AGENDA

- Introduction
- What is a Contract?
- Contract Negotiation
- Managing Award Requirements
- Questions
# Harvard University

<table>
<thead>
<tr>
<th>Metric</th>
<th>Value</th>
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<tbody>
<tr>
<td># of Faculty</td>
<td>2,400</td>
</tr>
<tr>
<td># of External Sponsored Projects</td>
<td>4,600</td>
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<tr>
<td>Total Research Budget</td>
<td>US$865 million – FY 2016 (~76% federal gov’t)</td>
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<tr>
<td># of Active Awards At Any Time</td>
<td>5,196 (FY16)</td>
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<tr>
<td># of Active U.S. Federal Contracts</td>
<td>146 (March 2019)</td>
</tr>
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<td># of Proposals Submitted</td>
<td>5,757 (FY16)</td>
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<tr>
<td># of New Awards and Amendments</td>
<td>180+/month</td>
</tr>
<tr>
<td># of Accounts Established</td>
<td>260+/month</td>
</tr>
<tr>
<td># of Awards Closed Out</td>
<td>130+/month</td>
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WHAT IS A “CONTRACT”?
DISTINGUISHING U.S. FEDERAL AWARD MECHANISMS
WHAT IS A “CONTRACT”? 

Contracts are one of three (3) main award mechanisms available to U.S. Federal grant-making agencies:

**GRANT**: Financial assistance for the conduct of research or other program as specified in an approved proposal.

**COOPERATIVE AGREEMENT**: Financial assistance, however, sponsor has significant involvement in the project or research.

**CONTRACT**: A mechanism for procuring goods (creation of tangible products) or services for the direct benefit or use of the U.S. Federal Government.
WHAT IS A “CONTRACT”?

- U.S. Government’s primary model of funding University research is through financial assistance awards (grants and cooperative agreements).

- While history of procuring research/IP from Universities predates Federal grant-making agencies, current practices reflect shift in focus towards supporting research for the public benefit.

WHAT IS A “CONTRACT”? 

➢ Funding Instrument Type(s) listed in Solicitation (BAA, RFP, etc.)

➢ Award type and Contract Number stated on face page
WHAT IS A “CONTRACT”? 

Fixed Price
Typically used for commercial items.
May otherwise be appropriate where acquiring supplies/services on the basis of reasonably definite functional or detailed specifications.
Burden on Contractor to control costs/meet specified deliverables.

Cost-Reimbursement
Typically used for non-commercial items (incl. R&D).
No incentive to control costs -> tighter controls.
Costs must be incurred in accordance with applicable Cost Principles.
WHAT IS A “CONTRACT”?  

Distinguishing Characteristics

- Subject to the Federal Acquisition Regulation (FAR)
- Clear value exchange
- Defined Scope of Work aimed at meeting Sponsor-defined specifications
- Expected deliverables/project milestones
- Payment may be tied to performance
- Legal/contractual penalties for failing to meet project deadlines
CONTRACT NEGOTIATION
FINDING YOUR WAY THROUGH THE F.A.R.
Contracting Officer (CO or KO) is empowered to execute and ensure compliance with the terms of the award on behalf of the Government.

The CO may designate certain responsibilities to the Contracting Officer’s Representative, however, only the Contracting Officer may authorize changes to the Contract.

Generally helpful to segment communications:

- University AOR works with CO to finalize Contract terms
- PI/Research team coordinates with Program Manager/Officer on technical requirements
The Components

- Section A – Cover Page
- Section B – Supplies or Services and Prices
- Section C – Descriptions and Specifications
- Section D – Packaging and Marking
- Section E – Inspection and Acceptance
- Section F – Deliveries or Performance
- Section G – Contract Admin Data
- Section H – Special Contract Clauses
- Section I – Contract Clauses
- Section J – List of Documents, Exhibits and Other Attachments
Regardless of awarding Agency, contracts are subject to the Federal Acquisition Regulation (FAR) (CFR: Title 48)

Core set of regulations is supplemented by Agency-specific provisions (e.g. DFARS)

Prescribing clause dictates whether a particular provision applies and which Alternate (if any) is appropriate

Searchable Index of the FAR available at: https://www.acquisition.gov/browse/index/far
CONTRACT NEGOTIATION

Anatomy of a FAR Clause

Prescribing clause dictates applicability...

52.216-7 Allowable Cost and Payment.

As prescribed in 16.307(a) insert the following clause:

Allowable Cost and Payment (Aug 2018)

(a)

(1) The contracting officer shall insert the clause at 52.216-7, Allowable Cost and Payment, in solicitations and contracts when a cost-reimbursement contract or a time-and-materials contract (other than a contract for a commercial item) is contemplated.

...and appropriate Alternates

(3) If the contract is with an educational institution, the contracting officer shall use the clause at 52.216-7 with its Alternate II.

Text follows main clause
The Applicable Regulations

Even though contracts represent a procurement action subject to the FAR, …

- **Uniform Guidance.** The cost principles under OMB's Uniform Guidance apply to all contracts, grants, and cooperative agreements with educational institutions. All other FAR contractual requirements take precedence over the OMB Uniform Guidance when there is a conflict.

- **Bayh Dole.** The rights in intellectual property afforded to educational institutions under Bayh-Dole apply to all contracts, grants, and cooperative agreements for the performance of research funded in whole or in part by the U.S. Federal government.

- **NSDD-189.** To the maximum extent possible, the products of fundamental research (including under Federal contracts) should remain unrestricted with respect to publication and dissemination.
The Key Takeaways

- Understand what is negotiable…and what is not
- Know how to read prescribing clauses, and use them to justify requested revisions
- Be mindful of the overarching regulatory environment and its impacts on discretionary terms
- When in doubt, find an expert! (Or at least a negotiation tool)

*Example: Penn State FAR Matrix Negotiation Tool:*
https://docs.google.com/spreadsheets/d/1X2ZyTMYykNO7fRZDIrTf69nPstsZ99Y_qOtM3dsbVnE/pub?output=html
Rights in Inventions

52.227-11 Patent Rights -- Ownership by the Contractor

- Ownership of Inventions by the Contractor is the default for contracts in support of research (Remember Bayh-Dole?)
- Contractor must submit invention reports, elect to retain title, file timely patent applications. Failure may result in Government exercising march-in rights.
- Government retains NERF license to “practice, or have practiced for or on its behalf, the subject invention throughout the world.”
- Final invention report due under 52.227-11
MANAGING AWARD REQUIREMENTS

Rights in Data


**Unlimited Rights**
Applies to most data developed, including all data exclusively funded by U.S. Government

**Government Use Rights**
Applies to data developed with a mix of U.S./other funding

**Limited Rights**
Applies to data developed exclusively at private expense
Government Property/Equipment

52.245-1, Government Property

- Government Property includes both property:
  - *Furnished by the Government* for purposes of the project
  - *Acquired by the Contractor* to which title vests in the Government
- Vesting of title is dictated by Contract type/specific provisions
- Academic institutions entitled to *Alternate II*:
  - Title to property (under $5k) vests in Contractor
  - Title to equipment (over $5k) vests as set forth in the Contract

*Use of Government Property must be limited to project purposes*
MANAGING AWARD REQUIREMENTS

Inspection and Acceptance

52.246-7, Inspection of Research and Development -- Fixed-Price; 52.246-8, Inspection of Research and Development – Cost-Reimbursement; 52.246-9, Inspection of Research and Development (Short Form)

- When Contract is for specified Deliverables (other than designs, drawings, reports), government reserves right to inspect and accept Work performed (Section F)
- Under standard clauses, Government reserves right to reject delivery and require correction of non-conforming deliverables.
- Short Form clause generally appropriate for R&D contracts with academic institutions:

**Inspection of Research and Development (Short Form) (Apr 1984)**

The Government has the right to inspect and evaluate the work performed or being performed under the contract, and the premises where the work is being performed, at all reasonable times and in a manner that will not unduly delay the work. If the Government performs inspection or evaluation on the premises of the Contractor or a subcontractor, the Contractor shall furnish and shall require subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.
Small Business Subcontracting

52.219-8, Utilization of Small Business Concerns; 52-219-9, Small Business Subcontracting Plan

- Requirement to utilize Small Business Concerns required for all contracts in excess of $150k unless the contract (including all subcontracts) will be performed entirely outside of the United States.

- For those contracts in excess of $700k, a Small Business Subcontracting Plan may be required, setting forth the Contractor’s goals (amount/percentage) based on its planned subcontracting.
MANAGING AWARD REQUIREMENTS

Technical Reporting

* e.g. 252.235-7011, *Final scientific or technical report*

- Progress reports may be specified deliverables
- Agency-specific clauses may address final technical reports (e.g. NASA, DFARS)
- Section H may set forth additional reporting requirements:

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H.1 Reporting Requirements

The Contractor shall submit reports in accordance with the requirements below.

a. MONTHLY TECHNICAL STATUS REPORT

The monthly Technical Status Report provides a means to capture a comprehensive assessment of project goals, progress, and status. The report provides a section for programmatic data, technical progress, project plans, and issues and concerns. The report shall be formatted in accordance with the report template provided at Section J, Attachment 2.
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MANAGING AWARD REQUIREMENTS

Security/Foreign Policy Considerations:
- Covered Defense Information/Systems
- U.S Manufacturing Plans
- Disclosure of Information
- Export Controls
- Buy American
QUESTIONS?
THANK YOU

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Harvard University