Chapter 5

Contract Compliance

IN THIS CHAPTER

Learn about key areas of compliance

Introduction

Our core values of integrity and excellence require that CARE perform activities in the highest quality manner while serving the communities in which we work. Any funding, donation or other item received by CARE from a donor must follow requirements aligned with the donor's intentions. These requirements, or "restrictions," may vary greatly, ranging from very limited requirements to complex rules relating to cost allowability and audit. Additionally, CARE's work is regulated or controlled by various local or national laws that place additional requirements on our work.

It is critical for every Project Manager to place a high priority on compliance with these requirements. Even if you are not directly responsible for such tasks, you are responsible for ensuring that individuals performing compliance-related functions at your Country Office are aware of the requirements and performing their job functions effectively. Of course, attention to – and compliance with – these requirements enhances CARE's relationship and reputation with a donor, and furthers CARE's overall commitment to integrity and accountability.

This chapter highlights key areas that are often regulated or controlled by donors and applicable laws. Although featured examples are primarily from US government-funded awards, other donors may have similar or competing requirements.

This section also offers a general overview of contract compliance. If you have specific questions or concerns relating to any of these topics, and in particular their application, please contact the appropriate staff at the Country Office or lead member, and / or the CI member designated as the contact point for a particular donor.

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For further information about US and other donor requirements, visit **www.carematrix.org.**

The collaborative work of various CI members aims to inform Country Office staff of the various regulations, policies and practices applicable to funding from AusAID, CIDA, Danida, DFID, EU, ECHO, NORAD, and the USG. The website is organized by topic relating to areas frequently questioned by Country Offices. A "Donor Materials" tab contains additional information (including electronic copies of application regulations) and guidance posted by CI members that may be used to assure compliance with various requirements.

PIN: When registering for the first time, you will need to use the following PIN: 84jh15kl (case sensitive, lower case letters only).

Pre-Award Requirements

Compliance requirements relating to a specific program originate at the earliest stages of a program's development with a donor. Before a donor even considers providing funding to an organization to pursue a relief or development objective, conditions or priorities apply. These may include specific program requirements, as well as general regulations and policies that apply to all recipients who apply for and receive funding.

Many of these conditions and priorities will be described in the donor's solicitation. Document names vary, including "Request for Application," "Request for Proposal," "Annual Program Statement," "Task Order Request for Proposal," "Tender" and others. Regardless of the name, from a compliance perspective you should be familiar with the context of a donor's funding of a program. In particular, you should understand any compliance requirements that might be a part of that solicitation. Be sure to maintain and review a copy of the solicitation in the initial stages of project planning, in case it is needed in the future.

CARE's proposal is a written response to a solicitation. It therefore contains multiple "promises." These promises are not only about the project and its objectives, but also are compliance-related representations, and, in some cases, legal certifications that commit CARE during the life of a project. CARE's proposal might also contain a number of items that, if approved by the donor, would constitute a required prior approval. For example, if one puts in a proposal to USAID "planned international travel during the life of an award," USAID's funding of that proposal would constitute the required prior approval for international travel. Receiving such prior approvals is key to avoiding seeking donor permission for certain activities or actions later. Some donors, however, such as the EU, will not consider the full proposal as being part of the contract and will always require explicit derogations/prior approvals. As indicated in Chapter 1, you should be familiar with the project proposal submitted by CARE, since the donor will seek to enforce activities and requirements CARE has promised during the term of an award.

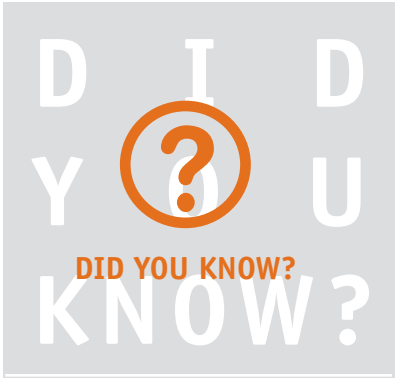
Agreement with the Donor

Once a donor has agreed to fund a CARE program, some form of legal agreement is executed by that donor and CARE. Depending on the donor, agreement, these may be named "Contract," "Cooperative Agreement," "Grant," "Sub Grant", "Sub Contract", etc. These documents may vary significantly, from a longstanding framework agreement signed by a CARE member, to complicated multi-page agreements, to simple two-page agreements that require minimal compliance requirements. Regardless of name or length, CARE's written agreement with a donor establishes the requirements applicable to CARE's work, including references to various rules, regulations and policies CARE is required to follow under the agreement. These documents should be reviewed thoroughly and incorporated into CARE's work under a given project, and maintained in an accessible file for ease of reference and use. This file should include any modifications that may be made to an award during its term.

As a project manager, you should become familiar with pre-award requirements, as well as the compliance-related "promises" described in CARE project proposals.

Items may require prior approval, and the donor will seek to enforce activities and requirements CARE has promised during the term of an award.

As Project Manager, it is essential for you to become familiar with CARE's legal agreement with the donor, and to maintain a copy all documentation and any amendments.



- In some cases, requirements such as legal obligations imposed by a local government or a lead member national govern ment apply regardless of whether or not the donor has recognized them as a requirement under an agreement.
- A number of fundamental practices should be utilized by aall Country Offices to assure that work is conducted in compliance not only with applicable rules and regulations, but also consistent with CARE policies, procedures and standards.

Additionally, it is CARE's practice for a CI member that is not a lead or designated member to a particular Country Office to enter into an **Individual Program Implementation Agreement ("IPIA")** which will govern the relationship between the CI member and the Country Office. The forms of IPIA vary by CI member. IPIA's are often executed to supplement a previously existing Project Implementation Framework Agreement between a CI member and the Country Office. Agreement is intended to govern the long-term working relationship between a CI member and a given Country Office.

As Project Manager, it is essential for you to become familiar with this documentation, and to maintain a copy of all documentation and any amendments.

Compliance: Key Terms and Conditions, Regulations, Laws and Practices

During implementation of any award from a donor, there are a number of notable compliance areas may be restricted or controlled. These areas may vary significantly based on the donor and its requirements.

Below is a list of common compliance requirements applicable to funds received and programmed by CARE:

- **Eligible Costs.** What donor regulations exist that inform what costs may or may not be charged to a particular program? For example, for US government funded projects, only costs that satisfy the requirements set forth ion OMB Circular A-122 can be paid by the donor. Costs incurred contrary to these requirements will lead to questioned or disallowed costs at a later date, resulting in the potential for CARE to pay back funds to the donor, or otherwise absorb unexpected losses.
- **Prior Approvals For Certain Costs.** Some eligible costs may require prior approval from the donor. For example, under USAID awards, this rule would apply to the following: the purchase of equipment (items exceeding $5,000 in value) and other capital expenditures; housing expenses; training support costs (for training of those other than CARE employees); membership costs; pre-award costs; publication and printing costs; international travel; and overtime pay. Any of these items that are specifically included in the cost proposal budget may be considered "approved" if the donor funds accepts a proposal and funds the overall program. A thorough understanding of the proposal documentation is extremely important.
- **Programmatic Prior Approvals.** A donor might also require approvals for certain programmatic actions. For example, for US government funding, the following prior approvals are required: changes in scope or objectives of a program; changes in key personnel; an absence of designated key personnel for more than 3 months or a 25% reduction in time devoted to the project; transfer of funds between direct and indirect cost line items; transfer of funds allotted for participant training (training for those other than CARE employees); and the sub awarding, transfer or contracting

out of activities if not previously approved by USAID. On the contrary, for the EU, transfer of funds between direct and indirect costs will never be allowed, but changes to key personnel will not have to be approved. You will need to review the applicable regulations or consult with the appropriate CI member representative for more information.

> **Procurement.** Procurement of equipment or services under an agreement from a donor represents one of the most crucial areas of compliance, in part because expense testing of these transactions is relatively simple, but also because procurement transactions are among the most regulated by CARE donors. The following requirements should be considered:

- *Standards, Policies and Procedures.* What procurement requirements and standards does the donor require? What are the procurement policies of your Country Office? Your Country Office has policies and procedures in place that ensure the fairness and integrity of the procurement process, addressing such matters as tendering/bidding requirements, conflicts of interest, and other areas. Additionally, the donor may have requirements that mandate certain procedures.
- *Source, Origin and Nationality.* To offer economic benefits to providers of goods and services from a donor country, many donors give preferential treatment or impose requirements that goods and services be purchased from certain providers. What limitations on source, origin and nationality apply to your agreement? Does the donor require that any items purchased under an award be purchased from a certain geographic location? What waivers might be available, and when and how can they be sought?
- *Ineligible Goods.* A donor may have a policy that forbids the procurement of certain items. Are certain equipment and supplies not allowed to be purchased under your agreement? For example, under USAID, the following may not be funded with USAID funds: military equipment, surveillance equipment, commodities and services for support of police or other law enforcement activities, abortion equipment and services, luxury goods and gambling equipment, and weather modification equipment. For the EU, purchase of land and buildings will usually be ineligible.
- *Prior Approval Requirements.* Does the purchase of certain items require prior approval from the donor? For US government awards, prior written approval is required to purchase with USG funds any item with a purchase price in excess of US$5,000 and a useful life of one year (defined as "equipment"). In addition, under USAID, the following items are considered "restricted goods," and prior approval is required regardless of the purchase's value: motor vehicles (including motorcycles), agricultural commodities, pharmaceuticals, pesticides, used equipment, fertilizer, and excess US government property.

Common Compliance Areas

- Eligible Costs
- Prior Approvals For Certain Costs
- Programmatic Prior Approvals
- Procurement
- Prior Approval Requirements
- Export Controls
- Import Controls
- Pre-award costs
- Donor Management and Oversight
- Marketing/Branding
- Cost Share/Match
- Line Item Flexibility
- Program Income
- Anti-terrorism
- Audits
- Sub grant Management and Monitoring
- Legal Agreement Review and Template Agreements
- Contract Management.
- Risk and other Legal Requirements
- Lobbying

- *Export Controls*. Does the proposed procurement need to adhere to any export control laws and regulations? For example, the US government has export laws, regulations, and procedures that monitor and control the export of certain goods and services originating in or manufactured in the United States. Generally, these requirements are imposed to monitor and limit the spread of technologies and materials that might be used to develop weapons of mass destruction, as well as to achieve various policy considerations such as national security and anti-terrorism interests. The following are items most commonly purchased by CARE that may have applicable export regulation requirements applicable to US brands (or US made or manufactured items):

    - Electronic equipment (computer, laptops, satellite phones, radios or software), or
    - Shipments of military, police or crime control items that are US brands such as body armor, bulletproof vests, vehicle armor or night vision goggles
    - Shipments of any type of merchandise or services to Cuba, Iran, Sudan, Syria, Libya or North Korea Country offices should consult with CARE USA Procurement Department prior to the purchase of any items fitting this description that are US brands (or US made or manufactured).

- *Import Controls*. Does the country in which you work have any controls, restrictions or limitations on what is imported into the country? What excise or duties may be owed? Does CARE have a tax exemption status in place that will avoid these levies? Does the nature of the imported item carry any legal risks to CARE? Will the donor pay for any taxes that might be owed?

- *Pre-award costs*. During the preparation stages of implementing a project, does CARE expect to incur costs for any expenses that may be required prior to signing the agreement with the donor? Does the donor place a limitation on when costs may be incurred under a given project? For example, such costs might include recruiting of personnel and pre-positioning of equipment or supplies. If, for example, the program is funded by the US government, prior approval to incur such costs is required.

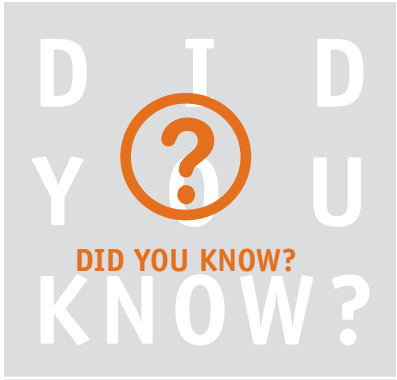
- *Donor Management and Oversight*. One of your most important relationships as a Project Manager, and for other Country Office staff, is with those individuals who manage a program on the donor's behalf. In most instances, larger donors place personnel in the same location as the country office who are responsibility for programmatic oversight of an award. However, in some cases, individuals from overseas (usually the donor country) also have a stake in managing a program. How much will the donor be involved in the day-to-day management or oversight of an award? Who will be responsible for that oversight? Clarity on this point and connection to the relevant parties is critical for the ongoing success of the program.

- *"Substantial Involvement"* For USAID-funded grants and cooperative agreements, "substantial involvement" is the term that is used to describe the oversight of the donor. In cooperative agreements with USAID, there is always a specific section in the agreement that explains the extent of USAID's substantial involvement in a given program. Generally, except in a few specific areas, USAID oversight and management is supposed to be quite limited. However, in some cases, personnel within USAID overstep or exceed their management authority. It is therefore critical to review and clarify the level of substantial involvement in writing as early in an award as possible.

- *Relevant Donor Staff*. Although all donor staff are important, do some rep resentatives have more authority than others? Who has the authority to give CARE approvals for certain tasks that are required by regulation or policy? For example, within USAID, the day-to-day monitoring of CARE's activities under a program is conducted by the assigned Cognizant Technical Officer (CTO). The CTO's authority, however, is limited. Ordinary management and oversight obligations are held by the Agreement Officer (who may also be known as the Contracting Officer). The Agreement Officer delegates to the CTO certain responsibilities to manage the ongoing implementation of an award. Unless expressly stated in the agreement with USAID or some other written documentation, any required prior approvals must be received in writing from the Agreement Officer. For the EU, the contact person will always be indicated in the grant agreement.

- *Marketing/Branding*. Donors increasingly are requiring public recognition for the funding that they have provided to CARE. The requirements may vary from CARE agreeing to recognize the donor when appropriate, to a detailed written proposal relating to project marketing and donor recognition strategies. What requirements does the donor have for public recognition? How are the donors name and/or logo to be used, if at all, when conducting project activities? What steps are required to get donor approval, if necessary?

- Cost Share/Match. Donors often require that CARE contributes towards the goals of a given project through cost share or match. Depending on the context and the donor, CARE might utilize cash contributions, contributions in kind (for example, donated equipment and supplies), community contributions to a program, other projects funded by other donors that support the activities of the project requiring cost share/match contributions, and others to satisfy the cost share obligation. What cost share or match is required under your specific project, and how will it be identified and accounted for? Will it be the responsibility of the Country Office, or will the CI member associated with the funding be providing a contribution—or both? What restrictions are in place related to cost share? US government regulations allow a broad range of contributions, but all must be documented, be allowable costs under applicable regulations, and directly support the project requiring a cost share/match contribution. It is recommended that the sources for cost



Carefully consider these cost share/match questions:

> What cost share or match is required under your specific project, and how will it be identified and accounted for?

> Will the cost/share match be the responsibility of the Country Office, or will the CI member associated with the funding be providing a contribution—or both?

> What restrictions are in place related to cost share?

> Will CARE pass part of the cost share obligations to sub grantees or partners? (If so, such amounts must be made part of the agreement, and monitored.)

> Are contributions from various donors compatible with rules and regulations of key funders such as the EU and the US government?

share/match be identified by CARE in advance, and reported properly and consistently. Additionally, if CARE is passing part of the cost share obligations to its sub grantees or partners, such amounts must be made part of the agreement with that party, and monitored to assure that the obligations are being met, and that the contributions satisfy applicable regulations. Finally, it is important to consider if contributions from various donors are compatible with their rules and regulations. For example, the EU will apply its rules to all funds, not only its share, including rules of nationality and origin, since its contribution is against the entire budget—not individual budget lines. Would these rules be compatible with those of the other donors?

- *Line Item Flexibility*. A proposal budget is an estimate of what CARE believes will be required to perform described activities. Often, estimates of how a given budget will be spent during implementation of a project are not accurate. To what extent can funds from one line item be "borrowed" to pay for costs in another line item? Did the donor impose any line item flexibility limitations under the agreement? How are such line item flexibility limitations imposed? Generally, line item flexibility requirements impose prior approval requirements when CARE may desire to transfer amounts between various line items in excess of a stated threshold. For example, USAID may restrict line item flexibility to 10% of the last approved budget, meaning that CARE can shift between most line items a total of 10% of the last approved budget without donor approval. Other US donor agencies, and other donors as well, impose varying levels of line item restrictions that you, as Project Manager, should be familiar with. For example, for the EU, flexibility is often unlimited within a budget sub-heading, but limited between sub-headings.

- *Program Income*. If the activities under an award expect to earn in-come in any way (for example, micro-credit loans, fees from participants in training activities, etc.), how is CARE required to account for that income, and how will the donor require that these amounts be attributed to the award's overall financial reports? In most cases, those amounts are simply to be spent to further activities under the award. However, these requirements may vary, and some donors may require an accounting of those amounts in financial reports.

Please refer to the Sub Grant Management and Compliance Manual for in-depth information about the sub recipient monitoring process.

- *Anti-terrorism*. Most donor agencies, national governments and multilateral organizations have anti-terrorism requirements in place to assure that funding does not support, knowingly or unknowingly, terrorist activity. CARE USA has a policy to address this obligation, and mechanisms must be in place at Country Offices to assure that the requirements in the policy are being followed and documented.

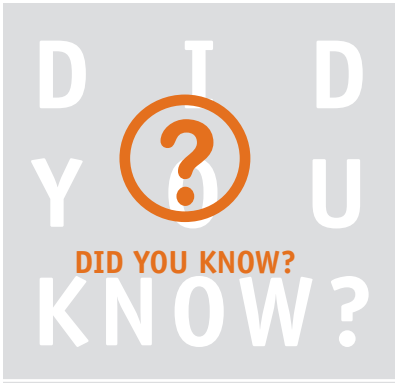
- *Audits*. As Project Manager, you should assume that your project will be audited. Continuous efforts should be made to assure that not only are activities being conducted following the appropriate rules and regulations, but that files related to transactions and other activities under an agreement are documented to support the activities. A rigorous record-keeping policy is recommended so that a Country Office is able to respond to questions and/or paperwork from auditors upon request.

- *Sub grant Management and Monitoring*. It is common for CARE to have one or more "partner" organizations in a given program, CARE often provides funding to those organizations through a sub grant or related mechanism. When this occurs, CARE is required by regulation to actively manage and monitor the activities of sub grantee organizations to assure that the sub recipient is achieving program objectives, and performing its activities consistent with the sub grant agreement and applicable regulations and laws. The sub recipient monitoring process requires significant preparations and attention, and is detailed in CARE USA's Sub grant Management and Compliance Manual. Among those areas to consider include details relating to the following:

  - Pre-award phase
  - Award phase
  - Implementation and Monitoring
  - Review of accounting systems, records retention policies, sub agreement files
  - Close-out Requirements

  For the EU however, partnerships and sub grants are two very distinct entities. Partners are already identified during the proposal phase and approved by the EU. Sub grantees, on the other hand, are identified during the implementation phase.

- *Legal Agreement Review and Template Agreements*. When contracting with any person, organization or company outside of CARE, it is critical that the written document between CARE and that third party places CARE in the most advantageous contractual position, and that the agreement clearly addresses CARE's expectations of the other party. Please seek a review of this documentation by CARE USA's Office of General Counsel (OGC). CARE USA lawyers are assigned to each region of CARE's work, and will willingly assist you and your Country Office in developing and negotiating agreements. Additionally, you may wish to discuss any agreements with your Country Office's local legal counsel. Among the agreements addressed by the OGC: prime grant/contract forms from donors (USG, EU, ECHO, etc.), sub grants, sub contracts,



> CARE USA's Office of General Counsel (OGC) will willingly help you develop and negotiate agreements

> The OGC maintains a library of updated template legal agreements to address almost every contractual circumstance.

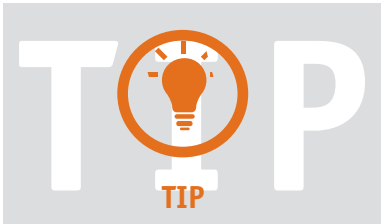
Contact the OGC at CARE HQ to learn more.

consultants, vendor/supply agreements, MOUs and consortia agreements, monetization agreements, and others. Additionally, the OGC maintains an updated library of template legal agreements to address almost every contractual circumstance. Please contact with the OGC for the latest version of a relevant form.

- *Contract Management*. Regardless of the form of agreement with a third party (sub grant, subcontract, vendor, etc.), when CARE provides funding to any external party, a rigorous and intentional system of contract management is required to assure that CARE's rights, obligations, and expectations are monitored and performed pursuant to the written agreement. Auditors of CARE frequently find th at the terms and conditions of third-party agreements are not followed—at times to CARE's disadvantage. Always pay special consideration to the following:

  - What type of funding instrument is most appropriate for a given activity? Is the agreement for a specific service or good (for which a subcontract would likely be appropriate), or is the agreement to fund general activities of a partner organization (for which a sub grant would likely be appropriate)? What are the advantages and disadvantages of each in a given situation?
  - Are the expectations of the third party clearly defined?
  - How and when will the other party be paid? If payment is made in advance, how will advances be reconciled or acquitted?
  - What steps will you take to verify that the performance expected of the third party is verified before payment is made?
  - Will you be able to avoid cash payments? Cash payments of any kind should be avoided, and payments should be made payable only to the contracting party (not, for example, to individual employees).
  - Is the person responsible for the above tasks in the Country Office clearly identified and held accountable for this role?

  For any assistance on these items, please be in touch with your designated lawyer from CARE USA, or CARE USA's Department of Procurement.



To minimize risk and legal liability, always maintain a relationship with a local legal counsel, and consult with your designated CARE USA attorney as needed.

- *Risk and other Legal Requirements*. By simply opening our doors and engaging in normal day-to-day activities, CARE and our country offices are exposed to various forms of risk and legal liabilities. One of the OGC's key responsibilities is to provide assistance to Country Offices in understanding and responding to legal exposure and other risks faced in the local context (government requirements, local labor laws, contractual and other exposures, etc.), and developing systems and/or strategies to face that risk and exposure. It is essential for your Country Office to maintain a relationship with a local lawyer for advice on matters relating to local law. When working with a local legal counsel, you can also consult your designated CARE USA attorney to assure that you are addressing the right questions and issues, and to assist in analyzing issues that need to be raised with a local lawyer. Matters that may be addressed by local counsel with the assistance of a CARE USA lawyer include representing your Country Office in any ongoing litigation in-country, advising the Country Office of in-country legal or policy changes, assuring that country office policies and procedures are in compliance with local laws, advising on local trademark protection, handling legal issues relating to the "spin-off" or separate legal registration of a micro-enterprise legal entity, and other matters.

- *Lobbying*. CARE's Rights-Based Approach (RBA) may entail CARE working towards changing laws and regulations to bring about positive implications for the beneficiaries that we serve. To the extent that a Country Office's activities entail lobbying efforts that relate directly to pending legislation or other formal public policy decision in your country, CARE USA is required to report expenses relating to these activities to the US government.

Note: Importantly, this kind of lobbying activity may not be charged to a USG or US foundation donor.

The requirements described in this chapter can be complex and overwhelming. In your role as Project Manager, you–or other CARE staff–should always feel comfortable asking questions that may arise, and seeking assistance and training in required areas. You are encouraged to use all resources within CARE for your assistance.

LEARN MORE ONLINE

For further information about US and other donor requirements, visit www.carematrix.org. Note that the website not only offers helpful information about compliance requirements—you will also find contact information from different CI members who are available to answer your questions about some of CARE's largest donors.

PIN: When registering for the first time, you will need to use the following PIN: 84jh15kl (case sensitive, lower case letters only).