

# TROUBLESOME CLAUSES IN CONTRACTS

## Problematic clauses

- **DFAR 252.204-7000 – Disclosure of Information**
- **ARL 52.005-4401 – Release of Information**
- **ARL 52.004-4400 – Foreign Nationals Performing Under Contract**
- **AFMC 5352.227-9000 EXPORT-CONTROLLED DATA RESTRICTIONS**

## Disclosure of Information

Clause **DFAR 252.204-7000** states: “Contractor shall not release to anyone outside the Contractor’s organization any unclassified information, regardless of the medium, pertaining to any part of this contract or any program related to this contract.”

- Problem
  - publication/information dissemination restriction

## Negotiation solution:

- Get it deleted in favor of 252.204-7000, “Release of Information” (December 1991) Deviation
- The Contractor shall be free to publish, permit to be published, or distribute for public consumption, any information, oral or written, concerning the results of conclusions made pursuant to performance of this contract; provided, however, that it shall provide copies of any such publication or release of information to the government’s contracting officer for review and comment at least thirty (30) days prior to any such release.

## Release of Information

Clause **ARL 52.005-4401**:

Includes reference to “non-releasable, unclassified information” and a requirement to “confer and consult” prior to release of information.

- Problem
  - What does the review entail? This clause is the “kitchen sink” approach.
  - Review for patentable materials - Is this allowable under the university’s statutes/policies?

## Negotiation solution:

- Get it deleted in favor of alternate language: “The Parties agree to **confer and consult** with each other prior to publication or other disclosure of the results of work under this Agreement to ensure that no classified or proprietary information is released. Prior to submitting a manuscript for publication or before any other public disclosure, each Party will offer the other Party ample opportunity (not to exceed **60** days) to review such proposed publication or disclosure, to submit objections, and to file application letters for patents in a timely manner.”

## Foreign Nationals Performing under Contract

- Clause **ARL 52.004-4400** requires:
  - All foreign nationals must be approved before beginning work on the project. (Army Corps of Engineers)
  - Contractor is required to divulge if any foreign nationals would be working on the program. (National Security Agency). Provision of name, last country, citizenship information, etc. required.
- Problem
  - Any restriction on non-U.S. citizens or persons participating in contract activities may invalidate the Fundamental Research exclusion.

### **Negotiation solution:**

- This is a problematic clause to dispute. These clauses are mostly seen in contracts involving controlled technology and sponsored by military agencies.

Contact the PI and sponsor's technical person on the project. There is a possibility that the PI is doing the basic research and the sponsor will take those results and work on the controlled technology at another location.

Air Force Acquisition Clause 5353.2279000, Export Controlled Data Restrictions in selected contract awards, requiring an export license prior to assigning any foreign national to work on the project or allowing foreign persons access to the work, equipment or technical data generated by the project.

### **AFMC 5352.227-9000 EXPORT CONTROLLED DATA RESTRICTIONS (JUL 1997)**

(a) For the purpose of this clause,

(1) Foreign person is any person who is not a citizen or national of the U.S. or lawfully admitted to the U.S. for permanent residence under the Immigration and Nationality Act, and includes foreign corporations, international organizations, and foreign governments;

(2) Foreign representative is anyone, regardless of nationality or citizenship, acting as an agent, representative, official, or employee of a foreign government, a foreign-owned or influenced firm, corporation or person;

(3) Foreign sources are those sources (vendors, subcontractors, and suppliers) owned and controlled by a foreign person.

(b) The Contractor shall place a clause in subcontracts containing appropriate export control restrictions, set forth in this clause.

(c) Nothing in this clause waives any requirement imposed by any other U.S. Government agency with respect to employment of foreign nationals or export controlled data and information.

(d) Equipment and technical data generated or delivered under this contract are controlled by the International Traffic in Arms Regulation (ITAR), 22 CFR Sections 121

through 128. An export license is required before assigning any foreign source to perform work under this contract or before granting access to foreign persons to any equipment and technical data generated or delivered during performance (see 22 CFR Section 125). The Contractor shall notify the Contracting Officer and obtain written approval of the Contracting Officer prior to assigning or granting access to any work, equipment, or technical data generated or delivered under this contract to foreign persons or their representatives. The notification shall include the name and country of origin of the foreign person or representative, the specific work, equipment, or data to which the person will have access, and whether the foreign person is cleared to have access to technical data (DoD 5220.22-M, National Industrial Security Program Operating Manual (NISPOM)).

#### Problem

- Foreign nationals make up a large portion of our scientific undergraduate, graduate, post-doc and visiting faculty population. Many times it is problematic to find U.S. citizens to work on certain projects.
- Many students are depending on these research projects to complete thesis and dissertations.

#### **Negotiation solution:**

- Ask the PI if the project is fundamental research (basic or applied), an exclusion under ITAR.
- Ask the defense contractor if foreign students are permitted to work on the project and get the answer in writing.