

Understanding the FAR

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Workshop Faculty

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FARs

- Selected Critical Clauses: University-friendly and Not so Nice
- Agency Specific-Not so Nice
- Taking Exception to the FAR
- Resources

Agency Supplements

- Each Agency has the authority to issue a supplement, subject to review
- Agency Supplemental Clauses either:
 - Implement existing, basic FAR clauses, OR
 - Supplement existing, basic FAR parts, subparts, sections or subsections

Finding the FARs You're Looking For

Ask:

1. What kind of contract is this?
2. What is the purpose of this work?

Which Clauses Are Acceptable? Accept or Except?

- Read the clause-can you live with it?
- Read the prescription-does it apply?
 - Contract type (FP, CR, T&M)
 - Contract purpose (R&D, Supply, Service)
 - Recipient type (for-profit, non-profit, educational)
- Is there a specific trigger, or does it apply no matter what?
- Is it Required or Optional (see matrix)

Do's

- Do your research
- Do assess the risk to your institution

Don'ts

- Don't assume all of your projects are Research and Development
- Don't presume the Contracting Officer knows more than you

Do's

- Avoid Major Mistakes
 - Read contract thoroughly
 - Ask questions about ambiguous clauses
- Print key clauses for file with prescription
- Advise PI and/or other departments of KEY clauses, obligations, invoicing & reporting requirements.

Substitution of Nomenclature

- Flow down clauses must accurately reflect the relationship between the parties
- Allowed Substitutions and exception clauses may be effected by an introductory paragraph to the clauses.
- When you are the subrecipient, Govt. means Government and Sponsor means prime recipient.
- Do not accept substitution of Sponsor for Government in IP clauses.

Critical Clauses

Patent Rights (Short Form) 52.227-11

- Purpose: Implements Bayh-Dole Act for universities and non-profits as government contractors
- Importance: Specifies minimum rights of government to inventions under contract; establishes contractor's rights to same, and minimum requirement to maintain them; prohibits higher tier contractor from mandating rights in subcontractor inventions as a condition of issuing subcontract.
- Action: Make sure this clause is included in contracts and federal funds accepted by your institution. 52.227-12 is the for-profit version and should not be accepted. Do not allow substitution of sponsor for Government when subcontracting.

Critical Clauses

Rights in Data - General 52.227-14

- Purpose: Establishes rights in data and works of authorship generated by contractor.
- Importance: Specifies government's rights to data and copyrights; contractors may claim copyright in scientific articles first produced, but must request permission from government to establish claim to other works of authorship; Alternate IV allows ownership to all copyrights, without prior approval, by university and college contractors performing basic R&D.
- Action: Request inclusion of Alternate IV . Do not allow substitution of sponsor for Government when subcontracting.

Critical Clauses

Rights in Data-Special Works 52.227-17

- Purpose: Establishes controls for data generated by contractors for the government's internal use.
- Importance: Represents an absolute restriction on the publication or dissemination of contractor-generated data that should not apply to basic and applied research.
- Action: Get removed from contract on basis of exceptions to this clause's applicability

Critical Clauses

Authorization and Consent

52.227-1

- Purpose: Provides a right to the Contractor to use any US patents required to be embodied in or to create the deliverables required by the contract.
- Importance: Protects the contractor from being sued by third parties for patent infringement related to contract performance.
- Action: Request Alternate I to expand permitted uses to all inventions covered by any US patents. Request removal of Patent Indemnity clause if included.

Critical Clauses

Patent Indemnity 52.227-3

- Purpose: Requires that the Contractor indemnify the government for any liability or costs related to patent infringement resulting from contract performance.
- Importance: Potential risk or exposure to significant liability that may accrue to the Contractor related to infringement of patents owned by third parties.
- Action: Get removed from contract on basis of uses permitted under Authorization and Consent, Alt. I

Critical Clauses

Inspection R&D 52.246-9

- Purpose: The government has a right to inspect work in progress and the place the work is performed for contractors and subcontractors.
- Importance: This is a reasonable clause IF used by itself, however, including -7 or -8 adds requirements most cannot meet, including an inspection system, possible implied warranties and government right to reject.
- Action: Accept only the -9 clause. You could flow down either -7 or -8 if sub is large government contractor.

Critical Clauses

Security Requirements

52.204-2

- Purpose: Designed to safeguard classified information utilized in contract performance.
- Importance: Applicable when contractor may require access to classified information, and classification level of contract increases; mandates that contractor continue with effort despite classified restrictions. Alternate I gives universities and colleges option to de-scope, or to terminate for convenience.
- Action: Request deletion on the basis that classified information will not be utilized. Otherwise, request inclusion of Alternate 1.

Critical Clauses

Stop Work Order 52.242-15

- Purpose: Provides the Government the opportunity to stop work on a pending a decision as to whether to proceed, modify the SOW or terminate.
- Importance: If you receive one of these orders, make sure you notify all concerned individuals, including subcontractors. Contractor will be reimbursed for additional costs, if adjustment proposal submitted within 30 days of end of stop-work period.
- Action: Try to get removed; otherwise, try to get government to reduce period of stop work to 30 days (default is 90 days). Make sure to flow down this clause.

Critical Clauses

Contract Terms and Conditions-Commercial items 52.212-4

- Purpose: Specifies terms and conditions that will apply to commercial purchases made by the government.
- Importance: This clause replaces many other clauses, because it includes them by reference. Means the contract officer is looking at this as a purchase of commercially available goods and services rather than research.
- Action: Get removed. Replace with standard FAR clauses for R&D. Otherwise get changed to 52.213-4 and negotiate to remove undesirable requirements.

Critical Clauses

Contract Terms and Conditions-Simplified Acquisitions 52.213-4

- Purpose: Specifies terms and conditions that will apply to non-commercial purchases made by the government.
- Importance: This clause replaces many other clauses, because it includes them by reference.
- Action: Replace with standard FAR clauses for R&D. Otherwise negotiate to remove undesirable requirements (e.g. termination for default, warranty, etc).

Critical Clauses

Small Business Subcontracting Plan 52.219-9

- Purpose: Provides procedures for development, compliance, and reporting of small business subcontracting efforts under the prime contract.
- Importance: Creates a good faith effort assurance for adherence to planned small business purchasing goals set by the developed plan and required reporting.
- Action: Monitor purchasing requirements closely and target opportunities intended to meet goals set by the accepted plan.

Critical Clauses

Interest 52.232-17

- Purpose: Creates an obligation of the Contractor to pay interest on any payments that become due to the Government due to defective cost or pricing data or unallowability of costs determined by applicable cost principles.
- Importance: Would require more than just re-paying inappropriate or unallowable costs-adds interest payment to be paid from other source of funds.
- Action: Request removal pursuant to 32.611 as inappropriate. Non-profit educations are exempt under item 5.

Agency Specific Critical Clauses

DFAR

Disclosure of Information

252.204-7000

- Purpose: To protect “sensitive” information inappropriate for public release.
- Importance: Requires government prior approval to publish or disseminate. Restricts University ability to publish, dissemination of research results, and free scientific exchanges. Export licensing may be required for foreign national participation in research.
- Action: Request removal. Cite University Policy, NSDD-189, Undersecretary of Defense Memo dated 5.24.10. Argue that work is basic or applied research and 7000 does not apply. Also note IRS Ruling 76-296.

Agency Specific Critical Clauses

DFAR

Warranty of Data

252.246-7001

- Purpose: Requires contractor to warranty technical data for 3 years after end of contract. Gov't may require correction of data; provides for remedies by gov't.
- Importance: Penalties include correction of data at contractor's expense, or reimbursement to gov't. Also liability for any damages incurred by gov't.
- Action: Negotiate removal on basis of inappropriate for basic research, and university rates do not include the cost of deferred liability associated with warranties.

Tips for Successful FAR Negotiation

- Explain why you're asking for the change or deletion
- Link the prescription to your reasoning
- Argue on the basis of institutional policy
- Cite previous contracts when possible
- If commercial, link back to federal contracts
- Take a break!
- Switch negotiators
- Ask their reasoning behind refusals

***Time is a great teacher, but
unfortunately it kills all its pupils.***

*Louis Hector Berlioz (1803-1869)
French Romantic Composer*

RESOURCES

- <http://www.fai.gov/pdfs/glossary.pdf>
 - Definitions of acquisition terms

- <https://www.acquisition.gov/far/index.html>
 - Recognized site for Basic FAR. Includes both HTML and PDF versions.

- <http://farsite.hill.af.mil>
 - Recognized site for FARS, DFARS and other agency supplements

- <http://www.gpoaccess.gov/cfr/index.html>
 - Code of Federal Regulations main page (Title 48 entire FAR updated annually)

RESOURCES

- 52.301 Solicitation provisions and contract clauses (Matrix).
 - Matrix for flow down of Required and Applicable Far clauses