

COMMON “RED FLAGS” IN AGREEMENTS

Comments and Alternate Language Provided

| COMMON TERMINOLOGY | COMMENTS | ALTERNATIVE LANGUAGE/SUGGESTION |
|----------------------------------|---|---|
| Anti-terrorist Compliance | For foreign subaward. | Collaborator hereby agrees that all funds, including subawards to subrecipients, will be used in compliance with all applicable United States anti-terrorist financing and asset control laws, regulations, rules, and executive orders. |
| Arbitration | Arbitration is fine as long as long as it is <u>not binding</u> . | |
| Binding Arbitration | The University cannot agree to submit to binding arbitration as it, in effect, enables a private party (as opposed to a lawfully authorized public official) to exercise the governmental authority of the Regents to determine an issue. It also limits the exercise of legal rights accorded all state entities. | <p>Should the parties under this Contract be unable to resolve between themselves any dispute arising from any of the provisions within this Contract, each party shall have recourse under the law. In the event that either party commences an action in law or equity to interpret, construe or enforce any provision of this Agreement, the losing party shall pay to the prevailing party, reasonable attorneys' fees as fixed by a court of competent jurisdiction.</p> <p style="text-align: center;">OR:</p> <p>In the event of a dispute arising from any of the provisions herein or performance hereof, the dispute first shall be referred to a high-level officer of each party having full authority to negotiate and settle the dispute. They shall endeavor to promptly resolve the dispute between themselves; however, should they then be unable to resolve the dispute arising from any of the provisions herein or performance hereof, each party shall have recourse under the law. In the event that either party commences an action in law or equity to interpret, construe or enforce any provision of this Agreement, the losing party shall pay to the prevailing party, reasonable attorneys' fees as fixed by a court of competent jurisdiction.</p> |

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| <p>DFAR Clause: 252.204-7012 Safeguarding of Unclassified Controlled Technical Information</p> | <p>The university cannot accept unclassified controlled technology or produce unclassified controlled technology. If we do this clause which is required to be flowed down, becomes effective and OSU cannot comply with the security requirements.</p> <p>Accepting a publication restriction also triggers this clause.</p> | <p>Proposals submitted to DOD sponsors or private sponsors who are applying for DOD funds (SBIRs/STTRs) must clearly indicated that OSU’s participation is only allowed if the work we are conducting is fundamental research. The scope of the project should clearly reflect this. In letters of support, it should also clearly reflect the university intentions.</p> <p><u><i>Suggested Language:</i></u></p> <p><i>Oklahoma State University is committed to the principle of “Openness in Research” which generally precludes acceptance of any research that imposes access, dissemination, or participation restrictions on the conduct, products, or results of its research. Oklahoma State University generally performs only unclassified, non-secret research, openly conducted. Thus, it conforms with both 15 CFR 734.3(b); 734.8 (EAR) and 22 CFR 120.11(8) (ITAR) requirements for public domain “fundamental research” excluded from those regulations (the “Fundamental Research Exclusion” or “FRE”).</i></p> <p>Award documentation must specify that OSU will not be receiving or generating unclassified controlled technical information in performance of this project so that 252.204-7012 will not apply. Also, we must not accept any publication restrictions which give sponsor “prior approval”.</p> |
| <p>Disputes</p> | <p>See Binding Arbitration.</p> | |
| <p>Dissemination of Information</p> | <p>Beware of clauses that limit dissemination of information. University will lose the Fundamental Research Exclusion and work will be subject to Export Administration Regulations (EAR).</p> | <p>Request removal of any clauses that restrict dissemination of information.</p> |

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| Export Controls | <ul style="list-style-type: none">• For foreign subawards. | <p>It is understood that University is subject to United States laws and regulations controlling the export of technical data, computer software, laboratory prototypes and other commodities, and that its obligations hereunder are contingent on compliance with applicable U.S. export laws and regulations (including the Arms Export Control Act, as amended, and the Export Administration Act of 1979). The transfer of any such Technology and Items and the entering into and provision of such Transactions and Services that are subject to Restrictions may require a license or authorization from the cognizant agency of the U.S. Government, and /or may require written assurances by the receiving party that it shall not re-export such Technology and Items to certain foreign destinations and/or to certain recipients without prior approval of the cognizant government agency, and/or may require that the involved individuals and entities will comply with conditions on Transactions and Services. While University agrees to cooperate in securing any license which the cognizant agency deems necessary in connection with this Agreement, University cannot guarantee that such licenses will be granted.</p> |

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| Export Controls...continued | <ul style="list-style-type: none">In general, the university desires to keep our Fundamental Research Exclusion (FRE) intact by not accepting any restrictions that would compromise this exclusion. <p>However, in the event that export controlled information is required to conduct research, the burden should be on the sponsor to specifically identify the controlled technology PRIOR to the university receiving it. The university will reserve the right to refuse receipt of controlled technology if the burden to manage it is too great.</p> <p>Notification to the Export Control Administrator should be made PRIOR to agreeing to accept controlled technology.</p> | <p><u>Suggested language:</u></p> <p><i>In the event that export controlled information is required to conduct research under this Project, Sponsor will so inform Oklahoma State University in writing PRIOR to ANY such disclosure, and Sponsor shall NOT forward or provide ANY export controlled information to Oklahoma State University without the express written permission. The burden shall be on Sponsor to (a) identify the nature of the export controlled item, including, e.g., the appropriate Export Classification Control Number or the item’s inclusion on the United States Munitions List; (b) prevent such export controlled information from being improperly disclosed or exported; (c) to obtain the appropriate license or approval from the relevant federal agency; and/or (d) to invoke an available exception, exemption, or exclusion. Oklahoma State University shall have the right to terminate the Agreement, if the disclosure of export controlled information under license or otherwise, would jeopardize Oklahoma State University’s ability to invoke the fundamental research exclusion with regard to the conduct or reporting of its research. In any event, if necessary for the continuation of the research under this Project, upon written notification and subsequent approval, the parties will cooperate to ensure that an appropriate plan is put in place to handle the transfer of any export controlled information. At any time, Oklahoma State University may either refuse receipt of any controlled information or it may terminate the Agreement if necessary to protect the FRE.</i></p> <p>Contact Export Control Administrator for additional options for specific instances.</p> |

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| Federal Information Security Management Act (FISMA) or data security references | References to FISMA or data security could mean additional security may need to be in place to use, process, or store Federal Government data if the data is of a sensitive nature. Be aware of agreements that include language such as: FISMA compliance required; requirement to submit a System Security Plan and obtain an “Authority to Operate” from the sponsor; clauses referencing “Information Security”; requirements to comply with OMB A-130 or FIPS 199; or requirements to comply with “all applicable NIST standards.” | See resources provided on university websites regarding FISMA. An Authorized University Official is generally required to sign-off on receipt and use of federal government data. Also, a data management plan may be required. |
| Foreign National Employment | Beware of a sponsor limiting the employment of foreign nationals on the project. This may put the Fundamental Research Exclusion in jeopardy and make the project subject to Export Administration Regulations (EAR). | Have reference removed. If reference cannot be removed, an Export Control Review of the project will be needed and PI should clearly be made aware of condition. |
| Governing Language | In foreign subawards, it is important that the official agreement be in English. | In the event that a translation of this Agreement is prepared and signed by the parties, this English language version shall be the official version and shall govern if there is a conflict between this English language version and the translation. All disputes under this Agreement shall be resolved and conducted, regardless of the means or authority, in the English language. |
| Governing Law | As an agency of the State of Oklahoma, the University cannot agree to allow disputes to be decided according to the law of another state or to submit itself to another state’s jurisdiction. Language MUST BE removed or altered. | First choice is for the agreement to specify Oklahoma law. Second choice is to remain silent on the issue and delete any reference to state governing law from the agreement. Foreign Subaward: Collaborator acknowledges that University is subject to the laws of the United States and will not be obligated to take any action that is in violation of such laws. |

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| Hold Harmless | As a state agency, the University CANNOT agree to hold harmless or indemnify anyone/entity from liability. Usually, the other party will agree to a clause which states that each party will be responsible for its own negligent acts according to prevailing law | If and only to the extent allowed by applicable law, Sponsor and University each, respectively, agree to be responsible for the negligent and intentional acts of their respective employees, agents, representatives, divisions, and affiliates that arise out of or are related to the performance of the services or manufacture and delivery of a product under this Agreement. Applicable in the University's case is the Oklahoma Governmental Tort Claims Act. OR: In the conduct of research under this contract, Contractor is acting in the capacity of an independent contractor, and neither party shall by reason of this contract be obligated to defend, assume the cost of defense, hold harmless or indemnify the other from any liability to third parties for loss or damage to property, death, or bodily injury; arising out of or connected with the research under this contract. See Independent Contractor for additional option. |
| Indemnification | Indemnification is the obligation to pay another party's damages and attorney's fees suffered as a result of the claims of third parties. It may be disguised. Look for implied or express reference to third party claims. | See Hold Harmless . |
| Independent Contractor | Can be used to replace clauses that contain Indemnification and/or Hold Harmless language. | In the conduct of research under this contract, Contractor is acting in the capacity of an independent contractor, and neither party shall by reason of this contract be obligated to defend, assume the cost of defense, hold harmless or indemnify the other from any liability to third parties for loss or damage to property, death, or bodily injury; arising out of or connected with the research under this contract. |

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| Insurance | <p>As a state institution, University is self-insured and should not be required to purchase insurance. Parties will usually accept a statement that the University is self-insured.</p> | <p>The Subcontractor (or University) is self-insured and agrees to provide insurance to the limits of the attached Certification of Self-Insurance.</p> <p style="text-align: center;">OR:</p> <p>Contractor (or University), as a state agency of the State of Oklahoma, is self-insured. Liability coverage is proved under the State of Oklahoma Governmental Tort Claims Act, Title 51 Oklahoma Statutes Supplement 1989, Section 151 et seq. Contractor shall be liable only to the limits of the attached Certification of Self-Insurance.</p> |
| Joint Venture/Partnership | <p>Beware of references to the arrangement set out in the agreement as a joint venture or partnership. The state is forbidden to be a general business or joint venture partner with another entity – each liable for the other’s wrongs. The same or very similar objectives can be accomplished using different names – collaborative, team, or cooperative agreement. All suggest to the third party that they are not a united legal entity for purposes of liability and suit, but rather, two entities working together.</p> | |
| Limited Damages | <p>The University cannot agree to limit the amount of damages recoverable by it, although it can agree that certain types of damages are not recoverable.</p> | |
| Liquidated Damages | <p>Beware of clauses establishing liquidated damages – they are considered penalties and are void under Oklahoma law unless, from the nature of the case it would be impracticable or extremely difficult to fix the actual damages.</p> | |

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| Official Signatory | Principal Investigators, Department Heads, and Deans cannot normally legally bind the university to any agreement. Only the Authorized Organizational Representative can legally bind the university. In most cases, this is the Vice President for Research and Technology Transfer . | |
| Patents | For foreign subawards. | Pursuant to Public Law 96-517, as amended by Public Law 98-620, title to any invention or discovery made or conceived under this subaward shall vest in the Collaborator. Collaborator shall promptly notify Principal Investigator in writing of any such inventions or discoveries. Collaborator hereby grants to University a royalty-free, non-exclusive license for internal research purposes to any Collaborator invention or discovery. |
| Proprietary Information | Do not accept proprietary information that is marked “export controlled” without first reviewing the material to be received. As much information about what is going to be received is critical. There could be a foreign national’s restriction. | Contact University Research Services for assistance. |
| Publication | <p>In research contracts or grants, there must be a provision allowing the University or the principal investigator the ability to publish.</p> <p>Do not accept publication controls or access/dissemination restrictions that require “prior approval”. Prior “review” is acceptable”. Beware of time associated with a “prior review”.</p> <p>Restrictions on confidentiality or nondisclosure agreements could limit the ability to publish if or when an agreement is made.</p> | See OSU Sponsored Research Agreement – Article 6 Publication . |

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| Reporting Requirements | Reporting requirements should be specific (i.e., monthly, quarterly, 45-days, etc.) and relevant to the particular project. Be mindful university timeframes and deadlines. Consult appropriate offices if in doubt. | |
| Term of Agreement | An agreement should not be open-ended. There should be a specific beginning date and a specific end date. | |
| VEVRAA (Vietnam Era Veterans’ Readjustment Assistance Act) | Language provided should be in all federal awards and subawards (modifications, renewals, or extensions) per OSU Legal Counsel memo dated 10/24/13 effective March 23, 2014. | This contractor and subcontractor shall abide by the requirements of 41 CFR 60-300.5(a). This regulation prohibits discrimination against qualified protected veterans, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans and qualified individuals with disabilities. |