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Author: Costing Policies Committee

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Uniform Guidance: A Midterm Report Card

COGR Meeting
Washington Marriott Hotel
Washington, DC
June 4-5, 2015

COGR

Panelists



Mary Beth Rudofski

Executive Director, Sponsored Award Accounting –
University of Chicago

Sara Bible

Associate Vice Provost for Research – Stanford University

Jackie Bendall

Director – RCA

David Kennedy

Director – Costing

Dates, Timeline, Logistics



- ▶ OMB “Final Rule” published 12/26/2013
- ▶ OMB Final Rule updated in Federal Register (FR), with “technical corrections”, on 12/19/2014 and published in 2 CFR Part 200
- ▶ Agency implementation of 12/19/2014 FR notice considered “interim” and effective immediately
- ▶ Public Comments to 12/19/2014 FR notice are being considered by OMB and COFAR and will be incorporated by Agencies and into 2 CFR Part 200

Dates, Timeline, Logistics



- ▶ COGR's Comments, submitted on 2/13/2015, are being considered and this summer COGR will engage with OMB and COFAR, accordingly
- ▶ One more round of “technical corrections”? FAQ updates?
- ▶ Research Terms and Conditions, applicable to NIH, NSF, and others; close to FDP review and publishing in the Federal Register
- ▶ DOD Terms and Conditions; under final review at DOD prior to OMB and Federal Register

Dates, Timeline, Logistics

- ▶ Single Audit (formerly, A-133) Compliance Supplement (CS) to be available in June; CS should cross-reference the November 2014 FAQs
- ▶ OMB expects to report on “metrics” and other indicators at the end of year-one (early 2016) to gauge the “success” of the UG implementation
- ▶ COGR and Research leaders expect regularly to engage with OMB and COFAR in 2015, 2016, and beyond; with a focus on UG impact on administrative and faculty burden, documenting agency deviations, proposing UG updates that will improve the UG, and other related initiatives

DOD Terms and Conditions



- ▶ Department of Defense – draft terms and conditions to direct their “component” organizations within DoD regarding implementation of the Uniform Guidance
 - ▶ Consistency across all programs (DARPA, ONR, etc.)
 - ▶ DoD engaged three COGR institutions to review draft language over the past year
 - ▶ Draft Ts & Cs will be submitted to OMB within a month for OMB “clearance”
 - ▶ Opportunity for public comment

Procurement: FDP Approach (200.317 – 200.326)



- ▶ Tentatively focus on micro-purchase threshold
- ▶ Understand current procurement data
- ▶ Consider 80/20 rule:
 - ▶ 80% of procurement spend is roughly within 20% of transactions
 - ▶ Analyze data to consider best balance of procurement spend vs. number of transactions to be reviewed
 - ▶ Advocate for a different micro-purchase threshold for each institution, or potentially different thresholds for small, medium and large institutions
 - ▶ Potential FDP pilot

Procurement: Stanford Example

COGR

- ▶ **Current Competitive Bid Threshold = \$25K**
 - ▶ Threshold set based on 80/20 rule
 - ▶ Purchaser/research group/department responsible for review of purchases under \$25K
 - ▶ Policy requires attestation of review
- ▶ **Audit transactions under Competitive Bid Threshold**
 - ▶ Procurement Department staff, or
 - ▶ Data analytics search engine
- ▶ **Reduction to \$3,000 micro-purchase threshold would require increase of 5+ Procurement staff**

Procurement: COGR Approach

MPT-Focus



- ▶ Synergize with FDP Approach
- ▶ Institutions are permitted to set a Micropurchase Threshold (MPT), not to exceed \$10,000, based on the Institution's internal risk assessment and other factors that are in accordance with established IHE policies and practices. Institutions may apply for a higher MPT
- ▶ The MPT is subject to increase on a biannual basis
- ▶ A “75% or 80% rule” can be used as one factor, though not the only factor to determine MPT
- ▶ If \$10,000 MPT selected, \$10,001 to \$150,000 as next tier; quotes only to justify procurement

Procurement: COGR Approach MPT-Focus, Sample Data



| Purchase Order Spend (excludes check request & Pcard) | | | | |
|---|----------------|--------------|------------|-------------------|
| Transaction Size | Spend | Transactions | % of Spend | % of Transactions |
| \$0-\$3,000 | \$ 37,140,455 | 151,521 | 8.1% | 81.9% |
| \$3,000.01-5,000 | \$ 8,809,112 | 6,634 | 1.9% | 3.6% |
| \$5,000.01-\$10,000 | \$ 9,123,090 | 5,152 | 2.0% | 2.8% |
| \$10,000.01-\$25,000 | \$ 17,194,298 | 5,151 | 3.8% | 2.8% |
| \$25,000.01-\$150,000 | \$ 45,212,291 | 7,814 | 9.9% | 4.2% |
| >\$150,000 | \$ 340,688,214 | 8,824 | 74.4% | 4.8% |
| | | | | |
| | \$ 458,167,460 | 185,096 | 100% | 100% |

Procurement: COGR Approach Beyond the MPT???



- ▶ Allow institutions to apply for exemptions to parts, or all, of 200.317-326. For example, State institutions may follow the State's procurement rules, Geographical preferences exempt, etc.
- ▶ Additional year grace period to fix broken parts
- ▶ Use audit data (i.e., lack of audit findings) to show procurement never was a problem
- ▶ Engage faculty, etc. to show impact on science
- ▶ Leverage studies (e.g., NAS, GAO, NIH, etc.) to show impact on administrative burden

200.317

Procurement by States



When procuring property and services under a Federal award, a state **must** follow the same policies and procedures it uses for procurements from its **nonfederal funds**. The state will comply with §200.322 Procurement of Recovered Materials and ensure that every purchase order or other contract includes any clauses required by §200.326 Contract Provisions. All other nonfederal entities including **Subrecipients of a state**, will follow §200.318 General Procurement Standards through 200.326 Contract Provisions.

Issues? Do public universities subject to state laws have the option to opt out?

200.319

Competition



Must have written procedures for procurement transactions Procedures **must ensure** that **all solicitations** :

Incorporate a clear and accurate description of the technical requirements for the material, product, **or service to be procured.**

Issues? Consultants (individuals) – not companies/contractors subject to EEO, workman's comp, FAR regulations. Do you consider this a routine service? Are these sourced or sole sourced? FAQ says non-competitive/scientific reasons

Procurement:

FAQ: .320-2 Methods of Procurement- Sole Source for Research

Procurement by noncompetitive proposals: Frequently, researchers need to acquire items from a particular source for scientific reasons; would this constitute a valid reason for a procurement by noncompetitive proposals? Is this method of procurement available for procurements of any dollar amount? Yes; this would be a valid reason, and yes this option is available at all dollar amounts, **provided it complies with the general procurement standards under 200.318, including documentation requirements in 200.318 (i).**

§200.318(h) the nonfederal entity must award contracts only to **responsible** contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, **and financial and technical resources.**

§200.318 (i) **the nonfederal entity must maintain records sufficient to detail the history of procurement (e.g., rationale for method, selection of contract type, contractor selection or rejection, and basis for contract type.**

Issues? What is sufficient to document history for noncompetitive procurements for scientific purposes?

Procurement: FAR says...



- ▶ **6.302-1 -- Only One Responsible Source and No Other Supplies or Services Will Satisfy Agency Requirements.**
- ▶ (2) When the supplies or services required by the agency are available from only one responsible source,..... from only one or a limited number of responsible sources, and no other type of supplies or services will satisfy agency requirements, full and open competition need not be provided for, provided that:
 - ▶ **(A) Demonstrates a unique and innovative concept (see definition at [2.101](#)), or, demonstrates a unique capability of the source to provide the particular research services proposed;**
 - ▶ **(B) Offers a concept or services not otherwise available to the Government; and...**

Questions? Type of agreement? How does one mirror what the federal government does for its own federal benefit?

Procurement: §200.319 Competition (cont.)



Section 200.319 (b) – Geographic Preference

The nonfederal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to complete for the contract.

Issues? Many institutions have established programs to encourage local consideration of supply – it is not clear how these initiatives would be viewed/impacted based upon this section.

Procurement: (200.317 – 200.326)



§200.320 – Methods of Procurement to be followed

(a) Procurement by micro-purchases. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed \$3,000 (or \$2,000 in the case of acquisitions for construction subject to the Davis-Bacon Act). **To the extent practicable, the non-Federal entity must distribute micro-purchases equitably among qualified suppliers.** Micro purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.

Issues? While not overly problematic because of the “extent practicable” language, this statement is directly opposed to our goals as Procurement colleagues to leverage expenditures in an effort to reduce cost (e.g. – Office Supplies)

§200.320 Methods of Procurement to be followed, cont.



(d) Procurement by competitive proposals. Normally conducted with more than one source, awarded as either a fixed price or cost reimbursement type contract when use of sealed bidding is not appropriate.

If this method is used, the following requirements apply: (I) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical;

Issues? The recent FAQs removed publicity requirements for Section 200.320 (c), but did not address this even more problematic section (more problematic because of expected transaction volume)

§200.323 Contract Cost and Price

(a) The non-Federal entity must perform a cost **or** price analysis in connection with **every procurement action in excess of the Simplified Acquisition Threshold including contract modifications.**

- ▶ **Issues?** How do Universities have the knowledge and expertise to perform cost or price analysis in the same manner as that of federal contract specialist/contracting officers? Must negotiate profit, establish fair and reasonable profit?

Conflict of Interest:



§200.112 – Conflict of Interest

The Federal awarding agency must establish conflict of interest policies for Federal awards. The non-Federal entity must disclose in writing any potential conflict of interest to the Federal awarding agency or pass-through entity in accordance with applicable Federal awarding agency policy.

§ 200.318 – General Procurement Standards

Organizational Conflicts of Interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related action.

FAR 2.101 defines as follows: an “organizational conflict of interest” means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

Conflict of Interest: Agency Example



EPA, Revised Interim 5/22

- ▶ Subrecipient selection is still considered a procurement action;
- ▶ The Policy does not take into account the COI grace period;
- ▶ The EPA definition of COI is not aligned with UG;
- ▶ The definition of immediate family remains the same as the interim policy extending beyond UG definition;
- ▶ The policy still requires COI inquiries prior to final grant application;
- ▶ The timeframes for reporting remain a challenge

Conflict of Interest: Agency Trends



- ▶ Blended approach of OCI and scientific conflicts in financial assistance agreements;
- ▶ COI could include direct/indirect financial interests, close personal relationships, positions of trust in outside organizations, consideration of future employment arrangements with a different organization, decision-making affecting the award that would cause a reasonable person with knowledge of the relevant facts to question the impartiality of the Recipient, Recipient employees, and Sub-recipients;
- ▶ Requires universities to monitor and disclose conflicts of granting agency personnel

Conflict of Interest: Agency Trends (cont.)



- ▶ Requires assurances from vendors/consultants that conflicts don't exist;
- ▶ Requires specific listings of actual or perceived, real or apparent COI's identified at **application stage**;
- ▶ Documentation required of how you arrived at your decision that no conflicts exist;
- ▶ Does not recognize grace period for procurement.
- ▶ Definition of immediate family are not uniform across agencies.

Conflict of Interest: Consequences?



- ▶ The plethora of varying federal agency requirements requires extensive time and resources of university personnel to analyze prior to acceptance and mostly at the time of application when funding is not affirmative. The non-uniform structuring of these policies defeat the intent of the Uniform Guidance.
- ▶ Any divergence from current disclosure processes/procedures already in place will require time of the investigator reducing his/her time on other projects, creating additional burden for faculty and staff.
- ▶ The lack of consistency will require additional university resources to review , coordinate, train and monitor.
- ▶ The variation in COI requirements among federal agencies increases costs and decreases effectiveness of electronic systems that would otherwise be employed to manage COI disclosure and oversight.

Conflict of Interest: What next?



- ▶ Under UG 200.112 re-emphasize the need to limit the scope of agency policies to procurement only, as intended by UG and reiterated by the OMB in the FAQs;
- ▶ Recommend that (non-PHS) agencies adopt the NSF standards for COI disclosure review and reporting?
- ▶ Recommend that agencies harmonize and avoid creating inconsistent definitions, verbiage and reporting requirements;
- ▶ Others?

Agency Deviations: (200.306 & 200.414)



- ▶ References to A-21/A-110: NIFA, NSA, Forest Service, State flowdowns
- ▶ 60 days to respond to Funding Announcement: State
- ▶ F&A Caps: Forest Service, NIH International Subs
- ▶ CS not required, but encouraged: EPA, HHS-Admin on Aging, HHS-AHRQ, Energy, State, NIH-NIGMS, NASA

Agency Deviations: Document & Troubleshoot



I) Identify language in Funding Announcement:

This FOA does not require cost sharing. While there is no cost sharing requirement included in this FOA, AHRQ welcomes applicant institutions, including any collaborating institutions, to devote resources to this effort. An indication of institutional support from the applicant and its collaborators indicates a greater potential of success and sustainability of the project ...

Agency Deviations: Document & Troubleshoot



2) Provide UG Citation(s):

§200.306 Cost sharing or matching.

(a) Under Federal research proposals, voluntary committed cost sharing is not expected ...

APPENDIX I TO PART 200—FULL TEXT OF NOTICE OF FUNDING OPPORTUNITY

E. APPLICATION REVIEW INFORMATION

... If cost sharing will not be considered in the evaluation, the announcement should say so, so that there is no ambiguity for potential applicants. Vague statements that cost sharing is encouraged, without clarification as to what that means, are unhelpful to applicants ...

Agency Deviations: Document & Troubleshoot



3) Statement to Agency:

Per 1) and 2) above, I have asked COGR, an association of 200 research institutions, to review this language in light of the newly implemented 2 CFR Part 200 that became effective on December 26, 2014. We are concerned that the vague request for cost sharing may inappropriately compel institutions to commit voluntary cost sharing in the budget proposal ...

Agency Deviations: Document & Troubleshoot



4) Request to Agency:

At your convenience, please provide: a) the basis or justification for the language included in the FOA, and b) a Policy Official point of contact at the agency who is responsible for approving the language. We look forward to working with you and COGR to resolve any discrepancies with 2 CFR Part 200 ...

Mid-term Grade?

Please Check Grade Below:

- | | | |
|------|--------------------|-------|
| A - | Simply Spectacular | _____ |
| B - | A job well-done | _____ |
| C - | Okay for now | _____ |
| D - | Needs improvement | _____ |
| F - | Failure | _____ |
| In - | Incomplete | _____ |