

FAR AND TROUBLESOME CLAUSES



THE FAR

1. What is it?

Federal Acquisition Regulations.

2. What is it used for?

It is a system of uniform policies and procedures governing the acquisition or contracting actions of all Executive agencies.

3. It seems very confusing! What does it consist of?

ORGANIZATION OF FAR

1. Part 52: Contains actual clause or regulations and clause matrix
2. Part 53: Contains sample Government forms.
3. Part 1-51: Prescription parts which are to inform user when part is to be applied and which, if any, clauses are to be used.

FAR AGENCY SUPPLEMENTS

- The various Agencies have their own FAR supplement clauses
- For example:
- Department of Defense- DFARS
Department of Energy- DEAR
NASA – NFS
Department of Transportation- TAR

NEED FAR WHEN:

- Responding to request for Proposal (RFP)
- Receiving federal prime contract (including awards resulting from proposals submitted under Broad Agency Announcements and some unsolicited proposals)
- Receiving subcontract under federal prime
- Issuing subcontract under federal prime

READING THE FAR WHAT TO LOOK FOR

- Look for clauses that will impact the University's ability to publish,
- Retain title to Intellectual Property rights
- Retain title to Property & Equipment
- Increase the cost of performing the research and it's liability

READING THE FAR WHAT TO LOOK FOR

- Part 1-51 of the FAR provides prescriptions for the use of the clause
- When reading the FAR Clause refer to the prescribing clause.
- The prescribing clauses will provide you with rationale for accepting or not accepting the clauses

PUBLICATION CLAUSES

- FAR 52.227-14 Rights in Data
- Need the prior expressed **written consent** of the Government, to establish claim in copyrightable data first produced or delivered under the contract
- Per Prescribing Clause 27.409 (e) Ask for:
- FAR 52.227-14 Rights in Data - Alternate IV
- Contractor may establish claim to copyrightable data first produced in the performance of the contract
- Use in contracts for fundamental research performed solely by University

PUBLICATION CLAUSES

- FAR 52.227-17 Special Works

Prevents the release, distribution and publication of any data first produced in the performance of the award

All data and deliverables owned by the Government

Prescribing Clause- Outlines the few situations where this clause should be used, unless this applies to your situation get it removed

PUBLICATION CLAUSES

- DISCLOSURE OF INFORMATION (AUG DFAR 252.204-7000 Aug 2013)
- (a) The Contractor shall not release to anyone outside the Contractor's organization any unclassified information, regardless of medium (e.g., film, tape, document), pertaining to any part of this contract or any program related to this contract, unless—
 - (1) The Contracting Officer has given prior written approval;
 - (2) The information is otherwise in the public domain before the date of release; or
 - **(3) The information results from or arises during the performance of a project that has been scoped and negotiated by the contracting activity with the contractor and research performer and determined in writing by the contracting officer to be fundamental research in accordance with National Security Decision Directive 189, National Policy on the Transfer of Scientific, Technical and Engineering Information, in effect on the date of contract award and the USD (AT&L) memoranda on Fundamental Research, dated May 24, 2010, and on Contracted Fundamental Research, dated June 26, 2008, (available at DFARS [PGI 204.4](#)).**
- (b) Requests for approval under paragraph (a)(1) shall identify the specific information to be released, the medium to be used, and the purpose for the release. The Contractor shall submit its request to the Contracting Officer at least 10 business days before the proposed date for release. (c) The Contractor agrees to include a similar requirement, including this paragraph (c), in each subcontract under this contract. Subcontractors shall submit requests for authorization to release through the prime contractor to the Contracting Officer.
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PUBLICATION CLAUSES

- DFAR 252.204-7000 Aug 2013 Disclosure of Information
- Prevents the release of Unclassified information.
- Any release requires Contracting Officer Approval. Obtain written confirmation from the Contracting Officer that the work is fundamental research
- Deal Breaker if not removed.
- This is an example of the an agency specific clause

PATENT CLAUSES

- 52.227-1 Authorization and Consent
- Allows the University to use any patented invention to accomplish the research being provided. Subject to any Patent Indemnity clause in contract. Many universities will not provide patent indemnity
- Per Prescribing Clause 27.201-2(b) Use Alternate I of the clause Govt. authorizes for the use of any invention covered by US patent - Also delete any patent indemnity clause in contract

PATENT CLAUSES

- 52.227-3 Patent Indemnity
- Allows for government to be indemnified for patent infringement, if contractor is delivering services in the open market
- Universities will not take patent indemnity
- Request Deletion of this clause and incorporation of 52.227-1 Authorization and Consent Alt I

PATENT CLAUSE

- 52.227-11 Patent Rights Retention by Contractor
- Allows university to elect ownership of patents developed under the contract
- Implements Bayh-Dole

COST CLAUSES

- 52.15-02 Audit and Records – Negotiation
- Establishes Government's right to access and audit records
- Per Prescribing Clause 15.209(b) (3) request Alternate II which incorporates
- OMB A-133 Audits of States, Local Governments, and Non-Profit Organizations

COST CLAUSES

- 52.216-07 Allowable Cost and Payment
- Outlines which cost principles apply the clause default to commercial cost principles FAR Part 31.2 which universities are not subject to
- Per Prescribing Clause 16.307(b) ask for the substitution of FAR Part 31.2 with FAR Part 31.3 Contract with Educational Institutions

COST CLAUSES

- 52. 232-22 Limitation of Funds
- Contractor must notify government when expenditures reach a certain threshold and advise Government if expenditures are more or less than the obligated total. Also establish that Contractor has 60 day period for supplemental funding or extension requests

COST CLAUSES

- 52. 232-20 Limitation of Costs
- Contractor must notify government when expenditures reach a certain threshold and advise Government if expenditures are more or less than the authorized total. Government then decides if they want to continue the work

PROPERTY CLAUSE

- 52.245-1 Government Property ALT II
- Per Prescribing Clause 45.107 (a)(3) Gives title to University
- Title to property (and other tangible personal property) purchased with funds available for research and having an acquisition cost of less than \$5,000 shall vest in the Contractor upon acquisition or as soon thereafter as feasible; provided that the Contractor obtained the Contracting Officer's approval before each acquisition. Title to property purchased with funds available for research and having an acquisition cost of \$5,000 or more shall vest as set forth in this contract

TERMINATION CLAUSE

- 52.249-5 Termination for Convenience of the Govt. Educational and Other Non-Profits
- In all cases the only acceptable termination clause is 52.249-5 (Termination for the convenience of the Government). Prescribing clause at 49.502 allows for use of this clause in Cost-Reimbursement or Fixed Price R&D contracts with educational institutions.
- All other FAR termination clauses have some sort of Default provision and/or do not allow reimbursement for non-cancelable commitments.

INSPECTION/LIABILITY CLAUSES

- FAR 52.246-3 Inspection of Supplies--Cost-Reimbursement
- FAR 52.246-5 Inspection of Services--Cost-Reimbursement
- Generally, inappropriate. In rare situations where the contract includes tasks which are not research and development, the clauses may be necessary.
- FAR 52.246-8 with Alternate I Inspection of Research and Development--Cost Reimbursement Request deletion, however, normally required when non-report deliverables are included.
- "If the Contractor fails to proceed with reasonable promptness to perform required replacement or correction, the Government may (1) by contractor or otherwise, perform the replacement or correction and charge to the Contractor any increased cost, ..."

INSPECTION/LIABILITY CLAUSES

- FAR 52.246-9 Inspection of Research and Development (Short Form) Preferable clause. Re-Engineering language removed

TROUBLESOME CLAUSES

- The Federal Government continues to impose and incorporate into agreements severe restrictions on:
 - Publications
 - Foreign Nationals

WHAT TO LOOK FOR

- Review the RFP or BAA for language that may restrict the dissemination of the research results, or restrict the participation of Foreign Nationals
- Once the award is received, do the clauses contained in it destroy the Fundamental Research Exemption by placing restrictions on Publications or Foreign Nationals?
- Does it restrict the goal of the Universities to provide the results of its research to the public?
- Does the award hinder the research and educational process of the students?

INCONSISTENCIES AMONG AGENCIES

- There is inconsistency among the Federal Agencies on interpreting on what is “fundamental”, “basic”, or “applied”, research.
- Some Agencies just take a broad brush approach and paint the whole agreement as subject to the restrictive clauses to protect themselves.

TROUBLESOME CLAUSES

- The U. S. Government is aware of the University's need to publish and is not likely to impose such restrictions, although it does happens.....more often than not
- It is more likely that a University will receive an agreement from an Industrial Sponsor receiving funding under a Government Prime Award who flows the industrial provisions from the Prime Award down to the University

RECENT DEVELOPMENTS

- Homeland Security Presidential Directive #12 (HSPD 12) issued by G. Bush requires all agencies to have policy in place for identifying and verifying Federal Employees and Contractors
- As result there are more:
- IT Security Control Clauses
- Requests requiring additional information like Visa #'s, Passports, proof of US citizenship

RECENT DEVELOPMENTS

- Universities are seeing more and more requirements for background checks for those using Agency facilities and systems
- Potential Issues:
 - 1) Do Students need access to agency facilities?
 - 2) Will not having access impinge on the students ability to complete degree work?

RECENT DEVELOPMENTS

- Previously troublesome clauses found in contracts. Now being found in Grants and Cooperative Agreement

RECENT DEVELOPMENTS

- System Access includes accessing Agency systems from the campus.

Although access is made while on campus background checks still apply

FOREIGN NATIONAL RESTRICTIONS

H.2 PERFORMANCE BY FOREIGN NATIONALS

a. In accordance with 8 U.S.C 1324a, it is unlawful to hire for employment in the U.S. an individual without verifying that individual's employment authorization. 8 CFR 274a.2 VERIFICATION OF EMPLOYMENT ELIGIBILITY identifies the official documents that establish employment eligibility.

b. Prior to performance of work by a foreign national under this contract under this contract, the employer shall provide the Contracting Officer the name of the foreign national and identify the type of form(s) produced for verification of employment status.

Should the foreign national's performance require access to DoD facilities, the employer shall coordinate with the sponsor providing access, in order to submit the following:

Individual's Name
Date & Place of Birth
Citizenship
Date & Location of the Visit
Purpose of the Visit
Passport Number
Employer's Verification of Work Authorization

This information shall be forwarded to the Contracting Officer at least thirty days prior to the visit taking place. Failure to provide this information within the time frame may prevent the individual(s) from entry into the DoD facilities.

FOREIGN NATIONAL RESTRICTIONS

- Clause was accepted by two other Universities and flowed down to Subcontract
- University tried to impose requirements for on campus work without clarification that this clause was only applicable to work being performed at DoD facility
- Resolution: Required Lead University to go back to DoD for clarification that this clause did not apply to on campus work
- DoD did confirm work only applicable to work at DoD facilities

FOREIGN NATIONAL RESTRICTIONS

- DOE/NETL Cooperative Agreement contained the following language
- **“FOREIGN NATIONAL INVOLVEMENT**
- The Recipient may be required to provide information to the Department of Energy (DOE) in order to facilitate our responsibilities associated with foreign national access to DOE sites, information, technologies, equipment, programs, or personnel. Foreign national is defined as any person who was born outside the jurisdiction of the United States, is a citizen of a foreign government, and has not been naturalized under U.S. law. If the Recipient, including subrecipients/contractors, anticipates utilizing a foreign national in the performance of an award, the Recipient may be responsible for providing to the DOE specific information about the foreign national(s) to ensure compliance with all of the requirements for access approval. Access approval for individuals from countries identified on the U.S. Department of State list of [*State Sponsors of Terrorism](#) must receive final approval authority from the Secretary of Energy before they can commence work.”
- * <http://www.state.gov/j/ct/list/c14151.htm>

FOREIGN NATIONAL RESTRICTIONS

- Also required DOE B-006 Form which required personal information about the FN
- Another University accepted the language and flowed it down to MIT. MIT walked from the award valued at \$3.5 M
- MIT also received this as Prime Award on 2 Agreements to date we have not signed and are working closely with DOE HQ to find alternative language

PUBLICATION RESTRICTIONS

- Air Force Research Lab

Issued award which contained CDRLS that required approval of Scientific and Technical reports. (Note Block 8 of CDRL was marked "A")

Resolution: AFRL was against removal of the approval yet was telling MIT that they understood we performed fundamental research. MIT negotiated a revision to the placing the remarks section of the CDRL was then revised to read:

"Approval is limited to ensuring that the reports produced by MIT have met formatting requirements and addressed the tasks outlined in the statement of work. All conclusions reached in the reports are the prerogative of the MIT Principal Investigator. There is no intent by AFRL to approve the research results."

PUBLICATION RESTRICTIONS

- SBIR Award – Small Business accepted award from Naval Research Lab (NRL) and was required to flow down DFAR Clause 252.204.7000 Disclosure of Information
- Resolution: Provided rationale (NSDD 189) to NRL that MIT portion of the work was fundamental research and as such was not subject the clause. NRL issued letter to Small Business that they agreed with MIT's position and the clause was not flown to MIT

PUBLICATION RESTRICTIONS

- Air Force (DARPA)- Issued Contract containing Publication restrictions – Contract Value was \$ 2.3 M over three years
- Resolution: After many months of negotiation MIT walked away from the contract

RATIONALE FOR NOT ACCEPTING CLAUSES

- Fundamental Research Exemption

Fundamental Research means “basic and applied research in science and engineering the results of which are published and shared with the scientific community as distinguished from proprietary research from industrial development, design and production, the results of which are restricted for proprietary or national security reasons”

- See NSDD 189

RATIONALE FOR NOT ACCEPTING CLAUSES

- NSDD 189 (September 1985)
States the products of fundamental research remain unrestricted
- DoD Memos (2008) Confirming NSDD 189

FINAL THOUGHTS & DISCUSSION

- Understand award terms and conditions so you can negotiate the best deal for all the players
- Realize sponsor restrictions and special requirements; negotiate to standardize when it makes sense and is possible
- Accept differences amongst sponsors and between award terms; there is no cookie cutter solution