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**INTERNATIONAL TRADE &  
CUSTOMS UPDATE**

**DoD Final Rule Requires Contract/Solicitation Clause Acknowledging  
Export Control Compliance of Contractors/Subcontractors**

Earlier this month, the U.S. Department of Defense (DoD) published its final rule in the Federal Register, (75 Fed. Reg. 18030 (April 8, 2010)), amending the Defense Federal Acquisition Regulation Supplement (DFARS) to require that all solicitations and contracts contain a clause addressing contractor responsibilities for export control compliance. The single clause essentially makes export control compliance a contractual obligation. It acknowledges in writing that contractors and subcontractors are responsible for complying with the Export Administration Regulations administered by the U.S. Department of Commerce and the International Traffic in Arms Regulations overseen by the U.S. Department of State. The clause, as described at 252.204-7008 of the DFARS,<sup>1</sup> must be included regardless of whether the contract involves export-controlled items. As a mandated “flowdown” clause, it also must be contained in all subcontracts arising from the prime contract.<sup>2</sup>

This final rule replaces an interim rule in place since July 21, 2008, and is widely viewed as an improvement because it eliminates any guesswork. The interim rule added two clauses to the DFARS for possible inclusion in a contract: one if export-controlled items, including software or technical data, would likely be involved in the contract; and the other if export-controlled items would not likely be involved. The DoD’s approach in its final rule is similar to that followed in Federal Acquisition Regulation (FAR) 52.225-13, which requires contractors to include a clause in all contracts and related subcontracts acknowledging that they must comply with Office of Foreign Assets Control (OFAC) regulations concerning U.S. economic sanctions.<sup>3</sup>

**FOR MORE INFORMATION**

Government contractors and subcontractors wanting to learn more about the export control laws and regulations covered by this clause should contact Julia M. McCalmon, 202.973.2778 or [Julia.McCalmon@ThompsonHine.com](mailto:Julia.McCalmon@ThompsonHine.com), or any member of our **International Trade & Customs** practice group.

If you do not wish to receive future communications by email, please send an email with “Unsubscribe: Trade Update” as the subject line to [Stacy.Weiner@ThompsonHine.com](mailto:Stacy.Weiner@ThompsonHine.com).

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<sup>1</sup>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.

<sup>2</sup>See DFARS 252.204-7008(e).

<sup>3</sup> 52.225 - 13 - Restrictions on Certain Foreign Purchases.

As prescribed in 25.1103(a), insert the following clause: Restrictions on Certain Foreign Purchases (Feb. 2006).

(a) Except as authorized by the Office of Foreign Assets Control (OFAC) in the Department of the Treasury, the Contractor shall not acquire, for use in the performance of this contract, any supplies or services if any proclamation, Executive order, or statute administered by OFAC, or if OFAC’s implementing regulations at 31 CFR chapter V, would prohibit such a transaction by a person subject to the jurisdiction of the United States.

(b) Except as authorized by OFAC, most transactions involving Cuba, Iran, and Sudan are prohibited, as are most imports from North Korea, into the United States or its outlying areas. Lists of entities and individuals subject to economic sanctions are included in OFAC’s List of Specially Designated Nationals and Blocked Persons at <http://www.treas.gov/offices/enforcement/ofac>. More information about these restrictions, as well as updates, is available in the OFAC’s regulations at 31 CFR chapter V and/or on OFAC’s web site at <http://www.treas.gov/offices/enforcement/ofac>.

(c) The Contractor shall insert this clause, including this paragraph (c), in all subcontracts.