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Part II
Department of Defense

Defense Acquisition Regulations System

48 CFR Parts 204, 206, 223, et al.

Defense Federal Acquisition Regulation Supplements; Export-Controlled
Items; Research and Development Contract Type Determination;
Acquisitions in Support of Operations in Iraq or Afghanistan;
Minimizing Use of Hexavalent Chromium; Final Rules and Proposed Rule
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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System
48 CFR Parts 204, 235, and 252
RIN 0750-AF13

**Defense Federal Acquisition Regulation Supplement; Export-
Controlled Items (DFARS Case 2004-D010)**

**AGENCY: Defense Acquisition Regulations System, Department of Defense
(DoD).**

ACTION: Final rule.

**SUMMARY: DoD is adopting as final, with changes, an interim rule
amending the Defense Federal Acquisition Regulation Supplement (DFARS)
to address requirements for complying with export control laws and
regulations when performing DoD contracts. The rule recognizes
contractor responsibilities to comply with existing Department of
Commerce and Department of State regulations and prescribes a contract
clause to address those responsibilities.**

DATES: Effective Date: April 8, 2010.

**FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, Defense Acquisition
Regulations System, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon,
Room 3B855, Washington, DC 20301-3060. Telephone 703-602-0328;
facsimile 703-602-0350. Please cite DFARS Case 2004-D010.**

SUPPLEMENTARY INFORMATION:

A. Background

DoD published an interim rule at 73 FR 42274 on July 21, 2008, to
address requirements for DoD contractors to comply with export control
laws and regulations, particularly the International Traffic in Arms
Regulations (ITAR) (22 CFR parts 120-130) issued by the Department of
State, and the Export Administration Regulations (EAR) (15 CFR parts

730-774) issued by the Department of Commerce. The rule implemented section 890(a) of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181) and also adopted recommendations resulting from proposed rules published at 70 FR 39976 on July 12, 2005, and 71 FR 46434 on August 14, 2006. This final rule does not address any export control regulations that may be imposed by the Department of Energy, the Nuclear Regulatory Commission, or the Department of the Treasury.

DoD received comments from 12 persons or organizations in response to the interim rule published on July 21, 2008. The following is a discussion of the comments and the changes included in this final rule as a result of those comments:

1. Need to Simplify

a. Single-Clause Construct

Comment: One respondent indicated that the interim rule used an unnecessarily complicated way to remind contractors of their responsibilities under existing export law. The respondent stated that the new clauses impose additional administrative requirements and recommended use of just one clause indicating that export-controlled items may be involved in the performance of the contract. This would eliminate the requirement for the contractor to notify the contracting officer under 252.204-7009(c).

DoD Response: The purpose of this rule is to ensure that contractors are aware of their responsibilities to comply with export control laws and regulations. As stated in DFARS 204.7303, it is in the interest of both the Government and the contractor to be aware of export controls as they apply to contract performance. The interim rule was designed to serve this common interest, to prompt appropriate research by Government requiring activities and communication between the parties to a potential contract, and to have the resulting contract include one of two clauses, so that each contract would reflect the parties' expectation that the contractor either would or would not need access to, or would or would not generate, export-controlled items in performance of the contract.

The final rule requires the use of a single clause in every solicitation and contract, and that clause is silent with regard to the parties' expectations. By not stating specifically whether or not the parties expect performance of the contract to involve export-controlled items, the clause clearly makes the point that the contractor is responsible for understanding and complying with all applicable laws and regulations regarding export-controlled items. That responsibility exists independent of, and is not established or limited by, any information provided in the DFARS clause.

The advantages of changing to a single-clause construct include--

(1) Raising awareness, by inclusion of the appropriate words in every DoD solicitation and contract, that contractors have a responsibility to comply with all applicable laws and regulations regarding export-controlled items;

(2) Eliminating any possible ambiguities that might complicate enforcement of export control laws and regulations by the Commerce, State, and Justice Departments, since there will be no statements in DoD contract clauses that indicate a DoD assessment regarding the applicability of export controls to performance of the contract;

(3) A much simpler DFARS requirement; and

(4) Elimination of the engagement or associated work that would

have been required to implement the two-clause construct.

The possible disadvantages of changing to a single-clause construct include--

(1) Questionable effectiveness of the single clause in raising offeror and contractor awareness of export controls as they apply to the performance of any particular contract, since it will be a standard clause automatically included in all contracts; and

(2) Elimination of the requirement that requiring activities and contracting officers be aware, in each case, of the parties' expectations with regard to performance of a contract involving export-controlled items.

After serious consideration of the pros and cons, and after extensive internal U.S. Government consultation, DoD has determined that a single clause best serves the interests of the Government and industry.

b. Contractor Obligation

Comment: Several respondents stated that the clauses at 252.225-7008 and 252.225-7009 imposed a burden on the contractor to assess whether contracted research will generate export-controlled items. The respondent suggested an approach for DoD to guide its contractors toward compliant exporting under DoD contracts.

DoD Response: The suggested approach was based on the premise that it is the responsibility of DoD to guide its contractor as the contractor determines whether the results of research under its contracts are export-controlled. DoD disagrees with this premise. Export control laws and regulations already exist, and contractors are obliged to comply with them whether or not a DoD contract points out this fact to the contractor. The clause serves to remind offerors and contractors of their existing obligations.

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2. Definition of ``Export-Controlled Items''

a. Broadness of Definition

Comment: One respondent stated that, since ``export-controlled items'' are defined as items subject to the EAR or the ITAR, and since EAR controls are very broad, very few contracts should include the clause at 252.204-7009, because virtually all contracts would involve an ``export-controlled item'' subject to the EAR. The example given was that commercial encryption found in most software applications is controlled by the EAR. This would mean that if a contractor needs to use certain commercial software applications in performance of the contract, the clause at 252.204-7008 would be appropriate, because the contractor would need access to ``export-controlled items.'' If the definition is intended to be this broad, there seems to be little purpose in having the two-clause construct.

DoD Response: DoD consulted with the Department of Commerce, which concluded that the EAR portion of the definition of ``export-controlled items'' is accurate and should remain broad to ensure that contractors are aware of all potential responsibilities under the EAR. For the reasons stated in the response to Comment 1a above, the two-clause construct has been eliminated.

b. Release to U.S. Persons in the United States

Comment: Several respondents were concerned that, as defined in the interim rule, ``export-controlled items'' excludes EAR-controlled commodities released to foreign persons in the United States, but does

not exclude (and thus has the effect of including) EAR-controlled commodities released to U.S. persons in the United States.

Several respondents believed the intent of the rule to be that the clause at 252.204-7008 is not required when the contract will require access to Commerce Control List (CCL) commodities solely within the United States. However, as written, the unintended consequence is a requirement that the clause be included when U.S. persons need access to CCL commodities in the United States. The respondents suggested deleting the phrase ``to foreign nationals'' from the second sentence in 252.204-7008(a)(2) and 252.204-7009(a)(2) to achieve the intended result.

Another respondent pointed out that the interim rule required the clause at 252.204-7008 in contracts involving commodities that are subject to the EAR and that are used solely in the United States, which would not create an export issue under the EAR.

DoD Response: As a result of the decision to adopt a single, mandatory clause, the text related to the release of technology or software source code subject to the EAR to foreign nationals in the United States (or ``deemed exports'') has been removed from the rule. Since the single clause is silent with regard to whether the contract is or is not expected to involve export-controlled items, there is no need to include language on deemed exports. Contractors will have a responsibility to consult the EAR for all activities that may require authorization from the Department of Commerce, including the release of technology and source code subject to the EAR to foreign nationals.

c. Differentiation Between Equipment and Technical Information

Comment: One respondent recommended that DoD change the definition of ``export-controlled items'' so that it does not create confusion and allow the possibility of incorrect application of the clauses by including both controlled equipment and other tangible items, and controlled technical information, in the definition. The respondent's rationale was that export control regulations apply differently to these two categories. While export controls apply to the export abroad of both, export controls do not apply to the mere use or transfer of equipment or tangible items in the United States without providing defense services or related technical data.

DoD Response: The definition of ``export-controlled items'' has a scope that fits the scope of the DFARS rule. The rule applies to export-controlled items, including information and technology. This broadening of the rule's applicability beyond ``export-controlled information and technology'' was logical and also required by section 890(a) of Public Law 110-181. The applicable export controls may indeed operate differently for each of the two categories. However, this fact exists independent of the DFARS rule, and has no bearing on the DFARS definition of export-controlled items.

3. Relationship of the DFARS Rule to the EAR and the ITAR

a. DoD Should Identify Export-Controlled Items

Comment: One respondent recommended that the rule (1) require the contracting agency to identify, by specific provision in the applicable export control regulation, those export-controlled items to which contractors or subcontractors will have access, and (2) require the contracting officer to notify the contractor of those items prior to release. The comment appeared to be limited to a subset of export-controlled items, specifically those that would be furnished or released by the Government to the contractor.

DoD Response: The interim rule did not include a requirement for identifying in the contract clause any specific export-controlled items to be involved in contract performance. As stated in the preamble to the interim rule published on July 21, 2008, such a requirement was determined to be unacceptable to the agencies of the Federal Government (i.e., Departments of State, Commerce, and Justice) responsible for enforcing export control laws and regulations (i.e., the ITAR and the EAR). From their point of view, it is important that any contract clause be free of information that could possibly create ambiguity about the contractor's responsibility to comply with all applicable laws and regulations regarding export-controlled items, which exists independent of, and is not established or limited by, the information provided in the DFARS rule or the prescribed contract clauses. The final rule prescribes a single clause that has no such content. Additionally, authorization to release and for releasing export-controlled items is covered by export control laws and regulations and is, therefore, independent of, and beyond the scope of, this DFARS rule.

b. DoD Should Determine if Research Is Export Controlled

Comment: One respondent stated that it is DoD's responsibility to determine whether the results of research under its contracts are export-controlled and that, since DoD has a leading technical input to any commodity jurisdiction action, DoD should be comfortable with advising contractors as to whether DoD considers the results of research conducted under its contracts to be export-controlled, or with providing ``DoD export direction.''

Another respondent stated that increased security benefits will be reaped if DoD diligently identifies those portions of fundamental research projects that it believes may be export-controlled. Several other respondents stated that the Government needs to convey to the universities the information that certain work is export-controlled.

DoD Response: The DFARS clauses in the interim rule did not establish the export controls with which exporters are obliged to comply. The ITAR and

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the EAR, not the DFARS clauses, impose the burden on exporters to know if the work they are doing, whether or not under a DoD contract, will involve export-controlled items. Exporters have strict liability to comply with the ITAR and the EAR. DoD's responsibilities under the DFARS rule in no way relieve DoD contractors of the responsibilities they have under the ITAR and the EAR. DoD does not have authority to issue ``export direction'' regarding contractor responsibilities to comply with the ITAR and the EAR.

c. Inappropriate Encouragement of the Use of Export Controls

Comment: One respondent stated that the DFARS rule would encourage unintentionally the use of export controls in cases where an exclusion would apply.

DoD Response: Export controls and exclusions are established by the ITAR and the EAR independent of DFARS requirements. In providing single-clause guidance to contracting officers and contractors with reference to the operative regulations, any potential for independent interpretation or encouragement should be eliminated.

d. Contractor Liability

Comment: One respondent stated that the rule is silent on contractor liability, making it unclear as to what approach contractors

must take in the event of an unauthorized export when the submittal of a voluntary disclosure to the State Department's Directorate of Defense Trade Controls or the Commerce Department's Office of Export Enforcement would be appropriate. The ITAR and the EAR lay out well-defined steps for submitting voluntary disclosures. It is not clear whether the DFARS rule would require the contractor to make disclosures with the DoD contracting officer in addition to those made under the ITAR or the EAR. The rule should clearly state that any matters related to controlled data should be addressed in accordance with existing State Department or Commerce Department regulations.

DoD Response: The interim rule's statements at 204.7302, and 252.204-7008(c), (d), and (e), were intended to make clear that the ITAR and the EAR govern the control of exports and enforcement of export controls, and that questions about the ITAR go to the State Department and questions about the EAR go to the Commerce Department. After consultation with the Departments of State and Commerce, DoD concluded that a change might enhance the clarity of the rule in this regard, without mentioning any particular ITAR or EAR requirement (such as voluntary disclosure), since mentioning one requirement could create confusion about the many requirements left unmentioned. Therefore, paragraph (d) (formerly paragraph (e)) of the clause at 252.204-7008 has been amended to state that ``nothing in the terms of this contract adds to, changes, supersedes, or waives any of the requirements of applicable Federal laws, Executive orders, and regulations * * *''

e. Process for Determining whether Export-Controlled Items are Involved

Comment: One respondent stated that the procedure prescribed by the rule can result in the Government issuing a solicitation that includes the clause at 252.204-7008, but provides no insight as to why the Government considered that clause appropriate. The rule should (1) give contractors the opportunity to consider whether the work can be performed without the contractor needing access to or generating export-controlled items, (2) provide explicitly for consultation with contractors, DoD contracting officers, and agencies responsible for the EAR and the ITAR in making a determination if export-controlled items are expected to be involved; and (3) provide for revisiting the determination after receipt of proposals but before award of the contract.

DoD Response: The single-clause construct of the final rule eliminates the concerns expressed by this comment.

4. Fundamental Research and the Clause at DFARS 252.204-7000, Disclosure of Information

Comments: The fundamental research aspect of the rule was a key focus of respondents. Ten of the twelve respondents represented a university or the university community. Two of the university respondents acknowledged that, on occasion, universities under contracts with DoD can and do have access to export-controlled items in fundamental research, noting that this is done in compliance with applicable export control laws and without publication restrictions on the results of their fundamental research. Comments associated with fundamental research had several common themes:

[cir] Concern that the DFARS definition of ``fundamental research'' (from National Security Decision Directive (NSDD) 189) is different than the definitions in the ITAR and the EAR. The distinction between ``fundamental research'' and ``applied research'' is dealt with adequately in the ITAR and the EAR and DoD should avoid adding

complexity or confusion with this DFARS rule.

[cir] Belief that an exclusion for fundamental research exists with regard to export controls, i.e., if a contract is for fundamental research and with a university, export controls cannot possibly apply. The EAR and the ITAR were cited to support this belief.

[cir] Focus on fundamental research rather than on the contract, to the extent that one respondent suggested identifying which export-controlled items are subject to the clause at 252.204-7008 and what part of the contract work is fundamental research subject to the clause at 252.204-7009.

[cir] Confusion regarding, concerns about, or arguments against the assertion in the DoD statement in the preamble to the interim rule published on July 21, 2008, that there is a borderline where fundamental research meets more advanced applied research and development.

[cir] Concern that contracting officers, in the event that export-controlled items are expected to be involved in the conduct of university research, may erroneously conclude that the results of university research must necessarily contain sensitive information or information not appropriate for public release, and may impose the clause at DFARS 252.204-7000, Disclosure of Information, or other access and dissemination restrictions on the contract. Application of publication restrictions on university research destroys the university's ability to conduct the research as fundamental research that is not subject to export control restrictions, and could lead to restrictions on the involvement of foreign researchers. Therefore, universities were concerned that the rule may restrict the conduct of fundamental research on university campuses.

[cir] Recommendations that the rule refer to the June 26, 2008, Under Secretary of Defense (Acquisition, Technology, and Logistics) memorandum on the subject of ``Contracted Fundamental Research,' ' and that the rule include the memorandum's guidance to DoD officials for contracting with universities for fundamental research.

[cir] The need to instruct requiring activities and contracting officers to manage fundamental research projects such that they do not become subject to export controls.

DoD Response: The two-clause construct has been eliminated in the final rule, which prescribes a single clause for use in all DoD solicitations and contracts. The single clause is silent

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with regard to whether the contract is or is not expected to involve export-controlled items. There is no need in the revised context to mention any particular type or category of contracts, including research and development contracts. The clause puts all contractors, including universities performing contracts for fundamental research only, on notice that they are responsible for complying with all applicable export control laws and regulations.

DoD does not have the authority to establish in the DFARS a presumption that DoD contracts for fundamental research do not involve export-controlled items or that contractors performing DoD contracts for fundamental research may assume that the ITAR and the EAR do not apply to what they do or produce in the performance of the contract.

After considering the public comments associated with this aspect of the rule, DoD concluded that the rule would be improved by removing the references to fundamental research. The result is a simpler,

clearer rule, with nothing that will distract the reader from the focus on the contractor's responsibility for complying with the ITAR and the EAR. Therefore, the final rule does not define or mention fundamental research. The clause is written to apply to all contracts, and there is no exception for contracts for fundamental research. The operation of the DFARS rule will be independent of, and have no bearing on, the applicability of NSDD 189, EAR, or ITAR definitions of ``fundamental research'' to a given contract. The interim rule did not, and the final rule does not, impose restrictions on the publication or dissemination of the results of research under research contracts.

5. Alternatives at 252.204-7009(c), Particularly the Alternative for Termination for Convenience of the Government

Paragraph (c) of the clause at 252.204-7009 in the interim rule required the contractor to notify the contracting officer if, during performance of the contract, the contractor became aware that it would generate or need access to export-controlled items. The contracting officer would then modify the contract to include the clause at DFARS 252.204-7008; negotiate a contract modification to eliminate the requirement for work involving export-controlled items; or terminate the contract, in whole or in part, for the convenience of the Government.

Comments: Many respondents were concerned with the alternative of terminating the contract for the convenience of the Government.

Several respondents suggested that contractors should also have the right to terminate for convenience of the contractor. Most of these respondents cite, for comparison purposes, FAR clause 52.204-2, Security Requirements, Alternate I, which, in paragraph (g), permits the contractor to request the contracting officer to terminate the contract in whole or in part in accordance with the terms of the Termination for the Convenience of the Government clause.

One respondent considered that the interim rule would unnecessarily encourage a contracting officer to potentially terminate a contract for convenience rather than modify the contract.

Another respondent was concerned, in general, that the unilateral nature of these provisions and the amount of discretion left to the contracting officer increase the ambiguity and uncertainty of the rule. The respondent requested that the final rule provide explicitly for consultation with contractors as to whether the research can be conducted without using export-controlled items.

DoD Response: The final rule removes the clause at 252.204-7009, including the language that was of concern to the respondents.

6. Flow-Down of Clauses to Subcontracts

a. Flow-Down of 252.204-7008

Comment: One respondent stated that, unless the term ``foreign nationals'' is deleted from paragraph (2) of the definition of ``export-controlled items,'' contractors would be required to flow down the clause at DFARS 252.204-7008 to subcontracts in cases in which U.S. persons need access to EAR-controlled commodities, but not in which foreign persons need access to these items.

DoD Response: The statement regarding foreign nationals has been excluded from the definition of ``export-controlled items.''

b. Flowdown of 252.204-7000

Comment: One respondent stated that mandatory flow down of the

clause at DFARS 252.204-7000, Disclosure of Information, from industry prime contractors to universities is perhaps the single largest impediment to efficient contracting between universities and their DoD-sponsored prime contractors.

DoD Response: The clause at DFARS 252.204-7000 is not prescribed by DFARS subpart 204.73. Therefore, changes to this clause or its prescription are outside the scope of this DFARS rule.

7. Training

Comment: One respondent stated that DoD should ensure export control compliance training for all DoD personnel involved in research and development acquisitions. Another respondent stated that extensive Government training would be needed for DoD requiring and contracting personnel, to permit selection of the appropriate contract clause as well as proper administration of the clause.

DoD Response: The final rule's prescription of a single clause for use in all solicitations and contracts eliminates the aspects of the interim rule that created the greatest need for additional training for requiring and contracting personnel. Nevertheless, DoD has a continuing interest in improving the training available on export control-related matters. Web-based training on this subject is available presently to DoD personnel through the Defense Acquisition University.

This rule was reviewed by the Office of Management and Budget under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because all contractors, including small entities, are already subject to export-control laws and regulations. The requirements of this rule reinforce existing responsibilities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2004-D010) in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

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List of Subjects in 48 CFR Parts 204, 235, and 252

Government procurement.

Ynette R. Shelkin,
Editor, Defense Acquisition Regulations System.

Accordingly, the interim rule amending 48 CFR parts 204, 235, and 252, which was published at 74 FR 42274, July 21, 2008, is adopted as a final rule with the following changes:

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1. The authority citation for 48 CFR parts 204, 235, and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR chapter 1.

PART 204--ADMINISTRATIVE MATTERS

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2. Subpart 204.73 is revised to read as follows:

Subpart 204.73--Export-Controlled Items

Sec.

204.7300 Scope of subpart.

204.7301 Definitions.

204.7302 General.

204.7303 Policy.

204.7304 Contract clauses.

Subpart 204.73--Export-Controlled Items

204.7300 Scope of subpart.

This subpart implements section 890(a) of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181).

204.7301 Definitions.

Export-controlled items, as used in this subpart, is defined in the clause at 252.204-7008.

204.7302 General.

Certain types of items are subject to export controls in accordance with the Arms Export Control Act (22 U.S.C. 2751, et seq.), the International Traffic in Arms Regulations (22 CFR parts 120-130), the Export Administration Act of 1979, as amended (50 U.S.C. App. 2401, et seq.), and the Export Administration Regulations (15 CFR parts 730-774). See PGI 204.7302 for additional information.

204.7303 Policy.

(a) It is in the interest of both the Government and the contractor to be aware of export controls as they apply to the performance of DoD contracts.

(b) It is the contractor's responsibility to comply with all applicable laws and regulations regarding export-controlled items. This responsibility exists independent of, and is not established or limited by, this subpart.

204.7304 Contract clauses.

Use the clause at 252.204-7008, Export-Controlled Items, in all solicitations and contracts.

PART 252--SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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3. Section 252.204-7008 is revised to read as follows:

252.204-7008 Export-Controlled Items.

As prescribed in 204.7304, use the following clause:

Export-Controlled Items (Apr 2010)

(a) Definition. Export-controlled items, as used in this clause, means items subject to the Export Administration Regulations (EAR) (15 CFR parts 730-774) or the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120-130). The term includes:

(1) Defense items, defined in the Arms Export Control Act, 22 U.S.C. 2778(j)(4)(A), as defense articles, defense services, and related technical data, and further defined in the ITAR, 22 CFR part 120.

(2) Items, defined in the EAR as ``commodities, software, and technology,' ' terms that are also defined in the EAR, 15 CFR 772.1.

(b) The Contractor shall comply with all applicable laws and regulations regarding export-controlled items, including, but not limited to, the requirement for Contractors to register with the Department of State in accordance with the ITAR. The Contractor shall consult with the Department of State regarding any questions relating to compliance with the ITAR and shall consult with the Department of Commerce regarding any questions relating to compliance with the EAR.

(c) The Contractor's responsibility to comply with all applicable laws and regulations regarding export-controlled items exists independent of, and is not established or limited by, the information provided by this clause.

(d) Nothing in the terms of this contract adds to, changes, supersedes, or waives any of the requirements of applicable Federal laws, Executive orders, and regulations, including but not limited to--

(1) The Export Administration Act of 1979, as amended (50 U.S.C. App. 2401, et seq.);

(2) The Arms Export Control Act (22 U.S.C. 2751, et seq.);

(3) The International Emergency Economic Powers Act (50 U.S.C. 1701, et seq.);

(4) The Export Administration Regulations (15 CFR parts 730-774);

(5) The International Traffic in Arms Regulations (22 CFR parts 120-130); and

(6) Executive Order 13222, as extended.

(e) The Contractor shall include the substance of this clause, including this paragraph (e), in all subcontracts.

(End of clause)

Section 252.204-7009 [Removed and Reserved]

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4. Section 252.204-7009 is removed and reserved.

[FR Doc. 2010-7258 Filed 4-7-10; 8:45 am]

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