

FELDESMAN+TUCKER+LEIFER+FIDELL

**District of Columbia
2018 Grants Management Conference**

Subrecipient Relationships: Formation, Monitoring, and Closeout

**Nicole M. Bacon, Partner
July 19, 2018**

NICOLE M. BACON



Contact Information:

nbacon@ftlf.com

202.466.8960

- 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.

DISCLAIMER

- **This presentation has been prepared by the attorneys of Feldesman Tucker Leifer Fidell LLP. The opinions expressed in these materials are solely their views.**
- **The materials are being used with the understanding that the authors are not engaged in rendering legal or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.**
- **Please do not record today's training session.**

LEARNING OBJECTIVES

- **Understand the requirements that apply when making and managing a subaward**
- **Identify strategies for structuring successful subrecipient relationships.**
- **Understand and differentiate between the roles of subrecipients and contractors under the uniform guidance.**
- **Identify the changes to subrecipients under the uniform guidance.**

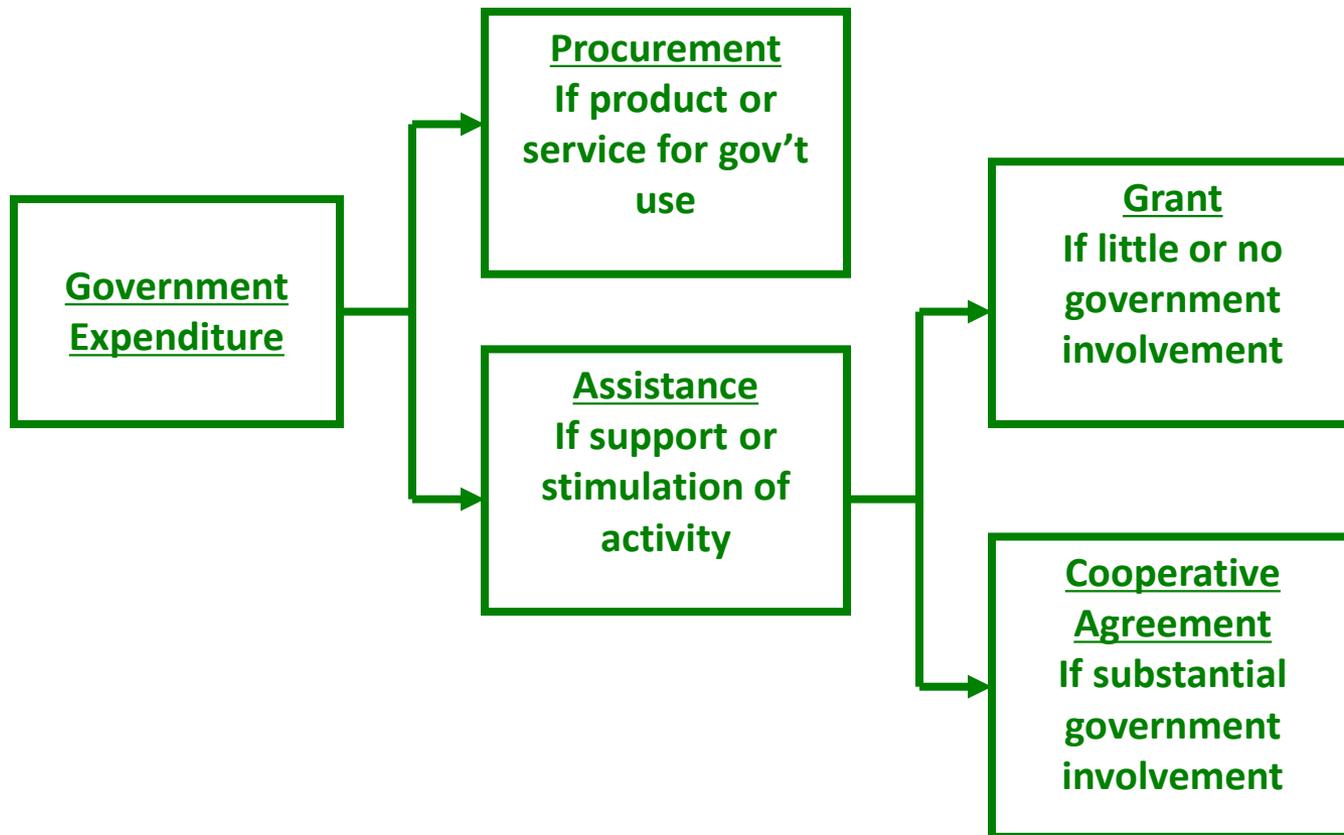
AGENDA

- I. Subrecipients vs. Contractors**
- II. Selection and Risk Assessment**
- III. The Agreement**
- IV. Administering the Award**
- V. Closing Out the Award**
- VI. Fixed Amount Subawards**

Subrecipient vs. Contractor:

How do you decide and why does it matter?

FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT



TRANSLATES INTO SAME DETERMINATIONS YOU MAKE ON SUB-RECIPIENT/CONTRACTOR RELATIONSHIPS



THE CONTRACT/SUBAWARD DISTINCTION



MINI-ME - 2 CFR §200.330

- The basic difference between subrecipients and contractors stems from the purpose or the nature of the money being passed from the grantee to the sub.
- **Subrecipient:** Take a piece of your program (programmatic decision making) → must comply with all regulations
 - If Sub-recipient must be approved by the Feds
- **Contractor:** Buying something to help you do your program or meet your purpose (paper and pencils or medical supplies)
 - If Contractor → refer to procurement standards
- Distinction leads to different requirements!
 - Monitoring, pricing, reporting, collateral rights

SUBRECIPIENT OR CONTRACTOR

Subrecipient

Take a piece of your program (programmatic decision making) → sub must comply with all regulations

Contractor

Buying something to help you do your program or meet your purpose (paper and pencils or “expert” contractor)

SUBRECIPIENT CHARACTERISTICS

- Determines who is eligible to receive what Federal assistance;
- Has its performance measured in relation to whether objectives of a Federal program were met;
- Has responsibility for programmatic decision making;
- Is responsible for adherence to applicable Federal program requirements specified in the Federal award; and
- In accordance with its agreement, uses the Federal funds to carry out a program for a **public purpose** specified in **authorizing statute**, as opposed to providing goods or services for the benefit of the pass-through entity.
- **2 C.F.R. § 200.330(a)**

CONTRACTOR CHARACTERISTICS

- Provides the goods and services within normal business operations;
- Provides similar goods or services to many different purchasers;
- Normally operates in a competitive environment;
- Provides goods or services that are **ancillary to the operation of the Federal program**; and
- Is not subject to compliance requirements of the Federal program as a result of the agreement, though similar requirements may apply for other reasons.

2 C.F.R. § 75.330(b)

USE BEST JUDGMENT TO DECIDE

- “All of the characteristics listed [on the prior slides] may not be present in all cases, and the pass-through entity must use judgment in classifying each agreement as a subaward or a procurement contract.” 2 C.F.R. § 200.330(c)
- **Substance of relationship more important than form of agreement**



WHY DO THESE DISTINCTIONS MATTER?

- **Different terms and conditions:**
- **Pricing**
 - Grants (and sub-grants) are cost reimbursement instruments
 - Contracts are up to you
- **Budgeting**
- **Termination**
 - There are limits on ability to terminate a subrecipient

WHY DO THESE DISTINCTIONS MATTER?

- **Different Procedural Requirements**
- **Prior Federal approval versus**
- **Free and open competition**
- **Different Reporting Obligations**
- **Under FFATA – must report subrecipient relationships over \$25,000**
- **Collateral Rights for Subrecipients under Authorizing Legislation**

CLOSE CALL EXAMPLE

Imagine you are the recipient of a medical research grant. You are conducting a trial involving ten sites, each of which enrolls participants. The PI works for you. The sites must follow your research protocol and will be producing data that you will incorporate into your findings, but will not be involved in any substantial programmatic decision-making.

What are they?

Selection and Risk Assessment

SELECTING A SUBRECIPIENT PROCESS

- This is NOT a procurement – no competition requirement.
- **Federal Agencies must identify and evaluate potential Awardees in a certain manner:**
 - Public notice with certain prescribed information (2 CFR §§200.202, 200.203)
 - Must use a “merit review process” (2 CFR §200.204)
 - Must check SAM (2 CFR §200.205)
 - Reporting certain decision not to make awards in FAPIIS (2 CFR §200.212)
- **PTEs are NOT specifically required to do these things**
 - 2 CFR §200.101(b)(1)
 - 80 Fed. Reg. 43307 (Acknowledging PTEs are not specifically required to check SAM in implementing FAPIIS).

SELECTING A SUBRECIPIENT

WHAT SHOULD YOU DO?

- **If you are a State or Local Government, follow your applicable administrative statutes, regulations, and policies.**
 - **Nondiscrimination**
 - **State Administrative Procedure Act**
- **Ensure potential Subrecipient is not debarred or suspended. 2 CFR Part 180 (Nonprocurement Suspension and Debarment).**
- **Evaluate the Risk Posed by the Subrecipient.**
 - **Recipient will be held accountable for many acts of noncompliance on the part of the Subrecipient.**

SELECTING A SUBRECIPIENT EVALUATING RISK

- **Obligation to Mitigate Risk:**
 - PTEs must “[e]valuate each subrecipient’s risk of noncompliance with Federal statutes, regulations, and the terms and conditions of the subaward for purposes of determining . . . appropriate subrecipient monitoring . . .” 2 CFR §200.331 (Requirements for PTEs).
- **Note the Similarity to the Internal Controls requirement:**
 - “The [NFE] must . . . [e]stablish and maintain effective internal control over the Federal award that provides reasonable assurance that the [NFE] is managing the Federal award in compliance with Federal statutes, regulations, and the terms and conditions of the Federal award. . .” 2 CFR §200.303 (Internal Controls).

SELECTING A SUBRECIPIENT EVALUATING RISK

- **2 CFR §200.331(b):**
 - **“Evaluate each subrecipient’s risk of noncompliance with Federal statutes, regulations, and terms and conditions of the subaward for purposes of determining the appropriate subrecipient monitoring described in paragraphs (d) and (e) of this section, which may include consideration of such factors as:”**
 - **Subrecipient’s prior experience with similar awards (past performance)**
 - **Results of prior audits**
 - **New personnel or systems**
 - **Direct federal monitoring on concurrent direct federal awards**

SELECTING A SUBRECIPIENT EVALUATING RISK

- Risk Evaluation Considerations:
 - PTEs have flexibility, but should (as good practice) also consider the Federal Agency evaluation factors at 2 CFR§200.205(c):
 - Financial Stability
 - Quality of management systems
 - History of performance
 - Audit reports (soon to be detailed info online at <https://harvester.census.gov/facweb/Default.aspx>)
 - Note: Most of FAPIIS info will be publicly available too (2 CFR §200.211(b)).
 - Applicant's ability to effectively implement requirements imposed on NFEs (redundant with above).

PRIOR APPROVAL

2 CFR §200.308(c)(1)(vi):

For non-construction Federal awards, recipients **must request prior approvals** from Federal awarding agencies for one or more of the following program or budget-related reasons: . . . Unless described in the application and funded in the approved Federal awards, **the subawarding, transferring or contracting out of any work under a Federal award . . .**”

The Agreement

PARTIES' INDIVIDUAL INTERESTS

- **PTE Perspective:**
 - **Accomplish the purpose of the federal award**
 - **Mitigate risk of Subrecipient causing compliance failure that affects PTE's award (*e.g.*, disallowance, specific award conditions, *etc.*)**
- **Subrecipient Perspective:**
 - **Acquire funding**
 - **Comply with Terms and Conditions of the subaward**
 - **Minimize administrative burden**

COMMON INTEREST CLARITY IN CORE TERMS

- That it is a subaward under a federal program
- Performance expectations
 - Purpose of award
 - Reporting requirements
 - Any performance metrics
 - Major ancillary compliance requirements (*e.g.*, no transactions with suspended or debarred entities)
- Payment right
 - The nature of allowable and unallowable costs
 - Payment schedule and terms (*e.g.*, advance payment)
 - Audit and reconciliation requirements / closeout

SPECIFICALLY REQUIRED TERMS AND CONDITIONS 2 CFR § 200.331

“All pass-through entities must:

(a) Ensure that every subaward is clearly identified to the subrecipient as a subaward and includes the following information at the time of the subaward and if any of these data elements change, include the changes in subsequent subaward modification. When some of this information is not available, the pass-through entity must provide the best information available to describe the Federal award and subaward. Required information includes...”

SPECIFICALLY REQUIRED TERMS AND CONDITIONS 2 CFR § 200.331

“(1) Federal Award Identification.

(i) Subrecipient name (which must match the name associated with its unique entity identifier);

(ii) Subrecipient's unique entity identifier;

(iii) Federal Award Identification Number (FAIN);

(iv) Federal Award Date (see §200.39 Federal award date) of award to the recipient by the Federal agency;

(v) Subaward Period of Performance Start and End Date;

(vi) Amount of Federal Funds Obligated by this action by the pass-through entity to the subrecipient...”

SPECIFICALLY REQUIRED TERMS AND CONDITIONS 2 CFR § 200.331

“.....(vii) Total Amount of Federal Funds Obligated to the subrecipient by the pass-through entity including the current obligation;

(viii) Total Amount of the Federal Award committed to the subrecipient by the pass-through entity;

(ix) Federal award project description, as required to be responsive to the Federal Funding Accountability and Transparency Act (FFATA);

(x) Name of Federal awarding agency, pass-through entity, and contact information for awarding official of the Pass-through entity;

(xi) CFDA Number and Name; the pass-through entity must identify the dollar amount made available under each Federal award and the CFDA number at time of disbursement;

(xii) Identification of whether the award is R&D; and

(xiii) Indirect cost rate for the Federal award (including if the de minimis rate is charged per §200.414 Indirect (F&A) costs).”

SPECIFICALLY REQUIRED TERMS AND CONDITIONS 2 CFR § 200.331

“...(2) All requirements imposed by the pass-through entity on the subrecipient so that the Federal award is used in accordance with Federal statutes, regulations and the terms and conditions of the Federal award;

(3) Any additional requirements that the pass-through entity imposes on the subrecipient in order for the pass-through entity to meet its own responsibility to the Federal awarding agency including identification of any required financial and performance reports...”

EXAMPLES OF OPTIONAL TERMS TO INCLUDE

1. **Restatement of unique and important program requirements, such as:**
 - a. **Eligibility requirements for beneficiary services under the program**
 - b. **Administrative cost caps in the federal program**
 - c. **Cost Sharing/Matching requirements**
2. **Restatement of compliance assurance measures, such as:**
 - a. **Audits and Reconciliation**
 - b. **Access to records and personnel**
 - c. **Disallowance mechanism**
 - d. **Termination (and Suspension)**
3. **Reference to less unique, but nonetheless important, terms and conditions of award (e.g., financial management, internal controls, property use and disposition, prior approvals, cost principles, etc.).**
4. **Additional financial and programmatic reporting requirements.**

SPECIFICALLY REQUIRED TERMS AND CONDITIONS 2 CFR § 200.331

“(4) An approved federally recognized **indirect cost rate negotiated** between the subrecipient and the Federal Government or, if no such rate exists, either a rate **negotiated between the pass-through entity** and the subrecipient (in compliance with this part), or a **de minimis indirect cost rate** as defined in §200.414 Indirect (F&A) costs, paragraph (f)...”

Note:

- The PTE is required to recognize the Subrecipient’s federally-negotiated indirect cost rate. If the Subrecipient has never had a negotiated indirect cost rate, it has the right to elect the 10 percent *de minimis* rate vis-à-vis the PTE. The PTE is not required to negotiate an indirect cost rate, but (absent specific statutory authority) cannot force a Subrecipient to accept less than the *de minimis* rate. COFAR FAQs .331-6, .331-7.
- Subrecipient are permitted to elect to “direct charge” all costs. COFAR FAQ .331-5.

2 CFR §200.101 – ALL OF THE TERMS AND CONDITIONS “FLOW DOWN”:

“(b)(1) *Applicability to different types of Federal awards.* The following table describes what portions of this part apply to which types of Federal awards. The terms and conditions of Federal awards (including this part) flow down to subawards to subrecipients unless a particular section of this part or the terms and conditions of the Federal award specifically indicate otherwise. This means that non-Federal entities must comply with requirements in this part regardless of whether the non-Federal entity is a recipient or subrecipient of a Federal award. *Pass-through entities must comply with the requirements described in Subpart D—Post Federal Award Requirements of this part, §§200.330 Subrecipient and contractor determinations through 200.332 Fixed amount Subawards, but not any requirements in this part directed towards Federal awarding agencies unless the requirements of this part or the terms and conditions of the Federal award indicate otherwise.*”

ADMINISTERING THE AWARD

EXTENT OF MONITORING RISK-BASED ANALYSIS

- Remember 2 CFR §200.331(b):
 - “Evaluate each subrecipient’s risk of noncompliance with Federal statutes, regulations, and terms and conditions of the subaward for purposes of determining the appropriate subrecipient monitoring described in paragraphs (d) and (e) of this section, which may include consideration of such factors as:”
 - Subrecipient’s prior experience with similar awards (past performance)
 - Results of prior audits
 - New personnel or systems
 - Direct federal monitoring on concurrent direct federal awards
- 2 CFR §200.331(d) – then “monitor” to extent “necessary”

EXTENSION INTERNAL CONTROLS CONCEPT (RISK MANAGEMENT)

GAO Green Book:

Definition of an Internal Control System

OV1.04 An internal control system is a continuous built-in component of operations, effected by people, that provides reasonable assurance, not absolute assurance, that an entity's objectives will be achieved.

Example: Navy Risk Management Matrix.

Source:
Navy Instruction on Operational Risk Management
OPNAVINST 3500.39C (2010)

Risk Assessment Matrix			PROBABILITY				
			Frequency of Occurrence Over Time				
			A Likely	B Probable	C May	D Unlikely	
SEVERITY	Effect of Hazard	I	Loss of Mission Capability, Unit Readiness or Asset; Death	1	1	2	3
		II	Significantly Degraded Mission Capability or Unit Readiness; Severe Injury or Damage	1	2	3	4
		III	Degraded Mission Capability or Unit Readiness; Minor Injury or Damage	2	3	4	5
		IV	Little or No Impact to Mission Capability or Unit Readiness; Minimal Injury or Damage	3	4	5	5
Risk Assessment Codes							
1 - Critical 2 - Serious 3 - Moderate 4 - Minor 5 - Negligible							

CHARACTERISTICS OF EFFECTIVE CONTROLS

Control Criteria	Remarks
Suitability	Control removes the threat or mitigates (reduces) the risk to an acceptable level.
Feasibility	Has the capability to implement the control.
Acceptability	Benefit or value gained by implementing the control justifies the cost in resources and time.
Explicitness	Clearly specifies who, what, where, when, why, and how each control is to be used.
Support	Adequate personnel, equipment, supplies, and facilities necessary to implement a suitable control are available.
Standards	Guidance and procedures for implementing a control are clear, practical, and specific.
Training	Knowledge and skills are adequate to implement a control.
Leadership	Leaders are ready, willing, and able to enforce standards required to implement a control.
Individual	Individual personnel are sufficiently self-disciplined to implement a control.

Source:
Navy Instruction on
Operational Risk
Management
OPNAVINST 3500.39C (2010)

UG-SPECIFIC IMPLEMENTATION

2 CFR §200.331

- **2 CFR §200.331(d):**
 - **“Monitor” to extent “necessary” – must include:**
 - Financial and Performance Reports
 - Follow-up on all deficiencies identified through audits, site visits, etc.
 - Issuing management decision on audit findings (*i.e.*, do your job in audit review)
- **2 CFR §200.331(e):**
 - **Also may find useful:**
 - Training and Technical assistance
 - On-site reviews
 - “Agreed Upon Procedures” audit services
- **2 CFR §200.331(c):**
 - Consider (when making award) specific award conditions

2 CFR §200.207 SPECIFIC AWARD CONDITIONS

“(b) These additional Federal award conditions may include items such as the following:

- (1) Requiring payments as reimbursements rather than advance payments;**
- (2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given period of performance;**
- (3) Requiring additional, more detailed financial reports;**
- (4) Requiring additional project monitoring;**
- (5) Requiring the non-Federal entity to obtain technical or management assistance; or**
- (6) Establishing additional prior approvals.”**

2 CFR §200.207 SPECIFIC AWARD CONDITIONS

(c) The Federal awarding agency or pass-through entity must notify the applicant or non-Federal entity as to:

(1) The nature of the additional requirements;

(2) The reason why the additional requirements are being imposed;

(3) The nature of the action needed to remove the additional requirement, if applicable;

(4) The time allowed for completing the actions if applicable, and

(5) The method for requesting reconsideration of the additional requirements imposed.

(d) Any specific conditions must be promptly removed once the conditions that prompted them have been corrected.

PTE IS ACCOUNTABLE

PTE is accountable for proper use and management of federal funds by Subrecipient

- 2 CFR § 200.331(f)**
 - **Verify Subrecipient audited in accordance with Subpart F if exceeds threshold (\$750,000)**
- 2 CFR § 200.331(g)**
 - **Consider whether Subrecipient actions require adjustment to PTE's own records.**
- 2 CFR § 200.331(h)**
 - **Consider taking enforcement action as described in 2 CFR § 200.338 (Remedies for noncompliance)**
 - Make sure you incorporate these in your Subaward Agreement.**

NOTE ON PRIOR APPROVALS

Prior Approval requirements for certain items appear to “flow up” (i.e., before PTE approves Subrecipient request, PTE must seek federal approval). For example:

- Capital Expenditures not in budget (2 CFR §200.439)
- Disposition of Real Property and Equipment (2 CFR §§200.311, 200.313).

If PTE has approved it, PTE has accepted responsibility/liability vis-à-vis the federal agency.

CLOSING OUT THE AWARD

CLOSEOUT

Concept:

- Review and document that Subrecipient carried out proposed programmatic activities
- Review and document that costs were allowable
 - Subrecipient to reimburse “prime” for any unallowable costs, and “prime” to reimburse Subrecipient for any unpaid allowable costs.

Basic Closeout Activities:

- 90 days after end of performance to submit all required reports
- Liquidate all obligations incurred under the award within 90 days of end of performance
- Account for all real or personal property acquired under the award
- Government to complete closeout activities within 1 year of after receipt of all reports. This cannot practically “flow down” verbatim. Structure your subawards to leave plenty of time.

CONTINUING OBLIGATIONS

2 CFR §200.344

Between Federal Agency and Recipient, closeout does not affect:

- Agency right to disallow costs (but must make determination within the record retention period).
- Recipient obligation to return funds if necessary upon final reconciliation of indirect cost rate
- Property management and disposition requirements
- Record retention obligation
 - 3 years from submission of final financial report, unless dispute (in which case longer)
 - PTEs' Subaward Agreements should expressly provide for the same rights vis-à-vis their Subrecipients.

Make sure you have the same rights vis-à-vis the Subrecipient

FIXED AMOUNT SUBAWARDS

FIXED AMOUNT SUBAWARDS

May make fixed-amount subawards up to SAT with prior approval of funding agency. 2 CFR §200.332.

Such subawards must meet same requirements as federal agency fixed amount subaward at 2 CFR §200.201:

- Amount is negotiated using cost principles
- Project scope is specific and adequate cost, historical, or unit pricing data is available to establish amount based on reasonable estimate of actual cost
- Payments based on meeting specific requirements (may not be “best efforts”)
- Accountability based on performance and results (same)

No review of actual costs during or after performance. 2 CFR §200.201(b)(1).

Certify in writing at end of period that LOE expended or project completed. 2 CFR §200.201(b)(3).

Cannot use in a program with match. 2 CFR §200.201(b)(2).

KEY TAKEAWAYS

- **Don't forget the basic flow-down (“mini-me”) concept.**
- **It is all really an extension of risk management. Make sure your subaward agreement provides you with sufficient rights.**
- **Go see what the subrecipient is doing, and make basic but fruitful requests while there, such as: “show me how you created your last financial report; show me the systems the data comes from and how you prepare the report.”**

QUESTIONS

Nicole Bacon

NBacon@FTLF.com

(202)466-8960

FTLF.com