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ONE HUNDRED SIXTEENTH CONGRESS

# Congress of the United States

## House of Representatives

### COMMITTEE ON ENERGY AND COMMERCE

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WASHINGTON, DC 20515-6115

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October 7, 2020

The Honorable Alex Azar  
Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue, SW  
Washington, DC 20201

Dear Secretary Azar,

We write regarding concerns arising out of recent events related to the U.S. Department of Health and Human Services' (HHS) Program Support Center (PSC). The PSC was established administratively by former HHS Secretary Donna Shalala in October 1995 to serve "as a customer service center to provide a wide range of administrative support services to components of the Department and other federal agencies." One of the PSC's functions included "centralized procurement and acquisition."<sup>1</sup> Throughout the COVID-19 pandemic response, the U.S. Department of Defense (DOD) and U.S. Department of Homeland Security have been providing acquisition assistance to HHS to procure critical medical supplies and personal protective equipment (PPE), along with additional contracting and acquisition assistance.<sup>2</sup> For example, the Defense Logistics Agency is currently awarding contracts for replenishment of HHS Strategic National Stockpile supplies.<sup>3</sup>

Historically, HHS has viewed the Service and Supply Fund statute (42 U.S.C. 231) as establishing a revolving fund that permitted HHS to provide services to both HHS and non-HHS

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<sup>1</sup> See 60 FR 51480 (October 2, 1995).

<sup>2</sup> *Department of Defense COVID-19 Response to Industrial Base Challenges*, 116<sup>th</sup> Cong., Statement of Ellen Lord, Department of Defense Under Secretary of Defense for Acquisition and Sustainment (June 10, 2020) available at <https://www.congress.gov/116/meeting/house/110794/witnesses/HHRG-116-AS00-Wstate-LordE-20200610.pdf>; Memorandum of Understanding Between the Federal Emergency Management Agency and the U.S. Department of Health and Human Services, Office of Assistant Secretary of Preparedness Response (Apr. 5, 2020) (on file with Committee).

<sup>3</sup> *Department of Defense COVID-19 Response to Industrial Base Challenges*, 116<sup>th</sup> Cong., Statement of Ellen Lord, Department of Defense Under Secretary of Defense for Acquisition and Sustainment (June 10, 2020) available at <https://www.congress.gov/116/meeting/house/110794/witnesses/HHRG-116-AS00-Wstate-LordE-20200610.pdf>.

agencies.<sup>4</sup> However, it appears from HHS's recent course of conduct reported in the media that internal concerns have arisen over whether HHS contracting for non-HHS agencies was appropriate, including a possible concern about legal authorities.

For example, the Acting Head of Contracting Activity of the PSC, announced in a June 14, 2019, memorandum to its customers that the PSC was terminating its \$1.4 billion assisted acquisition program for non-HHS agencies.<sup>56</sup> The same official wrote in an email that as a result of an ongoing internal review, PSC determined that it does not "have the policies, procedures, and internal controls in place to support the transfer of PSC contracts to non-HHS agencies."<sup>7</sup>

Further, a March 2, 2020, Federal News Network article reported that at the cost of more than \$600,000 per year, HHS has kept four top PSC officials, including the Director and the Financial Management Director on administrative leave suspension for nearly a year.<sup>8</sup> HHS has paid tens of thousands of dollars in prompt payment penalties, as much as \$84,000 for withholding payments to contractors while reviewing its PSC contracts. The payment delays are difficult for contracting companies and the termination of contracts has affected other federal agencies, including DOD, the Office of Special Counsel, and the Environmental Protection Agency.<sup>9</sup>

It was also reported that an HHS lawyer raised questions about whether the PSC was legally authorized to administer contracts for other agencies.<sup>10</sup> When Minority Committee staff requested HHS's interpretation of 42 U.S.C. 231, and whether it provided authority to PSC to administer contracts for non-HHS agencies, HHS declined to respond to this request asserting that HHS does not comment on attorney-client privileged communications. HHS informed Minority Staff that it could not locate any formal legal opinions issued in advance of the PSC's use of 42 U.S.C. 231 as a revolving fund. HHS also noted that it is possible "that HHS viewed the Service and Supply Fund statute as permitting PSC to conduct acquisitions for other Government offices," given the statute's reference to "such other services, as the Surgeon General, with the approval of the Administrator of the Federal Security Agency [Secretary] determines may be performed more advantageously as central services."<sup>11</sup> Even if HHS believed that the PSC had the legal authority to administer contracts for other agencies, it is not clear why

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<sup>4</sup> Email from HHS ASL to Minority Committee Staff, January 17, 2020.

<sup>5</sup> Bloomberg Law, *Four Officials Ejected at Health Agency; DOD Contracts Disrupted*, (July 22, 2019) available at <https://news.bloomberglaw.com/health-law-and-business/four-officials-ejected-at-health-agency-dod-contracts-disrupted>

<sup>6</sup> Jason Miller, *HHS puts more than \$1B in contracts at risk by shutting down assisted acquisition services*, Federal News Network, (July 22, 2019) available at <https://federalnewsnetwork.com/reporters-notebook-jason-miller/2019/07/hhs-puts-more-than-1b-in-contracts-at-risk-by-shutting-down-assisted-acquisition-services/>.

<sup>7</sup> Jason Miller, *HHS piling on the bad news for its assisted acquisition customers*, Federal News Network, (August 19, 2019) available at <https://federalnewsnetwork.com/reporters-notebook-jason-miller/2019/08/hhs-piling-on-the-bad-news-for-its-assisted-acquisition-customers/>.

<sup>8</sup> Jason Miller, *HHS shutdown of assisted acquisition services remains painful, wasteful*, Federal News Network, (March 2, 2020) available at <https://federalnewsnetwork.com/reporters-notebook-jason-miller/2020/03/hhs-shutdown-of-assisted-acquisition-services-remains-painful-wasteful>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Email from HHS ASL to Minority Committee Staff, January 17, 2020.

the PSC did not have policies, procedures, and internal controls in place to support this activity. This not only has ramifications for the PSC's non-HHS agency contract actions valued at more than a half billion dollars in FY 2019, but possibly for other HHS revolving funds that might be used to support non-HHS agencies.<sup>12</sup>

A recent HHS Office of Inspector General (OIG) report also raised concerns about the PSC's acquisition process. In May 2017, the HHS OIG issued an audit report, *HHS Did Not Identify and Report Antideficiency Act Violations*.<sup>13</sup> Out of 30 contracts randomly sampled in the audit, HHS OIG found that for 13 contracts, the PSC did not always obligate and expend funds for its contracts in compliance with applicable law and requirements, resulting in unreported Antideficiency Act obligation violations totaling \$20.3 million and expenditure violations totaling \$29.2 million. PSC agreed with the findings, and generally agreed with the recommendations. In checking with HHS on the status of implementation of the HHS OIG recommendations, HHS advised Minority Committee staff that "HHS continues to review the recommendations contained in the OIG report and will make any required account adjustments, as the OIG noted may be appropriate."<sup>14</sup> Once HHS finalizes its determinations regarding which adjustments to make and the amounts thereof, HHS will then assess whether it is required to report any violations, or if HHS can close the matter having made the required adjustments."<sup>15</sup>

In light of the concerns related to the PSC, we are interested in ensuring and supporting HHS efforts to improve oversight and administration of the PSC, other HHS revolving funds, and any other non-HHS agency contracting actions by HHS agencies. Please provide a written response by November 6, 2020 to the following questions:

1. What are the lessons learned from HHS' lack of policies, procedures, and internal controls at the PSC to support the transfer of PSC contracts to non-HHS agencies?
2. Does the PSC charge HHS agencies any fees for acquisitions? If so, how are those fees determined? How much did the PSC collect in FY 2018 for those fees?
3. Did the PSC charge non-HHS agencies with fees for assisted acquisitions? If so, what were the amounts of those fees? How were they calculated? How much in fees did PSC collect in FY 2018?
4. If there are fees collected by PSC, in what account(s) were the fees deposited? How are they accounted for? Did the fees provide a profit for the PSC?
5. At the request of the Minority Committee staff, the Congressional Research Service identified from various budget documents the following as "revolving funds," "working

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<sup>12</sup> The FY 2019 actual contract actions in PSC were approximately \$1.3 billion, with assisted acquisitions at approximately \$504 million (DOD being the largest customer at \$328.5 million). Email from HHS Assistant Secretary for Legislation to Minority Committee Staff, January 17, 2020.

<sup>13</sup> HHS OIG, *HHS Did Not Identify and Report Antideficiency Act Violations*, May 2017, A-03-13-03002.

<sup>14</sup> Email from HHS ASL to Minority Committee Staff, January 17, 2020.

<sup>15</sup> *Id.*

capital funds,” or management funds at HHS or HHS operating divisions with an aggregate annual budget in excess of \$9 billion:

Administration for Community Living, Aging and Disability Services Programs (Assistive Technology Alternative Financing Program (reference to a “revolving loan fund” in appropriations language));

Centers for Disease Control and Prevention, Working Capital Fund;

Food and Drug Administration, Working Capital Fund;

Health Resources and Services Administration (HRSA), Health Professions Revolving Loan Program (in Health Resources and Services);

HRSA, Medical Facilities Guarantee and Loan Fund (references a “revolving fund” for direct loans;

National Institutes of Health (NIH), Service and Supply Fund; and

NIH, Working Capital Fund.

How is HHS applying the lessons learned from the PSC service and supply fund being used for non-HHS contracts to the revolving, working capital, or management funds identified above? If there are other, similar funds at HHS or HHS operating divisions that are not listed above, please include them in your response.

6. Do federally funded research and development centers (FFRDCs) at NIH and the Centers for Medicare and Medicaid Services have the authority to assist non-HHS agencies? If so, what is the extent of FFRDC contract actions for non-HHS agencies?
7. When will HHS finish the review of the OIG recommendations in the May 2017 audit report and begin implementing those recommendations?
8. What is the dollar amount of prompt payment penalties HHS has paid since terminating the PSC’s assisted acquisition program for non-HHS agencies? If the PSC’s assisted acquisition program for non-HHS agencies was terminated on staggered dates, provide the total dollar amounts paid per quarter beginning with the initial quarter payments were issued.

If you have any questions, please contact Alan Slobodin of the Minority Committee staff at (202) 225-3641.

Sincerely,

A handwritten signature in blue ink that reads "Greg Walden". The signature is written in a cursive style and is positioned above a horizontal line.

Greg Walden  
Republican Leader  
Committee on Energy and Commerce

A handwritten signature in blue ink that reads "Brett Guthrie". The signature is written in a cursive style and is positioned above a horizontal line.

Brett Guthrie  
Republican Leader  
Subcommittee on Oversight and  
Investigations