



Research  
Office

# Federal & Industry Contracting: The Good, The Bad, and The Ugly

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# Today's Topics

- Types of Agreements
- Clauses of Doom
- Export Controls
- FAR Clauses

# Contracts & Subcontracts

- Diversifying UD's sponsor base
- Procurement mechanism rather than financial assistance
- Bidders proposal
- Scope of Work and/or Funding amount pre-determined by the sponsor
- Detailed terms and conditions
- FARs apply rather than Uniform Guidance

# Non-Disclosure Agreements

- NDA, Confidentiality Agreement, Proprietary Information Agreement (PIA)
- Binding contract between parties wishing to enter into discussions about specific confidential information
- Restricts the usage and additional disclosure of the information exchanged
- One-way or mutual disclosure

# Material Transfer Agreement (MTA)

- Contract without funding that governs the exchange of research materials between Universities, federal agencies, and industry partners
- Examples:
  - software, cultures, bacteria, chemicals, other physical research items
- Defines rights, obligations, and restrictions in providing, receiving, handling, using, and returning/disposing of the material
- Ownership rights

# Data Use Agreement (DUA)

- Contract that governs the transfer of data between parties
- Needed when there is no other controlling document in place and data contains:
  - PHI such as Human Subjects data (HIPAA)
  - PII such as Educational records (FERPA)
- Defines:
  - how data will be accessed or exchanged
  - usage restrictions
  - destruction/return terms
- New FDP Template: FacePage + 3 attachments

# Master Agreement (Industry)

- Defines the relationship between the parties
  - Research or Services
  - Contract terms & conditions are negotiated upfront
  - No Scope of Work
  - No funding amount
- Task Orders issued for each SOW with a corresponding funding amount

# Other Agreements (non-federal sponsors)

- Memorandum of Understanding (MOU)
  - Agreement at the proposal stage to collaborate in the future
  - Usually no funding is addressed
- Business Associates Agreements
  - issued by health agencies when an activity involves the use or disclosure of protected health information

# Clauses of Doom



in Industry and Federal Contracts

# Indemnification

- To compensate another party for losses that that party has incurred or will incur as related to the act(s) of the indemnifying party
- To put yourself into the shoes of another

# Indemnification

- “UNIVERSITY and COMPANY hereby each agree to indemnify and hold the other party and their personnel free and harmless from any and all loss, cost, damage, claim, action, or liability on account of the death of or injury to any person or persons or damage to or destruction of any property resulting from or growing out of any alleged negligence on the part of the indemnifying party or their personnel in the implementation of this Agreement.”

# Warranty

- A written guarantee of the project's deliverables



# Problem #1

Research is unpredictable.



## Problem #2

If a deliverable is deemed unsatisfactory by the sponsor, UD may be required to repair or replace it **at no cost** or **pay another entity** to complete the work.



## UD's Standard Warranty Language:

- UNIVERSITY makes no representations, extends no warranties, express or implied, and assumes no responsibilities whatsoever with respect to the performance, marketability, or fitness for a particular purpose of processes or products produced using the research information and know-how to COMPANY, its sublicensees, its vendees, or other transferees.

# Intellectual Property

- *U.S. Constitution provides that Congress shall have power . . .to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries*
- Copyright and Patent Law

# Copyright Law

- Copyright law in the U.S. is governed by federal statute - the Copyright Act of 1976.
- The Copyright Act prevents the unauthorized copying of a work of authorship.

# Patent Law

- Patent Act - Title 35 of United States Code
- Utility Patents
- Plant Patents
- Design Patents

# Patent Law

All inventions and discoveries

developed by University faculty, staff, or students

in the course of employment or result from work directly related to employment

OR

from work carried out on University time, or at  
University expense, or with the substantial use of  
University resources

**shall be the property of the University**

# Patent Law

## Sole/Sole/Joint Ownership

Title to any invention or discovery conceived or reduced to practice solely by UNIVERSITY personnel in the performance of this research shall remain with UNIVERSITY

Title to any invention or discovery conceived or reduced to practice solely by SPONSOR personnel in the performance of this research shall remain with SPONSOR

Title to any invention or discovery conceived or reduced to practice hereunder by UNIVERSITY personnel jointly with employees of SPONSOR shall be jointly owned.

# Patent Law

- Assignment
- Non-Exclusive License
- Exclusive License

# Confidentiality

- Proprietary information
- Inventions without patent protection
- Unpublished research findings
- Protected information such as PII or PHI
- Information the federal government deems classified or sensitive



# Termination

- Right to terminate the agreement
- UD prefers dual termination rights
- At least 30 days notice
- Right to cure

# Publication

- UD's mission is to disseminate knowledge
  - UD's publication rights should not be restricted
- Export controls

# Export Controls

The U.S. Government controls exports of sensitive equipment, software and technology as a means to promote our national security interests and foreign policy objectives. Through our export control system, the U.S. government can effectively:

- Provide for national security by limiting access to the most sensitive U.S. technology and weapons
- Promote regional stability
- Take into account human rights considerations
- Prevent proliferation of weapons and technologies, including of weapons of mass destruction, to problem end-users and supporters of international terrorism
- Comply with international commitments (nonproliferation regimes and UN Security Council sanctions and UNSC resolution 1540)

# Export Controls

## **WHAT IS AN EXPORT?**

Any item that is sent from the United States to a foreign destination is an export. “Items” include commodities, software, and technology.

How the item is transported outside of the U.S. does not matter in determining export license requirements



# Export Controls

## *Exports*

- Include transmission of physical things (including transmission of electronic information) sent to foreign countries as well as a deemed export
- A deemed export is the release within the U.S. of a technology or source code to a foreign national

# Export Controls

**Exports are controlled by:**

- U.S. Department of State: ITAR (International Traffic in Arms Regulations)



U.S. DEPARTMENT of STATE



Department of Commerce: EAR (Export Administration Regulations)

Commerce Control List (CCL)

Provides Export Control Classification Numbers

# Export Controls

- Technology Control Plan (TCP)
  - Responsible Investigator
  - Reason for Control
  - List of Activity Personnel
  - Handling of controlled material and information
  - Disposition

## Fundamental Research

- Exclusion available to UD
- Based on this exclusion, UD research may not be subject to export controls
- **Information** resulting from basic and applied research in science and engineering conducted at an accredited institution of higher education **in the U.S.** that is ordinarily published and broadly shared within the scientific community.
- Can be knocked out of exclusion
  - If accept publication restriction

# UD Export Control Policy

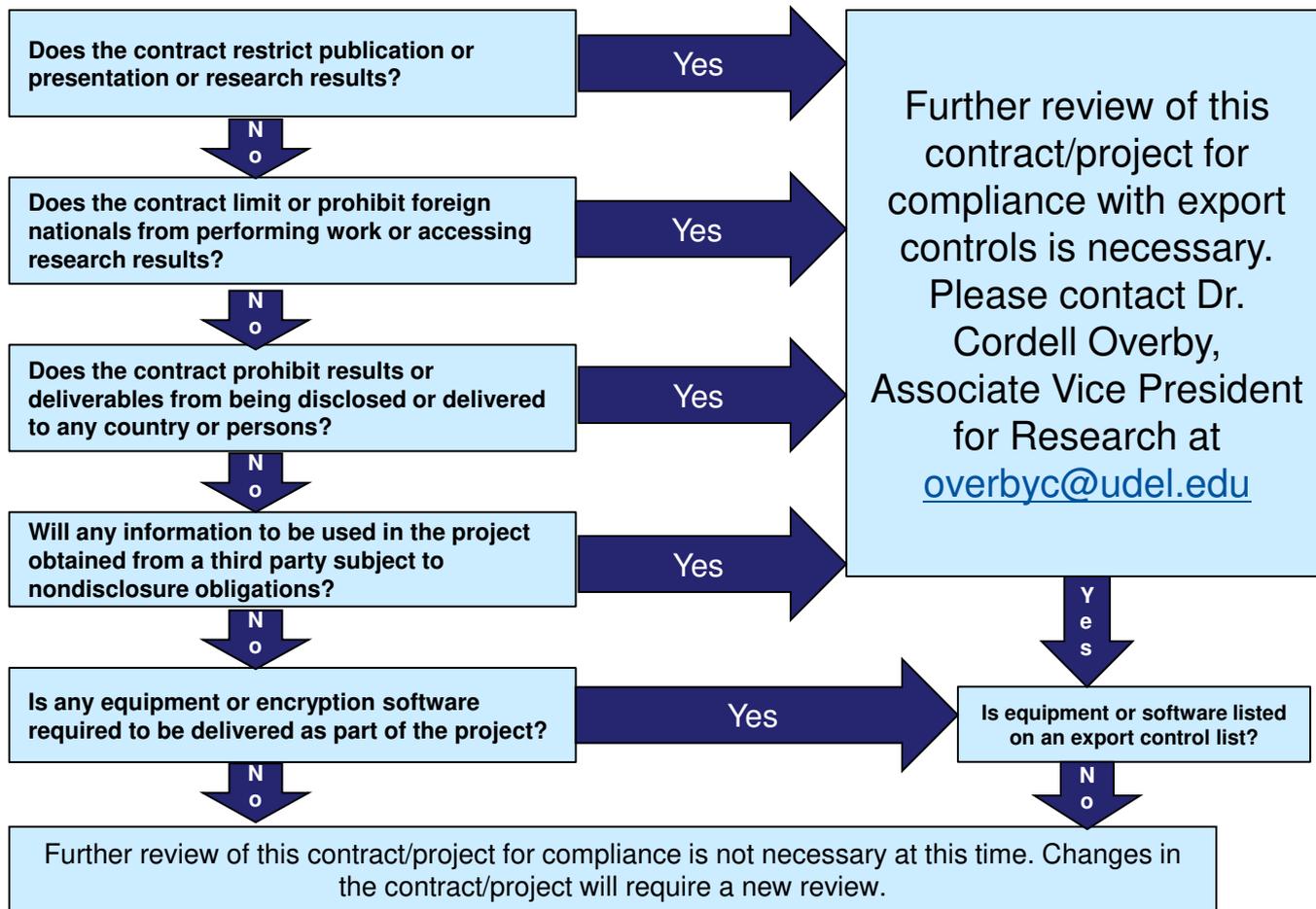
## 6-17 Export Controls and Trade Sanctions

- <http://www.udel.edu/ExecVP/policies/research/6-17.html>

## Export Compliance Manual

- <http://www.udel.edu/research/pdf/ExportComplianceManual.pdf>

# Is your UD project in compliance with Export Controls?



# Federal Acquisition Regulation (FAR)

- Set of principles that regulates purchasing of goods and services by government.
- These do not regulate the purchasing activities of private sector.
- Original purpose of the FAR was to consolidate the numerous individual agency regulations into one comprehensive set of standards which would apply government-wide – so supplements are closely governed.
- Agency supplement is the Defense Federal Acquisition Regulation Supplement (DFARS), used by the Department of Defense.

## 252.223-7004 Drug-Free Work Force

- Requires:
  - Employee drug testing
  - On-site employee counseling programs and referrals to treatment
  - Training for supervisors to identify illicit drug use
- UD will not accept this FAR clause, but is in compliance with Drug-Free Workplace (52.223-6 )

# Defense Federal Acquisition Regulation Supplement (DFARS)

- **252.204-7012 Safeguarding Covered Defense Information and Cyber Incident Reporting**
  - **Certification**
- **252.204-7000 Disclosure of Information**
  - **Publication Waiver Request**
  - **Indicates TCP may be necessary**

# 252.204-7000

**252.204-7000 Disclosure of Information.**

As prescribed in [204.404-70](#)(a), use the following clause:

DISCLOSURE OF INFORMATION (OCT 2016)

(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;
- (2) The information is otherwise in the public domain before the date of release; or

(3) The information results from or arises during the performance of a project that involves no covered defense information (as defined in the clause at DFARS [252.204-7012](#)) and has been scoped and negotiated by the contracting activity with the contractor and research performer and determined in writing by the contracting officer to be fundamental research (which by definition cannot involve any covered defense information), in accordance with National Security Decision Directive 189, National Policy on the Transfer of Scientific, Technical and Engineering Information, in effect on the date of contract award and the Under Secretary of Defense (Acquisition, Technology, and Logistics) memoranda on Fundamental Research, dated May 24, 2010, and on Contracted Fundamental Research, dated June 26, 2008 (available at DFARS [PGI 204.4](#) ([DFARS/PGI view](#))).

(b) Requests for approval under paragraph (a)(1) 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 10 business days before the proposed date for release.

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

(End of clause)

**204.404-70 Additional contract clauses.**

(a) Use the clause at [252.204-7000](#), Disclosure of Information, in solicitations and contracts when the contractor will have access to or generate unclassified information that may be sensitive and inappropriate for release to the public.

(b) Use the clause at [252.204-7003](#), Control of Government Personnel Work Product, in all solicitations and contracts.

## Quiz Time

Now let's give away some fabulous prizes!

# What does FAR stand for?

- a. Fair and Reasonable
- b. Federal Allocation Resources
- c. Federal Acquisition Regulation
- d. Federal Allowance Reserve

## Which FAR Clause can UD not accept?

- a. Drug-Free Workplace
- b. Disclosure of Information
- c. Drug-Free Work Force
- d. Safeguarding Covered Defense Information and Cyber Incident Reporting

## Which of these is not a Clause of Doom?

- a. Publication
- b. Confidentiality
- c. Force Majeure
- d. Termination



# What is another word for Warranty?

- a. Arrest authorization
- b. Indemnification
- c. License
- d. Guarantee

# Questions

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