

THE PURSUIT OF INFRASTRUCTURE OPPORTUNITIES

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AGENDA

- Infrastructure Act Overview
- Opportunity ID & Proposals
- Negotiation, Contracting & Subcontracting
- Performance & Reporting
- Audits & Oversight
- Q & A



INFRASTRUCTURE ACT OVERVIEW

INFRASTRUCTURE ACT OVERVIEW

- What is the Infrastructure Investment and Jobs Act?
 - The Bipartisan Infrastructure Law was passed on November 15, 2021 with the goals of:
 - Making improvements to America's ports, airports, rail and roads
 - Driving the creation of good paying union jobs
 - Expanding access to clean drinking water
 - Ensuring every American has access to high-speed internet
 - Supporting climate resiliency projects and advancing environmental justice

INFRASTRUCTURE ACT OVERVIEW

- Authorizes nearly \$550 billion in new federal money for infrastructure projects, as well as to renew existing programs that were set to expire
- Funding Summary for the Infrastructure Act's Initiatives:
 - \$110 billion to repair our roads and bridges and support major transformational projects
 - \$73 billion to update the nation's electricity grid
 - \$66 billion to upgrade and modernize America's rail system
 - \$65 billion to expand access to high-speed internet
 - \$55 billion to expand access to clean drinking water by improving our water infrastructure
 - \$71 billion for climate resiliency and environmental remediation projects
 - \$107 billion for other projects including ports, airports and transit improvements, EV charging infrastructure and other transportation-related initiatives

INFRASTRUCTURE ACT OVERVIEW

Infrastructure Act funding will largely be awarded through a combination of contracts and grants

- **Government Contract** - A mutually binding legal relationship obligating the seller to furnish the supplies or services and the buyer to pay for them (*See FAR 2.1 Definitions*)
 - The contract is more complex than a grant, as it is associated with many regulatory conditions which, if not met, can result in unfavorable Government actions.
- **Grant** - A relationship the principal purpose of which is to transfer anything of value to carry out a public purpose authorized by a law of the United States and not to acquire property or services for the Federal awarding agency or pass-through entity's direct benefit or use; (*See 2 C.F.R. 200 § 200.1*)
- IIJA grants will take 3 main forms
 - Block Grants
 - Competitive Grants
 - Procurement Contracts

COMPLIANCE UNDER THE INFRASTRUCTURE ACT

- Compliance Overview for Federal Contractors and Financial Assistance Recipients
- Focus areas include:
 - Domestic sourcing and supply chain limitations
 - Affirmative action and equal opportunity
 - Cybersecurity
 - Ethics and disclosure obligations
 - “Flow-down” requirements
 - Cost and pricing



SOURCES OF COMPLIANCE REQUIREMENTS

- Contract and Grant Terms.
- The Federal Acquisition Regulation (“FAR”) provides standard clauses to be used in contracts with all executive agencies. *See* 48 C.F.R. Ch. 1.
 - Federal agencies may also create tailored procurement regulations to address the specific needs of the agency. *See, e.g.*, 48 C.F.R. Ch. 2 (the Defense Federal Acquisition Regulation Supplement (“DFARS”)).
 - “Flowdown” requirements for subcontractors.
- Federal financial assistance agreements (*e.g.*, grants) are governed by Title 2, Part 200 of the Code of Federal Regulations (“the Uniform Guidance”).

THE BIDEN ADMINISTRATION'S COMPLIANCE FOCUS

- In a May 2022 press release, the White House expressed its dedication to “[d]elivering results with accountability, effectiveness, and transparency.”
- Collaboration with Federal agency Inspector General offices “to ensure that programs balance efficient results, equitable access, and program integration, including minimal waste, fraud, and abuse.”
- The government continues to wield its primary form of redress against fraud: the civil False Claims Act, 31 U.S.C. § 3729, *et. seq.*, which permits recovery of treble damages and associated penalties.



OPPORTUNITY ID AND PROPOSALS

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OPPORTUNITY ID AND PROPOSALS

- **Where to ID Opportunities**
 - www.SAM.gov - for contracts and grants, www.grants.gov - for grants only
 - Free and paid third party search services which pull and enhance publicly available data
 - Industry associations and newsletters
 - Other/less formal search means
- **Solicitation Process**
 - Solicitation/RFP/RFQ (for contracts)
 - Funding Opportunity Announcement (for grants)
- **Proposal Content (Contracts)**
 - For complex projects, there are generally 3 volumes for solicitation responses
 - Technical
 - Management
 - Cost/Price
 - Simpler projects or commercial type purchases may include a price volume with varying information about management and technical approaches

OPPORTUNITY ID AND PROPOSALS

Evaluation process (Contracts)

Evaluation criteria and their prioritization will be included in the solicitation so that bidders may understand the government's priorities in awarding funds. Evaluation criteria may include:

- Technical Approach
- Past Performance/Experience
- Management Approach (incl. utilization of small and disadvantaged businesses)
- Quality Control Approach
- Performance/delivery schedule
- Cost/Price

Agencies will evaluate proposals and assess them based on the factors specified in the solicitation. Evaluations commonly use a single rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file. Bidders (win or lose) can request a post award briefing to understand how they measured up.

OPPORTUNITY ID AND PROPOSALS

- **Proposal Content (Grants)**

- Developing your idea
- Conducting research
- Writing your proposal
- Grant proposals should follow the Assistance Announcement instructions and will generally contain the following information:
 - Proposal summary
 - Organizational intro
 - Assessment of need
 - Project objectives, design and/or methods
 - Project evaluation (assessment of usefulness of spend and benefits to be realized)
 - Future funding assessment
 - Project budget

OPPORTUNITY ID AND PROPOSALS

Evaluation process (Grants)

Evaluation criteria are generally included in the funding announcement. The grant proposal evaluation process may be different from agency to agency but will generally include:

- Initial screening to ensure application is complete
- Programmatic review and assessment of the substance of the applications
- Financial review of proposed budgets
- Award decision and announcement

OPPORTUNITY ID AND PROPOSALS

Proposal common issues

1. Failure to respond to all required elements of the solicitation/funding announcement.
2. Failure to submit a timely proposal through approved channels (e.g., USPS, express ship, manual delivery, electronic delivery).
3. Cost/Price outside the reasonable or competitive range (no competitive intelligence).
4. Mismatch between cost/price, management and technical volumes (contracts) or project design/methods and the proposed budget (grants).
5. Price to win and cost to deliver are not compatible (i.e., winner's curse).
6. Compliance infrastructure (systems and processes) or operational infrastructure are not sufficient to demonstrate an ability to perform on the contract.



NEGOTIATION, CONTRACTING AND SUBCONTRACTING

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REQUIREMENTS FOR LEGAL COMPLIANCE

COMMERCIAL PRODUCTS, SERVICES AND “COTS” ITEMS

- In certain instances, where a company provides to the government the same or similar product it sells in the commercial marketplace, less stringent rules may apply, including fewer “flow-down” clauses.
- The FAR defines “commercial products” and “commercial services.” *See* FAR 2.101.
- Contracts for “commercially-available off-the-shelf” or “COTS” items may be subject to fewer compliance obligations.



GOVERNMENT SUBCONTRACTORS AND SUBRECIPIENTS

- *What is a government subcontract?*
 - **Subcontract** means any contract entered into by a subcontractor *to furnish supplies or services for performance of a prime contract or a subcontract.*
 - Subcontracts take many forms, including:
 - Purchase orders and changes and modifications thereto;
 - Transfers between divisions, subsidiaries, or affiliates of a contractor or subcontractor.
- *How do I know if I'm a subcontractor?*
 - **Subcontractor** means *any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.*
- *Am I a subcontractor or a subrecipient?*
 - In the context of federal financial assistance agreement, careful analysis is necessary to determine a business's role.

FLOW-DOWNS AND APPLICABILITY THRESHOLDS

- Many FAR and supplemental agency clauses in a prime contract must “flow down” to subcontracts, depending on the cost type and value of the subcontract.
- The clause itself states the circumstances triggering flow-down.
- Flow-downs may be mandatory or discretionary at the prime level.
- Common thresholds include:
 - Current simplified acquisition threshold (“SAT”): \$250,000
 - Current micro-purchase threshold: \$10,000
- Certain clauses prohibit splitting orders to avoid meeting threshold requirements (*e.g.*, FAR 52.204-10, REPORTING EXECUTIVE COMPENSATION AND FIRST-TIER SUBCONTRACT AWARDS.)
 - Even without the specific prohibition, intentional order-splitting for the purpose of avoiding thresholds, without a legitimate business purpose, may be viewed as fraudulent with potential liability under the False Claims Act.
- A number of clauses do not apply to subcontracts for “commercial items” or “COTS” items. *See* FAR 2.101.

52.203-17 Contractor Employee Whistleblower Rights and Requirement To Inform Employees of Whistleblower Rights.

As prescribed in 3.908-9, insert the following clause:

CONTRACTOR EMPLOYEE WHISTLEBLOWER RIGHTS AND REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS (APR 2014)

(a) This contract and employees working on this contract will be subject to the whistleblower rights and remedies in the pilot program on Contractor employee whistleblower protections established at 41 U.S.C. 4712 by section 828 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and FAR 3.908.

(b) The Contractor shall inform its employees in writing, in the predominant language of the workforce, of employee whistleblower rights and protections under 41 U.S.C. 4712, as described in section 3.908 of the Federal Acquisition Regulation.

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in all subcontracts over the simplified acquisition threshold.

(End of clause)

GOVERNMENT ETHICS FRAMEWORK

- Transactions relating to the expenditure of public funds require the *highest degree of public trust and an impeccable standard of conduct.* FAR 3.101-1.
- This generally requires:
 - Mandatory disclosures
 - Prohibition on bribery, gratuities, and kickbacks; strict limitations surrounding gifts
 - Contractor Code of Business Ethics and Conduct and adequate internal controls
 - Prevention, identification, and mitigation of Organizational Conflicts of Interest
 - Limitations on lobbying
 - Record retention

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SMALL BUSINESS REQUIREMENTS

WHY DOES BUSINESS SIZE MATTER?

- Each year, the Federal government “sets aside” contracts for small businesses and tracks awards to satisfy small business contract goals.
 - IIJA seeks to increase opportunities for minority-owned businesses, codifying the Minority Business Development Agency.
 - Federal financial assistance awards may also condition eligibility on a company’s certification that it qualifies as a small business.
- Contractors must represent their size in accordance with U.S. Small Business Administration (“SBA”) regulations on SAM.gov.
 - Business size is determined by a company’s annual receipts or average employee headcount.
 - Size standards apply based on the company’s North American Industry Classification System (“NAICS”) Code.

SMALL BUSINESS TRAPS FOR THE UNWARY

- Government contractors must remain mindful of the following:
 - Ever-changing size standards and small business regulations.
 - Affiliation and common control concerns.
 - Organic growth versus mergers and acquisitions.
 - Re-certification requirements.
- Small Business Subcontracting Plans.
 - Even if you're not a small business, the FAR may require a Small Business Subcontracting Plan that demonstrates efforts to subcontract work to qualifying small businesses.



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EQUAL OPPORTUNITY AND AFFIRMATIVE ACTION

EQUAL OPPORTUNITY AND AFFIRMATIVE ACTION

- **Executive Order 11246 (1965), as amended:**
 - Prohibits discrimination and requires affirmative action to ensure that all employment decisions are made without regard to race, color, religion, sex or national origin.
 - Amended in 2014 to improve transparency of wages and make gender pay disparities easier to spot, as well as prohibit discrimination on the basis of sexual orientation or gender identity.
- **Section 503 of the Rehabilitation Act of 1973, as amended (“Section 503”):**
 - Prohibits discrimination against qualified individuals on the basis of disability and requires affirmative action in the employment of qualified individuals with disabilities.
- **The Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended:**
 - Prohibits discrimination against specific categories of veterans protected by the Act and requires affirmative action in the employment of such veterans.

EQUAL OPPORTUNITY CLAUSES

- Equal opportunity FAR clauses generally require:
 - Non-discrimination and equal opportunity policies for all covered groups
 - Written notice to all employees and prospective employees regarding the policies
 - Affirmative action plans
 - Cumbersome reporting on employment and hiring data (e.g., Form EEO-1)
 - Specific requirements to recruit veterans
- Requirements apply to grantees
 - Grant agreements may include statutory references and/or FAR clauses

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

- OFCCP is an Office of the Department of Labor
- Enforces equal opportunity and wage laws that apply to federal contractors and subcontractors
 - For construction contractors performing federal construction contracts, OFCCP ensures compliance with the Davis Bacon and Related Acts, requiring payment of prevailing wage and fringe benefit rates to contractor employees
- Conducts compliance evaluations and investigates complaints
- Provides compliance resources, such as sample Affirmative Action Programs, Equal Opportunity posters, forms, FAQs:
<https://www.dol.gov/agencies/ofccp/compliance-assistance>

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DOMESTIC SOURCING REQUIREMENTS

IIJA – BUILD AMERICA, BUY AMERICA

- A key goal of the Bipartisan Infrastructure Act is stimulating the American economy.
- Applies “Buy America”-style domestic sourcing requirements to “Infrastructure projects.”
- Key Requirements:
 - All iron and steel must be domestically sourced;
 - All manufactured products must be U.S.-manufactured and exceed 55% component threshold; and
 - All construction materials must be domestically sourced.
- Applies to “articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project.”

DOMESTIC SOURCING REQUIREMENTS

- **Buy American Act (“BAA”) of 1933, 41 U.S.C. §§ 8301-8305**
 - Requires products be domestically manufactured and exceed a percentage test for U.S.-produced components (currently 55%, soon to be 60%)
- **Trade Agreements Act (“TAA”) of 1979, 19 U.S.C. § 2501, *et. seq.***
 - Permits goods manufactured or “substantially transformed” in friendly countries
- **“Buy America” requirements conditioning funding from U.S. Department of Transportation sub-agencies**
 - With certain exceptions, requires 100% U.S. manufactured goods, including iron and steel

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CYBERSECURITY REQUIREMENTS

CYBERSECURITY AND CYBER INCIDENT REPORTING

- FAR 52.204-21, BASIC SAFEGUARDING OF COVERED CONTRACTOR INFORMATION SYSTEMS:
 - Imposes fifteen cybersecurity control measures that contractors must implement
 - Requirement must be flowed-down to subcontractors
- DFARS 252.204-7012, SAFEGUARDING COVERED DEFENSE INFORMATION AND CYBER INCIDENT REPORTING:
 - Applies to DoD contracts
 - Includes more rigorous safeguarding and cyber incident reporting requirements, including compliance with NIST SP 800-171



PERFORMANCE AND REPORTING

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STANDARD TERMS AND CONDITIONS

- **Termination for Convenience**

- Government agencies may terminate government contracts for any (or no) reason. *See* FAR 52.249-2.

- Terminated contractor may submit a Termination Settlement Proposal for limited cost recovery.

- **Termination for Default**

- After providing a chance to cure, government agencies may terminate government contracts for performance issues or delays. *See* FAR 52.249-8.

- Terminated contractor may be required to pay “reprocurement costs” to cover the difference in price for a new contractor to finish the job.

- **Disputes**

- Contractors may file a certified claim under the Contract Disputes Act to recover compensation from the government. *See* 41 U.S.C. §7101, et. seq.

CHANGES TO CONTRACT PERFORMANCE

- Government agencies possess authority to enact certain **unilateral** changes.
 - Order additional work within scope and exercise “option” periods.
 - Temporarily suspend work.
 - Update or amend specifications or description of services.
- Contractors must obtain a **bilateral** modification to address “differing site conditions.”
 - Parties must complete a Form SF-30 to memorialize changes.
- Grant recipients must promptly submit a **Post-Award Amendment** to awarding agency to reflect changes to scope or objectives of the federally funded program.
 - Parties must complete a Form SF-424 to memorialize changes.

COGNIZANT OFFICIALS

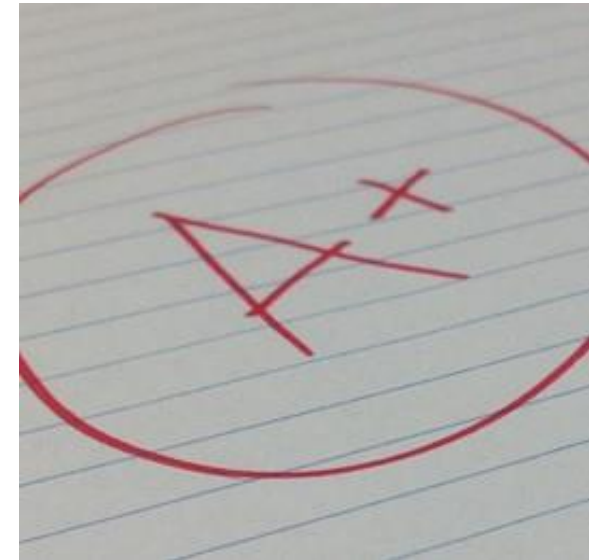
- Federal Contracts Team
 - Contracting Officers
- Federal Grant Team
 - Grant Officers and Managers
- Actual vs. Apparent Authority
 - Contracting Officers must possess a warrant to bind government.
 - Be cautious of government officials with only apparent authority
- Written Documentation
 - Obtaining information or instruction in writing is paramount

INVOICING AND COST REPORTS

- Per FAR 32.905, invoices must include specific information for the government to effect payment, including:
 - Contract number (including order number and line item number), description, quantity, unit of measure, unit price, and extended price of supplies delivered or services performed, shipping and payment terms, TIN, and any other information required by the contract
- Grant Payments
 - Automated Standard Application for Payments (ASAP) (Web-Based)
 - SF-270 Request for Reimbursement/Advanced Payment (Manual)
- Grantees must submit a Form SF-425, Federal Financial Report
 - Must detail Federal expenditures, recipient share, and program income

GOVERNMENT CONTRACT PERFORMANCE REPORTS

- **Contractor Performance Assessment Rating System (CPARS)**
 - Government is required to annually assess contractor performance, using ratings from Exceptional to Unsatisfactory. *See FAR subpart 42.15.*
 - Agencies may rely on CPARS in evaluations for future contract opportunities.
 - Contractors are encouraged to provide responses.
 - CPARS assess:
 - Technical/quality of work
 - Adherence to schedule
 - Cost control
 - Management and business relations
 - Small business subcontracting
 - “Catch-all” category



ENFORCEMENT

- **False Claims Act**

- Federal government’s *primary weapon to redress fraud* against government agencies and programs.
- Provides for recovery of *treble damages* and *civil penalties* from any “person” (natural or corporate entity) who knowingly submits or causes the submission of a false or fraudulent claim to the United States for money or property.
- Permits whistleblowers to lodge claims.

- **Suspension and Debarment**

- *Debarment* disqualifies a firm from contracting with the Government for a specific amount of time, usually limited to a maximum of three years.
- *Suspension* is the temporary disqualification of a firm from contracting with the Government.

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COST AND PRICING REQUIREMENTS

GOVERNMENT COST AND PRICING REQUIREMENTS

- Receipt of federal funds requires compliance with rigorous requirements regarding contractor and grantee costs and pricing.
- The FAR contains:
 - Contract cost principles and procedures for:
 - use in the pricing of contracts where cost analysis is required and;
 - the determination, negotiation, or allowance of costs when required under the contract.
 - Grantees must comply with similar cost principles set forth at 2 C.F.R. § 200.400, *et. seq.*
 - Government cost and pricing regulations impose accounting requirements that in many respects differ from GAAP or commercial business practices.
- Non-commercial contracts (**not grants**) exceeding a certain dollar threshold may also be subject to the Cost Accounting Standards (“CAS”) at FAR ch. 99.
 - Designed to achieve uniformity in cost accounting practices used by contractors and consistency in practices by individual contractors over accounting periods.

COST ALLOWABILITY

- FAR Part 31 Cost Principles apply in certain situations, including **where cost analysis is performed**.
 - Also applicable:
 - When the Truthful Cost and Pricing Data Act (f/k/a “TINA”) applies
 - When the determination, negotiation and allowance of costs are required by contract (*e.g.*, FAR 52.216-7, Allowable Cost & Payment)
 - May be used when evaluating other than certified cost or pricing data
 - When submitting requests for equitable adjustment and claims
- Applicability by Type of Organization
 - Commercial vs. Educational, State and Local, Nonprofit
- For Grants
 - NFP recipients follow the cost principles in 2 C.F.R. 200
 - For-profit recipients are directed back to FAR 31 through the provisions of 2 C.F.R. 200

COST ALLOWABILITY (CON'T)

- Costs are generally allowable if:
 - They are reasonable;
 - Allocable to the contract (i.e., incurred specifically for the contract; benefiting both the contract and other work; or is necessary to the overall operation of the business);
 - Accounted for in accordance with the Cost Accounting Standards (“CAS”) as applicable, or GAAP;
 - Permitted by the terms of the contract; and
 - Not limited by the specific principles in FAR subpart 31.2 (e.g., advertising).
- “Expressly unallowable costs” may result in penalties.
- Claiming unallowable costs can result in liability under the Civil False Claims Act.



AUDIT AND OVERSIGHT

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AUDIT AND OVERSIGHT

- **One-Time**
 - System Capability (pre-award)
 - Closeout (post award)
 - Defective pricing
- **In-Flight / Periodic / Real-Time**
 - Quality Audits - for manufacturing; quality reviews
 - Timekeeping & Material Audits (MAAR 6 and MAAR 13)
 - CAS Audits
 - Business System Audits
- **Annual**
 - ICP Audit
 - 2 C.F.R. 200 Uniform Grants Guidance Audits (Single Audit, Program Specific Audit)

AUDIT AND OVERSIGHT

In-Flight / Periodic / Real-Time Audits

- **Business System Audits - DFARS 252.242-7005 (Periodic)**
 - Accounting system, if this contract includes the clause at 252.242-7006 , Accounting System Administration;
 - Earned value management system, if this contract includes the clause at 252.234-7002 , Earned Value Management System;
 - Estimating system, if this contract includes the clause at 252.215-7002 , Cost Estimating System Requirements;
 - Material management and accounting system, if this contract includes the clause at 252.242-7004 , Material Management and Accounting System;
 - Property management system, if this contract includes the clause at 252.245-7003 , Contractor Property Management System Administration; and
 - Purchasing system, if this contract includes the clause at 252.244-7001 , Contractor Purchasing System Administration.

AUDIT AND OVERSIGHT

- **Pre-Award System Capability (One Time)**
 - SF1408 Accounting System Review
 - Determination is made whether your accounting system is set up to adequately perform and incur costs on a government contract
 - Not an actual audit - no testing is performed
- **Post-Award (In-Flight or Post Close)**
 - Defective Pricing

AUDIT AND OVERSIGHT

Incurred Cost Audits (Annual)

- Government contractors with cost reimbursable contracts are required to submit an incurred cost proposal within 6 months following the end of the contractor's fiscal year
 - FAR 52.216-7 - Allowable Cost & Payment
 - FAR 52.215-2 - Audit & Records
- Example ICS Model and Instructions can be found on the DCAA's website (dcaa.mil)
- DCAA or 3rd-party accounting firm will perform an audit of the contractor's claimed direct costs and indirect rates/costs on flexibly priced contracts
 - Exclusions
 - Commercial/Commercial Item Contracts (FAR 52.212-1 through 52.212-4)
 - Fixed Price Contracts

AUDIT AND OVERSIGHT

Annual Audits- Grants & Cooperative Agreements

- 2 C.F.R. 200 Audits
 - Single Audit- A non-Federal entity that expends \$750k or more in Federal awards during the non-Federal entity's fiscal year must have a single audit conducted (in accordance with 2 C.F.R. § 200.514) unless that non-Federal entity elects to have a program-specific audit conducted (in accordance with 2 C.F.R. § 200.507)
 - Program-Specific Audit Election: When an auditee expends Federal awards under only one Federal program (excluding R&D) and the Federal program's statutes, regulations, or the terms and conditions of the Federal award do not require a financial statement audit of the auditee, the auditee may elect to have a program-specific audit conducted (in accordance with 2 C.F.R. § 200.507)

AUDIT AND OVERSIGHT

Annual Audits- Grants & Cooperative Agreements

- 2 C.F.R. Single and Program Specific Audits
 - Financial Statements - The auditor must determine whether the financial statements of the auditee are presented fairly and whether the schedule of expenditures of Federal awards is stated fairly in all material respects
 - Internal Controls - The auditor must perform procedures to obtain an understanding of and to test the integrity of internal controls over Federal programs
 - Compliance - In addition to the requirements of GAGAS, the auditor must determine whether the auditee has complied with Federal statutes, regulations, and the terms and conditions of Federal awards
 - Audit Follow-Up - The auditor must follow-up on prior audit findings and report, as a current year audit finding, any material misrepresentation of the status of any prior audit findings. The auditor must perform audit follow-up procedures regardless of whether a prior audit finding relates to a major program in the current year.



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