



October 13, 2005

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

***By Electronic Mail to dfars@osd.mil
Subject: DFARS Case 2004-D010***

Dear Ms. Williams:

I write on behalf of the Vanderbilt University Medical Center (VUMC) in response to the request for comments on the Department of Defense's proposed rule "Defense Federal Acquisition Regulation Supplement; Export-Controlled Information and Technology," appearing in the Federal Register on July 12, 2005 (70 FR 39976) [hereinafter proposed rule]. VUMC is one of the nation's leading centers of biomedical research. Last year, our researchers conducted \$292 million in sponsored research that was enhanced by the use of a broad array of research technology and enriched by the participation of over 700 talented foreign students, post-doctoral candidates and faculty members.

We join our colleagues at the Association of American Medical Colleges, the Council on Governmental Relations, and the Association of American Universities, whose comments we support and endorse, in urging the Department to withdraw this proposal in its entirety or to modify it as recommended in the comments of the Council on Government Relations.

The proposed rule is characterized as providing "general information on export control law and regulations" (Section 204.7302), yet it fails to include a single reference to the fundamental research exclusion. Since 1985, the federal government has recognized that classification is the only appropriate method of restricting information and technology developed in federally funded fundamental research activities carried on in academic institutions.

NSDD 189, initially issued by President Reagan and affirmed by the current Administration in 2001, has been a source of protection and strength for the fundamental research enterprise in the U.S. Current export control regulations, EAR and ITAR, embody this protection of research in the fundamental research exclusion, which exempts from export licensing requirements the fundamental research activities carried on in academic institutions.

DoD Instruction 5230.27 also contains a similar protection: “The mechanism for control of information generated by DoD-funded contracted fundamental research . . . 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.” Thus the sole mechanism for restricting fundamental research carried on pursuant to federal grant or contract is classification, not contract clauses inserted, according to the words of the proposed rule, “in solicitations and contracts for (a) Research and development; or (b) Services or supplies that may involve the use or generation of export controlled information or technology.”

The proposed rule, as written, applies to all solicitations and contracts involving “research and development”, and is not limited only to those that may involve the use or generation of export controlled information or technology”. Even restricting the clause only to those contracts that “may” involve the use or generation of export controlled information or technology would be overly broad. We fear that the clause will be automatically included by contract officers in every DoD research contract. Such clauses will be difficult, if not impossible to negotiate out of DoD contracts.

The resulting contractual trumping of national policy is not only anomalous; it is destructive of the very scientific activity that the U.S. must encourage in order to maintain scientific and national leadership. No statement of reassurance exists in the proposed clause that asserts if a contract were only for fundamental research, it would not be affected by the proposed clause. Also, the proposed rule misleadingly indicates that it is a “clarification of existing obligations” [Supplementary Information, Section B]. This clearly is not the case, in light of the absence of reference to the fundamental research exclusion. The proposal in fact extends rather than clarifies existing obligations.

The Department of Defense should substitute for this misguided and overreaching proposal a clause that simply notes the contractor’s existing responsibilities under applicable export control law and regulations. This is the only appropriate approach to accomplish the stated objective of “clarifications of existing responsibilities.”

Failing that, the proposal must be modified as recommended by the comments submitted on the proposed rule by the Council on Governmental Relations. Should the Department proceed with some version of its proposal, it is critical that any export controlled information or technology be identified in advance and noted in the contract by DoD, rather than leaving the institution to make the identifications at its peril.

The imposition in the rule of specific elements of “an effective export compliance program”, e.g., unique badging requirements and segregated work areas, goes beyond current requirements in the regulations and will result in disruption and distortion of the work environment necessary to conduct fundamental research. This environment is necessarily characterized by openness, collaboration, and interactions in which both U.S. citizens and foreign nationals participate.

The collaboration essential to the conduct of research will suffer, and correspondingly, the country will suffer. We fear that adoption of the proposed rule as written will significantly impede partnerships between DoD and academic research centers such as ours at Vanderbilt because the costs of doing so will be prohibitive.

Thank you for your consideration of our views.

Sincerely,

A handwritten signature in cursive script, reading "Harry R. Jacobson". The signature is written in black ink and is positioned above the printed name.

Harry R. Jacobson, M.D.
Vice Chancellor for Health Affairs