

# Subcontracting Primer: The ABCs of Agreements Between Collaborators

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## **Abstract**

Even before all the corporate scandals and charges of corporate accounting indiscretions and manipulations, members of Congress were becoming increasingly concerned about the amount of attention federal agencies were paying to grant recipients. Congressional leaders were beginning to ask the federal funding agencies what procedures they were employing to ensure grant recipients were complying with federal regulations and the Office of Management and Budget (OMB) circular requirements. This concern has led to an increased focus on the handling of subcontracts and how to ensure subrecipients are handling federal funds in a fiscally responsible and compliant manner. Consequently, audit firms are focusing more attention on how lead institutions are monitoring subrecipients when conducting the lead institution's A-133 audit. This paper seeks to describe how to pass down and oversee compliance with essential responsibilities of subcontract administration.

## **Introduction**

Collaborations among researchers of multiple institutions are becoming an essential element in a growing number of research projects, and oversight of subcontract relationships is under increasing scrutiny by auditors and federal awarding agencies. The agreements that accommodate these collaborations are coming under increased scrutiny by the federal government, and the 2003 supplement to OMB Circular A-133 (Part 3, item M) describes subrecipient monitoring as one of the core compliance requirements that applies to most federal assistance

programs. According to the Federal Grants Management Handbook, this section of the 2003 supplement to OMB Circular A-133, includes audit objective, suggested audit procedures as well as an overview of subrecipient monitoring with references to specific circulars and relevant citations pertaining to subrecipient monitoring. A task force working on implementation of the Federal Financial Assistance Management Improvement Act (P.L. 106-107) will be evaluating whether the federal government needs to issue even more guidance on subrecipient monitoring. (2003)

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Knowing how to manage collaborations properly from a research administrator's perspective is an important grants management function. While performing this function, a research administrator must take care that the contractual instrument not overshadow the function it is designed to accommodate. Before designing an agreement the research administrator must know the function of the agreement: its purpose, what it should do, and what it should not do.

Research collaborations that involve subrecipient agreements have principal investigators (PI) in both the lead and subrecipient institutions. Frequently the PI at the subrecipient institution is the direct recipient of federal funds on other projects and therefore will not be a neophyte in the responsible management of federal funds. Occasionally, however, the subrecipient PI is inexperienced at grants management.

The success or failure of the collaboration depends not on the subcontract agreement but on the relationship that exists between the collaborators. If collaboration fails, it is usually due to the breakdown in the relationship between the PI's. During the performance period, the role of the research administrator should not be that of institutional warden, and the agreement should be one that is flexible enough to accommodate the needs of the project and the researchers while ensuring that all compliance and award requirements are met.

The subrecipient agreement is the institutional framework that provides structure to the professional relationship of the collaborating researchers. The agreement should be written in a way that will protect the grantee institution, flow down the terms and conditions of the prime award, and allow the PI to concentrate on the research relationship with collaborators and the project at hand. This paper will focus on the essential elements of a subrecipient agreement to ensure compliance with OMB Circular A-133. Two appendices have been included – Appendix A is a listing of some of the public policy requirements that federal award recipients are required to adhere to and must be “flowed down” to subrecipients and Appendix B lists the various types of subrecipients and the of Office and Management cost circular that applies to them.

## **Vendor or Subrecipient?**

The first step is to determine whether the relationship is that of a subrecipient or a vendor. OMB Circular A-133, Subpart A, Section 105 (Audits of Institutions of Higher Education) and OMB Circular A-110 (Uniform Administrative Requirements for Institutions of Higher Education, Hospitals and Other non-Profit Organizations) contain definitions of vendor and subrecipient. Vendors, although providing an essential service or product to a program, provide the same service or product as a routine part of their daily business and are not subject to OMB Circular A-133 or the compliance requirements of the award terms and conditions. Vendors generally supply goods and services that are necessary to the completion of a project but are not part of a cooperative programmatic effort. Subrecipients are usually sole source contributors (for example: universities, research institutes, hospitals employing professionals with unique experience and skills) who are part of the programmatic decision-making process and whose performance is measured against the program objectives. Subrecipients are subject to OMB Circular A-133 requirements (except foreign entities or institutions with less than \$500,000/year in federal expenditures) and must adhere to compliance requirements. A subcontract creates no direct contractual relationship between the subrecipient and the awarding agency. The relationship established by the subcontract agreement (also called subrecipient agreement, subgrant, subaward) is between the lead institution and the subrecipient and is a collaborative venture to bring to successful completion a project for which funding has been secured.

## **Reaching an Agreement**

If addition of a subcontract becomes necessary after the award is made, the awarding agency may require prior approval before they will issue the subcontract. In this case, the best is always to check with the agency guidelines. When a planned subcontract is part of the approved proposal, approval of the subcontract is part of the award.

Before issuing a subcontract under the prime award, the lead institution should require that the

subrecipient supply a statement of work (which can be included in the letter of support, the letter from the authorized institutional representative of the subrecipient organization that gives institutional approval to PI's participation in the project – the cover letter to the subrecipient's proposal); budget information, including budget justification; and a copy of the letter confirming the subrecipient's negotiated and approved facilities and administration rate. The awarding agency may also require the PIs' and senior personnel's curriculum vitae and current and pending support information.

The subcontract agreement also serves to protect both institutions by making clear the subrecipient's responsibilities. A checklist that the subrecipient must complete and submit as part of the subcontract proposal package may prove helpful. The lead institution is responsible for the subrecipient's adherence to the terms of the prime agreement. To assist the researchers at the Institute of Ecosystem Studies (IES), a document outlining the procedures that must be followed has been compiled and is available at <http://www.ecostudies.org/grants.html>.

A clear understanding of the respective roles and compliance with the terms and conditions of the award by PI's at both institutions are vital to the success of the project. The subcontracting agreement lays the groundwork for the collaborative arrangement between the institutions. Therefore, a well-structured and inclusive document is necessary. The agreement must clearly state the conditions of the relationship and flow down the necessary terms and conditions of the prime award. OMB Circular A-133 §.400(D) lists the obligations that pass-through entities must meet for subrecipients. The subrecipient agreement should include these obligations:

1. Identifying information – The pass-through entity must identify the federal award and give the subrecipient the Catalog of Federal Domestic Assistance (CFDA) number and title, the name of the federal awarding agency, and the award number. If this information is not readily available to the pass-through entity, it should provide the subrecipient with all available information that best describes the federal award;
2. Statement of work – work stated in the proposal that the subrecipient will be responsible for completing. Subrecipients should state the work they will perform and the goals they hope to achieve;
3. Project Direction – Key Personnel – Name the PIs at both institutions. When referring to the PI at the subrecipient organization, include the statement “who is essential to the project”;
4. Duration of the Agreement – The start and end date of award cannot exceed the time-frame in the prime award;
5. Estimated Cost – The amount should not exceed the amount stated in the subrecipient proposed budget, which should be attached as an appendix to the agreement;
6. Allowable Costs – cite applicable OMB circular reference (see Appendix B). The pass-through agency must monitor the subrecipient's expenses to ensure the funds are being used for authorized purposes;
7. Payment – address, format, and timing of invoices; invoices should itemize expenses and include period covered, expenses for the period, and itemized cumulative expenses;
8. Audit and Record Retainage Requirements – prime agency and pass-through agency must have permission to access the financial records of the subrecipient. State the period of time the records must be kept. The pass-through entity must ensure that subrecipients expending \$500,000 or more during the subrecipient's fiscal year have met the audit requirements for that year. If warranted in the audit findings of the subrecipient, the pass-through entity can issue a management decision within six months of receiving the subrecipient's A-133 audit report. The subrecipient's audit report may affect the pass-through entity's audit report and make it necessary for the pass-through entity to adjust its accounting reports. If warranted the pass-through entity must follow up to ensure that the subrecipient is taking corrective action in an appropriate and timely manner.
9. Changes in Objectives, Scope, or Personnel Reference – how any proposed changes should be handled and what permissions must be obtained for changes;
10. Termination Clause – conditions and terms for dissolution of agreement;
11. Reports and Deliverables Due – state what

is required and when due. The pass-through entity must monitor the subrecipient to make sure that the stated goals of the project are being met. Requiring the subrecipient's program report to be due a month before the pass-through institution's report to the agency so it can be incorporated into the progress report to the prime agency is prudent;

12. Additional Terms And Conditions – specific to agency requirements and the terms and conditions of the award. Provide the subrecipient with compliance requirements (see Appendix A) and attach the agency terms and conditions to the agreement;
13. Precedence Reference – determine which takes precedence if subrecipient agreement and prime award are in conflict;
14. Indemnification (if allowable) – because of state laws, some state universities do not permit indemnification but usually have language to which they can agree;
15. Rights in Data and Material – specify the right for both prime and lead agency to use material royalty-free;
16. Publication Clause – should include publication expectations; co-authorship stipulations (if any) and Stevens Amendment provisions (See Appendix A);
17. Independent Contractor Clause – include a statement that the subrecipient is an independent contractor;
18. Subcontracting Clause – no third party subcontract is allowed without lead institution approval;
19. General Release Clause – statement that payment of final invoices releases further claims of recipient;
20. Use of Name Clause – limitations on the use of the name of either institution; and
21. Complete Agreement Clause – this agreement is complete and supercedes previous agreements.

Specific situations may eliminate some clauses or dictate additional clauses. For example Institutional Animal Care and Use Committee approval date and Animal Welfare Assurance Number and Human Subject Exemption Number or Institutional Review Board Approval Date and Assurance of Compliance Number can be added, if applicable. The authorized official of both institutions must sign and date this agreement. In addition, the agreement should include the prime agreement number, the subrecipient's Dun & Bradstreet Universal Numbering System (DUNS) number, the contact information for both institutions and their respective addresses. Institutions without a DUNS number may go to [http://www.dnb.com/US/duns\\_update/index.html](http://www.dnb.com/US/duns_update/index.html) to acquire one.

The subrecipient also has the following responsibilities.

1. Administering the award in compliance with the terms and conditions of the award and the applicable circulars;
2. Having adequate internal controls to manage the subcontract;
3. Ensuring that all the terms and conditions of the award are carried out;
4. Requesting prior approval from the pass-through (lead) entity (not the granting agency), when necessary;
5. Providing pass-through (lead) entity with copies of A-133 report, when applicable, or informing pass-through (lead) entity when there are no management findings. If requested by the pass-through entity, the subrecipient is required to send the A-133 report even if there are no management findings;<sup>1</sup>
6. Keeping current on all changes in procedures or requirements and advising the principal investigator of changes.

<sup>1</sup> OMB Circular A-133 § 320 (c) (e) (1) Subrecipients shall submit to each pass-through entity one copy of the reporting package... when the schedule of findings and questioned costs disclosed audit findings relating the Federal awards that the pass-through entity provided... (2)...the subrecipient shall provide written notification to the pass-through entity that: an audit of the subrecipient was conducted in accordance with this part...; the schedule of findings and questioned costs disclosed no audit findings related to the Federal award(s) that the pass-through entity provided; and, the summary schedule of prior audit findings did not report on the status of any audit findings relating to the Federal award(s) that the pass-through entity provided... (f) In response to requests by a Federal agency or pass-through entity, auditees shall submit the appropriate copies of the reporting package...

In an attempt to clarify the compliance responsibilities of pass-through entities, the annual compliance supplement to OMB Circular A-133 contains clarifications of the responsibilities the pass-through entity has for monitoring a subrecipient's compliance. The 2003 annual supplement applies to audits conducted on fiscal years beginning after 30 June 2003. The 2003 supplement is available on the Office of Management and Budget website at [http://www.whitehouse.gov/omb/grants/grants\\_circulars.html](http://www.whitehouse.gov/omb/grants/grants_circulars.html).

Once the agreement is in place, the pass-through or lead entity's most important role is to monitor the subrecipient. Many lead institutions fall short of this responsibility because they do not fully understand their role and do not document their monitoring activities. Before entering into a subcontractual relationship, the lead institution should establish a checklist of monitoring activities. A checklist serves as a ready reference of all the pertinent information that the pass-through agency needs to have for the subrecipient. It is also an aide memoire that all the information necessary for subrecipient monitoring has been received and is up-to-date. This checklist should include institution name, DUNS number, contact person, auditor name, A-133 report request and receipt, agreement number, CFDA number, federal agency, amount of the award, whether the research project involves vertebrate animals or human subjects. If applicable, note the Institutional Animal Care and Use Committee approval date and Animal Welfare Assurance Number and Human Subject Exemption Number or Institutional Review Board Approval Date and Assurance of Compliance Number. Recording this information on the checklist can be very helpful during an A-133 audit and will help the pass-through entity make sure that the subrecipient's applicable assurances are current.

Database programs can be a powerful as well as a very useful tool for capturing monitoring information. A carefully designed database can be the central, electronic repository that allows the user to organize information into tables that can be linked and queried to generate reports that are both functional and timely. For example, the reports can be designed to serve as a reminder that assurances are due to expire and when, that A-133 reports have or have not been

received or can be designed to contain subrecipient information requested by the auditors.

The lead institution should also maintain a file for each subrecipient that contains all correspondence including relevant e-mails and notations of telephone conversations.

Finally, the lead institution should review the invoices submitted by the subrecipient to ascertain that requested reimbursements are for allowable expenses within the performance period of the agreement, the amount of the agreement has not been exceeded, and the invoices contain no mathematical errors. Many institutions require that the invoices include a statement signed by the person responsible for issuing the invoice verifying the accuracy of the expenses. Before making payment, the lead institution's PI should verify that the work has been performed and both the PI and a staff member responsible for overseeing the project's expenses should approve the invoice.

## Conclusion

Taking the time initially to construct a clear and concise agreement and establishing monitoring procedures are essential to ensuring that institutions are in compliance with OMB regulations and agency terms and conditions and will help cement the collaborative relationship between the two institutions. Smooth administrative relationships facilitate productive collaborations among the professionals involved. It is also important to have reference tools such as The Thompson Publishing Group's *Federal Grants Management Handbook* or The National Association of Colleges and University Business Officers' *A Guide to Managing Federal Grants for Colleges and Universities* and a current version of OMB Circular A-133.

## References

- Lamoreaux, D., Magill, B. & Woodworth, A. (Eds.). (April 2003). *Federal Grants Management Handbook, Current Developments*. Washington, D.C.: The Thompson Publishing Group.
- Office of Management and Budget, *Circular A-133 – Audits of States, Local Governments and Non-Profit Organizations*, revised June 27, 2003.
- Sherfy, E. J. & Lamoreaux, D. (Eds.). (1999). *Techniques for Monitoring Federal Subawards*. Washington, D.C.: Thompson Publishing Group.

### Appendix A

#### Some Examples of Public Policy Requirements

- Davis-Bacon Act, P.L. 86-624 & P.L. 88-349; 40 USC 276. FAR implementation at 52.222-6 – sets wage rate for laborers and construction workers on federal projects.
- Title VI of the Civil Rights Act of 1964 – prohibits discrimination based on race, color or national origin.
- Freedom of Information Act, 5 USC 522, as amended and implemented in each federal agency's Code of Federal Regulation section – grants public access to federal records.
- Fly American Act, International Air Transportation Fair Competitive Practices Act of 1974, Section 5 and implemented in FAR 52.247-63 – requires travelers using federal funds to use American owned airlines whenever possible.
- Stevens Amendment, Defense Appropriations Act of 1986 (P.L. 100-463); Department of Labor, Health and Human Services, and Related Agencies Appropriations Act of 1990 and 1991 (P.L. 101-166 and 101-517, Section 511) – requires grantees to give credit to funding agencies in all publications.
- Drug Free Workplace Act of 1988 (part of P.L. 100-690, Title V, Subtitle D: 41 USC 701, et seq.) – requires at a minimum that an institution develop a workplace policy and distribute it to all employees and students.
- Anti-Kickback Act of 1986, FAR 52.203-7 – states it is unlawful for subrecipients to make payments and for subcontractors to accept payments for the purpose of obtaining or rewarding favorable treatment in connection with either a subcontract or contract relating to prime award.
- Lobbying Disclosure Act of 1995 (P.L. 04-65) – requires the reporting of lobbying efforts that are aimed at Congress and the Executive branch of government.

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## Appendix A (cont.)

- The Clean Air Act and the Federal Water Pollution Control Act. Required by the Clean Air Act (42 USC 7401 et seq.), the Federal Water Pollution Control Act (33 USC 1251 et seq.), Executive Order 11738, 10 September 1973 (38 FR 25161), 12 September 1973 and the Environmental Protection Agency regulations at 40 CFR, Part 15 – must certify if facilities to be used in the proposed work are listed by the Environmental Protection Agency (EPA) as violating facilities and promise to give notice if informed by the EPA that facilities have come under consideration for listing.
- The Patriot Act, 25 October 2001, Subtitle B Section 411 – 416 Enhanced Immigration Provisions. This act limits the research activities of international students and other “restricted persons” and the possible creation of a new category of restricted information designated as “sensitive but unclassified.” Available at [http://www.eff.org/Privacy/Surveillance/Terrorism\\_militias/20011025\\_hr3162\\_usa\\_patriot\\_bill.html](http://www.eff.org/Privacy/Surveillance/Terrorism_militias/20011025_hr3162_usa_patriot_bill.html).
- The Bioterrorism Preparedness and Response Act, Public Health Security and Bioterrorism Preparedness Act of 2002 - Public Law 107-877 - July 12, 2002 - includes a list of selected agents (42 CFR 72, Appendix A) that must be reported to the federal government if used in a grantee institution. The new law requires an institution to register with the CDC if it possesses these infectious agents, toxins, and genetic elements. The list is available at <http://www.fda.gov/oc/bioterrorism/bioact.html>.

## Appendix B

### FEDERAL COST PRINCIPLES APPLICABLE TO GRANTS AND COOPERATIVE AGREEMENTS

TYPE OF (SUB) RECIPIENT	COST PRINCIPLE
College and University	OMB Circular A-21 – Cost Principles for Educational Institutions
State, Local or Indian Tribal Government	OMB Circular A-87 – Cost Principles for State, Local and Indian Tribal Governments
Non-Profit Organization	OMB Circular A-122 – Cost Principles for Non-Profit Organizations
Hospitals	DHHS Regulation 45CFR Part 74, Appendix E
For Profit Organizations	FAR 48 CFR Part 31