

INTEGRATED  
DUAL-USE  
COMMERCIAL  
COMPANIES

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OCTOBER 12, 2005

**Via E-Mail and Regular Mail**

Defense Acquisition Regulations Council  
Attn: Ms. Amy Williams  
OUSD (AT&L) DPAP (DAR)  
IMD 3C132  
3062 Defense Pentagon  
Washington, DC 20301-3062

Re: DFARS Case 2004-D010

Dear Ms. Williams:

The Integrated Dual-use Commercial Companies (IDCC) submits comments in response to the Department of Defense (DoD) proposed amendment of the Defense Federal Acquisition Regulation Supplement (DFARS) published at 70 Fed. Reg. 39976 (July 12, 2005). The proposed amendment would change certain sections of 48 CFR Parts 204, 235 and 252 with respect to Export Controlled Information and Technology at Contractor, University and Federally Funded Research and Development Center Facilities to address requirements for preventing unauthorized disclosures of export-controlled information and technology under DoD Contracts.

IDCC is dedicated to improving the efficiency and effectiveness of federal government procurement and R&D interaction with commercial firms and has the goal of encouraging and monitoring the implementation of Federal Acquisition Reform legislation, regulations and practices that eliminate unnecessary and counterproductive requirements. IDCC welcomes the opportunity to comment on the notice of proposed rulemaking addressed in DFARS Case 2004-D010.

IDCC recognizes the importance of all DoD contracting parties' adherence to U.S. export control laws and regulations and endorses the purposes and goals of the proposed rulemaking. IDCC also endorses the concept that all DoD contracting parties address export control issues, including export control classification of subject matter technology of DoD contracts, at the outset of the contracting process.

IDCC notes, however, that all export control concerns impacting DoD contracts are comprehensively controlled under regulations promulgated and enforced by both the U.S. Department of Commerce and the U.S. Department of State. The U.S. Department of Commerce

Bureau of Industry and Security (BIS) is responsible for enforcing the Export Administration Act of 1979, as extended by Executive Order, covering dual-use goods and technology and, to that end, has promulgated the implementing Export Administration Regulations (EAR). The U.S. Department of State Directorate of Defense Trade Controls (DDTC) is responsible for enforcing the Arms Export Control Act of 1976 and, to that end, has promulgated the implementing International Traffic in Arms Regulations (ITAR).

In view of the existing BIS and DDTC controlling regulations and schemes of export control compliance, licensing and enforcement, it appears unnecessary for DoD to embark on a parallel scheme of export control that encompasses both regulations and compliance requirements. Since DoD contracting parties are subject to comprehensive and long-standing BIS and DDTC regulations, DoD's proposed amendment of DFARS would not only impose additional burden on the already export-controlled regulated community, but also add uncertainty about regulatory requirements to the extent DoD's proposed rulemaking diverges and differs from the current BIS and DDTC export control schemes.

Notwithstanding its view that additional export control regulation by DoD is not necessary, IDCC nevertheless recognizes that DoD's proposed rulemaking is well-intentioned and offers the following comment about specific provisions of the proposed rules. IDCC's comments are aimed at reducing duplicative and overlapping export control regulations and consequent contractual risk to DoD contracting parties from use of terminology that is different from and inconsistent with existing terminology in BIS/EAR and DDTC/ITAR regulations.

#### Proposed § 204.7301: Definition

IDCC has no comment on the proposed definition of export-controlled information and technology, insofar as it defines existing BIS and DDTC regulations impact DoD contracting parties.

#### Proposed § 204.7302: General

IDCC has no comment about § 204.7302 aside from the suggestion that DoD ensure consistency with existing BIS/EAR and DDTC/ITAR regulatory terminology. DoD's use of new or different export-control terminology will result in both uncertainty and contractual risk to DoD contracting parties. IDCC's suggested modification orients the contracting parties to existing BIS/EAR and DDTC/ITAR requirements that encompass unauthorized export of information and technology.

U.S. eExport control laws and regulations administered  
by the Department of Commerce Bureau of Industry and

Security and the Department of State Directorate of Defense Trade Controls prohibit the unauthorized export ~~restrict the transfer~~, by any means, of certain types of information and technology. The release of technical data subject to the Export Administration Regulations (15 CFR parts 730-774) or the disclosure or transfer of technical data subject to the International Traffic in Arms Regulations (22 CFR parts 120-130) to a foreign national ~~Any access to export-controlled information or technology by a foreign national or a foreign person~~ anywhere in the world, including the United States, is considered an export to the home country of the foreign national or foreign person. For additional information relating to restrictions on export-controlled information and technology, see PGI 204.7302.

Proposed § 204.7303 Policy

IDCC endorses the policy statement of proposed §204.7303 that creates an obligation on the part of the contracting officer to identify the issue of export-controlled information and technology at the outset of the contracting process.

Proposed § 252.204.70XX – Paragraph (b)

IDCC believes the contracting officer's obligation to identify export-controlled information is continuing throughout the term of the contract. It is feasible that DoD contract subject matter information and technology not export-controlled, under BIS/EAR or DDTC/ITAR regulations, at the outset of the contract, but may become export-controlled. To reinforce the obligation of the contracting officer to identify the scope and purpose and consequent export-control classification of subject matter information and technology, IDCC suggests the following modification of Paragraph (b):

(b) In performing this contract, the Contractor may gain access to export-controlled information or technology. The contracting officer will designate the export-control classification of information or technology at the outset of the contract and will modify the export-control classification, as necessary, as the contract progresses.

Proposed § 252.204.70XX – Paragraph (c)

IDCC views Paragraph (c) as redundant of existing DDTC/ITAR requirements and thus unnecessary. IDCC recommends deletion of Paragraph (c).

Proposed § 252.204.70XX – Paragraph (d)

IDCC suggests deletion of Paragraph (d) in view of existing BIS/EAR and DDTC/ITAR export-control guidance for compliance programs which recognize that members of the export regulated community have individual and unique operational situations that impact export-control compliance programs. For example, BIS's Office of Exporter Services publishes Export Management System (EMS) Guidelines to help exporters develop EMS programs tailored to companies' unique export-related transaction requirements. (See <http://www.bis.doc.gov/complianceand enforcement/ExportManagementSystems.htm> - visited October 10, 2005.) The individual and unique operational situations of the export regulated community apply equally in the context of DoD contracting. For this reason, IDCC urges DoD to avoid imposition of conflicting obligations on contracting parties.

IDCC also has concerns about use of the term "effective" as it applies to an export compliance program, insofar as the proposed rule is not clear about who makes the determination of effectiveness, how the determination is made, or the consequences of such a determination. To the extent BIS and DDTC have existing regulatory export-control regulatory schemes that address compliance requirement and enforcement, IDCC urges DoD to forgo a parallel, undefined compliance and enforcement scheme.

IDCC suggests the following modification of Paragraph (d), if the paragraph is retained:

(d) It is recommended that tThe Contractor maintain a written export compliance program to protect against the export, reexport or transfer of export-controlled information or technology contrary to the requirements of the Export Administration Regulations (15 CRR Parts 730-774) and the International Traffic in Arms Regulations (22 CFR parts 120-130). shall maintain an effective export compliance program. The program must include adequate controls over physical, visual, and electronic access to export-controlled information and technology to ensure that access by foreign firms and individuals is restricted as required by applicable Federal laws, Executive orders,

~~and regulations.~~

~~— (1) The access control plan shall include unique badging requirements for foreign nationals and foreign persons and segregated work areas for export-controlled information and technology.~~

~~— (2) The Contractor shall not allow access by foreign nationals or foreign persons to export-controlled information and technology without obtaining an export license, other authorization, or exemption.~~

~~— (c) The Contractor shall—~~

~~— (1) Conduct initial and periodic training on export compliance controls for those employees who have access to export-controlled information and technology; and~~

~~— (2) Perform periodic assessments to ensure full compliance with Federal export laws and regulations.~~

Proposed § 252.204.70XX – Paragraph (e)

IDCC does not disagree that initial and periodic export control training and performance of export control assessments are elements of an export compliance program and notes that such activities are encompassed by existing BIS and DDTC guidance, as noted in IDCC's comment to proposed Paragraph (d). For the reasons stated in its comment to Paragraph (d), IDCC believes that Paragraph (e) is not necessary and should be deleted.

Proposed § 252.204.70XX – Paragraph (f)

To the extent proposed Paragraph (f) makes clear that existing export control laws are controlling of and not superseded by DoD's proposed rulemaking in DFARS Case 2004-D010, IDCC has no comment about Paragraph (f).

Proposed § 252.204.70XX – Paragraph (g)

IDCC views the flow-down provisions of Paragraph (g) as already required under existing BIS and DDTC regulations and thus unnecessary.

In conclusion, IDCC urges DoD to consider the necessity of the proposed rulemaking in view of existing export control laws and requirements, along with the concomitant considerations of burden and contractual risk and uncertainty that will be introduced by the

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proposed rulemaking. If DoD moves forward with rulemaking, IDCC urges consideration of the forgoing comment and suggestions.

These comments were prepared by Joan Kane, Corning Incorporated, if there are any questions please contact her at 607-974-9707 or [KaneJ@Corning.com](mailto:KaneJ@Corning.com).

Very truly yours,

IDCC

By:

A handwritten signature in black ink, appearing to read "Robert J. Kane", written over a horizontal line. The signature is fluid and cursive.