Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

The Children's Center, Inc.
Docket Nos. A-12-105 & A-13-10
Decision No. 2506
April 8, 2013

DECISION

The Children's Center, Inc. (TCCI) appeals determinations by the Office of Refugee Resettlement (ORR) in the Administration for Children and Families disallowing a total of $1,286,676 in federal funding provided to TCCI pursuant to the Unaccompanied Alien Children Services (UAC) program for federal fiscal years (FFYs) 2009 and 2010. ORR concluded that TCCI failed to show the funding was used for allowable costs. For the reasons discussed below, we uphold the disallowances in their entirety.

Legal Background

Non-profit organizations like TCCI that receive federal financial assistance from the Department of Health and Human Services (HHS) are subject to the uniform administrative requirements at 45 C.F.R. Part 74 and to the cost principles in Office of Management and Budget (OMB) Circular A-122, now codified at 2 C.F.R. Part 230. 45 C.F.R. §§ 74.1(a)(1), 74.27.

Under the cost principles, a cost is allowable under a federal award if, among other things, it is "reasonable for the performance of the award and . . . allocable thereto," is not "included as a cost or used to meet cost sharing or matching requirements of any other federally financed program in either the current or a prior period," and is "adequately documented." 2 C.F.R. Part 230, App. A ¶¶ A.2.a, f, g. A cost is allocable to an award if, among other things, it is "incurred specifically for the award," "[b]enefits both the award and other work and can be distributed in reasonable proportion to the benefits received," or is "necessary to the overall operation of the organization, although a direct relationship to any particular cost objective cannot be shown." *Id.* ¶ A.4.a.

The Part 74 regulations require a recipient of federal funding to have in place a financial management system that provides "[r]ecords that identify adequately the source and application of funds for HHS-sponsored activities" and "[e]ffective control over and accountability for all funds, property and other assets." 45 C.F.R. § 74.21(b)(2), (3). A recipient "shall adequately safeguard all such assets and assure that they are used solely for authorized purposes." *Id.* § 74.21(b)(3).

The regulations also provide that a recipient will be paid in advance if the recipient maintains written procedures designed to "minimize the time elapsing" between the transfer and disbursement of funds, and a financial management system that meets "the standards for fund control and accountability as established in § 74.21." 45 C.F.R. § 74.22(b)(1). Cash advances to a recipient "shall be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements" of the recipient "in carrying out the purpose of the approved program or project." *Id.* § 74.22(b)(2).[1] "The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program or project costs and the proportionate share of any allowable indirect costs." *Id.*

If a recipient "materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute or regulation, an assurance, an application, or a notice of award," the awarding agency may "[d]isallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance." 45 C.F.R. § 74.62(a)(2).

Factual Background

TCCI is a non-profit organization that provides services to needy individuals in the Texas Gulf Coast region. In 2008, TCCI entered into a cooperative agreement with ORR to provide temporary shelter and related services to unaccompanied alien children in ORR custody. Like a grant, a cooperative agreement is a funding instrument used "only when the principal purpose is to accomplish a public purpose of support or stimulation authorized by Federal statute." 45 C.F.R. § 74.11. In contrast, "[c]ontracts shall be used when the principal purpose is the acquisition of property or services for the direct benefit or use of the HHS awarding agency." *Id.* Thus, under Part 74, the term "award" is used only for financial assistance, such as a grant or cooperative agreement. *Id.* § 74.2.

Under the five-year cooperative agreement, TCCI agreed to maintain a set number of beds for use by unaccompanied alien children in ORR custody and to provide food services, counseling, educational services, recreational activities, and other services to the children who occupied those beds. TCCI Ex. B at 6-9 (Docket No. A-12-10).

[1] The language in section 74.22(b) also appears in OMB Circular A-110 at paragraph C.22(b), which is codified at 2 C.F.R. § 215.22(b)(2). The codification at 45 C.F.R. Part 74 applies specifically to grants and other agreements administered by HHS. *See* 59 Fed. Reg. 43,754 (Aug. 25, 1994) (interim final rule amending 45 C.F.R. Part 74 to incorporate changes established by revised OMB Circular A-110); 61 Fed. Reg. 11,743 (Mar. 22, 1996) (final rule).

Section 4.4 of the cooperative agreement, titled "Use of Funds," provides in relevant part that the "funds awarded under this Agreement may be used only for the performance of the Recipient's responsibilities under this Agreement and may not be used to cover expenses of unrelated activities." ORR Ex. B at 20. Section 4.5 of the cooperative agreement, titled "Schedule of Payments," provides in relevant part that the "Recipient shall submit monthly requests for payment to ORR, unless other arrangements are agreed to by the Recipient and ORR representatives." *Id.* Section 4.5 further provides that the "Recipient shall comply with Treasury Department Circular No. 1075 (31 C.F.R. Part 205) and OMB Circular A-110 (sec. c22) in regards to advances of funds." *Id.* The cooperative agreement then quotes the language regarding cash advances to a recipient that appears in section 74.22(b)(2) (quoted above). *Id.* at 21. The cooperative agreement also provides that any "budget requests or changes by the Recipient, affecting the Agreement amount, or the terms and conditions of this agreement shall be submitted in writing to the GO [Grants Officer]." *Id.* at 17. "No such changes shall be made without the prior written authorization of the GO." *Id.* Nothing in the cooperative agreement sets a fixed price per bed per day.

By letter dated June 5, 2012, ORR notified TCCI that it was disallowing $629,867 in federal funding that TCCI had received for FFY 2009. TCCI Ex. 3, at 2. The disallowance was based on an audit report concluding that TCCI had received $3,099,963 in funding from ORR for the UAC program for that fiscal year but had spent only $2,470,096 on the program. *Id.* at 1. According to the auditor, TCCI spent the remaining funds on other, unrelated programs, in violation of section 4.4 of the cooperative agreement. *Id.*; TCCI Ex. 5, at 29-30. The auditor also determined that TCCI's advance drawdown system violated section 4.5 of the cooperative agreement. TCCI Ex. 5, at 29. ORR concluded in the letter that TCCI's drawdown of excess funding violated OMB Circular A-122's rules regarding allowable costs and constituted "a material weakness, a material instance of noncompliance, and a repeat finding." TCCI Ex. 3, at 1-2. ORR also observed that TCCI had indicated in a corrective action plan that it had "ensured that all expenses charged to the ORR program were for allowable uses but had not provided any documentation indicating this" to ORR. *Id.* at 2.

By letter dated October 10, 2012, ORR notified TCCI that it was disallowing $656,809 in federal funding that TCCI had received for FFY 2010. TCCI Ex. B at 4. This disallowance was based on another audit report concluding that TCCI had received more funding from ORR for the UAC program ($3,941,196) than it had spent on the program ($3,284,387). *Id.* at 3. ORR noted that TCCI had asserted that all expenses charged to ORR were allowable, but failed to provide any documentation supporting the assertion. *Id.* ORR determined that TCCI "failed to implement the auditor's recommendations or implement its corrective-action plan submitted" for the identical audit finding for FFY 2009. *Id.* ORR also referenced section 4.5 of the cooperative agreement and concluded that TCCI "failed to comply with its written agreement as it related to the schedule of payments." *Id.*

TCCI timely appealed each of ORR's disallowance determinations to the Board. TCCI filed its notice of appeal regarding the disallowance for FFY 2010 shortly before it filed its reply brief in support of its appeal of the disallowance for FFY 2009. At TCCI's request and with ORR's agreement, the Presiding Board Member (PBM) issued an order consolidating the two appeals for purposes of disposition. In the same order, the PBM outlined the Board's preliminary analysis of the appeals and ordered TCCI to show cause why a decision should not be issued upholding the disallowances based on that analysis. TCCI submitted a reply to the analysis in the show cause order. This decision is based on that analysis.

Analysis

ORR does not contend that TCCI failed to provide the beds and services that are the subject of the cooperative agreement. Instead, ORR's disallowances are based on its determination that TCCI failed to show that all of the funds it drew down were used to cover costs allocable to those beds and services. Under "the applicable regulations and cost principles," a recipient of federal funding "bears the burden of documenting the existence and allowability of its expenditures of federal funds." *Touch of Love Ministries, Inc.*, DAB No. 2393, at 3 (2011). "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).

During the proceedings before the Board, TCCI failed to provide any documentation to show that the amounts disallowed by ORR were spent on allowable, allocable costs. Instead, TCCI argues principally that the generally applicable cost accounting rules and principles do not apply to its cooperative agreement with ORR. As we explain below, those assertions, and TCCI's other objections to the disallowances, are meritless. Accordingly, we conclude that ORR's disallowance determinations should be upheld in their entirety.

1. TCCI's contention that it appropriately drew down funding based on a fixed price per bed per day, rather than actual costs incurred, lacks merit.

TCCI asserts that, under a contract it had with ORR (that TCCI also refers to as a "blanket purchase agreement" or "BPA") prior to the implementation of the cooperative agreement, TCCI was paid a set amount per day per bed that it made available to unaccompanied alien children in ORR's custody, regardless of whether the beds were occupied, and it drew down those fixed payments on a periodic basis throughout the year. TCCI Br. at 5. TCCI contends that it continued to draw down funding under the cooperative agreement in this manner, consistent with the applicable regulations. Alternatively, TCCI asserts that, to the extent its fixed price drawdown method *was* inconsistent with the applicable regulations, it reasonably believed the method was

permissible under the cooperative agreement based on a letter that it received from ORR's Acting Director in December 2008. Based on this letter, TCCI contends that either ORR should be deemed to have affirmatively waived its right to impose different requirements from those imposed under the prior contract or ORR should be estopped from imposing different requirements. TCCI Br. at 14-21; TCCI Reply Br. at 2-6, 7-8. TCCI's arguments lack merit.

a. TCCI has not shown that receipt of a fixed price per bed per day was consistent with the cooperative agreement and the applicable regulations.

TCCI maintains that it drew down funding based on a fixed price per bed per day and that this methodology is consistent with the cooperative agreement and the applicable regulations. TCCI Br. at 9-10. TCCI acknowledges that OMB Circular A-110, which is quoted in part in section 4.5 of the cooperative agreement, limits a recipient's use of cash advances to "the actual, immediate cash requirement of the Recipient organization in carrying out the purpose of the approved program or project." *Id.* at 8-9, quoting 2 C.F.R. § 215.22(b)(2) (45 C.F.R. § 74.22(b)(2)); *see* TCCI Ex. 3, at 1; TCCI Ex. 5, at 29; TCCI Ex. B at 3-4. But TCCI cites to additional language in OMB Circular A-110 providing that "[w]henever possible, advances shall be consolidated to cover anticipated cash needs for all awards made by the Federal awarding agency to the recipient." TCCI Br. at 9, quoting 2 C.F.R. § 215.22(c) (45 C.F.R. § 74.22(c)). TCCI emphasizes that subsection (c) "clearly contemplates advances for 'anticipated cash needs,'" and contends that TCCI needed cash advances to perform its responsibilities under its agreement with ORR. *Id.* at 9.

TCCI's reliance on the additional language in OMB Circular A-110 is misguided. TCCI was entitled to receive federal funds in advance, but it was entitled to receive funds only for allowable costs allocable to the project. *See* 45 C.F.R. §§ 74.22(b), 74.27; 2 C.F.R. Part 230 App. A ¶¶ A.2, A.4. Thus, the availability of cash advances did not relieve TCCI of its obligation to document that the funds it drew down were for allowable, allocable costs.

TCCI also relies on paragraph 21 of OMB Circular A-122, which provides that the costs of "idle facilities" and "idle capacity" are allowable in certain circumstances, such as when idle capacity results from "normal fluctuations of usage" and the full capacity "is reasonably anticipated to be necessary." TCCI Br. at 10, quoting 2 C.F.R. Part 230 App. B ¶ B.21.c. TCCI asserts that its expenses were allowable costs under paragraph 21 because ORR required it to "maintain a certain number of dedicated beds," with the exact number "dictated after due consideration by ORR itself." *Id.* at 9. According to TCCI, the "fact that some beds were unoccupied did not alleviate the cost to TCCI of maintaining the facilities, and paying for them on a '24/7' basis." *Id.*

TCCI's reliance on paragraph 21 of OMB Circular A-122 is misplaced as well. First, even assuming that the costs of maintaining unoccupied beds were allowable costs of idle capacity, TCCI does not allege that the auditor failed to include such costs in calculating the total amount that TCCI spent on UAC program expenses during FFYs 2009 and 2010. Yet, the auditor concluded that during those years TCCI received funds from ORR in excess of the costs TCCI incurred for the UAC program, and TCCI has not provided any evidence suggesting that the auditor's calculations were erroneous. Second, paragraph 21 would not justify drawdown of a fixed amount per bed per day. TCCI has not provided any documentation establishing the expenses it incurred when beds were filled versus when beds were unoccupied. TCCI focuses only on its responsibility under the cooperative agreement to provide beds to unaccompanied alien children in ORR custody, but TCCI also was required to provide services to the children that occupied those beds. *See* TCCI Ex. B at 6-9 (Docket No. A-12-10). TCCI could not reasonably claim to incur the same amount of costs for an unoccupied bed as an occupied bed, in view of the fact that there would be no service costs associated with unoccupied beds.

b. The December 2008 cover letter from ORR does not provide a basis for concluding that the generally applicable cost accounting rules and principles should not apply to the cooperative agreement.

TCCI argues in the alternative that, even if its fixed price drawdown method was inappropriate under the cooperative agreement, it reasonably believed the method continued to be permissible and no new terms or conditions applied based on the December 15, 2008 cover letter from ORR's Acting Director, which enclosed TCCI's notice of Financial Assistance Award for FFY 2009 – the first award that it received under the cooperative agreement. TCCI Br. at 5-6; TCCI Resp. to Show Cause Order at 2.

As an initial matter, we find that TCCI has not provided documentation substantiating its assertion that, under its prior contract with ORR, it could draw down a fixed amount based on a per-bed, per-day rate, regardless of the actual costs it incurred for the UAC program. TCCI did submit an unsigned statement from its former Chief Financial Officer alleging that TCCI was paid a fixed rate under the prior contract. TCCI Ex. 2, at 1st page (unnumbered). However, the statement is not credible evidence of the terms of the prior contract. In addition to being unsigned, the statement contains only a single sentence about the prior contract/BPA ("Under the BPA, TCC was paid a per-bed, per-day rate.") and does not explain the alleged terms in any detail. *Id.* TCCI also submitted a signed affidavit from its president, but the affidavit does not contain any information about the terms of the prior contract. *See* TCCI Ex. 1. Even if the evidence were sufficient to establish the terms of the prior contract, we would nonetheless find TCCI's alleged interpretation of the cover letter to be unreasonable.

TCCI's argument is premised on a single sentence in the cover letter: "Please note that the standard terms, conditions, and reporting requirements of your award remain the same." TCCI Ex. 4, at 1st page (unnumbered). However, the sentence does not specify what "standard terms, conditions, and reporting requirements" are referenced or that those terms, conditions, and requirements are the same as under the prior contract/BPA. ORR argues, and TCCI does not deny, that it had for many years received grant awards from ORR under other, unrelated programs. Thus, TCCI could not reasonably assume the letter was referring to the terms of the prior contract related to the UAC program.

Even if the cover letter could be considered ambiguous, the notice of Financial Assistance Award that accompanied the letter is quite clear. It specifies that the award is "subject to the requirements set forth in 45 CFR Part 74 (for non-profit organizations and educational institutions) or 45 CFR Part 92 (for state, local, and federally recognized tribal governments)." TCCI Ex. 4, at 3rd page. The funding announcement pursuant to which TCCI applied for the cooperative agreement at issue likewise explains that recipients of UAC funds "are subject to the requirements in 45 CFR Part 74 (non-governmental) or 45 CFR Part 92 (governmental)." ORR Ex. A at 75. As noted above, section 4.5 of the cooperative agreement also specifically provides, in accordance with OMB Circular A-110 and 45 C.F.R. § 74.22(b)(2), that cash advances "shall be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements" of the recipient "in carrying out the purpose of the approved program or project." ORR Ex. B at 20-21. The cooperative agreement further provides that for "purposes of determining allowable costs of this agreement, OMB Circular A-122 . . . will apply." *Id.* at 21. If ORR had intended to pay a fixed price per bed per day, it would not have included these provisions in the cooperative agreement.

Other provisions in the cooperative agreement further undermine TCCI's interpretation of the letter. The agreement requires TCCI to "provide to ORR an annual budget outlining all projected costs for the prospective fiscal year." TCCI Ex. B at 19 (Docket No. A-12-10). If ORR were waiving the cost accounting principles and allowing TCCI to receive a fixed price per bed per day, regardless of costs incurred, ORR presumably would not need to know about TCCI's anticipated costs. In addition, the agreement specifically nullifies any prior agreement between ORR and TCCI. Section 8.1, titled "Entire Agreement," provides: "This Agreement constitutes the entire Agreement of the parties hereto concerning any matter addressed herein. It replaces and renders void any other agreement or understanding, whether written or oral, existing between the parties concerning any matter addressed herein." *Id.* at 32-33. In light of this section of the cooperative agreement, TCCI could not reasonably read the Acting Director's letter as somehow allowing the terms of the prior contract to continue under the agreement.

Thus, these documents put TCCI on notice that it needed to account for any funds drawn down by showing that it had incurred allowable costs allocable to the UAC program. In other words, TCCI could not reasonably rely on one potentially ambiguous sentence in the December cover letter to conclude that it could charge a fixed price per bed per day, even assuming it was permitted to do so under the prior contract.

The documents also establish that ORR did not waive the applicability of Part 74 and OMB Circular A-122 to the cooperative agreement. Waiver is the "voluntary relinquishment or abandonment – express or implied – of a legal right or advantage." *Black's Law Dictionary* (9th ed. 2009). ORR has discretion to waive certain "cost-related and administrative written prior approvals" required under the Part 74 regulations. 42 C.F.R. § 74.25(d). ORR also may allow recipients to otherwise deviate from the requirements of Part 74 on a case-by-case basis. *Id.* § 74.4(a). Yet, the funding announcement, the cooperative agreement, and the notice of Financial Assistance Award all indicate that the agreement is subject to the requirements of Part 74, and do not mention or imply that ORR was abandoning those requirements in any way.

TCCI's waiver argument is based entirely on the sentence in the cover letter discussed above. However, the cooperative agreement provides that any changes to the agreement "shall be set forth in writing and reflect the rights and obligations of both parties." TCCI Ex. B at 30 (Docket No. A-12-10). The sentence in the cover letter does not indicate that it was intended to modify the "rights and obligations" of TCCI and ORR under the cooperative agreement.

In addition, to the extent that TCCI argues ORR should be estopped from basing the disallowances on the regulations and cost principles, that argument has no merit. First, estoppel is an equitable remedy, and the Board is not authorized to reverse a disallowance based on equity. *See, e.g., Municipality of Santa Isabel*, DAB No. 2230, at 11 (2009) (noting that "the Board has no authority to waive a disallowance based on equitable principles"); *Arlington Community Action Program, Inc.*, DAB No. 2141, at 5 (2008) (explaining that the Board "is bound by applicable laws and regulations . . . and has no authority to waive a disallowance"). Second, estoppel requires reasonable reliance but, as discussed above, TCCI could not reasonably rely on its interpretation of the cover letter. *See, e.g., Family Health Servs. of Darke Cnty., Inc.*, DAB No. 2269, at 19 (2009) (citing *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, at 421 (1990)). Finally, ORR could not be estopped in any event absent a showing of "affirmative misconduct," which TCCI has not alleged. *See id.*

2. TCCI had adequate notice of the basis for the disallowances.

With regard to the disallowance for FFY 2009, TCCI argues that ORR's contention that TCCI did not provide adequate documentation supporting its use of funding for the UAC program "exceeds the scope" of ORR's June 5, 2012 letter concerning the disallowance. TCCI Reply Br. at 6. TCCI maintains that ORR's disallowance "was couched in terms of the Audit" and the "Audit did not complain[] of a lack of Documentation supporting the use of ORR funds, but instead complained of the fact that the funds were used in some degree to fund a non-federal program." *Id.* However, even if the disallowance letter did not specifically state that the disallowance was based on the absence of documentation showing that the funds were spent on allowable costs, TCCI had notice that it needed to document its use of the challenged funds in order to rebut the audit findings that funds were misused. Moreover, as noted above, both disallowance letters noted that TCCI had alleged all use of ORR funds was appropriate but had not provided any evidence to back up its contention.

In any event, even if the June 5, 2012 letter did not clearly notify TCCI that ORR's disallowance was also based on lack of supporting documentation, the Board has consistently held that a federal agency may amend or clarify its legal justification for a disallowance so long as the recipient is given adequate notice and opportunity to respond. *Bd. of Educ. of Topeka Pub. Schools, Unified School Dist. #501*, DAB No. 2421, at 11 (2011); *Tex. Health & Human Servs. Comm'n*, DAB No. 2404, at 10 (2011). In its response brief, ORR argued that the Board should uphold the disallowance on the ground that TCCI had failed to document that its costs were properly allocated to and allowable under the cooperative agreement. ORR Response Br. at 1, 4-5. TCCI had an opportunity to respond to this argument on the merits in its reply brief, but chose not to do so. TCCI also had a second chance to address the allegation of insufficient documentation in its response to the order to show cause issued by the PBM. As discussed below, however, TCCI's response is unpersuasive.

3. TCCI has not presented a reasonable explanation for its failure to produce any records to demonstrate that it used the disallowed funds for allowable costs.

In its response to the order to show cause, TCCI acknowledges that the audits for FFYs 2009 and 2010 determined "the issue of allowable costs . . . adverse to TCCI, at least as an initial proposition." TCCI Resp. to Order to Show Cause at 3. Nonetheless, TCCI asserts that it has been "unable in the time frame allowed to adequately research the issue of allowable costs." *Id.* TCCI further contends that its difficulty with obtaining documentation of the allowability of its costs "stems from the severe disruption of TCCI's operations in the wake of Hurricane Ike," the September 2008 storm that apparently damaged TCCI's main office. *Id.*; *see* TCCI Br. at 6.

TCCI's contentions do not provide a basis for reversing the disallowance. TCCI should have known at least as of the time it received the disallowance letters in June and October 2012, if not earlier, that it needed to gather documentation to address the auditor's findings. Moreover, although TCCI blames its inability to provide documentation on Hurricane Ike, TCCI does not specifically allege that the storm destroyed its records. Nor does TCCI explain why it has not been able to overcome any record retrieval issues caused by Hurricane Ike in the four and a half years that have elapsed since the storm hit. We therefore find that TCCI had adequate time to gather and produce any documentation supporting its use of the disallowed funds. We also note that TCCI did not request a stay of the proceedings before the Board to gather such documentation, even though TCCI previously requested and received multiple stays for other reasons.

4. TCCI's other arguments are irrelevant or lack merit.

TCCI raises a number of additional arguments that are not persuasive or have no bearing on the correctness of ORR's disallowance determinations. TCCI contends that the auditor exceeded an auditor's proper role in "flatly declaring" that TCCI owed money to ORR, and that ORR "automatically followed" the auditor's assessments. TCCI Br. at 7-8; TCCI Notice of Appeal dated Nov. 5, 2012; *see* TCCI Reply Br. at 8-9. The record demonstrates, however, that the auditor merely made "recommendations" about how TCCI should deal with the deficiencies identified by the audits. TCCI Ex. 5, at 29-30. Even if the auditor purported to make a final determination that the costs were unallowable, however, this would not provide a basis for reversing the disallowances, which ORR issued based on its own review of the audit findings.

In addition, TCCI maintains that ORR's disallowances are not authorized under the cooperative agreement or the applicable regulations. TCCI Br. at 13. TCCI relies on 45 C.F.R. § 74.48(a), which provides that contracts over $100,000 must contain provisions "that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate." *Id.* TCCI argues that the cooperative agreement does not contain the required provisions, so ORR has no remedy for a breach of the agreement. *Id.* at 14. However, section 74.48(a) applies to procurement contracts between recipients and third parties, not to agreements between recipients and the government. *See* 45 C.F.R. § 74.40 (explaining that sections 74.41 to 74.48 "set forth standards for use by recipients in establishing procedures for the procurement of supplies . . . with Federal funds"). Contrary to TCCI's contention, as noted above, section 74.62(a)(2), which applies to the cooperative agreement, authorizes a disallowance when a recipient "materially fails to comply with the terms and conditions of an award." For the disallowance for FFY 2009, ORR specifically stated that TCCI's drawdown of $629,876 in funds that exceeded its immediate need to cover allowable expenses was "material,"

and we agree. TCCI Ex. 3, at 1. The amount misspent for FFY 2010 also shows material failure to comply. Moreover, as the Board recently explained in *FFA Sciences, LLC*, an "awarding agency may disallow and recover any funds that are misspent or applied to unallowable costs, regardless of whether any noncompliance with program requirements is material." DAB No. 2476, at 22 (2012), citing 45 C.F.R. §§ 74.71-73.

TCCI also points to a sentence in ORR's June 5, 2012 letter regarding the disallowance for FFY 2009 stating that the "Office of Inspector General [I.G.] recommended that policies and procedures be strengthened to ensure drawdowns do not exceed the immediate need for funds to cover allowable expenditures for the program." Based on this statement, TCCI further argues that ORR "unilaterally altered" the terms of the cooperative agreement. TCCI Br. at 10-11; TCCI Reply Br. at 10. TCCI interprets the referenced recommendation from the I.G. as recommending changes to ORR's (not TCCI's) policies and procedures. TCCI appears to argue that ORR modified the cooperative agreement to incorporate the requirements of Part 74 and OMB Circular A-122 in response to the recommendation. There is no support for TCCI's interpretation. The I.G. clearly recommended that TCCI implement changes, not ORR. Indeed, the letter from the I.G. that contains the referenced recommendation is in the record, and it is a letter *to TCCI*. ORR Ex. E at 3rd page (unnumbered).

Conclusion

For the reasons explained above, we uphold ORR's disallowances in full.

/s/
Stephen M. Godek

/s/
Leslie A. Sussan

/s/
Judith A. Ballard
Presiding Board Member