May 3, 2010

Re: DFARS Case 2008-DO28 (Safeguarding Unclassified Information)

Defense Acquisition Regulations System
Attn: Mr. Julian Thrash
OUSD (AT&L) DPAP (DARS)
3060 Defense Pentagon, Room 3B855
Washington, D.C. 20301-3060

Dear Mr. Thrash:

We are responding on behalf of the Association of American Universities (AAU) and the Council on Governmental Relations (COGR) to the March 3, 2010 Federal Register Advance Notice of Proposed Rulemaking (ANPR) on Safeguarding Unclassified Information (DFARS Case 2008-DO28).

AAU represents 61 leading U.S. public and private research universities and is devoted to maintaining a strong national system of academic research and graduate education. COGR is an association of 182 U.S. research-intensive universities, affiliated hospitals, and research institutes that is specifically concerned with the impact of government regulations, policies, and practices on the performance of research conducted at its member institutions. AAU and COGR value their long working relationship with the Department of Defense (DoD) and the responsiveness shown by DoD to concerns we have raised in the past about other proposed DFARS rules. Most recently, we were pleased to see the single clause construct contained in the recent DFARS export control compliance clause (DFARS Case 2004-DO10), which reflects the approach we had urged DoD to follow in implementing the statutory mandate to develop such a clause for defense contractors.

We understand and appreciate DoD’s need to assure appropriate safeguards for the protection of certain unclassified DoD information that resides on contractor information systems. We also share DoD’s concerns about the threats raised by unauthorized access and disclosure and cyber intrusions. However, we fear that the rule as proposed will adversely affect both DoD and our member institutions in their ability to conduct critical research by making universities more reluctant to partner with DoD in such research.

We have two principal concerns: 1) the expanded prescription for use of the DFARS 252.204-7000 clause in this ANPR will lead to an increased likelihood of inappropriate use of the 7000 clause by DoD contracting officers to the detriment of both DoD and our member institutions and in contravention of stated DoD policy on Contracted Fundamental Research; and 2) new safeguarding requirements will greatly increase compliance burdens for universities who accept the 7000 clause. We also have serious concerns about the new requirements for safeguarding information, particularly as they relate to cyber intrusion reporting. These concerns are discussed in more detail below.
Background

AAU and COGR have longstanding concerns about the inappropriate use of DFARS Clause 252.204-7000 by DoD agencies in contracts for fundamental research at universities. The clause restricts not only publication of research results, but also the release of any information pertaining to the project without prior government approval. A core value of U.S. universities is the ability to conduct research and disseminate information in an open and freely accessible manner. For that reason, many universities refuse to accept sponsor restrictions of this nature, which leads to a refusal to conduct research for DoD or other sponsors that is subject to these types of restrictions. The problems that use of this clause has posed for our member institutions are described in more specific detail in two AAU/COGR reports on “Troublesome Clauses” (available at http://www.aau.edu/policy/scientific_openness.aspx?id=6872).

The first report, released in 2004, found that the DFARS 7000 clause was the single most common restriction on publications encountered by universities in their research contracts with federal agencies. The second report, released in 2008, found that about half of the publication restrictions received by universities from federal agencies involved the 7000 clause. Both reports recommended that DoD revise the DFARS prescription guidance to prevent the 7000 clause from being used in contracts for university research, either directly or as a flowdown from industry contracts. We also recommended that DoD revise its guidance to contracting officers stipulating that no controls should be imposed on publications in contracts for fundamental research either in direct awards or sub-awards.

These recommendations were reinforced in a 2007 report by the National Academy of Sciences (NAS) Committee on a New Government-University Partnership for Science and Security entitled, “Science and Security in a Post 9/11 World.” The NAS report recommended that the principle of National Security Decision Directive 189 (NSDD-189) that “no restrictions may be placed upon the conduct or reporting of federally-funded fundamental research” (except as required by statute) should be incorporated into all research contracts to universities for basic and applied research in science and engineering. The NAS report also recommended that “Federal funding agencies should make clear to industrial awardees that the restrictive publication… clauses placed in government awards that would not apply to universities (in direct contracts) should not be passed down to university sub-awardees conducting fundamental research.”

We were very pleased by the June 26, 2008 DoD memorandum issued by John Young, Under Secretary for Acquisition, Technology and Logistics, on “Contracted Fundamental Research.” The memo called attention to NSDD-189 as the governing policy and indicated that DoD awards for the performance of fundamental research should, with rare exceptions, not be subject to publication restrictions. This ANPR, however, may lead to results inconsistent with this policy.

Proposed New Prescription

Under the current prescription, the 7000 clause is to be applied “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” (202.404-70(a)). In this ANPR, that provision is replaced by a proposed new prescription (204.7XXX(a)(1)) that the 7000 clause is to be used in “solicitations and contracts when the contractor will have access to or generate DoD information.” According to the new clause 252.204-7XXX, “DoD Information” means “any unclassified information that has not been cleared for public release (in accordance with DoD Directive 5230.09) that has been provided by or on behalf of DoD to the contractor or subcontractor,”
“collected, developed, received, transmitted, used or stored by the contractor or its subcontractor(s) in support of official DoD activity.”

Our concern is that this expansive definition will lead to greatly increased use of the 7000 clause by DoD contracting officers in solicitation and contract terms and conditions. The current prescription does not contain the concept of “DoD information.” This ANPR’s linkage of this definition with internal DoD guidance is of additional concern. It is not clear how contractors will know whether information meets this standard, or how it aligns with the government-wide concept of “controlled unclassified information.” In fact, it is not clear why DoD is adopting a different term. This ANPR appears to raise issues of consistency with the recent Report and Recommendations of the Presidential Task Force on Controlled Unclassified Information (CUI), particularly the call for a standardized CUI framework and the recommendation that a moratorium be imposed on efforts to develop new categories of Sensitive but Unclassified (SBU) Information outside of the CUI Framework.

We recognize that the new prescription (7XX3(a)(2)) further indicates that the clause should not be used in solicitations or contracts for fundamental research unless there is a requirement for access to or generation of DoD information to perform the fundamental research effort. However, this language on its face appears ambiguous. For example, the potential need for access to any kind of DoD information covered by Directive 5230.09 appears sufficient to trigger the clause, even where no DoD information is actually provided to the contractor in a contract for fundamental research. We fear that the emphasis in the new policy in Subpart 204.7X on the need to safeguard DoD Information on unclassified contractor information systems (204.7XX2(a)) is likely to lead DoD contracting officers to take a cautious approach and apply the 7000 clause generally regardless of (a)(2). The emphasis in the prescription for the additional clauses (7XX3(b)(1) and (b)(2) heightens the concern (“use… when the requiring activity has identified that the contractor or a subcontractor at any tier will potentially have DoD information resident on or transiting its unclassified information system”).

This raises serious issues of consistency with DoD policy on Contracted Fundamental Research. It also may lead to an increased tendency of universities to refuse to conduct DoD-funded research since, as discussed above, sponsor restrictions on the ability to publish and disseminate research findings are a “deal breaker” for many universities. Even those universities that will conduct export controlled work and accept CUI typically will not do so when controls are inappropriately applied to fundamental research. The effects will be detrimental both to universities and to DoD. Universities will lose an important source of research funding, and DoD will lose access to many leading universities for the performance of research which it has judged as critical to DoD. This is an unfortunate outcome for both.

We also note that the mandatory flowdown requirement in Part (c) of the 7000 clause remains. As documented in the AAU/COGR reports, the flowdown of the clause in subcontracts from prime defense contractors to universities has been a major source of difficulty. We have repeatedly urged DoD to eliminate this requirement, and are disappointed that it is not addressed in this ANPR. Universities also are experiencing increased difficulty with inappropriate inclusion of the clause in subcontracts from DoD Small Business Innovation Research (SBIR) awardees. The additional new requirements for safeguarding information will further exacerbate these problems.
Contract Clauses

In cases where universities agree to accept the 7000 clause, under this ANPR’s approach, one or two additional clauses will apply. In all cases, the requirements of clause 252.204-7XXX will apply on Basic Safeguarding of Unclassified DoD Information resident on or transiting the contractor’s unclassified information systems. In addition, the 252.204-7YYY Enhanced Safeguarding and Cyber Intrusion Reporting will apply where the DoD information is Critical Program Information, subject to export controls, withheld from public release under the FOIA, subject to controlled access requirements, consists of certain technical data and software, or is personally identifiable information.

These clauses were the subject of considerable discussion at the April 22 public meeting on this ANPR. We agree with many of the concerns raised at that meeting concerning the definitional issues associated with terms such as “best level of security available,” “advanced persistent threat,” etc.; the need to assure that the requirements allow for the evolving, risk-based nature of security controls; and the potential for overwhelming both contractors and DoD with the cyber intrusion reporting requirements. As noted by a university representative at the meeting, universities experience thousands of such intrusions on a daily basis. It is essential that the requirements recognize gradations in the severity of the attacks that must be reported. It must also be recognized that “one size does not fit all.” Finally, there may be significant cost implications for contractors associated with the new requirements, and there is no indication in this ANPR that DoD intends to provide commensurate additional cost reimbursement to contractors for these purposes.

As noted above, the broad prescription for use of the new clauses may lead to their over-application (“… contractor… will potentially have DoD information…”). We also note that almost all items are subject to export controls, which could have the effect of requiring the more onerous Enhanced Safeguarding clause for virtually all contracts. The DoD guidance needs to be clarified to exclude low-control items such as “EAR 99” from application of this clause.

Specific Questions Posed in ANPR

This ANPR lists 13 questions for which DoD is seeking comments. Most of these questions are addressed in the above comments. We want to reiterate that the primary way to mitigate burdens for DoD university contractors (questions 2 and 3) is to eliminate use of the 7000 clause in contracts to universities for fundamental research, whether direct or through sub-awards. We do not believe the clauses as written provide clear and adequate guidance (question 5), and the 252.204-7YYY reporting requirements are likely to result in considerable burdens for universities (question 6). Many of the other questions are more appropriately addressed by industry contractors.

Conclusion

As noted above, we share DoD’s concern for assuring appropriate safeguarding of information that should be protected against unauthorized access and disclosure. We also understand that, in certain cases, enhanced information technology security measures may be appropriate. However, we are concerned that, as written, the proposed new policy will lead to indiscriminate application of the requirements by DoD contracting officers. This will contravene stated DoD policy, lead to increased refusal of universities to perform DoD-funded research, and greatly increase burdens for those that do.
We understand from the comments of DoD representatives at the public meeting that there will be at least one more round of public comments on the proposed rule. We urge DoD to reconsider the proposed rule in light of the comments it receives. We also again urge DoD to revise DFARS to allow for a clear exception from application of the 7000 clause for contracted fundamental research performed by universities, including research performed on a flowdown basis from prime defense contractors and SBIR companies.

Sincerely,

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Association of American Universities

Anthony DeCrappeo
Council on Governmental Relations