



Governor's Grants Office

ADMINISTRATIVE CIRCULARS WORKSHOP, PART II
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Martin O'Malley, Governor

Anthony Brown, Lt. Governor

Grantee Procurements, Property Management and Subrecipient Responsibilities

Presented By:

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Speaking with You Today is:

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- Prior to joining the firm, Ms. Le Blanc had a long and distinguished career in the Office of General Counsel within the U.S. General Services Administration and the Department of Commerce, primarily serving in the position of Chief, Federal Assistance Law Division. In this role she was legal advisor to all grant programs within the Department of Commerce program managers and grants officers, and legal advisor on legislation, appropriations, debarments, litigation, audits, and administrative law.

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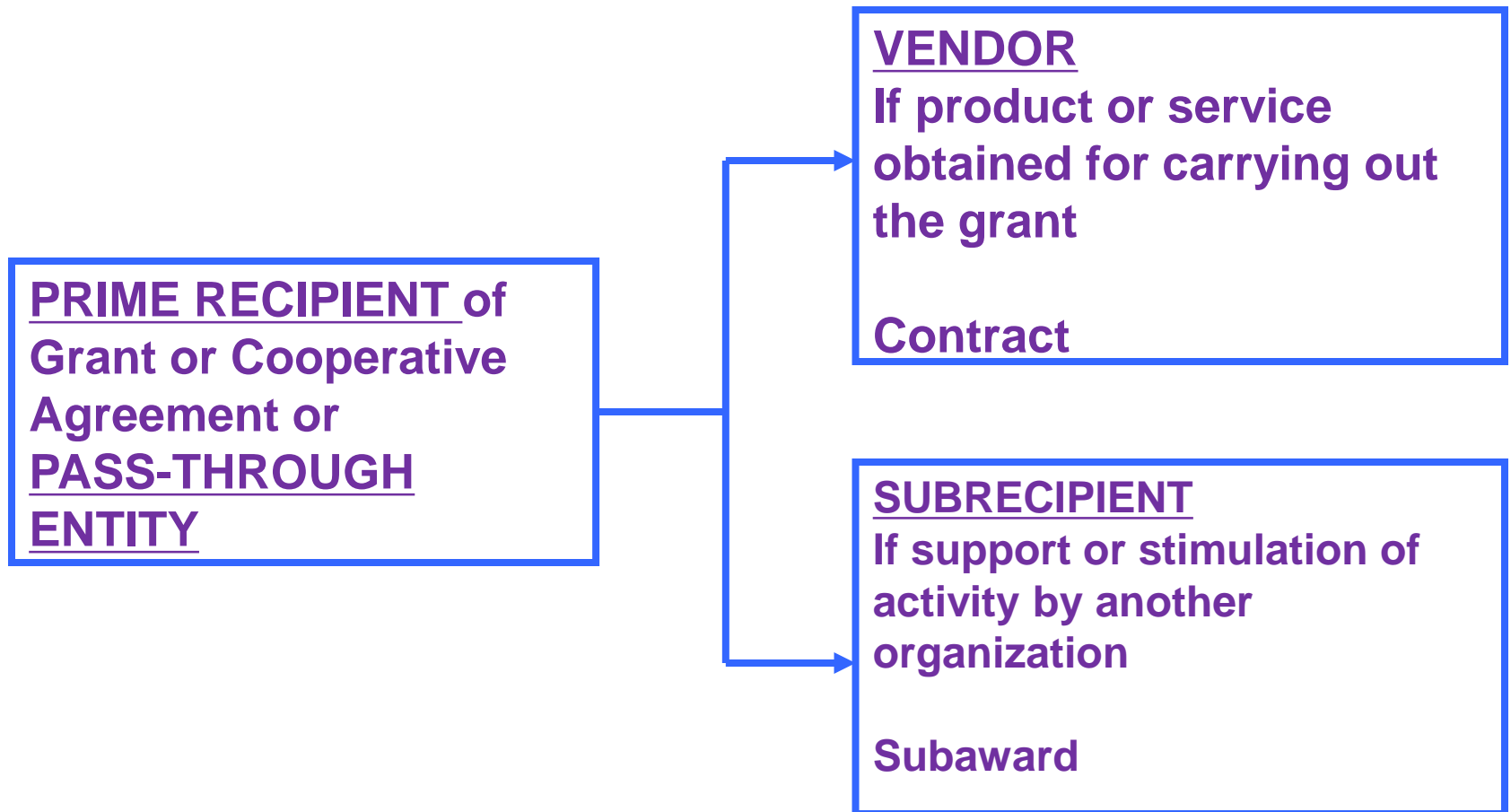
Disclaimer

- This presentation has been prepared as a service to the grants management community. The opinions expressed in these materials are solely my views.
- This is designed to assist you in developing and implementing effective practices with respect to the terms and conditions of your federal awards and subawards.
- The materials are being issued with the understanding that the author is not engaged in rendering legal or other professional services.
- If legal advice or other expert assistance is required, you should seek the services of a competent professional to address your particular facts and circumstances.

Learning Objectives

- Know what policies and procedures you need as a grantee and how to conduct competitive procurements of goods and services
- Know the difference between subrecipients and vendors
- Understand the responsibilities of the prime recipient and the subrecipient in administering a grant
- Learn about the Federal requirements and rights in property purchased with Federal grant dollars

Flow of Federal Grant Funds



Procurement Standards

- Procurement Regulations
 - *The acquisition by purchase, lease, or barter of property or services for the direct benefit of the grantee*
- Procurement Standards
 - OMB Circular A-110
(codified at 2 C.F.R. Part 215.40-.48)
 - OMB Circular A-102 : Agency implementing regulation
(HHS: 45 C.F.R. Part 92.36-.40 DOC: 15 CFR Part 24)

Vendor Characteristics

- (1) Provides the goods and services within normal business operations;
- (2) Provides similar goods or services to many different purchasers;
- (3) Operates in a competitive environment;
- (4) Provides goods or services that are ancillary to the operation of the Federal program; and
- (5) Is not subject to compliance requirements of the Federal program.

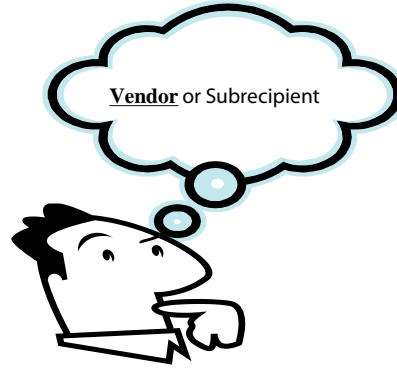
OMB Circular A-133 §.210

7 Steps to Successful Procurement

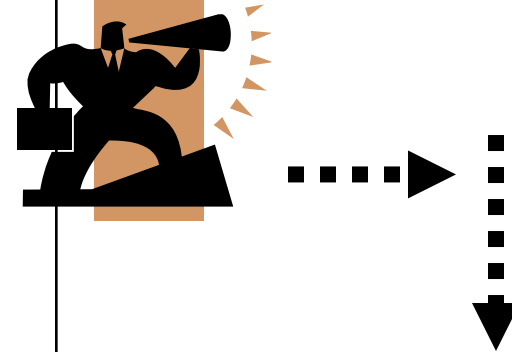
Step 1: Written Procurement Standards and Code of Conduct/Standard of Conduct



Step 2: Determine Whether Procurement Appropriate



Step 3: Solicitation



Step 7: Record Keeping



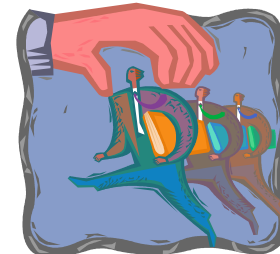
Step 6: Contract Administration



Step 5: Contract Formation



Step 4: Evaluation and Selection



Ground Rules

- States must follow their own procurement policies but...
 - If the State's policies are less restrictive then you need to redraft your policies to comply with the federal policies (OMB Circular A-102 agency regulation)
 - Local and tribal governments follow A-102
- Nonprofits and others must follow the procedures in OMB Circular A-110, codified at 2 C.F.R. §§215.40 - .48 (see agency-specific regulations in appropriate CFR)
- *Review your policies against these regulations.*

Ground Rules

- Grantees are required to **maximize open and free competition** § 215.43 /HHS 45 CFR § 92.36(c).
- Simplified acquisition threshold of **\$150,000**
 - Must obtain competition
 - Based on Federal Acquisition Regulation threshold
- Policies for different dollar thresholds and types
 - Purchase orders checking 3 sources
- Document:
 - Rationale for the method of procurement
 - Choice of contract type
 - Contractor evaluation, selection, or rejection
 - Cost/price analysis
 - Administration, oversight, acceptance

Ground Rules

- “The recipient is the responsible authority, without recourse to the awarding agency, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement”

§ 215.41/ § 92.36(b)(11)

- No privity of contract between Vendor and Government

Standards of Conduct

- Grantees must have policies to prevent conflicts of interest or appearances of conflict
 - Financial gain for self or family member
 - Non-objective
- Contractors that develop or draft solicitation or contract specifications are **EXCLUDED** from competing for such contracts
- Cannot oversee/administer contract
- Consequences in Human Resource Policies if violations – reprimand, suspension, termination
 - 2 C.F.R. §215.42 / 45 C.F.R. §92.36 (b)(3)

Standards of Conduct

2 C.F.R. 215.42 /45 C.F.R. 92.36(b)(3)

- “...The grantee's or subgrantee's officers, employees or agents will **neither solicit nor accept gratuities, favors or anything of monetary value** from contractors, potential contractors, or parties to subagreements
- Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of **nominal intrinsic value...**”

Simplified Acquisition Threshold

- **41 U.S.C. 403(11)**
- **48 CFR 2.101** “Simplified acquisition threshold” means \$150,000
- **Simplified Acquisition Threshold = \$150,000**
 - Above this amount, numerous additional requirements kick in
 - Below this amount you have more latitude
- You need to decide if \$150,000 is too high or too low for your organization.
 - You may want additional procedures for procurements over \$25,000 or \$50,000

Drafting Considerations

- Grantees must have **written procurement policies and procedure** § 215.43 / § 92.36(c)(1)
- Generally you divide the policies and procedures into two separate sections
- Policies: explain the “Why” and general rules
- Procedures: explain the “How”
- Goal: Standalone directions for any employee so that they know what to do, how to do it and when to do it.

Examples of important terms to define in your policies...

- Emergency – minimum competition
- Conflict of Interest
 - Board, family, employee, colleague
- Vendor v. Subaward
- Cost and Price Analysis
- Responsible Contractors
- Responsive Offers
- Sealed Bids
- Sole Source (Noncompetitive) Procurement
- Professional Services
- Time and Material
- Simplified Acquisition Threshold. . .

Who has to follow the Code of Conduct?

- Employees
- Members of the board of directors and officers.
- **Note: SF424 Contains Certification as to Code of conduct**
- You should make sure that all employees, members of the board of directors and officers receive training on the Code of Conduct
- Conflicts must be identified and resolved
 - A person in a position to make or influence a decision
 - Has a personal or business relationship
 - That could call into question the objectivity of such decision

Determine Method of Procurement

A-102 provides guidance on choosing the method of procurement depending on the situation broken down in the following categories:

- Small purchase procedures
- Sealed bids
- Competitive proposals
- Minimum competition
- Noncompetitive proposals
- 45 C.F.R. § 92.36 (d)

Designation of Type of Contract

- Specify type of procuring instrument in your policies (the type of contract should be determined by type of situation)
 - Fixed price
 - Cost reimbursement
 - Purchase order
 - Incentive contracts
 - The “cost-plus-a-percentage-of-cost” or “percentage of construction cost” methods of contracting shall **not** be used

Document Your Decision

- Decision regarding vendor vs. Subrecipient
- Be able to defend contract as reasonable, allowable, and allocable to the grant project
- Choice of Contract type:
 - Fixed price
 - Time and Materials
 - Cost contract – Fixed Ceiling – No Changes to Amount Obligated

Selection of Solicitation Method

- 2 CFR 215 A-110 provides very little guidance
- A-102 provides guidance on choosing the method of procurement depending on the situation broken down in the following categories:
 - Small purchase procedures (below \$150K) – “price or rate quotations from an adequate number of qualified sources”
 - Sealed bids – is what it says
 - Competitive proposals – similar to competing for a grant
 - Noncompetitive proposals (sole source discussed next)

Examples of Competitive Practices

- Purchase Orders
- Requests for Proposals
- Invitations for Bids
- Price/market comparisons
- Utilize three companies and rotate purchases - supplies
- Purchasing Cooperatives
- Web Price Comparisons – Document sources, print and save in file

What about Sole Source Procurements?

- Under A-102, Sole Source can only be used in specific situations, they are:
 - Item is available from only one source
 - Public exigency or emergency
 - Authorized by awarding agency
 - After solicitation from a number of sources, competition deemed inadequate
- Under Part 215, no guidance other than you must include written justification in file if above \$150,000 ... but word to the wise, look to A-102 list
- In either case, ALWAYS be sensitive to how you set the price
- Potential bidders cannot draft specifications of a request for proposal
- Look to simplified acquisition and micro-purchase procedures in the FAR 48 Code of Federal Regulations

Be inclusive

- 2 C.F.R. § 215.44 (b)/ 45 C.F.R. § 92.36 (e) Positive efforts shall be made by recipients to utilize **small businesses, minority-owned firms, and women's business enterprises**, whenever possible.
 - Use to the fullest extent practicable.
 - Make information on forthcoming opportunities available and arrange time frames to encourage and facilitate participation
 - Notify contracting opportunity to:
 - Small Business Administration
 - Department of Commerce's Minority Business Development Agency
 - Local agencies

Other Solicitation Requirements

- Include evaluation criteria and basis for award
 - Lowest Price/Best Value/Past Performance
- Include option for recipient to reject all bids if it is in the recipient's best interests to do so
- Ensure objective contractor performance
- Eliminate unfair competitive advantage
- Do **not** do business with businesses or individuals who have been **debarred or suspended** (but smaller contracts exempt)
- When drafting solicitation ask for a disclosure from bidders

How do you choose?

- Evaluate offerers/bidders based on objective evaluation criteria
 - cost/price
 - appropriateness and accuracy of response
 - qualifications, experience and/or quality
- Award to contractor that is most advantageous to recipient
- Include option permitting rejection of all bids/offers if in the recipient's best interest to do so
- And, always include an availability of funds provision – federal money goes away, so does this contract!
- Put In Writing!

Cost and Price Analysis

- Level of detail/scrutiny increases as the dollar amount increases
- There is a difference between cost and price
- Use a price analysis 9 out of 10 times
- Use cost analysis only with cost-type contracts and sole source procurements
 - Cannot make price comparison
 - Consider direct costs, overhead, indirect costs, time and material estimates, etc)
 - Do comparison of other costs of other vendors
 - Determine cost reasonableness, allocability and allowability
- 2 C.F.R. § 215.45 / 45 C.F.R. § 92.36(f)
- See Federal Acquisition Regulation/Comp Gen cases

Debarment and Suspension

- Make contracts only to **responsible contractors**
- Do **not** do business with businesses or individuals who have been **debarred or suspended** (but smaller contracts exempt)
 - Check GSA/SAM website to see if contractor is on the list of debarred/ suspended individuals (Excluded Parties List: <https://www.epls.gov/>)(www.SAM.gov)
2 C.F.R. § 180.220 + Agency Implementation at 2 CFR to identify how many lower tier subcontractors must be checked
- Contracts may not be made to anyone who has been debarred or suspended if the contract is
 - Equal to or exceeds \$25,000 (for contracts made by both recipients and subrecipients).
 - For Federally required audit services

Document the Selection Process

- **Document! Document! Document!**
- Basis for contractor selection
- Justification for lack of competition
- Basis for award cost or price
- Evaluation factors considered
- Document EPLS checked
 - Print and date

Additional Contract Provisions

- Additional contract provisions required in contracts in excess of \$100,000
 - Access to records by the grantee, Agency, OIG, and Comptroller General
 - Remedial actions available to the grantee in event of contractor violation/breach of contract
 - Circumstances justifying termination of contract by the grantee, including the manner of termination and the basis for settlement...



... More contract provisions

- ...More contract provisions required in contracts in excess of \$100,000
 - Contractor's compliance with certain federal laws **if applicable**
 - Clean Air Act and Federal Water Pollution Control Act
 - Byrd Anti-Lobbying Amendment
 - Contract Work Hours and Safety Standards Act, for construction contracts
- Construction Contracts Also Have Additional Terms
 - Bid Guarantees
 - Payment and Performance Bonds
 - Bonding Company Requirements
 - Davis-Bacon – Minimum Wage if Grant Program statute imposes compliance

The Rule

- § 215.47 Grantees are required to maintain a contract administration system that ensures
 - the contractor's compliance with terms, conditions and specifications of the contract
 - the grantee's oversight of the contractor's performance
 - adequate and timely follow-up
 - appropriate contract dispute provisions
 - No conflicts of interest

Adequate Invoices

- Consider including the following information in your invoices:
 - Tasks/Activities completed
 - Hours/ Days work performed
 - Time and Material consumed
- Act promptly if not timely submitted
- Withhold payment

What Grantee must Keep in the File

- Grantees are required to maintain procurement records and files that include
 - Detailed description of the scope of the contract
 - Justification for entering into the contract
 - Award selection
 - Cost and price analysis
 - 2 C.F.R. § 215.46/ 45 C.F.R. § 92.36(b)(9)
 - Note: 2 C.F.R. § 215.46 Imposes this requirement only for purchases over the small acquisition threshold

Agency Review of Files

- Procurement documents, records and files must be available to agency upon request
 - 2 C.F.R.§ 215.44 (e) and 45 C.F.R.§ 92.36 (g)
- Three Year Retention Period from Ending Date of Grant Award Period
- Extended if audit, administrative period, or litigation commences after award period.
 - Maintain for three years after the end of that process
- Real Property and Equipment – Additional Record Keeping Requirements!

Subrecipient Responsibilities



Definition of Subaward (A-110)

- an award of financial assistance in the form of money, or property in lieu of money,
- made under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient.
- The term includes financial assistance when provided by any legal agreement, **even if the agreement is called a contract**, but does **not** include procurement of goods and services...”

– 2 CFR§215.2(ff)

Definition of Subgrant (A-102)

- An award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee
- The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of grant in this part

– 15 CFR§24.37

Definitions

Definition of **Subrecipient** (A-110)

- Means the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided.

Definition of **Subgrantee** (A-102)

- The government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided

Subaward Compliance (A-110)

- Unless sections of this part specifically exclude subrecipients from coverage, the provisions of this part shall be applied to subrecipients performing work under awards, unless they are state and local governments who are governed by OMB Circular A-102.

2 C.F.R. §215.5

Subgrant Compliance (A-102)

- Subparts A through D or this part **apply to all grants and subgrants to governments**, except where inconsistent with Federal statutes
- States and Governmental Grantees must ensure that every subgrant includes a **provision to comply with this part**, and any clauses required by law, executive orders and regulations
- Ensure that **subgrantees are aware** of requirements imposed upon them
- Ensure **subgrantee recordkeeping** compliance

15 CFR 24.37

Characteristics of Subrecipient

- (1) Determines who is eligible to receive Federal financial assistance;
- (2) Has its performance measured against whether the objectives of the Federal program are met;
- (3) Has responsibility for programmatic decision making;
- (4) Has responsibility for adherence to applicable Federal program compliance requirements; and
- (5) Uses the Federal funds to carry out a program of the organization as compared to providing goods or services for a program of the pass-through entity

OMB Circular A-133

Pass-Through entity Responsibilities

- Monitor the activities of subrecipients
 - ensure that Federal awards are used for authorized purposes in compliance with laws, regulations, terms, and that performance goals are achieved.
- Ensure that subrecipients expending \$500,000 or more in Federal awards during the subrecipient's fiscal year have met the audit requirements
- Subrecipient records subject to audit by awarding agency, OIG, GAO

Subrecipient – Flow Down Provisions

- CFDA title and number
- Award project title, award number, and year
- Type of award – Grant or Cooperative Agreement
- Name of federal agency sponsor
- Administrative Requirements
- Cost Principles
- Audit Requirements
- Prime Award Terms

Subrecipient – Flow Down Provisions

- Prior Approval Requirements
- Some personnel changes require prior agency approval 2 CFR 215.25(c)(3)/ 15 C.F.R. § 24.30
- Changes in key personnel (e.g. principal investigator or project director)
- Be sure all agency prior approval requirements are incorporated into subaward

Pass-Through Audit Responsibilities

- Ensure subrecipients spending > \$500,000 in federal awards during the subrecipient's fiscal year have an A-133 audit
- Prime Issues a management decision on audit findings within 6 months after receipt of the subrecipient's audit report
- Ensure that the subrecipient takes appropriate corrective action
- Consider whether to adjust the recordkeeping as result of any subrecipient audit findings and questioned costs
- Require subrecipients auditors to have access to subrecipient's records and financial statements

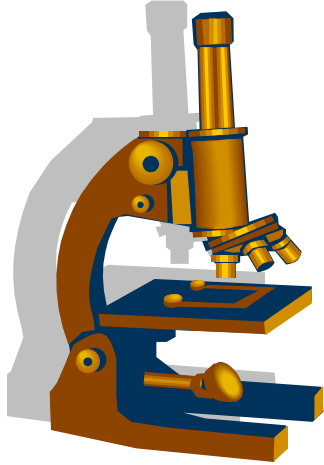
Subrecipient Risk Analysis

- Assess probable adverse conditions
- The 3 P's: Process, policies, procedures
- Internal controls in place
- Prior grant experience
- Personnel qualifications and experience
- Audit history
- Funding level
- Financial statement

Types of Subrecipient Monitoring

- Financial and performance reports
- On-site visits
- Remote desk reviews (documentation)
- Scheduled conference calls
- Ongoing assistance via communications
- Regular and consistent
- Address issues promptly
- Remember to Document!

Property Standards



Property Trust Relationship – 2 CFR § 215.37

- “Real property, equipment, intangible property and debt instruments that are acquired or improved with Federal funds shall be held in trust by the recipient as trustee for the beneficiaries of the project or program under which the property was acquired or improved. Agencies may require recipients to record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with Federal funds and that use and disposition conditions apply to the property.”

Real Property

- Real property = “land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.”
 - 2 CFR§215.2(bb)
 - 15 CFR§24.31

Real Property

- Title and federal reversionary interest
 - The federal government retains a reversionary interest in all property/equipment acquired (or improved), in whole or in part, with federal grant funds
 - Title vests in the grantee, subject to the grantee's continued use for authorized purpose
 - The grantee should obtain insurance as if it wholly owns the property

Real Property

Notice of Federal Interest (NOFI)

- The grantee may have to file notice regarding a federal reversionary interest in real property acquired with grant funds in the local real estate/deeds office
- This notice is intended to advise third parties that the grantee may not encumber, share, put to a different use or dispose of such property/equipment without Awarding Agency approval
- Fees incurred for the filing can be charged to the grant award

Real Property

- Property improved, in whole or in part, with federal grant funds cannot be:
 - encumbered
 - put to a different use or
 - disposed of without agency approval

Real Property – As Match

- Real property not funded by Awarding agency but obligated by grantee under award as matching cost and for use in grant project is also RESTRICTED up to the fair market value of the property
- Conservation areas, parks, etc.
- Need Property Appraisal
- Track Property Value over time

Real Property

- Use and disposition of real property if no longer needed for original federally-sponsored project:
 - must obtain agency approval to use in another federally-sponsored project
 - Continue to use for same purposes
 - Agency can permit the grantee to retain title, or direct the sale or transfer of real property
 - If agency instructs the grantee to transfer real property to the government or to a third party
 - the grantee will be entitled to the percentage of Fair Market value (FMV) attributable to the grantee minus expenses to transfer

Real Property Report SF 429

- Attachment A - General Reporting
- Attachment B - Request to Acquire, Improve or Furnish
- Attachment C - Disposition Request

Equipment

- Equipment Defined

- “Tangible, non-expendable personal property having a useful life of more than 1 year and an acquisition cost of \$5,000 or more per unit.”
- Can be attached and detached to real property
 - 2 CFR§215.2(I)
 - 15 CFR§24.32

- Federal Share

- The percentage of the property's or supplies' acquisition costs and any improvement expenditures paid with Federal funds.

Equipment

- Title and Reversionary Federal Interest
 - The federal government retains a reversionary interest in all equipment acquired or improved, in whole or in part, with federal grant funds
 - BUT title vests in the grantee, subject to the grantee's continued use of the equipment for its authorized purpose
 - The grantee should obtain insurance as if it wholly owns the equipment or property
- Agency may require lien against equipment

Equipment

- 2 CFR§215.34, In general...
 - Title to will vest upon acquisition in the grantee or subgrantee
 - Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired
 - whether or not the project or program continues to be supported by federal funds.
 - Make equipment available for other projects or programs currently or previously supported by Federal funds

Equipment

- Recordkeeping Requirements
 - Grantees must maintain records for equipment **acquired or improved** with grant funds
 - The records must
 1. Adequately describe the equipment
 2. Identify the equipment by serial, model, or other ID number
 3. Identify the source of funds, including award number
 4. Note whether title vests in grantee or government
 5. Provide the acquisition date and cost information used to calculate federal share

Equipment

- Recordkeeping Requirements (cont.)
 - The records must also
 6. Identify the equipment's location and condition and the reporting date
 7. Provide the unit acquisition cost
 8. Provide the ultimate disposition data, including date, sale price, method used to determine fair market value
 - At least every two years, the grantee must inventory its equipment and reconcile results with prior inventories

Equipment

- Use and Disposition of Equipment with Current Fair Market Value of \$5000 or more
 - If no longer needed for original federally sponsored project, may use in another federally sponsored project or retain title for authorized uses **without** agency approval
 - Grantee must Insure equipment
 - However, if the grantee no longer needs equipment for **any** federally sponsored use, it must either
 - Request permission to retain title for other uses
 - Agencies interpret narrowly
 - Request disposition instructions from the agency
 - Agency must issue instructions within 120 days

Tangible Personal Property Report

- SF 428
- Includes Equipment and Supplies
- Agencies establish reporting events
- Attachment A – Annual Report
- Attachment B – Final Award Closeout Report
- Attachment C – Disposition Report/Request

- Open SF 428 Attachment

Unfair Competition

- Notwithstanding the encouragement in _____.502 Standards for Financial and Program Management (g) to earn program income, the recipient or subrecipient must not use equipment acquired with award funds to provide services for a fee to **compete unfairly with private companies** that provide equivalent services, unless specifically permitted by Federal statute.

Supplies

- “Supplies” means all tangible personal property, other than “equipment” as defined in this part.
 - 2 CFR§215.2(hh)
 - 15 CFR §24.33
- Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively
 - 2 CFR§215.35

Supplies

- **Disposition**

- If there is a residual inventory of unused supplies exceeding \$5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other Federally sponsored programs or projects, the grantee or subgrantee shall **compensate the awarding agency for its share**



It's QUESTION TIME!!