

FEDERAL FUNDING ACADEMY

Scott S. Sheffler
Edward T. Waters
Jerry Bertrand

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Day 1

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Edward T. Waters
Jerry Bertrand

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Moderators

Edward T. Waters
Scott S. Sheffler
Jerry Bertrand

Nicole M. Bacon
Phillip A. Escoriaza
Kristen M. Schwendinger

Faculty



Scott S. Sheffler
Partner



Edward T. Waters
Managing Partner



Jerry Bertrand
Consultant

Breakout Sessions



Nicole
Community Action Agencies &
Head Start



Ted
Health Centers
CARES ACT



Scott
Institutions of Higher Education
PPP



Kristen
Institutions of Higher Education



Jerry
State & Local Government
Prior Approvals



Phillip
State & Local Government
Social Media

UNDERSTANDING THE FEDERAL GRANT SYSTEM AND THE GRANT AGREEMENT

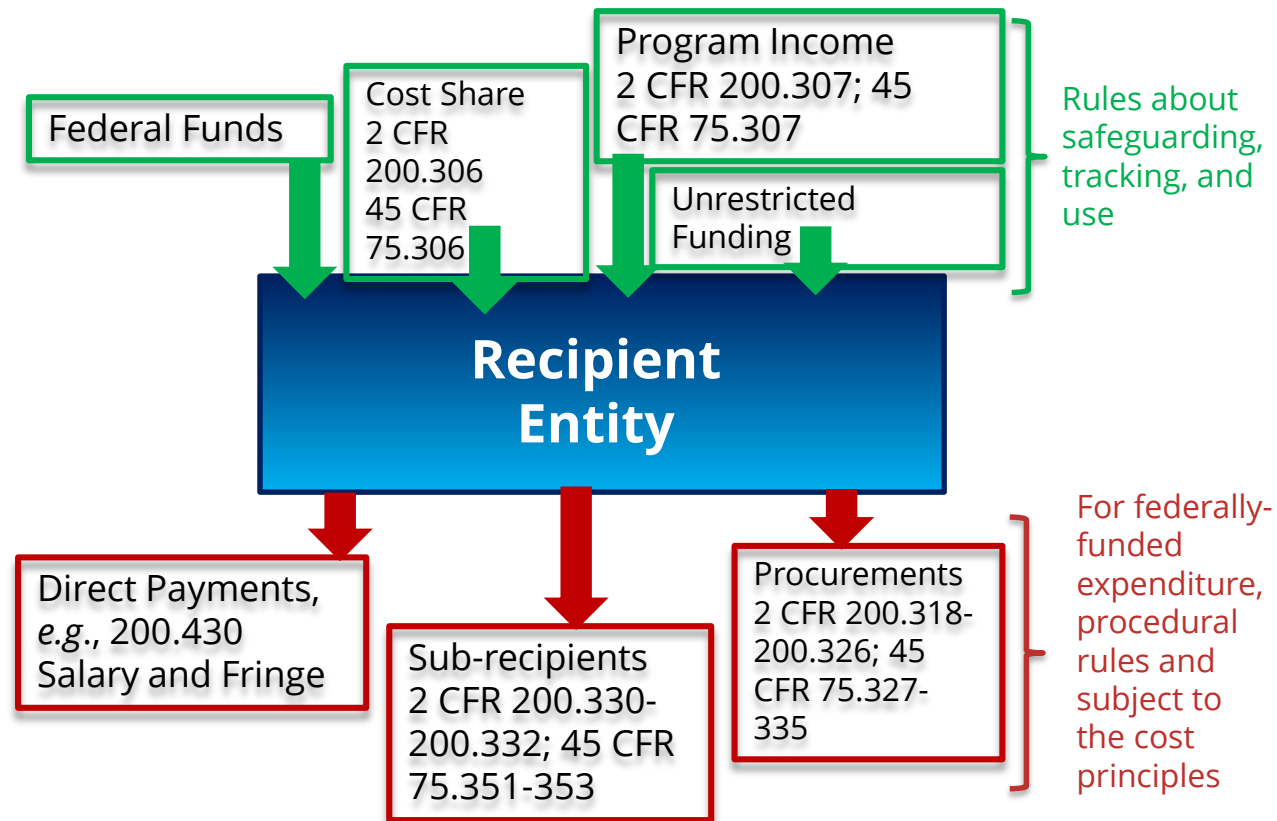
AGENDA

- Overview of the Federal Funding System
- Terms and Conditions of a Federal Award
- The Notice of Award and “Scope of Project”
- Financial Management / Funds Management
- The Anatomy of a Federally-Funded Entity

LEARNING OBJECTIVES

- Understand the framework of the broader federal funding system
- Understand the nature of grant and cooperative agreement awards, and the terms and conditions attached to the funding
- Understand the types of funding sources for federally-funded entities, and associated limitations
- Understand where to find, and how to interpret, the key terms on the face of a typical notice of award

INFLOWS AND OUTFLOWS IN AN NFE



RESTRICTED AND UNRESTRICTED FUNDS

Restricted Funds are:

- Funds with strings attached, *i.e.*, you can only use them in specific ways.
- Federal grants like Head Start are restricted to the uses for which they were appropriated.
- Bequests and gifts may also be restricted by donors.

Unrestricted Funds are your program's own money, common examples:

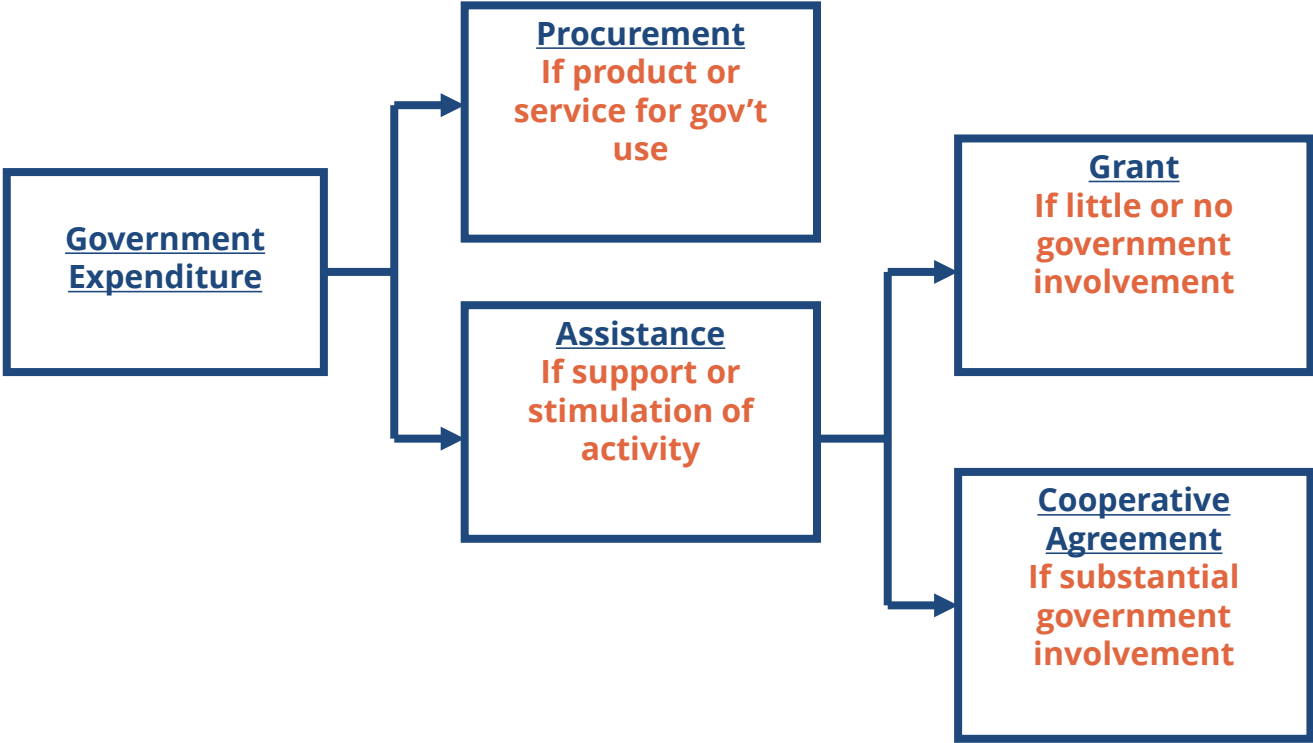
- Unrestricted gifts and donations.
- "Surplus" earned on contracts with States and localities.
- Fundraising done right.

BEGIN AT THE BEGINNING - OVERVIEW OF THE FEDERAL FUNDING SYSTEM



FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT

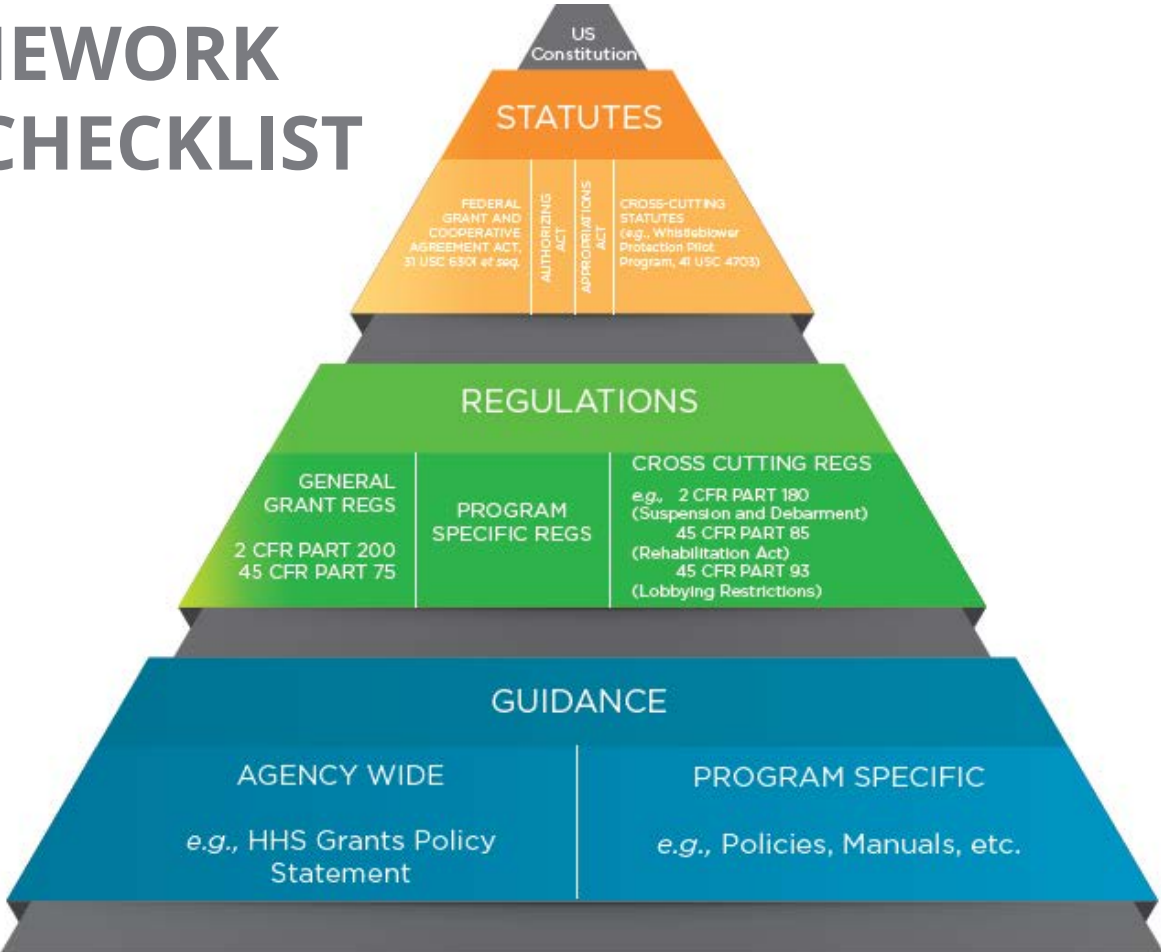
(31 U.S.C. § § 6301-6308)



CREATING YOUR LIBRARY



THE LEGAL FRAMEWORK AND A CHECKLIST



HOW DO YOU FIGURE IT ALL OUT?

Resources:

- Catalogue of Federal Domestic Assistance (“CFDA”)
- OMB Compliance Supplement
- Agency Website – “Resources” Tab
 - Authorizing Act
 - Program Regulations
 - Program Guidance
- The “Default Rules” 2 CFR Part 200 and 45 CFR Part 75

EXAMPLE:

AMERICORPS-SPECIFIC GRANT TERMS

- Statute –
 - National and Community Service Act of 1990, 42 U.S.C. § 12501 *et seq.*
 - Domestic Volunteer Service Act of 1973, 42 U.S.C. § 4950 *et seq.*
 - Consolidated Appropriation – HHS, Labor, Ed and “Related Agencies” (*e.g.*, Pub. L. 115-245, Div. B, Titles IV and V (Sep. 30, 2019)).
- Regulations –
 - 45 C.F.R. Chapter XII (CNCS General Regs)
 - 45 C.F.R. Chapter XXV (Program Regs; *e.g.*, Part 2520 for Subtitle C Programs)
- Guidance –
 - AmeriCorps Terms and Conditions (General and Project Specific)
 - <https://www.nationalservice.gov/resources/financial-management/terms-conditions-and-certifications-assurances-cnsc-grants>
 - CNCS “Financial and Grants Management” Guidance Webpage
 - <https://www.nationalservice.gov/resources/financial-management>

EXAMPLE:

DOJ-OJP OFFICE FOR VICTIMS OF CRIME AWARD GRANT TERMS

- Statute –
 - Authorizing Act: 22 U.S.C. § 7105
 - Appropriation: Consolidated Appropriation – Commerce, Justice, Science, and Related Agencies (e.g., Pub. L. 116-6, Div. C, Titles II and V (Feb. 15, 2019))
- Regulations –
 - No Program-Specific Regulations
- Guidance (examples) –
 - Office of Justice Programs Website
 - <https://ojp.gov/funding/index.htm>
 - OJP “DOJ Grants *Financial Guide*”
 - <https://ojp.gov/financialguide/doj/GeneralInformation/index.htm>

Core Concepts

In the Federal Grants System



IT'S A CONTRACT!

1. Government Program created by Congress
2. Offer by NFE (application)
3. Acceptance by Administering Federal Agency
4. Performance by NFE...

Let's explore each of these concepts...

THE “DEAL”

If you (grantee) engage in *certain activities* during a *certain period of time*, we (the U.S. government) will “reimburse” you for *certain costs* incurred in engaging in that activity.

“The Three Certains”:

1. Certain Activities = Scope of Project (Narrative + Budget)
2 C.F.R. § 200.308 and extent of flexibility permitted
What you say in your grant application really matters
2. Certain Period of Time = Project/Budget Period
2 C.F.R. § 200.309 and concept of “obligation”
3. Certain Costs = Necessary & Reasonable + Selected Items of Cost
2 C.F.R. Part 200, Subpart E

1. START WITH A FEDERAL PROGRAM

WHERE ARE THOSE “CERTAIN ACTIVITIES?” - START WITH THE AUTHORIZING ACT

- Congress, and only Congress, says what the Program is for by Passing an Authorizing Act and Appropriating Dollars to Fund that Act

WHAT CAN BE IN THE AUTHORIZING ACT?

- a) What is the Purpose of this Program?
 - 1) Who are the intended beneficiaries?
 - 2) What are required services (or facilities/equipment in the case of capital grants)
 - 3) Optional services or pilot program authority
- b) Which NFEs are eligible to receive a grant or sub-award under this program?
 - 1) What are evaluation criteria for making an award?
- c) Money issues
 - 1) Matching or cost share requirements if any
 - 2) Administrative cost caps if any
 - 3) Supplement/Supplant or Maintenance of Effort Provisions
 - 4) Deviations from Uniform Guidance, often program income related
 - 5) Davis-Bacon applicable to laborers and mechanics employed under contract paid with [name the grant's] authority
- d) Other special rules unique to your program

THEN THERE IS APPROPRIATIONS . . .

a) Restrictions on how [The Federal Agency's] dollars can be spent such as:

- Salary Caps
- No Lobbying
- No Abortions, Fetal Tissue Research, Needle Exchanges, etc.

b) Affirmative Requirements for these Funds such as:

- Giving Credit to the Federal Government
- Modifying Program Requirements (good or bad)

c) Modification to Authorizing Act or Uniform Guidance such as:

- Funds distributed differently
- Burn off of Federal Interest

2. GRANT APPLICATION IS YOUR “OFFER”

SCOPE OF PROJECT (WORK)

- Both narrative (what are we doing with your money) and budget (here is what we think your money is going to pay for) make up the “scope” that is approved for the use of federal funds
- These questions are all the more important with Supplemental Funding streams like COVID-19 money
 - When Auditors show up, what did you say about how you were going to use those dollars? (Review OIG letter)

PROGRAM INCOME

- Income generated from something paid with federal funds such as a salary or a building; must be spent on allowable cost unless Congress said otherwise for **YOUR** program

MATCHING / COST SHARING RULES

- Congress wants you to have Skin in the Game.
- If you could spend federal \$\$ on “it,” but didn’t have to, it’s match

3. ACCEPTANCE BY FEDERAL AGENCY – A DEAL IS MADE!

AWARD INSTRUMENTS

- I. Notices of Award (“NOA”) or Notice of Grant Award (“NoGA”) or Financial Assistance Award (“FAA”) etc..
 - Many discretionary grant programs where recipient is nonprofit or local government.

- II. State Plans
 - Major financial assistance programs where state is recipient.
 - Examples:
 - Medicaid (HHS, CMS),
 - WIC (Dept. of Ag.)
 - Child Care and Development Fund (HHS, ACF)
 - IDEA (Dept. of Ed.)

NOA HANDOUT

- Take a look at the sample NOA provided.
- Be familiar with yours!

4. PERFORMANCE BY THE NFE

- **PERIOD OF AVAILABILITY**
- **CASH MANAGEMENT**
- **BUDGET FLEXIBILITY**
- **ALLOWABLE COSTS**

KEY DEFINITIONS FOR PERIOD OF AVAILABILITY

Period of performance means the time during which the [non-Federal entity](#) may incur new [obligations](#) to carry out the work authorized under the [Federal award](#). The [Federal awarding agency](#) or [pass-through entity](#) must include start and end dates of the [period of performance](#) in the [Federal award](#) (see [§ 75.210\(a\)\(5\)](#) and [§ 75.352\(a\)\(1\)\(v\)](#)).

Obligations, when used in connection with a [non-Federal entity](#)'s utilization of funds under a [Federal award](#), *obligations* means orders placed for [property](#) and services, [contracts](#) and [subawards](#) made, and similar transactions, during a given period that require payment by the [non-Federal entity](#) during the same or a future period.

PAYMENT RULES – PERIOD OF AVAILABILITY

§ 75.309 Period of performance and availability of funds.

(a) A non-Federal entity may charge to the Federal award only allowable costs incurred during the period of performance (except as described in § 75.461) and any costs incurred before the HHS awarding agency or pass-through entity made the Federal award that were authorized by the Federal awarding agency or pass-through entity. Funds available to pay allowable costs during the period of performance include both Federal funds awarded and carryover balances.

(b) A non-Federal entity must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the final Federal Financial Report (FFR). This deadline may be extended with prior written approval from the HHS awarding agency. [(b) NOT IN Part 200]

CASH MANAGEMENT (PAYMENT) – § 200.305/ § 75.305

(1) The non-Federal entity must be paid in advance, **provided** it maintains or demonstrates the willingness to maintain both written procedures that minimize the time elapsing between the transfer of funds and disbursement by the non-Federal entity, and financial management systems that meet the standards for fund control and accountability as established in this part. **Advance payments to a non-Federal entity must be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the non-Federal entity in carrying out the purpose of the approved program or project.** The timing and amount of advance payments **must be as close as is administratively feasible to the actual disbursements** by the non-Federal entity for direct program or project costs and the proportionate share of any allowable indirect costs. The non-Federal entity must make timely payment to contractors in accordance with the contract provisions.

BUDGET RULES TO REMEMBER

1. A budget is an estimate
2. A budget is flexible (most of the time)
3. A budget is not reimbursable
4. A budget is **NOT** a cost

§ 200.308/ § 75.308* REVISION OF BUDGET AND PROGRAM PLANS.

(c)(1) For non-construction Federal awards, recipients must request prior approvals from Federal awarding agencies for one or more of the following program or budget-related reasons:

(i) **Change in the scope or the objective of the project or program** (even if there is no associated budget revision requiring prior written approval).

(ii) **Change in a key person specified** in the application or the Federal award.

(iii) The disengagement from the project for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(iv) The inclusion, unless waived by the Federal awarding agency, of costs that require prior approval in accordance with Subpart E . . .

(v) The transfer of funds budgeted for participant support costs as defined in § 200.75 Participant support costs to other categories of expense.

(vi) Unless described in the application and funded in the approved Federal awards, the subawarding, transferring or contracting out of any work under a Federal award, including fixed amount subawards as described in § 200.332 Fixed amount subawards. This provision does not apply to the acquisition of supplies, material, equipment or general support services.

(vii) Changes in the approved cost-sharing or matching provided by the non-Federal entity.

(viii) The need arises for additional Federal funds to complete the project.

(2) **No other prior approval requirements for specific items may be imposed** unless an exception has been approved by OMB. See also § § 200.102 Exceptions and 200.407 Prior written approval (prior approval).

* HHS (Part 75) adds a few things, incl. disposal of equipment

COST RULES TO BE REIMBURSED BY THE GRANT A COST MUST BE “ALLOWABLE”

- a) Reasonable in amount, ordinary and necessary, arms-length
- b) Allocable, *i.e.*, charged, to the program that received the benefit from the goods or services paid for
 - i. When goods or services are shared, the fun really begins!
 - ii. And, if you choose, indirect cost rates or the mysterious *de minimis* rate!
- c) Adequately documented, *i.e.*, valid and reliable records showing the expenditure benefited the program at no more than fair market value
- d) Conform to other limitations – [specific limits, specific situations, see our list!](#)

COST LIMIT CHECKLIST!

(CONFORM TO COST PRINCIPLE LIMITATIONS)

Selected Items of Cost – Limitation Types:

- Prohibited Costs (*e.g.*, alcohol, entertainment, bad debts)
- Designated Valuation of Costs (*e.g.*, less-than-arm's-length rent)
- Designated Accounting/Treatment of Costs (*e.g.*, depreciation, proposal costs)
- Prior Approval Requirements (*e.g.*, equipment and other capital expenditures)
- Documentation Requirements (*e.g.*, compensation for personal services)

BUT WAIT, WHAT IF MONEY COMES BACK?

Applicable Credits (200.406/75.406):

- “Reduction-of-expenditure type transactions”
- “To the that extent such credits . . . relate to allowable costs, they must be credited to the Federal award . . .”

QUESTIONS?

Edward T. Waters, Esq.
Ewaters@ftlf.com

Scott Sheffler, Esq.
Ssheffler@ftlf.com

Jerry Bertrand
Jerrybertrand@gmail.com

Feldesman Tucker Leifer Fidell LLP

1129 20th Street N.W. – Suite 400

Washington, D.C. 20036

(202) 466-8960

www.ftlf.com

Learning.ftlf.com

SUBRECIPIENT RELATIONSHIPS AND PASS-THROUGH ENTITY RESPONSIBILITIES

AGENDA

- I. Preliminary Considerations
- II. Making the Award
- III. Structuring the Award
- IV. Administering the Award
- V. Closing Out the Award
- VI. Fixed Amount Subawards

PRELIMINARY NOTE ON CITATIONS

- Throughout this presentation, we cite to 2 CFR Part 200.
- If your financial assistance award is from HHS, your award is instead governed by 45 CFR Part 75.
- There are no material differences between the portions of Part 200 and Part 75 addressed in this presentation.

I. PRELIMINARY CONSIDERATIONS

THE CONTRACT / SUBAWARD DISTINCTION



SUBRECIPIENT / CONTRACTOR DISTINCTION (2 CFR § 200.330 / 45 CFR § 75.351)

Uniform Guidance provides specific guidance (this is an improvement over the old Circulars)

Subrecipient:

- Purpose: “Carrying out a portion of the Federal award” not simply providing goods or services for the benefit of the pass-through.
- Characteristics:
 - Performance measured against objectives of the Federal program
 - Responsibility for programmatic decision-making
 - Required to adhere to Federal program requirements

DISTINCTION

2 CFR § 200.330 / 45 CFR § 75.351

Contractor (Vendor):

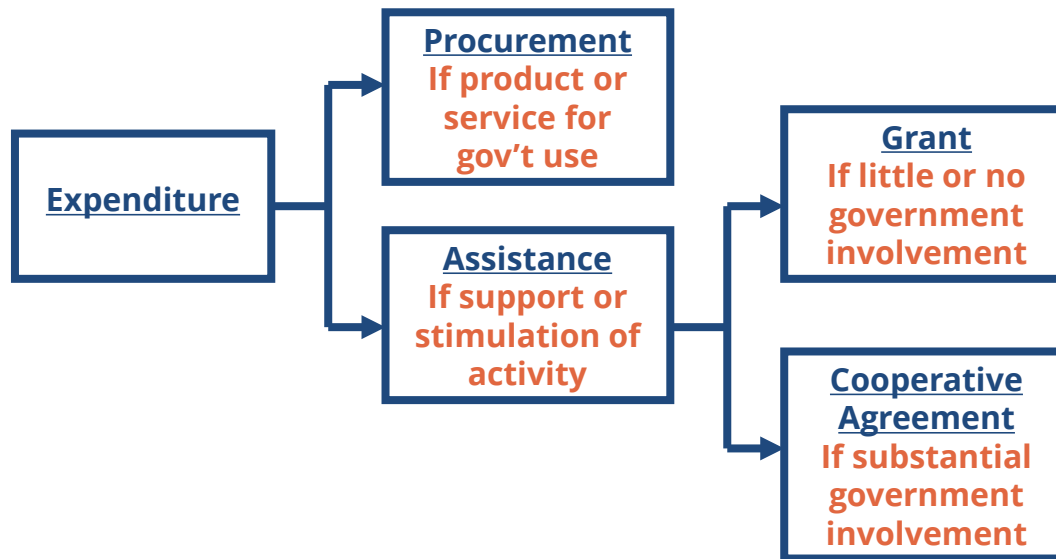
- Purpose: “obtaining goods or services for the [NFE]’s own use.”
- Characteristics:
 - Provides goods and services within normal business operations
 - Provider provides same goods or services to many different purchasers, normally in a competitive environment
 - Provides goods and services that are ancillary to the operation of the Federal program
 - Not subject to the requirements of the Federal program as a result of the agreement

AND DON'T FORGET ABOUT THE FGCAA

2 CFR § 200.201 / 45 CFR § 75.201

Use of grant agreements (including fixed amount awards), cooperative agreements, and contracts:

“The Federal awarding agency *or pass-through entity* must decide on the appropriate instrument for the Federal award (*i.e.*, grant agreement, cooperative agreement, or contract) in accordance with the Federal Grant and Cooperative Agreement Act (32 U.S.C. 301-08).”



DISTINCTION – CLOSE CALLS

2 CFR § 200.330 / 45 CFR § 75.351

You are empowered to characterize the relationship the way you reasonably see it:

- In particular, whether your agreement (i) delegates responsibility for programmatic decision making, and (ii) makes the “Sub” subject to the requirements of the Federal program.
- The Uniform Guidance provides, “All of the characteristics listed above may not be present in all cases, and the [PTE] must use judgment in classifying each agreement as a subaward or a procurement contract.” 2 C.F.R. §200.330(c); 45 CFR §75.351(c).

Remember: It is not what you call it – a “subaward” may be called a “contract.” It is about the substance of the relationship – how you structure it. 2 CFR 200.92; 45 CFR §75.2 (“Subaward” definition).

EXERCISE

The following are fact patterns. Please vote on whether you think this is a subaward or contract.

FACT PATTERN 1

You receive a federal grant to provide HIV outreach services. You enter into agreements with three local universities to assist you in providing those services. Under your agreements with the universities, you permit them to design their own outreach activities, subject to your final approval, and agree to reimburse them for allowable costs. The agreements require the universities to comply with all of the terms and conditions of your federal award.

POLLING QUESTION #1

Is this a subaward or a contract?

- a) Subaward
- b) Contract
- c) Unsure

FACT PATTERN 2

You receive a federal grant to build a sewage treatment plant. You seek competitive proposals for the construction, and the resulting agreement is fixed price. The agreement calls for the construction provider to comply with a number of federal regulatory requirements, including the Davis Bacon Act.

POLLING QUESTION #2

Is this a subaward or a contract?

- a) Subaward
- b) Contract
- c) Unsure

FACT PATTERN 3

You receive a federal grant to educate young children. You enter into an agreement with a day care facility in the same town as your organization. The agreement requires the day care center to provide ten slots per fall and spring “term” which are to be filled with children meeting certain strict eligibility requirements (set by you, and in the first instance by the terms of your grant). The day care facility conducts the eligibility evaluation, and makes the eligibility determination, subject to your final approval. Final approval is merely a review of the day care facility's paperwork.

POLLING QUESTION #3

Is this a subaward or a contract?

- a) Subaward
- b) Contract
- c) Unsure

FACT PATTERN 4

You receive a funding from your state to carry out job training activities. The agreement says on its face that it is a “contract,” and the award process was competitive. The agreement is cost reimbursement and incorporates by references all of the terms and conditions of a federal grant that, apparently, the state receives. It is cost reimbursement but permits profit.

POLLING QUESTION #4

Is this a subaward or a contract?

- a) Subaward
- b) Contract
- c) Unsure

FACT PATTERN 5

Imagine you are a health care provider that receives grant funds to provide outpatient family-practice-type care. You have decided to increase your capacity and have the grant funds to do so. You enter into an agreement with an entity similar to your own that is just down the street. That entity is to see patients at its facility, not to provide you with providers that come to your facility.

POLLING QUESTION #5

Is this a subaward or a contract?

- a) Subaward
- b) Contract
- c) Unsure

FACT PATTERN 6

Imagine you are the recipient of a medical research grant. You are conducting a trial involving ten sites, each of which enrolls participants. The PI works for you. The sites must follow your research protocol and detailed medical research requirements imposed upon federally-funded research. The sites will not be involved in decision-making about the structure of the applied protocol but will identify and enroll participants based on criteria set in the protocol. The sites will be producing data that you will incorporate into your findings. You pay each site a fixed price of \$10,000.

POLLING QUESTION #6

Is this a subaward or a contract?

- a) Subaward
- b) Contract
- c) Unsure

FACT PATTERN 7

Same as Example 6, except you reimburse the actual costs incurred by each site, with no profit permitted.

POLLING QUESTION #7

Is this a subaward or a contract?

- a) Subaward
- b) Contract
- c) Unsure

PRIOR APPROVAL

2 CFR §200.308(c)(1)(vi) / 45 CFR §75.308(c)(1)(vi):

For non-construction Federal awards, recipients **must request prior approvals** from Federal awarding agencies for one or more of the following program or budget-related reasons: “. . . Unless described in the application and funded in the approved Federal awards, **the subawarding, transferring or contracting out of any work under a Federal award . . .**”

FLOW DOWN

2 CFR §200.101 / 45 CFR §75.101 – All of the terms and conditions “Flow Down”:

(b)(1) *Applicability to different types of Federal awards.* The following table describes what portions of this part apply to which types of Federal awards. The terms and conditions of Federal awards (including this part) flow down to subawards to subrecipients unless a particular section of this part or the terms and conditions of the Federal award specifically indicate otherwise. This means that non-Federal entities must comply with requirements in this part regardless of whether the non-Federal entity is a recipient or subrecipient of a Federal award. Pass-through entities must comply with the requirements described in Subpart D—Post Federal Award Requirements of this part, §§200.330 Subrecipient and contractor determinations through 200.332 Fixed amount Subawards, but not any requirements in this part directed towards Federal awarding agencies unless the requirements of this part or the terms and conditions of the Federal award indicate otherwise.

II. MAKING THE AWARD

SELECTING A SUBRECIPIENT PROCESS

- This is NOT a procurement – no competition requirement.
- Federal Agencies must identify and evaluate potential Awardees in a certain manner:
 - Public notice with certain prescribed information (2 CFR §§200.202-203; 45 CFR §§ 75.202-203)
 - Must use a “merit review process” (2 CFR §200.204; 45 CFR §75.204)
 - Must check SAM (2 CFR §200.205; 45 CFR §75.205)
 - Reporting certain decision not to make awards in FAPIIS (2 CFR §200.212; 45 CFR § 75.212)
- PTEs are NOT specifically required to do these things
 - 2 CFR §200.101(b)(1) / 45 CFR §75.101(b)(1) (see language highlighted in yellow above)
 - 80 Fed. Reg. 43307 (Acknowledging PTEs are not specifically required to check SAM in implementing FAPIIS)

SELECTING A SUBRECIPIENT: WHAT SHOULD YOU DO?

- If you are a State or Local Government, follow your applicable administrative statutes, regulations, and policies
 - Nondiscrimination
 - State Administrative Procedure Act
- Ensure potential Subrecipient is not debarred or suspended. 2 CFR Part 180 (Nonprocurement Suspension and Debarment)
 - Note – Though not specifically required, use SAM for this
- Evaluate the Risk Posed by the Subrecipient
 - Recipient will be held accountable for many acts of noncompliance on the part of the Subrecipient

SELECTING A SUBRECIPIENT: EVALUATING RISK

- Obligation to Mitigate Risk:
 - PTEs must “[e]valuate each subrecipient’s risk of noncompliance with Federal statutes, regulations, and the terms and conditions of the subaward for purposes of determining . . . appropriate subrecipient monitoring” 2 CFR § 200.331; 45 CFR § 75.352 (Requirements for PTEs).
- Note the Similarity to the Internal Controls requirement:
 - “The [NFE] must . . . [e]stablish and maintain effective internal control over the Federal award that provides reasonable assurance that the [NFE] is managing the Federal award in compliance with Federal statutes, regulations, and the terms and conditions of the Federal award. . . .” 2 CFR § 200.303; 45 CFR § 75.303 (Internal Controls).

SELECTING A SUBRECIPIENT: EVALUATING RISK

- 2 CFR § 200.331(b) / 45 CFR § 75.352(b):
 - “Evaluate each subrecipient’s risk of noncompliance with Federal statutes, regulations, and terms and conditions of the subaward for purposes of determining the appropriate subrecipient monitoring described in paragraphs (d) and (e) of this section, which may include consideration of such factors as:”
 - Subrecipient’s prior experience with similar awards (past performance)
 - Results of prior audits
 - New personnel or systems
 - Direct federal monitoring on concurrent direct federal awards

SELECTING A SUBRECIPIENT: EVALUATING RISK

- Risk Evaluation Considerations:
 - PTEs have flexibility, but should (as good practice) also consider the Federal Agency evaluation factors at 2 CFR § 200.205(c) / 45 CFR §75.205(c):
 - Financial Stability
 - Quality of management systems
 - History of performance
 - Audit reports (soon to be detailed info online at <https://harvester.census.gov/facweb/Default.aspx>)
 - Note: Most of FAPIIS info will be publicly available too (2 CFR §200.211(b); 45 CFR §75.211(b)).
 - Applicant's ability to effectively implement requirements imposed on NFEs (redundant with above).

III. STRUCTURING THE AWARD

PARTIES' INDIVIDUAL INTERESTS

- PTE Perspective:
 - Accomplish the purpose of the federal award
 - Mitigate risk of Subrecipient causing compliance failure that affects PTE's award (e.g., disallowance, specific award conditions, etc.)
- Subrecipient Perspective:
 - Acquire funding
 - Comply with Terms and Conditions of the subaward
 - Minimize administrative burden

COMMON INTEREST CLARITY IN CORE TERMS

- That it is a subaward under a federal program
- Performance expectations
 - Purpose of award
 - Reporting requirements
 - Any performance metrics
 - Major ancillary compliance requirements (*e.g.*, no transactions with suspended or debarred entities)
- Payment right
 - The nature of allowable and unallowable costs
 - Payment schedule and terms (*e.g.*, advance payment)
 - Audit and reconciliation requirements / closeout

SPECIFICALLY REQUIRED TERMS AND CONDITIONS 2 CFR § 200.331 / 45 CFR § 75.352

Say it is a subaward

All pass-through entities must:

(a) Ensure that every subaward is clearly identified to the subrecipient as a subaward and includes the following information at the time of the subaward and if any of these data elements change, include the changes in subsequent subaward modification. When some of this information is not available, the pass-through entity must provide the best information available to describe the Federal award and subaward. Required information includes:

(1) Federal Award Identification.

(i) Subrecipient name (which must match the name associated with its unique entity identifier);

(ii) Subrecipient's unique entity identifier;

(iii) Federal Award Identification Number (FAIN);

(iv) Federal Award Date (see §200.39 Federal award date) of award to the recipient by the Federal agency;

(v) Subaward Period of Performance Start and End Date;

(vi) Amount of Federal Funds Obligated by this action by the pass-through entity to the subrecipient;

(vii) Total Amount of Federal Funds Obligated to the subrecipient by the pass-through entity including the current obligation;

(viii) Total Amount of the Federal Award committed to the subrecipient by the pass-through entity;

(ix) Federal award project description, as required to be responsive to the Federal Funding Accountability and Transparency Act (FFATA);

(x) Name of Federal awarding agency, pass-through entity, and contact information for awarding official of the Pass-through entity;

(xi) CFDA Number and Name; the pass-through entity must identify the dollar amount made available under each Federal award and the CFDA number at time of disbursement;

(xii) Identification of whether the award is R&D; and

(xiii) Indirect cost rate for the Federal award (including if the de minimis rate is charged per §200.414 Indirect (F&A) costs).

Provide details about the "prime" award, including information about the federal program (e.g., CFDA number)

SPECIFICALLY REQUIRED TERMS AND CONDITIONS 2 CFR § 200.331 / 45 CFR § 75.352

(2) All requirements imposed by the pass-through entity on the subrecipient so that the Federal award is used in accordance with Federal statutes, regulations and the terms and conditions of the Federal award;

(3) Any additional requirements that the pass-through entity imposes on the subrecipient in order for the pass-through entity to meet its own responsibility to the Federal awarding agency including identification of any required financial and performance reports;

Possible Terms to Include:

1. Restatement of unique and important program requirements, such as:
 - a. Eligibility requirements for beneficiary services under the program
 - b. Administrative cost caps in the federal program
 - c. Cost Sharing/Matching requirements
2. Restatement of compliance assurance measures, such as:
 - a. Audits and Reconciliation
 - b. Access to records and personnel
 - c. Disallowance mechanism
 - d. Termination (and Suspension)
3. Reference to less unique, but nonetheless important, terms and conditions of award (e.g., financial management, internal controls, property use and disposition, prior approvals, cost principles, etc.).
4. Additional financial and programmatic reporting requirements.

SPECIFICALLY REQUIRED TERMS AND CONDITIONS

2 CFR § 200.331 / 45 CFR § 75.352

(2) All requirements imposed by the pass-through entity on the subrecipient so that the Federal award is used in accordance with Federal statutes, regulations and the terms and conditions of the Federal award;

(3) Any additional requirements that the pass-through entity imposes on the subrecipient in order for the pass-through entity to meet its own responsibility to the Federal awarding agency including identification of any required financial and performance reports;

What This Does NOT Mean: Deviation from terms of “prime” award in any way the PTE wants.

Why:

2 CFR § 200.101(b) / 45 CFR §75.101(b) – T&C Flow Down.

2 CFR § 200.102(a) / 45 CFR §75.102(a) – Exceptions must be approved by OMB and will be permitted only in unusual circumstances.

More restrictive requirements should be based on good faith determination that they are necessary for PTE’s compliance with its obligations under the “prime” award.

Though it is not clear anyone is looking out for the Subrecipients in this regard.

SPECIFICALLY REQUIRED TERMS AND CONDITIONS

2 CFR § 200.331 / 45 CFR § 75.352

(4) An approved federally recognized indirect cost rate negotiated between the subrecipient and the Federal Government or, if no such rate exists, either a rate negotiated between the pass-through entity and the subrecipient (in compliance with this part), or a *de minimis* indirect cost rate as defined in §200.414 Indirect (F&A) costs, paragraph (f);

The PTE is required to recognize the Subrecipient's federally-negotiated indirect cost rate. If the Subrecipient has never had a negotiated indirect cost rate, it has the right to elect the 10 percent *de minimis* rate vis-à-vis the PTE. The PTE is not required to negotiate an indirect cost rate, but (absent specific statutory authority) cannot force a Subrecipient to accept less than the *de minimis* rate. COFAR FAQs .331-6, .331-7.

Subrecipient are permitted to elect to “direct charge” all costs. COFAR FAQ .331-5.

SPECIFICALLY REQUIRED TERMS AND CONDITIONS

2 CFR § 200.331 / 45 CFR § 75.352

(6) Appropriate terms and conditions concerning closeout of the subaward.

Discussed below under “Closeout.”

IV. ADMINISTERING THE AWARD

EXTENT OF MONITORING RISK-BASED ANALYSIS

- Remember 2 CFR §200.331(b)/ 45 CFR § 75.352(b):
 - “Evaluate each subrecipient’s risk of noncompliance with Federal statutes, regulations, and terms and conditions of the subaward for purposes of determining the appropriate subrecipient monitoring described in paragraphs (d) and (e) of this section, which may include consideration of such factors as:”
 - Subrecipient’s prior experience with similar awards (past performance)
 - Results of prior audits
 - New personnel or systems
 - Direct federal monitoring on concurrent direct federal awards
- 2 CFR §200.331(d) / 45 CFR §75.352(d) – then “monitor” to extent “necessary”

EXTENSION INTERNAL CONTROLS CONCEPT (RISK MANAGEMENT)

GAO Green Book:

Definition of an Internal Control System

OV1.04 An internal control system is a continuous built-in component of operations, effected by people, that provides reasonable assurance, not absolute assurance, that an entity's objectives will be achieved.

Example:
Navy Risk Management Matrix.

Source:
Navy Instruction on Operational Risk Management OPNAVINST 3500.39C (2010)

Risk Assessment Matrix			PROBABILITY				
			Frequency of Occurrence Over Time				
			A Likely	B Probable	C May	D Unlikely	
SEVERITY	Effect of Hazard	I	Loss of Mission Capability, Unit Readiness or Asset; Death	1	1	2	3
		II	Significantly Degraded Mission Capability or Unit Readiness; Severe Injury or Damage	1	2	3	4
		III	Degraded Mission Capability or Unit Readiness; Minor Injury or Damage	2	3	4	5
		IV	Little or No Impact to Mission Capability or Unit Readiness; Minimal Injury or Damage	3	4	5	5
Risk Assessment Codes							
1 - Critical 2 - Serious 3 - Moderate 4 - Minor 5 - Negligible							

CHARACTERISTICS OF EFFECTIVE CONTROLS

Control Criteria	Remarks
Suitability	Control removes the threat or mitigates (reduces) the risk to an acceptable level.
Feasibility	Has the capability to implement the control.
Acceptability	Benefit or value gained by implementing the control justifies the cost in resources and time.
Explicitness	Clearly specifies who, what, where, when, why, and how each control is to be used.
Support	Adequate personnel, equipment, supplies, and facilities necessary to implement a suitable control are available.
Standards	Guidance and procedures for implementing a control are clear, practical, and specific.
Training	Knowledge and skills are adequate to implement a control.
Leadership	Leaders are ready, willing, and able to enforce standards required to implement a control.
Individual	Individual personnel are sufficiently self-disciplined to implement a control.

Source:
Navy Instruction on
Operational Risk
Management
OPNAVINST 3500.39C
(2010)

UG-SPECIFIC IMPLEMENTATION

2 CFR §200.331 / 45 CFR § 75.352

- 2 CFR §200.331(d) / 45 CFR §75.352(d):
 - “Monitor” to extent “necessary” – must include:
 - Financial and Performance Reports
 - Follow-up on all deficiencies identified through audits, site visits, etc.
 - Issuing management decision on audit findings (*i.e.*, do your job in audit review)
- 2 CFR §200.331(e) / 45 CFR §75.352(e):
 - Also may find useful:
 - Training and Technical assistance
 - On-site reviews
 - “Agreed Upon Procedures” audit services
- 2 CFR §200.331(c) / 45 CFR §75.352(c):
 - Consider (when making award) specific award conditions

SPECIFIC AWARD CONDITIONS

2 CFR §200.207 / 45 CFR § 75.207

(b) These additional Federal award conditions may include items such as the following:

(1) Requiring payments as reimbursements rather than advance payments;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given period of performance;

(3) Requiring additional, more detailed financial reports;

(4) Requiring additional project monitoring;

(5) Requiring the non-Federal entity to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) The Federal awarding agency or pass-through entity must notify the applicant or non-Federal entity as to:

(1) The nature of the additional requirements;

(2) The reason why the additional requirements are being imposed;

(3) The nature of the action needed to remove the additional requirement, if applicable;

(4) The time allowed for completing the actions if applicable, and

(5) The method for requesting reconsideration of the additional requirements imposed.

(d) Any specific conditions must be promptly removed once the conditions that prompted them have been corrected.

PTE IS ACCOUNTABLE

PTE is accountable for proper use and management of federal funds by Subrecipient

- 2 CFR § 200.331(f) / 45 CFR §75.352(f)
 - Verify Subrecipient audited in accordance with Subpart F if exceeds threshold (\$750,000)
- 2 CFR § 200.331(g) / 45 CFR §75.352(g)
 - Consider whether Subrecipient actions require adjustment to PTE's own records.
- 2 CFR § 200.331(h) / 45 CFR §75.352(h)
 - Consider taking enforcement action as described in 2 CFR § 200.338 / 45 CFR § 75.371 (Remedies for noncompliance)
 - Make sure you incorporate these in your Subaward Agreement.

NOTE ON PRIOR APPROVALS

Prior Approval requirements for certain items appear to “flow up” (*i.e.*, before PTE approves Subrecipient request, PTE should seek federal approval).

For example:

- Capital Expenditures not in budget (2 CFR §200.439 / 45 CFR §75.439)
- Disposition of Real Property and Equipment (2 CFR §§200.311, 200.313 / 45 CFR §§75.318, 75.320).

If PTE has approved it, PTE has accepted responsibility/liability vis-à-vis the federal agency.

V. CLOSING OUT THE AWARD

CLOSEOUT

Concept:

- Review and document that Subrecipient carried out proposed programmatic activities
- Review and document that costs were allowable
 - Subrecipient to reimburse “prime” for any unallowable costs, and “prime” to reimburse Subrecipient for any unpaid allowable costs.

Basic Closeout Activities:

- 90 days after end of performance to submit all required reports
- Liquidate all obligations incurred under the award within 90 days of end of performance
- Account for all real or personal property acquired under the award
- Government to complete closeout activities within 1 year of after receipt of all reports. This cannot practically “flow down” verbatim. Structure your subawards to leave plenty of time.

CONTINUING OBLIGATIONS

2 CFR §200.344 / 45 CFR § 75.386

Between Federal Agency and Recipient, closeout does not affect:

- Agency right to disallow costs (but must make determination within the record retention period).
- Recipient obligation to return funds if necessary, upon final reconciliation of indirect cost rate
- Property management and disposition requirements
- Record retention obligation
 - 3 years from submission of final financial report, unless dispute (in which case longer)
 - PTEs' Subaward Agreements should expressly provide for the same rights vis-à-vis their Subrecipients.

Make sure you have the same rights vis-à-vis the Subrecipient

VI. FIXED AMOUNT SUBAWARDS

FIXED AMOUNT SUBAWARDS

- May make fixed-amount subawards up to SAT with prior approval of funding agency. 2 CFR §200.332; 45 CFR §75.353.
- Such subawards must meet same requirements as federal agency fixed amount subaward at 2 CFR §200.201 and 45 CFR § 75.201:
 - Amount is negotiated using cost principles
 - Project scope is specific and adequate cost, historical, or unit pricing data is available to establish amount based on reasonable estimate of actual cost
 - Payments based on meeting specific requirements (may not be “best efforts”)
 - Accountability based on performance and results (same)
- No review of actual costs during or after performance. 2 CFR §200.201(b)(1); 45 CFR §75.201(b)(1).
- Certify in writing at end of period that LOE expended or project completed. 2 CFR §200.201(b)(3); 45 CFR §75.201(b)(3).
- Cannot use in a program with match. 2 CFR §200.201(b)(2); 45 CFR §75.201(b)(2).

FEDERAL FUNDING ACCOUNTABILITY AND TRANSPARENCY ACT ("FFATA")

FFATA

1. Resources:

- a. Regulations Implementing FFATA, 2 CFR Part 170 (2010)
- b. OMB Guidance Document of August 2010
- c. FSRS.gov Frequently Asked Questions (“FAQs”).

2. Obligations (Fall on Prime Grantee):

- a. Report all Subawards of \$25,000 or more through the FFATA Subaward Reporting System (“FSRS”) at FSRS.gov.
- b. If Prime Grantee receives \$25 million or more in annual gross revenue from federal grants and contracts *and* such revenue constitutes eighty percent (80%) or more of the Prime Recipient’s annual gross revenue, it must:
 - i. Report the total compensation of its five most highly compensated executives for the preceding completed fiscal year – *unless* such information is already otherwise publicly reported (*e.g.*, through SEC or IRS filings).
 - ii. For *First-Tier* Subrecipients, the Prime Grantee must apply the same analysis (measured against the first tier subrecipient’s circumstances), and if the thresholds are met for any, report the same Executive Compensation information for such subrecipients.

FFATA

3. Several Answers to Common FFATA Questions:

- a. Requirements apply exclusively to prime and first tier subrecipients (OMB Guidance, p.8).
- b. Requirements apply only to subrecipients, and not to contractors/vendors (OMB Guidance, p.8 and FSRS FAQs).
- c. Executive compensation reporting requirements apply only when the pertinent prime award or first-tier subaward exceeds \$25,000 (OMB Guidance, p.6).

QUESTIONS?

Edward T. Waters, Esq.
Ewaters@ftlf.com

Scott Sheffler, Esq.
Ssheffler@ftlf.com

Jerry Bertrand
Jerrybertrand@gmail.com

Feldesman Tucker Leifer Fidell LLP

1129 20th Street N.W. – Suite 400

Washington, D.C. 20036

(202) 466-8960

www.ftlf.com

Learning.ftlf.com

CONTRACTS UNDER GRANTS: THE PROCUREMENT STANDARDS

AGENDA

- I. Basic Framework
- II. Key Steps and Questions
- III. Sample Policy

LEARNING OBJECTIVES

- Understand theory behind the procurement standards
- Understand the general requirements for all procurement transactions
- Understand the procedural requirements applicable to procurement actions at various value tiers
- Understand the conflict of interest limitations applied to procurement activities under the Uniform Guidance

I. BASIC FRAMEWORK



BASIC FRAMEWORK

- Government wants competition in federal grant project procurements to (i) root out waste and fraud and (ii) promote participation
- Spending grant funds triggers lots of rules, not just the procurement standards
- The core of the system revolves around competition requirements at differing value tiers
- Very specific conflict of interest restrictions are layered on
- There are a handful of public policy requirements implemented through required contract clauses – especially in construction and especially relating to labor standards

GOVERNMENT'S POINT OF VIEW

- The Government wants to ensure that certain safeguards are applied to expenditures of federal funds, even when the funds are in the hands of private parties through receipt of financial assistance.

IMPORTANT PRELIMINARY NOTE

- The Uniform Guidance Procurement Standards are, in many ways, a miniature and less-strict version of the federal acquisition system detailed in the Federal Acquisition Regulation, Title 48 of the Code of Federal Regulations.
- *THE FAR DOES NOT APPLY TO YOUR PROCUREMENTS.*
 - We are referring to the FAR only to fill in gaps, by method of comparison, where the Uniform Guidance does not explain well what it means for you to do.

SYSTEMIC GOALS

Fundamental Purposes Behind the Rules

Competition

- The power of the marketplace.

Integrity

- “Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none.” FAR 3.101-1.

Transparency (Access)

- Clear rules and access to information about opportunities.

Steven Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 P.P.L.R. 103 (2002).

BIG PICTURE: NOT JUST THE PROCUREMENT STANDARDS

- Procurement Standards:
 - 2 C.F.R. §§ 200.317-200.326 / 45 C.F.R. §§ 75.326-75.335
 - Appendix II
- Prior Approval Requirements:
 - *E.g.*, 2 C.F.R. § 200.439 / 45 C.F.R. § 75.439 (Equipment and other capital expenditures)
- Cost Principles:
 - Necessary and reasonable
 - 2 C.F.R. § 200.403(a) / 45 C.F.R. § 75.403(a)
 - Documentation
 - 2 C.F.R. § 200.403(g) / 45 C.F.R. § 75.403(g)
- Enforcement:
 - 2 C.F.R. § 200.338 / 45 C.F.R. § 75.371 (Remedies for noncompliance)
- COFAR FAQs for §§ 200.318 and 200.320*

APPLICABILITY

- Who:
 - Nonprofits and Local Governments must follow all of the requirements of the procurement standards, §§ 200.318-200.326 / §§ 75.326-75.335.
 - States need only follow §§ 200.322 / 75.331 (Procurement of recovered materials) and 200.326 / 75.335 (Contract provisions).
 - Otherwise must simply follow State's own procurement policies.
- When:
 - “For the procurement standards . . . [NFEs] may continue to comply with the procurement standards in previous OMB guidance . . . For **three additional fiscal years** after this part goes into effect. If [electing to do so] . . . The [NFE] **must document this decision in their internal procurement policies.**”
§200.110(a) / § 75.110(a).
- What Funds:
 - Procurements with **Federal Funds** and **Program Income**.
 - *Except:* Procurements of items for which costs are absorbed as indirect costs. COFAR FAQ .320-5 (p.19 of the FAQ document).

VALUE TIER-BASED SYSTEM

200.320 / 75.329

- Over \$250,000
 - Formal Competition
- Over \$10,000 up to \$250,000 (SAT)
 - Informal Competition
- Up to \$10,000 (micro-purchase)
 - Very Informal (No Competition Req)

AWARD

- Award to “responsible” offerors
 - § 200.318(h) / § 75.327(h)
- Price and Other Factors Considered
 - § 200.320(d)(4) / § 75.329(d)(4)
- Manage Conflict of Interest
 - Limits on who can participate in procurement process – financial interests
 - Limits or acceptance of things of value from contractors
 - Limits on contractor participation in drafting SOW
 - Organizational Conflicts of Interest
 - §§ 200.318(c) & 200.319(a); §§ 75.327(c) & 75.329(a)
- Include any required clauses from Appx. II

II. KEY STEPS AND QUESTIONS



THE KEY QUESTIONS (OPERATIONALIZING THE REQS)

1. How do you know what you need to buy?
2. Who is allowed to buy it/bind your organization?
3. How much competition do you need, and how do you get it?
4. What documents should I retain?
5. But this is construction, aren't there special rules?

1. HOW DO YOU KNOW WHAT YOU NEED TO BUY?

- Practical Considerations:
 - “Standard”/recurring need?
 - Do you have a process by which employees identify needs?
 - Workflow?
- Consider Using a Purchase Request Form

1. HOW DO YOU KNOW WHAT YOU NEED TO BUY?

- Procurement Standard Reqs:
 - Must eventually evaluate price, so develop and IPE
 - Must say what you require and what factors are most important
 - § 200.319(c) / § 75.328(c)
 - No unduly restrictive criteria (and “brand name or equal”)
 - § 200.319(a) / § 75.328(a)
 - Sole source requests
 - Very limited circumstances - § 200.320(f) / § 75.329(f)
 - Pre-approved vendor lists
 - Cannot be an unreasonable barrier to competition - § 200.319(d) / § 75.328(d)
 - Promotion of small business participation “when possible”
 - § 200.321 / § 75.330

2. WHO IS AUTHORIZED TO BIND YOUR ORGANIZATION?

- No Rules on this in the Procurement Standards
- But it is a CENTRAL consideration in your procurement process
- Consider:
 - Purchases under \$100? (petty cash?)
 - Purchases of \$5,000?
 - Purchases of \$25,000?
 - Purchases of \$100,000?
- A clear policy on authorities is important, especially for larger organizations

3. HOW MUCH COMPETITION DO YOU NEED AND HOW DO YOU GET IT?

Note on Recent Threshold Changes:

- **SAT** raised from \$150,000 to **\$250,000**
 - 2018 National Defense Authorization Act (“NDAA”), Sec. 805.
 - (Pub. L. 115-91 (Dec. 12, 2017))
- **MPT** raised from \$3,500 to **\$10,000**
 - 2018 NDAA, Sec. 806

We were waiting on an update to the FAR – then OMB issued an exception to the Uniform Guidance for recipient procurement thresholds:

- **OMB Memo M-18-18:**
 1. Making immediately effective the threshold changes
 2. Noting recipient must first update their procurement policies

3. HOW MUCH COMPETITION DO YOU NEED AND HOW DO YOU GET IT?

Over the SAT

Competitive Proposals or Sealed Bids

- Mostly Competitive Proposals (§ 200.320(d) / § 75.329(d)):
 - Key Requirements:
 - Written Evaluation Plan
 - Formal RFP
- May use Sealed Bids when (§ 200.320(c) / 75.329(c)):
 - Key Requirements:
 - Complete, adequate, and realistic specification available
 - Two or more bids from responsible bidders expected
 - Firm-fixed-price contract and may select successful bidder primarily on price

3. HOW MUCH COMPETITION DO YOU NEED AND HOW DO YOU GET IT?

Under the SAT (but above \$10k)

Simplified Purchase Procedures

- “Small purchase procedures are those relatively simple and informal procurement methods for securing [items] that do not cost more than the [SAT]. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.” §200.320(b) / §75.329(b).
- My Recommended *Minimum*:
 - Get Three Quotes

3. HOW MUCH COMPETITION DO YOU NEED AND HOW DO YOU GET IT?

\$10k and Under

Micropurchases:

- “To the extent practicable, the non-Federal entity must **distribute micro-purchases equitably** among qualified suppliers. Micro-purchases **may be awarded without soliciting competitive quotations** if the non-Federal entity considers the price to be reasonable.” § 200.320(a) / § 75.329(a).

Take-Away (Keep it simple):

- Documentation of purchase that you are required to maintain to prove “allowability” under § 200.403(g) / § 75.403(g) should be sufficient.
- If buying the same supply over and over again (*e.g.*, gas, copier paper), keep a record of “spreading the purchases around” as required.

4. WHAT DOCUMENTATION DO I NEED?

200.318(i) & 75.727(i):

“The non-Federal entity must maintain records sufficient to detail the history of the procurement. These records will include but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.”

5. BUT THIS IS CONSTRUCTION, AREN'T THERE SPECIAL RULES?

Same as the basic rules, except:

- Important:
 - Cannot expend federal funds on construction without prior agency approval (§ 200.439 / § 75.439)
 - Bonding requirements (§ 200.325 / § 75.334)
 - Don't forget Davis Bacon Act, when required by federal program legislation (§ 200.326 / § 75.335, Appendix II)
- Notable but not critical:
 - Process may start with another interesting procurement method, the special rules for procuring Architectural/Engineering services (§ 200.320(d)(5) / § 75.329(d)(5))
 - Sealed Bidding is preferred method (§ 200.320(c) / § 75.329(c))

III. SAMPLE POLICY



CONSIDER / ASK YOURSELF

1. Do we want to apply these rules to all procurements regardless of funding source, or only federally-supported procurements?
2. Is a policy that is more detailed with more structure desired or is something more flexible desired?
3. Do I want to “max out” flexibility on my thresholds (*i.e.*, \$250,000 SAT) or set them lower as an additional internal control?
4. What are the practical barriers, if any, to my obtaining competition – rural location, unusual needs, etc.
5. At what levels do I want to set my internal approval authorities? Do we want Board approval at some value tier?
6. Don't forget COI.
7. Consider having a waiver mechanism to the extent waiver would not violate federal law – give yourself an “out” from your own policy when approved at an appropriate level.
8. Workflow, workflow, workflow.

SAMPLE POLICY KEY

Yellow = Limits on what I can buy, how I describe it.

Blue = Who has authority

Orange = Competition process (operationalizing it)

Purple = Special rules (just a few) for construction

Pink = Conflict of interest

QUESTIONS?

Edward T. Waters, Esq.
Ewaters@ftlf.com

Scott Sheffler, Esq.
Ssheffler@ftlf.com

Jerry Bertrand
Jerrybertrand@gmail.com

Feldesman Tucker Leifer Fidell LLP

1129 20th Street N.W. – Suite 400

Washington, D.C. 20036

(202) 466-8960

www.ftlf.com

Learning.ftlf.com

FEDERAL FUNDING ACADEMY

Day 2

Scott S. Sheffler
Edward T. Waters
Jerry Bertrand

August 27, 2020

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GRANT CONCERNS BY PROGRAM AREA (BREAKOUT SESSIONS)

BREAKOUT SESSIONS

- Community Action Agencies and Head Start Programs
- Community Health Centers
- Institutions of Higher Education
- State and Local Government

OPERATIONALIZING INTERNAL CONTROL STANDARDS AND REQUIREMENTS

LEARNING OBJECTIVES

- Understand the meaning and importance of internal controls
- Understand the 5 components and 17 elements of internal controls
- Learn common areas of internal control failures
- Learn strategies and best practices for implementing internal control requirements

You do not climb a mountain like Everest by trying to race ahead on your own, or by competing with your comrades. You do it slowly and carefully, by unselfish teamwork. We could never have made it alone. We needed a great team.

-Tenzing Norgay
(first along with Edmund Hillary to reach the Mount Everest summit)

POLLING QUESTION #8

Please select which of the following topics you'd like to explore in a group exercise at the end of this session.

We request that everyone votes in order to customize your learning experience.

- a) Procurement
- b) Subrecipient Oversight
- c) Time and Effort Reporting
- d) Adequate Documentation
- e) Beneficiary Eligibility
- f) Financial Management Systems
- g) Cost Sharing and Matching
- h) Program Income

DEFINITION OF INTERNAL CONTROL (FROM THE GREEN BOOK (STANDARDS FOR INTERNAL CONTROL IN THE FEDERAL GOVERNMENT))

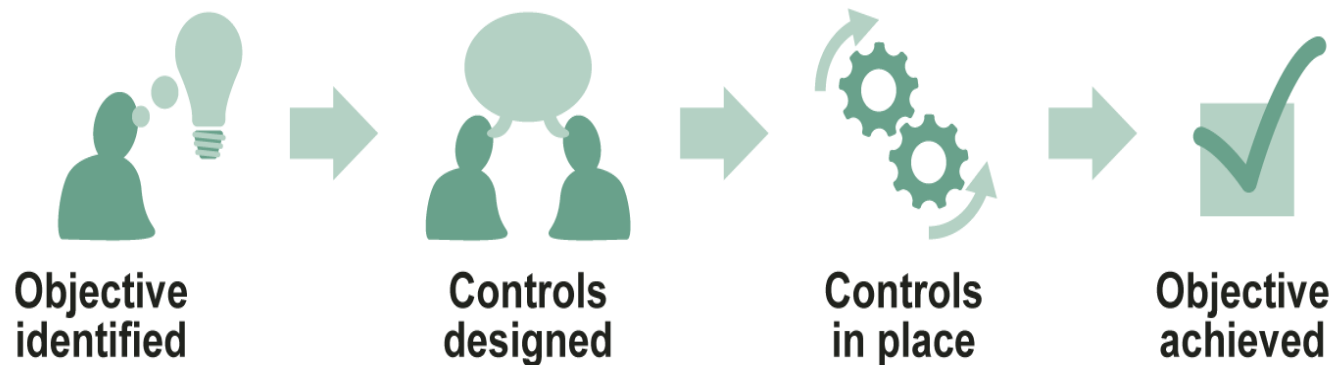
OV1.01 Internal control is a process effected by an entity's oversight body, management, and other personnel that provides reasonable assurance that the objectives of an entity will be achieved (see fig. 2). These objectives and related risks can be broadly classified into one or more of the following three categories:

- **Operations** - Effectiveness and efficiency of operations
- **Reporting** - Reliability of reporting for internal and external use
- **Compliance** - Compliance with applicable laws and regulations

OV1.02 These are distinct but overlapping categories. A particular objective can fall under more than one category, can address different needs, and may be the direct responsibility of different individuals.

OV1.03 Internal control comprises the plans, methods, policies, and procedures used to fulfill the mission, strategic plan, goals, and objectives of the entity. Internal control serves as the first line of defense in safeguarding assets. In short, internal control helps managers achieve desired results through effective stewardship of public resources.

An entity uses the Green Book to design, implement, and operate internal controls to achieve its objectives related to operations, reporting, and compliance.



Source: GAO. | GAO-14-704G

DEFINITION OF AN INTERNAL CONTROL SYSTEM (FROM THE GREEN BOOK (STANDARDS FOR INTERNAL CONTROL IN THE FEDERAL GOVERNMENT))

OV1.04 An internal control system is a continuous built-in component of operations, effected by people, that provides reasonable assurance, not absolute assurance, that an entity's objectives will be achieved.

DEFINITION OF AN INTERNAL CONTROL SYSTEM (FROM THE GREEN BOOK (STANDARDS FOR INTERNAL CONTROL IN THE FEDERAL GOVERNMENT))

OV1.05 Internal control is not one event, but a series of actions that occur throughout an entity's operations. Internal control is recognized as an integral part of the operational processes management uses to guide its operations rather than as a separate system within an entity. In this sense, internal control is built into the entity as a part of the organizational structure to help managers achieve the entity's objectives on an ongoing basis.

OV1.06 People are what make internal control work. Management is responsible for an effective internal control system. As part of this responsibility, management sets the entity's objectives, implements controls, and evaluates the internal control system. However, personnel throughout an entity play important roles in implementing and operating an effective internal control system.

DEFINITION OF AN INTERNAL CONTROL SYSTEM (FROM THE GREEN BOOK (STANDARDS FOR INTERNAL CONTROL IN THE FEDERAL GOVERNMENT))

OV1.07 An effective internal control system increases the likelihood that an entity will achieve its objectives. However, no matter how well designed, implemented, or operated, an internal control system cannot provide absolute assurance that all of an organization's objectives will be met. Factors outside the control or influence of management can affect the entity's ability to achieve all of its objectives. For example, a natural disaster can affect an organization's ability to achieve its objectives. Therefore, once in place, effective internal control provides reasonable, not absolute, assurance that an organization will achieve its objectives.

2 CFR 200 SUBPART D – POST-FEDERAL AWARD REQUIREMENTS

§200.303 Internal controls.

The non-Federal entity must:

- a) Establish and maintain effective internal control over the Federal award that provides reasonable assurance that the non-Federal entity is managing the Federal award in compliance with Federal statutes, regulations, and the terms and conditions of the Federal award. These internal controls should be in compliance with guidance in “Standards for Internal Control in the Federal Government” issued by the Comptroller General of the United States or the “Internal Control Integrated Framework”, issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).
- b) Comply with Federal statutes, regulations, and the terms and conditions of the Federal awards.

2 CFR 200 SUBPART D – POST-FEDERAL AWARD REQUIREMENTS

§200.303 Internal controls. (*continued*)

The non-Federal entity must:

- c) Evaluate and monitor the non-Federal entity's compliance with statutes, regulations, and the terms and conditions of Federal awards.
- d) Take prompt action when instances of noncompliance are identified including noncompliance identified in audit findings.
- e) Take reasonable measures to safeguard protected personally identifiable information and other information the Federal awarding agency or pass-through entity designates as sensitive or the non-Federal entity considers sensitive consistent with applicable Federal, state, local, and tribal laws regarding privacy and obligations of confidentiality.

Let's chat:

What are benefits of having effective internal controls?

or.....

What problems are caused by ineffective internal controls?

KNOWLEDGE + SYSTEMS + IMPLEMENTATION = SUCCESS

- The way to be successful in Grants Management is by having “Enlightened Systems”
 - Enables you to be consistent, compliant, thorough and efficient.
- Enlightened Systems give you a map. If you follow the map, you’ll accomplish the objective.
 - In this case, the objective is achieving grant compliance (only allowable costs and practices) and achieving outcomes.
- Develop systems (including written policies and procedures) that will prevent fraud, waste, and abuse, to the extent possible.
 - If the systems are used as designed.
- An Enlightened System will prevent or catch most fraud, waste, and abuse.
- Grants Management and Compliance is a team effort.
 - Design systems to bring in administrative, program and fiscal staff.

INTERNAL CONTROL

5 COMPONENTS AND 17 PRINCIPLES

The Five components are:

1. Control Environment
2. Risk Assessment
3. Control Activities
4. Information and Communication
5. Monitoring

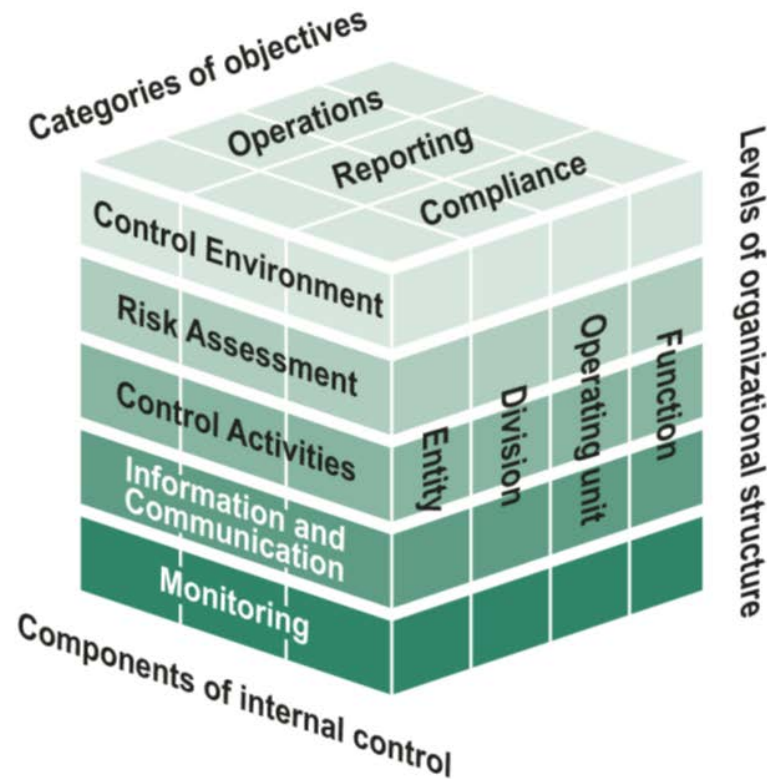
Source: GAO | GAO-14-704G

INTERNAL CONTROL 5 COMPONENTS (CONT.)

- **Control Environment** - The foundation for an internal control system. It provides the discipline and structure to help an entity achieve its objectives.
- **Risk Assessment** - Assesses the risks facing the entity as it seeks to achieve its objectives. This assessment provides the basis for developing appropriate risk responses.
- **Control Activities** - The actions management establishes through policies and procedures to achieve objectives and respond to risks in the internal control system, which includes the entity's information system.
- **Information and Communication** - The quality information management and personnel communicate and use to support the internal control system.
- **Monitoring** - Activities management establishes and operates to assess the quality of performance over time and promptly resolve the findings of audits and other reviews.

Source: GAO | GAO-14-704G

THE COMPONENTS, OBJECTIVES, AND ORGANIZATIONAL STRUCTURE OF INTERNAL CONTROL



Sources: COSO and GAO. | GAO-14-704G

THE FIVE COMPONENTS ARE SYNERGISTIC.
EFFECTIVE INTERNAL CONTROL IS ACHIEVED
WHEN THE COMPONENTS ARE UTILIZED TOGETHER.

Definition of Synergy

The interaction of elements that when combined produce a total effect that is greater than the sum of the individual elements, contributions, etc.



Source: www.dictionary.com

RESEARCH SHOWED:

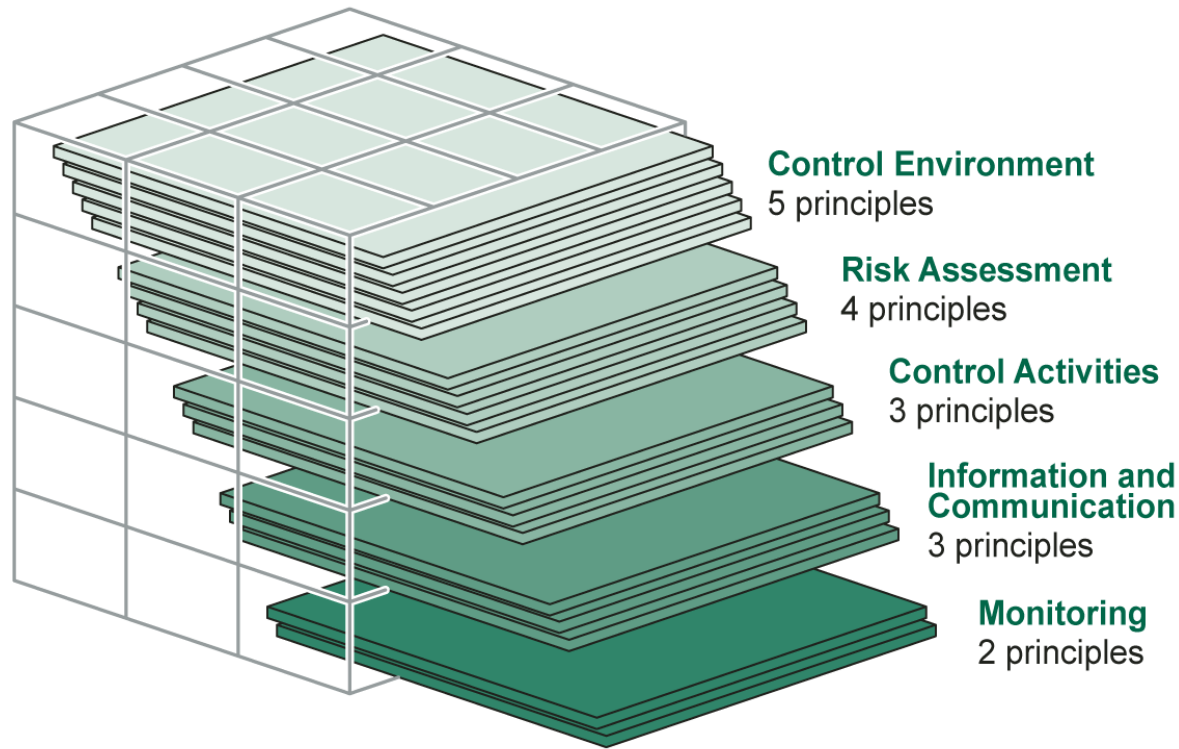
Grantees believed the most implemented components of internal control in their organizations were:

- Control Environment
- Risk Assessment

Grantees believed the least implemented components of internal control in their organizations were:

- Control Activities
- Monitoring

THE 17 PRINCIPLES SUPPORTING THE FIVE COMPONENTS OF INTERNAL CONTROL



Source: GAO. | GAO-14-704G

ACTIVITY

1. You will be placed in 1 of 17 breakout rooms. Your breakout room will be assigned the internal control principle that aligns with your breakout room number (*i.e.*, Breakout Room 1 is assigned Internal Control Principle 1).
2. With your breakout group, read the Green Book ([file name: Activity 1-665712 \(Green Book\).pdf](#)) section about your assigned principle
3. Fill out the questionnaire ([file name: Activity 1-Internal Control Principle Questionnaire](#)) provided indicating: 1) which of the five components of internal control your principle falls under; 2) what the principle is; 3) what its attributes are; and 4) a practical way to implement this principle.
4. Appoint a spokesperson to give a 60 second summary of your principle when called upon.
5. Use your checklist ([file name: Activity 1-17 Principles of Internal Control Checklist](#)) to follow along and check off each principle as it is presented.

INTERNAL CONTROL | CONTROL ENVIRONMENT

1. The oversight body and management should demonstrate a commitment to integrity and ethical values.
2. The oversight body should oversee the entity's internal control system.
3. Management should establish an organizational structure, assign responsibility, and delegate authority to achieve the entity's objectives.
4. Management should demonstrate a commitment to recruit, develop, and retain competent individuals.
5. Management should evaluate performance and hold individuals accountable for their internal control responsibilities.

Source: GAO | GAO-14-704G

INTERNAL CONTROL | RISK ASSESSMENT

6. Management should define objectives clearly to enable the identification of risks and define risk tolerances.
7. Management should identify, analyze, and respond to risks related to achieving the defined objectives.
8. Management should consider the potential for fraud when identifying, analyzing, and responding to risks.
9. Management should identify, analyze, and respond to significant changes that could impact the internal control system.

Source: GAO | GAO-14-704G

INTERNAL CONTROL | CONTROL ACTIVITIES

10. Management should design control activities to achieve objectives and respond to risks.
11. Management should design the entity's information system and related control activities to achieve objectives and respond to risks.
12. Management should implement control activities through policies.

Source: GAO | GAO-14-704G

INTERNAL CONTROL | INFORMATION AND COMMUNICATION

13. Management should use quality information to achieve the entity's objectives.
14. Management should internally communicate the necessary quality information to achieve the entity's objectives.
15. Management should externally communicate the necessary quality information to achieve the entity's objectives.

Source: GAO | GAO-14-704G

INTERNAL CONTROL | MONITORING

16. Management should establish and operate monitoring activities to monitor the internal control system and evaluate the results.
17. Management should remediate identified internal control deficiencies on a timely basis.

Source: GAO | GAO-14-704G

RESEARCH SHOWED:

Grantees believed the five most implemented principles of internal control in their organizations were (listed in order of more implemented to less implemented):

1. Principle 1- The oversight body and management should demonstrate a commitment to integrity and ethical values.
2. Principle 4 - Management should demonstrate a commitment to recruit, develop, and retain competent individuals.
3. **(tied)** Principle 3 - Management should establish an organizational structure, assign responsibility, and delegate authority to achieve the entity's objectives.
4. **(tied)** Principle 8 - Management should consider the potential for fraud when identifying, analyzing, and responding to risks.
5. Principle 2 - The oversight body should oversee the entity's internal control system.

RESEARCH SHOWED:

Grantees believed the five least implemented principles of internal control in their organizations were (listed in order of least implemented to most implemented):

1. Principle 17 - Management should remediate identified internal control deficiencies on a timely basis.
2. Principle 10 - Management should design control activities to achieve objectives and respond to risks.
3. Principle 16 - Management should establish and operate monitoring activities to monitor the internal control system and evaluate the results.
4. Principle 9 - Management should identify, analyze, and respond to significant changes that could impact the internal control system.
5. Principle 15 - Management should externally communicate the necessary quality information to achieve the entity's objectives.

RESEARCH SHOWED:

The top five reasons grantees said internal controls were not fully implemented in their organizations (in order of most frequently cited to least frequently cited reasons):

- Reason 1 - We don't have all of the needed skills, knowledge, or ability.
- Reason 2 - Urgent deadlines take priority.
- Reason 3 - Didn't realize it was required.
- Reason 4 (**tied**) - Staff are not held accountable.
- Reason 4 (**tied**) - Board and/or management doesn't believe it is important.

WHAT DOES IT TAKE TO IMPLEMENT OR IMPROVE INTERNAL CONTROLS?

- Be willing to go through the rigor of building good systems
- Understanding the ecosystem in which you work
- Learning from mistakes
- Obtaining the appropriate skills, knowledge, and abilities
- Good communication
- Self-monitoring

COMMON AREAS OF INTERNAL CONTROL FAILURES

- Procurement
- Subrecipient Oversight
- Time and Effort Reporting
- Adequate Documentation of Costs
- Beneficiary Eligibility
- Financial Management Systems
- Cost Sharing and Matching
- Program Income

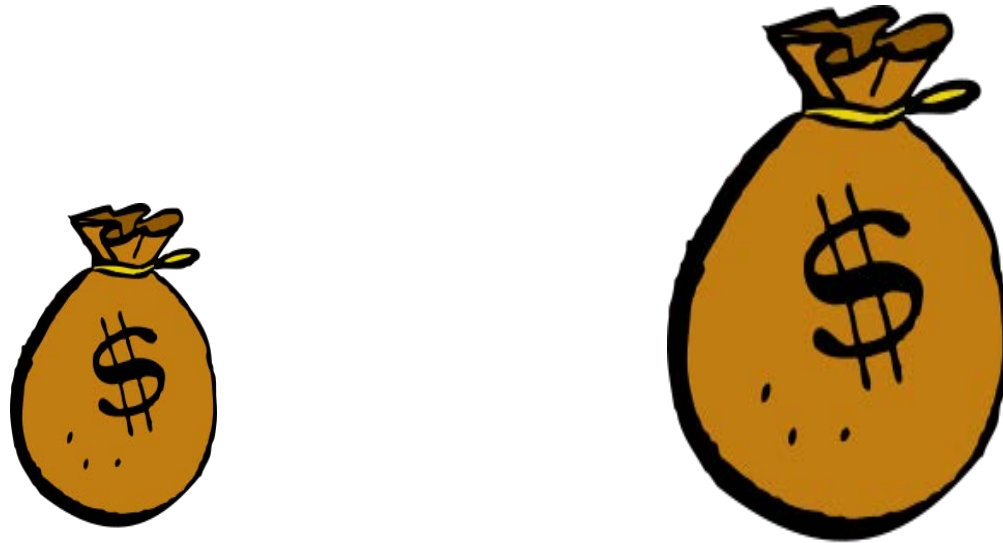
THE DIFFICULTY OF IMPLEMENTING APPROPRIATE CONTROLS

- Grantees face an increasingly large list of compliance requirements that must be adhered to.
- Change is constant, causing the need for vigilance and adaptation related to controls (organizational change, approved grant changes, changes to grant requirements, other changes outside your control)
- Good controls are not just a one-time exercise; rather, a continuous effort is required.
- The complexity and multi-layered requirements of funding sources require a team-based approach, utilizing staff and other resources from many work areas of an organization.
- There are many internal control components and principles, requiring time, diligence, knowledge, skills, and abilities for effective implementation.

LOOKING AT RETURN ON INVESTMENT

The cost of investing your resources in setting up good controls **up-front** is far less than...

The cost of resolving and recovering from internal control deficiencies **later**.



THE GOAL

To achieve continuous compliance with all requirements, **resulting in** allowable activities, practices and expenditures; and to ensure maximum programmatic effectiveness, through an approach that is:

- Proactive
- Efficient
- Effective
- System/process driven
- Thorough
- Unified with grant requirements
- Fully integrated into your organization, recognizing the necessity of the team approach



KEY CONCEPTS AND STRATEGIES

- **Commitment**
 - An overall organizational commitment to effective controls. Having good controls is seen as crucial to your organization's success
- **Intentionality**
 - Good controls don't usually happen by accident
- **Compliance Management**
 - Effective controls must be ensured through communication and teamwork between all appropriate parties
- **Staff/Volunteer Development**
 - Each staff person and volunteer must have the appropriate level of knowledge to carry out functions as designed
- **Work is appropriately structured with:**
 - Systems, Written Policies and Procedures, Segregation of Duties
 - Write Policies and Procedures so that when they are followed, they will only yield compliant costs and practices.

KEY CONCEPTS AND STRATEGIES

- **Ownership**
 - Everyone understands that they have a role or duty in designing and/or implementing controls
- **Continuous**
 - Acceptance of controls as a regular, day-to-day part of doing business, and integration of them into all activities
- **Recordkeeping**
 - Appropriate documentation is critical (if it's not documented, it didn't happen)
- **Disclosure**
 - Prompt disclosure of control issues will prevent problems from snowballing. Disclose problems to appropriate staff in your organization
- **Communication**
 - Communicate challenges within your organization and to grantors, peers, training/technical assistance providers, and others. Always ask for help!
- **Team-Based Approach**
 - Recognition of the need for a team-based approach and intentionally working together to achieve effectiveness

KEY CONCEPTS AND STRATEGIES

- Employ 7 Keys to Building Great Work Teams to Your Internal Control Efforts:
 1. Commitment
 2. Contribution
 3. Communication
 4. Cooperation
 5. Conflict Management
 6. Change Management
 7. Connections

F.A.C.T.S.

Model of effective team member behaviors:

- Follow-through
- Accuracy
- Creativity
- Timeliness
- Spirit

Source (7 Keys to Building Great Work Teams, Zoglio)

<http://www.stickyminds.com/sitewide.asp?Function=edetail&ObjectType=ART&ObjectId=2769>

SAMPLE RESPONSIBILITIES

- Executive Director/Executive Management
 - Set the tone in the organization regarding the importance of compliance and its commitment to it
 - Ensure the availability of resources for compliance
- Program Director
 - Overall knowledge of grant requirements
 - Communication to all other stakeholders regarding requirements (better to communicate too much than too little)
 - Internal monitoring/auditing to ensure compliance
 - Create processes, policies, procedures, tools to ensure compliance
 - Manage toward stated programmatic objectives

SAMPLE RESPONSIBILITIES

- Programmatic Staff
 - Overall knowledge of grant requirements
 - Accurate recordkeeping
 - Supervision of program participants to ensure activities are allowable
- Employees of Program Sites
 - Aware of unallowable activities
 - Accurate recordkeeping of time worked on the grant
 - Supervision of program participants to ensure activities are allowable

SAMPLE RESPONSIBILITIES

- Program Participants
 - Aware of prohibited activities
 - Accurate recordkeeping including activities and timesheets
- Fiscal/Payroll Staff
 - Understands Generally Accepted Accounting Principles
 - Thorough grasp of Code of Federal Regulations and Grant Award
 - Understands programmatic purposes of the grant
 - Regularly communicates with program staff
 - Accurate recordkeeping
 - Create processes, policies, procedures, tools to ensure compliance

SAMPLE RESPONSIBILITIES

- Internal Audit
 - Internal monitoring/audit to ensure compliance
- Volunteers
 - Submit documentation to substantiate volunteer contribution
- Contractors
 - Adhere to specifications provided by your organization

RESOURCES REQUIRED FOR EFFECTIVE CONTROLS

- Time of staff and others must be invested
- Money for appropriate staffing, supplies, software, etc.
- Some short-term programmatic impact may have to be sacrificed in order to develop better controls.

IDEAS / BEST PRACTICES: CONTROL ENVIRONMENT

- Create clear expectations and agreements and hold staff accountable
- Require and allow time for staff to take time to read and absorb compliance requirements, including OMB Circulars, Federal Regulations, grant terms and conditions (block off time on your calendar)
- Establish appropriate segregation of duties
- Create a Compliance Committee
- Create a compliance/controls Standard of Conduct for those involved with your grants
- Have a staff member specialized in compliance, but know that everyone has a role
- Assign point people to create controls to thoroughly address compliance directives
- Ensure that organizational leadership understands and buys into the necessity of compliance

IDEAS / BEST PRACTICES: RISK ASSESSMENT

- Assess risk, and use this knowledge to build policies/procedures and internal/external monitoring plans
- Determine your most substantial risks and ensure your policies and procedures are written to manage these risks
- Determine the most significant threats to you achieving performance outcomes on your awards and determine how you will mitigate these risks
- Perform risk-assessments of grantees at the pre-award stage and use this assist in funding decisions and to determine if specific conditions should be placed on the award
- Be vigilant. New risks necessitating your response will present themselves.

IDEAS / BEST PRACTICES: CONTROL ACTIVITIES

- Create processes and tools to automate, streamline, and simplify compliance
- Document your policies, procedures, and systems
- Use as much software functionality as possible, helping to ensure accuracy and efficiency
- Staff attrition plan – create a roadmap of how continued utilization of internal controls will be ensured in times of positions vacancies and how new hires will be brought up to speed with controls-related knowledge

IDEAS / BEST PRACTICES: INFORMATION & COMMUNICATION

- Hold monthly compliance/policies/procedures trainings for staff and others involved with grants
- Issue a periodic newsletter to staff and grantees on controls-related issues and changes
- Communicate early and often about grant-related developments, changes, issues, and challenges
- Engage outside training/advisory services:
 - Private consultants and trainers
 - Funder-Sponsored Training
 - Management support organizations and associations
- Borrow processes and tools, but be sure they make sense for your organization (modify when necessary)
- Work with other organizations to obtain and provide assistance with difficult issues
- Training for new and existing staff

IDEAS / BEST PRACTICES: INFORMATION & COMMUNICATION (CONT.)

- Kickoff Meeting held at the beginning of a grant to ensure that all appropriate parties are knowledgeable about grant requirements. Copies of the grant application, award, budget, etc. are provided.
- Talk with your funder about difficult compliance issues, and ask for training/technical assistance
- Read compliance directives thoroughly
- Ensure you reference the most current version of regulation and statute and become familiar with them
 - www.ecfr.gov
 - <http://uscode.house.gov/download/download.shtml>
- Don't assume you are compliant
- Seek out learning opportunities and don't stop learning
- Ask questions

IDEAS / BEST PRACTICES: MONITORING

- Perform internal auditing/monitoring and checks to ensure that processes are being followed appropriately
- Practice internal monitoring to ensure controls are being utilized and accomplishing what they were designed to do
- Monitor your grantees to ensure compliance and effectiveness
- When issues are uncovered, take swift action to fix the past and prevent similar issues in the future

PRACTICES TO AVOID

- Different parties not knowing what the other is doing (*siloed operations*)
- Policies and procedures not written down
- New staff not trained on policies and procedures
- Expecting effective controls to “just happen”
- Thinking of compliance at the last minute
- Unfamiliarity with grant requirements
- Taking the role of grant good controls solely onto yourself
- Keeping weak areas “under wraps” instead of disclosing and getting help

THE COST OF DEFICIENT CONTROLS (NEGATIVE IMPACT)

- The time of staff, volunteers, and other stakeholders is wasted
- Organizations must use unrestricted money to pay back disallowed costs
- Negative publicity
- Reduced or denied future funding
- Decrease in current and long-term impact and ability to provide services

ACTIVITY

1. Before the session started, you selected an area you would like to explore further
2. You'll be sent to the breakout room pertaining to the subject you wanted to explore further. Breakout room numbers are as follows:
 - 1: Procurement
 - 2: Subrecipient Oversight
 - 3: Time and Effort Reporting
 - 4: Adequate Documentation
 - 5: Beneficiary Eligibility
 - 6: Financial Management Systems
 - 7: Cost Sharing and Matching
 - 8: Program Income
3. Review the citation language pertaining to your group's topic (file name: [Activity 2-Group \[YOUR GROUP #\] {YOUR GROUP TOPIC}](#))
4. Then, discuss practical ideas to implement the 5 components/17 principles of internal controls related to that area and enter your ideas on the worksheet provided (file name: [Activity 2-Internal Control Principle and Common Areas of Failure](#))
5. Try to come up with at least one idea within each of the 5 components of internal control.

RESOURCES

- www.ecfr.gov
 - Latest version of all federal regulations
- <https://www.gao.gov/assets/670/665712.pdf>
 - The Green Book

QUESTIONS



CONTACT INFORMATION



Jerry Bertrand

(512) 497-3322

jerrybertrand@gmail.com



LinkedIn:

<https://www.linkedin.com/in/bertrandjerry>

COST ALLOCATION, INDIRECT COSTS, AND TIME & EFFORT

AGENDA

- I. Basic Cost Allocation Principles
- II. Time and Effort
- III. Direct Allocation and Indirect Cost Rate Agreements
- IV. *De Minimis* Rate (Latin? Really?)

And yes, teachable moments throughout

I. BASIC COST ALLOCATION PRINCIPLES

MYTHS / MISTAKES

1. This program was going to pay for “it” anyway
2. That “fill in the name” program doesn’t have enough funds to pay admin costs
3. I (Executive Director-type person) don’t have anything to do with that program
4. We looked at it (X years ago, always more than 5) and we came up with a fair charge for (other program)
5. But it is part of our mission!

BASIC DEFINITIONS

(2 CFR §§ 200.56, 200.413 / 45 CFR §§ 75.2, 75.413)

Direct Costs

- “Those costs that can be identified specifically with a particular final cost objective . . . or that **can be directly assigned to such activities relatively easily with a high degree of accuracy.** . . .” §200.413(a) / §75.413(a).

Indirect Costs

- “Those costs incurred for a common or joint purpose benefitting more than one cost objective, and **not readily assignable** to the cost objectives specifically benefitted, **without effort disproportionate to the results achieved.** . . .” §200.56 / §75.2.

Joint Costs

- Note that terminology is a big part of understanding cost allocation. Costs that benefit multiple activities are generally termed “joint” or “shared.” Such costs (as you can see from the above definitions) can often be allocated directly or indirectly. Recipients have discretion, and the key factor is how administratively burdensome and fair a particular approach is.

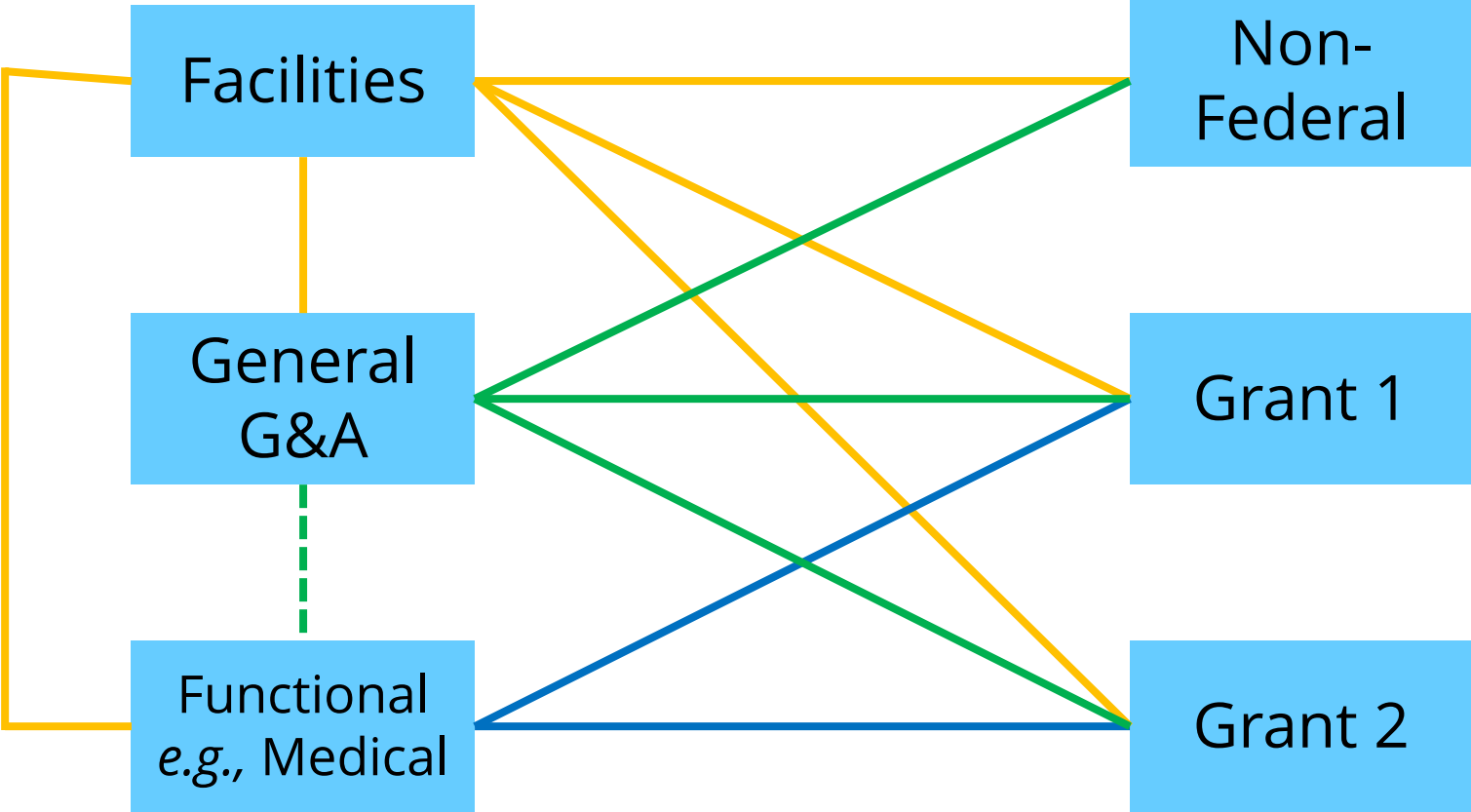
WHAT DOES IT MEAN TO “ALLOCATE” A COST

1. A cost is a payment for something, goods (supplies or equipment) or services (salaries for employees, consultant payments)
2. Presumably, you are spending that money for a reason, *i.e.*, to get something or someone you need.
3. Allocability is the concept that some cost objective, *i.e.*, function, program, activity, “benefits” from that good or service
4. When a cost “benefits” two or more cost objectives, it must be fairly allocated

Costs to be Allocated

A VISUAL

Final Cost Objectives



WE AREN'T MAKING THIS UP! DEFINITIONS

(2 CFR §§ 200.28, 200.44, 200.60 / 45 CFR § 75.2)

Cost Objective

- “Means a program, function, activity, award, organizational subdivision, contract, or work unit for which cost data are desired and for which provision is made to accumulate and measure the cost of processes, products, jobs, capital projects, etc. A cost objective may be a major function of the non-Federal entity, a particular service or project, a Federal award, or an indirect . . . cost activity, as described in Subpart E . . .” §200.28.

Final Cost Objective

- “Means a cost objective which has allocated to it both direct and indirect costs and, in the non-Federal entities accumulation system, is one of the final accumulation points, such as a particular award, internal project, or other direct activity of a non-Federal entity.” §200.44.

Intermediate Cost Objective

- “Means a cost objective that is used to accumulate indirect costs or service center costs that are subsequently allocated to one or more indirect cost pools or final cost objectives.” §200.60.

COST OBJECTIVE TERMINOLOGY

- In laymen's terms, Cost Objectives are often easiest to think of in terms of business lines, "major organizational units, or major organizational functions."
- Step 1 to structuring and planning your cost allocation approach is conceptualizing your business in these terms.
- Every entity is a little bit different. You have flexibility.

HOW TO ALLOCATE COSTS?

There are two primary ways to allocate costs.

1. For personnel, documenting what the person worked on and applying that “split” to payroll. This is often referred to as “time and effort” reporting; or
2. For groupings or “pools” of costs, dividing up the costs through a cost allocation plan

KEY REQUIREMENT: FAIR DISTRIBUTION

- Costs must be distributed using a method (*i.e.*, basis, or base) that fairly attributes portions of the cost to benefitting cost centers.
- The proportional share of the cost must reasonably approximate the proportional degree to which the “receiving” cost center benefits from the cost.
- Examples:
 - Distribute facility costs, where the facility is used by multiple “business lines,” on the proportional basis of square feet of the facility used by each cost objective.
 - Distribute HR Department costs, where the entity has multiple “business lines,” on the proportional basis of direct salaries and wages attributable each month to each cost objective.

THE BOTTOM LINE

- If a program receives a benefit from a cost (an expenditure of funds), it must be fairly charged for that benefit, not a penny more, not a penny less.
- Overcharging is a subsidy, feds hate that!

AND REMEMBER, IT IS UP TO YOU!

(2 CFR § 200.412 / 45 CFR § 75.412)

Recipient Discretion:

- No universal rule for classifying costs as either Direct or Indirect.
- A type of cost may be direct with respect to one function, but indirect with respect to another function.

But Consistent Treatment Required:

- “. . . it is essential that each item of cost incurred for the same purpose be treated consistently in like circumstances either as a direct or an indirect (F&A) cost in order to avoid possible double-charging of Federal awards. . .”

Or, to Quote Stan Lee, “With Great Power Comes Great Responsibility!”

A (KIND OF) REAL WORLD ILLUSTRATION OF THESE PRINCIPLES

LET'S GO TO DINNER

Three couples go to dinner –

- The Smiths order cocktails, appetizer, dinner, dessert, and cognac
- The Jones order water, salad, and dinner
- The McGuires order soda, dinner, and dessert
- The bill comes for \$120 of which \$60 is from the Smiths' orders, \$25 from the Jones' and \$35 is from McGuires'
- Joe Smith says, "let's split the bill three ways!"

DINNER EXAMPLE

1. What is the Cost Pool? The Check e.g., \$120
2. What is the allocation base? Number of Couples
 - So $\$120/3 = \40 per Couple
3. What is the subsidy of the Smiths?
 $\$60 - \$40 = \$20$
4. If the Smiths were actually a Job Training Program and Low-income Housing was the McGuires, what would be the disallowance?
\$5 (\$40 charged versus \$35 actual)

II. TIME & EFFORT

PERSONNEL COSTS

AGENDA

- Review Changes in the UG
- The Purpose of Time and Effort Reporting
- Urban Myths – woven throughout
- How to do it and When to do it – Nuts and Bolts
- Compliance Strategies

Before you tell me what I did
wrong, you should first
know that I don't care.



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RIPPED FROM THE HEADLINES....

QUOTE FROM DOJ PRESS RELEASE

“The University of Florida receives millions of dollars in grant funding from HHS on hundreds of grants each year. The settlement announced today resolves the alleged misuse of grant funds awarded by HHS to UF between 2005 and December 2010. **The United States contended that the university overcharged hundreds of grants for the salary costs of its employees, where it did not have documentation to support the level of effort claimed on the grants for those employees.**”

https://www.washingtonpost.com/news/grade-point/wp/2015/11/20/university-of-florida-to-pay-government-20-million-to-settle-fraud-charges/?utm_term=.a20eade9c5f0

SAMPLE OF CURRENT/COVID-19 GUIDANCE

“Programs are expected to pay staff who are working remotely their regular wages and health benefits. All staff should be paid for hours they were regularly scheduled to work before the COVID-19 closures, regardless of whether staff can perform all of their job duties remotely. Please note, the continued payment of wages and benefits does not apply to program staff who would normally be laid off during annual end-of-year program closures for summer breaks in service.

The ability of grantees to pay wages and benefits as described above remains in effect through September 30, 2020. It does not apply to any periods of time prior to September 30, 2020 during which programs reopen centers and resume any home-based services. OHS will continue to monitor program closures and may adjust the effective date of this guidance as needed.”

<https://eclkc.ohs.acf.hhs.gov/about-us/coronavirus/flexibility-pay-staff-wages-provide-benefits>

COVID-19 & THE HEAD START COMMUNITY

Interrelated issues:

- Sites closed
- Remote Operations
- Programming During Remote Service Delivery
- Only Partial Reopening
- Staff Wages and Benefits Guidance
- Recent Funding and Administrative Flexibilities Do NOT Include Waiver of Time and Effort Requirements

CHALLENGES OF WORKING REMOTELY

- Standby or Idle time
- Duties that cannot be done remotely
- Duties that must be completed at specific times or within certain hours of the day (*e.g.*, only during normal business hours)
- Employees who cannot fill 100% of their time remotely
- Employees that need to return to their physical place of work to perform a portion their job duties

URBAN MYTHS

- Clocking in and clocking out is T&E
- I know what my employees are doing so my signature is good enough
- Position Descriptions show what my employees are doing
- If I don't charge budget, the numbers won't add up
- We can just say what we did later
- Of course, our employees are working on the grant, what else would they be doing?

MNEMONIC GUIDANCE...

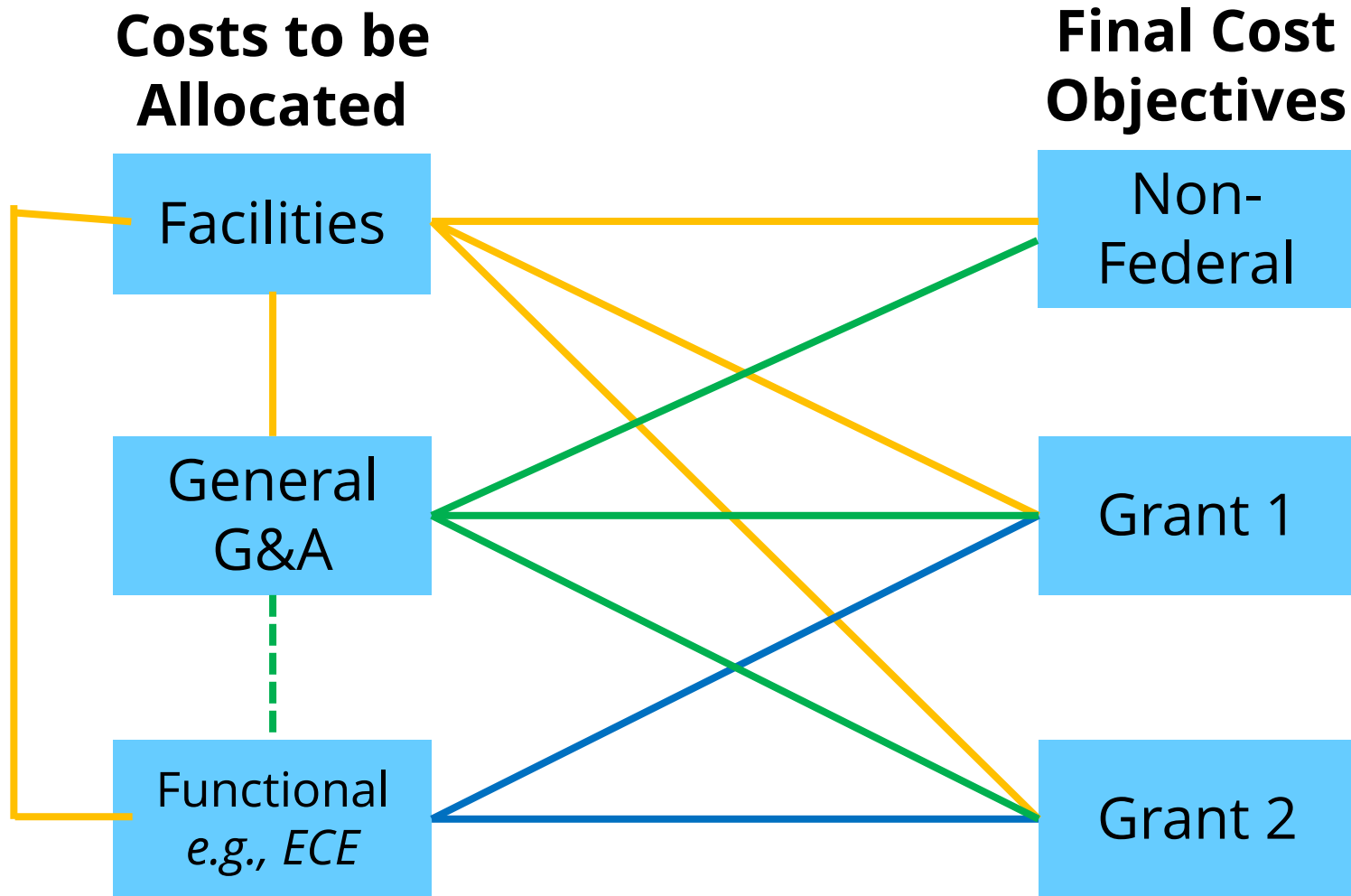
You are sending a bill to Uncle Sam for work by your employees and he wants to know what he is paying for.....



THREE DIFFERENT PIECES OF THE PUZZLE

- 1. Payroll** – What it costs to have employees (salaries, fringe benefits, employment taxes, etc.)
- 2. Time and Effort** – “Personnel Activity Reports” or other documentation showing which intermediate or final cost objectives is being changed (or accumulating) payroll costs
- 3. Charging Costs to Your Grant** – When you go to Payment Management and drawdown federal funds to pay allowable costs

BACK TO OUR VISUAL



RULES FOR DOCUMENTATION OF T&E (§200.430(I)(1) / §75.430(I)(1))

Documentation must **“accurately reflect the work performed”**

Records must:

- “(i) Be supported by a **system of internal control** which provides **reasonable assurance** that the **charges are accurate, allowable, and properly allocated;**
- (ii) Be incorporated into the official records of the non-Federal entity;
- (iii) Reasonably reflect the **total activity for which the employee is compensated** by the non-Federal entity, not exceeding 100% of compensated activities;



MORE ON T&E DOCUMENTATION...

(iv) **Encompass both federally assisted, and all other activities compensated** by the non-Federal entity on an integrated basis, but may include the use of **subsidiary records** as defined in the non-Federal entity's written policy;

(v) Comply with the established accounting policies and practices of the non-Federal entity; and

[Yes, the Supercircular is missing number vi...]



MORE ON T&E DOCUMENTATION...

(vii) Support the **distribution of the employee's salary or wages among specific activities or cost objectives** if the employee.

- ✓ Works on more than one federal award;
- ✓ A federal award and non-federal award;
- ✓ An indirect cost activity and a direct cost activity;
- ✓ Two or more indirect activities which are allocated using different allocation bases;
- ✓ Or an unallowable activity and a direct or indirect cost activity."



ALTERNATIVES OR SUBSTITUTE SYSTEMS

For State, Tribal, and Locals – still can use old RMTS and similar, statistically valid systems

For Everyone – two options:

- a) With federal approval “alternative proposals based on outcomes and milestones for program performance where these are clearly documented”
- b) Use “performance plans” to “incorporate funds from multiple federal awards and account for their combined use based on performance-oriented metrics, provided that such plans are approved in advance by **all** federal awarding agencies”

D.A.B. DECISIONS ON ADEQUATE DOCUMENTATION...

“The Board is generally reluctant to find that **non-contemporaneous documentation of personnel costs meets applicable record keeping requirements**, holding that such documentation must be closely scrutinized. [citations omitted.] The Board has held, however, that documents such as 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) (addressing similar requirements for documentation of salaries in the cost principles applicable to state and local governments and Indian tribal organizations, at OMB Circ. A-87, now at 2 C.F.R. Part 225).”

Philadelphia Parent Child Center, Inc., DAB No. 2297 (2009)

INADEQUATE DOCUMENTATION

“On the other hand, the **mere assertion** by the State's witness that this 18-month period is representative of the entire 60-month period is insufficient evidence upon which to base a claim for the months not covered by the summary time sheets. Without some other support, this unsubstantiated assertion simply cannot support a claim for FFP. Accordingly, we uphold the disallowance for the 42 months for which the State provided no documentation.”

California Dept. of Health Services, DAB No. 1155 (1990)

WARNING AUDIT: MAKE SURE YOUR WRITTEN POLICY IS ACCURATE, COMPLETE

The Council on Rural Service Programs, Inc., Claimed Unallowable Head Start Costs

11-13-2013 | Audit (A-05-12-00089) | [Complete Report](#)

HHS OIG could not determine the allowability of \$4,287,883 in salary and fringe benefit costs for the grantee's executive and administrative staff.

Instead of requiring the use of personnel activity reports, the grantee's policy stated that "...administrative and support personnel who work in the central office support all programs. *These employees are assigned to multiple grants in the payroll system based on the estimated benefit* received by each grant funding stream and allocated accordingly." **HHS OIG first took issue with the policy itself.**

Budget estimates (i.e., estimates determined before the services are performed) do not qualify as support for distribution of salaries and wages to awards

HHS OIG acknowledged that the grantee had an allocation system in place to account for administrative salaries. However, OIG contended that the system did not meet Federal requirements to adequately support, with personnel activity reports, the distribution of salaries and wages.

IN SUM...

Time and Effort is an allocation of a cost, *i.e.*, payroll cost, to a benefitting activity, all of it to one activity or parts to multiple activities, regardless still need “adequate documentation.”



What does a T&E report look like?



SAMPLE TIMESHEET 1

Sample Simple Timesheet

Period Covered	Pay Period: Jan 1 through Jan 14, 2020
-----------------------	--

Activity	Percent of Time
Medical Services	80%
Organizational Admin	10%
Clinical Quality Management	15%
PTO	5%
Total	100%

Employee Certification:

I have reviewed the time allocations set forth above and confirm they accurately reflect my effort during the covered period.

Name

Date

SAMPLE TIMESHEET 2

Sample Detailed Timesheet

Period Covered | Pay Period: Jan 1 through Jan 14, 2020

Activity	Week 1							Week 2							Total Hours	Percent
	1	2	3	4	5	6	7	1	2	3	4	5	6	7		
Medical																
Admin																
CQM																
PTO																
Total																

Employee Certification:

I have reviewed the time allocations set forth above and confirm they accurately reflect my effort during the covered period.

Name

Date

SAMPLE 3 SEMI-ANNUAL CERT.

DATE: _____

SEMI-ANNUAL CERTIFICATION

This is to certify that the following individuals have worked **100%** of their time during the last six months under the cost objective identified below:

First Name	Last Name	Cost Objective	Position	Location	Signature
Ima	Worker	§330	Physician	East Clinic	_____
Happy	Camper	§330	R.N.	West Clinic	_____
Green	Eyeshades	G&A	Accountant	Headquarters	_____

Signature of Supervisor: _____ Date: _____

ELECTRONIC SYSTEMS OK!

- T-Sheets: <https://www.tsheets.com/>
- Kronos: <https://www.kronos.com/>
- Send us others!

A PROPOSED APPROACH FOR T&E:

- Employees who charge all of their time to one funding source or cost objective, use semi-annual certifications
- Employees who “distribute” their time to two or more funding sources or cost objectives use samples #1 and #2 above

PRACTICAL APPLICATIONS

do YOUR TIME SHEETS IF
YOU EVER WANT TO SEE
YOUR PAYCHECK again.

someecards
RANSOMCARDS

THE ESSENTIAL ELEMENTS OF A TIME AND EFFORT SYSTEM

- Written Policies and Procedures that set out:
 - Purpose
 - Requirements
 - Good Faith, “reasonable” Estimate
 - Frequency
 - Employees must use independent judgement
 - Penalties for Non-compliance
- Monitoring
 - Start with a simple checklist, did everyone turn in their timesheets?
 - Internal integrity?
- Training

AFTER-THE-FACT REPORTING CHECKLIST

Report Form

- ✓ Each federal grant agreement and/or match/cost sharing/leveraged funding source is identified.
- ✓ Accounts for 100% of the employee's compensated time (including leave). Non-federal, non-match/cost sharing funds may be lumped together as "other" funding.
- ✓ Corresponds to one or more pay periods.
- ✓ Contains a certification statement. A sample statement is: "I/we certify to the best of my/our knowledge that the above allocation of time expended performing federal, state, and other program duties is true and accurate."
- ✓ Is signed and dated in a timely manner by the employee and/or another responsible individual with direct knowledge of the employee's work activity. While only one signature is required, some have forms signed by both the employee and a supervisor or other responsible individual with direct knowledge of the employee's work activity.

AFTER-THE-FACT REPORTING CHECKLIST

Process

- ✓ The organization has a written policy and process covering administrative and directly charged personnel, etc.
- ✓ The organization records initial personnel estimates (payroll and benefits) in an accounting system by individual federal grant agreement(s), individual match/cost sharing funding source(s), and/or all “other” funding.
- ✓ The organization has a suitable means of verifying the accuracy of time and effort reports.
- ✓ The organization has a way to monitor and adjust the individual’s work plan.
- ✓ The organization monitors and adjusts personnel costs from estimates to actual expenses.

FINAL PRACTICE POINT

- While time and effort reports may be used to implement cost allocation plans, they are a separate function that serve to record what work has been done by employees.
- Activity reports describe the activities performed; cost allocation plans describe how the costs of those activities are charged to benefitting activities.

Questions?

III. DIRECT ALLOCATION & INDIRECT COST RATE AGREEMENTS

DIRECT CHARGING

DIRECT CHARGING

(2 CFR § 200.412 / 75 CFR § 75.412)

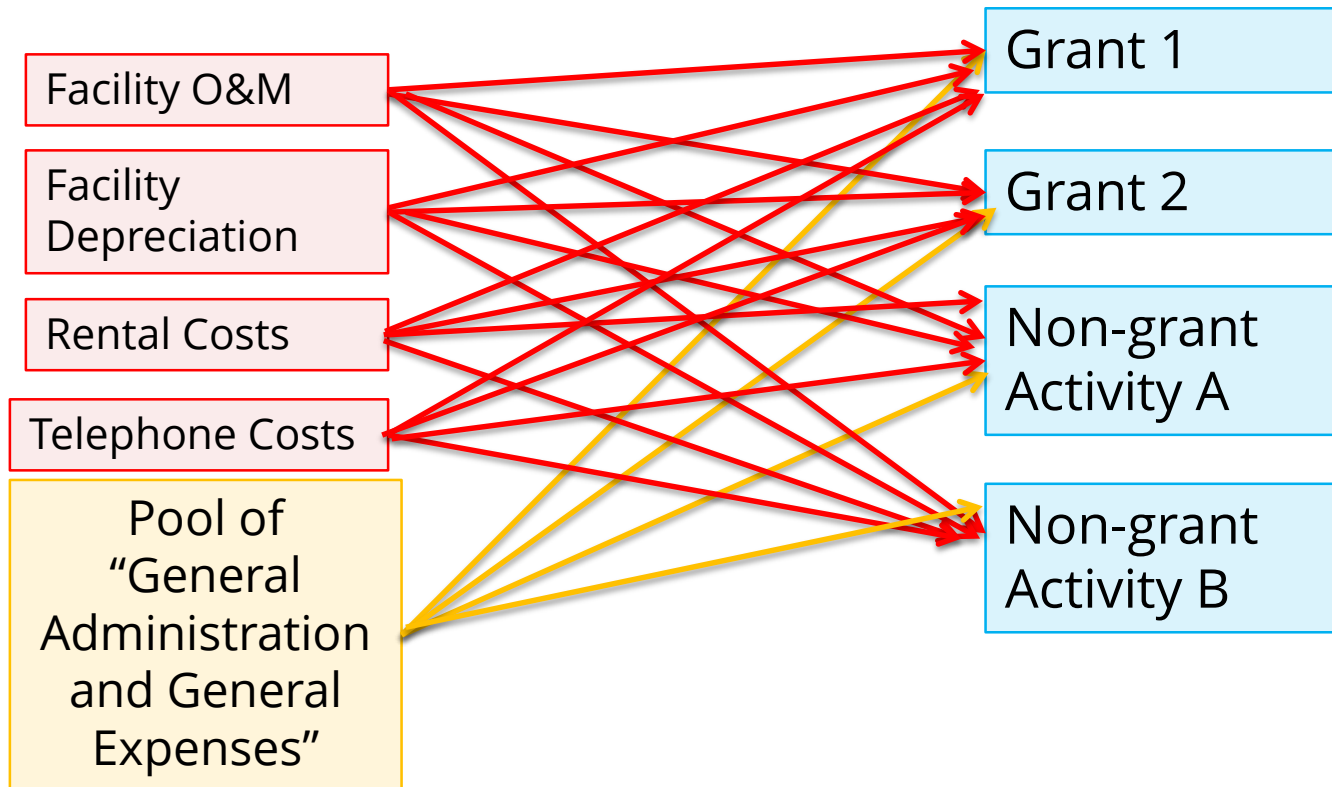
- As recognized by the “direct cost” definition above, some costs benefit multiple cost objectives (*i.e.*, be “joint costs”) but are such that they can be easily divided and assigned to those objectives. §200.412 / § 75.412.
- Most Common Examples:
 - **Facilities used for multiple cost objectives** – facility costs allocated on a square foot basis by the nature of the use of the space. *E.g.*, In a 10,000 sq. ft. building, 7,000 sq. ft. is used for research and 3,000 sq. ft. for instruction.
 - **Employee compensation**, where employees work in furtherance of multiple cost objectives – compensation allocated by percentage of full time spent working on various activities.
 - In fact, this direct charging is formally required by the cost principles through the concept of time and effort reporting – already covered!

COST ALLOCATION PLANS

- Many entities simply charge all joint costs this way.
- There is no requirement to have an ICRA.
- If you direct charge joint costs, best practice (by far) is to have a cost allocation plan that documents your approach to each type of joint cost. Generally, the cost allocation plan would be part of the grantees financial management policies.
- Writing it down facilitates:
 - Consistency, and
 - Proof of approach if related costs are ever questioned.

TERMINOLOGY NOTE ON “DIRECT ALLOCATION” METHOD

“JOINT COSTS” DIRECTLY CHARGED, AND “GENERAL ADMINISTRATION AND GENERAL EXPENSES” ALLOCATED THROUGH AN INDIRECT COST POOL. OK, SO LONG AS BASE USED FOR EACH “ACCURATELY MEASURES THE BENEFITS PROVIDED TO EACH . . . ACTIVITY.”



ICRA ADVANTAGES AND DISADVANTAGES



ADVANTAGES OF AN ICRA

- PTEs have to follow them now (§200.331(a)(4), COFAR FAQ .331-7)
 - Unless statutory limitation, of course
- Purchases with Indirect dollars exempt from procurement rules (COFAR FAQ .320-6)
- Bid and Proposal costs allowable
- Special Rates, like Fringe Benefit rate, are possible
- Pricing and Budgeting May Be Easier in Multi-funded Environment

DISADVANTAGES OF AN ICRA

- It is an estimate and is not particularly flexible
 - Not good in times of rapid growth/downsizing
 - With a provisional rate, may “leave costs on the table” or have to plan carefully to avoid over-recovery (depending upon your circumstances)
- Negotiating with different offices of your cognizant agency may be difficult
 - Cost Allocation Services (formerly Division of Cost Allocation) at HHS for example
 - Division of Cost Determination at Labor

ICRA NUTS AND BOLTS

LET'S EAT GRANDMA.
LET'S EAT, GRANDMA.

COMMAS SAVE LIVES

TYPES OF RATES

- Provisional – a billing rate
- Final – final settlement of a provisional rate to actual costs, can result in ADJUSTMENTS
- Predetermined – a fixed rate based on actual costs; not subject to adjustment except in “very unusual” circumstances; not supposed to exceed projected “actual” costs
- Fixed w/ carry forward – a fixed rate with adjustments in subsequent periods

WHERE / HOW DO YOU GET AN ICRA?

- “Unless different arrangements are agreed to by the Federal agencies concerned, the Federal agency with the **largest dollar value of Federal awards** with an organization will be designated as the cognizant agency for indirect costs for the negotiation and approval of the indirect cost rates . . .” Appx. IV, C.2.a. **Once cognizance assigned, will not change “unless there is a shift in the dollar volume of the Federal awards to the organization for at least three years. . .” *Id.***
- “The results of each negotiation must be formalized in a **written agreement** between the cognizant agency for indirect costs and the nonprofit organization. . .” Appx. IV, C.2.g.
- “**If a dispute arises** in a negotiation of an indirect cost rate between the cognizant agency for indirect costs and the nonprofit organization, **the dispute must be resolved in accordance with the appeals procedures of the cognizant agency for indirect costs.**” Appx. IV, C.2.h.

How does it work?

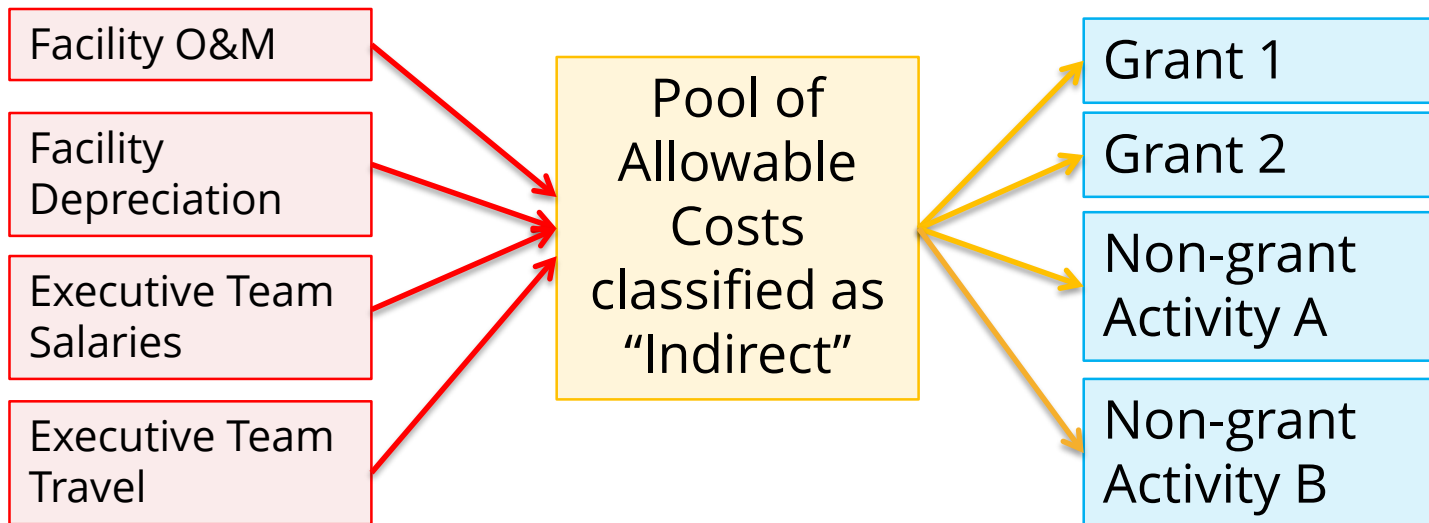
BASIC PRINCIPLE

Allocating **allowable costs** to benefitting cost objectives/functions.

Step 1: Determine treatment as indirect costs is appropriate for the underlying costs.

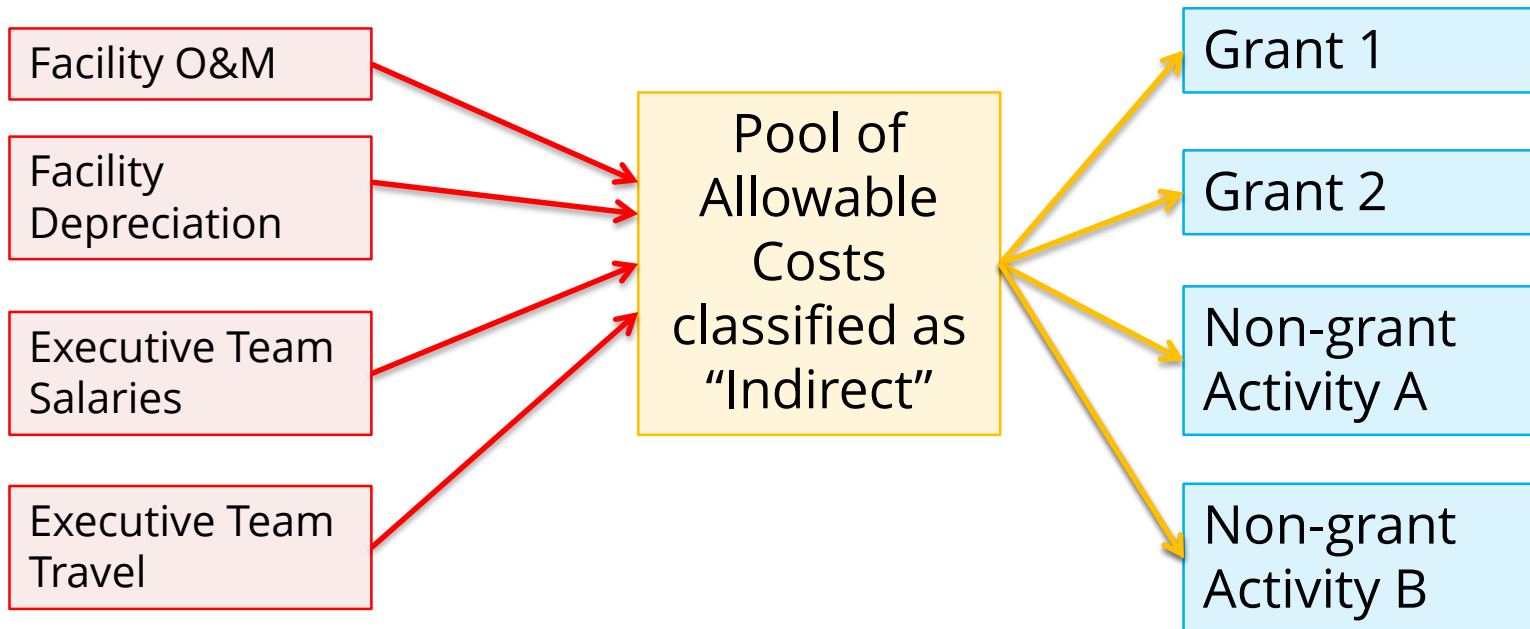
Step 2: Aggregate those costs into a “pool.”

Step 3: Allocate (following certain rules).



SIMPLIFIED ALLOCATION METHOD

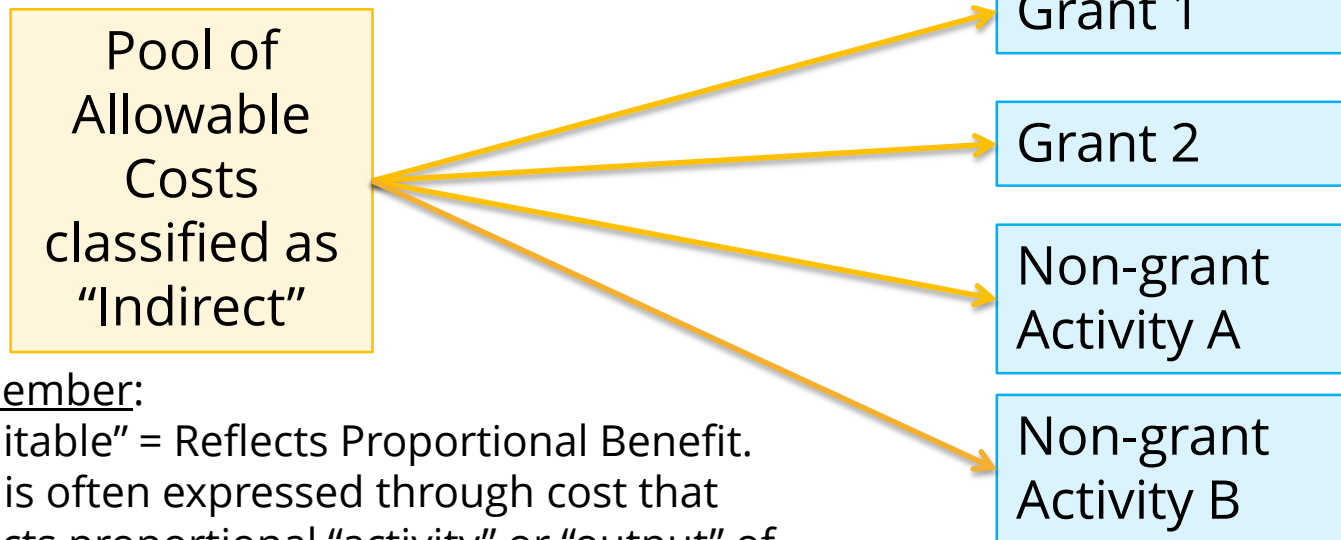
ONLY ONE POOL – **STEP 1** (IDENTIFYING WHICH COSTS TO DESIGNATE AS “INDIRECT”) AND **STEP 3** (ALLOCATING TO AWARDS) ARE THE FOCUS.



SIMPLIFIED ALLOCATION METHOD

STEP 3 IS ALL ABOUT THE BASE:

It must be “an equitable distribution base. . .” which “may be total direct costs (excluding capital expenditures and other distorting items . . .), direct salaries and wages, or [an]other base which results in an equitable distribution. . .” 2 C.F.R. Part 200, Appx. IV, Section B.2.



Remember:

“Equitable” = Reflects Proportional Benefit. This is often expressed through cost that reflects proportional “activity” or “output” of a business unit/business line.

WHAT IS THE DRIVING PRINCIPLE BEHIND SELECTION OF THE BASE?

- Getting back to Fairness!
- “The essential consideration in selecting a method or a base is that it is the one best suited for assigning the pool of costs to cost objectives in accordance with benefits received; a traceable cause and effect relationship; or logic and reason, where neither the cause nor the effect of the relationship is determinable.”
- Must be “equitable” to both federal and non-federal functions

SIMPLIFIED ALLOCATION METHOD

TO GET TO THE “RATE” (THE PERCENTAGE NUMBER), YOU SIMPLY DIVIDE THE AMOUNT IN THE POOL BY THE AMOUNT IN THE BASE.

Indirect Cost
Pool
[say \$150k]

MTDC
(for example)
[say \$1 million]



15 %
of MTDC

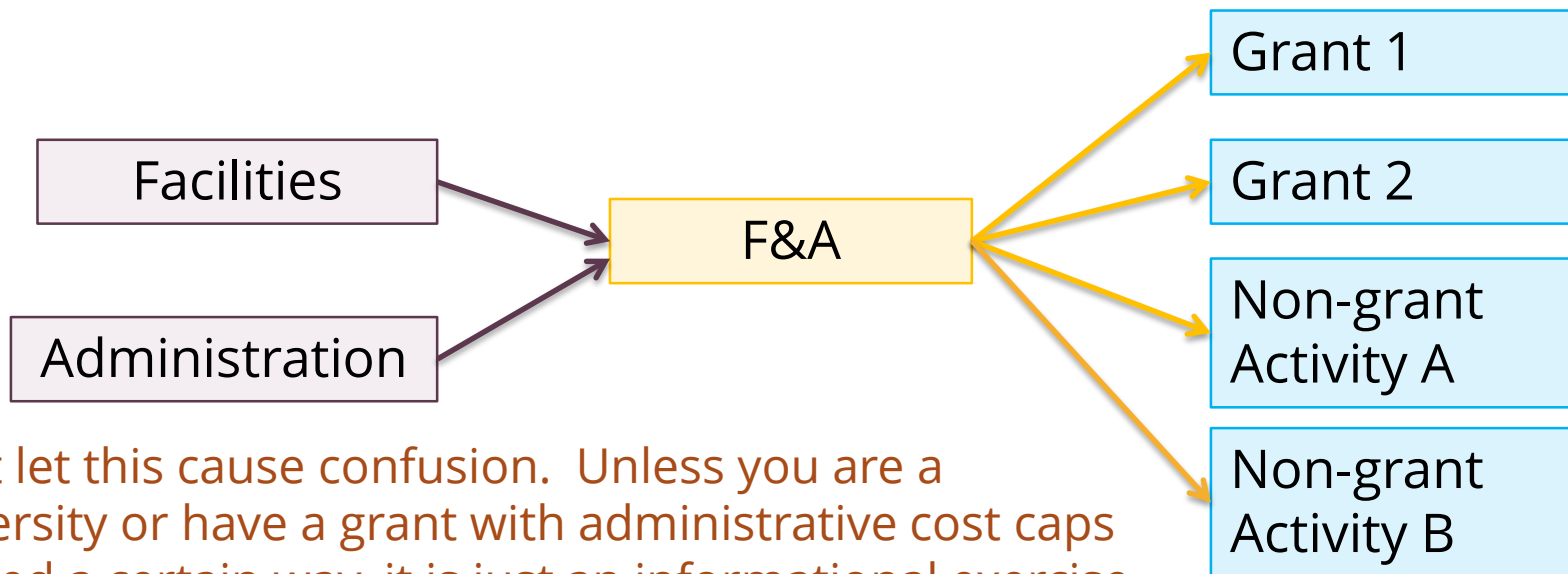
REMEMBER: The percentage number is meaningless without the base!

WHAT IT MEANS: For every \$1 of MTDC you charge to an award, you are entitled to charge \$0.15 of indirect costs (the stuff you put in the pool in STEP 1) to that award.

NOTE ON “F&A” DISTINCTION

NOTE:

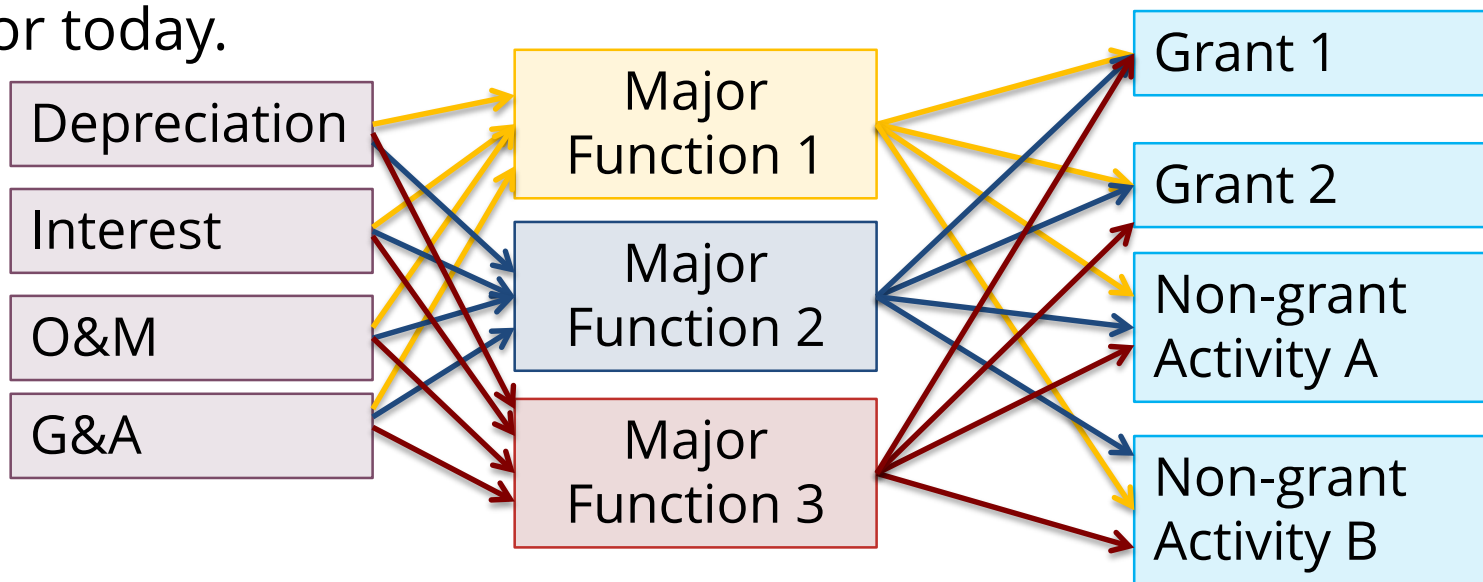
If more than \$10 million in direct Federal funding in a fiscal year, must breakout indirect costs into “facilities” and “administration.” Appx. IV, Section B.2. **Two separately identified components of a single F&A rate.**



Don't let this cause confusion. Unless you are a University or have a grant with administrative cost caps defined a certain way, it is just an informational exercise. It doesn't impact the stuff we are talking about.

MULTIPLE ALLOCATION BASE METHOD

Basic concept is that the entity has multiple major functions, and first allocates indirect costs to those various functions using certain prescribed allocation bases. Then, those major function cost pools are distributed to the various awards/cost objectives over a MTDC base. You end up with multiple rates (one for each major function). But that's all on this method for today.



IV. THE “*De Minimis*” RATE

I'm currently out of the office and can be reached by waiting until I get back.



somee cards
user card

***DE MINIMIS* RATE**

2 CFR § 200.414(f) / 45 CFR § 75.414(f)

The Uniform Guidance provides that an organization that has never previously had an indirect cost rate, may, instead of negotiating an indirect cost rate, elect to charge a 10% of MTDC “*de minimis*” rate.

There is no negotiation with any cognizant agency. The recipient simply elects the 10% and includes it in its proposed budget. If electing such a rate, it is important that the recipient know what costs are included in its indirect cost pool, and act similarly with respect to all awards.

2 CFR § 200.414 / 45 CFR § 75.414 ALSO SAYS...

- “...As described in §200.403 [75.403], costs must be consistently charged as either indirect or direct costs, but may not be double charged or inconsistently charged as both. If chosen, this methodology once elected must be used consistently for all Federal awards until such time as a non-Federal entity chooses to negotiate for a rate, which the non-Federal entity may apply to do at any time.”

MODIFIED TOTAL DIRECT COSTS

- Definitions: Modified Total Direct Cost (MTDC) (new with interim final rule):
- “MTDC means all direct salaries and wages, applicable fringe benefits, materials and supplies, services, travel, and **up to the first \$25,000 of each subaward (regardless of the period of performance of the subawards under the award)**. MTDC excludes equipment, capital expenditures, charges for patient care, rental costs, tuition remission, scholarships and fellowships, participant support costs and the portion of each subaward in excess of \$25,000. Other items may only be excluded when necessary to avoid a serious inequity in the distribution of indirect costs, and with the approval of the cognizant agency for indirect costs.”

COMMENTS IN PREAMBLE TO FINAL RULE ON *DE MINIMIS*...

- “Provide a *de minimis* indirect cost rate of 10% of MTDC to those non-Federal entities who have never had a negotiated indirect cost rate, thereby eliminating a potential administrative barrier to receiving and effectively implementing Federal financial assistance”
- “automatic rate without any review of actual costs, the rate should remain at . . . conservative levels”
- “concerned that pass-through entities might decline to negotiate, and this would make the *de minimis* rate more likely a de facto rate for subrecipients.”

QUESTIONS?

Edward T. Waters, Esq.
Ewaters@ftlf.com

Scott Sheffler, Esq.
Ssheffler@ftlf.com

Jerry Bertrand
Jerrybertrand@gmail.com

Feldesman Tucker Leifer Fidell LLP

1129 20th Street N.W. – Suite 400

Washington, D.C. 20036

(202) 466-8960

www.ftlf.com

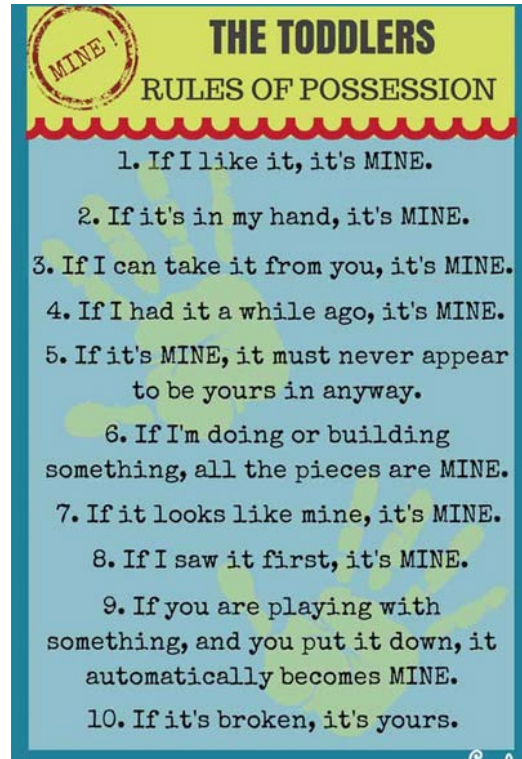
Learning.ftlf.com

FEDERAL INTEREST & PROPERTY MANAGEMENT

AGENDA

- I. Legal Concept of “Federal Interest”
- II. Creation and Valuation of Federal Interest
- III. Property Management (Federal Control and Disposition Rights)
- IV. Questions

FEDERAL INTEREST SUMMARIZED!



LEARNING OBJECTIVES

- Understand what a “federal interest” in property is.
- Understand the use, management, and disposition requirements applicable to real and personal property acquired with federal funds.
- Identify “federal interest” issues that may arise when offering real and personal property to satisfy cost sharing requirements.

I. LEGAL CONCEPT OF “FEDERAL INTEREST”

CURRENT REGULATORY LANGUAGE

2 C.F.R. § 200.316 / 45 C.F.R. § 75.323 [Property trust relationship]:

Real property, equipment, and intangible property, that are acquired or improved with a Federal award must be held in trust by the [NFE] as trustee for the beneficiaries of the project or program under which the property was acquired or improved. The Federal awarding agency may require the [NFE] to record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with a Federal award and that use and disposition conditions apply to the property.

2 C.F.R. § 200.41 / 45 C.F.R. § 75.2 [Federal interest]:

Federal interest means, . . . when used in connection with the acquisition or improvement of real property, equipment, or supplies under a Federal award, the dollar amount that is the product of the: (a) Federal share of total project costs; and (b) Current fair market value of the property, improvements, or both, to the extent the costs of acquiring or improving the property were included as project costs.

Note: This definition provides a formula for calculating value, but fails to clearly say what it "is"...

LEGAL CONCEPT

- Is it a contractual obligation?
- Is it a property right?

LEGAL CONCEPT

- We know from the Uniform Guidance (and the prior Circulars) that when grant funds are used to acquire property, **nominal title vests in the grantee.** 2 C.F.R. §§ 200.311(a), 200.313(a) / 45 C.F.R. §§ 75.318(a), 75.320(a).
- The “federal interest” is something else.

FEDERAL COURTS ADDRESSED THE NATURE OF THIS PROPERTY RIGHT

Federal Case	Principle
Henry v. First National Bank (5th Cir. 1979)	<u>Federal funds</u> in the hands of a grantee are subject to federal “reversionary interest” until properly expended.
Palmiter v. Action (7th Cir. 1984)	<u>Federal funds</u> in the hands of a grantee are subject to an “equitable, reversionary interest” of the federal government. No subject to garnishment in state court.
In re Joliet-Will (7th Cir. 1988)	<u>Funds and federally-funded property</u> in the hands of the grantee are subject to federal reversionary interest. Grantee does not hold “beneficial” title.
Neukirchen v. Wood County Head Start (7th Cir. 1995)	<u>Even federally-funded equipment under \$1,000</u> in the hands of the grantee is subject to federal reversionary interest until such time as no longer needed for the a federally funded project.

II. CREATION AND VALUATION OF FEDERAL INTEREST

**(How does a Federal Interest take hold,
and Who “owns” What Share of the
Equitable Interest in the Property)**

CREATION OF THE FEDERAL INTEREST

- A Federal Interest is created by:
 - Federal funding of equity
- No Federal Interest is created by charging depreciation or mortgage interest to a grant. Depreciation is mere loss of value over time and mortgage interest is an operating expense.

VALUATION

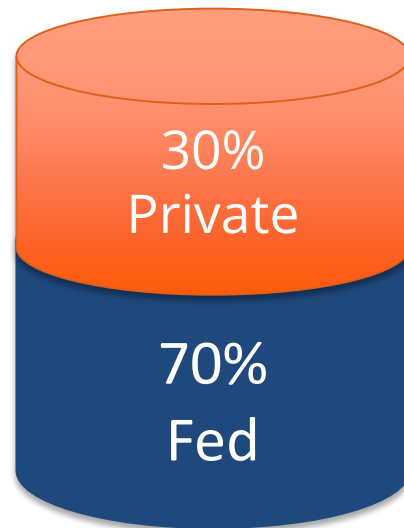
- The **Real Property rule** is explicitly stated at 2 C.F.R. § 200.311(c)(2) / 45 C.F.R. § 75.318(c)(2):
 - Upon disposition by sale, “[t]he amount due the Federal awarding agency will be calculated by applying the **Federal awarding agency’s percentage of participation in the cost of the original purchase (and cost of any improvements) to the proceeds of the sale . . .**”
- The **Equipment rule** is explicitly stated at 2 C.F.R. § 200.313(e)(2) / 45 C.F.R. § 75.320(e)(2):
 - Upon disposition by sale, “[t]he Federal awarding agency is entitled to an amount calculated by multiplying the **current market value or proceeds from sale by the Federal awarding agency’s percentage of participation in the cost of the original purchase. . .**”

VALUATION

- There are three common scenarios in which the grantee's "share" and the government's "share" of **equitable ownership** are typically calculated:
 1. Original Acquisition Funded in Whole or In Part with Federal Funds (easy)
 2. Federally Funded Improvements

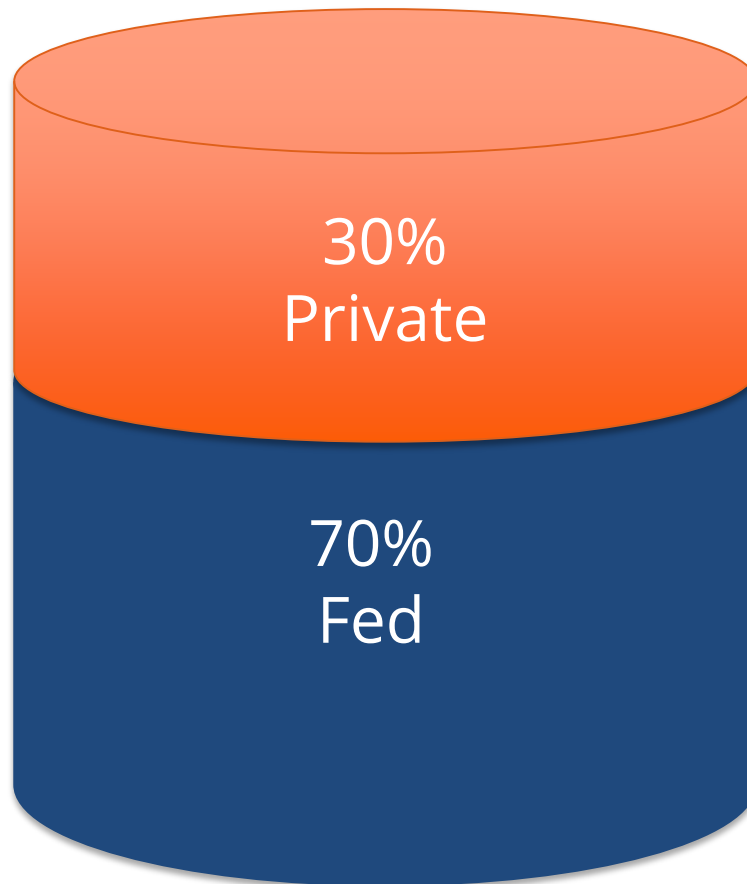
1. ORIGINAL ACQUISITION FUNDED ALL/PART WITH FED FUNDS

\$1 Million
Purchase Price



1. ORIGINAL ACQUISITION FUNDED ALL/PART WITH FED FUNDS

\$10 Million
Sale Price



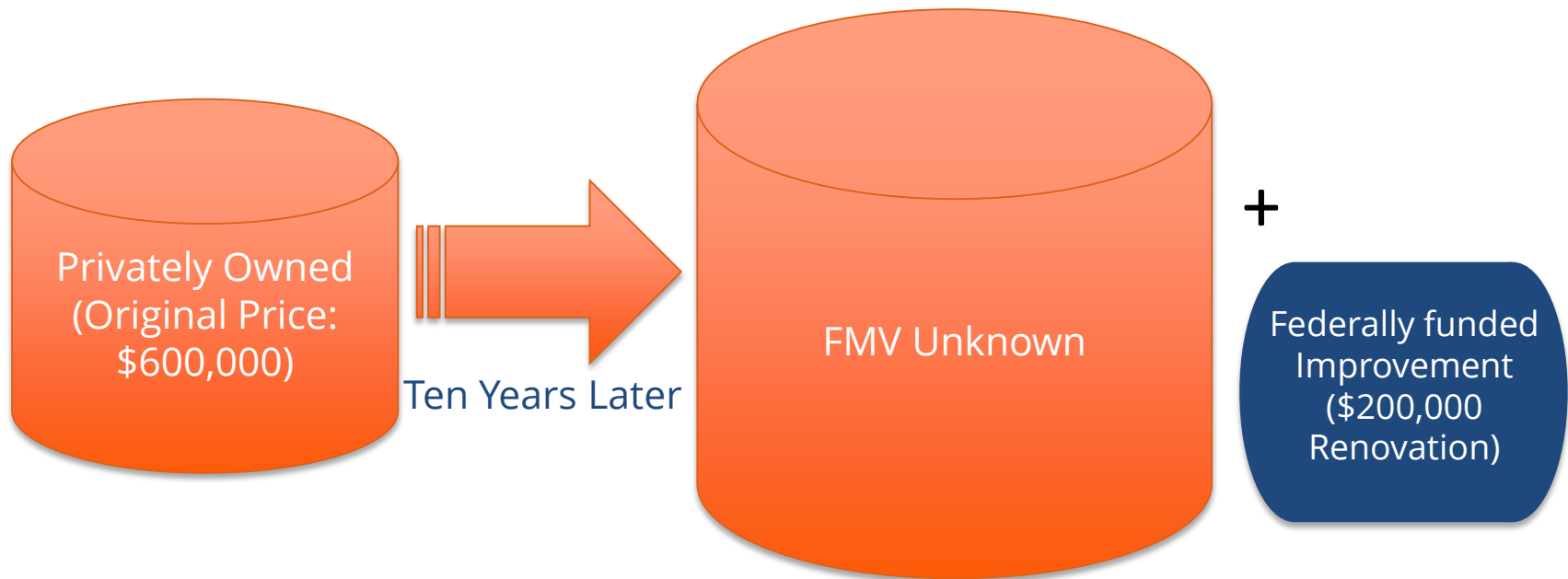
2. FEDERALLY FUNDED IMPROVEMENT

Same Basic Rule/Concept:

- At disposition, federal agency entitled to:
 - Federal awarding agency's percentage of participation in the cost of the original purchase (and cost of any improvements) x the proceeds of the sale.

2. FEDERALLY FUNDED IMPROVEMENT

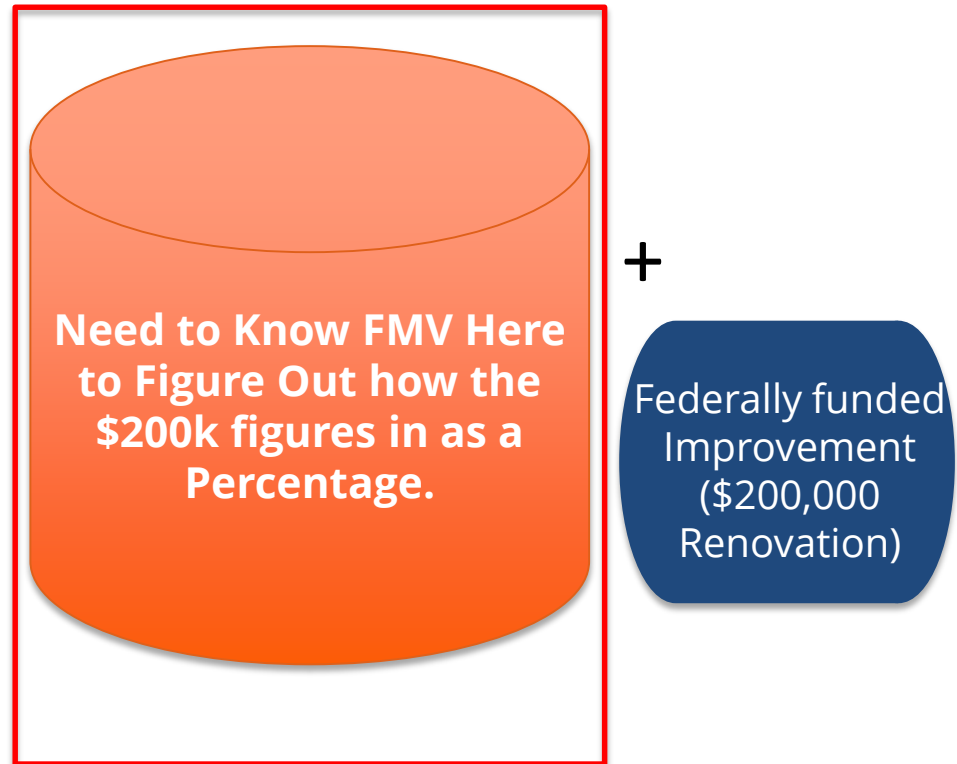
But Harder to Calculate



2. FEDERALLY FUNDED IMPROVEMENT

Need Appraisal Just Before the Improvement

Document contemporaneously and keep your documentation!



2. FEDERALLY FUNDED IMPROVEMENT

- Note on Leasehold Improvements:
 - If you improve leased property with federal funds, a federal interest is created in your leasehold interest.
 - Agencies will often require as part of a grant application for funds to improve leased property a “landlord letter of consent” that includes: (a) acknowledgment of the federal interest that will be created in the landlord’s property, and (b) walk-in rights for the agency if the grantee/lessee fails to make rent payments.
 - *Interesting Issue:*
 - Can the federal interest transcend the limitations of the your (the grantee’s) leasehold rights and attach to the underlying property?

III. FEDERAL CONTROL AND DISPOSITION RIGHTS

(Property Use, Management, and Disposition)

PROPERTY TRUST RELATIONSHIP

2 C.F.R. § 200.316 / 45 C.F.R. § 75.323 [Property trust relationship]:

Real property, equipment, and intangible property, that are acquired or improved with a Federal award must be held in trust by the [NFE] as trustee for the beneficiaries of the project or program under which the property was acquired or improved. The Federal awarding agency may require the [NFE] to record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with a Federal award and that use and disposition conditions apply to the property.

As trustee of property acquired or improved with a Federal award, the NFE has numerous responsibilities.

FEDERAL CONTROL AND DISPOSITION RIGHTS OUTLINE

A. Use Requirements

- Real Property
- Equipment

B. Management Requirements

- Real Property
- Equipment

C. Disposition Requirements

- Real Property
- Equipment

A. REAL PROPERTY USE

SUMMARY:

- Use for originally authorized purpose as long as needed for that purpose
- Do not dispose or encumber title

2 C.F.R. § 200.311(b) / 45 C.F.R. § 75.318(b)

A. REAL PROPERTY USE

(b) *Use.* Except as otherwise provided by Federal statutes or by the Federal awarding agency, real property will be used for the originally authorized purpose as long as needed for that purpose, during which time the non-Federal entity must not dispose of or encumber its title or other interests.

2 C.F.R. § 200.311(b) / 45 C.F.R. § 75.318(b)

- Simple and restrictive

A. EQUIPMENT USE

SUMMARY:

- Use in program/project for which it was acquired, as long as needed. If **excess capacity**, make available for others in following order:
 - (1) Program/project funded from same Federal awarding agency
 - (2) Program/project funded from other Federal awarding agencies
 - (3) Non-federally funded work but charge a user fee.
- When **no longer needed for original program/project**, make available in following order:
 - (1) Program/project funded from same Federal awarding agency
 - (2) Program/project funded from other Federal awarding agencies
 - *THEN SEE DISPOSITION*

2 C.F.R. § 200.313(c)(1)-(2) / 45 C.F.R. § 75.320(c)(1)-(2)

A. EQUIPMENT USE (EXCESS CAPACITY)

(c) Use. (1) Equipment must be used by the non-Federal entity in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by the Federal award, and the non-Federal entity must not encumber the property without prior approval of the Federal awarding agency. When no longer needed for the original program or project, the equipment may be used in other activities supported by the Federal awarding agency, in the following order of priority:

(i) Activities under a Federal award from the Federal awarding agency which funded the original program or project, then

(ii) Activities under Federal awards from other Federal awarding agencies. This includes consolidated equipment for information technology systems.

(2) During the time that equipment is used on the project or program for which it was acquired, the non-Federal entity must also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, provided that such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use must be given to other programs or projects supported by Federal awarding agency that financed the equipment and second preference must be given to programs or projects under Federal awards from other Federal awarding agencies. Use for non-federally-funded programs or projects is also permissible. User fees should be considered if appropriate.

2 C.F.R. § 200.313(c)(1)-(2) / 45 C.F.R. § 75.320(c)(1)-(2)

A. EQUIPMENT USE (NO LONGER NEED FOR ORIGINAL PURPOSE)

(c) *Use.* (1) Equipment must be used by the non-Federal entity in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by the Federal award, and the non-Federal entity must not encumber the property without prior approval of the Federal awarding agency. When no longer needed for the original program or project, the equipment may be used in other activities supported by the Federal awarding agency, in the following order of priority:

(i) Activities under a Federal award from the Federal awarding agency which funded the original program or project, then

(ii) Activities under Federal awards from other Federal awarding agencies. This includes consolidated equipment for information technology systems.

(2) During the time that equipment is used on the project or program for which it was acquired, the non-Federal entity must also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, provided that such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use must be given to other programs or projects supported by Federal awarding agency that financed the equipment and second preference must be given to programs or projects under Federal awards from other Federal awarding agencies. Use for non-federally-funded programs or projects is also permissible. User fees should be considered if appropriate.

2 C.F.R. § 200.313(c)(1)-(2) / 45 C.F.R. § 75.320(c)(1)-(2)

B. REAL PROPERTY MANAGEMENT

SUMMARY:

- Submit reports at least annually on status of real property unless Federal interest extends 15 years or longer
- If Federal interest extends 15 years or longer, the Federal awarding agency (or pass-through entity) may require the NFE to report at various multi-year frequencies

2 C.F.R. § 200.329 / 45 C.F.R. § 75.343

B. REAL PROPERTY MANAGEMENT

§200.329 Reporting on real property.

The Federal awarding agency or pass-through entity must require a non-Federal entity to submit reports at least annually on the status of real property in which the Federal Government retains an interest, unless the Federal interest in the real property extends 15 years or longer. In those instances where the Federal interest attached is for a period of 15 years or more, the Federal awarding agency or pass-through entity, at its option, may require the non-Federal entity to report at various multi-year frequencies (e.g., every two years or every three years, not to exceed a five-year reporting period; or a Federal awarding agency or pass-through entity may require annual reporting for the first three years of a Federal award and thereafter require reporting every five years).

2 C.F.R. § 200.329 / 45 C.F.R. § 75.343

B. EQUIPMENT MANAGEMENT

SUMMARY:

- Records
 - Maintain property records, which include information such as source of funding and percentage of Federal participation in the project costs for the Federal award under which the property was acquired
- Management
 - Take physical inventory of property and reconcile results with property records
 - Develop a control system to prevent loss or damage
 - Develop maintenance procedures to keep property in good condition

2 C.F.R. § 200.313(d) / 45 C.F.R. § 75.320(d)

B. EQUIPMENT MANAGEMENT

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part under a Federal award, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of funding for the property (including the FAIN), who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the project costs for the Federal award under which the property was acquired, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft must be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the non-Federal entity is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

2 C.F.R. § 200.313(d) / 45 C.F.R. § 75.320(d)

B. MANAGEMENT REQUIREMENTS: A NOTE ON FEDERAL INTEREST

- Grantees are sometimes required to file a Notice of Federal Interest (NOFI) on property as to which there exists a federal interest
- A NOFI functions as a lien on the property to protect the Federal Government's interest

Note: Federal interest may exist even absent a requirement to file a NOFI

C. REAL PROPERTY DISPOSITION

SUMMARY:

When real property is no longer needed for originally authorized purpose, NFE must obtain disposition instructions which must provide for one of three alternatives:

1. Retain title and compensate Federal awarding agency
2. Sell and compensate Federal awarding agency
3. Transfer title to Federal awarding agency or other approved third party, and compensate NFE

2 C.F.R. § 200.311(c) / 45 C.F.R. § 75.318(c)

C. REAL PROPERTY DISPOSITION

(c) Disposition. When real property is no longer needed for the originally authorized purpose, the non-Federal entity must obtain disposition instructions from the Federal awarding agency or pass-through entity. The instructions must provide for one of the following alternatives:

(1) Retain title after compensating the Federal awarding agency. The amount paid to the Federal awarding agency will be computed by applying the Federal awarding agency's percentage of participation in the cost of the original purchase (and costs of any improvements) to the fair market value of the property. However, in those situations where the non-Federal entity is disposing of real property acquired or improved with a Federal award and acquiring replacement real property under the same Federal award, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) Sell the property and compensate the Federal awarding agency. The amount due to the Federal awarding agency will be calculated by applying the Federal awarding agency's percentage of participation in the cost of the original purchase (and cost of any improvements) to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the Federal award has not been closed out, the net proceeds from sale may be offset against the original cost of the property. When the non-Federal entity is directed to sell property, sales procedures must be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) Transfer title to the Federal awarding agency or to a third party designated/approved by the Federal awarding agency. The non-Federal entity is entitled to be paid an amount calculated by applying the non-Federal entity's percentage of participation in the purchase of the real property (and cost of any improvements) to the current fair market value of the property.

2 C.F.R. § 200.311(c) / 45 C.F.R. § 75.318(c)

C. EQUIPMENT DISPOSITION

SUMMARY:

When equipment is no longer needed for original program/project or for other activities currently or previously funded by a Federal awarding agency, the NFE must request disposition instructions if required by terms/conditions of Federal award. Disposition occurs as follows:

1. If FMV is \$5,000 or less, no further obligation to Federal awarding agency
2. If FMV is more than \$5,000, the equipment may be retained by the NFE or sold, but the Federal awarding agency is entitled to compensation
3. NFE may transfer title to property to Federal Government or an eligible third party, but the NFE must be entitled to compensation

2 C.F.R. § 200.313(e) / 45 C.F.R. § 75.320(e)

C. EQUIPMENT DISPOSITION

(e) Disposition. When original or replacement equipment acquired under a Federal award is no longer needed for the original project or program or for other activities currently or previously supported by a Federal awarding agency, except as otherwise provided in Federal statutes, regulations, or Federal awarding agency disposition instructions, the non-Federal entity must request disposition instructions from the Federal awarding agency if required by the terms and conditions of the Federal award. Disposition of the equipment will be made as follows, in accordance with Federal awarding agency disposition instructions:

(1) Items of equipment with a current per unit fair market value of \$5,000 or less may be retained, sold or otherwise disposed of with no further obligation to the Federal awarding agency.

(2) Except as provided in §200.312 Federally-owned and exempt property, paragraph (b), or if the Federal awarding agency fails to provide requested disposition instructions within 120 days, items of equipment with a current per-unit fair-market value in excess of \$5,000 may be retained by the non-Federal entity or sold. The Federal awarding agency is entitled to an amount calculated by multiplying the current market value or proceeds from sale by the Federal awarding agency's percentage of participation in the cost of the original purchase. If the equipment is sold, the Federal awarding agency may permit the non-Federal entity to deduct and retain from the Federal share \$500 or ten percent of the proceeds, whichever is less, for its selling and handling expenses.

(3) The non-Federal entity may transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the non-Federal entity must be entitled to compensation for its attributable percentage of the current fair market value of the property.

(4) In cases where a non-Federal entity fails to take appropriate disposition actions, the Federal awarding agency may direct the non-Federal entity to take disposition actions.

2 C.F.R. § 200.313(e) / 45 C.F.R. § 75.320(e)

Remember: *Neukirchen* (7th Cir. 1995) (Fn. 4) ←

QUESTIONS?

Edward T. Waters, Esq.
Ewaters@ftlf.com

Scott Sheffler, Esq.
Ssheffler@ftlf.com

Jerry Bertrand
Jerrybertrand@gmail.com

Feldesman Tucker Leifer Fidell LLP

1129 20th Street N.W. – Suite 400

Washington, D.C. 20036

(202) 466-8960

www.ftlf.com

Learning.ftlf.com

COST SHARE / MATCH

FUNDAMENTAL CONCEPT

Cost share (also commonly referred to as “match”) is not bringing money to the table.

It is bringing “allowable costs” to the table.

BIG PICTURE

- Generally applies to programs where either a cost share requirement or federal share cap appears in the authorizing act.
- Government-wide standards governed by 2 C.F.R. § 200.306.
- Individual agencies tend to tweak these rules in their interpretation and implementation.
- Match often only factors in for programs where mandatory match exists. However (aside from research) “voluntary committed cost share” can favor into agency award decisions so long as stated in the FOA. § 200.306(a).

BASIC RULES

REMEMBER THAT BRINGING ALLOWABLE COSTS TO THE TABLE

To be eligible match, the cost share must:

- Be verifiable from the NFE's records
- No be including as match on any other award (can only use it once)
- Be necessary and reasonable for project accomplishment (*i.e.*, meet the first test of allowability)
- Be allowable under 2 C.F.R. Part 200, Subpart E (*i.e.*, again, be an allowable cost)
- Not be paid by the federal government under any other award, "except where the [f]ederal statute authorizing a program specifically provides that federal funds made available for such program can be applied to matching or cost sharing requirements of other [f]ederal programs." (Example: AmeriCorps funds can be matched with other program funds).
- Are included in the NFE's budget when the agency so requires
- Meet certain other standards of § 200.306 (discussed below).

§ 200.306(b).

WHAT CAN BE MATCH

Costs that can be match:

- Unrecovered Indirects – but requires prior approval of awarding agency (commonly approved). § 200.306(c).
- Typical operating costs (subject to specific valuation standards)
- Volunteer services.
- Either depreciation or, in certain cases, the equity value of real property.

PERSONAL SERVICES VALUATION

- Services of volunteers:

Value at rate paid for similar work by the NFE. If NFE has similar personnel on staff, value at salary/fringe value of such personnel. If NFE does not, value at rates paid for similar employees in the local labor market. § 200.306(e).

- Services of individuals furnished by third party entity:

When furnished to provide services consistent with normal job duties, value at individual's regular rate of compensation by his/her employer (salary/fringes) plus allocable overhead. § 200.306(f).

TANGIBLE PROPERTY VALUATION

- Supplies:
 - Value at FMV at time of donation. § 200.306(g).
- Equipment and Real Property:
 - If purpose of award is acquisition of such things, full value of property may be charged. § 200.306(h)(1).
 - If purpose of award is other than the acquisition of such things, can only treat depreciation value as match. Notwithstanding the general rule, with prior approval, may treat fair rental value as match for use of real property. § 200.306(h)(2).
- In all cases of third-party in-kind contributions must document the fair market value of the goods or services.

QUESTIONS?

Edward T. Waters, Esq.
Ewaters@ftlf.com

Scott Sheffler, Esq.
Ssheffler@ftlf.com

Jerry Bertrand
Jerrybertrand@gmail.com

Feldesman Tucker Leifer Fidell LLP

1129 20th Street N.W. – Suite 400

Washington, D.C. 20036

(202) 466-8960

www.ftlf.com

Learning.ftlf.com

FEDERAL FUNDING ACADEMY

Day 3

Scott S. Sheffler
Edward T. Waters
Jerry Bertrand

August 28, 2020

HOT TOPICS IN GRANT MANAGEMENT (BREAKOUT SESSIONS)

BREAKOUT SESSIONS

- CARES Act
- Paycheck Protection Program
- Prior Approvals
- Social Media Considerations

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CONFLICT OF INTEREST & STANDARDS OF CONDUCT

AGENDA

- I. Define Conflict of Interest
- II. Review COI in Grant Law
- III. COI Compliance and Enforcement

Defining Conflict of Interest

Not limited to grant law application



GENERAL CONFLICT OF INTEREST DEFINITION

- There is not one definition of conflict of interest. It is important to refer to the relevant standards of conduct for the grants or situation at issue.



DICTIONARY DEFINITION

- A conflict of interest arises when a person has two duties that conflict, or, more specifically, Black's Law Dictionary defines it as "a real or seeming incompatibility between one's private interests and one's public or fiduciary duties."
- In the organization context, for example, a conflict of interest exists if an employee has a direct or indirect pecuniary or personal interest in a decision being made that needs to be made objectively and in the best interests of only the organization.

Black Law's Dictionary (9th. Ed.).

EXAMPLES

- Nepotism
 - The practice among those with power or influence of favoring relatives or friends, especially by giving them jobs.
 - The practice of doing favors for family members or friends in connection with the organization.
- Self-Dealing
 - When someone in a position of power or responsibility has an outside conflicting interest and acts on their own behalf rather than the interest of the grantee.

COI Grant Law

Issued by different funding agencies



AGENCIES HAVE THEIR OWN REGULATIONS

- There is not one regulation for handling conflict of interest for your grants. It is important to refer to the relevant standards of conduct for the specific grants or situation at issue.
- We will focus by way of example on the materials from the Department of Interior and Department of Health and Human Services Health Resource Service Administration.
- We also provide links for comparison to the EPA, NIH, NSF, and HUD.



UNIFORM GUIDANCE

2 C.F.R. § 200.112 Conflict of interest.

The Federal awarding agency must establish conflict of interest policies for Federal awards. The non-Federal entity must disclose in writing any potential conflict of interest to the Federal awarding agency or pass-through entity in accordance with applicable Federal awarding agency policy. But, so far, only some agencies have policies governing disclosure of actual and COI Policy by applicants for, and recipients of, federal financial assistance awards.



DOI IMPLEMENTED UG COI REQUIREMENT

Financial Assistance Interior Regulation 2 CFR Part 1402 –

First review the handout of the FAIR requirements.

<https://www.govinfo.gov/content/pkg/FR-2019-08-30/pdf/2019-18650.pdf>.

(b) Notification.

(1)must disclose in writing any conflict of interest to the DOI awarding agency or pass-through entity ...

(2) must establish internal controls that include, at a minimum, procedures to identify, disclose, and mitigate or eliminate identified conflicts of interest....

(d) Review procedures. DOI will examine each conflict of interest disclosure[and] determine whether a significant potential conflict exists and, if it does, develop an appropriate means for resolving it.

(e)Failure to make required disclosures may result in any of the remedies described in 2 CFR 200.338...

HHS IMPLEMENTED UG COI REQUIREMENT

Review 45 CFR §75.112 - UG implemented by HHS shorter with additional materials issued by sub-agencies.

- (a) ...The non-Federal entity must disclose in writing any potential conflict of interest to the respective HHS awarding agency or pass-through entity in accordance with applicable HHS awarding agency's policy.
-
- (b) Agencies with Public Health Service (PHS) funded research will ensure that any conflict of interest policies are aligned with the requirements of 42 CFR part 50, subpart F.

HRSA IMPLEMENTED UG COI REQUIREMENT

Review HRSA COI Policy Together

https://www.hrsa.gov/sites/default/files/hrsa/grants/manage/HRSA_COI_Policy.pdf

- In section 5.0 HRSA specifies Disclosure Requirements by Recipient Type
- In section 6.0 HRSA specifies Timing of COI Disclosures
- HRSA specifies a template and content for disclosures
- HRSA sets an expectation to provide the grantee a response to a disclosure in 30 days, when possible.

HHS ACF: HEAD START PROGRAM ADDITIONAL STATUTORY CONFLICT OF INTEREST REQUIREMENTS, NOT JUST UG

Office of Head Start FAQ

<https://eclkc.ohs.acf.hhs.gov/organizational-leadership/article/head-start-program-governance-frequently-asked-questions-faqs>

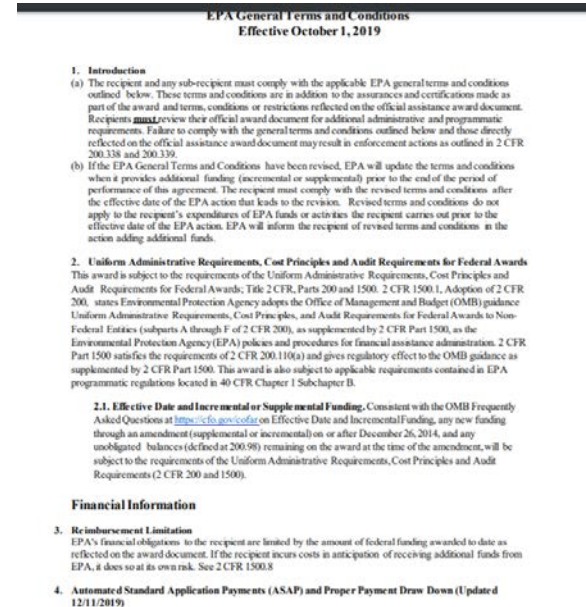
- Section 642(c)(1)(C) and (D) of the Head Start Act defines conflict of interest for governing body members. 45 CFR §1302.1, reaffirms this prohibition on conflict of interest. <https://eclkc.ohs.acf.hhs.gov/sites/default/files/pdf/hs-program-governance-reference-book.pdf>
- What constitutes a conflict of interest for Policy Council members? Policy Council and policy committee, 45 CFR §1301.3(b), states: (2) The program must ensure members of the policy council, and of the policy committee at the delegate level, do not have a conflict of interest pursuant to sections 642(c)(2)(C) and 642(c)(3)(B) of the Act. Staff may not serve on the policy council or policy committee at the delegate level except parents who occasionally substitute as staff.

EPA IMPLEMENTED UG REQUIREMENT: CHECK YOUR GENERAL T&C MORE LANGUAGE

EPA's Financial Assistance COI Policy

- [1.0 Purpose](#)
- [2.0 Applicability, Effective Date, and Relationship to other Policies](#)
- [3.0 Definitions](#)
- [4.0 Situations Requiring Disclosure](#)
- [5.0 Disclosure Requirements by Applicant/Recipient Type](#)
- [6.0 Disclosure Requirements](#)
- [7.0 Timing of Disclosures](#)
- [8.0 Content of Disclosures](#)
- [9.0 EPA Actions](#)

EPA General Terms & Conditions include COI terms (check your T&C as well)



Page 1 of 25

https://www.epa.gov/sites/production/files/2019-09/documents/fy_2020_epa_general_terms_and_conditions_effective_october_1_2019.pdf

NSF & NIH INVOLVE COMPARABLE RESEARCH ISSUES

[NSF Grant Policy Manual 05-131_5. Grantee
Standards](#)

[Promoting Objectivity in Research
42 CFR Part 50 Subpart F](#)

COI Compliance

Discovery, Disclosure, Monitoring



COI POLICY

- In a nutshell: Definitions, disclosure, disposition, documentation, discipline. The policy should answer:
- *Who Is Covered by this Policy?*
- *What Is the Meaning of Terms Defined in this Policy?*
- *What Types of Conflicts of Interest Are Prohibited by this Policy?*
- *Are There Exceptions to What Is Considered a Conflict of Interest under this Policy?*
- *What Information Must Be Disclosed under this Policy and How Should It Be Disclosed?*
- *How Are Disclosures and COI to Be Handled under this Policy?*
- *What Are the Consequences of Violating this Policy?*

Consider specifying examples of covered conduct for the board and the staff separately.

COI POLICY

- Sample language: The standard of behavior at the Organization is that all staff, volunteers, and board members scrupulously avoid conflicts of interest between the interests of the Organization on one hand, and personal, professional, and business interests on the other. This includes avoiding potential and actual conflicts of interest, as well as perceptions of conflicts of interest.

COI CAN LEAVE YOU VULNERABLE TO FRAUD

- A conflict of interest can be prevented, managed, or discovered after the fact.
- Whistleblowers sometimes report COI in addition to other allegations of misconduct like embezzlement, theft, or kickbacks.

INVESTIGATING CONFLICT OF INTEREST

- Most COI investigations have one of two factors:
 - Board Member/Employee has an undisclosed personal financial interest.
 - An employee accepts free gifts and free products from a training and development company and then recommends the purchase of these products without comparing them to comparable products from other vendors.
 - Board Member/Employee has a material familial/or other relationship interest.
 - An employee reports to a supervisor who is a relative or close friend and has control over their job responsibilities, salary, and promotions.

DETECTION & PREVENTION

Train employees regularly on your up-to-date policies and procedures.

Create two-step approval processes for use of grant funds, choosing vendors, establishing business relationships, hiring, and promotion.

Separate duties and document more clearly separation of responsibilities among staff and executives.

Provide examples of potential conflict of interest and encourage reporting of any concerns or questions.

Take action when violations of your policies and procedures may have occurred.

Do not accept incomplete responses or of lack of disclosures.

Explain to individuals the legal ramifications of a grantee failings to comply with these COI standards.

COMPLIANCE: WHAT TO LOOK FOR

Red Flags

- The typical issues in this area include:
- Less than Arms-Length Transactions: purchasing goods or services or hiring an individual from a related party such as a family member or a business associated with an employee of a grantee.
- Sub grant award decisions and vendor selections must be accomplished using a fair and transparent process free of undue influence. Most procurements require full & open competition.
- Consultants can play an important role in programs, however, their use requires a fair selection process, reasonable pay rates, and specific verifiable work product.

CASE EXAMPLE: CLINIC CEO CHARGED

Jonathan Wade Dunning

The judge ordered Dunning to pay \$13.5 million in restitution to the U.S. Department of Health and Human Services, the Health Resources and Services Administration, the Birmingham Financial Federal Credit Union, and the non-profit health clinics Birmingham Health Care and Central Alabama Comprehensive Health. Jonathan Dunning formed Synergy Entities so he could bleed money away from non-profit clinics meant to provide medical care and divert millions of dollars into his personal accounts and businesses.

He managed two FQHCs as CEO.

Over the course of years, Dunning used his position of power with the HRSA funded health clinics to get others to agree for the nonprofit to conduct business with his for-profit Synergy Entities through consulting contracts, real estate leases, and other means.

CASE EXAMPLE: HUD ENFORCEMENT HAS INCLUDED FAILURE TO MITIGATE

Identify, disclose, and manage all real and apparent conflicts of interest through elimination, mitigation, or waivers.

24 CFR § 570.611 - Conflict of interest.

- Example of a Procurement Conflict of Interest- A Neighborhood Stabilization Program (NSP) grantee funded a subrecipient to rehabilitate 28 homes.
- The subrecipient failed to report a conflict-of-interest situation when it entered into two contracts with a construction company that was 50 percent owned by the NSP subrecipient's executive director.
- Although the subrecipient stated that it had disclosed all relationships to the grantee in the proposal process, the grantee overlooked HUD's conflict-of-interest requirements and the requirements found in the agreement. Because the grantee approved the proposal and awarded the agreement, the subrecipient believed that there were no conflict-of-interest issues.
- The grantee should have flagged the conflict of interest situation during its risk assessment of the subrecipient and prohibited the use of the executive director's construction firm.

EXAMPLES FROM AUDITS & INVESTIGATIONS

Grantee buys something unnecessary or overpriced from a board member's business (have you documented consideration of alternatives and justification?)

Grantee hires an unqualified, overpaid family member of the executive director (is the positions/consulting/work actually needed at all, are they qualified, is the compensation FMV?)

Be transparent. If major purchases (for either goods or services) are involved, obtain competitive written bids to ensure that prices and product are comparable if a board member stands to benefit (financially) from a particular decision.

A board member of an environmental organization proposed having her bank offer an affinity card to members. Before making any decisions, the staff invited two other banks to submit proposals for such an arrangement.

THE FIVE “D” COI POLICY

1. Definitions
2. Disclosure
3. Disposition
4. Documentation
5. Disciplinary Action

QUESTIONS?

Edward T. Waters, Esq.
Ewaters@ftlf.com

Scott Sheffler, Esq.
Ssheffler@ftlf.com

Jerry Bertrand
Jerrybertrand@gmail.com

Feldesman Tucker Leifer Fidell LLP

1129 20th Street N.W. – Suite 400

Washington, D.C. 20036

(202) 466-8960

www.ftlf.com

Learning.ftlf.com

CHANGES TO THE UNIFORM GUIDANCE 2 CFR PART 200

POLLING QUESTION #9

Have you read the federal register notice implementing the changes?

a) Yes

b) No

KEY DOCUMENTS

- Proposed Rule Issued January 22, 2020:
<https://www.federalregister.gov/documents/2020/01/22/2019-28524/guidance-for-grants-and-agreements>
- Final Rule (Guidance) Issued August 13, 2020:
<https://www.federalregister.gov/documents/2020/08/13/2020-17468/guidance-for-grants-and-agreements>

SUBSTANCE OF PROPOSED CHANGES

1. Effective Dates
2. Treatment of Nonbinding Guidance
3. Performance-based Awards/Evaluation
4. Budget Periods and Termination Standards
5. Subaward Matters
6. Indirect Cost Rate Matters
7. Procurement Matters
8. FAPIIS Data on Parents and Subsidiaries
9. Miscellaneous

1. Effective Dates

KEY DATES

Uniform Guidance changes effective **November 12, 2020**.

Some caveats:

- Sec. 889 Requirements (“Huawei Ban”) effective immediately (Aug. 13, 2020, per statute).
- Termination section (§ 200.340) changes effective immediately.
- To the extent that the revisions may impact negotiated indirect cost rate agreements (“NICRAs”) (or underlying costs), they will only go into effect for future NICRAs.
- HHS will have to implement in 45 C.F.R. Part 75.

2. Treatment of Nonbinding Guidance

BACKGROUND

- E.O. 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents (Oct. 9, 2019), Goals:
 - “Agencies may clarify existing obligations through non-binding guidance documents, which the APA exempts from notice-and-comment requirements. Yet agencies have sometimes used this authority inappropriately in attempts to regulate the public without following the rulemaking procedures of the APA. Even when accompanied by a disclaimer that it is non-binding, a guidance document issued by an agency may carry the implicit threat of enforcement action if the regulated public does not comply. Moreover, the public frequently has insufficient notice of guidance documents, which are not always published in the Federal Register or distributed to all regulated parties.”
 - “Agencies may impose legally binding requirements on the public only through regulations and on parties on a case-by-case basis through adjudications, and only after appropriate process, except as authorized by law [or as incorporated into a contract.](#)”
- Basic Framework:
 - Guidance documents must be referred to as nonbinding except as authorized by law or incorporated into a contract.
 - Each agency to develop searchable guidance website.
 - Each agency to promulgate formal procedures for issuing new guidance, including procedures for the public to petition revocation of guidance.

BACKGROUND

- Significant Guidance Documents:
 - Include guidance documents that “materially alter . . . the rights and obligations of [grant] recipients . . .”
 - May only be issued after 30 days’ public notice and opportunity to comment and OIRA review (in the same manner as “significant regulatory actions”).
- Related E.O. 13892, Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication (Oct. 9, 2019)
- OMB Memo 20-02 Further Implements E.O. 13891:
 - Agency searchable websites must be established by Feb. 28, 2020
 - Any document not on the portal by June 27, 2020 can only be implemented by following E.O. 13891 procedures
 - Agency “guidance issuance” regs must be implemented by Apr. 28, 2020
 - Reiterates requirements for notice period for Significant Guidance Documents.

PROPOSED UG RULE (JANUARY 2020)

- The proposed UG Rule called for including a limitation in the required contents of a Notice of Award. Specifically, it called for § 200.211(e) to state:

Prohibition of Including References to Non-Binding Guidance Documents. Federal awarding agencies are prohibited from including references to non-binding guidance in the terms and conditions of award. As described in Executive Order (E.O.) 13891, references to non-binding guidance include references to promising practices and other documents that the inclusion of by reference carries the implicit threat of enforcement action. These resources may be shared outside of the terms and conditions for reference purposes.

FINAL UG RULE (AUGUST 13, 2020)

- Implemented *instead* as a legal standard at 2 C.F.R. § 200.105, Effect on other issuances:

“(b) Imposition of requirements on recipients. Agencies may impose legally binding requirements on recipients only through the notice and public comment process through an approved agency process, including as authorized by this part, other statutes or regulations, or as incorporated into the terms of a Federal award.”

- The preamble to the final rule suggests final approach intended to be more flexible for agencies:

“The proposed language for [200.211](e) was revised and moved to § 200.105(b) within the guidance. Many comments received suggested revisions that would make the language more prescriptive. Title 2 C.F.R. was written as guidance for a large array of users. If the language is too prescriptive, it doesn’t provide sufficient flexibility for use by the large array of users. . .” 85 Fed. Reg. 49509.

“To support implementation of E.O. 13892 . . . and to prohibit Federal awarding agencies from including references to non-authoritative guidance in the terms and conditions of Federal awards, OMB proposed changes . . . intended to reduce recipient burden and prevent Federal awarding agencies from imposing non-binding guidance as award requirements for recipients that had not gone through appropriate public notice and comment. . . . Some commenters suggested for this requirement to be moved within the guidance to 2 C.F.R. § 200.105(b) . . . For clarity of the policy intent. OMB concurred with the commenter’s suggestion and moved the requirement accordingly.” *Id.* at 49511.

FINAL UG RULE

- Result:
 - Regulatory language in the UG to strengthen transparency and clarity of terms.
 - Leads the analysis back to E.O. 13891, E.O. 13892 and OMB Memo 20-02.
 - At a minimum, agencies must establish the E.O. 13891 websites, designate “binding” guidance, and reference that guidance (or repository) in the award document.
 - Significant Guidance Documents require notice and comment.

3. Performance-Based Focus

PERFORMANCE METRICS ALIGNED WITH PROGRAM GOALS AND OBJECTIVES

- § 200.202: Program planning and design
 - Federal awarding agency must establish program goals, objectives, and indicators at the assistance listing level to the extent permitted by law. Performance metrics must align with the Congressional intent of the program as well as agency strategic goals and priorities.
 - The assistance listing must publish program goals, objectives and metrics for measuring performance against said goals and objectives.
- § 200.208: Specific conditions
 - Federal awarding agency must include clear performance expectations of recipients as required in 200.301.
- § 200.211(a): Information contained in a Federal award (*Federal award performance goals*)
 - The Federal awarding agency must specify in the terms and conditions of the Federal award how performance will be assessed, including the timing and scope of expected performance by the non-Federal entity as related to the outcomes intended to be achieved by the program.
- § 200.301: Performance measurement
 - The Federal awarding agency must measure the recipient's performance in a way that will help the Federal awarding agencies and non-Federal entities to achieve program goals and objectives, share lessons learned, and foster adoption of promising practices. The Federal awarding agency should provide recipients with clear performance goals, indicators, and milestones as described in § 200.211.

See 85 Fed. Reg. 49508-49509, 49539, 49541-49542, 49544 (Aug. 13, 2020).

PERFORMANCE-BASED PRE-AWARD MERIT AND RISK REVIEW

- § 200.205: Federal awarding agency review of merit proposals
 - For discretionary awards, unless prohibited by statute, the Federal awarding agency must implement a merit review process to select recipients most likely to be successful in delivering results based on the program objectives adopted pursuant to § 200.202.
- § 200.206(c): Federal awarding agency review of risk posed by applicants (Risk-based requirements adjustment)
 - The Federal awarding agency may adjust [statutory, regulatory or other] requirements when a risk evaluation indicates that it may be merited either pre-award or post-award.
 - PTEs may adjust conditions on subrecipients as well per § 200.208(b).

See 85 Fed. Reg. 49509, 49540-49541 (Aug. 13, 2020).

PERFORMANCE-BASED POST-AWARD REPORTING

- § 200.329(b): Monitoring and reporting program performance (Reporting program performance)
 - The Federal awarding agency must require recipients to submit performance reports using OMB-approved common information collections that relate financial data and accomplishments to the award's performance goals and objectives.
 - The Federal awarding agency (or PTE) must request that recipients submit performance reports at least annually but not more frequently than quarterly (with exceptions); subrecipients' final performance reports will be due no later than 90 days after the end of the period of performance (120 days for PTEs).

See 85 Fed. Reg. 49510, 49556 (Aug. 13, 2020).

4. Budget Periods and Termination

BACKGROUND

TPPP CASES

- Policy change in Teen Pregnancy Prevention Program led to cessation of awards after the end of a budget period that was in the middle of many grantees' project periods (five-year periods of performance).
- The award cessation was due to a policy change and not any compliance or performance failure on the part of the recipients.
- A number of grantees successfully sued, using the definitions of "period of performance" and "project period" in 45 C.F.R. Part 75 and the limited bases available for termination under 45 C.F.R. § 75.372 to argue the terminations were unlawful.
- HHS argued its longstanding "project period"/"budget period" distinction to no avail.
- Exemplary Case: *Policy and Research, LLC v. U.S. Department of Health and Human Services*, 313 F. Supp. 3d 62 (D.D.C., May 11, 2018).

BUDGET PERIOD CLARIFICATION

(ADOPTED ESSENTIALLY AS PROPOSED IN JANUARY)

Clarifying and conforming edits made throughout the Uniform Guidance to more clearly codify the “project period” and “budget period” concepts:

- New Definition (§ 200.1):

“Budget period means the time interval from the start date of a funded portion of an award to the end date of that funded portion during which recipients are authorized to expend the funds awarded, including any funds carried forward or other revisions pursuant to § 200.308.”

- “Period of performance” definition (formerly § 200.77) amended to state:

“Period of performance means the total estimated time interval between the start of an initial Federal award and the planned end date, which may include one or more funded portions, or budget periods. Identification of the period of performance in the Federal award per § 200.211(b)(5) does not commit the awarding agency to fund the award beyond the currently approved budget period.”

- New language in § 200.211 (formerly § 200.210):

“Future budget periods. If it is anticipated that the period of performance will include multiple budget periods, the Federal awarding agency must indicate that subsequent budget periods are subject to the availability of funds, program authority, satisfactory performance, and compliance with the terms and conditions of the Federal award.”

BUDGET PERIOD CLARIFICATION

(ADOPTED ESSENTIALLY AS PROPOSED IN JAN)

Clarifying and conforming edits continued:

- “Period of performance” (§ 200.309) changed to “Modifications to Period of Performance.” The prior language had operated as a “period of availability” definition/concept. The new language provides:

“If a Federal awarding agency or pass-through entity approves an extension, or if a recipient extends under § 200.308(e)(2), the Period of Performance will be amended to end at the completion of the extension. If a termination occurs, the Period of Performance will be amended to end upon the effective date of termination. If a renewal award is issued, a distinct Period of Performance will begin.”
- New language added to § 200.403 (Factors affecting allowability of costs), stating:

“(h) Costs must be incurred during the approved budget period. The Federal awarding agency is authorized, at its discretion, to waive prior written approvals to carry forward unobligated balances to subsequent budget periods pursuant to § 200.308(e).”
- Subaward agreements to now provide “Budget Period” start and end date, as indicated in a new § 200.332(a)(1)(vi).

REVISED TERMINATION LANGUAGE

- Termination Section (§ 200.340, formerly § 200.339) revised (as proposed in January 2020) as follows:

“The Federal award may be terminated in whole or in part as follows: . . . (2) By the Federal awarding agency or pass-through entity ~~for cause~~, to the greatest extent authorized by law, if an award no longer effectuates the program goals or agency priorities.” *(This is the biggest item.)*

- Also added:

“(5) By the Federal awarding agency or pass-through entity pursuant to termination provisions included in the Federal award.”

- Termination definition also amended (as proposed in January 2020):

“*Termination* means the ending of a Federal award, in whole or in part at any time prior to the planned end of period of performance. A lack of available funds is not a termination.

**Note: Blue language is the new language, orange “strikethrough” language was deleted.*

POLLING QUESTION #10

Have you found the Uniform Guidance to be an improvement over the prior circulars?

- a. Yes
- b. No
- c. About the same

5. Subaward Matters

INDIRECT RATE NEGOTIATION

Clarification of Pass-through Entity Responsibilities re: Indirect Rate Determination for Subrecipients:

Required information [in a subaward agreement] includes:

- (4)(i) An approved federally recognized indirect cost rate between the subrecipient and the Federal Government. If no approved rate exists, the pass-through entity *must* determine the appropriate rate in collaboration with the subrecipient, which is either:
 - (A) The negotiated indirect cost rate between the pass-through entity and the subrecipient; which can be based on a prior negotiated rate between a different PTE and the same subrecipient. If basing the rate on a previously negotiated rate, the pass-through entity is not required to collect information justifying this rate, but may elect to do so; [or]
 - (B) The *de minimis* indirect cost rate.
- (ii) The pass-through entity must not require use of a *de minimis* indirect cost rate if the subrecipient has a Federally approved rate. Subrecipient can elect to use the cost allocation method to account for indirect costs in accordance with § 200.405(d).

**Note that, with renumbering, the contractor-subrecipient distinction is now at § 200.331 and the subaward management requirements applicable to passthrough entities are now at § 200.332.*

AUDIT-RELATED RESPONSIBILITIES

- Clarifies at § 200.331(d)(4) that PTE responsibilities with respect to Single Audit Act audit report review are limited to review of findings specifically related to the subaward.
- Such responsibilities do not extend to “cross-cutting findings.” The cognizant oversight agency for the subrecipient is to address such findings.
- Practical consideration: If an organization-wide finding pertains to activities that might impact the subaward, the PTE should still take steps to ensure proper performance of the subaward.

6. *De Minimis* Indirect Cost Rates

DE MINIMIS INDIRECT RATE

2 C.F.R. § 200.414(f):

“In addition to the procedures outlined in the appendices in paragraph (e) of this section, any non-Federal entity that does not have a current negotiated (including provisional) rate ~~that has never received a negotiated indirect cost rate~~, except for those non-Federal entities described in Appendix VII to Part 200, paragraph D.1.b, may elect to charge a *de minimis* rate of 10% of modified total direct costs (MTDC) which may be used indefinitely. No documentation is required to justify the 10% *de minimis* indirect cost rate. As described in § 200.403 Factors affecting allowability of costs, costs must be consistently charged as either indirect or direct costs, but may not be double charged or inconsistently charged as both. If chosen, this methodology once elected must be used consistently for all Federal awards until such time as a non-Federal entity chooses to negotiate for a rate, which the non-Federal entity may apply to do at any time.”

DE MINIMIS INDIRECT RATE

Key Takeaways:

- The expansion of availability of the *de minimis* rate is less robust than as proposed in January. The proposed language appeared intended to open it to “any entity.”
- The language regarding “no documentation” is similar to the proposed rule, though different in exact wording. The preamble to the final rule fails to offer much clarity on intent, seemingly avoiding the most critical question:

“Another revision adds language to 2 C.F.R. 200.414(f) to clarify that when a non-Federal entity is using the *de minimis* rate for its Federal grants, it is not required to provide proof of costs that are covered under that rate. The 10 percent *de minimis* rate was designed to reduce burden for small non-Federal entities and the requirement to document the actual indirect costs would eliminate the benefits of using the *de minimis* rate. . .”

“OMB received several comments that were concerned with awarding a *de minimis* rate that is higher than a [NICRA]. OMB concurs with the concerns regarding applying a higher *de minimis* rate in cases where a NICRA is lower than 10 percent. However, the regulation states in paragraph (c)(1) that Federal agencies must honor negotiated rates. . .”

“Further, commenters were concerned with a lack of required documentation. OMB concurs with concerns that the language implies source documents rather than the indirect cost rate agreement and altered the language accordingly. . .” 85 Fed. Reg. 49510.

RATE PUBLICATION

§ 200.414(h) added:

The federally negotiated indirect rate, distribution base, and rate type for a non-Federal entity (except for the Indian tribes or tribal organizations, as defined in the Indian Self Determination, Education and Assistance Act, 25 U.S.C. 450b(1)) must be available publicly on an OMB-designated Federal website.

Slightly Narrower than Jan. 2020 Proposed Rule:

Proposed rule stated: “All rate agreements from non-Federal entities must be available publicly on an OMB-Designated Federal website.”

POLLING QUESTION #11

What organizational initiatives are you considering in light of the changes?

- a. Increase our MPT
- b. Use the *de minimis* rate
- c. Review our IT contracts (and systems with ongoing contracts) for potentially offending Huawei and ZTE Corporation items as “substantial components”
- d. Other
- e. Wait and see – we are super busy simply dealing with COVID health and/or economic impacts

7. Procurement Matters

CLARIFYING AND CONFORMING AMENDMENTS THROUGHOUT § 200.320

Clarifying and conforming edits made to § 200.320:

- Adopting increased thresholds reflected by OMB Memo 18-18 (Jun. 20, 2018) for simplified acquisition threshold and micro-purchase threshold, and rescinding Memo 18-18. One big change:
 - Micropurchase thresholds up to \$50k possible with clean audits (or if meet other, similar criteria). Must annually evaluate and meet criteria.
 - No agency approval required.
 - With approval by “cognizant agency for indirect costs” could, theoretically, go above \$50k.
- Reordering to group informal methods (micro-purchases and small purchases) and formal methods (sealed bids and proposals).
- Softening micro-purchase language about distribution of purchases from “*must* distribute micro-purchases equitably among qualified suppliers” to “*should* distribute.”
- Clarification that micro-purchases may be “sole sourced” by adding to the list of noncompetitive procurement justifications. This is not a substantive policy change, just clarifying language.

SOFT DOMESTIC PREFERENCE

NEW § 200.322

§ 200.322 Domestic preferences for procurements:

- (a) As appropriate and to the extent consistent with law, the non-Federal entity *should*, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products). The requirements of this section must be included in all subawards including all contracts and purchase orders for work or products under this award.
- (b) For purposes of this section:
- (1) “Produced in the United States” means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
 - (2) “Manufactured products” means items and construction materials composed in whole or in part of nonferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.

“NEVER CONTRACT WITH THE ENEMY”

NEW § 200.215 AND 2 C.F.R. PART 183

§ 200.215 Never contract with the enemy

Federal awarding agencies and non-Federal entities are subject to the regulations implementing Never Contract with the Enemy in 2 C.F.R. part 183. These regulations affect grants and cooperative agreements that are expected to exceed \$50,000, are performed outside the United States, including U.S. territories, *and* are in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

New 2 C.F.R. Part 183

- Implements, Title VIII, Subtitle E of the 2015 National Defense Authorization Act (NDAA) (Pub. L. 113–291).
- Must exercise “due diligence” (including checking SAM) to avoid providing funds, including subawards and contracts to “a person or entity who is actively opposing the United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.” Appendix A to proposed Part 183.

PROHIBITION ON CERTAIN TELECOMMUNICATIONS EQUIPMENT AND SERVICES

§ 200.216 Prohibition on certain telecommunications and video surveillance services or equipment

Proposed Rule:

Grant, cooperative agreement, and loan recipients are prohibited from using government funds to enter into contracts (or extend or renew contracts) with entities that use covered technology.

Final Rule:

Recipients and subrecipients are prohibited from obligating or expending loan or grant funds **to procure or obtain**; extend or renew a contract **to procure or obtain**; or enter into a contract (or extend or renew a contract) **to procure or obtain** equipment, services, or systems that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.

COVERED TELECOMMUNICATIONS EQUIPMENT – DEFINITION

UG Preamble Cites to Statutory Definition of “Covered Telecommunications Equipment”:

- Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities)
- For the purposes of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities)
- Telecommunications or video surveillance services provided by such entities or using such equipment
- Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense . . . reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of [the People’s Republic of China].

FOR OTHER GUIDANCE LOOK TO THE FAR

Federal Acquisition Regulation (“FAR”), Subpart 4.21:

- “*Substantial or essential component* means any component necessary for the proper function or performance of a piece of equipment, system, or service.” § 4.2101
- Approach to “ban” is to:
 1. Prohibit offerors from providing such items. Implemented through the following certification from offerors (§ 52.204-24):

The Offeror represents that – It [] will, [] will not provide covered telecommunications equipment or services to the Government in the performance of any contract, subcontract or other contractual instrument resulting from this solicitation.
 2. Require disclosure if such equipment is identified after performance commences (§ 52.204-25):

In the event the Contractor identifies covered telecommunications equipment or services used as a substantial or essential component of any system, or as critical technology as part of any system, during contract performance, or the Contractor is notified of such by a subcontractor at any tier or by any other source, the Contractor shall report [information about the contract, equipment item, and mitigation measures within one business day, and provide an update within ten business days that includes measures to prevent recurrence.]
- Possible additional measure: Indemnification clause for costs resulting from inaccurate disclosure.

POLLING QUESTION #12

What do you see as the biggest change for your organization?

- a) Micropurchase Threshold (“MPT”) increase
- b) Availability of *de minimis* rate notwithstanding previously having had a negotiated rate
- c) Additional 30 days for “prime” recipients to liquidate obligations and submit report
- d) Clarification of “federal interest” calculation
- e) The “Huawei ban” in federally funded acquisition activities

8. FAPIIS Data on Parents, Subsidiaries, and Predecessors

FAPIIS ON PARENTS AND SUBSIDIARIES

UG Update Preamble:

“To meet statutory requirements, OMB revised 2 C.F.R. parts 25 and 200 to implement Sec. 852 of the NDAA for FY 2013 . . . Which requires that FAPIIS include information on a [NFE]’s parent, subsidiary, or successor entities. OMB requires financial assistance applicants to provide information in SAM on their immediate owner and highest-level owner and subsidiaries, as well as on all predecessors that have been awarded a Federal contract, grant, or cooperative agreement within the last three years. In addition . . . Agencies must consider all of the information in FAPIIS with regard to an applicant’s immediate owner or highest-level owner and predecessor, or subsidiary, if applicable.” 85 Fed. Reg. 49516.

2013 NDAA, Pub. L. 112-239, requirement is codified at 41 U.S.C. § 2313(d)(3):

(3) INFORMATION ON CORPORATIONS.—The information in the database on a person that is a corporation shall, to the extent practicable, include information on any parent, subsidiary, or successor entities to the corporation in a manner designed to give the acquisition officials using the database a comprehensive understanding of the performance and integrity of the corporation in carrying out Federal contracts and grants.

FAPIS ON PARENTS AND SUBSIDIARIES

SAM Information:

2 C.F.R. § 25.200 is amended to include SAM information on “immediate and highest level owner[s] and subsidiaries, as well as . . . predecessors” as follows:

“The notice of funding opportunity . . . must require each applicant that applies and does not have an exemption under § 25.110 to . . . [m]aintain an active SAM registration with current information on a recipient’s immediate and highest level owner and subsidiaries, as well as on all predecessors that have been awarded a Federal contract or grant within the last three years, if applicable, at all times during which it has an active Federal award or an application or plan under consideration by a Federal awarding agency.”

PARENTS AND SUBSIDIARIES

Federal Agency Award Review:

As part of an award decision “risk review” under § 200.206 (formerly § 200.205) the following language is added:

As required by Public Law 112–239 National Defense Authorization Act for Fiscal Year 2013, prior to making a Federal award, the Federal awarding agency must consider all of the information available through FAPIIS with regard to the applicant and any immediate highest level owner, predecessor (i.e., a non-Federal entity that is replaced by a successor), or subsidiary, identified for that applicant in FAPIIS, if applicable.

PARENTS AND SUBSIDIARIES

Definitions added at § 200.1:

Subsidiary means an entity in which more than 50 percent of the entity is owned *or controlled* directly by a parent corporation or through another subsidiary of a parent corporation.

Highest level owner means the entity that owns or controls an immediate owner of the offeror, or that owns or controls one or more entities that control an immediate owner of the offeror. No entity owns or exercises control of the highest-level owner as defined in the Federal Acquisition Regulations (FAR) (48 C.F.R. 52.204-17).

*In proposed rule, the orange text was not present, potentially creating confusion for nonprofit entities. That has been corrected.

* “Predecessor” is not further defined.

POLLING QUESTION #13

What did not change that you wish had?

- a. Clarification of the MTDC definition
- b. Clarification (and narrowing) of the Program Income definition
- c. Expanded fixed amount subaward authority (beyond merely the SAT)
- d. Clarification of the “available from only one source” standard for noncompetitive procurement actions
- e. Clarification regarding whether matching funds create a federal interest in capital assets
- f. Other

9. Miscellaneous

CHANGES TO DEFINITION OF “CAPITAL ASSETS”

Adjustment of Rental Costs Language to Accommodate Accounting Terminology Changes: The terminology used in § 200.465 (Rental costs of real property and equipment) with respect to “capital leases” is amended with new paragraphs (d) through (f), to account for recent changes in accounting practice, now addressing “finance leases” for private entities and “financed purchases” for governmental entities.

FINAL REPORT SUBMISSION AND OBLIGATION LIQUIDATION PERIODS

Closeout periods extended for prime recipients (§ 200.344(a) and (b)):

- (a) The recipient must submit no later than **120** calendar days after the end date of the period of performance, all financial, performance, and other reports as required by the terms and conditions of the Federal award. **A subrecipient must submit to the pass-through entity, no later than 90 calendar days (or an earlier date as agreed upon by the pass-through entity and the subrecipient) after the end date of the period of performance, all financial, performance, and other reports as required by the terms and conditions of the Federal award.** The Federal awarding agency or pass-through entity may approve extensions when requested and justified by the non-Federal entity, as applicable.
- (b) Unless the Federal awarding agency or pass-through entity authorizes an extension, a non-Federal entity must liquidate all financial obligations incurred under the Federal award no later than **120** calendar days after the end date of the period of performance as specified in the terms and conditions of the Federal award.

DEFINITIONS – NEW 2 C.F.R. § 200.1

- All definitions combined into 2 C.F.R. § 200.1
- “CFDA numbers” now called “Assistance Listings”
- “Standard Forms” now called “Common Forms”
- “Federal Interest” definition clarified to be based upon acquisition price, not total project contribution.

OTHER

- Guidance has been added regarding the repayment of funds via an electronic letter of credit system such as HHS's Payment Management System ("PMS"). 2 C.F.R. § 200.305(b)(10).
- Pre-award costs are, when authorized, generally to be charged only to the first budget period of an award. 2 C.F.R. § 200.458.
- Publication costs related to research, when authorized, are generally to be charged only to the final budget period of an award. 2 C.F.R. § 200.461.
- FFATA threshold increased from \$25k to \$30k. 2 C.F.R. § 170.220.

AUDITS, AUDIT RESOLUTION, AND ADMINISTRATIVE APPEALS

AUDITS

MANY DIFFERENT TYPES OF AUDITS

Grantees can be “audited” for many different reasons. An audit by the IRS will be different and test different standards than an audit by the agency, the Inspector General, Department of Justice, or Single Audit.

I.G. Audit

Tax Audit

Financial Audit

Single Audit

Agency Audit

IT System Audit

Compliance Audit

Operational Audit

FEDERAL PLAYERS IN OVERSIGHT

- I. **Funding agency access to records/site**
- II. Single Audits-Third Party
- III. Inspectors General



General Agency Oversight



WHAT RECORDS DO WE MAINTAIN?

What

Financial records

Supporting documents

Statistical records

And all other

**Records pertinent to
the award**

§ 200.333

.... for a period of 3 years from
late FFR....

BUT, COULD BE LONGER IF...

- (a) Litigation, claim, or audit
- (b) Notified to extend the retention period
- (c) Records for real property and equipment
- (d) Records for program income transactions

WHO CAN ACCESS YOUR RECORDS & PERSONNEL?

Who

Awarding agency

Inspector General

Comptroller General

Pass-through entity

(or Any of their authorized
representatives)

§ 200.336(a) ...must have the right of access to any documents, papers, or other records of the non-Federal entity which are pertinent to the Federal award, in order to make audits, examinations, excerpts, and transcripts.

The right also includes timely and reasonable access to the non-Federal entity's personnel for the purpose of interview and discussion related to such documents.

See also 45 C.F.R. § 75.364(a)

HOW LONG DOES RIGHT OF ACCESS LAST?

As long as you keep the documents

- **§ 200.336(c)** Expiration of right of access. **The rights of access** in this section are not limited to the required retention period but **last as long as the records are retained**. Federal agencies and pass-through entities must not impose any other access requirements upon non-Federal entities.

See also 45 C.F.R. § 75.364(c)

REQUESTS FOR RECORDS

Desk Review

- Desk Review is an evaluation of a program or grant program operations in which written documentation is submitted, reviewed and analyzed for accuracy and completeness at the agency reviewers' site.

AGENCY SITE VISITS

- A Site Visit is an evaluation of institutions' programs and financial operations for the purpose of assessing effectiveness and efficiencies in meeting goals and objectives.
- Typically referred to as "not an audit," this type of review is conducted at the institution and involves review of written policies and procedures, visual documentation, and faculty and staff interviews.
- Site visits may last a few days and include observing facilities, interacting with employees, and scrutinizing documents. The results are an assessment in the form of a written report to senior management.



FEDERAL PLAYERS IN OVERSIGHT

- I. Funding agency access to records/site
- II. Single Audits-Third Party Auditors**
- III. Inspectors General



SINGLE AUDIT ACT BASICS

31 U.S.C. § 7502(a)(1)(A)

- Requirement only kicks in when an organization **has expended \$750,000** of federal funds. Federal funds expended include those directly from a federal agency in addition to federal funds passed through another entity first.
- Requires that pass-through entities provide the subrecipient written documentation of the source and amount of funds included in the award.

SINGLE AUDIT ACT BASICS

“Single Audit” only name. Sadly, even if a single audit is submitted by an organization, other audits are permissible by the government.

- The Single Audit also must be submitted to any pass-through entity, if applicable, and
- Copies of the audit report must be made available to the public, which can be accomplished by posting a link to the report from the nonprofit's website.
- Payments for patient care under Medicaid and Medicare are not included in funds expended toward reaching the \$750,000 threshold.

OBLIGATIONS OF THE AUDITEE



Calculate your federal awards expended. 2 C.F.R. § 200.502.



Obtain third-party independent, qualified auditor. 2 C.F.R. § 200.



Prepare pre-audit documents. 2 C.F.R. § 200.508(b).



Provide auditor access to all information needed. 2 C.F.R. § 200.508(d).



Submit audit package to the proper party on time. 2 C.F.R. § 200.508(a).



Consider audit costs. 2 C.F.R. § 200.425.



Follow up and take corrective action. 2 C.F.R. § 200.508(c).

FEDERAL AUDIT CLEARINGHOUSE

Part of the U.S. Census Bureau acting as the collecting agent on behalf of OMB

Submit an Audit	Find Audit Information	Ask a Question
		
<p>The Internet Data Entry System (IDES) is the place to submit the single audit reporting package, including form SF-SAC</p>	<p>All Single Audit reporting packages, with the possible exception of Indian Tribes, submitted under UG are available to the public on the FAC (IMS) per 2 CFR 200.512(b)(1).</p>	<p><u>Federal Agency Single Audit and Program Contacts</u></p>

FORM SF-SAC FOR SUBMISSIONS WITH FISCAL PERIODS ENDING IN 2019 IS NOW AVAILABLE

Standard Grants Reporting Forms

- SF-270, Request for Advance or Reimbursement
- SF-271, Outlay Report and Request for Reimbursement for Construction Programs
- SF-425, Federal Financial Report
- SF-425A, Federal Financial Report Attachment
- SF-428, Tangible Personal Property
- SF-429, Real Property Status Report
- Research Performance Progress Report (RPPR)
- SF-LLL, Disclosure of Lobbying Activities
- **SF-SAC, Data Collection Form for Single Audits**

The audit package and the data collection form SF-SAC must be submitted 30 days after receipt of the auditor's report(s), or 9 months after the end of the fiscal year - whichever comes first, unless a longer period is agreed to in advance by the cognizant or oversight agency for audit. See 2 CFR 200.512(a).

FORM SF-SAC (03/02/2019) U.S. Dept. of Commerce - Economics and Statistics Administration - U.S. Census Bureau
OMB No. 0807-0518 Approval Expires 03/03/2022 ACTING AS THE COLLECTING AGENT FOR OFFICE OF MANAGEMENT AND BUDGET

**Data Collection Form for Reporting on
AUDITS OF STATES, LOCAL GOVERNMENTS, INDIAN TRIBES,
INSTITUTIONS OF HIGHER EDUCATION, AND NONPROFIT ORGANIZATIONS
for Fiscal Period Ending Dates in 2019, 2020, or 2021**

PART I: GENERAL INFORMATION REPORT ID: _____ VERSION: _____

1. Fiscal Period
a. Start Date: [MM/DD/YYYY] [/] [/]
b. End Date: [MM/DD/YYYY] [/] [/]

2. Type of Uniform Guidance Audit
 Single audit
 Program-specific audit

3. Audit Period Covered
 Annual
 Biennial
 Other: Number of Months []

4. Auditee Identification Numbers
a. Auditee Employer Identification Number (EIN) []
d. Auditee Data Universal Numbering System (DUNS) Number []
b. Are multiple EINs covered in this report?
 Yes No
e. Are multiple DUNS numbers covered in this report?
 Yes No
c. If Part I, Item 4b is Yes, complete the attached Auditee EIN Continuation Sheet
f. If Part I, Item 4e is Yes, complete the attached Auditee DUNS Continuation Sheet

5. Auditee Information
a. Auditee Name []
b. Auditee Address
Number and Street []
City [] State [] Zip Code []
c. Auditee Contact
Name []
Title []
d. Auditee Contact Telephone []
e. Auditee Contact E-mail []

6. Primary Auditor Information
a. Audit Firm/Organization Name []
b. Audit Firm/Organization EIN []
c. Audit Firm/Organization Address
Number and Street []
City [] State [] Zip Code []
d. Auditor Contact
Name []
Title []
e. Auditor Contact Telephone []
f. Auditor Contact E-mail []
g. Was a secondary auditor used?
 Yes No
h. If Part I, Item 6g is Yes, complete the attached Secondary Auditors' Contact Information Sheet

SCHEDULE OF EXPENDITURES OF FEDERAL AWARDS (SEFA)-REQUIRED ELEMENTS

Auditor uses the SEFA to base the performance of risk assessment and selection of major programs.

- Completeness and accuracy is critical to avoid missing programs. Auditor is responsible for determining whether grantee includes all required SEFA elements. Common Deficiencies:
 - Amounts reported in the schedule did not reconcile to the financial records.
 - The schedule did not indicate whether awards were direct or pass-through.
 - The schedule did not clearly indicate the total federal expenditures and/or federal expenditures by program.
 - The schedule did not contain required information related to the federal agency and pass-through entities, including CFDA number or other identifying number, and the name of the federal agency or pass-through entity and identifying number assigned by the pass-through entity.
 - The schedule had inadequate notes or no notes to the schedule.
 - Notes to the schedule did not disclose the significant accounting policies used in preparing the schedule.

SINGLE AUDIT ACT BASICS

Do only high-risk Type A programs get audited?

- No. Any federal grant recipient has the potential to be audited. It is also important to remember that Single Audits pertains to the federal audit requirements in Uniform Guidance. The individual grantmaking agency may also request audits on grantees, specific awards or programs.

At a minimum, auditor must audit all Type A programs not identified as low risk and all Type B programs identified as high risk.

SINGLE AUDIT ACT BASICS

What is a Major Program Determination?

- Auditors use a risk-based approach to determine which of the grantee's Federal programs will be audited. 2 C.F.R. § 200.518
- UG provides step-by-step approach for auditors.
- Federal programs that do not qualify as Type A are Type B.
- Auditors then look at whether Type A program identified are low risk (audited in at least two of the most recent audit periods w/out program deficiencies).
- Auditors identify high risk Type B programs.

Total Federal Awards Expended	Type A/B Threshold
Equal to or more than \$750K but less than or equal to \$25M	\$750,000
More than \$25M but less than or equal to \$100M	Total Federal Awards Expended Times .03

SINGLE AUDIT ACT BASICS

What is audited?

- Auditor must determine if the financial statements and schedule of expenditures are presented fairly in all material aspects.
- The auditor should follow up with previous audits.
- The auditor must test the auditees operations to assess internal controls.

The auditor must determine whether the auditee has complied with Federal statutes, regulations, and the terms and conditions of Federal awards that may have a direct and material effect on each of its major programs.

WHAT ARE THE AUDITORS LOOKING FOR?

- Significant deficiencies and material weakness in internal controls
- Significant instances of abuse
- Material noncompliance with provisions of Federal statutes, regulations, or award terms
- Known questioned costs exceeding \$25,000
- Known or likely fraud affecting a Federal awards
- **Remember** – This year's audit will begin with last year's audit. Did you correct last year's problems?

DOCUMENTATION REQUIREMENTS – WORKING PAPERS (6.9)

Must prepare audit documentation in sufficient detail to enable an experienced auditor, having no previous connection to the audit, to understand the nature, timing, extent, and results of audit procedures performed, the audit evidence obtained, and its source and the conclusions reached.

AUDIT RESOLUTION

- With annual A-133/Subpart F audits, final report goes to Federal Audit Clearinghouse and then disseminated to grantor agencies
- With other audits conducted by grantor agencies, Inspectors General, and/or Comptroller General, final report goes directly to federal decision-making officials

AUDIT RESOLUTION: KEY PLAYERS

- Single Audit Coordinators

- Position in each IG office responsible for desk reviews and quality control reviews of single audits

- Key Management Single Audit Liaison

- Responsibilities defined in UG include serving at the agency's management point of contact for the single audit process both within and outside the government.

- Single Audit Accountable Official

- Policy official of the awarding agency who can be responsible for overseeing the agency management's role in audit resolution

AUDIT RESOLUTION AGENCY RESPONSIBILITIES: HRSA EXAMPLE

- Works with grant recipients to resolve management (procedural) and monetary audit findings (questioned costs).
- Follows up with grant recipients for written policies and procedures (P&P) supporting CAPs and additional explanations and documentation to support questioned costs.
- The Division of Financial Integrity (DFI) performs the Audit Resolution function for HRSA. Issues Management Decisions within six months.
- Conveys appeal rights to grant recipients when questioned costs are disallowed in Management Decisions.

FEDERAL PLAYERS IN OVERSIGHT

- I. Funding agency access to records/site
- II. Single Audits-Third Party Auditors
- III. Inspectors General**



THE I.G. CAN ACCESS YOUR RECORDS, SITE, AND PERSONNEL

- I.G. Act - access to all records, reports, audits, reviews, documents, papers, recommendations, or other material relevant to programs and operations within that OIG's purview of responsibilities.
- OIGs also have subpoena authority.
- This does not mean you give up all control.



THE I.G. CAN ACCESS YOUR RECORDS, SITE, AND PERSONNEL

- The Office of Audit Services conducts audits of local governments, colleges and universities, and other Federal grantees.
- OIG is authorized to carry out both investigations and audits.
- The results of OIG investigations may be used for administrative action by the Department and its bureaus, as well as for criminal and civil action by the U.S. Department of Justice (DOJ).



WHO WORKS FOR THE I.G.?

- OIG is staffed with trained, credentialed, and sworn “special agents” (criminal investigators who are federal law enforcement officers), auditors, investigative attorneys, and administrative investigators.
- OIG’s audits conform to the Government Accountability Office’s Government Auditing Standards, also known as the “Yellow Book.” Inspections conform to the Council of Inspectors General on Integrity and Efficiency’s Quality Standards for Inspection and Evaluation, also known as the “Blue Book.”

HOW DO I.G. AUDITS OR INVESTIGATIONS ORIGINATE?

High-priority issues. Some audits are based on issues that OIG has determined to be high priority for the Department, as communicated in the annual Inspector General's Assessment of Management and Performance Challenges report to the Department and Congress.

High-risk issues. OIG may initiate an audit if it uncovered significant issues during a previous review, or if it identifies a high risk of fraud, waste, abuse, or mismanagement in a program or office.

Interest. If the issue or program is of interest to Congress, the Secretary, senior Department officials, or the current administration, OIG may be asked to perform an audit.

Internal input. Information from OIG's other offices also helps prioritize OIG's audits.

Legal mandate. The audit may be required by law. For example, every year OIG assesses the effectiveness of the Department's IT security controls under the Federal Information Security Management Act of 2002.

Follow-up work. OIG also conducts follow-up reviews to determine the level of compliance with prior audit report recommendations.

STEPS IN THE AUDIT PROCESS

- Entrance Conference: Meeting between auditors and management about audit scope/purpose, methodology/procedures.
- Field Work: During the fieldwork stage, OIG will usually discuss preliminary findings with staff associated with the grantee being reviewed. It can also be important that grantee staff work with OIG while it conducts fieldwork to ensure that all information is factually correct and to quickly resolve any issues or miscommunications.
- Draft Report: Auditors supply auditee with draft findings and recommendations and give the grantee an opportunity to respond.
- Exit Conference: Either shortly after or contemporaneous with draft audit. Discussion of initial audit findings/recommendations.
- Final Audit Report: I.G. Auditors issue report incorporating and accounting for grantee's response. The Department receives a copy of the report. A copy of the report is posted on the I.G. website.

TO COMMENT OR NOT TO COMMENT

- Pros:
 - Can tell “your side” of the story
 - Can correct errors
 - May lead to changes in final audit report
 - May allow you to appeal final audit report
- Cons:
 - Auditor has the last word
 - Becomes part of public record
 - May actually hurt your case

AGENCY NOTICE

- Typically, the Recipient will have 30 days to provide a response to the agency.
 - If applicable, the Recipient's response should contain any objections to the audit findings and supporting documentation
 - If you intend to contest the findings, this is a good time to request the auditor's working papers
 - Response may be in the form of a corrective action plan; or, if the corrective action plan was submitted with the audit report, an updated plan or notice that the plan was completed

AGENCY FINAL DECISION

- You should always be aware where you are in the process. The agency may not offer much information, but you can ask. It is best to resolve what you can before a final decision is issued.
- At the completion of the audit resolution process, the auditee will be notified of the Action Official's final decision.
- Generally, the final decision will contain a statement of the basis for the decision, and enough information to enable the recipient to understand the issues and the position of the awarding agency.

DISPUTES & APPEALS

DISPUTES

Number and intensity of disputes have risen over the years:

- Initially over the making or withholding of a grant, the amount of funds committed, or the terms and conditions imposed.
- Post-award, over the grantee's relationships with program beneficiaries, subgrantees, or subcontractors, and other incidents of ongoing project administration.
- Disputes may arise in the form of audit disallowances.
- Finally, an agency may choose to terminate or debar a grantee or refuse to provide continued funding.

DISPUTES: BEFORE APPEAL, INFORMAL, OR INTERMEDIATE REVIEW

- When HHS first established its Departmental Grant Appeals Board (now the Departmental Appeals Board), there was no provision for the Department's subordinate agencies to first review the disputed actions of officials prior to appeal at the Departmental level.
- However, it quickly became apparent that a number of disputes could, and would, be resolved quickly by informal means if the grantees' complaints were surfaced to management levels within the HHS subordinate agencies.
- As a result, the regulations at 45 CFR Part 16 were revised to permit subordinate agencies to interpose an “informal” level of appeal prior to submission of an appeal to the Departmental Appeals Board. Various agencies in the Public Health Service instituted an intermediate informal review process as is currently described in 42 CFR Part 50, Subpart D.

DISPUTES: BEFORE APPEAL, INFORMAL, OR INTERMEDIATE REVIEW

- Subpart D—Public Health Service Grant Appeals Procedure
- Authority: Sec. 215, Public Health Service Act, 58 Stat. 690 (42 U.S.C. 216); 45 CFR 16.3(c).
- 42 C.F.R. § 50.401 - Establishes an informal procedure for the resolution of certain post-award grant and cooperative agreement disputes within the agencies and offices identified in § 50.402.
- Applies only to grant and cooperative agreement programs, except block grants, which are administered by the National Institutes of Health; The Centers for Disease Control and Prevention; the Agency for Toxic Substances and Disease Registry; the Food and Drug Administration; and the Office of Public Health and Science.
- In 2005, HHS removed HRSA from the list of agencies to which the regulations apply.

SAMPLE NIH POLICY 1ST LEVEL APPEAL

- HHS permits recipients to appeal certain post-award adverse administrative decisions made by HHS officials (see 45 CFR 16 and appendix to Part 16).
- NIH has established a first-level grant appeal procedure that must be exhausted before an appeal may be filed by the recipient with the Departmental Appeals Board (DAB) (see 42 CFR 50, Subpart D).
- HHS DAB is also the single level of appeal for F&A cost rates, research patient care rates, and certain other cost allocations used in determining amounts to be reimbursed under NIH <http://www.hhs.gov/dab/divisions/appellate/index.html>.

SAMPLE NIH POLICY 1ST LEVEL REVIEW

- Formal notification of an adverse determination will contain a statement of the recipient's appeal rights.
- 1st level - submit a request for review to the HHS official specified in the notification, detailing the nature of the disagreement with the adverse determination and providing supporting documents in accordance with the procedures contained in the notification (no later than 30 days from notice of adverse determination; however, an extension may be granted if the recipient can show good cause why an extension is warranted). 42 CFR 50.406(b).
- If the NIH decision on the appeal is adverse to the recipient or if a recipient's request for review is rejected on jurisdictional grounds, the recipient then has the option of submitting a request to the DAB for a further review of the case in accordance with the provisions of 45 CFR 16 within 30 days 45 CFR 16.3(c).

GRANTEE USUALLY BEARS THE BURDEN TO PROVE COMPLIANCE

Examples:

- HHS Departmental Appeals Board:

“In decisions reviewing disputed disallowances, the Board ‘has consistently held that a [recipient] has the burden to document the allowability and allocability of its claims for FFP.” *Pennsylvania Dept. of Public Welfare*, DAB No. 2653 (Sep. 2, 2015).

- Dept. of Education, Office of Postsecondary Education, Appeal Procedures for Audit Determinations:

“An institution . . . requesting review of the final audit determination or final program review determination issued by the designated department official shall have the burden of proving . . . (1) That expenditures questioned or disallowed were proper. . .” 34 CFR §668.116 (Hearing).

Practical Impact:

You are going to need documentation, preferably contemporaneous documentation, to prevail. This means purchase requests, receipts, policies, invoices, etc. . . .

PROCESS VARIES BY AGENCY

EXAMPLES:

- DOL - Generally appeal to OALJ. Very formal 29 CFR Part 18.
- HHS - Appeal to DAB. Agency Board, semi-formal. 45 CFR Part 16.
- DoD - Express preference for ADR. Also may appeal to designated "Appeal Authority," which is generally paper review. 32 CFR § 22.815.
- DOE - Express preference for informal resolution. Appeal to "Senior Procurement Executive." 2 CFR § 910.128.
- USAID - Paper appeal to "Assistant Administrator for the Bureau of Management" or designee. 2 CFR § 700.15.
- NSF - Cost disallowances, etc. are covered under the process described in GPM 923, "Procedures."
- FEMA may seek to recover disallowed costs through a Notice of Potential Debt Letter, Monitoring Results Letter, or Remedy Notification.

EXAMPLE FEMA SINGLE AUDIT STATE APPEAL

- West Virginia is off the hook on a possible Federal Emergency Management Agency claw back of nearly a million dollars.
- FEMA also reviewed an annual **Single Audit that questioned** whether many of the practices at the state agency are adequate. [Findings letter](#)
- [State officials successfully appealed](#) an original FEMA finding that West Virginia had not followed its own written regulations in overseeing some disaster grants.
- The initial FEMA ruling meant the state might have had to pay back \$901,411.
- State officials appealed the finding in August and then provided additional documentation.
- [FEMA notified the state that the appeal had been successful.](#)

WHISTLEBLOWER PROTECTION

REPORTING WITHOUT FEAR OF REPRISAL

- Whistleblowers perform an important service to your organization and the American public when they come forward with what they reasonably believe to be evidence of wrongdoing. They should never be subject to reprisal for doing so.

WHAT IS A WHISTLEBLOWER?

- A whistleblower is an employee of a Federal contractor, subcontractor, grantee, or subgrantee who discloses information that the individual reasonably believes is evidence of:
 - Gross mismanagement of a Federal contract or grant;
 - A gross waste of Federal funds;
 - An abuse of authority relating to a Federal contract or grant;
 - A substantial and specific danger to public health or safety; or
 - A violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.

PROTECTION FROM RETALIATION

- Whistleblower protection laws protect employees who report illegal conduct from retaliation, including:
 - Blacklisting
 - Demoting
 - Denying overtime or promotion
 - Discipline
 - Denying benefits
 - Intimidation
 - Threats
 - Reassignment to less desirable position
 - Reduction in pay or hours
 - Suspension
 - Firing or laying off

WHISTLEBLOWER PROTECTION LAWS

- False Claims Act - Misconduct under a federal grant can run afoul of the False Claims Act and doing the same under a state grant can result in violating the various state False Claims Acts.
- The whistleblower protection provision of the False Claims Act (FCA) protects “lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under [the FCA] or other efforts to stop 1 or more violations of [the FCA].”

EXAMPLES OF WHISTLEBLOWER LAWS

- Enhancement of Contractor Protection from Reprisal for Disclosure of Certain Information – 41 U.S.C. § 4712
 - Effective December 26, 2013
 - Protects employees of *all* contractors, subcontractors, grantees, and subgrantees
- Affordable Care Act – 29 U.S.C. § 218C
 - Effective March 23, 2010
 - Protects employees from providing information that the employer has violated any provision of the ACA
- Occupational Safety and Health Act – 29 U.S.C. § 660(c)
 - Effective December 29, 1970
 - Protects employees who file complaints or cause OSHA to take action against the employer

HHS OIG GRANT SELF-DISCLOSURE PROGRAM

Mandatory Disclosures

- HHS grant recipients or subrecipients must disclose evidence of potential violations of Federal criminal law involving fraud, bribery, or gratuity violations, potentially affecting the Federal award. Federal regulation, [45 C.F.R. § 75.113](#), mandates disclosures of criminal offenses that non-Federal entities must make with respect to HHS grants.

Voluntary Disclosures

- Recipients of HHS awards may voluntarily disclose conduct creating liability under the Civil Monetary Penalty Law (CMPL), 42 U.S.C. § 1320a-7a, or any other conduct—such as conduct that might violate civil or administrative laws—that does not clearly fall within the scope of offenses described at 45 C.F.R. § 75.113.

HHS OIG GRANT SELF-DISCLOSURE PROGRAM

- 21st Century Cures Act, OIG gained new authorities for false or fraudulent claims, as well as for making or causing to be made false statements, omissions, or misrepresentations of material facts in connection with applications and funded awards.
- Before making a disclosure and after a reportable event is identified, OIG expects the discloser to investigate and assess potential government losses, undertake corrective action, and prepare a written report in accord with the requirements set forth in the Grantee Self-Disclosure guidance, and the checklist OIG provides with it.

NOTE: MOST NONPROFITS DON'T HAVE WHISTLEBLOWER / COMPLAINT RESOLUTIONS POLICIES

The federal Form 990 asks if a charity has a whistleblower policy. A search of Form 990s in the Internal Revenue Service's Business Masterfile showed that of the Form 990s checked via GuideStar by Candid on behalf of The NonProfit Times, just 41 percent have a whistleblower policy and 1 percent of filers left the box blank.

[NPT Study: Most Nonprofits Don't Have Whistleblower Policies - Paul Clolery](#) February 18, 2020

- Even if it is not an insurance, D&O application requirement, there are benefits.
- People are more likely to report internally, and express concerns when they believe that the executive team and board hold themselves and others to the highest ethical standards.
- Strong culture may be reflected in policies set forth to protect people that may have concerns. Resolving it internally is always better than facing an FCA filing.

OPEN Q&A

CONTACT INFORMATION

Edward T. Waters, Esq.
Ewaters@ftlf.com

Scott Sheffler, Esq.
Ssheffler@ftlf.com

Jerry Bertrand
Jerrybertrand@gmail.com

Feldesman Tucker Leifer Fidell LLP

1129 20th Street N.W. – Suite 400

Washington, D.C. 20036

(202) 466-8960

www.feldesmantucker.com

Learning.ftlf.com