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Defense Acquisitions Regulations System  
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Re: DFARS Case 2004-D010  
Defense Federal Acquisition Regulation Supplement;  
Export-Controlled Information and Technology  

I. Introduction  

The Association of American Universities (AAU) represents 60 leading U.S. research universities. AAU universities constitute an exceptional national resource, conducting more than half of all federally sponsored university-based research. These institutions award approximately 17 percent of all U.S. bachelors degrees, 20 percent of masters degrees and more than 50 percent of all doctoral and postdoctoral degrees, many of which are in fields of science and engineering critical to the nation’s defense.  

As a group, AAU universities receive about 60 percent of all Department of Defense (DOD) research funds awarded to universities, an amount exceeding $1.2 billion each year. A large percentage of these funds is in the form of contracts and subcontracts, rather than direct grants.  

Given the significant role that AAU institutions play in defense research and training, the association greatly appreciates the opportunity to comment on the August 14, 2006, Notice of Proposed Rulemaking (NPRM) to amend the Defense Federal Acquisition Regulation Supplement (DFARS) that addresses requirements for preventing unauthorized disclosure of export-controlled information and technology under DOD contracts (DFARS Case 2004-D010).
II. AAU and its member institutions are aware of and remain fully committed to fulfilling their responsibilities to ensure compliance with export control laws and regulations.

AAU institutions understand that export controls are a necessary component of national security. AAU universities are committed to complying with applicable export control rules and regulations; indeed, they have in recent years strengthened their efforts to ensure compliance with existing export control regulations.

Universities have taken such steps as:

1. issuing policy statements from the university administration concerning compliance with export control laws;
2. incorporating export control training into educational materials provided to campus research administrators and sponsored research directors;
3. undertaking a wide range of outreach activities on campus to ensure that faculty and key researchers understand the nature of export controls and are more aware of their responsibilities;
4. sending university staff to export control seminars and panel discussions;
5. designating specific research administrative staff as responsible for export control compliance; and
6. hiring outside legal counsel to ensure compliance.

These steps and others are contributing to a culture of compliance across university campuses.

III. AAU Concerns and Recommendations Regarding the Proposed DFARS Case

AAU commends DOD for reconsidering the first proposed rule, published in the Federal Register on July 12, 2005, and for issuing an entirely new proposed rule. Although the association has some concerns about this second proposed rule, the proposal is significantly improved from the original. We greatly appreciate the Department’s efforts to address concerns expressed by the university research community and, particularly, comments made by AAU in its comment letter of October 12, 2005 (http://www.aau.edu/research/AAUCommDODECrule101205.pdf).

In terms of specific improvements, we are pleased that the new rule has been modified to eliminate overly prescriptive provisions that went far beyond existing Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR). In particular, we are pleased that the proposed requirement for unique badging and segregated work areas for foreign nationals has been removed. We also appreciate that the new proposed rule addresses the concern raised by AAU about the “flow-down” of export-control contract clauses from commercial entities to university subcontractors. Finally, AAU appreciates that this new proposal more explicitly references National Security Decision Directive 189 (NSDD 189).
Even with these significant improvements, however, we still have some areas of concern regarding the proposed rule. To address these concerns AAU makes the following four recommendations:

1) **Eliminate proposed clause 252.204 70YY for fundamental research.**

We believe the inclusion of proposed clause 252.204 70YY, *Requirements Regarding Access to Export-Controlled Information or Technology—Fundamental Research*, contradicts the existing fundamental research exclusion and would cause confusion among contracting officers.

The inclusion of this clause in the proposed rule inappropriately implies that fundamental research can be export controlled and can require licenses. This assumption is incorrect. Under the fundamental research exclusion in EAR 734.3(b)(3)(ii), ITAR 120.11, and ITAR 125.1(a), if the work to be conducted under a contract is fundamental research, it is excluded from export controls regardless of whether the inputs and outputs of the research would otherwise be export controlled.

Accordingly, **the first determining factor for inserting an export control clause in a DOD contract should not be if the information or results from the research might be controlled now or in the future, but whether or not the work is fundamental research.** Export controls can not be applied, and export control language should not be included in a contract if the research is determined to be fundamental—that is research whose results are intended to be published and shared broadly within the scientific community.

**AAU therefore recommends removal of proposed clause 252.204 70YY.** We further question the value of including the additional 252.204.70ZZ clause in the rule and would encourage DOD to examine closely whether the ZZ clause is necessary.

2) **DOD should reserve the right to include clause 252.204 70XX in any contract at such point that the research being conducted is no longer fundamental in nature and therefore the fundamental research exclusion no longer applies. In such instances, universities should be allowed to opt out of continuing work under the contract.**

Instead of including a specific clause in contracts involving fundamental research, DOD should simply reserve the right to renegotiate the terms of any contract involving fundamental research. If the nature of the research changes and is determined no longer to be fundamental, the contract could be renegotiated and the XX clause included. Likewise, universities and other contractors should have the option to be released from any contract requirements at the point at which such research is no longer deemed fundamental and requires security controls or classification.

3) **Provide a stronger reference to, and explanation of, the fundamental research exclusion in the existing EAR and ITARA.**

While we appreciate the additional reference made to NSDD 189 in the proposed rule, the rule should contain additional references to the fundamental research exclusion in EAR 734.3(b)(3)(ii), ITAR 120.11, and ITAR 125.1(a). As currently written, the proposed rule suggests that the only basis for the fundamental research exclusion is NSDD 189. In fact, NSDD
189 merely defines fundamental research while the specific fundamental research exclusion language is in EAR and ITAR.

4) In all contracts where export controlled information is not expected to be used or produced, AAU recommends that DOD simply include language stating clearly that a contractor is responsible for complying with existing export control regulations in accordance with EAR and ITAR.

The proposed rule continues to assume that contracting officers can determine accurately when fundamental research might lead to export controlled results. AAU continues to doubt the ability of contracting and programming officers, even with appropriate training, to make such distinctions.

We therefore reiterate a point made in our comment letter on the initial proposed rule. Unless DOD will provide export controlled information to a contractor for performance of the work, or knows that export controlled information will be produced from a contract, the agency should merely remind contractors of their responsibility for complying with existing export controls requirements.

If contracting officers are charged with makings such determinations, they should be required to identify exactly which portions of the work are export controlled, including providing specific Export Control Classification Numbers (ECCNs) for each item of concern in the contract. In addition, DOD should set up a formal process for contractors to challenge such decisions made by contracting officers. And since DOD has no official interpretation or enforcement authority under the EAR and ITAR, AAU urges that the agency establish a mechanism for mandatory consultation with the responsible federal agency when a dispute arises over the insertion of an export control clause in a contract. In the case of EAR, consultation would take place with the Department of Commerce; under ITAR, consultation would occur with the Department of State.

IV. Conclusion

AAU continues to maintain that DOD clauses pertaining to export controls should place the burden of export controls compliance on the contractor. DOD should avoid turning its contracting and program officers into export control compliance officers. The only instances in which contracting officers should be involved in export control determinations are when the research to be performed is not fundamental and when the information required to conduct the research, or the research results, are known at the outset to require security controls or classification.

In instances where the research is fundamental and the work is therefore excluded from export controls, the only clause that should be included in contracts is one that reminds the contractor about the need to comply with existing export control regulations as specified in EAR and ITAR. Should the nature of the research change at any point in the process such that it is no longer deemed fundamental, both DOD and the university contractor or subcontractor should be allowed to renegotiate or discontinue the contract. This is particularly important to universities
whose campus policies might prohibit them from working on a contract that requires is publication restrictions.

In addition to AAU’s comments, we are aware that several of our member institutions have submitted their own individual comments in response to the NPRM, as have other higher education associations and scientific societies. These include the Council on Governmental Relations, the National Association of State Universities and Land Grant Colleges, the Association of American Medical Colleges, and the American Association for the Advancement of Science. In addition to our comments above, we would like to endorse and associate ourselves with these other statements.

Again, we very much appreciate having the opportunity to provide input on this very important matter.

With best regards,

Robert M. Berdahl
President