University of Pittsburgh

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October 11, 2005

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

Re: Comments on Notice of Proposed Rulemaking [DFARS Case 2004-D010]
Defense Acquisition Regulation Supplement

Dear Sir or Madam:

Kindly accept these comments, submitted on behalf of the University of Pittsburgh---Of the Commonwealth System of Higher Education ("University"), in response to the above referenced Department of Defense Notice of Proposed Rulemaking ("NPRM") to amend the Defense Federal Acquisition Supplement ("DFARS") in order to address the disclosure of export-controlled information and technology, as published in the July 12, 2005 Federal Register. This NPRM stems from recommendations in the March 25, 2004 report of the Department of Defense ("DoD") Inspector General ("IG") Export-Controlled Technology at Contractor, University, and Federally Funded Research and Development Facilities (D-2004-061). The University has reviewed and supports the comments submitted by the Association of American Universities and the Council on Government Relations[1], and provides these comments in supplement to those organizations' responses. This University's primary concern is that if this NPRM is approved without modifications based on the comments submitted by academic research entities, such approval will have an adverse impact on national security by compelling most academic research universities to decline performing fundamental research on DoD contracts and subcontracts.

I. Approval of the NRPM is premature in light of the Department of Commerce Bureau of Industry consideration of 'use technology'.

In June 2005, the University submitted comments to the Bureau of Industry and Security ("BIS") of the U.S. Department of Commerce ("DoC") in response to a Proposed Revision of Deemed Export Related Regulatory Requirements [ANPR; RIN

[1] The University is a member of both the Association of American Universities and the Council on Governmental Relations.

0694-AD29—Fed. Reg. 3/8/05] concerning the correct interpretation of the deemed export requirements for equipment use technology in fundamental university research and other contexts. The contract provisions of the DoD's NPRM are closely related to the DoC's Advanced Notice of Proposed Rulemaking ("ANPR"). The academic research community and industry submitted hundreds of comments to the DoC regarding the definition of "use technology" and its application to the equipment required for the conduct of fundamental research. In our comments, the University noted the substantial adverse impact the ANPR could have on national security through restrictions on foreign national participation in fundamental research. And the University echoes many of those same concerns on this NPRM in the sections which follow.

It is the University's belief that the DoD's NPRM may be substantially impacted by the final decision of the DoC, which administers the Export Administration Regulations ("EAR"). Thus, the University would encourage the DoD to postpone a final decision on the NPRM until the DoC, through the BIS, issues its final decision on the ANPR. In addition, the University recommends that the DoD consider accepting the revised version of the DFARS clause proposed by the Council on Government Relations as drafted, or alternatively that the DoD prepare a second revised NPRM based upon the comments received, and submit that second NPRM for comment rather than issuing a final rule with changes.

II. The University's Commitment to Education, Collaborative Research, and National Security.

The University is a state-related institution of higher learning, and offers comprehensive undergraduate and graduate degrees in a wide range of disciplines. As part of its commitment to excellence in research and education, the University accepts scholars and researchers from around the world into its research programs. In FY 2004, the University had approximately 34,000 students enrolled in graduate and undergraduate programs, with about 1,700 of these foreign national students. During this same time period there were more than 5,300 faculty members and research associates, including foreign nationals. The top five countries sending students, researchers and scholars to the University in 2004, in descending order are: China, India, Republic of Korea, Taiwan and Japan. To promote a culture of academia, the University encourages a public and open atmosphere for both instruction and research by fostering an environment that allows multi-departmental, multi-institutional, and university-industry collaborative work among all members of the University's community.

The University brings recognized strengths to federal research needs and ranks among the top 20 universities in the country for research and development. In FY 2004, the University received almost $600 million in fundamental research funding. Included in the University's list of federal agency research sponsors are the Department of the Army, the Department of the Navy, the Department of the Air Force, and the National Aeronautics and Space Administration. Additionally, the University subcontracts to industry to perform research on numerous DoD projects. The research performed by the University for these sponsors includes areas such as medical research, bioterrorism preparedness, proteomics, electro-optics, and nanotechnologies.

To balance the University's commitment to an open and collaborative academic environment with national security interests, the University developed a policy that it would decline to accept classified research projects on campus. The University's policy is premised on the United States' policy, as expressed in National Security Decision Directive 189 ("NSDD 189"), that the federal government would rely on national security classification as the appropriate mechanism to control fundamental research. In addition, the DoD's own instruction to contract officers states "[t]he mechanism for control of information generated by DoD-funded contracted fundamental research in science, technology and engineering performed under contract or grant at colleges, universities, and non-government laboratories is security classification. No other type of control is authorized unless required by law." (As contained in DoD Instruction 5230.27, Section 4.3.). The University is confident that it has struck the appropriate balance between national security concerns and fostering an open academic environment by adopting the policy to decline accepting classified research, thus limiting all research conducted on campus to research where the results can be freely published and by closely monitoring all agreements entered into by our researchers to ensure that classified research is not accepted.

II. Failure to reference the well-established Fundamental Research Exemption and National Security Decision Directive 189 creates Internal Inconsistency in Government Policy on Fundamental Research.

The NPRM fails to sufficiently distinguish between DoD contracts and subcontracts that involve export controlled information or export controlled technology and those that involve fundamental research as defined by NSDD 189 in two ways. First, the NPRM fails to explicitly reference NSDD 189 or the fundamental research exemption. Second, the NPRM requires contracting officers to include the NPRM clause if, during the course of performing the contract "the Contractor ***may*** gain access to export-controlled information or technology" (emphasis added) and further requires the Contractor to include the substance of this clause in all subcontracts for research and development.

By failing to expressly recognize the fundamental research exemption from export controls, the NPRM will create ambiguity for the federal contracting officers, which has the potential to subject all DoD-funded research at the University to export control regulations. It is likely that contracting officers will resolve the ambiguity by including the clause where it is not appropriate. Once inserted by federal contracting officers, particularly in prime contracts to industry with the resulting flow-down clauses in subcontracts to the University, the clauses will be difficult for the University to renegotiate. The likely result would be for federal contracting officer to impose contract requirements that conflict with federal law as stated in NSDD189, thus contradicting well established U.S. policy towards fundamental research. Additionally, the imprecision of the NPRM language by using the term "may" instead of "must" or "shall" for access to controlled information or technology, will likely result in contracting officers including the NPRM even in those instances when no export controlled information or technology would be exchanged or when exclusions from controls or license exemptions would apply under both the EAR 15 C.F.R. part 734.8 and the ITAR 22 C.F.R. part 120.11(8).

The overarching concern raised by the NPRM is the likely increase in the use of export control clauses appearing in DoD contracts, especially industry subcontracts with the University, without the recognition of the fundamental research exclusion that protects fundamental university research from export control licensing. Because this University adopted a policy that it would not accept classified research on the University campus so that research results could be published and shared with the scientific community, a likely outcome is that DoD contracts containing this clause limit the availability and quality of the University's researchers who are able to perform fundamental research, but cannot accept the restrictions imposed by the NPRM Thus, instead of protecting national security, the NPRM's effect could be preventing the brightest and most capable researchers from participating in DoD research.

III. The International Nature of Fundamental Research and the Impracticality of the NPRM's Compliance Program.

The University is characterized by the opportunities provided to teams of eminent researchers to work together on major problems to integrate and synthesize their scholarship. The unrestricted participation of international students and faculty, who comprise a significant percentage of the University's academic community, is vital to the free exchange of ideas and open collaboration that are essential elements of the University's fundamental research environment. As noted by the National Academies of Science in its recent report, *Policy Implications of International Graduate and Post-Doctoral Scholars in the United States,* (NAS Press 2005), "[i]international students contribute to US society not only academically and economically, but also by fostering the global and cultural knowledge and understanding necessary for effective US leadership, competitiveness and security." Even the federal government, as expressed in NSDD 189, recognized that an open research environment provided benefits to national security, as well as risks, and that those benefits were sufficiently significant to warrant the exemption from export control for fundamental research.

Like most academic research centers, research at this University takes place in an open and collaborative environment. During a typical day foreign national researchers may discuss ongoing projects for a variety of sponsors with other colleagues, visit each other's laboratories, share equipment or move equipment to neighboring laboratories, work with multiple graduate students from a variety of countries, and freely exchange ideas on a variety of research projects. These are some of the reasons that the University maintains a policy of only agreeing to work on fundamental research projects. The University has in excess of 2,600 foreign nationals on campus at the present time. While it is difficult to quantify the number of active laboratories on campus, based on records maintained by the University's health and safety office, there are over 1,800 distinct research laboratories active on the main campus. Access to the University's laboratories is only restricted in instances when required: to protect an individual's safety; or to secure equipment such as when biological, chemical, or radioactive substances are in use; or to protect research laboratory animals. Absent access restrictions for these reasons, the laboratories and research facilities permit easy and open access to all researchers.

The "unique badging requirements for foreign nationals and foreign persons and segregated work areas for export-controlled information and technology" proposed in the

NPRM would require such an extensive reworking of the University's laboratory security access and student monitoring systems as to be impractical to implement. Given the large number of foreign nationals, and the large number of active laboratories, adoption of NPRM would require that the University to identify each area of research a particular international student may be exposed to during the course of his research work throughout the day and obtain an export license for that researcher in each controlled area they may discuss or they may overhear a conversation about or they may observe use of controlled technology. Even if the University could closely monitor all research activities and interactions involving foreign nationals to ensure all proper licenses are in place, the net effect will be to stifle collaboration among all the researchers. Each time a foreign national researcher joined in a discussion or observation with a different research group, that group would be compelled to have a security analysis conducted before proceeding. This would impair the ability of all researchers on campus to be innovative through open collaboration with colleagues. Consequently, requiring badging of foreign nationals or restricting access to certain research facilities will have a chilling effect on the open and collaborative environment that sparks innovation and fosters new knowledge.

Finally, the NPRM badging and segregated work areas requirements even exceed the DoD's requirements as set forth in The National Industrial Security Program Operating Manual ("NISPOM"), which "prescribes requirements, restrictions, and other safeguards that are necessary to prevent unauthorized disclosure of classified information and to control authorized disclosure of classified information released by U.S. Government Executive Branch Departments and Agencies to their contractors." (NISPOM, Section 1-1-1.) Although NISPOM provides for unique badging and segregated work areas the manual also allows for "**others measures as appropriate**" to protect classified information. (Emphasis added.) By this NPRM, the DoD is requiring greater control over researchers exposed to unclassified information and technology than required for classified information under the NISPOM.

Fundamental research conducted by Universities has greatly contributed to the intellectual knowledge of all federal research programs and the capital wealth enjoyed by the United States. Maintaining the right balance between the needs of national security with the needs of collaborative research environments that lead to innovative ideas at universities is essential to the United States remaining the leader in international research and education. Because the objective of both the DoD and the University is to strengthen our national security through the development of new technologies, the University has raised concerns about the NPRM and the potential it has to negatively impact fundamental research.

Very truly yours,

George E. Klinzing

George E. Klinzing, Ph.D.
Vice Provost for Research