University of California
Office of the President

Office of the
Associate Vice President —
Business and Finance

Contracts and Grants Office

Memo
Operating Guidance

No. 84-31, Supplement 1
June 3, 1985

VICE CHANCELLORS — BUSINESS AND FINANCE/ADMINISTRATION*
CONTRACTS AND GRANTS OFFICERS (NON-LAB)
OFFICE OF THE PRESIDENT FUNCTIONAL MANAGERS

Subject: Rights in Data Clauses (NASA) and Related Publication Issues

This Memo transmits a copy of the University Publication Policy. It is to be included with Contract and Grant Memo No. 84-31 concerning "Rights in Data Issues and Clauses" because consideration of publication issues is an integral part of the review of agency rights in data clauses. The Publication Policy should be filed as Enclosure 1a to C&G Memo 84-31.

In addition, this Memo transmits discussions of NASA rights in data clauses. These discussions should be considered by Contracts and Grants Officers in judging the conditions under which such clauses are acceptable to the University in individual extramural awards.

Please note that the basic NASA Rights in Data Clauses, NASA/FAR Supplement 18-52.227-74, contains language which is unacceptable to the University and which has been widely protested by the University community. Guidance is provided on this clause language in the enclosed materials.

The enclosed discussions of NASA rights in data clauses supplement Contract and Grant Memo No. 84-31 issued November 15, 1984. The enclosed NASA related materials should be physically filed as Enclosure 3 to C&G Memo No. 84-31. This Supplement should be filed with Contract and Grant Memo No. 84-31.

Refer: Joe Acanfora
ATSS 8-582-1638
(415) 642-1638

Barbara Yoder
ATSS 8-582-2886
(415) 642-2886

Subject Index: 01, 11
Organization Index: F-650

David F. Mears
University Contracts and
Grants Coordinator

Enclosures: Publication Policy (File as Enclosure 1a to C&G Memo No. 84-31)
NASA Clauses (File as Enclosure 3 to C&G Memo No. 84-31)

cc: Director Ditzel

*Note: The addressees above represent the standard distribution of Contract and Grant Memos. Additional addressees, if any, may be added based on the subject of the Memo. See cc's.

PUBLICATION POLICY

Enclosure 1a to
C&G Memo 84-31

Rights to Results of Extramural Projects or Programs. It is long-standing University policy that freedom to publish or disseminate results is a major criterion of the appropriateness of a sponsored project, and particularly of a research project.

(1) Normally a contract or grant is unacceptable if it limits this freedom. Examples of limitations a sponsor may attempt to impose are:

(a) assigning ownership of results to the extramural fund source;

(b) assigning the final decision as to what may be published to the extramural fund source;

(c) placing an unreasonably long or unlimited delay period on the publication or dissemination of the information resulting from the work under the project.

(2) Chancellors may make exceptions to this policy, or recommend exceptions in cases where contract or grant authority has not been delegated to the Chancellor, when one or more of the following conditions is met:

(a) security considerations in the national interest are involved;

(b) the sponsor reserves first right of publication, but only if there is a provision surrendering this right to the University after a reasonable interval of time, in the event the extramural fund source has not published within that time;

(c) the statement of work is so written that the work to be done under the project or program comprises the production of a manual, book, film, videotape, or the like, and it is clear that this product is what the sponsor is "buying" from the University;

(d) special or extraordinary circumstances prevail which do not involve censorship of the results of the project. AID programs in foreign countries may, for example, require restrictions on the timing or character of publications, to protect the national interest. Such projects or programs should be judged on their merits in light of the reasons given by the sponsor for any restriction on publication.

(3) If there is any doubt concerning an exception in a particular case, it should be resolved either by refusing to accept an award containing a restrictive clause, or by referring the problem to the President for resolution.

RIGHTS IN DATA CLAUSES

National Aeronautics and Space Administration
(NASA)

Reference: NASA/FAR Supplement 18-52.227-74

Title (Date): Rights in Data -- General (APRIL 1985)

Purpose: This clause serves as the basic NASA "data rights" clause. It establishes the rights of the Government and the contractor in the use, release, distribution and copyright of technical data, including computer software. Generally, the Government will have unlimited rights to all technical data unless the contractor takes specific action:

a) to withhold such data from delivery to NASA pursuant to paragraph (g) of this clause, or

b) to deliver such data with a prescribed legend as set forth in Alternates II and III to this clause (coverage on these Alternates follows this discussion of the basic NASA clause.)

In addition, under paragraph (c)(2) of this clause, the "express, written permission of the Contracting Officer" IS REQUIRED for the University to establish claim to copyright subsisting in all data first produced under the contract with the exception of that subsisting in scientific and technical articles or presented in academic, technical and professional journals or conference papers.

Further, paragraph (d)(3) of this clause states:

> The Contractor agrees not to establish claim to copyright, publish or release to others computer software first produced in the performance of this contract without written prior permission of the Contracting Officer.

Applicability: This clause would be included in NASA contracts in accordance with NASA FAR Supplement 18-27.475-1(a)(1). Generally, this clause is included in all contracts where data will be produced, furnished, or acquired (with some limited exceptions).

Special Actions or Concerns: The Contracts and Grants Officer in consultation with the Principal Investigator must determine whether there will be any limited rights data or restricted computer software produced which the University wants to withhold from NASA pursuant to paragraph (g)(1) of this clause. If so, the Contracts and Grants Officer should

assure that the University furnishes "form, fit, and function data" in its place.

Secondly, where such limited-rights data or restricted computer software must be submitted to NASA pursuant to the contract, Alternates II and/or III to the basic clause would be included in the contract (as discussed later). Contracts and Grants Officers must then assure the appropriate prescribed legends are included with the submitted items (as discussed later).

UNACCEPTABLE RESTRICTIONS

Thirdly, Contracts and Grants Officers must carefully consider the restrictions included in paragraphs (c)(1) and (d)(3) as follows.

Paragraph (c)(1) -- This paragraph requires written permission of the contracting officer to establish claim to copyright subsisting in all data first produced under the contract with the exception of that subsisting in scientific and technical articles or presented in academic, technical, and professional journals or conference papers. However, such permission may be routinely granted at the time of contracting or during contract performance pursuant to NASA FAR Supplement 1827.473-2(g):

(g) *Copyrighted data.*—(1) *Data first produced in the performance of a contract.* (i) In order to enhance the transfer or dissemination of information produced at Government expense, contractors may be granted permission to establish claim to copyright subsisting in data first produced in the performance of work under a contract containing the clause at 1852.227-74, Rights in Data—General. This permission is normally granted in paragraph (c)(1) of the clause for scientific and technical articles based on the work performed under the contract and published or presented in academic, professional and technical journals or conference papers. For all other data, such permission may be granted by the contracting officer, in consultation with installation Intellectual Property or Patent Counsel, in accordance with the procedures in paragraph (g)(1)(ii) below.

(ii) Usually, permission for a contractor to establish claim to copyright for data first produced under the contract will be granted under subparagraph (c)(1) of the clause at 1852.227-74, Rights in Data—General, when copyright protection will enhance the appropriate transfer or dissemination of such data. The request for permission must be in writing, and may be made either at the time of contracting or subsequently during contract performance. It should identify the data involved or furnish a copy of the data for which permission is requested, as well as a statement as to the intended publication or dissemination media or other purpose for which copyright is desired. The request normally will be granted unless: (A) The data consists of a report that represents the official views of the agency or that the agency is required by statute to prepare, (B) the data is intended primarily for internal use by the Government, (C) the data is of the type that the agency itself distributes to the public under an established program, or (D) the data is of a type that is subject to limited distribution due to Government Policy.

(iii) Whenever a contractor establishes claim to copyright subsisting in data first produced in the performance of a contract, the Government normally is granted a paid-up, nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute copies to the public, perform publicly and display publicly, by or on behalf of the Government, for all such data, as set forth in subparagraph (c)(1) of the clause at 1852.227-74, Rights in Data—General. However, NASA may on a case-by-case basis obtain on equitable terms a license of lesser scope than set forth in subparagraph (c)(1) of the clause if the contracting officer determines, with concurrence of installation Intellectual Property or Patent Counsel, that such lesser license will substantially enhance the transfer or dissemination of any data first produced under the contract.

Paragraph (d)(3) --This paragraph reads,

> The Contractor agrees not to establish claim to copyright, publish or release to others computer software first produced in the performance of this contract without written prior permission of the Contracting Officer.

The University community, including the Council on Governmental Relations, has strongly protested this provision and some NASA installations have agreed to provide blanket approval to copyright and publish such computer software or have deleted paragraph (d)(3) entirely. Other installations, including NASA, Washington, D.C., however, have only agreed to such a deletion on a case-by-case basis where software is incidental to contract activity and is not a deliverable item under the contract. COGR has stated that because of NASA's "apparent willingness to negotiate terms acceptable to universities where software is incidental to contract activity and not considered a deliverable item, the usual contract negotiation activity of universities should be able to resolve most individual problems on this issue."

Where software is to be first produced in the performance of the contract and is indeed central to the contract activity and/or a deliverable item, Contracts and Grants Officers may run into great resistance from NASA in their attempt to have paragraph (d)(3) deleted or to obtain a blanket approval. In such cases, the publication restrictions of paragraph (d)(3) would violate the University's Publication Policy. It is the responsibility of Contracts and Grants Officers to determine whether to reject the NASA contract based on this violation of University policy or to seek a Chancellor's exception based on the Publication Policy's exception criteria (See Enclosure 1a to this Memo.) In addition, the Principal Investigator and all those who will participate in the research effort must be apprised of and given an opportunity to object to the fact that under paragraph (d)(3), the University and its employees will have no rights to copyright or publish without prior written permission of the contracting officer.

Finally, Materiel Management must assure that the terms of any subcontract written under a contract containing this clause allow the University to deliver all necessary data and rights as required by the contract.

Reference: NASA/FAR Supplement 18-52.227-74, Alternate I

Title (Date): Alternate I (APRIL 1984)

Purpose: The purpose of Alternate I is to change the definition of "limited-rights data" in the "basic" NASA data rights clause, 18-52.227-74. The change removes from the definition the requirement that limited-rights data (which means data that embodies trade secrets or is commercial or financial and confidential or privileged) must "pertain to items components, or processes."

Applicability: In accordance with NASA FAR Supplement 18-27.473-2(b), Alternate I would be used in contracts where limited-rights data does not involve the development, use, or delivery of items, components, or processes that are intended to be acquired for use by or for the Government, but instead involves market research and surveys, economic forecasts, socio-economic reports, educational materials, health and safety information, management analysis and related matters.

Special Actions or Concerns: The Contracts and Grants Officer must ascertain that Alternate I is negotiated into the contract where the University intends to assert "limited" Government rights for data which meets the Alternate I definition rather than the definition provided in the basic clause 18-52.227-74, as discussed on the previous page.

Reference: NASA/FAR Supplement 18-52.227-74, Alternate II

Title (Date): Alternate II (APRIL 1985)

Purpose: The purpose of Alternate II is to provide a mechanism whereby NASA can request and the contractor can protect limited-rights data. Under Subparagraph (g)(1) of the basic data rights clause at 18-52.227-74, the contractor is allowed to withhold limited-rights data and in lieu thereof, to provide "form, fit, and function data." However, this Alternate II adds Subparagraph (g)(2) which enables NASA to selectively request delivery of such data. This Subparagraph, however, prescribes a legend which the contractor must use to restrict the Government use and distribution of such data.

Applicability: NASA would insert this Alternate II in a contract containing the basic data clause 18-52.227-74, where NASA wished to receive otherwise withholdable limited-rights data.

Special Actions or Concerns: The Contracts and Grants Officer must be certain that the University's right to limit Government use of limited-rights data supplied by the University or by its subcontractors is exercised, when necessary, through the proper use of the "LIMITED RIGHTS NOTICE (APRIL 1985)" included as part of the Alternate II clause.

Reference: NASA/FAR Supplement 18-52.227-74, Alternate III

Title: Alternate III (APRIL 1984)

Purpose: The purpose of Alternate III is to provide a mechanism whereby NASA can request and the contractor can protect restricted computer software. Under Subparagraph (g)(1) of the basic data rights clause at 18-52.227-74, the contractor is allowed to withhold restricted computer software, and in lieu thereof, to provide "form, fit, and function data." However, this Alternate III adds Subparagraph (g)(3) which enables NASA to identify and specify delivery of restricted computer software. This Subparagraph, however, prescribes a legend which the contractor may use to restrict the Governments use and distribution of such restricted software.

Applicability: NASA would insert this Alternate III in a contract containing the basic data clause 18-52.227-74 where NASA wished to receive otherwise withholdable computer software.

Special Actions or Concerns: The Contracts and Grants Officer must be certain that the University's right to restrict the Government's use of restricted computer software supplied by the University or by its subcontractors is exercised, when necessary, through the proper use of the "RESTRICTED RIGHTS NOTICE (APRIL 1984)" included as part of this Alternate III clause.

Reference: NASA/FAR Supplement 18-52.227-75

Title (Date): Representation of Limited-Rights Data and Restricted Computer Software (APRIL 1985)

Purpose: This notification provision is not a contract clause but is placed in solicitations to alert potential contractors to their rights and obligations in data and computer software under the basic data clause, 18-52.227-74 and its Alternates II and III. In addition, this solicitation provision requests that offerers identify any limited-rights data or restricted computer software in their offers.

Applicability: This provision would be included by NASA in solicitations in accordance with NASA FAR Supplement 18-27.475-2. Generally, the provision would be included in any solicitation which contains Clause 18-52.227-74 and where the NASA contracting officer desires to know whether there will be limited-rights data or restricted computer software involved. This would then indicate to the contracting officer whether to use Alternates II and/or III in any resulting contract.

Special Actions or Concerns: The Contracts and Grants Officer must work closely with the Principal Investigator and his/her associates to determine at the proposal state whether or not researchers will be developing and potentially delivering to NASA limited-rights data and/or restricted computer software. Where such items will be developed and potentially delivered, they must be appropriately identified in the offer.

Similar concerns and precautions apply to subcontractors.

Reference: NASA/FAR Supplement 18-52.227-76

Title (Date): Additional Data Requirements (APRIL 1984)

Purpose: Under this clause, NASA could order additional data requirements beyond those set forth in the contract which were "first produced or specifically used" in the performance of the contract. (Note: Pursuant to 18-27.475-3(b), the contracting officer may alter this clause by deleting the term "or specifically used", if delivery of such data is not necessary to meet the Government's requirements for data.) A NASA order for additional data could occur at any time during contract performance or within a 3 year period after acceptance of all deliverable items under the contract. The contractor would receive some compensation for submission of such additional data. All of the data rights and obligations set forth in the NASA basic data clause, 18-52.227-74, would apply to such additional data.

Applicability: Pursuant to NASA FAR Supplement 18-27.475-3, this clause would be included in experimental, developmental, research, or demonstration contracts, or other situations where it may not be possible to determine all the data requirement at the time of contract negotiation. Therefore, it would be applicable to the majority of the University's NASA research contracts.

Special Action or Concerns: Contracts and Grants Officers should be aware that all rights and responsibilities related to limited-rights data and restricted computer software as set forth in NASA basic data clause 18-52.227-74 also apply to the "additional data" discussed in this clause. Further, Contracts and Grants Officers should advise Principal Investigators and associates of the potential for additional data requests up to three (3) years after acceptance of the contract deliverable items.

Reference: NASA/FAR Supplement 18-52.227-77

Title (Date): Rights in Data - Special Works (APRIL 1984)

Purpose: The intent of this clause is to give the Government ownership of and control over all works first produced under the contract. This would prevent the University from asserting any rights or claim to copyright or to publish such items without express prior written permission of the contracting officer. Further it provides that the University will indemnify the Government against any liability to works furnished under the contract.

Applicability: This clause is imposed by the Government pursuant to 18-27.475-4, where it desires ownership or control of special works, including technical data and computer software. Examples of the types of data for which the Government usually desires such control are itemized at 18-27.473-3.

Special Actions or Concerns: The Principal Investigator and all those who plan to participate in the proposed effort must be apprised of and given an opportunity to object to the fact that under this clause, the University and its employees will have no rights to copyright without express prior written permission of the contracting officer. In addition, the Contracts and Grants Officer must determine whether to reject the NASA contract based on this violation of University Publication Policy or to seek a Chancellor's exception based on the Policy's exception criteria (see Enclosure 1a to this Memo).

Finally, this clause includes as paragraph (e) an indemnity provision protecting the Government from liability related to works furnished under the contract. Acceptance of such an indemnity provision in any contract is subject to specific Regental authorization (under Standing Order 100.4(dd) (11)) if the University would, under the contract, assume liability for the conduct of persons other than University officers, agents, employees, students, invitees and guests. Because this indemnity clause falls under the Standing Order's restriction, Regents' approval must first be obtained. All proposals to make this clause applicable to a contract must be referred to this office for review and for submission to The Regents of a request for specific authorization as required under the Standing Order.

Reference: NASA/FAR Supplement 18-52.227-78

Title (Date): Rights in Data--Existing Works (APRIL 1984)

Purpose: This clause is intended to give to the Government (and others acting of its behalf) full authority to use, perform and display all existing material or subject matter identified in the contract as covered by the clause. Further it provides that the University will indemnify the Government against any liability resulting from the use of such material or subject matter.

Applicability: Pursuant to 18-27.475-5(a), this clause applies to NASA solicitations and contracts exclusively for the acquisition, without modification, of existing works of the type set forth in 18-27.473-(4)(a). Generally, these works would be existing audio, video, and related musical and literary works.

Special Actions or Concerns: The Government will have unlimited rights to the use and disposition of identified existing works delivered under this contract. The Contracts and Grants Officer must, therefore, assure that the Principal Investigator and associates agree to deliver only works which are free and clear of third party interests or restriction and which the University itself does not object to delivering to the Government without restriction.

In addition, this clause includes as paragraph (b) an indemnity provision protecting the Government from liability related to works furnished under the contract. Acceptance of such an indemnity provision in any contract is subject to specific Regental authorization (under the Standing Order 100.4 (dd) (11)) if the University would, under the contract, assume liability for the conduct of persons other than University officers, agents, employees, students, invitees and guests. Because this indemnity clause falls under the Standing Order's restriction, Regents approval must first be obtained. All proposals to make this clause applicable to a contract must be referred to this office for review and for submission to The Regents of a request for specific authorization as required under the Standing Order.

Reference: NASA/FAR Supplement 18-52.227-81

Title (Date): Rights to Proposal Data (Technical) (APRIL 1985)

Purpose: This clause is used by the Government to obtain unlimited rights to technical data contained in the proposal upon which the contract award is based.

Applicability: Pursuant to 18-27.475-9, this clause applies to NASA solicitations and contracts where the contracting officer desires to obtain unlimited rights to technical data contained in the proposal upon which the contract award is based. The clause is not to be used to obtain rights to any commercial or financial information in the proposal.

Special Actions or Concerns: NASA contracting officers must specifically afford the University the opportunity to exclude technical data contained in the proposal from the unlimited rights to the Government provisions of this clause and the NASA contract file must reflect that fact. Contracts and Grants Officers should ascertain this opportunity is granted and should limit Government rights to technical data contained in proposals by excluding data from the provisions of this clause, as appropriate, in consultation with the Principal Investigator.

Such technical data may be excluded from the provisions of this clause by advising the contracting officer that the technical data (or portions thereof as identified) are covered by the prescribed RESTRICTION ON USE AND DISCLOSURE OF PROPOSAL AND QUOTATION INFORMATION (DATA) (DECEMBER 1984) at 18-52.215-72 for solicited proposals and at 18-15.509-70 for unsolicited proposals.

Reference: NASA/FAR Supplement 18-52.227-82

Title (Date): Reports of Work (APRIL 1985)

Purpose: This clause is used to establish a data delivery and reporting mechanism. It requires monthly, quarterly and final reporting and prescribes the scope of such reports.

Applicability: Pursuant to 18-27.475-10, the NASA contracting officer may use this clause for all research and development contracts unless it is determined "that it is not needed because the reporting requirements thereof are adequately addressed in a section of the contract schedule relating to data delivery requirements." Section 18-27.474(b)(2) states that, "Normally in contracts with non-profit organizations, the clause [18-52.227-82] should be modified to eliminate the requirement for monthly progress reports."

Special Actions or Concerns: Contracts and Grants Officers should be aware that pursuant to 18-27.474, NASA contracting officers have complete flexibility to modify or not use this clause, as appropriate. Because the clause imposes frequent reporting cycles, Contracts and Grants Officers should consider proposing deletion of this clause and creation of a separate data delivery section in the contract schedule hand-tailored to the needs of NASA and the University (as is allowed by 18-27.474).

Section 18-27.474 (b)(5) serves as a reminder that, "In no event should any data delivery requirements be construed to require that a contractor provide the Government as a condition of the procurement, unlimited rights in, or reprocurement rights to any data that qualifies as limited-rights data or restricted computer software." (See NASA FAR Supplement 18-52.227-74 with Alternates II and III).

Reference: NASA/FAR Supplement 18-52.227-82, Alternate I

Title (Date): Alternate I (APRIL 1985)

Purpose: The purpose of Alternate I is to require that a reproductible and a printed or reproduced copy of all reports additionally be sent to:

NASA Scientific and Technical Information Facility,
ATTN: Accessioning Department
P.O. Box 8757
Baltimore/Washington International Airport
Maryland 21240

Applicability: Alternate I may be used by contracting officers where clause 18-52.227-82 is included in a contract and where there is a blanket authorization in accordance with NASA Management Instruction (NMI) 2230.1, "NASA Scientific and Technical Document Availability Authorization," to have reports furnished under the clause disseminated by the NASA Scientific and Technical Information Facility without restriction.

Special Actions or Concerns: The Alternate, of course, is not appropriate where data is submitted to the Government with limited or restricted rights.