AAU *Association of American Universities*
COGR *Council on Governmental Relations*

August 16, 2011

Defense Acquisitions Regulations System
Attn: Mr. Julian Thrash
OUSD (AT&L) DPAP (DFARS)
Room 3B855, 3060 Defense Pentagon
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 June 29, 2011 Federal Register Notice of Proposed Rulemaking on Safeguarding Unclassified DoD information (DFARS Case 2011 D039).

AAU represents 59 leading U.S. public and private research universities and is devoted to maintaining a strong national system of academic research and graduate and undergraduate education. COGR is an association of over 180 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 our long working relationship with the Department of Defense (DoD) and the responsiveness shown by the Department to concerns we have raised in the past about other proposed DFARS rules. We particularly appreciate that in the subject DFARS Case, DoD has responded to the concerns we previously expressed about the prescription contained in the previous ANPR possibly leading to inappropriate use of the 7000 clause in DoD contracts for fundamental research, which is in contravention of DoD guidance on contracted fundamental research. As noted in our response to the ANPR, a core value of U.S. universities is the freedom to conduct research and disseminate information in an open and freely accessible manner. For that reason, many universities refuse to accept sponsor restrictions that limit their ability to publish or restrict the participation of foreign nationals in research, which leads to their refusal to conduct research for DoD or other sponsors that are subject to these types of restrictions.

The Department has recognized these concerns and addressed them in two memoranda on fundamental research, the most recent being the memorandum issued on May 24, 2010 by Dr. Ashton Carter, the Under Secretary of Defense for Acquisition, Technology and Logistics. That memorandum provides that in accordance with National Security Decision Directive 189, the performance of contracted fundamental research should not be managed in a way that it becomes subject to publication restrictions, and that DoD must not place restrictions on subcontracted unclassified research that has been scoped, negotiated, and determined to be fundamental research.

<u>Fundamental Research Exemption from Disclosure Restrictions (252.204—7000 ((b)(3))</u>

We were pleased to see that the fundamental research exemption from disclosure restrictions in the proposed DFARS rule (252.204—7000 (b)(3)) uses language similar to the May 24, 2010 memorandum. It removes from

the definition of nonpublic information any information that "results from or arises during the performance of a project that has been scoped, negotiated, and determined to be fundamental research within the definition of National Security Decision Directive 189 according to the prime contractor and research performer and certified by the contracting component" [and not subject to statutory or other restrictions]. This new language removes ambiguities that concerned us with the previous ANPR prescription, and we therefore view it as a significant improvement. However, we are concerned that this language appears to require the prime contractor to concur in the determination that the project is fundamental research. It has been the experience of our member institutions that prime contractors frequently do not want the responsibility of making such determinations, nor are they familiar enough with the definitions of fundamental research to do so effectively. We suggest that the determination be limited to the research performer and contracting component. This could be accomplished by changing (b)(3) in the proposed revised 7000 clause to "….(NSDD) 189 by the research performer and contracting component with the knowledge of the prime contractor, and that is not subject to …" This also could be accomplished by adding a provision that would allow institutions to designate an activity at the proposal stage as fundamental research, and then include a directive in the clause for the prime contractor to review and submit to the DoD contracting officer for final determination.

We also are concerned that the definition of DOD information in 252.204--7000(a)(2)(ii) does not specifically exempt fundamental research. This could create confusion as to the scope of the exemption. We suggest that "(unless exempted in (b) below)" be added at the end of (a)(2) (ii). We also note that in (b), "any unclassified information" appears redundant to "any unclassified DoD information" that precedes it. One additional suggestion is to incorporate the May 24, 2010 memorandum specifically into the DFARS Procedures, Guidance and Information (PGI) system. The memorandum currently is not specifically incorporated in the DFARS, which makes its status as acquisition guidance to DoD contracting officers somewhat tenuous. We assume that DoD plans to develop a PGI for the proposed 204.74 rule, and that would appear to provide an obvious venue for the memorandum. We note that a wide variety of other guidance and directives are included in the DFARS PGI.

Scope of "DoD Information" 252.204—7000 (a)(1) and (2)

One of our principal concerns with the previous ANPR was the broad scope of information subject to the definition of "DoD information." Unfortunately, that concern remains with the proposed rule. The revised clause (252.204—7000 (a)) provides that DoD information is any nonpublic information that has not been cleared for public release in accordance with DoD Directive 5230.09 or that is provided by or on behalf of DoD to the contractor (or subcontractor) or collected, developed, received, transmitted, used, or stored by the Contractor (or subcontractor) in support of a DoD activity. This language is identical to that used in the previous ANPR. We previously expressed concern that this expansive definition would lead to greatly increased use of the 7000 clause by DoD contracting officers in solicitation and contract terms and conditions. The current 252.204—7000 clause prescription does not contain the concept of "DoD information." The 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 our view DoD should avoid adopting a different term in advance of the government-wide guidance that we understand is being developed by the National Archives and Records Administration.

Basic Safeguarding Clause (252.204—70XX)

The distinction in (a) of this clause between "DoD information" and "Government information" is not clear. We suggest that all references to "unclassified government information" in the clause be changed to DoD information since that is the subject of the clause. It should clearly focus on DoD information, as is the case with the Enhanced Safeguarding clause. Otherwise the scope of this clause is unclear, and could be read to apply to information received by the contractor from other government sources with no relationship to the DoD activity.

We concur with DoD that the protective measures in the Basic Safeguarding clause (252.204-70XX) are routine for most businesses, including our member institutions. However, we suggest that a parenthetical sentence be added to 204.7404 to make it clear that the security provisions of 252.204-70XX are not applicable to projects using public domain information or to projects scoped and approved as fundamental research as defined in 252.204-7000 (b)(3).

Enhanced Safeguarding Clause (204.7402(d)(2); 252.204—70YY)

The DoD information requiring enhanced safeguarding is defined broadly to include several categories of information designated by various DoD directives (204.7402 (d)(2); 252/204—70YY(c)). As noted above, the linkage between this definition and internal DoD guidance is of concern. Reliance on such internal DoD guidance was a major concern with the previous ANPR and a concern which, in our view, DoD has still not adequately addressed in the proposed rule. This clause imposes substantial compliance burdens on contractors. Furthermore, contractors may not be aware that the information will be subject to these controls until issuance of the contract with the 70YY clause requirements. In accordance with the clear intent of NSDD 189, we do not believe that unclassified information should be subject to this degree of control. The requirements appear to us to be very similar to those that apply to classified information.

All of the standards required by the Enhanced Safeguarding clause cannot be met in the general computing environment of our member institutions and will require that affected systems and data be physically or virtually segregated. At a minimum, this means contract participants would need to use separate computers or separate "virtual machines" when doing contract related work. These separate systems would need to be on highly restricted and internal-only networks. A separate computer system is similar to the manner in which classified information is treated. Most of our institutions typically do not handle classified information, and would be required to invest substantial funds to ensure compliance with the requirements. It is likely that many universities would not want to engage in these types of projects involving DoD information given the increased costs and associated burdens. If unclassified information must be subject to this level of control, DoD needs to consider making additional funding available to universities and other contractors to defray the substantial costs associated with establishing and maintaining these systems.

The application of the enhanced safeguarding requirements in the clause (252.204—70YY) (d)(2) is of additional concern. It could be read as applying the NIST controls to the contractor's entire information technology system. As we already mentioned, it is our understanding that the intent is to apply these controls only to those separate systems where DoD information resides. While we do not expect our member institutions to routinely receive or accept this clause, any application of the NIST controls throughout the institution would result in enormous administrative costs and burdens. Of course, we expect that where DoD

information requires enhanced safeguarding, it would reside on a special protected system. We suggest that the phrase "where DoD information requiring enhanced safeguarding resides" be added at the end of the first sentence of (d)(2) to help to clarify the actual intent.

Once again, we would like to express our appreciation to DoD for its responsiveness to the concerns we previously raised about the 7000 clause. The additional clarity provided by the revised definition of fundamental research in the proposed rule should substantially reduce the instances in which our member institutions receive this clause. However, we are still concerned that there will be situations where there is lack of agreement that a project is fundamental research, or instances in which institutions will receive the clause in contracts when carrying out projects for DoD involving special studies or other activities that are not fundamental research. In such cases, the concerns raised above about the scope of the information subject to the requirements and the potential compliance burdens will apply. Therefore, we urge DoD to consider the clarifications suggested in this comment letter. We would further ask that the Department examine the appropriateness of applying increased controls, particularly the enhanced security controls, to unclassified information, especially given that government-wide guidance still is pending.

We very much appreciate the opportunity to comment and look forward to continuing to work closely with the Department on this and other matters of mutual interest to our universities and the DoD.

Sincerely,

Anthony DeCrappeo
President
Council on Governmental Relations

Hunter R. Rawlings
President
Association of American Universities

Cc:

The Honorable Zachary Lemnios, Assistant Secretary for Research and Engineering, U.S. Department of Defense

Dr. Robin Staffin, Director of Basic Research, U.S. Department of Defense