

NCURA Region IV Spring Meeting 2010

Federal Acquisition Regulations (FAR)

NCURA Region IV Spring Meeting
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Session Presenters...

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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

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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

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Finding the FARS You're Looking For

Ask:

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

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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)

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Do's

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

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Don'ts

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

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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.

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Flow Down Requirements

- Generally five different types of clauses:
 - Government clauses that must be incorporated in subs exactly as written;
 - Clauses that must have their substance incorporated;
 - Clauses which are silent regarding how they are to be incorporated but are automatically applicable to subs due to the operation of law;
 - Clauses that are not mandatory but are necessary because they impose obligations that we cannot fulfill effectively unless similar obligations are flowed to subrecipient;
 - Clauses that we choose to include based on the circumstances of the subagreement.

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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.

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Newer Clauses

Employment Eligibility Verification 52.222-54

- Purpose: Requires Contractor enrollment in E-Verify program and verification of contract employees eligibility to work in the United States.
- Importance: Adds institutional compliance requirements.
- Action: Required. May need to provide MOU to sponsor. Check with HR department for compliance.

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Newer Clauses

American Recovery & Reinvestment Act-Reporting Requirements 52.204-11

- Purpose: Requires Contractor reporting of specific data with use of ARRA funding for all ARRA contracts and subcontracts.
- Importance: Data elements submitted and published on www.FederalReporting.gov
- Action: Required. Reports due within 10 days of quarter end for contractors, and generally 5 days for subcontractors.

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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.

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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.

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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

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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.

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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

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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.

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Critical Clauses

Termination for Convenience of the Government
52.249-5

- **Purpose:** Provides for the termination of contract without cause or remedy for default and sets forth reasonable terms for covering costs related to early termination.
- **Importance:** Covers reasonable costs associated with contract termination without incurring penalties or added costs for contract default.
- **Action:** This is the preferred and appropriate clause for termination of Govt. R&D fixed price or CR contracts with educational institutions.

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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 1 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.

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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.

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Critical Clauses

Government Property 52.245-1

- **Purpose:** Defines ownership, protection, use, control and disposition of government property associated with a project.
- **Importance:** Government furnished equipment will always remain the property of the government. The appropriate alternate allows acquired property to be titled to institution.
- **Action:** Request Alternate II for R&D at educational institutions.
- **NOTE:** This clause was updated June 2007. There are many older versions of Govt. Property clauses listed in federal contracts and subcontracts-be sure you have the most recent, and ask for deletion of older clauses.

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Critical Clauses

Allowable Cost and Payment 52.216-7

- **Purpose:** Sets forth the standards for determining proper payments and allowable costs under cost reimbursement contracts.
- **Importance:** Determines the appropriate costs principles that must be applied for invoicing and payment under cost reimbursement contracts.
- **Action:** Request substitution of appropriate cost principle reference in paragraph (a) in place of reference to commercial, for-profit cost accounting standards (31.2). For educational institutions request 31.3.

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Critical Clauses

Audit and Records- Negotiation
52.215-2

- **Purpose:** Provides retention and access of records requirements for negotiated cost type contracts.
- **Importance:** Creates appropriate access and record retention requirements for Government contract auditing procedures.
- **Action:** Request modification with Alternate II for contracts with educational institutions (this incorporates OMB Circular A-133).

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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.

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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).

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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.

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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 appropriate. Non-profit educations are exempt under item 5.

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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 date 6.26.08. Argue that work is basic or applied research and 7000 does not apply. Also note IRS Ruling 76-296.

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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.

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Agency Specific Clauses

DFAR

Export-Controlled Items
252.204-7008 (April 2010)

- **Purpose:** For use in all solicitations and contracts.
- **Importance:** Replaces interim rule (July 2008) that involved the use of one of two clauses depending on whether or not the contract was expected to involve export controlled information.
- **Action:** The Contractor is responsible for understanding and complying with all applicable laws and regulations regarding export-controlled items.

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Agency Specific Critical Clauses

NAVAIR

Expediting Contract Closeout
5252.204-9503

- **Purpose:** Recipient Waives recovery of balance under \$1,000 at final contract closeout.
- **Importance:** Contractor may not be reimbursed for full costs incurred.
- **Action:** Negotiate removal on basis of inappropriate for non-profit educational institutions entitled to recover our full costs in performance of work.

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Agency Specific Critical Clauses

NAVAIR

Disclosure of Contract Information
5252.204-9504

- **Purpose:** To protect sensitive information.
- **Importance:** Requires government prior approval to publish or disseminate. Restricts University ability to publish, dissemination of research results, and free scientific exchanges.
- **Action:** Request removal. Cite University Policy, NSDD-189, Undersecretary of Defense Memo date 6.26.08. Argue that work is basic or applied research and 7000 does not apply. Also note IRS Ruling 76-296.

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Agency Specific Critical Clauses

EPAAR

Treatment of Confidential Business Information
1552.235-71

- **Purpose:** defines conditions for use of Sponsor's confidential information. May include EPA confidential information furnished to sponsor in subcontracts.
- **Importance:** Protects corporate or government confidential information used in research & development.
- **Action:** Ask to delete if no confidential information delivered to PI. (Communicate w/ PI and verify.) Ok to accept, but ask to include statement that any C.I. must be so marked prior to release to university.

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Agency Specific Critical Clauses

EPAAR

Organizational Conflicts of Interest
1552.209-71

- **Purpose:** requires Organization to report conflict of interest as defined by FAR subpart 9.5
- **Importance:** Not all Universities have Organizational Conflict of Interest Policy; may only have Personnel COI Policy.
- **Action:** Verify your institution can comply with this clause. If no Organizational Policy in place, request including statement such as "In the absence of such policy, Contractor certifies that it will abide by all personal conflict of interest regulations and will make a good-faith effort to disclose any other conflict of interest issues as they become known to the Contractor."

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Agency Specific Critical Clauses

EPAAR

Limitation of Future Contracting
1552.209-74

- **Purpose:** Restricts Contractor for 5 years from future contracting for specified type of projects. (Superfund)
- **Importance:** Doesn't just limit this project PI; University won't limit faculty from proposing research based on one project.
- **Action:** Request deletion. If your contract under simplified acquisition threshold, you may ask to include following statement: *"This clause only applies to contracts exceeding the simplified acquisition threshold so University considers this clause as non-applicable under the current funding and scope of work subcontract."*

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Agency Specific Critical Clauses

EPAAR

Project Employee Confidentiality Agreement
1552.227-76

- **Purpose:** Protect EPA sensitive information by requiring confidentiality agreements for all contract employees.
- **Importance:** Restricts dissemination of information.
- **Action:** If your contract under simplified acquisition threshold, ask to include following statement: *"This clause only applies to contracts exceeding the simplified acquisition threshold so University considers this clause as non-applicable under the current funding and scope of work subcontract."* If above SAT, ask for statement that *"No sensitive information is anticipated under this scope of work; University considers this clause non-applicable."*

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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

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

Louis Hector Berlioz (1803-1869)
French Romantic Composer

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RESOURCES

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

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RESOURCES

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

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Export-Controlled Items (Apr 2010)

252.204–7008 Export-Controlled Items.
As prescribed in 204.7304, use the following clause:

Export-Controlled Items (Apr 2010)

(a) *Definition. Export-controlled items*, as used in this clause, means items subject to the Export Administration Regulations (EAR) (15 CFR parts 730–774) or the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120–130). The term includes:

(1) *Defense items, defined in the Arms* Export Control Act, 22 U.S.C. 2778(j)(4)(A), as defense articles, defense services, and related technical data, and further defined in the ITAR, 22 CFR part 120.

(2) Items, defined in the EAR as “commodities, software, and technology,” terms that are also defined in the EAR, 15 CFR 772.1.

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Export-Controlled Items (Apr 2010)(cont.)

(b) The Contractor shall comply with all applicable laws and regulations regarding export-controlled items, including, but not limited to, the requirement for Contractors to register with the Department of State in accordance with the ITAR. The Contractor shall consult with the Department of State regarding any questions relating to compliance with the ITAR and shall consult with the Department of Commerce regarding any questions relating to compliance with the EAR.

(c) The Contractor's responsibility to comply with all applicable laws and regulations regarding export-controlled items exists independent of, and is not established or limited by, the information provided by this clause.

(d) Nothing in the terms of this contract adds to, changes, supersedes, or waives any of the requirements of applicable Federal laws, Executive orders, and regulations, including but not limited to—

(1) The Export Administration Act of 1979, as amended (50 U.S.C. App. 2401, *et seq.*);

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Export-Controlled Items (Apr 2010)(cont.)

(2) The Arms Export Control Act (22 U.S.C. 2751, *et seq.*);

(3) The International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.*);

(4) The Export Administration Regulations (15 CFR parts 730–774);

(5) The International Traffic in Arms Regulations (22 CFR parts 120–130); and

(6) Executive Order 13222, as extended.

(e) The Contractor shall include the substance of this clause, including this paragraph (e), in all subcontracts.

(End of clause)


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