September 19, 2008

Defense Acquisition Regulation Systems
Attn: Ms. Felisha Hitt
OUSD (AT&L) DPAP (DARS), IMD 3D139
3062 Defense Pentagon
Washington, D.C. 20301-3062

e-mail: dfars@osd.mil
Fax: 703-602-7887

Re: DFARS Case 2004—D010 (RIN 0750-AF13)
Defense Federal Acquisition Regulation Supplement; Export-Controlled Items

Dear Ms. Hitt:

On behalf of the Association of American Universities (AAU) and the Council on Governmental Relations (COGR), please find attached our response to the July 21, 2008 Federal Register Notice soliciting comments on the interim Defense Federal Acquisition Regulation Supplement (DFARS) rule addressing requirements for complying with export control laws and regulations when performing Department of Defense (DOD) contracts (RIN 0750-AF13).

Despite our concerns regarding the most recent version of the proposed DFARS clause, we want to express appreciation for DOD’s responsiveness to many of our previous concerns. We believe the dialogue has been mutually beneficial, and we hope that DOD will consider our comments and suggestions and modify the interim rule accordingly.

Should you have any questions regarding our comments, please contact Robert Hardy of COGR at 202-289-6655; e-mail: rhardy@cogr.edu, or Tobin Smith of AAU at 202-408-7500; e-mail: toby_smith@aau.edu.

Sincerely,

Robert M. Berdahl             Anthony P. DeCrappeo
President                 President
Association of American Universities  Council on Governmental Relations

Attachments:

1. Joint comments from AAU and COGR
2. Modified interim DFARS rule
3. Revised version of PGI 204-7302 and 7304
September 19, 2008

Defense Acquisition Regulation Systems
Attn: Ms. Felisha Hitt
OUSD (AT&L)DPAP (DARS), IMD 3D139
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Washington, D.C. 20301-3062

Subject: Joint Comments from the Association of American Universities (AAU) and the Council on Governmental Relations (COGR)

Re: DFARS Case 2004—D010 (RIN 0750-AF13)
Defense Federal Acquisition Regulation Supplement; Export-Controlled Items

AAU and COGR commented previously on the two earlier versions of this DFARS Case (DFARS Case 2004-D010). We appreciate the opportunities we have had to express our concerns about the proposed DFARS export control compliance clauses and are grateful that DOD has tried to be responsive to these concerns. As stated in the COGR comment letter of October 13, 2006, we believed the second proposed rule was a substantial improvement over the original version. We believe the interim rule issued on July 21, 2008 (73 FedReg 42274) is a further improvement.

However, we continue to have a number of serious concerns. These concerns are outlined below.

1) The rule is inconsistent with and does not reference departmental-wide guidance issued by the Under Secretary of Defense -- We commend DOD for the June 26 memorandum issued by the Under Secretary of Defense for Acquisition, Technology and Logistics on "Contracted Fundamental Research." We are concerned that the interim rule does not explicitly reference the memorandum and does not incorporate the guidance provided to DOD officials when contracting with universities for fundamental research. The June 26 memorandum should be referenced in the interim rule. If that is not possible, the policy statement in the memorandum should directly incorporate the guidance.

The June 26 memorandum reaffirms National Security Decision Directive (NSDD)-189 as national policy for controlling the flow of scientific information produced by federally funded fundamental research at universities. The memorandum states that "...DoD awards for the performance of fundamental research should, with rare exceptions, not involve classified items, information, or technology. Nor, with rare exceptions, should an award be managed or executed in such a manner that it becomes subject to controls under U.S. statutes, including export control (emphasis added). The performance of fundamental research, again with rare
exceptions, should not be managed in a way that it becomes subject to restrictions on the involvement of foreign researchers or, publication restrictions.” This memorandum provides a clear directive with respect to the acceptability of restrictions on fundamental research.

Without specifically referencing the June 26 memorandum guidance or directly incorporating its language, we believe the clauses in the interim rule are ambiguous and subject to misinterpretation inconsistent with the memorandum’s guidance, particularly regarding the applied research commentary included in the Federal Register Supplementary Information at Section A 2.b.(1). We suggest that the commentary be withdrawn or substantially revised before the final rule is published.

We are concerned that the commentary’s ambiguity will result in DOD contracting officers’ use of clause 252.204—7008 in discovery-focused applied research situations in a manner contrary to the clear intent of the DOD memorandum. We agree that some DOD-sponsored research that has the objective of developing advanced technologies for specific applications may be subject to export controls. However, the commentary discusses a transition point where fundamental research may evolve into more advanced applied research “specific enough” to involve export-controlled information or technology. We do not believe the authority for this statement exists in any other government or DOD issuance or regulation. Indeed, the June 26 memorandum instructs that fundamental research conducted in universities should be managed in such a manner as to prevent this transition, with exceptions requiring careful scrutiny and high level supervisory concurrence.

The June 26 memorandum also indicates that research funded by DOD Research, Development, Test and Evaluation Budget Activity 2 (Applied Research) performed on campus at universities is to be considered fundamental except “in those rare and exceptional circumstances where the 6.2-funded effort presents a high likelihood of disclosing performance characteristics of military systems or manufacturing technologies that are unique and critical to defense, and where agreement on restrictions have been recorded in the contract or grant.” These exceptional circumstances should be incorporated in the interim rule. Further, it is imperative to recognize the context of the research being conducted in an open university setting free of controls and restrictions—not the source of funding—as the most important factor in characterizing the research as fundamental. Also, we note that the export control regulations provide a broader definition of applied research than reflected in the interim rule (Section 204.7301), including in specific instances prototype design, development or fabrication (see ITAR 125.4(c)(3)). This should be clarified in the interim rule and accompanying DFARS Guidance.

2) The two new compliance clauses continue to reflect the false assumption that controls may apply to outputs of fundamental research -- The export control regulations provide that information or technology arising during or resulting from fundamental research is not subject to export controls (see EAR 734.3(b)(3)ii); ITAR 120.11; 125.1(a)). The two new compliance clauses carry forward the misconception that fundamental research may generate export controlled results. The rule fails to recognize the distinction between generating equipment or other tangible items that may be export controlled when they are actually exported abroad on the one hand, and technical information or data arising from fundamental research, where controls generally do not apply on the other (note that the generation of equipment or tangible items in the course of a fundamental research project does not subject the conduct or output of the research to export controls even if the items are controlled for actual export). The previous COGR comment letter noted our concern with the provision in the former 70YY(c) clause that if the Contractor “will generate…export-controlled information or technology, it shall notify the other party” (and either modify the contract to include the 70XX clause or negotiate a contract modification that eliminates performance of that part of the work). As we noted before, controls should apply
only when the government itself provides for already existing export-controlled technology to be given to a contractor as necessary for contract performance. We suggest that the clauses 252.204—7008 and 7009 otherwise be limited to the specific situation as discussed in the June 26 memo.

3) The definition of an export controlled item should clearly distinguish between controls on the treatment of equipment and tangible items compared to those on technical information -- We note that confusion and misapplication of export control rules will be created by including in the definition of an “export controlled item” both controlled equipment and other tangible items hand as well as controlled technical information. The export control regulations apply differently to these two categories. Export controls apply to the export abroad of both. However, export controls do not apply to the mere use or transfer of equipment or tangible items in the U.S. without providing defense services or related technical data. In our attached suggestions for particular changes in the rule, we do not change the definition, but we would be happy to work with DOD to do so.

The discussion in the DFARS Procedures, Guidance and Information (PGI) 204-7304 should be expanded to further discuss the above points. Procurements from universities for research contracts generally are for fundamental research (or involve only other publicly available, public domain or information otherwise excluded from controls). The fundamental research exclusion from export controls applies to the creation of information or technology at U.S. universities where the information is not subject to publication, dissemination or access restrictions. These points need to be emphasized in the PGI guidance. It also would be helpful and consistent with the June 26 memorandum for the PGI guidance to reflect that in contracts and subcontracts for work that is fundamental research, the clause at DFARS 252.204—7000 or other restrictions on the publication or dissemination of the results of fundamental research should not be used or flowed down.

4) DOD should clearly identify up front when they believe export controlled information and technology is involved in a university-based research project -- In our previous comments we noted the need for specificity in identifying the export-controlled information or technology involved in a research project. According to the commentary in the Federal Register Supplementary Information (Section A.3.), DOD rejected this in response to the concerns of the agencies that are responsible for export control enforcement. While the concerns are understandable, such concerns do not outweigh the benefits in security that will be reaped if DOD diligently identifies those portions of fundamental research projects which they believe may be export controlled. It is important to recognize that there may be procurements from universities for research and development that involve both export-controlled items, information or technology and fundamental research. For example, it is not unusual for commercially available ITAR-controlled defense articles to be used in DOD-funded fundamental research (e.g., inertial measurement units, autopilots). In such situations, it is important to clarify what existing export-controlled information or technology will be used in the university contract that is subject to the clause at 252.204-7008 and what part of the work is fundamental research subject to the 7009 clause.

While the above are our principal concerns with the interim rule, we also want to call DOD’s attention to two other aspects of the rule that need clarification.

1. To ensure that the applicability of the clauses is understood, the definition of EAR-controlled items should be revised by deleting the phrase "to foreign nationals" from the second sentence in 252.204-7008(a)(2) and 7009(a)(2). We understand that the intent of this sentence is to exclude from the definition of the term “items” commodities on the Commerce Control List (CCL) that are released or accessed solely within the United States, so that the 7008 clause is not required where the contract will require access to CCL commodities solely within the United States. However, as written the definition of items excludes only CCL commodities
released to foreign nationals in the United States, raising the implication that CCL commodities accessed in the United States by United States persons are included in the definition of items. The unintended consequence of this phrasing would be a requirement that the 7008 clause be included where US persons need access to CCL commodities in the US. Deletion of the phrase "to foreign nationals" from the definition of items would eliminate this implication.

2. Interim Clause 252.204-7009 provides for terminating the contract for the convenience of the government in the event that during the course of performance the contractor becomes aware that it will generate or need access to export-controlled items. The interim rule should also provide a termination for convenience provision for the contractor. Where the government exercises its unilateral right to modify a contract to include export control requirements, a contractor that is unable to accept an export controlled project, but accepted the agreement under the assumption that no export-controlled items will be involved should also have a right to terminate. We previously suggested as a model the Federal Acquisition Regulations (FAR) clause for contracts that require access to confidential, secret, or top secret information (FAR 52.204-2, Alternate I; see http://www.arnet.gov/far/current/html/52_200_206.html#wp1137568). This clause applies to research and development contracts with educational institutions and provides for termination for convenience by contractors under analogous circumstances - where a change in security requirements results in the inability of the contractor to continue performance. This should be added to the 7009 clause.

Attached please find a modified version of the interim DFARS rule that incorporates changes that address the concerns expressed above. We also have attached a revised version of PGI 204-7302 and 7304. We would be pleased to work with DOD on further changes to the DFARS to address the specific issues raised in our comments.
AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Interim rule with request for comments.

SUMMARY: DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address requirements for complying with export control laws and regulations when performing DoD contracts. The rule recognizes contractor responsibilities to comply with existing Department of Commerce and Department of State regulations. The rule adds two new clauses to be used when export-controlled items, including information or technology, are expected to be involved in the performance of a contract, or when there is a possibility that export-controlled items, including information or technology, may come to be involved during the period of performance of the contract.

ADDRESSES: You may submit comments, identified by DFARS Case 2004-D010, using any of the following methods:

- E-mail: dfars@osd.mil. Include DFARS Case 2004-D010 in the subject line of the message.
- Fax: 703-602-7887.

Comments received generally will be posted without change to http://www.regulations.gov, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Felisha Hitt, 703-602-0310.

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 890(a) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181). Section 890(a) requires DoD to prescribe regulations, not later than July 26, 2008, requiring...
DoD contractors providing goods or technology subject to export controls under the Arms Export Control Act or the Export Administration Act of 1979 to comply with those Acts and applicable regulations, including the International Traffic in Arms Regulations and the Export Administration Regulations. Comments received in response to this interim rule will be considered in the formation of the final rule.

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

Government procurement.

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

Therefore, 48 CFR Parts 204, 235, and 252 are amended as follows:

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

   **Authority:** 41 U.S.C. 421 and 48 CFR Chapter 1.

**PART 204—ADMINISTRATIVE MATTERS**

Subpart 204.73 is added to read as follows:

**Subpart 204.73—Export-Controlled Items**

Sec.

204.7300 Scope of subpart.

204.7301 Definitions.

204.7302 General.

204.7303 Policy.

204.7304 Procedures.

204.7305 Contract clauses.

**Subpart 204.73—Export-Controlled Items**

2. 204.7300 Scope of subpart.

This subpart implements Section 890(a) of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181).

**204.7301 Definitions.**

As used in this subpart—

*Applied research* means the effort that—

1. Normally follows basic research, but may not be severable from the related basic research;
2. Attempts to determine and exploit the potential of scientific discoveries or improvements in technology, materials, processes, methods, devices, or techniques; and
3. Attempts to advance the state of the art.

Applied research also can include the design, development and fabrication of prototypes and new processes to meet specific requirements. See PGI 204.7304 (a)(i).
Export-controlled items is defined in the clauses at 252.204-7008 and 252.204-7009. Fundamental research, as defined by National Security Decision Directive (NSDD) 189, means basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community. This is distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons.

204.7302 General.
Export control laws and regulations restrict the transfer, by any means, of certain types of items to unauthorized persons. The International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR) establish these restrictions. See PGI 204.7302 for additional information.

204.7303 Policy.
(a) It is in the interest of both the Government and the contractor to have a common understanding of export-controlled items expected to be involved in contract performance.
(b) The requiring activity shall review each acquisition to determine if, during performance of the contemplated contract, the contractor is expected to generate or require access to export-controlled items. See PGI 204.7304 for more information.
(c) The Department of Defense fully supports free scientific exchanges and dissemination of research results to the maximum extent possible. The requiring activity shall take appropriate steps to ensure that fundamental research activities are not managed or executed in such a manner that they become subject to controls under U.S. statutes, including export control. This includes applied research performed on campus at universities except in those rare and exceptional circumstances where the research presents a high likelihood of disclosing performance characteristics of military systems or manufacturing technologies that are unique and critical to defense, and where agreement on restrictions has been recorded in the contract. Such exceptions require review and concurrence at defense agency director and/or service acquisition executive levels.

204.7304 Procedures.
(a) Prior to issuance of a solicitation for research and development, the requiring activity shall notify the contracting officer in writing, as applicable, that—
(1) Export-controlled items are expected to be involved; and/or
(2) All or a portion of the work is fundamental research, and specify which, if any, of the tasks in the work are not fundamental research and should be included in 7304(a)(1).
(b) Prior to issuance of a solicitation for supplies or services, the requiring activity shall notify the contracting officer in writing when—
(1) Export-controlled items are expected to be involved; or
(2) The requiring activity is unable to determine that export-controlled items will not be involved. See PGI 204.7304 for guidance regarding this notification requirement.

204.7305 Contract clauses.
(a) Use the clause at 252.204-7008, Requirements for Contracts Involving Export-Controlled Items, in solicitations and contracts when the requiring activity provides the
notification at 204.7304(a)(1) or (b)(1), indicating that export-controlled items are expected to be involved in the performance of the contract.

(b) Use the clause at 252.204-7009, Requirements Regarding Potential Access to Export-Controlled Items, in solicitations and contracts—
(1) With sub-clause 7009(bA) for work that is fundamental research when the notice in 7304(a)(2) is given; or
(2) With sub-clause 7009(bB) and (c) for supplies and services, when the requiring activity provides the notification at 204.7304(b)(2).

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 items.
For requirements regarding access to export-controlled items, see Subpart 204.73.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES
5. Sections 252.204-7008 and 252.204-7009 are added to read as follows:

252.204-7008 Requirements for contracts involving export-controlled items.
As prescribed in 204.7305(a), use the following clause:

REQUIREMENTS FOR CONTRACTS INVOLVING EXPORT-CONTROLLED ITEMS
(JUL 2008)
(a) Definition. Export-controlled items, as used in this clause, means items subject to the Export Administration Regulations (EAR) (15 CFR Parts 730-774) and identified on the Commerce Control List (CCL) at 15 CFR 774 or subject to the International Traffic in Arms Regulations (22 CFR Parts 120-130) and identified on the US Munitions List at 22 CFR 121 or otherwise covered by ITAR. The term includes:
(1) Defense items, defined in the Arms Export Control Act, 22 U.S.C. 2778(j)(4)(A), as defense articles, defense services, and related technical data that are not in the public domain or otherwise excluded from ITAR controls. The term “defense items” includes technology and software that is "required for" or "directly related to" defense items (as those terms are used in 22 CFR 120.10(a)(1) and 120 CFR 121.8(f)) and that is not in the public domain as defined in 22 CFR 120.11.
(2) Items, defined in the EAR as “commodities, software, and technology,” terms that are also defined in the EAR, 15 CFR 772.1 that are not publicly available or otherwise excluded from EAR controls. Regarding access to items subject to the EAR within the United States, “items” only include technology and software source code (and not commodities) subject to the EAR and not publicly available as defined in 15 CFR 734.3(b)(3).
(b) The parties anticipate that, in the performance of this contract, the Contractor will generate or need access to export-controlled items.
(c) The Contractor shall comply with all applicable laws and regulations regarding export-controlled items, including, when applicable, the requirement for contractors to register with
the Department of State in accordance with the ITAR. The Contractor shall consult with the Department of State regarding any questions relating to the ITAR and with the Department of Commerce regarding any questions relating to the EAR.
(d) The Contractor's responsibility to comply with all applicable laws and regulations regarding export-controlled items (including commodities) exists independent of, and is not established or limited by, the information provided by this clause.
(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 from, applicable Federal laws, Executive orders, and regulations, including but not limited to—
(1) The Export Administration Act of 1979, as amended (50U.S.C. App. 2401-2420);
(2) The Arms Export Control Act of 1976 (22 U.S.C. 2751 et seq.);
(4) The Export Administration Regulations (15 CFR Parts 730-774);
(5) The International Traffic in Arms Regulations (22 CFR Parts 120-130);
(6) Executive Order 13222, as extended;
(9) DoD Industrial Security Regulation (DoD 5220.22-R); and
(10) June 26, 2008 - Under Secretary (Acquisition, Technology, and Logistics) Memorandum for Secretaries of Military Departments On the Subject of Contracted Fundamental Research.
(f) The Contractor shall include the substance of this clause, including this paragraph (f), in all subcontracts that are expected to involve access to or generation of export-controlled items.

(End of clause)

252.204-7009 Requirements regarding potential access to export controlled items.

As prescribed in 204.7305(b), use the following clause:

REQUIREMENTS REGARDING POTENTIAL ACCESS TO EXPORT-CONTROLLED ITEMS (JUL 2008)

(a) *[Definition.]* Export-controlled items, as used in this clause, means items subject to the Export Administration Regulations (EAR) (15 CFR Parts 730-774) and identified on the Commerce Control List (CCL) at 15 CFR 774 or subject to the International Traffic in Arms Regulations (22 CFR Parts 120-130) and identified on the US Munitions List at 22 CFR 121 or otherwise covered by ITAR. The term includes:
(1) Defense items, defined in the Arms Export Control Act, 22 U.S.C. 2778(j)(4)(A), as defense articles, defense services, and related technical data that are not in the public domain or otherwise excluded from ITAR controls. The term “defense items” includes technology or source code that is "required for" or "directly related to" defense items (as those terms are used in 22 CFR 120.10(a)(1) and 120 CFR 121.8(f)) and that is not in the "public domain" as defined 22 CFR 120.11.
(2) Items, defined in the EAR as “commodities, software, and technology,” terms that are also defined in the EAR, 15 CFR 772.1 that are not publicly available or otherwise excluded from EAR controls. Regarding access to items subject to the EAR within the United States, “items”
only include technology and software source code (and not commodities) subject to the EAR and not publicly available as defined at 15 CFR 734.3(b)(3) of that Part.

[Use either (bA or bB, as directed at 204.7305(b)]

(bA) The parties anticipate that performance of this contract will involve only fundamental research [except for certain activities in the following tasks: ....].

(bB) The parties anticipate that, in the performance of this Contract, the Contractor will not generate or need access to export controlled items.

(c) If, during the performance of this contract, the Contractor becomes aware that the Contractor will need to generate or have access to export-controlled items—

(1) The Contractor shall notify the Contracting Officer in writing; and

(2) The Contracting Officer will expeditiously—

(i) Modify the contract to include the Defense Federal Acquisition Regulation Supplement clause 252.204-7008, Requirements for Contracts Involving Export-Controlled Items, to apply to those tasks or activities that are subject to export controls; provided that in the event of any such modification, Contractor shall have termination rights as specified in Alternate I of Federal Acquisition Regulation 52.204--2;

(ii) Negotiate a contract modification that eliminates the requirement for performance of work that would involve export-controlled items; or

(iii) Terminate the contract, in whole or in part, as may be appropriate, for the convenience of the Government, in accordance with the Termination clause of the contract, or

(iv) Terminate the contract at the request of the Contractor, as specified in Alternate I to Federal Acquisition Regulation 54.204-2 for a change in security requirements for research and development contracts with educational institutions.

(d) The Contractor's responsibility to comply with all applicable laws and regulations regarding export-controlled items (including commodities) exists independent of, and is not established or limited by, the information provided by this clause

(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 from applicable Federal laws, Executive orders, and regulations.

(f) The Contractor shall include the substance of this clause in all subcontracts for work that is fundamental research.

(End of clause)

252.235-7002, 252.235-7003, 252.235-7010, and 252.235-7011

[Amended]

6. Sections 252.235-7002, 252.235-7003, 252.235-7010, and 252.235-7011 are amended in the introductory text by removing “235.071” and adding in its place “235.072”.

[FR Doc. 2008-16673 Filed 07/18/2008 at 8:45 am]
PGI 204.73—EXPORT-CONTROLLED ITEMS

PGI 204.7302 General.

(1) DoD Focal Point on Export Controls.

(i) Within DoD, the focal point on export controls is the Defense Technology Security Administration (DTSA). Official authorities and responsibilities of DTSA are established in DoD Directive 5105.72.

(ii) Initial DoD acquisition workforce questions regarding the applicability of the EAR or the ITAR to specific procurements or items, or interpretation of DoD issuances regarding export controls, may be directed to the DTSA Policy Directorate, by phone at 703-325-3637 or by visiting the DTSA Policy Directorate web site at: [http://www.defenselink.mil/policy/sections/policy_offices/dtsa/index.html](http://www.defenselink.mil/policy/sections/policy_offices/dtsa/index.html).

(2) Regulations. The Department of State and the Department of Commerce are the lead agencies responsible for regulations governing the export of commercial and defense articles:

(i) The International Traffic in Arms Regulations (ITAR), issued by the Department of State, control the export of defense-related articles and services, including technical data, ensuring compliance with the Arms Export Control Act (22 U.S.C. 2751 et seq.). The U.S. Munitions List (USML) identifies defense articles, services, and related technical data that are inherently military in character and could, if exported, jeopardize national security or foreign policy interests of the United States.


(B) The United States Munitions List (USML) is part of the ITAR, in 22 CFR Part 121, and is available at the above web sites.

(C) The Department of State is responsible for compliance with the ITAR. Depending on the nature of questions you may have, you may contact the following Department of State office to obtain additional information:

U.S. Department of State
Bureau of Political Military Affairs
Directorate of Defense Trade Controls
(D) Contracting officers should not answer any questions a contractor may ask regarding how to comply with the ITAR, unless the Department is providing existing listed export controlled items, which may include controlled equipment or other tangible items as well as controlled information or technology, to a contractor. In that case, references to the specific listing shall be provided to the contractor. If asked, the contracting officer should direct the contractor’s attention to paragraph (c) of the clause at DFARS 252.204-7008 and may inform the contractor that the Department of State publishes guidance regarding ITAR compliance at http://www.pmddtc.state.gov/compliance.htm.

(ii) The Export Administration Regulations (EAR), issued by the Department of Commerce, control the export of dual-use items, including commodities, software, and technology. Many items subject to the EAR are set forth by Export Control Classification Number on the Commerce Control List.


(C) The Department of Commerce is responsible for compliance with the EAR. Depending on the nature of questions you may have, you may contact the following Department of Commerce office to obtain additional information:

U.S. Department of Commerce
Bureau of Industry and Security
Office of Exporter Services (OExS)
OExS Hotline: 202-482-4811.

(D) Contracting officers should not answer any questions a contractor may ask regarding how to comply with the EAR unless the Department is providing existing listed export controlled items, which may include controlled information or technology as well as controlled equipment or other tangible items, to a contractor. In that case, references to the specific listing shall be provided to the contractor. If asked, the contracting officer should direct the contractor’s attention to paragraph (c) of the clause at DFARS 252.204-7008 and may inform the contractor that the Department of Commerce publishes guidance regarding EAR compliance at http://www.bis.doc.gov/.

(i) NSDD 189 establishes a national policy that, to the maximum extent possible, the products of fundamental research shall remain unrestricted. NSDD 189 provides that no restrictions may be placed upon the conduct or reporting of federally funded fundamental research that has not received national security classification, except as provided in applicable U.S. statutes. Fundamental research, other publicly available, public domain information or technology, or information or technology otherwise excluded from controls are defined in the ITAR (see 22 CFR 120.10, 11, and 125.1) and the EAR (15 CFR 734.3(b)(3)) and are not subject to export controls. As a result, contracts confined to the performance of unclassified fundamental research generally do not involve any export-controlled items, information, or technology.

(ii) NSDD 189 does not take precedence over statutes. NSDD 189 does not exempt or exclude any research, whether basic, fundamental, or applied, from statutes that apply to export controls such as the Arms Export Control Act, the Export Administration Act of 1979, as amended, or the U.S. International Emergency Economic Powers Act, or the regulations that implement those statutes (the ITAR and the EAR), except as authorized in the regulations. Thus, if an export-controlled item, information, or technology, is used to conduct research, the export control laws and regulations apply to the controlled item, information, or technology.

(iii) NSDD 189 is available at http://www.fas.org/irp/offdocs/nsdd/nsdd-189.htm.


(5) Other DoD Issuances. Other DoD issuances that address export control matters include those listed below. Except as otherwise noted, these issuances are available at http://www.dtic.mil/whs/directives/.


PGI 204—Administrative Matters

- DoD Directive 5105.72, Defense Technology Security Administration (DTSA).
- DoD Publication 5200.1-M, Acquisition Systems Protection Program.
- DoD Instruction 5230.27, Presentation of DoD-Related Scientific and Technical Papers at Meetings.
- Under Secretary (Acquisition, Technology, and Logistics) Memorandum for Secretaries of the Military Departments on the subject of contracted Fundamental Research available here provides clarifying guidance to ensure that the Department of Defense will not restrict the conduct or results of fundamental research, unless such research is classified for national security reasons, or otherwise required by statute, regulation, or Executive Order.

PGI 204.7304 Procedures.

The requiring activity shall review each acquisition to determine if, during performance of the contemplated contract, the contractor is expected (i) to generate or acquire export controlled equipment or other tangible items (because export controls will apply to their actual export abroad, but not to the mere use or transfer of such items in the U.S. without providing defense services or related technical data) or (ii) require acquisition or access to already existing export-controlled technical information or software code (sometimes referred to as “information or technology”) that is not covered by fundamental research or other exclusions from export controls (because export controls may apply in the U.S. as well as to their export abroad) or (iii) will generate or otherwise
involve export controlled information or technology not covered by fundamental research or other exclusions from controls (because export controls may apply in the U.S. as well as to their export abroad).

The contractor has full information and controls whether the prerequisites for application of fundamental research or other exclusions from controls will be met. Consequently, the contractor should have the primary responsibility for determining whether the prerequisites will be met for exclusions. Advice from the federal agency that administers any relevant export controls may be sought if the contracting officer or other Department of Defense official questions the contractor’s determination.

(a)(i) Procurements from universities for research and development contracts, whether involving basic or applied research, generally are fundamental research, or involve only publicly available information or technology or public domain information or technology; and are not export controlled. In contracts or subcontracts for work that is fundamental research, do not use or flow down the clause at 252.204-7000 or other restrictions on the access to, or publication or dissemination of results of the fundamental research. (Including such restrictions would cause a fundamental research project to become controlled when it would not otherwise be controlled.)

(Note that a fundamental research project may involve the use of existing export controlled equipment or tangible items, or the development of such controlled equipment or items. Contractors must comply with export control laws when exporting such equipment or tangible items abroad, but that does not subject the project to export controls in the U.S. Also, the fundamental research exclusion from controls applies to the creation of information or technology in the U.S. on a university campus where the information or technology is not subject to publication restrictions, or access and dissemination restrictions. However, when a project involves the use of already existing export controlled information or technology that is not subject to exclusions from controls, export controls apply to the transfer of that information or technology in the U.S. to any national of a country for which the information or technology is controlled, as well as to the export abroad of that information or technology to a country or a national of a country for which the information or technology is controlled. An example of already existing controlled information is existing controlled information provided by DOD to the contractor.

Note also that under the export control regulations (ITAR; 22 CFR125.4(c)(3)) “applied research” can include the systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design, development, and improvement of prototypes and new processes to meet specific requirements).

(ii) There may be instances in procurements from universities for research and development contracts that involve both export-controlled items, including information or technology, and work under the contract that is fundamental research or otherwise excluded from controls. In such cases, the Contracting Officer should coordinate with the Contracting Officer’s Technical Representative and the university to determine (a) what export-controlled equipment or tangible items will be used or generated and what already existing export-controlled information or technology will be used in the university contract that are subject to the clause at 252.204-7008, and (b) what part of the work is fundamental research subject to the clause at 252.204-7009. The university should be notified of this determination.
(iii) There may be instances in procurements from industry for research and development contracts in which universities participate as subcontractors. Unless there are compelling reasons (see 204.7303 (c)) to place controls on some applied research, such subcontracts should be managed or executed in a manner that does not cause them to become subject to export controls and does not cause them to become subject to restrictions on the involvement of foreign researchers, or publication or access and dissemination restrictions.

(b)(i) For certain procurements of supplies or services, the requiring activity will know that export-controlled items, including information or technology, will not be involved. In such cases, the requiring activity does not have to provide a notification to the contracting officer. A few examples of where this situation would exist include procurements of mowing services, painting services, and office supplies.

(ii) There may be instances where the requiring activity is not initially aware that the contractor will generate or need access to export-controlled items, including information or technology, during the performance of a contemplated contract, yet the requiring activity recognizes that the nature of the work is such that the situation could change during contract performance. For these procurements, the requiring activity must notify the contracting officer in writing that it is unable to determine that export-controlled items, including information or technology, will not be involved. Information or technology that is not subject to publication, or access and dissemination restrictions and is generated at a U.S. University generally is not subject to export controls.