
Grants Made Easy: Federal Grants Law

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Learning Objectives

- Understand federal law applicable to federal grants.
- Gain greater knowledge of key grants management concepts and how they relate to each other.
- Identify high-risk areas and how to address them.

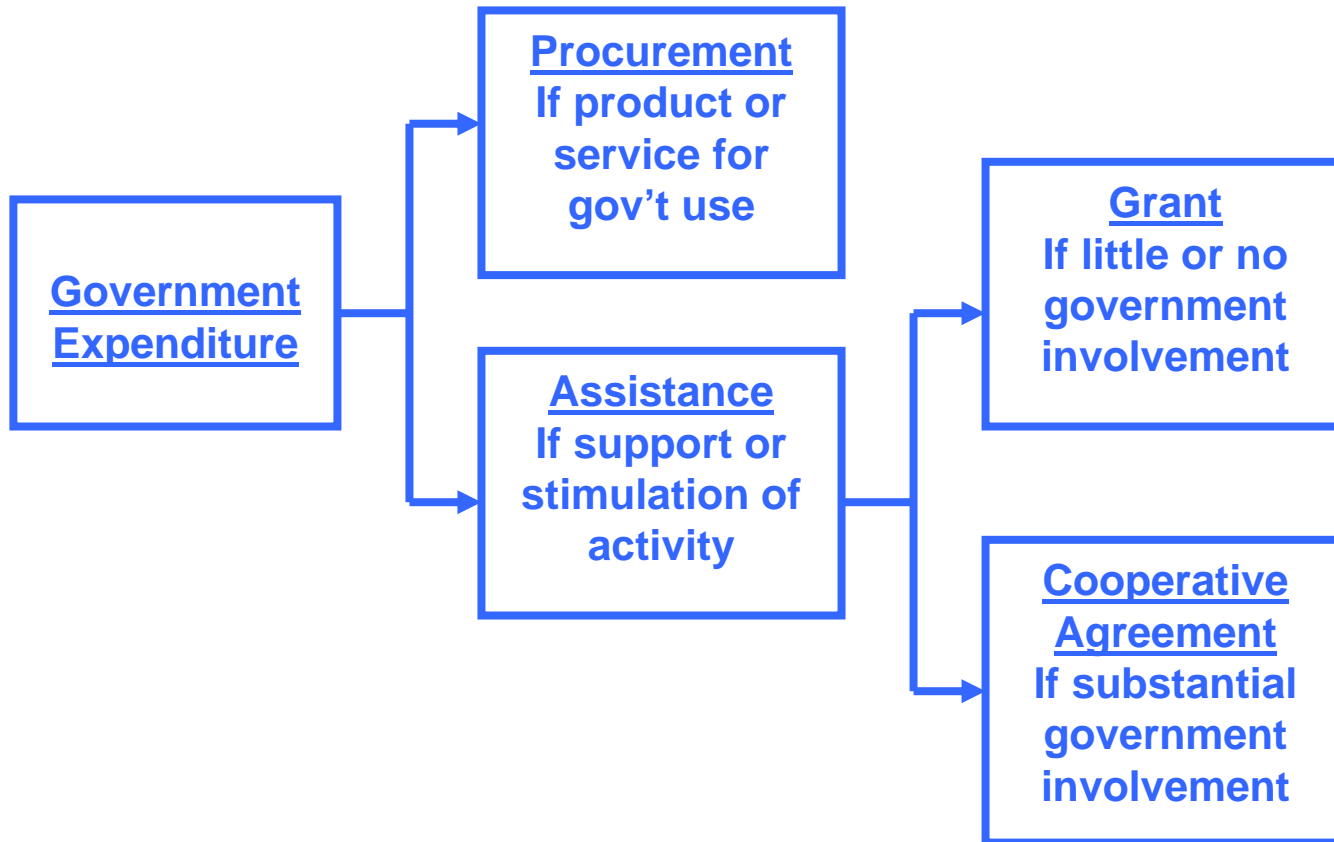
Where to Start?

- What is a Grant?
- What is a Contract?
- What is a Cooperative Agreement?



Grants and Cooperative Agreements Act

-31 U.S.C. §§ 6301-6308

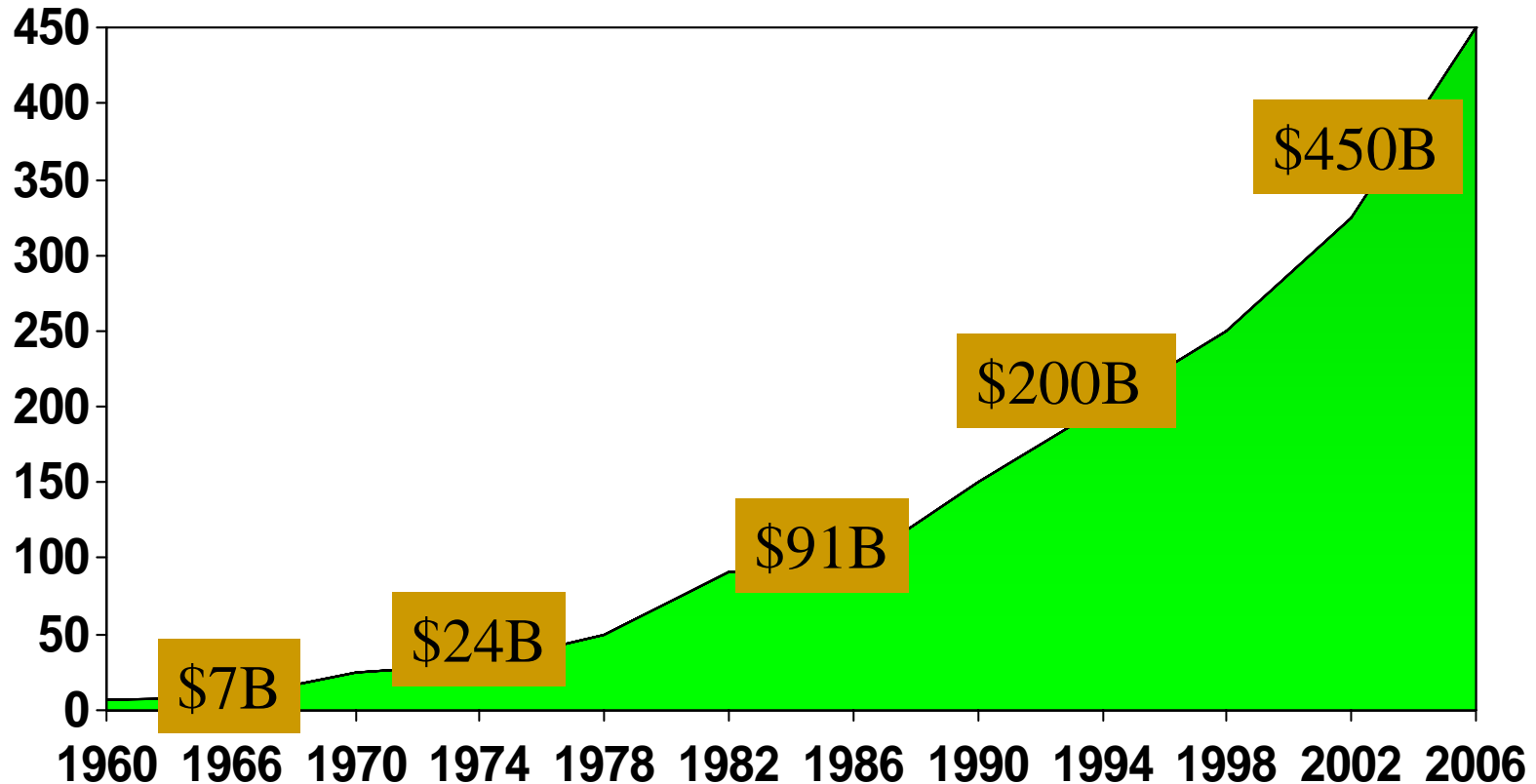


Why Doesn't the Federal Government Do the Job Itself?

- No Need to Reinvent the Wheel
- Creation and Dissolution Easier
- Not Tied Down with Laws Applicable to Federal Government, e.g. personnel, contracting, administration

Steep Rise in Federal Grants

In Billions of \$

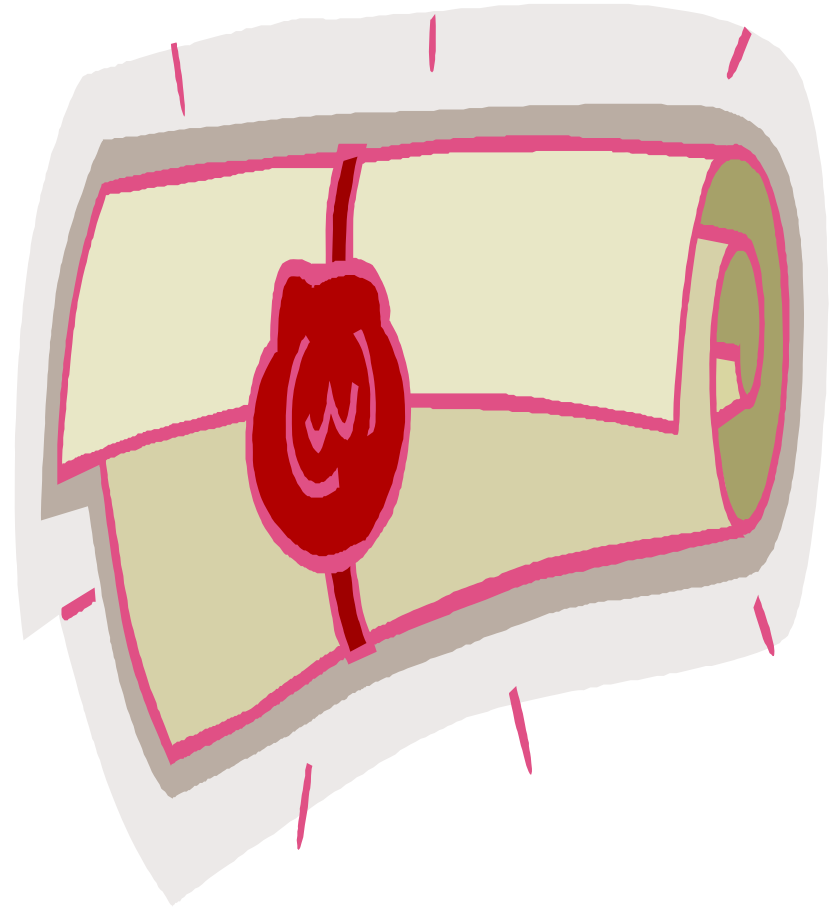


CFDA lists more than 1000 Federal grant programs

(Source: OMB Presentation at NGMA)

Terminology – Common Types of Grants

- **Entitlement (Mandatory)**
- **Discretionary**
- **Direct**
- **Block**

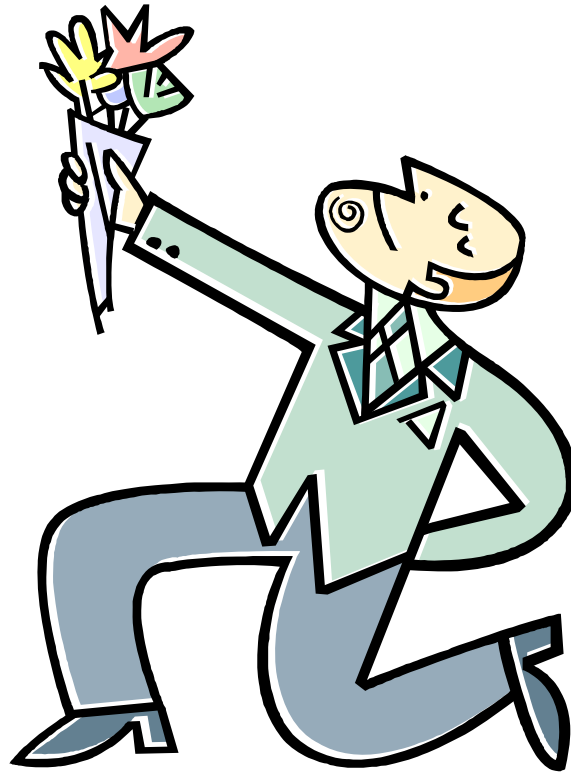


Federal Actors in the Life of a Grant

- Grants Officer
- Program Official/Project Officer
- Division of Cost Allocation/Cognizant Agency
- Office of Inspector General
- GAO/Comptroller General



Learning to Love the Law



Federal Law Pyramid



**U.S.
Constitution**

Statutes

General: Grants
and Cooperative
Agreements Act,
APA

YOUR
Program
e.g., ESEA
Head Start Act

Regulations

General:
Title 2, CFR

YOUR Program Regulations
(If any!)

Guidance

General: e.g., ED's
Handbook for Discret.
Grants, HHS GPDs

YOUR Program's Guidance
Query: Do you KNOW where to
Find it?

Key Federal Statutes

- a) Grants and Cooperative Agreements Act
- b) Single Audit Act
- c) Government Performance and Results Act
- d) Federal Financial Assistance and Management Improvement Act
- e) Improper Payments Information Act
- f) Federal Civil False Claims Act
- g) Program Fraud Civil Remedies Act
- h) Hatch Act

OMB Circulars

a) Cost Principles:

- (1) A-21: Educational Institutions
- (2) A-122: Non-Profit Organizations
- (3) A-87: State, Local, Indian Tribal Governments

b) Grants Administration:

- (1) A-110: Uniform Administrative Requirements for Grant and Other Agreements with Institutions of Higher Education, Hospitals and Non-Profit Organizations
- (2) A-102: Grants and Cooperative Agreements with State and Local Governments

Office of Management and Budget (OMB) Circulars: Audit Requirements

C) Audit Requirements:

(1) A-133: Audits of States, Local Governments, and Non-Profit Organizations -- guidance implementing the Single Audit Act. Single audits or program specific audits are required for all programs which receive more than \$500,000 or more in Federal support.

(2) A-50: Audit Follow-up

Where Can I be My Own Lawyer?

- <http://www.whitehouse.gov/omb/circulars/index.html>
- <http://www.grants.gov>
- <http://www.gpoaccess.gov/cfr/index.html>
 - Code of Federal Regulations (inc. 45 C.F.R. Part 74 and 92)
- <http://www.hhs.gov/grantsnet>
- <http://intranet.grantsinfo.hhs.gov/>
 - http://intranet.grantsinfo.hhs.gov/pg_AAGAM%20Chapters_621.cfm?id=661
 - http://intranet.grantsinfo.hhs.gov/pg_GPD%20Chapters_622.cfm?id=662
- <http://grants.nih.gov/grants/policy/gps/index.html>
 - Public Health Service Grants Policy Statement
- <http://www.findlaw.com/>



Being Your Own Lawyer, Cont.

- **DOL** -- <http://www.dol.gov/oasam/programs/boc/> (Business Operations Center within the Office of the Assistant Secretary for Administration and Management -- includes grants/contracting/procurement guidance, indirect cost determination guide)
- **HUD** -- http://www.hudclips.org/sub_nonhud/cgi/hudclips.cgi (HUDCLIPS library -- database maintained by HUD -- includes regulations, handbooks, guidebooks, directives, notices -- handbooks in the 2210.xx series provide guidance on departmental grants policy and cost principles)
- **ED** -- <http://www.ed.gov/about/offices/list/ocfo/grants/grants.html> (Office of the Chief Financial Officer -- information re: grants policy, funding announcements, program descriptions)

Key Grants Management Concepts



Hearing it from the Supremes...

- a) Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981)

- b) Bennett v. New Jersey, 470 U.S. 632 (1985)

- c) Bennett v. Kentucky Dept. of Education, 470 U.S. 656 (1985)

Still Hearing it...

d) [Bowen v. Massachusetts](#), 487 U.S. 879 (1988)

e) [Rust v. Sullivan](#) and its Progeny

Features of Grants

- **Grant Programs Must be Specifically Authorized by Congress**

Features of Grants

- **Grantee is considered autonomous, not an arm of the federal government**



Features of Grants

- **Grantee operations subject to federal legal and regulatory requirements only:**
 - **As specified in the terms and conditions of the grant award**
 - **Must be explicit**
 - **No implied terms**
 - **No retroactive application**
 - **No Unconstitutional Provisions**
 - **To the extent that they would be if no Federal funds were involved**
 - **BUT: Do not benefit from legal protections of feds either**

Features of Grants, Continued

- **Operational rules common among many of the federal assistance programs**
- **Generally, “best efforts” but movement toward performance measures, *i.e.*, outcomes**

Drilling Into the Detail: Regulatory Concepts Unique to Grants



Some Basic Concepts

- Advance Payments
- Cost Reimbursement
- Budget Flexibility
- Matching Share
- Program Income
- Federal Interest
- Subrecipients and Vendors

Advance Payments Are the Order of the Day

- A-110, _____.22 states:
(b) Recipients are to be paid in advance, provided they maintain or demonstrate the willingness to maintain: (1) written procedures that minimize the time elapsing between the transfer of funds and disbursement by the recipient, and (2) financial management systems that meet the standards for fund control and accountability as established in Section _____.21.



Costs Under Grants



- Grants are Cost Reimbursement Devices
- “Basic Guidelines” on allowability of costs are contained in each set of cost principles (e.g., OMB A- 87, A-122)

To be allowable, costs must:

- Be reasonable for performance of the award, i.e., prudent person standard
- Be allocable to Federal awards
- Conform to any limitations or exclusions in cost principles or in the award
- Be treated consistently with non-Federal awards
- Be adequately documented
- For state and local governments, be authorized or not prohibited under State or local laws or regulations

Budget Flexibility – A-110

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

BUT

(d) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

What Does (c) say?

What does (c) say? A lot...

(c) For nonconstruction awards, recipients shall request prior approvals from Federal awarding agencies for one or more of the following program or budget related reasons.

(1) Change in the scope associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or award document.

(3) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(4) The need for additional Federal funding.

(c) Cont.

(5) The transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa, if approval is required by the Federal awarding agency.

(6) The inclusion, unless waived by the Federal awarding agency, of costs that require prior approval in accordance with OMB Circular A-21, "Cost Principles for Educational Institutions," OMB Circular A-122, "Cost Principles for Non-Profit Organizations," or 45 CFR part 74 Appendix E, "Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals," or 48 CFR part 31, "Contract Cost Principles and Procedures," as applicable.

(7) The transfer of funds allotted for training allowances (direct payment to trainees) to other categories of expense.

(8) Unless described in the application and funded in the approved awards, the subaward, transfer or contracting out of any work under an award. This provision does not apply to the purchase of supplies, material, equipment or general support services.

Cost Sharing or Matching

A-110 Defines as:

Cost sharing or matching means that portion of project or program costs not borne by the Federal Government.



Cost Sharing or Matching – A-110, __.23

- (a) All contributions, including cash and third party in-kind, shall be accepted as part of the recipient's cost sharing or matching when such contributions meet all of the following criteria.
- (1) Are verifiable from the recipient's records.
 - (2) Are not included as contributions for any other federally-assisted project or program.
 - (3) Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

Cost Sharing or Matching

- (4) Are allowable under the applicable cost principles.
- (5) Are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.
- (6) Are provided for in the approved budget when required by the Federal awarding agency.
- (7) Conform to other provisions of this Circular, as applicable.

Program Income Defined – in A-110,

___2

(x) **Program income** means gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award (see exclusions in paragraphs ___24 (e) and (h)). Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in Federal awarding agency regulations or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

How To Use Program Income

- Add it to the funds that are committed to the project and use them to further eligible project objectives.
- Use it to finance the non-Federal share of the project
- Deduct it from the total project allowable cost in determining the net allowable costs on which the Federal share of costs is based

What is a Federal Share and Why is it called a Federal Interest?

- Under OMB Circular A-110 _____.2, “Federal Share” is defined as:
 - (q) **Federal share** of real property, equipment, or supplies means that percentage of the property's acquisition costs and any improvement expenditures paid with Federal funds.

Property Standards

- Property is held in grantee's name
- Feds retain federal share
- Grantee to file NOFI



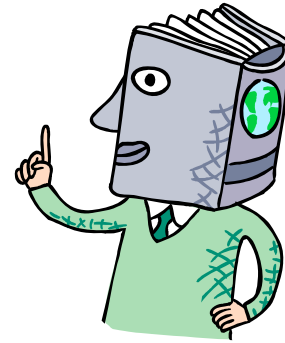
What is Implication of Federal Interest?

Disposition Instructions!

Feds can tell you to:

1. Retain Property and pay Fed for its fair share;
2. Dispose of property and pay Fed for its fair share;
3. Transfer property to Fed or to third party

And Don't Forget the NOFI.....



Availability of Funds

- A-110, __.28 states:

“Where a funding period is specified, a recipient may charge to the award only allowable costs resulting from obligations incurred during the funding period and any pre-award costs authorized by the HHS awarding agency pursuant to § 74.25(d)(1).”

Availability of Funds

- A-110, __.2 defines Obligations:

“*Obligations* mean the amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period.”

Pulling it All Together – Subrecipient/Vendor Distinctions

- OMB Circular A-133 “Audits of States, Local Governments and Non-Profit Organizations”
- **Subrecipient:** “a non-Federal entity that expends Federal awards received from a pass-through entity to carry out a Federal program, but does not include an individual that is a beneficiary of such a program. A subrecipient may also be a recipient of other Federal awards directly from a Federal awarding agency.”
- **Vendor:** “a dealer, distributor, merchant or other seller providing goods or services that are required for the conduct of a Federal program. These goods or services may be for an organization's own use or for the use of beneficiaries of the Federal program.”

Sources of Law – OMB Circular A-133, §__.210

(b) **Federal award.** Characteristics indicative of a Federal award received by a **subrecipient** are when the organization:

(1) Determines who is eligible to receive what 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.

Sources of Law – OMB Circular A-133, §__.210

(c) **Payment for goods and services.** Characteristics indicative of a payment for goods and services received by a **vendor** are when the organization:

(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.

Sources of Law – OMB Circular A-133, §__.210

(d) Use of judgment in making determination.

There may be unusual circumstances or exceptions to the listed characteristics. In making the determination of whether a subrecipient or vendor relationship exists, the substance of the relationship is more important than the form of the agreement. It is not expected that all of the characteristics will be present and judgment should be used in determining whether an entity is a subrecipient or vendor.

Why Does it Matter?

- All OMB Circulars apply to “Awards” and “Subawards”
- Vendor Contracts are governed by procurement rules of Grantee

Why Does it Matter?

- Different Terms and Conditions such as:
 - Pricing
 - Grants are Cost Reimbursement Instruments
 - Contracts are up to You
 - Budgeting
 - Termination
 - Limits on Ability to Terminate Subrecipient

Why Does it Matter?

- Different Procedural Requirements
 - Free and Open Competition versus
 - Prior Federal Approval

- Collateral Rights for Subrecipients under Authorizing Legislation
 - *e.g.* Head Start, Health Centers, CSBG

Why Does it Matter?

- Different Auditing Monitoring Responsibilities:
 - (f) **Compliance responsibility for vendors.** In most cases, the auditee's compliance responsibility for vendors is only to ensure that the procurement, receipt, and payment for goods and services comply with laws, regulations, and the provisions of contracts or grant agreements. Program compliance requirements normally do not pass through to vendors. However, the auditee is responsible for ensuring compliance for vendor transactions which are structured such that the vendor is responsible for program compliance or the vendor's records must be reviewed to determine program compliance. Also, when these vendor transactions relate to a major program, the scope of the audit shall include determining whether these transactions are in compliance with laws, regulations, and the provisions of contracts or grant agreements.

 - A-133 Coverage for Subrecipients

High Risk Areas Not Already Covered:

- Governance and Internal Control
- Monitoring Systems and Responsibilities
- Cost Allocation/Time and Effort issues

Grant-Related Disputes

Common Types

- Programmatic
 - Suspension or Termination of Funding
 - Denials of Refunding
- Financial (audit)
 - Cost Disallowances
- Other
 - Declaratory Actions
 - Debarment and Suspension

Where Disputes are Adjudicated

- Administrative Agency Proceedings
- United States District Court
- United States Court of Federal Claims



Recap of Learning Objectives

- Understand federal law applicable to federal grants.
- Gain greater knowledge of key grants management concepts and how they relate to each other.
- Identify high-risk areas and how to address them.

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A Last Word

- The body of grants law changes frequently.
- This presentation provides solely an overview of some of the key issues.
- Please refer directly to individual cases, statute, regulations, guidance and other sources and to your legal counsel for specific legal advice and interpretations.