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BY ELECTRONIC MAIL: dfars@osd.mil

Defense Acquisitions Regulations System
Attn: Ms. Debra Overstreet
OUSD (AT&L) DPAP (DARS)
IMD 3C132
3062 Defense Pentagon
Washington, D.C. 20301-3062

**Re: DFARS Case 2004-D010
Defense Federal Acquisition Regulation Supplement;
Export-Controlled Information and Technology, 71 FR 46434-40**

Dear Ms. Overstreet:

The Association of American Medical Colleges (AAMC) provides these comments on the August 14, 2006 Notice of Proposed Rulemaking to amend the Defense Federal Acquisition Regulation Supplement (DFARS). The proposed amendments address requirements for preventing unauthorized disclosure of export-controlled information and technology under Department of Defense (DOD) contracts (DFARS Case 2004-D010). The AAMC represents all 125 U.S. allopathic medical schools, nearly 400 affiliated teaching hospitals and health systems, and 96 academic and scientific societies representing 109,000 faculty members. Our member institutions maintain extensive research operations and many of these organizations, either independently or as part of larger universities, have a substantial interest in the proposed rule because of their roles in DOD-funded research.

The AAMC joined many other organizations from the university community in responding to DOD's publication in July 2005 of the initial version of the proposed DFARS rule. AAMC is grateful for DOD's willingness to address a number of issues that were raised in those initial comments, especially the new proposal's inclusion of an explicit reference to National Security Defense Directive 189 and to the definition of fundamental research. We also appreciatively note the reference to existing laws and regulations regarding export-controlled information and technology rather than the establishment of a parallel DOD compliance system, and the elimination of language regarding the content of compliance systems. These changes represent important improvements in DOD's approach.

However, simple acknowledgement of the existing laws and regulations governing export controls does not go far enough to assure the contractor community that implementation of the proposed rule will not result in confusion and conflict. The AAMC reiterates that the community

is already responsible for complying with applicable export control regulations in accordance with the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR). We again urge DOD to defer to *existing* obligations without putting its own contract personnel in the position of determining whether or not export licenses are required.

In addition, four key problem areas remain, and we ask DOD also to address these issues of continuing concern to the research community, of which AAMC institutions and academic societies are a prominent part.

First, AAMC continues to question the adequacy and accuracy of provisions in the proposed rule regarding fundamental research. Specifically, clause 70YY(c) indicates that if during performance of the contract the Government or the contractor “becomes aware that the Contractor will generate or need access to export-controlled information or technology, it shall notify the other party and either” modify the contract to include clause 70XX (requirements for contracts involving export-controlled information or technology) or negotiate a contract modification that eliminates the requirement for the work that would involve export-controlled information or technology. This clause is directly contrary to the export control regulations that indicate that information or technology arising during—or resulting from—fundamental research is NOT subject to export controls (EAR 734.3(b)(3)ii.; ITAR 120.11; ITAR125.1(a)). The inclusion of the “will generate” phrasing suggests a clear misunderstanding of these provisions. The 70YY clause should be deleted in its entirety because export controls are not applicable to such contracts. At a minimum, the phrase “will generate” must be deleted from clause 70YY(b) and 70YY(c).

The same issue is present in clause 70XX(b)(2) and 70ZZ(c) with respect to contracts partially involving performance of fundamental research. The phrase “will generate” must be deleted in these provisions, as well. If the research being conducted is no longer fundamental, then only at that point should DOD have the right to insert appropriate provisions regarding export control requirements. Similarly, the contractor should have the right to be released from its contract obligations at the point at which fundamental research has changed to such an extent that export controls are applicable, with their attendant obligations regarding security and restriction on publication.

Second, AAMC questions the ability of DOD contracting officers to make determinations about whether export-controlled information or technology will or will not be involved in a research and development contract. DOD attempts to reassure the research community in its preamble to the proposed rule that it will undertake necessary additional training for its program managers and contracting officers related to the ITAR and EAR, and that contracting officers will rely on the input from the requiring activity when selecting which clauses to include in solicitations and contracts. However, the key role that contracting officers play continues to be a source of concern to the research community. Such officers still may not be in a position to make the critically important and highly complex determinations that are required. There must be included a direction that they consult with the appropriate ITAR or EAR personnel. Moreover, in reference to selecting appropriate contract clauses, no provision is made for exclusions and exemptions from applicable export control regulations other than for the fundamental research

Page 3

exemption. Other exclusions or exemptions may well be applicable within the existing regulatory framework.

Third, AAMC urges DOD to accompany its references to the definition of fundamental research contained in NSDD 189 with citations of EAR and ITAR provisions that provide for and operationalize the fundamental research exemption. Only with such additional references can the research community be confident that the existing protective framework of federal regulation is not being eroded through contract clauses.

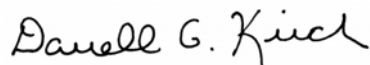
Finally, because the DOD approach is fundamentally flawed in that it puts its contract officers in the position of determining highly complex issues of whether export licenses are required, DOD should include a provision that permits contractor and subcontractor challenges of contract officer determinations regarding the inclusion of the 70XX clause. AAMC also urges the inclusion of the right of a contractor to terminate the contract in the event of an irresolvable disagreement about such determinations. As earlier noted, this right should also apply in the event that the character of what initially is fundamental research sufficiently changes during the performance of a contract such that export control restrictions become applicable. The latter right is especially important in view of the right of the DOD to require restrictions, including publication restrictions, by means of each of the three proposed clauses, and in view of the fact that applicability of the restrictions may not be evident at the onset of the contractual obligations.

The AAMC and its member institutions are committed to full compliance with all currently applicable export control laws and regulations. We have undertaken extensive efforts to assure compliance. The impact of DOD's current proposal will fall most heavily on academic institutions, including AAMC member institutions, whose commitments to fundamental research and to open publication are ineluctable aspects of their missions. While the proposed rule is a substantial improvement over the 2005 version, problems persist that we urge DOD to address. Otherwise, the ambiguities and misinterpretations incorporated into the proposal will lead to disagreement and conflict in implementation, and will further strain the nation's research enterprise without corresponding gain in benefit to national security.

The AAMC appreciates the opportunity to comment on the proposed rule and urges DOD's consideration not only of these comments, but also those submitted by the Association of American Universities (AAU) and the Council on Governmental Relations (COGR), whose comments we hereby endorse.

Requests for further information or clarification on AAMC's comments should be directed to Susan Ehringhaus at sehringhaus@aamc.org.

Sincerely,



Darrell G. Kirch, M.D.
President