



Problematic Grants and Contracts Language For the Department Research Administrator (DRA)

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Learning Objectives

- Develop an understanding of some common troublesome terms found in grants and contracts.
- Discuss those terms that may be potentially problematic for the DRA, the PI and the Institution.
- Learn best practices and tips in addressing problematic terms and managing compliance with terms agreed upon by the parties.





Grants & Contracts Life Cycle

Request For Proposal
RFA – RFTO - FOA

Proposal
Development
and Submission

Award
Negotiation and
Acceptance

Award Setup

Award
Management

Award
Closeout





Grants and Contracts Terms

- Most grant awards from the Federal Government, contain negotiated terms by either the Federal Demonstration Partnership (FDP) or governed by the PHS/HHS grants policies and for contracts, terms by the Federal Acquisitions Regulations (FARs).
- Grants and contracts awards from non-federal sponsors and industry may contain troublesome terms/clauses that institutions have to negotiate alternatives or remove.





Common Problematic Terms a DRA Periodically Encounters

- Publication Rights and associated FAR Clauses
- Export Controls
- Intellectual Property Rights/Ownership
- Institutional Risks and Financial Matters





Publication Rights

- The primary mission of most academic institutions is to advance and disseminate research results and information.
- Academic institutions are committed to maintaining a teaching and research environment that is open for the free exchange of ideas which contribute to the progress of research in all disciplines.





Publication Restrictions

- Because of their mission and commitment to the free exchange and dissemination of knowledge, most universities generally cannot accept publication restrictions such as:
 - ❖ Prior approval to publish;
 - ❖ To disseminate information;
 - ❖ Excessive delay in publication.





Federal Contracting Clauses and Publication Restrictions

- FAR 52.227.17 Rights in Data – Special Works.
- This FAR Clause includes publication restrictions and loss of data rights.
- Practice for academia is to request removal of the Special Works clause & replace with **FAR 52.227.14 Alternate IV - Rights in Data** which gives the contractor the right to copyright all data first produced in the performance of the work.
- If push back from sponsor – depending on your institution, one alternative is to request sponsor identify specific deliverables or research areas applicable to this clause.





Non-Federal Contracting Clauses & Publication Restrictions

- For non federal and industry sponsors, generally the restriction language will be spelled out in the agreement.
- Some non-federal sponsors will duplicate the FAR language in their agreements.
- Publication rights may appear in the FOA and a great opportunity to address up front at the proposal stage.





Publication Restrictions

- Generally, an academic institution will always assert rights to publish and will not grant editorial or approval rights.
- Publication clauses which convey veto or censorship authority from sponsor is generally unacceptable by academic institutions.
- Publication delays of 60 up to 90 days may be acceptable to offer comments or suggestions from sponsor.
- Limited prepublication review may be acceptable to allow sponsor to ensure nondisclosure of proprietary information or patent rights.
- Author should have final decision on content.





Export Controls

- An Export is the transfer of items, materials, information, software, technology or other unclassified, but restricted data to any person outside the U.S. – including to a U.S. citizen abroad.
- Deemed Export
Releasing, furnishing, showing or disclosing export controlled technical information to a non-U.S. Person, even in the U.S., is considered or “deemed” to be an export to the home country(ies) of the non-U.S. Person.





Export Controls - Persons

U.S. PERSON

- ✓ Citizens of the U.S.
- ✓ U. S. Permanent Resident or green card holder
- ✓ Protected Political asylee/refugee

NON- U.S. PERSON

- ✓ Not a U.S Citizen
- ✓ Not a U. S. green card holder
- ✓ Not a Protected Political asylee/refugee
- ✓ A FOREIGN NATIONAL IS A NON-US PERSON





Export Controls Laws

Federal Agencies for Universities

- Payment Terms Implemented by the Department of Commerce through its Export Administration Regulations (EAR).
- The Department of State through its International Traffic in Arms Regulations (ITAR)
- The Treasury Department Office of Foreign Assets Control (OFAC) administers and enforces economic and trade sanctions -imposed against specific countries for reasons of foreign policy, national security, or international agreements.





Export Controls

The Government's Concerns

- The Export-actual or potential military applications or economic protection issues.
- The Destination country, organization, or individual.
- Declared or suspected End Use or the End User of the export.





Export Controls Academia Concerns

Export controls directly impact the university personnel's ability to:

- Ship items out of the U.S. – including project deliverables.
- Travel Internationally with equipment and laptops.
- Collaborate with foreign colleagues/institutions.
- Allow participation of foreign students/researchers in research activities.
- Provide services to foreign persons, in both U.S. and abroad.
- Conduct research freely without having to implement restrictive and inconvenient security access controls.
- **Failure to comply with U.S. export and sanction laws can result in severe penalties.**





Fundamental Research & Export Controls

➤ Exclusion for Fundamental Research if:

- Information is ordinarily published;
- Shared broadly within the scientific community; and
- Available to the public and within the public domain.

➤ Research will not be considered fundamental if:

- Publication restriction of scientific and technical information resulting from the project is accepted.
- Federal funded research and specific access and dissemination controls protecting information resulting from the research are applicable i.e. classified research.





Intellectual Property (IP)

- ❖ Intellectual Property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.





TYPES OF IP IN ACADEMIA

- Inventions
- Copyright
- Database Rights
- Computer Software
- Designs





Elements of a typical IP Policy

- Disclosure Obligation
- Ownership Determination
- Filing of Patent Applications
- Commercialization
- Royalty Sharing
- Release of Invention
- Copyrights
- Computer Software





Intellectual Property Ownership

- ❖ Sponsor often vests all rights, title and interest of the IP to the academic institution.
- ❖ Academic institutions usually strive to have sole ownership to IP property that they generate.
- ❖ IP can also be jointly owned between institution and sponsor.
- ❖ Under the **Bayh-Dole Act of 1980**, institutions who conduct research using federal grants are permitted to elect title and exclusively own the resulting intellectual property providing the basis for universities to own, manage, and license IP.





IP Licensing

- What purpose does a License serve?
- Types of Licenses
- Sample Text found in Sponsored Agreements





Institutional Risks and Financial Matters

➤ Payment Terms

- Billing/invoicing
- Fixed price contracts

➤ Inspection

- Review
- Approval
- Testing

➤ Deliverables/SOW

- Reporting
- Milestone Requirements

➤ Re-performance





Institutional Risks and Financial Matters

- Termination
 - The Gold Standard- Everyone's Goal
 - Areas for Negotiation to Mitigate Risk
 - Grants, Contracts , and International Work

- Re-Budgeting
 - Uniform Guidance





OTHER CONTRACT CONSIDERATIONS FOR THE DRA

- CONTRACTING ISSUES FOR GLOBAL AND INTERNATIONAL AGREEMENTS
- MASTER AGREEMENTS
- FLOW DOWN CLAUSES
- INDEMNIFICATION LIABILITY
- PROPRIETARY/CONFIDENTIAL INFORMATION
- USE OF NAME/TRADENAME
- DATA USE AGREEMENTS AND SECURITY





Tips and Best Practices

- ❖ Keep lines of communication opened internally with PI and central staff.
- ❖ Know your institution's policies and history on acceptable terms.
- ❖ Read over your agreements and outline sponsor terms pertinent to your PI's obligations .
- ❖ Develop a cheat sheet for terms specific to the project.
- ❖ Keep track of contract deliverables for reporting purposes.



THANK YOU FOR ATTENDING!



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