

Selected Troublesome/Unacceptable Clauses Related to Information Release and Foreign Nationals

(Note: Please review the applicable clause in the most current version available to you to ensure you have the most up-to-date information. This list does not contain all possible troublesome clauses as they relate to publication and foreign national restrictions.)

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AFMC 5352.227-9000 – Export Controlled Data Restrictions

5352.227-9000 Export-Controlled Data Restrictions (AFMC) (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. or 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) not owned and controlled by a foreign person.

a. The contractor shall place a clause in subcontracts containing appropriate Export Control restrictions, set forth in this clause.

b. 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.

c. 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)).

DFAR 242-204-7000 – Disclosure of Information (Dec 1991)

(a) The contractor shall not release to anyone outside the Contractor's organization any unclassified information, regardless of medium (e.g., film, tape, document), pertaining to any part of this contract or any program related to this contract, unless

(1) The contracting Officer has given prior written approval; or

(2) The information is otherwise in the public domain before the date of release.

(b) Requests for approval shall identify the specific information to be released, the medium to be used, and the purpose for the release. The Contractor shall submit its request to the Contracting Officer at least 45 days before the proposed date for release.

(c) The contractor agrees to include a similar requirement in each subcontract under this contract. Subcontractors shall submit requests for authorization to release through the prime contractor to the Contracting Officer.

DFAR 242-204-7000 – Release of Information (Dec 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.

DFAR 252.204-7008 – Requirements for Contracts Involving Export Controlled Items

As prescribed in 204.7305(a), use the following clause:

- (a) *Definition*: "Export controlled items," as used in this clause, means items subject to the Export Administrative Regulations (EAR) (15 CFR Parts 730-774) or the International Traffic in Arms Regulations (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. The term "defense items" includes information and technology.
 - (2) "Items," defined in the EAR as "commodities, software, and technology," terms that are also defined in the EAR, 15 CFR 772.1. Regarding the release of items subject to the EAR to foreign nationals within the United States, "items" only include technology and software source code (and not commodities) subject to the EAR.
- (b) The parties anticipate that, in the performance of this contract, the Contractor will generate or need access to export controlled items.
- (c) The Contractor shall comply with all applicable laws and regulations regarding export controlled items, including 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 the ITAR and with the Department of Commerce regarding any questions relating to the EAR.
- (d) 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.
- (e) Nothing in the terms of this contract is intended to change, supersede, or waive any of the requirements of applicable Federal laws, Executive orders, and regulations, including byut

DFAR 252.204-7009 – Requirements Regarding Potential Access to Export Controlled Items

As prescribed in 204.7305(b), use the following clause:

REQUIREMENTS REGARDING POTENTIAL ACCESS TO EXPORT-CONTROLLED ITEMS (JUL 2008)

(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 (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. The term "defense items" includes information and technology.

(2) "Items," defined in the EAR as "commodities, software, and technology," terms that are also defined in the EAR, 15 CFR 772.1. Regarding the release of items subject to the EAR to foreign nationals within the United States, "items" only include technology and software source code (and not commodities) subject to the EAR.

(b) The parties do not anticipate that, in the performance of this contract, the Contractor will generate or need access to export-controlled items.

(c) If, during the performance of this contract, the Contractor becomes aware that the Contractor will generate or need access to export-controlled items—

(1) The Contractor shall notify the Contracting Officer in writing; and

(2) The Contracting Officer will expeditiously—

(i) Modify the contract to include the Defense Federal Acquisition Regulation Supplement clause **252.204-7008**, Requirements for Contracts Involving Export-Controlled Items;

(ii) Negotiate a contract modification that eliminates the requirement for performance of work that would involve export-controlled items; or

(iii) Terminate the contract, in whole or in part, as may be appropriate, for the convenience of the Government, in accordance with the Termination clause of the contract.

RL 52.005-4401 Release of Information

Army Regulations (AR) 530-1 and AR 360-1 prescribe Department of the Army policies for operations security (OPSEC) review prior to public release (July 2002). These include:

(1) Procurement instruments and solicitations (including grants, cooperative agreements, etc.), abstracts, papers, technical reports, articles, point papers, news releases, short items to be included in other publications, academic papers on work-related subject matter, speeches, briefings, media presentations, training materials, munitions cases, environmental impact statements, and other forms of information, including film, audio tapes and video cassettes which could divulge non-releasable, unclassified information.

(2) Information posted on electronic bulletin boards, passed over unsecured electronic mail systems, or posted in a manner to the World Wide Web

These policies are applicable to unclassified contracts/instruments as well as the classified contracts/instruments governed in this respect by DD Form 254.

Army policy is to make available to the public the maximum accurate information on Army contract/instrument relationships, industry/academic accomplishments, and scientific achievements. In furtherance of this policy, each party agrees to confer and consult with each other prior to publication or any other disclosure of information

relating to efforts under this contract/instrument. Prior to any public publication or disclosure, each party will offer the other party ample opportunity to review the proposed publication or disclosure, to submit objections, and to file application letters for patents in a timely manner. The contractor shall allow 60 days for completion of this process.

ARL Cooperative Agreement Language Substituting for ARL 52.005-4401 Release of Information (July 2002)

Prior Review of Public Releases. 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.

ARL 52.004--4400 Foreign Nationals Performing Under Contract (Feb 2002)

In accordance with Title 8 U.S.C. 1324a, local Foreign Disclosure Officers (FDOs) may approve access by foreign nationals working on unclassified public domain contracts for the duration of the contract, provided the foreign nationals have appropriate work authorization documentation.

In those instances where foreign nationals are required to perform under any resultant contract and employment eligibility was not submitted with an Awardee's proposal, the employment eligibility documentation specified at 8 CFR 274a.2 shall be submitted to the Contracting Officer at least two weeks prior to the foreign national's performance for review and approval. Awardees not employing foreign nationals in performance of any resultant contract may disregard this clause.

Army Corps of Engineers

ER 52.0000—4017 – Foreign Nationals

In accordance with Engineering Regulation (ER) 380-1-18, Section 4, all foreign nationals who work on any Corps of Engineers' contract or task order shall be approved by HQUSACE Foreign Disclosure Officer or higher before beginning work on a contract/task order. This regulation includes subcontractor employees. The Contractor shall submit a letter to the CERL

Security Officer containing the following:

- a. The Contracting Officer's Representative's Name
- b. Solicitation Number and/or Contract Number
- c. Narrative Title of the Contract
- d. A paragraph explaining what tasks the individual will be performing under the contract

e. A list of names identifying all foreign nationals proposed for performance under the contract/task order

f. Documentation to verify that he/she was legally admitted into the United States (US) and has authority to work and/or go to school in the US. Such documentation may include a US Passport, Alien Registration Card with photograph (INS Form I-151 or I-551), Employment Authorization Card (INS Form I-688A), INS Form 9, INS Form 20, H1B1, etc.

g. Standard Form 85P, Questionnaire for Public Trust Positions (Reference CERL website at <http://owwww.cecer.army.mil/contracts/formindex.html> for a copy of the SF-85P.

Alternate Form of Requirement

By signing this award, the Contractor certifies that no foreign national is working under this contract, regardless of pay status. Should this change, the individual will require clearance prior to performing any work under this contract. Foreign nationals must be approved in writing via the issuance of a modification to this contract that specifically identifies them by name and nationality. The Contractor will notify the Contracting Officer in writing providing the name and nationality and providing a copy of their VISA or other information as required.

National Security Agency

Section K - Representations, Certifications

(d) Will non-U.S. citizens be required to work on any resultant contract?

Yes__ No__. If yes, please provide the following information on each individual: Last Name, First Name, Middle Name, Alias (if any), Place of Birth, Date of Birth, Nationality, Employer and Address, Residence including street address, Other Identifying Information (i.e., passport number, visa number)

NOTICE: This Agency may prohibit non-U.S. citizens from all or certain aspects of the work to be performed under any resulting contract. The fact that the Offer or intends the use of non U.S. citizens on any resulting contract will not necessarily disqualify the company from consideration nor may the non-U.S. citizens finally be prohibited from working on some or all aspects of any resultant contract.

3. Have the responses above changed since the last submission to the Maryland Procurement Office? Yes ____, No ____, Not Applicable ____.

THE SUCCESSFUL OFFER OR SHALL NOTIFY THE CONTRACTING OFFICER IN WRITING IF ANY OF THE ABOVE INFORMATION CHANGES DURING THE PERFORMANCE OF ANY RESULTANT CONTRACT.

Federal Aviation Administration

Civil Aviation Security Publications: The Associate Administrator for Civil Aviation Security, ACS-1, or designee, must review all research results related to civil aviation security prior to release to the general public. This includes such items as dissertations, theses, archival and conference technical papers, technical reports, etc. This

requirement is to determine if the results contain information that may assist terrorists in undermining established security systems.

Information must be submitted by the grantee to the FAA Technical Monitor, whom then forwards the information to the Associate Administrator for Civil Aviation Security, ACS-1 through his or her respective appropriate management official.

Within 30 days of receipt by the FAA technical monitor, a notice of approval, declination, or a request for modification of the publication will be provided by the Office of Civil Aviation Security, ACS-1, to the FAA Technical Monitor. This notice will then be forwarded to the grantee by the FAA technical monitor.

Subcontract Clause Examples

Industry Sub--Prime Contract with DOD

This effort is unclassified, and access to classified material is not anticipated. Any proposed public release of information associated with this effort should be submitted to The Prime 70 days prior to the proposed release date, in order to allow Prime to comply with its contract.

Government Laboratory (Fermilab) Sub—DOE Prime (FL 90--4/02)

In connection with any activities in the performance of this subcontract, the Subcontractor agrees to comply with any "Sensitive Foreign Nations Controls" requirement that may be attached to this subcontract, relating to those countries which may from time to time, be identified to the Subcontractor by written notice as sensitive foreign nations. The Subcontractor shall have to right to terminate its performance under this subcontract upon at least 60 days prior written notice to Fermilab if the Subcontractor determines that it is unable, without substantially interfering with its policies or without adversely impacting its performance to continue performance of the work under this subcontract as a result of such notification. If the Subcontractor elects to terminate performance, the provisions of this subcontract regarding termination for convenience of Fermilab shall apply. The provisions of this clause shall be included in any sub-subcontracts.

BIR Sub—DOD Prime

Prior approval to use non-U.S. citizens to perform on this Order, at either the prime or sub-contract level must be obtained from the Contracting Officer and the Director, Intelligence and Security Directorate. To request approval for use of non-U.S. citizens (including permanent resident aliens) in performance of this Order, a letter of request should be provided to SBIR Company containing the name of the individual, country of origin, summary of tasks to be performed and a point of contact in case there are any questions. SBIR Company will immediately forward said requests to the Government's Contracting Officer for approval.

Additional examples:

Prime contract did not include the problem DFARS (7000 clause), but did include the following:

H-6 Dissemination of Information

- a. There shall be no dissemination or publication, except within and between the Contractor and any subcontractors, of information developed under this contract or contained in the reports to be furnished pursuant to this contract without prior written approval of the COR.
 - Prime Contractor had spent three months negotiating with another university over this language. The other university had agreed to the following in a subcontract whose terms took precedence over the prime:

UNIVERSITY'S project director and/or UNIVERSITY'S project staff shall have the right to publish results of work conducted under this Agreement subject only to the protection of any intellectual property rights and proprietary information, and Government-sensitive information, after giving a copy of material intended for publication to the Government, if Government so desires, for review and comment. UNIVERSITY'S project director and/or UNIVERSITY'S project staff agree to take such comments into consideration in the preparation of the final publication.

The University requested modified language which makes it clear that the government cannot actually control the publication of sensitive research results. The prime contractor agreed. The following language is substituted:

Papers or other publications resulting from unclassified contracted fundamental research are exempt from the prepublication controls and the review requirements of Section H-6 of the prime contract, and the following provisions apply:

University's principal investigator and/or University's project staff shall have the right to publish results of work conducted under this Agreement subject only to the protection of any intellectual property rights and proprietary information, after giving a copy of material intended for publication to the Government, if the Government so desires, for review and comment. The Government comments may also request modifications concerning protection of Government-sensitive information, and the principal investigator and/or project staff agree to take such comments into consideration in the preparation of the final publication.

Navy sponsor: very large, multi-year contract, partially classified, with a state university as prime

Problem DFARS applies, but university prime had negotiated somewhat less onerous terms, as follows:

An abstract of documents proposed for public release together with the author's identification of the information he/she views as the [government funded] component of the proposed publication shall be presented through the Component Point-of-Contact (CPOC) to the On-site Government Technical Lead for review prior to publication. If the On-site Government Technical Lead determines that the publication contains sensitive information directly related to the [government] contract, the document will be forwarded through [the] University [prime contractor] to the Government for review and clearance.

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