

Sub-contracting Under Federal Research Grants and Contracts

Presented by

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Just What is a “Subcontract”?

Subcontracts, Purchase Orders, “Consortium Agreements,” etc.

- Under Federal contract rules and the UCC:
 - Purchase orders and subcontracts are the same thing; NIH “consortium agreements” are also subcontracts
 - “Subcontract” means any contract as defined in [Subpart 2.1](#) entered into by a subcontractor It includes but is not limited to purchase orders, and changes and modifications to purchase orders

(continued)

Just What is a “Subcontract”? (2)

*Subcontracts, Purchase Orders,
“Consortium Agreements,” etc.*

- Distinctions often made by universities regarding subcontracts vs. subawards arise from 2 CFR 220 (OMB Circular A-21) which contains cost principles that provide the general accounting rules for colleges and universities

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Just What is a “Subcontract”? (3)

- Some institutions also use “Technical Services Agreement” – still treated as a subcontract under Federal rules
- So – the issue with any of these is that there is a third party in the background in subcontract situations

Subaward

FAR 215.2(ff)

- A formal legal agreement between your institution and another legal entity where:
 - A defined portion of the your sponsored project's intellectually significant activity is assigned to another entity (“the subrecipient”) to fulfill
 - Work is generally performed by the subrecipient's personnel using their resources, usually at their site

Subcontracts v. Subgrants

Only Used When Authorized by Granting Agency

- Many agencies do not authorized the use of subgrants at all – for instance NIH and NASA do not generally allow subgrants under research grants

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Subcontracts v. Subgrants (2)

- When allowed, subgrant is for the purpose of funding research or assistance of benefit to the public
- Subgrant not for support of University grant activities, even when University investigator has a “Co-PI”

Control of the Subcontract By the Third Party

Control the Prime to Control the Sub

- Contractor purchasing systems requirements (FAR 44.2)
 - Consent to Subcontract/Contractor Purchasing System Review (CPSR)
 - <http://guidebook.dcmamil/26/guidebookprocess.htm>
- “Flowdown clauses” (See handout)
- Other control methods

Federal Purchasing Requirements

FAR 44.202 and 2 CFR 215 and 220

- Terminology – subcontract v. purchase order, etc.
- Competition – how much, when and what if there is none
 - FAR 44.202 and 2 CFR Sec. 215.43

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Federal Purchasing Requirements (2)

- Methods of contracting, types of contracts and stacks of paperwork
 - FAR 44.202 and 2 CFR Sec. 215.44, et seq.
- Ethics, conflicts of interest, etc. (or how to stay out of jail)
 - FAR Parts 3 and 9, and 2 CFR Sec. 215.42

Other Systems to be Coordinated with Purchasing/ Subcontracting System

- Cost and Pricing
 - FAR 44.202 and FAR 15.4 and 2 CFR Sec. 215.45
- Intellectual Property and Government Property
 - FAR Part 27 and 45, and 2 CFR Sec. 215.33 et seq.
 - See also: **Intellectual Property in Government Contracts**, 6th edition, Ralph C. Nash Jr. and Leonard Rawicz, Wolters Kluwer (December 2008)

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Other Systems to be Coordinated with Purchasing/ Subcontracting System (2)

- Labor and other socio-economic issues
 - FAR Subchapter D
- Ethics and “good government”
 - FAR Parts 3 and 9; 2 CFR 215.42
 - *WITT v. EKU*, 205 S.W.3d 263 (KY, 2006)
 - Non-federal contracts (subcontracts, etc.) may also be controlled to comply with federal rules on “consistency”
 - CAS 101

Federal Government Enforces These Requirements Through the Subcontract Approval Process

Unapproved Systems – Lost Time and Unapproved Subcontracts – Unpaid Invoices

- FAR requires prior approval of subcontracts made by primes with unapproved subcontracting systems
 - FAR 44.201
- 2 CFR 220 and 2 CFR 215 make system approval prerequisite to being paid

Solicitation and Negotiation of Subcontracts

From the “Federal Model” to the “Buddy” System

- Federal rules mandate a competitive “fair” system
 - FAR 44.202-2; 2 CFR 215.44
- Subcontracts in commercial situations are subject only to institution’s rules
- Negotiation is negotiation (most of the time)

Issues to Address When Negotiating Subcontracts

A Team Effort With Early Communication Between the PI and Research Administration

- Authority of agents for each party
 - Particular emphasis on the authority of Principal Investigator/Technical Monitor
 - To what extent will University PI control/be controlled by the other PI?

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Issues to Address When Negotiating Subcontracts

A Team Effort With Early Communication Between the PI and Research Administration (2)

- Authority of third-party agents (e.g., auditors, inspectors, etc.)
- Changes and technical direction

Issues to Address When Negotiating

Costs and Budgets – The PI, Research Administration and Accounting Must Work Together

- Costs are different for each type of subcontractor
 - FAR Part 31; 2 CFR 220
 - See <http://research.uiowa.edu/dsp/main/?get=costevaluationfaq>
- Controlling regulations are different
 - Corporations are governed by FAR Part 31 or by generally accepted accounting principles for corporations

Issues to Address When Negotiating

Costs and Budgets (2)

- Universities ONLY are governed by 2 CFR 220
- Most non-profit organizations are under 2 CFR 230
- Many hospitals are governed by HHS regulations in 45 CFR

Issues to Address When Negotiating

Costs and Budgets (3)

- Overhead is a real cost, not “profit” to be waived
- Watch the application of the Cost Accounting Standards

Issues to Address When Negotiating

Intellectual Property Is Valuable But Negotiable – General Counsel Takes the Lead

- Right to use, not ownership, is normally the issue
- Need to publish for academic purposes versus the need to protect “trade secrets”
- Patent disclosure issues

Issues to Address When Negotiating

Intellectual Property Issues (2)

- Copyright
- Licensing
- Remember “background” and “derivative” rights
- Think global

Issues to Address When Negotiating

Intellectual Property Issues (3)

- Infringement and indemnification
- Trademarks and endorsements
- Processing costs (e.g., patent fees)
- See FAR Part 27
- See A Guide Through the Labyrinth: Evaluating and Negotiating a University Technology Transfer Deal, 11 B.U. J. SCI. & TECH. L. 221, 222

Issues to Address When Negotiating (Especially with a Corporation)

Competition, Conflict and Confidentiality

- Corporations want loyalty – i.e., non-compete
- Watch for conflicts within organization (engineering is with Coke, chemistry is with Pepsi)

Issues to Address When Negotiating (Especially with a Corporation)

Competition, Conflict and Confidentiality (2)

- When should there be confidentiality and who is covered?
- ***Be careful with consultant agreements***

Issues to Address When Negotiating

Security, International Issues and the Rights of Others (e.g., Students or Patients)

- Classified subcontracts (See FAR 4.4)
- “Export of data” and non-citizen investigators and staff
- Student rights
<http://www.admin.mtu.edu/admin/boc/policy/ch18/ch18p6.htm>
- Patients’ and other subjects’ rights
<http://www.hhs.gov/ocr/privacy/index.html>

Who is Responsible for Enforcing Export Controls and Sanctions?

- State Department (DDTC) (ITAR; 22 CFR 120 et. seq.)
- Commerce Department (BIS): Export Administration Regulations (EAR; 15 CFR 730 et. seq.)
- Treasury Department, Office of Foreign Assets Control (OFAC)
- Various other U.S. agencies have licensing authority for different exports, for example:
 - Nuclear - Nuclear Regulatory Commission, Departments of Energy and Commerce

Issues to Address When Negotiating

Audit and Access to Other Party's Documents

- Audit
- Lab notes and work papers
- Inspections, acceptance process and close-out

Issues to Address When Negotiating

Payment

- Payment process
- Measure of payment
- Security for payment

Issues to Address When Negotiating

Non-Performance

- Remedies
- Government's role
- Disputes
- Differences between private and governmental organizations

Issues to Address When Negotiating

Terminations

- Elements of default
- Terminations for convenience
- Termination for accounting and payment

Issues to Address When Negotiating

Disputes

- Jurisdiction and choice of law
- Method of resolving disputes
- Liquidated damages and other remedies

Subcontracting “Logistics”

Drafting and Documentation

- Who does what – PI Statement of Work versus contract drafting
- Methods of “flowing down” clauses
- Approval process
- Documenting “standard” contracts
- Documenting deviations

Performance

- Reporting and correspondence
- Technical versus administrative documentation
- Coordination with the government
- Changes and delays
- Completion and close-out
- “Carry-forwards” and extensions

Sources of Guidance

Texts, URLs and Formbooks

Research Administration and Management

by Elliott C. Kulakowski, Lynne U. Chronister (2006)

Guide To Service Subcontract Terms and Conditions

by American Bar Association (Paperback - 2008)

URL's

- <https://acc.dau.mil/CommunityBrowser.aspx?id=353257>
- <http://www.fedbar.org/govcon-subcontracts.doc>

FORMS

- researchadmin.uchicago.edu/about/forms.shtml
- [www.northeastern.edu/research/facts rates forms/forms/](http://www.northeastern.edu/research/facts_rates/forms/forms/)
- www.utoledo.edu/research/forms.html
- www.ovpr.uga.edu/docs/

Organization Websites

- SRA International
<http://www.srainternational.org/sra03/index.cfm>
- Society for International Affairs
<http://www.siaed.org/>
- Council on Governmental Relations
<http://www.cogr.edu>
- Association of American Universities
<http://www.aau.edu>
- NCURA
<http://www.ncura.edu/>

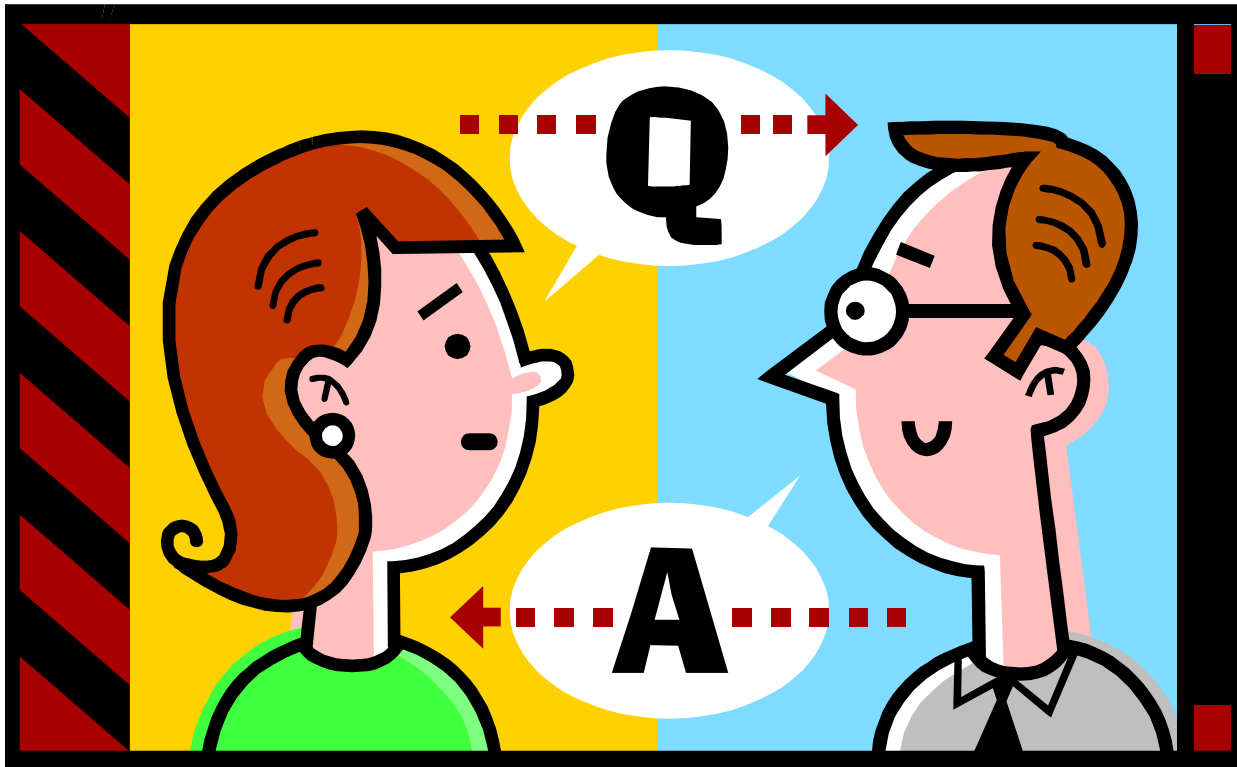
REGULATION AND POLICY SITES

- <http://acquisition.gov/far/>
- <http://farsite.hill.af.mil/>
- <http://www.hq.nasa.gov/office/procurement/regs/>
- <http://ec.msfc.nasa.gov/hq/grcover.htm>
- <http://grants.nih.gov/grants/oer.htm>
- <http://www.dtic.mil/whs/directives/corres/html/321006r.htm>
- http://www.nsf.gov/pubs/manuals/gpm05_131/index.jsp

Interest Group Websites

- <http://www.pogo.org/index.shtml>
- <http://www.usaspending.gov/>
- <http://www.ombwatch.org>
- <http://www.aaas.org/>
- <http://www.cagw.org/>

Questions and Answers



How Did I Do?

SRA Evaluation Form

- Possible adjectives
 - Scintillating
 - Absorbing
 - Brilliant
 - Captivating