Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

AmASSI Health & Cultural Center
Docket No. A-13-19
Decision No. 2516
June 13, 2013

DECISION

AmASSI Health & Cultural Center (AmASSI), a non-profit organization in Los Angeles, California, appeals an October 31, 2012 decision by the Centers for Disease Control and Prevention (CDC). CDC, an organization within the U.S. Department of Health and Human Services (HHS), denied continued funding and terminated a cooperative agreement under which AmASSI received federal funds for human immunodeficiency virus (HIV) prevention programs. CDC determined that AmASSI materially failed to comply with the terms and conditions of the agreement, concluding that AmASSI did not make satisfactory progress towards reaching project goals and objectives and did not use sound financial management practices.

As discussed below, the record shows that AmASSI did not timely hire, train, and maintain a full complement of competent employees; did not make satisfactory progress towards meeting key project goals and objectives; and did not have sound financial management systems. Although CDC gave AmASSI several opportunities to correct its deficiencies, including providing extensive technical assistance for well over a year, AmASSI failed to take advantage of those opportunities and resisted numerous attempts by CDC to help AmASSI reach key programmatic objectives of the award. Based on these conclusions, we concur in CDC's determination that AmASSI materially failed to comply with the terms and conditions of its awards, and we sustain CDC's determination to deny continued funding and terminate the cooperative agreement.

Legal Background

A non-profit organization that receives federal funds under a CDC cooperative agreement, grant or other award is subject to Part 74, Title 45, of the Code of Federal Regulations.[1] 45 C.F.R. § 74.1. A recipient must meet financial and program

[1] 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. 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).

management requirements, including reporting, record keeping, and cash management standards, set out in the regulations. 45 C.F.R. Part 74, subparts B-E. The Part 74 regulations require a non-profit organization to comply with the cost principles in Office of Management and Budget (OMB) Circular A-122, codified in 2 C.F.R. Part 230, Appendix A. 45 C.F.R. § 74.27(a).

If the recipient materially fails to comply with the terms and conditions of the agreement, whether stated in a federal statute or regulation, an assurance, an application, or a notice of award, CDC may take one or more of the following actions: terminate the cooperative agreement; withhold further awards for the project or program; take any other remedies that may be available legally. 45 C.F.R. §§ 74.61(a)(1), 74.62(a)(3)-(5).

The Board may hear appeals of certain final, written decisions concerning direct, discretionary project grants or cooperative agreements, including: 1) a decision to terminate an award for failure to comply with its terms and conditions; and 2) a decision to deny a noncompeting continuation award under the project period system of funding where the denial is for failure to comply with the terms of a previous award. 45 C.F.R. Part 16, App. A, ¶ ¶ C(a)(2)-(3). Before the Board takes an appeal, the appellant must exhaust any available preliminary appeal process required by regulation, such as the process described in 42 C.F.R. Part 50 (subpart D) for Public Health Service programs. 45 C.F.R. § 16.3(c).

Under the project period system, "a project may be approved for a multi-year period, but generally is funded in annual increments known as 'budget periods.'" HHS Grants Policy Statement at I-15.[2] This system notifies the recipient that the agency intends "to non-competitively fund the project during the approved project period as long as required information is submitted, funds are available, and certain criteria are met." *Id.*

Case Background

1. The funding opportunity announcement

In August 2009, CDC issued a funding opportunity announcement (FOA) of a cooperative agreement program for community-based organizations to develop and operate HIV prevention projects. FOA PS10-1003, at 11-16.[3] CDC explained that applicants would be evaluated in two steps. The first step involved a review of eligible

[2] The Grants Policy Statement is available at http://dhhs.gov/asfr/ogapa/grantinformation/hhsgps107.pdf.

[3] FOA PS10-1003 is available at http://www.cdc.gov/hiv/topics/funding/ps10-1003/index.htm. The program is authorized under sections 317(k)(2) and 318 of the Public Health Service Act (42 U.S.C. Sections 247b(k)(2) and 247(c)), as amended.

written applications; the second step involved a pre-decisional site visit. *Id.* at 79. CDC stated that an initial award would be for the first budget year of a five-year project period. *Id.* at 27. "Throughout the project period," CDC stated, its "commitment to continuation of awards will be conditioned on the availability of funds, evidence of satisfactory progress by the recipient (as documented in required reports), and the determination that continued funding is in the best interest of the U.S. Government." *Id.*

2. AmASSI's application

In October 2009, AmASSI submitted an application under FOA PS10-1003 requesting $500,000 for the first year (July 1, 2010 – June 30, 2011) of a proposed five-year project. Board Ex. 1.[4] AmASSI proposed to collaborate with the Treatment, Education and Assessment Institute (TEA) and to work closely with the Magic Johnson Foundation and the Los Angeles County Public Health Department to carry out three interventions: 1) Community Peers Reaching Out and Modeling Intervention Strategies (Community PROMISE); 2) comprehensive risk counseling services (CRCS)[5]; and 3) HIV counseling, testing and referral (CTR) services. *Id.* at 17. AmASSI proposed to staff its project with a project director, a senior program coordinator, two peer advocates, a project assistant, two part-time CTR specialists, and a subcontracted CTR physician-manager. *Id.* App. F.

AmASSI's application stated that its Community PROMISE program would "combine group education sessions, outreach, and community health promotion/information events that AmASSI has utilized successfully in its prevention efforts." *Id.* at 23. The objective of Community PROMISE was to "impact cultural norms, beliefs, and attitudes that have traditionally led to high risk behaviors (for a minimum of 500 clients)." *Id.*, Project Abstract Summary. The program had four core elements: "conduct community identification; write and distribute role model stories; recruit and train Peer Advocates . . . to reinforce the messages in the role model stories; and perform evaluation to ensure integrity of intervention." *Id.* at 26. AmASSI represented that its "staff ha[d] earned trust from the community already [and would] be able to recruit high risk clients and

[4] CDC provided a copy of AmASSI's application at the Board's request but did not designate the application as a CDC exhibit. We therefore have designated and included AmASSI's application in the record as Board Exhibit 1. We also note that CDC did not use the same numbering and lettering sequence for the exhibits it submitted in its original appeal file (the record for the Review Committee proceeding) and for the additional exhibits it submitted with its response to AmASSI's brief. For clarity, we refer to CDC's exhibits using both numbering and lettering systems in CDC's submissions rather than attempt to reconcile the differences.

[5] CRCS is "an intensive, individualized client-centered counseling for adopting and maintaining HIV risk-reduction behaviors," that is "designed for HIV-positive and HIV-negative individuals who are at high risk for acquiring or transmitting HIV . . . ." FOA PS10-1003, Attachment 1.

advocates with ease." *Id.* at 29. AmASSI stated that Community PROMISE "[o]utreach and educational efforts will begin immediately," and "[f]ull implementation of the intervention will be accomplished by or before January 11, 2011," (the projected 7th month of the first budget period). *Id.* at 31.

AmASSI's application stated that its CRCS program would "help clients initiate and maintain behavior change while addressing competing needs" by providing "several CRCS sessions of client-centered HIV risk-reduction counseling . . . ." *Id.* at 49. AmASSI stated that it was "[c]urrently providing CRCS in a limited scope," and had "strong collaborative relationships in the service community." *Id.* Therefore, it would use its award to expand its existing program. *Id.* AmASSI's objective was to "[r]educe self-reported HIV transmission risk behaviors (CRCS for a minimum of 150 clients)." *Id.*, Project Abstract Summary. AmASSI stated that full implementation of this intervention also would be accomplished by January 11, 2011 (the projected 7th month of the first budget period). *Id.* at 53.

To deliver CTR services, AmASSI proposed a subcontract with Dr. B.[6] of TEA Institute, with whom it had an existing, collaborative program. *Id.* at 36, App. F. AmASSI proposed to use the award to expand CTR resources and build capacity by "co-locating a CTR specialist from AmASSI" at TEA's "facility, expanding community locations for testing and integrating new CTR services with partner . . . HIV prevention programs." *Id.* at 36. TEA would "take the lead in [CTR] program implementation." *Id.* AmASSI proposed "to provide at least 400 tests within the first project year of full implementation," and "[f]ull implementation of the intervention will be accomplished by January 11, 2011" (the projected 7th month of the first budget period). *Id.* at 37, 44.

3. AmASSI's Year One award

On July 27, 2010, CDC awarded AmASSI $315,836 for the first budget period of eleven months (August 1, 2010, through June 30, 2011) of its proposed project. CDC Ex. 5. CDC approved a project period from August 1, 2010 through June 15, 2015. The award notice stated that after the first budget period, CDC would provide funds under noncompeting, annual continuation awards "based on satisfactory programmatic progress and subject to the availability of funds." *Id.* at 3. AmASSI's "Interim Progress Report" in the first budget period would "serve as the non-competing continuation application." *Id.* at 4.

[6] We refer to individuals by the first letter of their last names to protect their privacy.

4. Year One (August 1, 2010 through June 30, 2011)

In its March 10, 2011 Interim Progress Report, AmASSI reported that it had not implemented any of the three HIV prevention interventions or delivered any services funded under the award. CDC Exs. I-04, II-06. In response to the reported lack of progress, CDC arranged a site visit in April 2011 to assess AmASSI's programs and needs.[7] *Id.*

CDC concluded at the April 2011 first site visit that AmASSI faced multiple barriers to project implementation and needed substantial technical assistance to manage the award. CDC Ex. II-06. CDC identified and discussed with AmASSI specific "next steps" for AmASSI to take to meet its award obligations. *Id.* Those actions were summarized in CDC's site visit report, and they included with regard to the CTR program:

- Consider securing a CLIA waiver[8] for AmASSI and . . . consult with the Los Angeles County Office of AIDS Programs and Policy [OAPP] for needed assistance in obtaining the waiver; or,

- Consider following-through with original plans to subcontract Dr. B[.] to oversee the CTR[] program with AmASSI named as a secondary site under Dr. B[.]'s existing CLIA waiver; and

- Discuss the option of using the Los Angeles County lab for HIV confirmatory testing, together with weighing the costs for these services; and

- Develop a Memorandum of Understanding with agencies subcontracted to provide components of CTR[] onsite with AmASSI.

Id. CDC also instructed AmASSI to submit to CDC "a written program description of the CTR[] program model, together with a line item budget and budget narrative supporting direct services" on or by May 2, 2011. *Id.* In addition, CDC directed AmASSI to provide CDC a copy of any memorandum of understanding with subcontracted agencies or service partners. *Id.*

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[7] 45 C.F.R. § 74.51(g) provides for HHS agencies to make site visits, as needed, to monitor an award recipient's program performance.

[8] The funding opportunity announcement stated that applicants proposing to use a rapid HIV test waived under the quality standards for laboratory testing established under the Clinical Laboratory Improvement Amendments of 1988 (CLIA) were required to obtain a CLIA Certificate of Waiver or, if not operating under their own Certificate of Waiver, must establish a formal agreement with a laboratory and obtain approval to operate under that laboratory's CLIA certificate. FOA PS10-1003, at 54-55.

The site visit report "next steps" also directed AmASSI to hire a second peer advocate and to continue to pursue CRCS and Community PROMISE training for staff members who had not been trained on those interventions. Until all staff were trained, the "next steps" provided, "the project director will engage in offering CRCS" and "the project director and project coordinator will implement the [Community PROMISE] core elements in year one." *Id.* The report concluded: "AmASSI must achieve full program service delivery in three HIV prevention interventions in the last quarter of the first year of PS10-1003 funding." *Id.* "Failure to provide services during the first year of funding," the report stated, "will result in funding restrictions in [Year] 2." *Id.*

CDC made a second site visit in June 2011 to evaluate AmASSI's progress at the end of the first budget period. CDC Exs. II-00-F; II-04. During the visit, OAPP conducted an assessment of AmASSI's capacity to provide CTR services. CDC Ex. II-00-F. The visit also included a meeting with Dr. B. and review of the AmASSI and TEA memorandum of agreement and subcontracted budget. CDC Ex. II-04. According to the site visit report, AmASSI's management was "deeply committed" to the service populations and HIV prevention, but would "be challenged to fulfill program development" for the three interventions. *Id*. "Due to continued performance problems," CDC later reported, "an intensive technical assistance and capacity building plan was developed to strengthen AmASSI's ability to implement" services. CDC Ex. II-05; *see also* CDC Ex. I-04.

Under the June 2011 plan, CDC arranged for AIDS Project Los Angeles to provide capacity building assistance for AmASSI's Community PROMISE program. CDC Exs. II-04; II-05. In addition, CDC "arranged for OAPP to work intensively with AmASSI to develop internal capacity for CTR services." *Id*. Specifically, OAPP would help AmASSI to complete a CTR quality assurance plan, to apply for a CLIA waiver; and to train and certify three AmASSI employees as HIV testers. *Id.*

The June 2011 site visit report also instructed AmASSI to ensure that all staff attend an expedited CRCS training scheduled specifically in Los Angeles to facilitate AmASSI in CRCS program development and implementation; to develop CRCS program support materials; to reschedule a technical assistance call on reporting and data collection; and to "engage CDC-funded and experienced CRCS providers to learn about best practices for CRCS program development and implementation." *Id.*

5. AmASSI's Year Two award

On June 28, 2011, CDC awarded AmASSI $335,748 for the second year of the project. CDC Ex. 17. Because AmASSI had not achieved its Year One project goals and had not yet submitted an acceptable second period budget, the Year Two award imposed several new terms and conditions, including: 1) By August 1, 2011, AmASSI was required to submit a response to CDC's "technical review, which is a summary of recommendations, strengths, weaknesses and action items"; and 2) By August 1, 2011, AmASSI was

required to submit "a revised budget to reflect the 12-month level . . . (with budget amounts separated by approved intervention) and budget narrative and justification." *Id.* at 3. Like the first award, the Year Two award stated that future funding was "subject to the availability of funds and satisfactory progress of the project" and that the Year Two Interim Progress Report would serve as the non-competing continuation application. *Id.* at 2-4.

6. Year Two (July 1, 2011 through June 30, 2012)

CDC made a third site visit in December 2011 to asses AmASSI's progress under the June 2011 technical assistance and capacity building plan. With regard to the Community PROMISE program, the site visit report stated that AIDS Project Los Angeles personnel met with AmASSI staff once in August and once in September to provide training and to help AmASSI develop role model stories. CDC Ex. II-05. AIDS Project Los Angeles reportedly tried to follow up with AmASSI in October and November, but AmASSI did not respond to these attempts until one week prior to the December site visit. According to the site visit report, AmASSI told AIDS Project Los Angeles that no further assistance was needed. CDC found during the site visit, however, that AmASSI had "not made progress on Community PROMISE under the technical assistance plan" and that it was "enter[ing] the second half of the second year of funding unprepared to implement the evidence-based intervention . . . ." *Id.* During CDC's site visit discussions with AmASSI, the report stated, "it was agreed that AmASSI did not take full advantage of the technical assistance . . . ." *Id.*

CDC also assessed AmASSI's progress towards implementing CRCS. According to the December site visit report, the "Project Manager estimated that the peer advocate [who provided] CRCS services had a case load of only three individuals against a year two goal of serving 80 clients." *Id.* In addition, the Executive Director[9] had not provided CRCS services even though he was trained and previously told the CDC Project Officer that he expected to directly provide CRCS services. The report concluded that AmASSI "has made insufficient progress toward full implementation of CRCS, and will enter the second half of the second year with an under-developed CRCS program and with concerns as to whether the CRCS program is appropriately staffed and monitored." *Id.*

The December site visit report also described AmASSI's progress towards implementing its CTR program. After the June 2011 site visit, OAPP offered to furnish CTR services weekly at AmASSI's location and to mentor AmASSI's management and direct service staff, at no cost to AmASSI or CDC, until the end of the calendar year, when AmASSI

[9] AmASSI's Executive Director also served as its Chief Executive Officer and the Principal Investigator of the awards.

was expected to be ready to offer these services internally. CDC Ex. II-05; *see also* CDC Ex. II-00-G; II-01. OAPP personnel began to provide CTR services at AmASSI's location on August 25, 2011. CDC Ex. II-00-I. According to the site visit report, "OAPP and AmASSI worked well together through this mutual agreement resulting in 88 individuals tested by OAPP, with three new positives linked to care by OAPP staff." CDC Ex. II-05.[10]

By December 2011, however, AmASSI had yet to assume management of the CTR program. According to the site visit report, "The actual status of [AmASSI's] CLIA Waiver application could not be determined during the December site visit." *Id.* In addition, CDC reported, one of AmASSI's peer advocates twice failed CTR certification and was separated from AmASSI; the second peer advocate was certified in September but was separated from AmASSI soon thereafter, "leaving the Project Manager as the sole CTR certified staff." *Id.* Moreover, "AmASSI did not recruit and certify new CTR staff during the technical assistance period." *Id.* "Therefore," CDC concluded, "AmASSI has not made sufficient progress toward full implementation of CTR services and will enter the second half of the second year of funding with OAPP testing staff conducting HIV testing and linkage to care for AmASSI, without an approved CLIA Waiver or quality assurance plan, and with inadequate CTR staffing." *Id.*

The December 2011 site visit report also summarized AmASSI's progress in developing intervention program budgets. The report stated that the Project Officer had been "working with AmASSI to construct intervention program budgets that are consistent with CDC budget guidelines, that adequately portray the financial costs of the actual interventions as implemented at AmASSI, and that are consistent with the CDC-provided instructions that describe usual and customary line item expenses for approved interventions." *Id.* According to the report, AmASSI "struggled to demonstrate competency in HIV intervention program development and therefore has also struggled to demonstrate competency in program intervention budget development." *Id.* "To date," the report noted, "three revisions have been required for the year two budget . . . . The third budget revision was not approved while onsite." *Id.* Therefore, the report concluded, AmASSI "will enter the second half of the second year of funding without having demonstrated competency in prevention intervention program budget development." *Id.*

[10] CDC noted that during the June 2011 site visit, AmASSI had "reported approximately 86 HIV tests that had been provided in the medical offices of a collaborating physician, Dr. [B.], as tests that should be allocated to AmASSI service delivery statistics during year one." CDC Ex. II-05. OAPP provided technical assistance to the AmASSI project manager to help AmASSI enter the data, but as of the December 2011 site visit, "the project manager still had not entered this data." *Id.*

AmASSI's financial reporting and management also came into question in Year Two. AmASSI submitted its financial status report for the first funding period, reporting expenditures of $307,747, with a request to carry over unspent funds from Year One into Year Two. CDC Exs. I-04, II-01.[11] In November 2011, CDC denied AmASSI's carry-over request on the grounds that the activities proposed for carryover funding were not essential to project needs and that AmASSI had not provided adequate justification for the costs. CDC Ex. I-04. CDC also notified AmASSI that it had concerns about the accuracy of the Year One financial status report. CDC Ex. I-06. Consequently, a representative from the CDC Procurement and Grants Office joined the third site visit in December 2011 to conduct an internal review of AmASSI's Year One expenditures. *Id.*

The December 20, 2011, internal review report of AmASSI's costs for the first budget period, based on the site visit and analysis of AmASSI's financial records, concluded that of the $307,748 in Year One claimed costs, there were unsupported items totaling $66,349, and one questioned item of $4,560 (fringe benefit costs for a project assistant who was a contractor and ineligible for fringe benefits). CDC Ex. I-7. The review also found multiple previously unreported costs totaling $14,828. *Id.* The report further noted that the project accountant "did not demonstrate her knowledge of AmASSI's financial operations with a level consistent of what her billed time would suggest." *Id.*

CDC's concerns about AmASSI's ability to meet performance goals and accountability requirements led CDC to designate AmASSI a "high risk" recipient, impose special conditions, and place AmASSI on "manual restricted payment status for reimbursable costs" effective January 1, 2012.[12] CDC Ex. I-04. In addition, AmASSI was put on a formal corrective action plan (CAP) that imposed fiscal and programmatic actions for AmASSI to address on a specified timeline. CDC Exs. I-04; II-03, II-05. Under the fiscal component of the CAP, CDC instructed AmASSI, among other things, to submit: all supporting documentation for Year One expenditures that was not available during the December site visit by January 31, 2012; up-to-date financial policy manuals; and "an approvable year two revised budget" by January 6, 2012. CDC Ex. I-04; II-05. The key outcome to be achieved under the programmatic component of the CAP was full program service delivery by April 1, 2012. CDC Ex. II-03.

[11] Later, in designating AmASSI "high risk," CDC stated that "the Principal Investigator signed off on the [report], which suggests a lack of division of authorities and internal controls," and the "official communication letter lacked the Business Official's signature as required by the terms and conditions of the award." CDC Ex. I-04.

[12] An awarding agency may designate a recipient as a high-risk organization and impose "special award conditions" when the recipient has a history of poor performance, is not financially stable, has a management system that does not meet the regulatory standards, has not complied with the terms and conditions of a previous award, or is not otherwise responsible. 45 C.F.R. § 74.14. Manual or restricted payment status under the Payment Management System requires the recipient to submit a payment voucher using a standard form to request reimbursement prior to drawing down federal funds.

In April 2012, CDC conducted a fourth site visit and CAP assessment. CDC Ex. II-03. CDC found that AmASSI did not achieve the key outcome of the CAP, full service delivery in the three funded interventions by April 1, 2012. *Id.* CDC concluded that the Community PROMISE program "remain[ed] at the role model story development stage"; that "no services [had] been provided . . . even though both the [Executive Director] and Program Director [were] trained in Community PROMISE; and that AmASSI "ended the CAP period with a need for technical assistance through a second [capacity building assistance] provider" identified in early April. CDC Exs. II-02; II-03. With regard to CRCS, CDC found that AmASSI had retained the three clients from Year One "without having consistently provided CRCS to these three clients" and that "[n]ew clients were neither recruited nor screened and served prior to March 31, 2012." *Id.* Thus, CDC concluded, AmASSI had "made no further progress in CRCS program development even though the [Executive Director] completed CRCS program managers[']s training in [Year] 1." CDC Ex. II-02.

With regard to CTR services, the CAP assessment stated, "AmASSI was provided three phases of intensive onsite CTR technical assistance and service delivery by [OAPP] due to continuing delays in establishing a complete, internal program structure for AmASSI-delivered CTR services." CDC Ex. II-03. According to CDC, AmASSI "ended the CAP period without securing a CLIA Waiver." *Id.* CDC noted, however, that in April 2012, AmASSI had "secure[d] the cooperation of a physician who is willing to serve as the physician of record, as required for the CLIA Waiver." *Id.* CDC reported that during the site visit, CDC had reviewed the new CLIA waiver application for certification and determined that it needed to be revised. Accordingly, CDC asked AmASSI to provide it "with a signed and completed copy of the [revised] CLIA Waiver for Certification when submitted to the State." *Id.*

In a June 1, 2012 written assessment of AmASSI's progress towards meeting its fiscal CAP, CDC concluded that AmASSI had "failed to adequately address its lack of fiscal capacity to effectively implement a federal-funded program," and had "done little to nothing in terms of tangible, long-term improvements to its fiscal infrastructure's weaknesses and inconsistent application of internal controls." CDC Ex. I-05, at 1. Furthermore, the supplemental Year One financial documentation that AmASSI submitted at the end of January in response to the CAP led CDC to increase the amount of unsupported first year costs to $117,456, which constituted 38.17% of the Year One award amount of $307,748. CDC Ex. I-06.

CDC notified AmASSI by letter dated July 20, 2012, that CDC had decided to deny non-competing continuation funding and to terminate AmASSI's cooperative agreement for cause. CDC Ex. I-01. The letter identified AmASSI's failures to meet the award terms and conditions in two general areas: 1) failure to make satisfactory progress towards meeting project goals and objectives; and 2) failure to demonstrate that management

practices were sufficient to ensure appropriate and efficient use of federal funds. CDC stated that it would amend the Year Two award to include a 30-day no cost extension for AmASSI to have adequate time to close out the award and make proper arrangements for personnel and that programmatic activities ended June 30, 2012. *Id.*

AmASSI appealed that determination administratively within CDC, and the CDC Agency Review Committee sustained the termination on October 31, 2012. CDC Ex. I-00. In a letter dated December 6, 2012, AmASSI appealed CDC's decision to terminate the subject award to the Board. Both AmASSI and CDC filed briefs and accompanying exhibits. Neither party requested an evidentiary hearing to resolve any disputed material facts.

Analysis

As noted above, CDC may terminate an award or take other actions, such as denying further awards, if the recipient materially fails to comply with "terms and conditions" of the award. 45 C.F.R. §§ 74.61(a)(1), 74.62(a)(3)-(5). The terms and conditions of AmASSI's first and second budget period awards stated that they were "based on the application submitted to, and as approved by, CDC" and subject to: the requirements in 45 C.F.R. Part 74 (which incorporate by reference OMB Cir. A-122); applicable provisions of the HHS Grants Policy Statement; the terms in FOA PS10-1003; and the special terms and conditions of the award notices themselves. CDC Exs. 5, 17.

Below, we explain why we conclude that the record supports CDC's determination that AmASSI materially failed to comply with multiple terms and conditions of its awards. Most importantly, the record shows that AmASSI: 1) failed to timely hire, train, and retain a full complement of capable and qualified staff; 2) did not make satisfactory progress towards meeting project goals and objectives; and 3) failed to implement sound management practices to ensure appropriate and efficient use of federal funds. These failures are material and sufficient bases to deny continued funding and terminate the cooperative agreement. Lastly, we explain why we deny AmASSI's request that we depart from Board precedent and reinstate its cooperative agreement based on principles of basic fairness.

1. AmASSI failed to timely hire, train, and maintain a full complement of capable employees.

The duty to timely hire, train and maintain a full complement of competent employees to perform HIV prevention services was an essential condition of AmASSI's awards. The funding announcement plainly stated that each award recipient must "ensure that the program is staffed adequately" for "planning and oversight of the intervention or service"

and "delivery of the intervention or service." FOA PS10-1003, at 18-19. The announcement also stated that recipients must, within the first six months of funding, "participate in CDC-approved trainings on data collection and submission, CTR services, CRCS, and/or their selected [evidence-based interventions] prior to the implementation of program activities." *Id.* at 20. AmASSI represented in its project proposal, on which its award was based, that it had an experienced staff and partner organizations, and that it would timely hire and train additional personnel to deliver Community PROMISE, CTR, and CRCS services. CDC Ex. 5, at 3; Board Ex. 1 at 12-16, 33-55. AmASSI's project timeline targeted January 11, 2011(the projected 7th month of its first budget period) as the time by which its three interventions would be fully implemented. *Id.* at 31, 37, 44, 53.

The record shows that AmASSI did not meet the staffing and training conditions of its awards. As of April 2011 (the ninth month of Year One), only the Executive Director had been trained in all three interventions, and AmASSI had yet to hire its second peer advocate. CDC Ex. II-00-C. A full service staff was employed in the first month of Year Two (August 2011), and both peer advocates received CTR training; however, one peer advocate who was certified in September 2011was separated from employment soon thereafter, and the other was unable to pass the CTR certification test after two attempts and was terminated from employment. CDC Ex. II-05. AmASSI hired a replacement peer advocate in November 2011, but training for that individual was not available until the beginning of 2012. CDC Ex. II-05, at 4. Thus, the record supports CDC's assertion that "[a]ggressive recruitment and training of competent program staff" was a "key challenge" in the first two years of AmASSI's project. *Id.*

AmASSI argues that CDC's findings that it failed to meet the award staffing and training requirements are taken out of context and do not recognize events that were beyond AmASSI's control. AmASSI argues, "Most of the staff was already in place" by the time of the first site visit and it "had no insurmountable staff hiring challenges." AmASSI Br. at 4, 11. Amassi also argues that the CDC Project Officer "came to AmASSI with preconceived notions about the organization's capacity," that her "position on AmASSI's first 6 months was not based on direct observation," and that she mischaracterized AmASSI's organizational capacity in the first site visit report. AmASSI. Br. at 4.

Amassi also contends that not all of its employees were trained within the first six months of the project because: CDC cancelled one training session; employees with small children could not be "across country" (where training was available) for multiple days; some trainings were filled to capacity; and it could not schedule all staff to attend any one training at the same time because it would have had to close during that period. *Id.* at 4-5, 11-12. In addition, AmASSI says, it had to replace a female employee who was trained with a male employee who was not trained because CDC indicated in a

conference call "that Black MSM [men who have sex with men] was now CDC's primary population of focus, and that grantees needed to apply themselves." *Id.* at 17. AmASSI asserts that there was a "temporary lack of training options," not within its control, for the replacement staff. *Id.* at 12. Thus, AmASSI argues, its "training related challenges . . . were not based on neglect; or, result[] from decisions made strictly by AmASSI." *Id.* at 5.

AmASSI's arguments are not persuasive. While AmASSI generally denies having any significant staffing challenges, it acknowledges that by the ninth month of Year One, it had yet to hire the second peer advocate, an essential member of its service delivery staff. AmASSI Br. at 4. AmASSI also acknowledges that the peer advocate who was on the staff at the time of the first site visit had to be released because he twice failed HIV testing certification. *Id.* at 12. In addition, the individual hired as the second peer advocate "was released from employment [at] the end of September," leaving the Project Manager as the sole CTR-certified staff member as of December 2011. CDC Ex. II-05, at 4. Thus, the record supports CDC's conclusion that AmASSI was unable "to recruit, hire and retain qualified and capable staff." CDC Response at 12.

We also note that CDC denies that it ever instructed AmASSI to replace a female employee with a male, and we find no evidence in the record to support AmASSI's claim that there was a change in CDC policy that required such a replacement. As reflected in its awards, AmASSI received CDC funding to serve the populations identified in its award application, which included females as well as males. CDC Exs. 5, 11; Board Ex. 1, at 6. Even if AmASSI had been directed to serve only MSMs, moreover, that condition would not have resulted in a requirement that staff be only males. CDC Response at 12. We therefore reject AmASSI's claim that CDC required this staffing change.

We also find no merit in AmASSI's argument that it should not be held accountable for its "training related challenges" because staff with young children could not attend training in other cities, one training program was cancelled, some programs were filled to capacity by the time AmASSI tried to enroll in them, and all staff could not be trained at the same time. The staffing and training requirements of the award were made clear in the FOA and applied to all PS10-1003 recipients. FOA PS10-1003, at 18-20. By accepting the award, AmASSI agreed to fully staff its project and arrange for any needed training for its employees within the first six months of funding.

Furthermore, the record shows that CDC provided AmASSI and all other award recipients with ample opportunities to meet the training requirement. CDC arranged a multi-option, coordinated schedule of trainings on all of the interventions funded under PS10-1003. CDC Ex. 3. From August 2010 through November 2011, CDC offered

twelve Community PROMISE training opportunities, six CRCS training programs, and seven CTR training programs at various sites across the country. *Id.* CDC also approved travel funds for recipients to attend training not available to them locally. CDC Ex. I-03. In light of the notice given to AmASSI of its training responsibilities, and the range of opportunities CDC provided to facilitate training, we reject AmASSI's argument that its failure to ensure its staff was timely trained should be excused as beyond its control.

In addition, the record does not support AmASSI's claims that the Project Officer came to the first site visit with unsubstantiated, preconceived ideas about AmASSI's capacity and that the site visit report therefore reflects bias. The record shows that prior to the first site visit in April 2011, CDC assessed AmASSI's capacity based on a pre-decisional site visit conducted in the spring of 2010, email communications, and review of AmASSI's first budget period interim progress report. CDC Exs. I-09, II-06, II-07; *see also* CDC Response at 4. CDC conducted the first site visit in response to that interim progress report, which showed that over six months into the project, AmASSI had yet to provide any of the HIV prevention services for which it received funding. CDC Exs. I-01, II-01. Thus, CDC's concerns about AmASSI's capacity, which triggered the first site visit, were based on information that AmASSI itself had reported to CDC.

Moreover, the Project Officer did not conduct the first site visit or any of the subsequent visits alone. CDC Exs. II-03 – II-06. Rather, the Team Leader and the Project Officer together conducted the site visits and discussed the "recommendations and requirements stated in the site visit reports." CDC Ex. II-00-A. In addition, all of the reports were reviewed and approved by the Team Leader before they were issued. *Id.* Further, while AmASSI makes a generalized claim that the first site visit report reflects bias, AmASSI points to no specific facts, descriptions, or conclusions in the reports that are inaccurate. We therefore reject AmASSI's contentions that the Project Officer's assessment and CDC's site visit report were not supported.

Accordingly, we conclude that AmASSI materially failed to comply with the staffing and training requirements of its cooperative agreement.

2. AmASSI failed to make satisfactory progress towards meeting program goals and objectives.

The Board has previously held that an awardee's delay or lack of satisfactory progress in achieving key objectives of an award may constitute a material failure of the terms and conditions of the award. *See, e.g., Asian Media Access,* DAB No. 2301 (2010)(grantee's failure to plan and develop a shelter for runaway and homeless youth during the first year of the grant and to begin providing services no later than date specified in grantee's

proposed work plan constituted material failure); *Recovery Resource Center, Inc.*, DAB No. 2063, at 2-3, 18-19 (2007)(failure to make "acceptable progress" in fulfilling the project's main objective, to provide a peer-driven support program to promote recovery from substance addiction, constituted a material failure). The Board has also held that an awardee's failure to comply timely with special conditions that an awarding agency imposes on a continuation award may constitute a material failure. *Tuscarora Tribe of North Carolina*, DAB No. 1835, at 2, 8-11 (2002)(failure to meet special condition imposed at the beginning of the second project year that the grantee "will be serving youth within 90 days," was material failure).

As described above, CDC's site visit reports and assessments show that AmASSI failed to achieve the central objective of its cooperative agreement: providing HIV prevention services to hundreds of at-risk individuals in its community through operational Community PROMISE, CRCS, and CTR services programs. CDC Exs. II-03 – II-06. The reports and assessments of AmASSI's progress show that after unsuccessfully struggling to develop the interventions and achieve service delivery by the end of the first budget period, AmASSI did not meet the adjusted target dates established under the June 2011 technical assistance and capacity building plan, notwithstanding substantial capacity building assistance provided by CDC, OAPP and AIDS Project Los Angeles. *Id.* At the end of the first half of the second budget period, AmASSI had not made progress in developing its Community PROMISE program and had provided CRCS services to only three clients. Moreover, AmASSI entered the second half of the second year of funding without an approved CLIA waiver, a quality assurance plan, or adequate staff to operate its CTR services program. CDC Ex. II-05.

As further described above, the record shows that AmASSI did not reach the key programmatic outcome to be achieved under the December 2011 CAP: full program service delivery by April 1, 2012. At the end of the CAP period, CDC's CAP assessment concluded that AmASSI's Community PROMISE program was not on target to fulfill its Year Two program objectives and required additional technical assistance; its CRCS program had failed to consistently provide services to its only three clients and had neither recruited nor screened and served any additional clients; and it had yet to secure the CLIA waiver necessary to establish "a complete, internal program structure for AmASSI-delivered CTR services." CDC Ex. II-03.

AmASSI does not deny that it failed to achieve the project goals by the dates established in its application, the technical assistance and capacity building plan, or the December 2011 CAP. AmASSI argues, however, that the project delays were attributable to factors beyond its control, constraints imposed by CDC, and the "criteria that AmASSI was saddled under by choosing a cooperative agreement rather than a grant." AmASSI Br. at 6. First, AmASSI asserts that because CDC awarded it significantly less funding

($315,836 for the first, 11-month period, and $335,748 for the second year) than it requested for its project ($500,000 per year), AmASSI could not subcontract with Dr. B./TEA Institute to provide HIV testing services as it had proposed. AmASSI Br. at 7-8. AmASSI says that it "planned to suggest to CDC that [it] partner with another agency . . . funded under PS10-1003," but the CDC Project Officer rejected that plan and told AmASSI it "had to implement an independent HIV testing program." *Id.* at 5-6. This "sudden change in plan," AmASSI argues, "initially result[ed] in less attention . . . being directed to the PROMISE and CRCS programs." *Id.* at 7.

AmASSI further asserts that after the first site visit it "went back to Dr. B[.]" and arranged for her and TEA staff to furnish CTR services for a reduced fee. *Id.* at 8-9. AmASSI says that CDC did not approve of the arrangement because it considered the amount exorbitant. Yet, AmASSI states, CDC failed to explain why it "would not approve the cost of paying a medical doctor to provide HIV testing" and insisted that AmASSI hire a phlebotomist even though a part-time phlebotomist would cost roughly the same amount. *Id.* at 9-10. AmASSI says that CDC also did not "advis[e] AmASSI that perhaps it might request additional funding." *Id.* at 9. Instead, AmASSI contends, CDC directed it to begin working with OAPP "as the testing partner," even though the "configuration was similar to the one AmASSI had previously planned" with the other award recipient. *Id.* at 10. AmASSI adds, "Implementation of the CRCS program was closely connected to implementation of HIV testing." *Id.* The delays and numerous interruptions in the testing program, AmASSI says, impeded its "capacity to fully develop the CRCS program and serve the projected number of clients." *Id.*

AmASSI's arguments do not excuse its unsatisfactory progress towards achieving the key programmatic goals of its awards or its failure to meet the special conditions imposed under the CAP. We reject AmASSI's argument that its failure to make acceptable progress was caused by CDC's decision to fund AmASSI's project at a level below what it had requested. According to CDC, "At the point of award, and in the context of cooperative agreement budget-program negotiations prior to issuing the Notice of Grant award, all PS10-1003 agencies were given the opportunity to decline the award if the agency felt the reduced funding package was insufficient for service delivery." CDC Response at 10. AmASSI does not deny this assertion. Moreover, the terms and conditions of the award, including the exact amount of federal funding awarded, were set out clearly in the July 2010 award notice. CDC Ex. 5. The notice stated, "Acceptance of this award including the 'Terms and Conditions' is acknowledged by the grantee when funds are drawn down or otherwise obtained from the grant payment system." *Id.* AmASSI did not decline the award but instead began to draw down federal funds. Thus, AmASSI chose to take on the obligation to meet the goals and objectives of its HIV prevention project under the reduced funding amount. If that amount was insufficient to meet its project responsibilities, AmASSI should not have accepted the award.

We note that the record also shows that after the first site visit, CDC gave AmASSI an opportunity to reassess its capabilities and to determine, prior to the release of the second year funds, whether it had sufficient capacity to implement all three interventions. As reflected in an April 27, 2011 email from the Project Officer to AmASSI's Executive Director, the Project Officer encouraged AmASSI to consider whether "CRCS may be too much for AmASSI to take on at this time." CDC Ex. II-00-C. The Project Officer stated, "It is up to you, at this point. I am only trying to create an environment of permission for AmASSI to critically review its capacity and make decisions accordingly at the close of the first year of funding." *Id.* AmASSI declined this opportunity and chose to proceed under a renewed obligation to implement all three interventions.

We also reject AmASSI's request that the Board "reinstate the cooperative agreement . . . now that [AmASSI] has an understanding of the management parameters of a 'cooperative agreement' and how this collaboration works." AmASSI Br. at 25. AmASSI states that its prior "assumptions that CDC staff was being punitive, unreasonable and completely overstepping their bounds by micromanaging the project program, we now realize were inaccurate." *Id.* at 15. CDC's FOA notified AmASSI that its award was in the form of a cooperative agreement, under which CDC staff would be "substantially involved in the program activities, above and beyond routine grant monitoring." FOA PS10-1003, at 24. The announcement plainly stated that "HHS/CDC activities for this program" would include: "Collaborat[ing] with grantees and provid[ing] technical assistance in the development of all plans, policies, procedures, and instruments related to this program"; "[p]rovid[ing] technical assistance and consultation on program and administrative issues directly or through partnerships with health departments; capacity building assistance providers; contractors; and other national, regional, and local applicants"; "[c]onduct[ing] assessments of intervention fidelity"; and monitoring grantees' implementation of their programs, "grantee compliance with applicant requirements, including financial management practices," and the "applicant's progress toward meeting program objectives." *Id.* at 24-25. Thus, AmASSI was on notice that by applying for and accepting the award, AmASSI was required to work in concert with, and subject to intensive monitoring by, CDC. AmASSI's admitted failure during the first two budget periods to appreciate the roles and responsibilities of the parties in a cooperative agreement does not excuse its resistance to CDC's guidance and involvement in the project.

Furthermore, the record does not support many of AmASSI's characterizations of CDC's involvement. For example, we find no evidence substantiating AmASSI's claim that its programs were delayed because CDC rejected a plan by AmASSI to partner with another award recipient to deliver CTR services. AmASSI does not point to any evidence to support its contention about the alleged partnership proposal, and CDC states that "[p]artnering with [the organization identified in AmASSI's brief] has never been an

aspect of the AmASSI-[CDC] discussions on the full implementation of PS10-1003 services." CDC Response at 7. Moreover, under the terms of the cooperative agreement, such a change in its CTR services plan would have required AmASSI to submit a request and obtain prior approval by CDC to effectuate the change. AmASSI Br. at 6-7, *citing* 45 C.F.R. § 74.25(b). AmASSI does not assert that it ever submitted such a request.

The evidence also shows that AmASSI mischaracterizes CDC's evaluation of AmASSI's CTR program proposals and the history of AmASSI's relationship with OAPP. The first site visit report shows that CDC did not tell AmASSI that it "had to implement an independent HIV testing program," as AmASSI asserts. AmASSI Br. at 6. Rather, the site visit report shows that CDC advised AmASSI to "consider following-through with original plans to subcontract Dr. B[.] to oversee the CTR[] program with AmASSI named as a secondary site under Dr. B[.]'s existing CLIA waiver" *or* "consider securing a CLIA waiver for AmASSI" to operate an independent CTR program. CDC Ex. II-06. CDC instructed AmASSI to "write a program narrative and construct a program budget that describes AmASSI in a direct services role." CDC Ex. II-00-C.

Emails between the Project Officer and AmASSI's Executive Director show that AmASSI renegotiated with Dr. B./TEA to provide HIV testing services. CDC Exs. II-00-E – II-00-H. After reviewing details of that arrangement, the Project Officer told AmASSI that it was an "expensive model, particularly the cost to use a physician to conduct actual testing while AmASSI is also bearing the costs of the testing kits and costs for confirmatory testing and then only for 2 days weekly." CDC Ex. II-00-E. Nevertheless, the Project Officer stated, "We will permit this to go forward in YR 02 to give AmASSI the opportunity to mount a successful CTR Program but this approach and related costs will no doubt be pulled under review for Yr 03." *Id.* The Project Officer later questioned the feasibility and per-test cost of AmASSI's revised CTR plan, noting that the plan would require TEA "to consistently provide 3.46 tests per hour" at a cost of $160 per test, in addition to the cost of testing supplies, confirmatory tests and sanitation supplies. CDC Ex. II-00-E. In contrast, the Project Officer later explained, CDC's expanded testing initiative developed at the same time was "using an estimate of $40.00 per test." *Id.*

The correspondence between the parties further reveals that after the second site visit, OAPP offered "to assign OAPP staff to AmASSI to conduct [testing] until November 2011 when [OAPP and CDC were] expecting AmASSI to be fully prepared to offer these services internally." CDC Ex. II-00-G. As described to AmASSI, this "temporary support" would allow AmASSI's staff to directly observe testing, shadow certified OAPP staff and "learn about all of the reporting requirements." *Id.* "The services would be provided under the OAPP CLIA Waiver" and "would be reported as OAPP data (because it is their staff and their expended resources) until the services are directly provided by AmASSI." *Id.*

In response to OAPP's offer, AmASSI's Project Coordinator replied that "the plan . . . fits perfectly into [AmASSI's needs]." *Id.* AmASSI's Executive Director responded: "My thoughts are that this is a great idea, in many ways. And we do plan to do this . . . . We are very involved in this process, and will work with OAPP." *Id.* Thus, the evidence does not show that CDC "directed" AmASSI "to begin working with [OAPP] as the testing partner" in a "configuration . . . similar to the one AmASSI had previously planned" with the other award recipient. AmASSI Br. at 10. Rather, the record shows that OAPP offered to provide AmASSI intensive CTR capacity building assistance, including *temporary* onsite testing, to help AmASSI establish capacity as a direct provider of CTR services, and that AmASSI enthusiastically accepted this offer.

Moreover, with regard to AmASSI's claim that CDC insisted AmASSI hire a phlebotomist for its CTR program, CDC asserts that--

> [t]he LA County [Department of Health] recommended the direct hire of a phlebotomist, a recommendation made in joint conversation and problem-solving with AmASSI. This recommendation was offered as a possible solution to approval of a needed CLIA Waiver for AmASSI's internal CTR service model. AmASSI decided to not hire the phlebotomist due to an agreement AmASSI negotiated to use the CLIA Waiver issued to Dr. [J.] as well as to the CDC's revision of its policy on use of rapid testing methodologies that no longer required blood-draw.

According to CDC, it "agreed with and did not interfere with this decision." CDC Response at 11, *citing* CDC Exs 2, 4. CDC's explanation is supported by the CAP final summary report, which states that in April 2012, AmASSI "did secure the cooperation of a physician who [was] willing to serve as the physician of record" and that an application for a waiver under that arrangement would be submitted. CDC Ex. 4, at 3, 5. In light of this evidence, we reject AmASSI's claim that CDC insisted it hire a phlebotomist.

Finally, there is no merit in AmASSI's suggestion that CDC should have advised it to request additional funds to pay for Dr. B.'s services. CDC states, "PS10-1003 grantees have not been allocated additional federal funding to supplement existing awards." CDC Response at 10. Thus, CDC could not have awarded supplemental funding even if AmASSI had requested it. Moreover, even if supplemental funding had been available, note 11 of the "additional terms and conditions" of its award plainly notified AmASSI that it could submit a prior approval request for supplemental funds. CDC Ex. 5, at 4. In addition, the Grants Policy Statement explains that an award recipient may submit a request for additional funding "to meet increased costs that . . . were unforeseen when the new or competing continuation application . . . was submitted." CDC Ex. 6. As CDC notes, AmASSI would not have met the GPS criteria for receiving additional funds because "the costs associated with Dr. B[.] were not unforeseen at the onset of the project but were well known by AmASSI." CDC Response at 10.

Based on the discussion above, we conclude that AmASSI did not make satisfactory progress towards achieving the key programmatic goals and objectives of its project and that its lack of progress constituted a material failure to meet the terms and conditions of its awards. In light of the record evidence, we also reject AmASSI's claims that the delays it experienced in achieving the central goals and objectives of its HIV prevention project were caused by factors beyond its control and unreasonable constraints imposed by CDC. To the contrary, the record shows that CDC gave AmASSI extensive guidance, substantial technical support, and intensive capacity building assistance and that AmASSI failed to satisfactorily use this help to advance its HIV prevention project.

3. AmASSI failed to comply with financial management requirements of its awards.

Costs charged to a federal award must be "reasonable for the performance of the award," allocable to the award, and "adequately documented." 2 C.F.R. Part 230, App. A, ¶ A.2. Consistent with this requirement, under 45 C.F.R. § 74.21(b) an award recipient's "financial management systems shall provide for," among other things:

> (2) Records that identify adequately the source and application of funds for HHS-sponsored activities. These records shall contain information pertaining to Federal awards, authorizations, obligations, unobligated balances, assets, outlays, income and interest.
>
> (3) Effective control over and accountability for all funds . . . .
>
> * * *
>
> (6) Written procedures for determining the reasonableness, allocability and allowability of costs in accordance with the provisions of the applicable Federal cost principles and the terms and conditions of the award.
>
> (7) Accounting records, including cost accounting records, that are supported by source documentation.

The regulations also require recipients to retain all financial records, supporting documents, and all other records pertinent to an award for a specified period. 45 C.F.R. § 74.53(a).

Discussing these requirements in prior appeals, the Board has stated that "[b]eing able to account for the expenditure of federal funds is a central responsibility of any grantee." *Recovery Resource Center, Inc.*, at 12-13. The Board also has held that "[o]nce 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." *Id.*; *see also Northstar Youth Services*, DAB No. 1844, at 5 (2003). Furthermore, a grantee's failure to document the allowability of expended funds is among the grounds that may support a determination that the grantee did not have financial management systems that provided for "[a]ccurate, current, and complete disclosure of financial results . . . in accordance with" applicable reporting requirements. *Recovery Resource Center, Inc.*, at 12-13.

Applying the documentation and recordkeeping requirements here, we conclude that AmASSI did not have financial management systems that provided for accurate, current, and complete disclosure of costs charged to its award. Most notably, the evidence shows that AmASSI failed to account for and sufficiently document the allowability of costs charged to its Year One award. As detailed above, CDC's December 20, 2011 internal review of AmASSI's federal expenditures for the first budget period, based on the December 2011 site visit and analysis of financial records produced during the visit, concluded that of the $307,748 in Year One claimed costs, $70,909 was unsupported or questionable. CDC Ex. I-07. The review also found previously unreported costs totaling $14,828. *Id.* Because AmASSI did not produce all of the documentation requested by CDC during the site visit, the fiscal CAP provided AmASSI additional time, until January 31, 2012, to produce all supporting documentation for Year One expenditures that it had not produced at the site visit. CDC Ex. I-04.

Even with the additional time and opportunity to supplement the records it produced during the onsite review, the record shows, AmASSI was unable to produce all of the documentation necessary to verify that costs charged to its award were actually incurred and allowable. CDC's February 14, 2012 revised internal review of Year One expenditures, adjusted to take into account the additional documentation that AmASSI did submit, concluded, "$117,456 of the total funds authorized ($307,748) [was] unsupported." CDC Ex. I-06. Specifically, the revised internal review found multiple costs ($40,696 for the Hourly Peer Advocate, $6,000 in graphic design costs, $8,600 for media placement costs, $13,889 for an evaluator, and an accounting/audit cost of $36,754) unsupported because AmASSI had provided only invoices or bank statements to substantiate the claimed expenditures. *Id.* The report explained that the invoices and bank statements were insufficient to verify the accuracy of questioned costs and that to demonstrate that the costs were actually incurred and allowable, AmASSI "should have the ability to furnish voided checks with the assigned recipient's name and amount for verification." *Id.*

The revised internal review additionally identified as unsupported $975 for a computer; $956 for postage; $1,169 for telecommunications costs; and $2,433 for travel. *Id.* Further, the report identified two items (totaling $3,925) that were incorrectly accounted

for as insurance costs: a CPA firm invoice and a life insurance policy for the Executive Director that "should be a part of the fringe benefit rate." *Id.* The unsupported costs also included $2,060 in fringe benefit costs for an expense from Paychex, a payroll vendor, which was not allowable as a fringe benefit. *Id.*; AmASSI Br. at 14.

The February 2012 internal review report noted with particular concern that AmASSI's response "presented new information that was not furnished in the onsite visit or explained," including a utilities cost arrangement with the landlord (utility expenses were part of the occupancy agreement) that the accountant did not mention when questioned about utilities costs during the site visit.[13] CDC Exs. I-03; I-06. "As the accountant," the report stated, "she should have known of this arrangement considering her time dedicated to this grant." CDC Ex. I-06. The report also noted that AmASSI's CAP response indicated that a bonus of $2,500 was given to the Project Manager "but this information was not presented on the onsite review." *Id.* Moreover, the report pointed out that "the new documentation furnished in response to the internal review by the grantee was not present during onsite review although documentation was requested for each cost segment." *Id.*

Thus, CDC's internal review of AmASSI's Year One expenditures shows that AmASSI materially failed to meet the financial management terms and conditions of its award. AmASSI's inability to produce complete source documentation to support all of its expenditures after it was provided two opportunities to do so, its incorrect categorization of multiple expenditures, and its submission of documentation and financial information in January 2012 that was not available during the onsite review, together demonstrate that it did not have effective control over and accountability for its federal funds.

On appeal to the Board, AmASSI does not deny that during the December 2011 site visit it was unable to provide all of the documentation requested by CDC to support its claimed expenditures. Nor does AmASSI dispute that its supplemental submission at the end of January 2012 did not include all of the documentation necessary to substantiate its Year One costs. Instead, AmASSI asserts that its accountant was not prepared to provide all of the documentation requested during the December 2011 site visit because CDC "at the last minute" asked for items (such as cancelled checks) that were not on the list of documents needed for the review that CDC had provided prior to the site visit. AmASSI Br. at 13.

[13] CDC's January 5, 2012 letter designating AmASSI "high risk" stated that during the December 2011 internal review, it "was unclear how AmASSI paid for utilities." CDC Ex. I-04.

AmASSI also submitted with its appeal additional financial records to validate its previously unsupported Year One costs. AmASSI states that "[a]t CDC's request and resultant from this appeal, the opportunity has permitted AmASSI the time to collect all that was requested." *Id.* at 14. At the same time, AmASSI writes, "*Virtually all* of the unsupported costs have been cured as a result of " its submission to the Board. *Id.* (emphasis added). AmASSI acknowledges that the "folder containing the [postage expense] receipts has been misplaced" and that telecommunications and travel costs, remain unsupported. With regard to the incorrect accounting of certain costs pointed out by the auditor, AmASSI writes, "Based on the extensive documentation it is clear that it was not AmASSI's intention to misuse government funding." AmASSI Br. at 15.

AmASSI's arguments and evidence submitted on appeal do not cure its material failure to comply with the financial management conditions of its award. As a preliminary matter, whether an award recipient intended to misuse government funding is immaterial to the question whether its financial management systems are sufficient. Here, the sufficiency of AmASSI's financial management systems turns on whether its accounting records adequately identified the source and application of CDC HIV prevention funds and are supported by source documentation, including the types of documentation necessary to verify expenditures and proof of payment.

Furthermore, with respect to AmASSI's claim that its production of additional financial records on appeal was at "CDC's request," we note that CDC gave AmASSI ample time (an additional month after the December 2011 onsite review) to supplement the documentation it had produced during the site visit to support and verify its Year One costs. Having provided AmASSI that additional opportunity, CDC reasonably determined and notified AmASSI in a March 8, 2012 letter that it did "not anticipate requesting . . . AmASSI to provide additional information on year one's expenditures beyond [the] two previous attempts . . . ." CDC Ex. I-02.

While on appeal AmASSI has nevertheless offered new documentation to validate its unsupported Year One costs, AmASSI admits that even with this submission, the records necessary to verify all of those costs remain incomplete.[14] We note further that in addition to the postage, telecommunications and travel costs that AmASSI acknowledges still lack support, the peer advocate costs remain unverified because no additional invoices were provided and it is unclear which payments in the submitted documents apply to this line item. AmASSI Ex. C; CDC Ex. 10. The $13,889 in evaluator costs also remains unsupported because AmASSI provided no cancelled checks payable to the evaluator or other documentation that shows payment of that amount to the evaluator. *Id.*

[14] The Board procedures permit an appellant to provide new evidence on appeal. 45 C.F.R .§ 16.8.

Accordingly, we conclude that even with the documentation provided in this appeal, AmASSI's financial records remain incomplete and, consequently, do not meet the accounting and documentation standards of section 74.21.

We also conclude that AmASSI did not meet its obligation under section 74.21 to have "written procedures for determining the reasonableness, allocability and allowability of costs . . . ." The January 5, 2012 CDC letter designating AmASSI "high risk" noted that CDC's predecisional site visit report found, "Budgetary controls were claimed to be practiced although standard procedures were not written into the accounting policy manual"; and "Numerous 'practiced' standard procedures were not codified into employee, procurement, [or] accounting policy manuals." CDC Ex. I-04. Consequently, AmASSI's fiscal CAP instructed AmASSI to "submit its most up-to-date policy manuals: Financial Management Systems, Employee Handbook, Equipment Policies & Procedures, etc., which should have incorporated the [pre-award site visit] findings." *Id.* According to CDC's July 20, 2012 termination letter and an evaluation by the Grants Management Specialist, even after AmASSI submitted updates in June 2012, AmASSI's fiscal policies and procedures manuals remained incomplete and insufficient. CDC Exs. I-01, I-03. For example, policies for approval of budget amendments and budgetary controls were "still missing even though [AmASSI] pledged to revise and update the manuals. . . ." CDC Ex. I-03. AmASSI does not refute this finding.

Further evidencing the inadequacies of AmASSI's financial management systems was AmASSI's failure to submit an approvable budget for Year Two (which began July 1, 2011) until April 2012, three months after the deadline established under the CAP, more than halfway through the second funding period, and after seven earlier versions had been submitted and rejected by CDC. CDC Ex. I-05. AmASSI argues, "A primary reason this budget was sent back by [CDC] several times" was that the CDC Project Officer and AmASSI Executive Director disagreed about the use of bus bench ads to recruit Black men for HIV testing. AmASSI Br. at 20. "Soon after" CDC approved the bus bench ads, AmASSI states, "the budget was finally approved." *Id.* According to AmASSI, "This situation appears like simple AmASSI incompetence, which is not the case." *Id.*

The record does not support AmASSI's suggestion that the central reason for CDC's rejection of earlier versions of its Year Two budget was a disagreement over the use of "bus bench ads." Rather, correspondence between the parties and CDC's assessments of the earlier budgets show that CDC did not accept the seven previous versions of the Year Two budget because of an array of errors and lack of justification for multiple items. CDC Exs. I-01; I-05; II-00-H; II-00-A. For example, an October 31, 2011 email from the Project Officer to AmASSI's Executive Director states that the errors in its then recent budget submission provided for payment to Dr. B. to provide testing and counseling in

Year Two even though AmASSI was expected to be providing services with its own, internal staff. CDC Ex. III-01, at 45. In addition, AmASSI had allocated funds to confirmatory tests, which was unnecessary because, "due to the direct relationship with OAPP, AmASSI may submit tests to the lab at no cost to AmASSI." *Id.* Moreover, the three intervention budgets continued to use a 33 1/3% allocation methodology even though, as discussed during the June site visit, AmASSI "need[ed] to develop and present realistic program intervention budgets that reflect actual program implementation costs." *Id.* Later revisions of the budget were rejected because, among other things, AmASSI had failed to correctly calculate indirect costs. CDC Ex. I-13. Thus, the record supports CDC's conclusion that AmASSI's "program budgets consistently reveal[ed] AmASSI's inability to define a program with a corresponding program budget that me[t] CDC program intervention budget guidelines, that describe[d] reasonable program costs, and that cohere[d] in fidelity with program core elements." CDC Ex. 2.

Correspondence between the parties also shows that AmASSI struggled to monitor accurately its expenditures, implement sound cash management practices, and submit acceptable manual drawdown reimbursement requests. As reflected in emails between the CDC Grants Management Specialist and AmASSI staff, AmASSI's manual drawdown reimbursement requests repeatedly lacked supporting documentation, contained incorrect calculations, and requested unallowable costs. CDC Ex. 16. The emails also show that even after CDC gave AmASSI substantial technical assistance, AmASSI continued to have difficulties with the manual drawdown procedures and requirements. *Id.* Indeed, we note with regard to the technical assistance offered by CDC from April 2011 through June 2012, that AmASSI itself "[a]dmit[s] . . ., where AmASSI should have utilized more technical assistance was in the fiscal department." AmASSI Br. at 20.

In sum, we conclude that AmASSI failed to account for and sufficiently document the allowability of costs charged to its Year One award; did not maintain complete and sufficient fiscal policies and procedures manuals; failed to submit timely and approvable budget revisions; and struggled to monitor its expenditures and comply with manual drawdown procedures. Based on these deficiencies, we conclude that AmASSI materially failed to comply with the financial management requirements of its awards.

4. We deny AmASSI's request that we depart from Board precedent and reinstate its cooperative agreement based on principles of basic fairness.

Lastly, AmASSI asks the Board not to follow prior Board decisions that have sustained agency determinations to terminate awards based on grantees' material failures to comply with award terms or conditions. AmASSI Br. at 22, *citing FFA Sciences, LLC*, DAB No. 2476 (2012); *National AIDS Education & Services for Minorities, Inc.*, DAB No. 2401

(2011). AmASSI states that it "recognizes that [the Board] has no authority to make its decision based upon equitable principles," but contends that "basic fairness suggests a liberal construction of 45 C.F.R. 74 et. seq and 2 C.F.R. 230 as recognized." *Id.* at 23. AmASSI also asserts, "At the point where [it] was suddenly defunded, AmASSI was right on the brink of receiving its CLIA waiver," and that "All staff was trained and implementing services." *Id.* at 21.[15]

These arguments do not provide a basis for reinstating AmASSI's cooperative agreement. In reviewing an award termination, the Board is "bound by all applicable laws and regulations." 45 C.F.R. § 16.14. Therefore, the Board must uphold an agency determination to terminate a discretionary award where termination is authorized by law and the grantee has not disproved the factual basis for the determination. *Family Voices of the District of Columbia*, DAB No. 2409 (2011).

As detailed above, CDC's determination to terminate AmASSI's award on the ground that AmASSI materially failed to comply with multiple terms and conditions of its agreement is supported by the record, and AmASSI has not disproved the factual bases for the determination. Moreover, the record shows, CDC gave AmASSI multiple opportunities and extensive help to attain the key objectives of the agreement in a reasonable period of time. AmASSI repeatedly failed to take advantage of those opportunities and CDC's assistance. Accordingly, we deny AmASSI's appeal and uphold CDC's determination to deny continued funding and terminate the cooperative agreement.

[15] AmASSI additionally claims it "has had other 'grants' funded by HHS and never experienced the barrage of problems encountered with this cooperative agreement." P. Br. at 15. This claim is belied by evidence offered by CDC showing that AmASSI received a Substance Abuse and Mental Health Services Administration (SAMHSA) award under which SAMHSA designated AmASSI as "high risk" based on financial management concerns similar to the CDC cooperative agreement. CDC Ex. 11. CDC also alleges that together the award applications list the same individual assigned to both award projects working more than 100% of his time (50% on the PS10-1003 award and 70% on the SAMHSA award). CDC Response at 14, citing CDC Exs. 12, 13 (application excerpts). AmASSI has not refuted this allegation.

Conclusion

Based on the discussion above, we sustain CDC's determination to deny continued funding of the project and terminate AmASSI's cooperative agreement.

/s/
Judith A. Ballard

/s/
Leslie A. Sussan

/s/
Steven M. Godek
Presiding Board Member