



**SAN DIEGO STATE
UNIVERSITY**

Research Foundation

Understanding Potential Contract Issues

Learning Objectives

- ① Tips for reviewing and negotiating agreements
- ① Streamlining for efficiency
- ① Review of sample language/rationale for revision requests



Create a review baseline

- ① Standardized review document
 - ① Meets institutional needs
 - ① Documents process of review
 - ① Captures contractual concerns



Snapshots...

BUDGET & SPONSOR

AWARDED BUDGET INFORMATION

Budget Period Start: Budget Period End:

Budget Period Awarded Amount: F & A Awarded:

F & A Rate: % F & A Basis: MTDC ▼

SPONSOR INFORMATION

* Funding Agency: 

Sponsor ID: Category: State of California Sponsor Type:

Award Type: Cost-Reimbursable Contract ▼ Award Mechanism: Original NOA ▼

☐ AB20	☐ Grant Agreement	☐ PO
☐ Collaborative Agreement	☐ Intergov Personnel Agreement	☐ Prev Negotiations
☐ Cooperative Agreement	☐ Joint Venture Agreement	☐ SDSURF Template
☐ County of SD Proforma	☐ Master Agreement	☐ Subaward/Subcontract
☐ CRADA	☐ MOA/MOU	☐ Task Order
☐ FDP Template	☐ Other	

Entire Period of Performance: to

Total Agreement Amount:

Originating Sponsor: 

OS Category: Federal Agencies 

OS Award ID: CFDA Number:

TERMS & CONDITIONS

AWARD TERMS AND CONDITIONS

Select Terms that Apply

- ☐ Audit
- ☐ Budget
 - ▼ Contingency Clause
 - ▼ Percentage Withheld
 - ▼ Program Income
- ☐ Closeout Reporting
- ☐ Code of Federal Regulations (CFR)
- ☐ Confidentiality
 - ▼ HIPPA/PHI/PII Requirements
 - ▼ McKee Language Included
 - ▼ Protecting Controlled Unclassified Information (e.g. NIST 800-171 / DFAR 252-204-7012 / FAR 52.204-21)
- ☐ Conflict of Interest
- ☐ Cost Share *
 - ▼ 3rd Party Cost Sharing MOU
- ☐ Data Rights
- ☐ Dispute Resolution
 - ▼ Arbitration
- ☐ Employment Eligibility Verification *
- ☐ Equipment
 - ▼ Equipment Budgeted
 - ▼ Sponsored Furnished Property *
- ☐ Export Control/ITAR *
- ☐ False Claims Act *



Snapshots...

- ☐ Federal Acquisition Regulations (FARs)
- ☐ FFATA/Executive Compensation *
- ☐ Governing Law
- ☐ Hiring Restrictions *
 -
 -
- ☐ Indemnification
 -
 -
- ☐ Insurance *
 -
 -
 -
 -
- ☐ Intellectual Property/Patents *
 -
- ☐ International Activity *
- ☐ Invoicing/Payment
 -
 -
- ☐ Joint Travel Regulations
- ☐ Publishing/Disclosure
 -
 -
 -
 -

- ☐ Records Retention
 -
- ☐ Responsible Conduct in Research *
- ☐ Small/Minority/Women/Disabled/Veteran-owned Business *
- ☐ Subcontracting
 -
 -
- ☐ Termination/Disentanglement
 -
 -
- ☐ Text Messaging While Driving
- ☐ Trafficking in Persons *
- ☐ Work Standards

Additional Notes:

CORRECTIONS

Administrative Corrections

- ☐ Attachments/Exhibits
- ☐ Dates
- ☐ F & A Calculations/Rate Agreement
- ☐ Funding Mechanism
- ☐ Notice Information
- ☐ Recipient Name
- ☐ Removal of Inappropriate Clauses
- ☐ Statement of Work
- ☐ Tax Status
- ☐ URLs (broken)
- ☐ Other Administrative Corrections

Key Terms of Concern

- ⊙ Administrative
 - ⊙ Party names, addresses, contact information
- ⊙ Type of Contract
 - ⊙ Cost Reimbursable v Firm Fixed Price v Quasi Mix
- ⊙ Dates/Scope of Work/Budget
 - ⊙ PI/PD – review and approve
- ⊙ Invoicing
- ⊙ Termination



Always try to obtain...

- ⊙ Confidentiality – McKee or by law
- ⊙ Indemnification – Mutual
- ⊙ Intellectual Property Ownership
- ⊙ Publications – not restrictive
- ⊙ Record Retention – institutional standard
- ⊙ Mutual Termination



Confidentiality - Rebuttal

- ① Rebuttal:
SDSU's Academic Senate Policy prohibits classified and "otherwise privileged research." Otherwise privileged research is defined as "requests from sponsors or others for the maintenance of confidentiality. However, the policies do allow for a review, comment/redaction period not to exceed 90 days for the protection of proprietary information. Below is suggested the alternative language:



Confidentiality: Alternative Language

Seller reserves the right to make or permit to be made scholarly disclosures of the results of the project, including without limitation, publication in scholarly journals, presentations at academic and other conferences, disclosures to **Seller** and non-**Seller** scholars, and disclosures in grant and funding applications. **Seller** shall provide **Buyer** a copy or notice of any disclosure of the results of the project. No less than 15 business days prior to public disclosure of any results of the project, Project Director will provide **Buyer** a manuscript or other draft of the proposed public disclosure. Within 15 business days following receipt thereof, **Buyer** will notify Project Director in writing if the proposed disclosure contains any **Buyer** confidential information and specify the portions of the proposed disclosure requiring redaction. In the event **Buyer** identifies Intellectual Property in which **Buyer** has rights and which is likely to be adversely affected by such disclosure, **Buyer** may request that the public disclosure be delayed or amended for an additional 60 days to allow the filing of appropriate Intellectual Property protection. If **Buyer** fails to notify **Seller** and the Project Director in writing and in a timely manner of any objections to the proposed disclosure, **Buyer** right to object under this provision will be deemed to be conclusively waived. **Seller** further agrees to provide, in accordance with customary standards, an appropriate acknowledgement in any such publication of **Buyer** support or other role in the Project.



Indemnification - Rebuttal

- ◎ **SDSU Research Foundation is an auxiliary to San Diego State University**, one of 23 campuses in the CSU system. As a result, **SDSU Research Foundation** is required to include the university and the CSU board of trustees in any indemnification language contained in third party agreements. **SDSU Research Foundation** respectfully requests the following language be used as indicated as below.



Indemnification: Alternative Language

Contractor shall defend, indemnify and hold harmless **the State of Iowa**, its officers, employees and agents from and against any and all liability, loss, expense, attorney's fees, or claims for injury or damages arising out of the performance of this Agreement but only in proportion to and to the extent such liability, loss, expense, attorney's fees or claims for injury or damages are caused by or result from the negligent or intentional acts or omissions of **Contractor**, its officers, agents or employees.

The **State of Iowa** shall defend, indemnify and hold harmless **Contractor**, San Diego State University, Trustees of the CSU, the State of California, its officers, employees and agents from and against any and all liability, loss, expense, attorney's fees, or claims for injury or damages arising out of the performance of this Agreement, but only in proportion to and to the extent such liability, loss, expense, attorney's fees or claims for injury or damages are caused by or result from the negligent or intentional acts or omissions of the **State of Iowa**, its officers, agents or employees.



Intellectual Property: Rebuttal

- ⊙ **SDSU** as a state institution **and Seller as an auxiliary to SDSU** cannot waive its right to ownership rights related to intellectual property, including those funded with Federal financial participation.

45 CFR § 92.34 states that “[t]he Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes: (a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and (b) [a]ny rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.”

Nothing in § 92.34 provides the prime grantee/contractor with provisions for owning the data and/or intellectual property resulting from Subcontractor(s). However, §92.34 does require that Subcontractors must provide the granting agency a “royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes” such works. In accordance with § 92.34, Seller will provide the same provisions for **Buyer**.



Intellectual Property: Alternative Language

Contractor will provide **Buyer** with an irrevocable, fully paid up, non-exclusive, license. **Contractor** will continue to own the intellectual property rights and can use the intellectual property for any other purpose. Through the license, **Buyer** will have a free license to use the intellectual property or allow anyone else to use the intellectual property on its behalf as provided in 45CFR §92.34.



Publication Rights - Rebuttal

- ⊙ Article 22, “Release of Information” as written, **restricts SDSU Research Foundation’s (and SDSU’s) ability to publish, which violates the San Diego State University Academic Senate policy.** Further, prohibition from freely publishing is contrary to the purpose of academic professionals. For example, the project director, Dr. G and any other individuals, including students involved with the project would not be able to discuss, present or publish any portion of the work or related work funded by the agreement, including posters and/or presentations at professional symposiums.

The SDSU Academic Senate policy does allow for brief delays in the publication for intellectual property concerns, redaction of proprietary or sensitive information and/or other propriety purposes or for sponsor review and comment on manuscripts (not to exceed 90 days) provided that the sponsor agree that no changes in the manuscript be made without the consent of the author. **SDSU Research Foundation’s** preference is to revise the text as indicated below.



Publication Rights: Alternative Language

Draft publications and/or presentations shall be submitted for review to **Buyer** at least sixty (60) days prior to submission for publication and/or presentation. **Buyer** reserves the right to comment and request reasonable modifications and/or redactions based upon the need to protect proprietary information, including other Protected Individual Information (PII), which would jeopardize **Buyer's** proprietary and protected information. **Seller** will work with **Buyer** to appropriately modify the proposed publication for the protection of proprietary information and/or data. The delay will not exceed 90 days total. A non-response by the **Buyer** will be considered concurrence that materials presented for publication and/or presentation are acceptable.



Record Retention - Rebuttal

- ① **SDSU Research Foundation** would request that the retention period be adjusted to three (3) years to reduce administrative burden and match federal retention period requirement as stated in 2CFR Part 200.333.



Record Retention: Alternative Language

Revise language appropriately to reflect the three (3) year retention period maybe as simple as adding:

...for a period not to exceed three (3) years after the final payment has been made, in accordance with federal standards (2 CFR Part 200.333).



Exclusive Termination - Rebuttal

- ② In the unlikely event that the scope of work cannot be performed by the project staff and no suitable replacement can be located in a reasonable amount of time, **SDSU Research Foundation** requests mutual termination be incorporated into the contract. Please see suggested language below.



Exclusive Termination: Alternative Language

Either Party may, by thirty (30) days written notice stating the extent and effective date, terminate this Agreement for convenience in whole or in part, at any time. **Seller** shall be entitled to payment of allowable and any uncancellable costs up to and including date of termination or such reasonable part of the fee as shall apply to services properly performed prior to the date of postponement, suspension or termination.



Avoid whenever possible...

- ⊙ Employer/Employee Implied Relationship
- ⊙ Evergreen
- ⊙ Exclusivity
- ⊙ Export Control/Controlled Unclassified Information
- ⊙ Joint Travel Regulations
- ⊙ Source Documentation
- ⊙ Venue of law - outside of local area
- ⊙ Warranties



Employer/Employee Implied Relationship: Rebuttal

- ① Please delete the text in Article X. as indicated. Inclusion of the text as written implies an employee/employer relationship. Further, SDSU Research Foundation's Human Resources would need to be involved in any personnel action, including the removal of personnel from the project. Exclusion of SDSU Research Foundation from the disciplinary process would imply that the individuals working on the project are employees of XXXXX.



Employer/Employee Implied Relationship: Alternative Language

At all times during the term of this Agreement, **Contractor** shall be an independent contractor and shall not be an employee of **Buyer**. **Buyer** shall have the right to control **Contractor** only insofar as the results of **Contractor's** services rendered pursuant to this Agreement and assignment of personnel. **Buyer** shall not have the right to control the means by which **Contractor** accomplishes services rendered pursuant to this Agreement. Further, if **Buyer** is dissatisfied with any of the Contractor's personnel, Buyer and the Contractor will consultant and agree upon actions required to ensure qualified are personnel provided.

Notwithstanding any other **Buyer**, state, or federal policy, rule, regulation, law, or ordinance to the contrary, **Contractor** and any of its employees, agents, and subcontractors providing services under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any and all claims to, any compensation, benefit, or any incident of employment by **Buyer**, including but not limited to, eligibility to enroll in any retirement program or other defined benefit plans as an employee of **Buyer** and entitlement to any contribution to be paid by **Buyer** for employer contributions and/or employee contributions or other benefits.



Evergreen: Rebuttal

- ① SDSU Research Foundation is restricted from entering into agreements beyond a five year duration that provide for automatic renewal.



Evergreen: Alternative Language

Article X. Term. This Agreement shall commence as of the Effective Date first written above and shall remain in full force and effect for a period of five (5) years therefrom (the “Initial Term”). Upon the expiration of the Initial Term, this Agreement shall renew each year on the anniversary of the Effective Date for an additional one (1) year term (“Renewal Term”), upon acknowledgement from both Parties.



Exclusivity: Rebuttal

- ③ The language as written would prohibit **SDSURF, Dr. XXX and staff** from working with any other organization for similar, but different work for the duration of the award. SDSURF cannot agree to this condition. Please delete the language as indicated.



Exclusivity: Alternative Language

The Parties understand and agree that nothing herein shall be interpreted as establishing any form of exclusive relationship between **Seller** and **Buyer**. The Parties further understand and agree that nothing herein shall be interpreted as precluding either party from entering into agreements similar to this Agreement with third parties or from conducting educational, research or other activities that may involve the same or similar subject matter as the Project, the conduct of which is outside and independent of this Agreement, provided that any such educational, research or other activities are not done in a manner that is inconsistent with the rights and obligations of the parties to this Agreement.



Export Control/CUI: Rebuttals

- ③ **SDSURF** requests the deletion of **16 – Export Controls** as written, however, the inclusion of the following language addressing export controls would be acceptable.
- ③ **SDSURF** requests the deletion of **F.5 – Export Control** as written, due to **Dr. X's** scope of work being protected by the Fundamental Research Exemption for Basic Research. However, the inclusion of the following language addressing export controls would be acceptable.



Export Control/CUI: Alternative Language

Each Party shall comply with all applicable export control laws and regulations. Neither Party shall provide export controlled information to the other Party without prior written approval by the other Party's Authorized Export Control Official. The burden shall be on the Party disclosing the export controlled information to make it only available to individuals as designated by the receiving Party. Any oral disclosure of export controlled information, shall be reduced to writing and provided to the other Party's Authorized Export Control Official within 30 days of disclosure. Each Party shall assure that the material containing the information carries sufficient legends warning of its export controlled and proprietary nature. A Party shall not remove legends from material received under this Agreement without written permission of the Party supplying the material. Authorized Export Control Official for **SDSURF** is **Zena Hovda, Export Control Officer, zhovda@sdsu.edu, (619) 594-0758.**

Because **San Diego State University Research Foundation** is an auxiliary of an institution of higher education that has many foreign persons as employees and students, and conducts its activities under the fundamental research exclusion, **SDSURF** may at its sole discretion elect to not accept Export Controlled information from **Buyer**. Further, **Buyer** acknowledges that **Seller** will be employing a foreign national from the Country of **France** to assist in the performance of the scope of work.



Joint Travel Regulations: Rebuttal

SDSURF is subject to FAR Subpart 31.3—Contracts with Educational Institutions, as such – please note provision 31.303(b)

31.303 Requirements.

(a) Contracts that refer to this [Subpart 31.3](#) for determining allowable costs under contracts with educational institutions shall be deemed to refer to, and shall have the allowability of costs determined by the contracting officer in accordance with, the revision of OMB Circular A-21 in effect on the date of the contract.

(b) Agencies are not expected to place additional restrictions on individual items of cost.

Please revise to change from 31.2 to 31.3. **Note: SDSU Research Foundation would flow appropriate FAR language to subrecipients based on type of organization.**



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Source Documentation: Rebuttal

- ② SDSU Research Foundation maintains robust financial accounting records according to U.S. Federal Office of Management and Budget standards. Support documents will be made available upon request. Providing support documents at the time of invoicing is unduly burdensome.



Source Documentation: Alternative Language

SDSU Research Foundation respectfully requests to have the language related to support documentation in this clause removed or revised to read “Support documents will be made available upon request.”



Venue of Law: Rebuttal

- ② SDSURF requests that the agreement remain silent on the venue of law or reference the laws of the United States of America.



Warranties: Rebuttal

- ③ **SDSURF** as a non profit auxiliary of an institution of higher cannot guarantee and warrant. **SDSURF** respectfully requests a revision of the Article title to REPRESENTATIONS and change of language as shown below.



Warranties: Alternative Language

Seller will conduct the Project in accordance with generally-accepted professional standards of workmanship and effort at a quality comparable to research performed at major public and private research universities within the United States. Buyer understands that all research is experimental in nature and that the outcome of the Project is inherently uncertain and unpredictable. Buyer agrees and acknowledges that Seller has not made and does not make any representation, guarantee or warranty, express or implied, regarding the results of the Project. Excepting only as expressly provided in this Agreement, Seller makes no other warranties, express or implied, including warranties or merchantability or fitness for a particular purpose, and hereby disclaims all such warranties as to any matter whatsoever including, without limitation, warranties with respect to: (i) the project and any results of the project; (ii) data, reports, information or research provided by either the Seller or Buyer, and (iii) any invention or product, or ownership thereof, whether tangible or intangible, tested, conceived, discovered, or developed in the Project or in connection with conducting the Project under this Agreement.



Moving forward...

- ① Institutional risk threshold
- ① Established parameters for terms and conditions – what is acceptable?
- ① Subject matter experts (SMEs)
- ① Create a toolkit of resources
 - ① Contract Rebuttals
 - ① Negotiation Notes



Institutional Risk Threshold

- ② What types of work would be unacceptable?
- ② Establish with appropriate SMEs what terms need additional review.



Deal Breakers and Makers: Getting to Win-Win

- ② Determine what terms can are the deal breakers
- ② What terms are acceptable if revisions are declined



Establish SMEs

- ① Know your SMEs
- ① Establish a good working relationship
- ① Don't overuse – develop your toolkit language for repetitive use



Snapshots of the Toolkit: Contract Rebuttals

- ⊙ Contract rebuttal language
- ⊙ Minor editing
- ⊙ Major timesaver
- ⊙ Consistent negotiations

PC > r801574053 (\\filer\srcc\Users\sNordahl) (K:) > Contract Rebuttals

Name	Date modified	Typ
County of San Diego Negotiation Notes	8/29/2018 10:02 AM	File
CSU Executive Orders	10/30/2017 2:44 PM	File
DoD T&C	11/28/2018 7:44 AM	File
Export Control T&C	12/5/2018 10:11 AM	File
Intellectual Property T&C	11/27/2018 9:10 AM	File
KPBS Production Agreement Examples	10/4/2018 10:37 AM	File
SDSURF Documents	11/20/2018 5:35 PM	File
USC Terms and Conditions	12/12/2017 9:45 AM	File
UTC518 Terms and Conditions	7/3/2018 10:57 AM	File
1 - Docusign Awards	5/16/2018 9:00 AM	Mic
1 - Trans letter	7/10/2017 2:36 PM	Mic
1- Proposal Terms and Conditions Except...	3/13/2017 2:24 PM	Mic
1- Proposal Terms and Conditions Except...	9/26/2016 11:28 AM	Mic
1- Proposal Terms and Conditions Except...	11/18/2016 11:48 ...	Mic
2009 Fictitious Business Name Statement	3/12/2010 10:36 AM	Ad
2013-Scope of Authority w Hirshman Me...	12/9/2015 9:18 AM	Ad
Agreement Amount - Payment Terms	11/5/2013 7:26 AM	Mic
ALTERNATIVE DISPUTE RESOLUTION	6/8/2018 9:13 AM	Mic
Amendments	10/6/2017 12:22 PM	Mic
Arbitration and Disputes	11/30/2018 7:01 AM	Mic
Audit - Alternative Language	9/17/2013 11:14 AM	Mic
Authorized Institution Official - Renée Le...	1/23/2017 10:06 AM	Mic
Authorized Institution Official - Sandra M...	7/3/2018 9:20 AM	Mic
Board Auth Signatures 12-20-2011	5/25/2012 2:41 PM	Ad
Business Associate Terms and Conditions...	7/22/2013 11:35 AM	Mic
Chancellor's Office - McKee Transparenc...	1/22/2018 2:08 PM	Ad
Change Orders and Extensions of Agree...	5/17/2018 10:17 AM	Mic
Confidentiality - McKee Transparency Ac...	4/4/2018 3:03 PM	Mic
Confidentiality - Proprietary Information ...	4/3/2018 3:07 PM	Mic
Confidentiality	1/3/2018 12:20 PM	Mic
Conflict of Interest - Imperial County Co...	9/12/2012 2:52 PM	Mic
Conflict of Interest Use of SDSU Policy	5/10/2018 3:58 PM	Mic
Contractor's Objections to RFP Terms an...	12/2/2015 10:20 AM	Mic



Snapshots of the Toolkit: PI Documents

- ⊙ Consistent negotiations from year to year
- ⊙ Divided into awards and subagreements
- ⊙ Further defined by proposal number or subagreement number

The image shows two screenshots of a Windows File Explorer window. The top screenshot shows the path 'PC > srcc (\\filer) (O:) > 4- PI DOCUMENTS > M - P - Done > ' with a table listing 'Awards' and 'Subagreements' as file folders. The bottom screenshot shows the path 'cc (\\filer) (O:) > 4- PI DOCUMENTS > M - P - Done > ' with a sub-path 'Awards' selected, showing a table of folders: 'Public Consulting Group', 'SD County', and 'SDSU- '.

Name	Date modified	Type	Size
Awards	9/6/2018 2:52 PM	File folder	
Subagreements	6/30/2015 3:43 PM	File folder	

Name	Date modified	Type
Public Consulting Group	9/3/2015 10:29 AM	File folder
SD County	8/3/2018 8:49 AM	File folder
SDSU-	9/6/2018 2:30 PM	File folder



Questions?

Sandra M. Nordahl, CRA
Director

Sponsored Research Contracting and Compliance
and Facility Security Officer

Email: snordahl@sdsu.edu

Phone: 619-594-4172



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