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# A New World of Federal Fun(?)ding

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# Agenda

- Introduction
- Federal grants vs. contracts
- Award termination
- Termination costs
- Considerations and strategies for appeals
- Q&A
- Litigation considerations
- Overview and strategies for certifications
- Q&A
- Closing remarks

A puzzle of a US dollar bill, with the central piece featuring the portrait of Benjamin Franklin. The puzzle is set against a dark background, and the text "Grants versus Contracts" is overlaid in white.

# Grants versus Contracts

# Federal Grants vs. Contracts

- Federal Grant and Cooperative Agreement Act (1977)
  - Agency shall use a **grant** when
    - the principal purpose of the relationship is the transfer of resources to the recipient in order to accomplish a public purpose of support or stimulation authorized by Federal statute
  - Agency shall use a **procurement contract** when
    - the principal purpose of the instrument is acquisition of property or services for the direct benefit or use of the Federal Government.

# Federal Grants vs. Contracts

- Grants & Cooperative Agreements:
  - 2 CFR 200 (OMB Uniform Guidance)
  - Agency implementations of OMB Uniform Guidance
  - Agency grant terms, policies, and guidance
- Procurement contracts:
  - Federal Acquisition Regulation (FAR)
  - Agency supplements to FAR
  - Agency contract terms, policies, and guidance

A US dollar bill is shown as a puzzle, with several pieces missing and scattered around it. The bill features the portrait of George Washington and the serial number 0849587176C. The puzzle pieces are scattered on a light gray surface.

# Award Terminations

# Grant Terminations

- Key sources of recipient rights and obligations
  - Award termination notice, memorandum
  - Agency regulations, including implementation of OMB UG
  - Agency grant policies, procedures, and standard terms
  - Award instrument (notice of award, etc.)

# Grant Terminations

- Award termination notice
  - EPA Example:
    - *Termination notice*: “The recipient demonstrates its commitment to carry out this award by either: 1) drawing down funds within 21 days after the EPA award or amendment mailing date; or 2) not filing a notice of disagreement with the award terms and conditions within 21 days after the EPA award or amendment mailing date.”
    - *Termination memo*: “If you wish to dispute this termination decision, the Disputes Decision Official (DDO) must receive the Dispute no later than 30 calendar days from the date this termination notice is electronically sent to you.”
  - DOD Example:
    - *Termination notice*: “You are asked to reply by [Date], with proposed termination conditions, including effective date, for consideration and discussions, as necessary, to reach an agreement quickly.”

# Grant Terminations

- OMB Uniform Guidance (2 CFR 200.340)
  - (a) The Federal award may be terminated in part or its entirety as follows...
    - (4) By the Federal agency or pass-through entity pursuant to the terms and conditions of the Federal award, including, to the extent authorized by law, **if an award no longer effectuates the program goals or agency priorities.**
  - (b) The Federal agency or pass-through entity must clearly and unambiguously specify all termination provisions in the terms and conditions of the Federal award.
- Note agency implementation of this provision.

# Grant Terminations

- Agency grant and cooperative agreement policies:
  - NSF PAPPG and General Grant Conditions
  - NIH GPS
  - DoD R&D General Terms and Conditions
- Closeout and termination costs
- Other considerations

# Grant Terminations

## 2 CFR 200.344

- The recipient must liquidate all financial obligations incurred under the award no later than 120 calendar days after the conclusion of the period of performance.
- A subrecipient must liquidate all financial obligations incurred under a subaward no later than 90 calendar days after the conclusion of the period of performance of the subaward (or an earlier date as agreed).
- When justified, the Federal agency or pass-through entity may approve extensions for the recipient or subrecipient.”

How does pending litigation factor in?

# Contract Terminations

- Government has broad right to terminate a contractor's performance of work under a contract when it is in the government's interest to do so
  - Not a breach of contract
  - Termination for convenience must be in good faith
  - Contractor eligible for certain cost recovery

A conceptual image showing a puzzle where one of the pieces is a US dollar bill, symbolizing the financial aspects of a project or contract. The puzzle is set against a dark background.

# Awardee Right to Costs in Termination

# Termination Costs in Grants

- Governed by 2 CFR 200.343
- “Properly incurred . . . before the effective date of suspension or termination, and not in anticipation of it.”
- Can also include
  - Non-cancelable obligations
  - Costs of publication or sharing of research results
  - Administrative closeout costs

# Allowed Non-Cancelable Obligations

- Some salaries
  - Postdocs, fixed-term faculty, staff hired for terminated grant.
- Graduate students through the end of the current academic period.
- Custom equipment and supplies.
- Human/Animal subject research orderly closeout.
- Non-cancelable deposits
  - Travel
  - Conference planning
  - Administrative closeout costs

# Cancelable Costs

- Regular faculty/staff salaries
- Graduate student support in future academic periods.
- Hourly wages
- Not yet delivered standard equipment/supplies
- Future planned travel costs
- Subcontracts and purchased services
  - Subrecipients/vendors can also claim noncancelable costs

# Costs Under Contracts

- Contractor shall “promptly” comply with a notice of a Termination for Convenience, including:
  - Stop work immediately and stop placing subcontracts
  - Terminate all subcontracts
  - Immediately advise Termination Contracting Officer (“TCO”) of any special circumstances precluding stoppage of work
  - Perform continuing portion of contract and submit request for an equitable adjustment of price supported by evidence
  - Promptly notify TCO in writing of any legal proceedings
  - Settle outstanding liabilities arising out of termination of subcontracts, obtaining any approvals or ratifications required by TCO
  - Promptly submit a settlement proposal, with support
  - Dispose of termination inventory, as directed by TCO

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# Appeal Considerations

# Right to Appeal?

- “The Federal agency must maintain written procedures for processing objections, hearings, and appeals.” - 2 CFR 200.342
- But see NSF FAQs (updated May 23, 2025):
  - “Terminations of awards on the basis that they no longer effectuate program goals or agency priorities are the final agency decision and are not appealable to NSF...Because there are no allegations of deficiencies by the awardee to dispute, there are no grounds for agency appeal.”
- Note discrepancies with NSF PAPPG and NSF Grant General Conditions

# Appeal Considerations

- Competing considerations
  - Opaque and disparate process across agencies
  - Rarely a favorable venue for the grantee
  - Financial considerations
  - Litigation considerations
  - Public relations
  - Faculty support and perceptions
  - Cost recovery
  - What is the end goal?

# Appeal Content

- Note the deadlines and extensions
- This is a formal process
- What are we appealing, exactly?
- Details matter
- Faculty involvement crucial
- Use emotional restraint
- What are we asking for, exactly?
- Set expectations with researchers/faculty

# Appeals Under Contracts

- Contracts Disputes Act
  - "[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision."  
41 U.S.C. § 7103(a)(1).
- Receive a CO's Final Decision
  - Even if the CO's termination for convenience was styled as a final decision.
- Jurisdiction at the appropriate board of contract appeals or the U.S. Court of Federal Claims.

# Appeals and Litigation

- Do we need to appeal if we're thinking about suing?
  - APA review available for "final agency action." 5 U.S.C. § 704
  - Tucker Act review available after CO decision on a "claim."  
41 U.S.C. § 7103
- What does appeal do to "final agency action"?
- Do we want the agency to revise its reasoning?

# What if Others are Suing?

- Potential to benefit from other lawsuits
  - Especially if suit is brought by (home) states or associations
  - Ask faculty if they are association members
- May want to buy time while litigation plays out
- But important to not fall out of relief
- What happens if an injunction is vacated?

# Ways to Preserve Rights

- Avoid unintentionally consenting to termination
  - Check specific agency rules and procedures
  - Don't unconditionally accept modifications
- Consider submissions “under protest”
- But cannot delay forever

# Institutional Strategy -- Communication

- Pls whose grants are terminated understandably feel some combination of:
  - Angry
  - Offended by the termination language
  - Bewildered by the “reasoning”
  - Worried about their future viability and funding options
  - Sad about the loss of the project.
  - All of the above
- Institutional response needs to communicate:
  - Empathy
  - Options for response
  - **Who gets to decide**

# Institutional Strategy -- Communication

- Difference between administrative appeals and judicial actions
  - Merits of the decision  
vs.
  - Legitimacy of the process
- Manage expectations
  - Most administrative appeals are doomed to failure
  - Beware the lay press
- Decision process
  - Researcher makes the case; but
  - Institutional decision

# Institutional Strategy – Appeal, Or Not?

- Who decides?
  - Institutional decision; ideally taken (and owned) by senior leadership.
- Why not appeal everything?
  - Cost (staff time/effort) of preparing appeal
  - Risk of lost closing costs
  - Uncertainty in light of near-certain denial (or worse)

# Institutional Strategy – Appeal, Or Not?

- Factors in favor
  - Clear factual error in basis for termination
  - Grant can be tied to administration priorities
  - Significant danger to human or animal subjects can be mitigated by extension of grant termination date.
- Factors against
  - Clearly disfavored subject matter
  - Grant near completion
  - Significant closing costs at risk

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# Q&A

A puzzle of a US dollar bill, with the central piece featuring the portrait of Benjamin Franklin. The puzzle is set against a dark background, and the text "Litigation Considerations" is overlaid in white.

# Litigation Considerations

# Why Sue?

- Keep the money flowing
- Delay adverse action, such as new conditions
- Limit agency overreach

- 
- Recover money damages after the fact

# What Cause of Action?

- Administrative Procedure Act (APA): the “wonky workhorse of American law.” NYT, May 5, 2025
  - Requires reviewing courts to “hold unlawful and set aside” final agency action that is “arbitrary, capricious, an abuse of discretion,” or otherwise not in accordance with law. 5 U.S.C. § 706(2).
  - Vehicle to secure prospective equitable relief—*i.e.* an injunction—against discrete decision
  - Tool to manage “complex ongoing relationship between the parties.” *Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988).
- APA benefits
  - One lawsuit can seek reinstatement of many separate grants
  - Gives access to many different legal theories
  - Gives plaintiff a choice of forum
  - Speed!

# APA Limits

- APA vs. Tucker Act

- **APA allows for** “relief *other* than money damages.” 5 USC § 702.
- Courts have traditionally understood this to allow injunctive and declaratory relief—even if that relief involves paying money. *Bowen*, 487 U.S. at 893.
- But “[T]he Tucker Act ... ‘impliedly forbid[s]’ an APA action . . . if that action is a ‘disguised’ breach-of-contract claim.” *United Aeronautical Corp. v. U.S. Air Force*, 80 F.4th 1017, 1026 (9th Cir. 2023).

- With grants, this distinction can get elusive.

- Courts look “beyond the form of the pleadings to the substance:”

- (1) the source of rights claimed and
- (2) the type of relief sought

# APA, in Practice

- The Just Security blog Litigation Tracker lists 38 major lawsuits related to grants, loans, and assistance.
- Lower courts have been entering broad, expeditious relief
  - Challenge to indirect rate changes across agencies
  - Challenges to funding of specifically-appropriated funding, such as for clean energy
  - Challenges to dismantling of agencies and associated grant terminations
- Relief often flows to non-parties

# The Pushback

- Scope of relief
  - Question about availability of “universal” injunctions
- *Department of Education v. California*, 145 S. Ct. 966 (2025)
  - District court entered an order “enjoining the Government from terminating various education-related grants” and to “pay out past-due grant obligations.” *Id.* at 968.
  - Supreme Court enters a stay.

# The Current Landscape

- APA probably still good for challenging “upstream” decisions
  - Even this is receiving some pushback.
- Past obligations may not be recoverable
- Relief may be increasingly limited to parties
- Important to focus on statutory and/or constitutional claims

# What Makes a Good Case?

- Statutory violation
  - *E.g.*, NIH indirect rate; Title VI procedures, etc.
  - Disregard of clear Congressional appropriation
  - Attaching conditions beyond scope of statutory authority
- Constitutional violation
  - Retaliation for First Amendment activity. *NRA v. Vullo*, 602 U.S. 175 (2024)
  - Other improper leveraging of constitutional rights.
  - Conditions that extend beyond the federal program. *USAID v. All. for Open Soc'y*, 570 U.S. 205 (2013)

# Emerging Problems

- Are grants really like contracts?
  - Compare *Nat'l Ctr. for Mfg. Sci. v. United States*, 114 F.3d 196, 201 (Fed. Cir. 1997) with *Columbus Reg'l Hosp. v. United States*, 990 F.3d 1330, 1338–40 (Fed. Cir. 2021)
- What claims are available under the Tucker Act?  
What recovery?

# The Big Question

- What to do about 2 C.F.R. 200.340(a)(4)?

The Federal award may be terminated . . . pursuant to the terms and conditions of the Federal award, **including**, to the extent authorized by law, if an award no longer effectuates the program goals or **agency priorities**.

A US dollar bill is shown as a puzzle, with several pieces missing and scattered around it. The bill features the portrait of George Washington and the serial number 0849587176C. The text "Certifications Overview" is overlaid in white on a dark red background.

# Certifications Overview

# New Certifications

- Executive Order 14173, “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”
  - Directs each agency to include terms in every contract or grant making clear that the contractor/grantee:
    - (A) agrees that compliance with “all applicable Federal anti-discrimination laws is material to the government’s payment decisions” for FCA purposes; and
    - (B) certifies that it does “not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.”
- Bondi Memorandum (Feb 5)
- Blanche Memorandum (May 19)

# NIH Certification

<https://grants.nih.gov/grants/guide/notice-files/NOT-OD-25-090.html>

- *Recipients must comply with all applicable Federal anti-discrimination laws material to the government's payment decisions for purposes of 31 U.S.C. § 372(b)(4).*
  - (2) Grant award certification.*
    - (a) By accepting the grant award, recipients are certifying that:*
      - (i) They do not, and will not during the term of this financial assistance award, operate any programs that advance or promote DEI, DEIA, or discriminatory equity ideology in violation of Federal anti-discrimination laws; and*
      - (ii) They do not engage in and will not during the term of this award engage in, a discriminatory prohibited boycott.*
  - (3) NIH reserves the right to terminate financial assistance awards and recover all funds if recipients, during the term of this award, operate any program in violation of Federal anti-discriminatory laws or engage in a prohibited boycott.*

# New Certifications & False Claims Act

- False Claims Act (31 U.S.C. § 3729, et seq.)
  - Any person who knowingly presents, or causes to be presented, false or fraudulent claims for payment or false statements material to the government's payment decision will be liable for three times the government's damages plus penalties and costs.
  - The FCA's *qui tam* provisions permit relators who possess relevant non-public information to bring suits in the name of the government.
- Liability often turns on allegations of "legal falsity" -- defendant allegedly falsely certifies either expressly or impliedly that it complied with a term that is material to the government's decision to pay
- The elements of an FCA claim are falsity, scienter, materiality, and causation
- Consider subjective belief of defendants
- Materiality requires that the allegedly false statement was material to the government's payment decision

# Certifications Strategy

**Whether** and **What** to certify is an institutional decision.

- Three types of certifications:
  - Specific grant or proposal complies with EOs and/or does not violate federal law.
  - Award conditioned on certification that no federal funds will be used to support DEIA or other EO-prohibited activities across institution “in violation of federal law.”
  - Certification that entire institution complies with federal laws as interpreted by various agency communications (without regard to funding).

# Certifications Strategy

- Before you can certify anything, you need to know what your institution is doing.
  - Survey institutional activities, including outside of research ecosystem
  - Consider whether and how to define “DEIA” in order to determine whether activities are questionable.
- Centralize and reinforce AOR authority to sign any certifications

A US dollar bill is shown as a puzzle, with several pieces missing and scattered around it. The bill is tilted and the text "Q&A" is overlaid in the center. The missing pieces are scattered around the main bill, some showing parts of the bill's design and others showing the word "DOLLAR".

# Q&A

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