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October 11, 2005

Defense Acquisition Regulations Council

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

RE: Department of Defense Notice of Proposed Rulemaking  
DFARS Case 2004-D010

Ladies and Gentlemen:

We appreciate this opportunity to comment on the recently proposed amendment to the Defense Federal Acquisition Regulation Supplement ("DFARS") (Case 2004-D010).

We take seriously our compliance responsibilities under the Export Administration Regulations ("EAR"), the International Traffic in Arms Regulations ("ITAR") and the Office of Foreign Asset Control regulations ("OFAC") and we have devoted considerable resources to instituting effective export control policies.

We are concerned and alarmed, however, by the DFARS amendment proposed by the Department of Defense ("DOD") for a number of reasons. Our most serious concerns are the following:

- (1) **DOD's proposed amendment is not coordinated with Commerce's recently proposed changes to the Export Administration Regulations. The two sets of proposed rules operating without congruence would result in unintended, adverse consequences to the research enterprise at American institutions of higher education.**
- (2) **The contract clause creates yet another layer of export control regulatory requirements. This new regulatory regime would be particularly onerous and expensive to implement and administer without adding commensurate value to national security.**
- (3) **The proposed contract clause as currently drafted fails to acknowledge the fundamental research exemption, and it fails to limit the scope of the prescribed access control measures to export controlled equipment and technologies within the research to be performed under the DOD contract.**
- (4) **The proposed access control requirements veer into discriminatory practices that may be unconstitutional and are also contrary to the principles and to the**

**strengths of American research universities. They will lead to international scholars electing to perform their research outside the United States in countries that compete with us, dramatically reducing our national economic and technological strength.**

In the second part of this comment letter we propose specific revisions to the proposed contract clause. We believe our suggested modifications, if accepted, will achieve the DOD's objectives with the proposed contract clause, while addressing the concerns articulated herein.

### CONCERNS

**(1) DOD's proposed amendment is not coordinated with Commerce's recently proposed changes to the Export Administration Regulations. The two sets of proposed rules operating without congruence would result in unintended, adverse consequences to the research enterprise at American institutions of higher education.**

Commerce's recently proposed changes to the deemed export provisions in the EAR, if implemented as currently drafted, would dramatically impact the meaning and practical application of the term "deemed export." As you most likely are aware, Commerce received 307 letters, the vast majority from institutions of higher education, in response to its request for comments on its proposed changes to deemed export analysis of the EAR. We understand that Commerce is currently reviewing these comment letters and may reevaluate its proposed changes. We feel it is imperative that DOD and Commerce coordinate their rulemaking, and fully consider the joint effect any new or revised regulations will have. We recognize that DOD and Commerce are separate federal agencies and each is vested with the authority to issue regulations independently. However, given that DOD's proposed contract clause is so heavily dependent on the content of the export control regulations administered by Commerce, we strongly encourage DOD to delay moving forward with any new export control regulations until resolution has been reached on Commerce's proposal so that the full impact of any regulations issued by DOD can be fully understood.

**(2) The contract clause creates yet another layer of export control regulatory requirements. This new regulatory regime would be particularly onerous and expensive to implement and administer without adding commensurate value to national security.**

The access control measures required by the contract clause would add substantial costs to the university research enterprise for which there is no funding source. We estimate that the initial costs of implementation, excluding ongoing maintenance, would exceed one and a half million dollars on our campus alone. The aggregate effect would clearly be the diversion of significant resources away from productive fundamental research activity that contributes to our nation's economic and technological strength.

At our institution, over 1,100 principal investigators are currently conducting research using over 6,600 rooms. It is difficult to exaggerate the massive opportunity cost of having to implement and maintain the extensive access control plan mandated by the proposed contract clause. The opportunity cost would not be limited to merely cutting support for departments or programs that would otherwise receive the monetary support. For example, reorganizing laboratory space to consolidate sensitive research equipment in fewer buildings would eliminate the synergies that naturally arise from housing a department laboratory in the building that houses the other department laboratories.

The mandated access control system, in addition to being expensive and damaging to our research enterprise, would also be exceedingly onerous to administer. We would need to hire additional security and administrative personnel to track licenses, controlled room assignments, badge identifications and access card activations.

We are not a commercial entity and have no unit product price onto which we can tack the cost for this process. Existing F&A rates do not cover even existing administrative costs for federally sponsored research.

This extensive security system requirement may be appropriate to a national laboratory devoted to classified research or to a commercial contractor producing equipment to DOD specifications. It is unworkable and actually counterproductive in the environment of a major academic research university where no classified research is conducted.

**(3) The proposed contract clause as currently drafted fails to acknowledge the fundamental research exemption, and it fails to limit the scope of its prescribed access control measures to export controlled equipment and technologies within the research to be performed under the DOD contract.**

The proposed contract clause does not explicitly recognize the fundamental research exemption from export control regulations. At the September 16, 2005, workshop hosted by the National Academy of Sciences on the DOD Notice of Proposed Rulemaking to Amend the DFARS, the panelists from the DOD indicated that the access control restrictions required by the contract clause were not intended to apply to fundamental research. We were relieved to hear this to be the case, but uncertainty and concern regarding this pivotal point will continue across the academic community unless the contract clause is revised to explicitly exclude from its application equipment and technology within the performance of fundamental research or resulting from fundamental research.

Additionally, as the clause is currently written, the required access control measures appear to apply to all export-controlled equipment and technology in the possession of the DOD contractor, instead of to specific equipment and technology within performance of the research under the DOD contract. We trust that this was not the intent of DOD. Otherwise, the result would be that the moment a university would enter into a single DOD contract containing this proposed clause, the university would be contractually obligated to implement these access controls in laboratories across the university campus,

regardless of whether the laboratories have any connection to the DOD-contracted research. The same shortcoming also appears in the last section of the contract clause, which appears to obligate the DOD contractor to include the clause in all its subcontracts that may involve export-controlled equipment and technology, rather than only the subcontracts involving export-controlled equipment and technology relating to the prime DOD-contracted research.

**(4) The specified access control requirements veer into discriminatory practices that may be unconstitutional and are also contrary to the principles and strengths of American research universities. This will lead to international scholars electing to perform their research outside the United States in countries that compete with us, dramatically reducing our national economic and technological strength.**

The proposed contract clause's requirement for foreign nationals to wear badges is contrary to some of our institution's most fundamental principles. Requiring unique badges to be worn by our foreign national researchers and students, who we note are legally in the country and have gone through the federal government's visa application and review process, is incompatible with the nature and mission of a university community such as ours.

We are also deeply troubled by the DOD contract clause because, like Commerce's proposal to categorize foreign nationals by country of birth rather than citizenship, it sends a message to our valued international researchers and students that they are unwelcome. This carries profound implications, not only for our particular institution, but for our nation. Foreign born scholars will be deterred from coming to American universities because of their unwillingness to be treated as suspicious persons. To close our research to foreign scholars would impoverish our own technological progress while our competitors forge ahead. Declining participation by foreign scholars and students would dramatically reduce the output of fundamental research in the U.S. within only a few years, putting our country at a competitive disadvantage in economic competitiveness and security. Once begun, this development will not be reversible by our nation without dramatic infusions of financial and political resources.

Fundamental research in the United States is heavily dependent on foreign-born scholars. It has been documented extensively that our U.S. born population is not generating enough scientists and mathematicians for continued technological progress. As just one recent example, a report of the National Academies released May 10, 2005, states that 33% of the Ph.D.s in science and engineering in the United States were awarded to international students in 2003. In computer science alone, the United States has been a net importer of foreign talent since World War II. A large proportion of these computer scientists have come from India and China and have stayed to form the backbone of our domestic computer science industry following their participation in university research. The economic and military strength of our country is dependent on our technological and scientific advancements. These technological and scientific advantages in turn depend heavily on scientists of foreign birth and citizenship.

Our losses will be our international competitors' gains. The expertise of international scholars is appreciated and actively sought by the countries that are our economic and military competitors. The more difficult we make the entry and research participation of these scholars, and the more messages we send that they are disfavored on the basis of their nationality, the more they will choose to study and conduct research in the countries that compete with us. In the intensely competitive realm of computer science we have already seen a reduction in the number of international applicants to U.S. computer science programs because of visa rule changes.

Each time a foreign scholar chooses to establish his or her research career and research collaborations with another country rather than the U.S., we lose not only that scholar's expertise but also the contributions of the stream of young scholars from his or her home university who will follow in future years. Promising young foreign scholars establish their research careers and collaborations abroad based on the positive experiences of other scientists from among fellow alumni or previous faculty of the universities at which they received their early training. Once a nexus of talented foreign scholars is established in a country, there is a strong momentum for continuing attraction of the best talent from among their fellow nationals. The United States has benefited enormously from this phenomenon in the past. The proposed regulations would generate this dynamic in nations who are our competitors, and our existing advantages in recruiting talent would disappear.

### RECOMMENDATIONS

To address our concerns articulated above while preserving the DOD's objectives, we recommend that the modifications set forth below be made to the proposed contract clause.

As prescribed in 204.7304, use the following clause:

Requirements Regarding Access to Export-Controlled Information and Technology (XXX 2005)

(a) Definition. Export-controlled information and technology, as used in this clause, means information and technology that may only be released to foreign nationals ~~or foreign persons~~ in accordance with the Export Administration Regulations (15 CFR parts 730-774) and the International Traffic in Arms Regulations (22 CFR parts 120-130), respectively; provided, that the phrase "export-controlled information and technology" shall not include information or technology used to conduct, or generated from the conduct of, fundamental research.

(b) In performing this contract, the Contractor may gain access to export-controlled information or technology.

(c) In the performance of this contract, the Contractor shall comply with all applicable laws and regulations regarding export-controlled information and technology within the performance of research under this contract, including any registration required in accordance with the International Traffic in Arms Regulations.

(d) The Contractor shall maintain an effective export compliance program. The for export-controlled information and technology relating to the research to be performed under this

contract. Such program must shall include adequate and reasonable controls over physical, visual, and electronic access to any export-controlled information and technology to ensure that access by foreign firms and individuals is restricted as required within the research to be performed under this contract to prevent violations of 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 licence, other authorization, or exemption.~~

~~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. (f)~~

(e) Nothing in the terms of this contract is intended to change, supersede, or waive any of the requirements of applicable Federal laws, Executive orders, and regulations, including but not limited to--

(1) The Export Administration Act of 1979 (50 U.S.C. App. 2401 as extended by Executive Order 13222);

(2) The Arms Export Control Act of 1976 (22 U.S.C. 2751);

(3) The Export Administration Regulations (15 CFR parts 730-774);

(4) The International Traffic in Arms Regulations (22 CFR parts 120-130);

(5) DoD Directive 2040.2, International Transfers of Technology, Goods, Services, and Munitions; and

(6) DoD Industrial Security Regulation (DoD 5220.22-R); and

(7) National Security Decisions Directive 189.

(gf) The Contractor shall include the substance of this clause, including this paragraph (g), in all subcontracts for

~~(1) Research and development, or (2) Services or supplies that may involve the use or generation of), in any~~

subcontract it enters into which involves some or all of the same export-controlled information or technology subject to this contract.

Thank you for this opportunity to comment on this critically important issue. We are committed to working with and assisting the Department of Defense in devising effective, well-crafted regulations that protect both our national security and our national university research enterprise, which is an important source of our national economic and technological strength.

Sincerely,



Tony G. Waldrop

Vice Chancellor for Research and Economic Development