

Government Contracts: Federal Grants and Cooperative Agreements Compliance

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A Practice Note discussing the compliance obligations of companies that are awarded federal grants and cooperative agreements. This Note reviews the obligations imposed by the Office of Management and Budget's (OMB's) Uniform Guidance Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards. This Note covers key obligations and requirements of recipients as well as requirements that must be flowed down to contractors and subrecipients.

Federal grants and cooperative agreements are legal instruments that provide funding to non-federal entities to carry out a public purpose of support or stimulation authorized by law. Recipients of federal grants and cooperative agreements (collectively referred to in this Note as grants) must comply with the obligations imposed by the Office of Management and Budget's (OMB's) Uniform Guidance Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance) in 2 C.F.R. Part 200.

The Uniform Guidance regulates many aspects of federal grants, including payment under grants, how to treat and manage property acquired or developed under grants, reporting and audit requirements, and how grant recipients can issue lower-tier subawards and contracts in support of the grant. The Uniform Guidance also requires grant recipients to include certain contract provisions in contracts and subawards issued under the grants.

This Note explains key obligations and requirements that are applicable to grant recipients, including those that must be flowed down to contractors and subrecipients.

Key Obligations and Requirements Applicable to Grant Recipients

The Uniform Guidance sets out minimum criteria that all grant recipients must follow when performing under a federal grant. A recipient is a non-federal entity that receives a grant directly from a federal agency. Many of the obligations that apply to recipients also apply to

subrecipients. A subrecipient is a non-federal entity that receives a subaward from a recipient (directly, or indirectly through a pass-through entity) to carry out part of a federal grant (2 C.F.R. § 200.1).

Payment Terms

Cost Reimbursement

The default payment structure for a grant is cost reimbursement, under which the government reimburses the recipient for the actual allowable costs incurred in performing the grant. Alternatively, the agency could pay the recipient on an advance payment basis, in which the recipient requests payment of its anticipated allowable costs in advance of incurring them.

Under a cost reimbursement grant, the recipient must account for its actual incurred costs in accordance with the applicable cost principles. 2 C.F.R. Part 200, Subpart E contains the applicable cost principles for the following entities:

- Non-profit organizations.
- Institutions of higher education.
- States.
- Local governments.
- Indian tribes.

If the recipient is a for-profit entity, the applicable cost principles are found in the Federal Acquisition Regulation (FAR), 48 C.F.R. Part 31.

To receive or retain funding under a cost reimbursement grant, the recipient's incurred costs must be allowable and allocable to the grant under the applicable cost principles. If the recipient receives payment for costs that are later determined to be unallowable, the recipient must refund the payment, with interest (2 C.F.R. § 200.410).

Reimbursable costs may be either:

- **Direct costs.** Direct costs are costs that can be:
 - identified specifically with a particular final cost objective; and
 - tied to a particular grant, such as purchasing equipment needed to carry out a particular grant, or labor performed directly in support of a grant (2 C.F.R. § 200.413).
- **Indirect costs.** Indirect costs are costs incurred for common objectives that cannot be directly identified to a single cost objective, such as a recipient's facilities and administration costs (2 C.F.R. § 200.414).

A recipient of a cost reimbursement grant typically cannot receive profit under the grant unless the grant specifically authorizes the payment of profit (2 C.F.R. § 200.400(g)).

Grant recipients that expend \$750,000 or more in federal awards or subawards during their fiscal year are subject to an incurred cost audit (2 C.F.R. § 200.501(a)). An audit may be conducted by a federal agency or third-party auditor retained by the recipient (2 C.F.R. § 200.509). Recipients that expend less than \$750,000 in their fiscal year:

- Are exempt from the annual audit requirement.
- Must make records available for review or audit by the appropriate federal agency and the US Government Accountability Office (2 C.F.R. § 200.501(d)).

A portion of the costs attributable to the grant may be made up of cost sharing or matching of costs contributed by the recipient or a subrecipient (2 C.F.R. § 200.1). When a grant includes cost sharing or matching, the government credits, but does not pay, the recipient for a portion of its contributions to the grant project. Cost sharing or matching must consist of allowable costs and may be in the form of cash or in-kind contributions (such as property or services) from the recipient, a subrecipient, or a third party (2 C.F.R. § 200.306(b)).

Fixed Price

A grant may be priced on a fixed price basis if the following conditions are met:

- The award amount is negotiated using the cost principles (or other pricing information) as a guide.

- The project scope has measurable goals and objectives, and adequate cost, historical, or unit pricing data is available to establish a fixed amount award on a reasonable estimate of actual cost.

- Payments are based on meeting specific requirements of the grant.

(2 C.F.R. § 200.201(b)(1).)

Fixed price payments may be structured either in:

- Several partial payments payable on the accomplishment of milestones or specified events, on a unit price basis.
- One payment on completion of the grant.

(2 C.F.R. § 200.201(b)(1).)

On completion of a fixed price grant, the recipient must certify in writing that the project or activity was completed or the required level of effort was expended (2 C.F.R. § 200.201(b)(3)). If the required level of effort or activity was not completed, the amount of the grant may be adjusted (2 C.F.R. § 200.201(b)(3)).

Program Income

Performance of a grant may generate program income, which is gross income earned by the recipient that is directly generated by a supported activity or earned because of the grant during the period of performance (2 C.F.R. § 200.1). Program income may include income from:

- Fees for services performed.
- The use or rental of real or personal property acquired under the grant.
- The sale of commodities or items fabricated under a grant.
- License fees and royalties on patents and copyrights.
- Principal and interest on loans made with grant funds.

(2 C.F.R. § 200.1.)

The costs incidental to generating program income may be deducted from gross program income, provided those costs have not been charged to the grant (2 C.F.R. § 200.307(b)).

Program income ordinarily is deducted from a recipient's total allowable costs to determine the net allowable costs, unless otherwise specified in the grant terms and conditions. Program income may be used to meet cost sharing or matching requirements under the grant if approved in advance by the federal agency (2 C.F.R. § 200.307(e)(3)). Unless the terms and conditions of the

grant state otherwise, the recipient keeps any income earned after the period of performance (which would have been considered program income if earned during the period of performance) (2 C.F.R. § 200.307(f)).

Intellectual Property Requirements

Performance of a grant may generate intellectual property or “intangible property,” which is property that has no physical existence, such as trademarks, patents, and patent applications (2 C.F.R. § 200.1). The recipient’s rights and obligations regarding intellectual property are governed by the Uniform Guidance and other regulations that apply to federal grants, such as the Department of Commerce regulations found in 37 C.F.R. Part 401. Additional rights and obligations may apply depending on the particular terms and conditions of the grant.

A grant recipient generally retains the entire right, title, and interest throughout the world to each “subject invention” made under the grant (2 C.F.R. § 200.315(c); 37 C.F.R. § 401.14(b)). A subject invention is an invention conceived or first actually reduced to practice in the performance of work under the grant (37 C.F.R. § 401.14(a)(2)). The federal government has a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced any subject invention throughout the world (37 C.F.R. § 401.14(b)).

To retain title in a subject invention, the recipient must disclose the subject invention to the federal agency within two months after the inventor discloses it in writing to recipient personnel (37 C.F.R. § 401.14(c)(1)). The recipient also must elect in writing whether or not to retain title to any invention by notifying the federal agency within two years of disclosing the invention (37 C.F.R. § 401.14(c)(2)). If the recipient elects to retain title, it must file an initial patent application on the subject invention within one year after election of title or, if earlier, before the end of any statutory period for patent protection (37 C.F.R. § 401.14(c)(3)).

If the recipient fails to timely disclose or elect title to a subject invention or fails to timely file patent applications or prosecute patent applications, the recipient must convey title to the federal agency on the agency’s request (37 C.F.R. § 401.14(d)). The recipient also must notify the government of use of subject inventions (37 C.F.R. § 401.14(h)). The government may require the recipient to grant to responsible applicants a nonexclusive, partially exclusive, or exclusive license in certain situations, for example when necessary to alleviate health or safety needs that are not reasonably satisfied (37 C.F.R. § 401.14(j)).

A recipient may copyright any work that was developed or acquired under a grant (2 C.F.R. § 200.315(b)). The federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable right to reproduce, publish, or otherwise use the copyrightable work and to authorize others to do so (2 C.F.R. § 200.315(b)). Additionally, the federal government has the right to:

- Obtain, reproduce, publish, or otherwise use the data produced under a grant.
- Authorize others to receive, reproduce, publish, or otherwise use the data.

(2 C.F.R. § 200.315(d).)

Tangible Property Requirements

Real Property

Title to real property acquired or improved under a grant vests on acquisition in the recipient (2 C.F.R. § 200.311(a)). Real property means land, including improvements, structures, and appurtenances, but excluding moveable machinery and equipment (2 C.F.R. § 200.1). Real property must be used for the originally authorized purpose for as long as needed for that purpose. The recipient cannot dispose of or encumber its title or other interests in the property during that time (2 C.F.R. § 200.311(b)). The recipient must provide the equivalent insurance coverage for real property acquired or improved with federal funds as provided for other property owned by the recipient (2 C.F.R. § 200.310).

When real property is no longer needed for the originally authorized purpose, the recipient must obtain disposition instructions from the agency, which will provide for one of the following alternatives:

- Retain title after compensating the agency.
- Sell the property and compensate the agency.
- Transfer title to the agency or to a third party designated or approved by the agency.

(2 C.F.R. § 200.311(c).)

Equipment

Equipment is defined as tangible personal property having a useful life of more than one year and a per-unit acquisition cost that equals or exceeds the lesser of the capitalization level established by the recipient for financial statement purposes or \$5,000 (2 C.F.R. § 200.1).

The recipient’s title to equipment acquired under a grant vests on acquisition, subject to the following conditions.

Unless otherwise stated in the grant, such title is a conditional title based on the recipient:

- Using the equipment for the authorized purposes of the project during the period of performance, or until the property is no longer needed for the project.
- Not encumbering the equipment without agency approval.
- Using and disposing of the equipment as outlined below.

(2 C.F.R. § 200.313(a).)

Equipment must be used in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by the grant (2 C.F.R. § 200.313(c)(1)). When equipment is no longer needed for the program or project, it may be used for other activities supported by the same agency, first for activities under a grant from the agency that funded the original program or project, then for activities under grants from other agencies (2 C.F.R. § 200.313(c)(1)).

The recipient must also make the equipment available for use on other projects or programs supported by the government if this use does not interfere with the original grant (2 C.F.R. § 200.313(c)(2)). Use for non-federally funded projects is also permissible, although the recipient should charge user fees if appropriate (2 C.F.R. § 200.313(c)(2)). As with real property, the recipient must provide the equivalent insurance coverage for equipment acquired or improved with federal funds as provided for other property owned by the recipient (2 C.F.R. § 200.310).

The recipient must have procedures in place for managing the equipment that meet the following requirements:

- Maintaining records that include:
 - a description of the equipment;
 - an identification number;
 - the source of the funding;
 - who holds title;
 - the acquisition date;
 - the cost of the equipment;
 - the percentage of federal participation in the project costs;
 - the location, use and condition of the equipment; and
 - ultimate disposition data.

- Taking a physical inventory of the equipment at least every two years.
- Developing a control system to ensure adequate safeguards to prevent loss, damage, or theft of the equipment.
- Developing adequate maintenance procedures.
- Establishing proper sales procedures, if authorized or required to sell the equipment.

(2 C.F.R. § 200.313(d).)

When the equipment is no longer needed for the grant or other activities supported by an agency, the recipient must request disposition instructions from the agency if required by the terms and conditions of the grant (2 C.F.R. § 200.313(e)). The disposition instructions typically include one of the following options:

- Retaining the equipment, but if the equipment's fair market value exceeds \$5,000, paying the agency its share of the fair market value of the equipment.
- Selling the equipment, but if the equipment's fair market value exceeds \$5,000, paying the agency its share of the proceeds of the sale (less selling and handling expenses).
- Transferring title in the equipment to the government or an eligible third party. In this case, the recipient is entitled to receive compensation for the recipient's share of the fair market value of the equipment.

(2 C.F.R. § 200.313(e).)

Supplies

Supplies are all tangible personal property other than equipment (2 C.F.R. § 200.1). The recipient's title to supplies acquired under a grant vests on acquisition (2 C.F.R. § 200.314(a)). On termination or completion of the grant, any residual inventory of unused supplies exceeding \$5,000 in total aggregate value not needed for another grant must be either retained for use on other activities or sold (2 C.F.R. § 200.314(a)). In either case, the recipient must compensate the government for the government's share of the supplies. The amount of compensation must be computed in the same manner as for equipment (2 C.F.R. § 200.314(a)).

So long as the government retains an interest in the supplies, the recipient must not use the supplies acquired under a grant to provide services to other organizations for a fee that is less than what private companies charge for equivalent services, unless authorized by statute (2 C.F.R. § 200.314(b)).

Federal Property

If the recipient receives any federally owned property in connection with the grant, title to this property remains vested in the government (2 C.F.R. § 200.312(a)). The recipient must provide the agency an annual inventory of all federally owned property in the recipient's possession (2 C.F.R. § 200.312(a)). When the grant is completed or the property no longer needed, the recipient must report the property to the agency for instructions on further agency utilization (2 C.F.R. § 200.312(a)).

Reporting Requirements, Record Retention, and Audit Requirements

Depending on the grant, the recipient must submit on a quarterly or annual basis:

- Financial reports, using an OMB-issued form (2 C.F.R. § 200.328).
- Performance reports, in the form and containing the information prescribed by the grant terms and conditions (2 C.F.R. § 200.329).

Performance reports compare actual accomplishments to the objectives of the grant and provide a computation of the cost or performance trend data. They may also include:

- Reasons why established goals were not met, if appropriate.
- Analysis and explanation of cost overruns or high unit costs.

(2 C.F.R. § 200.329(c)(2).)

Grant recipients may also be required to submit intellectual property and tangible property-related reports, depending on the scope of their grants.

A grant recipient must retain financial records, supporting documents, statistical records, and all other records pertinent to a grant for a period of three years from the date of submission of the final expenditure report or from the submission of the quarterly or annual financial report (2 C.F.R. § 200.334). This period may be extended:

- By the awarding agency.
- By the agency responsible for annual cost audits or indirect cost determinations.
- Until any litigation, claim, or audit that is started before the end of the three-year period is resolved.

(2 C.F.R. § 200.334.)

The federal awarding agency, Inspectors General, the Comptroller General of the United States, and the recipient (in the case of a subrecipient) also have a right to access any documents, papers, or other records which are pertinent to the grant to make audits, examinations, excerpts, and transcripts (2 C.F.R. § 200.337(a)). This right also includes access to the recipient's (or subrecipient's) personnel for interviews and discussions related to the documents (2 C.F.R. § 200.337(a)).

Additional Compliance Obligations

Federal Funding Transparency and Accountability Act of 2006

Grant recipients must comply with the Federal Funding Transparency and Accountability Act of 2006, as amended (Pub. L. 109-282, as amended by section 6202 of Public Law 110-252) (FFATA).

For grants of \$30,000 or more, executive compensation reporting is required if, in the preceding fiscal year:

- The recipient received 80% or more of its annual gross revenues from federal grants, subawards, contracts, and subcontracts.
- The recipient received \$25 million or more in annual gross revenues from federal grants, subawards, contracts, and subcontracts.
- The recipient had gross income, from all sources, of \$300,000 or more.
- The public does not have access to the [executive compensation information](#) through regular filings under the Securities Exchange Act of 1934 or the Internal Revenue Code.

(2 C.F.R. Part 170, Appendix A.)

If all four conditions are met, the recipient must report compensation information for its five highest compensated executives for the preceding fiscal year on the Federal Funding Accountability and Transparency Act Subaward Reporting System (FSRS) [website](#).

The FFATA also requires a recipient to report on the FSRS website information about the recipient's first-tier subawards that equal or exceed \$30,000, including information about the subaward itself as well as the compensation of certain first-tier subrecipients' executives. The test for determining whether a subrecipient must report the compensation of its five

highest-compensated executives is the same as the test for recipients outlined above.

A recipient is not required to report information about subawards below the first tier or its contracts.

Human Trafficking

Grants that provide funding to a private entity (either directly or indirectly through a grant to a state, local government, Indian tribe, or foreign public entity) must include a term addressing the government's prohibition on human trafficking (2 C.F.R. § 175.15(a)). This term prohibits the recipient, the recipient's employees, subrecipients, and subrecipient's employees from:

- Engaging in human trafficking during the award.
- Procuring a commercial sex act during the award.
- Using forced labor in the performance of the award.

(2 C.F.R. § 175.15(b).)

The recipient must inform the agency immediately if it receives any allegations of a violation of these prohibitions.

Drug-Free Workplace

As a condition of receiving a grant, a recipient must make a continuing good faith effort to maintain a drug-free workplace (2 C.F.R. § 182.200(a)). The recipient must:

- Publish a drug-free workplace statement and establish a drug-free awareness program for its employees.
- Take disciplinary action against employees convicted of violating drug statutes in the workplace.
- Identify all known workplaces under the recipient's federal awards.

(2 C.F.R. § 182.200.)

The recipient's drug-free workplace statement must:

- Tell employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the workplace.
- Specify the actions the recipient will take against employees for violating the prohibition.
- Inform each employee that, as a condition of employment under any award, the employee must:
 - abide by the terms of the statement; and
 - notify the recipient in writing within five calendar days of a conviction of a violation occurring in the workplace of a criminal drug statute.

(2 C.F.R. § 182.205.)

The recipient's drug-free awareness program must inform employees about:

- The dangers of drug abuse in the workplace.
- The recipient's policy of maintaining a drug-free workplace.
- Any available drug counseling, rehabilitation, and employee assistance programs.
- The penalties the recipient may impose on employees for drug abuse violations in the workplace.

(2 C.F.R. § 182.215.)

Prohibited Telecommunications and Video Surveillance Services or Equipment from Chinese Companies

Grant recipients are prohibited from obligating or expending grant funds to procure or obtain:

- Telecommunications equipment produced by:
 - Huawei Technologies Company;
 - ZTE Corporation; and
 - any subsidiary or affiliate of the above companies.
- Telecommunications and video surveillance equipment produced by:
 - Hytera Communications Corporation;
 - Hangzhou Hikvision Digital Technology Company;
 - Dahua Technology Company; and
 - any subsidiary or affiliate of the above companies.
- Telecommunications or video surveillance services provided by these entities.

(2 C.F.R. § 200.216(a).)

Subrecipient Management

Before issuing an agreement to a third party in support of a grant, a recipient must determine whether the third party should be considered a "subrecipient" or a "contractor:"

Classification as a Subrecipient

A grant recipient awards a subaward to a subrecipient to carry out a portion of the grant. The subaward creates a federal assistance relationship with the subrecipient (2 C.F.R. § 200.331(a)). Characteristics of the third party's work that support its classification as a subrecipient include when the third party:

- Determines who is eligible to receive what federal assistance.
- Has its performance measured in relation to whether objectives of a federal program were met.
- Has responsibility for implementing the program funded by the grant.
- Is responsible for adherence to applicable program requirements specified in the award.
- According to its agreement from the recipient, uses the federal funds to carry out a program for a public purpose specified in the authorizing statute, as opposed to providing goods or services for the benefit of the recipient.

(2 C.F.R. § 200.331(a).)

Classification as a Contractor

A grant recipient awards a contract to a contractor to obtain goods and services for the recipient's own use and creates a procurement relationship with the contractor. Characteristics indicative of a procurement relationship between the grant recipient and a contractor are when the contractor:

- Provides the goods and services within normal business operations.
- Provides similar goods or services to other purchasers.
- Normally operates in a competitive environment.
- Provides goods or services that are ancillary to the operation of the federal program.
- Is not subject to compliance requirements of the federal program resulting from the agreement from the recipient.

(2 C.F.R. § 200.331(b).)

Contents of a Subaward

A subaward must be clearly identified to the subrecipient as a subaward, and must include:

- Information about the grant, such as the grant's project description.
- Information about the subaward, such as the amount of federal funding obligated to the subrecipient.
- All grant requirements that the grant recipient is flowing down to the subrecipient according to federal statutes, regulations, and the terms and conditions of the grant.

- Any additional requirements necessary for the recipient to meet its reporting requirements under the grant.
- One of the following indirect cost rates:
 - an approved federally recognized indirect cost rate;
 - a negotiated indirect cost rate; or
 - the de minimis indirect cost rate.
- A requirement that the subrecipient permit the recipient and auditors to have access to the subrecipient's records and financial statements as necessary.
- Appropriate terms and conditions concerning closeout.

(2 C.F.R. § 200.332(a).)

Before awarding a subaward, the recipient must evaluate the subrecipient's risk of noncompliance with federal statutes, regulations, and the terms and conditions of the subaward to determine the appropriate mechanism for monitoring the subrecipient (2 C.F.R. § 200.332(b)). The recipient must monitor the activities of the subrecipient as necessary to ensure that the subaward:

- Is used for authorized purposes.
- Complies with federal statutes, regulations, and the terms and conditions of the subaward.
- Performance goals are achieved.

(2 C.F.R. § 200.332(d).)

Depending on its risk assessment of the subrecipient, the recipient may use additional tools to ensure proper accountability and compliance with program requirements and achievement of performance goals, such as training and on-site reviews (2 C.F.R. § 200.332(e)).

The recipient:

- Must verify that every subrecipient that meets or exceeds the threshold for audit is audited (2 C.F.R. § 200.332(f)).
- Must consider whether the results of the subrecipient's audits, on-site reviews, or other monitoring indicate conditions that require adjustments to the recipient's own records (2 C.F.R. § 200.332(g)).
- Should consider taking enforcement action against noncompliant subrecipients (2 C.F.R. § 200.339).

Procurement Standards for Contracts Issued by Recipients

When issuing contracts under a grant, state recipients must follow the same policies and procedures for

procurements from its non-federal funds (2 C.F.R. § 200.317). All other recipients must have and use documented procurement procedures, consistent with state, local, and tribal laws and regulations and the Uniform Guidance, for the acquisition of property or services required under a grant or subaward (2 C.F.R. § 200.318(a)). Those documented procurement procedures must conform to the procurement standards set out in the Uniform Guidance at 2 C.F.R. §§ 200.317 to 200.327.

When procuring property or services under a grant, the recipient must conduct procurement transactions in a manner providing full and open competition (2 C.F.R. §§ 200.319 to 200.320). There are limited circumstances in which noncompetitive procurement can be used, including if:

- The item is only available from a single source.
- A public exigency or emergency does not allow for a delay resulting from publicizing a competitive solicitation.
- The agency expressly authorizes a noncompetitive procurement.

(2 C.F.R. § 200.320(c).)

When the value of the procurement exceeds the simplified acquisition threshold defined in 2 C.F.R. § 200.1 (currently \$250,000, unless the recipient determines a lower amount is appropriate), the recipient must follow formal procurement methods (2 C.F.R. § 200.320(b)). Formal procurement methods require:

- Following documented procedures, which can include sealed bids or requesting proposals.
- Public advertising unless a non-competitive procurement can be used.

(2 C.F.R. § 200.320(b).)

For procurements that are below the simplified acquisition threshold, the recipient may use informal procurement methods to expedite the completion of its transactions and minimize the associated administrative burden and cost (2 C.F.R. § 200.320(a)).

The recipient also must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible (2 C.F.R. § 200.321(a)). The recipient should, to the greatest extent practicable under a grant, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the US (including, but not limited to, iron, aluminum,

steel, cement, and other manufactured products) (2 C.F.R. § 200.322(a)). Additionally, if the recipient is a state agency or agency of a political subdivision of a state, its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, which includes requirements about procuring recovered materials, which are materials and byproducts recovered or diverted from solid waste (2 C.F.R. § 200.323).

Mandatory Provisions for Contracts Issued by Recipients

The recipient's contracts issued under the grant must include the applicable provisions listed below and described fully in 2 C.F.R. Part 200, Appendix II.

Equal Employment Opportunity

All contracts that meet the definition of "federally assisted construction contract" in 41 C.F.R. § 60-1.3 must include the equal opportunity clause provided under 41 C.F.R. § 60-1.4(b) (2 C.F.R. Part 200, Appendix II(C)). The equal opportunity clause requires, among other things, that the contractor:

- Not discriminate against employees or applicants based on race, color, religion, sex, sexual orientation, gender identity, or national origin.
- Include equal opportunity language in job advertisements, and comply with Executive Order 11246, which requires written affirmative action programs (for more information, see [Practice Note, Preparing a Written Affirmative Action Program](#)).

Wage and Hour Requirements

If a grant recipient awards a prime construction contract in excess of \$2,000, the contract must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. §§ 3141 to 3144) and its implementing regulations (29 C.F.R. Part 5). Contractors must, among other things, pay laborers and mechanics at least the prevailing wage specified in an applicable wage determination (2 C.F.R. Part 200, Appendix II(D)). These construction contracts also must include a provision requiring compliance with the Copeland "Anti-Kickback" Act (40 U.S.C. § 3145), which prohibits a contractor from inducing an employee to give up any part of the employee's compensation.

All contracts awarded by a grant recipient over \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 3701

to 3708) and its implementing regulations (29 C.F.R. Part 5). Contractors:

- Must pay workers one and a half times the basic rate for all hours worked above 40 hours in a work week (2 C.F.R. Part 200, Appendix II(E)).
- Cannot require a laborer or mechanic to work in unsanitary, hazardous, or dangerous surroundings or working conditions.

These requirements do not apply to contracts for:

- Supplies or materials or articles ordinarily available on the open market.
- Transportation.
- Transmission of intelligence.

For more information, see [Practice Note, Davis-Bacon Act: Overview](#).

Rights to Inventions Made Under a Contract or Agreement

If the grant meets the definition of “funding agreement” under 37 C.F.R. § 401.2(a) and the recipient wishes to enter into a contract with a small business or nonprofit organization regarding the substitution of parties, assignment, or performance of experimental, developmental, or research work under that funding agreement, the recipient must comply with the requirements of 37 C.F.R. Part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements,” and any implementing regulations issued by the awarding agency (2 C.F.R. Part 200, Appendix II(F)). 37 C.F.R. Part 401 governs the rights of the contractor and the government in inventions made under grants, cooperative agreements, and contracts.

Clean Air Act and Clean Water Act

Contracts over \$150,000 must contain a provision that requires the contractor or subrecipient to agree to comply with:

- **The Clean Air Act (CAA) (42 U.S.C. §§ 7401 to 7671q).** The CAA requires the government to establish National Ambient Air Quality Standards and emission standards that require a reduction in emissions for major sources, including sources that emit ten tons per year or more of a hazardous air pollutant or 25 tons per year or more of a combination of hazardous air pollutants.
- **The Clean Water Act (CWA) (33 U.S.C. §§ 1251 to 1387).** The CWA prohibits the discharge of any

pollutant from a point source, such as pipes or man-made ditches, into navigable waters, unless a permit is obtained.

(2 C.F.R. Part 200, Appendix II(G).)

Debarment and Suspension Requirements

The recipient cannot award a contract to a party on the government-wide exclusions list in the [System for Award Management \(SAM\) database](#), unless granted an exception by the agency (2 C.F.R. Part 200, Appendix II(H)). The exclusions list contains parties that have been debarred, proposed for debarment, suspended, or otherwise excluded from doing business with the government, as well as parties ineligible under statutory or regulatory authority.

To confirm that a prospective contractor is not excluded or disqualified from doing business with the government, the recipient should do one of the following:

- Check the government-wide exclusions in SAM.
- Obtain a certification from the contractor that they are not excluded.
- Add a clause or condition to the contract requesting a certification.

(2 C.F.R. § 180.300.)

Byrd Anti-Lobbying Amendment

A contractor that receives an agreement exceeding \$100,000 must submit to the recipient a certification regarding compliance with the Byrd Anti-Lobbying Amendment (31 U.S.C. § 1352) (2 C.F.R. Part 200, Appendix II(I)). This certification must state that the contractor will not and has not used federal appropriated funds for lobbying:

- An officer or employee of an agency.
- A member (or their employee), officer, or employee of Congress.

The contractor also must disclose to the recipient any lobbying with non-federal funds that takes place in connection with obtaining any federal award.

Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment

Like grant recipients, contractors performing under a grant are prohibited from spending grant funds on telecommunications equipment or services provided by certain Chinese firms (see Prohibited Telecommunications

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and Video Surveillance Services or Equipment from Chinese Companies).

Procurement of Recovered Materials

A recipient that is a state agency or an agency of a political subdivision must ensure that their contractors comply with Section 6002 of the Solid Waste Disposal Act (SWDA), as amended by the Resource Conservation and Recovery Act (2 C.F.R. Part 200, Appendix II(J); 2 C.F.R. § 200.323). The SWDA requires:

- Procuring only items designated in Environmental Protection Agency (EPA) guidelines at 40 C.F.R. Part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000.
- Procuring solid waste management services in a manner that maximizes energy and resource recovery.
- Establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

Domestic Preferences for Procurements

To the greatest extent practicable, the recipient must provide for the purchase, acquisition, or use of goods,

products, or materials “produced in the United States,” including but not limited to:

- Iron.
- Aluminum.
- Steel.
- Cement.
- Other manufactured products.

(2 C.F.R. Part 200, Appendix II(L); 2 C.F.R. § 200.322.)

“Produced in the United States” means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the US (2 C.F.R. § 200.322(b)(1)). “Manufactured products” means items and construction materials composed in whole or in part of:

- Non-ferrous metals such as aluminum.
- Plastics and polymer-based products such as polyvinyl chloride pipe.
- Aggregates such as concrete.
- Glass, including optical fiber.
- Lumber.

(2 C.F.R. § 200.322(b)(2).)

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