

Report on Research Compliance Volume 19, Number 12. November 23, 2022

Managing Federally Funded Research: Publication Rights, FCOIs, Collaborations

By Theresa Defino

Say you—or your colleagues in your organization—are experts at managing federal grants. But what about procurement contracts from the government that fall under the Federal Acquisition Regulation (FAR)?

According to Scott Sheffler, it will “eventually happen” that a research organization is presented with a procurement contract.

“When you get that first procurement contract and you’re thinking, ‘Well, I’ve been a grantee for ages. What do I need to do,’” organizational officials might reason there are few additional requirements.

Not so, said Sheffler, a partner with Feldesman Tucker Leifer and Fidel LLP.

During a webinar earlier this year, Sheffler described how managing research awards differ from oversight of service delivery awards.^[1] He addressed what he called five areas of concern or “friction points.” An article in the November issue of *RRC* addressed the first two—federal grants management parameters (and potential research flexibilities) and human subjects research.^[2]

In addition to covering procurement-related issues, this article addresses the other three friction points: data rights and intellectual property, financial conflicts of interest and collaborative research.

Those with grant experience may discover they have more contact with the contract-awarding agency than they were used to.

With a procurement contract, the funding agency may exercise “involvement in the day-to-day direction of the research,” Sheffler said. “With a grant, at least theoretically, there wouldn’t be, though agencies [sometimes] ignore these distinctions and pass-through entities ignore these distinctions as well.”

In contrast to grants that might not have explicit requirements, on the “federal procurement side, it’s very easy to determine what all of the terms and conditions are because they’re right there in the agreement,” Sheffler said.

New Labor Policies May Apply

This may bring with it new requirements, however, particularly related to labor practices.

“What tends to be more of a challenge, especially for a large established grantee that’s just now getting into carrying out procurement contracts, is that the procurement contract side of this system...tends to [have] far more robust public policy requirements applied to you as the private party with respect to your labor and employment practices,” Sheffler said.

Additionally, institutions with more than 50 employees entering a procurement contract for the first time will

likely need to fill out and annually update “a very detailed affirmative action policy and affirmative action plan,” he said. This includes “a very detailed analysis of the positions within your organization, who’s in those positions and whether they are representative of historically disadvantaged groups, etc., and then a plan to, if you have any imbalances, remedy those imbalances over time,” he added.

Such contracts will also necessitate certain hiring policies.

Organizations will need to establish “a relationship with your local workforce development board to ensure that, in that job office, they’re posting your opportunities...so that veterans, for example, can participate in your opportunities and [implement] other preferences for historically disadvantaged groups,” said Sheffler.

He noted that such policies “are sort of encouraged on the grant side” but said, “there’s nothing that makes you do this as a grantee. Once you become a procurement contractor, those labor policies become a lot more robust in terms of the specific steps you have to take and what the Department of Labor will be looking at in terms of overseeing it.”

Finally, “if your research agreement is a service contract, there is a high likelihood that you will also have to comply with the Department of Labor’s prescribed prevailing wage standards for all of your non-exempt employees” working on the contract, he said.

He added that “eventually, the Department of Labor will actually check” compliance. The contracting agency doesn’t govern or enforce the labor practices of a procurement agreement, said Sheffer.

Sheffler advised reading such contracts “really carefully” and making a list of “all of these labor policy clauses and make sure you’re doing” what is required.

Moving on to data rights, patents or copyright issues in grants, “the first place you want to start is always [in the] grant management regulations,” he said. These can be found under 2 C.F.R. § 200.315, “intangible property.”

Generally speaking, these provide that “when the federal government funds the creation of a copyrightable work, a patentable invention or data, then you, as the recipient will own the thing; you’ll own the title to the copyright, you’ll own the patent rights, but we—the federal government—will obtain, essentially, a free, worldwide permanent license,” Sheffler said. This license is royalty-free, nonexclusive and irrevocable and allows for publication and other uses. He added that the concept is similar to inventions.

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