



UNC
RESEARCH

What's the Hold Up? Exploring Contracting Under the FAR and other Troublesome Clauses.

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AWARD ACCEPTANCE & NEGOTIATION

Complex Answers to Four Basic Questions:

Who?

- Who will manage this award?
- Who is the sponsor?

What?

- What kind of award are we receiving?
- What regulations apply?

Where?

- Where is the work taking place?
- Where do we stand on publication and intellectual property?

When?

- When did we receive it?
- When is it due?

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Who Will Manage This Award?



OSR: Federal, State, Non-Profit, and Industry contracts, grants, and other funded agreements



OCT: Industry-funded Clinical Trial Agreements



OTD: Material Transfer Agreements and License Agreements



OUD: Gifts and charitable contributions



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What Is it: GIFT or GRANT?

- No single indicator: one vs. the other
- Grants are reciprocal
 - each party giving/receiving
- Gifts are contributions
 - with no expectation in return
- Federal funds should never be treated as a gift



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What Is it: GIFT or GRANT?

CHARACTERISTIC	GIFT	GRANT
Defined Scope of Work?	NO	YES
Revocability?	NO	YES
Award Terms (Publication, IP, Royalty Sharing, etc.)?	NO	YES
Cost & Budget Information Required?	NO	YES
Detailed Reporting?	NO	YES
Performance Period / Milestones?	NO	YES
Return of Unexpended Funds?	NO	YES
Unrestricted Funds (no contract terms)?	YES	NO
Report of Accomplishments (Impact of Support)	YES	NO
No specified performance period?	YES	NO



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What is the Funding Mechanisms?

Grant

- Assistance to accomplish a public purpose
- Idea originates with the recipient

Contract

- Legally binding document
- Federal procurement to acquire property or services for direct benefit or use of the Sponsor Government

Cooperative Agreement

- Award to accomplish a public purpose, but with substantial sponsor involvement in design and execution

Fellowship

- Award generally made for an individual, often through the institution



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Funding Mechanisms - Other

Purchase Order

Used to request goods or services in return for payment

Master Task Order

Authorizes work and appropriates funds in increments/supplements

IDIQ

Delivery order requesting an indefinite delivery and indefinite quantity

Subaward

Transfers a portion of a larger award to another institution

Letter Agreement

Basic agreement for goods or services with specific terms and conditions

Any award instrument that includes financial consideration



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What Regulations Apply?

- What regulations apply to an award depends largely on 3 things:



Who is the awardee?



What Type of Sponsor?



What Type of Award?

- UNC policies and procedures always apply.



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Applicable Regulations

	Federal Grant	Federal Contract	Federal Cooperative Agreement	Federal Flow-Thru	State Grant or Contract	Private/Non-Profit/Industry Grant or Contract
NC Statutes	X	X	X	X	X	X
NC Administrative Code	X	X	X	X	X	X
UNC Policies & Procedures	X	X	X	X	X	X
UNC GA Policies & Procedures	X	X	X	X	X	X
Federal Acquisition Regulations		X		X (if prime is a Federal Contract)		
OMB Circulars	X	X	X	X	X	X
Sponsor-specific Terms & Conditions	X	X	X	X	X	X



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Typical Applicable Regulations

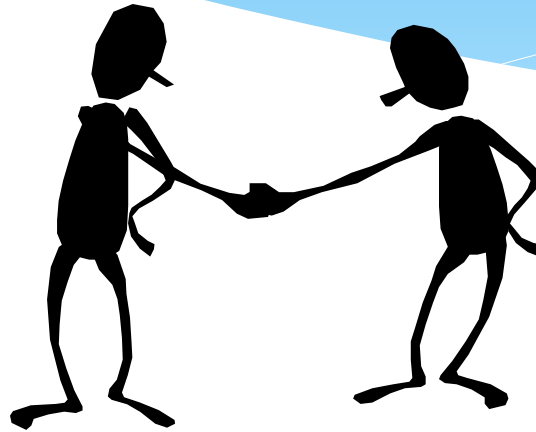
The compass that guides our decision-making:

- Federal
 - OMB Circulars
 - A-21 – Cost Principles for Educational Institutions
 - A-110 – Administrative Requirements
 - A-133 – Audit
 - Federal Acquisition Regulations



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Negotiation Process



Not all award types require negotiation!

Who is responsible for negotiation?

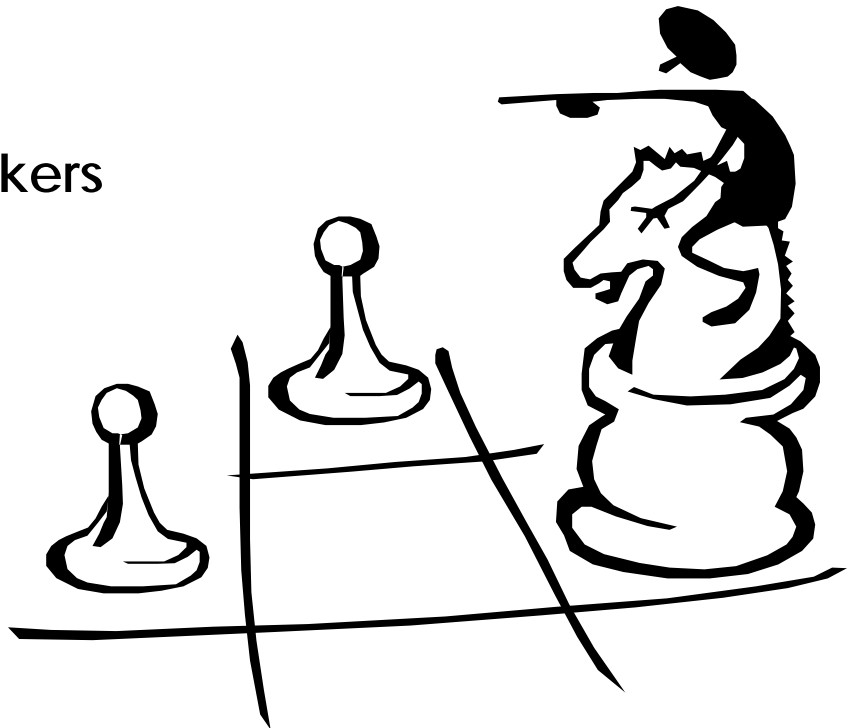
What is involved in the process?



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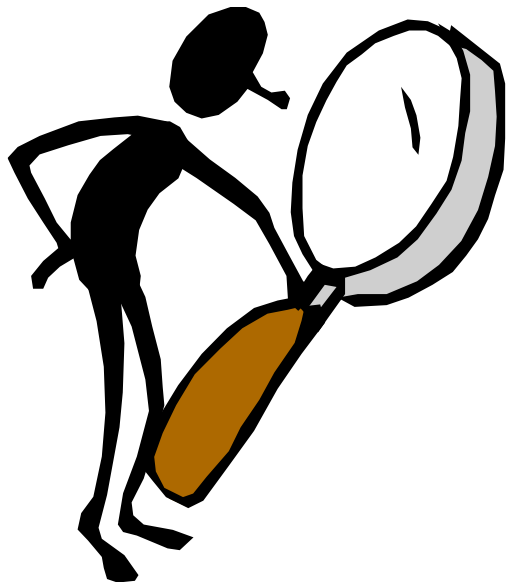
Negotiating Terms

- Goal is to protect the University and the PI's interests
- Troublesome clauses
- Negotiable vs. Deal-breakers
- Each award is unique



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Where Do We Stand on Terms?



TERMS TO CONSIDER

FAR

Indemnification

Governing Law

Publication

Deliverables

Administrative Issues

Equipment Vesting

Revenue Collection

Liability/Risk Assessment

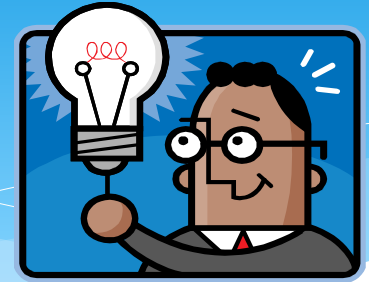
Warranties

IP and Data Rights



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Important Terms to Consider...



Indemnification

To protect a party and hold them harmless from future damages, losses, or injury

Ideal Terms:

- No language requiring UNC to indemnify any third parties.
- Limit the extent of such indemnification to be consistent with NC Statute and not beyond the State's waiver of sovereign immunity



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Important Terms to Consider...

Governing Law and Venue

Provision in a contract that allows the parties to agree that a particular state's laws will be used to interpret the agreement

Ideal Terms:

- Governed in accordance with the laws of the State of North Carolina, with venue in Orange County, NC.
- Remain silent on governing law
 - What is the impact of signs first?
 - What is the impact of where the work is taking place?



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Important Terms to Consider...

Publication

In general, the University should not accept or participate in any research grant or contract that will prevent or restrict investigators from publishing fully and freely the results of their investigations.

Ideal Terms:

- No restriction on faculty's right to publish
- Prior review (not approval) of publication



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What is Intellectual Property?

Patents

Trademarks

Copyrights

Trade Secrets



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What is the Basis for Protecting our IP?

- **Article 1, Section 8 of the Constitution** states:
 - "Congress shall have the power to...promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." (US Const., art I. sec. 8, cl. 8.)
- **The Bayh-Dole Act**
 - allows universities, small businesses and non-profits to own IP resulting from federal funding. (35 U.S.C. § 200-212)
- **Data Rights**
 - FAR 27.401 and 52.227-14



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Why do we want to protect IP?

○ Social, Cultural, and Economic Development

○ Drives industrial growth

○ Helps raise living standards

○ Protects key technology

○ Creates a barrier to others

○ Generates value

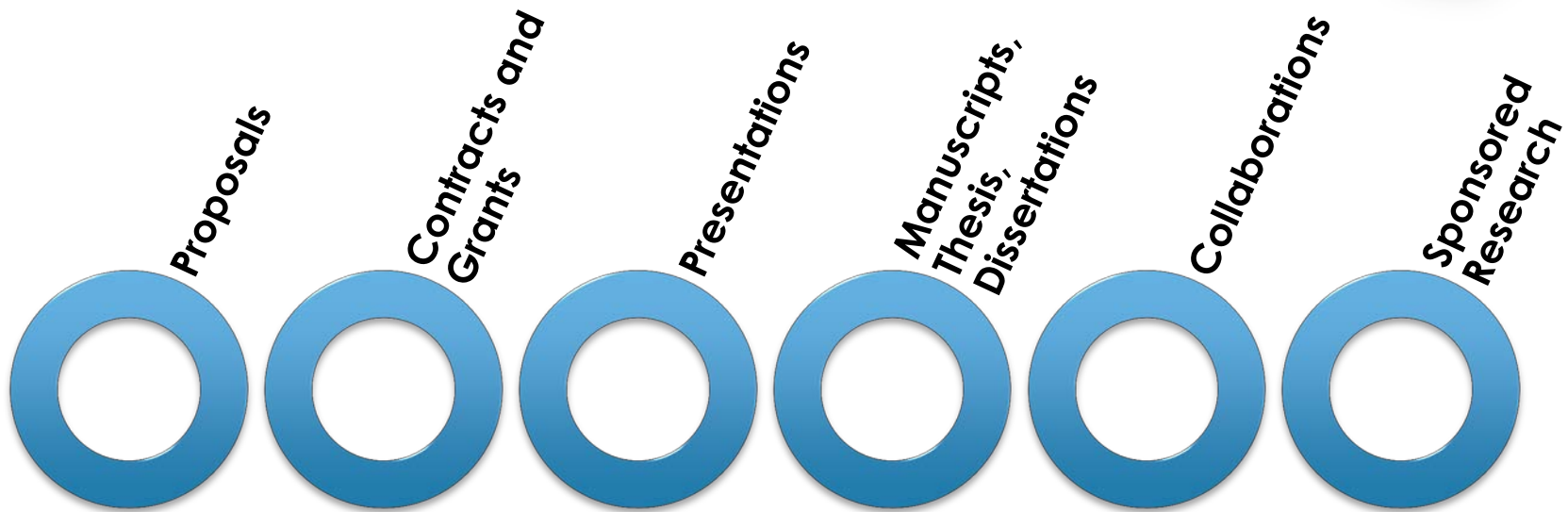
○ Incentivizes commercialization



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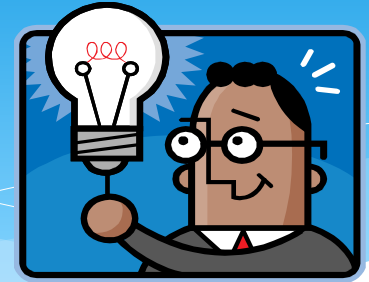


IP can be generated at any time:



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Important IP Terms to Consider...



Background Intellectual Property

All inventions, improvements and/or discoveries...which were in existence, prior to the execution date of the Agreement.

Ideal Terms:

- Existing Background Intellectual Property of any party existing prior to the Agreement is separate property and not affected.
- Neither party acquires rights in any Background Intellectual Property of the other that exists prior to the execution date of the Agreement.



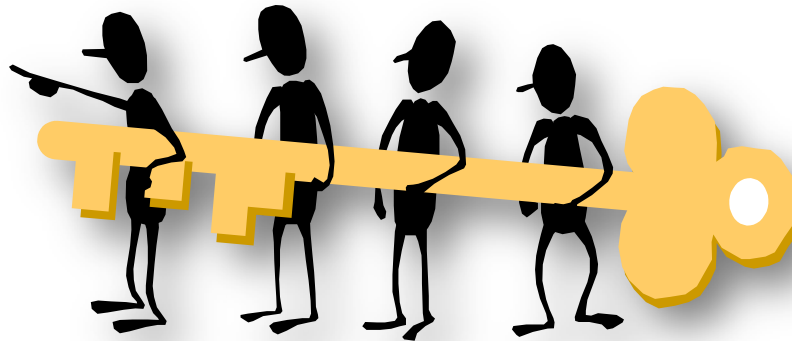
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Important IP Terms to Consider...

Ownership of Intellectual Property

Ideal Terms (Mutual, or Neutral IP Language:

- UNC shall own any IP developed by UNC personnel.
- Company shall own any IP developed by Company.
- UNC and Company shall jointly own and IP developed jointly.



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Impacts of Negotiating IP

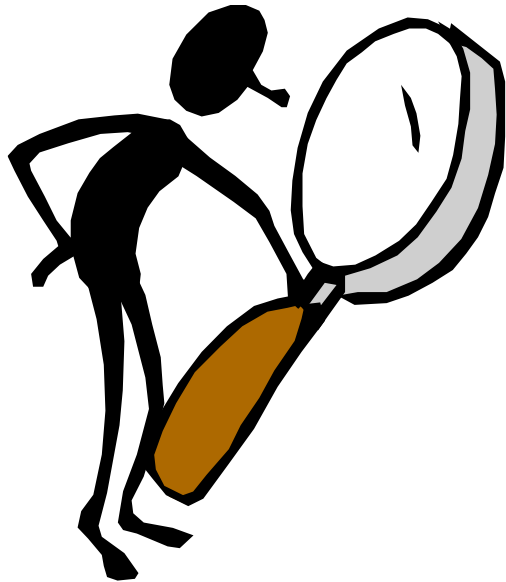
Regardless, you always have to consider the *current* and *future* impact of IP terms to UNC and the PI:

- Future research
- Funding
- Collaborations
- Publications
- Graduate Students
- Tenure



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Let's Examine Contracting Under the FAR?



Federal Acquisition Regulations

Policy and procedures written by the government for the government as a means to regulate the federal government's acquisition process

Serves as an instruction manual for federal contracting officers to construct a proper contract

Only applies to federal acquisition by contract

Codified in the Code of Federal Regulations (CFR), not the United States Code (USC), therefore not considered statutory (or Federal Law); however, Federal courts still recognize the FAR to have the same force and effect of Federal Law



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Let's Examine Contracting Under the FAR?

- Under the CFR, the FAR is divided into 37 Chapters (not necessarily sequentially)
- Chapter 1, the basic FAR is divided into 99 parts:
 - Parts 1-51 contain topical instructions (Prescription)
 - Currently parts 21, 22, and 40 are reserved (not used)
 - Part 52 contains solicitation provisions and contract clauses
 - Part 53 contains forms
 - Parts 54-99 are reserved
- All federal contracting requirements with across-the-board applicability are contained in Chapter 1
- Chapters 2-63 are known as the Supplements (typically one per agency)
- Most of our contract will reference FAR clauses found in Chapter 1, Part 52.

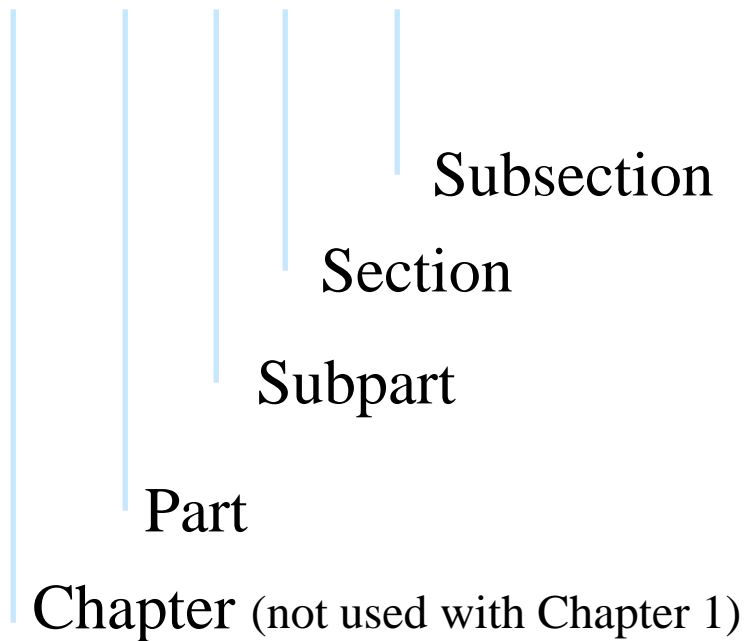


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Let's Examine Contracting Under the FAR?

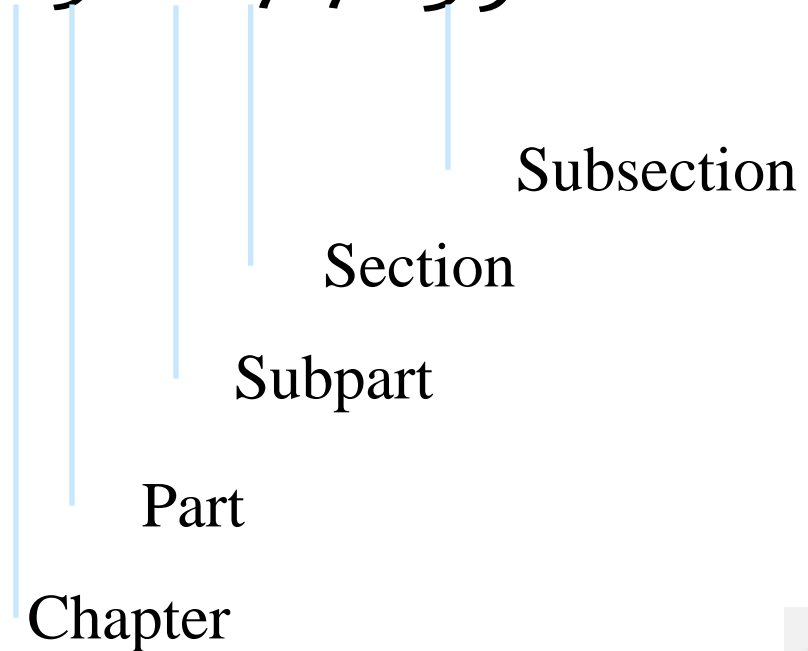
Numbering System:

XX-XX.XXX-XX



Numbering from Chapter 2:

252.227-7039



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Let's Examine Contracting Under the FAR?

The Federal Acquisition Regulations:

Contracting officers include/exclude FAR clauses based on:

1. Purpose of the contract (R&D, construction, supply, etc.)
2. Type of contractor (non-profit, for-profit, educational, etc.)
3. Financing method (fixed price, cost-reimbursement, etc.)

Up to the institution to review and ensure that the proper clauses have been included

Found in print and online

Code of Federal Regulations (CFR) – Title 48

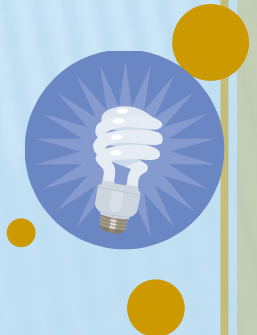
<http://farsite.hill.af.mil/>

<https://www.acquisition.gov/far/index.html>





QUESTIONS or COMMENTS?



THANKS FOR JOINING US!



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