

Contracts in Research Administration

Dorothy A. Spurlock
Director, Research & Sponsored Programs

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Introduction

This session is an open discussion concerning stand-alone agreements, so please feel free to share your own experiences, both positive and negative

Disclaimer

I AM NOT A LAWYER

Guiding Principle

**If it is not in the agreement,
it wasn't part of the agreement.**

What Is a Contract

- A contract is a set of promises to do or not do something that creates a legal duty to perform the promise.
- A contract is a legally enforceable promise.
- It does not matter what the document is titled; contract, agreement, etc.

What Makes A Contract

- **Offer** - may be for a good or a service - offer allows someone to promise to do something.
- **Acceptance** – the party capable of accepting the “offer”, does so.
- **A counter-offer is a rejection of the offer**

Consideration

- **Consideration** – means something of value must be exchanged
- **In a contract, consideration is mutual** – in that both parties must receive something of value
- **In research, the value exchanged is usually money**



Fundamental Components

Contracts should include the following key information:

- **Scope/Statement of Work (SOW)**
- **Program requirements:**
 - A) Period of Performance
 - B) Cost & Cost-sharing
 - C) Payment
 - D) Billing / Final invoice
 - E) Intellectual Property
 - F) Reports/Deliverables
 - G) Termination
 - H) Notices
 - I) Publications
 - J) Debarment/Suspension

Fundamental Components - 2

- **Period of Performance is a key contract element**
 - * when does the contract start and when does it end
- **Period of Performance creates the timeline for other terms and conditions:**
 - SOW
 - Payment and Invoicing
 - Termination or Breach of Contract
 - Deliverables/Reports

Fundamental Components - 3

- **Payment:**
- **Cost Reimbursement vs. Fixed-Price** is a key element - how will this work be paid for
 - * Cost-Reimbursement - requires the performer to work on the SOW until the funds are spent
 - * Fixed Price - the SOW must be completed regardless of actual costs

Fundamental Components - 4

- **Payment language to look-out for:**
- Final payment upon acceptance of final report – commercial term means sponsor has final say based on their inspection; can withhold payment. Seek to use receipt of deliverable
- Payment made upon satisfactory report/deliverable – allows sponsor to reject item; can withhold payment. Seek to use upon submission

Fundamental Components - 5

- **Termination- Material Breach - Notices**

- * Termination – how many days notice; how will it occur; required for a good faith effort/cure period before termination

- Is voluntary (without cause) termination acceptable

- * Material Breach – breach allows harmed party to terminate contract; cure period – can legal remedies be pursued

- * Contract Notices – who, how, when and where

Fundamental Components - 6

- **Billing – Final Invoice are key elements**
 - * how often to issue payment or receive payment
 - * when is the final invoice due in or out
 - * are special forms required or other special details



Negotiable Components

- Publications Rights
- Indemnification
- Hold Harmless
- Warranty/Guarantee
- Binding Arbitration
- Governing Law
- Use of Name
- Patents/Intellectual Property/Invention
- Confidential Information



Negotiable Components - 2

- **Publications** — academic institutions want to publish early and often - students and faculty —
- Some sponsors don't support this philosophy —
ex: industry
- Good publication language: right to use data/information developed during project

Negotiable Components - 3

- **Indemnification – Hold Harmless – Defend**
- **Indemnify** – the right to receive payment, repair or replacement from another for a incurred liability (Ohio does not allow public institutions to do)
- **Hold Harmless** – promise not to hold the other party responsible if the other party causes loss or damage (Ohio does not allow public institutions to do)
- **Defend** – provide or reimburse for a defense attorney and litigation cost
- **Warranty/Guarantee** – research/development cannot be guaranteed; reasonable effort is better

Negotiable Components - 4

- **Binding Arbitration**

- * dispute will be settled by Arbitrator only; waives all rights to jury trial (Ohio does not allow with public inst)

- **Governing Law**

- * if a dispute occurs, what state will the dispute be settled (Ohio does not allow with public inst)

- **Use of Name**

- * advance written approval required to use

Negotiable Components - 5

- **Patents/Intellectual Property/Invention**

***Intellectual Property Ownership** - In accordance with ORC § 3345.14, the University shall own all rights, title and interests, including all intellectual property rights, in and to all materials, inventions, discoveries, works of authorship, software, information and data conceived or developed by any employee of the University, which includes the rights to any intellectual property developed using institutional facilities.

- **Confidentiality/Non -Disclosure**

* not revealed; treated as private and not for publication; can be sensitive

Certs, Reps and FAR Clauses

- **Certs and Reps** are pretty straight forward and you may be able to negotiate removal of some. For example: Drug-free workplace place means employee drug testing
- **Federal Acquisition Clauses**
 - * some are required and some are negotiable
 - * the title of the clause doesn't always represent the true purpose of the clause
 - * some clauses are specific to universities (audits, allowable costs)
 - * some clauses address reporting requirements
 - * do your homework

Contact Information

Dorothy A. Spurlock

Director

Research & Sponsored Programs

Phone: 419-530-2844

Email: dorothy.spurlock@utoledo.edu