



Document Downloaded: Tuesday July 28, 2015

COGR letter on the DFARS - Export-Controlled Information and Technology

Author: Anthony DeCrappeo

Published Date: 10/13/2006

COGR

an organization of research universities

COUNCIL ON GOVERNMENTAL RELATIONS

1200 New York Avenue, N.W., Suite 750, Washington, D.C. 20005
(202) 289-6655/(202) 289-6698 (FAX)

BOARD OF DIRECTORS

CHAIR

JANE YOUNGERS
University of Texas Health Science
Center at San Antonio

JANET ACKERMAN
Yale University

MICHAEL AMEY
The Johns Hopkins University

MARK BRENNER
University of Nevada, Reno

SUSAN BURKETT
Carnegie Mellon University

JOANNE DE STEFANO
Cornell University

JERRY FIFE
Vanderbilt University

TODD GUTTMAN
The Ohio State University

ALBERT HORVATH
Columbia University

KATHLEEN IRWIN
University of Wisconsin-Madison

JAMIE LEWIS KEITH
University of Florida

NATALIE KRAWITZ
University of Missouri System

GUNTA LIDERS
University of Rochester

MARVIN PARNES
University of Michigan

YOKE SAN REYNOLDS
University of Virginia

JAMES SEVERSON
University of Washington

WENDY STREITZ
University of California

ARA TAHMASSIAN
University of California, San Francisco

DAVID WYNES
University of Iowa
ANTHONY DE CRAPPEO
President

October 13, 2006

Ms. Debra Overstreet
OUSD (AT&L)
DPAP (DARS)
IMB 3C132, 3062 Defense
The Pentagon
Washington, D.C. 20301-3062

SUBJECT: RIN 0750—AF13 (Defense Federal Acquisition Regulation Supplement:
Export-Controlled Information and Technology (DFARS Case 2004—
D010)

Dear Ms. Overstreet:

The Council on Governmental Relations (COGR) is an association of more than 170 research universities and their affiliated academic medical centers and research institutes. COGR concerns itself with the influence of government regulations, policies, and practices on the performance of research conducted at its member institutions.

We very much appreciate that DOD has sought to respond to the concerns expressed by COGR and others in the university community about the initial version of the proposed DFARS rule published by DOD on July 12, 2005. COGR submitted comments on October 11, 2005 on that proposed rule, including a proposed modified version of the DFARS clause. We believe this second proposed rule is a substantial improvement, particularly with regard to the explicit reference to National Security Decision Directive (NSDD)-189 and the recognition of the fundamental research exclusion from export controls, as well as the removal of the prescriptive requirements that characterized the previous version. We also appreciate that DOD has incorporated the concepts of some of the COGR-proposed language in rewriting the proposed rule, including the importance of addressing the subcontract issue.

We recognize DOD's intent to respond to the needs of the university research community in this second proposed rule. However, we still have a number of concerns, particularly involving the conceptual framework for use of the three DFARS contract clauses set forth in the proposed rule, the characterization of the fundamental research exclusion from export controls, and the need to address what happens when there is disagreement between DOD and university contractors. Also we remain concerned about assuring the necessary level of understanding of the export regulations on the part of DOD program and contracting staff.

Ms. Overstreet
October 13, 2006
Page Two

We continue to believe that it is inappropriate for DOD contracting officers to make determinations on the applicability of export controls. We again urge DOD to reconsider the need for any specific DFARS contract clause(s) that goes beyond reminding contractors of the need to assure compliance with export control requirements. Contractors have the legal responsibility to comply with these requirements, and they are in a better position to determine whether the fundamental research or other exclusion or license exemption applies to the performance of particular projects. In cases where such an exclusion or exemption applies, we question why any specific DFARS export control clause is needed.

Our concerns with the revised DFARS rule are discussed in more detail in the attachment.

Despite these concerns, we want to reiterate our view that the revised rule responds to many of the comments submitted by the university community on the initial version. We restate our appreciation to DOD for seeking to address these points. However, clarification is needed of the issues and concerns discussed in the attachment. We are concerned that the rule as proposed will lead to difficulties and disagreements in implementation.

We hope DOD will consider our comments and suggestions and either withdraw the proposed rule or modify it substantially. While we have not included a modified version of the DFARS rule as in our previous comments, we would be happy to work with DOD on specific DFARS language to address our issues and concerns.

In addition to our comments, we endorse and support the comments submitted by the Association of American Universities (AAU), the Association of American Medical Colleges (AAMC) and the National Association of State Universities and Land-Grant Colleges (NASULGC).

Sincerely,

Anthony DeCrappeo
President

Attachment

1. Identification of Export-Controlled Information or Technology

a) Contracting Officer Capabilities. The proposed policy set forth in 204.7303 and clause 252.204—70XX requires DOD requiring activities and contracting officers to identify the specific information or technology that must be controlled, including the applicable references to the International Traffic in Arms Regulations (ITAR; 22 CFR 120-130) or the Export Administration Regulations (EAR; 15 CFR 730-774). In the Background information provided in the Federal Register notice, DOD acknowledges the concerns raised by commentators on the initial proposed rule about the capability of DOD contracting officers to properly identify specific information or technology subject to export controls. DOD states its commitment to appropriate training of program managers and contracting officers related to the ITAR and the EAR. We do not doubt DOD's commitment. However, given the size and diversity of the DOD program and contracting workforce and its geographic dispersion, we remain concerned about the level of the necessary training resources that will be required to accomplish this objective.

Despite the best intentions of DOD, it is unclear whether DOD personnel will have sufficient training and expertise to make these difficult and complex determinations. It also is not clear whether they will be expected to consult regularly with the agencies with specific responsibilities for export controls. Given the complexities, we again urge that DOD routinely consult with the responsible regulatory agency, especially when it contemplates use of the 252.204—70XX clause. Such consultation should be provided for in the 204.7303 Policy.

b) Specificity of Identification. In our previous comments we had raised concerns about the specificity of the identification of export-controlled information or technology. The proposed rule requires that the specific information or technology that must be controlled be identified with references to the ITAR or EAR. However, it is not clear from the proposed rule how specific the identification must be. We strongly urge that DOD be required to provide contractors with Export Controlled Classification Numbers (ECCNs) for EAR-controlled items or Munitions List categories if ITAR-controlled. The identification needs to be as specific as possible e.g. ECCN 6A001.a.1.c. This should be clearly set forth in 204-7303(a)(1) and the implementing contract clauses. It also is important for DOD contracting officers to be able to clearly explain why they believe controls apply to particular project activities. General references to technologies involved in the project as controlled under the EAR or ITAR are not sufficient particularly given that fundamental research or other exclusions still may apply. Reports from COGR member institutions indicate that lack of understanding of these distinctions by DOD and other government contracting personnel unfortunately are common.

2. Conceptual Framework

The proposed rule sets forth three situations for consideration by DOD requiring activities regarding export-controlled information or technology: export-controlled information or technology will be involved in which case controls are required (70XX); the work is fundamental research only (with no involvement of export-controlled information or technology)(70YY); or the contract involves neither export-controlled information or technology nor fundamental research (70ZZ).

a) We are concerned that this framework is oversimplified. Export-controlled information or technology may be involved in a contract where exclusions from export controls other than fundamental research or exemptions from licensing requirements apply (e.g. EAR 734.3 Published Materials; 734.9 Educational Information, ITAR 125.4(1) Bona Fide Employee Exemption). It is not clear whether the 252.204—70ZZ clause is intended to be the default in such situations, or whether 70XX(d) applies. This needs clarification. There are other difficulties with this approach, since while the DOD requiring activity may be able to identify information or technology subject to export controls that are involved in a contract, they often are not likely to be in a position to determine whether exclusions from controls or exemptions from licensing requirements apply. This is reinforced by the fact that under EAR 734.3(a), all non-excluded items in the U.S. (and all U.S.-origin items wherever located) are subject to the EAR even if they do not require a license to export (i.e. EAR 99). As written, the 204.7303 Policy (and 70XX(b)(1)) can be read to require the requiring activity and/or contracting officers to identify all information or technology involved in the contract regardless of whether licensing restrictions apply. The Policy in 204.7303 should be expanded to address these issues. It also should recognize that contractors are better able to make determinations on possible exclusions or license exemptions, subject to discussion with DOD and further consultation with the appropriate export regulatory agency, if needed. A better policy would be to direct the requiring DOD activity to determine only whether DOD itself will provide export-controlled information or technology subject to licensing restrictions to a contractor that is necessary for contract performance. Contractors otherwise should be responsible for assuring compliance.

b) Of particular importance is the need to recognize situations that involve a mix of both fundamental research and other activities involving controlled information or technology. For example, contracts for fundamental research on basic technologies could also include development of specific prototypes for particular defense needs as a contract deliverable. In such cases, the actual prototype development activity might be subject to export controls but the fundamental research component would not be. It is not clear how projects involving such mixed activities will be handled under the DFARS framework. Neither the 204.7303(a)(1) prescription nor the 70XX clause clearly recognize this situation. DOD should consider developing an alternative version of 70XX(b) to address it.

c) An additional problem with the 70XX clause is the requirement in 70XX(c) for contractors “to register with the Department of State in accordance with the ITAR.” Under 122.1 of the ITAR, not all entities are required to register. Currently there are a number of exemptions. These include, among others, “persons whose pertinent business activity is confined to the production of unclassified technical data only” and “persons who engage only in the fabrication of articles for experimental or scientific purpose, including research and development.” The latter is of particular relevance for universities, as is the ITAR bona-fide employee exemption. While registration is a prerequisite to obtaining an ITAR export license, it is entirely possible for an agreement to involve ITAR-controlled data such that the “XX” clause would be included, yet no license would be required. The “XX” clause could be interpreted

as creating a contractual obligation to register with State, even when such registration would not be required under the ITAR. This needs clarification.

d) We question why any additional DFARS clause is needed beyond 204--70xx (with the alternative version of 70XX(b) as suggested above). If DOD agrees with a contractor's determination that the work is fully covered by an exclusion from export controls or an exemption from licensing requirements, there is no reason to include any clause setting forth requirements regarding access to export-controlled information or technology.

3. Characterization of Export Controls and Fundamental Research

a) We are concerned that the proposed rule may imply a fundamental misunderstanding of the applicability of export controls to fundamental research. Of particular concern is the provision in 70YY(c) stating that if during performance of the contract the Government or Contractor becomes aware that 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). The export control regulations provide that information or technology arising during or resulting from fundamental research are not subject to export controls (see EAR 734.3(b)(3)ii.; ITAR 120.11; 125.1(a)). The clause as stated obfuscates this general principle. Such information would only become controlled if the contract were first modified to restrict publication or other dissemination of the results. For this reason "will generate" should be deleted from both (b) and (c) in 70(YY). Similar problems could arise with use of this term in 70XX(b)(2) or 70ZZ(C) to the extent that contracts containing these clauses partially involve performance of fundamental research.

b) As noted above, we appreciate that DOD has modified the proposed rule to explicitly include a reference to NSDD-189. The reference in the proposed rule to NSDD-189 is very important and should remain. However, since both the EAR (734.8) and ITAR (120.11(8)) specifically define "fundamental research," the proposed rule also should cite the regulatory definitions. This is particularly important since the ITAR definition (120.11) makes additional distinctions that are not found in NSDD 189.

c) We believe that DOD should reconsider the need for a DFARS clause for contracts solely for the performance of fundamental research. Export controls are not applicable to such contracts. There are additional exclusions (e.g. publicly available information) that would also make controls inapplicable. We suggest that 70YY be deleted. The reference to NSDD 189 (and the EAR/ITAR definitions of fundamental research) should be moved to the 204.7303 Policy. We also question the need to include definitions of basic and applied research. They do not appear necessary or useful to the interpretation of the clause. The references should be sufficient.

d) We question the need for any clause addressing export control requirements where the work is fully excluded or exempted as discussed above. However, as an alternative approach, DOD might consider broadening the prescription for 70ZZ to encompass contracts for any work that is fully covered by an exclusion from controls or an exemption from licensing requirements even though export-controlled information or technology (other than EAR 99 items) may be involved. 70ZZ(b) should be modified accordingly. The notification requirement should be broadened to also encompass situations where the

government or the contractor becomes aware of information or technology not covered by any exclusion or exemption that will be involved in the contractor's performance of work. Corresponding changes should be made in 7303 and 7304.

4. Contractor Remedies

a) Right to Challenge Determinations. We suggest the need to include a mechanism for a contractor to challenge a contracting officer's determination to include the 70XX clause. Given the complexities and ambiguities of the export control regulations, and their applicability to particular situations, such a mechanism would be advisable both for DOD and contractors. For example, the 70XX clause might be appropriate to include in the general solicitation, but the statement of work for a particular project may have a narrower focus that warrants using the "YY" or "ZZ" clause. It is especially important that such a mechanism be available in a subcontract situation, particularly given 70XX(e). This right should be incorporated into both the 7303 Policy and the individual implementing clauses.

While DOD's intent is for this clause to be applied only when the subcontract involves information or technology controlled for release to particular foreign nationals, our experience suggests that prime contractors may tend to flow down the clause even when a university sub is engaged only in fundamental research (in which case 70YY would be appropriate). Our understanding is that universities typically hear from industrial partners that they must flow down export control access and publication restrictions included in DOD prime contracts. DOD contracting officers need to recognize that a university can be performing fundamental research even if the work done by the prime contractor is appropriately subject to controls. They also need to specifically communicate this fact to industry prime contractors. This should be added to the prescription in 204.7304.

b) Termination. It is critical also to build a contractor's right to terminate into the regulations. The ordinary government Termination for Convenience clause is for the benefit of the government, not the contractor. A university contractor that is proceeding under the assumption that no publication restrictions will be imposed must have its own right to obtain a Termination for Convenience of a contract which, through no fault of the contractor, is modified by the government under its unilateral right in all three clauses to require restrictions. Otherwise, the government could terminate for default or the contractor can be held in breach of contract if the contractor argues that it cannot continue because of a university policy forbidding such restrictions. This is not a fair or equitable outcome.

One possibility might be to address this issue along the lines of the Federal Acquisition Regulations (FAR) clause for contracts that require access to confidential, secret, or top secret information (FAR 52.204-2; see http://www.arnet.gov/far/current/html/52_200_206.html#wp1137568). Alternate I for R&D contracts with educational institutions provides for Termination for Convenience by contractors under analogous circumstances where a change in security requirements results in the inability of the contractor to perform the contract. This should be added to each of the proposed contract clauses.