

MANAGING FEDERAL GRANTS IN UNCERTAIN TIMES

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Conference

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THE CURRENT FEDERAL GRANTS ENVIRONMENT

The Importance of a Federal Grants “Civics Lesson”

Sources of Grant Authority

- United States Constitution

- Article I, Section 8

- Article II, Section 3

- Statutes

- Executive Orders

- Regulations

- Administrative Procedure Act

- Other Policies and Procedures

- Award Terms and Conditions

GRANTS AS TOOLS OF PUBLIC POLICY

Actions by Federal Agencies

“Government by Agency”

--- The Federal Grant and Cooperative Agreement Act (PL 95-224)

--- Federal Acquisition

-----Federal Acquisition Regulation (48 CFR)

--- Federal Assistance

----- Grants and Agreements (2 CFR)

Presidential Actions to Use Grants to Advance Policy Goals

--- Examples: Nondiscrimination (Johnson); Labor Practices (Obama, Biden) ; Domestic Preference (Trump, Biden, Trump)

THE TRUMP ADMINISTRATION'S "FULL COURT PRESS"

Appropriation

--- Deferral

--- Rescission

Solicitation

Application

Awarding Agency Review

Award Agreement

Payment

Incurrence of Cost

--- Indirect Cost Recovery

Reporting

Suspension

Termination

--- Noncompliance

--- Contrary to Administration Priorities

CURRENT POLICIES OF FEDERAL GRANTING AGENCIES

Availability of Appropriated Funds

Allotment of Appropriated Funds to Agency Offices

Solicitation of Applications (NOFO's) (2 CFR 202-204)

Review of Applications

--- Determination of Program Merit (2 CFR 200.205)

--- Risk Assessment of Applicant (2 CFR 200.206)

Award Decision and Agreement

--- Amount **Obligated** (Statutory Language: 31 USC 1501(c)(5))

--- Period of Performance

----- "Burn Rate"

Imposition of Requirements (Uniform Guidance: 2 CFR 200)

POSSIBLE GRANT INTERRUPTION ACCESS POINTS

Rescind the appropriation

Defer the appropriation (budget authority) until it expires

Slow the grant application process

Make no grant award(s)

Slow the grants management process

Suspend grant implementation

Terminate the grant award

--- For noncompliance

--- For policy or priority reasons

Claw-back (disallow) costs incurred by recipients

GRANT INTERRUPTION DETAILS

Unilateral recipient prerogative

--- *Massachusetts vs. Mellon* (1923)

--- “...the option of yielding”

Mutual consent (2 CFR 200.340(a)(3))

Noncompliance by the recipient (2 CFR 200.339 and 2 CFR 200.340(a)(1))

--- Normally follows progressive discipline

Award termination by the awarding agency or pass-through entity “pursuant to the terms and conditions of the award, including the extent authorized by law, if the award no longer effectuate the program goals or agency priorities.” (2 CFR 200.340(a)(4))

The federal awarding agency or pass-through entity “must clearly and unambiguously specify all terminations in the terms and conditions of the federal award (2 CFR 200.340 (b))

REQUIRED PROCEDURES FOR TERMINATION

2 CFR 200.341

- Written notice
- Reasons for termination
- Effective date
- If non-compliance, referral to SAM.gov (FAPIS)
- Right of appeal (2 CFR 200.341(c))

APPEALS

Federal Agency Required Written Procedures ----- “Arbitrary and Capricious” Standard

--- Opportunity to Object and Challenge

----- Exhaustion of Administrative Remedies

--- Regulatory Silence for Subrecipients
Bases (2 CFR 200.342)

--- Federal Claims Collection Standards (31
CFR 900)

--- Noncompliance-related

--- Other

Agency Specific Examples

General Authority

--- Administrative Procedure Act

INITIAL TRUMP ADMINISTRATION RESCISSIONS

Foreign Aid

- Department of State (including PEPFAR)
- USAID
- Payments to International Organizations

Public Media

- CPB, PBS, NPR, USAGM

Narrowly Approved by Both Houses of Congress

“Pocket Rescission”

- Additional Foreign Aid

Impact of Government Shut-down

Additional Rescission Packages Coming?

EXECUTIVE ORDER 14332: “IMPROVING OVERSIGHT OF FEDERAL GRANTMAKING”

Assertions

--- Misuse of Federal Grant Instrument(s)

----- “Government by Horror Story”

----- “Waste and Garbage”

Insufficient Government Oversight

--- Questionable Public Benefit

EXECUTIVE ORDER 14332--FEATURES

Applicable to Discretionary Grants

--- Exclusion of Mandatory Entitlement (and Block) Grants

Subject to Availability of Appropriations

Appointment of Senior Oversight Official in Each Agency

--- Review of NOFO's

--- Reliance on Selected Subject Matter Experts

--- Pre-award Review of Grants for Consistency

----- Presidential Priorities

----- DEI Policy

----- Illegal Immigration Policy

----- Public Safety Considerations

EXECUTIVE ORDER 14332—ADDITIONAL FEATURES

“All else being equal”—preference for organizations with “lower indirect cost rates”

Awards to a “broad range of recipients” not just a “select group of repeat players”

--- Peer review can continue (as advisory only)

Awards with “clear benchmarks” for performance and outputs

No right is created for a “particular level of review”

EXECUTIVE ORDER 14332—REQUIRED FEDERAL ACTIONS

OMB to Revise Uniform Guidance (2 CFR 200)

--- OMB Prior Statement: 2 CFR 200 is “Guidance, not a Regulation”

--- Transparency of Revision?

Create Termination Provisions “for Convenience” and “in the National Interest”

Federal Agencies to Review Existing Terms and Conditions for Termination Features

Limit Use of Grant Funds for “Facility and Administrative” Costs

Introduce “Payment Drawdown” Control and Prior Approval

CURRENT FEDERAL GRANT LAWSUITS

> 300— But Who's Counting?

Opportunity for Confusion

--- Immigration Cases

--- Federal Contract Cases

Grant-related cases

--- Interruption of Payment or Drawdown

--- Termination of Active Awards

--- Separation of Federal Agency Grants Personnel

MAJOR ISSUES

Plaintiffs Seeking Relief

- Standing to Sue
- Jurisdiction of U.S. District Courts
- Nationwide Injunctions

Constitutional Separation of Powers

Constitutional Duty to “Take Care”

Due Process of Law

WATCHING THE ACTION

Beware of Media Coverage

Internet Search Tips

--- U.S. District Courts (93)

--- Courts of Appeals (11)

--- Location of Cases

Actions

--- Administrative Stay

--- Temporary Restraining Order

--- Injunction

Supreme Court Decisions

--- Nationwide Injunctions by District Courts

--- NIH Grant Terminations (25A103)

TAKING PART

In Court

- Exhaustion of Administrative Remedies
- Coalitions of Similarly Situated Organizations

In Congress

- Individual Members
- State Delegations
- Committee and Subcommittee Memberships
 - Substantive
 - Appropriations

Allowability of Government Relations (Lobbying) Costs (2 CFR 200.450)

IN THE MEANTIME...

Monitor Communications from Awarding Agencies

- Policy Changes and Award Modifications

- Clarity

- Accuracy

Maintain or Exceed Project Implementation Schedule

- Maximize Your “Burn Rate”

- Conduct Timely Financial and Performance Reporting

- Release Public Information (Allowable Costs: 2 CFR 200.421)

Discharge Any Previous Summary Schedules of Prior Audit Findings

Arrange for Timely Single Audit

- Pursue a Proactive Corrective Action Plan