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FALD NEWSLETTER

A Closer Look at the 10% De Minimis Indirect Cost Rate Election

When the Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards were implemented in 2014 (Uniform Guidance), there was initial buzz about the new 10 percent de minimis indirect cost rate election for federal financial assistance awards found in 2 C.F.R. § 200.414(f). With limited exceptions, non-federal entities that never had a negotiated indirect cost rate agreement (NICRA) for their federal awards were given an option to elect a 10% de minimis indirect cost rate for all of their federal awards, in lieu of having to go through the process of obtaining a NICRA from the non-federal entity's cognizant federal agency. While the 10% de minimis indirect cost rate alleviates the administrative burden on both non-federal entities and on federal agencies in the processing of NICRAs, federal grant officers and grant specialists must provide oversight to ensure that non-federal entities properly apply the 10% de minimis indirect cost rate and charge only allowable indirect costs to the subject award.

> CALCULATING THE 10% DE MINIMIS INDIRECT COST RATE IS NOT ALWAYS AS STRAIGHTFORWARD AS MULTIPLYING THE AWARD'S TOTAL ALLOWABLE DIRECT COSTS BY 10%.

Specifically, the 10% de minimis indirect cost rate election allows non-federal entities to charge, as allowable indirect costs, 10% of the "modified total direct costs" (MTDC) attributable to an award. MTDC is determined by the non-federal entity as part of its calculation of the 10% de minimis indirect cost rate election and is subject to appropriate review and oversight by federal agencies. The Uniform Guidance, at 2 C.F.R. § 200.68, defines MTDC as:

> all direct salaries and wages, applicable fringe benefits, materials and supplies, services, travel, and up to the first $25,000 of each subaward (regardless of the period of performance of the subawards under the

DID YOU KNOW?

Every five years, OMB is required to review the Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards (Uniform Guidance – 2 CFR Part 200). With the first review now underway, OMB plans to initiate a proposed rulemaking that will provide an opportunity for public review and comment prior to issuance of the final revised guidance. The revisions will focus on reducing burdens on recipients, eliminating inconsistent terminology, resolving conflicts between different sections of the guidance, and addressing statutes, executive orders and other requirements promulgated since the guidance became effective in 2014. Be on the lookout for your opportunity to contribute to the review and comment on OMB's revised Uniform Guidance, through the appropriate Department channels, sometime this fall!

award). MTDC excludes equipment, capital expenditures, charges for patient care, rental costs, tuition remission, scholarships and fellowships, participant support costs and the portion of each subaward in excess of $25,000. Other items may only be excluded when necessary to avoid a serious inequity in the distribution of indirect costs, and with the approval of the cognizant agency for indirect costs.

Importantly, MTDC is not necessarily equal to the total amount of allowable direct costs under an award and, in many cases, MTDC will be less than the award's total allowable direct costs. In particular, many financial assistance awards allow non-federal entities to charge costs associated with subawards, rental costs, equipment purchases and other capital expenditures against an award; however, some or all of these costs must be excluded in the calculation of MTDC. Moreover, an award cost that would otherwise be included in the calculation of MTDC may be excluded from MTDC by a federal agency when "necessary to avoid a serious inequity in the distribution of indirect costs and with the approval of the cognizant federal agency for indirect costs." Whether a "serious inequity in the distribution of indirect costs" exists is a fact-specific inquiry and would arise in cases where a non-federal entity would be unjustly enriched by the inclusion of certain costs in the calculation of MTDC, i.e., the non-federal entity would be allowed to charge a greater amount of indirect costs than that which would be fair and equitable under the award.

For example, let's say that a non-federal entity has allowable costs under its federal award totaling $325k, consisting of the following costs:

$100k – salaries	$20k – fringe benefits
$50k – equipment	$20k – supplies
$10k – travel	$100k – subaward #1
$25k – subaward #2	

To determine the MTDC, the non-federal entity must subtract from the $325k of allowable direct costs those costs not includable in MTDC. Specifically, the costs associated with the non-federal entity's purchase of equipment ($50k) and the amount of each subaward exceeding $25k ($75k for subaward #1) must be excluded from MTDC. Therefore, in this hypothetical, such exclusions result in an MTDC of $225k even though there are $325k of allowable direct costs under the award. The non-federal entity must calculate its 10% de minimis indirect cost allowance based on an MTDC of $225k, resulting in $22,500 of indirect costs, and not the $325k of allowable direct costs (which would incorrectly result in $32,500 of indirect costs).

The bottom line is that calculating the 10% de minimis indirect cost rate is not always as straightforward as multiplying the award's total allowable direct costs by 10%. Grant specialists and grant officers should pay particular attention to a non-federal entity's calculation of MTDC to ensure that only allowable indirect costs are charged to an award. Additionally, FALD is available to assist with questions concerning the interpretation and application of 2 C.F.R. § 200.414(f), including questions regarding 2 C.F.R. § 200.68.

FALD's Role in the Audit Resolution Process

FALD provides its review, upon request, of any proposed Agency Resolution that will result in the establishment of a debt or other adverse action against a recipient or subrecipient of a DOC grant or cooperative agreement. FALD also provides its recommendation and assistance to the Assistant General Counsel for Administration and Transactions who must ultimately clear all proposed Audit Appeal Determinations.

DAO 213-5 and the DOC Grants & Cooperative Agreements Manual describe the policies and procedures for resolving appeals for audit resolutions for grants and cooperative agreements. The Grants Office is tasked with reviewing the audit report, the recipient's response, and, along with the input of the Program Office, prepares the proposed audit resolution determination for consideration by the Audit Action Official. This process aims for the prompt and thorough resolution of both the financial and nonfinancial issues identified in an audit report.

Disputes arising from an audit resolution that cannot be resolved at the bureau or Department level are decided in accordance with the appeal procedures and specified time frames outlined in DOC's "Policies and Procedures for Resolution of Audit-Related Debts," 54 Fed. Reg. 4053 (January 27, 1989), as clarified and updated in DAO 213-5. After the Department renders a decision on an appeal, there are no other administrative appeals available within DOC.

When May a Grant Recipient Transfer Award Funds to a Federal Agency?

Grants recipients occasionally propose to transfer grant funds to a Federal agency in order to carry out grant project activities. Federal agencies may receive and expend only appropriated funds unless there is a law that allows them to receive and use funds from other sources. This is why, for example, the DOC Financial Assistance Standard Terms and Conditions requires that recipients "may not issue a subaward, contract, subcontract of any part of a DOC award to any agency or employee of DOC or to other Federal employee, department, agency, or instrumentality, without the advance prior written approval of the DOC Grants Officer." In light of these augmentation concerns, a recipient may transfer award funds to a Federal agency only if the agency is legally allowed to accept and expend the funds for the purpose it has been received.

OBTAINING ASSURANCES FROM THE RECEIVING FEDERAL AGENCY HELPS SAFEGUARD BOTH THE RECIPIENT AND THE DEPARTMENT

The General Counsel's office of the Federal agency set to receive the award funds will determine if that agency has the legal authority to receive and spend the transferred funds. Accordingly, FALD advises that DOC program and grants management officials require recipients to obtain written assurances (to include the specific legal citation) from the receiving Federal agency regarding its legal authority to take the funds and to carry out the identified work. This helps safeguard both the DOC recipient and DOC if the legal authority of the receiving agency to accept and use the funds ever becomes an issue.

On a final and important note, recipients commit to spending award funds on the specific activities detailed in the project descriptions and in accordance with the cost principles and program policy. Therefore, in a scenario where a recipient is considering transferring award funds to a Federal agency, the recipient must also ensure that these funds are going to finance an activity that is necessary to carry out the award project and can be carried out by the Federal agency.

In sum, a recipient may transfer award funds to a Federal agency if that agency has the proper legal authority to accept and expend those funds, and the terms and conditions of the award (including the cost principles) are followed.

CONTACT US!

This newsletter, written by FALD staff, provides general information to Department of Commerce employees but is not intended to render legal advice. Please contact FALD regarding any specific legal matter involving financial assistance. Email us at FALD@doc.gov.