UNIVERSITIES SPACE RESEARCH ASSOCIATION
7178 Columbia Gateway Drive • Columbia, MD 21046
410-730-2656 • 410-730-3496 (fax) • www.usra.edu

February 13, 2015

Ms. Suzanne Plimpton
Reports Clearance Officer
National Science Foundation
4201 Wilson Blvd, Rm. 1265
Arlington, VA 22230
VIA E-MAIL TO: splimpto@nsf.gove

Subject: Comments on the National Science Foundation (NSF) Implementation of Proposed NSF Management Fee Policy

Dear Ms. Plimpton:

USRA submits the following comments in response to the Notice and Request for Comments on the National Science Foundation (NSF) Implementation of Proposed NSF Management Fee Policy, published in the Federal Register, FR 2014-30244 (Dec 29, 2014).

I. Background

The NSF has a long history of closely partnering with nonprofit organizations to enable the advancement of science. The NSF funds the construction and operation of large and complex scientific research facilities at locations around the world. Many of construction and management projects are undertaken by nonprofit organizations, under federal assistance awards, such as cooperative agreements or cooperative support agreements, awarded by NSF. In accordance with the NSF Large Facilities Manual, a management fee is not normally awarded in financial assistance awards, except for SBIR/SBTRs, or in limited circumstances where the award is made to a nonprofit organization that meets specific criteria.

The reason for paying a "management fee" to nonprofit organizations is different from the reason for paying a fee to profit-making entities. Since both terms include the word "fee" the term "management fee" can be misinterpreted to mean something that directly benefits nonprofit management. A profit-making contractor is engaged in business, and part of the fee received is paid to the benefit of investors, such as shareholders, as profit. In contrast, modest fees paid to a nonprofit contribute solely to institutional resources to allow for operating capital and ordinary business expenses that are non-reimbursable. Institutional resources are necessary to sustain a nonprofit organization, and include funds from management fees, earned interest, or other independent sources.

Nonprofit organizations that receive NSF awards have a long history of operating specialized facilities that enable research within respective scientific communities, but have limited financial resources to construct and operate major facilities. These nonprofit organizations do not generate any significant "profit" from the operations they conduct. There are many costs that these nonprofits organizations incur that are unallowable under government fiscal regulations, but which must be paid in order for the organization to continue operations. These organizations would find it impossible to continue operations, or would be forced to drastically reduce their capability, without a management fee being provided. Permitting a management fee enables nonprofit organizations to operate with appropriate fiduciary responsibility and reduces the risk of the undertaking for the Government.

The proposed policy change does not eliminate award of an appropriate management fee on NSF assistance awards, but is intended to strengthen both the criteria to establish management fees and the controls to monitor use of the fees. USRA supports this stated intent, and offers the following comments:

II. Discussion

1. NSF Policy to Pay a Management Fee to Nonprofit Organizations for the Construction and Operation of Major Facility Projects Supports the NSF Mission.

As a nonprofit organization currently operating high-performing scientific and engineering research projects for multiple U.S. government agencies, USRA understands and supports payment of an appropriate management fee on cooperative agreements. The NSF proposed policy change recognizes three criteria for the negotiation and award of a management fee. In contrast, the current *NSF Large Facilities Manual*, paragraph 4.2.2.2, *Management Fees*, dated November 3, 2014, contains seven listed considerations for awarding management fee, which include the three criteria retained in the proposed policy.

USRA concurs with the seven considerations listed in the November 3, 2014 Manual. Modest fees paid to a nonprofit organizations, such as USRA, provide institutional resources for operating capital and ordinary business expenses that are non-reimbursable. These institutional resources are necessary to sustain the organization. The list below provides examples that show the range of reasonable and appropriate considerations for use of institutional resources, including organizational considerations, operational considerations, and program considerations:

a. **Organizational considerations**, which can threaten or impact the existence of the entire nonprofit organization. These considerations include reasonable and appropriate actions that nonprofit organizations take in order to minimize risk. Examples of institutional-level risk include:

- *Assuming management and performance risks. USRA faces ordinary business risks when operating programs, the same as a for-profit entity. Reasonable and appropriate business decisions with business risk, such as entering into long-term lease agreements, allow USRA to minimize operating costs and ultimately save the government money. Institutional resources enable USRA to assume ordinary business risk that is otherwise non-reimbursable.*

- *Litigation risk. USRA faces a range of litigation risks that could arise from Government-funded programs. Some of the risks are covered by insurance, but there are many litigation risks that are not covered by insurance and are in some instances non-reimbursable.*

Examples include employee disputes, environmental concerns, false claims by an employee, and many other matters.

b. **Operational considerations**, which impact the ability of the nonprofit to function effectively and to fulfill its nonprofit function. Examples of organizational risk include:

- *Self initiated activities, such as research, education and outreach. USRA allocates fee as part of institutional resources to further our nonprofit purpose and benefit society. For example, USRA uses institutional resources to sponsor student scholarships.*

- *Managing Government funding shortfalls. Institutional resources, provide a vital source of "bridge" revenue to help USRA weather short-term federal funding shortfalls, including delays in advance payments, without interrupting critical activities.*

- *Interest payments on bank loans. Institutional resources enable nonprofits to obtain a bank line-of-credit to cover ordinary operating expenses, such as payroll and indirect costs. USRA requires working capital to meet these expenses. Interest charges on a line of credit are not reimbursable under government regulations.*

c. **Program considerations**, which impact the nonprofits ability to effectively run and manage large Government facilities and other technical programs. Program considerations include:

- *Attracting and retaining professional staff. In some cases, attracting and retaining highly qualified staff—including key scientists—requires a higher salary or benefits than is allowable under cooperative agreement terms. Institutional resources give USRA the flexibility to attract and retain the best talent in support of the Government's mission and purpose.*

- *Relocation expenses for employees. Many research projects require experienced personnel with special capabilities to be recruited and relocated, often on short notice. Some of those costs are non-reimbursable. Institutional resources enable USRA to attract and recruit high-level talent for NSF-funded activities.*

The three uses identified by the NSF in the proposed policy, as well as other uses of institutional resources, allow nonprofit organizations to carry out NSF-funded activities, in fulfillment of their nonprofit purpose, and in partnership with the NSF and its mission and purpose.

2. NSF Should Use Management and Operations Contracts under FAR 17.6 for the Operation of Major Facilities.

As discussed above, there are compelling reasons to award a management fee to nonprofit organizations that construct and operate large NSF facilities. OMB and NSF regulations, including the proposed policy, allow management fees for some cooperative agreements.

However, the type of work to construct and operate NSF large research facilities and the award of a fee are more closely aligned with management and operation (M&O) contracts defined in FAR 17.6. The DOE has long used M&O contracts to fund much of its research operations and national laboratories, many of which are FFRDCs. The long-term special relationship and rigor required to operate NSF large facilities and perform the research are similar.

The FAR, section 17.601 defines a management and operating contract as "an agreement under which the Government contracts for the operation, maintenance, or support, on its behalf, of a Government-owned or -controlled research, development, special production, or testing establishment wholly or principally devoted to one or more major programs of the contracting Federal agency." Construction and operation of NSF major facility projects are long-term efforts that require a special relationship between the NSF and the awardee to perform the important scientific research and engineering objectives, and are directly suited to an M&O contract.

A significant benefit of M&O contracts to the NSF is M&O contracts appropriately share the risk between the NSF and the nonprofit organization. Under cooperative agreements, NSF shoulders the risk. An M&O contract shifts appropriate risk to the nonprofit operator. The M&O contract can and should be structured to share the risk and incentivize the nonprofit operator, for instance, by structuring the fee with an award fee component to measure and reward the desired performance.

a. NSF Authority to Enter into M&O Contracts.

Section 17.602(a) of the FAR requires a written, non-delegable determination by the agency head, with requisite statutory authority, in order to establish and maintain an M&O contract. At this time, only the DOE has exercised this authority, but NSF could choose to do so. NSF has the requisite statutory authority to enter into an M&O contract. The requisite NSF statutory authority to enter into M&O contracts is granted by 42 USC 1830(c), which states:

> The Foundation shall have the authority, within the limits of available appropriations, to do all things necessary to carry out the provisions of this chapter, including, but without being limited thereto, the authority—…
>
> (c) to enter into contracts or other arrangements, or modifications thereof, for the carrying on, by organizations or individuals in the United States and foreign countries, including other government agencies of the United States and of foreign countries, of such scientific or engineering activities as the Foundation deems necessary to carry out the purposes of this chapter…

The Foundation has the authority to elect to establish and use an M&O contract for the operation of major facilities.

b. NSF Projects Are Appropriate for an M&O Contract.

FAR 17.604 provides a list of basic criteria to identify a requirement that is appropriate for an M&O contract. Among the criteria are:

> (a) Government-owned or -controlled facilities must be utilized…
>
> (b) Because of the nature of the work, or because it is to be performed in Government facilities, the Government must maintain a special, close

relationship with the contractor and the contractor's personnel in various important areas (*e.g.,* safety, security, cost control, site conditions).

(c) The conduct of the work is wholly or at least substantially separate from the contractor's other business, if any.

(d) The work is closely related to the agency's mission and is of a long-term or continuing nature, and there is a need—

(1) To ensure its continuity; and

(2) For special protection covering the orderly transition of personnel and work in the event of a change in contractors.

Each of these criteria are satisfied in the construction and operation of large NSF facilities.

c. NSF Would Tailor Contract Terms By Promulgating an NSF Regulation with NSF Specific Requirements.

In recognition of the circumstances consistent with the establishment of an NSF M&O contract, the terms of the contract differentiate it from typical contracts awarded by other agencies and other contracts awarded by NSF under the FAR, and from cooperative agreements NSF may award.

Examples of specific terms, listed below, are indicia of a "special relationship," the M&O contractors share with NSF:

(1) Fee. One aspect of using an M&O contract is that fee is awardable under a contract, and the FAR contains guidelines to calculate the fee amount. The FAR provides for a structured fee analysis approach, and NSF would tailor its own consistent and structured fee approach that applied to all its M&O contracts and supported NSF goals. In particular, NSF should consider implementing an award fee component to the management fee.

(2) Significant NSF involvement in labor relations. The contractor's workforce is large, remaining at the site despite change of contractors. This results in the need for NSF to assume stewardship of employee relations and workplace labor conditions.

(3) Integrated involvement in M&O contractor management controls.

(4) NSF involvement with the M&O contractor's purchasing process.

(5) Application of specific NSF directives to the operations of the M&O contractor

These instances are provided for example only. There are many more specific requirements NSF can include as contract requirements.

USRA believes M&O contracts provide an improved funding method over cooperative agreements for the long-term special relationship required to operate a large NSF facility, and provide a well-defined framework for fee calculation and other NSF oversight functions.

3. Appropriate Management Fee Should Be Calculated Using a Structured Analysis.

Should NSF elect to continue using financial assistance awards as the primary funding instrument, then USRA believes the appropriate management fee should be calculated using a structured analysis unless there are circumstances that make it clearly inappropriate.

The structured approach for calculating appropriate management fee should include factors such as:

(1) Performance risk;
(2) Financial risk including working capital adjustment; and
(3) Other considerations. This category may include special circumstances that are not adequately addressed in the performance risk and contract type risk factors.

Using a structured approach, NSF would assign values to each identified factor. The value multiplied by the base results in the management fee objective for that factor. Each factor has a normal value and an expected range of values. The normal value is representative of average conditions on the prospective project when compared other NSF projects. The proposing organization must state any conditions that justify assignment of other than the normal value.

Using a structured approach to determine an appropriate management fee for construction and operation of NSF large facilities would provide a discipline ensuring that all relevant factors are considered.

4. The Calculated Management Fee Should be Separate from Consideration of Other Sources of Income.

The proposed policy accurately points out that "a management fee represents an amount in excess of cost and is therefore not subject to the applications of the cost principles of 2 CFR 200." The OMB expressly excluded fee from the cost principles and government oversight and direction, because use of fee is within the discretion of the nonprofit organization and is used for their nonprofit purposes, as directed by management and overseen by the nonprofit Board.

However, the subject proposed policy states "[t]he proposal must also include a schedule of all federal, non-federal, and other sources of income to justify that alternate sources of income are not available to address potential needs covered in the proposal."

While USRA appreciates and supports the requirement to be fiscally responsible and only award appropriate management fees, this requirement is inconsistent with the purpose of management fees and the function of the Foundation. USRA recommends this provision be eliminated.

Both for-profit and nonprofit organizations must allocate performance and financial risk across all their operations. That is the function of the organization management, with oversight by the nonprofit Board. The fact that there may be a fee-bearing contract or other source of potential funds in the nonprofit portfolio that could be diverted to cover the needs in one award should not be considered or relevant to NSF. Nonprofit organizations allocate funds to support their nonprofit purposes, purchase new facilities for expansion, pursue new business opportunities, and a myriad of other legitimate reasons determined by their management and overseen by the nonprofit Board. Having the NSF review all potential sources of funds and be involved in the business decisions and direction of the organization is not appropriate.

USRA recommends NSF analyze the appropriate management fee for each award considering the risk and other considerations of that specific operation. A structured fee should be used to ensure all relevant considerations are included and analyzed. NSF should not be involved in other activities of the nonprofit organization and should not be involved in directing other funding sources to be used. Financial management and risk mitigation of the nonprofit organization is properly within the province of the nonprofit management and the nonprofit Board.

5. The Calculated Management Fee Should be Separate from Consideration of How Previous Fee was Allocated.

The proposed policy accurately points out that fee represents an amount in excess of cost and is therefore not subject to the applications of the cost principles of 2 CFR 200. The OMB expressly excluded fee from the cost principles and government oversight and direction, because use of fee is within the discretion of the nonprofit organization and is used for their nonprofit purposes as directed by management and overseen by the nonprofit Board.

However, the subject proposed policy states: “Information on actual uses of management fee previously awarded by NSF in the preceding five-year period under any award shall be included in the proposing organizations fee proposal…NSF will examine the extent to which awardee fee proposals have proven reliable when compared with the actual uses of management fee. NSF will also perform periodic reviews of management fee usage under an award. Repeated, unexplained failure to reasonably adhere to planned uses of fee will result in reduction of future management of fee amounts under the award.”

Similar to paragraph 4, above, USRA appreciates and supports the requirement to be fiscally responsible and only award appropriate management fees. However, this requirement is inconsistent with the purpose of management fees, the function of the Foundation, and it violates the intent of the OMB guidelines. USRA recommends this provision be eliminated.

The organization management must be free to prioritize and use their funds to meet the organization purpose and goals. The NSF should not substitute their judgment for the judgment of the nonprofit management and nonprofit Board. The 2 CFR 200 cost principles were crafted by OMB to protect the government interest, while also understanding and appreciating the role that an organization’s management has in making financial decisions that affect the operations and direction of the nonprofit. Substituting NSF judgment and allowing NSF to be involved in the nonprofit’s management violates the intent of the cost principles and is inappropriate.

USRA recommends NSF analyze the appropriate management fee for each award considering the risk and other considerations of that specific operation. A structured fee should be used to ensure all relevant considerations are included and analyzed. NSF should not be involved in other activities of the nonprofit organization and should not be involved in reviewing management decisions on how to use the organizations institutional resources. Use of a nonprofit organization's institutional resources is properly within the province of the nonprofit management and the nonprofit Board.

III. Conclusion

Nonprofit organizations are an important partner to NSF in construction and operation of major facility projects. Nonprofit organizations do not generate a profit for shareholders or investors. Institutional resources to which management fees contribute enable nonprofit organizations to operate with the requisite fiduciary responsibility in support of the communities they serve and in support of the NSF mission and purpose.

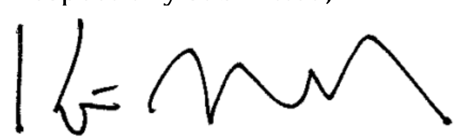
NSF large facilities enable scientific research. The type of work performed requires a special relationship between the NSF and the operator. Management and operations contracts, FAR 17.6, are uniquely suited for the character of work and to foster the long-term special relationship required. M&O contracts also appropriately share the risk and allow NSF to incentive performance. NSF has the statutory authority to enter into M&O contracts, but requires written approval. M&O contracts usually have fee associated with them, and a structured analysis is used.

NSF should apply a structured approach to calculate the appropriate management fee, regardless of what funding mechanism is selected. A structured approach provides a disciplined approach to the analysis and ensures all relevant considerations are analyzed. The analysis should expressly consider risk as an element.

Finally, NSF should only impose additional administrative burdens that are appropriate and that support legitimate NSF requirements. In particular, requiring nonprofits to submit information regarding other sources of income and previous management fee usage violates OMB guidelines, and should not be required.

If you have any questions or require additional information, please feel free to contact me at 410-740-6244.

Respectfully submitted,



Kevin Schmadel
Vice President,
University and Government Relations