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UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer
Assistant Secretary for Administration
Washington, D.C. 20230

FINANCIAL ASSISTANCE MEMORANDUM 2015-02

ACTION

MEMORANDUM FOR: DEPARTMENT OF COMMERCE GRANTS COUNCIL

Signed

FROM: Barry E. Berkowitz
Senior Procurement Executive
and Director for Acquisition Management

SUBJECT: The Department of Commerce's Policies, Procedures, and General Decision-Making Criteria for Deviations from Negotiated Indirect Cost Rates under Federal Financial Assistance Programs and Awards

- 1. Purpose.** In accordance with 2 C.F.R. § 200.414(c)(3) (Indirect (F&A) costs), this memorandum sets forth the Department of Commerce's (DOC's) policies, procedures, and general decision-making criteria for deviations from negotiated indirect cost rates. These policies and procedures are applicable to all Federal financial assistance programs awarded and administered by DOC bureaus as Federal awarding agencies.
- 2. Effective date.** In accordance with 2 C.F.R. § 200.110, these requirements are effective December 26, 2014.
- 3. Expiration date.** Until superseded.
- 4. Background.** In accordance with the Federal Register notice published on December 19, 2014 (79 FR 75871) and the regulation at 2 C.F.R. § 1327.101, effective December 26, 2014, the DOC adopted the Uniform Administrative Requirements, Cost Principles, and Audit Requirements codified at 2 C.F.R. Part 200 (Uniform Guidance). The Uniform Guidance streamlines the language from eight Office of Management and Budget (OMB) circulars, including cost principles (OMB Circulars A-21, A-87, A 122) and administrative requirements (OMB Circulars A-102 and A 110), into one consolidated set of guidance applicable to Federal financial assistance awards. For awards made on or after December 26, 2014, the Uniform Guidance supersedes DOC's uniform administrative requirements set out at 15 C.F.R. parts 14 and 24.

At 2 C.F.R. 200.414(c), the Uniform Guidance requires Federal agencies to accept Federally negotiated indirect cost rates unless certain exceptions apply. Federal agencies may use a rate different from the negotiated rate for a class of awards or a single Federal award only when required by Federal statute or regulation, or when approved by a Federal awarding

agency head or delegate based upon documented justification described within 2 C.F.R. § 200.414(c)(3). Within the DOC, there are programs that impose reduced indirect cost rates.

In addition, on an award-specific basis, the DOC does accept indirect cost rates that have been reduced or removed voluntarily by the proposed recipient of the award.

5. **Action required by this policy.** DOC bureaus shall apply the following policies, procedures, and general decision-making criteria for deviations from negotiated Indirect Cost Rates for financial assistance programs and awards.
6. **Distribution basis.** For all deviations to the Federally negotiated indirect cost rate; including statutory, regulatory, programmatic, and voluntary; the basis of direct costs against which the indirect cost rate is applied must be:
 - A. The same base identified in the recipient's negotiated indirect cost rate agreement, if the recipient has a Federally negotiated indirect cost rate agreement; or
 - B. The Modified Total Direct Cost (MTDC) base in cases where the recipient does not have a federally negotiated indirect cost rate agreement or, with prior approval of the Federal awarding agency, when the recipient's Federally negotiated indirect cost rate agreement base is only a subset of the MTDC (such as salaries and wages) and the use of the MTDC still results in an overall reduction in the total indirect cost recovered. As defined at 2 C.F.R. § 200.68, MTDC means:

[A]ll 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 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.

In cases where a recipient does not have a Federally negotiated indirect cost rate agreement, DOC bureaus will not use a modified rate on a base that is not defined in accordance with 2 C.F.R. § 200.68. This restriction is to ensure that the reduced rate is applied against a base that does not include any potentially distorting items (such as the portions of subawards in excess of \$25,000 and participant support costs) and is based on the requirements within 2 C.F.R. § 200.68; 2 C.F.R. § 200.414(f); and the relevant provisions of appendices to 2 C.F.R. Part 200 (see Section C.2. of Appendix III, Section B.3.f. of Appendix IV, and Section C.2.c. to Appendix VII).

7. **Indirect cost rate deviation required by statute or regulation.** In accordance with 2 C.F.R. 200.414(c)(1), a Federal awarding agency may use a rate different from the negotiated rate for a class of Federal awards or a single Federal award only when required by Federal statute or regulation, or when approved by a Federal awarding agency head or delegate based on documented justification as described in 2 C.F.R. § 200.414(c)(3) (*see* section 8 of this memorandum for the DOC's process on indirect cost deviation justifications). When a

different indirect cost rate is required by Federal statute or regulation, the official award file must document the specific statute or regulation that required the deviation.

8. Process for indirect cost rate deviation approval. In accordance with 2 C.F.R. § 414(c)(3), the following requirements apply to DOC bureaus as Federal awarding agencies in their review, approval, and posting of programmatic and award-specific indirect cost rate waivers:

A. Program Qualifications. Programs that have instituted a program-wide requirement and governance process for deviations from Federally negotiated indirect cost rates may qualify for a programmatic deviation approval.

B. Deviation Requests.

(1) *Programmatic deviations.* The responsible senior program official must submit each programmatic deviation request to the head of the Federal awarding agency or delegate for review. **The request for deviation approval must include a description of the program, including the nature of the program and the program's reasons for limiting indirect costs, and the program's governance process for negotiating and/or communicating to recipients the indirect cost rate requirements under the program.** The program must make their program governance documentation, rate deviations, and other program information publicly available.

(2) *Award specific deviations.* The responsible senior program official must submit each award-specific deviation request to the head of the Federal awarding agency or delegate for review. **The request for deviation approval must include a description of the award, including the nature of the award and the reasons for limiting indirect costs under the award, and how the deviation was negotiated and/or communicated to the recipient.** The program must make their rate deviations and other relevant award-specific information regarding the indirect cost rate publicly available.

C. Approvals. Programmatic and award-specific deviations must be approved, in writing, by the Federal awarding agency head or delegate. The DOC bureau must send approved deviations electronically to the DOC Office of Acquisition Management (OAM), which will make them publically available, and must include the approved deviation in the award file of each relevant award. In addition, OAM will notify OMB of each approved deviation.

D. Initial programs approved for deviation. With the initial release of this policy, the following programs have been approved by the head of the respective Federal awarding agency or delegate to use a rate that deviates from the Federally negotiated indirect cost rate agreements.

1. National Institute of Standards and Technology (NIST) Summer Undergraduate Research Program (SURF) Program;
2. NIST Summer Institute for Middle School Science Teachers (SI) Program; and

3. NIST Research Experience for Teachers (RET) Program
4. International Trade Administration (ITA) Market Development Cooperator Program (MDCP)

The approved deviation for each of these programs is included as an attachment to this memorandum. In addition, program information is publically available on the program websites. The rates in effect as of the date of this memorandum are subject to change based upon the governance process established for each program.

9. **Voluntary indirect cost rate reduction.** On an award-specific basis, an applicant and/or proposed recipient may elect to reduce or eliminate the indirect cost rate applied to costs under that award. The election must be voluntary and cannot be required by the Grants Officer, Federal Funding Opportunity (FFO) announcement, program, or other non-statutory or non-regulatory requirements. For these voluntary, award-specific reductions, the DOC bureau can accept the lower rate as long as the official file clearly documents the recipient's voluntary election.
10. **Unrecovered indirect costs and cost sharing.** Where the Federal awarding agency authorizes unrecovered indirect costs to be included as part of cost sharing or matching in accordance with 2 C.F.R. § 200.306(c) (Cost sharing or matching), if a recipient elects to use a rate lower than the Federally negotiated indirect cost rate and uses the balance of the unrecovered indirect costs to meet a cost-share or matching requirement required by the program and/or statute, this is not considered a deviation from 2 C.F.R. § 200.414(c) as the Federally negotiated indirect cost rate is being applied under the agreement in order to meet the terms and conditions of the award. In accordance with 2 C.F.R. § 200.405 (Allocable costs), indirect costs not recovered due to deviations to the Federally negotiated rate in accordance with this policy are not allowable for recovery via any other means.
11. **Publication.** This policy will be posted on the DOC's website at http://www.osec.doc.gov/oam/grants_management/policy/default.htm. Please disseminate this policy throughout your organizations. Questions about this policy may be directed to John Geisen at (202) 482-0602.

Attachment

Attachment

1. National Institute of Standards and Technology (NIST).

- A. **Program Description.** In December 2014, NIST announced funding competitions for three science, technology, engineering, and mathematics (STEM) engagement programs with undergraduate students from domestic colleges and universities and science educators from domestic middle schools (sixth, seventh, and eighth grade levels) as described below:
- i. **NIST Summer Undergraduate Research Program (SURF):** SURF provides funding for approximately 150 summer research fellowships. The fellowships provide research opportunities for undergraduate students to work with NIST scientists and engineers, to expose them to cutting-edge research, and to promote the pursuit of graduate degrees in science and engineering via participation in a multi-week program on either the Gaithersburg, Maryland or Boulder, Colorado NIST campus during the summer months
 - ii. **NIST Summer Institute for Middle School Science Program (SI):** SI provides selected teachers at the sixth, seventh, and eighth grade levels with hands-on activities, lectures, tours, and visits with NIST scientists and engineers at the NIST Campus in Gaithersburg, Maryland. The teachers participate in a two week program during the summer. SI enables the teachers to gain a better understanding of the scientific process and to incorporate this into their teaching curriculum. Ultimately, the program enables the teachers to inspire their students to pursue careers in science and technology
 - iii. **NIST Research Experience for Teachers Program (RET):** RET provides selected teachers who have participated in the NIST SI program (*see* item 2 above) the opportunity to participate in scientific research with NIST researchers at the NIST Campus in Gaithersburg, Maryland via a six week program during the summer months. SI is tailored to encourage teachers to inspire their students to pursue careers in fields of science, technology, engineering, and mathematics.
- B. **Justification for limiting Indirect Costs.** At NIST, the practice of limiting negotiated indirect costs has not been widespread, and these costs have only been considered unallowable or limited in a handful of programs. The reasons for not allowing these costs are considered by both the Program Office and the Grants Office. For the identified programs, the principal reason for the limitation is based on the partnership nature of the program missions. The three programs involve tailored science and technology engagement and training activities at NIST with university students and middle school teachers. A key purpose of these programs involves partnering with the educational institutions in support of our mutual missions to train the next generation of our nation's STEM workforce. While collaborative partnerships are ordinary in Federal assistance, several aspects of these partnerships have led NIST to decline to support indirect costs in these programs.

Most significantly, the practical effect of NIST's approach is to allow NIST and the partner institutions to increase the impact of these important programs by maximizing the

number of participating students and teachers. By supporting only limited direct costs of stipends and travel for training participants, and effectively asking partners to support their own costs to administer the award, more students and teachers have the opportunity to participate. This maximizes the impact on the STEM workforce.

Given NIST's limited resources for education and outreach, with only around \$1 million per year for all the referenced programs, the mutual benefit of this approach has traditionally been the overriding consideration in declining to support indirect costs in these programs. Increased participation significantly benefits educational institution partners by increasing the number of students and teachers from their organizations provided this opportunity to learn. Through this aspect of the partnership nature of these programs, NIST and the partner institutions are best able to leverage limited funds in terms of individuals affected. This approach demonstrates to the best extent possible, science technology, engineering, and mathematics education among our country's youth and next generation.

- C. **Governance Process.** NIST's process for communicating its indirect cost rate limitations to the SURF, SI and RET programs is as follows:
- i. The policy will be set forth on the NIST OAAM/GMD website, <http://www.nist.gov/director/grants/index.cfm>.
 - ii. The policy will be published in the federal funding opportunity notice prior to each competition.
 - iii. The policy will be included as a standard award condition on each award.
 - iv. Posting deviations on OAM website.

2. International Trade Administration (ITA).

- A. **Program Description.** The Market Development Cooperator Program (MDCP) awards include financial and technical assistance to support projects that help U.S. firms export. An MDCP award establishes a partnership between ITA and non-profit industry groups such as trade associations and chambers of commerce. Such groups are particularly effective in reaching small- and medium-size enterprises (SMEs). ITA provides up to \$300,000 in total funds to MDCP to be spent over a 3-5 year project period. A recipient must put up at least a 2-to-1 match (approximately 67%). The average actual match is 73%. Historically, the largest group of entities eligible to apply for and receive MDCP funding is trade associations. These groups are funded primarily by dues paid by member companies and from fees collected from industry trade events. Both the constituency of these groups, mostly SMEs, and the focus of much of their activity, industry-promotion, make them ideal to undertake MDCP projects.
- B. **Justification for Limiting Indirect Costs.** Trade associations tend to have very low overhead. Most of the trade association MDCP award recipients do not claim indirect costs because such costs are fairly low, the association usually has a fairly small staff, and the administrative burden is not worth the benefit. The indirect cost rates of those associations that do claim such costs generally range from 4 to 7%.

By contrast, MDCP award recipients affiliated with an educational institution usually have very high indirect cost rates ranging from 45 to 65%. Such institutions alone have never been eligible to receive MDCP awards, however, as indicated in the MDCP federal funding opportunity notice:

“[O]rganizations that are part of or affiliated with an educational institution for administrative, accounting, financial, legal, or logistical reasons may be eligible. Such organizations that are not independent legal entities, for example, an unincorporated organization, that otherwise may be classified under *III.A. Eligible Applicants*, above, as a trade association, non-profit industry association, or state department of trade and its regional associations, are eligible.”

So, while the educational institution itself is not eligible, an entity affiliated with it that would otherwise be eligible could be found to be eligible. One example is a Small Business Development Center (SBDC). There are scores of SBDCs around the United States that serve the SME community that ITA seeks to help. Most exist as stand-alone legal entities with their own accounting system but some SBDCs are affiliated with a college or university and use the host institution’s accounting system. Such an SBDC benefits from the high overhead of the host educational institution because the overhead can be claimed as indirect cost and used as part of the required award match. By comparison, a stand-alone SBDC that serves the same type of SME pool would have much lower overhead, which means a lower indirect cost rate.

Higher Indirect Cost Rate Correlates Inversely with Project Performance. The primary measure of MDCP project success is dollar value of exports generated by the project. On average, MDCP award recipients affiliated with an educational institution have project results well below those reported by other types of MDCP award-recipients, especially trade associations. So, on average, the higher the indirect cost rate claimed, the lower the dollar value of exports that a project generates.

The de minimis 10% indirect cost rate is the only rate that may be claimed by MDCP award recipients. This applies to all MDCP award recipients, including those that already have an indirect cost rate higher than 10% certified by another cognizant agency. This 10% de minimis cap is implemented for the following reasons.

- i. High overhead is not required to achieve satisfactory results from an MDCP project. MDCP awards are for export-promotion projects. No scientific research is involved. Minimal organizational expenses are all that are relevant or necessary for an organization to be able to successfully conduct export expansion activities.
- ii. MDCP recipients with low overhead have a greater match burden than recipients with high overhead. Stand-alone organizations have low overhead. Organizations associated with an educational institution generally have higher overhead to account for the great cost of maintaining such institutions. Because a high overhead translates to a high indirect cost rate, an MDCP recipient with a high indirect cost rate can significantly reduce the amount of match that must come from cash or in-kind sources. This means that a stand-alone organization that is identical in its purpose

and staffing to an organization that is associated with a university would have to put up disproportionately more cash and/or in-kind match than would the university-associated organization. This puts the stand-alone organization at an unfair disadvantage.

C. Governance Process. ITA's process for communicating its indirect cost rate limitation to MDCP award recipients is as follows:

- i. The policy is set forth on the MDCP website, trade.gov/mdcp.
- ii. The policy is published in the federal funding opportunity notice prior to each competition.
- iii. An example of how to claim the limited de minimis rate in the form of an electronic spreadsheet may be downloaded from trade.gov/mdcp and used to create a project budget.
- iv. Posting deviations on OAM website.