And Then There Was One--DoD Streamlines DFARS Export-Control Clause
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On April 8, 2010, the Department of Defense issued a final rule adopting, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement ("DFARS") to establish a mandatory DoD contract clause that addresses compliance with U.S. export laws. 75 Federal Register 18030-18034. The final rule eliminates many of the concerns resulting from the July 21, 2008 interim rule, by eliminating the requirement that the contractor and contracting officer agree, at the time of negotiating the contract, whether access to export controlled items will be required during contract performance. The final rule establishes a single contract clause that must be included in all DoD contracts that:

1) defines "export-controlled items" as tangible and intangible items controlled by the International Traffic in Arms Regulations or the Export Administration Regulations, including subset definitions of "defense items" subject to the ITAR and "items" subject to the EAR;

2) states that the contractor shall comply with all applicable laws and regulations regarding export-controlled items;

3) provides a reminder that this responsibility for compliance stems from the applicable U.S. export laws and regulations and not from the DFARS clause; and

4) requires that the contractor include the substance of the DFARS clause in all subcontracts.

This greatly simplified formulation is a significant departure from the interim rule, which prescribed two possible DFARS clauses that included an explicit determination, in the contract, as to whether export controlled items would be involved in contract performance. The final rule is no longer premised on the objective that the contractor and contracting officer reach a common understanding as to whether access to export controlled items will be required. This eliminates many of the concerns in the interim rule concerning this determination, such as whether any experts from the agencies that actually administer the U.S. export laws would be supporting contracting officers in making such export determinations and what avenues would be available to contractors in the event they disagree with the contracting officer concerning the inclusion of export controlled items in a statement of work.

The final rule removes references to "deemed exports" under the EAR, eliminating potential confusion concerning the treatment of ITAR-controlled exports to foreign persons in the United States which were not specifically called out in the interim rule. The final rule also removes language in the interim clauses that permitted termination of the contract for convenience of the government where export expectations changed as well as ambiguous language that muddled existing voluntary disclosure requirements under the ITAR and EAR by implying that the DoD contracting officer may need to be notified in the event the contractor identified export violations, in addition to the governing export-control agency. Also of note, the final rule removes references to "fundamental research" in the interim rule that created concern, particularly in the university community, related to the scope of the provision and removes from the discretion of the contractor whether to flow down the clause to subcontractors.

As finalized, this rule becomes little more than a reiteration to DoD contractors that the U.S. export laws exist and govern DoD contracts as they do any other contracts. One can hope that the reiteration of these requirements as well as the explicit statement that they be flowed down to subcontractors will serve to heighten awareness among already heavily regulated DoD
contractors of these export requirements rather than become one of the plethora of existing clauses that are lost in a flood of boilerplate language. It is interesting to note that, while the final rule removed a number of references to specific requirements under the U.S. export laws, the final language continues to call out the requirement for contractors to register under the ITAR. Although the rule goes to great lengths to emphasize that the clause does not in any way modify a contractor's obligations under the ITAR and the EAR, the flow down of this requirement to subcontractors may, at a minimum, continue the trend of lower tier subcontractors becoming more aware of the registration provisions of the ITAR and may encourage additional prime contractors to mandate that their suppliers become registered under the ITAR.