

Federal Contracting

Office of Sponsored Programs



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.

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 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

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.

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

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 FAR

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.

Types of Agreements (Cont.)

- **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.

The FAR

- **What is it?**
 - The Federal Acquisition Regulation
 - Title 48 of the Code of Federal Regulations

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

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)

Purpose of the FAR

- **Benefit the federal government in terms of:**
 - Cost (both administrative and price of services)
 - Quality
 - Efficiency

Purpose of the FAR (Cont.)

- 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

Need to consult the FAR when:

- Responding to an RFP
- Completing Reqs and 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

Uniform Contract Format

Far 15.404-1; Standard Form 33

- 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

Uniform Contract Format

Far 15.404-1; Standard Form 33 (Cont.)

- 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

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

Federal Contracting Process (Cont.)

- **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

Federal Contracting Process (Cont.)

- **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

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 deobligated

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

Contracting Officer vs. Contracting Officer's Technical Representative (Cont.)

- **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– cannot legally bind the government

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)

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

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).

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

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

Publication Clauses (Cont.)

- **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

Patent Clauses

- **FAR 52.227-1: Authorization and 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

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 U.S. Government
 - Request deletion of this clause in favor of 52.227-1, Alt. I, Authorization and Consent
 - Can be a deal breaker

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

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 the government within 2 months and government retains “government purpose rights”

Cost Clauses

- **FAR 52.215-2: Audit and 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

Cost Clauses

- **FAR 52.216-7: Allowable Cost and 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)

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

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

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

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

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 U.S. carrier flies the required route
 - U.S. carrier involuntarily re-routes traveler to a foreign carrier

Questions?

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