
CHAPTER 13

RESOLVING POST-AUDIT DISPUTES

Most colleges and universities will have no problems once their A-133 audits are completed and the results are properly submitted to the federal government. However, when problems do arise, they will range from corrective action to a full-blown investigation by an agency Office of Inspector General (OIG) based upon the audit's findings.

For the most part, proposed cost disallowances will account for the majority of the disputes with government agencies. However, the post-audit phase also may produce other types of disputes — between the institution and a subrecipient, the institution and its auditor, and the auditor and the federal government.

The information below is designed to explain the audit review process, the nature of the disputes that may arise in the course of that process, and the resolution mechanisms available for dealing with those disputes. The final section describes a number of legal authorities that may be relevant to resolving disputes that arise as a consequence of an A-133 audit.

13.1 THE FEDERAL GOVERNMENT'S AUDIT REVIEW PROCESS: AN OVERVIEW

The audit review process has several stages. The review process for an audit of an individual college or university will depend, primarily, on the amount of federal awards that the institution typically expends in a fiscal year.

Under §__.320(b) of OMB Circular A-133, all auditees must submit a copy of the audit reporting package and data collection form (see 3.7.2 and 7.1) to the Federal Audit Clearinghouse (FAC) maintained by the Bureau of the Census (see 4.3). The FAC performs an initial review of the audit reporting package and data collection form to ensure that the reports comply with the requirements of the circular. The FAC then forwards copies to the federal awarding agency when there are findings and questioned costs in the audit related to awards made by the agency to the institution, or when the summary schedule of prior audit findings reported in the audit relate to awards made by the agency.

Under §__.400 of Circular A-133, institutions that expend more than \$50 million a year in federal awards have a designated cognizant federal agency for audit, generally the agency making the predominant amount of direct awards to the institution. The cognizant agency for audit must obtain or conduct quality control reviews of selected audits made by nonfederal auditors and provide the

results, when appropriate, to other interested organizations. The cognizant agency for audit also must advise the auditor and, where appropriate, the auditee, of any deficiencies in the audit when corrective action is required (see Circular A-133, §___400(a)(5)). The Council of Inspectors General on Integrity and Efficiency (CIGIE) revised its checklists for desk review and quality control review of A-133 audit reports in 2010. These are posted on the FAIS website, www.FederalAuditing.com/Other_main.php.

Circular A-133 specifies that institutions that do not have a cognizant agency for audit are under the general oversight of the federal agency that provides the predominant amount of federal awards to the institution. The circular directs this agency, referred to as the “oversight agency for audit,” to provide technical advice to auditors and auditees as requested and authorizes the agency to assume some or all of the responsibilities normally performed by the cognizant agency for audit. In short, the oversight agency (typically through its OIG) may conduct quality reviews of audits and otherwise involve itself in uncovering and correcting audit deficiencies.

In all cases, the awarding agency will receive audits with findings or those that indicate that findings were reported in previous audit reports.

An official in each awarding agency will make a “management decision” with regard to audit findings, especially those related to questioned costs. That ultimate decision maker — who is sometimes referred to as the Grants Officer, Contracts Officer, Responsible Official or another title indicating final authority — is the designated official to make a final decision with respect to each and every issue raised by the audit report.

Depending on the agency, the issue in dispute, and whether the issue arises under a grant or cooperative agreement or a cost-type procurement contract, there is some type of mechanism or process to appeal final audit decisions. Even where there is no appeal mechanism, institutions may be able to create one in light of constitutional due process considerations.

There are certain exceptions to the process described above. If the audit report reveals illegal acts or other extremely serious deficiencies, it is possible, indeed probable, that the OIG of the awarding agency will launch an investigation. For example, Circular A-133 requires a cognizant agency for audit to promptly inform other affected federal agencies and appropriate federal law enforcement officials of any reported irregularities or illegal acts. In these circumstances, the report’s findings are likely to be eclipsed by the findings that emerge from an investigation conducted by these officials.

13.2 REVIEWING AUDIT REPORTS: REACHING A FINAL DECISION

Once the audit is transmitted to awarding agencies for audit resolution, certain OMB and other requirements take effect. The heart of the government-wide requirements for audit resolution is found in OMB Circular A-50, Audit Follow-up. Among its requirements, Circular A-50 imposes the following:

- The OIG not only will review the work of nonfederal auditors, but also will review responses to audit reports, and it will report significant disagreements with those responses to the audit follow-up official.
- Each agency will appoint an audit follow-up official who has personal responsibility to ensure that disagreements are resolved and corrective actions are actually taken.

- There should be “prompt” resolution and corrective action on audit recommendations, and each agency should devise criteria for proper resolution and corrective action.
- There should be coordinated resolution and corrective action on recommendations involving more than one program or agency.

OMB Circular A-50 also requires that federal agencies complete the audit resolution process within six months after receiving the audit report. However, this six-month period does not include

- corrective actions, or
- administrative appeals from final decisions.

Rather, it represents the time period that agency officials have to make their final decisions based on the audit report.

The six-month time limitation can place a strain on the audit resolution process. Frequently, officials involved in that process are so pressed by the six-month limit that they all but ignore an institution’s arguments about audit findings (see 13.3).

It is important to be aware that the six-month limit is not necessarily an absolute one. The time limit is not always enforced, regardless of the issues or circumstances involved, which may result in an institution having more time to make its case.

Federal agencies have implemented Circular A-50 primarily through internal guidance, and A-50 responsibilities usually are divided among different agency officials:

- An audit office within the OIG may maintain the records on audit follow-up and perform reviews on the adequacy of the audits.
- Other personnel, typically operations or program officials, will resolve audit findings (make final decisions).
- High-level agency officials will mediate disagreements that may arise among these offices and officials.

ARRA ALERT

In the March 22, 2010, memorandum (M-10-14), OMB instructed federal awarding agencies to expedite review and resolution of audit findings to ensure all findings are resolved within 6 months after the date the FAC shows filing status as complete.

13.3 ARGUMENTS TO BE ADVANCED BY INSTITUTIONS

In most agencies, institutions may have the opportunity to become involved in the audit review process. Typically, institutions may file comments and sometimes even meet (or negotiate) with audit resolution officials. For the vast majority of adverse audit findings, an institution’s preparation, submission, and implementation of a corrective action plan will put an end to any problems. The plan will be acceptable to reviewing agencies, and assuming the plan is fulfilled, those agencies will be satisfied. Sometimes, however, monetary issues in the form of questioned costs will be present in the audit.

While it is impossible to describe and discuss every situation that could lead to an adverse finding raising a monetary issue, some useful arguments for institutions to make in some of the more typical situations are described below. Note that these arguments are available not only for the resolution

process (i.e., before a final decision), but also on appeal from a final decision. Some, in fact, may be made more effectively in the appeals process.

13.3.1 Prior Approval

Institutions sometimes have costs questioned because of situations in which they should have sought prior approval before taking an action or incurring a cost but did not seek or obtain such approval. While the auditor is likely to question costs incurred without prior approval, institutions in this situation have a substantial chance of persuading the agency to allow the cost in question. Some agencies look to the following:

- (1) The transaction would have had approval had the grantee requested prior approval.
- (2) The transaction is approved by the proper official.
- (3) The grantee agrees to institute controls to ensure that prior approval requirements are met in the future.

13.3.2 Lack of Documentation

Another major area where auditors may question costs, and agencies frequently allow them, is lack of documentation. OMB Circular A-21's requirements, as well as those of related circulars, indicate that there must be sufficient documentation to justify the reasonableness, allowability, and allocability of every charge that is made to an award. Auditors may have a somewhat narrow view of what types of documentation are acceptable (e.g., they may insist that the documentation be contemporaneous with the charge, or that it be in a certain form). In this regard, however, colleges and universities should not surrender to an auditor's initial reaction to the absence of proper documentation and are encouraged to offer their auditors any available alternative documentation (or other evidence) that may justify a particular charge.

For example, Chapter 3, section 3.35 of the *Government Auditing Standards* states that auditors should use professional judgment in determining the type and amount of evidence to be gathered. While any such evidence must be sufficient, relevant, and competent to establish the allowability of a cost or compliance with a grant requirement, auditors have discretion to accept various forms of evidence as satisfactory. As a result, testimony in place of documents can be acceptable and should be offered to auditors by institutions, if available.

Appeals bodies generally are more lenient than auditors in accepting non-contemporaneous documentation, testimony in place of documents, and documentary evidence specifically tailored for an administrative hearing. Reviewing officials who are mindful of the flexibility allowed by appeals boards — or are themselves flexible on the issue — frequently will accept evidence of cost allowability auditors would not accept.

Time and attendance ("Did someone work?") and time distribution ("Did someone work on this grant?") are simple examples of the kinds of documentation that might be established by alternative evidence, which appeals boards and reviewing officials are often willing to accept. If time and attendance records for staff charged to an award are not available, other records, such as affidavits or testimony from other staff or trip reports, may be adequate to show that the particular individuals were on the job and that the charges were bona fide. Similarly, work products and affidavits or testimony that individuals were working on the award may be acceptable substitutes for missing records.

There also are instances in which colleges and universities cannot locate documentation for the auditors but later (after the audit is completed) are able to obtain it. Reviewing officials and appeals boards almost invariably will accept such late-arriving documentation if it appears valid.

13.3.3 Expenditures in Excess of Awards

Another audit finding that can be contested effectively involves questioned costs in circumstances where program expenditures were in excess of award amounts. Suppose, for example, that an audit questions \$5,000 of costs under a particular award. Suppose, further, that under the program supported by the award, the audit shows that the federal agency provided \$50,000 of assistance, but that the college or university spent \$5,000 of its own money on the project supported by the award. In such a case, the institution should be able to argue that the \$5,000 of questioned costs may be attributed to the institution's own funds, and that no disallowance is appropriate. If there is an agreed-upon matching share, however (i.e., the institution committed to spending its own funds on the project), this argument will work only if the institution has expended funds sufficient to cover the disallowed costs in excess of the required match because matching funds are subject to applicable cost principles.

13.3.4 Interpretation Disagreements

Frequently, an institution will interpret a requirement one way and an auditor, ordinarily in consonance with the views of representatives of the cognizant or oversight federal agency, will interpret it differently. If the requirement is ambiguous (i.e., it could reasonably be interpreted the institution's way), and if the federal agency has never formally interpreted it to remove the ambiguity, there is an excellent argument to be made that the ambiguity must be resolved in the institution's favor.

For grants and cooperative agreements, there are varying relevant opinions going from HHS's Departmental Appeals Board all the way to the U.S. Supreme Court (see *Pennhurst State School and Hospital v. Halderman*, discussed at 13.9.2). On balance, those opinions favor the institution where a true ambiguity exists, but the rules governing an ambiguity are still far from clear. For procurement contracts, however, the principle that an ambiguity is to be resolved in the institution's favor does appear clear. Because of the potential importance of this area and the confusion on the grants and cooperative agreement side, institutions that face cost disallowances or similar problems as a result of the application of ambiguous requirements are encouraged not to acquiesce in an agency's insistence that its interpretation of the requirement is the final word.

In a decision of great importance to recipients of federal awards, the U.S. Supreme Court also has held that agency policy interpretations contained in opinion letters, policy statements, agency manuals, enforcement guidelines and the like, which are not published in agency regulations, lack the force of law. While they are entitled to respect insofar as they are persuasive, they are not entitled to the same deference as are formal published regulations. See *Christensen v. Harris County*, 120 S. Ct. 1655 (2000).

13.3.5 Retroactive Application of Requirements

Over the life of a particular federal program, or even one award, conditions and requirements imposed by statute, regulations, award conditions, or other documents may change. When performing the compliance portion of the A-133 audit process, auditors might refer to the requirements in effect at the time the audit is performed.

However, in a case involving a grant, *Bennett v. New Jersey* (470 U.S. 632), the U.S. Supreme Court made it clear that unless unusual circumstances exist, such as a clear indication from Congress that it wants a new statutory requirement applied retroactively, the recipient's obligations under the award are to be "determined by reference to the law in effect when the grants were." For example, if an award were made on January 1, and a new law (or regulation) that affects a recipient's obligation were to go into effect on January 10, the recipient would not be bound by the requirements of the new law. (Note: In the event the new law is more advantageous to the recipient, the agency generally will expect the recipient to comply with the new law or policy and probably will not hold, or want to hold, the recipient to the standard the new law changed, but only after the new law becomes effective.)

13.3.6 Auditor/Institution Disagreement

There also may be a disagreement between a college or university and its auditor over the auditor's findings. Reviewing officials and appeals boards are not limited by an auditor's findings, nor are they precluded from accepting an institution's argument that its auditor made a mistake.

Disagreement with an auditor may be over an interpretation of a federal requirement (see the discussion on ambiguity at 13.3.4) or simply the validity of a particular factual finding. In this connection, the source of the disagreement often will be that the report does not contain sufficient evidence to support the finding, even though the audit may have been reviewed by an OIG and found to comply with Circular A-133.

Despite the positive relationship institutions may have with their auditors, or the trust they may place in the auditor's judgment and expertise, an auditor may not always be correct. Accordingly, although institutions should be reluctant to voice disagreement with their auditors before federal agencies (because institutions do not want to place themselves in the position of suggesting that the audit may be deficient), where significant matters are at stake and the institution believes the audit does not supply proper justification for the auditor's finding, an argument to that effect can and should be made to agency officials.

13.3.7 Equitable Defenses

Finally, there are certain "equitable" defenses that can be made to adverse findings in an audit report. Even if a particular cost is clearly unallowable, there may be circumstances present that would justify an agency allowing the costs nonetheless. For example, an agency official may have mistakenly advised that the costs would be allowable; the costs, although unallowable, may have been made in an area that resulted in savings to the government; or the taking of the particular disallowance may have an unfair or unintended result. Federal agencies have substantial latitude to allow costs in such circumstances.

OMB Circular A-133 requires auditors to report "known questioned costs" (i.e., those questioned costs specifically identified by the auditor), which are greater than \$10,000. However, the auditor also is required to report "known questioned costs" when "likely questioned costs" (i.e., those questioned costs that can reasonably be projected from the sample of identified costs questioned by the auditor) exceed \$10,000 (Circular A-133, §.510). The circular attempts to strike a balance between requiring auditors to report all questioned costs (as was previously required under Circular A-128 for state and local governments) and only reporting substantial questioned costs.

In sum, A-133 assures that questioned costs exceeding the threshold are reported to the awarding agency. However, the awarding agency retains considerable discretion with regard to its management decision on audit findings (i.e., whether to disallow questioned costs and/or to attempt to collect all or part of the disallowed costs). Under the Dispute Resolution Act (31 USC 3711(a)), for example, agencies may compromise claims of up to \$100,000, as long as the claim does not appear to be fraudulent, false, or misrepresented by a party with an interest in the claim (i.e., accept less than the full amount that the agency asserts is due).

Agencies also may seek compromise for significantly greater amounts under that statute if they obtain approval of the Department of Justice. Similarly, where the particular cost disallowance is premised on an OMB circular requirement, agencies also may seek a deviation from OMB. Although deviations are not easily granted, OMB ordinarily will respond to agency requests that are reasonably justified.

Two other avenues for equitable relief that may be available are the General Accounting Office Act of 1996 amendments to the Debt Collection Act and “equitable estoppel.” (See discussion of the Debt Collection Act at 13.9.1 and estoppel as explained in *Heckler v. Community Health Services* in 13.8.2.)

In most agencies, it will be necessary first to establish the cost disallowance (i.e., agency officials will issue a management decision on audit findings before any claims waiver authority or deviation request occurs). As a consequence, audit review officials and agency appeals boards customarily lack the authority to grant waivers. Nevertheless, to the extent that reviewing officials are sympathetic to the institution’s circumstance, even though they may not technically be able to waive the claim, their views concerning whether the claim should be waived will be of extreme importance in an eventual decision on waiver. It is noteworthy that the Department of Health and Human Services in its old Grants Administration Manual, Chapter 1-105-60-2, actually gave its reviewing officials waiver authority in “truly exceptional cases, where strict adherence to an original provision of an award would result in a clear inequity to the organization....” Such waivers are limited to the following four conditions:

- (1) The provision is not required by statute.
- (2) The waiver is granted by certain authorized officials (the grants officer or contracts officer and, generally, a higher official).
- (3) Where the waiver is from a regulation, any existing deviation procedure is followed.
- (4) HHS’s OIG concurs in the legality of the waiver.

Accordingly, even though an institution may not have a good legal argument in favor of resisting a particular audit finding, if there are meritorious reasons why the institution should not be made to pay back money because of the finding, the college or university may find a receptive audience in federal officials who review and ultimately decide whether claims should be paid.

Institutions considering a claims waiver also should refer to *Action, Inc. v. Donovan* (see 13.9.2). This case, involving a Labor Department grantee, requires that an agency at least consider using its waiver authority where a waiver request is made.

13.3.8 Strategic Considerations

Although institutions ordinarily will want to advance all of their arguments to all reviewing officials willing to hear such arguments, there may be strategic reasons not to do so. There also may

be reasons why such arguments should be advanced only very generally (simply to preserve them legally), but not sufficiently to reveal the institution's entire case. Invariably, such strategic reasons relate to whether the arguments are likely to be better made to an appeals board after a final appealable management decision is reached. Such a strategic judgment ordinarily should be made after consultation with legal counsel. Additionally, institutional policies and procedures regarding cost sharing should be recorded and distributed to faculty.

MANAGING AN APPEAL TO A FEDERAL AGENCY

Colleges and universities should consider the following in appealing a "final decision" to a federal agency:

- Decide early on as to whether an appeal will be filed. This will facilitate developing a complete record.
- Consider all of the "costs" involved in mounting an appeal. The costs include not only actual costs (i.e., legal counsel, consultants, staff time, etc.) but potential program costs (i.e., diversion of institutional focus from its mission to litigation).
- The effect of the appeal on future relationships with the agency also should be considered. In this regard, note that it is illegal for an agency to retaliate against a recipient for filing an appeal.
- If the decision is to appeal, advise the agency early on. A firm statement of position by the institution may encourage the agency to back down or to be receptive to a compromise offer of settlement.
- All of the costs (real and programmatic) must be weighed against the potential benefit to be gained by prevailing on an appeal and the likelihood of success. The latter requires a careful consideration of the facts of the case, and legal precedent, and is best decided with the advice of experienced legal counsel.

13.4 SANCTIONS

Federal agencies have authority to impose a variety of increasingly severe sanctions against a recipient that does not comply with applicable requirements. These include the following:

- Notice of noncompliance, with an opportunity for the institution to correct the deficiency
- Special award conditions, which may cause the recipient to be classified as "high risk"
- Cost disallowances
- Suspension
- Termination
- Debarment

The sanctions ordinarily are applied when an institution has not corrected a situation that resulted in a final adverse management decision. These often are findings that an institution may want to appeal. They are discussed below.

13.4.1 Disallowances

When a federal agency determines that an institution has claimed “unallowable costs” under an award, a “disallowance” of those costs ordinarily is made. Depending on whether the institution has already drawn down funds to pay those costs, the agency will demand that the institution not charge any award for those costs or will direct a repayment of funds already received and expended.

It is important to understand that agency officials who make disallowance determinations are not restricted by an audit report’s findings. For example, agency officials may conclude that certain costs should be disallowed even though the audit report indicates otherwise. Similarly, where an audit report questions only the amount determined in that sample, an agency official is free to disallow a larger amount by projecting the sample.

In this connection, HHS’s Grants Policy Directive System (at Chapter 1-105-60 C) states that HHS officials with final decision making authority on audits must have a clear understanding of, among other items, the auditor’s findings. The auditor is responsible for developing estimates of unallowable costs. This chapter directs officials to obtain whatever additional information is necessary to reach an informed conclusion on the amount of the disallowances, including direct contact with the auditors to obtain estimates of the full amount of unallowable costs in the event samples or similar techniques were used, and the report does not contain an estimate of the total amount at issue. In any event, it must be stressed that colleges and universities that concede the correctness of an adverse finding to their auditor or to reviewing officials may find themselves with a cost disallowance that is significantly larger than the amount identified in the audit report. Note that the institution may challenge the use of an estimate or the auditor’s procedures to develop the estimate and may perform an alternative analysis to develop more precise results.

13.4.2 Special Award Conditions

Based on a determination that an institution is not performing satisfactorily under its federal funding agreements or is not financially stable, or that the institution’s management systems are not satisfactory, a federal agency may impose additional terms and conditions on the award. These terms and conditions often require the institution to increase accountability, for example, by demanding additional financial/programmatic reports, requiring the institution to obtain technical assistance, paying on a reimbursement (instead of an advance payment) basis, and denying special, supplementary, or additional funding. Agency authority and the standards for imposing special grant conditions are set forth in OMB Circular A-110, §215.14. While Circular A-110 requires an agency to advise a recipient of the method for requesting reconsideration of the special conditions, if available, there ordinarily is no appeals mechanism available for an agency’s imposition of special conditions. Further, the imposition of special conditions may well result in the recipient being labeled “high risk”.

13.4.3 Suspensions and Terminations

Many federal agencies have mechanisms for terminating a contract or grant, during a funding period, for materially failing to comply with the terms of that agreement. There also may be provision for suspending payments under an agreement pending corrective action or until a termination takes place.

Pursuant to OMB Circular A-110, §215.61, under grants and cooperative agreements, termination for “convenience” of federal awards requires the recipient’s approval. The government or a primary recipient may terminate unilaterally only “for cause” and then only “if a recipient materially fails to comply with the terms and conditions of an award.” Most agencies provide for a hearing before termination of a grant or cooperative agreement.

13.4.4 Debarment and Suspension

“Debarment” of federal funding refers to an institution’s exclusion (for a specific period of time) from eligibility for any federal funding, including grants, contracts, or cooperative agreements, or any subarrangements under those funding mechanisms.

“Suspension” in this context is a preliminary step that may be taken if there are grounds for debarment. A suspension may be imposed only for a temporary period, typically the time needed to obtain a debarment.

Government-wide regulations adopted by individual agencies were first issued in 1988, were reissued in November 2003 (68 Fed. Reg. 66534, Nov. 26, 2003), and now have been relocated to 2 CFR Part 180. There are no individual agency regulations governing contract debarment; the Federal Acquisition Regulations (at 48 CFR Subpart 9.4) contain the government-wide requirements. The list of offenses under both sets of debarment regulations that can trigger a debarment includes, but is not limited to, the following:

- A willful failure to perform in accordance with the terms of one or more public agreements or a history of failure to perform or of unsatisfactory performance
- A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction
- Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program
- Knowingly doing business with a debarred, suspended, or ineligible person, except as permitted under the regulations
- Conviction of or a civil judgment for a variety of offenses including fraud, antitrust, price fixing, bid rigging, making false statements, emission of embezzlement, theft, forgery, bribery, falsification or destruction of records, tax evasion, or any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibilities of a person to be entrusted with federal funds
- A non-procurement debarment by any federal agency taken before October 1, 1988, or a procurement debarment taken before August 25, 1995
- Failure to pay a single substantial debt to the federal government (including disallowed costs and overpayments) (except for tax liabilities) after the debtor’s legal and administrative remedies have been exhausted
- Any other cause so serious or compelling that it affects the present responsibility of a person to be entrusted with federal funding

It is important to note that under Circular A-133 federal cognizant agencies for audit and oversight agencies for audit may recommend sanctions for failure to conduct a proper audit under the enforcement provisions of Circular A-110 (see §215.62 of A-110). These sanctions may include withholding a

percentage of assistance payments, suspending the federal assistance award, and withholding further awards for the project or program. The suspension or debarment would have to be accomplished under the standards and procedures for debarments and suspensions.

13.5 APPEALS OF FINAL MANAGEMENT DECISIONS

The information below addresses the administrative appeals mechanisms that exist for cost disallowances and other sanctions likely to flow from a management decision on a Circular A-133 audit report. It includes a discussion regarding jurisdiction over disallowance appeals and a listing and description of individual agency appeals mechanisms, along with a suggestion for creating such a mechanism when none exists.

13.5.1 Jurisdiction Over Disallowance Appeals

Because under A-133 the federal awarding agency has the responsibility for issuing a management decision to an institution on audit findings concerning its awards, any appeal of a management decision, including cost disallowances, must begin with the awarding agency. Circular A-133 specifically provides that the management decision should describe any agency appeal process available to the auditee (see §___405). While A-133 provides that the cognizant or oversight agency for audit “coordinates” a management decision for audit findings that affect the federal programs of more than one agency, it does not have authority to bind an individual awarding agency.

However, a question of jurisdiction for purposes of audit dispute resolution is raised by the Contract Disputes Act (see 13.9.1), under which procurement contract disputes must be decided in accordance with that act’s procedures and requirements. Upon receipt of the contracting officer’s decision, the Contract Disputes Act gives the college or university a choice as to where to appeal a contract issue: either the agency’s designated board of contract appeals, or the U.S. Court of Federal Claims.

As long as the cost disallowance is made under a procurement contract, it is clear that the Contract Disputes Act controls the appeal. However, when the disallowance arises under both procurement contracts and grants (e.g., with respect to an institution’s federally approved indirect cost rate), a jurisdictional conflict arises.

Because the appeals mechanisms for grants (see the agency listing beginning at 13.6) is completely different from the appeals route prescribed under the Contract Disputes Act, it is unclear as to which appeals mechanism is appropriate or whether the disallowed costs must be apportioned between an institution’s grants and contracts and separately appealed.

Although answers to these questions are not clear, it appears that a college or university in such a situation has a choice. It may appeal through a grants or contracts mechanism (and argue that the appeals body or court has “ancillary jurisdiction” over the non-contract or grant portion of the disallowance (i.e., the awards for which the appeals body ordinarily has no jurisdiction).) Similarly, it may file appeals under both grants and contracts mechanisms and hope for the best, although it is possible that the agency will try to get the entire issue heard in a single forum.

There are certain distinct advantages and disadvantages to the appeals mechanisms available under procurement contracts and grants. Generally speaking, the contract appeals route — whether before a board of contract appeals or the Court of Federal Claims — is far more advantageous procedurally. However, the costs of appeals are generally not allowable costs under OMB Circular A-21 for

contract appeals but usually are allowable for grant appeals. Thus, the decision regarding whether and how to appeal also should involve an evaluation of the likelihood of a favorable outcome versus the cost of legal and other fees.

Of all the agencies that issue grants and cooperative agreements and have disputes mechanisms, only the Department of Education's Office of Administrative Law Judges (see 13.6.4) and perhaps the Department of Labor (see 13.6.3) have administrative appeals that provide comparable procedural protections to a board of contract appeals.

Accordingly, institutions are generally more procedurally protected before a board of contract appeals than before a grants appeals body.

It also is important to understand that an appeal from a grants appeals mechanism may go either to the Court of Federal Claims or a federal district court, while appeals under the procurement contract route go either to the Court of Federal Claims (which is appealed to directly from a final decision) or a federal circuit court of appeals, which hears appeals from board of contract appeals decisions.

There are many reasons why an institution would prefer to appeal to one federal court over another. They include court precedent and the fact that district court judges sit locally while Court of Federal Claims judges do not. An institution's legal counsel should be knowledgeable on these issues.

Finally, as surprising as it may seem, even though OMB Circular A-21 contains the cost allowability standards applicable to educational institutions regardless of the type of award those institutions receive (i.e., grants or procurement contracts), at a minimum, the HHS Departmental Appeals Board has indicated that its interpretations of A-21 need not follow those of the Court of Federal Claims or Boards of Contract Appeals made under a procurement contract. Under Joint Consideration Legal Fees, Decision No. 349 (p. 12), the board stated that:

We do not find the rationale articulated by the Court of Claims necessarily appropriate outside the procurement context

In a subsequent decision, *Humanics Associates*, Decision No. 860 (p. 11), the board made it very clear that it was not bound by interpretations of A-21 arising in a procurement context:

We are not bound by Board of Contracts Appeals decisions, even though they decide issues concerning contract provisions containing the same wording as grants provisions.

Again, when asked to advise on the best appeals route where the disallowance relates to both procurement contracts and grants, an institution's legal counsel will need to be knowledgeable about whether the decisions of the HHS appeals board or boards of contract appeals or the Court of Federal Claims are more or less favorable concerning the issues involved in the disallowance.

13.6 APPEALS BODIES AND MECHANISMS

The following is a listing of the grant, cooperative agreement and contract appeals mechanisms in the various federal agencies, including approaches that would produce such a mechanism where one is lacking or inadequate.

13.6.1 Civilian Board of Contract Appeals

As of January 2007, the Civilian Board of Contract Appeals (CBCA) hears and decides contract disputes between government contractors and all executive agencies except the Departments of Defense, Army, Navy, and Air Force; NASA; the United States Postal Service; the Postal Rate Commission; and the Tennessee Valley Authority. The CBCA was established under the National Defense Authorization Act of 2006. Statutory authority is in 41 USC 438; regulations are in 48 CFR Chapter 61, Part 6101.

13.6.2 Corporation for National and Community Service

- (1) **Disallowances.** No agency-wide procedure.
- (2) **Distinct Features.** The Corporation for National and Community Service is required by statute (42 USC §5052) to prescribe procedures to insure that (a) no assistance will be suspended, except in emergency situations for 30 days, and an application for refunding will not be denied unless the recipient has been given “reasonable notice and opportunity to show cause why such action should be taken”; and (b) assistance will not be terminated unless the recipient has been given “reasonable notice and opportunity for a full and fair hearing.” In response to this statutory mandate, The Corporation for National and Community Service has adopted regulations at 45 CFR Part 1206. Subpart A sets out the procedures applicable to suspension and termination actions for material failure to comply with the terms of any of The Corporation for National and Community Service’s domestic volunteer grant programs. Subpart B sets out the procedures for appealing denials of applications for refunding arising out of the same programs.

13.6.3 Department of Agriculture

- (1) **Grant and Cooperative Agreements Disallowances.** No agency-wide procedure.
- (2) **Contract Disallowances.** See 13.6.1, Civilian Board of Contract Appeals.
- (3) **Distinct Features.** The Food and Nutrition Service and the Farmers Home Administration (7 CFR part 1900, Subpart B) have established grant dispute procedures. The latter procedures apply only to denials of requests for grant assistance, reductions, cancellations, or non-renewals of grants. The agency also encourages mediation (7 CFR 1900.5).

13.6.4 Department of Commerce

- (1) **Grant and Cooperative Agreements Disallowances.** A Department of Commerce “policy statement” (54 Fed. Reg. 4053 et seq., Jan. 27, 1989) provides for an appeal of an “Audit Resolution Determination” through the provision of written documents to the department. A “Memorandum of Understanding” between the Commerce Department’s Inspector General and the Assistant Secretary for Administration in 1988 details the policy statement. The Commerce Department should place notice of the provisions of its Memorandum of Understanding in the terms and conditions of its financial assistance awards.
- (2) **Contract Disallowance.** See 13.6.1, Civilian Board of Contract Appeals.

13.6.5 Department of Education

- (1) **Grant and Cooperative Agreement Disallowances.** 34 CFR Part 81, except for programs authorized by the Higher Education Act of 1965, as amended, the Act of September 30, 1950, as amended, and the Act of September 23, 1950.
- (2) **Contract Disallowances.** See 13.6.1, Civilian Board of Contract Appeals.
- (3) **Distinct Features.** The regulations governing appeals do not use the word “disallowance.” Rather, they use the terms “recovery of funds” and “withholding.” Until recently, appeals were heard by the Education Appeals Board. Appeals are now heard by the Office of Administrative Law Judges, which affords greater due process protections than the board did (see 34 CFR Part 81). Recipients need not repay funds when unallowable costs were incurred more than five years before the recipient received an initial notice.

The decision of the administrative law judge (ALJ) is not the final agency decision because an institution may appeal an ALJ decision to the Secretary of Education. Appeal of the secretary’s decision is taken to the U.S. Court of Appeals for the circuit in which the institution is located.

The Office of Administrative Law Judges does not have jurisdiction over the termination/suspension of grants. 34 CFR §74.114 and §74.115 provide that before the department suspends or terminates a grant, it will provide notice to the college or university.

13.6.6 Department of Energy

- (1) **Grant and Cooperative Agreement Disallowances.** 10 CFR §600.22.
- (2) **Contract Disallowances.** See 13.6.1, Civilian Board of Contract Appeals.
- (3) **Distinct Features.** The regulations governing grant and cooperative agreement disputes require the agency to attempt to resolve the dispute at the lowest possible level.

If informal resolution is not achieved, the “Contracting Officer” must issue a final written determination, and that determination may be appealed to the cognizant Senior Procurement Executive (SPE) for either DOE or the National Nuclear Security Administration if it is one of the following types of disputes:

- Any type of dispute for which a right of appeal is established by program rule or an award
- A determination that the recipient has failed to comply with the requirements of 10 CFR Part 600
- A finding that the recipient has failed to comply with the program statute or rules or terms and conditions of an award
- A decision not to make a continuation award based on recipient failure to comply with 10 CFR Part 600, the statute, rules, or terms and conditions of an award
- A termination of an award for cause, in whole or in part
- A determination that an award is void or invalid
- The application of an indirect cost rate
- A disallowance of costs

The SPE does not have jurisdiction to review the following circumstances:

- A pre-award dispute (except for decision not to make a continuation award) including use of any special restrictive condition
- A denial of a request for a deviation
- A denial of a request for a budget revision or other change in the approved project
- A suspension, a denial of a renewal application, or a request for extension of time or additional funding for the same project when related to recipient noncompliance
- A denial of a request for prior approval

13.6.7 Environmental Protection Agency

- (1) **Grant and Cooperative Agreement Disallowances.** 40 CFR §30.63, §31.70.
- (2) **Contract Disallowances.** See 13.6.1, Civilian Board of Contract Appeals.
- (3) **Distinct Features.** The current regulations in 40 CFR §30.63 require disagreements to be resolved “at the “lowest possible level.” If a resolution cannot be reached, the first step is a written decision from the EPA “disputes decision official,” the person designated by the award official to resolve disputes. Review of the decision may be requested from either the assistant administrator responsible for the program (if the disputes decision official is at headquarters) or the regional administrator (if the disputes decision official is at the regional level). At this level, there must be an “informal conference.” A decision by the assistant administrator is the final agency decision. A decision by the regional administrator may be reviewed by the assistant administrator for the program if a petition for such review is filed within 30 calendar days of the regional administrator’s decision. That decision is then the final agency decision. This process does not apply to disapprovals of deviations, bid protest decisions, certain National Environmental Policy Act decisions, wastewater treatment decisions of the administrator, and policy decisions of the EPA Audit Resolution Board.

13.6.8 Department of Health and Human Services

- (1) **Grant and Cooperative Agreement Disallowances.** 45 CFR Part 16. (See also 42 CFR Part 50, Subpart D for an informal Public Health Service grant appeals process.)
- (2) **Contract Disallowances.** See 13.6.1, Civilian Board of Contract Appeals.
- (3) **Distinct Features.** The members of the HHS Departmental Appeals Board are attorney-employees of the department, not administrative law judges. Board members do not have powers to compel discovery or issue subpoenas. The regulations, however, provide for in-person hearings if the board finds there are complex or material issues in dispute.

An appeal must be filed with the board within 30 days of receiving the decision.

In addition to disallowance disputes, the board has jurisdiction to hear appeals of the following types of disputes arising in any HHS program authorizing the award of direct, discretionary project grants, or cooperative agreements:

- Other determinations denying payment of an amount claimed under an award
- A termination for failure to comply with the terms of an award

- A denial of a non-competing continuation award under the project period system of funding where the denial is for failure to comply with the terms of a previous award
- A voiding (a decision that an award is invalid because it was not authorized by statute or regulation or because it was fraudulently obtained)
- A decision related to a cost allocation plan
- A dispute involving an indirect cost rate, fringe benefit rate, computer rate, research patient care rate, or other special rate

The board does not have jurisdiction over any of the following:

- A determination of award amount
- A disposition of unobligated balances
- A selection in the award document of an option for disposition of program-related income
- A decision if a hearing under the Administrative Procedure Act is required by statute
- A decision that there has been a violation of applicable civil rights or nondiscrimination laws or regulations
- A decision where some other hearing process is established pursuant to statute

The board is among the most senior of grant and cooperative agreement appeals bodies in the federal government. As such, its decisions are more numerous than those of other grants appeals mechanisms. As described at 13.5.1, the board does not necessarily follow the same interpretation of OMB Circular A-21 as Board of Contract Appeals or the Claims Court.

Before taking an appeal to the board, institutions with disputes over indirect costs or with regard to grants made by the Public Health Service (including the National Institutes of Health) must engage in a preliminary appeal process. Part 50, Subpart D of 42 CFR sets forth an informal PHS grant appeals process that applies to all grant and cooperative agreement programs (except block grants) administered by PHS. The types of disputes heard by the informal PHS process are identical to the jurisdiction of the HHS appeals board, except for indirect cost-type disputes. Part 50 provides for a review committee made up of PHS employees, and no member of a committee reviewing any given appeal may be from the office of the responsible official whose adverse determination is being appealed. The committee has discretion to ask the institution to discuss the issues orally. Its decision may be appealed to the Departmental Appeals Board.

13.6.9 Department of Housing and Urban Development

- (1) **Grant and Cooperative Agreement Disallowances.** No agency-wide procedure.
- (2) **Contract Disallowances.** See 13.6.1, Civilian Board of Contract Appeals.

13.6.10 Department of the Interior

- (1) **Grant and Cooperative Agreement Disallowances.** 43 CFR Part 4.
- (2) **Contract Disallowances.** See 13.6.1, Civilian Board of Contract Appeals.
- (3) **Distinct Features.** If the Interior regulations governing a particular program provide for a right of appeal, under Subpart G, of 43 CFR Part 4, an institution aggrieved by an adjudicatory action or decision of a departmental official has a right to appeal to the Office of Hearing

and Appeals. Either the director of that office, or an ad hoc appeals board appointed by the director, will permit briefing and may direct a hearing and oral argument.

13.6.11 Department of Justice

- (1) **Grant and Cooperative Agreement Disallowances.** No agency-wide procedure.
- (2) **Contract Disallowances.** See 13.6.1, Civilian Board of Contract Appeals.
- (3) **Distinct Features.** DOJ has an appeals procedure — found at 28 CFR Part 18 — for proposed terminations and suspensions, in whole or in part, of grant funding. A grantee can request a review of the action of the “responsible agency official” and a hearing. The hearing is conducted by an administrative law judge or other department employee who would be vested with powers similar to an administrative law judge’s. The hearing officer submits findings of facts and conclusions of law to the responsible agency official who makes the final agency decision, after giving the parties an opportunity to comment on the hearing officer’s findings and recommendations.

13.6.12 National Endowments for the Arts and the Humanities

- (1) **Grant and Cooperative Agreement Disallowances.** No agency-wide procedure.
- (2) **Contract Disallowances.** None.
- (3) **Distinct Features.** The enabling statutes of both endowments provide that “after reasonable notice and opportunity for hearing,” if the chairperson finds that an institution is not complying substantially with the provisions of the statute, or an institution has diverted funds from the purposes for which they were allotted or paid, the chairperson may decide not to make any further grants until there is no longer a failure to comply or the diversion has been corrected, or if compliance or correction is impossible, until the group repays or arranges the repayment of the federal funds which were diverted or expended. (20 USC §954(h), 20 USC §956(f)(7))

In 1983, the National Endowment for the Arts published a policy for the review of declinations of grant applications (48 Fed. Reg. 13118 (March 29, 1983)). There is no provision for a formal hearing, but it provides for several levels of reconsideration.

13.6.13 National Science Foundation

- (1) **Grant and Cooperative Agreement Disallowances.** Informal procedure.
- (2) **Contract Disallowances.** None.
- (3) **Distinct Features.** In Chapter VII of its Award & Administration Guide, NSF outlines an informal procedure to resolve post-award disputes. The process may be used for cost disallowances, termination orders, and the final settlement amount under a termination. A letter identifying the grantee’s dispute must be filed within 30 days of the decision. Content of the letter and the process that follows are set out in the section. The Award & Administration Guide also describes procedures for handling reviews of suspension and termination orders. The review of a termination order involves a termination review committee that may hold an informal conference with the parties. The NSF Grant Proposal Guide also outlines a procedure

for handling requests for reconsideration of rejected proposals (Ch. IV. D). It involves several layers of reconsideration by foundation officials, but no formal briefing and hearing opportunities.

13.6.14 Department of Labor

- (1) **Grant and Cooperative Agreement Disallowances.** 29 CFR Part 96, Subparts E and F and 29 CFR Part 18.
- (2) **Contract Disallowances.** See 13.6.1, Civilian Board of Contract Appeals.
- (3) **Distinct Features.** Subpart E of Part 96 of 29 CFR sets forth procedures for the resolution of audit findings prior to final determination.

Subpart F provides for two appeal routes for appeal of a final determination, which are to be chosen at the discretion of the DOL grantor agency. However, the regulation states that all grants within the same grant program shall follow the same appeal route.

One route is an appeal within 21 days of receipt of the final determination to the head of the grantor agency or his/her designee. With regard to the process afforded, the regulations merely state that the grantor agency will establish procedures for the conduct of "hearings." The decision coming out of the "hearing" is the final action of the department.

A second route is an appeal to the DOL Office of Administrative Law Judges. The request must be filed within 21 days of receipt of the final determination. Such an appeal is governed by the procedures set forth in 29 CFR Part 18 and provides for a full due process hearing before an administrative law judge. There is also an opportunity to file an appeal of that decision with the Administrative Review Board.

13.6.15 Department of Transportation

- (1) **Grant and Cooperative Agreement Disallowances.** No agency-wide procedure.
- (2) **Contract Disallowances.** See 13.6.1, Civilian Board of Contract Appeals.

13.6.16 Department of Defense

- (1) **Grant and Cooperative Agreement Disallowances.** No agency-wide procedure.
- (2) **Contract Disallowances.** 48 CFR Part 217, Appendix A (Armed Services Board of Contract Appeals).

13.7 OBTAINING DUE PROCESS IN GRANT DISPUTES WHERE NO APPEALS MECHANISM EXISTS

In the event no dispute resolution mechanism is available, or the resolution procedure that is available fails to provide adequate protection, institutions should note a report prepared for the Administrative Conference of the United States concerning federal grant dispute resolutions, which is reprinted in Stein, Mitchell, Mezines, *Administrative Law* (Matthew Bender & Co.), 53.05.

This report discusses the constitutional due process required to be afforded recipients of grants and cooperative agreements and suggests legal arguments for obtaining such due process. As the re-

port indicates, for legal purposes, a grant or cooperative agreement is a binding contract and any cost disallowance or other adverse action against the grantee or cooperative agreement recipient affects a “property interest,” which is protected by the Fifth Amendment of the Constitution.

Although the case law seems outdated and less than clear, state and local governments (and, arguably, public colleges and universities) appear not to be entitled to Fifth Amendment protections.

Under cases involving Fifth Amendment protections, it is at least arguable that before a grant or cost disallowance may be finally taken by a federal agency, or a grant may be terminated, an institution is entitled to a full due process hearing. This hearing should have an independent official presiding, not merely a review procedure before agency officials, or a hearing conducted by a board or other persons who are neither independent nor have the ability to compel depositions, subpoena witnesses, or take other actions necessary to assure the recipient of the same broad range of protections to which contractors are entitled before boards of contract appeals. The report also notes cases decided under the federal Administrative Procedure Act that would argue for the same result.

13.8 OTHER APPEALS

An institution may appeal certain other decisions that may arise under Circular A-133. These include

- (1) subrecipient issues, and
- (2) problems with an institution’s auditor.

The appeal opportunities regarding each are described below.

13.8.1 Subrecipient Appeals

Circular A-133 places the responsibility on the recipient of a federal award to ensure that any subrecipients expending more than \$500,000 in federal awards during the subrecipient’s fiscal year have met the audit requirements of the circular. If the audit discloses problems particular to one program, the federal awarding agency responsible for that program will be responsible for making a management decision based on the audit. Responsibility for any disallowed costs then will rest clearly with the primary recipient. Further, the prime recipient must issue a management decision on any audit findings within six months after receipt of a subrecipient’s audit report and ensure that the subrecipient takes appropriate and timely corrective action. According to §___405(d) of the circular, corrective action should be initiated within six months of the recipient’s receipt of the audit report and “proceed as rapidly as possible.” In short, the recipient stands in the shoes of the federal government with respect to identifying noncompliance with federal laws and regulations on the part of its subrecipients and for ensuring that corrective action is taken. The circular also requires recipients to consider whether the subrecipient’s audit necessitates adjustment to the recipient’s own records.

However, neither Circular A-133 nor any other published requirement addresses the consequences if the subrecipient disagrees with audit findings or proposes corrective action that the recipient believes to be inappropriate.

Finding an effective way to resolve disputes over a proposed disallowance under a subaward is important. One of the standard suggestions is to include an arbitration provision in the subrecipient agreement, which would govern circumstances where a subrecipient contests a disallowance by the recipient. The problem with this suggestion is that an arbitrator may decide one way and the federal

awarding agency may decide another. For example, an arbitrator could decide that a cost is allowable, and the agency could decide it is not. Such an outcome would place the primary recipient in a no-win situation where it would be responsible to the federal agency for the cost, yet have no recourse against the subrecipient.

A more prudent alternative would be to give a subrecipient two choices: either pay any disallowed costs or mount a defense. Agency appeals procedures generally prevent a subrecipient from bringing an appeal directly because it is not the primary recipient of federal funds. But the primary recipient could agree to appeal the disallowance as long as the subrecipient paid any attorneys' fees and related costs. To the extent the subrecipient did not want to pursue the appeal or did not want to pay for one, the subrecipient would owe the primary recipient the money to cover the disallowance.

There also could be variations on this theme. For example, the primary recipient might agree to pursue the disallowance during the audit resolution process, but any appeals before an appeals board or court would be paid for by the subrecipient. Another option is arbitration with the proviso that, if the federal agency disagrees at any point, the agency's decision would be binding. The point here is to devise an approach that protects the prime recipient from being placed in the middle.

While there is no perfect solution in this area, the best one appears to be putting a condition in the subrecipient award that specifically sets out the subrecipient's obligations and responsibilities in the event of a cost disallowance, and that gives the recipient the right to terminate the award if the subrecipient does not comply. In that case, the subrecipient would either provide a satisfactory plan to address the disallowance or have any outstanding subaward with the primary recipient terminated for cause.

13.8.2 Disputes Over Auditor Matters

Disputes with auditors fall into two categories:

- Potential disputes between the college or university and its auditor
- Disputes between an auditor and a federal agency

(1) Disputes Between Institution and Auditor

Disputes between an institution and its auditor will largely be confined to questions concerning the auditor's compliance with the terms of its agreement with the institution, especially concerning issues that arise if the audit is deficient. Typically, federal agencies have categorized deficient audits as requiring

- minor modification;
- major modifications; or
- containing significant deficiencies.

Auditors are given the opportunity to make the appropriate corrections. If the audit is not corrected, it will be rejected in its entirety and, as a result, cannot be relied on by the federal government. Accordingly, there should be agreement between the institution and its auditor as part of the engagement agreement (8.12.8) as to the responsibility for costs associated with correcting a deficient audit. If there is none, institutions and auditors should anticipate problems in the event an agency asks for additional work or, even more problematically, eventually rejects the audit report.

In addition, the engagement letter should contain a mechanism for an institution and its auditor to jointly dispute the federal agency in the event that a report is rejected improperly.

Because Circular A-133 prohibits charging the costs of an unacceptable audit to federal awards, and because cost disallowances generally are appealable, institutions simply may want to charge the costs of a rejected audit to their awards, receive a disallowance, and mount a challenge on appeal, at which time they will be able to present evidence as to why the audit was properly performed.

(2) Disputes Between Auditor and Federal Agency

A closely related question arises when sanctions are ordered by a federal agency against an audit firm. Circular A-133 provides that the agency not only has the responsibility to advise the auditor of deficiencies in the audit that require corrective action, but also is required to refer auditors to the appropriate state licensing agencies and professional bodies for disciplinary action in the event of “major inadequacies or repetitive substandard performance.” To assist inspectors general in determining what constitutes a referable action by an independent auditor and what action should be taken as a result, the then President’s Council on Integrity and Efficiency (PCIE) issued Position Statement No. 4.

Under PCIE’s Position Statement No. 4, the cognizant agency inspector general may refer an independent auditor to the appropriate licensing authority for disciplinary action when the underlying audit is so “pervasively deficient” that it is unreliable.

Examples of inadequacies serious enough to warrant referral include the following:

- The auditor is unqualified (i.e., not properly licensed or not independent).
- The working papers are so deficient that the auditor’s work on the study of internal controls or the testing of compliance requirements cannot be assessed, and the deficiency is pervasive.
- A major component of the report is missing, such as the financial statement(s), opinion, report on compliance, required supplemental schedule, and so forth.
- The auditor fails to correct substandard work on a timely basis.
- The auditor fails to review compliance with requirements.
- The auditor fails to perform an appropriate evaluation of internal controls.
- The auditor commits a gross departure from Generally Accepted Government Accounting Standards, which undermines the credibility of the audit.

Once the cognizant agency inspector general has concluded that a referable action has occurred, the PCIE’s Federal Cognizant Agency Audit Organization Guidelines provide that the Office of Inspector General should coordinate its conclusions with the experiences of other federal agencies funding the recipient to achieve a consensus among the agencies about the inadequacy of the work. When the agencies agree that significant inadequacies exist, the cognizant agency inspector general must communicate this both to the recipient of federal funds and to the auditor.

The communication with the recipient and the auditor must be in writing and must state the reasons why the work was deemed inadequate (e.g., the audit standards violated, including the criteria used to evaluate the deficiencies). In addition, the inspector general must also state the following:

- The impact of the inadequacies on the program
- Recommendations for resolving the inadequacies

- Time frames for accomplishing corrective actions
- Possible sanctions if no corrective action is taken

The auditor then has the opportunity to respond to the correspondence and to provide adequate justification for the apparent deficiencies or to take corrective action. If the auditor does not respond, this fact is noted in the referral. If the auditor does respond, the inspector general may reply to the response.

If corrective action is not taken, the cognizant agency inspector general may decide to refer the matter to the appropriate state licensing board and the AICPA, if the auditor is a member. The PCIE has developed a Uniform Inspector General Referral Package, which includes a cover letter explaining the referral and certain enclosures. The cover letter states the nature of the complaint and the standards violated and whether similar letters of referral have been sent to other licensing boards. It also gives a commitment that the inspector general's work papers are available for the board's review and inspector general personnel are available to testify. Finally, the letter requests that the inspector general be notified of any decision by the state board. The letter also should be sent to the auditor. In addition to the letter, the inspector general must provide the following four enclosures:

- (1) The auditor's report
- (2) A copy of the correspondence that was sent to the auditor by the inspector general
- (3) A copy of any response by the auditor
- (4) A copy of the inspector general's reply

Once a referral has been made, the state board of accountancy must determine what action, if any, should be taken against the auditor. Hearings before the board typically afford the auditor basic due process rights, such as the right to notice and the opportunity to be heard and confront one's accusers. Sanctions include a requirement for continuing professional education, peer review, or even revocation or suspension of the license to practice. Certain practices also may be criminally punishable as misdemeanors.

As a consequence of deficient audits, auditors also are subject to federal agency suspension and debarment. The same suspension and debarment proceedings discussed in 13.4.4 are equally applicable to auditors. Obviously, an auditor facing any of these sanctions, either before the state board of accountancy or over a suspension or debarment from federal funds, is in serious trouble. Auditors should react with extreme concern to any indication that an agency inspector general may be in the process of seeking sanctions.

Colleges and universities should be concerned if they find that their auditor has been threatened with sanctions. Apart from joining with the auditor to contest a proposed sanction, there seems to be little the institution can do to protect itself once this situation arises, other than enforcing a contractual understanding that the auditor must meet A-133 standards. The problems such a situation can cause for an institution argue strongly for colleges and universities to take seriously the suggestions in Chapter 8 concerning the procurement and engagement of their auditors. At a minimum, an institution should make sure its auditor has had no negative history with regard to A-133 auditing.

13.9 LEGAL REFERENCES

There are a number of potentially useful legal references in regard to the kinds of disputes or problems that can arise during or after an A-133 audit. Several refer to "claims" against the government

(i.e., where an institution is presented an invoice or other request for funds under a grant, cooperative agreement, or contract indicating that the recipient has properly incurred costs and is entitled to reimbursement under its award). These important legal references are summarized below.

13.9.1 Federal Statutes

Assignment of Claims Act (31 USC §3727 and 41 USC §15). A contractor may assign to a bank, trust company, or other financial institution money that is due from the federal government for payments of at least \$1,000. Amounts due or about to become due under a grant can also be assigned under this act.

Conspiracy to Defraud the Government with Respect to Claims (18 USC §286). Any person who enters into “any agreement, combination or conspiracy to defraud the United States or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim,” is subject to a \$10,000 fine and imprisonment for up to ten years.

Contract Disputes Act (41 USC §601 et seq.). This act sets out the process that must be used by all federal agencies to resolve contract disputes, both with regard to claims against the contractor and claims against the federal government.

Debt Collection Act (31 USC §3711 et seq.). This act provides the authority for the federal government to collect debts. The implementing regulations can be found at 4 CFR Part 101 et seq. Under §3716, agencies may “offset” against current amounts owed for up to ten years after a claim against the institution is established.

Dispute Resolution Act, 31 USC §3711(a). Authorizes agencies to negotiate and settle with regard to collections of monies owed to the U.S.

False, Fictitious, and Fraudulent Claims (18 USC §287). Any person who knowingly makes or presents a false, fictitious or fraudulent claim against the federal government is subject to fines and imprisonment.

False Claims Act (31 USC §3729 et seq.). An institution that makes or causes to make a “false or fraudulent claim” against the federal government is subject to a fine of not less than \$5,000 and not more than \$10,000, plus up to three times the amount of damages that the federal government sustains. This act applies to any request or demand for money from the federal government under a grant, contract or cooperative agreement. The act also provides for private persons acting on behalf of the federal government to institute a civil action in federal court against an institution for false claims.

False Statements Act (18 USC §1001). Any person who knowingly and willfully (1) falsifies, conceals, or covers up a material fact; (2) makes a false, fictitious, or fraudulent statement; or (3) makes or uses a false writing or document in a matter within the jurisdiction of a federal department or agency shall be fined not more than \$10,000 or imprisoned not more than five years or both.

Fraud Enforcement and Recovery Act (FERA) (31 USC 3729(a)). Amends and broadens the reach of the False Claims Act.

Improper Payments Information Act of 2002 (Pub. L. No. 107-300). Requires federal agencies to estimate and report improper payments annually.

Improper Payments Elimination and Recovery Act of 2010 (Pub. L. No. 111-204). Amends Pub. L. No. 107-300 to require agency heads to identify programs at risk of significant improper payments every three years and report on actions to reduce and recover improper payments.

Indirect Costs (41 USC §254a). Predetermined, fixed-percentage rates may be used to reimburse indirect costs to colleges, universities, and other educational institutions that have research and development contracts and grants with the federal government.

Major Fraud Act (18 USC §1031). Any person who executes a scheme to defraud the United States or obtain money or property by means of false or fraudulent pretenses, representations, or promises in a procurement contract in excess of \$1 million is subject to a fine of not more than \$1 million (with certain exceptions for which the fine may be larger) and imprisonment of not more than ten years. The statute also contains protections for “whistle blowers.” This act can be triggered by findings in areas (e.g., indirect costs) that cut across an institution’s federal awards, as long as the institution has at least one \$1 million award.

General Accounting Act of 1996 (31 USC §3702). This act amended the Debt Collection Act to give the Office of Management and Budget authority to settle most claims against the United States that do not involve military or civilian personnel. The official responsible for settling a claim is required to report to the Congress on claims against the federal government that the official believes Congress should consider for legal or equitable reasons even though the claim is technically disallowable.

Program Fraud Civil Remedies Act (31 USC Chapter 38). Similar to the False Claims Act, this act provides for civil penalties for “small” (under \$150,000) false claims or statements. The bases of a statutory violation are very similar to those under the False Claims Act, with statutory penalties of up to \$5,000.

Statute of Limitations (28 USC §2415 and §2516). A civil action for “money damages” can be filed by the U.S. in court based on “any contract, express or implied in law or fact” within six years after the action first accrues, or one year after a final decision of an administrative body required by contract or law, whichever is later. If the government wants to file a claim to recover illegally diverted grant funds, presumably including costs improperly claimed where funds already are drawn down and spent, such a suit must be brought within six years. Note, however, the government’s right of offset under the Federal Claims Collection Act (see above).

Using Procurement Contracts and Grant and Cooperative Agreements (31 USC Chapter 63). These provisions prescribe the criteria that federal agencies are to use when deciding whether to select a grant, contract, or cooperative agreement as the legal instrument for entering into a relationship with a recipient of federal funds.

13.9.2 Court Decisions

Accardi v. Shaughnessy, 347 U.S. 260 (1954): A federal agency must comply with its own statute and regulations.

Action, Inc. v. Donovan, 789 F.2d 1453 (10th Cir. 1986): Where there is authority for a federal agency to exercise discretion to waive a disallowance, the agency must respond to a request to exercise that discretion, and it must do so setting forth its reasons for exercising or not exercising discretion. This does not mean that the agency must grant the waiver request. But the case does stand for the proposition that an agency cannot ignore such a request or deny a request without giving any reason.

Bennett v. Kentucky Dept. of Educ., 470 U.S. 656 (1985): Absence of bad faith does not absolve a grantee from liability if funds were in fact spent contrary to the terms of a grant agreement. In the absence of ambiguity with respect to a grant condition, the federal government may recover misused federal funds.

Bennett v. New Jersey, 470 U.S. 632 (1985): Changes in substantive requirements for federal grants generally should not be applied retroactively. Obligations under the grant should be determined by reference to the law in effect when the grants were made. Reiterates *Pennhurst* (see below) holding that grants are “much in the nature of contracts.”

Bowen v. Massachusetts, 487 U.S. 879 (1988): Federal district courts have jurisdiction to hear appeals from disallowance decisions upheld by the HHS Departmental Appeals Board.

City of Wheeling, W. Va. v. U.S., 20 Cl. Ct. 659 (1990), *aff'd* 928 F.2d 410 (Fed. Cir. 1991): Claims Court has jurisdiction to hear appeals of disallowances, in light of *Bowen v. Massachusetts*.

Christensen v. Harris County, 120 S. Ct. 1655 (2000): Agency policy interpretations contained in opinion letters, policy statements, agency manuals, enforcement guidelines, and the like, which are not published in agency regulations, lack the force of law. Although courts may give them some weight insofar as they are persuasive, they are not entitled to judicial deference as are agency regulations that have gone through a rulemaking (notice and comment) procedure.

Gonzales v. Freeman, 334 F.2d 570 (D.C. Cir. 1964): If a grantee is being blacklisted by an agency (debarred) or otherwise denied the opportunity to apply for grants, there must be certain ingredients of due process given before the action is taken.

Heckler v. Community Health Services, 467 U.S. 51 (1984): The standards that an institution would have to meet if it wanted to make a claim of “equitable estoppel” against the government (i.e., it received and acted upon advice or approval from an agency official that turned out to be wrong) and would like its conduct excused in light of its reliance on the agency official. This case — as well as other estoppel cases — stands for the proposition that in order to successfully estop the government, four elements must be proved: (1) misrepresentation of fact by the government; (2) reasonable reliance on that misrepresentation; (3) detriment to the party seeking estoppel flowing from the misrepresentation; and (4) affirmative misconduct by the government.

New Jersey v. Hufstедler, 662 F.2d 208 (3rd Cir. 1981), *rev'd on other grounds*, 461 U.S. 773 (1983); \. The court held that the terms and conditions of a grant must be clear on its face. The Supreme Court, reversing the Third Circuit, found that the plain language of the statute in question allowed recovery of grant funds that were misspent or misapplied.

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981): Federal grants are “much in the nature of contracts.” If Congress intends to impose a condition on a grant, it must do so unambiguously.

Qonaar Corp. v. Metropolitan Atlanta Rapid Trans., 441 F. Supp. 1168 (N.D. Ga. 1977): OMB Circular A-102 was applicable to grants from a federal agency, even though that agency had not promulgated regulations to implement the circular. Note that this decision has not been cited by any other court, but is frequently referred to by OMB in various relationships.

Vietnam Veterans v. Secretary of the Navy, 843 F.2d 528 (D.C. Cir. 1988): Federal agencies must follow their own internal procedures.

