



# KEY ISSUES IN US FEDERAL GRANT LAW FOR IN-HOUSE LAWYERS

June 14, 2018

# Agenda

- Basics of Federal Grants
- Difference in Agency Rules and Interpretive Guidance
- Procurement Rules and Sole Sourcing
- Indirect Rates
- Match Rules
- Program Income
- Recent Enforcement Cases
- Trend of Grants to Cooperative Agreements

# Speaker Biographies



**Mr. Jonathan C. Rotter, Esq.**  
Nature Conservancy  
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Jonathan Rotter has over 20 years of government grants experience and has presented extensively on this and other topics related to international law and conservation law and policy. He currently serves as a Senior Attorney for the Nature Conservancy in which capacity he provides legal support to the Conservancy's operations in Latin America and the Caribbean as well as to the Conservancy's climate change staff and its Global Lands Team. He has been a member of the Virginia Bar since 1995.

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**Gregory S. Jacobs**  
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Greg Jacobs works with companies across all aspects of government contracts and grant law. He has obtained successful outcomes in bid protests before the Government Accountability Office and Court of Federal Claims and Contract Disputes Act claims before both Boards of Contract Appeals. Greg also has extensive experience in guiding clients through voluntary disclosures in federal contracts and grants.

Greg is the Chair of Polsinelli's Government Contracts Practice Group.

# BASICS – WHAT IS A GRANT?

# What is a Grant?

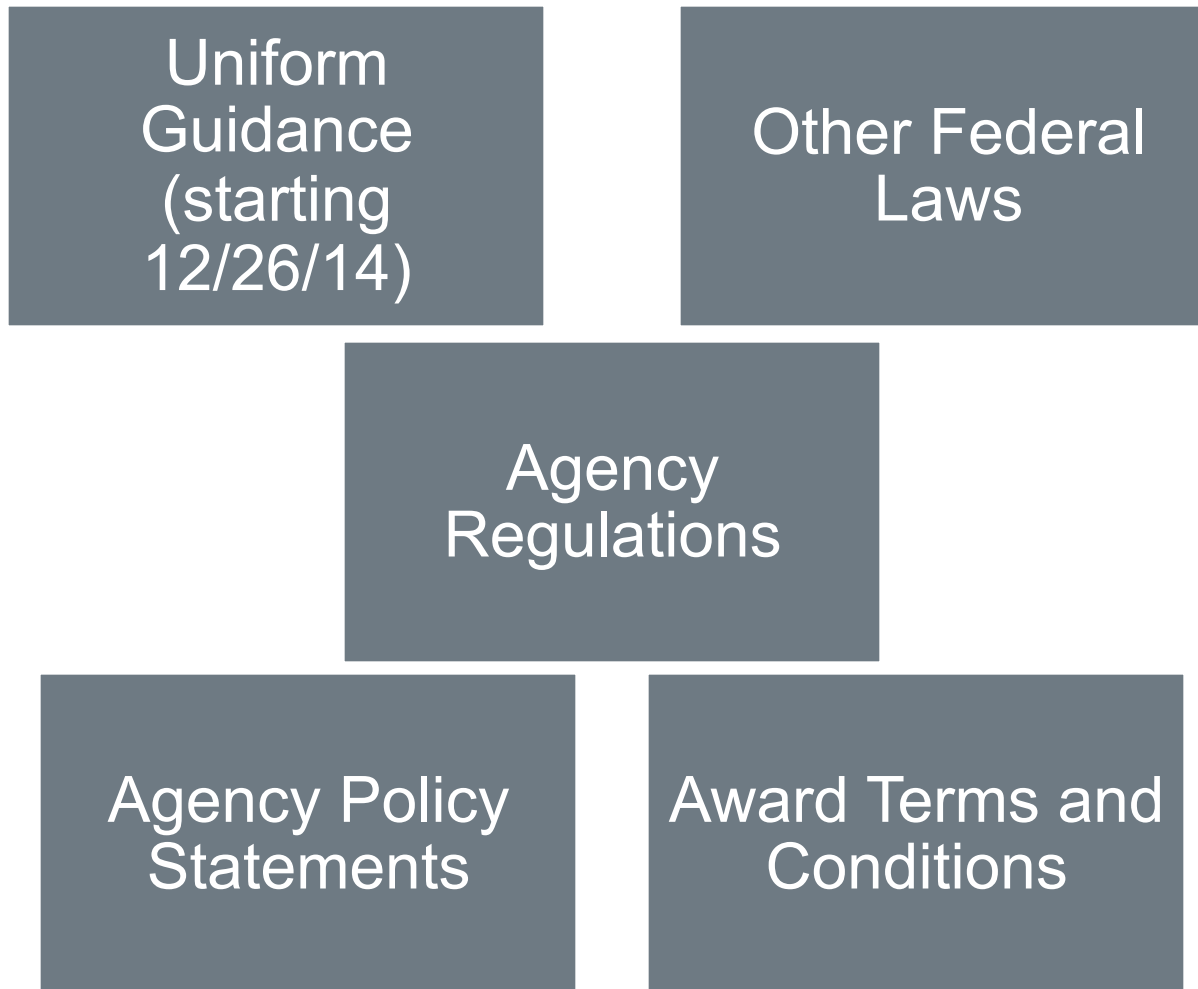
- Today we are talking about federal grants only.
- 2 C.F.R. § 200.51 – “Grant Agreement” is “a legal instrument of financial assistance” that is a transfer of federal money to non-federal entity “to carry out a public purpose” and is not -
  - A contract to acquire property or services;
  - A cooperative agreement (no substantial federal involvement); and
  - An agreement for a subsidy, loan, insurance, etc.

# Who Makes Grants?

- A federal entity
  - HHS
  - USAID
  - DOT
  - ED
  - USDA
- A “pass-through entity” (makes a subaward to a subrecipient)

# DIFFERENCE IN AGENCY RULES AND INTERPRETIVE GUIDANCE

# Many Overlapping Levels of Requirements





# Uniform Guidance (2 C.F.R. Part 200)

- Apply to awards made December 26, 2014 and later.
- Comprehensive and uniform rules for:
  - Definitions
  - Pre-Award Requirements
  - Post-Award Requirements
  - Cost Principles
  - Audits
- Replaced several long-standing OMB Circulars (A-110, A-122, etc.)

# Other Federal Laws

- Examples:
  - Drug-Free Workplace Act
  - Davis-Bacon Act
  - Title VI of the Civil Rights Act of 1964
  - The Byrd Amendment on Government Lobbying
  - Whistleblower Protection Statutes
  - Export Control Laws
  - Executive Orders

# Agency Regulations and Grant Provisions

- Each agency has its own regulations under the Uniform Guidelines
- Found in regulatory supplements under 2 C.F.R. (see 45 C.F.R. for HHS version)
- May impose additional requirements or deviations from the Uniform Guidelines
  - *E.g.* – HHS has specific limits on indirect cost rates for training grants
- Agreements often include agency-specific clauses that reflect laws, regulations, or agency policy positions

# Agency Guidance

- Finally, there are agency guidance and policy documents, which do not rise to the level of regulations
- These documents provide an agency's view on a specific grant policy issue, but do not have the force of law
  - E.g., HHS has a Grant Policy Statement, and NIH has its own Grant Policy Statement
- An agency may also publish OIG opinions, letters to recipients, etc.

# PROCUREMENT RULES AND SOLE SOURCING

# Procurement

- §200.320 – Procurement: Buying goods or services in support of work under the grant
- Key Procurement Standards:
  - §200.319(c): required to have written procedures
  - §200.318(b): Must exercise sufficient oversight of contractors and sub-awardees
  - §200.318(c)(1): Written procedures must contain standards of conduct for employees, including conflict of interest rules
  - §200.318(i): Must maintain records of amounts spent and goods and services received

# Procurement (cont.)

- Competition Requirements:
  - §200.319(a): General requirement to use open and competitive procedures in accordance with written processes
  - U\$150,000 and above – use one of 2 methods:
    - §200.320(c): Procurement by sealed bids (formal advertising)
    - §200.320(d): Procurement by competitive proposals
  - Exceptions:
    - §200.320(a): Micro-purchase: Below US\$3,000, no competition required
    - §200.320(b): Small-purchase: Below US\$150,000, may use simple and informal methods
    - §200.320(f): Noncompetitive process may be used in limited circumstances

# Noncompetitive Proposal procurement ("Sole Sourcing") Rules

- §200.320(f) – allowed only when:
  - Available only from a single source
  - Emergency and not sufficient time for competitive process
  - Federal awarding agency authorizes in writing
  - After solicitation of a number of sources, competition is determined inadequate.
- §200.323(b): in sole source situation UG requires negotiation of "profit."



# Noncompetitive Proposal procurement ("Sole Sourcing") Rules (cont.)

- In sole source situation UG requires negotiation of "profit."
- §200.323(b): factors in determining fair and reasonable profit:
  - complexity of the work,
  - contractor's risk,
  - contractor's capital investment,
  - amount of subcontracting,
  - quality of past performance, AND
  - local industry profit rates for similar work.

# INDIRECT RATES

# Cost Principles

- **2 CFR §200.400**
- Non-Federal entity is responsible for the administration of the Federal award through the application of sound management practices
- Non-Federal entity assumes responsibility for administering Federal funds in a manner consistent with underlying agreements, program objectives, and the terms and conditions of the Federal award
- The principles must be used in determining the allowable costs of work performed by the non-Federal entity under Federal awards

# Factors Affecting Allowability of Costs

- **§200.403 Costs must meet the following general criteria in order to be allowable under Federal awards:**
  - (a) Necessary and reasonable for the performance of the Federal award
  - (b) Conform to any limitations or exclusions in the principles or in the Federal award as to types or amount of cost items
  - (c) Be consistent with policies and procedures that apply uniformly to both federally-financed and other activities of the non-Federal entity
  - (d) A cost may not be assigned to a Federal award as a 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
  - (e) Be determined in accordance with GAAP
  - (f) Not be included as a cost or used to meet cost sharing or matching requirements of any other federally-financed program in either the current or a prior period
  - (g) Be adequately documented

# Direct v. Indirect Costs

- **Direct cost** – *those that can be identified specifically with a particular final cost objective*
  - Examples – salaries of program staff and related benefits, materials used for the delivery of specific federal program, etc.
- **Indirect cost** – those that have been incurred for common or joint objectives and cannot be readily identified with a particular final cost objective
  - Examples – management and general-type costs (lawyers!), building maintenance, etc.
- The key factor in distinguishing direct and indirect costs is whether the cost is associated with a grant, not the nature of the cost

# Indirect Cost Rates Under Uniform Guidance

- An organization must negotiate an indirect rate with its cognizant agency
  - Cognizant agency will usually be the one with the largest dollar value of federal awards
  - Negotiated indirect rate will apply to all federal awards, unless deviation approved by agency head.
- Organizations with negotiated rates may apply for a one-time four-year extension
- Organizations that have never had a negotiated indirect cost rate may use a de minimis rate of 10% indefinitely

# Negotiating Indirect Cost Rates

- Organization must submit a new indirect cost proposal to the cognizant agency within 6 months of the end of its fiscal year
- Agency and organization have the ability to negotiate different types of indirect rates
- Indirect cost proposal must be certified - by an official no lower than vice president or CFO – that the individual has read the proposal and all costs included are allocable and allowable (and specifically that no unallowable costs have been included)

# MATCH RULES



# Match

- §200.29: Also known as “cost share”
- Your organization’s share (or a third party’s) share of the project costs
- §200.306: Cash Match vs. In-Kind Match

# Match (cont.)

- **How do I know if match is required for my award? What type? How much?**
  - Request for Proposals (RFPs)
  - Proposal guidelines
  - Program regulations / statutes
  - Award Agreement

# Match (cont.)

- §200.306(b) – Match- Meeting Your Obligation:
  - Expenses from one federally-funded award cannot be used to match costs in another federally-funded award (unless permitted by statute)
  - Expenses used to match one federally-funded award cannot be used again for another federally-funded award
  - Secure match commitment from third parties
  - Match expenses for the award must be documented

# Match (cont.)

- §200.306(b); §200.309 – Match expenses must:
  - be necessary to accomplish the project to which they will be applied
  - meet all of the general “allowability” requirements in the Uniform Guidance
  - also be allowable per particular items of cost in the Uniform Guidance and in the project budget **and**
  - be incurred during the project period

# Match (cont.)

Indirect Costs as Match....Don't forget to include in your budget!

- §200.306(c):
  - If there is a matching requirement, with prior approval, you should be allowed to include indirect costs as part of your match, unless the proposal guidelines expressly prohibit this.
  - Unrecovered indirect costs can only be used as match with prior approval.

# Match (cont.)

- §200.306(e)(f)(g)(h); §200.465(c)(4)(vi) –  
**Types of In-Kind Match**
  - Donated Goods
  - Professional Services
  - Non-Professional Services
  - “Partner” Contributions

# PROGRAM INCOME

# What is Program Income?

- Definition (2 C.F.R. Sec. 200.80): gross income earned by the non-Federal entity that is directly generated by a supported activity or earned as a result of the Federal award during the period of performance
- May be earned from services performed, the use of acquired property, the sale of items, licensing of IP created under the grant, or interest on loans made with federal money
- Does **not** include: rebates, credits, discounts



# Program Income Rules

- Program income is encouraged, when “appropriate”
- Costs of generating program income may be deducted from gross income
- Award documents may have specific rules for use of program income
- If not, program income is to be deducted from total allowable costs – in general, used to reduce the size of the government’s payment, not increase the total budget
- May be used to increase the total budget, or satisfy matching or cost-sharing requirements, with agency permission

# GRANT ENFORCEMENT CASES

# Government Regulatory Remedies

- Withholding payment
- Disallowing costs
- Terminating the award (in whole or in part)
- Suspending and/or debarring the entity

# False Claims Act Liability

- Compliance failures under grants may also be the basis for liability under the Civil False Claims Act (31 U.S.C. §§ 3729–3733)
- Key features:
  - Damages per false claim, plus treble of actual damages;
  - *Qui tam* provisions allow whistleblower recovery; and
  - ‘Falsity’ can be satisfied by recklessness
- Examples:
  - Work not performed;
  - Work performed, but properly chargeable to a different award;
  - Failing to maintain records of work performed;
  - False information provided in obtaining grants; etc.

# Criminal Liability

- Embezzlement
- False Statements
- Mail Fraud
- Wire Fraud

# Mandatory Disclosures and Integrity Reporting

- Recipients must disclose, in a timely manner, “all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award”
- Those recipients with a total value of grants exceeding \$10,000,000 during the period of award are also required to submit *Reporting of Matters Relating to Recipient Integrity and Performance*, which requires reporting about the following, relating to the performance of a federal grant, cooperative agreement, or procurement contract:
  - Criminal Proceedings
  - Civil Proceedings (resulting in payments \$5,000 or more)
  - Administrative Proceedings (resulting in fines \$5,000 or more or reimbursement, etc. of \$100,000 or more)

# Enforcement Example #1

- CFO of New Orleans non-profit, Alternatives Living, Inc., which provided affordable housing to the elderly, homeless, and individuals with mental disabilities
- Received federal funds from US Dept. of Housing and Urban Development in the form of Community Development Block Grants
- Used grant money for items prohibited under the grant program, including: children's cellphone bills; personal travel; satellite radio; concert tickets; medical bills; and, automobile repairs
- 13 months imprisonment, restitution in the amount of \$84,308, etc.

# Enforcement Example #2

- Two leaders of a DC non-profit, Langston in the 21st Century Foundation, failed to report and concealed the misappropriation of \$392,000 in government grants
- Defendants were among five people to plead guilty to charges involving a former District of Columbia Council Member's scheme to use more than \$350,000 that was earmarked for the arts, youth recreation, and summer programs for his own personal benefit
- They determined paperwork contained false representations and funds were not being used for designated purposes, yet they failed to report the improprieties to authorities, concealed the misappropriation of funds, and continued to deposit grant money into the Council Member's accounts



# Enforcement Example #3

- Following investigation by National Science Foundation OIG, non-profit organization, Sciencefriday, found to have misused funds and made false cash advance requests
- Defendant maintained a time and effort system *incapable of tracking the time spent working on the grant award and the amount of salary charged to the grant*
- Civil settlement agreement with the government in which Defendants will pay \$145,531 to resolve allegations that they violated the False Claims Act, plus one-year exclusion from federal awards and five-year compliance plan

# TREND OF GRANTS TO COOPERATIVE AGREEMENTS

# Cooperative Agreement Trend

- More Cooperative Agreements and fewer Grants
- Remember:
  - §200.51 – Grant Agreement
  - §200.24 – Cooperative Agreement

# QUESTIONS?