

FAR FROM AGREEMENT -

Complications arising from federal contracts and subcontracts

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Sponsored Projects

- ⦿ Contracts, Grants, & Gifts – What’s the difference?
 - Restricted vs. unrestricted
 - Extent of terms and conditions - guidelines or FAR
- ⦿ Why does it matter and who cares?
 - time and effort lost, financial loss, institutional embarrassment, funding termination,
 - and because System policy demands it
 - BOR IV-2.00 - POLICY ON SOLICITATION AND ACCEPTANCE OF SPONSORED PROJECTS

The Wellspring of Objections

- Really just two sources to most objections in sponsored projects agreements:
 1. Maintaining the sovereignty of the State
 2. Maintaining the freedom to disseminate knowledge
- These are the basic principles we live by as a state institution of higher education

Basic Principle 1

- ⦿ Provisions Impacting Sovereignty of the State
- ⦿ Embodied in IV-2.00 - *POLICY ON SOLICITATION AND ACCEPTANCE OF SPONSORED PROJECTS* (Section IV)
 - conditions for performance which are not standard System practice –
 - Abridgement of publication rights
 - Necessity for legislation in order to conduct the program of work
 - Assumption of liability for a third party
 - Creation of an unfunded liability
 - The Chancellor may, in consultation with the chief executive officer, require withdrawal of the proposal or non-acceptance of the award.

Basic Principle 2

- ⦿ Publication Restrictions
- ⦿ Embodied in BOR IV-2.20- *POLICY ON CLASSIFIED AND PROPRIETARY WORK*
- ⦿ Policy Excerpts-
 - Section 2. The University of Maryland System enters into no contractual agreement that restrains it from disclosing the existence of the agreement, the nature of the work, and the identity of the sponsor.
 - Section 3. University System institutions will enter into no agreement that bars investigator(s) from publishing or otherwise disclosing the findings publicly. However, ... the institution may agree to delay publication for a maximum of 90 days...

Application to Agreements

- ⦿ These tenets are tested by many terms and conditions found in awards, for example:
 - Indemnification, Arbitration, Applicable law and venue provisions
 - Export Control, Publication or Nationality restrictions (e.g., DFARS 252.204-7000, ARL 52.004-4400) Work for hire, IP Ownership by Sponsor, and Patent clauses with long delays.
- ⦿ These conditions appear with greater frequency now, particularly after 9/11

Provisions Impacting Sovereignty of the State

- ⦿ Assumption of liability for a third party and creation of an unfunded liability
 - Created whenever UMBC is asked to sign an award with an Indemnity provision
- ⦿ Indemnity is an agreement by Party 1 that it will pay to Party 2 the amount of liability which may be suffered by Party 2.
- ⦿ Typical text-
 - Awardee will defend, indemnify, and save Sponsor harmless for and against any and all claims (including costs of litigation and attorneys' fees) arising from the Awardee's performance under this Agreement, except for claims resulting from the willful misconduct or negligent action of Sponsor.

Indemnities and Insurance

- By Attorney General opinion, state entities may not agree to indemnify others, since this deprives the Governor and the Legislature of their respective discretionary actions
- Since the State and its various units are self insuring, we do not carry General Commercial/Liability Insurance

And last but not least, Arbitration

- ⦿ Since the State is a sovereign entity, it does not consent to be bound by authorities outside of the Judicial branch.
- ⦿ UMBC can consent to non-binding arbitration, but the cost can be close to litigation cost, without any binding result.

Publication Restrictions

- ⦿ Publication restrictions not only violate BOR policy, but can have serious secondary impact on research operations and dissemination
- ⦿ Accepting restrictions on publication (DFARS 252.204-7000) or the nationality of persons performing under the award (ARL 52.004-4400), can trigger export control licensing requirements – potentially delaying the start of research by weeks, months or even years.

Export Control

- ④ Departments of State and Commerce administer 2 systems regulating the export or dissemination of articles, products, services, designs, or technical data relating to military, dual use, or commercial technologies.
- ④ For technologies covered by the regulations, a license is required to export. A license can take weeks, months or even years to issue.
- ④ An “export” can occur just by discussing a covered technology without ever leaving the US.
- ④ Violations can subject institutions and individuals to fines, and may include criminal prosecution in certain cases.

Material in the Public Domain

- ◎ ITAR/EAR regulations provide exclusion for material in the public domain – no license required! To be considered in the public domain, information must be freely disclosed.
 - through subscriptions,
 - at libraries
 - in patents
 - through unlimited distribution at conferences, seminars, etc
 - through **fundamental research** in science and engineering (ITAR further restricts to “at accredited institutions of higher ed”), and information is published and shared broadly

Fundamental Research under Export Control Regulations

- ① Definitions vary in ITAR/EAR regs, but NSDD 189 provides a good general characterization
- ① “‘Fundamental research’ means basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons.” NSDD 189

Classification & NSDD 189

- National Security Decision Directive 189 - *National Policy On The Transfer Of Scientific, Technical And Engineering Information* (1985) (Reaffirmed by Bush Admin 2001)
- “...establishes national policy for controlling the flow of science, technology and engineering information produced in federally funded fundamental research at colleges, universities, and laboratories.”
- “It is the policy of this Administration that, to the maximum extent possible, the products of fundamental research remain unrestricted. It is also the policy of this Administration that, where the national security requires control, the mechanism for control of information generated during federally funded fundamental research in science, technology and engineering at colleges, universities and laboratories is classification.”
- *“No restriction may be placed upon the conduct or reporting of federally funded fundament research that has not received national security classification, except as provided in applicable U.S. Statutes.”*

IP Restraints = Publication Restraints

- ⊙ Work for Hire
 - Ownership passes to employer/payor
 - But limited to 9 specific types of works
 - UMBC does not agree to WFH
- ⊙ Ownership (“title”)
 - Ownership means dissemination control
 - Always retained by UMBC
- ⊙ Exclusive License
 - Effectively conveys ownership in ©
 - Never given solely in return for sponsoring work
 - Non-exclusive license can be conveyed in sponsored project agreement, but exclusive license is the result of second stage license negotiation

finally, The End!

- Have you hugged your Grants and Contracts Manager lately?
- Questions?
- Contact information-
 - Telephone ext. 5-2709
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- Thank you!