

Breakout Session

Community Action Agencies and Head Start Programs

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- Nicole, a Partner at Feldesman Tucker Leifer Fidell LLP, has been with the firm since 2008 and a practicing attorney since 2003.
- She is counsel to numerous federal grantee organizations across the country representing her clients in federal litigation as well as providing counsel on compliance and transactional matters.
- Her representative activities include reviewing and revising contracts, subrecipient agreements, procurement policies and procedures, and other grant-related documents to ensure compliance with programmatic requirements and other federal regulations. Nicole also advises clients on the federal requirements for grant related construction and renovation projects including issues related to filing notices of federal interest.
- Prior to joining the firm, Nicole worked as a legal services staff attorney, representing low-income clients in domestic violence matters, family law issues, public housing and landlord-tenant disputes, and consumer cases.

HEAD START SPECIFIC ISSUES

1. Match / Non-federal share
2. Agreements under Head Start Grants
 - Early Head Start – Child Care Partnership
 - Delegate Agreements
3. Federal Interest under Head Start

Match / Non-Federal Share



AGENDA

- I. Basic Matching Concepts
- II. Allowability, Valuation, and Documentation of Match

I. BASIC MATCHING CONCEPTS



COST SHARING OR MATCHING DEFINITION

45 CFR §75.2

“**Cost sharing or matching** means the portion of project **costs not paid by Federal funds** (unless otherwise authorized by Federal statute). This may include the value of allowable third party **in-kind contributions**, as well as **expenditures by the recipient.**”

BASIC RULES FOR MATCH: 45 CFR§ 75.306 (b)

1. **Verifiable** from NFE's records.
2. **No Double Counting**, *i.e.*, are not included as contributions for any other federal award.
3. **Necessary and Reasonable**
4. **Allowable** under the Cost Principles including (Subpart E).
5. **No Fed to Fed**: Are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.
6. Included in **approved budget**.
7. Conform to other provisions of the Supercircular/UGG.



...IN OTHER WORDS

- A cost is allowable if it is incurred in furtherance of program objectives
 - For example, is this cost helping me meet one of the requirements under the Head Start Performance Standards?
- **General Rule:** If I could spend Head Start money on X, but instead got X for free or I paid for it myself, then I can count the cost as match
- **PS:** Unrecovered indirect costs can be counted if you have an indirect cost rate agreement.

PROGRAM INCOME AND MATCH

- Defined as “gross income **earned by the recipient** that is **directly generated by a supported activity or earned as a result of the award** . . . Program income includes, but is not limited to; income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects . . . Interest earned on advances of Federal funds is not program income.”
- “With **prior approval** of the [federal agency], program income may be used to meet the cost sharing or matching requirements of the Federal award.” 45 CFR 75.307(e)(3)

HHS GPS: DIRECT OR INDIRECT AS MATCH

“Unless restricted by statute or regulation, matching or cost sharing may be provided as **direct** and/or **indirect costs**, consistent with the recipient’s accounting system—and its usual method of charging for similar items—and any restrictions or limitations in the applicable cost principles.”

HHS GPS p. I-24

HHS GPS: FEDERAL FUNDS AS MATCH

“Recipient contributions may be derived from any non-Federal source; from **Federal sources if received as fees, payments, or reimbursements for the provision of a specific service, such as patient care reimbursements received under Medicare or Medicaid; or from other program income, if authorized by the OPDIV** (see Part II). Otherwise, unless there is specific statutory authority, Federal funds may not be used to match HHS grant funds.”

HHS GPS p. I-24

II. ALLOWABILITY, VALUATION, AND DOCUMENTATION OF MATCH

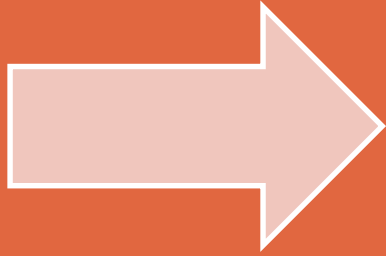


DOCUMENTATION OF IN-KIND CONTRIBUTIONS

“To the extent feasible, services donated to the non-Federal entity will be **supported by the same methods used to support the allocability of regular personnel costs.**”

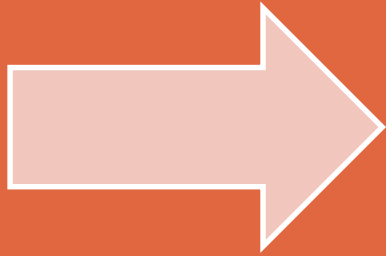
45 CFR § 75.434(d)

CONSIDERATIONS FOR WHICH RULES TO APPLY...



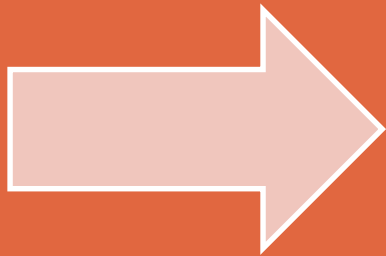
What is the Contribution?

(Services, Supplies, Equipment, or Facilities)



Who is Making the Contribution?

(Grantee or Third Party)



What is the Purpose of the Grant?

(Acquisition or Operations)

QUESTION #1

Allowable or Unallowable?

Board member time for participating in training or board meetings.

QUESTION #2

Allowable or Unallowable?

Activities between an enrolled Head Start child and the **child's parent** at **home**.

QUESTION #3

Allowable or Unallowable?

Activities between an enrolled Head Start child and the **child's parent** at the center.

QUESTION #4

Allowable or Unallowable?

Staff member volunteering for Head Start related activities during non-paid time.

QUESTION #5

Allowable or Unallowable?

Donation of **clothes** to the
Head Start Center.

QUESTION #6

Allowable or Unallowable?

Discounts from vendor/contractor.

WAIVERS:

How to Protect Your Program from Matching Mishaps



WAIVER STATUTE: HEAD START ACT §640 (B)

- “For the purpose of making such determination, the Secretary shall take into consideration with respect to the Head Start program involved–
- (1) the **lack of resources available** in the community that may prevent the Head Start agency from providing all or a portion of the non-Federal contribution . . . ;
- (2) the impact of **the cost** the Head Start agency may incur in **initial years** it carries out such program;

WAIVER STATUTE: HEAD START ACT §640 (B), CON'T.

- (3) the impact of an **unanticipated increase** in the cost the Head Start agency may incur to carry out such program;
- (4) whether the Head Start agency is located in a community adversely affected by a **major disaster**; and
- (5) the impact on the community that would result if the Head Start agency ceased to carry out such program."

DRAFTING SOLID WAIVER REQUESTS

1. Tell Your Story

- Provide Context – How did we get in this situation?
- Add reasons for situation (ideally, not your fault)

2. Make a Connection

- Look at the waiver requirements in the Head Start Act. Which one fits? (e.g., lack of available resources)
- Describe factual conditions that result in a lack of the requirement.
 - Make sure you have a cause and effect relationship. For example, the poor economy resulted in fewer volunteers because of X reason.
- Conclude: Because of the reasons we described, we need a waiver.
 - Be specific about amount or percentage.

3. Ideally, waiver requests made before the end of your program year (but not definitive).

FINAL NON-FEDERAL SHARE TIPS

Ask the following 3 questions:

- 1. Would this expenditure be allowable if we were using federal dollars?**
 - ✓ Reasonable? Ordinary? Necessary?
- 2. How much federal money would we spend to purchase the same goods or services?**
 - ✓ What is the fair market value of the goods or services?
- 3. How would we document this expenditure if we were using federal funds?**
 - ✓ Documentation should be detailed and include receipts and other verification if available (don't just summarize!)
 - ✓ Use the **“same methods used by the recipient for its own employees.”** For example, use sign-in/sign-out sheet
 - ✓ Time should be recorded on a real-time basis after the fact

Agreements Under Head Start Grants:

CONTRACT/CONTRACTOR DEFINITION

Contract means a legal instrument by which a non-Federal entity purchases property or services needed to carry out the project or program under a Federal award. The term as used in this part does not include a legal instrument, even if the non-Federal entity considers it a contract, when the substance of the transaction meets the definition of a Federal award or subaward (see *Subaward*).

Contractor means an entity that receives a contract as defined in *Contract*.”

45 CFR §75.2

SUBAWARD/ SUBRECIPIENT DEFINITION

“Subaward means an award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a Federal award received by the pass-through entity. It does not include payments to a contractor or payments to an individual that is a beneficiary of a Federal program. A subaward may be provided through any form of legal agreement, including an agreement that the pass-through entity considers a contract.

Subrecipient means a non-Federal entity that receives a subaward from a pass-through entity to carry out part of a Federal program; but does not include an individual that is a beneficiary of such program. A subrecipient may also be a recipient of other Federal awards directly from a Federal awarding agency.”

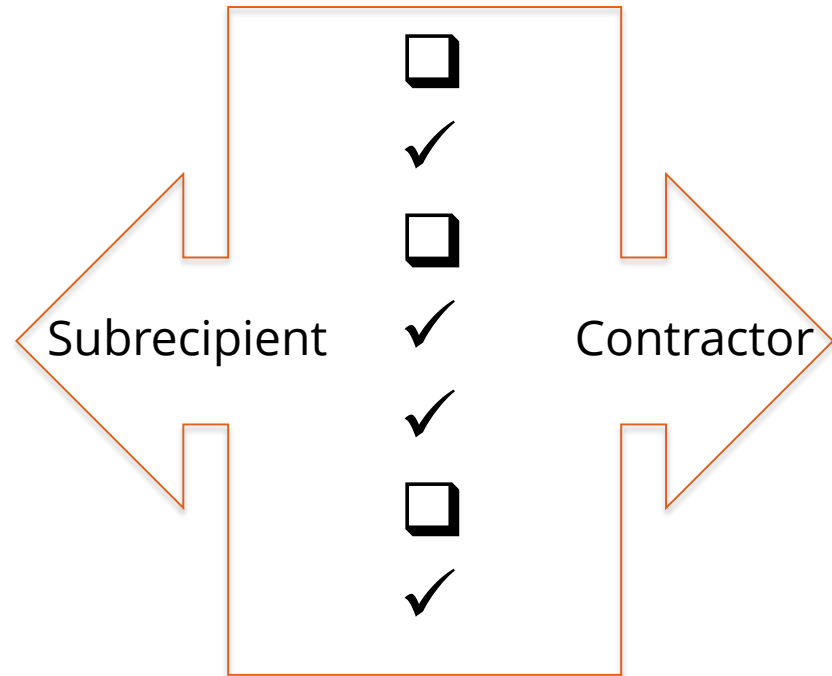
45 CFR §75.2

DELEGATE DEFINITION

“The term "delegate agency" means a public, private nonprofit (including a community based organization, as defined in section 9101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7801), or for profit organization or agency to which a grantee has delegated all or part of the responsibility of the grantee for operating a Head Start program.”

Sec. 637(3) Head Start Act [42 U.S.C. § 9832]

FACTORS TO CONSIDER



SUBRECIPIENT CHARACTERISTICS

- Determines who is eligible to receive what Federal assistance;
- Has its performance measured in relation to whether objectives of a Federal program were met;
- Has responsibility for programmatic decision making;
- Is responsible for adherence to applicable Federal program requirements specified in the Federal award; and
- In accordance with its agreement, uses the Federal funds to carry out a program for a **public purpose** specified in **authorizing statute**, as opposed to providing goods or services for the benefit of the pass-through entity.

2 C.F.R. § 200.330(a)

CONTRACTOR CHARACTERISTICS

- Provides the goods and services within normal business operations;
- Provides similar goods or services to many different purchasers;
- Normally operates in a competitive environment;
- Provides goods or services that are **ancillary to the operation of the Federal program**; and
- Is not subject to compliance requirements of the Federal program as a result of the agreement, though similar requirements may apply for other reasons.

2 C.F.R. § 75.330(b)

USE BEST JUDGMENT TO DECIDE

- “All of the characteristics listed [on the prior slides] may not be present in all cases, and the pass-through entity must use judgment in classifying each agreement as a subaward or a procurement contract.” 2 C.F.R. § 200.330(c)
- **Substance of relationship more important than form of agreement**



EHS-CCP

Under EHS-CCP, new or existing Early Head Start grantees will **partner** with regulated center-based or family child care providers who agree to meet the Head Start Program Performance Standards...

Source: 101: Early Head Start Child Care Partnership
https://www.acf.hhs.gov/sites/default/files/ecd/ehs_ccp_101_final_hhsacf_logo_2014.pdf

EHS-CCP

....The resulting partnerships **will allow programs to leverage their funds** to provide more high quality early learning slots in their community. *Applicants who propose a partnership with local child care providers and demonstrate strong alignment with other Federally, State, or locally funded early childhood programs, such as Child Care and Development Fund (CCDF), will receive strong competitive priority.*

Source: 101: Early Head Start Child Care Partnership
https://www.acf.hhs.gov/sites/default/files/e cd/ehs_ccp_101_f inal_hhsacf_logo_2014.pdf

Federally Supported Property



AGENDA

I. Basic Concepts

II. Equipment

III. Real Property

I. BASIC CONCEPTS

Federally Supported Property



GOVERNING PROVISIONS

- Part 1303, Subpart E (replaces old 45 C.F.R. Part 1309)
- Some requirements are the same
- Some requirements are new
- Provisions for the UGG still apply but now only referenced in HSPPS

TYPES OF PROPERTY

- Supplies



- Equipment



- Real Property



IMPORTANT DEFINITIONS

*Federal Interest
Capital Assets

Construction
Facility
Major Renovation
Minor Renovations
Modular Unit
Purchase
Repair

CREATION OF THE FEDERAL INTEREST

- A Federal Interest is created by:
 - Federal funding of equity
- General Rule under the Cost Principles:
- 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.
- But see rules for Head Start:

HEAD START DEFINITION OF “PURCHASE”

- *“Purchase means to buy an existing facility, including outright purchase, down payment or through payments made in satisfaction of a mortgage or other loan agreement, **whether principal, interest or an allocated portion principal and/or interest.** The use of grant funds to make a payment under a capital lease agreement, as defined in the cost principles, is a purchase subject to these provisions. Purchase also refers to an approved use of Head Start funds to continue paying the cost of purchasing facilities or refinance an existing loan or mortgage beginning in 1987.”*
- Note: This is different from the general rule under the Uniform Guidance (45 CFR Part 75)

HHS GRANTS POLICY STATEMENT: NOFI POLICY

Agency Policies may provide additional guidance on federal interest:

- “To protect the Federal interest in real property that has been constructed or has undergone **major renovation** with HHS grant funds, **recipients must record an NFI in the appropriate official records of the jurisdiction in which the property is located**. Recordation must occur **when construction or renovation begins**. Fees charged for recording or modifying the NFI may be charged to the grant. A copy of the NFI must be provided to the awarding office.”
- HHS GPS p.II-70
- Note: OHS lists required contents of NFI in 1303.47

HEAD START DEFINITION OF MAJOR RENOVATION

- “*Major renovation* means any individual or collection renovation that has a cost equal to or exceeding \$250,000. It excludes minor renovations and repairs except when they are included in a purchase application.”

II. EQUIPMENT



1. ACQUISITION / IMPROVEMENT OF EQUIPMENT

- Prior approval required for acquisition (amount?)
- Can create a federal interest if improved with federal funds

2. USE REQUIREMENTS: EQUIPMENT

- 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
- If 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

3. MANAGEMENT REQUIREMENTS: **EQUIPMENT**

- 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

4. STANDARD PROPERTY REPORTING FORMS (SF 428)

- **Tangible Property Report**

- To be used by awarding agencies to collect information related to tangible personal property (equipment and supplies) when required by a Federal financial assistance award.

- [Tangible Personal Property Report SF-428 and Instructions - Annual](#)
 - [Tangible Personal Property Report SF-428 and Instructions - Final](#)

5. DISPOSITION REQUIREMENTS: **EQUIPMENT**

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

III. REAL PROPERTY



HOW IS A FEDERAL INTEREST CREATED FOR REAL PROPERTY IN HEAD START

- Federal Interest arises when a grantee uses Head Start funds to purchase, construct or renovate a facility, or make mortgage payments. This includes:
 1. Head Start money used to finance acquisition or improvements (**mortgage interest**)
 2. Costs charged to **match**, or costs contributed by a “related organization” if they were charged to match
 3. Includes improvements to property owned by third parties

45 CFR §1305.2

REAL PROPERTY AS MATCH

Federal interest is a property right which secures the right of the federal awarding agency to recover the current fair market value of its percentage of participation in the cost of the facility in the event the facility is no longer used for Head Start purposes by the grantee or upon the disposition of the property. When a grantee uses Head Start funds to purchase, construct or renovate a facility, or make mortgage payments, it creates a federal interest. **The federal interest includes any portion of the cost of purchase, construction, or renovation contributed by or for the entity, or a related donor organization, to satisfy a matching requirement.**

45 C.F.R. 1305.2

HEAD START PRIOR APPROVAL REQUIREMENTS

- Compare costs of continued purchase against cost of purchasing a comparable facility
- Demonstrate that the proposal will save money

45 CFR §1303.44.

2. USE REQUIREMENTS: REAL PROPERTY

- Use for originally authorized purpose as long as needed for that purpose
- To use for different purpose need to seek disposition instructions and agency approval
- Do not dispose or encumber title

MANAGEMENT REQUIREMENTS: REAL PROPERTY

- Submit reports
 - SF-429
- Maintain 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
- Maintain Insurance
 - Title insurance
 - Physical damage or destruction insurance at full replacement value

3. MANAGEMENT REQUIREMENTS: REAL PROPERTY (FINANCING)

- Am I required to notify my lender about the NoFI?
 - Pre-existing mortgage?
 - Your mortgage agreement may have a requirement to do so. Seek specific legal advice on this issue
 - New Mortgage?
 - Yes, because it will be subordinate to the federal interest unless OHS approves otherwise.

3. MANAGEMENT REQUIREMENTS: REAL PROPERTY (FINANCING)

The Mortgage Agreement

- Gives HHS the right to intervene & cure if grantee defaults, terminates or withdraws
- Provides HHS with a copy of any notices of default & includes regional GMO's current address
- Suspends foreclosure for 60 days after HHS receives default notice
- Preserves NOFI and grantee's obligation for the federal share if HHS fails to respond to a notice of default
- Requires payment to HHS before lender, unless subordination
- Gives HHS the right to assign or transfer to another grantee

45 CFR §1303.44.

3. MANAGEMENT REQUIREMENTS: REAL PROPERTY (LEASEHOLD IMPROVEMENTS)

- Lease or occupancy agreement must
 - Give the grantee the right to use and occupy the premises during the entire term of the lease
 - At least 30 years for purchase or construction
 - At least 15 years for modular unit
 - Provide that a copy of any notice of default must be given to the regional GMO & include the address
 - Give HHS the right to cure a default within a designated period
 - Give HHS the right to transfer the lease to another grantee

45 CFR §1303.44.

4. FEDERAL PROPERTY REPORTING

ACF-IM-HS-15-01

To: All Head Start and Early Head Start Grantees

Subject: Real Property Reporting and Request Requirements

Information: Effective for budget periods beginning on or after Dec. 26, 2014, all grantees, including those with no covered real property, are instructed to use and submit Standard Form (SF) 429. It includes the following real property reporting and request forms:

- [Instructions for 429](#) [PDF]
- [SF-429-A](#) (General Reporting; includes the cover page) [PDF]
- [SF-429-B](#) (Request to Acquire, Improve, or Furnish; includes the cover page) [PDF]
- [SF-429-C](#) (Disposition or Encumbrance Request; includes the cover page) [PDF]

5. DISPOSITION REQUIREMENTS: REAL PROPERTY

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

VALUATION OF THE FEDERAL INTEREST

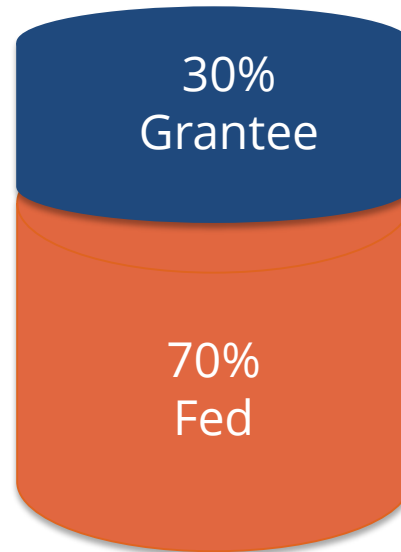


VALUATION

- 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
 3. Acquisition Debt (e.g., mortgage) Repaid with Federal Funds

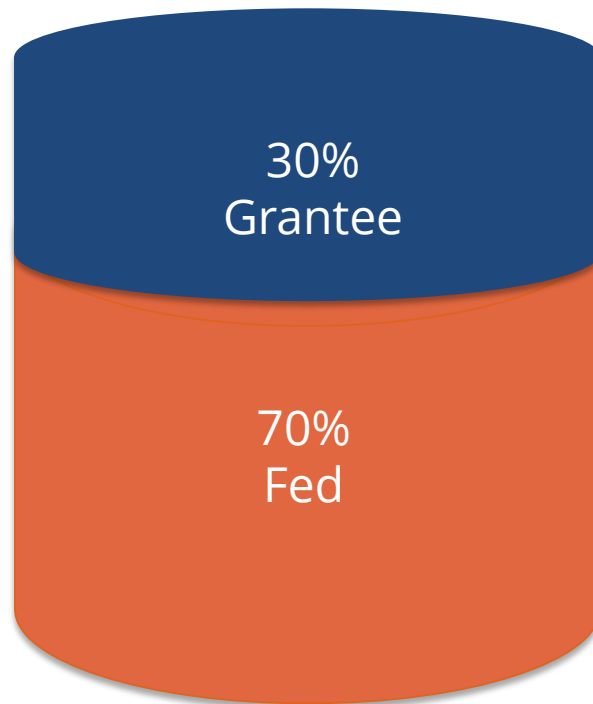
1. ORIGINAL ACQUISITION FUNDED ALL/PART WITH FED FUNDS

\$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 value of any improvements) x the proceeds of the sale.

2. FEDERALLY FUNDED IMPROVEMENT

Need Appraisal Just Before the Improvement

**Need to Know
FMV Here to
Figure Out how
the \$200k
figures in as a
Percentage.**

+

Federally
funded
Improvement
(\$200,000
Renovation)

Document
contemporaneously and
keep your documentation!

DESIGNATION RENEWAL SYSTEM (DRS) IMPLICATIONS

DRS IMPLICATIONS

- If federal interest in property, then competitors in grant competition may include that property in their application (regardless of the size of the federal interest!)
- Valuation of incumbent grantee interest should be considered against the competitor
- OHS may be allowed to permit competitor to take possession of facility pending satisfaction of incumbent grantee's interest



THE TODDLERS

RULES OF POSSESSION

1. If I like it, it's MINE.
2. If it's in my hand, it's MINE.
3. If I can take it from you, it's MINE.
4. If I had it a while ago, it's MINE.
5. If it's MINE, it must never appear to be yours in anyway.
6. If I'm doing or building something, all the pieces are MINE.
7. If it looks like mine, it's MINE.
8. If I saw it first, it's MINE.
9. If you are playing with something, and you put it down, it automatically becomes MINE.
10. If it's broken, it's yours.

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QUESTIONS

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