NADO 2023 Annual Training Conference

Comment Clinic: Proposed Revisions to Title 2 Code of Federal Regulations

November 7, 2023
Presented by Bob Lloyd
OMB’s Continuing Grant Reform Efforts

- Grants Policy Evolution
- OMB Circulars for Different Types of Performers (1968-2014)
- OMB’s Uniform Guidance—2 CFR 200 (2014-Present)
  --- Federal Agency Uniform Implementation (12/26/14)
  --- OMB Commitment for Five Year Review (1/20/20)
  --- COVID Interruption (2020)
  ----- Limited Revisions (Effective 11/12/20)
  --- Current Process
  ----- Request for Information (2/9/23)
  ----- Public Response (1,250 Comments from 113 Sources)
Toward a “Comprehensive System of Guidance”

• OMB’s Sources of Authority (88 FR 69393)
• 2 CFR 25 Unique Entity Identifier and System for Award Management
• 2 CFR 170 Reporting Subaward and Executive Compensation Information
• 2 CFR 180 OMB Guidelines to Agencies on Government-Wide Debarment and Suspension (Nonprocurement)
• 2 CFR 182 Government-Wide Requirements for Drug-Free Workplace (Financial Assistance)
• 2 CFR 183 Never Contract With The Enemy
• 2 CFR 184 Buy American Preferences for Infrastructure Projects (New Regulation--8/23/23)
• 2 CFR 200 Uniform Administrative Requirement, Cost Principles, and Audit Requirements for Federal Awards
Understanding OMB’s Policy Baseline

• IN EFFECT UNTIL OMB PROPOSAL IS FINALIZED AND ADOPTED BY FEDERAL AWARDING AGENCIES!

• 2 CFR 200 (Federal Agency Codifications--DOS: 2 CFR 600; USAID: 2 CFR 700; DHHS: 45 CFR 75)

• Six Subparts
  --- 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

• Twelve Appendices
  --- Including Instructions on Development and Submission of Indirect Cost Rate Proposals
OMB’s Current Proposal

• Federal Register Publication (10/5/23)
  --- www.govinfo.gov
  --- Citation: 88 FR 69390-69500
• Comments: Due by 12/4/23

• Stated Intentions
  --- Incorporate Intervening Statutory and Executive Order Policies
  --- Update, Change or Clarify Existing Guidance
  --- Employ Plain Language
  --- Reduce Federal Agency and Recipient Burden
  --- Reflect Administration Priorities
  --- Maintain Policy Structure and Numerical Citations
OMB’s Statements

• OMB’s Audience: Federal Awarding Agencies
• The issuance “... is guidance to Federal agencies and not a regulation.”
• Preamble (Important Commentary About Intent)
Grant
“Politics”

• Addressing the Underserved
• Consideration for Less Experienced Applicants
• Inclusion of Labor Organizations
• Encouragement of Diversity
• Broader Nondiscrimination Policies
• Sustainability

• Stakeholders/Other Voices
  --- Federal Awarding Agencies
  --- The “Oversight Community”
  --- The “Federal Assistance Community”
  --- Who Are the “Elephants in the Room?”
Proposal Highlights

• Key Word Choice Change
  --- Non-federal Entity → Recipient and/or Subrecipient
• Problematic Word Choice Deletions
  --- See Proposed 2 CFR 200.318(k) and 2 CFR 200.400
• Interpretation Clarifications
• Revised Dollar Thresholds
  --- Single Audit Requirement
  --- Equipment and Supply Definitions
  --- Modified Total Direct Costs
  --- Fixed Amount Awards and Subawards (2 CFR 200.201, 2 CFR 200.333)
• Proposed Changes in Prior Approval Policies
  --- [Defective] Definition
  --- Proposed Elimination of Some Prior Approvals (2 CFR 200.407)
  --- [Attempted] Clarification of Subaward-Related Prior Approval (2 CFR 200.308)
  --- Treatment of Costs Included in Award Budget
  --- Timing of Responses to Prior Approval Requests

• Treatment of Close-out Costs
  --- Incurrence
  --- Liquidation
Other Proposed Revisions

- Policies Affecting Federal Agency Pre-award Activities
  --- Requirements for Obtaining a UEI and Registering with SAM.gov
     ----- Exceptions
  --- Full Revision of 2 CFR 200, Appendix I (Full Text of Notice of Funding Opportunity--NOFO)
     ----- Notifications of Unsuccessful Applicants
  --- Clarifications about Timing and Scope of Federal Agency Risk Assessment of Applicants and Recipients
Proposed Revisions: Procurement and Property Management

• Procurement
  --- 2 CFR 200.318 Contractor Selection Criteria—Responsible Contractor Classification of Workers under FLSA
  --- 2 CFR 200.322 Changes in Geographic Preference Policies
  --- 2 CFR 200.323 Encouragement of Sustainability Policies
  --- 2 CFR 200.324 Clarification of Recipient/Subrecipient Responsibility for Cost or Price Analysis

• Property Management
  --- Revised Dollar Thresholds for Acquisition and Disposition of Equipment and Supplies
Proposed Revisions: Post-Award Impact for Recipients and Subrecipients

- 2 CFR 200.308 Clarification on Prior Approval of Subrecipients
- 2 CFR 200.331 Clarification on Criteria for Case-by-Case Determination of “Lower Tier” Relationships
- 2 CFR 200.333 Elimination on Dollar Cap on Fixed Amount Subawards
- 2 CFR 200.201 Clarification on Retention of Unexpended Funds under Fixed Amount Awards and Subawards
- 2 CFR 200.329 Clarification about Frequency and Timing of Performance Reports
- 2 CFR 200.340 Clarification of Bases for Non-Continuation of Funding or Termination
Proposed Revisions: Cost Allowability and Allocability

- 2 CFR 200.407 Revised List of Prior Approvals; Some Proposed Eliminations
- 2 CFR 200.403 Treatment of Close-out Costs
- 2 CFR 200.420 Clarification of Policy Concerning Costs Not Listed Among the “Selected Items of Cost”
Proposed Revisions: Indirect Cost Recovery Matters

• Raising the *De Minimis* Indirect Cost Rate to 15% of the Modified Total Direct Costs (MTDC) Charged

• Revision of the Definition of “Modified Total Direct Costs” Allowing Indirect Costs to Be Charged on the First $50,000 of Each Subaward.

• Handling of Indirect Cost Rate Cognizance and Submission of Indirect Cost Allocation Plans and Rate Proposals for Organizations Receiving Less than $35 Million Annually.

• Deferral of Requirement to Post Indirect (F&A) Rates on a Public Website
Proposed Revisions—Audit Related

- Increase in Threshold of Total Federal Awards Expended Annually to Trigger the Requirement for a Single Audit.
  --- Currently: $750,000
  --- Proposed: $1,000,000
- Proposed Revision to Involve Independent Auditors in the Process for Issuance of OMB’s Annual Compliance Supplement
- Clarification of Policies Concerning Reporting of Questioned Costs in a Single Audit
- Revised Language Concerning Mandatory Disclosures (2 CFR 200.113)
- Added Language on Whistleblower Protection (2 CFR 200.217)
- Enhanced Language about Post Award Disputes (2 CFR 200.342)
NADO’s Comments

• OMB’s Solicitations
  --- Specific Topics Identified in the Preamble
  --- Alert for “Unintended Consequences”
• Due at OMB on December 4
• Possible Responses
  --- “We Agree” and “Thank You”
  --- “We Disagree”
  --- “We Need Further Clarification”
  --- “We Need an Additional Policy”
  --- “We Told You Before”
• Accurate and On Point
• IMPORTANT—”Live Case” Examples of Member Experiences
• Consider Sending an Individual Member Letter

• *Internal NADO Deadline: November 22*
“Ripe” Issues

• 2 CFR 200.331 Subrecipient vs. Contractor Determinations
• 2 CFR 200.305(b) Advance Payment of Subrecipients
• 2 CFR 200.308; 2 CFR 200.407 Prior Approval Authority of Pass-through Entities
• 2 CFR 200.308 Timing for Prior Approval Responses
• 2 CFR 200.308 Case-by Case Waivers by Pass-through Entities
• 2 CFR 200.328 Financial Reporting Frequency and Content for Subrecipients
• 2 CFR 200.332(a); 2 CFR 200.414 Acceptance of RDO Indirect Cost Allocation Plans and Resulting Rates by Pass-through Entities
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• “Internal” NADO Comment Deadline: High Noon, 11/27/23!!
Sorting Out Federal Award Relationships