

Are you Ready for the Supercircular?

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Agenda

- Overview & Background
- Reforms to Administrative Requirements
- Reforms to Cost and Audit Principles
- Strategic Considerations



Overview



Overview

- December 26, 2013 OMB issued Uniform Administrative Requirements, Cost Principles, and Administrative Requirements for Federal Awards
 - Consolidates regulations to provide consistent guidance for grant recipients and issuers
- Changes and consolidations include:
 - Provides a single resource for requirements that apply to all recipients, eliminating the requirement for grants professionals to cross-reference between multiple resources
 - Includes new measures designed to ensure merit-based grant awards and identify problems early in the process
 - Introduces more formal requirements for certification of compliance and disclosure of noncompliant or criminal acts
 - Attempts to streamline and standardize the cost principles in many ways, including new options for the recovery of indirect costs



Implementation - Key Dates

- December 26, 2013: Policies applicable to federal agencies.
- June 26, 2014: Draft implementing regulations from federal agencies were due to OMB. Most agencies have not yet published final regulations.
- December 26, 2014: Policies applicable to non-federal entities for new and incremental awards made on or after 12/26/14.
- Fiscal Years Beginning on or After December 26, 2014: Audit threshold changes effective.



New Priorities, New Risks

- The new rules address many practical considerations familiar to grants professionals, but also brings to the grants world the emphasis on compliance that has dominated Federal contracting in the last decade
- The independence of grants administrators is a strength of Federal grants programs, but the new rules will require these professionals to adapt
- The consequences of violation can be dire, but good-faith efforts at compliance are preventive medicine
- The new rules still recognize the distinction between a grant recipient and a contractor



Reforms to Administrative Requirements



Reforms to Administrative Requirements

Pre-Award Requirements (§200.200-211)

- Notices of funding opportunities
- Federal awarding agency review of merit of proposals
 - Opportunity announcement must disclose review procedures
 - Must include risk review
 - FAPIIS
 - Past performance
 - Available audits
- Standard application requirements
- Standard form of award requirements (award will be published)



Sub-recipient Overview

Implications for Pass-Through Entities

- One of the most significant changes is the more stringent requirements for sub-recipient monitoring (200.330)
- Examples of expanded pass-through entity responsibilities include (200.331):
 - Distinguishing sub-recipient from contractor
 - Identifying or negotiating an appropriate sub-recipient indirect cost rate at the time of award
 - Ensuring “flow-down” of new requirements into sub-recipient agreements, as applicable
 - Evaluating sub-recipient risk of noncompliance and determining necessary monitoring activities – including on-site reviews
 - Imposing remedies for sub-recipient noncompliance, when necessary



Sub-recipient or Contractor...

What's the Difference?

- Sub-recipient:
 - A sub-recipient “uses the Federal funds to carry out a program for a public purpose specified in authorizing statute”
 - Characteristics that support classification of the non-Federal entity (NFE) as a sub-recipient includes when the NFE:
 - 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 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.



Sub-recipient or Contractor...

What's the Difference? - (cont'd)

- Contractor:
 - A contract is for the purpose of obtaining goods and services for the non-Federal entity's own use and creates a procurement relationship with the contractor
 - Characteristics indicative of a relationship between a NFE and a contractor are when the NFE who is receiving federal funds:
 - 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.



Sub-recipient Selection & Planning

What's Required?

- Establish formal process to structure sub-recipient agreements properly. Be sure to include:
 - All flow-down requirements necessary to ensure appropriate sub-recipient use of Federal award
 - Any additional flow-down requirements necessary for pass-through entity to meet its own responsibilities
 - A requirement that the sub-recipient permit access to records and financial statements through the period of performance
- Consider expanded pass-through entity responsibilities
 - Required information to be provided to sub-recipients
 - Use of appropriate sub-recipient indirect cost rates
 - Conduct sub-recipient risk assessment



Sub-recipient Monitoring Activities Risk Based Approach

- Sub-recipient monitoring plan must ensure that the sub-award:
 - Is used only for authorized purposes
 - Is in compliance with Federal statutes/regulations & sub-award Ts&Cs
 - Achieves its performance goals
- Recipient must consider risk of sub-recipient noncompliance and document its conclusions
- Risk assessment is based on:
 - Prior/past experience with similar sub-awards
 - Previous audit results
 - Significant changes in personnel or systems
 - Extent and results of Federal awarding agency monitoring



Sub-recipient Monitoring Activities Monitoring Plan

- Monitoring activities include:
 - Reviewing financial and programmatic reports
 - Conducting on-site reviews/audits if deemed necessary per risk assessment
 - Conducting follow-up reviews to ensure timely completion of corrective actions required to address deficiencies – as identified through on-site reviews, audits, or other means
 - Issuing a management decision for audit findings pertaining to the Federal award
 - Verifying that each sub-recipient receive completed, required audits
- Design of monitoring plan will vary based on sub-recipient risk assessment:
 - i.e., more stringent monitoring plan is required for high risk sub-recipients



Sub-recipient Monitoring Activities Additional Considerations

- Based on results of monitoring activities, pass through entities should:
 - Provide training and technical assistance to appropriate sub-recipient staff
 - Determine if on-site reviews/audits necessitate adjustments to own records
 - Consider taking enforcement action against noncompliant sub-recipients

- If sub-recipient noncompliance is determined, pass through entities may apply enforcement action through specific conditions (§200.207)

- If noncompliance cannot be remedied through specific conditions, more severe enforcement action may be taken (§200.338)



Sub-recipient Monitoring Activities

Key Internal Controls

- Sub-recipient monitoring procedures should include:
 - Informing your sub-recipient of pertinent information
 - Ensuring your sub-recipients are receiving audits when necessary
 - Reviewing financial and programmatic reports
 - Reconcile the sub-recipient's budgeted expenditures to actual expenditures
 - Perform an on-site visit to the sub-recipient to review financial and programmatic records and observe operations
 - Desk review - review financial and program reports submitted by sub-recipients for allowable use of the grant funds
 - Establishing a tracking system to assure timely submission of required reporting
 - Having a 2nd party within your organization periodically review the adequacy of sub recipient monitoring for all programs
 - Document! Document! Document!



Procurement Requirements

Procurement Standards for “non-Federal entities” (§200.317-326)

- Requires a formal, almost FAR-like process, presumably to ensure the most efficient use of grant dollars
 - Procedure must be “documented”
 - Must provide “full and open competition”
 - Must perform “cost or price analysis”
 - Must consider conflicts of interest
 - Award only to “responsible” contractors
- Records must be maintained to document the history/rationale of the procurement
- Prohibits state or local geographical preferences
- Must use one of 5 procurement methods (§200.320)
 - Less formal methods OK if under the Federal “Simplified Acquisition Threshold” of \$150,000



Procurement Requirements

Methods of Procurement to be followed (§200.320)

- Procurement by Micro Purchase (<\$3,000)
 - “may be awarded without soliciting competitive quotations if Non Federal entity considers price to be reasonable”
- Procurement by Small Purchase Procedures (<\$150,000)
 - “price or rate quotations must be obtained from adequate number of qualified sources”
- Procurement by Sealed Bids (formal advertising)
- Procurement by Competitive Proposal
- Procurement by Noncompetitive Proposal
 - Contracting with small and minority-owned businesses



Procurement Requirements

Procurement by Noncompetitive Proposal (200.320)

- Limit Sole Source Procurements to the following situations:
 - The item or service is available only from a single source;
 - Public exigency or emergency will not permit a delay resulting from competitive solicitation;
 - The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or
 - After solicitation of a number of sources, competition is determined inadequate.



Procurement Internal Controls

- Maintain adequate descriptions of your procurement system including policies, procedures, and purchasing practices that comply with applicable laws, regulations, and contract terms and conditions
 - Mitigate against conflicts of interest
 - Ensure applicable flow down clauses and terms and conditions are included in contracts, as required to execute the requirements of the award
 - Clearly define lines of authority and responsibility within the system
 - Ensure procurements are based on authorized requisitions



Effective Procurement Controls

- Define contractor evaluation criteria and methods for determining source selection
- Perform timely cost/price analysis and technical evaluations to determine cost/price is fair and reasonable
- Maintain documentation that details the complete and accurate history of the purchase transaction to support method, contractor selected/basis of award, and reasonableness of cost/price
- Implement strong contractor monitoring and management of controls
- Address adequacy of competition



Mandatory Disclosures (§200.113)

- Recipients and sub-recipients must disclose, “in a timely manner,” in writing to the awarding agency or pass-through entity “all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award.”
- Failure to make “required disclosures” can result in remedies in §200.338, including withholding of payments, disallowance, and suspension/debarment from future awards.
- This disclosure requirement is somewhat narrower than the so-called “mandatory disclosure” rule under the FAR.
- §200.113 requires disclosure of violation of federal criminal law – presumably higher standard of proof and intent requirement.
- FAR rule, on other hand, is triggered if the contractor has “credible evidence” of violation of Federal criminal law, violation of civil False Claims Act, or significant overpayment.
- But, some agencies are already moving closer to FAR rule and may take this as cue to do more.



Certification Requirements For Recipients (§200.415)

- New enforcement tools added to the new rule at the insistence of the enforcement entities within the Agencies and DOJ.
- Apply to annual and final fiscal year reports/vouchers.
- “By signing this report, I certify to the best of my knowledge and belief that the report is true, complete, and accurate, and the expenditures, disbursements and cash receipts are for the purposes and objectives set forth in the terms and conditions of the Federal award.”
- “I am aware that any false, fictitious, or fraudulent information, or the omission of any material fact, may subject me to criminal, civil or administrative penalties for fraud, false statements, false claims or otherwise.”
- Potential civil and criminal liabilities (including the Civil False Claims Act) could be applied to the individual and the organization.
- Organization also subject to remedies for non-compliance under §200.338.



Effective Certification and Disclosure Controls

- Process by which the Organization reviews records to determine if more current, accurate, and complete cost data is reasonably available and should be disclosed to the Government. (200.302(b))
- Identify and disclose assumptions and limitations in data.
- If discovered, additional cost data must be provided to the Government with the executed Certificate.
- The impact/effect of the new cost data on proposal cost should also be provided to the Government.
- Typically occurs after budget agreement, but prior to contract award.



Effective Certification and Disclosure Controls

- Effective internal controls are preventive medicine:
 - Establish processes to assess the risk of reportable conduct
 - Assign responsibility at a sufficiently high level to ensure business ethics and compliance programs are effectively carried out
 - Set standards and establish procedures to facilitate timely discovery of improper conduct/inaccurate accounting/OCIs/etc.
 - Establish an effective internal reporting mechanism for employees (e.g., hotline) that allows for anonymity or confidentiality
 - Conduct periodic reviews to ensure compliance with standards
 - Define disciplinary action for improper conduct
 - Establish a process to consider appropriate and timely disclosure, in writing, to applicable agency OIG or pass-through entity
- Compliance is **ongoing** and **active**. A policy in a binder gathering dust on a shelf is no policy at all.



Oversight

Conflict of Interest

- Agency Policies; Disclosure Requirements
 - Agencies required to develop conflict of interest policies for “Federal awards,” including subawards
 - Recipients and sub-recipients required to disclose conflict to the agency/pass-through entity
- Conflict of Interest Policies for Procurement Activities
 - Recipients are required to maintain written policies that cover personal conflict of interest (PCI) and organizational conflict of interest (OCI) in the selection, award, and administration of contracts
 - PCI – arises in situations in which a covered employee has a financial interest, personal activity, or relationship that could impair the employee’s ability to act impartially and in the best interest of the Government.
 - OCI - arises when, because of other relationships or circumstances, a contractor may be unable, or potentially unable, to render impartial advice or assistance to the government, the contractor’s objectivity in performing the work is or might be impaired, and/or the contractor would have an unfair competitive advantage.



Oversight

- Effective Processes for Conflict of Interest:
 - Establish methods to identify and evaluate potential conflicts as early as possible in the acquisition or subaward process
 - Establish responsible party for monitoring potential conflicts
 - Screen covered employees for PCI:
 - Require Disclosure of Interest Statement
 - Updated when personal or financial interest changes and no less than annually
 - Maintain written standards of conduct covering PCI and OCI
 - Develop training to promote awareness and reinforce disclosure requirements
 - Define disciplinary action, if PCI is violated
 - Establish process for disclosure in writing of any “potential violation of conflict of interest” and demonstrate corrective actions



Oversight

- Internal Control Requirements:
 - 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
 - Comply with Federal statutes, regulations, and the terms and conditions of the Federal awards
 - Evaluate and monitor the non-Federal entity's compliance with statute; regulations and the terms and conditions of Federal awards
 - Take prompt action when instances of noncompliance are identified including noncompliance identified in audit findings
 - Take reasonable measures to safeguard protected personally identifiable information (PII) and other information the Federal awarding agency or pass-through entity designates as sensitive



Oversight

- Internal control best practices:
 - Design and document effective practices in policies and procedures
 - Establish independent monitoring practices to ensure actual practices are consistent with documented processes, including review of established policies and procedures
 - Establish reporting requirements for potential noncompliance, including recommended corrective action plans and milestones for implementing corrective actions
 - Develop and provide training to applicable personnel



Reforms to Cost and Audit Principles, Strategic Considerations

Changes to Audit Thresholds & Timing

- Audit threshold increase from \$500K to \$750K expended in federal awards during fiscal year.
- Organizations will be audited against new standards starting full FY after December 26, 2014.
- Organizations may elect a one-year grace period for new procurement standards.



Changes to Selected Items of Cost

- Compensation for Personal Services (200.430)
 - Sets forth documentation standards for time recording and labor expense
 - Charges to Federal awards for salaries and wages must be based on records that accurately reflect the work performed. These records must:
 - Be supported by a system of internal control that provides reasonable assurance that the charges are accurate, allowable, and properly allocated
 - Be incorporated into the official records of the non-Federal entity
 - Reasonably reflect the total activity for which the employee is compensated by the non-Federal entity not exceeding 100% of compensated activities
 - Encompass both federally assisted and all other activities
 - Comply with the established accounting policies and practices of the non-Federal entity



Changes to Selected Items of Cost

- Compensation for Personal Services
 - New guidance provides that the grantee must meet broad objectives for allowability and specific time and effort documentation is not required.
 - Must be reasonable for the services rendered and conform to the established written policy
 - Charges to the Federal awards for salaries and wages must be based on records that accurately reflect the work performed
 - Records must meet the documentation standards set forth in 200.430
 - Budget estimates continue to be insufficient support for charges, however, the regulation does allow non-federal entities to make interim charges based on budget estimates as long as final adjustments to charges are made to ensure that amounts charged to Federal awards are accurate.



Cost Charging Controls

- Allows for direct charging of administrative and clerical salaries if all of the following conditions are met (200.413):
 - Integral to a project or activity;
 - Individuals can be specifically identified;
 - Such costs are explicitly included in the budget or have the prior written approval of the Federal awarding agency; and
 - The costs are not also recovered as indirect costs.



Cost Charging Controls

- Key to Successful Implementation – Consistency!

- 200.403(d)
 - A cost may not be assigned to a federal award as direct cost if any other cost incurred for the same purpose in like circumstances has been allocated to the Federal award as an indirect cost.



Considerations

- The guidance provides flexibility and new options for the recovery of indirect costs
 - Consider new options that may offer significant advantages
- Take action:
 - Perform gap assessment of current processes to uniform guidance
 - Compliance polices are critical
 - Conflicts of Interest, ethics and compliance, and internal reporting policies
 - Procurement – document process, rationale, and consideration of price/cost
 - Internal training
 - Subawards
 - Address award process and effective monitoring/oversight
 - Address changes to cost principles

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