

Those Freaking FAR Clauses: Which One Should Get My Attention

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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 developed under contract; establishes contractor's rights to same, and minimum requirement to maintain them; prohibits higher tier contractors from mandating rights in subcontractor inventions as a condition of issuing subcontract.
- Action: Make sure this clause is included in contracts and subcontracts of federal funds accepted by your institution. 52.227-12 is the for-profit version, and should not be accepted.

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 any 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.

Rights in Data - Special Works

52.227-17

- Purpose: Establishes controls for data generated by contractors for the government's internal use (e.g., training and instructional manuals and audio-visual works, investigatory reports, histories of federal agencies, etc.)
- Importance: Represents an absolute restriction on the publication or dissemination of contractor-generated data; shouldn't apply to basic and applied research.
- Action: Get removed from contract on basis of exceptions to this clause's applicability, located at FAR 27.405(a)(1).

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 patent.

Patent Indemnity 52.227-3

- Purpose: Requires that the Contractor indemnify (reimburse) 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, Alternate I.

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: The 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.

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 confidential information will not be utilized. Otherwise, request inclusion of Alternate I.

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 that the contract officer is looking at this as a purchase of commercially available goods/services, rather than of research.
- Action: Replace with standard FAR clauses for R&D. Otherwise, get changed to 52.213-4, and negotiate to remove undesirable requirements (e.g., termination for default, warranty, etc).

Order of Precedence - Uniform Contract Format 52.215-8

- Purpose: Specifies the order of precedence that will apply to the contract.
- Importance: Allows the contractor to determine which part of a contract will supersede another, in the event of conflicting terms: (a) The Schedule (excluding the specifications); (b) Representations and other instructions; (c) Contract clauses; (d) Other documents, exhibits, and attachments; (e) The specifications.
- Action: None.

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. Very similar to 52.212-4, except it applies to non-commercial.
- Action: Replace with standard FAR clauses for R&D. Otherwise, negotiate to remove undesirable requirements (e.g., termination for default, warranty, etc).

Termination for Convenience of the Government 52.249-5

- Purpose: Provides for termination of contract for the convenience of the government, without penalty assigned to contractor; sets forth reasonable terms for covering costs related to early contract 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 Government R&D fixed price or cost reimbursement contracts with educational institutions.

Stop-Work Order 52.242-15

- Purpose: Provides the government the opportunity to stop work on a contract 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.

Government Property 52.245-2 &-5

- Purpose: Defines ownership, protection, use, control and disposition of government property associated with a project.
- Importance: The basic clauses give government ownership to all property associated with a project. Government furnished equipment will always remain the property of the government. The appropriate alternates, Alt 1 for -2 and Alt 2 for -5, allow acquired property to be titled to the institution.
- Action: Be sure to use the correct alternate and have ownership designated in the contract.

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: Requires substitution of appropriate cost principle reference in paragraph (a) in place of reference to commercial, for-profit cost accounting standards (31.2).

Limitation of Cost 52.232-20

- Purpose: Provides the total contract cost limitation for fully-funded cost reimbursement contracts being performed on a best efforts basis.
- Importance: Provides notification requirements to the Government for cost overruns and a mechanism for submission and acceptance of contract cost revisions.
- Action: Appropriate clause for use in fully-funded cost reimbursement contracts. Notify the Government 60 days prior to exceeding 75% of total estimated contract costs.

Limitation of Funds 52.232-22

- Purpose: Provides the contract cost limitation for incrementally funded cost reimbursement contracts being performed on a best efforts basis.
- Importance: Creates provisions for notification and contract amendment for incrementally funded cost reimbursement contracts.
- Action: Provides notification provisions to the Government when the next increment of funding will be required. Notify the Government 60 days prior to exceeding 75% of total estimated contract costs.

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 proceedings.
- Action: Require modification with Alternate II for contracts with educational institutions (incorporates OMB Circular A-133).

Changes-Cost Reimbursement 52.243-2

- Purpose: Allows the government to direct changes in the drawings, designs, specifications, or place of delivery.
- Importance: If the change causes an increase in the cost, the contractor must submit an adjustment proposal within 30 days. The government may make these changes, regardless of inclusion of the clause, due to the Christian Doctrine.
- Action: Make sure to flow down this clause.

Subcontracts 52.244-2

- Purpose: Provides approval process and procedures for obtaining approval to issue certain, specified subcontracts under the prime agreement.
- Importance: Creates a written authorization requirement from the Contracting Officer prior to issuance of certain identified subcontracts.
- Action: Address approval for budgeted subcontracts up-front in prime agreement or, subsequently, through procedures required by this clause.

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 subcontracting goals set by the developed plan and related reporting requirements.
- Action: Monitor subcontracting purchases closely and target opportunities intended to meet goals set by accepted plan.

Cost Contract - No Fee 52.216-11

- Purpose: The contracting officer may create a “reserve” fund after 80% of the estimate cost is paid.
- Importance: This reserve fund could withhold up to \$100,000 of payments until the contract is complete. The contracting officer can reduce the reserve to \$10,000 or \$0 if the correct alternate is used.
- Action: Try for Alt I to get the full waiver, or negotiate the \$10,000 maximum to keep the cash flow to the Institution.

Interest

52.232-17

- Purpose: Creates an obligation of the Contractor to pay simple interest on any payments that become due to the Government due to defective cost or pricing data or unallowability of costs determined by the applicable cost principles.
- Importance: Would require more than simply re-paying inappropriate or unallowable costs – adds interest payment to be paid from other source of funds.
- Action: Request removal pursuant to 32.216(5) as appropriate.

Disputes

52.233-1

- Purpose: Prescribes the method used by the government or contractor to resolve a dispute in a contract.
- Importance: By definition, all disputes involve money. This clause defines the method used and the time required to get an initial resolution.
- Action: Accept the clause but be cognizant of the requirements and thresholds to resolve disputes.

Defense Priority and Allocation System 52.211-15

- Purpose: Specifies whether the contract is rated for national defense use.
- Importance: The government may direct that a rated contract be given higher priority with regard to contractor resources than a lower-rated, or unrated contract. Designed for contracts of importance to national defense, and unlikely to be activated in an R&D activity.
- Action: Make sure to flow-down this requirement to all subcontractors.