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Office of Management and Budget Proposes Widespread Changes to Guidance on Grants and Agreements

*By Brian Walsh, George E. Petel and Morgan W. Huston**

In this article, the authors discuss a rule proposed by the Office of Management and Budget that would affect recipients and subrecipients of federal financial assistance by changing everything from basic definitions of terms such as “federal financial assistance” to the standard for mandatory disclosures, the threshold for the disposition of equipment and supplies, audit requirements, socioeconomic policies, prior approval requirements, the treatment of indirect costs, and more.

The Office of Management and Budget (OMB) has issued a proposed rule¹ to revise sections of OMB Guidance for Grants and Agreements. OMB’s proposed guidance provides detailed insight on the changes OMB plans to implement. The changes included therein reflect comments OMB received from federal agencies and the public in response to its Notice of Request for Information.²

OMB is proposing changes to 2 C.F.R. Parts:

- 1 (About Title 2 of the Code of Federal Regulations and Subtitle A);
- 25 (Universal Identifier and System for Award Management);
- 170 (Reporting Subaward and Executive Compensation Information);
- 175 (Award Term for Trafficking in Persons);
- 180 (OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Non-procurement));
- 182 (Governmentwide Requirements for Drug-Free Workplace (Financial Assistance));
- 183 (Never Contract with the Enemy); and
- 200 (Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards).

As a whole, OMB’s revisions intend to advance the following objectives:

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¹ <https://www.federalregister.gov/documents/2023/10/05/2023-21078/guidance-for-grants-and-agreements>.

² 88 FR 8480 (Feb. 9, 2023).

- (1) Incorporating statutory requirements and administration priorities;
- (2) Reducing agency and recipient burden;
- (3) Clarifying sections that recipients or agencies have interpreted in different ways; and
- (4) Rewriting applicable sections in plain language, improving flow, and addressing consistent use of terms

These changes seek to make the rules more flexible and make compliance with the rules easier. This article discusses the major categories of proposed changes.

PLAIN LANGUAGE REVISIONS

Many of OMB's proposed changes alter the guidance language used to increase clarity and consistency. For example, in Part 200 Subpart A, OMB proposes to alter the definition of the term "Federal financial assistance" to include assistance received or administered by "recipients or subrecipients" rather than "non-Federal entities."

MANDATORY DISCLOSURES

Under current guidance, recipients and subrecipients (i.e., non-federal entities) or federal award applicants must disclose all violations of federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the federal award.³ OMB proposes to incorporate the Federal Acquisition Regulation (FAR) "credible evidence" standard to the mandatory disclosure requirement for grants and cooperative agreements.

Under the proposed guidance, recipients or subrecipients would be required to disclose any credible evidence of a violation of federal criminal law potentially affecting the federal award, or a violation of the civil False Claims Act. The disclosure would need to be in writing to the federal awarding agency and pass-through entity (if applicable) as well as that agency's Office of Inspector General.

THRESHOLDS

The proposed guidance raises the threshold amount for the disposition of equipment and supplies. Current guidance provides that post award, equipment with a current fair market value of \$5,000 or less may be retained by the non-federal entity.⁴ The proposed guidance raises this threshold to \$10,000. Current guidance also provides that the non-federal entity must retain or sell

³ 2 C.F.R. § 200.113.

⁴ 2 C.F.R. § 200.313.

residual supplies exceeding \$5,000 in aggregate value that are not needed for another federal award.⁵ The proposed guidance also raises this threshold to \$10,000.

OMB also intends to make an upwards adjustment on the exclusion threshold of subawards for modified total direct cost base calculations used in allocating recipients' indirect costs. Currently, modified total direct costs only include up to the first \$25,000 of each subaward, specifically excluding the portion of each subaward in excess of \$25,000. The proposed guidance increases the threshold for exclusion from \$25,000 to \$50,000.

OMB also proposes to remove the Simplified Acquisition Threshold (SAT) limit for fixed amount subawards. Under the current rule, pass-through entities were limited to providing subawards based on fixed amounts up to the SAT with prior written approval from the agency.⁶ While a recipient's use of fixed amount subawards would remain subject to the prior written approval of the agency, the proposed revision would provide agencies and recipients with more flexibility in making programmatic and budgetary decisions.

Under current guidance, a non-federal entity that expends \$750,000 or more in federal awards during the entity's fiscal year must have an Single Audit (or program-specific audit) conducted for that year.⁷ OMB proposes to raise the audit threshold from \$750,000 to \$1,000,000.

AUDIT REQUIREMENTS

In addition to increasing the Single Audit threshold, OMB proposes several other changes to audit requirements. Auditees are required to prepare a schedule of expenditures of federal awards (SEFA) for the period covered by the auditee's financial statements.⁸ Current guidance dictates what the schedule must include. OMB proposes to add a requirement that, for audits covering multiple recipients, the schedule must identify the recipient of the federal award.

The awarding federal agency is responsible for certain audit-related functions for the awards it makes, including submitting annual updates to the compliance supplement to OMB.⁹ OMB proposes updating the awarding federal agency responsibilities to encourage agencies to engage with external audit stakeholders and NSAC prior to submitting compliance supplement drafts to OMB.

⁵ 2 C.F.R. § 200.314.

⁶ 2 C.F.R. § 200.333.

⁷ 2 C.F.R. § 200.501.

⁸ 2 C.F.R. § 200.510.

⁹ 2 C.F.R. § 200.513.

In terms of the scope of an audit, OMB proposes to add a requirement that compliance testing include a test of transactions and other auditing procedures necessary to provide auditor with sufficient evidence to support an opinion on compliance.

SOCIOECONOMIC POLICIES

OMB proposes to clarify that 2 C.F.R. Part 200 does not prohibit recipients and subrecipients from:

- Using Project Labor Agreements or similar forms of pre-hire collective bargaining agreements;
- Requiring commitments or goals to hire people residing in high-poverty areas, disadvantaged communities as defined by the Justice40 Initiative OMB Memorandum M-21-28, or high-unemployment census tracts within a region no smaller than the county where a federally funded construction project is located, provided that a recipient or subrecipient may not prohibit interstate hiring;
- Requiring commitments or goals to individuals with barriers to employment (as defined in Section 3 of the Workforce Innovation and Opportunity Act,¹⁰ including women and people from underserved communities as defined by Executive Order 13985;
- Using agreements intended to ensure uninterrupted delivery of services;
- Using agreements intended to ensure community benefits; or
- Offering employees of a predecessor contractor rights of first refusal under a new contract.

Federal agencies may consider allowing recipients or subrecipients to use such practices if consistent with the U.S. Constitution, applicable federal statutes and regulations, the objectives and purposes of the federal financial assistance program, and other requirements of part 200.

OMB also proposes to remove the prohibition on using geographic preference requirements. In the same vein, OMB also proposes to state that 2 C.F.R. Part 200 Subpart D does not prohibit recipients and subrecipients from incorporating a scoring mechanism that rewards bidders committing to specific numbers and types of U.S. jobs, as well as certain compensation and benefits.

Regulations currently provide that the non-federal entity should use minority businesses, women's business enterprises, and labor surplus area firms when

¹⁰ 29 U.S.C. § 3102(24).

possible.¹¹ OMB proposes to add veteran-owned businesses to the types of businesses recipients and subrecipients are encouraged to consider for procurement contracts.

OMB also seeks to encourage sustainability through its proposed guidance. In accordance with Executive Order 14057, Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability, OMB proposes to add language encouraging federal award recipients to purchase, acquire, or use products and services that can be reused, refurbished, or recycled; contain recycled content, are biobased, or are energy and water efficient; and are sustainable.

PRIOR APPROVAL REQUIREMENTS

OMB seeks to clarify and add certain requirements for prior approval when revising budget and program plans. OMB proposes to clarify that recipients do not need prior approval of individual subrecipients under all circumstances, but only when making subawards of programmatic activities not proposed by the recipient in the application for an award. OMB proposes to further clarify that agencies should not require approval of a change in a proposed subrecipient unless the initial inclusion of a subrecipient was a determining factor in the agency's merit review process. OMB proposes to add requirements for prior approval where a recipient or subrecipient requests additional federal funds to complete a project, or transfer funds between construction and nonconstruction work. Under the proposed rules recipients and subrecipients must also seek prior approval for a no-cost extension to the period of performance, but not for one-time extensions authorized by the agency.

OMB also intends to remove a significant number of prior written approval requirements for various costs. Prior written approval will no longer be required for real property, equipment, direct costs, entertainment costs, exchange rates, memberships, participant support costs, selling and marketing costs, and taxes. OMB clarified that although it proposes to remove the prior approval requirement for participant support costs, the recipient or subrecipient is responsible for treating these costs consistently across federal awards. OMB also clarified that although it proposes to remove the prior approval requirement for selling and marketing costs, such costs are unallowable unless they meet certain requirements.

While removal of these prior approval requirements may decrease the administrative burden for recipients in some circumstances, it may also make it more difficult for recipients to assess the reasonableness and allocability of certain cost items in advance of their incurrence.

¹¹ 2 C.F.R. § 200.321.

INDIRECT COSTS

OMB proposes to revise several aspects of the guidance pertaining to indirect costs. OMB proposes to clarify that recipients and subrecipients may notify OMB of any disputes regarding an agency's application or acceptance of federally negotiated indirect cost rates. OMB also proposes to clarify that pass-through entities must accept all federally negotiated indirect costs rates for subrecipients.

OMB also proposes to raise de minimis rate from 10% to 15%, and seeks comments on the advantages and disadvantages of doing so in the way it proposes. According to OMB, this would allow for a more reasonable and realistic recovery of indirect costs, particularly for new or inexperienced organizations that may not have the capacity to undergo a formal rate negotiation, but still deserve to be fully compensated for their overhead costs. OMB specified that while recipients and subrecipients still have discretion to apply a rate lower than 15%, agencies cannot compel them to do so unless required by statute. OMB also proposes to clarify that the de minimis rate may not be applied to cost-reimbursement contracts.

Finally, OMB also proposes to remove the requirement that all indirect rates be publicly available on a government-wide website.

FUTURE CHANGES

OMB also flagged areas where it is considering making changes, although it has not yet proposed specific accompanying language. OMB is considering requiring additional pre-award certifications for fixed amount awards to mitigate the potential increased risk of fraud under fixed amount awards. OMB specifically invites comments on appropriate pre-award certifications in the fixed amount award context and makes explicit that it may include such certification requirements in its final guidance.

OMB is also considering allowing agencies to grant a one-time exception from the requirement to obtain a Unique Entity Identifier (UEI), register in SAM.gov, or both for foreign organizations or foreign public entities applying for an award between \$25,000 and \$250,000 for a project or program performed outside the United States. To the extent this exception is included in the final guidance, OMB contemplates a case-by-case application with the agency conducting a risk-based analysis. This exception would be implemented to reduce the administrative burden associated with obtaining a UEI and registering in SAM.gov for foreign organizations or foreign public receiving federal awards between the Transparency Act threshold and the SAT. If implemented, OMB would also consider incorporating limits in the exception to mitigate risk, such as prohibiting its application to awards that will include subawards above \$30,000.

Current regulations provide for a 30-day extension where the agency determines there are exigent circumstances prohibiting an applicant from obtaining a UEI and registering in SAM.¹² OMB is contemplating expanding this exception to provide recipients with an additional ninety days where exigent circumstances persist.

MISCELLANEOUS

OMB proposes to clarify the applicability of the requirements to obtain a UEI and SAM.gov registration in 2 C.F.R. Part 25. While the requirements will not apply to second-tier subrecipients or contractors, it does apply to recipients of loan guarantees, and agencies have discretion over whether they apply to beneficiary borrowers.

OMB also proposes clarifications related to suspension and debarment in 2 C.F.R. Part 180. OMB intends to clarify available administrative actions in lieu of debarment. OMB proposes that officials consider “other indicators of adequate evidence that may include, but are not limited to, warrants and their accompanying affidavits” before initiating a suspension. OMB also proposes to add “whether your business, technical, or professional license(s) has been suspended, terminated, or revoked” to the factors influencing a debarment decision.

CONCLUSION

To summarize, OMB’s proposed rule would affect recipients and subrecipients of federal financial assistance. The proposed changes affect everything from basic definitions of terms such as “federal financial assistance” to the standard for mandatory disclosures, the threshold for the disposition of equipment and supplies, audit requirements, socioeconomic policies, prior approval requirements, the treatment of indirect costs, and more.

¹² 2 C.F.R. § 25.110.

