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**District of Columbia
2018 Grants Management Conference**

Rights and Obligations of Federal Grantees and Subrecipients

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- Nicole, a Partner at Feldesman Tucker Leifer Fidell LLP, has been with the firm since 2008 and a practicing attorney since 2003.
- She is counsel to numerous federal grantee organizations across the country representing her clients in federal litigation as well as providing counsel on compliance and transactional matters.
- Her representative activities include reviewing and revising contracts, subrecipient agreements, procurement policies and procedures, and other grant-related documents to ensure compliance with programmatic requirements and other federal regulations. Nicole also advises clients on the federal requirements for grant related construction and renovation projects including issues related to filing notices of federal interest.
- Prior to joining the firm, Nicole worked as a legal services staff attorney, representing low-income clients in domestic violence matters, family law issues, public housing and landlord-tenant disputes, and consumer cases.

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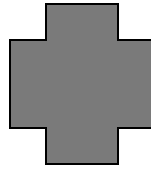
WHERE TO START?

- **Need authority to spend money**
- **Need to spend appropriated money for the intended purpose(s) and in the correct time and amount**
- **Need to select the proper instrument**

FEDERAL LAW: THE MAKING OF PUBLIC POLICY



Authorizing Statute, the Head Start Act



Appropriations Statute, typically Labor/HHS



Federally Funded Program, Head Start or any other program you have heard of, WIC, Medicaid, TANF etc.

KEY QUESTIONS

- What is a Contract?
- What is a Grant?
- What is a Cooperative Agreement?



(31 U.S.C. §§ 6301-6308)

Prescribes criteria that federal agencies use when deciding whether to select a grant, cooperative agreement, or procurement contract as the legal instrument to enter a relationship with a recipient of federal funds

FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT

- **Contract:**
 - ***Principal purpose:*** to acquire (“purchase, lease, or barter”) property or services for the direct benefit or use of the United States Government
 - ***Primary beneficiary:*** USG

FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT

- **Grant or Cooperative Agreement:**
 - ***Principal purpose:*** to transfer something of value to a recipient, to accomplish public purpose of support or stimulation, authorized by Federal law
 - ***Primary beneficiary:*** recipient; i.e., the public
 - Grantees are autonomous

FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT

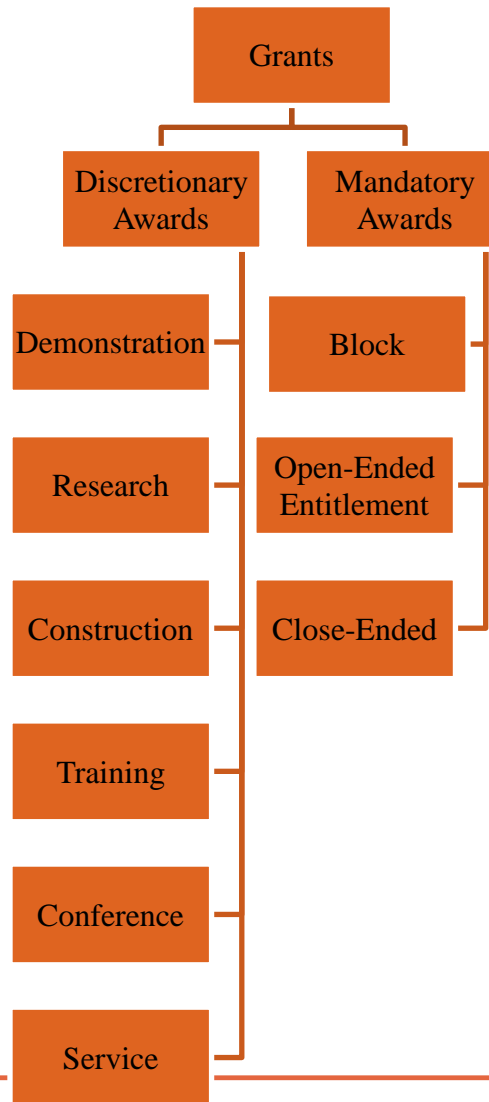
- **Grant versus Cooperative Agreement:**

Is there “**substantial involvement**” of awarding agency?

If **NO**, then consider Grant

If **YES**, then consider Cooperative Agreement

TYPES OF GRANTS



WHY DOESN'T THE FEDERAL GOVERNMENT DO THE JOB ITSELF?

- **No need to reinvent the wheel**
- **Creation and dissolution easier**
- **Not tied down with laws applicable to federal government**
 - e.g. personnel, contracting, administration
- **“Encourage” certain activities by others**

FEATURES OF GRANTS

- **Grantee is considered autonomous**
- **Not an arm of the federal government**



FEATURES OF GRANTS

- **Grantee operations subject to federal legal and regulatory requirements only:**
 - **As specified in the terms and conditions of the grant award, including grantee's plans, proposals and assurances**
 - » All terms must be clear (no implied terms)
 - » Changes in terms apply prospectively only
 - » Spending conditions are subject to constitutional limits
 - **To the extent that they would be if no Federal funds were involved**
 - **BUT:** Do not benefit from legal protections of feds either

FEATURES OF GRANTS

- **Operational rules common among many of the federal assistance programs**
- **Generally, “best efforts” -- but movement toward performance measures, *i.e.*, outcomes**
- **Funds to state and local governments often come with anti-supplanting rules.**

KEY GRANTEE(NFE) ROLES

- **Authorized Organizational Representative Project Director(s)/ Principal Investigator(s) (PD/PI):** directs project/program supported by the **(AOR)** or **Signing Official (SO)**: award administration; certifies compliance w/applicable assurances & accountability for appropriate use of funds and award objectives
- **award; accountable for proper conduct of project/program, including reports/financial and administrative aspects of award; communicates w/agency's PO re: programmatic issues + GMO re: business and administrative issues**

KEY FEDERAL AGENCY ROLES

- **Grants Management Officer (GMO):** business management & other non-programmatic aspects of award; signs NGA [NGA also identifies Grants Management Specialist]
- **Program Official (PO):** programmatic, scientific, and/or technical aspects of award; works w/grants management on post-award administration, including review of progress reports, site visits, and other activities

LEGAL FRAMEWORK

GENERAL

PROGRAM SPECIFIC

Federal Grants & Cooperative Agreement Act, APA

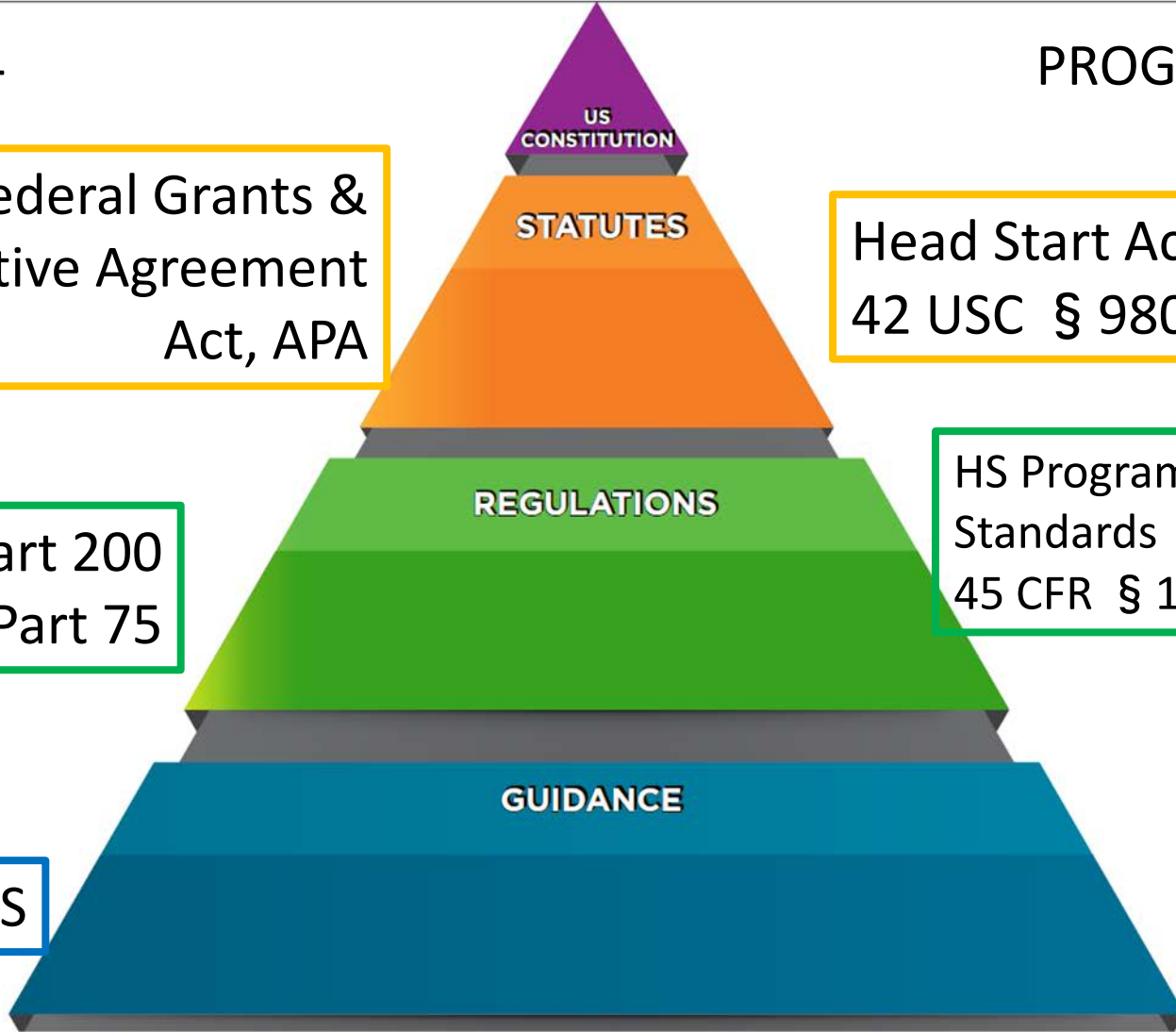
Head Start Act
42 USC § 9801 *et seq.*

2 CFR Part 200
45 CFR Part 75

HS Program Performance Standards
45 CFR § 1301 *et seq.*

HHS GPS

PIs, IMs,
Policy Clarifications



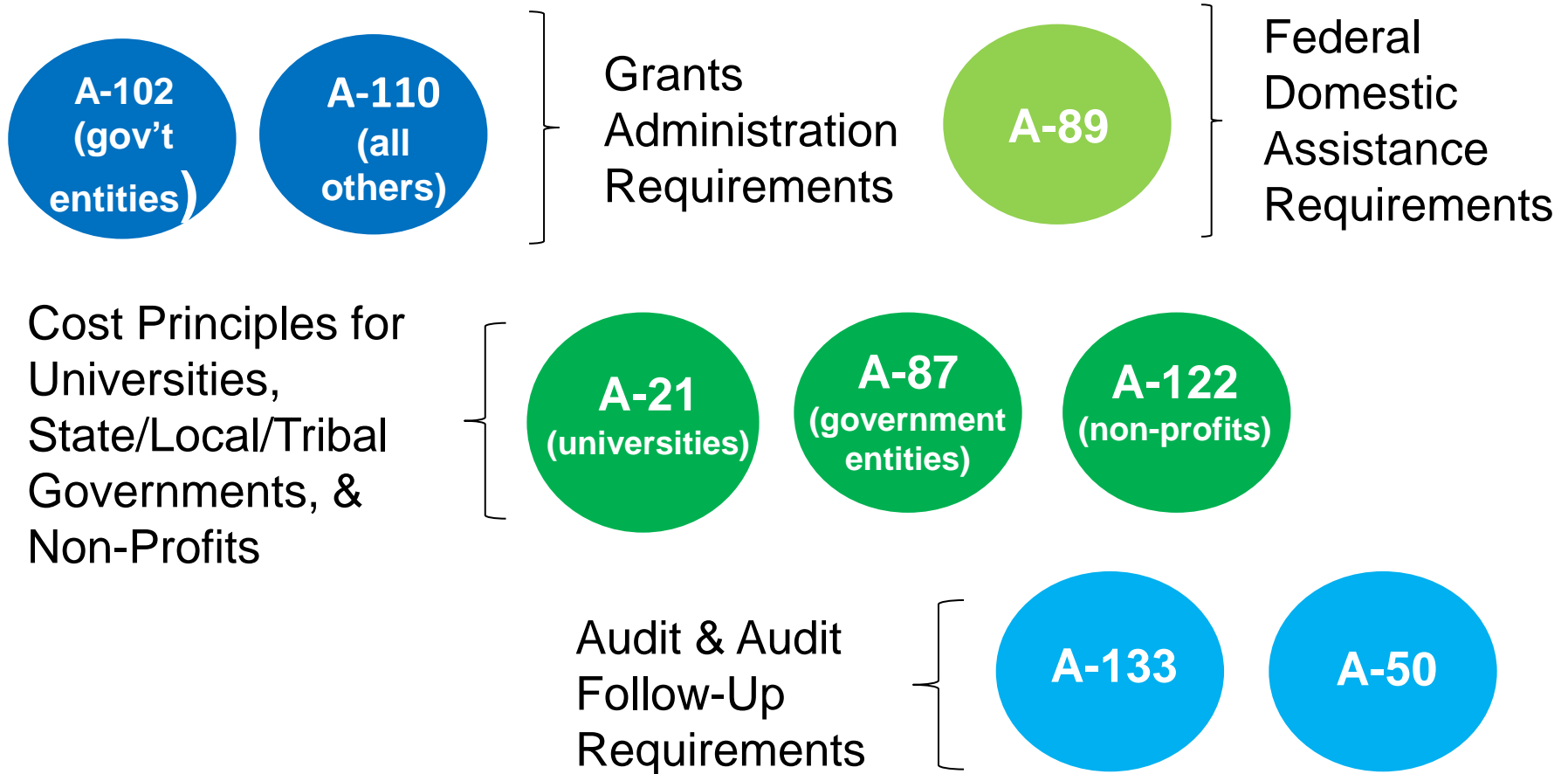
KEY FEDERAL STATUTES

- **Grant and Cooperative Agreement Act**
- **Single Audit Act**
- **Title VI of the Civil Rights Act of 1964**
- **Government Performance and Results Act**
- **Federal Financial Assistance and Management Improvement Act**

KEY FEDERAL STATUTES

- **Improper Payments Information Act**
- **Federal Civil False Claims Act**
- **Program Fraud Civil Remedies Act**
- **Hatch Act**
- **Federal Funding Accountability and Transparency Act**
- **Byrd Anti-Lobbying Amendment**

OLD OMB CIRCULARS



CONTENT/ORGANIZATION

- **New 2 CFR part 200; other circulars removed from CFR**
- **Six subparts, A through F:**
 - A. **Acronyms and Definitions**
 - B. **General Provisions**
 - C. **Pre-Federal Award Requirements and Contents of Federal Awards**
 - D. **Post Federal Award Requirements**
 - E. **Cost Principles**
 - F. **Audit Requirements**
- **Eleven Appendices (I-XI)**

OVERSIGHT AND ENFORCEMENT

- **Impose special award conditions**
- **Disallow cost of activity/action**
- **Suspend or terminate award**
- **Withhold further awards in project/program**
- **Refer for suspension/debarment**
- **“Take any other remedies that may be legally available” ...**

DEBARMENT AND SUSPENSION

- **Exec. Order No. 12,549 (3 CFR 1986 Comp.)**
- **Exec. Order No. 12,689 (3 CFR 1989 Comp.)**
- **31 U.S.C. § 6101 note**
- **Codified regulation is at 2 C.F.R. Part 180**
- **Individual departments are adopting the common rule and repealing their existing regulations**
- **Agency-specific provisions are published at 2 C.F.R. in their designated subparts**

DEBARMENT AND SUSPENSION

- **Debarment may be based on criminal conviction or other activities “affecting the integrity of an agency program.”**
- **Suspension is temporary pending completion of investigation or proceeding. Indictment is adequate evidence for suspension.**
- **Both debarment and suspension are appealable, although there is no opportunity to contest earlier grounds for conviction**

KEY GRANTS MANAGEMENT CONCEPTS: COURT DECISIONS



SUPREME COURT DECISIONS ON GRANT TERMS

[Pennhurst State School & Hosp. v. Halderman](#), 451 U.S. 1 (1981): Court held that Congress may not attach spending conditions to grants without doing so clearly and unambiguously. The Court analogized a grantee to a contracting party, which cannot knowingly accept and be bound by written terms unless they are clearly imposed.

[Bennett v. New Jersey](#), 470 U.S. 632 (1985):

Changes in substantive requirements for federal grants generally should not be applied retroactively. Obligations under the grant should be determined by reference to the law in effect when the grants were made. Reiterates [Pennhurst](#) (see above) holding that grants are “much in the nature of contracts.”

SUPREME COURT DECISIONS ON GRANT TERMS, CON'T.

National Federation of Independent Business v. Sebelius, 567 U.S. 1154 (2012)

Federal government cannot require State to participate in “new” assistance program as a condition of continued participation in existing program.

WHEN ARE TERMS UNCONSTITUTIONAL?

Rust v. Sullivan, 500 U.S. 173 (1991) Supreme Court held that HHS regulations do not violate the First Amendment if they prohibit federally funded projects from engaging in counseling concerning referrals for abortion as a means of family planning.

(The Rust holding was distinguished when the Court rendered its rulings in Legal Services Corp. v. Velazquez.)

Drilling Into the Details: Fundamentals of Grant Administration



PRE-AWARD: NGA OR FAA

DOE F 4600.1#
(7/05)

U.S. DEPARTMENT OF ENERGY
NOTICE OF FINANCIAL ASSISTANCE AWARD

Under the authority of Public Law _____

| | | |
|---|--|---|
| 1. PROJECT TITLE | 2. INSTRUMENT TYPE <input type="checkbox"/> GRANT <input type="checkbox"/> COOPERATIVE AGREEMENT | |
| 3. RECIPIENT (Name, address, zip code) | 4. INSTRUMENT NO. | 5. AMENDMENT NO. |
| | 6. BUDGET PERIOD FROM: THRU: | 7. PROJECT PERIOD FROM: THRU: |
| 8. RECIPIENT PROJECT DIRECTOR (Name, phone and E-mail) | 10. TYPE OF AWARD <input type="checkbox"/> NEW <input type="checkbox"/> CONTINUATION <input type="checkbox"/> RENEWAL | |
| 9. RECIPIENT BUSINESS OFFICER (Name, phone and E-mail) | <input type="checkbox"/> REVISION <input type="checkbox"/> INCREMENTAL FUNDING | |
| 11. DOE PROJECT OFFICER (Name, address, phone and E-mail) | 12. DOE AWARD ADMINISTRATOR (Name, address, phone and E-mail) | |

13. RECIPIENT TYPE

- | | | | | |
|--------------------------------------|--|---|---|--|
| <input type="checkbox"/> STATE GOV'T | <input type="checkbox"/> INDIAN TRIBAL GOV'T | <input type="checkbox"/> HOSPITAL | <input type="checkbox"/> FOR PROFIT ORGANIZATION | <input type="checkbox"/> INDIVIDUAL |
| <input type="checkbox"/> LOCAL GOV'T | <input type="checkbox"/> INSTITUTION OF HIGHER EDUCATION | <input type="checkbox"/> OTHER NONPROFIT ORGANIZATION | <input type="checkbox"/> C <input type="checkbox"/> P <input type="checkbox"/> SP | <input type="checkbox"/> OTHER (Specify) _____ |

PRE-AWARD: NGA OR FAA CON'T.

| | | | |
|--|------------------------|---|------------------------|
| 14. ACCOUNTING AND APPROPRIATIONS DATA: | | 15. EMPLOYER I.D. | |
| | | a. TIN: b. DUNS: | |
| 16. BUDGET AND FUNDING INFORMATION | | | |
| a. CURRENT BUDGET PERIOD INFORMATION | | b. CUMULATIVE DOE OBLIGATIONS | |
| (1) DOE Funds Obligated This Action | \$ _____ | (1) This Budget Period | \$ _____ |
| (2) DOE Funds Authorized for Carry Over | \$ _____ | <i>[Total of lines a.(1) and a.(3)]</i> | |
| (3) DOE Funds Previously Obligated in this Budget Period | \$ _____ | (2) Prior Budget Periods | \$ _____ |
| (4) DOE Share of Total Approved Budget | \$ _____ | (3) Project Period to Date | \$ _____ |
| (5) Recipient Share of Total Approved Budget | \$ _____ | <i>[Total of lines b.(1) and b.(2)]</i> | |
| (6) Total Approved Budget | \$ _____ | | |
| 17. TOTAL ESTIMATED COST OF PROJECT, INCLUDING DOE FUNDS TO FFRDC: \$ _____ <i>(This is the current estimated cost of the project. It is not a promise to award nor an authorization to expend funds in this amount.)</i> | | | |
| 18. AWARD AGREEMENT TERMS AND CONDITIONS | | | |
| This award/agreement consists of this form plus the following: | | | |
| a. Special terms and conditions. | | | |
| b. Applicable program regulations (specify) _____ (Date) _____. | | | |
| c. DOE Assistance Regulations, 10 CFR Part 600 at http://ecfr.gpoaccess.gov or, if the award is a grant to a Federal Demonstration Partnership (FDP) institution, the FDP Terms & Conditions and the DOE FDP Agency Specific Requirements at http://www.nsf.gov/awards/managing/fed_dem_part.jsp . | | | |
| d. Application/proposal as approved by DOE. | | | |
| e. National Policy Assurances to Be Incorporated as Award Terms in effect on date of award at http://grants.pr.doe.gov . | | | |
| 19. REMARKS | | | |
| 20. EVIDENCE OF RECIPIENT ACCEPTANCE | | 21. AWARDED BY | |
| _____ <i>(Signature of Authorized Recipient Official)</i> | _____ <i>(Date)</i> | _____ <i>(Signature)</i> | _____ <i>(Date)</i> |
| _____ <i>(Name)</i> | | _____ <i>(Name)</i> | |
| _____ <i>(Title)</i> | | _____ <i>(Title)</i> | |

GRANT ADMINISTRATION: A FEW BASIC RESPONSIBILITIES

- **Budget Flexibility**
- **Cost Sharing or Matching**
- **Program Income**
- **Federal Interest**
- **Audits**

BUDGET FLEXIBILITY

2 C.F.R. 200.308

- “(b) Recipients are **required to report deviations** from budget and program plans, **and request prior approvals** for budget and program plan revisions, in accordance with this section.” **BUT**
- “(d) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.”

COST SHARING OR MATCHING

2 C.F.R. 200.306

Put your money where your mouth is.

Cost sharing or matching means “that portion of project or program costs not borne by the Federal Government.”

“(a) All contributions, including cash and third party in-kind, shall be accepted as part of the recipient's cost sharing or matching when such contributions meet **all** of the following criteria.

- (1) Are **verifiable** from the recipient's records.
- (2) Are **not included as contributions** for any other federally-assisted project or program.

COST SHARING OR MATCHING CON'T.

- (3) Are **necessary and reasonable** for proper and efficient accomplishment of project or program objectives.
- (4) Are **allowable** under the applicable cost principles.
- (5) Are **not paid by the Federal Government** under another award, except where authorized by Federal statute to be used for cost sharing or matching.
- (6) Are **provided for in the approved budget** when required by the Federal awarding agency.
- (7) Conform to other provisions of the Circular, as applicable.

WHAT IS PROGRAM INCOME?

2 C.F.R. 200.80

If you plant federal seeds, it's a federal harvest.

- **Defined in Supercircular as “gross income earned by the non-Federal entity that is directly generated by a supported activity or earned as a result of the award . . . Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects . . . and principal and interest on loans made with Federal award funds.”**

FEDERAL SHARE (2 C.F.R. 200.43) AND FEDERAL INTEREST (2 C.F.R. 200.41)

What's mine is mine, what's yours (in name) is mine.

- **Federal share:** “the portion of the total project costs that are paid by federal funds”
- **Federal interest:** “the dollar amount that is the product of the: (a) Federal share of total project costs; and (b) Current fair market value of the property, improvements, or both . . .”

AWARDS SUBJECT TO AUDITS

AUDIT REQUIREMENTS: 2 C.F.R. 200.501

- Can be fiscal (e.g., A-133 single audits), programmatic (e.g., triennial monitoring reviews in Head Start), or from agency's Office of Inspector General
- Can lead to findings of noncompliance which must be corrected
- Must properly document what you do
 - Not enough to just do it
 - Personnel Costs/Time and Effort Reporting one of the biggest hotspot areas for documentation

Grant Related Disputes

COMMON TYPES OF GRANT-RELATED DISPUTES

- **Programmatic**
 - Suspension or Termination of Funding
 - Denials of Refunding
- **Financial (audit)**
 - Cost Disallowances
- **Other**
 - Declaratory Actions
 - Debarment and Suspension
 - Bid Protests

EXHAUSTION?

- **Agency Practices vary, such as Audit Resolution Process**
- **Regardless, Must have Final Agency Action**
- **Most Agencies have some form of Administrative Appeal such as:**
 - **HHS Departmental Appeals Board**
 - **DOL Office of Administrative Law Judges**

More on Recent Trends

...A recap of fundamental principles

QUESTIONS

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