



The National Council on International Trade Development
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October 12, 2005

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

Subject: Proposed Department of Defense Rule published July 12, 2005
(DFARS Case 2004-D010)

Dear Ms. Williams:

The National Council on International Trade Development (NCITD) is pleased to respond to the Defense Department's request for comments on a proposed amendment to the Defense Federal Acquisition Regulation Supplement (DFARS). The amendment addresses requirements for preventing unauthorized disclosure of export-controlled information and technology under DOD contracts.

Founded in 1967, NCITD is a nonprofit trade association of U.S. exporters and importers who are advocates of export control policies that are consistent with national security, foreign policy, and a flexible export transaction process that promotes export trade. Our membership includes large, mid-size, and small firms, exporters and importers, freight forwarders and brokers, banks, attorneys, and consulting firms. Our members understand the importance of their role in preventing exports and reexports that might be contrary to the national security and foreign policy interests of the United States.

Our specific comments and concerns on the proposed rule are outlined below with a reference to the relevant section of the proposed rule:

204.7302: This section specifically references the "transfer" of export-controlled information. While the word "transfer" comports with the wording of the Export

Administration Regulations (EAR), it does not convey the depth of the restrictions that the International Traffic in Arms Regulations (ITAR) place on export-controlled information, as the ITAR also restrict oral and visual disclosures of export-controlled information. A disclosure is not encompassed by the word “transfer” or by the phrase “transfer by any means”. This section further references “foreign nationals” and “foreign persons” without defining what is meant by these terms and without referencing the definitions for these terms in the EAR or ITAR. The shortcoming is misleading as a “green card holder” or “permanent resident alien” is technically a foreign national or a foreign person but not under ITAR or EAR, which define green card holders and permanent resident aliens as “U.S. persons”.

204.7303: This section requires the contracting officer to ensure that contracts identify export-controlled information but does not require the contracting officer to identify the relevant export control agency, i.e., the State Department’s Directorate of Defense Trade Controls (DDTC) or the Commerce Department’s Bureau of Industry and Security (BIS). This is a major flaw in the proposed regulations, in that the contracting officer is better positioned than the contractor to know whether the information or technology conveyed to the contractor qualifies as ITAR-controlled technical data or EAR-controlled technology. Further, the restrictions imposed by ITAR and EAR differ considerably in that ITAR currently prohibits exports to 22 countries and requires an export license for virtually all exports whereas the EAR currently prohibits exports to 4 countries and requires export licenses on far fewer exports than the ITAR.

252.204-70XX(a): This section defines export controlled information and technology as meaning “information and technology that may only be released to foreign nationals or foreign persons in accordance with the Export Administration Regulations and the International Traffic in Arms Regulations...” It is unclear what this means. With some exceptions for publicly available information, most information and technology is “controlled” for export although export licenses may not be required under the EAR or the ITAR. Further, this section gives no consideration to the fact that certain destinations and certain end users are deemed to be prohibited for which no export license will be granted in any event. This section is also unclear as to how a contracting officer can ensure that contracts identify any export-controlled information and technology.

252.204-70XX(d): This section requires a contractor to maintain an “effective export compliance program”. First of all, “effective” is a relative term – how is a contractor to know that a compliance program is “effective”? Secondly, neither the ITAR nor the EAR require exporters to maintain export compliance programs. While one can easily infer that compliance under both the ITAR and EAR can only be accomplished by the development and maintenance of an export compliance program, this section goes beyond the actual regulatory requirements of ITAR and EAR and in so doing contradicts section 252.204-

70XX(f) which states that nothing in the proposed regulations is intended to "... supercede ... the requirements of ... ITAR or the EAR".

252.204-70XX(d)(1): This section requires an access control plan that includes special badging requirements and segregated work areas for foreign nationals and foreign persons but does not take into consideration that fact that foreign nationals and foreign persons are accorded different treatment *vis a vis* export licensing requirements under ITAR and the EAR. So while badging and a segregated work area may be appropriate under ITAR, they may not be required under the EAR.

252.204-70XX(e): This section requires contractors to conduct training on and perform periodic assessments of export compliance. While one can easily infer requirements for these activities under both the ITAR and EAR, this section goes beyond the actual regulatory requirements of ITAR and EAR and in so doing contradicts section 252.204-70XX(f) which states that nothing in the proposed regulations is intended to "... supercede ... the requirements of ... ITAR or the EAR".

Non-section specific: We question why the proposed regulation includes a statement that a contractor must comply with all applicable laws and regulations regarding export-controlled information and technology. Contractors as well as any other organizations are already required to comply with export control provisions. We also feel strongly that the government should not mandate how a company or industry manages its compliance responsibilities. The DFARS may stipulate what has to be done, but should not mandate how it must be done.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "MJ Ford", is positioned above the typed name.

Michael J. Ford
Chairman,
National Council on International Trade Development