DEPARTMENT OF DEFENSE

48 CFR Parts 204, 235, and 252

[DFARS Case 2004-D010]

Defense Federal Acquisition Regulation Supplement;
Export Controlled Information and Technology

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule with request for comments. ---------------

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition
Regulation Supplement (DFARS) to address requirements for preventing
unauthorized disclosure of export-controlled information and technology
under DOD contracts.

DATES: Comments on the proposed rule should be submitted in writing t
the address shown below on or before September 12, 2005, to be
considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2004-D010,
using any of the following methods:
   Follow the instructions for submitting comments.
   Follow the instructions for submitting comments.
   E-mail: dfars@osd.mil. Include DFARS Case 2004-D010 in the
   subject line of the message.
   Fax: (703) 602-0350.
   Mail: Defense Acquisition Regulations Council, Attn: Ms.
   Amy Williams, OUSD (AT&L) DFAP (DAR), IMD 3C132, 3062 Defense Pentagon,
   Washington, DC 20301-3062.
   Hand Delivery/Courier: Defense Acquisition Regulations
   Council, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA
   22202-3402.
   All comments received will be posted to http://emissary.acq.osd.mil/dar/dfars.nsf

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, (703) 602-0328.

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SUPPLEMENTARY INFORMATION:

A. Background

This proposed rule contains a new DFARS Subpart 204.73, Export-Controlled Information and Technology at Contractor, University, and Federally Funded Research and Development Center Facilities, and associated contract clause. The proposed subpart provides general information on export control laws and regulations and requires contracting officers to ensure that contracts identify any export-controlled information and technology. The proposed clause is prescribed for use in solicitations and contracts for research and development or for services or supplies that require the export of export-controlled information or technology in the performance of the contract. The clause requires the contractor to-

- Comply with all applicable laws and regulations regarding export-controlled information and technology; and
- Maintain an export compliance program that complies with regulatory requirements.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

The proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because all contractors, including small entities, are already subject to export control laws and regulations. The requirements in this proposed rule are clarifications of existing responsibilities. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2004-DO10.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

List of Subjects in 48 CFR Parts 204, 235, and 252

Government procurement.

Michele P. Peterson,
Editor, Defense Acquisition Regulations System.

Therefore, DoD proposes to amend 48 CFR parts 204, 235, and 252 as follows:

1. The authority citation for 48 CFR parts 204, 235, and 252 continues to read as follows:


   PART 204--ADMINISTRATIVE MATTERS 2. Subpart
   204.73 is added to read as follows:

Subpart 204.73--Export-Controlled Information and Technology at Contractor, University, and Federally Funded Research and Development Center Facilities

Sec.
204.7301 Definition.
204.7302 General.
204.7303 Policy.
204.7304 Contract clause.

204.7301 Definition.

Export-controlled information and technology, as used in this
subpart, is defined in the clause at 252.204-70XX.

204.7302 General.

Export control laws and regulations restrict the transfer, by any means, of certain types of information and technology to certain foreign persons in the U.S. or abroad and to anyone (even U.S. citizens) in certain foreign countries, unless an exclusion from controls or a license exemption applies, or a license or other approval is obtained. Any transfer of non-excluded export-controlled information or technology to a foreign national or a foreign person anywhere in the world, including the United States, is considered an export to the home country of the foreign national or foreign person and any such transfer to U.S. citizens or foreign nationals in any foreign country is considered an export to that country. For additional information relating to restrictions on export-controlled information and technology, see PGI 204.7302.

204.7303 Policy.

The contracting officer shall ensure that DoD identifies in its contracts, Broad Agency Announcements, Requests for Proposals, and other forms of solicitations or funding mechanisms, any information and technology that, absent an applicable exclusion from controls or exemption from licensing requirements, may require a license or other government approval under U.S. export controls prior to the information’s and technology’s transfer (i) to nationals of those foreign countries for which the information and technology are controlled in the U.S. or abroad, or (ii) to anyone in those controlled countries. Each export-controlled technology or information shall be specifically identified. The contracting officer shall provide the Contractor with sufficient and appropriate information including Export Control Classification Numbers (ECCNs) and/or Munitions List categories to allow the Contractor to identify whether any export controlled technology or information will be provided to the Contractor in the work under the contract that is not subject to an exclusion from controls or a license exemption. Contracted fundamental research (DOD Instruction 5320.27, dated October 6, 1987) shall not be subject to the clause at 252.204-70XX.

204.7304 Contract clause.

Use the clause at 252.204-70XX, Requirements Regarding Access to Export-Controlled Information and Technology, only in those solicitations and contracts for research and development, services or supplies that pursuant to 204.7303, require the transfer of export-controlled information or technology in the performance of the contract, as determined by the Department of Commerce Bureau of Industry and Security and/or Department of State Directorate for Defense Trade Controls in consultation with the COTR and the contractor; provided, however, that an exclusion from controls or a license exemption does not apply.

PART 235--RESEARCH AND DEVELOPMENT

CONTRACTING 235.071 [Redesignated]

3. Section 235.071 is redesignated as section 235.072.

4. A new section 235.071 is added to read as follows:

235.071 Export-controlled information and technology at contractor, university, and Federally Funded Research and Development Center facilities.

For requirements relating to restrictions on export-controlled
PART 252--SOLICITATION PROVISIONS AND CONTRACT CLAUSES 5.

Section 252.204-70XX is added to read as follows:

252.204-70XX Requirements Regarding Transfer of Export-Controlled Information and Technology.

As prescribed in 204.7304, use the following clause:

Requirements Regarding Transfer of Export-Controlled Information and Technology (XXX 2005)

(a) Definition. Export-controlled information and technology, as used in this clause, means information and technology that is subject to, does not qualify for exclusions from, and may only be released to certain foreign nationals or foreign persons in accordance with, the Export Administration Regulations (15 CFR parts 730-774) or the International Traffic in Arms Regulations (22 CFR parts 120-130). Export-controlled information and technology does not include information excluded from control under the applicable regulations, such as, but not limited to, information arising out of or resulting from fundamental research and other information that is publicly available or in the public domain.

(b) Pursuant to 204.7304, the performance of this contract will require the Contractor to receive export-controlled information and technology as defined in 252.204-70XX(a). DoD will identify all such controlled information and technology through providing contractor with sufficient and appropriate information including Export Control Classification Numbers (ECCNs) and/or Munitions List categories.

(c) Contractor shall comply with all applicable laws and regulations regarding export-controlled information and technology which the Contractor receives in performing work under this contract, including, if required under the regulations, registration in accordance with the International Traffic in Arms Regulations.

(d) Contractor shall maintain an export compliance program that complies with regulatory requirements to the extent that the contractor receives information or technology under this contract that is subject to export controls and does not qualify for an exclusion from controls or for an exemption from licensing. In the event of a question, compliance with regulatory requirements shall be determined by the agency that administers the applicable export control regulations in consultation with the DoD contracting officer and the Contractor.

(e) Nothing in the terms of this contract is intended to change, supersede, or waive any of the requirements of, or any of the exclusions or licensing exemptions from, applicable and related Federal laws, Executive orders, and regulations, including but not limited to:

1. The Export Administration Act of 1979 (50 U.S.C. App. 2401 as extended by Executive Order 13222);
2. The Arms Export Control Act of 1976 (22 U.S.C. 2751);
3. The Export Administration Regulations (15 CFR parts 730 - 774);
4. The International Traffic in Arms Regulations (22 CFR parts 120-130);
6. DoD Industrial Security Regulation (DoD 5220.22-R);
7. National Security Decision Directive 189 (NSDD-189);
8. National Industrial Security Program Operating Manual (NISPOM) (DoD 5220.22-M); and
DoD Instruction 5230.27.

The Contractor shall include the substance of this clause, including this paragraph, only in those subcontracts for research and development, services or supplies that:

1. pursuant to 204.7303, require the transfer of export-controlled information; and
2. provided, however, an exclusion from controls or a license exemption does not apply.

(End of clause)


6. Sections 252.235-7002, 252.235-7003, 252.235-7010, and 252.235-7011 are amended in the introductory text by removing "235.07l'' and adding in its place "235.072'".

[FR Doc. 05-13305 Filed 7-11-05; 8:45 am] BILLING CODE 5001-08-P