

## Which Clauses Are Acceptable? Accept or Except?

NCURA Region IV Spring Meeting 2010

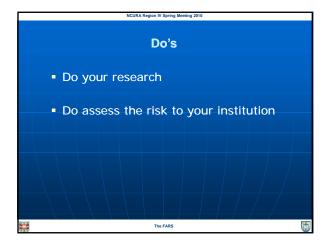
- Read the clause-can you live with it?
- Read the prescription-does it apply?
  - Contract type (FP, CR, T&M)
  - Contract purpose (R&D, Supply, Service)
  - Recipient type (for-profit, non-profit,
  - educational)

1

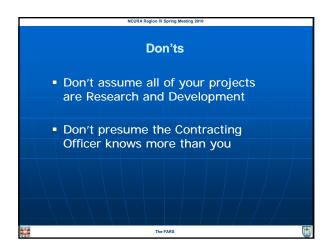
 Is there a specific trigger, or does it apply no matter what?

The FARS

Is it Required or Optional (see matrix)







## Do's

on IV Spring Meeting 201

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.

## NCURA Region IV Spring Meeting 2010 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;

The FARS

Clauses that we choose to include based on the circumstances of the subagreement.

#### NCURA Region IV Spring Meeting 2010

### **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.

The FARS

 Do not accept substitution of Sponsor for Government in IP clauses.

## **Newer Clauses**

on IV Spring Meeting 201

## Employment Eligibility Verification 52.222-54

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

The FARS

II.

American Recovery & Reinvestment Act-Reporting Requirements 52.204-11

- <u>Purpose</u>: 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
- <u>Action</u>: Required. Reports due within 10 days of quarter end for contractors, and generally 5 days for subcontractors.

The FARS

## NCURA Region IV Spring Meeting 2010

## **Critical Clauses**

#### Patent Rights (Short Form) 52.227-11

- <u>Purpose</u>: Implements Bayh-Dole Act for universities and non-profits as government contractors
- <u>Importance</u>: 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.
- <u>Action</u>: Make sure this clause is included in contracts and federal funds accepted by your institution. <u>52.227-12 is the for-profit</u> version and should not be accepted. Do not allow substitution of sponsor for Government when subcontracting.

## The FARS

# NCURA Region IV Spring Meeting 2010

## Rights in Data - General 52.227-14

- <u>Purpose</u>: 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.

The FARS

Rights in Data-Special Works 52.227-17

- <u>Purpose</u>: Establishes controls for data generated by contractors for the government's internal use.
- <u>Importance</u>: 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

The FARS

## NCURA Region IV Spring Meeting 2010

## **Critical Clauses**

#### Authorization and Consent 52.227-1

- <u>Purpose</u>: 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.
- <u>Action: Request Alternate I</u> to expand permitted uses to all inventions covered by any US patents. Request removal of Patent Indemnity clause if included.

The FARS

## **Critical Clauses**

on IV Spring Meeting 2010

## Patent Indemnity 52.227-3

- <u>Purpose</u>: Requires that the Contractor indemnify the government for any liability or costs related to patent infringement resulting from contract performance.
- <u>Importance</u>: Potential risk or exposure to significant liability that may accrue to the Contractor related to infringement of patents owned by third parties.
- <u>Action: Get removed from contract on basis of uses</u>
   <u>permitted under Authorization and Consent. Alt. 1</u>

The FARS

#### Inspection R&D 52.246-9

- <u>Purpose</u>: 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.

The FARS

## NCURA Region IV Spring Meeting 2010

## Critical Clauses

Termination for Convenience of the Government 52.249-5

- <u>Purpose</u>: Provides for the termination of contract without cause or remedy for default and sets forth reasonable terms for covering costs related to early termination.
- <u>Importance</u>: 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.

The FARS

## NCURA Region IV Spring Meeting 2010

## Security Requirements 52.204-2

- <u>Purpose</u>: 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.

## The FARS

#### Stop Work Order 52.242-15

- <u>Purpose</u>: 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.

The FARS

## NCURA Region IV Spring Meeting 2010

## **Critical Clauses**

#### Government Property 52.245-1

- <u>Purpose</u>: Defines ownership, protection, use, control and disposition of government property associated with a project.
- <u>Importance</u>: Government furnished equipment will always remain the property of the government. The appropriate alternate allows acquired property to be titled to institution.
- Action: <u>Request Alternate II for R&D at educational</u> 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.

The FARS

## NCURA Region IV Spring Meeting 2010

#### Allowable Cost and Payment 52.216-7

- <u>Purpose</u>: 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.

Audit and Records- Negotiation 52.215-2

- <u>Purpose</u>: Provides retention and access of records requirements for negotiated cost type contracts.
- <u>Importance</u>: 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).

The FARS

## NCURA Region IV Spring Meeting 2010

## Critical Clauses

Contract Terms and Conditions-Commercial items 52.212-4

- <u>Purpose</u>: Specifies terms and conditions that will apply to commercial purchases made by the government.
- <u>Importance</u>: 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.

The FARS

## NCURA Region IV Spring Meeting 2010

Contract Terms and Conditions-Simplified Acquisitions 52.213-4

- <u>Purpose</u>: 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.

1

 Action: Replace with standard FAR clauses for R&D. Otherwise negotiate to remove undesirable requirements (e.g. termination for default, warranty, etc).

## Small Business Subcontracting Plan 52.219-9

- <u>Purpose:</u> Provides procedures for development, compliance, and reporting of small business subcontracting efforts under the prime contract.
- <u>Importance</u>: 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.

The FARS

### NCURA Region IV Spring Meeting 2010

## **Critical Clauses**

#### Interest 52.232-17

- <u>Purpose</u>: 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 <u>5.</u>

The FARS

## Agency Specific Critical Clauses DFAR

NCURA Region IV Spring Meeting 2010

### Disclosure of Information 252.204-7000

- <u>Purpose</u>: 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.
- <u>Action</u>: 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.

### Agency Specific Critical Clauses DFAR Warranty of Data 252.246-7001

NCURA Region IV Spring Meeting 2010

- <u>Purpose</u>: 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.
- <u>Importance</u>: Penalties include correction of data at contractor's expense, or reimbursement to gov't. Also liability for any damages incurred by gov't.
- <u>Action</u>: Negotiate removal on basis of inappropriate for basic research, and university rates do not include the cost of deferred liability associated with warranties.

The FARS

### NCURA Region IV Spring Meeting 2010

## Agency Specific Clauses DFAR Export-Controlled Items 252.204-7008 (April 2010)

- Purpose: For use in all solicitations and contracts.
- <u>Importance</u>: 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.
- <u>Action</u>: The Contractor is responsible for understanding and complying with all applicable laws and regulations regarding export-controlled items.

The FARS

## NCURA Region IV Spring Meeting 2010 Agency Specific Critical Clauses

## NAVAIR

### Expediting Contract Closeout 5252.204-9503

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

The FARS

## Agency Specific Critical Clauses NAVAIR

NCURA Region IV Spring Meeting 2010

Disclosure of Contract Information 5252.204-9504

- <u>Purpose</u>: 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.
- <u>Action</u>: 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.

The FARS

### NCURA Region IV Spring Meeting 2010

## Agency Specific Critical Clauses EPAAR Treatment of Confidential Business Information 1552.235-71

- <u>Purpose</u>: 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.

The FARS

## Agency Specific Critical Clauses EPAAR

NCURA Region IV Spring Meeting 2010

### Organizational Conflicts of Interest 1552.209-71

- <u>Purpose</u>: requires Organization to report conflict of interest as defined by FAR subpart 9.5
- <u>Importance</u>: 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."

The FARS

## Agency Specific Critical Clauses EPAAR

NCURA Region IV Spring Meeting 2010

Limitation of Future Contracting 1552.209-74

- <u>Purpose</u>: Restricts Contractor for 5 years from future contracting for specified type of projects. (Superfund)
- <u>Importance</u>: 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."

The FARS

#### NCURA Region IV Spring Meeting 2010

### Agency Specific Critical Clauses EPAAR Project Employee Confidentiality Agreement 1552.227-76

- <u>Purpose</u>: Protect EPA sensitive information by requiring confidentiality agreements for all contract employees.
- Importance: Restricts dissemination of information.
- <u>Action</u>: 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."

The FARS

## **Tips for Successful FAR Negotiation**

NCURA Region IV Spring Meeting 2010

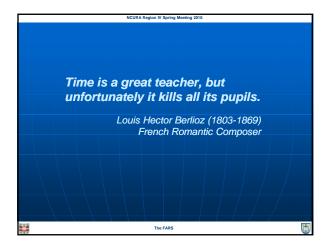
- Explain why you're asking for the change or deletion
- Link the prescription to your reasoning
- Argue on the basis of institutional policy
- Cite previous contracts when possible
- If commercial, link back to federal contracts

The FARS

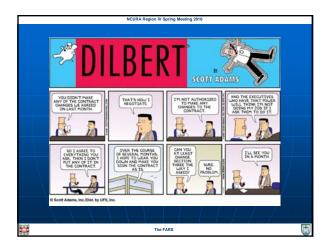
Take a break!

II.

- Switch negotiators
- Ask their reasoning behind refusals







## RESOURCES

on IV Spring Meeting 2010

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

- <u>http://www.arnet.gov/far</u>
   Recognized site for Basic FAR. Includes both HTML and PDF versions.
- <u>http://farsite.hill.af.mil</u>
   Recognized site for FARS, DFARS and other agency supplements
- <u>http://www.gpoaccess.gov/cfr/index.html</u>
   Code of Federal Regulations main page (Title 48 entire FAR updated annually)





### NCURA Region IV Spring Meeting 2010 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(I)(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.

The FARS

## 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.);

The FARS

## NCURA Region IV Spring Meeting 2010 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.

The FARS

(End of clause)