

TROUBLESOME CLAUSES: An Update

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June 5, 2008

Previous AAU/COGR Survey

- Covered period August '03—February '04
- Undertaken at the request of OSTP
- Tracked experience of 20 COGR member institutions with “troublesome clauses” over this timeframe
- Asked for outcomes
 - 1) Accepted as proposed
 - 2) Negotiated alternate language
 - 3) Rejected award
 - 4) Negotiations still in progress

“Troublesome Clauses”

- Defined as sponsor restrictions on ability of institution to publish or disclose research findings, ability of foreign nationals to participate in research project without sponsor approval, or other restrictions on project access or dissemination of project results

Participating Institutions

- Caltech
- Carnegie Mellon
- Duke
- Georgia Tech
- Harvard
- MIT
- Northwestern
- Penn State
- Stanford
- Texas A&M
- UC Berkeley
- UC San Diego
- Cincinnati
- U. Col. Boulder
- Maryland
- Michigan
- Minnesota
- UT Austin
- Wisconsin
- Washington Univ.

Results in Brief

- Participating institutions reported **138** instances where restrictive clauses were included in awards
- **105** involved publication restrictions
- Of these, **47** involved the “dreaded” DFARS 7000 clause
- Remaining **33** mostly involved restrictions on foreign nationals

The 7000 Clause

- 14 institutions received the 7000 clause in **47** instances over the reporting period (**16** directly from DOD; **31** as a “flow-down”)
- Clause was accepted **18** times by 4 institutions
- Clause was rejected **3** times by 3 schools
- Alternative language was negotiated in **19** instances (7 still pending)

Other Restrictions

- **58** other publication restrictions received, involving a variety of federal sponsors
- Majority were DOD flow-downs
- **29** foreign national restrictions were received, split almost evenly between DOD flow downs and other fed. sponsors
- Time to resolution >1 month in **75%** of cases, with **25%** taking 3—6 mos. or more

Results

- AAU/COGR recommended greater adherence to NSDD-189 by agencies
- Specifically recommended revision of DFARS guidance to remove mandatory flow down of 7000 clause
- OSTP appreciative of data but nothing has changed in terms of policy

Subsequent Developments

- Issues a continuing focus of AAU/COGR
- NAS Science and Security Report Committee Recommendations:
 - 1) Research funding agencies should adhere to NSDD 189 and implementing FAR clause;
 - 2) Agencies should tell prime contractors not to pass restrictions down to university subs; and
 - 3) **AAU/COGR should update troublesome clause data annually and expand to include other restrictive clauses, particularly data on “sensitive but unclassified,” with results provided to OSTP.**

The New Survey

- New survey undertaken under auspices of the Federal Demonstration Partnership (FDP) Contracts Task Force
- Covers period July '07—January '08
- AAU/COGR focus remains on the same 20 institutions but data reported via web form to FDP (which also permits reporting by other FDP member institutions on ongoing basis)
- Captures all federal and federal flow-through proposals/awards during demo period that contained controls/restrictions

Note on Interpretation

- Great variety of clauses reported that contain complex terms with nuances that are difficult to fully capture
- Analysis of data required judgment on characterization of issues to assure uniformity and provide consistency with previous survey
- Institutions differ in their interpretations of the nature of restrictions in similar clauses

Results of Analysis

- Participating institutions reported **180** instances where our analysis confirmed restrictive clauses were included in awards
- **91** involved publication restrictions, 67 of which were flow-downs
- **44** of the publication restrictions involved the “dreaded” 7000 clause (DFARS) and 39 of these were flow-downs

Results—continued

- **26** involved restrictions on foreign nationals
- **26** clauses specifically addressed export controls
- **37** involved various other issues with restrictions that implicate science/security:
 - intellectual property restrictions (e.g. restrictions on ownership of data with agencies acquiring all rights)
 - proprietary information designations
 - background check, classification reference or security clearance requirements

Restrictions in Assistance Awards

- Previously only contracts were reported as containing troublesome clauses
- New survey reported **8** grants and **7** cooperative agreements (3 flow-down) with restrictions (5 other types of agreements also included e.g. with fed labs)
- Every type of restriction (except proprietary information designation) was represented in these numbers

Current Status of Troublesome Clauses

- **16** Total Rejections (15 last time)
- **38** Accepted as Proposed
- **84** Negotiated Acceptable Language
- Balance (42) were pending as of late May.

Conclusions

- The situation has not improved since prior AAU/COGR survey.
- DOD still is primary source of troublesome clauses (both direct and flow-down) and DFARS 7000 clause remains a significant problem.
- The frequency of publication and foreign national restrictions encountered are very similar.
- The increase in total number of troublesome clauses reported reflects new forms of restrictions that were not reported in original survey.

Conclusions--continued

- The wide scope and variety of troublesome clauses reported in new survey may indicate that universities have become more sophisticated and vigilant in reviewing and assessing award terms and conditions.
- The reporting mechanism for the recent survey was more refined.
- The consensus of AAU/COGR working group is that government contracting officials have become more cautious and protective and industry contractors more explicit and technical in terms and conditions provided subawardees.

Bottom Line

- Federal agencies are expanding the nature of the controls and restrictions included in terms and conditions of awards to universities.
- Industry prime contractors are increasingly adding protective terms to university subcontracts, whether or not required by funding agency.
- Spread of troublesome clauses to assistance awards is particularly troubling.

Recommendations

1. A high level group should be established within DOD to ensure uniformity, consistency and clarity in DOD policies and practices that impact science and security issues.
2. DOD acquisition guidance should be revised to eliminate restrictions on publications and foreign nationals in fundamental research, whether funded by DOD directly or via flow-down.
3. OMB should clarify that these restrictions are inappropriate for use in grants/cooperative agreements.
4. Agencies should follow NSDD-189 and the implementing FAR provision should be incorporated into all federal research contracts to universities for fundamental research (which also should include “Alt IV” data rights).
5. Export control compliance clauses should be used more selectively by federal agencies and prime contractors.
6. OSTP should establish a government—university working group to address issues of this type in the partnership on an ongoing basis.

Actions Taken

- NAS Committee Co-Chairs have been aggressive in presenting findings to leadership both in Executive and Legislative Branches.
- DOD has established Joint Analysis Team (JAT) under DDR&E with charge to review issues discussed in NAS report, specifically including DOD practices with regard to use of restrictive clauses in university research contracts.
- AAU/COGR have briefed JAT and continue to discuss issues with DOD on ongoing basis.

Looking to Future

- DOD is considering revising guidance re “contracted fundamental research” and/or developing some form of DFARS 7000 Deviation Clause for universities.
- FDP will maintain continuing capability to collect troublesome clause data; question of frequency of collection (and reporting).
- Senior university leadership should push NAS recommendations, particularly with regard to establishing high level Science/Security group.

Questions/Comments?

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