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FEDERAL GRANT & CONTRACT NEWS FOR NONPROFITS - JUNE 2014

As part of our ongoing effort to prepare nonprofit organizations for the implementation of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (commonly known as the "**Super Circular**"), we devote this month's newsletter to short discussions of various aspects of the Super Circular. Specifically, we take a close look at several of the Super Circular's definitions, as well as issues to keep in mind while preparing for the Super Circular's implementation.

Background

One of the Super Circular's notable benefits is its consolidation of eight U.S. Office of Management and Budget ("OMB") Circulars—including eight separate sets of definitions, which, over time, had begun to separately evolve and deviate from each other. These gradual definitional changes of identical terms caused conflict and confusion for nonprofits with multiple applicable Circulars. Under the Super Circular, the Federal government has harmonized these definitions and incorporated key policy decisions. Thus, the definitions, which are now truly "uniform," also represent key substantive elements to the Circular's guidance. The uniform definitions are provided at 2 CFR Subsection 200.1 through 200.99.

Cognizant Agency for Audit (200.18) and Oversight Agency for Audit (200.73)

"*Cognizant agency for audit* means the Federal agency designated to carry out the [audit] responsibilities described at § 200.513," but such agency may not be the same agency responsible for determining a nonprofit's indirect cost rate.

"*Oversight agency for audit* means the Federal awarding agency that provides the predominant amount of funding directly to a non-Federal entity not assigned a cognizant agency for audit."

Comments to the Super Circular suggested that the government should have defined cognizant or oversight agency for audit as the agency that provides the most total funding (in order to eliminate a potentially burdensome process of changing cognizant agencies when direct funding is minimal and constantly fluctuating, even though indirect funding is much larger and static). The Council on Financial Assistance Reform ("COFAR") ultimately rejected this suggestion because the Federal government only maintains a direct relationship with the direct grantee, not the lower-tiered grant recipients. Indeed, establishing such links could be problematic for the Federal government from a liability or sovereign immunity standpoint. Thus, nonprofits must keep in mind that the cognizant agency may not be its largest customer. Moreover, for those nonprofits who work with the Federal government only through intermediaries, it is unclear how COFAR would assign the cognizant agency. Accordingly, nonprofits may be subject to varying involvement based on agency discretion.

We recommend that you document your negotiations and interactions with each agency—particularly regarding interpretation of grant provisions and requirements, as well as the negotiation of an indirect cost rate—so that if questioned by either your cognizant or oversight agency in an audit, your organization will have the proper supporting audit trail for each significant decision.

Contractor (200.23)

"*Contractor* means an entity that receives a contract as defined in § 200.22 Contract." 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," but does not include subawards (*i.e.*, subgrants). Nevertheless, the term would include contracts issued by higher-tiered contractors (*i.e.*, subcontracts).

The debate between the term "contractor" and "vendor" is considerable, and some commenters suggested using the term "vendor" because it was more in line with the Federal Acquisition Regulation. COFAR considered, but rejected, the use of the term "vendor"—which is broader—in favor of the narrower term "contractor." Typically, the term "contractor" limits the application of certain requirements

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to those entities that are retained in direct performance of a grant, subgrant, or higher-tiered contract. However, COFAR failed to use the specific limiting language of a "direct" engagement, thereby leaving open to interpretation whether a party providing products or services indirectly (such as a utility provider) would be subject to the conditions placed on contractors. Notably, COFAR did not include a definition for "vendor," which has been removed altogether from the Super Circular.

We recommend that, if in doubt, you interpret the term "contractor" broadly to ensure compliance. If such an interpretation would be impractical, we recommend that you seek written guidance from your agency's grants officer as to whether a lower-tiered entity is the type of contractor to which the regulatory requirements attach.

Cooperative Agreement (200.24) v. Grant Agreement (200.51)

The difference between cooperative agreements and grants can be confusing and misunderstood. The Super Circular attempts to clarify this distinction as follows:

"*Cooperative agreement* means a legal instrument of financial assistance between a Federal awarding agency or pass-through entity and a non-Federal entity that" aims to carry out a public purpose and not to acquire goods or services, and provides for "substantial involvement" by the Federal awarding agency or pass-through entity.

Alternatively, "[g]rant agreement means a legal instrument of financial assistance between a Federal awarding agency or pass-through entity and a non-Federal entity that" aims to carry out a public purpose and not to acquire goods or services, and **does not** provide for "substantial involvement" by the Federal awarding agency or pass-through entity.

Therefore, the distinction between a cooperative agreement and grant is whether the legal instrument accounts for the "substantial involvement" of the Federal government or pass-through entity. Interestingly, the Super Circular fails to define or explain what constitutes "substantial involvement."

Program Income (200.80)

"*Program income* means 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." The Super Circular provides examples of program income, which include but are not limited to income from:

- Fees for services performed, or fees from the use or rental of real or personal property acquired under Federal awards;
- The sale of commodities or items fabricated under a Federal award, and license fees and royalties on patents and copyrights; and
- Principal and interest on loans made with Federal award funds.

Interest earned on advances of Federal funds, however, is not program income, except as otherwise provided in Federal statutes, regulations, or the terms and conditions of the Federal award. Program income also does not include rebates, credits, discounts, for which the Federal government must get the benefit of the bargain, and interest earned on any of such amounts.

We recommend that your internal control system closely track any potential program income to ensure compliance with the Cost Principles articulated in the Super Circular.

Supplies (200.94)

"*Supplies* means all tangible personal property other than those described in § 200.33 Equipment." With respect to "computing devices," however, such devices are "a supply if the acquisition cost is less than the lesser of the capitalization level established by the non-Federal entity for financial statement purposes or \$5,000, regardless of the length of its useful life."

Previously, the definition for supplies included all tangible personal property that fell below \$5,000, including technology equipment. However, COFAR recognized that since computing devices increasingly fall below the threshold, the Super Circular would make explicit that when they do, they shall be treated consistently with all other items below the threshold, notwithstanding the useful life consideration.

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As the authors of this newsletter have consistently commented, the consolidation and creation of the Super Circular—especially with respect to the creation of uniform definitions—is a positive development. Yet many of these definitions are vague or silent on key issues. As a result, nonprofits must be mindful

of gaps and may consider seeking legal guidance and/or authoritative interpretations from their Federal agencies before proceeding in these uncharted waters.

Related Information

To read any of Venable's previous Federal Grant & Contract News for Nonprofits newsletters or other related publications, please [click here](#).

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