

Grants vs. Contracts



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What is a Contract

- Agreement between parties to act or refrain from acting in a manner.
- Elements:
 - Offer
 - Acceptance
 - Consideration
- A written agreement is not always required (but is recommended)

Purpose of a Contract

- Formalize an agreement between the parties and their legal obligations.
- Improves clarity on each party's commitments
- (Generally) To acquire property or services
- Reflect a 'meeting of the minds'

Grants vs. Contracts

- Grants are a subset of contracts
 - Industry contracts involve specific goals and deliverables, and are generally intended for the benefit of the contracting parties.
 - In Government Contracts, a “contract” means a FAR-based contract.
 - Involve specific deliverables which benefit the Government.
 - Grants are awards of assistance provided with the aim of furthering the public good and involve goals, may or may not have specific deliverables attached.
- OTAs
- Fee-For-Service vs Research

OTAs

- Is it an OTA – Other Transaction Authority – FAR/supplementals do not apply;
- OTA allows certain fed agencies(NASA, DOD, Homeland Security, etc.) to operate similar to a commercial entity;
- Intended to attract "non-traditional" contractors

OTAs

OTA -> 10 U.S.C. § 2371 (Research) or 10 U.S.C. § 2371(b) Prototype

- ✓ A Prototype OTA solicitation IS NOT usually considered fundamental research.
- ✓ Likely to see export controls, publication restrictions.
- ✓ May include ability to award follow on production contracts non-competitively.

Types of Contracts – FFS vs. Research

Fee for service – often specific deliverables, funding entity expects to own all outcomes.

Research – NU traditionally provides report to funding agency but expects to own the results and data it generates, and seeks for IP to follow the rules of Inventorship under US patent law.

Types of Contracts – Common contract types

- Grants
- Cooperative Agreements
- Procurement Contracts
- Cooperative Research and Development Agreements
- STTR/SBIR agreements
- Data Use Agreement
- Materials Transfer Agreements
- Sponsored Research Agreements
- Memorandum of Understanding
- IP Agreement
- “Other Transactions”

Types of Contracts – Compensation

Common categorization of compensations

- Fixed price: parties agree on a set price to be paid under the agreement:
 - Excess funds kept by the receiving party
 - Excess expenses not provided for through funds under the contract are the responsibility of the incurring party
 - Risk borne by contractor
- Cost reimbursement:
 - No excess funds, unexpended funds returned to the funding agency
 - Funding party reimburses for allowable expenses
 - Contract may include a cost ceiling for reimbursement/incremental funding. Ceilings can be adjusted, but do not presume an adjustment until it properly occurs.

Additional classifications under each category exist.

Which rules apply?

- Grants: Uniform Guidance
- Industry Contracts: Uniform Commercial Code
- Government Contracts: FAR and supplemental regulations (DFARS, DEAR, HSAR, etc.)
 - To acquire property or services for the direct benefit or use of the United States Government?
 - 31 U.S.C. § 6303.
 - To transfer a thing of value to carry out a public purpose of support or stimulation authorized by a law of the United States?
 - 31 U.S.C. § 6304.

Role of the Contracting Officer (Gov't)

- Government representative responsible for the drafting, negotiation, execution and management of a contract
 - Not responsible for program management
- Only Government authority who can alter the terms of the contract
 - Consults with, *inter alia*, Government scientific team

Contracting/Agreements Officer's Perspective

- Principal Purpose Test (Acquisition or Assistance?)
 - Is the principal purpose for the Government to acquire good or services ***FOR ITS DIRECT BENEFIT OR USE?***
 - Contract is appropriate
 - Is the principal purpose to ***FURTHER PUBLIC GOOD?***
 - Grant or Cooperative Agreement is appropriate

35.003 Policy.

(a) *Use of contracts.* Contracts shall be used only when the principal purpose is the acquisition of supplies or services for the direct benefit or use of the Federal Government. Grants or cooperative agreements should be used when the principal purpose of the transaction is to stimulate or support research and development for another public purpose.

Contracting/Agreements Officer's Perspective

- Other considerations
 - Is the Government providing specifications?
 - Is the Government providing technical direction?
 - Is the work classified?

Industry vs. Government contracts

- **Government:**
 - Very structured, terms are standardized, but there is some flexibility among which terms are incorporated
 - Consistency across federal government entities
 - FAR and supplemental regulations
- **Industry:**
 - More flexibility in contract terms
 - ‘Wild west’, consistency to the extent of interests common to industry partners.

Award Process

- Industry contracts:
 - meeting of the minds
- Government contracts:
 - Process for awarding contracts is very structured
 - Competition in Contracting Act mandates competition unless a permissible exception exists.
 - “Open Solicitations” meet the competition requirement

Selection for Grants and Cooperative Agreements is more merit based.

- Competition to the extent practicable, but multiple agreements are often awarded based upon the merit of applicants.

Factors in Awarding Government Contracts

- Price competition (is the amount proposed competitive)
- Price analysis (is it a fair and reasonable price)
- Cost Analysis (any uncertainties and where does the burden of costs lie)
- Type and complexity of work to be performed
- Urgency of the work and Period of performance
- Contractors technical capacity, financial responsibility, accounting system, concurrent contracts, history, concurrent contracts

Difference in Deliverables

Contracts will specify the obligated deliverable(s) of each party.

- Grants: commonly, reports
- Contracts: may include reports, materials, technology, etc.

Certain agreement types have special rules for deliverables (e.g., IDIQ, Procurement, etc.)

Research Outcomes as Contract Deliverables

Research outcomes cannot be guaranteed

- Deliverables should include reports and specificity regarding what research will be conducted
- Deliverables should not be predictive or guarantee any particular outcome

Government contract: Deliverables must be ****ACCEPTED****

Supplemental Agreements

Where possible, all terms related to a contract are included in that contract. Where this is not practical or possible, supplemental agreements may be required.

Do not be surprised if a contract requires an accompanying yet separate agreement regarding the transfer of data, confidential information, equipment or materials, etc.

In certain circumstances supplemental agreements are required prior to contracting (e.g., IP agreements for SBIR/STTR proposals, etc.)

Intellectual Property

Government contracts: IP treatment clearly identified as a matter of law.

- Bayh-Dole Act (35 U.S.C. § 200-212)
- “Follow the money”
- Mostly non-negotiable

Industry Contracts: common point of contention, often subject to extensive negotiation.

Data and Results Ownership

Industry contract:

- NU traditionally expects to own the data and results it generates.
- Ownership rights can impact further research opportunities and other uses

Government contract:

- Fundamental Research vs. other type
- Even where owned by NU, dissemination may be subject to government review.
- “Data rights” refer to the Government’s nonexclusive license rights in Technical Data & Computer Software.

Questions?
