

# Just the Facts 201: Contract Language



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## Invoices/Payment

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| <p><u>Yes, please:</u></p> <ul style="list-style-type: none"> <li>Specified Agreement type identified: Cost Reimbursable, Fixed Price, Fixed Fee</li> <li>standard University invoice</li> <li>Monthly or quarterly payments</li> <li>Backup documentation as requested for specific line item inquiries</li> <li>30 days after period for invoice submission. 45 days or more for Final invoice due date</li> <li>U.S. dollars</li> </ul> | <p><u>No, thank you:</u></p> <ul style="list-style-type: none"> <li>Payment after deliverables accepted</li> <li>Penalties for late invoices</li> <li>Withholding of payments other than Final Payment</li> <li>Penalties for invoice errors or unallowable costs</li> <li>Backup documentation, receipts required for every invoice</li> <li>Non-standard invoice</li> <li>Invoices due less than 15 days after expense period</li> <li>No set-off to other funding agreements</li> </ul> |
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## Sample Language

Subrecipient is required to sign and return a fully executed copy of this Subaward Agreement. In the absence of Subrecipient signature, Subrecipient agrees that submission of, and receipt of payment for, any invoice against this Subaward constitutes full acceptance of all terms and conditions without modification.

What would you do?

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## Payment Sample language

Payment to Subrecipient shall be contingent upon the availability of funding from the Awarding Agency and upon Subrecipient's compliance with this Agreement and the terms and conditions of the Awarding Agency's Prime Agreement.

What would you do?

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## Just the Facts 201: Contract Language

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### Invoice Sample language

Subrecipient agrees that acceptance of the final invoice payment from the Grantee hereby releases and forever discharges the Grantee of and from all claims, demands and liabilities whatsoever or every name and nature both at law and in equity.

What would you do?

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### Invoice Sample language

Payment of each properly submitted invoice shall be made to subcontractor within 30 days after receipt of invoice, subject to the following: (i) Sponsor may withhold an appropriate portion of the payment until any disputed items are resolved and/or defects in the Work are corrected; (ii) sponsor may set off any amounts due from subcontractor against amounts payable under this Subcontract or any agreements between Sponsor and Subcontractor.

What would you do?

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### Time & Material/Labor Hour Proposal Disclaimer

- Hourly rate exception Statement:  
"Budgetary figures based on hours and or hourly rates are inconsistent with the University's practices and are provided for estimating purposes only. The University's effort reporting and invoicing are consistent with the percent of effort process outlined in OMB Circular A-21, Section J.10.c."

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## Scope of Work

|   |   |
|---|---|
| <p><u>Yes, please:</u></p> <ul style="list-style-type: none"> <li>■ Clear and detailed description of work performed, meetings to attend, etc.</li> <li>■ Performance with "reasonable standard of care"</li> </ul> | <p><u>No, thank you:</u></p> <ul style="list-style-type: none"> <li>■ "PI will collaborate with sponsor" or other one sentence SOW.</li> <li>■ "No payment shall be made by sponsor to recipient until all conditions specified in the Scope of Work have been satisfied."</li> <li>■ IP ownership terms buried in SOW</li> <li>■ "strict" adherence to industry standard of care</li> <li>■ "Time is of the essence"</li> <li>■ Any Warranty of Outcome</li> </ul> |
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## Warrants and Warranties

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|---|--|
| <p><u>Yes, please:</u></p> <ul style="list-style-type: none"> <li>■ Replace "Subrecipient warrants" with "Subrecipient represents"</li> <li>■ AS IS WITHOUT WARRANTY</li> </ul> | <p><u>No, thank you:</u></p> <ul style="list-style-type: none"> <li>■ "Warrants" imply a heavier liability burden than "represents" or "certifies"</li> <li>■ Warranty of SOW-not appropriate for R&amp;D</li> </ul> |
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## AS IS WITHOUT WARRANTY Sample language

THE WORK IS PROVIDED "AS IS", WITHOUT WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NONINFRINGEMENT. IN NO EVENT SHALL THE AUTHORS OR COPYRIGHT HOLDERS BE LIABLE FOR ANY CLAIM, DAMAGES OR OTHER LIABILITY, WHETHER IN AN ACTION OF CONTRACT, TORT OR OTHERWISE, ARISING FROM, OUT OF OR IN CONNECTION WITH THE WORK OR OTHER DEALINGS IN THE WORK.

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## WARRANTY Sample language

Contractor warrants that all work performed herein will be performed by qualified personnel in a timely and professional workmanlike manner consistent with reasonable academic standards. Services provided by Contractor under this Agreement may involve the use and development of state-of the art technology, science and engineering and may require the use of experimental or new technologies. Accordingly, the results of such services are provided "AS IS".

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## Governing Law /Venue/Jurisdiction

|   |   |
|---|---|
| <u>Yes, please:</u>   | <u>No, thank you:</u>   |
| <ul style="list-style-type: none"><li>■ "All applicable" laws</li><li>■ Your state or leave silent on Governing law</li></ul> | <ul style="list-style-type: none"><li>■ State law of Sponsor if not state where your institution resides and work is to be performed.</li></ul> |

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## Governing Law Sample language

A. All legal proceedings and matters pertaining to this grant will be governed by the laws of the State of Alaska, notwithstanding the conflicts of law principles of Alaska or any other state, except that nothing herein may be interpreted as:

(i) a waiver of the sovereign immunity of the state in which Grantee is incorporated or headquartered, or

(ii) An agreement by the Grantee to any obligation or undertaking contrary to the laws of its state of incorporation or headquarters which bind state agencies.

B. Any dispute arising under this grant will be heard exclusively in the state or federal courts with subject matter jurisdiction sitting in Alaska.

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Disputes

Yes, please:

- Good faith efforts to resolve issues.
- "Court of competent jurisdiction" or "appropriate jurisdiction" to be determined in the event of a dispute.
- Note: such a small percentage of sponsored research agreements end up in dispute

No, thank you:

- Mandatory Binding Arbitration

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Dispute Sample language

In the event of any financial dispute, claim question, or disagreement arising from or relating to this Agreement or the breach thereof, the parties hereto shall use reasonable efforts to settle the dispute, claim, question or disagreement. To this effect, they shall consult and negotiate with each other in good faith and recognizing their mutual interest, attempt to reach a just and equitable solution satisfactory to both parties.

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Insurance

Yes, please:

- Confirm with your Risk Management Office acceptable coverage minimums for Event and Aggregate levels and caps.
- OK to notify of Change in provider AFTER change.
- Contact your Risk Office about adding sponsor as additional insured.

No, thank you:

- Notification to Sponsor of any coverage or provider changes PRIOR to change.

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### Use of Name/Logo

|  |   |
|--|---|
| <u>Yes, please:</u>  | <u>No, thank you:</u>   |
| <ul style="list-style-type: none"><li>■ Mutual prior approval for publicity, press release, promotion or advertising (PI and institution)</li><li>■ University allowed to report existence of award for annual or internal reporting purposes</li><li>■ PI allowed to identify award in "Other Support" in external grant applications</li></ul> | <ul style="list-style-type: none"><li>■ One-way prior approval</li><li>■ Broad Prior Approval requirement for any use of name</li></ul> |

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### Use of Name Sample language

Grantees agree that sponsor may issue news releases regarding this Agreement and post such announcement on the sponsor's internet site. Grantees agree to submit to sponsor for prior approval any and all news releases or other published statements if such news releases or public statements mention sponsor.

What would you do?

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### Use of Name Sample language

No party shall use the name or names of another party, or any adaption, abbreviation, or derivative thereof, whether oral or written, without the permission of such party. Notwithstanding the foregoing, prior written permission of Grantees shall not be necessary for Sponsor to identify them as Grantees or in research results, summaries, or discussions.

What would you do?

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## Just the Facts 201: Contract Language

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### Use of Name Sample language

Neither party shall use the name of the other party or any adaptation thereof or the name of any staff member, employees, agent or student of the other party in an advertising, promotional, or sales literature or publicity without the prior approval of the party or individual whose name is to be used. For the Grantee, such approval must be obtained from the Office of News and Public Affairs.

Notwithstanding the foregoing, the Awarding Agency may at its discretion publish information regarding this Project, the Grantee and Subrecipient. All publicity directly related to the Project shall be managed in accordance with the Awarding Agency policy as set forth in Appendix D.

What would you do?

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### Federal Demonstration Partnership (FDP)

- FDP Model Subagreement
  - On January 4, 2005, the Office of Science and Technology Policy and the Office of Management and Budget issued a joint memorandum endorsing the use of the FDP model subagreement by all A-110 recipients and subrecipients of research grants and cooperative agreements. FDP templates are not applicable in federal contracts.
  - See the Subaward Agreement Forms website (see link below) Sample subaward template is included in workshop binder.

<http://thefdp.org>

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### Federal Demonstration Partnership (FDP)

- Subaward Agreement Forms
  - [http://sites.nationalacademies.org/PGA/fdp/PGA\\_056\\_020](http://sites.nationalacademies.org/PGA/fdp/PGA_056_020)
  - The FDP subaward agreement form may be used by any institution. There is no longer a separate form for use with non-FDP institutions. Federal agencies were represented on the FDP which approved the use of the forms and federal participants in the FDP were a part of the Task Force that created and tested the forms. However, the FDP makes no representation or warranties regarding the suitability of these forms for use on any federal or non-federal sponsored projects. All users utilize these forms at their own risk.
  - Current version June 2009

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### Indemnification

- The party causing harm will stand in front of the vulnerable party and shield it from harm
  - Willful misconduct, malfeasance, intentional acts, etc.
- Institution indemnifies for negligent acts within its control
  - No protection extends to employees acting outside of his/her scope of employment

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### Indemnification

|   |   |
|---|---|
| <u>Yes, please:</u>   | <u>No, thank you:</u>   |
| <ul style="list-style-type: none"><li>■ Mutual responsibility for negligent acts or omissions (See FDP Article 7)</li><li>■ Survivability of execution or termination of the agreement.</li><li>■ American Rule-each party is responsible for paying its own attorney's fees. (Note: default rule-other statutes allow plaintiffs to recover attorney's fees)</li></ul> | <ul style="list-style-type: none"><li>■ Responsibility for anything related to <u>performance</u> under the Agreement.</li><li>■ Indemnification for use of third party intellectual property rights/patent infringement.</li></ul> |

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### Indemnification Sample language

The parties acknowledge and agree that in making this grant Sponsor assumes no responsibility for any of the activities of the Grantee, co-investigators or other staff or the Sponsoring Institution other than the payment of this grant in accordance with the terms set forth herein.

It is further agreed that the Grantee shall hold sponsor harmless and indemnify it from any claims, damages, costs and expenses that may arise as a result of activities of the Grantee, co-investigators, other staff or the Grantee in connection with this grant except if caused by the actions of sponsor and to the extent authorized under the Constitution and laws of Grantee's state, if applicable.

What would you do?

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## Indemnification Sample language

Contractor shall indemnify, defend and save harmless Sponsor and Prime Federal Agency from any and all losses, damages, claims, actions and suits (including attorney's fees" arising out of (i) Contractor's breach of or activities under, this Agreement; and (ii) any claim that the Contractor's authorized use, by Sponsor or Prime Federal Agency, of any deliverable delivered by Contractor to Sponsor infringes any third party patent, copyright or other proprietary right.

What would you do?



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## Limitation of Damages Sample language

IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER FOR ANY LOST PROFITS, SPECIAL INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES IN CONNECTION WITH OR ARISING OUT OF ITS PERFORMANCE OR FAILURE TO PERFORM PURSUANT TO THIS AGREEMENT EVEN IF ADVISED OF THE POSSIBILITY IN ADVANCE.

What would you do?



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## Termination

|  |   |
|--|---|
| <u>Yes, please:</u> <ul style="list-style-type: none"><li>■ Mutual termination rights with 30 days written notice</li><li>■ Payments for uncancellable obligations incurred up to receipt of notice of termination</li></ul> | <u>No, thank you:</u> <ul style="list-style-type: none"><li>■ One way termination rights</li><li>■ Penalties for termination</li><li>■ University payments to third party if terminated for cause</li></ul> |
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## Just the Facts 201: Contract Language

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### Conflict of Interest

|  |   |
|--|---|
| <u>Yes, please:</u>  | <u>No, thank you:</u>   |
| <ul style="list-style-type: none"><li>■ Federal regulation compliance required.</li><li>■ Certification of absence of conflicts.</li><li>■ Notification and institutional certification that conflict has been reduced, managed or eliminated.</li></ul> | <ul style="list-style-type: none"><li>■ Sponsor specific forms for PI and/or institution.</li><li>■ Consultation with Sponsor concerning management of actual or potential conflicts.</li><li>■ Full disclosure of actions taken to reduce, manage or eliminate conflict.</li></ul> |

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### Conflict of Interest Sample language

The Subcontractor agrees it has a conflict of interest policy which complies with all applicable federal regulations including 42 CFR 50, Subpart F and the Public Health Services and National Science Foundation policies; namely, the Subcontractor policy requires disclosure and resolution of all conflicts of interest, potential and actual, which exist for those involved in the design, conduct and reporting of research under this agreement prior to the acceptance of funding.

OR

Subcontractor does not have an active and/or enforced conflict of interest policy and hereby agrees to abide by the policy of University, found at <http://manuals.university.edu/COI/XX>

What would you do?

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### Copyright

- Is a form of protection provided by the laws of the U.S (title 17, U.S. Code) to the authors of "original works of authorship" including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available to both published and unpublished works...and gives the owner of the copyright the exclusive right to do and to authorize others to do the following:
  - To reproduce the work in copies or phono-records;
  - To prepare derivative works based on the work;
  - To distribute copies of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
  - To display the work publicly;
  - In the case of sound recordings, to perform the work publicly by means of a digital audio transmission.

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### Copyright

- Copyright protects the tangible embodiment of the copyrighted material, it does NOT protect the underlying idea or concept.
- As a general rule, a university & researchers are comfortable giving a sponsor a non-exclusive and perhaps royalty-free license to copyrightable research products.
- Exceptions to the rule:
  - Computer software that may be patentable and copyrightable

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### Copyright

- Typical works that result are scholarly papers and software code
- Papers and articles are not subject to tech transfer
- Software Code
  - Not usually direct tech transfer to product
  - Code must usually be written/Many ways to implement the same algorithm
  - Copyright exclusivity not usually important to industry

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### Copyrights

|  |   |
|--|---|
| <u>Yes, please:</u>  | <u>No, thank you:</u>   |
| <ul style="list-style-type: none"><li>■ To Sponsor: NERF right and license to use solely to meet obligations to Federal Government under Prime Award (see FDP)</li><li>■ If non-federal Prime Sponsor, or Sponsor, NERF for "non-commercial, educational and research purposes only".</li><li>■ If deliverable is a chapter for a nonprofit publication, it is acceptable to assign copyright to Sponsor, <u>as long as</u> institution retains NERF right to use.</li></ul> | <ul style="list-style-type: none"><li>■ Ownership by Sponsor.</li></ul> |

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## Just the Facts 201: Contract Language

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### Copyright Sample language

Subrecipient grants to Prime recipient an irrevocable, royalty-free, non-transferable, non-exclusive right and license to use, reproduce, make derivative works, display, and perform publicly any copyrights or copyrighted material (including any computer software and its documentation and/or databases) first developed and delivered under this Subaward Agreement solely for the purpose and only to the extent required to meet Prime Recipient's obligations to the federal Government under its Prime Award.

See FDP Attachment 2, Special terms and Conditions, item 1.

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### Copyright Sample language

The Work is being completed as works for hire under this Subagreement. Accordingly, Sponsor shall be the sole and exclusive owner of all Intellectual Property rights in and to the results of the Work created, authored, developed under this Agreement, including without limitation all rights of ownership, all rights to reproduce and deliverables or results, all rights to prepare derivative works, all rights to distribute (including by sale or other transfer of ownership by license, rental, lease or lending) and all rights to perform and display the results or deliverables received by Sponsor pursuant to the Work.

What would you do?

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### Data rights

- Applies to data first produced under the contract
- Form, fit and function data
- Instructional, maintenance, or training materials
- Any other data delivered under the contract unless qualifying and marked as limited rights or restricted computer software in accordance with the clause

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## Data Rights

|   |  |
|---|--|
| <p><u>Yes, please:</u></p> <ul style="list-style-type: none"> <li>■ University retains ownership.</li> <li>■ To Sponsor: right to use solely to meet obligations to Federal Government under Prime Award (see FDP)</li> <li>■ If non-federal Prime Sponsor, or Sponsor, right to use for "non-commercial, educational and research purposes only".</li> </ul> | <p><u>No, thank you:</u></p> <ul style="list-style-type: none"> <li>■ Ownership by Sponsor.</li> </ul> |
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## Data Rights Sample language

Subrecipient grants to Prime recipient the right to use data created in the performance of this Agreement solely for the purpose and only to the extent required to meet Prime Recipient's obligations to the federal Government under its Prime Award.

See FDP Attachment 2, Special terms and Conditions, item 2.

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## Proprietary Information

Materials and information relating to or associated with a company's products, business, or activities, including but not limited to:

|  |  |
|--|--|
| <ul style="list-style-type: none"> <li>■ Financial information</li> <li>■ Data or statements</li> <li>■ Trade secrets</li> <li>■ Product research and development</li> <li>■ Existing and future product designs and performance specifications</li> <li>■ Marketing plans or techniques</li> <li>■ Schematics</li> <li>■ Client list</li> </ul> | <ul style="list-style-type: none"> <li>■ Computer programs</li> <li>■ Processes</li> <li>■ Know-how that has been clearly identified and properly marked by the company as "proprietary information"</li> <li>■ This information must have been developed by the company and NOT be available to the Government or to the public without restriction from another source.</li> </ul> |
|--|--|

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## Proprietary or Confidential Information (NOT PHI)

|   |   |
|---|---|
| <u>Yes, please:</u>   | <u>No, thank you:</u>   |
| <ul style="list-style-type: none"><li>Material or Information must be MARKED Confidential or Proprietary before disclosure.</li><li>If verbally disclosed, must be reduced in writing with 30 days of disclosure.</li><li>Eight exceptions for Confidential/Proprietary information (next slide).</li></ul> | <ul style="list-style-type: none"><li>Everything related to Project as Confidential or Proprietary.</li><li>Confidentiality agreements signed by every project employee</li></ul> |

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## Confidential/Proprietary Sample language

The receiving party shall use its best efforts not to disclose, in whole or in part, any of the providing party's Confidential or Proprietary information to any third party for a period of four years following termination of this Agreement. The receiving party shall have no obligation to prevent disclosure, in whole or in part, of such Confidential or Proprietary information that is:

- (a) Disclosed by the receiving party after three years following termination of this Agreement.
- (a) Now in, or hereafter comes into, the public domain without breach of this Agreement.
- (a) Known on an unrestricted basis by the receiving party prior to its receipt from the providing party.
- (a) Disclosed by the receiving party with the prior express written approval of the providing party.
- (a) Independently developed by the receiving party.
- (a) Disclosed on an unrestricted basis by the providing party to a third party other than the U.S. Government.
- (a) Lawfully received by the receiving party on an unrestricted basis from a third party.
- (a) Required by law or by lawfully-issued subpoena to be disclosed.
- (a) Not identified as Confidential or Proprietary in writing and appropriately marked at the time of disclosure by the providing party to the receiving party.
- (a) Neither the execution and delivery of this Agreement nor the delivery of any P or C information hereunder shall be construed as granting, either expressly or by implication, estoppel, or otherwise, any right or license under any present or future data.

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## Patents

- Patent is the legal protection afforded an invention or discovery.
  - Whoever invents or discovers any new, useful, and non-obvious process, machine, manufacture, or composition of matter, or...useful improvement thereof, may obtain a patent...35 USC 101.
- It is expensive and time consuming to obtain a patent.

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### Bayh-Dole\*Act

1980 federal law that provides the basis for University ownership of federally funded inventions.  
Statutory cite: 35 U.S.C.200-212  
Regulatory cite: 37 CFR Part 401 et seq

- Establishes a uniform patent policy for federally sponsored inventions
- Applies to:
  - Grant, contract and cooperative agreements
  - Inventions funded in whole or in part by federal dollars
- Recognition that there may be inventions from products that are closely related, but also arise from non-government sponsored research [37 CFR 401.1(1) and (2)]

\*Birch Bayh (D-Indiana) & Robert Dole (R-Kansas)

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### Bayh-Dole Act

- Preservation of government rights
  - Non-exclusive, royalty-free right to use for government purposes
- Prohibition against assignment to a third party, other than a patent mgmt organization, without specific government approval
- Requirement for U.S. manufacture in cases of exclusive license

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### Patents / Inventions/ Intellectual Property

| <u>Yes, please:</u>  | <u>No, thank you:</u>   |
|--|---|
| ■ University retains sole ownership of our IP including Patents, inventions, copyrights, data, etc.  | ■ Licensing terms in sponsored research agreement.                            |
| ■ Option for license.  | ■ Broad definitions of project IP.  |
| ■ Specific definitions of "Technical materials", "Data", "Inventions", "Funded Inventions", "Background IP", "Joint IP", "Sponsor IP", "University IP" | ■ Unreasonable timeframes for patent application and license option decision. |
| ■ Reasonable timeframes for license option / patent registration.  |   |

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## Inventions Sample language

The determination of rights of ownership and disposition of inventions resulting from the performance of the Work under this Agreement shall be in accordance with 37 CFR part 401, "Rights to Inventions made by nonprofit organizations & Small Business Firms under Government Grants, Contracts and Cooperative Agreements" and any implementing regulations issued by the Prime Sponsor.

What would you do?



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## Intellectual Property Sample language

Sponsor shall be the sole and exclusive owner of all Intellectual Property Rights in and to the results of the Work created, authored, developed, reduced to practice or furnished by Subcontractor under this Agreement, including without limitation all rights of ownership, all rights to reproduce any deliverables or results, all rights to prepare derivative works, all rights to distribute (including by sale or other transfer of ownership or by license, rental, lease or lending) and all rights to perform and display the results or deliverables received by Sponsor.

What would you do?



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## Intellectual Property Sample language

1. Subcontractor shall promptly disclose any potentially patentable inventions to Sponsor.
2. All inventions and discoveries made solely by sponsor shall be the sole property of Sponsor.
3. All inventions and discoveries made jointly by Sponsor and University will be owned jointly by Sponsor and Subcontractor "Joint Inventions" unless the Subcontractor does not elect to retain any interest therein. Each party shall negotiate a mutually acceptable arrangement for management of the invention and sharing financial returns therefrom.
4. All inventions and discoveries made solely by Subcontractor and/or its employees shall be in accordance with 37 CFR 401.14 as implemented by NIH Policy: "Subcontractor Inventions". Subcontractor shall have the right to retain title to any patentable inventions made by its employees. If Subcontractor decides it will not retain title to any such invention, it will so notify sponsor and U.S. Government within the timeframe required by 37 CFR 401.14. In such an event, and if petitioned by Sponsor, Subcontractor will request approval from the U.S. Govt. to assign title to Sponsor, on mutually agreeable terms and conditions, and subject to any and all rights of the U.S. Govt. and the inventor(s).
5. The Subcontractor will ensure that all of its employees who perform any part of the work under this Agreement and who may be reasonably anticipated to make inventions agree to assign their rights in such inventions to the Subcontractor.



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### Publication

The word publication means “the act of publishing”. To publish is to make publicly known, and, in reference to text and images, it can mean distributing paper copies to the public or putting content on a website. Among publications are books and periodicals, the latter including magazines, scholarly journals, and newspapers.

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### Publication

|   |  |
|---|--|
| <u>Yes, please:</u>   | <u>No, thank you:</u>  |
| <ul style="list-style-type: none"><li>■ University has sole right to determine means, mode, content and time of publication.</li><li>■ Submission to sponsor of proposed publication for review and comment .</li><li>■ Reasonable timeframe for review and comment. If not response within XX days, university proceeds with publication.</li><li>■ If university is part of multi-site project gathering data, acceptable to delay publication until group results compiled and released.</li></ul> | <ul style="list-style-type: none"><li>■ Prior written approval by sponsor before submission to publisher.</li><li>■ Delays for review and comment past 6 months.</li></ul> |

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### IRS issues: Tax Exempt Bonds & Private Business Use

- Tax Exempt Bonds
  - Interest on bonds issued for the benefit of non-profits and governments may be exempt from income tax
  - Tax exempt bonds are very attractive to investors and result in lower interest cost to the issuer
  - Tax exempt bonds are a preferred method of bonding for construction at university facilities

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## IRS issues: Tax Exempt Bonds & Private Business Use

- Private business use of a bond financed facility may invalidate the tax exemption
  - If the private business use exceeds 10% for most public institutions or 5% for most private institutions, the interest on that bond issuance is not exempt
  - Research sponsored by corporations is considered private business UNLESS it meets certain criteria
    - Fact and circumstance analysis

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## Export Control Laws & Regulations

Fundamental Research Exclusion (FRE)

- Research results are "ordinarily published and shared broadly in the scientific community"
- No restrictions on publications or dissemination of research results
- **Including citizenship participation restrictions**
- Neither the University **nor its researchers** can accept restrictions
- **Formal or Informal-no 'side-bar' deals or agreements**

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## Suggested Minimum Terms and Conditions

- Include:
  - Name of institution and Principle Investigator for both parties
  - Title, number and Sponsor name of Prime Award
  - Performance period
  - Funding amount
  - Scope of Work description
  - Payment terms, invoice address & contact
  - Report requirements (Deliverables)
  - Authorized institutional signatures from both parties

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### Agreement Title

| <u>Yes, please:</u>  | <u>No, thank you</u>   |
|--|--|
| <ul style="list-style-type: none"><li>• Sponsored agreement</li><li>• Research Agreement</li><li>• Collaborative Agreement</li></ul> | <ul style="list-style-type: none"><li>• Testing</li><li>• Work for Hire</li><li>• Fee for Service / Service Agreement</li><li>• No "Partner" or Joint Venture Language</li></ul> |

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### Preamble/First paragraph

| <u>Yes, please:</u>  | <u>No, thank you</u>   |
|--|--|
| <ul style="list-style-type: none"><li>• Identify the parties-use correct legal entity names</li><li>• Sponsor name, prime award #, title, cfda (if applicable)</li><li>• "non-profit, educational institution"</li></ul> | <ul style="list-style-type: none"><li>• "Company" or "Provider" for University</li><li>• "corporation established in 1904"</li></ul> |

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### Performance Period

| <u>Yes, please:</u>  | <u>No, thank you:</u>  |
|--|--|
| <ul style="list-style-type: none"><li>■ Start date for allowable costs to be incurred</li><li>■ Full Performance period stated</li><li>■ Include Preaward start date if applicable</li></ul> | <ul style="list-style-type: none"><li>■ Start date as effective date of executed Agreement</li></ul> |

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### Key Personnel

|  |   |
|--|---|
| <u>Yes, please:</u>  | <u>No, thank you:</u>   |
| <ul style="list-style-type: none"><li>■ Name Key Personnel for both parties</li><li>■ Change of PI requires prior approval</li><li>■ "Only the authorized representative of institution (as identified in contact section X) may approve modifications to this Agreement on behalf of institution.</li></ul> | <ul style="list-style-type: none"><li>■ If more than one Key Personnel named by Sponsor, verify with our PI</li><li>■ Principal Investigator as additional signing party (?)</li><li>■ Authorized Official or other contacts as Key</li></ul> |

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### Reporting

|  |   |
|--|---|
| <u>Yes, please:</u>  | <u>No, thank you:</u>   |
| <ul style="list-style-type: none"><li>■ DUE DATES for all required reports-specify Technical, Progress, Financial and ARRA reports and appropriate contact for submission.</li></ul> | <ul style="list-style-type: none"><li>■ Reports as Confidential Information</li></ul> |

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### Contacts

|   |                            |
|---|----------------------------|
| <u>Yes, please:</u>   | <u>What's not to like?</u> |
| <ul style="list-style-type: none"><li>■ Administrative</li><li>■ Technical</li><li>■ Send invoices to...</li><li>■ Payment inquiries to...</li><li>■ Authorized Institutional signing official</li><li>■ ARRA Reporting Contact (if applicable)</li></ul> |                            |

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### Negotiation Strategy

"With problem solving, or interest-based bargaining, parties look at their underlying interests rather than merely asserting positions and demands. Together they search for solutions to meet those underlying interests while making concessions consistent with their own needs and concerns."

[Negotiation Strategy: Planning is Critical – by Cathy Cronin-Harris, The CPA Journal]

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**DILBERT**  
BY SCOTT ADAMS

YOU DIDN'T MAKE ANY OF THE CONTRACT CHANGES WE AGREED ON LAST MONTH.

THAT'S HOW I NEGOTIATE.

I'M NOT AUTHORIZED TO MAKE ANY CHANGES TO THE CONTRACT.

AND THE EXECUTIVES, WHO HAVE THAT POWER, WILL THINK I'M NOT GOING ANY FURTHER IF I ASK THEM TO DO IT.

SO I AGREE TO EVERYTHING YOU ASK, THEN I DON'T PUT ANY OF IT IN THE CONTRACT.

OVER THE COURSE OF SEVERAL MONTHS, I HOPE TO LEAVE YOU DOWN AND MAKE YOU SIGN THE CONTRACT AS IS.

CAN YOU AT LEAST CHANGE SECTION THREE THE WAY I ASKED?

SURE, NO PROBLEM.

I'LL SEE YOU IN A MONTH.

© Scott Adams, Inc./Dist. by UFS, Inc.

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