

Federal Contracting

OSP Research Certificate Program

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Where Innovation Is Tradition

What is a Grant?

Financial assistance mechanism providing money, property or both, to an eligible entity to carry out an approved project or activity.

A grant is used whenever a sponsor anticipates no substantial programmatic involvement with the recipient during the performance of the project - the recipient conducts the work independently and reports the results to the sponsor.



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Characteristics of a Grant:

- The objective is to advance science for the benefit of **the public**.
- Primarily for basic and applied research.
- Publication is encouraged.
- More flexible, less restrictive and easier to administer than procurement contracts.
- Primarily awarded to educational or not-for-profit organizations.
- Sensitive, secured or classified information is usually not involved.
- There is no a fee or profit.
- DoD Grant and Agreement Regulations (DoDGARS) apply.
- Not subject to the terms of a procurement contract (not subject to the FAR).
- Substantial involvement between the Government and the recipient is not anticipated.
- Must provide Government with , at a minimum, a paid-up, royalty-free license to any IP created under the grant.
- Government reserves "march in" rights to patents.



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What is a Cooperative Agreement?

A financial assistance mechanism used when there will be substantial Federal scientific or programmatic involvement

Substantial involvement means that, after award, the sponsor's scientific or program staff will guide, coordinate or participate in the project activities



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Characteristics of a Cooperative Agreement:

- Used when a grant is determined inappropriate.
- Substantial Government involvement is anticipated.
- Government receives paid-up license and march-in rights to IP.
- There is no fee or profit.
- Cost share may be encouraged or required.
- DoD Grant and Agreement Regulations (DoDGARS) apply.
- Not subject to the FAR.



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What is a Contract?

A mutually binding legal relationship obligating the seller to furnish the supplies or services and the buyer to pay for them. (FAR 2.101)

- Primary purpose is the delivery of goods and services for the benefit of the Government.
- Not an assistance award.
- Paid with federal appropriated funds.
- Subject to the Federal Acquisition Regulation.



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Types of Agreements

• Cost Reimbursable

When the Contractor is reimbursed for allowable costs incurred during contract performance. A total cost estimate is prepared and the award contains a ceiling that may not be exceeded without Sponsor approval. OMB Uniform Guidance cost principles apply.

• Fixed Price

Issued when the Sponsor determines that the price quoted is reasonable and does not want to give the Contractor an opportunity to adjust their price based upon actual expenses incurred during performance. The completion of a task/milestone usually renders a payment due. Easy to administer but poses a slight risk to the Contractor.



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Types of Agreements

• Indefinite Delivery Indefinite Quantity

Issued when a set quantity of goods or services are needed, but not known or specified (although there can be minimums and maximums.) The Sponsor issues Task Orders for the delivery of the goods or performance of the services during the life of the contract.

• Time and Materials

Allows a Sponsor to acquire supplies or services based upon specific labor hours and actual material costs. Because Universities do not track time using an hourly time-keeping system, it is impossible for us to report and certify hours on an invoice. A T&M agreement is not appropriate for a University.



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The FAR

What is it?

- The Federal Acquisition Regulation
- Title 48 of the Code of Federal Regulations



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Organization of the FAR

Chapter 1: The Basic FAR

Chapter 2+: Specific Agency Supplements

Part 52: The Clauses

Part 53: Sample Government Forms

Parts 1-51: Prescriptions



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FAR Agency Supplements

Most federal agencies have their own supplemental acquisition regulations.

Examples:

- Department of Defense Federal Agency Regulation Supplement (DFARS)
- NASA FAR Supplement (NFS)
- Department of Education Acquisition Regulation (EDAR)



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Purpose of the FAR

Benefit the federal government in terms of:

- Cost (both administrative and price of services)
- Quality
- Efficiency

cont'd



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Purpose of the FAR (cont'd)

- Establish uniform acquisition procedures for all federal agencies
- Promote competition among government contractors
- Minimize administrative operating costs
- Obtain services at the best value to the government
- Conduct government business with integrity, fairness and transparency



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Uniform contract format

Far 15.404-1; Standard Form 33 (cont'd)

Contracting Officers must prepare solicitations and contracts using the uniform contracting format as follows:

Part I--The Schedule

- A Solicitation/contract form
- B Supplies or services and prices/costs
- C Description/specifications/work statement
- D Packaging and marking
- E Inspection and acceptance
- F Deliveries or performance
- G Contract administration data
- H Special contract requirements



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Need to consult the FAR when:

- Responding to an RFP
- Completing Reqs & Certs
- Receiving a federal prime contract
 - Incorporated in full text
 - Incorporated by reference
- Receiving a subcontract under a federal prime
- Issuing a subcontract under a federal prime



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Uniform contract format

Far 15.404-1; Standard Form 33 (cont'd)

Contracting Officers must prepare solicitations and contracts using the uniform contracting format as follows:

Part II--Contract Clauses

- I Contract clauses

Part III--List of Documents, Exhibits, and Other Attachments

- J List of attachments

Part IV--Representations and Instructions

- K Representations, certifications, and other statements of offerors
- L Instructions, conditions, and notices to offerors
- M Evaluation factors for award



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Federal Contracting Process

- **Pre-Proposal:** Government agency identifies a need
 - PI may be in discussions with federal technical representative
 - Be thinking about any potential subcontractors (NDA/TA)
- **Solicitation (or RFP, RFQ):** Government advertises need to the public inviting proposals to be submitted
 - Standard Form 33, Solicitation, Offer and Award
 - Includes federal terms and conditions applicable to the award
 - Period where questions/request for clarifications allowed



(cont'd)

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Federal Contracting Process (cont'd)

- **Proposal:** Government reviews all bids/offers submitted in response to the Solicitation based on stated selection criteria and FAR guidelines
 - Any exceptions to T&C must be identified in the proposal
 - Technical and cost proposal
 - Proper format required or rejected
- **Negotiation:** Government and prime recipient agree to terms of award
 - Proposal = Offer that may be accepted by government (legally binding)
 - Terms must be consistent with state and university policies



(cont'd)

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Federal Contracting process (cont'd)

- **Award:** Federal agency issues the award incorporating all necessary FAR and supplemental regulations
 - Troublesome clauses
- **Contract Administration:** Post award activities and obligations performed by both the government and the award recipient
 - Delivery/acceptance of financial and technical reports
 - Disputes
 - Modifications
 - Termination and close-out



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Close-Out

Contract close-out can not occur until:

- All services have been performed
- All deliverables have been submitted and accepted
- Any disputes have been settled
- Any classified material has been properly disposed of
- Final patent report has been submitted
- All government property has been accounted for
- Final invoice has been paid
- Any remaining funds have been de-obligated



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Contracting Officer vs. Contracting Officer's Technical Representative

Contracting Officer (CO):

- Authorized by a government warrant to issue awards and modifications
- May legally bind the government

(cont'd)



Where Innovation Is Tradition

Contracting Officer vs. Contracting Officer's Technical Representative

(cont'd)

Contracting Officer's Technical Representative (COTR):

- Appointed by the CO to monitor technical performance and progress
- Reviews and approves deliverables
- Reviews and approves invoices
- Limited authority—can not legally bind the government



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What to look for:

Clauses that impact the University's ability to:

- Publish
- Retain title to intellectual property (no "work for hire")
- Retain title to property and equipment
- Apply appropriate cost principles
- Determine allowable costs
- Authorize the use of foreign nationals (faculty and students)



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Reading the Prescriptions

- When questioning a clause, review the prescription
- This provides the rationale for its inclusion in the contract—identifies when it is required
- Will assist the University in the determination as to whether they can challenge its inclusion



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Publication Clauses:

FAR 52.227-17 Special Works

- Prevents the release, distribution and publication of any data first produced in the performance of this award. All data and deliverables will belong to the Government.
- Prescribing Clause at 27.409(e) sets forth the limited situations in which this clause is required. It should be removed unless it directly applies (i.e., when research is for internal government use).



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Publication Clauses:

FAR 52.227-14 Rights in Data

- Requires the prior written consent of the Government to establish a claim in copyrightable data first produced or delivered under the contract
- Prescription at FAR 27.409(e) allows the use of Alt. IV:
 - A contractor may establish a claim to the copyrightable data first produced or delivered under the contract
 - Specifically for use in contracts to universities performing fundamental research



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Publication Clauses:

DFARS 252.204-7000 Disclosure of Information

- Prevents the release of unclassified information without advance, specific contracting officer approval
- Prescribing Clause at 204.404-70(a) specifies that this clause must be included when the contractor will generate unclassified information that may be sensitive and inappropriate for public release

(cont'd)



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Publication Clauses: (continued)

DFARS 252.204-7000 Disclosure of Information

- Serves as a waiver of the university fundamental research exclusion to export control laws
- Update in August 2013 requires subrecipients to “scope out” fundamental research portion of their statement of work with Government CO (requires understanding and cooperation from the prime sponsor)
- **May be a deal breaker**



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Data Use and Security

The federal Government now requires specific controls over *unclassified* information, as well.

- **FAR 52.204-21, Basic Safeguarding of Covered Contractor Information Systems (June 2016):** when government contract information is stored on a non-governmental system, that system must meet 15 specific requirements.
 - Applies to ALL federal agency contracts
 - These requirements are *in addition* to any specific agency requirements.



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Data Use and Security, continued

DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting (Dec. 2015).

- Required in all DoD contracts and subcontracts
- Requires safeguarding all **controlled** government information (any technical information with a Distribution Statement B-F limitation, critical system operations security information, export controlled information, etc.)
- Requires compliance with all National Institute of Standards and Technology (NIST) Special Publication 800-171.



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Data Use and Security, continued

Controlled Unclassified Information (Nov. 2016)

- 32 CFR Part 2002;
- Will apply to all federal grants and contracts
- Creates a uniform “CUI Program” to establish policies for designating, handling, safeguarding and disseminating CUI.
 - Two types: Basic CUI and CUI Specified
- National Archives and Records Administration will oversee.
 - CUI Executive Agent, CUI Program Managers, CUI Registry, etc.
- Agencies are free to add supplemental requirements.



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Patent Clauses:

FAR 52.227-1 Authorization & Consent

- Allows a Contractor to use any invention covered by a U.S. patent to accomplish the research covered under the contract
- Universities should request Alt I which removes the patent indemnity provision



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Patent Clauses:

FAR 52.227-3 Patent Indemnity

- Allows the government to be indemnified for a patent infringement if the contractor is delivering services in the open market
- Public Universities cannot accept indemnification provisions - even to the US Government
- Request deletion of this clause in favor of 52.227-1, Alt I, Authorization and Consent
- Can be a deal breaker



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Patent Clauses:

FAR 52.227-11 Patent Rights-Retention by the Contractor

- Allows the University the right to elect ownership of patents it develops under the contract
- Implements the Bayh-Dole Act



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Bayh-Dole Act

35 U.S.C. § 200 et seq., 1980

- Promotes collaboration between commercial concerns and not for profit organizations (including universities)
- Promotes the use of inventions arising from federally sponsored research and development
- Ensures that government-sponsored inventions are used to promote free competition and enterprise
- Allows Universities to retain title and file for patent on inventions they elect to own. However, must disclose invention to Government within 2 months and Government retains “government purpose rights”



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Cost Clauses:

FAR 52.215-2: Audit & Records-Negotiation

- Establishes the Government’s rights to access and audit a Contractor’s records
- Per the prescription at 15.209(b)(3), request Alt II which implements OMB Uniform Guidance (formerly A-133, Audits of States, Local Governments and Not for Profit Organizations)
 - Provides for audit of OMB Uniform Guidance Cost Principles:
 - Allowable
 - Reasonable
 - Allocable



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Cost Clauses:

FAR 52.216-7: Allowable Cost & Payment

- Establishes which cost principles apply to the Contractor
- Default clause applies commercial cost principles of FAR Part 31.2 to the contract
- Per the prescription at 16.307, request the substitution of the university cost principles of FAR Part 31.3, Contracts with Educational Institutions (OMB UG)



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Cost Clauses:

FAR 52.230-5, Cost Accounting Standards—Educational Institutions

- Specifically tailored to universities
- Incorporates OMB Uniform Guidance, (formerly A-21 Principles for Determining Costs Applicable to Grants, Contracts and Other Agreements with Educational Institutions)

cont'd



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Cost Clauses:

FAR 52.230-5, Cost Accounting Standards—Educational Institutions

- OMB Uniform Guidance states costs must be:
 - Allowable
 - Allocable
 - Reasonable



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Cost Clauses:

FAR 52.232-22: Limitation of Funds

Requires the Contractor to notify the Government:

- When expenditures reach a certain threshold (usually 75%)
- If expenditures are more or less than the obligated total

Also establishes that the Contractor has a 60 day period to request supplemental funding or a no cost extension



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Property Clause:

FAR 52.245-1: Government Property

- Gives the Contractor:
 - Title to property and tangible assets purchased with federal funds
 - When acquired property is less than \$5,000
 - And Government Contracting Officer has approved the purchase
 - Requires property to be labeled, tracked and reported (DD 1662)
 - Reports must be submitted annually and are required for close-out



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Foreign Clauses:

Buy America Act (FAR Section 25.1)

- Limits purchase of commercial items to domestic end products
- Exceptions can be authorized by the CO when:
 - In the public interest
 - Non-availability determination has been made



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Foreign Clauses:

Fly America Act (FAR Section 47)

- Transportation on government contracts must occur on a U.S. flag air carrier
- Exceptions can be made when:
 - No US carrier flies the required route
 - US carrier involuntarily re-routes traveler to a foreign carrier



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Subaward Process and Subrecipient Monitoring Responsibilities

2 CFR 200 – Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, aka “Uniform Guidance”

Subpart D – Post Federal Award Requirements, Section 200.330 – 200.332

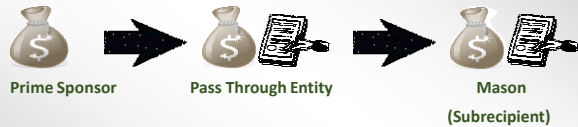
Mason Policy 4009, Subrecipient Monitoring



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Incoming vs Outgoing Subaward

Incoming Subaward



Outgoing Subaward



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Subrecipient vs. Contractor

- Use of a subaward
 - Issued and administered by OSP
 - A subaward is for the purpose of carrying out a portion of a Federal Award, and creates a Federal assistance relationship with the subrecipient. Characteristics which support a subrecipient classification include:
 - Has their performance measured in relation to whether the Federal programmatic objectives were met
 - Has responsibility for programmatic decision making
 - Uses Federal funds to carry out a program for public purpose specified in an authorizing statute, as opposed to providing goods or services for the benefit of the pass through entity.
 - Subject to all Federal program requirements specified in the Federal award.



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Subrecipient vs. Contractor, Continued

- Use of a purchase contract
 - Paid by a purchase order, administered by the Purchasing office.
 - A purchase order is for the purpose of obtaining goods and services and creates a procurement relationship with the contractor. Characteristics which support the use of a purchase order include:
 - Provides goods and services within normal business operations
 - Provides similar goods and services to many different purchasers
 - Normally operates in a competitive environment
 - Provides goods and services which are ancillary to the operation of the Federal program
 - Not subject to all Federal program requirements specified in the Federal Award



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Subrecipient vs. Contractor, continued

Sometimes it's difficult to determine.

- OSP created a tool to help make the determination when it's not clear.
- Determination done in conjunction with OSP's guidance, if necessary.
- OMB Guidance allows for the exercise of judgment.



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Planning for a Subaward

- At the proposal stage, the PI identifies a collaborator who will have significant involvement. The OSP Grants Administrator must collect from each potential subrecipient the following documentation:
 - Subrecipient Commitment form
 - W-9 (Substitute Virginia Form)
 - Budget
 - Statement of Work (As approved by our PI)
 - Audit Report
 - Conflict of Interest Disclosure
 - Indirect Rate Agreement
 - Technical and Administrative contact information
 - Any additional documentation as required by the solicitation documents.
- Subrecipient's proposal is incorporated into ours and submitted to the Federal sponsor.



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Planning for a Subaward

FDP Expanded Clearinghouse

- System that publishes online organizational profiles for use in conjunction with subrecipient commitment forms
 - Although an entity might be located within in the Federal Audit Clearinghouse because they are subject to OMB Uniform Guidance does not **automatically** mean they are registered under the FDP Expanded Clearinghouse



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Planning for a Subaward

FDP Member Organization	
George Mason University	
General Information Contacts Registrations & Docs Certifications Audits Assessments Authentication	
General Information	
Legal Entity Name	George Mason University
Common Name	George Mason University
Address	4400 University Drive MS 4C5 Falls Church, VA 22041-4422
Congressional District	VA-02
IRS	54-987654
DISPS	07/18/2017
Is entity a member of the FDP?	Yes
Entity Details	
Entity Type	Public/State Controlled Institution of Higher Education
Entity represents that it is a small business concern as defined in 13 CFR 121.2012	Not Applicable
Fiscal Period End Date	June 30
Payment Address	4400 University Drive



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Drafting a Subaward

Upon award of our joint proposal OSP will initiate the subaward preparation process, this includes the Risk Assessment

- Risk Assessment
 - Federal requirement under the Uniform Guidance Section 200.330
 - Limits Mason's Risk
 - Mason is held accountable by the Federal sponsor for our subrecipient's research, spending, and reporting actions, which must conform to all terms and conditions of both the prime and sub award.
- What do we look at?
 - Is the Subrecipient debarred or suspended from receiving federal or state funding? (www.visualcompliance.com)
 - Size of entity
 - Percentage of the Prime Award funding being flowed down
 - Domestic or Foreign?
 - Export Controlled, Classified, or PHI data?
 - Financial Accountability
 - IRB or IACUC approvals
 - Awards under PHS funding must disclose FCOI



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Drafting a Subaward

Risk Assessment Criteria

- **Low Risk:** A secure, established, financially sound entity such as a federal, state, or local governmental agency; a large, national corporation; a public or private university; or an entity in conformity with state or federal cost accounting standards and procedures, including OMB Uniform Guidance.
- **Medium Risk:** A medium to large-sized corporate entity with a solid financial background and a record of successful state and federal contracting; or an entity with a good past performance and a successful audit history; any project involving secured, classified or controlled data or technology.
- **High Risk:** A small or newly established corporate entity, a foreign entity or an entity with a history of poor past performance or audit findings.
- **Unacceptable:** An entity who has been, or employs someone who has been, suspended or disbarred from receiving federal or state contracts.



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Based upon the results of the risk assessment, determine what terms and conditions to insert into the subaward:

- Limit period of performance and/or funding amount into small increments.
- Increase frequency of reporting requirements.
- Fixed price type agreement instead of Cost Reimbursable (*if* Federal approval is obtained).
- Limit payments to the successful completion of a specific task or milestone.



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Drafting a Subaward Continued

General Considerations

- Fixed price vs. Cost Reimbursable
- Cost Share
- International
- Reporting Requirements
- Intellectual Property Ownership Provisions



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Subrecipient Monitoring

Mandated under 2 CFR Section 331 of the Uniform Guidance

- Subrecipient monitoring is a joint responsibility between OSP and the PI
 - Mason Policy 4009
 - Implementing Regulations
- What are we monitoring?
 - Compliance with all applicable federal regulations
 - Compliance with Prime Award Terms and Conditions
 - Spending that is appropriate, allowable, and allocable
 - Adequate technical progress consistent with the Statement of Work and invoices



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Invoicing Process

- Subrecipient's substitute Virginia W-9 is submitted to Accounts Payable.
- Each subaward is given a unique encumbrance number.
- Subrecipient submits monthly invoices to Accounts Payable.
- AP sends them to OSP for review and coordination with the PI.
- OSP sends them to PI for review and approval.
- PI has the right to reject an invoice.
- If approved, AP issues check to subrecipient.
- Mason must comply with the Virginia Prompt Payment Act which requires payment of a proper invoice or rejection, for a legitimate reason, within 30 days of receipt.



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Subaward Modifications

OSP issues Subawards incrementally. Modifications are necessary annually. Before issuing future increments of time and funding, the following occurs:

- Ensure we have obtained our own increment under the prime award.
- Obtain PI approval.
- Review subrecipient's debarment status.
- Review subrecipient's audit status.
- Review subrecipient's performance.



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Federal Funding Accountability and Transparency Act (FFATA) 31 USC § 6101

- ❑ Under Federal law, all Federal subawards must be reported to the Federal Spending Reporting System database within 30 days of issuance.
- ❑ OSP collects required information from the subrecipient to submit the report.
- ❑ The report is updated as the subaward is modified.



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Submitted FFATA Report

AWARD SUMMARY

GEORGE MASON UNIVERSITY

AWARD OVERVIEW

Award Number: N014AP91G
 Order Number: N/A
 Awarding Agency: National Aeronautics and Space Administration
 Award Date: 9/5/2014
 Total Award Amount: \$750,000
 Total Number of Transactions: 5
 Total Number of Sub-Awards: 1
 Total Amount of Sub-Awards: \$67,000

RECIPIENT INFORMATION

Recipient Name: GEORGE MASON UNIVERSITY
 Recipient DUNS Number: 077817430
 Recipient Address: 4400 UNIVERSITY DR
 Recipient City: Fairfax
 Recipient State: Virginia
 Recipient Congressional District: VA-11
 Recipient Country: United States of America
 Executive Compensation Provided: The Prime awardee has declared that, for this DUNS, no reporting of executive compensation is required under Section 6102 of P.L. 110-252, amending the Federal Funding Accountability and Transparency Act (P.L. 109-282)

ALL TRANSACTIONS

Page 1 of 1
 Award Number: N014AP91G
 Modification Number: #
 Fiscal Year: 2017
 Transaction Date: 12/30/2015
 Award Description: THE FEASIBILITY STUDY OF THIS PROJECT HAS IDENTIFIED DECISION SUPPORT ACTIVITIES AND CHALLENGES AT THE USDA BASIS AND RMA. THERE ARE MAINLY FIVE ACTIV.
 Bureau: N/A
 Major Funding Agency: N/A

ALL SUB-AWARDS

Page 1 of 1
 Sub-Awardee: REGENTS OF THE UNIVERSITY OF COLORADO, THE
 Sub-Award Amount: \$67,000
 Sub-Award Date: 1/15/2017
 Sub-Award Number: E0033581
 Sub-Award Description: Overall project tasks include technical training, interactions with the GMA team, data service customization and reformatting, and other needs to be met as the project draws in providing operational decision support in house, and as noted, the MODS SIRT processor is already transferring MODS information into a GIS surface-water