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Revised UG Ups Micro-Purchase Level, Eases Award Termination, Addresses Indirect Rates

By Theresa Defino

The 120-day closeout that institutions fought for after the Office of Management and Budget (OMB) first released the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in December 2013 has now been codified in the five-year update to the Uniform Guidance (UG).[1] With a few notable provisions that were in force immediately upon publication in the Aug. 18 *Federal Register*, new UG requirements became effective in mid-November.

Universities and other federal awardees are working to understand the nuances of this and the other "relatively large number of changes," many of which Scott Sheffler, a partner with Feldesman Tucker Leifer Fidell LLP, deemed "cleanup" to clarify inconsistencies and confusion. As with closeout, they also reflect changes that agencies have made more informally during the five years since the first UG was issued. Fellow Feldesman Tucker partner Edward Waters also saw the changes in oversight of federal grants and awards as a continuation of the direction to mirror government procurement contracts.

The new UG finalized proposed changes were published Jan. 22.[2] OMB said it received more than 2,500 comments on the proposed UG.

In mid-October, the Council on Governmental Relations (COGR) published a 17-page uniform guidance readiness guide aimed at assisting universities and others with federal research funding to understand and implement "a significant number of impactful changes and overarching concepts" contained in the revised UG.[3]

COGR officials "strongly encourage" its members to "read both OMB's comments in the *Federal Register* and the revisions in their entirety," as well as OMB's redlined version, in addition to using the guide. Issued in draft form, COGR planned to finalize the readiness guide with "feedback from the community" sometime later this year.

This article will address some of the changes in the new UG; others will be featured in future issues of *RRC.*

Micro-Threshold May Increase to $50K and Beyond

Under 2 C.F.R. § 200.320 , "all non-federal entities are now authorized to request a micro-purchase threshold higher than $10,000 based on certain conditions that include a requirement to maintain records for threshold up to $50,000 and a formal approval process by the Federal government for threshold above $50,000," OMB explained.

Speaking along with Waters during their law firm's webinar[4] on the new UG, Sheffler called this change "mind-blowing" and "an extremely expansive approach to procurement." He added that this was not in the proposed UG.

"This is a big change," he said. "It was a big change when we went from a $3,500 micro-purchase threshold up to

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$10,000 micro-purchase threshold. I'm very surprised to see this."

Sheffler discouraged smaller organizations "outside the higher-education institution framework" from a "knee-jerk" adoption of the $50,000 micro-purchase threshold across the board. He suggested instead making incremental increases applicable only to certain goods and services.

The new guidance also contains what Sheffler termed a "softening" of the micro-purchase language meant to support women- and minority-owned businesses. Now the guidance states that there "should" be an equitable distribution of micro-purchases among qualified suppliers; previously it said this was a "must."

Termination for Convenience Permitted

Among the immediately effective changes as of the August publication are those that deal with termination, which Waters called "concerning." These are found at 2 C.F.R. § 200.340 , which was formerly 2 C.F.R. § 200.339 in the 2013 version.

This marks the first time there is what Waters called "termination for convenience." "In other words, if the government says 'It's no longer convenient for me to continue this contract with you; it's over,' you have rights to restitution and other things, but you can't say, 'Hey, I was dependent on that contract to run my business.'"

Until now, grants "were different. There was no termination for convenience in the grants world; there was only termination for cause," he explained.

The new UG deletes the words "for cause" and states that an award can be terminated by an agency or a pass-through entity "to the greatest extent authorized by law, if an award no longer effectuates the program goals or agency priorities."

Other new language indicates that termination can be made "pursuant to termination provisions" included in the award, and defines termination as "the ending" of a federal award. The UG added that a "lack of available funds is not a termination."

Waters called this change "a big, big deal," adding that agencies can now terminate an award either during the period of performance or during a budget period.

PTEs Get Some Relief But Face Risk

In the introduction to the readiness guide, COGR noted three "welcome and positive" changes, including 2 C.F.R. § 200.325 Federal awarding agency or pass-through entity review and 2 C.F.R. § 200.332 Requirements for pass-through entities.

- "Prime awardees or pass-through entities (PTEs) may rely on the risk determination from a subrecipient's Single Audit if a subrecipient has a current Single Audit report posted in the Federal Audit Clearinghouse and has not otherwise been excluded from receipt of Federal funding."
- "PTEs may rely on the subrecipient's cognizant audit agency or cognizant oversight agency to perform the audit follow-up and make management decisions related to cross-cutting findings" under 2 C.F.R. § 200.513(a)(3)(vii) . "These changes do not eliminate the PTE's responsibility to issue subawards that conform to agency and awards specific requirements, manage risk through on-going subrecipient monitoring, and monitor the status of the findings that are specifically related to the award."
- "PTEs may accept a subrecipient's expired, previously negotiated rate and cost method to account for an indirect cost rate under" 2 C.F.R. § 200.405(d) .

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However, COGR also pointed out that PTEs "must include new elements in each subaward, including a budget period start and end date," the award dollar amount, and assistance listing number "at the time of disbursement."

But the UG's instruction to PTEs to focus only on a subrecipient's single audit for findings "specifically related to the subaward" was greeted with caution by Waters.

Guidance to "stay in your lane…don't worry about the bigger picture" isn't practical, said Waters, because "if there's an organization-wide finding that might impact your subawards, you can't ignore it."

As noted earlier, OMB made changes to 2 C.F.R. § 200.344 , which deals with closeout, giving PTEs 120 days to "submit closeout reports and liquidate all financial obligations," but is "leaving in the current 90-day requirement for subrecipients to submit their reports" to the PTE. NIH and the National Science Foundation have already put the 120-day closeout in place.

Indirect Costs Negotiations Clarified

The new UG also offers "good clarifications" related to indirect rate negotiations, Waters said.

The original UG said that a PTE had to honor an indirect cost rate that a subrecipient had with a federal agency. Waters noted that a lot of subrecipients "are both direct federal grantees and subrecipients, and up until the Uniform Guidance, it was OMB's position PTEs could ignore the negotiated indirect cost rate agreement, or the NICRA."

Under the UG, in the absence of a NICRA, the PTE could negotiate a rate, but in no case could it be less than 10%. Apparently PTEs, saying they had "no idea" how to establish a NICRA, were forcing subrecipients to accept the 10% di minimus amount, he said.

The revised guidance states that if no approved rate exists, the PTE "must determine the appropriate rate in collaboration with the subrecipient," and this can be either a new (or existing) NICRA between the entities or the di minimus. "The pass-through entity must not require use of a de minimis indirect cost rate if the subrecipient has a federally approved rate," according to the new guidance. Additionally a subrecipient "can elect to use the cost allocation method to account for indirect costs in accordance with" 2 C.F.R. § 200.405(d) .

A related change at 2 C.F.R. § 200.414(f) states that entities may develop a new NICRA if the subrecipient lacks a "current" one and that "no documentation" is required to justify using the 10% di minimus rate. Waters said the new UG still "doesn't answer…what costs are you covering with this 10% di minimus?" He said application should not be "so restrictive that it covers virtually nothing, and therefore you're generating a profit." He said this "is going to continue to be a risk area."

Waters's advice is to develop a NICRA policy to cover "classic general and administrative costs with the 10%" and should specify to which costs this is applicable. "And when it turns out the 10% isn't enough, what you don't get to do is make up some new rules behind the scenes. You need to say, 'Okay, we need to move to a NICRA or get rid of the 10% or whatever.'"

He also noted that the revised UG requires the publication on a public website of an organization's NICRA and some associated information, but does not require the actual agreement be posted, which had been part of the proposed revised UG.

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1 Uniform Administrative Requirements, Cost Principles, and Audit Requirements, 85 Fed. Reg. 50,757 (August 18, 2020) , https://bit.ly/3kteTIS.
2 Guidance for Grants and Agreements, 85 Fed. Reg. 3,766 (January 22, 2020) , https://bit.ly/38KWkNK.
3 Council on Governmental Relations, "Implementation and Readiness Guide for the OMB Uniform Guidance Prepared by the Council on Governmental Relations (COGR)," October 20, 2020, https://bit.ly/2K2pVHY.
4 Feldesman Tucker Leifer Fidell LLP, "Changes to the Uniform Grants Guidance 2 C.F.R. Part 200 : The 5-Year Update," webinar, August 24, 2020, https://bit.ly/38S0N0S.

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