Contract Compliance and the Federal Acquisition Regulation (FAR)

ORA CERTIFICATE PROGRAM
(MODULE 11)
27 MAY 2015

Learning Objectives

- Participants will learn about the history of the Federal Acquisition Regulation (FAR)
- Participants will understand the differences between a contract and a grant
- Participants will learn about contract types and understand key FAR clauses
- Participants will learn about compliance requirements for federal contracts
- Participants will learn about important University policies

What is a Contract?

A legally binding agreement involving two or more people or businesses (called parties) that sets forth what the parties will or will not do.

Definition from NOLO's Plain-English Law Dictionary
What is a Contract

Basic Elements of a Contract
- Mutual Assent (e.g., an offer to do X in exchange for Y, followed by an acceptance of that offer)
- Consideration (e.g., a promise to fix a leaky roof in return for a payment of $1,000 — or a promise not to do something, such as not disclose another’s confidential or proprietary information)
- Capacity (e.g., rules often require a person to have reached a minimum age and to have soundness of mind)
- Legality (quality or state of being in accordance with the law)

Contract vs. Grant

Contract
- Procurement: funds appropriated by Congress for agencies to conduct business; used by the government to procure goods and services for its use
- Request for Proposals (RFP) or Request for Quote (RFQ) Sponsor determines SOW/ Proposals are used to evaluate Prospective Offers

Grant
- Financial Assistance: funds appropriated by Congress to support a public purpose; advancements in Arts or Science, Social Welfare Programs, etc.
- Standard Sponsor Guidelines/Funding Opportunity Announcement Project idea conceived by Principal Investigator

Contract vs. Grant

Contract
- Federal Acquisition Regulation (FAR)
- OMB Circulars: A-21 (FAR Subpart 31.3) & A-133 (FAR 52.215-2 Alt. II)
- Restrictive Terms & Conditions

Grant
- OMB Circulars: A-110 (Administrative), A-21 (Cost), & A-133 (Audit)
- Expanded Authority
- Flexible Terms & Conditions
### Contract vs. Grant (Uniform Guidance)

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### History of the FAR

**Key Events in the Federal Acquisition Process**

1779

**Constitution of the United States**

The power of the Federal Government to make purchases is an implicit power granted in Article I, Section 8 of the Constitution, which gives Congress the power to "to pay the Debts and provide for the common Defense and general Welfare of the United States", with the authority to establish post offices, raise and maintain armies, a navy, and other services to carry out this purpose.

Article I, Section 9 establishes the "power of the purse", requiring appropriations to be passed by Congress and signed by the president before agencies can expend money.
**Bona Fide Needs Rule**

The Bona Fide Needs Rule originates from the first general appropriation act in 1789, which held that appropriations were for services "in the present year," meaning that such funds could not be carried over into the next fiscal year. The Bona Fide Needs rule is a cornerstone of appropriations law and is codified in 31 U.S.C. 1502(a).

Relevance to Research Administration: The government's fiscal year end on September 30 is one of the busiest cycles in federal procurement, and often requires the University to turn around contracts quickly to avoid losing fiscal year funds.

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**1809**

**Misappropriations Act**

Congress enacted this statutory control in 1809 as part of a reorganization of the War, Navy, and Treasury Departments to limit the Executive Branch in spending appropriations. The current version of the law as stated in 31 U.S.C. § 1501(a) holds that "appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

Relevance to Research Administration: Contracting Officers must use specific funds for intended purposes, and can suffer criminal penalties by violating this law.

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**Civil Sundry Appropriations Act of 1861**

The Civil War created procurement needs for the federal government that were more effectively carried out through advertised solicitations for sealed bids, as established by this act.

Relevance to Research Administration: This act created the basis for the modern day federal solicitation. Sealed bids are still practiced in Government Contracting. Sealed bids do not allow for contracting by negotiation.
1870

Anti-deficiency Act

The first version of this Act can be traced to 1870 and is now codified in 31 U.S.C. § 1341. It holds that Federal employees may not involve the government in any obligation to pay money before funds have been appropriated for that purpose, with few exceptions.

Relevance to Research Administration: The Government shutdown in 2013 is a prime example of how a lack of federal appropriations can impact business as usual at the University.

1945

Science The Endless Frontier published

Vannevar Bush, Director of the Office of Scientific Research and Development, published a report for President Truman making the case to invest government resources in creating grant-making agencies for research and development, with the argument that investment in scientific development would wage against disease and protect the national security of the American people.

Relevance to Research Administration: This report is credited in leading to legislation establishing NSF, DOE, and NIH.

1947

Armed Services Procurement Act of 1947

This act governed acquisition by defense agencies, creating the first consolidated rule book.

Relevance to Research Administration: This act established competitive negotiation as a method of Government Contracting and laid the foundation for the FAR.
Federal Procurement Policy Act of 1974

Established Federal Acquisition Regulation, for the codification and publication of uniform policies and procedures for acquisition by all executive agencies.

Relevance to Research Administration: Most of the University of Maryland’s research and development contracts are governed by the FAR.

Federal Acquisition Regulations System

- Codified at Title 48 of the Code of Federal Regulations (CFR)
- A system of uniform policies and procedures governing acquisitions by all federal executive agencies
- Consists of the Federal Acquisition Regulation (FAR) which is the primary document; there are agency specific acquisition regulations that implement or supplement the FAR.
- FAR Part 52 contains solicitation provisions and contract clauses

Government Contracting Parties

- Contracting Officer
  - Solicits and acquires goods/services, negotiates, and reviews Contractor requests for approval; only person authorized to approve changes to any of the terms and conditions of the contract, including cost/price adjustments
- Contract Specialist
  - Solicits and acquires goods/services under direction of CO and engage in negotiations, also assists with contract administration
- Contracting Officer Representative / Contracting Officer Technical Representative
  - Responsible for the administration of technical details within the scope of work and inspection, acceptance of deliverables and reports (not authorized to obligate government funding, change SOW, or to make any other changes to the contract)
Contracting by Negotiation

- Negotiations are not entertained in Sealed Bidding, in which proposals are evaluated without discussions with Contractor (FAR Part 14)
- Contracting by Negotiation rules are in FAR Part 15
- Government engages in discussions with prospective Contractor and allows opportunities to:
  - Revise Cost Proposal
  - Revise Technical Requirements
  - Type of Contract (Cost Reimbursable/Firm Fixed Price)
  - Contract Terms

Contract Types

Contract type is a major factor in the contract clauses prescribed under the Federal Acquisition Regulations (FAR)

Cost-Reimbursement Contracts

- Provides for payment of allowable incurred costs
- Obligated vs. Anticipated
- Incremental Funding
- Contractor may not incur expenditures beyond funding obligation without the approval of the Contracting Officer (except at own risk)
- Defined in FAR 16.301
Types of Cost-Reimbursable Contracts

- Other types of Cost-Reimbursable Contracts used by the Government include Cost Plus Incentive Fee, Cost Plus Award Fee, and Cost Plus Fixed Fee
- The University operates under “Cost Contracts” (no fee)
- While the University does not propose fee contracts, it may need to issue them to commercial subcontractors working under Government Prime Awards on a fee (for profit) basis

Contracts for Research and Development

“Because the absence of precise specifications and difficulties in estimating costs with accuracy (resulting in a lack of confidence in cost estimates) normally precludes using fixed-price contracting for R&D, the use of cost-reimbursement contracts is usually appropriate.” - FAR 35.006(c)

Audit Requirements


- Government has the right to examine and audit all records and other evidence sufficient to determine costs anticipated or incurred were done properly
- Alt. II incorporates OMB Circular A-133
  - Ensures contracts will be audited in accordance with standards appropriate for educational institution
Allowable Costs

52.216-7 Allowable Cost and Payment (Jun 2013)
Alternate II (Aug 2012)

- Costs must actually be "incurred" before they are paid by the Government
- Incorporates OMB Circular A-21
- Prescribes method of payment and invoicing procedures
- Gives the Government the right to adjust previous payments in the event of an audit or if a cost is otherwise found to be unallowable by the Contracting Officer

Limitation of Funds

52.232-22 Limitation of Funds (Apr 1984)

- Requires the Contractor to notify the Contracting Officer in writing 60 days in advance when it anticipates it will have incurred 75 percent of the total amount obligated on Contract
- As prescribed in 32.705-2(f), clause inserted in solicitations and contracts if an incrementally funded cost-reimbursement contract is contemplated
- PIs and Departments must forecast spending needs on a regular basis (at least monthly)
- PIs and Departments must alert ORA to notify the Contracting Officer under this clause

Limitation of Costs

52.232-20 Limitation of Cost (Apr 1984)

- Notification requirements are similar to Limitation of Funds Clause (send 60 days in advance of exceeding 75% of funding)
- Notification utilized when Contractor has reason to believe that total costs will be greater or substantially less than had been previously estimated
- Government may negotiate increase in contract price or terminate the agreement
- Only the Contracting can authorize work to exceed the authorized cost ceiling in writing (not the COR or COTR)
**Firm-Fixed Price Contracts**

“A firm-fixed price contract provides for a price that is not subject to any adjustment on the basis of the contractor’s cost experience in performing the contract. This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss. It provides maximum incentive for the contractor to control costs and perform effectively and imposes a minimum administrative burden upon the contracting parties.”

-FAR 16.202-1

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**Firm Fixed Price Contracts**

- As with Cost-Reimbursable contracts, the University expends funds on Firm-Fixed-Price Contracts under a no fee basis.
- University does not submit detailed invoices, but cost proposals are still auditable.

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**Payments**

52.232-2 Payments under Fixed-Price Research and Development Contracts (Apr 1984)

- Invoices are based on milestones or deliverables (not incurred costs).
- Government may reject invoices if milestones or deliverables are not met.
What happens if we have money left?

The University has established an administrative procedure in place for this scenario:

“Sponsored Program Procedure for Balances on Fixed Price Contracts: Administrative Procedure A10.3”

Indefinite-Delivery Contracts

- Can be either Cost-Reimbursable or Fixed-Price
- Provides for Delivery Orders or Task Orders to be issued under a base contract with general terms and conditions
- May cover multiple projects involving different PIs for certain tasks

Other Contract Types

- Time and Materials Contracts are used when it’s not possible to estimate the duration of the work or costs with confidence; fixed hourly rates are required
- Labor Hour Contracts are a variation of time and Materials Contract, where materials are not being delivered; fixed hourly rates are required
- Letter Contracts are contractual instruments that authorize the contractor to begin work while a definitive contract is negotiated
Compliance

Other Contract Notifications and Prior Approval Requirements

E-Verify

FAR 52.222-54 Employment Eligibility Verification (Aug 2013)

- Purpose is to stop unauthorized employment of individuals who are not legally allowed to work in the United States
- E-Verify is an Internet-based system that compares information from an employee’s Form I-9 to data from U.S. Department of Homeland Security and Social Security Administration records to confirm employment eligibility
- Department is responsible for initiating the process for employees assigned to the contract with E-Verify clause incorporated
- Employees hired prior to 11/6/86 are not subject to the E-Verify process
Travel

- Travel under a contract requires prior approval by either Contracting Officer, Contract Specialist or COR/COTR even if included in approved budget.
- Sponsor requires specific details, such as name of travelers, purpose of trip, destination, number of travel days, and estimated costs (foreign travel may require additional information or requirements before approval).
- Travel done in accordance with FAR Subpart 31.3 not Federal Travel Regulations or other regulations.

Subcontracting Plans

FAR 52.219-9, Small Business Subcontracting Plan (Jul 2013)

- Required for contracts expected to exceed $650,000.
- PI and Department must work with procurement to complete Subcontracting Plan required by RFP.
- Incorporated into Contract.
- Applies to all non-salary and benefits costs.
- University has Master Subcontracting Plan.
Subcontracts

52.244-2 Subcontracts (Oct 2010) ALT 1 (Jun 2007)

- Contractor must receive written permission from Contracting Officer before issuing new Subcontracts
- Subcontracts are requested by the PI and Department using the Subaward Request Form – they are not automatically issued
- Subcontracts can take time to negotiate

Equipment

52.245-1 Government Property (Apr 2012) ALT II (Apr 2012)

- Government retains ownership of equipment purchased with contract funds
- Status of equipment must be reported annually
- Non-profits must ask permission at the end of the contract to retain equipment (disposition)
- Non-profits are allowed to retain ownership of equipment under $5k with permission of CO
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Reporting Inventions

52.227-11 Patent Rights – Ownership by the Contractor (Dec 2007)

- Implements Bayh-Dole
- University must report subject inventions
- PI submits disclosure to the Office of Technology and Commercialization (OTC)
- OTC submits reports on behalf of University
- Failure to report can result in assignment of patent rights to Government
USM Board of Regents & University Policies

IV-2.00 Policy on Solicitation and Acceptance of Sponsored Projects
- Applications may be submitted and awards accepted directly by the designated officer on each campus (Office of Research Administration)

IV-2.20 Policy on Classified and Proprietary Work
- University does not conduct federal classified work nor permits the use of University facilities or resources for classified work on campus
- University will not enter into an agreement that bars investigator(s) from publishing or otherwise disclosing the findings publicly

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Questions