESM’s] financial management systems and to evaluate and discuss programmatic activities” related to its cooperative agreements. CDC Ex. C.

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<sup>2</sup> An independent audit report submitted by NAESM indicates that NAESM recognized \$983,515 in revenue from CDC for fiscal year 2009, while total annual “support and revenue” for that year was \$1,436,726. App. Ex. 19 (“Independent Auditor’s Report” issued by Forrestall, Galeano & Li, C.P.A., L.L.C., pages 2 and 9).

CDC attached to its July 16 letter a list of various types of documents – including accounting records, bank and credit card statements, documentation of expenditures, and Board of Directors minutes – that it wanted to review during the site visit. *Id.*

CDC performed the site visit on July 28-30, 2009. CDC Ex. A. A report of the July 2009 site visit entitled “NAESM Visit, Preliminary Results” (Preliminary Report) indicates that CDC’s reviewers were unable to obtain or copy certain documents during the visit, including bank and credit card statements, Board of Directors minutes, indirect cost data, documentation supporting the reasonableness of expenditures on office space (“occupancy costs”), and “back up support” for “draw downs” of federal cash during November 2008, December 2008, February 2009, and April 2009. *Id.* In addition, the Preliminary Report states that NAESM provided “redacted” personnel information. *Id.* The Preliminary Report also cites various “questionable disbursements” for travel and other purposes and further notes that NAESM failed to provide evidence that its Board of Directors had authorized certain “major changes,” including the naming of Rudolph Carn (who is representing NAESM in this appeal) as its Chief Executive Officer, the opening of an office in Brooklyn, New York, and salary increases for Mr. Carn and another employee. *Id.* NAESM did not seek or obtain CDC’s approval of these actions, according to the Preliminary Report. *Id.*

A second report relating to the July 2009 site visit, entitled “Site Visit Questionnaire for Evaluation of Financial Management Internal Controls,” indicates that CDC was given “restricted access to records” during that visit. CDC Ex. B ¶ A (bottom of page). According to the questionnaire, as a result of the access restrictions, CDC was unable to determine whether NAESM had adequate accounting, timekeeping, personnel, cost, and budgetary controls to ensure that federal funds were not misspent. *Id.* ¶¶ A, C.2, C.3, C.5-C.9, D.6, D.8, E.2, G.1-G.3.

On August 3, 2009, CDC notified NAESM by letter that it was being placed on “restricted payment status,” which meant that NAESM was required to seek CDC’s prior approval to draw down award funds from its account with HHS’s Payment Management System. CDC Ex. D. CDC indicated that the payment restrictions were a response to NAESM’s alleged noncompliance with 45 C.F.R. § 74.53(e), which provides that an awarding agency has “the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents.” *Id.* Under the payment restrictions, NAESM was obligated to justify its drawdown requests with monthly payment vouchers supported by budget plans, accounting records, and other documents. *Id.*

On August 13, 2009, four CDC employees, including the Grants Management Officers (GMOs) responsible for overseeing the cooperative agreements, met with NAESM employees, including Mr. Carn, to discuss the July 2009 site visit, the requirements

associated with its restricted payment status, and other matters of concern to NAESM. CDC Ex. F at 6.

On September 7, 2009, Mr. Carn sent a letter to CDC in which he recounted his version of recent events, asserted that certain CDC employees were unfairly “trying their best to close our agency,” and asked CDC to “clarify” the regulations or policies upon which it relied and the reasons for its information requests and decision to place it on restricted payment status. CDC Ex. F. Mr. Carn acknowledged in his September 7 letter that he had received an email from GMO Cynthia Pressley which indicated that no federal funds were available under two of NAESM’s cooperative agreements. Mr. Carn informed CDC that “[b]ecause of limited resources as a result of this situation, I will have no alternative but to temporarily close [NAESM] for a period of about weeks [sic] until we have resolved the issues at hand.” *Id.*

On September 15, 2009 and October 7, 2009, CDC conducted two additional site visits in response to its concern that NAESM had halted its federally funded activities. CDC Ex. I at 13. According to CDC, during the September site visit, “many NAESM staff were not present” even though CDC “had authorized payment for their salaries” that month. CDC Response at 3.

On October 14, 2009, CDC sent Mr. Carn a written response to his September 7, 2009 letter. CDC Ex. G. Among other things, CDC asserted that NAESM had “overdrawn” the 04-019 and 06-618 awards and used 26 percent of the funds authorized under the no-cost extension of the 04-064 award to cover costs that had been charged to the other two awards. *Id.* at 1. “As a result,” said CDC, “available funds for the [04-064] award have been reduced by almost \$8,000 per month, which will have a direct impact on future planned programmatic activities.” *Id.*

On October 21, 2009, representatives of CDC and NAESM met in person to discuss various issues, including ongoing disagreements about CDC’s requests for NAESM’s personnel, financial, and other records and CDC’s finding that NAESM had overdrawn two of its awards. CDC Ex. H. During the meeting, a CDC project officer named Donna Alexander reported that NAESM had experienced “constant staff turnover” in key program positions and that CDC had not been notified about key staff changes. *Id.* at 4. Ms. Alexander also expressed the view that NAESM was not meeting relevant program goals because of constant turnover in key positions. *Id.*

On November 12, 2009, CDC designated NAESM as a “high-risk” recipient of federal funds.<sup>3</sup> CDC Ex. H. As justification for that action, CDC pointed to its inability to

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<sup>3</sup> The high-risk designation was made pursuant to 45 C.F.R. § 74.14 and 2 C.F.R. § 215.14.

complete the July 2009 site visit and to confirm that NAESM was compliant with financial management standards in section 74.21 relating to financial reporting, accounting and budgetary control, cash management, allowable costs, and source documentation. *Id.* CDC also cited its discovery that NAESM had overdrawn two of its awards. *Id.*

In accordance with the high-risk designation, CDC advised NAESM that it would “closely monitor [its] grant activities” and provide technical assistance to address its deficiencies. CDC Ex. I. CDC also placed NAESM on a “corrective action plan” (CAP) which (1) identified “fiscal and programmatic issues” requiring corrective action, (2) specified the actions that NAESM needed to take to resolve those issues, and (3) established deadlines for completing the corrective actions. *Id.* The corrective actions required by the CAP included the submission of accounting, financial, and other records that CDC said were needed to verify that NAESM had implemented adequate financial, accounting, and budgetary controls, as required by section 74.21. *Id.* (Appendix A to Nov. 12, 2009 letter). CDC advised NAESM that its high-risk status would continue “until all deficiencies have been corrected and [CDC] is assured that controls have been developed and implemented to prevent their recurrence,” and that “compliance in all program component areas and fiscal matters [was] imperative for future grant funds not to be jeopardized.” *Id.*

On November 30, 2009 and December 14, 2009, NAESM sent letters to CDC through which it responded to the CAP’s requests for information and documentation. App. Ex. 16. Although NAESM submitted these transmittal letters for the record of this appeal, it did not submit copies of the material transmitted by those letters.

On February 22, 2010, CDC issued a “demand letter” which advised NAESM that it had “not complied with all action items and established due dates required in the CAP.” CDC Ex. J at 1. The demand letter directed NAESM to submit complete, unredacted accounting and other business records (including bank and credit card statements) that CDC indicated were necessary to evaluate the allowability of costs for which NAESM had sought or received (or intended to seek) federal funds. *Id.* at 1-2. CDC warned NAESM that it would suspend its cooperative agreements for 30 days beginning on March 5, 2010 if NAESM did not submit the requested documents by that date, and further warned NAESM that its two active awards (04-064 and 06-618) would be terminated if it failed to correct its deficiencies during the suspension period.<sup>4</sup> *Id.*

The record contains an undated letter purportedly sent by NAESM in response to CDC’s February 22<sup>nd</sup> demand letter. *See* App. Ex. 17. Among other things, the response letter

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<sup>4</sup> The project period for the 04-019 award ended on September 29, 2009. CDC Ex. E.

states that it was transmitting additional documentation to CDC, but, again, the attached documentation was not made part of the record of this appeal.

CDC determined that NAESM's response to the February 22<sup>nd</sup> demand letter was unsatisfactory. CDC Ex. K at 1. Accordingly, on March 16, 2010, CDC notified NAESM that disbursement of federal funds under the 04-064 and 06-618 awards would be suspended for a period up to 30 days and that NAESM would "not be reimbursed for any costs incurred against" those awards during the suspension period. CDC Ex. K. In support of the suspension, CDC stated:

Based on your response and our review of source documentation submitted, you have not provided all the information in its entirety as a requirement of the [February 22<sup>nd</sup>] demand letter. Additionally, there appears to be major weaknesses in NAESM's accounting system internal controls. For example, the demand letter required that you provide copies of the October 2009 bank reconciliations for all accounts and the cash receipts and disbursement journals for the period January 1<sup>st</sup> – October 31<sup>st</sup> 2009. In your response, you stated that you have purchased new accounting software and the module for reconciliations has not been purchased yet. Therefore, it appears that the bank statements have not been reconciled for six months. You also stated that your new accounting software (and previous software) does not support cash receipts and disbursement journals.

*Id.* at 1-2. CDC advised NAESM that it would have until March 31, 2010 to provide financial and other information specified on pages two through four of the March 16<sup>th</sup> suspension notice and that failure to submit all of the requested information "will result in the termination" of NAESM's active awards. *Id.* at 2-4.

On March 30, 2010, NAESM sent CDC a written response to the suspension notice. App. Ex. 17. The response indicates that NAESM enclosed accounting records and other documents and further states that NAESM had furnished "[a]ll documents requested" by CDC. (Once again, however, the documents purportedly transmitted by the March 30<sup>th</sup> letter were not submitted for the record of this appeal.)

On May 4, 2010, GMO Pressley notified NAESM that its active cooperative agreements would be terminated effective May 5, 2010 due to its failure to provide "proper and adequate stewardship of Federal funds" and material failure to comply with the terms and conditions of the cooperative agreements. CDC Ex. L.

In a letter dated June 4, 2010 (June 4 appeal letter), NAESM appealed the GMO's termination decision to the Board. App. Ex. 6. The Board responded that the appeal was premature and that NAESM first needed to raise its objections to the termination in the informal appeals process described in 42 C.F.R. Part 50, subpart D. App. Ex. 7. In

accordance with those regulations, an Agency Review Committee (ARC), consisting of CDC officials who had no previous involvement or knowledge of the case, reviewed the May 4, 2010 termination and the documentation submitted by NAESM in opposition to that determination. App. Ex. 5.

On August 11, 2010, the ARC sustained the termination, stating that “contributing factors included but were not limited to material failure to maintain adequate accounting records based on generally accepted accounting principles and a failure to adhere to prior approval requirements.” App. Ex. 5, at 1. The ARC letter also mentioned NAESM’s “lack of progress in correcting the deficiencies.” *Id.* at 2.

On February 23, 2011, NAESM filed another notice of appeal, to which it attached several documents, including the June 4 appeal letter. NAESM later asked the Board – and the Board agreed – to treat the June 4 appeal letter as containing its argument opposing CDC’s termination determination.

CDC filed its response to the notice of appeal on May 11, 2011 (CDC Response), and NAESM filed a reply to CDC’s response on June 3, 2011 (NAESM Reply).

## **Discussion**

In section one of our discussion (below), we explain why CDC had sufficient legal grounds to terminate NAESM’s cooperative agreements and conclude that NAESM failed to carry its burden of demonstrating that it was complying with the agreements’ terms and conditions. In sections two and three, we consider but reject several objections to the termination that are unsubstantiated or immaterial to our conclusion in section one.

1. *NAESM materially failed to comply with terms and conditions of its cooperative agreements.*

As indicated, the applicable regulations authorize a federal agency to terminate an award if the recipient has materially failed to comply with the award’s “terms and conditions.” 45 C.F.R. § 74.62(a)(3). The terms and conditions of NAESM’s cooperative agreements are specified in the underlying Notices of Award issued by CDC. *See* CDC Ex. E. These notices stipulate that the awards’ terms and conditions include the administrative requirements in 45 C.F.R. Part 74, applicable provisions of the HHS Grants Policy Statement,<sup>5</sup> and other provisions set out in the award notices. *Id.* (page 3 of the Notices of Award for the 04-064 and 06-618 awards). The Part 74 regulations obligate a non-

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<sup>5</sup> The HHS Grants Policy Statement is available at <http://dhhs.gov/asfr/ogapa/grantinformation/hhsgps107.pdf>.

profit organization to comply with the cost principles in Office of Management and Budget (OMB) Circular A-122, now codified in 2 C.F.R. Part 230, Appendix A. 45 C.F.R. § 74.27(a). Thus, the applicable provisions of that Circular are also terms and conditions of NAESM's cooperative agreements.

Failure to comply with one award term or condition is a legally sufficient ground for termination if the failure is material. *Cf. Abstinence for Singles/Urban Community Action Network*, DAB No. 2217, at 16 (2008) (upholding termination of a grant based solely on noncompliance with prior approval requirement in section 74.25(c)(7)). The record here demonstrates that NAESM materially failed to comply with terms and conditions of the 04-064 and 06-618 awards relating to record access, allocable costs, financial management, and prior agency approval. NAESM's failures in each of these areas are material. Singly and collectively, these failures provide ample grounds to sustain the termination.

- a. NAESM failed to comply with its obligation under 42 C.F.R. § 74.53(e) not to interfere with CDC's right of access to records and employees.

Section 74.53(e) provides that "HHS awarding agencies . . . or any of their duly authorized representatives have the right of (1) *"timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents,"* and (2) *"timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to such documents."* (Italics added.) CDC determined that NAESM violated these requirements, and the record supports that determination.

In its Preliminary Report of the July 2009 site visit and accompanying Site Visit Questionnaire, CDC reported that NAESM had restricted or limited the site visitors' access to various business records, including bank and credit card statements, documentation supporting the reasonableness of expenditures on office space ("occupancy costs"), and "back up support" for the "drawdown" of federal funds during November 2008, December 2008, February 2009, and April 2009. CDC Ex. A. The record also indicates that NAESM hindered access to its employees during the July 2009 site visit. According to notes of an October 21, 2009 meeting, CDC Project Officer Donna Alexander reported that she was unable to interview NAESM staff during the site visit because Mr. Carn had "excused his staff" during the period when she planned to conduct staff interviews. CDC Ex. H at 3.

NAESM resisted CDC's information requests from the start. On July 21, 2009, five days after CDC told NAESM which types of records it would seek to inspect or acquire during the upcoming site visit, Rodolfo Price, NAESM's Board President and Treasurer, wrote



to CDC that “the requested items . . . cannot be provided to the CDC unless the CDC is seeking receipts and/or timesheets that are allocated to specific programs funded by CDC.” CDC Ex. C at 3. Mr. Price further implied that NAESM was obligated to provide the requested documents only to an independent auditor:

Though the books of NAESM [are] open to the public, its bank and credit accounts, general ledger, journal entries, chart of accounts, travel policies, etc. (per the items listed in the request document) are not. Such items are generally required for a full and satisfactory audit and will be provided to an independent auditor for the upcoming audit for the September 30, 2009 year end.

Should the CDC require another financial audit by an independent auditor, please inform NAESM and NAESM will provide all required audit documentation to such independent auditor.

*Id.* CDC replied to Mr. Price’s letter in a July 23, 2009 email, quoting section 74.53(e) and stating that CDC “has authority to review and have access to the records” it asked NAESM to produce. App. Ex. 11 (July 23, 2009 email from R. Curington (CDC) to R. Carn).

Following the July 2009 site visit, in both meetings and written communications with CDC, NAESM suggested that accounting and business records sought by CDC were not pertinent to the awards because they contained information about the use of non-federal funds.<sup>6</sup> *See, e.g.*, CDC Ex. H at 2. In an October 19, 2009 letter to the Director of CDC’s Procurement and Grants Office, for example, Mr. Carn stated that NAESM was “willing to provide any and all financial records to CDC except those which involve non-CDC funds,” and that “[w]here there is overlap, such as in NAESM’s General Ledger, then we must find common ground and procedures which allow NAESM to redact from its general ledger any deposits and expenditures not related to CDC funds.” App. Ex. 19 (emphasis in original). Mr. Carn went on to state that “[w]e already have this capability and were attempting to exercise it during the recent site visit and audit,” and that “[o]ur redactions of non-CDC grant fund monies is what caused problems.” *Id.*

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<sup>6</sup> NAESM also maintains that it reasonably objected during the site visit to CDC’s request to inspect or copy certain personnel records because of its concern about the confidentiality of the employees’ medical information (including HIV status). App. Ex. 6, at 5. We need not discuss or resolve this issue because there is ample evidence that NAESM limited CDC’s access to other types of business records (e.g., bank and credit card statements and documentation regarding occupancy costs, for example) that were pertinent to the cooperative agreements. We note that NAESM has not responded to CDC’s assertion that it was the “practice of NAESM, Inc. not to allow CDC staff access to the ‘official’ personnel files, but would rather extract generic, less revealing documents from the ‘official’ personnel file and place them in a temporary file made available for CDC review.” CDC Ex. G at 3.

We conclude that NAESM has not stated legitimate reasons for not timely and fully responding to CDC's record requests. First, NAESM cited no plausible legal justification for its belief that it was obligated to provide financial information only to an independent auditor. No such limitation is contained in the applicable regulations or award notices, and the HHS Grants Policy Statement, whose provisions are terms and conditions of NAESM's cooperative agreements, states that a federal agency "may request additional audits necessary to carry out their responsibilities under Federal laws or regulations." HHS Grants Policy Statement at II-88 (noting that additional audits "will build upon work performed by the independent auditor"). Furthermore, NAESM has offered no evidence that identifies, with reasonable specificity, (1) the business records that it claimed to have properly withheld or redacted, (2) the nature of the information contained in those records, or (3) NAESM's basis for believing that such information was not pertinent to the administration of its federal awards. In addition, NAESM has offered no opinion or statement from a qualified accountant or auditor that explains how CDC could have achieved the indisputably legitimate goals of the July 2009 site visit – namely, to assess the adequacy of NAESM's financial management systems and verify the allowability of costs charged to NAESM's awards – without reviewing *complete* accounting and financial documentation for all transactions (regardless of their financing source). At a minimum, CDC needed complete information about NAESM's expenditures and transactions in order to verify that NAESM's internal financial controls were capable of ensuring that organizational costs were being properly allocated among federal and non-federal funding sources, and that federal funds were being used only for purposes authorized by the cooperative agreements.

More troubling is evidence that concealment was an apparent motive for NAESM's refusal to afford CDC full access. According to an interview summary attached to the Site Visit Questionnaire, Terrell Whitaker, NAESM's former Finance Manager, informed CDC during an interview that NAESM's Chief Executive Officer and Board President were "adamant" about not giving CDC full access to NAESM's records because they did not want CDC to know about improper or unsupported "adjustments" they had asked Mr. Whitaker to make to NAESM's accounting records prior to the site visit. CDC Ex. B. NAESM has never provided any evidence disputing the veracity of Mr. Whitaker's interview statements.

NAESM asserts that "in the end," it provided CDC with all the information it sought. App. Ex. 6, at 4. What NAESM means by "in the end" is unclear. If NAESM means that it provided all of the records requested by CDC during the July 2009 site visit, that claim is not borne out by the record. The parties' correspondence demonstrates that NAESM was continuing to object to CDC's record requests in mid-October 2009, more than two months after CDC's initial site visit. See App. Ex. 19 (Oct. 19, 2009 letter from NAESM to CDC, ¶ 2).

It is true that starting in late November 2009, in response to the CAP, NAESM began to supply the type of documentation previously sought by CDC. *See* App. Ex. 16 (Nov. 30, 2009 and Dec. 14, 2009 letters); CDC Ex. I (Appendix A ¶ 1)). However, that fact does not undermine CDC's finding of noncompliance. Under section 74.53(e), CDC was entitled to "timely" access. NAESM plainly failed to comply with that requirement by waiting until late November 2009 (or later) to give CDC unhindered access to records that were initially sought in July 2009.

Another example of NAESM's apparent uncooperativeness concerned rental or other "occupancy" costs charged to the 06-618 award. According to a chronology prepared by GMO Pressley (whose relevant parts NAESM does not dispute), CDC questioned those occupancy costs on the ground that NAESM had incurred no actual expense to acquire or lease the property in question. *See* CDC Ex. N at 1. The record shows that although CDC requested records justifying NAESM's occupancy costs during the July 2009 site visit, NAESM did not begin to supply those records until mid-December 2009, and that these submissions were deemed inadequate by CDC. CDC Ex. A at 1 (stating that CDC was unable to obtain documentation supporting occupancy costs during the July 2009 site visit); App. Ex. 16 (Dec. 14, 2009 letter from NAESM to CDC responding to the CAP's request for documentation justifying claimed occupancy costs and stating that NAESM was the "property owner and can provide the warranty deed for review if needed"); CDC Ex. J at 2 ¶ 7 (February 22, 2010 demand letter requesting additional documentation, including property records, justifying NAESM's calculation of occupancy costs); CDC Ex. K at 3 (asserting that NAESM "did not provide supporting documentation and justification" for calculating occupancy costs based on fair market rental).

In sum, a preponderance of the evidence demonstrates that NAESM failed to comply with its obligation not to interfere with CDC's access rights under section 74.53(e). As a result of that interference, CDC was unable to determine promptly whether NAESM had properly spent federal funds and to verify that NAESM had internal controls that were adequate to safeguard those funds.

- b. NAESM failed to comply with terms and conditions of its cooperative agreements concerning "allocable costs" and "redirection of funds."

CDC reported that as of June 30, 2009, NAESM had no federal funds available under the 04-109 award and only \$95 available under the 06-618 award, even though the budget or project periods for those awards did not end until three months later (on September 29, 2009). CDC Ex. G at 1. CDC also reported that 26 percent of the federal funds available to NAESM as a result of a one-year extension of the 04-064 award had been used by NAESM during the first month of the extension period (July 2009) to reimburse costs of activities that should have been financed by the 06-618 and 04-019 awards. *Id.* NAESM

does not deny that it diverted 04-064 award funds for that purpose or claim that it received prior approval from CDC to do so.

By using funds from the 04-064 award to cover costs that should have been financed by the 04-019 and 06-618 awards, NAESM failed to comply with cost principles in OMB Circular A-122 (which are, as noted earlier, terms and conditions of the cooperative agreements). In a section entitled “Allocable Costs,” that Circular provides: “Any cost allocable to a particular award or other cost objective under these principles may not be shifted to other Federal awards to overcome funding deficiencies, or to avoid restrictions imposed by law or by the terms of the award.” 2 C.F.R. Part 230, App. A, ¶ 4.a.3. Because NAESM took that action without CDC’s prior approval, NAESM also violated a condition of the 04-064 award which required it to seek prior approval for “[r]edirection of funds.” CDC Ex. E (¶ 11 of the 04-064 award notice). NAESM has offered no explanation for its failure to seek prior approval to redirect its 04-064 award funds. NAESM also does not dispute CDC’s finding that the diversion of funds had affected its ability to achieve the program goals under its 04-064 award. *See* CDC Ex. I (CAP ¶ 2 ) (noting that the redirection of funds from the 04-064 award had “resulted in funding shortfalls that will force NAESM to redirect funds from other budgeted cost categories which will have a direct impact on program execution”).

For these reasons, we conclude that NAESM failed to comply with the terms and conditions of its cooperative agreements regarding allocable costs and redirection of funds.

- c. NAESM failed to comply with financial management standards and requirements in 42 C.F.R. § 74.21(b).

Section 74.21(b) obligates an award recipient to have “financial management systems” that provide for: (1) “[r]ecords that identify adequately the source and application of funds for HHS-sponsored activities”; (2) “[e]ffective control over and accountability of all funds, property and other assets” so that such funds, property, and assets are “used solely for authorized purposes”; and (3) “[a]ccounting records, including cost accounting records, that are supported by source documentation.” 45 C.F.R. § 74.21(b)(2), (3), and (7).

NAESM admits in its June 4 appeal letter “to having some issues with our accounting systems,” including a lack of qualified accounting personnel. App. Ex. 6, at 10. Elsewhere, NAESM informed CDC prior to the termination that it did not keep cash receipts or disbursement journals, and that its accounting system was incapable of

performing bank account reconciliations.<sup>7</sup> In view of these admitted deficiencies, CDC had ample reason to conclude that NAESM lacked the capacity to “identify the source and application” of funds for its federally financed projects and to maintain “effective control over and accountability of” federal funds, as required by section 74.21(b). NAESM’s financial management deficiencies are plainly illustrated by other unrefuted CDC findings:

- During federal fiscal year 2009, NAESM failed to maintain adequate funding for the projects associated with the 04-019 and 06-618 awards (CDC Ex. G at 1);
- NAESM granted pay raises to its Executive Director and Acting Executive Director without obtaining approval from its Board of Directors (CDC Ex. A);
- NAESM’s Board of Directors did not exhibit the capacity to fulfill its role to oversee the use of financial and other organizational resources (CDC Ex. I (CAP ¶ 7)); and
- After being placed on restricted payment status, NAESM was unable to file timely, accurate or supportable payment requests (CDC Ex. H at 3; CDC Ex. I (CAP ¶ 3)).

Regarding the latter example, CDC reported – and NAESM does not deny – that NAESM requested the payment of full-time salaries for four positions during a single pay period even though NAESM identified only one person in those positions during that pay period. CDC Response at 3.

NAESM claims it ran short of funds under the 04-019 and 06-618 awards because CDC had not released or made available all of the federal funds authorized under several previous awards dating back to 1999. App. Ex. 2, at 7, 8; *see also* App. Ex. 19 (Oct. 19, 2009 letter from NAESM to CDC, ¶ 6). The documentation and explanation provided by NAESM (*see* App. Ex. E and App. Ex. F at 7) does not support that claim or show how much money, if any, might be owed. Even if NAESM did not receive all of the funds authorized under the prior awards, NAESM would not have been entitled to those funds absent, at minimum, (1) documentation that those funds would cover previously unreimbursed costs that were allowable under the prior awards, or (2) evidence that CDC had authorized the unused funds to be used for future projects or budget periods. *Cf.* 45

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<sup>7</sup> NAESM’s December 14, 2009 letter to CDC indicated that its current accounting software did not maintain a journal for cash receipts or disbursements. App. Ex. 16. In its undated response to CDC’s February 22, 2011 demand letter, NAESM admitted that that it lacked the necessary accounting software to perform bank account reconciliations. *Id.*

C.F.R. § 74.71(c) (requiring HHS to make prompt payment at the closeout of an award for “allowable reimbursable costs under the award being closed out”) and § 74.71(d) (requiring an award recipient to “promptly refund any balances of unobligated cash that HHS has advanced or paid and that is not authorized to be retained by the recipient for use in other projects”).<sup>8</sup> NAESM offered no evidence that it incurred allowable costs under the prior awards that were not – but should have been – reimbursed under those awards, nor has it shown that CDC has ever authorized NAESM to retain previously unobligated funds for use in future award periods or different projects.

NAESM contends that an independent audit of its organization confirms that it always “kept good documentation of how our funds are being spent.” App. Ex. 6, at 10. In support of that contention, NAESM submitted an “Independent Auditor’s Report” prepared pursuant to the Single Audit Act, 31 U.S.C. 7501 *et seq.*

We give little weight to that report, which has two parts. The first part, which examines whether NAESM’s financial statements present a fair picture of its financial condition, is irrelevant because the integrity of those statements is not at issue here. The second part, consisting of a two-page opinion letter concerning NAESM’s “internal control” over financial reporting and compliance with applicable law and program requirements, is of little probative value. It states that NAESM “complied, in all material respects, with the requirements [of laws, regulations, contracts, and grants] that are applicable to each of its major federal programs for the year ended September 30, 2009.” App. Ex. 19. The foundation for that broad conclusion is unclear, however. The opinion letter does not describe in any meaningful detail the audit methodology or lay out findings that address, with specificity, the legal requirements at issue in this case. Although the letter indicates that the auditor’s examination found NAESM compliant “in all material respects” with applicable requirements, the letter expresses “no opinion on the effectiveness of [NAESM’s] internal control over compliance” and further states that the auditor’s “consideration of internal control over compliance . . . would not necessarily identify all deficiencies in internal control that might be significant deficiencies or material weaknesses.” At most, the audit report shows that NAESM may have developed internal controls and had records sufficient to satisfy the auditors for certain purposes by the time of the audit report in February 2010. It does not establish that NAESM was in compliance with the terms and conditions of the cooperative agreements at the time of the on-site reviews and subsequent few months. Indeed, as mentioned above, NAESM

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<sup>8</sup> See also *Kuigpagmiut, Inc.*, DAB No. 1780, at 3 (2001) (holding that federal award recipients “may not retain federal funds in excess of the amount authorized for and actually expended for [award] purposes”); *Rapid City American Indian Development, Inc.*, DAB No. 1401, at 2-5 (1996) (holding that the grantee could not use the unobligated funds awarded under one grant to cover administrative costs of another grant).

admitted that it did not have its financial system up to standards at that time. App. Ex. 6, at 10.

For these reasons, we conclude that NAESM failed to comply with financial management standards in section 74.21(b).

- d. NAESM failed to comply with the prior approval requirements in 45 C.F.R. § 74.25(c).

Section 74.25(c) requires recipients of non-construction awards to obtain the awarding agency's prior approval for certain program and personnel changes, including a "[c]hange in the project director or principal investigator or other key persons specified in the application or award document."<sup>9</sup>

CDC found that NAESM violated section 74.25(c) by failing to obtain prior approval for the designation of Rudolph Carn as the organization's Chief Executive Officer and by frequently changing key program managers without notifying CDC or seeking CDC's prior approval. *See* CDC Ex. I (CAP ¶¶ 6, 8); CDC Ex. H at 4 (indicating that NAESM had changed Program Coordinators for the 06-618 award three times without notifying CDC). NAESM does not claim that the employees implicated by CDC's finding were not "key" personnel, nor does NAESM contend that it sought CDC's approval for the changes in advance. *See* App. Ex. 6. Furthermore, the violations were plainly material, not only because they involved supervisory personnel directly responsible for implementing NAESM's federally financed HIV prevention programs, but also because they impaired CDC's ability to ensure that NAESM was adequately staffed and competently managed to meet the goals of those programs. *Cf. Abstinence for Singles/Urban Community Action Network* at 14 (noting that prior agency approval for an organization change is a "necessary mechanism for HHS to ensure that grant recipients responsible for implementing awards projects or programs . . . can satisfy their administrative and legal responsibilities").

The necessity for CDC oversight was especially critical here because, as a CDC Project Officer observed, the success of NAESM's programs depended heavily on the hiring and retaining of qualified staff, and because there was unrefuted evidence of personnel practices that called into question NAESM's capacity to fulfill its mission. *See* CDC Ex. H at 1; CDC Ex. G at 3 (indicating that personnel records showed that "professional

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<sup>9</sup> Consistent with section 74.25(c), the award notice for the 04-064 award states that "prior approval" by CDC was "required" for a "[c]hange in Key Personnel." CDC Ex. E. In a separate provision, entitled "Key Personnel," the award notice required NAESM, in accordance with section 74.25, to obtain prior approval from CDC for any "[c]hange in the project director or principal investigator or other key persons specified in the application or award document[.]" *Id.*

boundaries were crossed, staff were demoted and/or terminated without cause, and staff were placed in technical positions (e.g., IT Administrator) without having the technical expertise to carry out the functions of the position”).

For these reasons, we conclude that NAESM failed to comply with the prior approval requirement in section 74.25(c)(2). In addition, we note that NAESM concedes that it failed to obtain “prior approval” for renovations to its office space. June 4 appeal letter at 10. Such approval was required by OMB Circular A-122, Appendix B, ¶ 15(b) (setting forth prior approval requirements for “capital expenditures” for general purpose buildings, equipment, and land) and section 74.25(c)(5) (requiring NAESM to comply with the prior approval requirements in OMB Circular A-122).

e. CDC met its evidentiary burden in this case.

In its June 3, 2011 reply to CDC’s appeal brief, NAESM asked CDC to provide additional documentation “to back up charges/accusations made against NAESM.” NAESM Reply at 1. However, no additional proof was required from CDC in these circumstances. CDC’s burden in this proceeding was to make a prima facie showing that there was a basis for termination. *National Urban Indian Council*, DAB No. 710, at 4 n.3 (1985) (holding that the federal agency must come forward with evidence supporting grant termination). CDC carried that burden. In its determination letters and response to NAESM’s appeal, CDC articulated legally sufficient grounds – namely, material failures to comply with award terms and conditions – for terminating NAESM’s cooperative agreements. CDC also submitted evidence, including reports authored by CDC staff who participated in the July 2009 site visit, that established the existence of those grounds. Because CDC came forward with adequate evidence for its termination determination, the burden shifted to NAESM to rebut CMS’s case and establish by a preponderance of evidence that it was complying with applicable program requirements. *National Urban Indian Council* at 4 n.3. NAESM did not carry that burden for the reasons outlined above.

2. *NAESM’s contentions concerning CDC’s pre-termination investigation and oversight are unsubstantiated or immaterial.*

NAESM contends that during the period between the July 2009 site visit and CDC’s decision to terminate the cooperative agreements, CDC often did not reply to its requests for clarification and information, and that CDC did not give it “the necessary technical assistance that other majority agencies with some of the same issues were given and are still receiving CDC funds to date.” App. Ex. 6, at 2, 4, 8-9. These contentions are unsubstantiated. In fact, the record shows that, in both correspondence and in-person meetings, CDC responded promptly and appropriately to concerns expressed by NAESM about the July 2009 site visit and ensuing enforcement actions. *See, e.g.*, CDC Ex. F at 6 (indicating that CDC officials met in person with NAESM’s Executive Director and



others on August 13, 2009 to discuss the site visit and CDC's subsequent decision to place NAESM on restricted payment status); CDC Ex. G (Oct. 14, 2009 CDC letter responding to various questions and concerns about the conduct and legality of the site visit and CDC's other investigative activities); CDC Ex. H (indicating that CDC met with NAESM and its attorney on October 21, 2009 to discuss ongoing issues). We see no evidence that CDC failed or was unwilling to provide technical assistance. When it placed NAESM on a CAP, CDC expressly invited NAESM to request necessary technical assistance. CDC Ex. I. NAESM does not point to evidence of any particular request for technical assistance that was ignored or went unfulfilled prior to the termination decision.

NAESM complains that it "never received any correspondence related to our progress or (lack of progress) from" CDC in implementing the CAP. App. Ex. 6, at 9. NAESM also implies that CDC acted in bad faith when it issued the CAP because it never intended to allow the continuation of federal funding, regardless of whether NAESM implemented the CAP. *Id.* at 8-9. These contentions are immaterial because CDC was not obligated to offer NAESM an opportunity to correct its noncompliance before terminating the awards. "Although an awarding agency may, as a matter of policy or prudence, give an award recipient the opportunity to correct noncompliance before imposing termination, nothing in the applicable regulations require[s] [it] to do so." *Renaissance III*, DAB No. 2034, at 11-12 (2006).

In any event, NAESM's factual assertions regarding CDC's use of the CAP process are unsubstantiated. NAESM does not cite any evidence that CDC intended to deny it an adequate opportunity to correct its deficiencies. Moreover, CDC's February 22, 2010 and March 16, 2010 letters plainly indicate that CDC considered NAESM's "progress" in implementing the CAP to be inadequate. The February 22<sup>nd</sup> demand letter, for example, expressly cites a "failure to comply with all action items and established due dates" in the CAP. CDC Ex. J. NAESM has not demonstrated that it fully implemented the CAP prior to the termination decision.

NAESM maintains that it would have been "more appropriate and productive" for CDC to help NAESM correct its noncompliance than to terminate a relationship with an organization that the federal government has "invested in for the past 13 years and that has proven its effectiveness in the community." App. Ex. 6, at 2, 11. We lack the authority to overturn the termination on that ground. The selection and timing of an enforcement action from among the lawful options is a matter committed to the discretion of the awarding agency. *Cf. Recovery Resource Center, Inc.*, DAB No. 2063, at 20 (2007) (holding that the federal agency "had the authority *and discretion* to take immediate enforcement action without giving [the grantee] an opportunity to correct" (*italics added*)). Thus, the Board's proper role here is not to decide whether termination was, or was not, the most reasonable or effective remedy for NAESM's noncompliance

under the circumstances, but to decide whether CDC had sufficient legal grounds for termination under section 74.62.

In pre-termination correspondence, NAESM suggested that CDC had exceeded its oversight authority, asserting that “[t]here is a difference between CDC auditing our use of its grant funds and telling us how to run our programs . . . .” App. Ex. 19 (Oct. 19, 2009 letter from NAESM to CDC ¶ 2). Reiterating that theme, NAESM asserts in its June 3, 2011 reply letter that CDC “stepped outside of [its] duties as a federal agency” when it asked for information “that had nothing to do with CDC funding” and by inquiring about whether it had opened an office in cities other than Atlanta. App. Reply at 3. NAESM further claims that as a tax-exempt organization, it “does not report to CDC nor are we required by the regulations of our [tax-exempt status] to report to the CDC.” *Id.*

Having carefully reviewed the record, we find that CDC appropriately exercised its authority to monitor NAESM’s management and program performance to ensure that it was safeguarding federal funds and using them cost-effectively. *Cf.* 45 C.F.R. § 74.60 *et seq.* (granting the awarding agency authority to enforce award terms and conditions); HHS Grants Policy Statement (Jan. 1, 2007) at I-14 (stating that “HHS, as a Federal grantor agency, is responsible to Congress and the U.S. taxpayer for carrying out its mission cost-effectively and in compliance with applicable requirements”) and I-37 (stating that an awarding agency fulfills its stewardship role by engaging in site visits and other “active monitoring” in order to identify “potential problems and areas where technical assistance might be necessary”). As we discussed earlier, NAESM has not shown that CDC’s record requests were unreasonable or beyond its legal authority. Moreover, the intensity of CDC’s scrutiny was appropriate given NAESM’s total level of federal support (70 percent during fiscal year 2009) and the results of the July 2009 site visit, during which NAESM exhibited a lack of financial and managerial transparency.<sup>10</sup>

NAESM’s assertion that it “does not report to CDC” is refuted by the regulations and relevant award notices, which impose substantial reporting obligations on all award

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<sup>10</sup> In email correspondence dated June 16, 2009, CDC advised NAESM that it was interested in knowing whether NAESM had used award funds to “facilitate” the opening of a New York office even though the target population of the CDC-funded awards was Atlanta, Georgia. App. Ex. 8 (June 16, 2009 email). A press release issued by NAESM indicated that it was “in the process of opening operations” in Brooklyn, New York and that this expansion was intended to “fill the gap” left by another organization – People in Color Crisis, Inc. (POCC) – that had recently decided to close because of lack of funding. *Id.* In addition to seeking information about NAESM’s New York-based activities, CDC questioned the reasonableness of NAESM’s proposal to retain, as an “evaluation consultant,” an individual who, CDC suspected, had been employed as POCC’s Interim Executive Director. *Id.*; CDC Ex. G ¶ 7. We find nothing improper about CDC’s interest in these subjects. CDC had the duty to verify that NAESM was using federal funds cost-effectively and only for the purposes authorized by its cooperative agreements.

recipients. *See* 45 C.F.R. §§ 74.50-.52; CDC Ex. E (Notice of Award for the 04-064 award, pg. 5 (Note 6)). In addition, CDC's close oversight of NAESM's prevention programs was an inherent feature of the cooperative agreements, a funding mechanism that is used when "substantial involvement is expected between the executive agency and the . . . recipient when carrying out the activity contemplated in the agreement." 31 U.S.C. § 6305(2). CDC thus had a role in ensuring that CDC project personnel were qualified and were not charging to CDC awards time spent on other projects run by NAESM.

3. *The importance of NAESM's mission is irrelevant to the legal issue before the Board.*

NAESM objects to the termination on the ground that organizations like it are urgently needed to prevent the spread of HIV in the populations targeted by its work. App. Ex. 2, at 1-2. NAESM asserts that it does not understand how CDC could permit the termination to occur "[g]iven the substantial current state of the AIDS epidemic in the African American community and specifically in the African American MSM [Men Who Have Sex With Other Men] community with reports coming directly from the CDC[.]" *Id.* at 2.

The importance of NAESM's mission is irrelevant in this proceeding. The issue before the Board is whether NAESM materially failed to comply with terms and conditions of its cooperative agreements.<sup>11</sup> As the Board stated in a prior decision, "[a]n award recipient must do more than show that its work is beneficial and supported by the community" in order to continue its relationship with the federal government. *Renaissance III* at 13. "The recipient must also manage itself to ensure that taxpayer money is spent properly, in compliance with federal requirements." *Id.*

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<sup>11</sup> Thus, NAESM's request that we reverse CDC's May 4, 2010 decision to cancel a site visit relating to a pending application by NAESM for a new, competitive award under CDC funding announcement PS10-1003 is beyond the scope of our review in this proceeding. App. Ex. 6, at 2; App. Ex. 19 (May 4, 2010 letter from CDC to NAESM re: "Cancellation of Pre-decisional Site Visit for PS10-1003"). NAESM did not timely appeal the site-visit-cancellation decision or cite any authority under which we could grant relief from that decision. *See* App. Ex. 1 (February 23, 2011 notice of appeal); 45 C.F.R. Part 16, Appendix A, ¶ C(a) (specifying the types of final, written decisions concerning discretionary grants or cooperative agreements that may be appealed to the Board).

**Conclusion**

Because the record demonstrates that NAESM materially failed to comply with terms and conditions of the 04-064 and 06-618 awards, the Board sustains CDC's August 11, 2010 determination to terminate those awards.

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/s/  
Stephen M. Godek

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/s/  
Sheila A. Hegy

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/s/  
Judith A. Ballard  
Presiding Board Member