2021-11-19
FDP Working Group Subcommittee

FAR Guidance Resource Document*

Clause Version	Prescribing	Why is it a Problem?	Proposed Solution(s)
52.227-14 Rights in Data - General (DEC 2007)	27.409(b)(1)	Basic clause does not guarantee rights to data and software created under the agreement Note, this is not a deal breaker at universities that permit restrictions on publications, *e.g.* obtaining prior written approval to publish	Request exception to add ALT IV. ALT IV gives rights to "data" including software that would otherwise be excluded. (see 27.409(b)(5)) If your institution does not require Alt. IV or will accept the basic clause (without Alt. IV), then escalate as appropriate (e.g. legal, dean) and ensure that PI accepts the ramifications.
52.249-2 Termination for Convenience of the Government (Fixed Price) (MAY 2004) (APR 2012)	49.502(b)(1)(i)	Should not be used for R&D with educational institutions. This clause assigns all IP to Gov't at termination. (see (b)(4)).	Request exception that replaces the clause with 52.249-5 (Termination for Convenience of the Government (Educational and Other Nonprofit Institutions –prescribing clause is 49.502(d)))
52.249-6 - Termination (Cost Reimbursement) (May 2004)	49.503(a)(1)	Should not be used for R&D with educational institutions. This clause assigns all IP to Gov't at termination. See (c)(4) In the event contract terminated for default, there could be negative ramifications for your institution.	Request exception that replaces the clause with 52.249-5.
DFARS 252.204-7000 - Disclosure of Information	204.404-70(a)	Clause as written can limit freedom to publish without prior approval, limits rights in data created under	Request the designation as constituting "Fundamental Research" under clause (a)(3).

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(OCT 2016)		the award, affects designation of fundamental research. Note, this is not a deal breaker at universities that permit restrictions on publications, *e.g.* obtaining prior written approval to publish	Note, mandatory flow down to subs, may require your institution obtain (a)(3) for the sub. If request for "Fundamental Research" is rejected, then escalate per your institution's policies and procedures for either rejection or acceptance of other than fundamental research. If your institution does not require or limit its portfolio to fundamental research, then negotiation of fundamental research may not be necessary, albeit subs may require it. It is recommended to attempt to receive a fundamental research determination when the institution feels that a fundamental research determination is appropriate even if the institution accepts controlled research. This reduces unnecessary burden on the institution as well as good citizenship for fellow institutions who cannot accept controlled research.
Self-Deletion – No clause exists	N/A	Numerous, inapplicable clauses added to a federal contract – sometimes included due to statute and sometimes because the government wants to reserve the option of requiring compliance if the agreement is modified.	Ideally, only the clauses that apply should be included into the contract. But, if the CO requires the kitchen sink approach, then you might request that additional clauses be flown down as needed through an amendment. Option B would be to suggest an exception, *e.g.*

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		Not referenced in the FAR, other than is found in 52.230-6 Administration of Cost Accounting Standards, subsection (l)(1) "So state in the body of the subcontract, in the letter of award, or in both (do not use self-deleting clauses)."	"Clauses made inapplicable by the type of order or contract are self-deleting." or "Clauses which do not by their nature or content apply to the University, or to the work being performed by the University, shall be self-deleting." or "FAR/DFAR clauses included in the prime flow-down contract are based upon prescription and threshold requirements. Those reflected that are not prescribed based on entity type, work conducted, applicability, or threshold amount are considered self-deleting. Perhaps even suggest adding the following to the clause "and the university is not responsible for compliance with any self-deleting clauses" or add "For the sake of clarity, the following clauses are self-deleting for this contract:" Some COs may issue a separate letter agreement noting which clauses are self-deleting. Letter is incorporated in contract.

DFARS 252.204-7012 - Safeguarding Covered Defense Information and Cyber Incident Reporting (DEC 2019)	204.7304 (c)	This clause is problematic, as it requires a heightened standard of cybersecurity controls and infrastructure (including, but not limited to NIST 800-171) if Covered Defense Information is involved in your institution's performance. Compliance with this clause requires allocation of scarce IT resources, extensive PI education, and is very costly.	The first step is to question the Sponsor as to whether or not your institution's performance will involve covered defense information ("CDI"), either provided by the Sponsor or PTE or developed as a result of performing the work. If not, you should ensure that the work is classified by the Contracting Officer as fundamental research. If the contract is directly federal, the prescription 48 C.F.R. § 204.7304 (c) requires this clause "in all solicitations and contracts, including solicitations and contracts using FAR part 12 for the acquisition of commercial items, except for solicitations and contracts solely for the acquisition of commercial off the shelf items ("COTS")." If the directly federal contract is for other than COTS items, the clause is required. Best practice is to obtain, in writing from the Contracting Officer, that CDI will not be involved in the performance. The requirements of the clause do not apply if CDI is not at issue. If your institution is a subcontractor, best practice is to ask your prime sponsor whether CDI will be involved in the performance. If yes, then the clause will apply. If no, best practice is to request removal of the clause pursuant to DFARS 252.204-7012 (m). Subsection (m) only requires prime recipients to include the clause "in subcontracts or similar contractual instruments for operationally critical

			support, or for which subcontract performance will involve covered defense information…" If the determination is made that CDI is involved and that the requirements of the clause will apply, you should work with the PI and their department/college to ensure they are aware. Your export control/compliance officer/research security (IT) officer will need to meet with the PI to review the SOW, facilities being used, etc. Ultimately, a Technology Control Plan will need to be put in place and be signed off on by the PI and relevant research administration offices. Other considerations: - It is a best practice to have the CDI specifically referenced and described in your contract. - Do contracts with CDI require higher signoff? (VPR, etc.?) - Have pre-prepared talking points to explain to the PI what this clause will mean before accepting the clause. - Consider obtaining written confirmation from the PI and documenting that in a file. - Prepare a letter to be leveraged in negotiations with PTEs providing guidance

			on how to have the CUI/CDI conversation with the prime sponsor.

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DFARS 252.204-7019 - Notice of NIST SP 800-171 DoD Assessment Requirement and DFARS 252.204-7020 - NIST SP 800-171 DoD Assessment Requirements (NOV 2020) *Based on Interim Rule	204.7304 (d) & (e)	The 7019 clause provides notice of the requirement of an assessment of your institution's compliance with NIST SP 800-171. The 7020 clause sets out the specific requirements of that assessment. The 7019 clause is required in solicitations (except those solely for COTS items) and the 7020 clause is required in all solicitations and contracts, task orders, or delivery orders, except those for COTS items. The clause is problematic because your institution's entire network may not comply with 800-171. The assessment, whether basic (self-assessment) or medium/high (government assessment) can be costly. Reporting is required to the SPRS system.	Largely the same as the 7012 clause. If your institution's performance involves CDI, then these will apply. The requirement is tied to "covered contractor information system" and that system being required to comply with NIST 800-171. What about subcontracts? There is no similar "out clause" like 252.204-7012 (m). Although it's not explicitly stated, an argument could be made that if 7012 is not applicable then 7019 and 7020 should also not apply to a subcontract. See 7020(b) stating "(b) Applicability. This clause applies to covered contractor information systems that are required to comply with the National Institute of Standards and Technology (NIST) Special Publication (SP) 800-171, in accordance with Defense Federal Acquisition Regulation System (DFARS) clause at 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting, of this contract." 7020 is referenced in 7019
DFARS 252.204-7021 - Cybersecurity Maturity Model Certification Requirements *Based on Interim Rule	204.7503 (a) & (b)	Compliance and certification will be costly. Requires that university and subs have a current (i.e. not older than 3 years) CMMC certificate at the CMMC level required by the contract and maintain the CMMC certificate at	CMMC 2.0 was released by OUSD(A&S) in November 2021. DFARS 252.204-7021 is currently in the rulemaking process. At this time, inclusion of this clause is inappropriate, unless an exception has been issued in writing by

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		the required level for the duration of the contract. CMMC is cumbersome and will require extensive education of both PIs and sponsored research administrators, as submitting proposals will require some knowledge of CMMC levels/requirements. There will be further problems associated with the "waterfall" of CDI from the prime award recipient to any subcontractors. What happens when the levels are different from a prime to a sub? In the current state, assessors are scarce.	OUSD(A&S) as CMMC 2.0 has not yet been confirmed or initiated. Per Prescription at 204.7503: Use the clause at 252.204-7021 , Cybersecurity Maturity Model Certification Requirements, as follows: (a) Until September 30, 2025, in solicitations and contracts or task orders or delivery orders, including those using FAR part 12 procedures for the acquisition of commercial items, except for solicitations and contracts or orders solely for the acquisition of commercially available off-the-shelf (COTS) items, if the requirement document or statement of work requires a contractor to have a specific CMMC level. In order to implement a phased rollout of CMMC, inclusion of a CMMC requirement in a solicitation during this time period must be approved by OUSD(A&S). (b) On or after October 1, 2025, in all solicitations and contracts or task orders or delivery orders, including those using FAR part 12 procedures for the acquisition of commercial items,

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			except for solicitations and contracts or orders solely for the acquisition of COTS items.