



Rensselaer

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VICE PRESIDENT FOR RESEARCH

October 11, 2005

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:

As the Vice President for Research at Rensselaer Polytechnic Institute, I am writing to offer comments on the Department of Defense's Proposed Amendment to Defense Federal Acquisition Regulations Supplement that appears in the Federal Register on July 12, 2005. That proposed rule offered a DFARS subpart 204.73 entitled, "Export-Controlled Information and Technology at Contractor University and Federally Funded Research and Development Center Facilities," with an associated contract clause denominated as DFARS Part 252.204-70XX.

National Security Decision Directive (NSDD) 189, issued under the authority of then-President Reagan in September of 1985, constitutes established federal government policy concerning the classification of information and technology developed through federally funded fundamental research at a university. Directive 189 provided that if sensitive information arose from or in connection with fundamental research, security classification, not export regulation, would be the sole mechanism for control over dissemination of that information. The Directive expressly stated:

"No restriction may be placed upon the conduct of reporting of federally funded fundamental research that has not received national security classification except as provided in applicable U.S. statutes."

NSDD 189 was *specifically* reaffirmed on November 1, 2001 by the Bush Administration, through a letter issued by then-National Security Advisor Dr. Condoleezza Rice.

The issue of greatest concern in the proposed regulation is the omission and complete failure to address or even mention the issue of fundamental research. As written, the rule may even be read to impose export controls as a matter of contract to controlled information and technology even where the fundamental research exemption clearly applies. Such a result would be in direct opposition to the directive of NSDD 189 and could have the disastrous effect of completely

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abrogating the fundamental research exception from export control regulation and was surely not the intent of the proposed regulation. Even though that is not the intent, the serious ambiguities in the language chosen will at the very least confuse federal contracting officers over the proper law to be applied, with the unfortunate result that some officers may assume that far more DoD contracts require export control restrictions than what is otherwise already prescribed by law.

Ambiguity in the application of what is or is not fundamental research that is exempt from licensing requirements would have disastrous consequences for virtually every major university in the United States and ultimately, the competitive position of the United States. It has been estimated that, as of 2003, there are over 586,323 foreign students studying in the United States, of which 260,000 are undergraduates or graduate students in the critically important fields of science and engineering (see <http://opendoors.iienetwork.org/?p=49936>.) At Rensselaer alone, we currently have approximately 577 foreign national undergraduate and graduate students, with the vast majority enrolled in science and engineering. If, as is seemingly implied from the proposed DoD directive, DoD research, even fundamental research, would have to be performed by the university in a manner so that foreign members of the campus community could not have access to any export controlled information or technology, Rensselaer would have to either decline the research outright or impose stringent security provisions which would adversely impact our open and collaborative research environment.

Thus, this proposed DoD regulation, by attempting to control information and technology developed through federally funded fundamental research in a manner other than security classification, is therefore in direct violation of NSDD 189. The clause is also inconsistent with the DoD Instruction 5230.27, apparently promulgated to enforce compliance with NSDD 189; Section 4.3 of that Instruction states:

“The mechanism for control of information generated by DoD-funded contracted fundamental research in science, technology and engineering performed under contract or grant at colleges and universities and non-governmental laboratories is security classification. No other type of control is authorized unless required by law.”

It is also important to note that the proposed regulation is unnecessary. It ignores the fact that the United States maintains a comprehensive visa process which screens foreign nationals to assess any threat to national security before approving entry by those individuals. Visa applications are extensively reviewed by federal agencies and extensive background checks are conducted on any individuals who are to study or do research in fields that may give rise to concerns about access to technology. If there are security concerns with regard to the presence of any given foreign individual, they are better addressed in the visa security assessment process rather than attempting to change in fundamentally destructive ways the open and collaborative academic research environment that is the foundation of learning in the United States.

Moreover, even if it is assumed that this proposed regulation adds value to the already existing laws and regulations concerning export controls, it is premature. Since the Bureau of Industry and Security (BIS) of the Department of Commerce is currently in the process of considering comments received in response to their own advance notice of proposed rule making

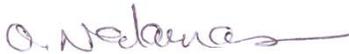
(concerning the correct interpretation of deemed export requirements for equipment use technology in fundamental university research), this proposed amendment is premature. Further action from the Department of Commerce modifying or altering the definitions contained in their regulation will have a direct effect on the construction of terms in this DoD-generated regulation. Therefore, it appears far more prudent for the Department of Defense to await final activity on the Department of Commerce regulation prior to adopting any related regulations.

Finally, the regulation directs extraordinarily specific processes and mechanisms to control export controlled information and technology, including the required imposition of an access control plan that would mandate badging requirements, segregated work areas and the like. It goes well beyond requirements under the National Industrial Security Program operating manual for the handling of *classified* materials, which provides for badging or segregated works areas *only* as appropriate rather than imposing a blanket requirement. It is not appropriate for controls for unclassified information and technology to be less flexible than for classified information. Moreover, the requirement of badging requirement only for foreign nationals and not other individuals could raise serious constitutional equal protection concerns.

An open, unfettered and truly international campus research environment is a critically important factor in the quest for academic excellence and the economic well-being of our country. An essential ingredient to that environment is the pure and unfettered collaborative connection between US citizens with foreign national students and scholars. It is Rensselaer's position that this proposed regulation goes well beyond what is authorized by statute or presidential directive, is overly broad, confusingly drafted, and most important of all, may serve to constrain, and thereby substantially damage, our nation's fertile scientific and research community, out of which comes our nation's competitive edge in the world economy, and which supports our own national security. We ask that this regulation be seriously reconsidered.

Thank you for the opportunity to comment on this proposed regulation.

Very truly yours,



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