

**SELECTED TROUBLESOME/UNACCEPTABLE CLAUSES RELATED TO
INFORMATION RELEASE AND FOREIGN NATIONALS**

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(Note: The text of each of the clauses referenced below is reproduced after the summary.)

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

This DFAR Clause is included in the contract boilerplate of many DOD agencies. Originally issued in 1987 and then updated in 1991 but without substantive changes. The prescribing language indicates the clause is to be used when results of research are expected to be SBU (sensitive but unclassified). Continues to be a problem for many universities. Clause states that **“contractor shall not release to anyone outside the Contractor’s organization any unclassified information, regardless of medium pertaining to any part of this contract or any program related to this contract....”**At least one institution has seen deviation language, but it definitely is not DOD wide and it’s not clear whether the deviation will be accepted by any specific DOD installation. The deviation follows the clause reproduced on the next page.

ARL 52.005- 4401 – Release of Information (July 2002)

This July 2002 version is an improvement over the August 2001 version but still raises concerns in the university community *regarding the inclusion of a reference to “non-releasable, unclassified information” and a requirement to “confer and consult,”* as well as what the (OPSEC) review entails. There are also institutional concerns about what the breadth of the review (a “kitchen sink issue”). Language in ARL Cooperative Agreement seems to be a good compromise and is attached.

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

Clause requires contractor **to submit employee’s eligibility documentation for review and approval.** Prior version was notification only. This is a step backwards and many institutions consider it a “dealbreaker.”

Army Core of Engineers (All Installations)

Language included in contract. *May be in the form of clause 52.0000—4017 Foreign Nationals, or in the form of a required contract certification.* The clause requires that **all foreign nationals who work on any Corps of Engineers' contract or task order shall be approved by the Headquarters Foreign Disclosure Officer or higher before beginning work on a contract/task order.** This regulation includes subcontractor employees. Detailed requirements for information and documentation that must be submitted are included in the clause. The alternate form of the requirement states that by

signing a contract, **the Contractor certifies that no foreign nationals are working under the contract.** Should this change, the individual will require clearance prior to performing any work under the contract. Foreign Nationals must be approved in writing via the issuance of a contract modification that specifically identifies them by name and nationality.

National Security Agency

Prior to award (either at proposal stage or during contract negotiation), **contractor is required to divulge if any foreign nationals would be working on program.** If affirmative, name of person and last country of citizenship and other information must be provided (with the assumption of a background check). Foreign National Approval Clause would then be inserted in contract. If negative response is provided, no FN Clause is included in contract. However, NSA considers certification to be material and requires contractor to notify the contracting officer in writing if any of the information in the certification changes (and they will then modify the agreement to include the foreign national clause).

Federal Aviation Administration

Associate Administrator for Civil Aviation Security **must review all research results related to civil aviation security prior to release to the general public.** This includes items such as dissertations, theses, conference technical papers, etc. This requirement is **to determine if the results contain information that may assist terrorists in undermining established security systems.**

Subcontracts

May involve both foreign national and information dissemination restrictions. *Universities have received these restrictions as flowdowns in contracts from industry, government laboratories and SBIR primes.* Because the university is not the direct award recipient, negotiation of these restrictions with the federal sponsors must involve the company, and has often been unsuccessful.

TEXT OF CLAUSES REFERRED TO IN ABOVE SUMMARY

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.

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.

ARL 52.005-4401 Release of Information (July 2002)

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

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 Offeror 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 OFFEROR 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 is 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.

SBIR 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 received by MIT:

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.