

Do You Take Money from the Government? Federal Grant Risks and How to Avoid Them

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Entities that do business with the federal government have long known the risks of False Claims Act (FCA) allegations and suspension and debarment. But federal grantees should know that operating programs with federal grant funds comes with the same pitfalls.

Federal grant recipients are facing increased scrutiny on multiple fronts, increasing compliance and enforcement risks for grantors and grantees. On the regulatory front, the implementation of the Super Circular requirements has imposed more “contract-like” requirements on grantees over the past few years. On the administrative front, agencies are facing increased political and fiscal pressure to manage grants and control costs. And, on the responsibility front, the efforts spurred by the U.S. Government Accountability Office’s recommendation in 2011 for agencies to increase suspension and debarment actions have spread beyond traditional government contractors to include federal grantees as well.

Along the same lines, the U.S. Department of Justice and FCA whistleblowers have increasingly targeted grant recipients with FCA allegations related to performance of grant programs. For example, in November 2015, a former Duke University employee filed an FCA complaint against the university alleging that the university had made false representations in over 60 grant applications relating to over \$200 million in grant awards. In March 2019, Duke agreed to pay \$112.5 million to settle the case, with nearly \$34 million being awarded to the former employee who first brought the case.

In this environment, federal grantees face serious pitfalls if they do not adequately monitor representations in grant applications and their use of grant funds. Suspension or debarment by one agency can

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often apply government-wide. Beyond suspension and debarment, a company or nonprofit can face massive liability for violating the FCA in performing under a federal grant – sometimes as much as triple the entire grant value, along with other substantial penalties. FCA allegations also bring a host of other potential harms to a company's business and reputation, including negative publicity; placement on "watch status," which reduces agency flexibility to administer an award; and special terms and conditions on future government contracts and grants.

To avoid these pitfalls, federal grantees should ensure they have all required policies and procedures in place before an issue arises. Further, federal grantees should review their internal controls to ensure sufficient oversight over grant applications and accounting of grant funds. Grantees should bear in mind their obligation to monitor subcontractors' use of grant funds, as their misuse can create liability for the prime grantee. Grantees should also be aware of specialized rules governing grants. For example, many agencies, such as the U.S. Department of Health and Human Services, have issued supplements to the Super Circular that contain additional rules on the award and administration of grants. Wiley Rein's Government Contracts Practice is available to assist your organization with its federal contract and grant compliance needs.

Brian Walsh is a partner in the Wiley Rein Government Contracts practice and works with election law attorneys on related matters.