

WASHINGTON STATE UNIVERSITY

# Ins & Outs of Contracts

Office of Research Support & Operations

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Recording date of this workshop is  
**November 18, 2016**

Some of the rules and procedures discussed  
in this workshop are subject to change.

**Please check university resources  
before relying exclusively  
on this recorded presentation.**

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## Today's Content:

- What is a contract?
- What types of research contracts are there?
- What are the University's priorities in contracting?
- How are agreements processed?



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### What is a Contract?

- A contract is an agreement creating obligations that are enforceable by law.

*"A contract is a promise or a set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."*  
Restatement (Second) of Contracts §1 (1981)
- 4 Basic Elements of a Contract
  - Mutual Assent
  - Consideration
  - Capacity
  - Legality

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### What is a Contract?

*4 Basic Elements of a Contract*

- Mutual Assent:** "a meeting of the minds"
  - Both parties exhibit "contractual intent"
  - Terms of the offer are clear and definite.
  - Acceptance must be clearly communicated.
- Consideration
- Capacity
- Legality

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### What is a Contract?

*Mutual Assent: Terms are Clear and Definite*

**Key Areas:**

- Parties
- Purpose
- Period of Performance
- Price

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### What is a Contract?

*Mutual Assent: Terms are Clear and Definite*

**Key Areas:**

- **Parties:** Who is bound by this agreement?
  - Should be identified up front
  - WSU's legal status – an agency of the State of Washington and institution of higher education
  - WSU is NOT a non-profit/501(c)(3)
  - WSU Foundation is a separate entity
- Purpose
- Period of Performance
- Price

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### What is a Contract?

*Mutual Assent: Terms are Clear and Definite*

**Key Areas:**

- Parties
- **Purpose:** Why are we doing this?
  - Scope of work and budget must be clear.
  - For no-money agreements, the scope is also important—how can the material be used/transferred, what information is protected under an NDA, etc.
  - Other clauses of the agreement must be consistent with the purpose, e.g. publication rights.
- Period of Performance
- Price

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### What is a Contract?

*Mutual Assent: Terms are Clear and Definite*

**Key Areas:**

- Parties
- Purpose
- **Period of Performance:**
  - Start date: important to properly charge effort & expenditures; some sponsors allow pre-award costs.
  - End date: check for reasonableness to avoid needing to secure extensions.
  - Cannot expend funds outside performance period.
- Price

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### What is a Contract?

*Mutual Assent: Terms are Clear and Definite*

**Key Areas:**

- Parties
- Purpose
- Period of Performance
- Price:
  - Structure: cost-reimbursement vs. fixed price
  - Invoice schedule should align with payment schedule. For example, are monthly invoices really needed for with 50% upfront, 50% final payment?
  - Price as reflected in the agreement may vary from WSU official budget categories: lump sum, hourly rate, and summary budgets are all options.

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### What is a Contract?

*4 Basic Elements of a Contract*

- Mutual Assent
- Consideration:** Something bargained for and received by a promisor from a promisee.
  - Examples: \$\$\$, a promise, an act, or agreement to voluntarily refrain from doing something.
- Capacity
- Legality

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### What is a Contract?

*4 Basic Elements of a Contract*

- Mutual Assent
- Consideration
- Capacity:** A person's ability to satisfy the elements required to enter into binding contracts.
  - Agreements are made by WSU, not individuals or components, and signed are by an authorized institutional official. Colleges, departments, professors, etc. cannot bind WSU by contract.
  - Authorized officials must be designated signature authority through a letter from the University President.
  - Dan Nordquist, Associate V-P, ORSO, is the institutional official for sponsored project activity.
- Legality

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## What is a Contract?

### 4 Basic Elements of a Contract

- Mutual Assent
- Consideration
- Capacity
- **Legality:** An agreement is legal and enforceable only if it complies with the law of the land and public policy. Any agreement is not legally binding if for illegal purpose.

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## Contract Types:

*What types of research related contracts might you see?*

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## Two Types of Contract



### Funding Agreements

- Grant
- Contract
- Cooperative Agreement
- Sub-award
- Facility Use Agreement
- Special Agreements:
  - E.g. CRADA



### No-Money Agreements

AKA Alphabet Soup

- Master Agreement
- MOA: Memorandum of Agreement
- NDA: Non-Disclosure Agreement
- MTA: Material Transfer Agreement
- DUA/DSA: Data Use/Sharing Agreement
- Teaming Agreement
- Equipment Loan Agreement

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### Funding Agreements: Federal

- In general\*, Federal Agencies can transfer funding to non-federal entities in two ways: grants/cooperative agreements and procurement contracts.
- Both are “contracts” in the general sense, but they are different legal instruments in gov’t contracting.
- The Federal Grant and Cooperative Agreement Act of 1977 (31 USC 6301 et seq.) establishes the basic distinctions between procurement contracts, grants, and cooperative agreements.

\* Some federal agencies are authorized to enter into agreements other than traditional mechanisms, known as “other transaction authority”, but these are comparatively rare. For more information, see: <http://www.gao.gov/assets/680/674534.pdf>.

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### Funding Agreements: Federal

#### Comparing Procurement Contracts, Grants, & Cooperative Agreements

- Procurement Contract:**
  - The principal purpose is to acquire property or services for the direct benefit or use of the U.S. Government; or
  - the agency decides in a specific instance that the use of a procurement contract is appropriate.
- Grant/Cooperative Agreement:**

The principal purpose is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by law.

  - Grant = no substantial involvement of the federal sponsor in carrying out the contemplated activity.
  - Cooperative Agreement = substantial involvement of the federal sponsor is expected.

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### Funding Agreements: Federal

#### Comparing Procurement Contracts, Grants, & Cooperative Agreements

	Grants	Contracts
Authority	Specific legislation authorizing federal financial assistance	General authority if in compliance with acquisition law and regulations and for a purpose authorized by law
Purpose	Used to support or stimulate an activity to advance a public purpose	Used to acquire goods/services for the direct benefit of the Government
Announcement	Funding Opportunity Announcement	Solicitation
Scope of Work	Applicant defines SOW	Government initiated
Basis for Award	Technical Merit	Solicitation Criteria. Must incl. both technical evaluation & price/cost
Contract	Award with terms	Contract with clauses
Payment	Usually in advance	Varies by contract type and terms
Regulations	Uniform Guidance, CFR Title 2	Federal Acquisition Regulations

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## Funding Agreements: Federal

### Procurement Contract Types

**Contract Types:**

- Firm Fixed Price:** risk of loss on contractor = incentive to control costs; imposes the least administrative burden; invoices based on milestones or deliverables.
- Cost Reimbursement/Cost Plus Fee:** payment of allowable incurred costs; incremental funding; "Because the absence of precise specifications and difficulties in estimating costs with accuracy...normally precludes using fixed-price contracting for R&D, the use of cost-reimbursement contracts is usually appropriate." - FAR 35.006(c)
- Time-and-Materials/Labor-Hour:** fixed hourly rates; used when not possible to confidently estimate duration of work or costs.
- Indefinite-Delivery/Quantity:** can be cost-reimbursement or fixed-price; task orders issued under a base contract with general terms and conditions; task orders may contain additional T&C.

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## Funding Agreements: Federal

### Cooperative Research & Development Agreements: a Special Case

- A CRADA is an agreement between a federal research organization and one or more federal or non-federal parties to work together on a research project of mutual interest.
- The Government may provide personnel, facilities, equipment or other resources with or without reimbursement (but **not funds** to non-federal parties).
- The non-federal parties provide personnel, funds, services, facilities, equipment or other resources to conduct specific research or development efforts that are consistent with the mission of the federal research organization.
- For us, these most often occur related to sub-awards to federal research organizations (i.e. DOD research labs).

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## Funding Agreements: Non-Federal Sponsors

- Other Sponsor Types:** Private industry, non-profit organizations and foundations, state and local government entities.
- Non-federal sponsors often have more flexibility on terms, but their standard templates are generally written for suppliers or service providers rather than research, which can result in problematic terms.
- State government agencies can be difficult to negotiate with due to their own internal restrictions. Some are resistant to negotiating their template agreements.

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### Funding Agreements: Where to go?

ORSO	Business Office (Contracts)	Business Office (Purchasing)
<ul style="list-style-type: none"> <li>Agreements regarding:                             <ul style="list-style-type: none"> <li>Research, teaching or other scholarly activity;</li> <li>Testing or services work without an authorized service center.</li> </ul> </li> <li>Subcontracts: transfers a portion of the research or substantive effort to another organization.</li> </ul>	<ul style="list-style-type: none"> <li>Agreements related to business or administrative activities (e.g. real estate, facilities use, inter-local agreements, etc.).</li> <li>Service Center agreements.</li> </ul>	<ul style="list-style-type: none"> <li>Personal services contracts: not substantive programmatic work but beyond routine work-for-hire.</li> <li>Purchase orders for goods and services.</li> <li>Equipment maintenance agreements.</li> </ul>

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### No Money Agreements

“Consideration” is more than just money. It can be a promise, act, or forbearance.

There are three general categories:

- Agreements that transfer something from one entity to the other for a particular purpose.
- Agreements that memorialize a relationship between the parties.
- Agreements that protect proprietary information.

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### No Money Agreements

Materials, Data, and Equipment

- A **material transfer agreement** transfers some item (plasmids, mice, seeds, etc.) for a particular purpose (research) subject to certain limitations (forbearance). May require return or destruction of material at conclusion of research or prohibit transfers to other entities.
- Data use agreements** are like MTAs but for data, often data that is sensitive or proprietary.
- Equipment loan agreements** allow one party to temporarily transfer equipment to another. This may involve transport costs or liability for loss or damage. If WSU will be assuming liability for loss or damage, this must be approved by the department or college.

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## No Money Agreements

### Relationships

- **Teaming agreements** generally arise as part of large federal proposals. It is an agreement to work together for the purpose of preparing and submitting a proposal.
- A **Memorandum of Understanding or Agreement** is a formal agreement which establishes a partnership for a particular purpose. These agreements are not legally binding and do not obligate the parties to enter into further agreements. An MOU may be a stand alone agreement or may be required for a proposal submission. MOUs are **NOT** used to transfer funding.  
\* Despite the name, the CAHNRS Gift/Grant Agreements are different altogether. Please direct questions to CAHNRS Business Center.
- **Intellectual Property Management Plans** are related to SBIR/STTR applications or awards. They address the allocation of intellectual property rights, if any, and the right to carry out follow-on research development, or commercialization.

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## No Money Agreements

### Proprietary or Confidential Information

- For all agreements that impose confidentiality obligations, these obligations must not inhibit scholarly activity.
- **Non-Disclosure or Confidential Disclosure Agreements** memorialize the agreement of the parties to maintain the confidentiality of certain information exchanged.
  - They should define (1) the scope of the information that should be treated as confidential, (2) the time period for exchange, (3) the time period for which the information must be kept confidential, and (4) the final disposition of the information.
  - These agreements are used to allow discussion of a potential project or proposal or to facilitate information exchange during a collaborative project.
- **MTAs/DUAs** may also have significant confidentiality obligations.

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## No Money Agreements: Where to go?

- In general, no-money agreements are processed through ORSO.
- However, agreements relating to work conducted by an approved service center through a service center agreement will be processed by the Business Office.

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### Contract Analysis:

What are the University's priorities in contracting?

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### Our Mission

Washington State University is a **public research university** committed to its land-grant heritage and tradition of **service to society**

- To advance knowledge through creative **research and scholarship** across a wide range of academic disciplines
- To extend knowledge through innovative **educational programs in which emerging scholars are mentored to realize their highest potential** and assume roles of leadership, responsibility, and service to society
- To **apply knowledge through local and global engagement** that will improve quality of life and enhance the economy of the state, nation, and world

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### Our Mission

- All agreements entered into by the University **MUST** be consistent with our mission and our authorizing legislation as a state agency.
- Key Concepts:
  - Public
  - Service to Society/Application of Knowledge
  - Research and Scholarship
  - Education

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## Our Mission

*...as a Public University and State Agency*

As a State Agency, WSU has only the powers that have been granted by the legislature. We also must be mindful of preserving our sovereign immunity.

Where does this come up?

- Indemnification:** In Washington, state agencies must be specifically empowered to indemnify—we are not. Preferred language: *Each party will be responsible for the acts and omissions of its employees, etc.*
- Governing Law:** As a state agency, it is problematic for us to agree to governing law or exclusive jurisdiction in another state.
- Insurance:** Some agreements seek to impose specific insurance requirements. WSU is self-insured through the State.

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## Our Mission

*...as a Public University and State Agency (Pt. 2)*

As a State Agency, WSU has only the powers that have been granted by the legislature. We also must be mindful of preserving our sovereign immunity.

Where does this come up?

- Injunctive Relief:** NDAs may include a clause stating that breach *will* result in irreparable harm which *will* be entitled to injunctive relief. Agreeing to this language could be read as a waiver of our sovereign immunity, which is bad.
- Confidentiality:** Due to the Washington Public Records Act, confidentiality obligations must allow disclosures required by operation of law. We also need to ensure that our partners are aware of our obligations under the Act and what can be done to protect their information.

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## Our Mission

*...In Service to Society*

Our mission is to serve the people of the state, not advance or subsidize the interests of our sponsors.

Where does this come up?

- Budgets:** Indirect costs must be subsidized by the state if they are not fully compensated in our Agreements.
- Liability Issues:** In reviewing agreements we are cognizant of potential legal risk to WSU. We are not a profit-based organization.
- Technology Transfer:** By partnering with companies, we can find new applications for discoveries made at WSU.
- Licenses:** Some sponsors request a license in exchange for research funding. This is negotiable, but licenses do have value and are not part of the project budget. If a license is granted, the sponsor pays patent expenses.

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## Our Mission

*To Advance Knowledge Through Creative Research and Scholarship*

Where does this come up?

- **Publication Restriction:**
  - Publications and presentations are a major priority.
  - Academic freedom and advancement of knowledge are fundamental to our mission, and without this, projects are of questionable value to the university.
  - Allowing the sponsor to quash unfavorable results implicates our academic integrity.
  - We offer pre-publication review for confidential information or patentable discoveries. Any redaction will be done by our researchers.

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## Our Mission

*To Advance Knowledge Through Creative Research and Scholarship (Pt. 2)*

Where does this come up?

- **Data Rights:** In general, WSU retains the ownership of research data. At the minimum we retain the right to use the data for our internal research and teaching purposes.
- **Confidentiality:** The definition of confidential information must not include the research results.

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## Our Mission

*...Education*

Where does this come up?

- **Confidentiality/Publications:** It is critically important that sponsored project agreement terms and conditions not impose upon the ability of graduate students to publish or complete a thesis project.
- **Data Rights:** Faculty need to be able to use the results of their research for their normal teaching, research, and public service activities without hindrance.

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**Workflows:**  
*How are research contracts negotiated?*

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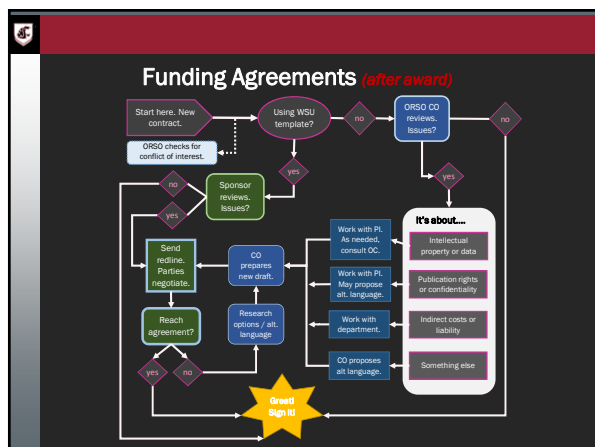
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**No Money Agreements**  
*Internal Forms*

**Material Transfer Agreements:** requires an MTA information sheet. <http://orso.or.wsu.edu/DOCS/MTAInformationSheet.pdf>

**Outgoing Material Transfer Agreements:** please contact the Office of Commercialization for *outgoing* MTAs. <https://commercialization.wsu.edu/Resources/Documents.html>

**Non-Disclosure Agreements:** require the NDA approval form. [http://orso.or.wsu.edu/documents/NDA\\_Internal\\_Master\\_05.14.2015.pdf](http://orso.or.wsu.edu/documents/NDA_Internal_Master_05.14.2015.pdf)

**Subawards:** require a subaward initiation form. <http://orso.or.wsu.edu/documents/SubcontractInitiation.xlsx>

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WASHINGTON STATE UNIVERSITY



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If you attended this live training session  
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