

# “Is it a Gift or a Grant?” and Other Critical Funding Mechanism Clarifications Your Staff Need to Know

Presented by David Mayo



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Topics to Cover

- Introduction
- Federal awards
- Gifts
- Subawards and Subcontracts
- Technical Services and Facilities Use
- Unfunded Agreements



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

# Introduction



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## What's in a name?

Research contract, research grant, research agreement, gift agreement, grant agreement, purchase order, purchase contract, purchase agreement, research services agreement, technical services agreement, consulting agreement, memorandum of understanding



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## What is a contract – legally?

A contract is an agreement between two or more entities that creates a legal obligation between them to do something, or to not do something.



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Elements of a legal contract

- An offer is made by one party and accepted by the other;
- The parties must be competent (e.g., not underage, drunk, mentally incompetent, etc.);
- There must be consideration (something of value) given by one party to the other party;
- There must be mutuality of agreement (e.g. no fraud or intent to mislead);
- The purpose or objective must be legal.



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## What does this mean?

- An agreement is legally binding if it meets the test of a “legal contract”, regardless of the label at the top of the agreement
- An agreement is not legally binding unless it meets the test of a legal contract, regardless of the label at the top of the agreement



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Federal Awards



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Types of federal funding

- Defined by the “Federal Grant & Cooperative Agreement Act of 1977” (PL 95-224; 31 USC 63)
- Procurement
  - All agencies authorized
  - *To acquire property or services for the direct benefit or use of the Federal Government*
  - Governed by the Federal Acquisition Regulation (48 CFR)



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Types of federal funding

- Financial Assistance
  - *To transfer money, property, services or anything of value to a recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than the acquisition of property or services for the direct benefit or use of the Federal Government*
  - Governed by OMB Circulars and the Uniform Guidance (2 CFR)



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Types of federal awards

- Contracts – used to award procurement
- Grants – used to award financial assistance when there will be no substantial involvement by the government
- Cooperative Agreements – used to award financial assistance when there will be substantial involvement by the government



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Types of federal awards

- Other Transaction – an award that is not a contract, grant or cooperative agreement.
  - Limited use available to federal agencies when traditional awards will not serve government's purpose; generally in place of contracts.
  - Neither the FAR nor Circulars/Uniform Guidance apply to Other Transactions; terms are as agreed between government and awardee



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Practical Distinctions

### Procurement

- Government defines scope
- Awardee proposes cost and methodology
- Government awards lowest bid with best methodology
- Cost principles circular applies
- Administrative requirements based in FAR
  - No Expanded Authorities
  - Subawards not recognized - everything is a subcontract

### Financial Assistance

- Awardee defines scope
- Awardee proposes cost and methodology
- Government awards best scope and methodology
- Cost principles circular applies
- Administrative requirements based upon Circulars/UG
  - Expanded Authorities
  - Subawards are different from subcontracts



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Summary of Federal Awards

- Financial Assistance (OMB Circulars/UG)
  - Grants: government support *without* government programmatic involvement
  - Cooperative Agreements: government support *with* government programmatic involvement
- Procurement (FAR)
  - Contracts: government purchases



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Applicable Federal Regulations

	Type of Award	Cost Principles	Admin. Requirements	Audit Requirements
Educational	Assistance	A-21	A-110	A-133
	Procurement	A-21	FAR	A-133
Non-Profit	Assistance	A-122	A-110	A-133
	Procurement	A-122	FAR	A-133
Hospital	Assistance	45 CFR 74-E	A-110	A-133
	Procurement	45 CFR 74-E	FAR	A-133
State & Local	Assistance	A-87	A-102	A-133
	Procurement	A-87	FAR	A-133
For-Profit	Procurement	FAR	FAR	FAR



© National Council of University Research Administrators | www.ncura.edu

## Applicable Federal Regulations

	Type of Award	Cost Principles	Admin. Requirements	Audit Requirements
Educational	Assistance	2CFR200	2CFR200	2CFR200
	Procurement	2CFR200	FAR	2CFR200
Non-Profit	Assistance	2CFR200	2CFR200	2CFR200
	Procurement	2CFR200	FAR	2CFR200
Hospital	Assistance	2CFR200	2CFR200	2CFR200
	Procurement	2CFR200	FAR	2CFR200
State & Local	Assistance	2CFR200	2CFR200	2CFR200
	Procurement	2CFR200	FAR	2CFR200
For-Profit	Procurement	FAR	FAR	FAR



© National Council of University Research Administrators | www.ncura.edu



# Gifts



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Applicable Policies/Regulations

- Case Reporting Standards and Management Guidelines for Educational Fundraising
- IRS Regulations
- State Tax Regulations
- Institutional Policy



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Case Reporting Standards

- Gift – a contribution from an individual received by an institution, for restricted or unrestricted use, in furtherance of the institution and for which an institution has made no commitment of resources or services other than possibly committing to use the gift as the donor directs



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Case Reporting Standards

- Grant – a contribution from a corporation, foundation or other organization
  - Non-specific grant: a grant that did not result from a specific proposal; otherwise the same as a Gift
  - Specific grant: a grant that resulted from a proposal and for which the institution commits resources or services as a condition of the grant; the donor may require reporting on how the donation was used and what the results were



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Case Reporting Standards

- Contract – an agreement between the institution and another entity to provide economic benefit for compensation. The agreement is binding and creates a *quid pro quo* relationship between the institution and the entity



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Case – Basic Concepts

- To be reported to Case
  - Donor cannot benefit economically
  - Donor may not retain any explicit or implicit control over the use of the contribution after acceptance by the institution
  - Donor may not direct the donation to benefit a particular individual
  - Donations can be revocable
  - Donations must be legally enforceable



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Case – Types of Donations

- Cash
  - Unrestricted
  - Restricted – the donor designates the use of the donation, or what it can't be used for, such as:
    - Academic Divisions; Research
    - Faculty and Staff Compensation
    - Student Aid; Athletics
    - Library; Infrastructure
    - Public Service; Extension



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Case – Types of Donations

- Property, Buildings, Equipment
- Endowment
  - Unrestricted
  - Restricted – where the donor designates the use of the income generated from the endowment



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## What this means

- Based on the Case Standards, a reportable gift/grant is legally binding and can include the following elements:
  - Reporting requirements
  - Allowable and unallowable expenditures
  - Return of unused funds



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## What about institutional policy?

- Example - Caltech policy on Development activities...
  - Development provides assistance for gifts and grants *where the contemplated award does not impose conditions on reporting, deliverables and accountability that are generally found in sponsored projects*
  - Gifts may not include deliverables or IP rights
  - Gifts may not be directed to individuals



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Who will process the award/gift?

- Often a point of discussion between Sponsored Research and Development offices
- Each office tends to use the terms gift, grant and contract differently
- Could both offices be right...?
  - Does an award need to be processed by the office that reports/counts it?
  - Could it be reported/counted by both offices?

Follow your institutional policy



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Caltech implementation...

- Development will concentrate on growing and maintaining donor relationships
- Sponsored Research will process awards that are not true gifts (by Case/Caltech standards)
- Sponsored Research will report its processing quarterly to Development for all corporate and non-profit awards
- Development will report activity, as appropriate



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Subawards and Subcontracts



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Basic Concepts

- Two basic scenarios for issuing funds:
  - Engage an entity to conduct a portion of the SOW of an existing award to the institution
    - OMB A-110/UG (2 CFR): Subaward
    - FAR (48 CFR): Subcontract
  - Engage a vendor to provide goods or services under an existing award to the institution
    - OMB A-110/UG (2CFR): Contract
    - FAR (48 CFR): Subcontract



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Characteristics of a vendor

- Provides the goods/services within its normal business operations
- Provides similar goods/services to many different purchasers
- Operates in a competitive environment
- The goods/services to be acquired are ancillary to the federal award



© National Council of University Research Administrators | www.ncura.edu

## Terminology

	Engage Portion of SOW			Procure Goods/Services		
	Instrument	Payer	Performer	Instrument	Payer	Performer
<b>A-110</b>	Subaward	Recipient	Subrecipient	Contract	Recipient	N/A
<b>A-133</b>	Subaward	Recipient	Subrecipient	Contract	Recipient	Vendor
<b>UG</b>	Subaward	Recipient	Subrecipient	Contract	Recipient	Contractor
<b>FAR</b>	Subcontract	Contractor	Subcontractor	Subcontract	Contractor	Subcontractor



© National Council of University Research Administrators | www.ncura.edu



## Independent Contractors

- The IRS sets forth clear guidelines to distinguish between employees and independent contractors.
  - Independent contractors: the payer may only direct the results of the work (e.g., deliverables) but not how the work is accomplished
  - Employees: the payer directs both how the work is accomplished and the results of the work



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Independent Contractors

- IRS guidance - independent contractors generally:
  - have a substantial financial investment in their business;
  - are not reimbursed for their expenses by the payer;
  - realize a profit or loss from their work;
  - do not receive fringe benefits from the payer;
  - do not receive training or supervision from the payer in how to perform their work.



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## What about Consultants?

- The term is often used generically by researchers to designate an individual who will provide technical input to a project
- While there is no formal IRS or OMB definition of consultant, most institutions treat consultants as a type of independent contractor
- Many sponsors limit use of consultants, specifically treating them as independent contractors (e.g., NSF, NIH, NASA)



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Pulling it together

- The key is in understanding the intended relationship between the performer and the institution, and then using the appropriate agreement/terms to engage the performer:
  - Employee
  - Independent Contractor
    - Vendor – engaged via procurement transaction
    - Subrecipient – engaged via subaward



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Independent Contractor Attributes

Subrecipient	Contractor/Subcontractor (Vendor)
Responsible for a portion of payer's SOW	Goods/services are ancillary to payer's SOW
Provides customized/unique services	Provides similar services to many different purchasers
Does not operate in a competitive environment	Operates in competitive environment
Performer owns IP it will develop	Payer owns IP performer will develop
Performer is a co-PI on Payer's award	Performer would not be considered a co-PI by payer's PI if employed by Payer
Payer's PI and performer will be co-authors	Payer's PI and Performer will not be co-authors



© National Council of University Research Administrators | www.ncura.edu

## Audit Ramifications

- Federal financial assistance (A-110/UG) requires:
  - Subrecipient monitoring on subawards
  - Cost/price analysis and open competition on vendor transactions
- Federal procurement:
  - FAR requires cost/price analysis and open competition on subawards and vendor transactions
  - A-133/UG require subrecipient monitoring on subawards under procurement awards



© National Council of University Research Administrators | www.ncura.edu

## Technical Services and Facilities Use Agreements



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Facilities Use

- Non-collaborative access to institution's facilities and/or instrumentation by outside entities
  - Research labs and instrumentation
  - Service Centers
  - Shops
  - Conference/meeting facilities

Key element: external party *will* enter institutional property



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Technical Services

- Non-collaborative technical effort perform by institutional personnel for outside entities
  - Testing and analyses (e.g., mineral assays)
  - Shop work (e.g., repair, fabrication)
  - Editorial work
  - Remote access to instrumentation

Key element: External party *will not* enter institutional property



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Why engage in this activity?

- Make unique research instrumentation and unique processes available to local researchers and members of community
- Initiate relationships with corporate sponsors
- Generate income for lab or facility
  - Subsidize institutional use
  - Bridge funding



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Non-collaborative effort

- No institutional expectation to utilize resulting data in its research/educational activities
- No institutional expectation to publish results or co-author publications
- No scholarly exchanges between institution and external party
- Customer/User owns IP of deliverables



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Nature of engagement

- Institution gives up ownership of IP
- Institution accepts publication restrictions
- However, institution is likely operating outside its primary non-profit, educational/research mission
  - May be considered unrelated business income
  - May jeopardize fundamental research exclusion
  - May jeopardize non-profit status and bond-funded buildings



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## General Concerns

- For facilities use and technical services
  - Who enters into these agreements?
  - Who issues invoices?
  - How is income tracked?
  - Do F&A apply and/or sales tax?
  - What about the government as a customer – is this a “federal award” that must be tracked?
  - Can you charge a lower rate to external entities?



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Additional concerns for facilities use

- Which party is responsible for
  - damage to institutional property?
  - injury – worker’s compensation?
  - user’s controlled information?
- Key distinction: Does the user have a formal relationship with the institution (e.g., a visiting appointment), or simply a lessee?



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Customer expectations

- External parties tend to treat this as commercial-type work and issue commercial-type POs with:
  - Commercial warranties
  - IP infringement indemnification
  - Restricted access (e.g. foreign persons)
  - Re-performance guarantees
  - Ownership of all foreground and background IP



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Protect your institution

- Develop your own agreement:
  - Give priority to academic/research activities
  - Include no-warranty wording
  - Limit customer ownership of IP to deliverables
  - Don't accept re-performance language
  - Include insurance requirements for facilities use
  - Include a brief description of SOW



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)



## Protect your institution

- Make sure to address
  - Use of name
  - Indemnification
  - Invoicing and payment
  - Applicable law
- Use a fixed-price model – no breakout of costs
- Make customer responsible for export compliance when on-site



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Unfunded Agreements



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## What are Unfunded Agreements?

- Agreements associated with sponsored research or other institutional activities but for which no funding comes to the institution
- Often used to address single issues that are comprehensively covered in a sponsored research agreement



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Memorandum of Understanding (MOU)

- Establish parameters for a collaboration
  - Describe scope of collaboration
  - Limited period
  - Each party covers its own expenses
  - Not intended to be legally binding (e.g., nothing of value exchanged)
  - May be legally binding, depending on the terms, particularly if something of value is exchanged



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Collaboration/Teaming Agreement

- Establish parameters for a collaboration
  - Each party covers its own expenses
  - Parties agree to share information
  - Parties agree to maintain confidentiality
  - Each party retains ownership of its IP
  - Intended to be legally binding
  - Often leading up to a sponsored research agreement



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Non-Disclosure Agreement (NDA)

- Maintaining confidentiality of proprietary data
  - Nature of data and its marking
  - Length of confidentiality
  - Exceptions to confidentiality
  - Disposition of data at end of agreement
  - Intended to be legally binding
  - Also known as a confidentiality or proprietary information agreement



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Material Transfer Agreement (MTA)

- Establish parameters for a loan of materials (e.g., biological, chemical)
  - Identification of materials
  - Length of time
  - Responsibility for adverse effects
  - Ownership of IP of materials and of derivatives
  - Disposition of materials at end of agreement
  - May include small dollar amounts to cover expenses



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Data Use Agreement

- Establish parameters for loan of data (similar to MTA, but no physical materials; similar to CDA, but intended more for specific data sets)
  - Identification of data
  - Length of use
  - Ownership of data
  - Disposition of data at end of agreement
  - Intended to be legally binding



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Licensing Agreement

- Establish parameters for use of intellectual property
  - Identify IP to be licensed
  - Length of time
  - Ownership of IP and derivatives
  - Commercial or non-commercial use



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Equipment Loan Agreement

- Establish parameters for loan of equipment; similar to MTA
  - Identification of equipment
  - Length of time
  - Responsibility for damage, wear-n-tear, liability
  - Ownership of equipment
  - Disposition at end of agreement
  - May include small dollar amounts to cover expenses



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Conclusion



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Summing it up

- Almost every type of award or agreement we receive is *legally* a contract
- Even a gift can be legally binding
- Institutional policy is the primary criterion for determining how a particular agreement should be processed
- Find out which office is responsible for various types of agreements



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

## Summing it up

- Understanding context and usage is vital to communicating about agreements
- It doesn't matter what it says as the top of the agreement
  - The terms determine the purpose
  - The terms should reflect the parties' intent
  - Ideally, the title at the top should reflect that intent, but don't fret if it doesn't



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

Thank you



© National Council of University Research Administrators | [www.ncura.edu](http://www.ncura.edu)

Thank you for attending this event.

Today's event features an online, post-event evaluation form. To send us your feedback, please click on the link below, or type the URL into your web browser's address bar.

<http://survey3.krm.com/22667.eval>

Your feedback and comments are very important to us. Thank you in advance for taking the time to complete this evaluation!