



American Bar Association
Public Contract Law Section
State and Local Government Division Meeting

Grant Funding for State and Local Governments: Overseeing Subrecipients and Contractors

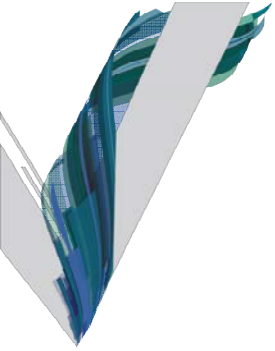
Dismas N. Locaria, Esq., Venable LLP

June 22, 2017



Agenda

- Background
- Subrecipient Monitoring: Assessing Risk
- Procurement: What's New and How to Implement
- Addressing Ethical Requirements

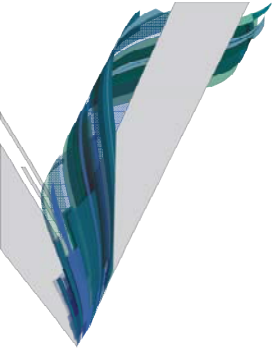


Background



Highlights

- **December 26, 2013** – Super Circular issued
 - January 27, 2014, Council on Financial Assistance Reform (COFAR), conducted an informational webinar on the Super Circular
 - Shortly thereafter, COFAR issued FAQs on Super Circular (<https://cfo.gov/wp-content/uploads/2013/01/2-C.F.R.-200-FAQs-2-12-2014.pdf>)
- **December 19, 2014** – OMB and 28 Federal agencies issued a joint interim final rule implementing the Super Circular, with the exception of procurement standards
- **May 17, 2017** – OMB extends grace period for compliance with procurement standards through December 25, 2017



Subrecipient Monitoring

Assessing Risk



Subrecipient Overview

Implications for pass-through entities

- One of the most significant changes is the more stringent requirements for subrecipient monitoring
- Examples of expanded pass-through entity responsibilities include:
 - Requirement for consistent practice to distinguish subrecipient from contractor
 - Identifying or negotiating an appropriate subrecipient indirect cost rate at the time of award
 - Ensuring “flow-down” of new requirements are included within sub agreements, as applicable
 - Evaluating subrecipient risk of noncompliance and determining necessary monitoring activities – including on-site reviews
 - Imposing remedies for subrecipient noncompliance, when necessary



Subrecipient Monitoring Activities

Risk Assessment

- Subrecipient monitoring plan must ensure that the subaward:
 - Is used only for authorized purposes
 - Is in compliance with Federal statutes/regulations and subaward Ts&Cs
 - Achieves its performance goals
 - Considers risk of subrecipient noncompliance
- Risk assessment is based on:
 - Prior/past experience with similar subawards
 - Previous audit results
 - Significant changes in personnel or systems
 - Extent and results of Federal awarding agency monitoring



Subrecipient Monitoring Activities

Monitoring Plan

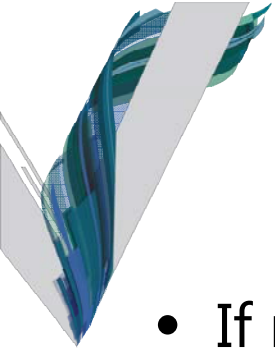
- Minimum monitoring activities must include:
 - Reviewing financial and programmatic reports
 - Conducting on-site reviews/audits based on risk assessment
 - Conducting follow-up reviews to ensure timely completion of corrective actions required to address deficiencies – as identified through on-site reviews, audits or other means
 - Issuing a management decision for audit findings pertaining to the Federal award
 - Verifying that each subrecipient receive completed audits, as required
- Design of monitoring plan will vary based on subrecipient risk assessment:
 - e.g., more stringent monitoring plan is required for high risk subrecipients



Subrecipient Monitoring Activities

Additional Considerations

- Based on results of monitoring activities, pass-through entities should
 - Provide training and technical assistance to appropriate subrecipient staff
 - Determine if on-site reviews/audits necessitate adjustments to own records
 - Consider taking enforcement action against noncompliant subrecipients
- If subrecipient noncompliance is determined, pass-through entities may apply enforcement action through specific conditions (§200.207)
- If noncompliance cannot be remedied through specific conditions, more severe enforcement action may be taken (§200.338)



Subrecipient Monitoring Activities

Additional Enforcement Action

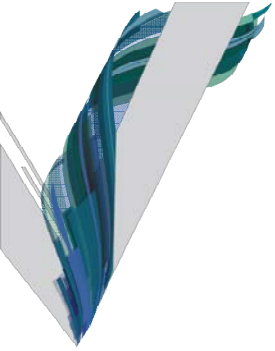
- If noncompliance cannot be remedied through specific award conditions, consider more severe enforcement action, such as:
 - Applying temporary cash withholds
 - Disallowing all or part of the cost of the activity
 - Suspending or terminating the subaward
 - Recommending the Federal awarding agency initiate suspension or debarment proceedings
 - Withholding future awards to the subrecipient
 - Pursuing other remedies legally available



Subrecipient Monitoring Activities

General Best Practices

- Subrecipient monitoring procedures should include:
 - Informing your subrecipient of pertinent information
 - Ensuring your subrecipients are receiving audits when necessary
 - Reviewing financial and programmatic reports
 - Reconcile the subrecipient's budgeted expenditures to actual expenditures
 - Perform an on-site visit to the subrecipient to review financial and programmatic records and observe operations
 - Desk review—review financial and program reports submitted by subrecipients for allowable use of the grant funds
 - Establishing a tracking system to ensure timely submission of required reporting
 - Having a second party within your organization periodically review the adequacy of subrecipient monitoring for all programs
 - Document! Document! Document!



Procurement

What's New and How to Implement



Choosing a Contract vs. a Subgrant

- How does your organization determine whether to use a subrecipient or a contractor?
 - “Subrecipient” – a non-Federal entity that receives a subaward from a pass-through entity to carry out part of a Federal program but does not include an individual that is a beneficiary of such program
 - “Contract” – a legal instrument by which a non-Federal entity purchases property or services needed to carry out the project or program under a Federal award
- Create guidance for your template agreements on how to choose an instrument
 - Understand the timeline required for competition
 - Consider ability of subawardee to run a program that meets all Federal requirements



Understanding the New Contract Procurement Standards

- Old regulations required full and open competition to the “maximum extent possible”
- Full and open competition now required for all procurement contracts issued above \$150,000
- Consider ways to demonstrate “full and open competition”
 - Drafting your RFP to promote full and open competition
 - Clearly state all requirements
 - Do not limit competition to certain vendors (even those on retainer) or unnecessary requirements
 - Consider how to properly advertise each opportunity
 - Generally best practice to post opportunities online
 - How can you increase awareness for each proposal?



Establishing a Workable Procurement System

- Contracts can be sole-sourced when:
 - Item is available from a single source
 - There is a public exigency or emergency where delay is not an option
 - The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request
 - If after the solicitation of a number of sources, competition is determined inadequate
- Cost analysis is required where there is no price competition (profit must be separately analyzed)
 - Consider in advance how to analyze cost for your niche industries without competition



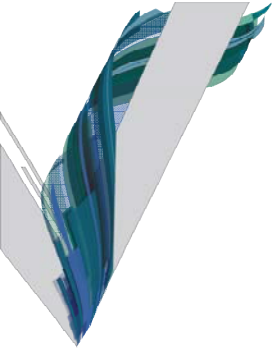
Establishing a Workable Procurement System

- All contract actions (e.g., solicitation, Q/A, evaluation, award decision) should be maintained in the contract file
 - Even documents related to unsuccessful offerors should be maintained
- Keep all modifications within the original scope
 - Failure to remain in scope compromises the integrity of the price competition



Threshold Organizational Issues

- Who in your organization is responsible for implementing the changes in the procurement system?
 - Does that person operationalize procurement?
 - If not, how are you training your procurement teams?
- How are you tracking the changes?
- Who should be contacted with procurement issues and questions?



Addressing Ethical Requirements



Conflicts of Interest

- Reporting Conflicts of Interest (COI), (*id.* § 200.112)
 - Section 200.112 continues the practice of allowing agencies to establish their own COI policies that are “appropriately tailored to the specific nature of their programs”
- Non-Federal agencies must disclose any COI to an awarding agency
 - Agencies must assess COIs as part of their risk assessment
- Requires reporting of Organizational Conflicts of Interest (OCI)
 - Non-Federal entities must have “strong policies preventing organizational conflicts of interest which will be used to protect the integrity of procurements under Federal awards and subawards.”
 - FAR Part 9.5 outlines the FAR OCI rules that may provide guidance



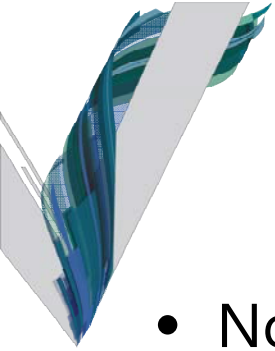
Mandatory Disclosure

- Mandatory Disclosure (*id.* § 200.113)
 - Requires organizations to disclose “in a timely manner” and in writing “all violations of Federal **criminal** law involving fraud, bribery, or gratuity violations potentially affecting the Federal award”
 - An organization’s failure to make the required disclosures can result in a number of actions, including suspension and/or debarment
- A clear move toward the FAR arena, which has a mandatory reporting requirement
 - Unlike the FAR, however, this requirement does not currently apply to civil acts of fraud, such as those that may be alleged under the False Claims Act (FCA)
 - Notwithstanding a clear requirement to report potential FCA or similar civil violations, suspension and debarment is still a potential consequence of non-disclosure



Creating Ethical Infrastructure

- Organizations should consider:
 - Top-level attention
 - Policy directive
 - Letter to staff
 - Policy and procedural changes
 - Policy requirements
 - Agreement provisions
 - Education
 - Communication
 - Training
 - Ongoing examination, oversight and enforcement
 - Compliance/Ethics Officer
 - Internal audit



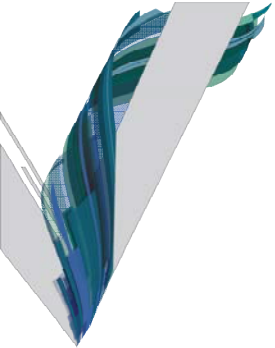
Creating Ethical Infrastructure

- No one-size-fits-all approach
- What an organization does can depend on
 - Organizational structure
 - Size of organization
 - Mission
 - Philosophy for effectuating mission
- Thoughtful, reasonable approach
 - Consider documenting major decisions
 - Remain open and nimble should circumstances change



Failure to Address Ethical Issues

- The failure to implement processes to account for these new rules could have damaging impacts
 - Disallowance of funds
 - Suspension of grant
 - Grant termination
 - Civil penalties
 - Criminal penalties
 - Administrative action (e.g., suspension, debarment)



Questions?

Dismas Locaria, Esq.
Venable LLP
dlocaria@Venable.com
t 202.344.8013