COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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August 22, 2013

U.S. Department of Energy
Office of Acquisition and Project Management
MA-611
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Attn: Lawrence Butler

Ref: Export Control and RIN 1991-AB99
CODSIA Case **07-2013**

Via email: DEARrulemaking@hq.doe.gov
Lawrence.butler@hq.doe.gov

Dear Mr. Butler:

On behalf of the Council of Defense and Space Industry Associations (CODSIA),[1] we are pleased to submit the following comments on the Department of Energy's (DoE) proposed rule titled "Acquisition Regulations: Export Control" published in the Federal Register on June 12, 2013. CODSIA requested an extension of the comment period[2] and we appreciate the department granting this request. An extension of the due date for comments until August 23, 2013 was published in the Federal Register on July 26, 2013.

DoE is proposing to amend DEAR subparts 925 (relating to Foreign Acquisitions) and 970 (relating to DoE Management and Operating Contracts) by adding new subsections relating to the export control of items, including adding associated contract clauses in Part 952, for all DOE solicitations and contracts that may involve the export of items, including but not limited to unclassified information, materials, technology, equipment, or software. Similar provisions would apply to management and operating contracts. Like the 2010 Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.204-7008—Export-Controlled Items, the new DEAR clause would require that DOE contractors comply with all applicable export control laws, regulations, and

[1] CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of six associations – the Aerospace Industries Association (AIA), the American Council of Engineering Companies (ACEC), the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), TechAmerica, and the Chamber of Commerce of the United States. CODSIA's member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

[2] See CODSIA's July 11, 2013 letter, available at http://www.pscouncil.org/c/b/Letters_Comments_Tes.aspx?hkey=f1b46c86-458d-4e75-a12a-bceb796c2bc6

directives, although the list of covered laws, regulations and directives is more extensive to include authorities unique to DOE. However, in our view, the DEAR clauses still have more far-reaching requirements than the DFARS clause.

In addition, the scope of the proposed rule exceeds its stated purpose which is "to amend the DEAR for consistency with a 2010 amendment to the Department of Defense Acquisition Regulations (DFARS) (DFARS Case 2004-D010, 75 FR 18030, April 8, 2010)." (Emphasis added). The proposed DEAR rule is not consistent with the DFARS. The proposed DEAR rule is broader and would impose additional burdens and risks on DOE contractors and DOE procurement personnel.

The DEAR Proposed Rule is Not Consistent with the Final DoD Rule

While the stated goal of the DEAR rule is to be consistent with the 2010 DoD final rule, it is not. The DEAR rule is broader and would impose additional contractual and compliance responsibilities on DoE contractors beyond those required by the DoD rule – even taking into account the expanded list of laws, regulations and DoE directives that are covered by the DEAR rule. For example, the DoD rule does not require the use of an Export Restriction Notice; as provided for in both Parts 925 and 970 of the DEAR, the rule would require contractors to place a lengthy "Export Restriction Notice" in all "transfers, sales or other offerings of unclassified information, materials, technology, equipment or software pursuant to a DoE contract."

The DoD rule does not require notification to the DoD contracting officer of either the export control requirements the contractor has determined apply to contract performance or that the contractor has "taken appropriate steps to comply with such requirements." Furthermore, the DEAR flows down the clauses to a different universe of covered actions -- "subcontracts at any tier that involve such transfer, sale or other items, including but not limited to, unclassified information, materials, technology, equipment or software."

Compliance Requirements in the DEAR Proposed Rule Are Unclear

Several of the compliance requirements imposed on contractors by the DEAR are unclear and, absent clarification, may lead to disagreements about the scope of the contract compliance imposed, or at worst, result in the U.S. government initiating contractual, civil or criminal actions for alleged non-compliance with the clauses. For example, both the 925 and the 970 clauses require the contractor to notify the contracting officer in writing of "any export control requirements it has determined apply to contract performance," but the rule does not provide any information on the extent of the notice, the details regarding the nature and extent of the export control requirements, or any subsequent information if the determination changes for any reason. In addition, by using the past tense of the phrase "has determined," we interpret the notification requirement of this element to come only after the contractor has taken the necessary action to confirm coverage of an export requirement, including after consulting with the agencies responsible for the administration of the export laws such as listed in subsection 925.7101(b) or 970.2571-1(b).

Furthermore, the contractor's notification to the contracting officer that the contractor "has taken appropriate steps to comply with such requirements" also raises concern. As the department knows well, the export control laws and regulations are extremely complex and challenge even the most sophisticated contractor – let alone subcontractors. Here, too, the rule does not provide any information on the details regarding the nature and extent of the notice to the contracting officer of the "steps taken" to comply with such requirements, or any subsequent information if the "steps taken" change for any reason. By using the past tense of the phrase "steps taken," we interpret the notification requirement of this element to also come only after the contractor has taken the necessary action to comply with the export requirements it "determined" apply to the instant contract performance requirements. In addition, as noted below regarding the President's export control reform initiative, we are also concerned about the risk of

continuous notification requirements as the substantive export control regimes under both the International Arms Traffic Regulations (ITAR) and the Export Administration Regulations (EAR) both of which are offshoots of the Arms Export Control Act, or the department's own Part 810 rules are revised.

The Export Restriction Notice States a Potentially False Conclusion

The text of the Export Restriction Notice in both 952.225-XX(c) and 970-5225-1(c) makes the definitive statement that the use, disposition, export or re-export of property covered by this notice "are subject to export control laws, regulations and directives." While this provision could be interpreted in various ways, one interpretation is that the DoE has already made its own determination that the property is subject to the export control laws, notwithstanding any contrary "determination" by the contractor. We recommend either (1) that the lead-in text in subparagraph (c) preceding the dictated fixed text of the Notice require the inclusion of this Export Restriction Notice only where the contractor has determined that the specific property to be covered by the Notice is subject to export control restrictions, or (2) that the text of the Notice be revised to state that the contractor has determined that the property is covered by the export control restrictions.

The Part 925 and Part 970 proscriptions are not identical.

For example, 925.7101(a) applies "when exporting items, including but not limited to, unclassified information, materials, technology, equipment, or software." 970.2571(a) has a different and narrower formulation (and lacks a period at the end of the sentence after "equipment or software"). Furthermore, the scope of the prescription in 970.2571(a) differs from the scope of the flow down clause in 970.5225-1(h).

DoE's "Part 810 Rule" Must Be Reconciled With this DEAR Rule

On August 2, 2013, DoE published in the Federal Register[3] a supplemental notice of proposed rulemaking to amend DoE's Part 810 regulations which govern the export and re-export of unclassified nuclear technology and assistance. This supplemental notice replaces and updates an earlier version of the Part 810 rewrite published in 2011.[4] Comments on this supplemental notice are due by October 31, 2013. CODSIA is evaluating whether to comment on this supplemental notice.

Both the 2011 and the 2013 Part 810 proposed rules make substantial revisions to Part 810. Significantly, the 2013 version retains the concept of "deemed export" and "deemed re-export" from the September 2011 DOE notice of proposed rulemaking but establishes a new general authorization for certain deemed exports; neither DOE's August 2, 2013 Supplemental Notice of Rulemaking nor this DEAR rule discuss how covered contractors are to reconcile the different compliance responsibilities of the two rules. In addition, the 2013 Part 810 rule excludes from its scope of coverage exports authorized by the Commerce and State Departments but neither the Part 810 rule nor this DEAR rule discuss how covered contractors are to reconcile the different coverage under the two rules.

The President's Export Control Reform Initiative Must be Reconciled With this DEAR Rule

The President's export control reform initiative is being implemented in three phases. Phase One, which is already substantially complete, harmonized definitions and regulations between the ITAR and the EAR and built a consolidated licensing database. In fact, in mid-July 2013, licensing transitioned to a Defense Department secure export licensing database. Phase Two of the initiative involves revising the US Munitions List (USML) and the Commerce Control List (CCL); several final revised categories have already been published and more than a dozen revised USML categories are still out for public comment.

[3] See 78 Fed. Reg. 48629 (Aug 2, 2013), available at http://www.gpo.gov/fdsys/pkg/FR-2013-08-02/pdf/2013-18691.pdf

[4] See 76 Fed. Reg. 55278 (Sep 7, 2011), available at http://www.gpo.gov/fdsys/pkg/FR-2011-09-07/pdf/2011-22679.pdf

With the on-going work under this reform initiative, contractors subject to the DEAR rule could be held accountable for the never-ending timely notification to the DoE contracting officer "of any export control requirements" as required by subparagraph (d) of the proposed 952.225-XX and 970.5225-1 clauses. This DEAR rule must provide some flexibility to contractors for adjusting to the continuing revisions under the President's export control reform initiative.

Conclusion

CODSIA has significant concerns with several portions of this rule. In addition, the rule is not consistent with the final DoD rule published in 2010, has numerous internal inconsistencies, and lacks the clarity of many of the requirements that are imposed by the rule. CODSIA recommends that the rule be significantly redrafted to address these concerns and to more closely align it with DoD's 2010 final rule. In addition, because of the significance of DoE's Part 810 rule, CODSIA strongly requests that DoE await the outcome of the public comments on the Part 810 rule and then reconcile any final rule on Part 810 with these requirements. We also recommend that DoE address the impact on this DEAR rule of the continuing evolution of the President's export control reform initiative.

CODSIA appreciates this opportunity to comment on the Proposed Rule, and we would be pleased to respond to any questions the department may have on these comments. Alan Chvotkin of the Professional Services Council serves as CODSIA's project lead on this case and he can be reached at 703-875-8059 or at Chvotkin@pscouncil.org. Bettie McCarthy, CODSIA's administrative officer, can serve as an additional point of contact and can be reached at codsia@pscouncil.org or at (703) 875-8059.

Sincerely,

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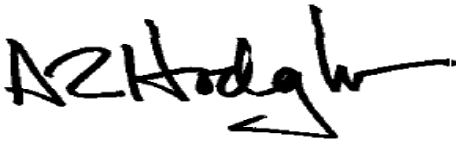

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