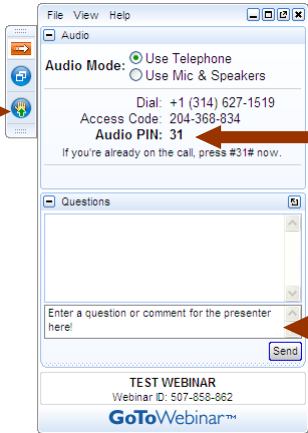


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Federal Grant Rules Relating to Attorneys' Fees, Litigation Costs, and Settlements

CAPLAW Attorney Network Webinar
May 6, 2014

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Agenda

- Role of grant rules
- New OMB Supercircular
- General provisions of cost principles
- Selected specific cost principles as applied to:
 - Attorneys fees and other legal costs in connection with litigation and proceedings
 - Attorneys fees for other legal matters
 - Judgments and settlements



Role of Grant Rules

- OMB issues guidance to federal granting agencies
 - Grant administrative requirements
 - Cost principles
 - Independent audits
- Fed. agencies promulgate OMB guidance through regulations
- Direct federal grants, sub-grants subject to these regulations
- CSBG is a block grant, so grants to CAAs not directly subject to federal agency regulations that incorporate OMB cost principles
 - BUT, CSBG Act mandates that eligible entities (CAAs) are subject to OMB “cost and accounting standards,” i.e. OMB Cost Principles and portions of grant administrative requirements

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New OMB Supercircular

- Culmination of multi-year project to streamline guidance, apply principles consistently across grantee sectors, and improve accountability and transparency
- Final guidance published by OMB on December 26, 2013
 - 78 Fed. Reg. 248 at 87590
- Replaces current OMB guidance in Title 2 of CFR
- Federal agencies must implement by promulgating regulations by December 26, 2014 unless otherwise required by statute or approved by OMB
 - 2 CFR 200.110

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General Cost Principle Provisions

2 CFR Pt. 230, App. A, Pgh. A; 2 CFR Pt. 225, App. A, Pgh. C;
2 CFR § 200.403

- In order to be allowable under a federal grant, cost must be:
 - Necessary and reasonable for performance of the grant
 - For shared costs, allocable to the grant
 - Conform to any limitations in Cost Principles, award terms and conditions and applicable law as to types or amount of cost items
 - Consistent with policies and procedures that apply uniformly to both federally-financed and other activities of the grantee
 - Accorded consistent treatment by the grantee
 - Determined in accordance with GAAP
 - Not be included as a cost or used to meet match requirements of another federally-funded program
 - Adequately documented

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Principles for All Professional

Service Costs: 2 CFR: Part 230, App. B, Pgh. 37; Part 225,
App. B, Pgh. 32; § 200.459

- Service provider may not be officer or employee of grantee
 - If hired as consultant, rather than performing services as employee
- These factors are relevant in determining if cost is allowable:
 - Nature and scope of service provided compared to service required
 - Need to contract with outside party, rather than in-house
 - Past pattern of similar costs
 - Impact of federal grants on grantee's business
 - Whether proportion of federal grants to grantee's total business influences grantee to incur the cost
 - Whether service can be performed more economically by direct employment rather than contracting

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Principles for All Professional

Service Costs, cont.: 2 CFR: Part 230, App. B, Pgh. 37; Part 225, App. B, Pgh. 32; § 200.459

- Additional relevant factors:
 - Qualifications of and usual fees charged by individual or entity providing services
 - Adequacy of contract
 - Including description of service, estimate of time required, rate of compensation, and termination provisions
 - Certain contract provisions are required
 - 2 CFR Part 215, App. A (nonprofits); Part 200, App. A (Supercircular)
- Retainer fee must be supported by evidence of service available or provided

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Summary of Rules on Use of Grant Funds for Attorneys' Fees in Litigation and Other Proceedings with the Government

- Generally, grant funds may *not* be used to:
 - Defend grantee in proceedings brought by government if grantee loses, or in most cases, settles
 - Unless legal costs specifically allowed in settlement agreement
 - This prohibition not included in current rule for state grantees
 - Prosecute claims against federal government
- Generally, grant funds *may* be used to:
 - Defend grantee in proceedings brought by government if grantee wins
 - Limitation on costs

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Summary of Rules on Use of Grant Funds for Attorneys' Fees in Litigation and Other Proceedings with Private Parties

- Generally, grant funds may *not* be used to:
 - Litigate patent infringement or Major Fraud Act private party suits
 - Under current rules for nonprofit grantees, litigate antitrust suits
 - But OMB Supercircular provision omits this ban
 - Defend action brought under federal contractor and grantee whistleblower protection laws, unless grantee wins
- No general rules restrict use of grant \$ for private suit legal fees
 - OMB response to comment in 1998 revision of A-122:

Legal fees incurred in defense of lawsuits not brought by [a government], except suits by former employees under Major Fraud Act, are allowable
 - 63 Fed. Reg.104 at 29795

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Current Rule for Allowability of Legal Fees for State Grantees: 2 C.F.R. Part 225, App. B, § 10

- Simpler and more permissive than rule for nonprofit grantees
- “Legal expenses required in the administration of Federal programs are allowable.”
- “Legal expenses for prosecution of claims against the Federal Government are unallowable.”
- Other sections addressing defense of civil or criminal fraud proceedings brought by federal government apply only to defense contracts

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Litigation and Other Proceedings: Specific provisions - 2 CFR § 200.435

No grant funds may be used for legal services (in-house or outside counsel), accountants, consultants or others in connection with the following judicial or administrative proceedings, including an investigation:

- Defense of proceedings against the grantee brought by a government, or joined by the federal government, **or a complaint brought by a third party or current or former employee of the grantee under federal contractor and grantee whistleblower protection laws that:**
 - Relate to a violation of law or grant provision by the grantee or its employees or agents; and

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Litigation and Other Proceedings, cont.

- Result in any of the following:
 - Criminal conviction, including a plea
 - Grantee found liable for fraud or similar misconduct
 - Disallowance of grantee costs
 - Monetary penalty imposed on grantee
 - Does not include restitution, reimbursement, or compensatory damages
 - **Corrective action order imposed by federal agency head or delegate in connection with violation of whistleblower protection for employees by federal contractors and grantees**
 - Suspension or debarment of grantee
 - Rescinding, voiding, or terminating a grant or terminating a grant for default for failure to comply with a statute, regulations, or grant provisions
 - Settlement if action could have resulted in any of above

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Litigation and Other Proceedings

- More unallowable costs:
 - Defense of action brought by current or former employees under Major Fraud Act that results in grantee liability or settlement
 - Prosecution of claims against federal government
 - Including appeals of final federal agency decisions
 - Patent infringement litigation, unless grant provides otherwise
- If proceeding brought by a government other than federal, federal agency official may allow costs if they were incurred as result of a specific provision of the grant or specific written direction of authorized official of federal agency

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Successful Litigation and Other Proceedings with the Government

- If grantee wins in proceeding brought by government or whistleblower, it may recover costs to extent that:
 - Costs are reasonable and necessary in relation to administration of grant and activities required to deal with the proceeding and underlying cause of action
 - Payment of such costs is not prohibited by grant provision
 - Costs are not recovered from federal government or 3rd party
 - Authorized federal official determines % of costs allowed considering complexity of litigation, generally accepted principles governing award of legal fees in civil actions involving the U.S.
 - Cost do not exceed 80% unless federal agency agrees as part of overall settlement

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Legal Costs in Connection with Head Start Litigation: 42 USC 9841(a)

- 2007 Head Start Act required HHS to prescribe procedures prohibiting use of grant funds to appeal HHS decision to terminate or reduce grant, or deny application for refunding
- In litigation where grantee prevails over delegate agency or Policy Council, Act required HHS to issue procedures for determining when reimbursement for reasonable fees is due to grantee
- No rules or procedures issued to date

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Reimbursement of Legal Fees Under Equal Access to Justice Act (EAJA)

- EAJA applies to proceedings brought by or against the U.S. in court or administrative action
- To be reimbursed, party must prevail in a judgment that can't be appealed
 - Order of settlement may be sufficient
- To recover fees in administrative proceeding, file application with agency establishing it is entitled to receive attorneys' fees under 5 USC 504 and amount sought
- In judicial proceeding, file application under 28 USC 2412
- Fees will be awarded unless U.S. position was substantially justified or special circumstances make award of fees unjust

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Fines, Penalties, Damages, and Other Settlements: 2 CFR § 200.441

- “Costs” **resulting from** the following are unallowable unless incurred in order to comply with a specific grant provision or with **prior** written approval of the federal awarding agency:
 - Federal grantee’s violations **or alleged violations** of, or failure to comply with, federal, state, local, **tribal, or foreign** laws or regulations
- **2 CFR § 200.435, addressing defense and prosecution of criminal and civil proceedings, claims, appeals, and patent infringements, is now referenced**

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Fines, Penalties, Damages, and Other Settlements: 2 CFR Parts 225 and 230, App. B, pgh. 16; 2 CFR § 200.441

- Addition of “alleged violations” and “damages and other settlements” (for nonprofits) is a significant new restriction
- “Costs” not defined, but presumably don’t include legal fees
 - Prior language in A-122 had limited unallowable costs to “costs of fines and penalties resulting from”
 - Prior language in A-87 was broader than A-122; it disallowed “fines, penalties, *and other settlements* resulting from...”
 - Current language: “costs resulting from”
 - Section heading: “Fines, Penalties, Damages and Other Settlements,” but those terms not repeated in text
 - Other provisions address legal fees

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Judgments and Attachments

- Although OMB rules don't address judgments in general, Section 441 may require prior written approval from federal funder to use federal funds to pay judgment if it:
 - Includes fines, penalties or damages; and
 - Results from violations or alleged violations of, or failure to comply with laws and regulations
- Federal grant fund advances may not be garnished or attached (because of sovereign immunity), but funds paid to grantee as reimbursement may be
 - *Palmiter v. Action, Inc.*, 733 F.2d 1244, 1247 (7th Cir. 1984) and more cases citing this decision
 - *Bochetto & Lentz, P.C. v. Whitman Council, Inc.*, (Pa. Com. Pl 2009) 2010 WL 4814088 (discussion of reimbursement issue)

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Insurance and Indemnification: 2 CFR Parts 225 and 230, App. B, pgh. 22; 2 CFR § 200.447 (c)

- Actual losses that could have been covered by insurance aren't allowable
 - Unless expressly stated in grant
- Costs not covered under insurance because of deductible may be allowable if insurance terms and deductible are "in keeping with sound management practices"
- Previously, this language would generally permit payment from grant funds of settlements for amounts within the deductible in most private party litigation
- New language in §441 suggests prior written approval needed if suit alleges violations of law, unless resulting from compliance with grant terms

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Organizational Costs:

2 CFR Part 230, App. B, pgh. 31; 2 CFR § 200.455

- Federal grant funds may not be used, without prior approval of the federal awarding agency, for costs related to the establishment or reorganization of an organization, such as:
 - Incorporation fees
 - Fees to attorneys, promoters, management consultants, accountants, or investment managers (in-house or outside professionals)

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Intellectual Property: *2 CFR Part 230, App. B, pgh. 34; 2 CFR Part 225, App. B, pgh. 29; 2 CFR § 200.448*

- Allowability of costs to secure patents and copyrights
 - Allowable: costs of preparing disclosures, reports or other documents required by the federal grant
 - Unallowable: if not required by federal grant
 - Allowable: costs in connection with filing and prosecution of U.S. patent application where title or royalty-free license is required by the federal government to be conveyed to the federal government
 - Unallowable: costs related to filing non-U.S. patents or any U.S. patent application where no federal requirement of conveying title or royalty-free license to federal government
 - Allowable: general counseling services relating to patent and copyright matters, consistent with general rule for allowability of professional service costs

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Legal Costs Related to Unions: 42 USC 9839(e)

- Head Start Act prohibits use of Head Start funds to assist, promote, or deter union organizing.
 - Can't use Head Start funds to pay lawyer or consultant to do so
- ACYF-IM-HS-0011 (*currently under review by Office of Head Start*):
 - May use Head Start funds to pay for legal advice on Head Start grantee's rights and responsibilities under NLRA or other applicable laws concerning union organizing
 - May use Head Start funds to pay legal fees in connection with negotiating labor agreements

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Grant Termination: 2 C.F.R. Part 230, App. B, pgh. 48; 2 C.F.R. Part 225, App. B, pgh. 41; 2 C.F.R. 200.471(e)

- Legal costs reasonably necessary in connection with the following grant termination matters are generally allowable:
 - Preparation and presentation to federal awarding agency of settlement claims
 - Unless termination was "**for cause**"
 - A-122 language said not allowable if termination was "for default"
 - Termination and settlement of subawards

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Attorney's Fees for Other Grant Administration Matters

- Attorneys' fees in connection with non-litigation matters not otherwise mentioned are usually allowable if they meet the general standards for allowability of grant costs and specific standards for professional service costs
- Examples:
 - Contract drafting
 - Counseling on wage and hour law compliance
 - Real estate closing
 - Governance matters

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Attorney's Fees for Other Grant Administration Matters

- Check section of cost principles for specific cost type
 - Failure of Cost Principles to mention particular cost item doesn't imply it is unallowable; rather determination on allowability should be based on treatment or principles provided for similar or related cost items (2 CFR Parts 225 and 230, App. B, preamble; 2 CFR § 200.420)
- Check applicable program authorizing statute, regulations, and grant terms and conditions
- If state grant or contract with federal funds, check state law

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