



2024 SRAI SO/NE
SECTION MEETING
HILTON HEAD, SC
MAY 7 - 10



Conquering Contracts – A Guide to Agreement Review

SRAI SO/NE Section Meeting – May 7, 2024

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Who are we?

- **Farrell Rapp**

- University of Wyoming, 19 years

- **John Hedberg**

- Attain Partners, 1.5 years
- Dauphin Island Sea Lab, 1 year
- Auburn University, 2 years
- University of South Alabama, 2.5 years

Objectives



Learn the differences between a contract, grant, cooperative agreement, other transaction authority (OTA), subcontract, etc.



Develop negotiation tactics



Understand associated risks with research agreements

Case Studies



Case Study #1



Case Study #2



Case Study #3 (if needed)

Introduction and Overview

- Who's the Boss?
 - Contract vs. Program Officers
- Award Mechanisms
 - Explore the different award mechanisms
 - Breakdown key components of each mechanism
 - Funding vehicles for award mechanisms
 - Rules Rules Rules. . . order of precedence and who is first
 - Understanding FARs
- Understanding the Award Structure
 - Highlight key sections of an award – informational, legal, budgetary
 - Common Legal Sections of a Grant or Contract
 - Managing FARs
- Agreement Risk Management
 - Identify potential risks in research awards
 - Mitigation strategies

Introduction and Overview

- Negotiation Tactics
 - Knowing the sponsor
 - Creating standard language
 - Common challenges with industry
- Questions

Who's the Boss?

- Contracts Officer
 - Authorized by a government to issue awards and modifications
 - May **legally** bind the government into an agreement
 - Do not let the PI tell you that the program officers said it was ok
 - Do **look at the title**, because that person might have the authority. It “**just depends**” on the sponsor
- Program Officer/Contracting Officer's Technical Representative (COTR)
 - Decisions over the program or science
 - Reviews and approves deliverables and invoice
 - Limited authority—**cannot legally bind** the government into an agreement



Award Mechanisms – What's the difference?

- Grant
 - Mechanism providing money, property, or both to an entity for an approved project
 - Program solicitations
 - Little to no programmatic input from the sponsor
 - Standard award terms
 - Flexible rebudgeting authority
- Cooperative Agreement
 - Similar to a grant in the provision of funds and objectives
 - Request for Applications
 - Substantial programmatic input and involvement from the sponsor
 - Standard award terms plus additional sponsor terms
 - Usually, flexible rebudgeting authority

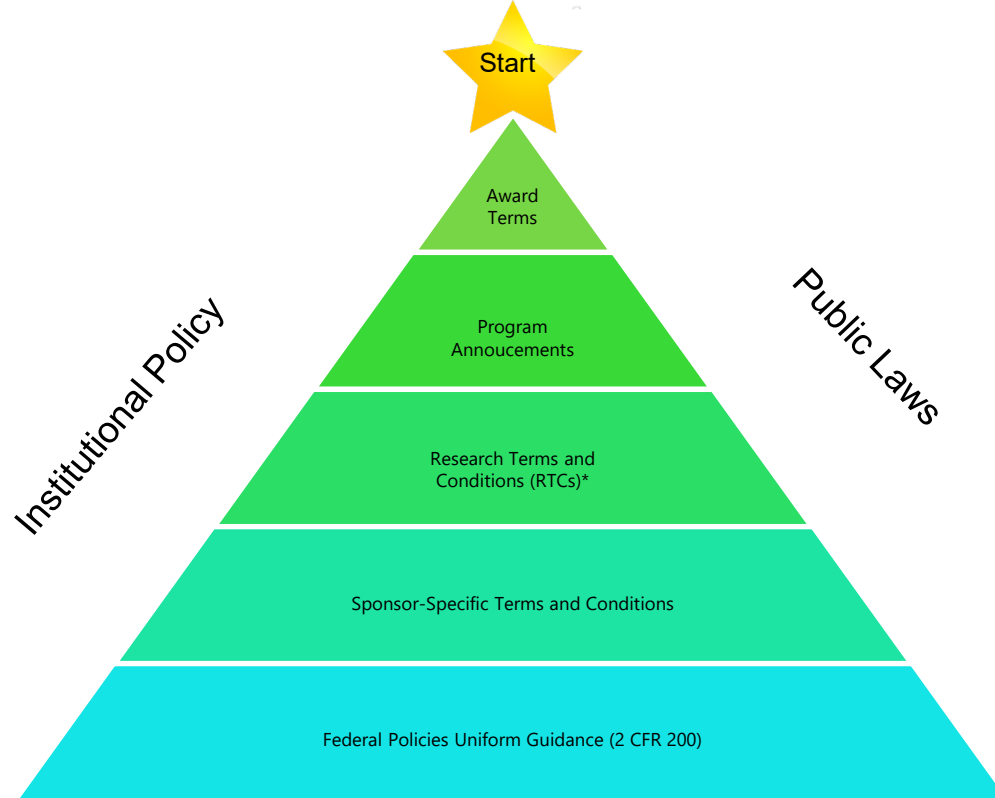
Award Mechanisms – What's the difference?

- Contract
 - Award mechanism for acquiring goods or services
 - Significant input and involvement from the sponsor
 - Driven by FAR (Federal Acquisition Regulations) rather than the standard terms and conditions
 - Restrictions on rebudgeting requiring approval from the sponsor
- Other Transaction Agreement/Authority
 - Contain elements that are similar to a contract
 - Typically, not subject to FARs or other grant regulations
 - Wild Wild West
 - Go over each agreement to see the applicable terms
 - Restrictions on rebudgeting, but check the terms of each award

How Award Mechanisms are Funded

- Cost Reimbursable – Reimbursement for allowable costs during an approved period of performance
- Fixed Price – Set cost for work performance. Payment is typically on a schedule according to tasks or milestones
- Indefinite Delivery Indefinite Quantity (IDIQ) - Issued when a set quantity of goods or services are needed, but not known or specified (although there can be minimums and maximums.) Potentially funded through Purchase Orders or Task Orders
- Time and Materials - Allows a Sponsor to acquire supplies or services based upon specific labor hours and actual material costs.
 - Ensure that your institution's effort reporting can meet the requirements in the terms

RULES RULES RULES ... Where do You Start?



Understanding the Award Structure

- Typically 4 parts to an award
 - 1st – Informational: Sponsor name and address, recipient name and address, federal or other PTE award identifying factors
 - 2nd – Legal language
 - 3rd – Scope of work and budgetary information
 - 4th – Additional information including attachments
- Key Clauses/Terms of an Award
 - Need a general knowledge the meaning behind each section
 - Project Period (effective upon last date of signature scenario) -
 - Indemnification or Liability
 - Governing Law/ Jurisdiction
 - Intellectual Property Rights
 - Inventions
 - Confidentiality
 - Termination
 - Payment
 - Reporting
 - Publishing
 - Severance Clause

Understanding the Award Structure - FARs

- Instead of Title 2 of the Conduct of Federal Regulations (think 2 CFR 200) used for Grants and Cooperative Agreements, Federal contracts are controlled by Title 48.
 - **Prescriptions** specify when and how a particular clause or set of clauses should be included in a government contract
 - **Clauses** incorporate specific terms and conditions into a contract to establish rights, responsibilities, and obligations for the involved parties.
- [Title 48 Chapter 1](#): Standard FARs
- [Title 48 Chapter 2 +](#): Specific Agency FARs
- Examples:
 - [Title 48 Chapter 10](#) -Department of the Treasury
 - [Title 48 Chapter 18](#) -NASA FAR Supplement (NFS)
 - [Title 48 Chapter 2](#) – Department of Defense (DFARs)
 - Within each Chapter are Parts
 - **Parts 1-51**: Prescriptions
 - **Part 52**: The Clauses
 - **Part 53**: Sample Government Forms

Let's Find A FAR!

- <https://www.acquisition.gov/content/regulations>
- Use the website above to successfully navigate to the referenced FAR or Agency FAR
 - FAR 52.203-17
 - FAR 52.215-2 Alternative II
 - NFS 1819.001

Risk Management In Agreement Review

- What is Risk Management
 - Risk Management is the process of identifying, assessing, and mitigating threats or uncertainties that may affect your institution or organization
- Potential risks in an agreement
 - Does the entity you are engaging have experience with federal funding?
 - Is the sponsor from a foreign country?
 - How many dollars are at stake?
 - Does the PI have any research history?
 - What systems do you have in place to manage the award?
 - Timeline of the award
 - Publishing
 - Intellectual Property

Case Study #2 – Risk Management

- Case Study #2 – A PI create situation with industrial foreign sponsor (country of concern) with potential export control. Human subjects?

What things would your institution flag from an agreement review standpoint?

Negotiation Tactics

- Know you sponsor or subcontractor
 - Federal Sponsors
 - Terms in grants are most likely not negotiable
 - Cooperative Agreements have some leeway, but are similar to grants
 - Contracts – pay attention to the FARs. Some clauses have Alternatives for Institutes of Higher Education
 - State Sponsors
 - Tend to be more difficult because each entity has their own state rules they have to abide by
 - Industry sponsors
 - might have a longer negotiation period because of things like Intellectual Property
- FARRELL TO ENTER CINDY's TACTICS

Negotiation Tactics

- Governing Law - if presented in an agreement, work towards having the governing law follow your institution's jurisdiction.
- Indemnification – Mutual indemnification is typically the easiest route in negotiations
- Site Visits - ensure that you receive a written request and that the visit is reasonable
- Termination – if an award is in jeopardy of termination, ask if you can deobligate the funding to avoid a termination for cause. Also make sure that you have the ability to recover incurred costs up to termination.
- Publishing – opt for the University to have no restrictions on publications
- Currency – when dealing with foreign sponsors, always try to have the transaction occur in USD.
- Industry Intellectual Property – try to get the University an irrevocable and indeterminable right to use any software or data needed to complete the project.
- Remaining Silent – Essentially removes a clause of an agreement through "silence." Typically, used as a last resort when there is an impasse between the sponsor
- **INSERT MORE NEGOTIATION TACTICS**

Case Study #1

- Case Study #1 – FARRELL ENTER CASE STUDY

Case Study #3

- Case Study #3 – FARRELL ENTER CASE STUDY

Summary

- Whos' the Boss?
 - Contract Officer vs. Program Officer
- Award Mechanisms
 - Grant, Cooperative Agreement, Contract, OTA
 - Cost Reimbursable, Fixed Price, IDQ, Time and Materials
 - Use the "Christmas Tree" to help determine precedence
 - Use <https://www.acquisition.gov/content/regulations> to help navigate FARs
- Risk Management
 - Experience, funding, research history, etc.
- Negotiation Tactics
 - Think of the sponsor you are dealing with and how willing they are to engage in research
 - Review the list for ensuring a mutually beneficial outcome for each party

Questions?

Contact us!

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