Federal Acquisition Regulation (FAR)

Basics of the FAR

ORSPA’s Proposal and Negotiation Team (PNT)

Heather Clark, Nancy Henderson, Avery Wright, Catherine Miller, Susan Lyman
In 1984, the Federal Government created the FAR to provide “coordination, simplicity, and uniformity in the Federal acquisition process.”
The FAR is the **who**, **what**, **when**, **where**, **why**, and **how** of Federal contracting.
Clause

52.246-9 -- Inspection of Research and Development (Short Form).

As prescribed in 46.309, insert the following clause:

**Inspection of Research and Development (Short Form) (Apr 1984)**

The Government has the right to inspect and evaluate the work performed or being performed under the contract, and the premises where the work is being performed, at all reasonable times and in a manner that will not unduly delay the work. If the Government performs inspection or evaluation on the premises of the Contractor or a subcontractor, the Contractor shall furnish and shall require subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.

Prescription

46.309 -- Research and Development Contracts (Short Form).

The contracting officer shall insert the clause at 52.246-9, Inspection of Research and Development (Short Form), in solicitations and contracts for research and development when the clause prescribed in 46.307 or the clause prescribed in 46.308 is not used.
Structure

Chapters > Subchapters
Parts > Subparts
Sections > Subsections
## Structure

<table>
<thead>
<tr>
<th>Subchapters</th>
<th>Parts</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A</strong> General</td>
<td>1-4</td>
</tr>
<tr>
<td>B Competition and Acquisition Planning</td>
<td>5-12</td>
</tr>
<tr>
<td>C Contracting Methods and Contract Types</td>
<td>13-18</td>
</tr>
<tr>
<td>D Socioeconomic Programs</td>
<td>19-26</td>
</tr>
<tr>
<td>E General Contracting Requirements</td>
<td>27-33</td>
</tr>
<tr>
<td>F Special Categories of Contracting</td>
<td>34-41</td>
</tr>
<tr>
<td>G Contract Management</td>
<td>42-51</td>
</tr>
<tr>
<td>H Clauses and Forms</td>
<td>52, 53, Appendix, Index</td>
</tr>
</tbody>
</table>

- **Parts 1-51:** Prescriptions for the Clauses
- **Part 52:** Clauses
- **Part 53:** Forms
As prescribed in 46.309, insert the following clause:

**Inspection of Research and Development (Short Form) (Apr 1984)**

The Government has the right to inspect and evaluate the work performed or being performed under the contract, and the premises where the work is being performed, at all reasonable times and in a manner that will not unduly delay the work. If the Government performs inspection or evaluation on the premises of the Contractor or a subcontractor, the Contractor shall furnish and shall require subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.
The FAR – Why Do I Care?

You hold the keys to guide your Faculty so that they tailor any response to a Sponsor so there is no question that their Project is Research and Development. You can help set the course for successful negotiations.

35.002 General

• The primary purpose of contracted R&D is to advance scientific and technical knowledge and apply that knowledge to the extent necessary to achieve agency and national goals.

• Unlike Contracts for supplies and services, most R&D contracts are directed toward objectives for which the work or methods cannot be precisely described in advance.

• R&D contracting focuses on the Statement of Work.
Types of Contracts

Subpart 16.2 Fixed-Price

• Acquisition of supplies or services is on the basis of reasonably definite functional or detailed specifications.

• When costs can be estimated reasonably accurately – normal for supplies and services and for use in FAR 12 commercial purchases.

• Imposes on the contractor maximum incentive to control costs, but with minimum administrative burden.
Types of Contracts

Why might you want one?

- Freedom to rebudget
- Limited financial reporting
- Keep it if you don’t spend it
- Period of Performance not tied to allowable cost

Why might you not want one?

- Payments are tied to deliverables (e.g., full payment upon receipt of final report-cash flow/nonpayment problems)
- Must perform regardless of cost of performance
- Universities are not good at managing contract changes
Types of Contracts

Subpart 16.3 Cost-Reimbursement

• Used for procurement of non-commercial items which cannot be based on reasonably definite functional or detailed specifications (i.e., R&D, due to higher performance risks).

• There is no incentive for contractor to control costs, thus Government imposes tighter controls.

• Cost must be determined to be allowable, allocable and reasonable under the appropriate cost principles.

• This is the typical contract type for universities and nonprofits.
Types of Contracts

Why might you want one?

- **Best/reasonable efforts basis:** when you run out of funds, you stop working
- **FAR clauses are more favorable (e.g.: termination)**

Why might you not want one?

- Tighter re-budgeting controls
- More frequent financial reports
- **Closer scrutiny** (e.g. audits)
- More administrative oversight required
- Challenge to determine if directed changes are in scope or out of scope (when can/should you ask for more money)
Types of Contracts

Subpart 16.5 Indefinite Delivery, Indefinite Quantity (IDIQ); AKA – Master Agreement

• Provide for an indefinite quantity of services for a fixed time
• Used when the Sponsor can’t determine the precise quantities of supplies or services required during the contract period
• Delivery orders/task orders are issued for individual projects
• Minimum/maximum quantity limits are specified in the Master as either number of units (for supplies) or as dollar values (for services)
Types of Contracts

Why might you want one?

• Streamlines the contract process and speeds service delivery

Why might you not want one?

• Every new Task Order requires a new project under ASU system
• More administrative oversight required
• Being locked into a contract for several years is not always desirable
Types of Contracts

Subpart 16.6 Time and Materials, Labor-Hour, Letter Contracts

• An arrangement under which a contractor is paid on the basis of: (1) actual cost of direct labor, usually at specified hourly rates; (2) actual cost of materials and equipment usage, and (3) agreed upon fixed ad-on to cover the contractors overhead.
Types of Contracts

Why might you want one?

• Precise charges for everything used with an exact cost plus hourly fees for labor

Why might you not want one?

• More administrative oversight required because ASU Financial System is not set up to accommodate reporting labor on a hourly basis
Agency Supplements

• The purpose of the FAR was to consolidate numerous individual agency regulations into one comprehensive set of standards that could be applied government wide

• Nearly every major cabinet-level department and the agencies below them have issued regulations
Agency Supplements

- The best-known example of an agency supplement is the Defense Federal Acquisition Regulation Supplement (DFARS) used by the Department of Defense.
- Format for agency FAR supplements is to follow the basic FAR format.
- These supplemental FAR clauses place further restrictions on contractors and contracting officers.
The FAR and Requests for Proposals

• RFPs may be packaged using a Federal Standard Form format or in a less formal appearing letter to Prospective Offerors

• Both formats require the same level of attention to detail and diligence in preparing the ASU response
Research Advancement Team Helps Set the Course for Proposal and Award

• Review RFP in detail
• Identify all administrative requirements and colleagues/University units to assist
• Inform PNT of RFP requirements
  – Terms and Conditions
  – Representations and Certifications
  – Small/Diversity Business Subcontracting Plan
  – Past Performance
• Confer with GCO to define administrative requirements for sub-recipient collaborators and advise subs
• Check regularly for amendments to RFPs
FAR Terms and Conditions

• FAR T&Cs are located in RFP Section I and throughout the RFP

• PNT reviews and documents the University’s concerns in the form of a letter or table for inclusion in the proposal

• If issues/exceptions are not specified when submitting the proposal, they may not be eligible for negotiation at time of award
FAR Terms and Conditions

PNT Review for T&Cs Acceptability

- *Read* the clause – can the University live with it?
- *Read* the prescription – does it apply to the
  - Contract type (FP, CR, T&M),
  - Contract purpose (R&D, Supply, Service),
  - Recipient type (for-profit, non-profit, educational)?
- Is there a trigger, or does it apply no matter what?
- Is Sponsor Contracting Officer *required* to include term, or is it *optional*?
- Is PI information required to assess acceptability?
FAR Terms and Conditions

Acceptance

• ASU accepts most FAR clauses
• Many clauses require internal processes to manage for compliance
• Some T&Cs require specific actions by the PI, pre-award RA and PNT, or post-award RA and AMT
Representations and Certifications

• Reps and Certs are legal representations that state the University is in compliance with laws, regulations, and policies associated with each and every provision in the solicitation including
  – Contractor responsibility (e.g., responsible conduct of research, institutional financial capabilities)
  – Costs (e.g., proposal budget based on cost principals)
  – Labor standards (e.g., drug-free workplace)
• Reps and Certs will be incorporated into the contract
• Reps and Certs may require PI and subrecipient input
Representations and Certifications

PNT Request for PI Input

• FAR 52.227-15 “Representation of Limited Rights Data and Restricted Computer Software”

• PI and Sub-recipient PI must identify technical data or computer software that was developed partially or entirely at private expense

• Sponsor will not have rights to use, release, or disclose that intellectual property

• An “exception” to the Bayh-Dole Act
Small/Disadvantaged Business Subcontracting Plan

• FAR 52.219-09 Requires a plan to engage small businesses in performance in Federally-funded contracts that >= $650,000
• Pre-award: PNT coordinates with the Purchasing Department to develop the Plan; Plan may be required as part of proposal or prior to award; Job Aid provides guidance on process to develop a Plan
• Post-award: PI and Post-award RA implement the Plan; AMT reports expenditures to Sponsor
• Plan is incorporated into contract
• Nonperformance is a material breach of contract
FAR - Uniform Contract Format
What are the basic parts of a government contract?

• Part I – Schedule
  – A – Solicitation/Contract
  – B – Supplies or services and prices
  – C – Description/Specifications
  – D – Packaging and marking
  – E – Inspection and Acceptance
  – F – Deliveries or performance
  – G – Contract Administrative data
  – H – Special contract requirements
FAR - Uniform Contract Format

What are the basic parts of a government contract?

• Part II – Contract Clauses
  I – Contract Clauses

• Part III – List of Documents, Exhibits and Other Attachments
  J – List of Documents, Exhibits and Other Attachments
FAR - Uniform Contract Format
What are the basic parts of a government contract?

• Part IV – Representations and Instructions
  – K – Representations and certifications and other statements of bidders
  – L – Instructions, conditions and notices to bidders
  – M – Evaluation factors for award
AWARD/CONTRACT

1. THIS CONTRACT IS A RATED ORDER UNDER DFARS (15 CFR 700)

2. CONTRACT (Proc. Inst. Indent.) NO.
3. EFFECTIVE DATE
4. REQUISITION/PURCHASE REQUEST/PROJECT NO.

5. ISSUED BY CODE
6. ADMINISTERED BY (If other than Item 5) CODE

7. NAME AND ADDRESS OF CONTRACTOR (No., street, city, state and ZIP Code)

8. DELIVERY
   □ FOB ORIGIN □ OTHER (See below)
   9. DISCOUNT FOR PROMPT PAYMENT

10. SUBMIT INVOICES (4 copies unless otherwise specified to the address shown in)

CODE FACILITY CODE
11. SHIP TO MARK FOR CODE
12. PAYMENT WILL BE MADE BY CODE

13. AUTHORITY FOR USING OTHER THAN FULL AND OPEN COMPETITION:
   □ 10 U.S.C. 2304(c) □ 41 U.S.C. 253(c)

14. ACCOUNTING AND APPROPRIATION DATA

15A. ITEM NO. 15B. SUPPLIES/SERVICES 15C. QUANTITY 15D. UNIT 15E. UNIT PRICE 15F. AMOUNT

15G. TOTAL AMOUNT OF CONTRACT $

16. TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>(X) SEC.</th>
<th>DESCRIPTION</th>
<th>PAGE(S)</th>
<th>(X) SEC.</th>
<th>DESCRIPTION</th>
<th>PAGE(S)</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>SOLICITATION/CONTRACT FORM</td>
<td></td>
<td>I</td>
<td>CONTRACT CLAUSES</td>
<td></td>
</tr>
<tr>
<td>B</td>
<td>SUPPLIES OR SERVICES AND PRICES/COSTS</td>
<td></td>
<td>J</td>
<td>LIST OF ATTACHMENTS</td>
<td></td>
</tr>
<tr>
<td>C</td>
<td>DESCRIPTION/SPEC./WORK STATEMENT</td>
<td></td>
<td>K</td>
<td>REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS</td>
<td></td>
</tr>
<tr>
<td>D</td>
<td>PACKAGING AND MARKING</td>
<td></td>
<td>L</td>
<td>INSPECS, CONDS., AND NOTICES TO OFFERORS</td>
<td></td>
</tr>
<tr>
<td>E</td>
<td>INSPECTION AND ACCEPTANCE</td>
<td></td>
<td>M</td>
<td>EVALUATION FACTORS FOR AWARD</td>
<td></td>
</tr>
<tr>
<td>F</td>
<td>DELIVERIES OR PERFORMANCE</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>G</td>
<td>CONTRACT ADMINISTRATION DATA</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>H</td>
<td>SPECIAL CONTRACT REQUIREMENTS</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

17. □ CONTRACTOR'S NEGOTIATED AGREEMENT (Contractor is required to sign this document and return 2 copies to issuing office) Contractor agrees to furnish and deliver all items or perform all services set forth or otherwise identified above and on any continuation sheets for the consideration stated herein. The rights and obligations of the parties to this contract shall be subject to and governed by the following documents: (a) this award/contract, (b) the solicitation, if any, and (c) such provisions, representations, certifications, and specifications, as are attached or incorporated by reference herein. (Attachments are listed here.)

18. □ SEALED-BID AWARD (Contractor is not required to sign this document.) Your bid on Solicitation Number including any additions or changes made by you which additions or changes are set forth in full above, is hereby accepted as to the terms listed above and on any continuation sheets. This award consummates the contract which consists of the following documents: (a) the Government's solicitation and your bid, and (b) this award/contract. No further contractual document is necessary. (Block 18 should be checked only when awarding a sealed-bid contract.)

19A. NAME AND TITLE OF SIGNER (Type or Print)

19B. NAME OF CONTRACTOR

20A. NAME OF CONTRACTING OFFICER

BY

AUTHORIZED FOR LOCAL REPRODUCTION
Previous edition is NOT usable

STANDARD FORM 26 (REV 5/2011)
Prescribed by GSA - FAR (48 CFR) 53.214(a)
Notable FAR Clauses

• **52.204-02 Security Requirements**
  - **Purpose:** Establishes protocols which will apply to the contract if it involves classified information.
  - **Action:** PNT will request clause Alternate I, which provides educational institutions the opportunity to revise SOW or terminate if the level of classification increases. If contract will involve access to classified (DD254 will be in the contract) coordinate with ORIA for compliance.

• **52.212-04 Contract Terms and Conditions Commercial Items**
  - **Purpose:** Sets forth abbreviated set of fixed-price terms and conditions for the acquisition of commercial supplies and services. Note the C.O. may use FAR 12 because it may contain the only tools the agency knows how to use, e.g. purchase orders.
  - **Action:** PNT will attempt to get the contract changed to cost reimbursement R&D or to have 52.213-04 – Simplified Acquisitions (other than Commercial Items) in the contract instead. If not successful, PNT will negotiate out unacceptable terms (e.g. warranty, patent indemnity, default).

• **52.213-04 Contract Terms and Conditions Simplified Acquisitions (Other than Commercial Items)**
  - **Purpose:** Sets forth abbreviated set of fixed-price terms and conditions for the acquisition of non-commercial supplies and services under $150,000.
  - **Action:** PNT will attempt to get the contract changed to cost reimbursement R&D. If not successful PNT will negotiate out unacceptable terms (e.g. warranty, default)

• **52.227-01 Authorization and Consent**
  - **Purpose:** Basic clause allows Contractor to utilize a US patented invention to accomplish the contract, subject to any patent indemnity clause also included in contract. Alternate I is available for R&D contracts
  - **Action:** PNT will request Alternate I be added which applies to R&D and deletion of any patent indemnity clauses.

• **52.227-3 Patent Indemnity**
  - **Purpose:** Contractor indemnifies the Government for patent infringement that may occur. Applies when the Contractor is delivering supplies and/or services normally offered for sale in the open market (commercial items).
  - **Action:** PNT will request this clause be deleted as ASU does not sell commercial items. As a state entity, ASU cannot agree to indemnify or hold harmless.
Notable FAR Clauses

- **52.227-11 Patent Rights – Ownership by the Contractor**
  - **Purpose:** Establishes patent terms, which implement Bayh-Dole for federal contractors.
  - **Action:** Since clause allows some federal contractors to elect ownership of patents developed under the contract, educate PIs on the disclosure requirements if ASU intends to take title to inventions developed under contract.

- **52.227-14 Rights in Data – General**
  - **Purpose:** Establishes ownership of data and copyrights.
  - **Action:** Basic clause allows contractors to establish copyright only on publications first produced under the contract. PNT will request inclusion of Alternate IV for educational institutions, which will allow ASU ownership of all data and software.

- **52.227-17 Rights in Data - Special Works**
  - **Purpose:** Establishes that contract deliverables are for sole use of the Government (e.g., work-for-hire). All data and deliverables are owned by the Government. Contractor may not publish or release without prior approval; must request permission for ownership and/or use.
  - **Action:** PNT will request deletion of this clause. The FAR prescription for using this clause is very clear about the few situations for which the Government may invoke this clause.

- **52.232-20 Limitation of Costs**
  - **Purpose:** Requires notification of the Government when contractor expenditures reach a specified threshold or when expenditures will be substantially more or less than total estimated cost.
  - **Action:** Expenditures must be monitored very closely so notifications are provided IAW clause requirements.

- **52.232-22 Limitation of Funds**
  - **Purpose:** Requires notification of the Government when contractor expenditures reach a specified threshold or are expected to exceed total obligated funds.
  - **Action:** Expenditures against current funding must be monitored very closely so notifications are provided IAW clause requirements.
Notable FAR Clauses

• 52.242-15 Stop-Work Order
  – Purpose: Establishes responsibilities of each party when government issues a stop-work order. Contractor must stop work on date stated. Government has up to 90 days to cancel the order, extend it, or terminate the contract. Contractor will be reimbursed for allowable cost incurred prior to effective date and allowable, non-cancellable obligations.
  – Action: PNT will request reduction of 90-day suspension to 30 days. PI and RA should be knowledgeable about their responsibilities when a stop work has been issued by the Government.

• 52.243-2 Changes - Cost Reimbursement
  – Purpose: Establishes conditions under which Government may direct changes to Scope of Work. Only the Contract Officer may direct changes. These changes are unilateral. If changes increase cost and/or time, contract officer may make equitable adjustment to cost based upon Contractor’s request for adjustment.
  – Action: PI and RA need to know how to recognize a “Changes” and the actions to take when this occurs.

• 52.245-1 Government Property
  – Purpose: Defines property; establishes title (ownership) and management standards for property.
  – Action: PNT will request clause Alternate II which allows educational institutions to retain title to property if under $5,000, provided prior approval is obtained. Title to property over $5,000 shall vest as set forth in the contract. PIs and RAs need to be familiar with the requirements associated with Government furnished property and when purchasing material/property using contract funds. Who has title to that property is very important and should be clearly stated in the contract (to include when title transfers between the parties in cases where ASU purchases the property with project funds.)

• 52.247-63 Preference for U.S.-Flag Air Carriers
  – Purpose: Imposes requirement to use only U.S-flag air carriers for government-funded travel.
  – Action: Educate ALL researchers. Foreign travel becomes an unallowable cost if U.S. flag air carrier is not used, except under certain predefined situations.
Notable DFARS Clauses

• 252.204-7000 Disclosure of Information (See Research Ops Update, September 27, 2013)
  – **Purpose:** REVISED AUGUST 2013. Prohibits release of any unclassified information pertaining to any part of the contract or any program related to the contract, unless—
    • 1-The contracting officer has given prior written approval;
    • 2-The information is otherwise in the public domain before date of release; or
    • 3-The information results from or arises during the performance of a project that has been scoped and negotiated with the contractor and research performer and determined in writing by the contracting officer to be fundamental research IAW NSSD-189, National Policy on the Transfer of Scientific, Technical and Engineering Information, in effect on the date of award and the USD (AT&L) memo on Fundamental Research dated May 24, 2010, and on Contracted Fundamental Research dated June 26, 2009 (all available in DFARS). Requires government prior approval to publish or disseminate with certain exceptions.

  – **Action:** The fundamental research determination must be in writing from the Federal Agency Contracting Officer (CO). Proposals submitted to DOD entities where a contract is the anticipated award mechanism should include the statement: “Arizona State University as a public institution of higher learning considers the nature of this research to be fundamental and meet the definition of NSDD 189 for the exemption to apply.” An additional level of review for At-Risk Preaward requests is required as the CO approval is needed prior to the PI commencing any work on the project. If this clause is in a contract and has not been addressed at proposal time, PNT will request the fundamental research determination as part of negotiations.
Notable DFARS Clauses

- **252.223-7004 Drug-Free Workforce**
  - **Purpose**: Requires contractor to conduct drug testing and maintain anti-drug policies and procedures for it workforce. Applies when contract involves access to classified information or CO determines it’s necessary.
  - **Action**: PNT will request deletion. May violate institutional policy; union contracts.

- **252.227-7013 Rights in Technical Data-Noncommercial Items**
  - **Purpose**: Grants the Government royalty free, world-wide, non-exclusive, irrevocable license rights in technical data (excludes computer software documentation and data incidental to contract administration) developed under the contract. Type of rights that can be granted are 1) Unlimited; 2) Government purpose, 3) Limited, or 4) Specifically Negotiated License Rights. Government could get unlimited rights to ASU developed IP/technical data that is not proper. Delivered IP must be marked with the correct “rights” or else the Government gets unlimited rights to it.
  - **Action**: Must assert in the proposal when ASU believes the Government should have less than unlimited rights to ASU’s IP. This would be IP that is developed in whole or in part at private expense, or belongs to a 3rd party. Consult with AzTE.

- **252.227-7014 Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation**
  - **Purpose**: Grants the Government royalty free, world-wide, non-exclusive, irrevocable license rights in noncommercial computer software and software documentation developed under the contract. Type of rights that can be granted are 1) Unlimited; 2) Government purpose, 3) Restricted, or 4) Specifically Negotiated License Rights. Government could get unlimited rights to ASU developed IP/software that is not proper. Delivered IP must be marked with the correct “rights” or else the Government gets unlimited rights to it.
  - **Action**: Must assert in the proposal when ASU believes the Government should have less than unlimited rights to ASU developed software. This is software developed in whole or in part at private expense, or belongs to a 3rd party. Consult with AzTE.
Notable DFARS Clauses

• **252.246-7001 Warranty of Data**
  - **Purpose:** Requires contractor to offer a warranty on delivered technical data for 3 years after end of contract. Government may require correction of data; provides for remedies by government including correction of data at contractor’s expense, or reimbursement to government. Also, makes ASU liable for any damages incurred by government.
  - **Action:** PNT will request deletion of the clause as it’s not appropriate for R&D. ASU is unable to warrant the results of research. ASU does not include the costs for deferred liability in it’s budgets.
Broad Agency Announcements and FAR

• BAAs typically leave open the eventual award instrument and contain minimal terms and conditions.
  • Award could be a grant, cooperative agreement, FAR contract

• PNT will review BAAs and advise if the proposal needs to address any terms that could appear if a FAR contract is awarded
  • Typical terms are IP, publication restrictions, export control.

• Should a FAR contract be awarded for a proposal in response to a BAA, PNT will negotiate the terms with the sponsor.
Business Considerations

• What is the institutional risk if accepted?

• What is the level of risk & can we mitigate?

• What is our relationship with the Sponsor?

• What is the health of the Sponsor?

• Who are the internal parties that need to be notified?
Key Takeaways

• FAR allows the Gov’t to procure items with an accountable structured methodology

• All branches of the Gov’t influence the FAR

• Maximize through collaboration and discussion

• Fundamentals & Practical skills to be knowledgeable about FAR contracts and negotiation
Questions & Helpful Links

• http://farsite.hill.af.mil/vffara.htm

• http://www.asu.edu/counsel/other_resources.html

• http://www.azte.com/index.php/inventors/IPPolicies

• Contact PNT