

Life Cycle of the Award Series:

Part II: Federal Contracts



Session Leaders:

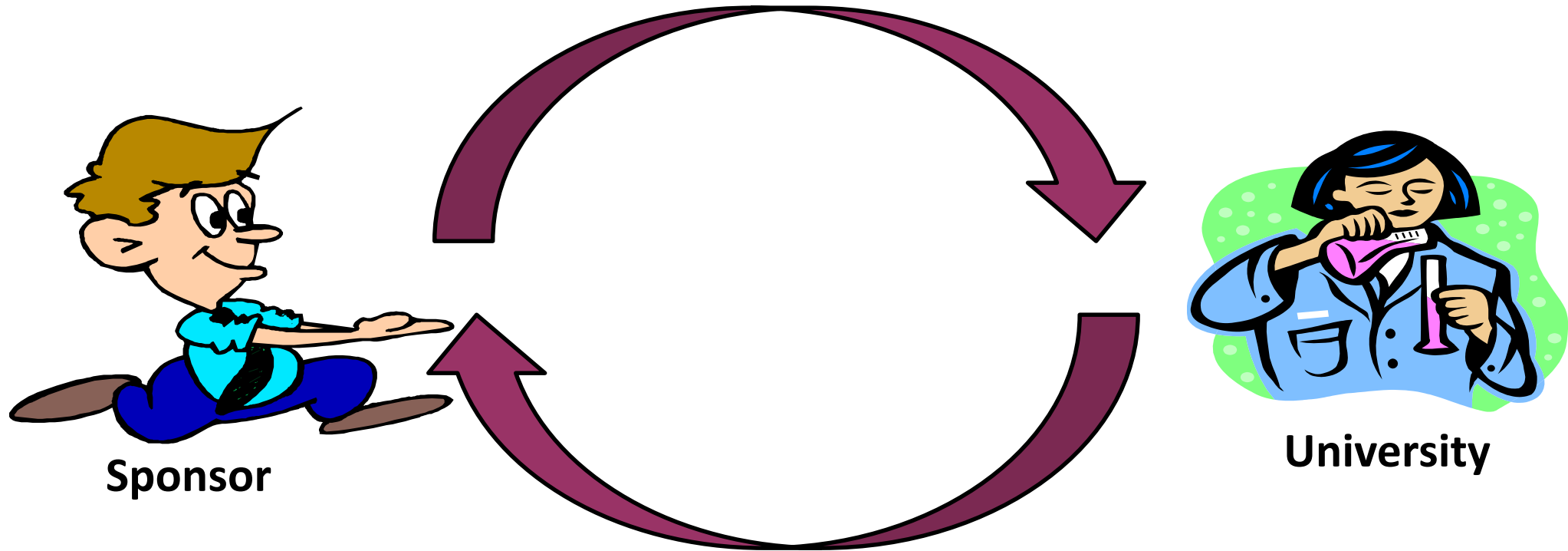
- Craig Reynolds, Director, Office of Research and Sponsored Projects, University of Michigan
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- Patricia Hawk, Assistant Vice President, Office of Sponsored Research and Award Administration, Oregon State University

What is the real difference between a grant and a contract?



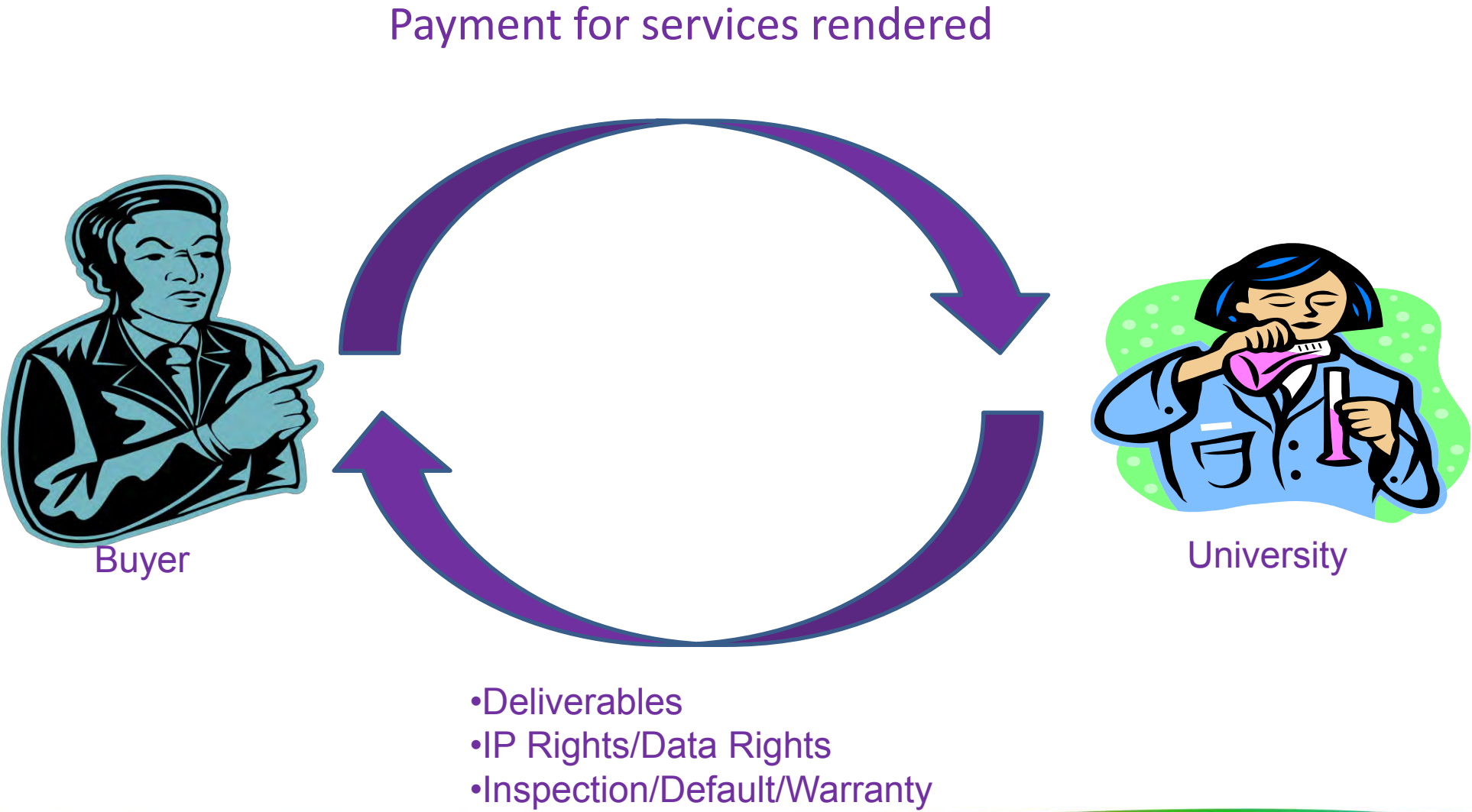
Grants are given to support a public purpose.

Financial assistance



- Progress reports
- Final reports
- Other reports

Contracts are used to buy a product or a service.



Federal contracts are typically longer and more complicated than federal grants.

Federal contracts include detailed provisions for termination, liability, property management, subcontracting, etc.

Faculty should anticipate that it will take longer to review a contract than a grant.

Post-award personnel should anticipate that it will take more effort to administer a contract than a grant.



A contract SOW must be written very carefully.

The scope of work constitutes a detailed description of what the government is buying.



Payment may be tied to specific deliverables:

| | |
|----------|--|
| CLIN 001 | \$25,000 – Test samples for salinity & impurities. |
| CLIN 002 | \$85,000 – Develop software model for predicting impurity rates based on geological features. |
| CLIN 003 | \$35,000 – Analyze historical salinity rates. |

Boring fact: CLIN = Contract Line Item Number

Quiz question: What happens if a PI spends all her money on tasks one and three and never finishes task two?



| | |
|----------|---|
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A typical federal contract includes pages of lovely FAR clauses.

| Section I - Contract Clauses | | |
|-----------------------------------|--|----------|
| CLAUSES INCORPORATED BY REFERENCE | | |
| 52.202-1 | Definitions | JUL 2004 |
| 52.203-3 | Gratuities | APR 1984 |
| 52.203-5 | Covenant Against Contingent Fees | APR 1984 |
| 52.203-6 | Restrictions On Subcontractor Sales To The Government | SEP 2006 |
| 52.203-7 | Anti-Kickback Procedures | JUL 1995 |
| 52.203-8 | Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity | JAN 1997 |
| 52.203-10 | Price Or Fee Adjustment For Illegal Or Improper Activity | JAN 1997 |
| 52.203-12 | Limitation On Payments To Influence Certain Federal Transactions | SEP 2007 |
| 52.204-4 | Printed or Copied Double-Sided on Recycled Paper | AUG 2000 |
| 52.204-7 | Central Contractor Registration | APR 2008 |
| 52.209-5 | Certification Regarding Responsibility Matters | DEC 2008 |
| 52.209-6 | Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, or Proposed for Debarment | SEP 2006 |
| 52.211-15 | Defense Priority And Allocation Requirements | APR 2008 |

What is the FAR?

A system of uniform policies and procedures governing the acquisition or contracting actions of all federal executive agencies

Where does the FAR come from?

Title 48 of the Code of Federal Regulations (CFR), which represents the policies and procedures of the United States

Where did the FAR really come from?

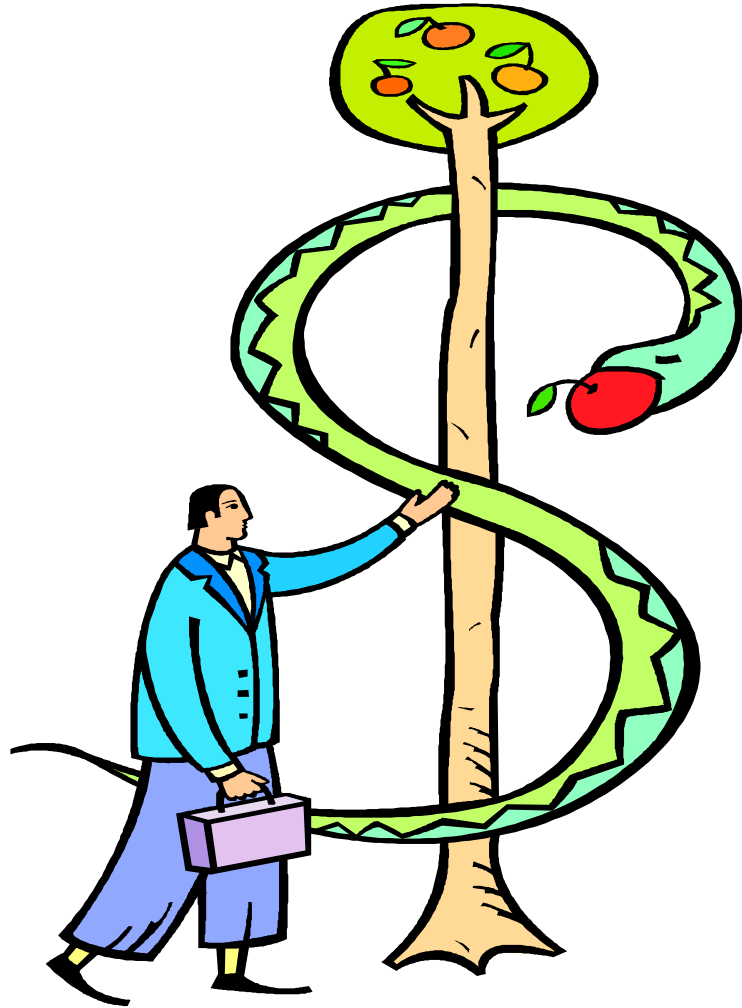
The FAR can be traced back to 1792 when Congress granted the Departments of War and Treasury the authority to contract.

The purpose of the FAR is to establish uniform rules for federal contracting.



http://www.solarnavigator.net/history/explorers_history/President_George_Washington.jpg

Why is the FAR important?



Without uniform rules, there would be nothing preventing federal contracting officers from:

- Issuing contracts to their friends
- Engaging in other forms of corruption
- Acting in self-serving or arbitrary ways

The FAR is focused mainly on commercial procurements.

| | Type of Award | Cost Principles | Admin. Requirements | Audit Requirements |
|---------------|---------------|-----------------|---------------------|--------------------|
| Educational | Assistance | Subpart E | Subpart D | Subpart F |
| | Procurement | Subpart E | FAR | Subpart F |
| Non-Profit | Assistance | Subpart E | Subpart D | Subpart F |
| | Procurement | Subpart E | FAR | Subpart F |
| Hospital | Assistance | Subpart E | Subpart D | Subpart F |
| | Procurement | Subpart E | FAR | Subpart F |
| State & Local | Assistance | Subpart E | Subpart D | Subpart F |
| | Procurement | Subpart E | FAR | Subpart F |
| For-Profit | Procurement | FAR | FAR | FAR |

Modified slide based on a slide developed by David Mayo, Caltech. Used with permission.

Cost Principles

- The default language of 52.216-7 includes a reference to FAR 31.2, which is for “Contracts with Commercial Organizations.”
- Your pre-award office should ask the CO to replace the reference to 31.2 with a reference to 31.3, i.e., “Contracts with Educational Institutions.”
- FAR 31.3, in addition to pulling in A-21, also states that “Agencies are not expected to place additional restrictions on individual items of cost.”



This phrase comes in handy when arguing
with your CO about cost allowability!

- (As of December 2015, FAR 31.3 has not yet been updated to reference Subpart E of the Uniform Guidance instead of OMB Circular A-21.)

Audit Requirements

- Use 52.215-2 (Alt. II)
- Ensures that your federal contracts will be audited using the same principles as your federal grants.
- (As of December 2015, FAR 31.3 has not yet been updated to reference Subpart F of the Uniform Guidance instead of OMB Circular A-133.)

A FEW KEY CLAUSES

Certifications

- 52.209-5 – Certification Regarding Responsibility Matters (12/08)
 - Prescription: Applicable to contracts that exceed the **simplified acquisition threshold**.
 - This term (and many other terms) are defined at FAR 2.101. Currently, the simplified acquisition threshold is \$150,000.

Certifications

- 52.209-5 requires the contractor to certify that:
 - They are not debarred or suspended.
 - They have not been convicted of fraud.
 - They are not delinquent in federal taxes.
 - They have not had federal contracts terminated for default during the preceding three year period.

Certifications

- This is an area where pre-award and post-award need to coordinate their efforts.
 - Pre-award offices need to negotiate out “default” clauses whenever possible, decreasing the chances your institution will be found in default.
 - Post-award offices need to respond quickly to unhappy CO’s to prevent things from escalating to the point where default becomes a real threat.

Certifications

- What happens if you default?
 - Defaulting on a federal contract does not automatically make you ineligible to receive federal funds.
 - However, a CO is required to take prior defaults into consideration to determine if your institution is “responsible” enough to receive federal funds.

Simplified Acquisitions

- 52.213-4 – Terms and Conditions – Simplified Acquisitions
 - Abbreviated set of fixed-price terms and conditions for the acquisition of non-commercial supplies and services
 - Can be used for acquisitions between the micro-purchase threshold (\$3K) and the simplified acquisition threshold (\$150K) (FAR 2.101)
 - Includes terms normally objectionable to universities, such as **warranty** of results and **termination for default**

Simplified Acquisitions

- Important Actions:
 - Must enforce all clauses referenced in this “super-clause,” e.g., 52.222-50, Combating Trafficking in Persons
 - Must ask for substitutions to remove objectionable clauses. (Note: The prescription states that the clause “may be modified to fit the individual acquisition.”)

Simplified Acquisitions

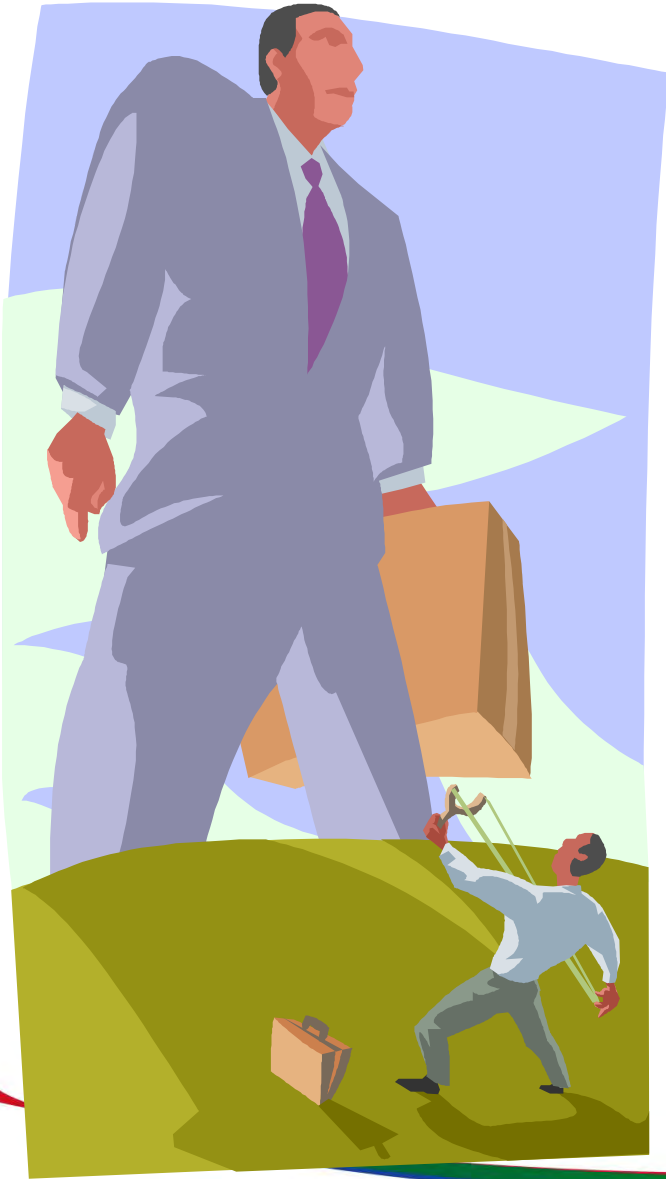
- Substitutions:
 - Delete Section (d) – Inspection/Acceptance. Replace with 52.246-9.
 - Delete Section (g) – Termination for Cause. Replace with 52.249-5 (if the CO insists upon a replacement clause).
 - Delete Section (h) – Warranty. Replace with 52.246-9.



Why can't we offer a warranty?
Don't we stand behind our work?

COPING WITH THE COMMERCIAL ORIENTATION OF THE FAR

Working under Commercial Terms



Contracting Officers see themselves as “buyers” on behalf of the federal government.

In order to protect the government’s interests, they are inclined to impose clauses like these:

52.212-4 (Commercial Items)

52.246-8 (Inspection R&D)

52.249-6 (Termination for Default)

52.246-20 (Warranty)

Re-performance Requirements

Many of these clauses include “re-performance requirements.”

What this means is that if the government isn’t satisfied with your work, they can force you to do it again at no additional cost.

If they lose confidence in your ability to do the work, they can ask someone else to redo it and then charge you the cost!!



Universities cannot offer a warranty.

How will we pay if the government isn't satisfied?

Student tuition dollars?



State appropriations?



http://www.pacapitol.com/Photo_Pages/Capitol.html

Other sponsors?



Universities must avoid “default” clauses.

University researchers should not be put in a position where they can be accused of defaulting (i.e., failing to make progress).



Can a cancer researcher guarantee that she will cure cancer? Can any cutting-edge researcher guarantee a particular outcome?

It is o.k. for the government to terminate university contracts for its convenience, but not for default. (If a university is accused of defaulting on a federal contract, it might jeopardize its ability to pursue additional federal funds.)

PROPERTY AND INTELLECTUAL PROPERTY

Property

- Government Policy

- Discussed at Part 45
- Imposed by 52.245-1
- Government does not support acquisition of property – expects contractor to provide all equipment necessary for contract performance
- If acquisition is necessary, title vests in government
- Detailed property management requirements

Another way contracts differ from grants



Property

- Government Policy
 - Restricted to use on contract; requires prior approval for use on non-governmental projects, for sale, or for other disposition
 - Prior approval required as per Subcontracts clause or as otherwise stated in contract
 - Reports of property acquired under contract, both government and non-government
 - Disposition must be requested at end of contract

Property

- Contract Clause
 - 52.245-1 – New clause that replaces all previous property clauses
 - Alternate II is intended for universities
 - Provides for automatic title to contractor if equipment has prior approval and under \$5,000
 - Provides for government to give title to contractor for acquired property over \$5,000 *if specifically stated in the contract*
 - Requires *quarterly* reporting of any equipment to which title vests in contractor

Patents

- 52.227-11 “Patent Rights”
 - Establishes contractor’s right to own its inventions, and government’s rights to access those inventions
 - The Government receives a non-exclusive license to use any invention developed with federal funds.
 - Key protection for subcontractors: “The Contractor shall not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor’s subject inventions” (Section k(3)).

Patents

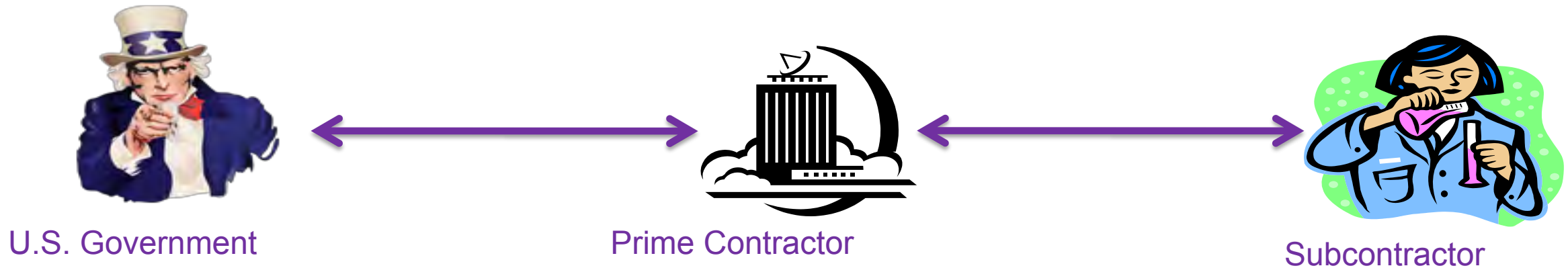
- 52.227-11 “Patent Rights”
 - Establishes disclosure requirements and deadlines to which contractor and all subcontractors must abide:
 - Within 60 days of invention’s internal disclosure
 - Election of title within 2 years of disclosure
 - Filing of application within 1 year of election

Failure to abide by these requirements may result in a forfeiture of your university’s IP rights.

PRIVITY AND SUBCONTRACTING

Contract Privity

- “Privity of contract” means a connection or derived interest between two or more contracting parties.
- Contract privity means that only the entities who entered into a contract (and who are privy to it) are entitled to enforce its terms.



What does it mean?

- In a dispute, the subcontractor does not have recourse to bypass the prime contractor and approach the funding agency – the subcontractor must deal with the prime, and vice versa.
- The same applies to a subcontractor's subcontractor relative to the prime contractor
- Designed to protect the relationships between contracting parties.

Exceptions to Privity

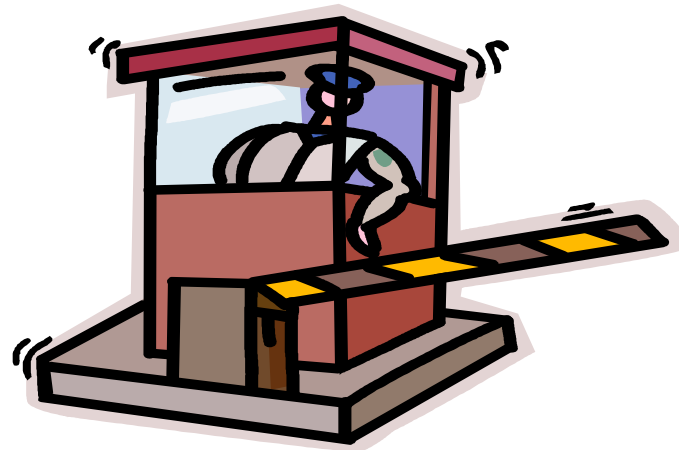
- When one party gives another party permission, such as if subcontractor needs to talk directly to funding agency
- When the government reserves rights, such as with intellectual property

Payment

- Payment of subcontractors is a matter between prime contractor and subcontractor
- Key guidance includes:
 - 32.110 – Payment of subcontractors under cost-reimbursement prime contracts
 - 32.112 – Nonpayment of subcontractors under contracts for noncommercial items
 - 52.216-7 – Allowable Cost and Payment

Payment

So what should you do if the prime contractor isn't paying you? Is there any recourse to talk to the U.S. Government?



Is privity a barrier?



Payment

If the prime won't respond to your requests, make sure to follow the guidance in FAR 32.112:

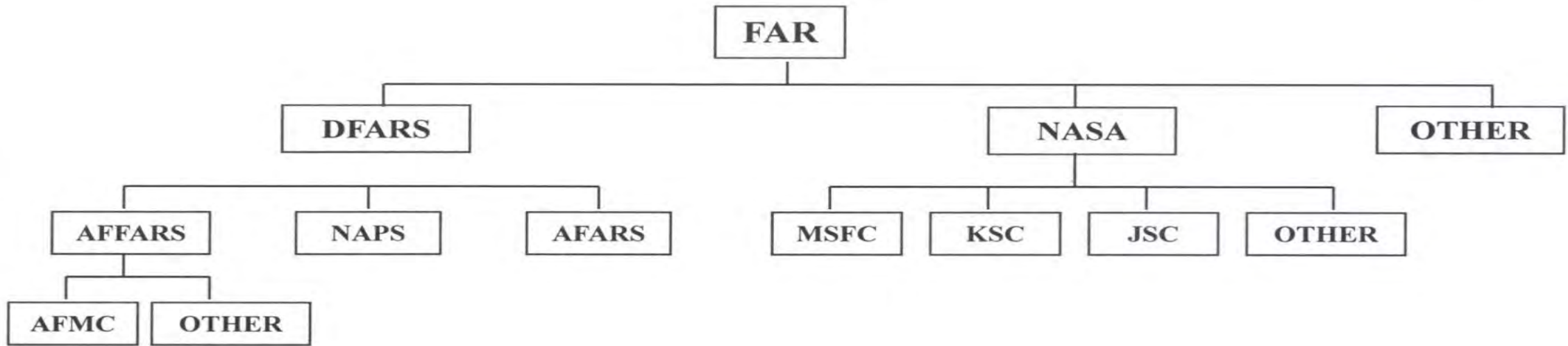
1. Find out whether the prime contractor has been paid.
(See FAR 32.112-2: "Subcontractor Requests for Information.")
2. Inform the Government that you have not been paid.
(See FAR 32.112-1 "Subcontractor Assertions of Nonpayment.")

THE FAR SUPPLEMENTS

INTRODUCTION TO THE DFAR

Agencies are permitted to supplement the FAR with their own regulations.

Supplements



**Organization Supplements begin with the top level of the service or agency
And each level or organization can further supplement due to its mission.**

The Dreaded 7000 Clause

Universities always try to negotiate out DFARS 252.204-7000 whenever they can. Publication restrictions are inconsistent with the university mission and undermine the fundamental research exclusion.

Based on the prescription, this clause should only apply to projects that involve information which “may be sensitive and inappropriate for release to the public.”



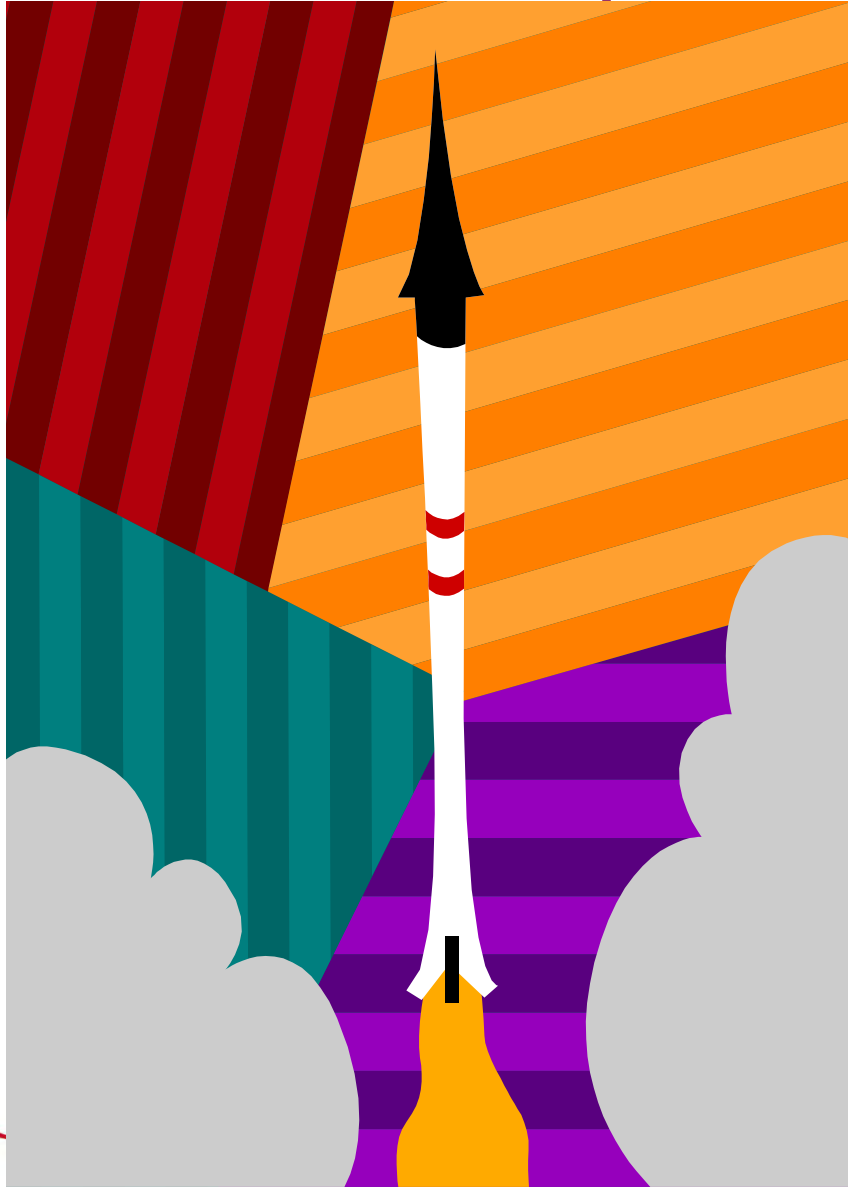
Fighting Arbitrary Restrictions

Contracting Officers will sometimes try to impose the clause, because they don't always have a clear idea of whether the research is “sensitive” or not.

What can we do in such cases?



Is the 7000 clause always arbitrary?



Well, no!

**It is important to know what
you've proposed to do in your
scope of work!**

Other Resources



The DoD offers additional guidance to contracting officers, discouraging them from excessive, arbitrary use of the 7000 clause:

<http://www.research.psu.edu/osp/manage-awards/export-control/export-documents/DODMemo.pdf>

Our newest challenge: “Safeguarding Covered Defense Information and Cyber Incident Reporting” (DFARS 252.204-7012)

Requires universities to impose stringent security requirements on any information systems that will support work involving “controlled technical information” (defined further at NIST 800-171).

These standards are enormously difficult to implement in a university environment.

Do not rely on PI certification of compliance. It is critical that you get your university’s IT professionals involved in identifying an acceptable data security plan.

NOTE: We expect to see a new FAR clause come out in February 2016 that will establish a federal-wide standard for IT security, based on NIST 800-171.

General Resources



Good source for the FAR: <http://farsite.hill.af.mil/>

Archived versions can be found here: <https://www.acquisition.gov/far/>

FAR clauses can be included anywhere in a federal contract, most frequently in Section H (Special Contract Requirements) and Section I (Contract Clauses).

Questions?

Concerns?

**Life-altering
insights?**