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Export Control Contract Clause and Alternatives- Handout from February 2001 Session

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CONTRACT CLAUSE AND ALTERNATIVES:

1852.225-70 Export Licenses. (FEBRUARY 2000)

As prescribed in 1825.970-2, insert the following clause:

(a) The Contractor shall comply with all U.S. export control laws and regulations, including the International Traffic in Arms Regulations (ITAR), 22 CFR Parts 120 through 130, and the Export Administration Regulations (EAR), 15 CFR Parts 730 through 799, in the performance of this contract. In the absence of available license exemptions/exceptions, the Contractor shall be responsible for obtaining the appropriate licenses or other approvals, if required, for exports of hardware, technical data, and software, or for the provision of technical assistance.

(b) The Contractor shall be responsible for obtaining export licenses, if required, before utilizing foreign persons in the performance of this contract, including instances where the work is to be performed on-site at [*insert name of NASA installation*], where the foreign person will have access to export-controlled technical data or software.

(c) The Contractor shall be responsible for all regulatory record keeping requirements associated with the use of licenses and license exemptions/exceptions.

(d) The Contractor shall be responsible for ensuring that the provisions of this clause apply to its subcontractors.

(end of clause)

Negotiating points:

Given the sensitivity within the university community about any controls upon dissemination of information to and participation in research by foreign nationals, we would like to confirm our understanding of the NASA Clause 1852.225-70, paragraph (b). Because publicly available technology and software is not subject to the EAR under 15 CFR 734.3(b)(3) and 734.7 through 734.11, and technical data in the public domain is exempt from the ITAR under 22CFR 120.10(a)(5) and 120.11, there may arise circumstances under which an export license might be required for some aspect of a project while other portions of the project may operate under the above-cited exclusions. As currently worded, the NASA clause section (b) could be interpreted to mean that all required export licenses for any portion of the project requiring licenses must be secured before any foreign national may participate in the project, even though their participation may be in an aspect of the project not requiring any license. We presume that such is not the intent of the clause.

A more precise wording of section (b) is “the Contractor shall be responsible for obtaining export licenses, if required, before exporting or allowing access to export-controlled technical data or software to foreign nationals in the performance of this contract. This includes instances where the work is to be performed on site at NASA.”

In addition or alternatively, some universities have had success adding provisions to the contract stating that “all work performed under the contract is considered fundamental research and therefore not subject to export controls.” Also, universities have added termination clauses to contracts that allow them to terminate if research to be performed should become ITAR or export controlled and require an export license.