



October 12, 2006

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

REF: DFARS Case 2004-D010

Dear Ms. Overstreet

The American Association for the Advancement of Science (AAAS) appreciates the opportunity to comment on the Department of Defense (DOD) revised rule published in the *Federal Register* on August 14, 2006, to amend the Defense Federal Acquisition Regulation Supplement (DFARS) for “preventing unauthorized disclosure of export-controlled information and technology under DOD contracts.

AAAS submitted comments as part of the first public comment period conducted in 2005 and we are pleased that many of our concerns and recommendations were addressed. The extent to which the DOD reached out to the academic and private-sector community and discussed this issue in public fora is to be commended.

The revised proposed rule is significantly improved from the original proposal. Specifically, elimination of the access control plans including the badging requirement and segregated work area is a positive step and AAAS supports its removal in the revised August rule. The elimination of this provision reflects an awareness of the broader mission and goals of institutions of higher learning that rely on academic freedom, scientific openness, and an unrestricted dialogue to nurture the flow of ideas and advance the creative nature of scientific inquiry.

In addition, we are pleased that the revised proposed rule recognizes the 1985 National Security Decision Directive 189 (NSDD-189) that called for “no restrictions... upon the conduct or reporting of federally-funded fundamental research that has not received national security classification.”¹ While its inclusion is a positive step in crafting a coherent export control policy, AAAS believes that the revised rule still includes provisions that may restrict the free flow of information that is a cornerstone of fundamental research. Thus, we respectfully submit the following recommendations in the interest of balancing scientific progress and national security interests in an effective manner.

¹ National Security Decision Directive 189, “National Policy on the Transfer of Scientific, Technical, and Engineering Information,” September 21, 1985.

Proposed Clause 252.204-70YY: Requirements Regarding Access to Export-Controlled Information or Technology – Fundamental Research. The principle that the conduct of fundamental research should not be restricted, as outlined in NSDD-189, is one that has been upheld for decades by the Departments of State and Commerce. In fact, fundamental research exemption clauses exist within the International Traffic in Arms Regulations (ITAR) and the Export Administrations Regulations (EAR) [ITAR 120.11, ITAR 125.1(a), and EAR 734.3(b)(3)(ii)]. Under these regulations, if the research is determined to be fundamental it is exempt from export controls.

However, the proposed DFARS clause 252.204-70YY does not include any explicit language that would exempt fundamental research. This new proposed clause states that the “parties do not anticipate that in the performance of this contract the Contractor will generate or need access to export controlled information or technology.” And at the same time, the proposed revisions state that it is the responsibility of the contractor to comply with “all applicable laws and regulations” including compliance with ITAR and EAR.

AAAS believes that the proposed clause 252.204-70YY runs counter to the underlying principle that fundamental research should not be restricted and believes its inclusion would generate confusion among contractors and contracting officers. AAAS recommends that it be removed in the final rulings and that language citing ITAR 120.11, ITAR 125.1(a), and EAR 734.3 (b)(3)(ii) be referenced.

Proposed Clause 252.204-70XX Requirements for Contracts Involving Export-Controlled Information or Technology. AAAS understands that, given the dual-use nature of many areas of science and technology, ambiguities may arise as to what constitutes basic or fundamental research as contrasted with applied research. If the DOD determines that a contract needs to be renegotiated to include the proposed clause 252.204-70XX, we believe that mechanisms should be put in place to allow the (sub)contractor to decline such revisions and be released from its contract without being held in default. AAAS recommends that DOD work in concert with the appropriate agencies that have jurisdiction on this subject and organizations that have expertise in this area (e.g., Council on Government Relations) to develop language and procedures that meet the interests of all parties.

Founded in 1848, AAAS is the world’s largest general science society with over 120,000 members and 262 affiliated societies. AAAS continues to uphold the standard that “freedom and national security are best preserved by adherence to the principles of openness that are a fundamental tenet of both American society and of the scientific process.” In this regard, we greatly appreciate the opportunity to submit comments to DOD and stand prepared to work with you in the future on this important topic.

Sincerely,

A handwritten signature in blue ink, appearing to read "Alan I. Leshner". The signature is fluid and cursive, with the first name "Alan" and last name "Leshner" clearly legible.

Alan I. Leshner
Chief Executive Officer