

WASHINGTON STATE UNIVERSITY

# Ins & Outs of Contracts

Office of Research Support & Operations

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## Today's Content:

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



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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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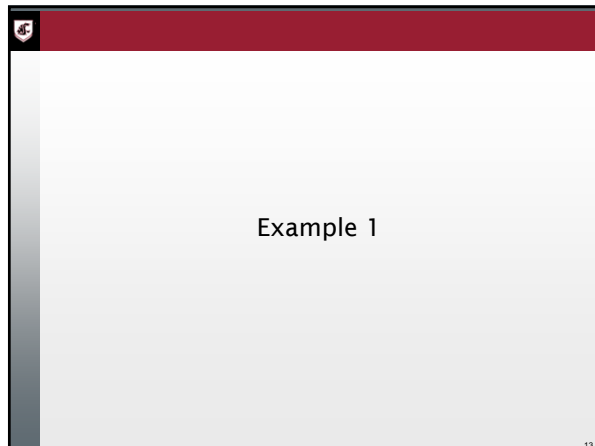
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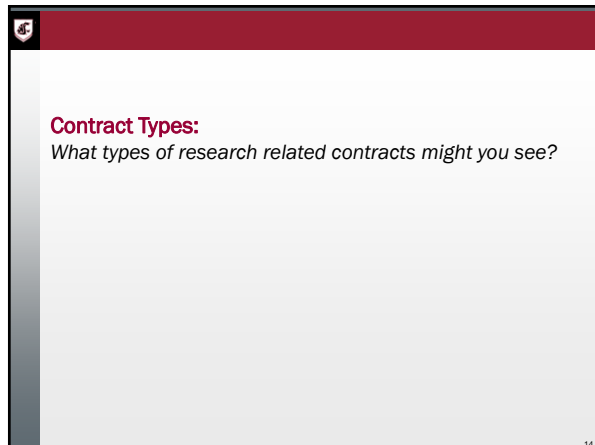
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## Funding Agreements

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## Research 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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## Research 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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Research 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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Research Funding Agreements: Federal	
Procurement Contract Types	
<b>Contract Types:</b>	
<ul style="list-style-type: none"> <li><b>Firm Fixed Price:</b> risk of loss on contractor = incentive to control costs; imposes the least administrative burden; invoices based on milestones or deliverables.</li> <li><b>Cost Reimbursement/Cost Plus Fee:</b> payment of allowable <u>incurred costs</u>; incremental funding; "Because the absence of precise specifications and difficulties in estimating costs with accuracy...normally precludes using fixed-price contracting for R&amp;D, the use of cost-reimbursement contracts is usually appropriate." - FAR 35.006(c)</li> <li><b>Time-and-Materials/Labor-Hour:</b> fixed hourly rates; used when not possible to confidently estimate duration of work or costs.</li> <li><b>Indefinite-Delivery/Quantity:</b> 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&amp;C.</li> </ul>	

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Research Funding Agreements: Non-Federal	
<ul style="list-style-type: none"> <li><b>Other Sponsor Types:</b> Private industry, non-profit organizations and foundations, state and local government entities.</li> <li>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.</li> <li>State government agencies can be difficult to negotiate with due to their own internal restrictions. Some are resistant to negotiating their template agreements.</li> </ul>	

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## No-Money Agreements

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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
- Agreements that protect proprietary information

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## Agreements That Transfer Stuff

### 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. Not always required.
- **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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## Agreements About Relationships

### 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. 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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## Agreements to Protect Confidential Information

### 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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## MTA Example

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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/State Agency
  - Service to Society
  - Research and Scholarship
  - Education

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### State Agency Status

As a State Agency, WSU has only the powers that have been granted by the legislature. Our State Agency status also imposes some contracting limitations.

Where does this come up?

- **Governing Law:** What state's rules will govern interpretation of the contract
- **Venue:** What courts will have jurisdiction over a dispute.
- **Insurance:** Requirements must allow for self-insurance.
- **Indemnification:** In Washington, state agencies must be specifically empowered to indemnify—we are not.
- **Confidentiality:** Disclosure of information required by operation of law must be allowed due to the Washington Public Records Act. Our partners must be made aware of our obligations under the Act and what can be done to protect their information.

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### Service to Society

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

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.
- **Intellectual Property:** 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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### Research and Scholarship

Where does this come up?

- **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.
  - Pre-publication review for confidential information or patentable discoveries is okay, but any redaction will be done by our researchers.

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### 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.
  - Protects the PI's research program/future work.
- Confidentiality:
  - Sneaky publication restriction.
  - The definition of confidential information must not include the research results.

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### 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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### Example 2

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## Workflows:

Who to talk to and what happens next

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## Funding Agreements: Where to go?

	ORSO	Contracts	Purchasing
Incoming	Agreements regarding: Research, teaching, or other scholarly activity; Testing or services work without an authorized service center.	Service Center agreements; revenue contract	
Outgoing	Sub-awards—transfers a portion of the research or substantive effort to another organization.	Agreements related to business or admin activities (e.g. real estate, facilities use, interagency, etc.).	Procurement Personal Services Sub-contracts— provides goods or services to the contractor

<https://orso.wsu.edu>  
<https://contracts.wsu.edu>  
<https://purchasing.wsu.edu>

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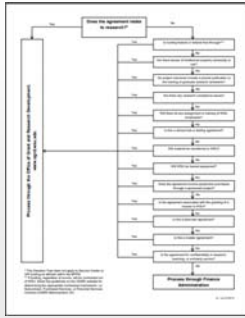
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## Funding Agreement Routing Decision Trees

<https://contracts.wsu.edu/DecisionTree.html>
[https://orso.wsu.edu/documents/decision\\_tree.pdf](https://orso.wsu.edu/documents/decision_tree.pdf)

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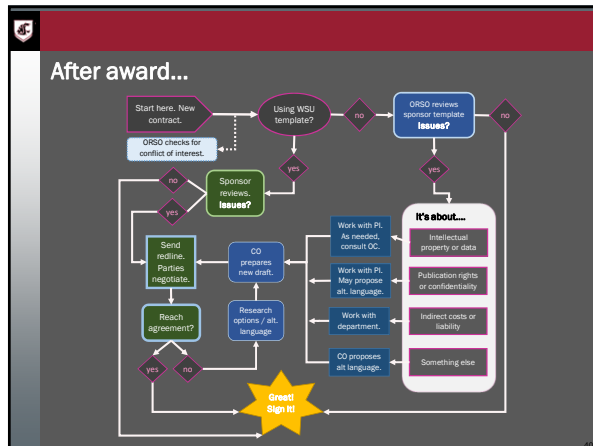
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**No Money Agreements: Where to go?**

- In general, research-related no-money agreements are processed through ORSO.

<https://orso.or.wsu.edu/forms.asp>

Material Transfer Agreement Information Sheet:  
[https://orso.or.wsu.edu/DOCS/MTA\\_Info\\_Sheet\\_Jan\\_2018.pdf](https://orso.or.wsu.edu/DOCS/MTA_Info_Sheet_Jan_2018.pdf)

Non-Disclosure Agreement Information Sheet:  
[https://orso.or.wsu.edu/documents/NDA\\_Info%20Sheet\\_Jan\\_2018.docx](https://orso.or.wsu.edu/documents/NDA_Info%20Sheet_Jan_2018.docx)

Subaward Initiation Form:  
<http://orso.or.wsu.edu/documents/SubcontractInitiation.xlsx>

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**Routing of No-Money Agreements: Exceptions**

- Agreements relating to work conducted by an approved service center through a service center agreement will be processed by the Contracts Office.
- Contracts processes other types of no-money agreements, like internship and affiliation agreements.

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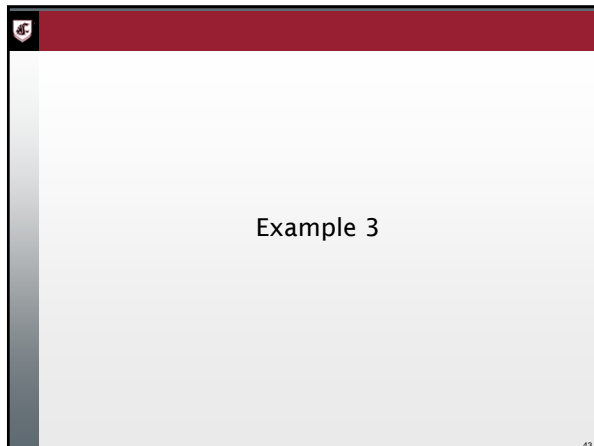
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