Tips and Traps: Let's Talk about Post-Award Compliance with the Experts

— *So you got your federal funds! Now what?*

By Karen Lash, Consultant,[1] Rosie Dawn Griffin, Partner,[2] Feldesman Leifer LLP, and Scott Sheffler, Partner,[3] Feldesman Leifer LLP

Civil legal aid organizations and advocates are mission-focused and driven. And it's a big mission.

Legal aid advocates are dedicated to not only opening courthouse doors to all but also to achieving the much more difficult and elusive goal of equal justice. Add in the challenges of securing sufficient funding and ensuring compliance with restrictions on the use of those funds — think: what counts as a "crime victim?" or can you help people who aren't documented? — and the task begins to feel Herculean. Developing and maintaining the organizational capacity necessary to efficient and compliant routine administration of federal funding is key to building equity, balancing power, and achieving the goal of equal justice. It also makes weathering challenges and pursuing new opportunities much easier.

Karen Lash (Top Left); Rosie Dawn Griffin (Top Right); Scott Sheffler (Bottom Left).

To explore this crucial aspect of a healthy and trusted legal aid organization, legal aid and funding expert Karen A. Lash sits down to talk with attorneys Rosie Dawn Griffin and Scott S. Sheffler of the Washington, DC law firm Feldesman Leifer LLP, which represents federal grantees of all types in navigating federal award compliance, from strategic planning, to transactional matters, to compliance investigations and disputes.

Karen: While essential Legal Services Corporation (LSC) funding ensures a national network of legal aid organizations, the combined "other public funds" category of the ABA National Legal Aid Funding Report (ambar.org/ABArray) now surpasses the annual LSC appropriation for LSC and non-LSC grantees. A substantial portion of those other public funds for critical legal help comes from federal agencies both directly and passed through state and local government agencies. As MIE readers know well, I frequently encourage pursuing these potential sources of federal funds. But I have focused less on what happens after securing the funds. Fortunately, we have experienced friends at Feldesman Leifer to help.

Scott and Rosie, what would you say are some of the key resources the legal aid community should know about regarding post-award compliance requirements?

Scott: We are lucky to have progressed to a point in which there is a nice simple answer to this question. And that is — there is essentially one set of federal regulations that govern, referred to appropriately as the "Uniform Guidance." The key regulations are found at 2 C.F.R. Part 200, technically "guidance" promulgated by the Office of Management and Budget ("OMB")

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in that each federal grant-making agency — setting aside the separate treatment of LSC funding — has adopted the guidance as binding (and never really had any other choice). While Part 200 is relatively "new" in the history of federal financial assistance, the rules are derived from decades of practice under a preceding series of various "OMB Circulars."

Every agency simply adopted 2 C.F.R. Part 200 "as is" with very modest supplemental guidance, with the exception of HHS. HHS reissued the text of 2 C.F.R. Part 200 with slight modifications whole-cloth at 45 C.F.R. Part 75. For this reason, recipients (again, directly or via state and local government administered pass-through funds) will find the Uniform Guidance there.

Rosie: Of course, that's your highest-level set of obligations and restrictions as a recipient of federal funds. Below those overarching rules, there are program-specific requirements —imposed by statutes and sometimes agency regulations — as well as the terms and conditions included in particular grant agreements which in practice function more or less like contract terms.

Karen: What are some examples of program-specific and grant specific requirements for the legal aid community?

Scott: Examples are everywhere and can be generally categorized as program implementation requirements and grant administration requirements. With respect to the first category, beneficiary eligibility requirements are a great example, such as income thresholds. Another great example would be program-design requirements, such as AmeriCorps' National Service Criminal History Check requirements and very specific requirements related to AmeriCorps member benefits. From a grant administration standpoint, cost caps and mandatory cost share contributions come immediately to mind — for example, the administrative cost caps imposed in Victims of Crime Act (VOCA) programs.

Karen: And that doesn't quite cover the waterfront on requirements attached to a particular funding source, right?

Rosie: Right, there is also a whole world of what we call "sub-regulatory" guidance, which agencies issue in the form of manuals, guidance documents, FAQs, Q&As, and that sort of thing. Sub-regulatory guidance can play a useful role in providing direction and insight into complex regulations. As those managing DOJ-funded projects are well-aware, there is, for example, DOJ's Financial Management Guide. HHS, by comparison, maintains — though it is overdue for update — a 200-plus-page Grants Policy Statement. And then each grant-making office or bureau has its own set of guidance regarding each specific funding source.

But in general, I want to provide a caution about agency guidance. Unlike a regulation, guidance does not have the force of law. As a litigator, my first instinct is always to push back against any assertion that guidance can impose legal obligations or restrict action. Standing alone, it is not actually binding. It cannot create rules. That said, guidance can operate very similarly to the actual "rules" where it is explicitly incorporated into grant terms and conditions. So, again, always read those very carefully. And where guidance is not included in terms and conditions, be aware that, while policy statements and the like can be an important resource, the relevant statute and regulatory scheme — and any additional terms and conditions attached to a particular funding source — are what actually govern a grantee's actions and use of federal funds.

Karen: Okay, so there is Part 200 (or Part 75 for HHS grantees), program-specific status and funding agency regulations, and sub-regulatory guidance (with a caution). Anywhere else grantees should be looking to understand their obligations in administering a grant-funded program?

Scott: There are various tools for researching program-specific requirements and, more broadly, understanding how a particular program is administered. Generally speaking, it is most efficient to work one's way through: Assistance Listings (*i.e.*, the detailed public descriptions of federal programs that provide grants), individual agency Notices of Funding Opportunities ("NOFOs") or Funding Opportunity Announcements ("FOAs"), and agency websites. The last may sound a bit silly, but most grant-making agencies do a fairly good job of conveying applicable guidance on their websites in an organized fashion.

Karen: Given the breadth of the requirements we have just discussed, are there areas or activities in the post-award compliance phase that nonprofits need to give special attention?

Rosie: Absolutely. We see the most avoidable mistakes and disallowances in four areas.

First, time and effort documentation. This area is about accurately documenting employee time spent in furtherance of the objectives of a particular grant to ensure reasonable allocation of personnel costs. The good news for LSC grantees is that the strictness with which LSC articulates timekeeping expectations has led most LSC-recipients to have fairly strong timekeeping practices.

Second, cost allocation errors or inconsistencies. Cost allocation often proves to be one of the most challenging compliance obligations for all federal grantees. At its core it is a very straight-forward concept, but in practice it presents two risks. First, the subjectivity of applicable regulatory cost allocation standards can lead to aggressive funders second-guessing an ostensibly compliant approach simply because it differs from what they have seen in the past. Second, the fact that cost allocation touches every aspect of a grant-funded organization creates potential that even small "glitches" can compound in cost exposure over time.

Third, a failure to obtain required prior approvals from the funding agency. Such approval is required for particular items, as well as certain changes and deviations to a grantee's budget or program plans. Although many agencies will consider retroactive approvals to correct oversights, some can be very rigid. Moreover, even those that may consider retroactive approval of a routine request can be less inclined to do so when the "missing" approval forms part of a broader dispute.

Fourth, issues related to procurement. In this case, the relevant rules for how a grantee can acquire goods and services revolve around competition requirements at differing value tiers. In the past few years, we have seen a failure to competitively award contracts become an increasing source of audit findings and enforcement actions. We have also seen agencies now asserting full disallowance of the entire cost of any problematic procurement.

Scott: I also want to flag one other area, which applies to a subset of federally-funded organizations. For grantees with subrecipients, management of those subrecipients comes with risk. The grantee is generally responsible for "unallowable costs" incurred by the subrecipient.

Karen: For legal aid programs that have multiple funding sources, what do you see as potential areas of strength and potential challenge areas?

Rosie: We have just identified cost allocation errors and inconsistencies as a risk area. This is particularly true in programs in which service delivery activities overlap and otherwise seem very similar in nature. Best practices include allocating personnel costs through detailed timesheets and allocating other shared costs through consistently applied cost allocation plans using "proxy" allocation bases. This, as it happens, reflects a competitive advantage of legal aid programs.

As we noted a moment ago, a significant inherent strength in legal aid programs is that they generally have very thorough timekeeping processes and staff that are dedicated to accuracy in that timekeeping. It is second nature for lawyers to meticulously track their time, and non-lawyers that work with attorneys are accustomed to a time-tracking culture. Having such data for purposes of allocating personnel costs is not just useful for the charging of the personnel costs reflected by the time allocations, but also in creating a very strong, activity-based allocation base for distribution of other costs.

Karen: You mentioned procurement as a risk area under federal awards. Could you go into a bit more detail about the most significant requirements in that area?

Rosie: So as a starting point, the government's interest in competitive procurement is essentially twofold: first, competition in federal grant project procurements can protect against fraud, waste, and abuse; second, the rules promote integrity, transparency, and broad market participation.

In terms of compliance with the relevant rules and requirements, you can break down the issues in a few different ways, but if you look at it in terms of a roughly chronological process, you have, as an initial step, the structure that your organization creates to govern its procurements. You could call that the "planning" phase. The concerns there are that you have adequate policies, procedures, and processes in place to ensure compliance with applicable legal requirements and minimize risk — in fact, a written procurement policy is one of the few policies expressly called out as required in the Uniform Guidance. You must have a detailed, written procurement policy that ensures adequate competition at the relevant purchase value tiers. With that policy as

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your guide, you will then need to always be planning in advance for all federally funded procurements to minimize the urge to sole source based on time-constraints that could have been avoided. You will also want to think about and mitigate against conflicts of interest with a clear written policy.

Then you have the next phase of actually engaging in the purchasing process for goods or services. Here, the focus should be on ensuring adequate competition to comply with legal requirements — and with your own policies! And this is going to be easy if you have set up a solid structure to follow in the first phase we discussed. The relevant competitive requirements are tied to dollar thresholds.

Karen: What are those thresholds?

Scott: For small dollar purchases, anything below $10,000, the federal government has determined that the benefits of competitive procurement do not outweigh practical burden, so no competition is required. In grants jargon (borrowed in the first instance from federal government contracts jargon), this $10,000 dividing line is called the "micro-purchase threshold."

Above $10,000 and up to $250,000 — which is termed the "simplified acquisition threshold"—grantees are required to foster at least informal, or simplified, competition. Grantees utilizing small purchase procedures must obtain "price or rate quotations… from an adequate number of qualified sources as determined appropriate." Our recommendation is usually to obtain at least three quotes to meet this standard.

Purchases above the $250,000 simplified acquisition threshold require formal competitive proposals or sealed bids. Competitive proposals are most common and involve a formal, widely-publicized Request for Proposal (RFP) and an accompanying formal evaluation process for bids/proposals received in response to the RFP.

Rosie: One additional, important point on procurement: throughout the procurement process you want to make sure you are documenting everything. If a funder has questions, they're normally going to be posed years after the purchase. And the expectation is for contemporaneous documentation. You will want to have a well-organized contract file for every procurement. The regulatory requirement at 2 C.F.R. § 200.318(i) is to "maintain records sufficient to detail the history of the procurement."

Karen: From a cost allocation standpoint, it seems there is a balance between fully covering overhead costs of administering the grant, operational efficiency and stability during the year, and periodic administrative burden in negotiating an indirect rate. What factors should an organization consider in evaluating whether to pursue a negotiated indirect rate?

Rosie: So, as a starting point, what is an indirect rate? It is the ratio between the total indirect expenses and some direct cost base. The indirect expenses to be recovered via an indirect rate are those expenses, or some portion of those expenses, that an entity would consider "general and administrative" ("G&A") expenses, "overhead," or some combination of the two. Which exact expenses within those categories a grantee chooses to be recovered via the indirect cost rate agreement are up to the discretion of the grantee, provided the costs are otherwise allowable and consistently treated throughout the organization and over time. The particular indirect cost allocation methods appropriate to an individual legal aid organization depend on the organization's structure, program functions, accounting system, and, to a degree, preferences.

There can be significant benefit to a negotiated indirect rate. First and foremost, organizations able to negotiate a rate are generally better able to recover the actual cost of managing their federal grants. Doing so ensures a degree of predictability and financial stability that is both a positive in the present, and also helps to set organizations up to be successful in future competitive grant applications.

In terms of process, in the pursuit of an indirect cost rate agreement, the first step is to negotiate with the federal "cognizant agency," which is generally the grantee's largest direct funder. On this point, programs should note that, without direct federal funding — *i.e.*, grants secured directly from a federal agency versus passthrough funds a program receives from a state or local government — it is typically impossible to get a federal agency to negotiate a rate with you.

Assuming an organization has a direct federal award, the question is whether to negotiate a rate. Two primary considerations in this decision are whether doing so will decrease administrative burden or assist in navigating administrative cost caps. In terms of administrative burden, the type of negotiated rate is a significant

consideration. Most commonly, rates are issued as "provisional-final," meaning there is an annual "true-up" obligation (which creates burden in administration and submissions). That said, it may also be possible to negotiate a predetermined rate or, for large complex organizations, a "fixed-with carry forward" rate, both of which are easier to administer. In particular, the predetermined rate is an easy-to-administer approach, as it is a truly fixed rate.

Scott: Despite the benefits of a negotiated indirect cost rate, many entities prefer to elect the *de minimis* rate, which is an automatic 10 percent (over modified total direct costs) rate that requires no negotiation. It is simply elected, but if elected must be applied to all federal awards, whether received directly or via a passthrough entity such as a state government. In our experience, the *de minimis* rate has been very popular over the past five years, likely for its simplicity. But choosing the *de minimis* rate does entail its own risks and downsides. In particular, organizations should be aware that 10 percent may not come close to actually covering the significant costs of administering federal grant funding.

Rosie: One more point on the benefits of a negotiated indirect rate: securing such a rate provides a degree of enhanced negotiating power when attempting to recover indirects on funding passed-through state or local governments. Although statutory and regulatory administrative cost caps will continue to apply where required by a particular federal program's requirements, passthroughs generally are prohibited by 2 C.F.R. § 200.332(a)(4) from ignoring a federally negotiated indirect cost rate agreement when determining whether to permit budgeting and recovery of indirect costs.

Karen: There is a lot to cover here. And while there is a lot to learn about best practices for compliance, the advantages significantly outweigh the burdens. Most obviously, your organization gets resources to provide more help to more people. But federal funding awards can also attract other funders, build organizational capacity, enable new collaborations and partnerships, advance participation in policy improvements, lead to training and technical assistance opportunities, and more.

Rosie: Yes! And the more knowledgeable your organization becomes, and the more compliance policies and procedures it has in place, the better you will be able to secure additional federal funds.

1 Karen A. Lash's consulting practice helps organizations and foundations working to close the justice gap. It builds on her experience working within government, universities, and nonprofits. In 2021 she served in the Biden Administration to help reestablish the US Department of Justice Office for Access to Justice, an office she had served in as a President Obama political appointee in leadership positions and as the founding Executive Director of the White House Legal Aid Interagency Roundtable (LAIR). In between the two tours with DOJ, Karen was Practitioner-in-Residence and Director of The Justice in Government Project at the American University School of Public Affairs where she applied the lessons from LAIR to state and local government and their justice partners to tap federal funds and integrate civil legal help in government programs to improve outcomes, effectiveness, and fairness. Karen may be reached at *karen@lash.us.*

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