



Northwest Justice Project

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César E. Torres
Executive Director

December 8, 2015

VIA EMAIL

Ms. Stefanie K. Davis
Assistant General Counsel
Legal Services Corporation
3333 K Street NW
Washington, D.C. 20007

Re: NJP Comments on Part 1630/PAMM Rulemaking

Dear Ms. Davis:

The Northwest Justice Project (NJP) is the LSC grantee for Washington State. NJP appreciates the opportunity to comment on proposed changes to 45 CFR Part 1630 (Cost Standards and Procedures applicable to LSC grants) and the Property Acquisition and Management Manual (PAMM) set out in the Advanced Notice of Proposed Rulemaking at <http://federalregister.gov/a/2015-25735>.

NJP has reviewed the comments submitted by the National Legal Aid and Defender Association and generally agrees with those comments. In particular, NJP joins NLADA in commending LSC for seeking early input from the field and, because of the technical nature of the Cost Standards and PAMM, supports the request that LSC consider using workshops or negotiated rulemaking to ensure that the appropriate technical expertise from field program financial leaders and fiscal managers is received prior to formal rulemaking. NJP's Director of Finance, Steve Pelletier, is a leader among field program financial officers and would be happy to participate in such efforts.

NJP repeats below, only the questions on which it has specific comment at this time.

I. Impetus for Rulemaking

The stated purposes of the proposed rulemaking are: (1) to account for changes in federal grant policy; (2) to address ambiguities in existing provisions of Part 1630 and the PAMM; and, (3) to ensure clarity, efficiency and accountability in LSC's grant-making and oversight process. NJP shares these goals and emphasis on clarity, efficiency and accountability. That said, while NJP supports consolidating the rules and processes into one source, NJP disagrees with certain proposed changes as not serving these goals.

Major Areas of Revisions and LSC's Questions for Public Comment

A. Prior Approval Provisions in 1630 and the PAMM: Revising, Restructuring, and Consolidating the Provisions

LSC Question 3: Are there any potential concerns or problems that could arise from revising the rule to specify that recipients must seek prior approval of single acquisitions of multiple items whose aggregate value exceeds the prior approval threshold?

The current provision of 45 CFR 1630.5 now requires approval only for a single item of non-expendable personal property purchased with LSC funds that meets or exceeds the required threshold (currently \$10,000). The requirement is very clear, unambiguous and efficient. Requiring prior approval of each transaction in which costs of aggregate items purchased is \$10,000 or more would be highly burdensome and unrealistic; it does not take account of how personal property is purchased in contemporary business settings or for the needs of large statewide programs such as NJP's. This requirement would lead to a host of questions as to what actually is an aggregated purchase transaction. Is it one purchase order with one vendor? Is it one invoice for multiple purchase orders that happened to ship and be billed at the same time? Is it one purchase decision with multiple vendors on different purchase orders and multiple invoices? Is it multiple purchase orders and multiple invoices that add up to a payment that exceeds the threshold? Does this aggregation only apply to purchases of depreciable assets (items with a useful life of more than one year and a unit value of \$5,000 or more)? Does the threshold apply to the entire purchase or only the portion to be funded with LSC funds?

Bulk purchase of certain products, e.g. computers, office furniture, telephone systems, office supplies, etc. tend to allow for greater savings and bargaining power than multiple orders of the same product. Moreover, for a program such as NJP with 17 offices throughout the state, even small dollar amount supplies orders can add up and thus potentially require prior approval for the aggregated cost of purchasing individually small or relatively inexpensive items. In some cases anticipating the absolute total cost of a purchase of multiple items including applicable State sales taxes and shipping also might not be easy to determine in advance. We believe that this change would be highly burdensome for both LSC staff and recipient staff and would interject LSC into the day-to-day operations of the program as well as potentially delay the purchase of operations critical personal property due to an administratively cumbersome process.

The proposed change is also unnecessary to assure accountability given the recipient's need to maintain reasonable internal controls, purchasing policies and expenditure documentation. It also creates ambiguity if the requirement is applied to all aggregated purchases, including those that may be substantially supported by non-LSC funds.

LSC Question 4: Would the proposed approach generally be consistent with other funders' requirements for all purchases of nonexpendable personal property costing more than the prior approval threshold?

LSC's proposed approach would be generally *inconsistent* with other funders' requirements. None of the other of NJP's multiple funders requires a prior approval for specific purchases of nonexpendable personal property. They do require that grant budgets project what, if any, proposed budget amount is to be allocated to fixed assets and capital purchases, subject to audit and review as appropriate.

LSC Question 5: Should LSC raise the prior approval threshold? If yes, what amount should LSC set as the threshold?

NJP supports raising the approval threshold, even for single item purchases. The current amount of \$10,000 appears to have been in place since the mid 80's and does not account for inflation. Assuming that the \$10,000 threshold came to be with adoption of 45 CFR 1630 in 1986, it equates to \$21,700 in today's dollars considering inflation. In order to account for future inflation without having to repeatedly or annually amend the regulation, NJP supports a single item threshold of \$25,000.

B. Clarifying When LSC Provides Notice of its Intent to Disallow Costs

LSC Question 6: Are there any other changes LSC should consider when revising 1630.7(b)? How would the proposed approach affect recipients who are subject to a questioned cost proceeding?

NJP disagrees with the proposal to establish the look back time for recovering the amount of questioned costs from when it notifies the recipient of the "intent to disallow a cost" instead of the current five years from when the cost is actually disallowed. There is no time frame proposed as to how long LSC has to determine if the cost will in fact be disallowed, and ongoing uncertainty is not in the best interest of any recipient. Given that some records only need to be retained for five years, and if the disallowed cost is more than five years old, evidence that would support either the propriety of the cost or its disallowance may no longer exist. Moreover, limiting the time for look back recovery to five years from when the cost was disallowed incentivizes LSC to conduct adequate and timely reviews of recipient financial systems, audits, etc. and promotes accountability all around. Delay in either identifying a possible questioned cost and "determination of a basis for disallowing a questioned cost" serves no useful purpose and does nothing to increase efficiency or fiscal accountability.

C. Revising the PAMM's Requirements for Disposal of Property

LSC Questions 8: Would revising the provisions discussed above to require notice and approval by the Corporation prior to any disposal of personal or real property create or remove problems for grantees? Should any provision governing a particular type of property disposal have its own unique requirements or exceptions?

NJP urges LSC not to require notice and obtain approval before disposing of personal property acquired with LSC funds. Again, in a large statewide program supported by multiple funding sources, personal property is acquired all the time and for various needs. Moreover, with planned obsolescence of technology, purchases and disposal of used property is more frequent. Providing notice and obtaining approval every time an item of personal property is disposed of is highly burdensome, inefficient and does nothing to promote accountability. If LSC determines to adopt this change, at minimum it needs to establish an appropriate fair market value or book value for which a large disposal needs approval and that value should be (1) more than *de minimus* (e.g. no less than \$25,000 of LSC funds); (2) apply solely to property purchases exclusively with LSC funds; and, (3) take account of depreciation and age of property (e.g. property of X value purchased with LSC funds within the past three years (which coincides with the time frame set out for information to be provided in the competitive bidding process)).

LSC Question 9: How would it affect recipients if LSC revised the disposal provisions of the PAMM to require grantees to seek disposition instructions from LSC?

As stated above, requiring NJP to seek transaction specific LSC disposition instructions, beyond those generally found in the regulations themselves, would be administratively burdensome and substantially impractical. This is particularly true in the absence of limitations on (a) the value of property or equipment for which “instruction” would be required; or, (b) time frame in which LSC must provide instructions or deem the proposed disposal approved. Moreover, the proposal provides no reference to any process by which a program can seek review of proposed instruction or exigent circumstances (e.g. natural disaster, fire or theft) that would make an “instruction” meaningless or be contrary to the interests of a recipient, e.g. insurance claims, collaborative agreements and partnerships, etc.

LSC Question 13: Should LSC revise the PAMM’s definition of “personal property” to include intellectual property? Should LSC create a new provision that governs exclusively rights in intellectual property created using LSC grant funding? Should general rights in data produced under LSC grants be addressed separately from any new provisions governing the acquisition of intellectual property?

NJP urges LSC to not include intellectual property in the definition of “personal property” without more thorough discussion and clearly articulated rationale for doing so. Currently, LSC’s logo is required to be affixed to all materials created by an LSC grantee. This serves the laudable purpose of providing LSC visibility within the service area and community at large for the role it places in making recipient services available. However, the provision of funding alone should not dictate ownership. NJP staff produce substantial written materials and legal education videos for the benefit of our client communities. The materials are broadly distributed and posted at www.WashingtonLawHelp.org and at <https://www.youtube.com/user/NWJusticeProject>.

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These materials are often borrowed by pro bono private attorneys, other providers and bar associations as sources of information for clients, for Continuing Legal Education programs, law school clinics, use by law libraries, and other appropriate uses. It is unclear how rights in LSC funded intellectual property would benefit LSC and managing permissions for legitimate use would be burdensome and contrary to the purposes for which the funds were provided. NJP should not have to contact LSC for permission every time a request is made for use of NJP created IP. NJP copyrights its NJP created intellectual property and readily grants permission for its non-commercial use. NJP has also on occasion issued "cease and desist" letters when NJP materials have been wrongfully used for commercial purposes. Does LSC want to get into the business of managing these uses? No NJP funder requires NJP to turn over its intellectual property used for grant related purposes.

We greatly appreciate and thank you for the opportunity to submit these comments in advance of formal publication of proposed revisions to 45 CFR 1630 and the PAMM.

Sincerely,

A handwritten signature in dark ink, appearing to read "Deborah Perluss", with a long horizontal flourish extending to the right.

Deborah Perluss

Director of Advocacy/General Counsel

C Steve Pelletier, NJP Director of Finance

César E. Torres, NJP Executive Director