



Life Cycle of the Award Series:

Part III: Industry and International Agreements



Session Leaders:

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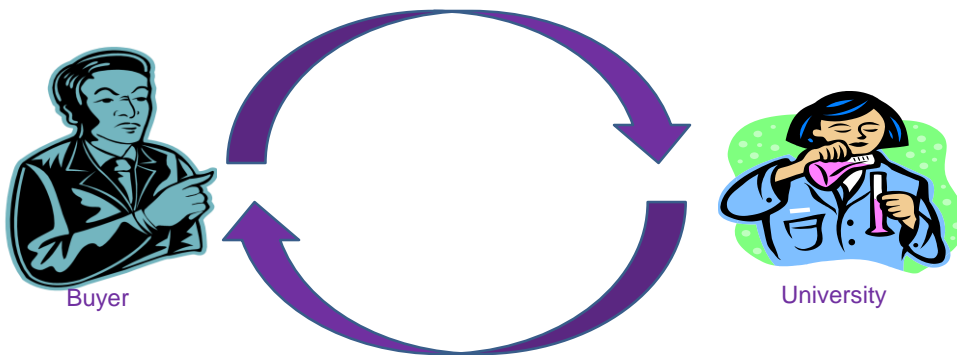
What is the difference between federal, industry and international agreements?



Contracts are used to buy a product or a service.



Payment for services rendered



- Deliverables
- IP Rights/Data Rights
- Inspection/Default/Warranty

Industry contracts are typically shorter and can be more complex than Federal contracts

Both Federal and industry contracts include detailed provisions for termination, liability, property management, subcontracting, etc.

Some industry contracts are pass-through from a Federal prime contract.

There will likely be more effort to administer a federal contract than an industry contract.



A contract SOW must be written very carefully.



The scope of work constitutes a detailed description of what the sponsor is buying. With industry sponsors, your institution's work is likely complementing their in-house work



Payment may be tied to specific deliverables or milestones:

- | | |
|--------|---|
| Task 1 | \$25,000 – Test samples for salinity & impurities. |
| Task 2 | \$85,000 – Develop software model for predicting impurity rates based on geological features. |
| Task 3 | \$35,000 – Analyze historical salinity rates. |

Quiz question: What happens if a PI spends all her money on tasks one and three and never finishes task two or doesn't complete the work on time?



What are the rules for industry agreement?



The “rules” are dictated by the sponsor. If the sponsor is a “pass-through entity”, remember that FAR clauses may be incorporated, and they may not be the clauses that apply to colleges, universities or non-profits

Industry

A FEW KEY CONSIDERATIONS



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Governing Law

- This is an area where public universities may have constraints
 - Many public universities are not allowed to accept governing law outside of their home state/territory
 - Many industry sponsors insist on governing law they deem appropriate
 - International sponsors also typically insist on governing law they deem appropriate



Venue

- Venue defines where any legal proceedings would take place in the event of a dispute. This is an area where public universities may have constraints
 - Many public universities are not allowed to accept a venue outside their home state/territory
 - Many industry sponsors want the venue to be to their advantage
 - International sponsors also typically insist on venue they deem appropriate



Publication Restrictions

- This is an area where negotiation is common. Industry sponsors have a concern about sharing proprietary data—even if the project isn't classified or proprietary
- Colleges and universities have a concern about publication restrictions because of the fundamental research exemption in export control regulations



Confidentiality Clauses

- Confidentiality clauses are very common with industry agreements
- A conflict may arise with confidentiality clauses in these ways:
 - Conflict with your institution's public records policies (quite common with state-controlled institutions of higher education)
 - The industry sponsor may ask for a very long (e.g., 10 years) period of confidentiality
 - Confidential information is not always clearly identified or defined in the agreement



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Intellectual Property

- Industry sponsors typically want to own all of the intellectual property rights when they fund projects
- This can constitute private activity under the U.S. IRS regulations
 - Many colleges and universities use tax exempt bonds to financial research facilities, and in order to maintain that tax-exempt status, activity must be limited in these activities
 - The limits are currently 5% for private institutions and 10% for public institutions
 - Space usage for these facilities need to be monitored throughout the life of a project
- International sponsors typically want to own all of the intellectual property rights when they fund projects



Patent Indemnity

- Some industry sponsors want patent indemnity
- Patent indemnity means an institution would warrant that the work they deliver does not infringe on anyone else's patents or patent claims
- This is very difficult to guarantee and institutions may be prohibited from accepting such a clause



Industry

Indemnity

- Indemnity is not product liability
- Indemnity clauses require a party to pay the other party for losses incurred, e.g., injury
- These clauses take different approaches:
 - Sponsor will be “held harmless” for anything that happens at your institution but your institution does not have the ability to be “held harmless “ for anything that happens as the sponsor’s organization
 - Sponsor and recipient have mutual indemnity (sometimes thought of “we’re responsible for us and you’re responsible for you”)
 - The agreement is silent



Industry

Product Liability

- Product liability is similar to a warranty
- The theory behind product liability is that products available to the public are held responsible for the injuries those products cause
- Determining “what is the product” is the critical item to determine; knowing what the project entails and whether there is a product becomes key



Breach or Non-Performance

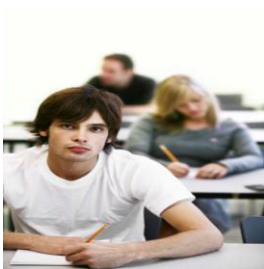
- Industry sponsors expect projects to stay on schedule and expect results
- Some industry sponsor will insist on a re-procurement clause (sometimes called a re-compete or re-performance clause) which means the recipient is liable for re-procurement costs if they don't meet the schedule or results are not acceptable.
- Some institutions are prohibited from accepting this type of clause



Universities cannot offer a warranty.

How will we pay if the sponsor
isn't satisfied?

Student tuition
dollars?



State appropriations?



http://www.pacapitol.com/Photo_Pages/Capitol.html

Other sponsors?



Privity of Contract

- “Privity of contract” means a connection or derived interest between two or more contracting parties. The concept would apply to any contract, regardless of type of sponsor
- Contract privity means that only the entities who entered into a contract (and who are privy to it) are entitled to enforce its terms.



Sponsor



Prime Contractor



Subcontractor

Payment

- Payment terms, required documents, etc. should be clear in any type of contract
- What about agreements with foreign entities (either we pay them or they pay us)?
- What should you do if the sponsor isn't paying you? Is there any recourse?
- What about awards made in foreign currency?



Summary

- Industry agreements are similar to Federal contracts in many respects, but:
 - Many of the contracting issues are both legal and business decisions, so make sure you know which is which for your organization
 - Meeting deadlines and deliverables are important
 - December is typically the end of an industry sponsor's fiscal year

International Agreements

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International Awards

Global engagement, regardless of whether the funding is **incoming** or **outgoing**, should be assessed as a **high risk**.



International

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Supporting and Negotiating International Research Requires a Team

- Pre-Award and Post-Award
- International Support Office
- General Counsel / External Counsel
- Intellectual Property Management
- Export Compliance
- Risk Management



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Special Concerns

- Translation and Exchange Rates
- Audit Standards
- Governing Law
- Deliverables
- Export Compliance



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Incoming Funding Concerns

- Agreement Type
- Source of Funds
- Collecting Full Costs
- Intellectual Property
- Reporting Requirements
- Visiting Faculty



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Outgoing Funding Concerns

- Compensation
- Procurement
- Property Management
- Taxes
- Compliance with Prime Award
- In-Country Rules and Practices



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Uniform Guidance states in Part 200.331 that all pass-through entities must use an approved federally recognized indirect cost rate negotiated between the subrecipient and the federal government or, if no such rate exists, either a rate negotiated between the pass-through entity and the subrecipient, or a de minimis indirect rate as defined in Part 200.414



International

Uniform Guidance 200.414

Foreign organizations that do not have a current US federally negotiated indirect cost rate are limited to a *de minimis* indirect cost rate recovery of 10% of Modified Total Direct Costs.

Foreign grantees that have a US federally negotiated indirect cost rate may recover indirect costs at the current negotiated rate.

International

Assess Key Systems and Policies of Foreign Subawardee


- Accounting
- Procurement
- Property
- Payroll
- Policies / Practices



International

Management Challenges

- Equipment availability and procurement
- Equipment maintenance
- Lack of technical expertise in-country
- Buy American Act (federal dollars)
- Large encumbrances versus expenditures
- Paying international subcontractors



International



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Most Common Audit Concerns

- Unsubstantiated Salaries and Wages
- Misunderstand Obligations
- Currency Exchanges Unrecorded
- Foreign costs deemed Unallowable



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Export Control Tips

- Know the regulations: International Traffic in Arms (ITAR) ; Export Administration Regulations (EAR); Office of Foreign Asset Control (OFAC)
- Be aware of the OFAC sanctioned countries/entities/persons
- Catch export control restrictions in the proposal stage
- Check with your Export Control Officer before executing an international agreement

International

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Involvement of Human Subjects

All foreign grantees must receive a Federal wide Assurance (FWA) and approval from the Institutional Review Board (IRB) or Institutional Biosafety Committee (IBC) as well as your own regulatory requirements associated with the country where the research is being conducted.



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Involvement of Animal Subjects

All foreign grantees must receive an Animal Welfare Assurance (FWA) from the Office of Laboratory Animal Welfare. Note that animal welfare requirements will vary for U.S. and foreign institutions.



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Available Resources

International Research Collaborations
Chapter in *Sponsored Research*
Administration: A Guide to
Effective Strategies and
Recommended Practices

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Summary

- Remain cognizant of the concerns that global engagement presents regardless of whether the funds are **incoming** or **outgoing**.
- Identify and maintain an institutional management team necessary to execute and manage a large complex global project.
- Recognize that managing a global project mandates flexibility in your policies and practices.

International

