

AAU Association of American Universities
COGR Council on Governmental Relations

October 18, 2012

General Services Administration
Regulatory Secretariat (MVCB)
ATTN: Hada Flowers
1275 First Street NE, 7th Floor
Washington, D.C. 20417

RE: Response to FAR Case 2011-020

Dear Ms. Flowers:

The Association of American Universities (AAU) is an association of 59 U.S. and two Canadian preeminent research universities organized to develop and implement effective national and institutional policies supporting research and scholarship, graduate and undergraduate education, and public service in research universities. The Council on Governmental Relations (COGR) is an association of 190 U.S. research universities and their affiliated academic medical centers and research institutes that concerns itself with the impact of federal regulations, policies and practices on the performance of research and other sponsored activities conducted at its member institutions.

The proposed rule cites the Advance Notice of Proposed Rulemaking (ANPR) proposed by DOD on March 3, 2010 (75FR9563) for the DFARS (Case 2008-D028, "Safeguarding Unclassified Information"). COGR and AAU extensively commented on the proposed DFARS rule on May 3, 2010. The FAR Notice states that public comments on the proposed DFARS were considered in drafting the proposed FAR rule.

The DFARS rule previously proposed contained an exception for solicitations and contracts for fundamental research. The proposed FAR rule contains no such exception. We appreciate that to some extent the proposed FAR rule has a different focus from that of the previous DFARS ANPR. Also, most of our member institutions have at least first level information technology security measures in place within the systems that they normally use for storing and processing data that require protection which appear to meet most of the Basic Safeguarding requirements.

However, we are concerned about the broad potential scope of the information subject to these requirements. The scope of the proposed rule is for "...information systems that contain information provided by or **generated for** the Government (other than public information) that will be resident on or transiting through contractor information systems" (**emphasis added**). The proposed rule cites the Federal Information Security Management Act (FISMA) of 2002 as the authority for imposing information security requirements on federal contractors. The experience of our member institutions over the past 10 years is that agencies have tended to broadly expand FISMA requirements to information developed under federal contracts regardless of whether the information is a deliverable under the contract. Examples include data exchanged among

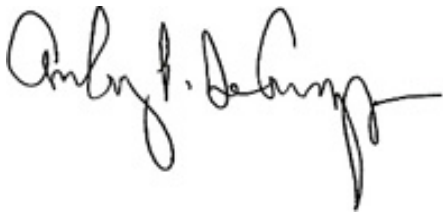
researchers generated under a federal contract that is not itself a deliverable or otherwise required under the contract.

Obviously affording such a broad scope to the requirements significantly increases the compliance burden for contractors. In the case of our member institutions, desktop and personal electronic devices that individual researchers use under a covered contract would have to be inventoried and assessed to ensure that they are utilizing the appropriate FISMA-compliant technologies. This leads to increased costs and burdens. We also are concerned that some of the terminology used in the proposed FAR rule is vague and could lead to further compliance issues (e.g. “best level of security available;” “reasonable assurance that access is limited”). We raised similar concerns with regard to the previous DOD ANPR.

For these reasons, we urge the FAR Councils to consider exempting contracts for fundamental research from the requirements except in unusual circumstances, as in the DOD ANPR. We also suggest the scope of the clause be limited by changing the phrase “generated for” to “delivered to” in the proposed 52.204—XX(b) and (c) and the prescriptions at FAR 4.1702 and 1703. Alternatively, the definitions in 52.204-XX(a) and 4.1701 could be expanded to include a definition of “generated for” which makes clear that the information must be a deliverable under the contract and/or a contract requirement. This would help limit the applicability of the proposed FAR rule to incidental data that might be developed under the contract but not generated directly on behalf of the agency.

We appreciate the opportunity to comment.

Sincerely,



Anthony DeCrappeo
President
Council on Governmental Relations



Hunter R. Rawlings III
President
Association of American Universities