

SESSION 5

GRANTS AND COOPERATIVE AGREEMENTS

TUESDAY, JANUARY 26, 2021

2:00 PM to 3:00 PM

Pub K

PUBLIC CONTRACTS



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Revisions to the Uniform Guidance Include Welcome Changes and New Areas of Risk

- On August 13, 2020, OMB issued its Final Guidance on amendments to the OMB Guidance for Grants and Agreements (Uniform Guidance), marking the first major changes since the guidance was first promulgated in 2013.
- Noteworthy revisions for grant recipients generally fall into three overarching concepts:
 - Implementing Administration Goals and Initiatives, which, for the most part, grant agencies flexibility in designing and monitoring programs and encourage the use of data collection and reliance on data to identify best practices
 - Incorporating Statutory Requirements
 - Clarifying Existing Requirements

Revisions to the Uniform Guidance Include Welcome Changes and New Areas of Risk

- The impact of these revisions may range from minor and unique circumstances to large-scale changes that affect all recipients.
- ▶ 2 C.F.R. § 200.102, Exceptions. In limited circumstances, this provision grants agencies the flexibility to make exceptions to Uniform Guidance requirements. However, OMB's revisions state that it "strongly encourages Federal awarding agencies to add or remove requirements by applying a risk-based, data-driven framework to alleviate select compliance requirements and hold recipients accountable for good performance," recognizing that the Uniform Guidance is not a one-size-fits-all approach, and in some circumstances, deviations may be reasonable.

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- ▶ 2 C.F.R. 200.340, Termination. This provision was revised to "strengthen the ability" of the awarding agency to terminate federal awards when the program goals or agency priorities are no longer met.
- ▶ 2 C.F.R. § 200.414(f), De Minimis Rate, which previously outlined that the only non-federal entities that could use the de minimis rate were ones that had never received a negotiated indirect cost rate agreement (NICRA), was revised to expand the use of the de minimis rate of 10 percent of modified total direct costs to entities with expired rates.

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- ▶ 2 C.F.R. § 200.414(h), *Publication of NICRAs*. This new paragraph requires that the indirect negotiated rate, the distribution base, and the rate type relating to NICRAs are collected and displayed on a public website.
- ▶ 2 C.F.R. § 200.105, *Effect on other issuances*. To reduce recipient burden, this section was modified to “prohibit Federal awarding agencies from including references to non-authoritative guidance in the terms and conditions of Federal awards.”
- ▶ 2 C.F.R. § 200.322, *Domestic preferences for procurement*. This new section encourages recipients to “maximize use of goods, products, and materials produced in the United States.”

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- ▶ 2 C.F.R. § 200.320, Methods of procurement to be followed. To reflect statutory changes that should also significantly reduce the burden on procuring goods and services, the micro-purchase threshold was raised from \$3,500 to \$10,000, and the simplified acquisition threshold was raised from \$150,000 to \$250,000. Recipients may now request higher micro-purchases, up to \$50,000, based on certain conditions, such as maintaining records and receiving agency approval.
- ▶ 2 C.F.R. § 200.344, Closeout, was revised to extend the time period for recipients to submit closeout reports and liquidate all financial obligations from 90 days to 120 days and directs agencies to report failures to submit final closeout reports as a "failure to comply with the terms and conditions of the award."

Revisions to the Uniform Guidance Include Welcome Changes and New Areas of Risk

- ▶ C.F.R. §§ 200.216 and 200.471 were revised to incorporate section 889 of the National Defense Authorization Act (NDAA) for FY 2019, which prohibits the obligation or expenditure of federal funds and awards for the use of “covered telecommunications equipment or services.”
- ▶ 2 C.F.R. Part 183 was added to implement “Never Contract with the Enemy.”
- ▶ 2 C.F.R. Part 170, Reporting subaward and executive compensation information, was revised.
- ▶ 2 C.F.R. Parts 25 and 200 were revised to implement statutory changes to the Federal Awardee Performance and Integrity Information System (FAPIS).

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- 2 C.F.R. § 200.332, *Requirements for pass-through entities*, was revised to clarify the below situations regarding a pass-through entity's responsibility relating to its subrecipients:
 - Pass-through entities are not responsible for addressing a subrecipient's entire audit findings. Instead, the cognizant agency is responsible for addressing a subrecipient's entity-wide issues.
 - Concerning a subrecipient's indirect cost rate, OMB directs pass-through entities to use a subrecipient's NICRA, but, if none exists, the parties are to negotiate a rate or use the de minimis rate, or the subrecipient may use the cost allocation method to account for indirect costs.



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PPP Loans, Federal Grants & Cooperative Agreements and Non-Profits

■ CARES Act – Enacted April 2, 2020.

- ▶ 100% guarantee of up to \$10M forgivable loan with a 1% interest rate
- ▶ Rules consolidated into 1 SBA IFR issued January 6, 2021 (available at <https://www.sba.gov/document/policy-guidance-ifr-paycheck-protection-program-ppp-amended-economic-aid-act>)
- ▶ Last date for applications was August 8, 2020

PPP Loans, Federal Grants & Cooperative Agreements and Non-Profits

■ Economic Aid Act – Enacted December 27, 2020

- ▶ Authorized 2nd draw (2nd loan) of up to \$2M
- ▶ Authorized increases for 1st draw loans under very limited circumstances
- ▶ Last date for applications is March 31, 2021
- ▶ 1 SBA Interim Final Rule issued January 6, 2021 (available at <https://www.sba.gov/document/policy-guidance-ifr-paycheck-protection-program-ppp-second-draw-loans>)

Key Risk – FCA Liability

■ False Claims Act Liability

- ▶ False facts
- ▶ False representations and certifications
 - ▶ Double dipping

■ Bank and Wire Fraud Charges

501(c)(3) Non-Profit Eligibility

■ 501(c)(3) Non-Profits Are Eligible

- ▶ No more than 500 employees
 - ▶ **Employees of Affiliates Count** - Same as for SBA Loans (see 13 CFR § 121.103). Starting point for non-profits: Accounting consolidation rules.
 - ▶ **Employees Abroad Count** - Caveat: Loans applied for prior to May 5, 2020, borrowers allowed to count only employees with principal place of residence in the U.S. See 85 Fed. Reg 30,835 (May 21, 2020)

501(c)(3) Non-Profit Eligibility

■ 501(c)(3) Non-Profits Are Eligible (cont)

- ▶ **State and Local Government Controlled Non-Profits** - Ineligible except a hospital may be eligible if it is a 501(c)(3) and receives less than 50% funding from the government (excluding Medicaid)
- ▶ **Religious Institutions** – Exempt from affiliation rules if “reasonable, good faith” determination affiliation rules would “substantially burden religious exercise”

2nd Draw Eligibility

- **2nd Draw Eligibility Requirements** – Same as 1st draw except borrower must have:
 - ▶ 300 or fewer employees instead of 500 or fewer
 - ▶ 25% revenue reduction in 2020 relative to 2019
 - ▶ Received a 1st draw PPP loan
 - ▶ Used 1st draw PPP loan before 2nd draw disbursement
 - ▶ (Other exclusions apply)

Loan Application Certification – Use on Eligible Costs

- **Certification** - Loan and forgiveness applications require certification that borrower will use/did use loan proceeds for eligible costs (fungibility of cash?)
- **Payroll Costs** - must represent at least 60% of the loan amount
- **Operating Costs** – must not represent more than 40% of the loan amount - Includes mortgage interest payments, rent payments and utilities, covered operations expenditures, covered supplier costs, COVID 19 worker protection expenditures, covered property damage costs due to unrest

Loan Application Certification – Use on Eligible Costs

- **Foreign Operation Costs** – Costs of foreign payroll or operations not eligible
- **Covered Payroll Period** –
 - ▶ Period over which costs can be calculated
 - ▶ At borrower option, 8 to 24 weeks from date of disbursement

Key Loan Application Certification – Necessity

Loan Application Certification – “Current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant”

- **Loans Under \$2M** – Safe harbor applies, and if loan less than \$2M certification deemed in “good faith”
- **Loans Over \$2M** - Subject to SBA review for necessity, and if SBA determines not necessary and borrower repays when notified SBA will not seek additional remedies (See SBA PPP FAQ Question #46)
- **SBA Review** – See SBA PPP FAQs Questions #31 and #53 and the Paycheck Protection Program Loan Necessity Questionnaire (Non-profit Borrowers) – No questions specific to state or federal funding

Key Considerations for Loan Forgiveness

- Apply within 10 months of the end of the covered payroll period to avoid payment obligations
- Include only eligible costs incurred during the covered payroll period
- Reductions in payroll or headcount may reduce forgivable amount
- Don't double dip

OMB and Agency Guidance on PPP Loans and Grants & Cooperative Agreements

■ OMB Memo M-20-26

- ▶ “Under this flexibility, payroll costs paid with the Paycheck Protection Program (PPP) loans or any other Federal CARES Act programs must not be also charged to current Federal awards as it would result in the Federal government paying for the same expenditures twice.”

OMB and Agency Guidance on PPP Loans and Grants & Cooperative Agreements

■ OMB Memo M-20-26 (cont)

- ▶ “Due to the limited funding resources under each federal award...awarding agencies must inform recipients to exhaust other available funding sources to sustain its workforce and implement necessary steps to save overall operational costs (such as rent renegotiations) during this pandemic period in order to preserve Federal funds for the ramp-up effort.”
- ▶ USAID FAQs on whether to charge costs to USAID or seek PPP loan forgiveness – “consult your accountants and general counsel”

Key Issues for Federal Recipients with PPP Loans

■ Fixed Obligation Grants and De Minimis Indirect Cost Rates

- ▶ No identifiable PPP eligible costs charged to the award

■ Calculating Loan Amount

- ▶ Including direct chargeable costs and indirect eligible costs –
Not prohibited
- ▶ Impact on necessity?
 - ▶ Lack of program activity = layoffs for direct charged employees = lack of direct spending = lower indirect cost recovery = financial uncertainty

Key Issues for Federal Recipients with PPP Loans (Cont'd)

■ Seek Forgiveness or Charge the Awarding Agency

- ▶ Lack of OMB or agency guidance on how to decide – Up to you
- ▶ Direct Chargeable Costs
 - ▶ Consider ability to achieve program goals within budget if additional costs charged to the award vs forgiven under the PPP loan
- ▶ NICRA Eligible Costs
 - ▶ PPP loan forgiveness = lower NICRA rate
 - ▶ Consider impact on future rate negotiations



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Section 889 Roll-Out Grant Recipients



Part of U.S. Government concerns about PRC and cyberespionage

- ▶ U.S.-China Economic and Security Review Commission Report (2011)
 - ▶ Describes potential vulnerabilities in U.S. communications infrastructure and products
 - ▶ Specifically addresses optical fiber networks, routers, switches, and hubs, WiMAX and WiFi, network control devices, software, controllers, drivers, security software, handsets and smart phones, wireless headsets, earpieces, and Bluetooth

Section 889 Roll-Out Grant Recipients



Part of U.S. Government concerns about PRC and cyberespionage

- ▶ “Deliver Uncompromised” – MITRE Corporation
 - ▶ Recommends making supply chain security a “fourth pillar” of acquisition (along with cost, schedule, performance)

FY 2019 National Defense Authorization Act (NDAA)

“Part A”

Section 889(a)(1)(A): prohibits contractors from furnishing Government customers with any equipment, system, or services that uses covered telecommunications equipment or services as a substantial or essential component of any system or as a critical technology of any system

“Part B”

Section 889(a)(1)(B): prohibits agencies from entering into a contract with an entity that uses covered telecommunications equipment or services as a substantial or essential component of any system or as a critical technology of any system (no nexus to government contracting required)

Key Elements of Section 889 B

Covered Telecommunications and Video Surveillance Equipment

- Huawei or ZTE telecommunications equipment or services
- Certain video surveillance equipment or services from identified companies such as Hytera, Hangzhou, and Hikvision
 - Video surveillance equipment for the purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes
- Other equipment and services that may be identified by DoD or DNI

Key Elements of Section 889 B

New Definitions

- Backhaul, Interconnection Arrangements, Roaming, Reasonable Inquiry
- Effect application of exception to 889(a)(1) (both A and B) and inquiry expectations when making representations
 - 889(a)(1)(A) will need to be reviewed to ensure definitions used internally before this rule are consistent with the new definitions
- Does *not* define “use,” “system,” or qualifying video surveillance language which may have helped to limit application

Revisions to the Uniform Guidance

- August 13, 2020 - Office of Management and Budget (OMB) finalizes its update to rules that apply to grant recipients
- Revise 2 CFR Part 200
- 2 CFR §§ 200.216 and 200.471 were revised to incorporate Section 889 of the National Defense Authorization Act (NDAA) for FY 2019, which prohibits the obligation or expenditure of federal funds and awards for the use of “covered telecommunications equipment or services”
- Agencies administering loan grant or subsidy programs should prioritize funding awards for efforts by recipients **to transition away from covered equipment by replacing it with alternative equipment**

New Regulations 2 CFR § 200.216

Clarifies that federal grant recipients and subrecipients are restricted from using the funds to procure or obtain, or enter into a contract for equipment, services and systems prohibited under Section 889.

- Recipients and subrecipients are prohibited from obligation or expending loan or grant funds to:
 - Procure or obtain;
 - Extend or renew a contract to procure or obtain; or
 - Enter into 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 or services" -- As defined in Section 889

New Regulation 2 CFR § 200.471 - Costs

Telecommunication costs and video surveillance costs

(new definition for telecommunications and video surveillance costs)

Costs incurred for telecommunications and video surveillance services or equipment such as phones, internet, video surveillance, cloud servers are allowable **except** for the following circumstances:

- Obligating or expending covered telecommunications and video surveillance services or equipment services as described in § 200.16 to:
 - Procure or obtain, extend or renew a contract to procure or obtain;
 - Enter into a contract (or extend or renew a contract) to procure; or
 - Obtain the equipment, services or systems

New Regulation 2 CFR § 200.471 - Costs

Telecommunication costs and video surveillance costs (cont)

Note: Does not prohibit recipients from using covered telecommunications equipment or services; grant recipients cannot use federal loan or grant funds to acquire such equipment or services.

Indirect Costs --prohibited equipment also excluded from allowable cost pools.

Subrecipients and Subcontractors

- No flowdown requirement
- No representation or certification requirement
- No requirement for awardees to make affirmative certification
 - Ways to ensure compliance?
 - Best practices?
 - Refund obligations?



Best Practices – *Robust risk-based compliance-based approach*

- Determine whether your organization provides product or services to the US government, and/or performs under the terms of a grant – consider all federal agencies – VA, HHS, DoD, OPM
- Inventory and categorize direct and indirect purchases
- Develop standard written risk-based process for evaluation (think through criteria)
- Solicit necessary representations for compliance from subgrantees, subcontractors, distributors, manufacturers, etc.
- Develop process to track responses (or lack of responses)
- Education organization’s professionals – purchasing/procurement/materials management



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The Bayh Dole Act - 37 CFR 401

- Applies to Grants and Cooperative Agreements Awarded by the US
- Covers ownership of patentable Inventions and Discoveries
- Applies to Small Business and Non-Profit Organizations (Universities)

Application/Use of Bayh Dole Act

- Applies to companies that receive SBIR/STTR (research) grants
- Focus is on the development of IP stemming from the use of government funding
- Requires the contractor to set up processes to properly manage filing of IP/licensing of IP
- Make appropriate disclosures to the US
- Gives the USG March-In Rights

Subject Inventions

- Subject Inventions are covered by Bayh Dole
- The Act covers inventions conceived or reduced to practice during the Grant Performance Period
- The use of Government funds in conception or confirmation makes the invention subject to Bayh-Dole

Implications of IP Ownership

- The USG is granted a world-wide nonexclusive, irrevocable, paid-up license to use the Subject Invention
- Manufacture must be performed in the US, unless an exception is obtained
- Subject Invention Includes the Government's right to exercise its March-In-Rights
- Requirement to use the Subject Invention in support of the Purpose of the Grant

Administrative Compliance Under Bayh Dole

- Need for written IP assignments
- Need to educate employees about the importance of reporting inventions
- Requirement to disclose each Subject Invention to a patent administrator
- Report each Subject Invention to the sponsoring agency
- Determination of whether to retain title to the Subject Invention.

Filing For IP Protection

- The Contractor must timely file for All Patent Applications
- The Contractor must provide appropriate notice of filing and license to the government
- Notify the government of the date a patent is issued, the patent number, and the expiration date of the issued patent.

Summary of Required Filings

- Annual Utilization Report
- Annual Invention Statement Disclosing all Subject Inventions conceived/reduced to practice during reporting period
- Final Invention Statement and Certification for all Subject Inventions which summarizes covering the entire term of the grant/contract
- Notification of all decisions to not pursue the patent - at least 60 days before any filing deadline

Final Considerations

- Failure to comply with the Bayh Dole Act could result in the following:
 - ▶ Loss or restriction of the IP ownership
 - ▶ Government exercise of its March-In-Rights
 - ▶ Create a cloud on the title to a subject invention
 - ▶ Disclosure to investors and/or other parties
 - ▶ Create a negative impact for investors and ultimate corporate transactions

Conclusion

- It is imperative to remain compliant
- Corporate Team Training is imperative
- Know and follow the provisions of the Act and applicable Grant Contract Provision
- Use Government provided resources
- Use iEdison (NIH Portal) for help with Bayh-Dole Compliance
- Look for Guidance/Assistance provided by NIST (National Institute for Standards and Technology)

Challenge Question



Submit your answer to craig@pubklaw.com
Subject line: Panel 5 Challenge Question