Legal Issues Unique to CAAs

Part 2

Applications

CAPLAW Attorney Network Webinar
Thursday, September 21, 2017

PRESENTED BY:
Eleanor Evans, Esq.
Alison Ma’lof, Esq.
(617) 357-6915

Agenda

Part 1:
- Federal grant vs. contract
- Type of grant
- CSBG basics
- Board composition
- Bylaws provisions
- Personnel Policies
- Lobbying & political activity

Part 2:
- Uniform Guidance basics
- Disallowances
- Attorney fees
- Contract provisions
- Mergers and shared services
- Garnishment
- Bankruptcy
What is the Uniform Guidance (UG)?

**UNIFORM GUIDANCE BASICS**

- **Answer:** generally, the UG is a set of federal rules applicable to federal grants that establishes parameters as to how federal funds may be used and a framework for protecting those funds

- **UG contents:**
  - Subpart A – Acronyms and Definitions
  - Subpart B – General Provisions
  - Subpart C – Pre-Federal Award Requirements and Contents of Federal Awards
  - Subpart D – Post Federal Award Requirements
  - Subpart E – Cost Principles
  - Subpart F – Audit Requirements
  - Appendices

Where is UG and Info About it Located?

**UNIFORM GUIDANCE BASICS**

- **Answer:** UG is generally codified. It was also adopted by each federal agency with minor changes, except for the U.S. Department of Health and Human Services (HHS) which codified its own version
  - Generally codified at 2 C.F.R. Part 200
  - HHS codification, 45 C.F.R. Part 75 (applicable to Head Start, CSBG, and other HHS grants)

- **Guidance available from Chief Financial Officers Council** (previously referred to as Council on Federal Assistance Reform (COFAR) (https://cfo.gov/grants)):
What Relationships does UG Cover?

**UNIFORM GUIDANCE BASICS**

- **Answer:** a CAA may play several different “roles” under the UG which affects the provisions that may apply to it:
  - **Recipient** (2 CFR § 200.86)
  - **Pass-through entity** (2 CFR § 200.331)
  - **Subrecipient** (2 C.F.R. § 200.92)
  - **Contractor** (2 C.F.R. § 200.23)

---

How Does UG Apply?

**UNIFORM GUIDANCE BASICS**

- **Answer:** Depends on the funding a CAA receives and the applicability provisions in the UG (2 C.F.R. 200.101):
  - **Direct Grants:**
    - Generally, must comply with all of UG, e.g., Head Start
  - **Formula Grants**
    - Generally, must comply with all of UG, e.g., Weatherization Assistance Program (WAP)
  - **Block Grants**
    - Compliance with only a few, select UG provisions, e.g., Low-Income Home Energy Assistance Program (LIHEAP)
When do Additional UG Provisions Apply?

**UNIFORM GUIDANCE BASICS**

- **Answer:** Additional UG provisions may be incorporated by reference via the:
  - Authorizing statute for the federal funding
  - Grant agreement between the pass-through entity and the non-federal entity
  - State statutes and regulations

---

Which UG Provisions Apply to CSBG?

**UNIFORM GUIDANCE BASICS**

- **Answer:** The following UG provisions apply to all block grants, including CSBG:
  - **Subpart A** (Acronyms & Definitions)
  - **Subpart B** (General Provisions)
  - **Subpart F** (Audit Requirements)

- **Certain provisions of Subpart C**
  - §200.202 – Requirement to provide public notice of federal financial assistance programs
  - §200.330 – Subrecipient and contractor determinations
  - §200.331 – Requirements for pass-through entities
  - §200.332 – Fixed amount subawards

- **Additionally:** Subpart E, Cost Principles, applies to CSBG because CSBG Act, the authorizing statute (42 U.S.C. § 9916(a)(1)(B)), specifically requires it
What is a Disallowance?

**Answer:** Determination by a federal awarding agency or pass through entity that certain expenditures of federal grant funds are not allowable under the UG or specific terms and conditions of the federal award. Examples of disallowances include:

- Improper procurement (i.e., policies not as restrictive as UG requirements, etc.) so funding used to enter into transaction is disallowed
- Fundraising activity (i.e., golfing event) paid for with federal funds absent prior approval from the funding source
How Should a CAA Respond to a Disallowance?

**DISALLOWANCES**

**Answer:** No established approach exists for responding to a disallowance since funding source rules vary and may impose requirements with respect to how funds may be used; however, a response will likely consist of reviewing:

- Grant/subgrant agreement and/or notice of funding award to determine applicable requirements
- Specific funding source requirements
- UG requirements, if applicable, including the general principles, selected items of specific costs, and uniform administrative requirements
- HHS Departmental Appeals Board (DAB) Decisions [https://www.hhs.gov/about/agencies/dab/decisions/board-decisions/index.html](https://www.hhs.gov/about/agencies/dab/decisions/board-decisions/index.html), e.g., regarding substituting documented costs that would have been allowable but were not charged

---

What if Specific Cost is Not in UG?

**DISALLOWANCES**

**Answer:** UG (2 C.F.R. §200.420) explains that failure to mention a specific item of cost does not imply that it is allowable or unallowable; rather, an allowability determination is based on the treatment provided for similar/related items of cost and the basic considerations (2 C.F.R. § 200.402-411).

- UG establishes factors to consider when determining if a cost is:
  - Allowable
  - Reasonable
  - Allocable
Can Federal Funds Pay Attorney Fees?

**ATTORNEY FEES**

- **Answer:** Depends on how the fee arises. Generally, all attorneys fees must meet the UG basic considerations (2 C.F.R. §§ 200.402-411) and the factors for charging professional services costs (2 C.F.R. § 200.459). Legal fees often incurred by CAAs include those from:
  - Administration of federal grants
  - Reorganization and grant termination
  - Proceedings against the government
  - Program-specific provisions
  - Private lawsuits
  - Settlement agreements

**Guides:**

- **Working with Attorneys Guidebook,**
  [http://caplaw.org/resources/PublicationDocuments/WorkingwithAttorneys.html](http://caplaw.org/resources/PublicationDocuments/WorkingwithAttorneys.html)
Does UG treat Subrecipients and Contractors Differently?

**Contract Provisions**

- **Answer:** Yes, the UG sets forth factors to consider when determining if a non-federal entity is a subrecipient or contractor (2 C.F.R. § 200.330)
  - Substance of the relationship is more important than the form of the agreement
    - Not all characteristics will be present in every relationship
  - A pass-through entity should use judgment in classifying an agreement as a subaward or a procurement contract

<table>
<thead>
<tr>
<th>Subrecipient <em>(Subaward)</em></th>
<th>Contractor <em>(Procurement contract)</em></th>
</tr>
</thead>
<tbody>
<tr>
<td>Purpose is to carry out a portion of the Federal award</td>
<td>Purpose is to obtain goods and services for the non-Federal entity's own use</td>
</tr>
<tr>
<td>Determines eligibility for assistance</td>
<td>Provides goods and services within normal business operations</td>
</tr>
<tr>
<td>Performance measured according to Federal program objectives</td>
<td>Provides similar goods and services to many different purchasers</td>
</tr>
<tr>
<td>Responsible for program decision-making</td>
<td>Normally operates in a competitive environment</td>
</tr>
<tr>
<td>Must comply with Federal program requirements</td>
<td>Is not subject to compliance requirements of the Federal program as a result of the agreement</td>
</tr>
<tr>
<td>Funds used to carry out the Federal program, rather than providing goods or services</td>
<td>Provides goods or services that are ancillary to the operation of the Federal program</td>
</tr>
</tbody>
</table>
**Does the UG Require Specific Contract Provisions?**

**CONTRACT PROVISIONS**

**Answer:** Yes, Appendix II to Part 200 (2 C.F.R. § 200.362) of the UG lists specific provisions to include in federally funded contracts, some of which are subject to certain threshold amounts. Examples of provisions required include:

- Administrative, contractual or legal remedies for violations or breaches of a contract exceeding the simplified acquisition threshold
- Byrd Anti-Lobbying Amendment (31 U.S.C. § 3352) for contracts in excess of $100,000
- Termination provisions for contracts in excess of $10,000
- Davis-Bacon Act requirements for construction contracts when required by the federal program statute
- Debarment and suspension provisions
Are there Other Contract Provisions?  

**CONTRACT PROVISIONS**

- **Answer:** Yes. Such provisions often address potential issues arising from the federal grants funds a CAA receives and may include:
  - Termination due to issues with grant funding
  - Record retention requirements
  - Protecting confidential information
  - Insurance coverage and types, certificates of insurance, renewal

Are Mergers/Shared Services Different for CAAs?  

**MERGER AND SHARE SERVICES**

- **Answer:** Partially, yes. Because of the funding CAAs receive they must work with federal and state funders on a host of issues unique to that funding, such as:
  - Payment of costs associated with each option
  - Transfer of federal funds to another entity, for example:
    - CSBG transfer requires state approval and compliance with CSBG Act as to the type of entity that may receive funding
    - Head Start: potential for competition of non-surviving Head Start program


- Working Better Together, Part One: An Exploration of Shared Administrative Services

- Working Better Together, Part Two: Mergers as a Strategy for Success
Can Federal Funds be Garnished?

**GARNISHMENT**

**Answer:** Several court decisions, including some involving CAAs and Head Start grantees, have held that federal grant funds may not be seized or garnished by third parties

- Grant funds must be used for their intended purposes and are held in trust by the grantee for intended beneficiaries
- May need to distinguish between funds paid as advances and funds paid as reimbursements

What Options are Available for Insolvent CAAs?

**INSOLVENT CAA**

**Answer:** Options that exist for CAAs experiencing insolvency include:

- State receivership
- Declaring bankruptcy
This training is part of the Community Services Block Grant (CSBG) Legal Training and Technical Assistance (T/TA) Center. It was created by Community Action Program Legal Services, Inc. (CAPLAW) in the performance of the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Community Services Cooperative Agreement – Grant Award Number 90ET0441-03.

Any opinion, findings, and conclusions, or recommendations expressed in this material are those of the author(s) and do not necessarily reflect the views of the U.S. Department of Health and Human Services, Administration for Children and Families.