

DISTINGUISHING BETWEEN A SUBCONTRACT AND A CONSULTING AGREEMENT

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OVERVIEW

- ✘ What is a subcontract
- ✘ What is a consulting agreement
- ✘ Appropriate uses of each
- ✘ Implications of using each
- ✘ Adding agreements after the award is made
- ✘ Examples

WHY DOES THIS MATTER TO ME?

- ✘ Subcontracts require sub-recipient monitoring and may eventually required disclosure per the Federal Funding Accountability and Transparency Act (FFATA)
- ✘ Costs for consulting not properly documented can be disallowed
- ✘ OIG Audits / Financial ramifications for getting it wrong and not properly documenting or not providing adequate monitoring

WHY DOES THIS MATTER TO ME?

- ✘ As the institutional representatives, we need to be able to distinguish between the two types of agreements in order to properly document the use of university resources and effort reporting

WHAT DO WE SEE IN OSR?

- ✘ Consultant letters with programmatic effort and the promise of institutional resources
- ✘ Faculty hesitant to involve collaborators as subcontractors, because subcontracts appear more complicated and costly than simple consulting agreements
- ✘ PIs who want to get the funding first and then sort out the details on the back end
- ✘ Grants.gov proposals often come in at the last minute and require a quick turn around
- ✘ How much time do you have to review the proposal?

WHAT IS A SUBCONTRACT?

- ✘ A financial and legal mechanism used to transfer an integral portion of the project's scope of work to another entity
- ✘ A formalized agreement that spells out the fiscal arrangements, defines the scope of work to be carried out by the subcontractor, and flows down the terms and conditions of the prime award to the subrecipient

WHEN TO USE A SUBCONTRACT

- ✘ When a collaborator will perform work as part of institutional appointment
- ✘ When a collaborator will have programmatic decision-making responsibility
- ✘ When a collaborator will manage technical and administrative aspects of a portion of the overall project statement of work
- ✘ When a collaborator will be using institutional facilities, students and staff

WHAT IS A CONSULTANT?

- ✘ An individual and/or firm/organization retained to provide professional advice or services for a fee
- ✘ Meets the independent contractor status established by the IRS
- ✘ Provides goods and services within normal business operations
- ✘ Provides similar goods or services to many different purchasers
- ✘ Operates in a competitive environment
- ✘ Can be an employee of the awardee organization in limited circumstances

WHEN TO USE A CONSULTANT

- ✘ When individual/firm rendering service does not participate in programmatic decision-making
- ✘ When consultant is affiliated with another academic institution, the services provided must be:
 - + outside of their institutional time and commitments
 - + without use of their institutional resources (including students and staff)
 - + paid directly to the consultant as an individual, above and beyond their institutional salary with associated tax liability

WHAT ABOUT “INTERNAL” CONSULTING?

- ✘ Faculty may serve as consultants on awards to the institution where they are employed only under very limited situations
- ✘ Payment to an employee for internal consulting is allowable only when all of the following conditions exist:
 - + When consultation pertains to a sponsored project, such work is specifically provided for in the award document or approved in writing by the sponsor
 - + When consultation is performed for a department different than the individual's primary department or involves a separate or remote location
 - + The work performed is beyond the scope of the individual's regular departmental responsibilities and is allowable under the terms of his/her regular appointment
 - + Must be “incidental work”
 - + Faculty are not “key personnel” for that particular grant or contract
 - + Consultancy not used to increment institutional base salary

Most institutions also require approval from the individual's departmental chairperson

CHARACTERISTICS OF SUBCONTRACTING AGREEMENTS

- ✘ Must abide by terms and conditions of subcontract, including the terms from the prime award
- ✘ Work within the budget
- ✘ Subcontract institution owns all the data, reports, drawings, materials and inventions developed under the agreement for work done at their institution
- ✘ Work is performed with “best or reasonable efforts”
- ✘ Free to publish and disseminate results

CHARACTERISTICS OF A CONSULTING AGREEMENT

- ✘ Awardee institution owns all the data, reports, drawings, materials and inventions developed under the agreement
- ✘ Publication rights can be prohibited
- ✘ Consultant work is often warranted
- ✘ Deadlines must be met
- ✘ Improper characterization of independent consultants can be costly to the hiring institution

DISTINGUISHING FACTORS

- ✘ IRS 20 factors (Employee vs. Independent Contractor)
- ✘ Will they be contributing to the project in a programmatic manner?
- ✘ Will they be considered as “Key Personnel” on your proposal? If so, how will effort be quantified?
- ✘ Will a consultant agreement interfere with faculty member’s institutional responsibilities? Consider conflict of commitment
- ✘ Where is collaborator going to do the work and will institutional resources be used?

WHAT IS NEEDED AT PROPOSAL STAGE?

× Subcontracts

- + Scope of work, budget, and F&A because institutional facilities are being used
- + Budget costs are included in the consortium line item
- + Sub-recipient's institutional approval, usually in the form of a letter of intent

WHAT IS NEEDED AT PROPOSAL STAGE?

✘ Consultants

- + Letter providing detail about services to be provided and rate schedule
- + Budget in consulting line item
- + Cost will generally include fees and may include travel and should be described in the prime's budget justification

ADDING SUBCONTRACTS AFTER THE FACT...

- ✘ Most federal sponsors have waived the need for prior approval as long as there is no change in the scope of work
- ✘ Will not occur frequently because they most likely indicate a change in the scope of work
- ✘ Will be expensive since sponsors will not award additional funds for the consortia's F&A and these costs come out of your direct costs
- ✘ Ensure letter of intent, biographical sketch, updated other support, budget, and scope of work are submitted by the new subcontracting institution

ADDING CONSULTANTS AFTER THE FACT...

- ✘ More common as unforeseen issues arise during the conduct of the project
- ✘ PI should be able to document that the services are essential, cannot be carried out by an employee, the most qualified person was hired, and the payment was appropriate
- ✘ Documentation and the consulting agreement should in place prior to the work being conducted
- ✘ PI must approve all invoices prior to being paid

CONSULTING AGREEMENT OR SUBCONTRACT?

“Specifically, I will provide approximately 100 hours of consulting at the rate of \$100/hour to assist with data management and operations and data analysis as needed.

Much of my research is devoted to the application and development of statistical methods for study design, management and analysis in resource-limited settings. Your proposed work dovetails nicely with these interests and I am enthusiastic about providing biostatistical support regarding your important work, e.g., I will provide expertise and assistance with the study’s design, implementation, data analysis, writing of reports, and preparing study findings for peer review publications.”

CONSULTING AGREEMENT OR SUBCONTRACT?

A collaborator agrees to supervise a post doctoral fellow and other personnel associated with the performance of specific aim 2 on your project. They will also assist the project PI with preparation of the progress reports and manuscripts resulting from the study. The collaborator plans to spend about 2 - 4% of their time per year on the project and will not request salary support.

CONSULTING AGREEMENT OR SUBCONTRACT?

A collaborator at another institution agrees to perform an analysis on your samples, provide the results and work with you on the interpretation of the data. They have the staff and facilities to perform the analysis and an excellent track record.