

COOPERATIVE AGREEMENTS

The purpose of this outline is to provide a summary explanation of the University's policy vis-à-vis cooperative agreements. It is University policy to not enter into government contracts, but the University will accept appropriately crafted cooperative agreements. This outline first defines a "cooperative agreement," describes the rationale underpinning the University's policy, briefly explains of what distinguishes cooperative agreements from government contracts, and concludes with some suggested prefatory language and issues to consider when entering into cooperative agreements.

- I. The University does not enter into government contracts, but will consider entering into appropriate cooperative agreements.**
- II. What is a cooperative agreement?**
 - a. Cooperative Agreement:** an agreement transferring something of value to carry out a public purpose where there is substantial involvement between the receiving entity and the government; the parties work together, but the government expects nothing directly in return.
 - b.** For example, the University has entered into cooperative agreements with school districts in which it agreed to provide educational instruction (for example, to members of the public) and with other government agencies to conduct research projects.
 - c.** By contrast, a "government contract" is an agreement by which the government acquires property, goods, or services for the direct benefit of the government.
- III. Why has the University taken this position?**
 - a.** Contracting with the government may limit our ability to favor co-religionists in our personnel decisions.
 - b.** Government contractors are required to meet specific, stringent regulatory compliance obligations.
 - c.** These obligations impose significant administrative costs and burdens.
 - d.** Contracting with the government may involve unknown future regulation and obligations.
 - e.** Parties to cooperative agreements are generally not subject to the same level of regulatory obligations.
- IV. How to determine whether an agreement is a "government contract" or a "cooperative agreement"?**
 - a.** Determine the primary purpose of the transaction.
 - b.** Is the government purchasing goods or services for its own primary benefit?
 - If yes, then it is likely a government contract.
 - c.** Is the government transferring something of value to carry out a public purpose?
 - If yes, then it may be a cooperative agreement.

- d. General Operating Rule: If an agreement with a governmental contracting agency contemplates providing goods and/or services in exchange for payment, it is likely that it is a government contract.

V. What language should be used to delineate an agreement as a “cooperative agreement”?

- a. A cooperative agreement cannot directly benefit the government, but must instead have as its principal purpose the transfer of a thing of value to carry out the public purpose of support or stimulation of research (for the benefit of the public). It is therefore important to add “prefatory language” explaining the parties’ intent and the purpose (i.e. the substantive public benefit) of the cooperative agreement.
- b. Recommended prefatory language:

This agreement is made and entered into by and between [government agency] and Pepperdine University (“University”). It is the parties’ intent that this agreement is a cooperative agreement for the benefit of the public and that entering into this agreement does not trigger any compliance or reporting obligation on the part of the University. This agreement does not in any way enlarge the University’s obligations under federal or state law regulation.

Whereas, [government agency] has established a need for certain [research projects/educational instruction] regarding [fill in with more detail], which will provide a benefit to the public;

Whereas, University has proposed to provide such [research projects/educational instruction] for [government agency]; and has persons specifically trained and experienced and competent to perform the [research projects/educational instruction] required and such [research projects/educational instruction] are needed on a limited basis;

Now, therefore, in consideration of the mutual covenants and agreements stated herein, and the funding for [research projects/educational instruction] hereinafter described, the parties hereto do mutually agree as follows:

VI. Issues to Consider When Entering Into Cooperative Agreements

- a. The cooperative agreement should be clear with respect to the scope of the anticipated collaboration [research project/educational instruction].
- b. The cooperative agreement should reflect an actual collaborative process between the University and the government agency (i.e. both parties should bring something to the table and work together for a purpose that does not directly benefit either one).
- c. The cooperative agreement should contain a provision clarifying the relationship between the University and the government agency. The University should consider inserting the following provision, if such a provision does not already exist in the cooperative agreement: “University, in providing [research/educational instruction] under this Agreement, is an independent agent and shall not act as, or be an agent or employee of, [Government Agency].”

- d. The cooperative agreement should sufficiently and appropriately limit the University from being required to comply with federal compliance and reporting obligations.
- e. The cooperative agreement should consider payment as “funding” rather than direct compensation (*i.e.* the contract should speak to the funding available for purposes of the cooperative effort rather than compensation.)

VII. Additional Tips

As with any agreement, a cooperative agreement should include provisions which address the following issues.

- What are the terms of the agreement?
- What are the requirements for payment/funding?
- How are the fees and expenses paid?
- How does the agreement end (terminate)?
- Is there an indemnification/hold harmless clause?
- Is there a provision for insurance?
- Is there a provision for attorney fees?
- Is there a modification/merger clause?
- Is there a governing law or forum selection clause?
- What about arbitration clauses?
- Is there a place for the signature of both parties?