

OMB Broadly Updates Grant Guidance

June 2024

On April 22, 2024, the Office of Management and Budget (OMB) issued a final rule broadly revising sections of OMB Guidance for Grants and Agreements, following review and consideration of the comments received in response to the proposed guidance published on October 5, 2023. The effective date for the final rule is October 1, 2024, although federal agencies may elect to apply it to federal awards issued as early as June 21, 2024 (60 days from the date of publication of the final rule).

OMB's final rule affects recipients and subrecipients of federal financial assistance. The changes affect everything from basic definitions of terms such as "federal financial assistance," to the standard for mandatory disclosures, the threshold for the disposition of equipment and supplies, audit requirements, socioeconomic policies, prior approval requirements, the treatment of indirect costs, and more.

OMB made changes to the same Parts of the Uniform Guidance indicated in the proposed rule: 2 C.F.R. Parts 1 (About Title 2 of the Code of Federal Regulations and Subtitle A), 25 (Universal Identifier and System for Award Management), 170 (Reporting Subaward and Executive Compensation Information), 175 (Award Term for Trafficking in Persons), 180 (OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Non-procurement)), 182 (Governmentwide Requirements for Drug-Free Workplace (Financial Assistance)), 183 (Never Contract with the Enemy), and 200 (Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards). The final rule also updated 2 C.F.R. Part 184 (Buy America Preferences for Infrastructure Projects), which was not changed in the proposed rule.

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Practice Areas

Federal Grants and Cooperative Agreements

Government Contracts

OMB's revisions generally reflect a desire to make the rules more flexible and make compliance easier, reducing burden on both agencies and recipients. OMB's revisions, as a whole, intend to advance the following objectives:

- (1) Incorporating statutory requirements and administration priorities;
- (2) Reducing agency and recipient burden;
- (3) Clarifying sections that recipients or agencies have interpreted in different ways; and
- (4) Rewriting applicable sections in plain language, improving flow, and addressing consistent use of terms.

Major changes to the rules, as well as deviations from the proposed guidance, are discussed below.

Plain Language Revisions

As laid out in the proposed rule, many of OMB's proposed changes update the guidance language to increase clarity and consistency. For example, in Part 200 Subpart A, OMB proposes to alter the definition of the term "Federal financial assistance" to include assistance received or administered by "recipients or subrecipients" rather than "non-Federal entities." Agencies and awardees have long been confused by this term, which was used throughout the guidance.

Mandatory Disclosures

Under current guidance, recipients and subrecipients (i.e., "non-federal entities") or Federal award applicants are required to disclose, in a timely manner, all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. 2 C.F.R. § 200.113. In the proposed rule, OMB proposed to incorporate the Federal Acquisition Regulation (FAR) "credible evidence" standard to the mandatory disclosure requirement for grants and cooperative agreements. Under the proposed guidance, recipients or subrecipients would be required to promptly disclose any credible evidence of a violation of federal criminal law potentially affecting the Federal award, or a violation of the civil False Claims Act in writing to the Federal awarding agency and pass-through entity (if applicable) as well as that agency's Office of Inspector General. In the final guidance, OMB revised this requirement to better align with the FAR 52.203-13 disclosure requirement by replacing the phrase "potentially affecting" with "in connection with," and adding the phrase "commission of" before "a violation."

Thresholds

The final guidance largely implements the threshold changes contemplated by the proposed guidance, but implemented a different change than initially contemplated for fixed amount subawards.

OMB raised the threshold amount for the disposition of equipment and supplies. Current guidance provides that post-award, equipment with a current fair market value of \$5,000 or less may be retained by the non-Federal entity. 2 C.F.R. § 200.313. As in the proposed rule, the final rule raises this threshold to \$10,000. Prior

guidance also provided that the non-Federal entity must retain or sell residual supplies exceeding \$5,000 in aggregate value that are not needed for another Federal award. 2 C.F.R. § 200.314. Also as in the proposed rule, the final guidance raises this threshold to \$10,000.

OMB also made an upward adjustment on the exclusion threshold of subawards for modified total direct cost base calculations used in allocating recipients' indirect costs. Currently, modified total direct costs only include up to the first \$25,000 of each subaward, specifically excluding the portion of each subaward in excess of \$25,000. In accordance with the proposed guidance, the final guidance increases the threshold for exclusion from \$25,000 to \$50,000.

Under the current rule, pass-through entities were limited to providing subawards based on fixed amounts up to the Simplified Acquisition Threshold (SAT) with prior written approval from the agency. 2 C.F.R. § 200.333. OMB initially proposed to remove the SAT limit for fixed amount subawards entirely. Upon further analysis, OMB determined that a threshold for fixed amount subawards remains warranted. Instead of removing the threshold entirely, OMB doubled the prior threshold from \$250,000 to \$500,000.

Under current guidance, a non-federal entity that expends \$750,000 or more in Federal awards during the entity's fiscal year must have a Single Audit (or program-specific audit) conducted for that year. 2 C.F.R. § 200.501. OMB proposed to raise the audit threshold from \$750,000 to \$1,000,000. The final guidance implements this change.

Indirect Costs

The final rule's indirect costs-related changes mirrors those in the proposed rule.

OMB clarified that recipients and subrecipients may notify OMB of any disputes regarding an agency's application or acceptance of federally negotiated indirect cost rates. OMB also clarified that pass-through entities must accept all federally negotiated indirect cost rates for subrecipients.

OMB also raised the *de minimis* rate from 10% to 15%. OMB specified that while recipients and subrecipients still have discretion to apply a rate lower than 15%, agencies cannot compel them to do so unless required by statute or regulation. OMB also clarified that the *de minimis* rate may not be applied to cost-reimbursement contracts.

Finally, OMB also removed the requirement that all indirect rates be publicly available on a government-wide website.

Audit Requirements

Under current guidance, auditees are required to prepare a schedule of expenditures of Federal awards (SEFA) for the period covered by the auditee's financial statements. 2 C.F.R. § 200.510. Current guidance dictates what the schedule must include. OMB proposed to add a requirement that, for audits covering multiple recipients, the schedule must identify the recipient of the Federal award. In the final rule, OMB removed this proposed addition, citing an intention to look for alternative means of making the information

available in a manner that would be less burdensome for auditees and auditors.

The awarding Federal agency is responsible for certain audit-related functions for the awards it makes, including submitting annual updates to the compliance supplement to OMB. 2 C.F.R. § 200.513. OMB proposed updating the awarding Federal agency responsibilities to encourage agencies to engage with external audit stakeholders and the National Single Audit Coordinator (NSAC) prior to submitting compliance supplement drafts to OMB. OMB changed the language to clarify that agencies “should” rather than “are encouraged to” engage with external stakeholders.

In terms of the scope of an audit, OMB proposed to add a requirement that compliance testing include a test of transactions and other auditing procedures necessary to provide the auditor with sufficient evidence to support an opinion on compliance. In the final guidance, OMB replaced the “and” with an “or” to reflect that testing of transactions may not always be the most appropriate method for every situation.

Socioeconomic Policies

As in the proposed guidance, the final guidance clarifies that 2 C.F.R. Part 200 does not prohibit recipients and subrecipients from:

- Using Project Labor Agreements or similar forms of pre-hire collective bargaining agreements;
- Requiring commitments or goals to hire people residing in high-poverty areas, disadvantaged communities as defined by the Justice40 Initiative OMB Memorandum M-21-28, or high-unemployment census tracts within a region no smaller than the county where a federally funded construction project is located, provided that a recipient or subrecipient may not prohibit interstate hiring;
- Requiring commitments or goals to individuals with barriers to employment (as defined in Section 3 of the Workforce Innovation and Opportunity Act (29 U.S.C. § 3102(24)), including women and people from underserved communities as defined by Executive Order 13985;
- Using agreements intended to ensure uninterrupted delivery of services;
- Using agreements intended to ensure community benefits; or
- Offering employees of a predecessor contractor rights of first refusal under a new contract.

The proposed guidance stated that Federal agencies may consider allowing recipients or subrecipients to use such practices if consistent with the U.S. Constitution, applicable Federal statutes and regulations, the objectives and purposes of the Federal financial assistance program, and other requirements of Part 200. In response to some commenters, who observed that language seemed to indicate that use of the practices remains contingent on Federal agencies allowing recipients to use them, the final guidance clarifies that recipients and subrecipients may use the listed practices if consistent with the U.S. Constitution, applicable Federal statutes and regulations, the objectives and purposes of the applicable Federal financial assistance program, and other requirements of this part.

Consistent with the proposed guidance, the final guidance also

- Removes the prohibition on using geographic preference requirements;
- Clarifies that 2 C.F.R. Part 200 Subpart D does not prohibit recipients and subrecipients from incorporating a scoring mechanism that rewards bidders committing to specific numbers and types of U.S. jobs, as well as certain compensation and benefits;
- Adds veteran-owned businesses to the types of businesses recipients and subrecipients are encouraged to consider for procurement contracts; and
- Adds language encouraging Federal award recipients to purchase, acquire, or use products and services that can be reused, refurbished, or recycled; contain recycled content, are biobased, or are energy and water efficient; and are sustainable.

Prior Approval Requirements

In accordance with OMB's proposed guidance, OMB's final guidance clarifies that recipients do not need prior approval of individual subrecipients under all circumstances, but only when making subawards of programmatic activities not proposed by the recipient in the application for an award. The final rule also follows the proposed guidance in clarifying that agencies should not require approval of a change in a proposed subrecipient unless the initial inclusion of a subrecipient was a determining factor in the agency's merit review process.

As discussed in the proposed rule, OMB added requirements for prior approval where a recipient or subrecipient requests additional federal funds to complete a project, or transfer funds between construction and nonconstruction work. Also in accordance with the proposed rule, under the final rule recipients and subrecipients must seek prior approval for a no-cost extension to the period of performance, but not for one-time extensions authorized by the agency.

OMB also removed a significant number of prior written approval requirements for various costs. As contemplated by the proposed rule, prior written approval will no longer be required for real property, equipment, direct costs, entertainment costs, memberships, participant support costs, selling and marketing costs, and taxes. OMB's proposal to remove the prior approval requirement for exchange rates did not make it into the final rule.