


May 14, 2013

R-1213-3A  
Chancellors



José A. Lasalde Dominicci, Ph.D.  
President (Interim)

### **APPLICABILITY OF 2 CFR 220 (FORMERLY OMB A-21) IN FIXED-PRICE, VENDOR CONTRACTS**



The purpose of this circular is to clarify if fixed-priced or lump sum contracts have to abide by the requirements and regulations expressed in OMB Circular A-21.

The exceptions expressed in this circular do NOT apply to research awards, cost reimbursement contracts and cooperative agreements.

The fixed-price contract is a type of contract where the University agrees to supply certain goods or services to the sponsor at a predetermined price. This means that, absent a price adjustment clause in the contract, the University assumes the risk that the performance costs will exceed the contract price. The Federal Acquisition Regulation in its subpart 16.2 defines the fixed price contract and its categories.

The norms established in Title 2 in the Code of Federal Regulations (2 CFR), subtitle A, chapter II, part 220 (formerly known as OMB Circular A-21) "Cost Principles for Educational Institutions," in its OMB A-21 applicability section 3a states the following regarding fixed-price contracts:

*"All Federal agencies that sponsor research and development, training, and other work at educational institutions shall apply the provisions of this Circular in determining the costs incurred for such work. **The principles shall also be used as a guide in the pricing of fixed price or lump sum agreements.**"*

Therefore, for fixed-priced, vendor agreements, University personnel should use 2 CFR 220 (OMB Circular A-21) **as a guide to determine the allowable costs of the project. The costs incurred for the fulfillment of the agreement are not subject to compliance with 2 CFR 220 (former OMB Circular A-21) cost principle after award and are not subject to post award audit.** Although 2 CFR 220 (former OMB Circular A-21) does not apply to incurrence of costs in a fixed price contract, it applies to the pricing itself and the fixed price contract is subject to Federal Acquisition Regulation (FAR) on the development of the cost structure and pricing.

In order to further assure compliance with these principles in fixed-price contracts (awarded directly or as pass-through), all University campuses are immediately requested to:

- Verify with their Finances, Sponsor and Legal Offices if a contract considered being a fixed-price contract is in effect a fixed-price contract. To determine if an agreement is either a federal award (subject to post award auditing) or a vendor relationship (fixed-price, not subject to post award auditing), substance is more important than the form. Therefore the University officials should use the following guideline contained in Circular No. A-133, in its subpart B.210, to make the judgment:

- ✓ Federal award. Characteristics indicative of a Federal award received by a subrecipient are when the organization:
  - ✚ Determines who is eligible to receive what Federal financial assistance;
  - ✚ Has its performance measured against whether the objectives of the Federal program are met;
  - ✚ Has responsibility for programmatic decision making;
  - ✚ Has responsibility for adherence to applicable Federal program compliance requirements; and
  - ✚ Uses the Federal funds to carry out a program of the organization as compared to providing goods or services for a program of the pass-through entity.
  
- ✓ Payment for goods and services. Characteristics indicative of a payment for goods and services received by a vendor are when the organization:
  - ✚ Provides the goods and services within normal business operations;
  - ✚ Provides similar goods or services to many different purchasers;
  - ✚ Operates in a competitive environment;
  - ✚ Provides goods or services that are ancillary to the operation of the Federal program; and
  - ✚ Is not subject to compliance requirements of the Federal program.
  
- Revise and assure that all active, pending and future contracts of this type have generated budgets and pricing in compliance with 2 CFR 220 (former OMB Circular A-21) principles. Attention should be given to consistency, allocation, and reasonability in all costs categories. For instance, if set by the university, a price rate proposed must be reasonable and not inflated. Moreover, use of 2 CFR 220 (former OMB Circular A-21) at the proposal stage will ensure that cost estimates are comparable to budgeting procedures used with other University contracts and will provide a basis for determining the reasonableness of the total contract price.
  
- Make sure that participants in fixed price agreements do not have conflicts with other grants subject to 2 CFR 220 (former OMB Circular A-21). For instance, the time dedicated by any personnel in a fixed price contract should be reasonable and not interfere with other compromises agreed on 2 CFR 220 (former OMB Circular A-21) applicable grants.
  
- Assure that all post award expenses (even though not 2 CFR 220 (former OMB Circular A-21) auditable at this stage for the university) comply with state and institutional regulations. The latter is important, since these expenses are subject to audit by the university's Office of Internal Auditors and the PR Government Comptroller's Office.
  
- Adequately track all program related accounts to appropriately determine any residuals or margins generating by the program or award, and hence the institutional liability or benefit.