

Managing Subrecipients Under Federal Grant Awards

Strategic Oversight Without Undue Burden

Edward T. Waters
Scott S. Sheffler

October 21, 2019



PRESENTER: EDWARD (TED) WATERS



Contact Information:

ewaters@ftlf.com

202.466.8960

- Well known for his expertise in federal grants, government reimbursement, payment and administrative issues, and his strategic handling of organizations facing crises, Ted has been selected as a “Super Lawyer” for Health Care in Washington, D.C. again in 2019.
- Ted has been counsel to a wide variety of federal grantees in the past 25+ years as well as many other entities such as managed care organizations and federal contractors, and has represented clients in front of federal and state courts, administrative tribunals, Offices of Inspector General and federal agencies.
- Ted has been Managing Partner of Feldesman Tucker since 2003 and each Spring teaches, what he believes is the first and only, law school class in the country on federal grant at the George Washington University School of Law.



CHANGING
Maryland
FOR THE BETTER

PRESENTER: SCOTT S. SHEFFLER



Contact Information:

ssheffler@ftlf.com

202.466.8960

- Scott is a Partner at Feldesman Tucker Leifer Fidell.
- Counsels federal grant recipients on financial assistance administrative requirements and cost reimbursement, and represents grant recipients in grant disputes including cost disallowances.
- Assists grant recipients undergoing government investigations.
- Assists government contractors with various contracting matters, including compliance and disputes.
- Prior to joining Feldesman Tucker, Scott was a procurement attorney with the United States Navy, counseling Navy contracting officers and program managers on, among other things, federal acquisition laws and regulations, claims, and bid protests.



CHANGING
Maryland
FOR THE BETTER

DISCLAIMER

This training 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 issued with the understanding that the authors are not engaged in rendering legal or other professional services.



CHANGING
Maryland
FOR THE BETTER

AGENDA

- I. Overview
- II. Before the Award
- III. Structuring the Award
- IV. Managing the Award
- V. Closing Out the Subaward
- VI. Questions



LEARNING OBJECTIVES

- Understand pass through entity accountability and risk assessments
- Understand core concepts of effective monitoring strategies
- Identify strategies for dealing with management issues of Subrecipients
- Understand potential long-term liabilities and the importance of proper close out of Subawards



PRELIMINARY NOTES ON CITATIONS

Throughout this presentation, we cite to the Uniform Guidance as promulgated at 2 C.F.R. Part 200.

If your financial assistance award is from HHS, your award is governed by HHS's implementation of the Uniform Guidance at 45 C.F.R. Part 75.

There are no material differences between the portions of Part 200 and Part 75 addressed in this presentation.



CHANGING
Maryland
FOR THE BETTER

Overview



CHANGING
Maryland
FOR THE BETTER

OVERVIEW

- I. Before the Award: Risk management in the Subrecipient relationship should start before the award is made
 - Make sure the sub knows what it is getting into
 - Risk assessment / evaluating subrecipient systems
- II. Structuring the Award: If you want rights to oversee the subrecipient, you have to put them in your agreement
- III. Managing the Award: The routine and “non-routine”
 - Routine oversight
 - Oversight mechanisms in special circumstances
 - Monitoring plans
- IV. Closing Out the Subaward: Managing the long term risk; you have ongoing liabilities vis-à-vis the federal government.



Before the Award



CHANGING
Maryland
FOR THE BETTER

WHAT THE REGS SAY

- 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).
 - Note - Though not specifically required, use SAM for this.
- Evaluate the Risk Posed by the Subrecipient.
 - Pass-through entity will be held accountable for many acts of noncompliance on the part of the Subrecipient.



WHAT THE REGS SAY

- **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(b) (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(a) (Internal Controls).



CHANGING
Maryland
FOR THE BETTER

EXTENSION INTERNAL CONTROLS CONCEPT (RISK MANAGEMENT)

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.

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							

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



CHANGING
Maryland
FOR THE BETTER

WHAT THE REGS SAY

- 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)
 - Financial stability
 - Results of prior OMB Circular A-133/Subpart F audits
 - New personnel or changed systems
 - Direct federal monitoring on concurrent direct federal award



WHAT THE REGS SAY (GOOD IDEAS, NOT REQUIREMENTS)

- 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).



RISK ASSESSMENT THOUGHT PROCESS

- Fundamental Simple Questions:
 - Does the sub already receive direct federal funding?
 - Does the sub already receive passthrough funds?
 - Do we have an existing relationship with the sub (as a federal grant subrecipient), and how are they doing?
- Let's Assume No Direct Funding or Prior Relationship:
 - What is the subaward for?
 - What are its inherent risks, in terms of the underlying activities as well as grant management requirements?
 - Does the potential sub appreciate the risk profile?
 - Are the sub's financial management systems adequate to manage the award (*i.e.*, cost reimbursement with expenses tracked per §200.302)?
 - How does the sub track time and effort?
 - Does the subrecipient have (i) written procurement policy, and (ii) standards of conduct policy?



CHANGING
Maryland
FOR THE BETTER

RISK ASSESSMENT THOUGHT PROCESS

- Let's Assume **No Direct Funding** ~~or Prior Relationship~~:
 - What is the subaward for?
 - What are its inherent risks, in terms of the underlying activities as well as grant management requirements?
 - Does the potential sub appreciate the risk profile?
 - Are the sub's financial management systems adequate to manage the award (*i.e.*, cost reimbursement with expenses tracked per §200.302)?
 - How does the sub track time and effort?
 - Does the subrecipient have (i) written procurement policy, and (ii) standards of conduct policy?



CHANGING
Maryland
FOR THE BETTER

RISK ASSESSMENT THOUGHT PROCESS

- Let's Assume ~~No Direct Funding or~~ Prior Relationship:
 - What is the subaward for?
 - What are its inherent risks, in terms of the underlying activities as well as grant management requirements?
 - Does the potential sub appreciate the risk profile?
 - Are the sub's financial management systems adequate to manage the award (*i.e.*, cost reimbursement with expenses tracked per §200.302)?
 - How does the sub track time and effort?
 - Does the subrecipient have (i) written procurement policy, and (ii) standards of conduct policy?



CHANGING
Maryland
FOR THE BETTER

POSSIBLE TOOLS

- Federal Audit Clearing House
<https://harvester.census.gov/facweb/Default.aspx>
- EPLS (SAM)
<https://www.sam.gov/SAM/pages/public/searchRecords/search.jsf>
- Financial Management System Review Tool
NSF Prospective New Awardee Guide, Form 358 (Appx. 3)
<https://www.nsf.gov/pubs/policydocs/pnag/pnag151.pdf>
- Reviewed financials
AICPA Educational Material
<https://www.aicpa.org/interestareas/privatecompaniespracticesection/qualityservicesdelivery/keepingup/what-is-the-difference-between-compilation-review-audit.html> (see “brochure”)



CHANGING
Maryland
FOR THE BETTER

Structuring the Subaward



CHANGING
Maryland
FOR THE BETTER

PARTIES' INDIVIDUAL INTERESTS

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.



CHANGING
Maryland
FOR THE BETTER

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 from the PTE
 - Comply with Terms and Conditions of the subaward
 - Minimize administrative burden



CHANGING
Maryland
FOR THE BETTER

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



CHANGING
Maryland
FOR THE BETTER

SPECIFICALLY REQUIRED TERMS AND CONDITIONS 2

CFR § 200.331

Say it is a subaward

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:

- (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;
 - (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).

Provide details about the “prime” award, including information about the federal program (e.g., CFDA number)



HANGING
Maryland

FOR THE BETTER

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;

Possible 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);

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.



CHANGING
Maryland
FOR THE BETTER

SPECIFICALLY REQUIRED TERMS AND CONDITIONS

2 CFR § 200.331

(6) Appropriate terms and conditions concerning closeout of the subaward.

Discussed below under “Closeout.”



CHANGING
Maryland
FOR THE BETTER

Managing the Subaward



CHANGING
Maryland
FOR THE BETTER

WHAT THE REGS SAY

- 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”



CHANGING
Maryland
FOR THE BETTER

WHAT THE REGS SAY

- 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.

(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.



CHANGING
Maryland
FOR THE BETTER

MONITORING METHODOLOGIES

- Monthly Invoices
 - Personnel costs
 - Supplies and equipment
 - Service contract costs

The routine invoice is your number one best tool - really put a lot of thought into your invoice format. What supporting data do you want?

- One Idea:
 - For personnel: Call for spreadsheet of all charged personnel, showing full cost (salary and fringe) by person, % effort, final line item, then total at the bottom.
 - For supplies and equipment: Call for spreadsheet showing item and total price.
 - For service contracts: Include on the supplies and equipment spreadsheet, but ask for a copy of the contract.



CHANGING
Maryland
FOR THE BETTER

SAMPLE INVOICE

Personnel Expense (Personal Services Expense)					
Name	Invoice Period Salary	Invoice Period Fringe	Total	Percent FTE	Billed Amount
Personnel Total					

Other than Personal Services ("OTPS") Expense		
Item	Description	Amount
OTPS Total		

Expense Type	Amount
Personnel	
OTPS	
Total	

Certification: Subrecipient hereby certifies that the expenses set forth above have been incurred in furtherance of its work under the subaward Agreement in relation to which this invoice is submitted. Subrecipient further certifies that the Personnel Expense amounts set forth above are supported by auditable documentation meeting the standards of 2 C.F.R. § 200.430. Signature: _____, Print: _____.

MONITORING PLANS

- A written Monitoring Plan is not specifically required by the Uniform Guidance.
- However, it is a very good idea, for three reasons:
 - If you have a standard document that you tailor to each subaward, it forces you and the sub to think about this stuff up front
 - You can incorporate it into the subaward via appendix, making your monitoring rights clear (from a legal standpoint) and facilitating a meeting of the minds about how the monitoring (at least routine monitoring) will occur.
 - When awarding agencies and auditors ask you to prove you are doing monitoring, it is a wonderful document to be able to show them.



CHANGING
Maryland
FOR THE BETTER

RECENT HHS REAL LIFE EXAMPLE NORTHWESTERN UNIVERSITY

Northwestern (“NW”) received 229 NIH grants totaling more than \$268 million in FY15 and \$307 million in FY16. NW used a risk-based approach to subrecipient monitoring, assigning risk levels based upon:

- Size of subaward
- Size of subaward relative to subrecipient’s research portfolio
- Award complexity
- Prior experience with subrecipient
- Percentage of award passed down
- Subrecipient location or for-profit status
- Degree of external oversight by auditors or sponsoring agencies
- Sophistication of subrecipient’s administrative systems and operations



REAL LIFE EXAMPLE CONT'D

NW checked SAM for each subrecipient, for registration, exclusions, and any federal debts.

NW reviewed the FDP Financial Conflict of Interest (“FCOI”) Institutional Clearinghouse to determine compliance with PHS FCOI requirements.

229 of NW’s grants (\$447 million in value) contained subawards to other entities. OIG looked at 30 grants that had subrecipients.

OIG Found: “Although [NW] claimed allowable expenditures on subawards it awarded . . . it did not always perform required subaward risk assessments. For 24 of the 30 grants to subrecipients, [NW] did not perform a risk assessment on 1 or more.”



REAL LIFE EXAMPLE CONT'D

The finding was primarily driven by the fact that NW “categorized affiliates and FDP members as low risk solely because [NW]’s experience with these organizations was positive, and Federal awarding agencies had made awards to the organizations.”

According to the OIG: “Neither Federal statutes, regulations, nor the terms and conditions of subawards permit prime Federal award recipients to exempt affiliates, FDP members, or subrecipients from a risk assessment.”

The OIG recommended:

1. NW establish policies to perform risk assessments for affiliates, FDP members, and subrecipients; and
2. NW ensure the subrecipient risk assessments are performed on all subrecipients.



CHANGING
Maryland
FOR THE BETTER

Closing Out the Subaward



CHANGING
Maryland
FOR THE BETTER

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 of PTE:

- 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



CHANGING
Maryland
FOR THE BETTER

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



CHANGING
Maryland
FOR THE BETTER

QUESTIONS??

Edward T. Waters

ewaters@ftlf.com

Scott S. Sheffer

ssheffler@ftlf.com

1129 20th Street N.W. - Suite 400

Washington, D.C. 20036

(202) 466-8960

www.ftlf.com

www.learning.ftlf.com



CHANGING
Maryland
FOR THE BETTER