

August 29, 2017

**Submitted via U.S. Mail and Regulations.gov**

Defense Acquisition Regulations System  
Attn: DFARS Subgroup RRTF  
OUSD (AT&L)DPAP/DARS  
Room 3B941, 3060 Defense Pentagon  
Washington, DC 20301-3060

**Re: DFARS-RRTF-2017-01**

The [Association of American Universities \(AAU\)](#) and the [Council on Governmental Relations \(COGR\)](#) appreciate the opportunity to comment on DFARS solicitation provisions and contract clauses that may be appropriate for repeal, replacement, or modification as part of the Department of Defense implementation of Executive Order 13777, “Enforcing the Regulatory Reform Agenda.”

We very much appreciate DOD’s responsiveness over the years to concerns the university community has raised with respect to DFARS 252.204—7000, and modifications made last year to address our concerns. Unfortunately, the revised DFARS 252.204-7000 clause includes a statement in parentheses that fundamental research “...by definition cannot involve any covered defense information...”

From correspondence with DOD we understand that the revision sought to clarify that fundamental research (characterized by unrestricted dissemination of information) and covered defense information (dissemination restrictions) cannot coexist on the same project. When the DFARS clause revision was issued last October, the discussion stated “A contract or project that is appropriately scoped as fundamental research will not contain any covered defense information.” It also stated that fundamental research determinations must “ensure that it is clear that no covered defense information is involved when making a fundamental research determination” (81 FR 72986).

This is particularly problematic because the definition of “covered defense information” in the DFARS 7012 clause is now broader and encompasses both “controlled technical information” and “other information” described in the NARA CUI Registry, which potentially impacts the exclusion in subsection (a)(3) of the DFARS 7000 clause. By definition “controlled technical information” is technical information with military or space application that is subject to access or disclosure controls. “Other information” is information subject to other CUI Registry controls such as Privacy controls (e.g. Health Information or Student Records). It is possible for fundamental research to take place using both types of information as background information only, with the intention of unrestricted dissemination of the research results. For example, one of our institutions reported receiving funding for DARPA projects where the Principal Investigator attends program meetings in which controlled technical information is discussed. Such information will not be included in the project outputs nor will it be disseminated to the team participating in the project on campus at the institution. However, DARPA has taken the position that under the revised DFARS clause the project may no longer be considered fundamental research because of this limited exposure to CUI. Another example might be a project involving military medicine where access to restricted health information is required as part of the research. Again there is no intent to disseminate such controlled unclassified information in the research results, but under the DFARS clause it is not considered fundamental research.

We believe that in cases such as the ones described here, it is possible to ensure the necessary safeguarding or dissemination controls for the covered defense information while still providing for unrestricted dissemination of the research results. Our institutions have a clear understanding and experience with this concept in complying with the current export control interpretations of fundamental research and have often had to distinguish research outputs from either inputs or conduct. The revised DFARS clause might be interpreted to mean that this practice would cause the entire project to lose its fundamental research status, even where the research results are not subject to disclosure restrictions. Conflating the *input* of any covered defense information, as presently defined in the DFARS clause and even where such information is managed appropriately under the applicable laws and regulations, with the conduct or output of research in making the determination of fundamental research is overly broad. This situation does not appear beneficial to either universities or DOD.

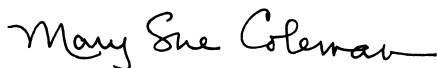
We request that the DFARS guidance be clarified to address these types of situations. One possibility would be to modify subsection (3)(a) of the clause as follows:

The information results from or arises during the performance of a project that involves no covered defense information (as defined in the clause at DFARS 252.204-7012), and/or has been scoped and negotiated by the contracting activity with the contractor and research performer and determined in writing by the contracting officer to be fundamental research, ~~(which by definition cannot usually does involve any covered defense information)~~ in accordance with National Security Decision Directive 189, National Policy on the Transfer of Scientific, Technical and Engineering Information, in effect on the date of contract award and the Under Secretary of Defense (Acquisition, Technology, and Logistics) memoranda on Fundamental Research, dated May 24, 2010, and on Contracted Fundamental Research, dated June 26, 2008 (available at DFARS PGI 204.4 (DFARS/PGI view))).

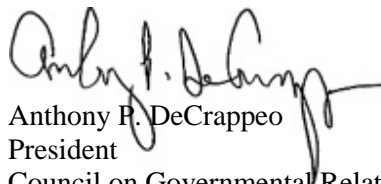
The above edits would allow for a thoughtful review of a project that includes some covered defense information as inputs to the project, as such inputs may or may not impact the determination of whether the project qualifies as fundamental research. Additional guidance as to situations such as those discussed above where covered defense information might be present in projects still appropriately scoped as fundamental research could be addressed in the PGI and/or Federal Register notice or other issuances setting forth the revised clause.

AAU and COGR appreciate the opportunity to participate in the Department's efforts to alleviate regulatory burden associated with DFARS solicitation provisions and contract clauses. We are available to answer any questions and for further discussion on suggested reforms outlined in this letter.

Sincerely,



Mary Sue Coleman  
President  
Association of American Universities



Anthony R. DeCrappeo  
President  
Council on Governmental Relations

Cc: Dr. Robin Staffin  
Director for Basic Research  
Office of the Assistant Secretary of Defense for Research and Engineering

Jason O. Day, PhD  
Subject Matter Expert  
Basic Research Office  
Office of the Assistant Secretary of Defense for  
Research and Engineering (ASD(R&E))