Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: County of Orange, California
Docket No. A-06-64
Control No. 09-06-003PD
Decision No. 2071

DATE: March 16, 2007

DECISION

The County of Orange, California (Orange County), appealed a determination by the Health Resources and Services Administration (HRSA) to disallow $143,328 in costs the County claimed under two grants. The grants were awarded under the Ryan White Title I program for services to persons living with HIV/AIDS, and the costs were for services performed by a County contract provider, New Millennium Community Coalition (NMCC), during the periods April 3, 2001 through February 28, 2002 and March 1, 2002 through February 28, 2003. HRSA determined, based on a report of an on-site review, that the costs were unallowable because they did not meet the requirements of Office of Management and Budget (OMB) Circular A-87, specifically, that there was a lack of sufficient documentation.

In its appeal brief, Orange County alleged, among other things, that the determination letter did not adequately explain the basis for the disallowance. Orange County pointed out that the disallowance was of the entire amount paid to NMCC for services over the two-year period. According to Orange County, it had provided documentation to HRSA that is the type of support required for the salaries, operating expenses, and other costs incurred by NMCC and that HRSA also has had copies of the NMCC client files containing information on service delivery, physician verification of the client's HIV positive status, and case worker notes. Orange County asserts that the documentation it submitted shows that it had $123,606 in allowable costs.

In response, HRSA provided a slightly more detailed explanation regarding the disallowance determination, listing the following three reasons for the disallowance:

- The documentation of patients served was inadequate in that it did not show that they were Title I program eligible patients under the contract.

- Orange County did not provide documentation to show that costs were reconciled with actual services provided, as required by the contract.

- The cost reports provided were not sufficient to support costs claimed.

Below, we first describe the background of this dispute. We then address each of the reasons given by HRSA for the disallowance. We conclude that the disallowance of all contract funds for the two-year period is not warranted since Orange County documented that NMCC provided services under its contract with Orange County to Title I program eligible patients. We further conclude that, under the particular circumstances here, the documentation provided by the County is adequate to show that NMCC incurred $121,234 in allowable costs for providing those services and for other activities under the contracts. We therefore reverse the disallowance of that amount, but uphold the disallowance of the remaining $22,094.

Background

Congress passed the Ryan White Comprehensive AIDS Resources Emergency Act (CARE Act) in 1990 (Public Law 101-381) and reauthorized it in 1996 (as Public Law 104-146) and in 2000 (as Public Law 106-345). The CARE Act provides funding to develop, organize, coordinate, and operate effective and cost-efficient health care and support services for medically underserved individuals and families affected by HIV/AIDS. Title I provides emergency relief grants to eligible metropolitan areas for community-based HIV-related services. The services are provided either directly through health department programs or through contracts with subgrantees who apply for and receive funds directly from the grantees.

Orange County is an eligible metropolitan area that receives CARE Act funds. In Fiscal Years 2002 and 2003, HRSA approved Orange County's applications for funding on the condition that a specified amount of Title I funds be used "specifically for the Congressional Black Caucus (CBC) initiative." Appeal File (AF) Tab 1, at 1, and Tab 2, at 18. The CBC initiative (later referred to as the Minority AIDS Initiative) required that certain funds be dedicated to obtaining services from "Minority Community Based Organizations" qualified to serve racial or

ethnic minority populations under CBC initiative guidelines. AF Tab 1, at 5-6. These guidelines encouraged eligible metropolitan areas to use these funds for "capacity-building" activities. AF Tab 3, at 33; Tab 4, at 44. Such activities "are typically designed to expand access to, and the availability of, HIV care services and treatment in underserved communities" and "to address gaps in the continuum of care in those communities." AF Tab 3, at 33. Examples of capacity-building efforts to be funded included initiatives designed to improve:

- staff expertise with respect to the care and treatment needs of clients with HIV/AIDS;
- processes, systems or procedures used in program or fiscal planning, resources development and management related to the delivery of HIV care services; and/or
- capacity to document, manage use and report information that tracks client demographics, service utilization, and/or outcomes.

Id.

The award notices for the relevant fiscal years identify an allocation of funds for the CBC initiative under the service category of "Case Management."

In response to the HRSA instruction regarding the CBC initiative, Orange County sought a qualified Minority Community-Based Organization to serve people living with HIV/AIDS (referred to as PL WH/A's) in the African-American community in the County. According to Orange County, this was challenging because, while roughly eight percent of PL WH/A's in Orange County were African-American, less than two percent of the County's population was African-American. OC Br. at 3, citing AF Tab 16, at 456. Orange County also asserts that there were no qualified Minority Community-Based Organizations to serve the African-American community in the County that had experience providing HIV/AIDS services. Id. In consultation with HRSA, however, Orange County determined to establish a services contract with NMCC, consistent with the goal of capacity-building. NMCC was qualified as a Minority Community Based Organization, and its "principals . . . had experience in providing HIV/AIDS services." OC Br. at 3, citing AF Tab 16, at 428.

The first contract between Orange County and NMCC was for the period March 1, 2001 through February 28, 2002 and provided for a maximum amount of funding of $70,496. The second contract was for the period March 1, 2002 through February 28, 2003 and provided a maximum amount of funding of $72,832. The contracts

provided for NMCC to provide care management and comprehensive care management services to PL WH/A's, including activities such as client outreach, assessment of client needs, development of individual client service plans, referrals to appropriate service providers, and counseling. AF Tab 8, at 111, and Tab 10, at 156. An addendum to the first contract also provided for transportation services, specifically, including payment of taxi or bus fares in order for a client to access HIV-related health care or psychosocial support services. AF Tab 7, at 86. The contracts called for provisional payments to be made on a monthly basis, but, as discussed below, indicated that the payments would be adjusted to actual costs based on the final cost report, to be submitted after the end of the agreement. AF Tab 8, at 93; Tab 10, at 140. Both contracts contained detailed directions for how NMCC was to document and report its costs. The second contract called for NMCC to report monthly on "units of service," for example, a "Simple Visit" or "Intermediate Visit" for "psychosocial case management." AF Tab 10, at 165. Both contracts also set goals for the amount of services that NMCC would provide under the contracts. Orange County asserts, and HRSA does not deny, that HRSA received copies of the contracts at or near the time of their execution.

To help build capacity at NMCC, Orange County provided NMCC with a manual containing "extensive information and documentation to guide NMCC in its role as a Title I provider." AF Tab 16, at 459. Orange County also provided training funds to enable NMCC's Projects Director to attend a conference, and Orange County's Program Evaluation Specialist provided technical assistance to NMCC on at least 12 occasions between March 20, 2001 and April 18, 2002. AF Tab 16, at 460-461.

On December 12, 2001, Orange County's Program Evaluation Specialist conducted an annual on-site administrative and programmatic review of NMCC. The review findings included findings related to NMCC's performance in meeting the contracted service goals and findings related to the lack of documentation in clients' charts. AF Tab 16, at 441. The Program Evaluation Specialist conducted a follow-up visit on March 7, 2002, to ensure that the recommendations from the previous review were implemented and to provide additional technical assistance, if needed. The follow-up report found that improvements had been made although some client charts were still missing some required information. AF Tab 16, at 446-447.

Also in March 2002, the HRSA HIV/AIDS Bureau Project Officer conducted a field visit to Orange County, which included a visit to NMCC. The report of this visit includes the following:

> Discussed infrastructure capacity development needs related to organizational goals of this start-up agency, housed in cramped quarters of a multi-service publicly funded community center. Newly hired case manager, Linda Polk, discussed small support groups and the characteristics of clients who sought out their services. The Project Officer could not get a clear response to short or long term organizational program goals or plans/ability of organization to expand services in order to reach targets for higher client levels established in their contract. The Provider does not have data tracking software in place and has had difficulty tracking health status outcomes due to an unstable client base.

AF Tab 16, at 487. At the end of the visit, the Project Officer discussed NMCC with Orange County and they agreed that "deficiencies in the management of the African American service provider merit an intensive reassessment of whether the needs of this community are best served by this particular delivery format or whether the provider simply lacks the skills to deliver culturally-competent case management." Id. at 488. The Project Officer noted that, given the problems and "the amount of technical assistance that has already been provided by the Grantee, it does not appear further benefit would accrue from continuation of a capacity development approach with this provider." Id. His report noted, however, that, after further discussion of the options, it appeared that the preferred option was to have the contractor enter into a mentoring arrangement with another Orange County HIV case management service provider. Id. at 499. Orange County was to include the steps taken and changes in contractual arrangements in its plan for the use of Title I funds, in conformity with guidance regarding the selection of providers and Minority AIDS Initiative goals of building capacity in minority communities.

As a result, the Contract Administrator for Orange County wrote NMCC, noting that the HRSA finding "indicates that Case Management services for African-Americans funded under the Minority AIDS Initiative are not being delivered with the adequate infrastructure and capacity to reach the target population and track health outcomes." AF Tab 16, at 452. He requested that NMCC submit a corrective action plan and schedule a meeting for further discussion. The request stated that the "recommendation is to establish a mentoring relationship between New Millenium and AIDS Services Foundation (ASF), implemented in a way that (a) ensures services to African-American clients are not interrupted, (b) the County is confident the needed services

are provided, and (c) health outcomes are tracked." Id. In addition to raising some programmatic issues, including documentation of information in client charts, this request raised some contract issues regarding the budget documents and data and reports submitted by NMCC and stated that the "Cost Report document needs to be corrected and resubmitted by May 31, 2002." Id. On June 5, 2002, NMCC submitted a corrective action plan, including plans to collaborate with and be mentored by ASF, to use a spread sheet to report information such as clients' viral load counts and T cell counts, to attend Quality Assurance meetings regularly as required by the contract, and to market the program to increase client base and reduce unit cost of the services. Id. at 455-456. Orange County and NMCC also met several times about these issues. Id. at 457-459. As a result, NMCC and ASF entered into an agreement under which ASF agreed to provide training to NMCC and to provide space for a NMCC case manager to see clients; NMCC moved into a new office with increased space to see clients and developed a spreadsheet to track patient outcomes. Id. at 493-497.

On June 25, 2002, the Program Evaluation Specialist and another specialist from Orange County conducted another chart audit at NMCC, reviewing 22 client charts. This review found that there had been a "marked improvement" in documentation although some items were still missing from the files. On February 25, 2003, Orange County staff conducted an Annual Site Visit and Program Review for Fiscal Year 2003. AF Tab 16, at 463-483. This report also noted some improvements, such as monthly cost reports being submitted on time, but identified some continuing areas of concern, such as NMCC's problems in reporting units of service for Orange County's database and in tracking client outcomes. As a result, the contract was not renewed.

In April 2003, Orange County initiated a final Fiscal and Administrative review of NMCC. At a meeting with Aubry Keys, pastor and chief executive officer of NMCC, and Ernesta Wright, NMCC's Projects Director, the reviewers were provided with cancelled checks for the first contract period and a check register for the second period, but no other source documentation was available at that meeting. Id. at 644. Pastor Keys indicated he would be traveling for a few weeks, but would have the documentation copied and provided to Orange County; he did not do this, however, and did not respond to several subsequent requests for documentation. Id. The reviewers evaluated the information they had (including submitted reports and reports of earlier reviews), finding that the expenditures did not appear questionable on their face and that the transactions appeared to

be appropriate, but that they could not be verified. Id. at 645-646.

Based on a complaint that Orange County was not adequately monitoring its CARE Act contractors, HRSA conducted a review in August 2004. By the time of this review, NMCC was no longer in existence. The draft report found that Orange County's monitoring was "not fully effective" because:

> 1) [Orange County] did not ensure that its contractors verified that CARE Act Title I funds were expended only for eligible HIV-positive clients or, as appropriate, HIV-affected clients, and
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> 2) NMCC was being paid by [Orange County] even though NMCC's files lacked sufficient documentation to support services were for eligible HIV-positive clients.

Orange County sought clarification of the draft report findings and responded on August 23, 2005 and December 29, 2005, providing serostatus verification for the 22 clients served by NMCC and information regarding the services provided to the clients, the report of the April 2003 Fiscal and Administrative Review, the monthly cost and staffing reports that had been submitted by NMCC, and an analysis reconciling the costs shown on the cancelled checks and check register against the reported costs. AF Tabs 18 and 19.

On March 2, 2006, HRSA issued its disallowance letter referencing the final report (issued the same day) and advising Orange County that "the questioned costs cited in the subject report are unallowable because they do not meet the requirements of OMB Circular A-87." AF Tab 21, at 649. The disallowance letter concluded that "the documentation provided, such as the Final Expenditure and Revenue Report, does not support those costs." Id. "Considering the lack of sufficient documentation and in consultation with our HIV/AIDS Bureau," the letter said, "we have determined that the costs are unallowable" and that "Orange County must return $143,328 to" HRSA. The disallowance letter contains no analysis of the documentation provided. On May 1, 2006, however, HRSA provided Orange County with a copy of the final report, stating that "we have addressed your comments in the report . . . ." AF Tab 652. In response to the comments, HRSA's final report noted that Orange County "had re-audited the files of many clients and re-verified the HIV status of all clients." AF Tab 23, at 663. "However," the report continued, "the documentation . . . regarding contractor costs, including the monthly expenditure and revenue reports, did not provide any new information" and "did not provide documentation to *support*

those costs, such as time sheets, invoices, vouchers, or receipts," as required by OMB Circular A-87.

As noted above, Orange County challenges the disallowance notice as too vague. Also, in its reply brief, Orange County argues that HRSA had, in its final report, accepted the eligibility of NMCC's clients and untimely sought to rely on lack of eligibility during the appeals process. In view of how we resolve the key issues below, we do not need to address these procedural issues.

Analysis

1. Whether documentation of client eligibility was adequate

The draft review report questioned the eligibility of the clients served by NMCC based on the reviews of client charts performed by Orange County's Program Evaluation Specialist over the contract periods, and the Annual Site Visit and Program Review sent to NMCC on July 16, 2003. In response, Orange County explained that the client charts that were lacking documentation of eligibility in the earlier reviews by the Program Evaluation Specialist were included in the 22 charts relating to the total clients served by NMCC. Orange County explained that, ultimately, NMCC had included in its charts serostatus verification showing eligibility for all of these clients except for two (including one client for whom the NMCC documentation was incomplete). Orange County explained that it viewed NMCC's failure to have the serostatus verification in all of the clients' charts as a documentation issue, not an eligibility issue, since Orange County's own files contained documentation of the status showing that these individuals were eligible for services. Orange County provided HRSA with documentation of serostatus for each of the 22 NMCC clients. AF Tab 19.

Neither HRSA's response to Orange County's comments on the draft review report nor HRSA's brief submitted to us states any basis for rejecting the documentation Orange County provided as adequate to support the clients' eligibility.

Instead, in its brief to us, HRSA states:

> Prior to the site visit and while on-site, HRSA requested documentation of patients served under the Title I program and the types of services provided, but such information was never made available. After the site visit, HRSA continued to request this information, but did not receive it until over one (1) year after the

> site visit concluded. . . . That information was inadequate for the following reasons: 1) the services shown were not identical to those services specified in the contracts, 2) these records were prepared in 2005, almost four years after which at least some of the services were allegedly delivered, and 3) there were no signatures to indicate who prepared these records in 2005 and the source is not validated. Therefore, without adequate documentation, we cannot assess if services were provided to Title I program eligible patients.

HRSA Response Br. at 3. HRSA's response does not raise any specific questions about Orange County's documentation to show that the 22 clients for whom NMCC had files were eligible, but focuses on whether Orange County has documented that NMCC was providing contract services to those clients.

HRSA does not explain what it means by stating that the services listed in Orange County's response to the HRSA draft report were not "identical" to those specified in the contracts. In reply to this concern, Orange County asserts that a "comparison of the services provided with the terms of the contracts shows that NMCC performed services as described in the contracts." OC Reply Br. at 4. As an example, Orange County cites to the contract service provisions for the NMCC 2001-2002 contract and to the "notes from the file of verified HIV positive client 'G.R.'" Id. at 4-5. The cited contract provisions describe various activities that are considered care management or comprehensive care management, under the categories of client outreach and orientation, client screening and intake, assessment of client needs and abilities, individualized service plan, referral, and case termination. AF Tab 8, at 111-113. The cited notes contain descriptions of activities that reasonably can be considered the types of activities described in the contract. AF Tab 19, at 583-587.

While HRSA does not specify in what respect the services listed for each client are different from the services specified in the contracts, it appears from statements made elsewhere in the record that a question had been raised about whether NMCC was accurately reporting to Orange County on an ongoing basis the units of service it was providing under the contract (such as, "intermediate visit" or "simple visit"). Even if NMCC did not always accurately report the units of services, however, that does not mean that the activities in which NMCC was engaged on behalf of eligible individuals did not qualify as the types of care management services that NMCC was expected to perform under the contract.

With respect to HRSA's concern that the lists of services for the 22 clients were compiled in 2005, Orange County points out that HRSA's review did not begin until more than three years had passed since NMCC began providing its services and more than a full year after the County had terminated operations with NMCC.[1] Orange County asserts that, "[w]hile some of the service details (which were based on contemporaneous patient records) were compiled in 2005 pursuant to HRSA's 2005 request, the actual patient records given to HRSA were contemporaneous with the services provided, as evidenced on the face of the records themselves." OC Reply Br. at 5. While Orange County did not provide to us the underlying patient records for all of NMCC's clients, we have no reason to doubt that the service lists reflected those records, especially since the contemporaneous reports of on-site evaluations of NMCC (as described above) indicated that NMCC did have client charts showing the provision of services and was reporting services on an ongoing basis to Orange County.

The reviews showed that NMCC was not making its targets for the number of units of services to be provided, but this was attributed to factors such as the limited number of hours during which NMCC was providing services and its unstable client base (problems which Orange County was trying to address during the second contract period, with HRSA's concurrence). No question was raised about whether NMCC was in fact engaged in activities that would qualify as care management under the contract. We also note that contract activities such as "outreach" would not necessarily be reported as separate units of service under the contract. The record indicates that NMCC was a new contractor in the first year and was still having trouble establishing a stable client base in the second year, so it was being encouraged to engage in outreach activities. The record also refers to other contract-related activities of NMCC staff, such as participating in training in the first contract period and negotiating about an agreement with ASF in the second contract period.

In reply to HRSA's concern about the lack of signatures indicating who prepared the 2005 records, Orange County points out that the documents verifying serostatus are signed by the

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[1] Orange County also asserts in its initial brief, and HRSA does not deny, that the July 29, 2004 notice from HRSA to Orange County that HRSA would conduct an on-site review in August did not specifically identify NMCC as a contractor site for which documentation should be provided. See AF Tab 11.

patients' physicians. The compiled lists of services provided are not separately signed, but they were provided to HRSA with a cover letter signed by the Division Manager, Disease Control & Epidemiology, of Orange County's Health Care Agency (HCA), stating that "the service units are those reported in HCA's CaseWatch database and a review of chart notes indicates that the units are generally underreported." AF Tab 19, at 547. While it is not clear whether the Division Manager personally compiled the lists, she describes them elsewhere as "documented services" and says the units "verify that services were provided to all 22 HIV-positive clients" which should be all that was needed since the contract was a "cost-reimbursement" contract, not a "fee-for-service contract." Id. at 549. As we discuss next, we agree with her assertion that the contract was a "cost reimbursement contract." Moreover, while the lists of service units provided to HRSA were compiled by Orange County in 2005, they were based on the contemporaneous records of the services NMCC provided, and Orange County had also reviewed those records as part of its site visits. Thus, HRSA's concern that the lists were compiled in 2005 is not a reasonable basis for rejecting them as showing that NMCC was providing contract services to eligible individuals.

2. Orange County was not required to provide documentation to show that costs were reconciled with actual service units provided.

HRSA's response to Orange County's appeal includes as a reason for the disallowance that Orange County "did not provide documentation to show that costs were reconciled with actual services provided, as required by the contract." HRSA Response Br. at 2. HRSA's discussion of this reason indicates that HRSA continues to be under the mistaken impression that the basis for final settlement between Orange County and NMCC was to somehow reflect the actual cost of each unit of service and the number of units of each type provided, compared to the total costs claimed on NMCC's cost reports. Thus, for example, HRSA states:

> The final expenditure and revenue reports for both contract periods . . . includes "cost per unit of services," but offers no explanation of how that amount was calculated. It is simply shown as one additional item on the report along with other expense summaries with no reconciliation to those other expenses.

Id. HRSA also relies on a reference in the second contract to the basis for reimbursement being "Fee-for-Service." See AF Tab 10, at 3.

As Orange County had previously explained to HRSA, however, the references in the contracts to units of service were because Orange County was trying to build capacity for the contractor to bill on a fee-for-service basis. Specifically, Orange County explained in response to the draft report of the HRSA August 2004 site visit:

> HCA was attempting to transition all providers from cost-reimbursement contracts to fee-for-service contracts during the two years NMCC was a contract provider. (This transition to fee-for-service was deemed not feasible and contracts have remained on a cost-reimbursement basis.) This, along with the fact that the payment *method* was provisional (twelve prorated monthly payments), created understandable confusion. To clarify, though monthly payments were provisional and the year-two contract contained reference to service unit rates, **the contract payment was based strictly on cost reimbursement for both years.** This is verified in Attachments 2 and 5.

AF Tab 18, at 516 (emphasis in orginal). Attachments 2 and 5 are the relevant contract provisions for the two years. The first clearly says that the final settlement "shall be based on the actual and reimbursable costs for services hereunder less applicable revenues, not to exceed COUNTY'S Maximum Obligation as set forth on Page 3 of this agreement." AF Tab 18, at 521. The second says that final settlement "shall be based upon the cost of actual units of services provided hereunder, not to exceed COUNTY'S Maximum Obligation as set forth on Page 3 of this agreement." AF Tab 18, at 536. The reference in the latter provision to "actual units of service" does not transform the contract into a fee-for-service one based on a set fee for each type of service, rather than one for reimbursement for the underlying costs of the services provided. Moreover, other language that HRSA cites is from a provision in the second contract permitting (but not requiring) Orange County to reduce its provisional monthly payments to NMCC based on reconciling the total number of units of service reported on a monthly basis (at the amounts set out in the contract) to the provisional payments. AF Tab 9. This reconciliation provision is different, however, from the provision establishing cost as the basis for the final settlement.

Clearly, the payments to NMCC ultimately had to be reconciled under the contract to NMCC's actual costs. Moreover, those costs had to be the costs of services actually provided under the contract. Indeed, the contracts provide that NMCC must document

that its costs are "reasonable and allowable and directly or indirectly related to the services provided thereunder." Id. at 521, 536. That does not mean, however, that Orange County had to somehow determine the actual costs of each different type of unit of service provided and reconcile that to the total amount paid under the contract, as HRSA's argument suggests. HRSA does not explain how it would expect such a reconciliation to work and does not claim that such a reconciliation was required by Title I.

Finally, we note that if we were to read the second contract as a fee-for-service contract, as HRSA does, the record would support payment to NMCC at the maximum amount under the contract. The Annual Site Visit and Program Review conducted by Orange County in February 2003 included a review of the clients' charts, based on which the reviewers concluded that NMCC had provided the following units of psychosocial care management services during the contract year: 416 simple client visits; 119 intermediate visits, and 80 complex visits. AF Tab 16, at 480. The total fees for these services using the rates under the contract, as amended, is $89,669, greater than the maximum contract obligation of $72,832.[2]

3. Orange County did provide documentation adequate under the circumstances here to reverse the disallowance of $121,234 in costs for providing services under the contracts; the disallowance of the remaining $22,094 is upheld.

HRSA's third reason it gives for the disallowance of the entire amount paid by Orange County to NMCC is that "the cost reports provided were not sufficient to support costs claimed." HRSA Response at 2. This reason is in part based on HRSA's mistaken impression that the second contract is a fee-for-service contract. HRSA also relies, however, on the facts that there were no invoices to support the purposes for which the cancelled checks Orange County obtained from NMCC were written and that Orange County itself had attempted unsuccessfully to obtain more documentation from NMCC. Id. at 3.

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[2] We calculated this amount as follows: (416 x $126) + (119 x $127) + (80 x $128) = $89,669. The second contract also identifies a unit cost of $130 for each termination of a client. The $89,669 does not take into account what the total fees for termination would have been, but the service lists and case notes Orange County provided show some termination services.

While NMCC clearly did not live up to its obligation under the contract to maintain complete source documentation of costs, we have determined under the particular circumstances here that the record as a whole is sufficient to show that Orange County properly reimbursed NMCC $70,496 in the first year and $50,738 in the second year for the cost of services under the contract, as it asserts. This totals $121,234, rather than the $123,606 that Orange County asks us to allow. Orange County does not specify how it got the $123,606, but it appears that this total may have included some costs for the first contract year in excess of the maximum obligation under the contract.

Thus, we uphold the disallowance of $22,094. Our reasons for reversing the remaining disallowance are as follows. First, it is clear from the record that both HRSA and Orange County considered the contract with NMCC to be one for capacity-building. In other words, they did not expect NMCC to have had the capacity to perform like an experienced service provider under the contract initially, including with respect to its documentation of services and costs.

Second, contrary to what HRSA suggests, Orange County is not relying solely on the cost reports to substantiate that it properly reimbursed NMCC for $70,496 for the first contract year and $50,738 for the second year, but is also relying on the documentation of the checks written by NMCC and other evidence. Yet, HRSA's response contains no analysis of that evidence in light of the applicable requirements.[3]

The documentation of the checks written by NMCC shows that most of the checks were written to cover the costs of NMCC staff whom the record shows worked on the project ($52,768 for the first

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[3] Indeed, HRSA's reliance on OMB Circular A-87 with respect to the requirements for NMCC to document its costs is mistaken. The cost principles in OMB Circular A-87 apply to Orange County because it is a local government, but a subrecipient such as NMCC is subject to different cost principles related to the type of organization it is. See 45 C.F.R. § 92.22(b). Yet, HRSA nowhere identifies what cost principles apply to NMCC's costs. Since all recipients and subrecipients are required to document their costs, we do not consider this failure to be material, but it illustrates the extent to which HRSA's confusion over the nature of the contract between Orange County and NMCC affected its determination.

contract period and $41,234 for the second contract period). Orange County reconciled these checks to the certified cost reports submitted by NMCC, and also determined that they were consistent with the project budget. Moreover, the record includes contemporaneous monthly staffing reports that NMCC was submitting to Orange County showing the amount of time each staff member worked each month on the project. Orange County submitted on appeal a declaration by Ernesta Wright, who was Projects Director for NMCC during the contract periods, averring that she had compiled these monthly reports using time sheets each NMCC employee was required to complete to demonstrate their work on the contract. Ms. Wright avows, under penalty of perjury:

> Each time sheet called for the employee to provide an accounting for how much of each work day was spent on individualized contract tasks, such as client visits, site visits, and telephone calls. The time sheets were specific as to how much time was spent on each task and further itemized which client benefited from the task. Before submitting the time sheets to me, each employee was required to sign the time sheet certifying that the hours and activities reported were accurately reflected in the time sheet. Any time spent by NMCC employees on non-HCA contract business was not reported on the staffing reports to HCA.

AF Tab 27, at 722-723. While of course it would have been preferable if NMCC had retained the time sheets and provided them to Orange County, HRSA has provided no basis for considering Ms. Wright not to be credible on this issue, and the monthly staffing reports themselves can be accepted as a contemporaneous record of how much staff time was allocable to the contract.[4]

The operating costs that Orange County asserts should be accepted total $17,728 for the first period and $9,504 for the second period, for items such as supplies, printing and copying,

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[4] The Board has previously held that summary time sheets, which indicate the time that an employee actually worked on grant-related projects, accompanied by signed affidavits, may constitute adequate documentation for wage and salary expenditures under cost principles requiring time sheets. California Dept. of Health Services, DAB No. 1155 (1990).

insurance, and bus passes and taxi vouchers.[5] While Orange County was unable to obtain the type of source documentation that HRSA found lacking (such as invoices), cancelled checks are considered a type of source documentation. See, e.g., 45 C.F.R. § 92.20(b)(6). Moreover, Ms. Wright avows in her declaration that in drafting the cost and expenditure reports NMCC submitted to Orange County, she "relied upon and used information from time sheets, receipts, bills, invoices, or other information NMCC had received for its expenses" and "limited the reporting of costs and expenditures to only those costs and expenditures that were provided under and were within the scope of the HCA contracts for CARE services." Id. at 723. Given that the fact that, for the most part, Orange County's division manager of contracts was able to reconcile the checks written by NMCC (based on notations indicating, for example, if they were for supplies or insurance) to contemporaneous cost and salary reports and to NMCC's budget, this assertion is credible. See AF Tab 726.

In sum, for the first contract year, there is evidence that the costs exceeded the maximum obligation. For the second year, costs in the amount of $50,738 ($41,234 for salaries and benefits and $9,504 in operating expenses) of the $72,832 funded are consistent with the contract and actual costs reported and supported by additional documentation (including the check register and monthly staffing reports). AF Tab 20, at 605.

In addition, as discussed above, the record contains adequate documentation to show that NMCC was providing services to eligible individuals under the contracts and was engaged in some other contract-related activities. Compare North Dakota Children's Services Coordinating Committee, DAB No. 1399 (1993), at 9-12(disallowance upheld where grantee had no documentation to verify that grantee's contractors actually performed services). While NMCC was not as successful in its efforts as had been anticipated, nothing in the contracts made payment for costs contingent on meeting performance targets.

Finally, as the Orange County financial review concluded after examining the purposes for which NMCC wrote checks, nothing on the face of the check documentation indicates that any of the costs were questionable or were for inappropriate transactions. Whether there are audit or review findings suggesting that a grantee misspent or misappropriated funds is one of the factors

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[5] As noted above, the first contract provided for transportation services, which were provided in the form of bus passes and taxi vouchers.

the Board has considered in evaluating evidence of costs where source documentation such as invoices or time sheets are lacking. See, e.g., Second Street Youth Center, DAB No. 1270 (1991). In this case, however, there is no such finding or even any finding by HRSA that any cost claimed by NMCC was not an allowable type of cost or was unreasonable in amount. Absent such findings and in light of the documentation Orange County did provide about NMCC's costs and services, as well as the nature of the contract as capacity-building, HRSA's determination to disallow the full of amount of the funding Orange County provided to NMCC under the contracts clearly is not warranted.

Conclusion

For the reasons stated above, we uphold the disallowance of $22,094 and reverse the remaining disallowance of $121,234.

Donald F. Garrett

Leslie A. Sussan

Judith A. Ballard
Presiding Board Member