



OFFICE OF THE VICE PRESIDENT
FOR RESEARCH

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October 10, 2005

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

Re: DFARS Case 2004-D010

Dear Ms. Williams:

Thank you for considering the following comments from the University of Iowa with respect to the proposed amendment to the Defense Federal Acquisition Regulation Supplement (DFARS), DFARS Case 2004-D010. The proposed rule institutes a new DFARS subpart (DFARS Subpart 204.73, *Export-Controlled Information and Technology at Contractor, University, an Federally Funded Research and Development Center Facilities*) and contains a related contract clause (DFARS Part 252.204—70XX).

The University is an extensive doctoral/research institution as classified by the Carnegie Foundation and provides a full range of teaching, research and service missions in an increasingly global environment. The University comprises 11 colleges, including a major academic health center. The University has vigorous research programs in engineering and computer science, as well as the physical and biological sciences. During the last fiscal year, the University of Iowa received over \$360,000,000 in external research funding, with significant funding directly from the Department of Defense (DOD). We believe that the proposed DFAR amendment would have a major negative impact on our teaching, research, and service missions. This, in turn, will have a direct negative impact on the ability of the DOD to meet its research requirements.

We have several concerns with the implications of this amendment and contract clause, and its timing. First, the proposed amendment and contract clause appear to be in direct conflict with National Security Decision Directive (NSDD) 189. This directive states "no restrictions may be placed upon the conduct ... of federally funded fundamental research that has not received national security classification." This Directive was reaffirmed by the current Administration in November of 2001. By failing to explicitly recognize the fundamental research exclusion from export controls, DFARS Case 2004-D010 at best creates ambiguity. Even more importantly, it has the potential to subject all DOD-funded research at universities to the export control regulations, which is directly in conflict with NSDD 189. Ultimately, this will adversely affect the DOD's ability to access the science and technology absolutely necessary to defend this nation and will stifle research critical to national and economic security.

Additionally, because the Department of Commerce Bureau of Industry and Security (BIS) is currently considering the hundreds of comments it received on the Advanced Notice of Proposed Rulemaking (ANPR; RIN 0694-AD29 – Fed. Reg. 3/8/05), we believe that it is premature for the DOD to consider implementing this amendment and related contract clause. The BIS ANPR concerns the correct interpretation of the deemed export requirements for equipment use technology in fundamental university research and in other contexts. Several organizations representing universities are currently engaged in dialogue with Commerce about the ANPR and how BIS will respond. It seems logical that other federal agencies wait for additional guidance on the correct interpretation of controversial regulatory provisions and any resulting regulatory changes before adding to those provisions, or creating new, related provisions. This timing would address the need for consistency among federal agencies.

Another major concern with the proposed rule is that it does not make any mention of the applicable exclusions from export control regulations, specifically, the fundamental research exemption. The result of this apparent oversight is a glaring ambiguity where the rule may be read to contractually apply export controls and license requirements to controlled information and technology, even when neither ITAR nor EAR would apply any such controls. This will likely cause confusion among contracting officers, lengthen contract negotiations related to export control provisions, cause delays in research and apply the controls in an overbroad fashion.

The proposed change would require the University of Iowa to track the nationality of our faculty, staff, students and visitors and segregate foreign nationals from other members of the campus community. Some of these individuals will have to wait for export control licenses before they are allowed to conduct research and use equipment essential to basic research. Universities everywhere will be forced to control access to research laboratories to ensure that foreign nationals without the proper licenses are not able to enter. This means costly new systems of access control that most universities can ill afford. We fear that the end result will be to discourage researchers from conducting DOD-funded research because of the added difficulties in handling foreign students and other researchers. Universities will face the difficult choice of either altering the normal open campus research environment to comply with these proposed requirements or refusing to conduct DOD-funded research.

While we are certainly willing to participate in measures designed to enhance national security, we don't believe the proposed amendment and contract clause achieve that purpose. We would like to point out the fact that the DOD Inspector General (IG) report did not provide any evidence that existing visa and classification processes have failed to protect the transfer of sensitive technologies at universities. Our foreign students and faculty are subject to extensive background checks when they enter the U.S. to study and engage in research. Once cleared through this process, foreign students and researchers should be permitted to fully participate in the academic research community. Any further restrictions imposed by the DOD on a foreign individual's ability to engage in fundamental unclassified research – as the proposed badging requirements and segregated work stations for foreign nationals would impose - are unjustified and overbroad.

Protecting national security is undeniably important and worthwhile, but we find little in the proposed amendment or contract clause that would accomplish that purpose. We believe that anticipated research contracts between the DOD and universities should examine export control issues on a case-by-case basis and secure any necessary licenses from Commerce or State as needed. This is a much more efficient and effective approach than to either have to renegotiate each DOD contract or, even worse, decide that we cannot accept such contract terms at all.

We request that the DOD delay the proposed rulemaking pending the outcome of the Commerce ANPR process and the resulting government policy discussions of the applicability of deemed export controls to fundamental research. There is currently a thoughtful, organized process underway, and it would benefit all involved to see those deliberations through before taking additional action.

Sincerely,

A handwritten signature in black ink, appearing to read 'Meredith Hay', with a large, stylized flourish at the end.

Meredith Hay
Vice President for Research