One EIN
One DDTC registration
Two perspectives on federal contracts

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Two different worlds

**MIT Lincoln Laboratory**
- Federally Funded R&D Center
- Restricted environment
- US citizens
- Export-controlled & classified research

**MIT campus**
- University
- Open environment
- International (37% grad students not US)
- Fundamental research and education

Massachusetts Institute of Technology

LINCOLN LABORATORY
Massachusetts Institute of Technology
Campus: don’t break this

Unrestricted publication  Fundamental research  Unrestricted access

Massachusetts Institute of Technology
J. Reece Roth (MIT ’59)

- Professor EECS, UTenn Knoxville
- Research subcontract
  - Sponsor: Air Force
  - Plasma actuators for small military drone
  - Prime: Atmospheric Glow Technologies
- One Atmosphere Uniform Glow Discharge Plasma
Prime flowed clause to UTenn

Air Force

AFMC 5352.227-9000 export-controlled data restrictions
Data is ITAR, no foreign persons

Atmospheric Glow Technologies

AFMC 5352.227-9000 export-controlled data restrictions
Data is ITAR, no foreign persons

University of Tennessee
The Project Manager while not a party a to this Agreement or this Task Order, acknowledges that he has read the Agreement and Task Order and understands his obligations hereunder as a University employee.

By: J. Reece Roth
Print Name: J. Reece Roth
Title: Professor Emeritus
Date: April 29, 2005
Serious consequences

• Roth’s research was not fundamental
  – Results ITAR: publication restricted
  – No foreign persons: access restricted
• Test device a defense item
• Non-US GRAs (China, Iran)
• Unauthorized transfers of ITAR technical data
• Defense services
• 4-year prison sentence
Could this have been avoided?

- Funding was 6.2
  - University subcontract research fundamental except under “rare and exceptional circumstances”
- Scope of Roth research arguably “fundamental”
- Could fundamental research exception (FRE) have been negotiated/preserved?
- Worthwhile trying to preserve FRE and “openness”
  - Academic principles
  - Reduced compliance risk
  - Even if university does not insist on fundamental research
"Fundamental Research" per OSD/ATL

2008 Young Memo

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
ATTN: SERVICE ACQUISITION EXECUTIVES
CHAIRMAN, JOINT CHIEFS OF STAFF
ATTN: COMMANDER, U.S. SPECIAL OPERATIONS COMMAND
DIRECTORS OF THE DEFENSE AGENCIES

SUBJECT: Contract Fundamental Research

Reference:
(c) DoD Instruction 5220.21, Procedures for DoD-Related Scientific and Technical Papers at Meetings, October 6, 1987

The Department of Defense (DoD) fully supports free scientific exchange and dissemination of research results to the maximum extent possible. Critical to enabling exchanges and dissemination is an understanding on the part of DoD program managers, potential grantees, and contractors of the policies governing restrictions that may be imposed by the DoD on basic and applied research. Understanding will help guide DoD program managers, and contract and grant recipients, in making sound and decisions that will affect performance of research under DoD awards and implementing measures that may be needed to comply with security concerns.

I have determined that clarifying guidance is required to ensure that the DoD will not restrict disclosure of the results of contracted fundamental research, as herein defined, unless the research is classified for reasons of national security, or otherwise required by statutory, regulatory, or executive action. This memorandum replaces earlier guidance (Attachment A), addresses modern issues, and sheds explicitly with additional aspects of fundamental research. My intention is to ensure that DoD grants, contracts, and agreements with the research community for fundamental research are consistent across Components and fully compliant with National Security Decision Directive (NSDD) 198 (Attachment B).

DoD Directive 199 established the national policy for controlling the flow of scientific, technical, and engineering information produced in federally funded fundamental research at colleges, universities, and laboratories. Reference (c) defines fundamental research as follows:

More than a just foot-stomp...
“There will be circumstances in which the DoD Components may find it valuable to perform research with other Budget Activity funds (e.g., Budget Activity 3 and higher) without placing restrictions on publications or personnel. This should be within the discretion of acquisition personnel in consultation with contracting officers, Component management, counsel, and the cognizant Comptroller to ensure consistency with financial management regulations...

- Provides for the removal of publication restrictions on contracted research performed with “other Budget Activity funds”
...In addition, the DoD must not place restrictions on subcontracted unclassified research that has been scoped, negotiated, and determined to be fundamental research within the definition of NSDD 189 according to the prime contractor and research performer and certified by the contracting component, except as provided in the applicable federal statutes, regulations, or executive orders. Provisions shall be made to accommodate such subcontracts for fundamental research and to ensure DoD restrictions on the prime contract do not flow down to the performer(s) of such research.”

- Provides for the removal of publication restrictions on subcontracted research that been “scoped, negotiated, and determined to be fundamental research”
Fundamental-research friendly terms

• University prime, negotiating with USG
  – CO knows you’re a university, can work with you to select appropriate clauses

• University subcontractor to university prime
  – Prime contract may be FRE-friendly
  – Don’t assume — university tolerance for Federal restrictions varies

• University subcontractor to non-academic prime
  – Prime contract may not be FRE-friendly
  – Prime contractor may not be thinking of (or aware of) fundamental research
Negotiating a FRE-friendly prime

- Universities that perform FR should negotiate FRE-friendly prime contracts
- Institutions that subcontract to universities should negotiate primes that provide for FRE-friendly subcontracting
- Lincoln Laboratory negotiated such a contract
  - Modified prime mid-course (2012) to accommodate Carter memo expansion
  - Time consuming to accomplish (~1 yr)
  - Greatly eases subsequent subcontract negotiations with universities
  - Reduces risk to both LL and university subcontractor
Lincoln Laboratory Prime Contract

- DFARS 252.204-7000 “Disclosure of Information” clause incorporated by reference
  - Special contract clause negotiated to remove blanket requirement under certain conditions
- Enables FR/removes publication restrictions on BA-1 research conducted by Lab or university subcontractor
  - CO approval required
- Enables FR/removes publication restrictions on BA-2 research conducted by university subcontractor
  - CO approval required
- Enables FR/removes publication restrictions on “other BA” research conducted by Lab and/or university subcontractor
  - Funding sponsor AQ authority and CO approval required
In practice

- US DOD sponsor
- Provides BA-3 funding to Lincoln to develop software, test with real data, repeat
- Lincoln subcontracts the development of certain algorithms to MIT
- Lincoln obtained US DOD sponsor AQ authority and CO approval to exercise the special contract clause
  - Significant time spent educating funding sponsor
  - Additional delays as sponsor determined cognizant approval authority within the organization
No substitute for careful review

Standardized clauses

• Modular, reusable, road-tested language

But:

• Proliferation of clauses
  – Small language change -> new number, new name, paragraphs of text
  – Differences, similarities may not be easy to see
  – Not all “special contract clauses” intended to make your job easier

• Read carefully, consider implications for your research
If you find troublesome clauses

- Look for an existing university-friendly alternative
- Look for a local alternative
- On subcontracts, have prime seek CO approval to not flow clause down to you
- Negotiate “substantially similar” language
- Negotiate and document clarifications
Compliant participation

• If research is subject to the ITAR:
  – Physical export, transfer of technical data, visual transfer of technical data, defense service
  – Must be limited to “US persons,” unless license obtained

• If research is subject to the EAR:
  – Country restrictions vary with ECCN and use
  – Deemed export licenses possible

• Limit access to “US persons”?
  – Perhaps easiest administratively, but not only recourse
Other compliance concerns

- Publication restrictions
- Using/purchasing restricted hardware?
- Purchasing custom or modified COTS parts?
  - Downstream compliance needs to be managed
- Otherwise subcontracting?
  - Downstream compliance; flowdowns
- Shipping hardware, software or data in furtherance?
Questions?
Federal clause books (partial list!)

- FARS: Federal Acquisition Regulation System (48 CFR 1)
  - DFARS: Defense
    - AFARS: Army
    - AFFARS: Air Force
      - AFMC: Air Force Materiel Command
    - NMCARS: Navy Marine Corps
      - NAVAIR
    - USTRANSCOM: Transportation Command
  - DEAR: Energy
  - EPAAR: EPA
  - HHSAR: Health and Human Services
  - HSAR: Homeland Security
  - NFS: NASA FARS Supplement
  - NRCAR: NRC
  - TAR: Transportation
Some access restriction clauses

- AFMC 5352.227-9000 export-controlled data restrictions
- Army Corps of Engineers ED 380-1-18, names and documentation for foreign nationals
- Army lab verification of employment status
- FAA Order 1600.72A non-US citizen visa number, etc.
- FAR 52.204-2 Security requirements
  - Use Alt 1
- H-1 52.204-4708 Non-US citizens
- NASA Personal Identity Verification
- Transportation award with foreign national restrictions
Some publication restriction clauses

- AFMC 5352.227-9000 export-controlled data restrictions
- AFRL CDRLS requiring approval of Scientific and Technical Reports
- DFAR 252.204.7000 Disclosure of information
  - CO agreement to no flowdown
  - Use 12/91 deviation
- NAVAIR 5252.204-9504 disclosure of contract info
- “NASA Publication Guide for Authors”
Evaluate these carefully

• DFAR 252.204-7008 Requirements for Contracts Involving Export Controlled Items
  – Heads up – what are the items?
• DFAR 252.204-7009 Requirements Regarding Potential Access to Export Controlled Items
• NASA funding for bilateral research with China