

THE NATIONAL ACADEMIES
Advisers to the Nation on Science, Engineering, and Medicine

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October 12, 2005

The Honorable Donald H. Rumsfeld
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Subject: National Academies Comments on DFARS Case 2004-D010: Export-
Controlled Information and Technology

Dear Secretary Rumsfeld:

We appreciate the opportunity to comment on behalf of the National Academy of Sciences, National Academy of Engineering, and Institute of Medicine (collectively "The National Academies") concerning the proposal to amend the Defense Federal Acquisition Regulation Supplement (DFARS) published in the Federal Register on July 12, 2005 (DFARS Case 2004-D010). The proposal contains a new DFARS Subpart 204.73, and an associated contract clause (DFARS Part 252.204-70XX) relevant to export-controlled information and technology.

Our comments are based on a Sept. 7 meeting and Sept. 16 public workshop at the National Academies on the DOD Notice of Proposed Rulemaking (NPRM), as well as a May 6 workshop on the related Commerce Department's Advance Notice of Proposed Rulemaking (ANPR) on "Revision and Clarification of Deemed Export Related Regulatory Requirements" (70 Fed. Reg. 15607). The participation of DoD representatives in these events was extremely helpful in our arriving at an understanding of the intent of the proposed rule.

We do not question the appropriateness of regulations intended to address requirements for preventing unauthorized disclosure of export-controlled information and technology under DoD contracts. We also laud the intent of the proposed rule and clause to ensure that contractors are aware that performance of the contract will involve export-controlled information or technology, and to hold them accountable for complying with existing requirements. However, the proposed regulation and clause will have significant impacts well beyond DoD's

OSD 20263-05

The Honorable Donald H. Rumsfeld
October 12, 2005
Page 2 of 4

stated intent, and in so doing will create ambiguities in the existing regulatory framework that are likely to impede the very compliance sought by DoD.

With respect to the specifics of the proposed rule, we draw your attention to the following concerns:

- Sections (d) and (e) of proposed clause 252.204-70xx would impose new obligations on contractors that are not included in existing export-control laws and regulations, including the proposed requirements for badging, segregated work areas, and specific training requirements. For example, Section (d)(1) of the proposed clause requires badging and segregation of all "foreign nationals and foreign persons." Under current law, an "export" is defined in terms of "foreign persons" only. This and other added requirements contravene both the policies and spirit underlying America's research universities. Accordingly, sections (d) and (e) of the proposed clause are unnecessary and should be deleted in their entirety. These sections either reiterate current law or specify methods of complying with the export-control laws that are not required by the law itself. Alternatively, we recommend amending the proposed regulation and clause to allow contractors to secure controlled information by "alternative acceptable controls"—for example, by limiting access of export-controlled technology to those few individuals demonstrating a need to know.
- Section 204.7304 of the proposed regulation provides that the new contract clause would apply to all contracts for research and development or services or supplies that *may* involve the use or generation of export-controlled information or technology. Section (g) of the proposed DFARS clause would require contractors to flow-down this requirement in all subcontracts that *may* involve use or generation of export-controlled information or technology. While many contracts or subcontracts *may* involve the use or generation of export-controlled information or technology (*i.e.*, anything is possible), few are likely to. Accordingly, we recommend amending the proposed rule and clause to make clear that the clause will apply only in contracts or subcontracts for which export-controlled activity can be specifically identified by DoD (in the case of prime contract awards) or by prime contractors implementing the flow-down requirements under subsection (g) of proposed clause. This clarification is needed to avoid placing an expensive and unnecessary compliance burden on contractors and subcontractors.
- We recommend that the proposed DFARS rule and clause be revised to ensure that its requirements will not apply to contracts confined to fundamental research. If adopted without explicit recognition of the existing exclusions from export controls and licensing

The Honorable Donald H. Rumsfeld
October 12, 2005
Page 3 of 4

requirements, the proposed rule and clause may be read to apply export controls as a matter of contract to clearly uncontrolled information and technology. The proposed DFARS regulation and clause should explicitly reference National Security Decision Directive (NSDD-189), which provides that the mechanism for control of information generated by DOD-funded fundamental research in science, technology, and engineering at colleges, universities, and non-government laboratories is security classification. No other type of control is authorized.

We believe that these changes will result in a more effective clause that focuses on notifying contractors that contract performance will require access to export-controlled information and technology, while ensuring that contractors are subject to consistent and clearly articulated requirements.

In addition to these specific concerns, we bring to your attention ancillary matters that the NPRM does not currently address.

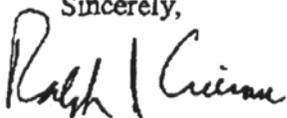
- First, we have concerns whether DoD contracting officers are in a good position to determine whether information and technologies are subject to export controls. DoD does not have primary authority for determinations under the International Traffic in Arms Regulations or the Export Administration Act. We recommend that DoD coordinate closely with the Department of State's Directorate of Defense Trade Controls (DDTC) and the Department of Commerce's Bureau of Industry and Security (BIS) to ensure that the proposed regulation and clause do not impose inconsistent requirements on contractors in general and research universities in particular.
- Second, we believe that the proposed amendments to the DFARS are premature given that BIS has not responded to the 310 comments received in response to its ANPR on deemed exports. The proposed DFARS rule and clause only add to the existing confusion and uncertainty regarding the requirements concerning controlled use technology. This is another area ripe for collaboration between Commerce, State, and DoD. While contractor compliance with the export-control laws is a laudable goal, it is possible only if the relevant regulatory agencies provide clear and consistent standards that are clearly understood by the affected contractor community.
- We are pleased that the Office of Science and Technology Policy has taken an interest in interagency coordination on the deemed exports issue, and that individuals within DoD have additionally taken the initiative to reach out to their sister agencies. However, the issuance of the DOD NPRM prior to the resolution of the relevant rulemaking processes

The Honorable Donald H. Rumsfeld
October 12, 2005
Page 4 of 4

is counterproductive. We therefore propose deferring any amendments to the DFARS until after the Department of Commerce has issued its recommendations based on its March 28th advance notice of proposed rulemaking.

Thank you for this opportunity to comment. We have appreciated the dialogue we have engaged in with the Office of the Secretary of Defense on the NPRM and would be pleased to continue on behalf of our shared goals for strong national security and a robust science and engineering enterprise.

Sincerely,



Ralph J. Cicerone
President
National Academy of Sciences



Wm. A. Wulf
President
National Academy of Engineering



Harvey V. Fineberg
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cc: Ms. Amy Williams
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THE NATIONAL ACADEMIES

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