

Chamber of Commerce - 2017

Federal Grants v Federal Contracts: Key Differences



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OVERVIEW OF AWARDS - FY 2017

The federal agencies distribute funding through federal contracts, grants, loans, and other financial assistance. See the [Overview of Awards by Fiscal Year](#) trend graph for spending by all Fiscal Years.



*See explanation in [Glossary](#)

[Text View of Overview of Awards](#)

<https://www.usaspending.gov/Pages/Default.aspx>

Federal Grant and Cooperative Agreement Act of 1977

An executive agency shall use a **procurement contract** as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when ... the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government.

31 U.S.C. § 6303

Federal Grant and Cooperative Agreement Act of 1977

An executive agency shall use a **grant agreement** as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when

31 U.S.C. § 6304

Federal Grant and Cooperative Agreement Act of 1977

(1) the principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and

31 U.S.C. § 6304

Federal Grant and Cooperative Agreement Act of 1977

(2) substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

31 U.S.C. § 6303

Federal Grant and Cooperative Agreement Act of 1977

An executive agency shall use a **cooperative agreement** as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when

31 U.S.C. § 6305

Federal Grant and Cooperative Agreement Act of 1977

(1) the principal purpose of the relationship is to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and

18 U.S.C. 6305

Federal Grant and Cooperative Agreement Act of 1977

(2) substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

31 U.S.C. § 6305

Initial Takeaways

- Focus on “the principal purpose of the relationship”
- For a procurement contract, the Government is a consumer of goods or services
- Grants & cooperative agreements, the “principal purpose” is federal assistance
- Nevertheless, grants & cooperative agreements are contracts (*e.g.* “common law” contracts) not subject to the FAR

Different Bibles

Federal Acquisition Regulation

48 C.F.R. *et seq.*

Uniform Administrative

**Requirements, Cost Principles, and
Audit Requirements for Federal**

Awards 2 C.F.R. Part 2.



POC:

Contracting
Officer

POC:

Grant
Officer

The Elephant In The Room

“Grants to fund things such as a study of the sex lives of ducks (to better understand human relationships), a report about comic book characters (is Batman a superhero—he has no superhuman powers like Superman), and exhibitions of pole dancing (no kidding) read well in the scandal sheets, but do not sit well with people who work two jobs, pay taxes, and live in a country that is trillions of dollars in debt. To be sure, procurement can also be wasteful, but it cannot hold a candle to some federal grants for spending that gives the entire Government a tarnished reputation.”

Briefing Paper 16-6 (Federal Publications 2016)

Major Differences

Procurement Contract

- Awardees typically are private sector entities motivated by profit.
- Agencies have inherent authority to purchase goods and services to perform mission.
- Adequate accounting system required for a cost reimbursement contract. FAR § 16.301-3(a)(3)

Grant

- Awardees typically, state government, local government, tribe or nonprofit
- An agency needs express statutory authority to give aware appropriated money
- Grant officers less likely to insist on proof of an inadequate accounting system. 2 CFR § 215.21

Major Differences

Procurement Contract

- Congressional reform/micro-management is frequent
- There is a plethora of mandatory and discretionary boilerplate clauses. *See generally*, FAR Part 52.
- Training of acquisition officials (e.g., contracting officers) relatively defined and structured.

Grant

- Grants Oversight and New Efficiency (GONE) Act of 2016 ended general lack of Congressional oversight
- Generally less boilerplate clauses
- Training of grant officers generally not as thorough nor as structured compared to contracting officers.

Major Differences

Procurement Contract

- Specifications are normally clear; goal is precision
- Free thinking often detrimental

Grant

- Specifications are often (and appropriately vague)
- Free thinking generally welcomed

Major Differences

Procurement Contract

- A contractor who walks away from a procurement contract will probably be held in material breach and terminated for default.
- Can be held for excess reprocurement costs
- Basis for debarment. FAR § 9.406-2(b)(1)(A)

Grant

- A grantee can walk away from a grant while retaining payments for performed work.
2 C.F.R. § 200.339(a)(4).

Similarities

Procurement Contract

- FEDBIZOPPs. [See FAR Part 5]
- Termination for Convenience

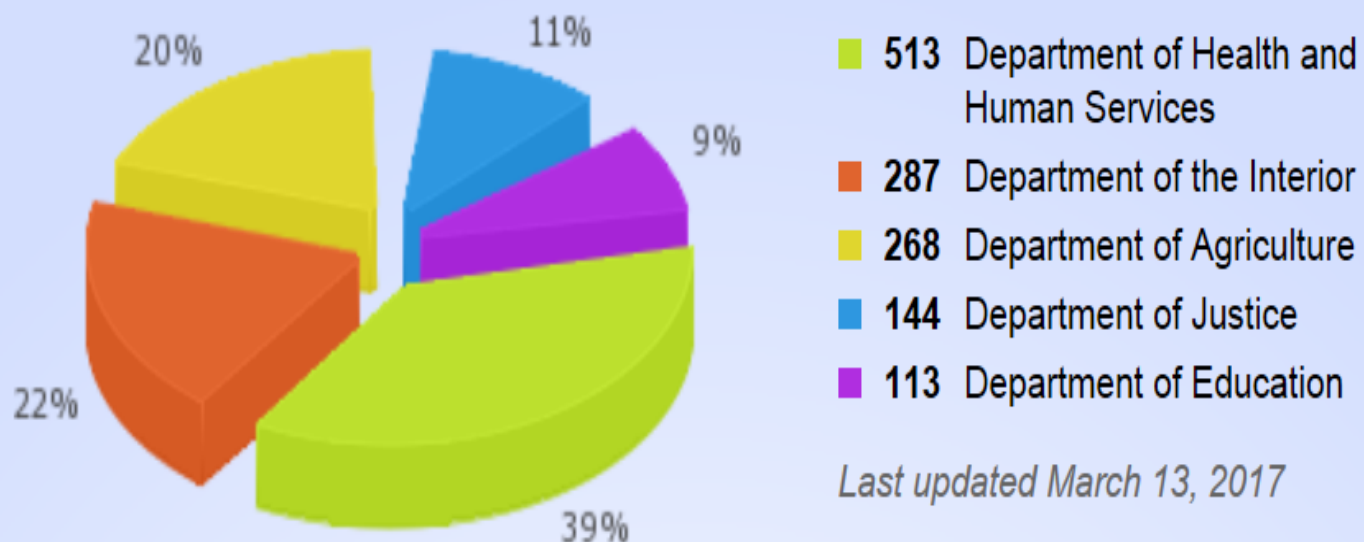
Grant

- Grants.gov [See 2 C.F.R. pt. 200, app. I, ¶E2]
- No fault termination of a grant

Harder Look Into Grants

CFDA Statistics: Programs at a Glance

CFDA contains detailed program descriptions for 2,308 Federal assistance programs. The following chart shows the program distribution for the top five issuing agencies.



Last updated March 13, 2017

**Catalog of Federal
Domestic Assistance
*USA.gov***

Harder Look Into Grants

- States, Local Governments, Indian Tribes, Universities, and non-profits are awarded largest share of grants.
- Although most recipients have accounting systems capable of ants

Protests Based On FGCA Act Violations

In 67 Comp. Gen. 13 (1987), GAO found that the Maritime Administration should have used a procurement contract rather than an assistance agreement for a transaction for the operation of research and training programs, because this outsourced operation directly benefited the agency in performing its statutory duty.

Protests Based On FGCA Act Violations

In B-257430, Sept. 12, 1994, GAO ruled that the Office of Personnel Management should have used a procurement contract to obtain survey services, because it directly benefited from the services by providing assistance in performing the agency's statutory duty.

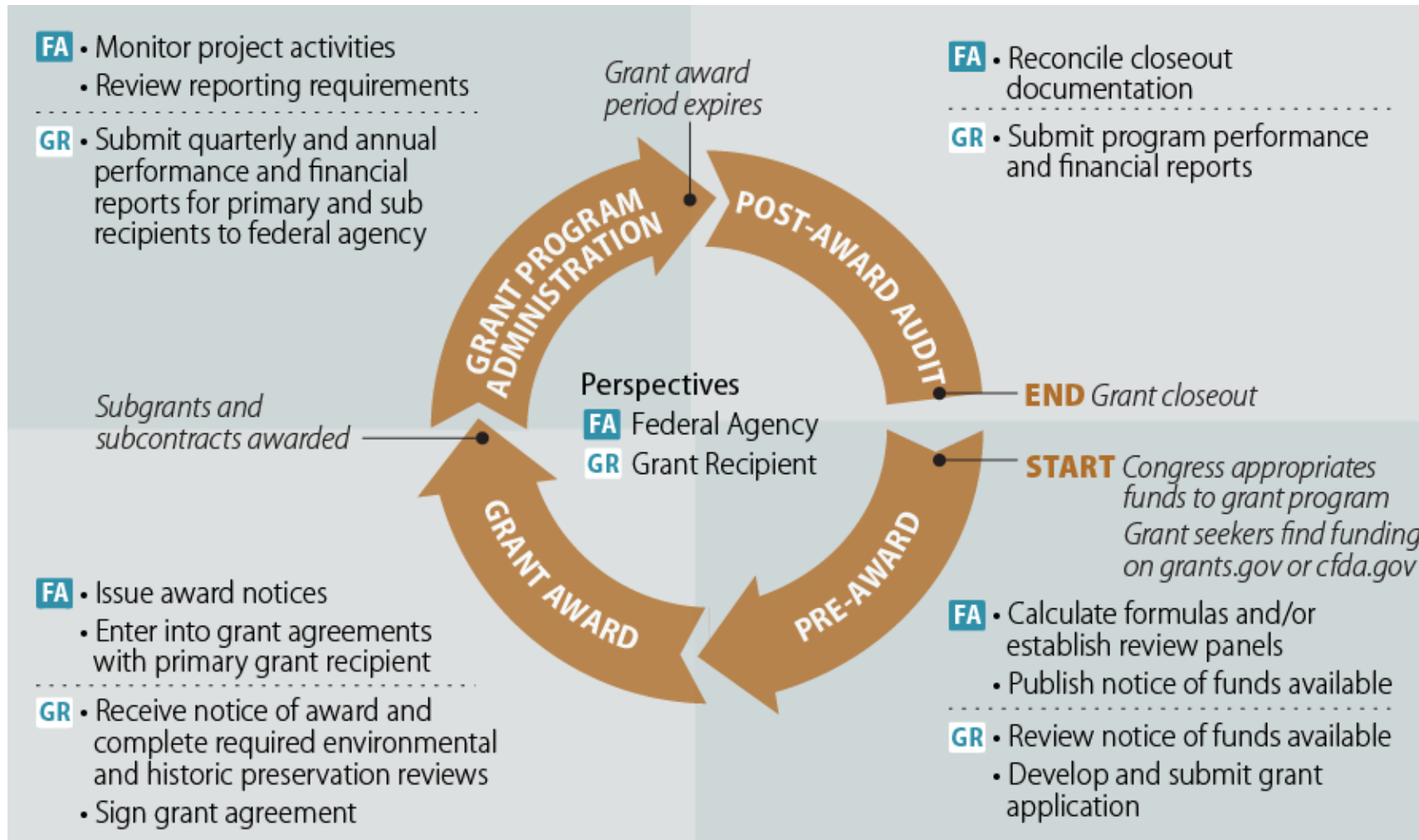
Protests Based On FGCA Act Violations

In B-262110, Mar. 19, 1997, GAO determined that the Environmental Protection Agency had improperly used a cooperative agreement to acquire conference support services; a procurement contract was required because the support services were a direct benefit to the agency.

Protests Based On FGCA Act Violations

In 61 Comp. Gen. 428 (1982), GAO observed that the Department of Energy had properly selected a cooperative agreement to fund a research project pursuant to the Solar Energy Act of 1974. The use of a cooperative agreement was appropriate even though the research would directly benefit DOE because the transaction was with the type of organization intended to benefit from Solar Energy Act funding.

Life Cycle Of A Federal Grant



Pre-Award -- Competition

Procurement Contract

Grant

- **§200.319 Competition.**
- (a) All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section

Fraud Is Fraud

The Civil False Claims Act (FCA) prohibits the knowing submission of false or fraudulent claims to the government for payment. The FCA applies equally to procurement contracts and grants. Knowing is defined as actual knowledge, deliberate ignorance, or reckless disregard of the truth or falsity of the claim. The government need not prove specific intent to defraud. Civil penalties ranging recouping payments, penalties from \$5,500 to \$11,000 per each false request or invoice; and possible triple damages.

Backup

Key Difference - Competition

- The Competition In Contracting Act of 1984 is one of the foremost pillars of federal procurement contracts.
- It is the exception where there is a statutory obligation to competitively award grants.
 - A noteworthy example is 10 U.S.C. § 2361 which requires DOD to competitively award grants to colleges and universities)

Grants As Common Law Contracts

- Offer, acceptance, consideration
- Rules of contract interpretation apply. For example, the doctrine of contra proferentem was not applied against the Government, when the result would frustrate the congressional programmatic scheme behind the grant award. In such cases, grants might not be viewed as a “regular bilateral contract governing a discrete transaction.” See *Bennett v. Ky. Dep’t of Educ.*, 470 U.S. 656, 669 (1985).

Federal Fiscal Law Very Similar

- Incremental funding
- Exception is payment in advance. See *Urban Mass Transp. Admin.—Advances of Grant Funds Before Disbursement of Local Matching Share*, B-201546, 60 Comp. Gen. 208, 1981 WL 22446; *Envtl. Protection Agency Public Participation Program*, B-197100, 59 Comp. Gen. 424, 1980 WL 18012; *To R.P. Hogan, Dep't of Commerce*, B-147642, 41 Comp. Gen. 394, 1961 CPD ¶75.

Suspension & Debarment

- 48 C.F.R. ch. 1.
- Govt wide
- “As to debarment and suspension,²¹² the grant and procurement rules were brought into line as a result of a 1989 Executive Order,²¹³ and an exclusion in one venue now applies to both as a result of the Federal Acquisition Streamlining Act of 1994.²¹⁴ The number of exclusions on the grant side has gone up in recent years—as they have in procurement. But for those in Government who want to see more exclusions, in grant practice, as in procurement, exclusion is not a “punishment” (as it is in most other countries), it is to guard against entering into “covered transactions”²¹⁵ with parties that are not “presently responsible.”²¹⁶

Compliance Programs I

Every effective organization needs a good structure for internal control.¹³³ Under the OMB Circulars, internal control was something that was an audit topic—and it still is. However, under the Uniform Guidance, effective internal control is now an affirmative management requirement for the grantee, and the Uniform Guidance specifically recommends that grantees fashion their internal controls in consonance with either the GAO’s Standards for Internal Control in the Federal Government (known as the “Green Book”) or the Internal Control Integrated Framework of the Committee of Sponsoring Organizations of the Treadway Commission (COSO).¹³⁴

Compliance Programs II

133 2 C.F.R. §§ 200.61, 200.303; see Allen, Federal Grant Practice § 29:1 et seq. (2015 ed.).

134 2 C.F.R. §§ 200.303(a); see GAO, Standards for Internal Control in the Federal Government, GAO-14-704G (Sept. 10, 2014); <http://www.coso.org/ic.htm>.

Allowability of Costs I

- IR&D
- FAR 31 OK for nonprofits

It might help to view all grants like cost-reimbursement contracts (except for “fixed awards”). Whether the recipients are paid in advance or by reimbursement,¹²⁰ they can only incur—and have finally applied to their grant, costs that are reasonable, allocable, and allowable.¹²¹ The cost allowability analysis and rules of the Uniform Guidance, and its predecessor OMB Circulars, is very close to FAR Part 31 (where the rule is still that nonprofits that receive a cost-reimbursement procurement contract are under the grant cost rules; not FAR Part 31).¹²²

Allowability of Costs II

- 120. The allowability of costs is governed in the Uniform Guidance in Subpart E—Cost Principles. Payment is governed in 2 C.F.R. § 200.305. See Allen, *Federal Grant Practice* §§ 32:1 et seq. (payment of nonstate recipients), 33:1 et seq. (payment of state recipients) (2015 ed.).
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- 121 2 C.F.R. § 200.403; see *Texas Neighborhood Servs., Inc.*, DAB No. 2571 (2014); *Touch of Love Ministries*, DAB No. 2393 (2011); *Utica Head Start Children & Families, Inc.*, DAB No. 1765 (2001); *Waccamaw Econ. Opportunity Council, Inc.*, DAB No. 1718 (2000); *Orange Cnty.*, DAB No. 1751 (2000); *Marie Detty Youth & Family Servs. Center*, DAB No. 1643 (1998); *Bee Cnty. Action Agency*, DAB No. 1625 (1997).
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- 122 See FAR subpt. 31.7.

Auditors & Audits

- Single Audit Act 31 U.S.C.A. §§ 7501–7505.
- Audits required - 2 C.F.R. § 200.501.

Go to BP and read section on Audits note 185 to 203

Fixed Price Contract ~ “Fixed Amount Award”

Under the Uniform Guidance, a new type of grant is recognized. A “fixed amount award” is made where the agency feels assured that specific results can be achieved at fixed price. The award is made for that amount, and the grantee executes the grant. If the goal is accomplished, the Government does not review the grantee’s costs. 2 C.F.R. §§ 200.45, 200.201(b), 200.332.

Cost sharing I

There are other “type” perspectives as well. Will the award be fully funded by the grantor agency, or will the Government require the grantee to chip in (cost sharing)? (The rules on cost sharing are highly regulated in the Uniform Guidance.)⁷³

73. See Allen, *Federal Grant Practice* § 35:1 et seq. (2015 ed.).

Grantees can be contributors to their grant.¹²⁸ This is when they are required to contribute to the supported effort, and that support can be cash or in-kind. What qualifies as allowable in-kind and donated support is not left to chance. It is another matter of grant administration that is highly regulated—and the subject of an occasional dispute.¹²⁹

Cost sharing II

- 128 2 C.F.R. § 200.306; see Allen, Federal Grant Practice § 35:1 et seq. (2015 ed.).
- 129 PRIDE Youth Programs, DAB No. 2259 (2009) (dispute over the value of donated labor).

Protest Not Being Selected For Award?

The grantor agency also makes a difference. Some agencies offer debriefings and allow an appeal of a no funding decision; others do not. Most agencies provide no avenue of appeal from a grant officer's decision other than within the agency, while recipients of HHS grants can take an appeal to a panel of administrative law judges—the Departmental Appeals Board (DAB)—who specialize in grants.⁷²

⁷². See 45 C.F.R. pt. 16.

OCI

Organizational conflicts of interests. While agencies must screen for and avoid organizational conflicts of interest in procurement,⁷⁶ in grant practice agencies are specifically required to issue agency-composed OCI guidance, for example, factors and criteria on potential OCIs, and to require their applicants to apply them and to report any potential or actual OCIs.⁷⁷ The presence of an OCI in a recipient's administration of a grant, especially when contracting out its grant dollars, has long been an invitation for the disallowance of all federal funding that is tainted by the conflict.⁷⁸

- 78 Suitland Family & Life Corp., DAB No. 2326 (2010) (\$64,176 disallowed); Prof'l Counseling Servs., Inc., DAB No. 2213 (2008) (\$387,970.80 disallowed).
- 79 80 Fed. Reg. 43301 (July 22, 2015); see also 80 Fed. Reg. 45395 (July 30, 2015).

Indirect Costs

variations for three different types of recipients (institutions of higher education, nonprofits, and state and local and Indian tribal governments).¹⁰¹ A specific federal agency is assigned by the OMB to have “cognizance” over a recipient population. Once the “cognizant agency for indirect costs”¹⁰² and the recipient negotiate the rate, that rate must be honored by all other federal grantor agencies. The regulations provide for various rate arrangements (predetermined, fixed rate with carry forward, provisional/final, and final), and rates are periodically renegotiated. Negotiating an indirect cost rate requires information management and accounting resources that are often beyond the affordability of many smaller grantees, and the Uniform Guidance provides for a default rate of 10%—called the “de minimis” rate—for those grantees that do not have an approved overhead rate.¹⁰³

Indirect Costs II

- 101 Indirect costs are governed by the Uniform Guidance in appendices to 2 C.F.R. pt. 200: Appendix III for institutions of higher education; Appendix IV for nonprofits; and Appendices V and VI for states, local governments, and Indian tribal governments. See Allen, *Federal Grant Practice* § 37:1 et seq. (2015 ed.).
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- 102 See 2 C.F.R. § 200.19.
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- 103 2 C.F.R. § 200.214(f).

Acceptable accounting system |

Recipients must have financial management systems with certain features.¹³⁵ The core capabilities must assure the identification of grant funding sources, the generation and submission of accurate financial reports, sound financial records management, and control over federally funded assets, including the ability to link grant spending to the approved grant budget items.¹³⁶ A grantee's failure to satisfy these requirements is a noncompliance that warrants the imposition of a remedy.¹³⁷

Acceptable accounting system II

135 2 C.F.R. §§ 200.302 (financial management), 200.327 (financial reports); see Allen, *Federal Grant Practice* §§ 31:1 et seq. (financial management), 38:1 et seq. (financial reports) (2015 ed.).

136 2 C.F.R. § 200.302.

137 2 C.F.R. § 200.338; see *Texas Neighborhood Servs., Inc.*, DAB No. 2571 (2014); see also *Family Voices of D.C.*, DAB No. 2409 (2011) (grant terminated for noncompliance because of inadequate financial management system and failure to file proper financial and performance reports).

Disallowed Cost Because Work Not In Scope I

Unlike in procurement (except in contracts for commercial items),¹⁵¹ the Government does not have the authority to unilaterally change a grant—although the Government will occasionally attempt to write comparable authority into a cooperative agreement.¹⁵² The Government’s control is in having the authority to approve certain aspects of the grantee’s execution of the grant. These “prior approvals” are spelled out in the Uniform Guidance and in the terms of the specific grant, and they pertain to matters from the incurrence of certain costs (not generally to the costs in the approved grant budget—they usually require no further or special approval¹⁵³), to changes in the grantee’s researchers (i.e., key personnel).¹⁵⁴ A grantee that makes a change, or incurs a cost, without the required prior approval, is in noncompliance and is subject to a “remedy,” to include the disallowance of the unapproved cost.¹⁵⁵

Disallowed Cost Because Work Not In Scope II

- 151 See FAR 52.212-4(c).
- 152 2 C.F.R. § 200.308; see Allen, Federal Grant Practice § 42:1 et seq. (2015 ed.).
- 153 Cmty. Med. & Dental Care, Inc., DAB No. 2556 (2014).
- 154 2 C.F.R. § 200.308(c).
- 155 2 C.F.R. § 200.338; see, e.g., Bright Beginnings for Kittitas Cnty., DAB No. 2623 (2015) (\$126,398 disallowed); River East Econ. Revitalization Corp., DAB No. 2087 (2007) (\$235,772 disallowed).

High Valued Items Directly Charged to Govt

- **§200.313 Equipment.**
- See also §200.439 Equipment and other capital expenditures.

FAR Part 4X