Sent by e-mail to: SubgrantRulemaking@lsc.gov

June 10, 2016

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Re: Further Notice of Proposed Rulemaking, 45 C.F.R. 1627, Subgrants and Membership Fees or Dues

This letter is submitted in response to the Legal Services Corporation's (LSC) Further Notice of Proposed Rulemaking (FNPRM) request for public comments regarding proposed revisions to the regulation on Subgrants and Membership Fees or Dues, 45 C.F.R. 1627. These comments are submitted on behalf of NLADA by its Civil Policy Group, the elected representative body that establishes policy for the NLADA Civil Division, and its Regulations and Policy Committee.

NLADA appreciates the serious consideration LSC has given to the public comments previously submitted by NLADA, LSC-funded programs, and stakeholders in response to the initial notice of proposed rulemaking (NPRM).

Thank you for providing a second opportunity for input on LSC's further revisions. Below, we highlight areas of the FNPRM that would be particularly beneficial to, or negatively impact, LSC-funded programs, their client communities, and other stakeholders.

1. Proposed Change 1: Removing the Proposed Definition of Programmatic

The proposed revisions made by LSC to 45 C.F.R 1627.2, *Definitions*, and 45 C.F.R 1627.3, *Characteristics for all sub grants*, are beneficial to grantees, overall. The changes provide more clarity for LSC-funded programs when determining whether an agreement should be considered a subgrant, or a vendor contract for services. LSC's current proposal to define a "procurement contract" and eliminate the previous proposed definition of "programmatic" in the first notice of proposed rulemaking (NPRM) eliminates concerns previously raised by NLADA regarding the definition. NLADA had raised questions in our first set of comments that LSC's proposed definition

of "programmatic" was so broad that it could include activities that should be considered a procurement contract.[1] The current proposed revisions make clear that LSC's definition of "programmatic" would not encompass activities, such as lease agreements, which are appropriately categorized as contracts for services.

NLADA also appreciates LSC further refining the list of five characteristics of subgrants in 45 C.F.R. 1627.3. These changes provide further guidance for determining when an agreement should be considered a subgrant.

LSC noted in the FNPRM's Supplementary Information that "LSC analyzed fact patterns using the five factors in the Uniform Guidance, 2 C.F.R. 200.330" to determine whether the use of the factors appropriately distinguished between a subgrant and a procurement contract. 81 FR 25444, 24546. NLADA recommends that LSC publish these fact patterns and the analysis LSC used to assist programs in applying the five factors.

NLADA previously indicated that, because analysis using the five factors requires the exercise of judgment, both in applying and balancing the factors, there may be situations where LSC and a grantee's judgment could reasonably differ. The proposed criteria indicate that "all of the characteristics may not be present in all cases" and "the recipient must make case-by-case determinations", 81 FR 25444, 24550. Because LSC has been so responsive to the concerns raised regarding this subsection, NLADA assumes that LSC will apply a good faith and reasonable judgment standard when applying the factors. And, if there are occasions when LSC's application of the criteria differs from a grantee, the grantee will not be sanctioned.

2. Proposed Change 2: Allowing Recipients To Use Property or Services Acquired in Whole or in Part with LSC Funds as Support for a Subgrant

NLADA appreciates LSC's agreement that prohibiting grantees from using LSC resources, such as office space, to partner with other programs and entities would be burdensome and inefficient. The changes in the FNPRM allowing grantees to utilize LSC-funded resources, as well as LSC funds, provides recipients with necessary flexibility to leverage resources through partnerships with organizations such as bar association programs to increase the availability of legal services for eligible clients. NLADA wishes to express two remaining concerns.

i. The provision requiring valuation of property in subsection 1627.4(2)(ii) requires documentation of the value of the subgrant, either by fair market value (FMV) or by a showing that the actual cost is reasonable. However, requiring an independent property appraisal for leased space, as indicated in subsection 1627.4 (2)(i), is an added requirement that should not be necessary. There are sufficient LSC policies and regulations, including 45 C.F.R. 1630, to ensure that the cost of a lease is at or below FMV. The prorated rental

[1] NLADA comments submitted to LSC on June 10, 2015 Re: Use of Non-LSC Funds, Program Integrity; Subgrants and Membership Fees or Dues; Cost Standards or Procedures.

amount should be sufficient evidence of the fair market value of the office space that a third party is permitted to use. The appraisal requirement would be appropriate for property owned by the recipient, unless the property was recently purchased. If not recently purchased, the FMV of owned property may need to be assessed by an independent property appraisal.

ii. Based on the definitional section in 1627, an agreement between a recipient and a third party, where LSC funds or resources are provided to the third party, must be treated as either a subgrant or a procurement contract. There is an exception for judicare arrangements and contracts with private attorneys in 1627.2(e)(1), if the cost of the arrangement or contract does not exceed $60,000 the agreement. The regulation specifically provides that an agreement that does not meet the $60,000 threshold is not considered a subgrant. Note: NLADA previously expressed its full support for LSC raising this threshold to $60,000.

NLADA recommends that LSC consider establishing a second limited exception for certain agreements to be exempted from the definition of subgrants, similar to the exception in 45 C.F.R. 1627.2 (e)(2). This second exception to the definition of a subgrant would set out criteria so that a recipient's agreement, with a bar association, pro bono program, or law firm, to provide pro bono services to LSC-eligible clients would be exempted from the subgrant regulatory requirements. NLADA has learned through discussions with LSC-funded members, that there are private attorneys and local bar associations willing to offer pro bono services to eligible clients who do not want to be bound by the administrative requirements in LSC's subgrant regulation.

For example, LSC received comments regarding this FNPRM from the Denver Bar Association (DBA). DBA's comments indicate that, although DBA has a longstanding relationship with Colorado Legal Services, providing pro bono services through the Metropolitan Volunteer Lawyers (MVL) to LSC-eligible clients, complying with the administrative requirements in LSC's subgrant regulation would be burdensome and hamper, if not result in terminating their current relationship. DBA now provides significant pro bono services, at an estimated value of $900,000, to LSC-eligible clients in exchange for the use of minimal office space with an estimated fair market value below $15,000 at Colorado Legal Services.

NLADA understands LSC's responsibility to ensure accountability for the use of publicly appropriated funds, and that LSC must be able to determine that LSC funds are spent consistent with the terms of its governing statutes and regulations. Further, the subgrant regulation provides a framework for ensuring accountability when a grantee provides LSC funds or resources to a third party. However, the regulation regarding subgrants, including the definition of a subgrant, was created through the regulatory process and is not mandated by Congress in the LSC Act or appropriations riders. LSC has the authority to create a second exception to it's the subgrant rule.

Grantee agreements with private attorneys and bar entities could be exempted from regulatory subgrant requirements while still maintaining appropriate accountability. An exception could provide that only LSC-eligible clients would be served using LSC resources exclusively for the purpose of involving private attorneys in providing pro bono services. Both the value of LSC resources and the services of the private attorney or bar entity would need to be quantified, to ensure the amount of the LSC resources exchanged would not exceed the value of services received from the private attorney pro bono provider.

Defining any agreement with a private attorney or bar entity providing pro bono services to LSC-eligible clients as a subgrant, with the one existing exception, decreases grantees' ability to involve private attorneys and bar entities unwilling to be subject to the administrative requirements of the subgrant.

3. Proposed Change 3: Establishing a $15,000 Threshold at Which Recipients Must Seek LSC's Written Approval Before Awarding a Subgrant

NLADA strongly supports LSC's establishment of a threshold for recipients before they must seek prior approval to award a subgrant. Because grantees are required to comply with part 1630, which includes a requirement that all expenses be necessary and reasonable, additional oversight for smaller subgrants is not necessary. Eliminating the prior approval requirement increases efficiency for both grantees, and LSC. LSC noted in its supplemental information that the prior approval process for subgrants is estimated to take between 10 and 20 hours. NLADA recommends that LSC consider a higher threshold of $20,000, given the significant amount of accountability requirements which are already in place, in addition to a preapproval process.

4. Proposed Change 4: Notifying Recipients of Decisions on Requests for Prior Approval of Subgrants

NLADA raised strong objections to LSC's initial proposal to eliminate the current provision regarding the time periods for subgrant approval in 1627.3(a)(2). NLADA appreciates LSC's consideration of the comments submitted regarding this provision and its willingness to revise the initial proposed rule. LSC now proposes adopting a notice provision, similar to the one used by OMB in its Uniform Guidance, that will only apply to subgrant approvals requested as part of a special grant or during the mid-year grant process. LSC's proposal of an initial 45-day time period for subgrant approval is significantly longer than the initial 30-day time period recommended by the OMB in the Uniform Guidance. This shorter time frame is a more equitable and workable time frame for recipients.

Once this initial time frame expires, NLADA remains very concerned that LSC is not required to meet any further approval deadlines. Consistent with the OMB Uniform Guidance, LSC proposes that, once the initial 45-day approval period expires, the grantee can request a date certain for approval. NLADA reiterates its concerns that LSC's proposal basically omits any time frame for LSC to take action on subgrants, leaving programs in a state of fiscal uncertainty as to subgrant agreements. Affording recipients and subgrantees reasonable time periods to plan for

operational continuity to the greatest extent possible is essential for your grantees' efficient operation. NLADA recommends that LSC be required to either approve or deny a subgrant no later than 45 days from a grantee's initial request.

5. Proposed Change 5: Adopting a Flexible Timekeeping Requirement

LSC indicates in its supplementary section to the FNPRM its consideration of three options to respond to concerns raised about imposing the timekeeping requirement in 45 C.F.R. 1635 to all subgrantees. LSC chose the option of promulgating minimum standards for timekeeping that would provide the information it needs to ensure that subgrant funds are properly accounted for, but that does not prescribe how the recipient or subrecipient keeps time. 81 FR 24545, 24549. However, the actual subsection proposed in 45 C.F.R. 1627.5 (c) of the FNPRM does not provide the suggested minimum standards. Instead, the subsection basically sets out the all the same timekeeping requirements provided in 45 C.F.R. 1635. The only difference is that the program and the subgrantee are able to negotiate who will be responsible for meeting the requirements. NLADA objected to these requirements, inter alia, as creating a one-size-fits-all approach, with specific requirements that would be burdensome for subgrantees (e.g., keeping time in increments of not greater than one-quarter hour). Since LSC is still proposing to impose the specific timekeeping requirements in 45 C.F.R. 1635 on subgrantees, NLADA references its previous comments submitted in response to the NPRM, in addition to the comments below.

These requirements in the FPRN leave little, if any, room for negotiation. They restate all the requirements included in 45 C.F.R 1635 for grantees and do not provide the flexibility included in LSC's introductory comments. The only way a recipient would be able to verify that a subgrantee keeps time as required by proposed 1627.5 (c) would be to ensure the subgrantee maintains detailed timekeeping records in increments of no less than ¼ hours (45 C.F.R 1627.5(1)) and maintains records by activity categories.

NLADA recommended in its initial comments that time keeping requirements remain flexible so that subgrantees would not have to keep time as required by 45 C.F.R 1635, but that they would need to establish time keeping methods that would account for the time spent on categories of activities. For example, a staff attorney employed by a bar foundation as a full-time pro bono coordinator responsible for making pro bono referrals could record her time showing 7 or 8 hours per day making referrals to pro bono attorneys. Likewise, a pro bono attorney could report 10 hours spent on negotiating a child support agreement.

Reporting the aggregate time spent providing pro bono services accurately reflects how their time was spent on subgrant activities, but does not provide the detailed time keeping currently being proposed by LSC. We recommend that LSC revise 1627.5(c) to allow the flexibility intended by its comments and, if necessary, allow grantees and subgrantee to establish timekeeping arrangements to maintain accountability for their time and activities without requiring the detailed level of reporting called for in the proposed subsection of regulation.

Thank you for the opportunity to provide comments on Subgrants and Membership Fees or Dues, 45 C.F.R. § 1627.

Sincerely,

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