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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

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
General Cost Principle Provisions

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

Principles for All Professional Service Costs:

- 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

• 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

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
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 Super circular 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


• 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
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

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
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

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
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.

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.
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

Fines, Penalties, Damages, and Other

- 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
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

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
Organizational Costs:

- 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)

Intellectual Property:

- 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
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


• 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
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

- 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