

The NEON Light Flashed Red: Doors Were Secured

Written by Nick Sanders
Monday, 16 May 2016 00:00

*Well calm down, temper, temper
You shouldn't get so annoyed
You're acting like a silly little boy
And they wanted to be men
And do some fighting in the street
(They said) no surrender
No chance of retreat ...*

*Drunken plot's hatched to jump it
Ask around are you sure?
Went for it but the red light was showing
And the red light indicates doors are secured*

“Red Light Indicates Doors are Secured,” The Arctic Monkeys



According to its website—

The NEON Light Flashed Red: Doors Were Secured

Written by Nick Sanders
Monday, 16 May 2016 00:00

The National Ecological Observatory Network (NEON) is an NSF-funded large facility project. NEON comprises terrestrial, aquatic, atmospheric, and remote sensing measurement infrastructure and cyberinfrastructure that deliver standardized, calibrated data to the scientific community through a single, openly accessible data portal. NEON infrastructure is geographically-distributed across the United States, including Alaska, Hawaii and Puerto Rico, and will generate data for ecological research over a 30 year period.

NEON is designed to enable the research community to ask and address their own questions on a regional to continental scale around the environmental challenges identified as relevant to understanding the effects of climate change, land-use change and invasive species patterns on the biosphere.

It's a government project, a government IT project. We all know without looking that it's going to be a troubled project, with cost overruns and schedules slips. That's the way most government IT projects go these days.

But we didn't expect controversial audit findings, auditors being whistleblowers on their own management, and Congressional hearings.

We wrote about the NEON controversy [before](#). That was in 2014. Much has happened since then, but if not for a couple of gently persistent folks who kept pointing us to the Wikipedia article on DCAA (in which the controversy is prominently featured), we would have missed it.

Our original article did not express much sympathy towards the DCAA whistleblower or towards the Senators who wrote nasty letters or towards the Congresspersons who held hearings on the topic in December, 2014. Additional hearings [were held](#) in February, 2015. Records are sketchy but it appears to us that NEON justified the use of "management fees" charged to the subsidiary performing the NSF grant.

The NEON, Inc. Chairman testified that-

The NEON Light Flashed Red: Doors Were Secured

Written by Nick Sanders
Monday, 16 May 2016 00:00

It is our understanding that OMB has long held that fees in the case of a non-profit like NEON or profit in the case of a private business are not considered appropriated funds and are outside the scope of OMB Circular A-122 and the Byrd Anti-Lobbying Amendment. Moreover, NSF has consistently indicated to NEON that management fees constitute discretionary or unrestricted funds and can be used to pay for business costs that are considered unallowable. ... NEON has used management fees to cover a variety of costs, including those associated with contract terminations, late fees, and other normal business expenses. NEON also has used management fees to cover costs associated with government outreach activities, providing amenities, including coffee, for its employees, and meals and social functions that included the purchase of alcohol.

We noted a letter from the law firm of Gibson Dunn (found on the website, link in the previous sentence) that stated—

OMB Circular No. A-122 provides principles for determining the costs of work performed by non-profit organizations under cooperative agreements. The Circular explicitly states that '[p]rovision for profit or other increment above cost is outside the scope of this Circular.' While the Circular notes that the costs of alcoholic beverages and lobbying are unallowable, the Circular's cost principles do not apply to any management fee or profit earned by an organization through a cooperative agreement. Accordingly, Circular No. A-122 does not prohibit a non-profit organization from using funds earned through management fees on a cooperative agreement for such costs. Nor does any other statute, rule or guidance of which we are aware.

Likewise, according to NSF regulations, as clarified by OMB guidance, management profit and fees earned under a cooperative agreement are excluded from the definition of 'appropriated funds' for purposes of the prohibition on use of such funds for lobbying. Accordingly, it appears there is no prohibition on the use of management fees or profit for the purposes of lobbying, so long as proper disclosure is made in accordance with 45 C.F.R. § 604.100(c).

According to NEON and its attorneys, NEON, Inc. charged a management fee to the subsidiary, which was akin to profit and could be used to pay for business-related costs, including costs that would otherwise be considered to be unallowable costs under applicable rules. Seems like a total victory.

But it may have perhaps been a Pyrrhic victory because, while the parent company was

The NEON Light Flashed Red: Doors Were Secured

Written by Nick Sanders
Monday, 16 May 2016 00:00

successfully surviving Congressional hearings into its use of the management fees, the performing subsidiary was looking at an \$80 million project overrun and 2 year schedule slip, which did NOT make the NSF happy. As a result, the management contract [was terminated](#) and NSF [picked](#) Battelle Memorial to try to wrangle the troubled project.

Now, back to the DCAA Wikipedia article that discusses the audit allegations and results. According to that article, NEON, Inc. was “fired from the project” and that action “represents one of the largest Federal agreement terminations for cause in history.” We are not convinced that’s the proper way to view this. While it is indisputable that the NEON management contract was terminated, it is not at all clear that it was terminated for cause. There was no need for NSF to take such a drastic step—a step that could be litigated and converted to a T4C—when the easier step was to simply terminate the contract for convenience and let the parties walk away. We strongly suspect that is the proper way to view the termination and replacement of the management contractor.

Similarly, the Wikipedia claims that the whistleblower’s claims “directly led” to the termination of the NEON management contract is suspect. While we are quite sure that the controversy and hearings did the contractor no good whatsoever, we strongly suspect it was the large cost overrun and significant schedule slip that were more directly linked to the termination. If the contractor had been performing well, it might have survived its audit problems. This is, in our view, an important illustration of the importance of effective project management—a topic that’s gotten lots of attention on this website in the past 7 years.

Some people who send us email would like to make the NEON controversy into a back-room management conspiracy. In particular, they’d like to link it to the sudden departure of former Director Fitzgerald from DCAA. We don’t see it that way. Occam’s Razor suggests the simplest explanations are more likely to be true. In that sense, the auditor was overruled by DCAA management, and it seems there was good rationale for the position they took. We don’t know why Director Fitzgerald left DCAA, but it is more likely to be linked to the pile of unaudited Incurred Cost Submissions (which led to Draconian action by Congress in the 2016 NDAA) than it is to audit problems with a non-profit entity under a non-DOD grant/contract.