❖AAEI American Association of Exporters and Importers

The Voice of the International Trade Community Since 1921

October 11, 2005

Via E-Mail: *dfars@osd.mil*
Defense Acquisition Regulations Council
OUSD (AT&L) DPAP (DAR)
IMD 3C132, 3062 Defense Pentagon
Washington, DC 20301-3062

ATTN: Ms. Amy Williams

Re: Comments on Proposed Defense Federal Acquisition Regulation Supplement; Export-Controlled Information and Technology
DFARS Case 2004-D010

Dear Ms. Williams:

On behalf of the American Association of Exporters and Importers (AAEI), we respectfully submit the comments below on the Department of Defense's (Department or DOD) proposed regulations on the Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 204.73, Export-Controlled Information and Technology at Contractor, University, and Federally Funded Research and Development Center Facilities, published on July 12, 2005, by the DOD. *See*, 70 Fed. Reg. 39976. We appreciate the opportunity to comment upon the instant proposal.

AAEI has been the national voice of the international trade community since 1921. Its unique role, speaking for both importers and exporters, is driven by its broad economic base of manufacturers, distributors, retailers and service providers, many of which are small businesses with important capabilities and technology to offer the many agencies of the U.S. Government. With promotion of fair and open trade policy and practice at its core, AAEI speaks to international trade, supply chain, export controls, and customs and border protection issues covering the expanse of legal, technical and policy-driven concerns.

As a representative of private sector participants engaged in and impacted by developments pertaining to international trade, national security and supply chain security, AAEI is deeply interested in the proposed DFARS under consideration. What is more, at the appropriate moment, we hope to assist DOD consider how best and most efficiently to serve and advance the interests of national security of the United States.

The proposed regulation gives general information on export control laws and requires contracting officers to ensure that contracts identify export-controlled information and technology (ECI). The proposed clause would be used in solicitations and contracts for research and development or services and supplies that may involve export-controlled information or technology or programs whereby the DOD/U.S. Government seeks to develop or procure Commercial Off-the-Shelf (COTS) products or technology. The clause would require contractors to comply with export laws and regulations pertaining to controlled information and technology,

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maintain an effective export compliance program, conduct initial and periodic training on export compliance controls, and perform periodic assessments.

1. DFARS 204.7303 Should be an Internal Directive

Proposed DFARS 204.7303, "Policy," would require contracting officers to ensure that contracts identify export-controlled information and technology. The policy would enhance certainty in government contracting for all parties involved, but, for the reasons set forth below, should not be issued publicly as a DFAR provision. AAEI supports this underlying policy, but urges the Department to issue the policy as an internal directive, not a regulation. AAEI has concerns about all other aspects of the rule and urges the Department not to issue the rule, as currently conceived, for the reasons below.

2. The Proposed Regulation is Redundant and Problematic

The proposed rule is both redundant and where it goes beyond existing law, drafted in a problematic way. The new DFARS clause creates a redundant requirement that a company must comply with already applicable export control laws. Existing export statutes, administered by the Departments of Commerce and State, impose on contractors the requirement to prevent unauthorized transfers of controlled technical data. There is no need for a contract clause to enforce these rules. The penalties — civil and criminal, as well as a loss of export privileges — are strong and sufficient deterrents. The contracting agency does not need the provision for deterrence purposes.

The practice of using contract clauses to require compliance with pre-existing regulatory schemes fell into disfavor during the effort to streamline federal acquisition several years ago, pursuant to the Federal Acquisition Streamlining Act of 1994. Many clauses without a statutory basis (i.e., not required by statute), or that that merely restated the statutory or regulatory requirements were removed. The proposed clause is not required to implement a statute and should not be required in the procurement process.

Some of our members indicate that a policy directive is in order to eliminate confusion in contracting practices. In some DARPA policy reviews, it has been noted that contracting officers often arrogate unto themselves the authority to determine elements of export compliance when such authority is not given to them by statute. At worst, such a policy (not regulatory) pronouncement will eliminate a recognized deterrent for smaller firms from doing business with the government, thus depriving the public from efficient COTS technology and goods suppliers.

To the extent that the proposed regulation goes beyond existing law, it does so in a problematic and excessively burdensome manner. The proposed regulation requires an "effective compliance program" and specifies initial and periodic training, and periodic reviews. Although part of "best practices," these are not required under current law. The trade community involved in the commercial ("dual use") and defense industry is not opposed to training and internal reviews. These are expected to some degree and in many cases are required as part of U.S. securities law or by international standards (e.g., ISO-9000), as the minimum element of an adequate export control program under existing law. The proper parameters of these elements are usually difficult to identify and to apply since they are tailored to

particular companies and industries under present agency compliance guidance, yet the proposed rule would require a contractor to comply with its requirements or face the possible consequences of contract breach.

One technical problem, for example, is "who should be trained?" Also, defense contracting has been moving in the direction of encouraging use of commercial items wherever necessary. Many commercial contractors' items have a relatively low-level of controls (EAR 99 or AT controls), and many do not have instances where an export scenario presents itself at all, either because of offshore sourcing, foreign persons working on contracts, or export or reexport of goods of technology. Therefore, even following the best of best practices, those companies would not normally need to train every employee that is hired, although it is possible that an export scenario could present itself on any particular day.

The scope of who must be trained is unclear because the concept of access is not defined. What is meant by "employees who have access" to ECI? Does it mean employees that potentially have access to information or technology, or those that have actual access? Does it mean access to a building, to a room, or to the specific area where controlled information or technology is contained? Even if access is defined more clearly, training is not a proper measure of whether a contractor's export program is defective or adequate to impose contractual remedies. How much training is required, who should be trained, and how deeply to conduct a performance review varies significantly depending on the sensitivity of the technology involved and the amount of risk created by the involvement of the particular foreign persons involved in the transaction. A broad sweeping "one-size-fits-all" mandate will only inject uncertainty and unnecessary costs into the procurement process.

Similarly, the requirement that ECI be physically segregated is unworkable in most work situations. A much more refined set of internal controls than physical segregation is needed to permit employees to do their jobs without being hamstrung by treating export controlled information as if it were classified information. This proposal goes far beyond being impractical and will be a major disincentive for desired firms from contracting with the U.S. Government: having to impose an extensive segregation or badge control system in a commercial company is, at best, difficult.

The requirement of performance assessments for the purpose of ensuring full compliance is overly broad and unwieldy. It is virtually impossible to meet the standard suggested by the language in the proposed regulation, that the reviews "ensure full compliance." This would suggest a standard that would permit no lapses whatsoever in the compliance program, when the proper methods for compliance are at best amorphous.

3. Regulatory, Not Contractual, Methods are Appropriate

As a contractual matter, the clause is excessive because the Government already has adequate contractual protections and deterrents to address the situation where a contractor is deemed untrustworthy or careless with controlled protected information. The Government has the right to terminate a contract for default or convenience. It can render a finding that a contractor is non-responsible and prevent the contractor from receiving further awards. Finally, the Government can

suspend or debar a contractor for any of the causes in FAR 9-406-2, 9-407-2, including a lack of business integrity.

The inherent ambiguity of the subject matter, and in some cases the lack of clarity and regulatory guidance from the export agencies forces many companies to make judgment calls on a daily basis as to what would constitute a controlled product or technology, the proper level and method of internal controls, the applicability of exemptions, and other issues. The vast majority of violations are in the realm of technical violations where the exporting party in good faith (but in error) made the export thinking that it was appropriate to do so under the law. To have a technical violation create the possibility that a contract could be terminated for default, or a purchasing system found to be non-compliant, due to these violations seems an unwarranted step.

As opposed to regulatory schemes that often must be painted in broad strokes, a basic principle of contract law is that a party's obligations must be clearly defined so that each party can perform its obligations under the contract. Requirements such as conducting performance reviews to ensure full compliance bring uncertainty and lack of precision into the contracting process. Because a contractor can be terminated by the Government with serious consequences such as contract damages, a finding of non-responsibility, suspension, and debarment, this overly broad regulation interjects a fundamental unfairness into the contracting process.

Conclusion

AAEI urges the Department to adopt proposed DFARS 204.7303, "Policy," as an internal directive to enhance certainty in the procurement process, and to eliminate the remaining aspects of the proposed DFARS change. The remaining sections are redundant and/or attempt to impose training and assessment requirements on an activity that is anything but standard.

AAEI and its members would be pleased to be available to discuss our comments with you and to assist in crafting a policy which would ensure that all companies, regardless of their size, will be able to contract with the U.S. Government in full compliance with extensive and existing export control laws and regulations.

Respectfully submitted,

Hall Northcott
President

cc: Melvin Schwechter, Co-Chair, AAEI Export Compliance & Facilitation Committee
Phyliss Wigginton, Co-Chair, AAEI Export Compliance & Facilitation Committee