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Research Agreements: FAR Based Contracts vs. Grants and Cooperative Agreements

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Research Agreements: FAR Based Contracts vs. Grants and Cooperative Agreements

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Agenda

1. The “Federal System”
2. Terms and Conditions
3. Award Challenges and Performance Disputes
4. Additional Takeaways and Practice Points

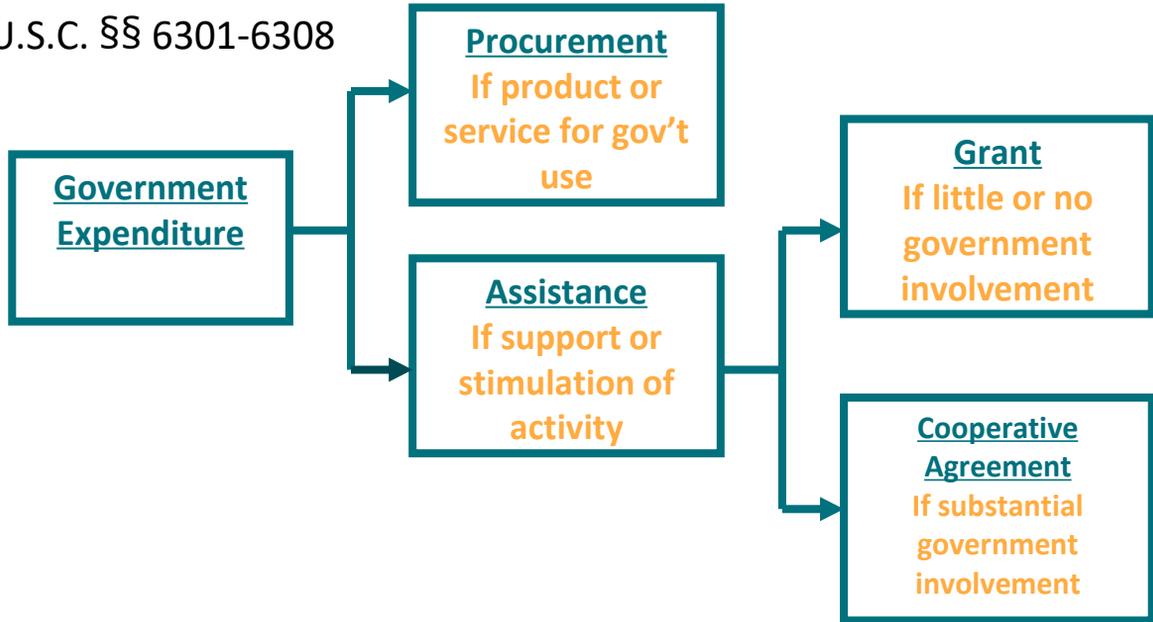
1. The “Federal System”

Basic Federal Funding System



Federal Grant and Cooperative Agreement Act of 1977

31 U.S.C. §§ 6301-6308



Federal Grants Framework: Find it for Yourself, with Differing Agency Practice



Fed Procurement Contracts Legal Framework: A Rule for Everything, and Most Rules in the FAR

A very detailed regulatory framework – which means you do not have to do too much ‘hunting,’ but there is a system to learn.

- Federal Acquisition Regulation (“FAR”) – Title 48 of the Code of Federal Regulations
- Agency Supplements to the FAR (e.g., DFARS, HHSAR, etc.)
- Very few, but very important, operative statutes. The key statutes are:

Statute	Citation	FAR Implementation
Competition in Contracting Act (“CICA”)	41 U.S.C. § 3301 et seq	FAR Part 6
Truth in Negotiation Act (“TINA”)	41 U.S.C. § 3502	FAR Part 15
Contract Disputes Act (“CDA”)	41 U.S.C. § 7101 et seq	FAR Part 33

II. Terms and Conditions

The Grant “Deal”

If you (grantee) engage in *certain activities* during a *certain period of time* we (the U.S. government) will “reimburse” you for *certain costs* incurred in engaging in that activity.

Federal Legal Grants Framework: Driven by the System (and Agency Practice)



NSF Example: Background Resources

- Program and Statute
 - Scholarships in Science, Technology, Engineering, and Mathematics (S-STEM), 42 U.S.C. § 186g(c), [https://uscode.house.gov/view.xhtml?req=\(title:42%20section:1869c%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title42-section1869c\)&f=treesort&num=0&edition=prelim](https://uscode.house.gov/view.xhtml?req=(title:42%20section:1869c%20edition:prelim)%20OR%20(granuleid:USC-prelim-title42-section1869c)&f=treesort&num=0&edition=prelim)
- Assistance Listing
 - 47.706
 - www.sam.gov
- Funding Opportunity Announcement
 - NSF S-STEM No. 23-527
 - <https://beta.nsf.gov/funding/opportunities/nsf-scholarships-science-technology-engineering>
- OMB Compliance Supplement
 - No specific entry – but all NSF awards are “R&D Cluster” for audit purposes, per page 8-VII-8, so see Part 5 at page 5-2-1.
 - <https://www.whitehouse.gov/omb/office-federal-financial-management/>
- NSF Proposal and Award Policies & Procedures Guide (“PAPPG”)
 - See: https://nsf.gov/publications/pub_summ.jsp?ods_key=pappg

The Procurement Contract “Deal”

If you furnish the deliverables set forth in the contract, in a manner generally compliant with Sections C and H of the contract, we (the U.S. government) will pay you for those deliverables – to include a reasonable profit.

With respect to the above, note that we (the U.S. government) can change the deliverables within the general scope of the contract, but, if that causes you increased cost, we (the U.S. government) must pay the additional amount.

Procurement Contract Terms: Mostly in the Agreement

- Federal Procurement Contracts are drafted to fit:
 - A standard form;
 - Standardized contract “sections” with specified general contents; and
 - Standard terms generally subject only to modest tailoring.
- Standard Form (SF-33) with Standardized Contract Sections:

11. TABLE OF CONTENTS

(X)	SECTION	DESCRIPTION	PAGE(S)	(X)	SECTION	DESCRIPTION	PAGE(S)
	<i>PART I - THE SCHEDULE</i>				<i>PART II - CONTRACT CLAUSES</i>		
	A	SOLICITATION/CONTRACT FORM			I	CONTRACT CLAUSES	
	B	SUPPLIES OR SERVICES AND PRICES/COSTS			<i>PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACHMENTS</i>		
	C	DESCRIPTION/SPECIFICATIONS/WORK STATEMENT			J	LIST OF ATTACHMENTS	
	D	PACKAGING AND MARKING			<i>PART IV - REPRESENTATIONS AND INSTRUCTIONS</i>		
	E	INSPECTION AND ACCEPTANCE			K	REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS	
	F	DELIVERIES OR PERFORMANCE					L
	G	CONTRACT ADMINISTRATION DATA			M	EVALUATION FACTORS FOR AWARD	
	H	SPECIAL CONTRACT REQUIREMENTS					

- FAR Clauses are Set Forth in FAR Part 52, i.e., 48 C.F.R. Part 52. In turn, each clause in the regulations is preceded by a “prescription” that states when to use it, and each clause is numbered in such a way as to reflect the substantive FAR Part that contains regulatory standards giving rise to the clause itself.

Reps and Certs

- You may have noticed that, in SAM.gov, you sign up to perform:
 - Financial Assistance only,
 - Procurement Contracts only, or
 - Both
- Which you choose significantly impacts the “representations and certifications” you are required to complete. For grants, this is simple:
 - For Procurement Contracts, there is a whole lot there.
 - Let's look at an example. In prep for this presentation, I pulled Princeton University's – which are publicly available via SAM.gov.

Provisions and Clauses: Overview of Ancillary Compliance Obligations

Labor Policy/Employment-Related:

Requirement	Clause	Basic Premise
Basic EEO	52.222-26 (and 52.222-25 provision)	Applies to all contracts over \$10k. If contract is \$50k or more and have 50 employees or more, formal Affirmative Action Plan requirements.
Rehabilitation Act	52.222-36	Applies to contracts over \$15k (per DOL regs \$10k). Must post certain notices in office and job announcements. If AAP, address in AAP.
Vietnam Era Veterans' Readjustment Assistance Act ("VERAA")	52.222-35 and 52.222-37	Applies to contracts over \$150k (per DOL regs \$100k). File annual VETS-4212 Report, AAP requirements, post certain notice, provide notice of job opportunities to local One-Stop delivery system.
E-Verify	52.222-54	Applies to all contracts over \$250k. All new employees must be checked via E-Verify, plus all employees on the contract must be checked.
Service Contract Labor Standards	52.222-41	Applies to all "service contracts" over \$2,500. Detailed requirements to pay (in rough terms) non-exempt employees certain minimum wages and fringes, established through a "wage determination" process governed by DOL.
Minimum Wages per EO 14026	52.222-55	Follows the SCLS clause for applicability. Minimum wage of \$15.00 per hour for all employees working on, or in connection with, the contract. Notice requirement.

How to Navigate SCLS Example

- Let's say the contract is a \$350,000 per year service contract.
- We will have an RFP in front of us. Assuming the government reps preparing the RFP checked the right boxes, clause 52.222-41 will be in the contract.
 - Start with FAR clause 52.222-41. We know (because we now know the system) that is 48 C.F.R. §52.222-41.
 - Follow that through (via the prescription and numbering) to:
 - FAR Part 22 (subpart 22.10), and
 - 29 C.F.R. Part 4 (Dept. of Labor regulations)
- How about VEVRAA:
 - Start with FAR clause 52.222-35. We know (because we now know the system) that is 48 C.F.R. §52.222-35.
 - Follow that through (via the prescription and numbering) to:
 - FAR Part 22 (subpart 22.13), and
 - 41 C.F.R. Part 60-300 (Dept. of Labor regulations)

Scope of Terms Somewhat Dependent Upon Nature of Contract

- Since the mid-1990s the federal procurement system has distinguished (by law) between “commercial items” and non-commercial items.
- The definition of a “commercial item” is:

Commercial product means -

- (1) A product, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and -
 - (i) Has been sold, leased, or licensed to the general public; or
 - (ii) Has been offered for sale, lease, or license to the general public;

- It also includes items that would be a commercial item, but for minor modifications.
- Admittedly, less likely to be invoked in a research context. Nonetheless, important to be aware of as a “commercial item” contract will have more streamlined terms and conditions and less compliance burden.
- You can tell when a solicitation / contract is viewed by the agency as a commercial item because it will invoke FAR Clauses 52.212-4 and FAR Clause 52.212-5. More on this below.

A Note on IP Rights

- **Procurement Contracts:**

- FAR-based system is more “advanced” and nuanced.
- Read the contract and see clauses starting: 52.227-XX.

- **Financial Assistance:**

- IP rights primarily set forth at 2 C.F.R. § 200.315.
- Agency guidance provides instruction regarding reporting of inventions, publication policy, etc.

- **The two systems are largely in harmony, but not identical:**

- Copyright generally held by author with government obtaining a broad, royalty-free, irrevocable, world-wide license to use and display, and to permit others to use and display.
- Patent rights generally driven by Bayh Dole Act terms, as set forth in the “standard patent rights clause” at 37 C.F.R. § 401.14. Inventor retains right to patent, with broad license to practice to federal government.
- More potential to negotiate and to protect IP under government contracts framework.

A Note on Cost Principles

- Cost principles for procurement contracts are set forth at FAR Part 31.
- Cost principles for financial assistance are set forth at 2 C.F.R. Part 200, Subpart E.
- But – coordinating rule within the FAR:

Subpart 31.7—Contracts With Nonprofit Organizations

31.701 Purpose.

This subpart provides the principles for determining the cost applicable to work performed by nonprofit organizations under contracts with the Government. A nonprofit organization, for purpose of identification, is defined as a business entity organized and operated exclusively for charitable, scientific, or educational purposes, of which no part of the net earnings inure to the benefit of any private shareholder or individual, of which no substantial part of the activities is carrying on propaganda or otherwise attempting to influence legislation or participating in any political campaign on behalf of any candidate for public office, and which are exempt from federal income taxation under section 501 of the Internal Revenue Code.

31.702 General.

The OMB Uniform Guidance at [2 CFR part 200, subpart E](#) and appendix IV, sets forth principles for determining the costs applicable to work performed by nonprofit organizations (as defined in the OMB Uniform Guidance at [2 CFR part 200](#)) under contracts (as well as grants and other agreements) with the Government. See 31.108 for exceptions to the cost principles for nonprofit organizations.

...and CAS

- Similarly, institutions of higher education are subject to special rules under the Cost Allocation Standards (“CAS”) at 48 C.F.R. Part 9905 (within Chapter 99).
- Per 48 C.F.R. 9903-2(c), IHEs must only comply with Parts 9903 and 9905:
- **48 C.F.R. Part 9903:**
 - Administration of CAS (e.g., contract coverage)
 - Disclosure Statement (DS-2) requirements // Note coordinating provision at 2 C.F.R. § 200.419
- **48 C.F.R. Part 9905 (and 2 C.F.R. § 200.419):**
 - Consistency in estimating, accumulating and reporting costs (9905.501)
 - Consistency in allocating costs incurred for the same purpose (9905.502)
 - Accounting for unallowable costs (9905.505)
 - Cost accounting period (9905.506)

III. Award Challenges and Performance Disputes

Procurement Contract Award Disputes: GAO and COFC “Bid Protests”

- Most FAR-based contracts are awarded under procedures set forth in FAR Part 15:
 - Full and open competition above the Simplified Acquisition Threshold (“SAT”)
 - Calls for even-handed and non-arbitrary evaluation of offers
 - Calls for “equal” discussions between government and offerors during evaluation of offers
 - Awarding agencies required to strictly adhere to RFP evaluation factors and prove they did so through documentation
 - Process is perilous for federal agencies, because disappointed offerors have robust rights to challenge the award decision – with substantial “bid protest common law” established to govern the review.
- Disappointed offerors have the right to challenge the award decision through a “bid protest” to the agency, the GAO, or through a lawsuit before the Court of Federal Claims, or both.
- But you must act fast to get effective relief via an automatic “CICA Stay” before GAO or (potentially) preliminary injunction before COFC – to pause the award process.

Procurement Contract Performance Disputes: Relatively Powerful Rights

- Under a procurement contract, a contractor can submit a “claim” as a matter of right to the federal agency via the Contracting Officer. The claim can be a demand (i) for “contract interpretation” (i.e., clarify what a contract term means), or (ii) the agency to carry out one or more of its obligations under the contract (usually in the form of a demand for payment).
- The Contracting Officer has a set period of time to respond, generally 60 days, after which the claim can be treated by the Contractor as “deemed denied.”
- The Contracting Officer is required to issue a “Contracting Officer’s Final Decision” (“COFD”) on the claim with an explanation of that decision.
- The Contractor can then challenge that COFD (or a “deemed denial”) through one of two ways, at its election:
 - First, it can appeal the COFD to an agency Board of Contract Appeals, the members of which must be largely independent in their employment from the influence of the business decision-makers in the agency.
 - Alternatively, it can file a lawsuit in COFC.
- Both BCA and COFC decisions are appealable directly to the Federal Circuit.
- A MAJOR practical difference in the system therefore is that agencies are more accountable in their contract management and treatment of contractors than federal awarding agencies are with respect to grantees.
- A MAJOR practical difference is that the Federal Circuit, COFC, and BCAs develop a body of common law that provides interpretation of ambiguous regulatory provisions and enhances consistent application across agencies.

Grant Award Dispute: Difficult to Pursue

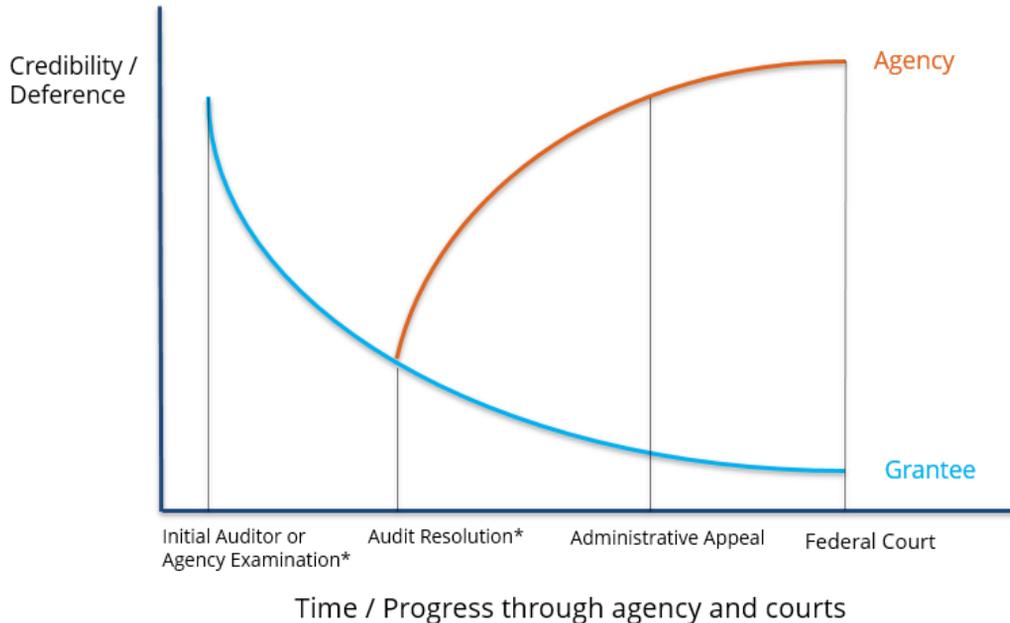
- Often many, many applications with outside reviewers and highly discretionary standards. Moreover, information about the decision will not be readily available before your lawsuit.
- No special disputes process, so suit must be brought under the judicial review provisions of the Administrative Procedures Act, 5 U.S.C. §§ 702 and 706.
- Basic case:

§ 200.205 Federal awarding agency review of merit of proposals.

For discretionary Federal awards, unless prohibited by Federal statute, the Federal awarding agency must design and execute a merit review process for applications, with the objective of selecting recipients most likely to be successful in delivering results based on the program objectives outlined in section § 200.202. A merit review is an objective process of evaluating Federal award applications in accordance with written standards set forth by the Federal awarding agency. This process must be described or incorporated by reference in the applicable funding opportunity (see appendix I to this part.). See also § 200.204. The Federal awarding agency must also periodically review its merit review process.

- APA provides for review of final agency action, on the administrative record, for whether arbitrary, capricious, or contrary to law.
 - If all funding awarded, suit can be rendered moot, so must file promptly and should demand, as part of requested relief, suspension of lapse provision in the pertinent appropriation.
- As you can see, this is a difficult case.

Grant Award Disputes: Audit and Agency-Driven with Difference Built in



*Exception: OIG can be more strict in view than agency.

Grantee Usually Bears the Burden to Prove Compliance

Examples:

- **HHS Departmental Appeals Board:**

- "In decisions reviewing disputed disallowances, the Board 'has consistently held that a [recipient] has the burden to document the allowability and allocability of its claims for FFP.'" *Pennsylvania Dept. of Public Welfare*, DAB No. 2653 (Sep. 2, 2015).

- **Dept. of Education, Office of Postsecondary Education, Appeal Procedures for Audit Determinations:**

- "An institution...requesting review of the final audit determination or final program review determination issued by the designated department official shall have the burden of proving... (1) That expenditures questioned or disallowed were proper..." 34 CFR §668.116 (Hearing).

- **Practical Impact:**

- You are going to need documentation, preferably contemporaneous documentation, to prevail. This means purchase requests, receipts, policies, invoices, etc.

Process Varies by Agency

- DOL

- Generally, appeal to OALJ. Very formal ALJ appeal, governed by APA standards. 29 CFR Part 18.

- HHS

- Appeal to DAB. Agency Board, semi-formal. 45 CFR Part 16.
- NIH preliminary appeal process under 45 CFR Part 50, Subpart D.

- DoD

- Express preference for ADR. Also, may appeal to designated "Appeal Authority," which is generally paper review. 32 CFR § 22.815.

- DOE (Energy)

- Express preference for informal resolution. Appeal to "Senior Procurement Executive." 2 CFR § 910.128.

- USAID

- Paper appeal to "Assistant Administrator for the Bureau of Management" or designee. 2 CFR § 700.15.

IV. Additional Takeaways and Practice Points

Along These Lines – Concepts That do not Exist Under a Procurement Contract

Grant Concept	Comment in Procurement Contract Context
Program Income	When paid for performance, it is your money.
Cost Share	There may be situations where you agree, for other business reasons, to perform a contract at a loss, but there is no “mandatory cost share” concept.
Advance Payment	Whereas advance payment is the norm under grant agreements, it is generally legally prohibited by federal appropriations laws for procurement contracts.
Federal Interest	Generally, even under a cost-reimbursement procurement contract, the government will only pay for facility operating costs (depreciation, mortgage interest, etc.). To the same end, there is no notion of the federal government acquiring an underlying ownership interest in a capital asset because it funded the equity of the capital asset.
Noncompetitive Continuation Awards	Most contracts are structured as having a one-year base period with four one-year unilateral options. Generally, those option periods are priced at the time of the original competition.
Relinquishment by the Non-Federal Party	Unlike a grant agreement, a contractor has no right to “relinquish” a procurement contract. Telling the government that you no longer intend to perform would likely be considered “anticipatory repudiation” of your legal obligations under the contract and very well may lead to the government terminating the contract for default and seeking damages.

Mixed Funding Practice Note

- It is often beneficial to keep your federal procurement contract “lines of business” separate from your grant-funded lines of business. If you do not, the profit on the procurement contract can – depending on the circumstances and nature of the overlap – become program income on the grant-supported line of business.
- This means:
 - In preparing your price proposal, you should consider the cost of performance and ensure that the contract price will cover the cost of performance. Note that the procurement contract will likely be fixed price per unit of service or time and materials, not cost reimbursement – so this requires some budgeting on your end.
 - *DO NOT UNDERPRICE A PROCUREMENT CONTRACT PROPOSAL! YOU HAVE TO PERFORM AT THE AGREED PRICE, POTENTIALLY FOR YEARS. PROFIT IS NOT ONLY ALLOWED – IT IS EXPECTED IN THE PROCUREMENT SYSTEM.*
 - In the course of performance, you should create an account to accumulate the costs of performance just like you do on your grants. These accumulated costs won't lead to the invoiced amount in a fixed price context, but will be an important component of proof that the procurement contract line of business is “kept separate” from your grant-supported lines of business.

Two Other Legal Instruments

- **Cooperative Research and Development Agreement (“CRADA”)**
 - Purpose is to foster collaboration between government labs (and federally employed scientists/investigators) and private entities (privately employed scientists/investigators)
 - Authorized by 15 U.S.C. § 3710a
 - Lab (government) may accept funding (including subaward of federal funds), but cannot provide funds
 - Flexible terms, including authority to agree to flexible patent rights terms (always subject to government purpose rights license to government)
 - Resource: <https://www.techtransfer.nih.gov/policy/cradas>
- **Other Transaction Authority/Agreements (“OTAs” or “OTs”)**
 - Intentionally flexible contracting vehicle, allowing for contracts outside the parameters of the FAR.
 - Authorized for certain agencies. See, e.g., 10 U.S.C. §§ 4021-22
 - Contracting still largely informed by concepts of federal procurement system, but flexibility provided to encourage participation in federal contracts by entities that otherwise would not do business with the federal government
 - Resource: https://www.acq.osd.mil/asda/dpc/cp/policy/docs/guidebook/TAB%20A1%20-%20DoD%20OT%20Guide%20JUL%202023_final.pdf