

News

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**DOD Issues Interim Rule and Requests Comments  
Concerning Additional Requirements for Contracts  
Involving Export-Controlled Items**

The Department of Defense (“DoD”) has issued an interim rule, effective July 21, 2008, amending the Defense Federal Acquisition Regulation Supplement (“DFARS”) to address requirements for complying with the export control laws and regulations when performing DoD contracts. See [73 Fed. Reg. 42274](#) (July 21, 2008). The interim rule recognizes contractor responsibilities to comply with existing Commerce Department and State Department regulations. The interim rule also adds two new clauses to be used when export-controlled items, including information or technology, are expected to be involved in the performance of a contract, or when there is the possibility that export-controlled items, including information or technology, may come to be involved during the period of performance of the contract.

DoD previously published a proposed rule on July 12, 2005, to address requirements for preventing the unauthorized disclosure of export-controlled information and technology under DoD contracts. See [70 Fed. Reg. 39976](#) (July 12, 2005). In consideration of the public comments received in response to the proposed rule, DoD published a second proposed rule on August 14, 2006. See [71 Fed. Reg. 46434](#) (August 14, 2006). The second proposed rule simplified the policy

framework in recognition of existing policy found in the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR).

Section 890(a) of the National Defense Authorization Act for Fiscal Year 2008 ([Pub. L. 110-181](#)), enacted on January 28, 2008, requires DoD to prescribe regulations, not later than July 26, 2008, to address requirements for DoD contractors to comply with laws and regulations applicable to goods or technology subject to export controls. In light of this new statutory requirement, and in consideration of the public comments received in response to the proposed rules issued in July 2005 and August 2006, DoD has developed an interim rule to address export controls. A summary of the provisions of this interim rule follows below.

New Subpart on Export-Controlled  
Items Added to 48 CFR Part 204

Specifically, the interim rule amends 48 CFR Part 204 (Administrative Matters) to add a new Subpart 204.73 regarding export-controlled items. This new subpart is divided into the following sections:

**204.7300** - notes that new subpart 204.73 implements Section 809(a) of the

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fiscal year 2008 National Defense Authorization Act.

**204.7301** - defines export-controlled items, applied research, and fundamental research.

**204.7302** - states that the export control laws and regulations restrict the transfer, by any means, of certain types of items to unauthorized persons. The International Traffic in Arms Regulations (“ITAR”) and the Export Administration Regulations (“EAR”) establish these restrictions.

**204.7303** - states that it is in the interest of both the Government and the contractor to have a common understanding of export-controlled items expected to be involved in contract performance. The requiring activity shall review each acquisition to determine if, during performance of the contemplated contract, the contractor is expected to generate or require access to export-controlled items.

**204.7304** - outlines the procedures for the subpart and states that:

- (a) Prior to issuance of a solicitation for research and development, the requiring activity shall notify the contracting officer in writing when:
  - (1) export-controlled items are expected to be involved; or
  - (2) the work is fundamental research only, and export-controlled items are not expected to be involved.
- (b) Prior to issuance of a solicitation for supplies or services, the requiring activity shall notify the contracting officer in writing when: (1) export-controlled items are expected to be

involved; or (2) the requiring activity is unable to determine that export-controlled items will not be involved.

**204.7305** - indicates when each of the two new clauses in 48 CFR Part 252 for export-controlled items should be used.

#### Two New Clauses for Export-Controlled Items Added to 48 CFR Part 252

The rule adds two new clauses to be used when export-controlled items, including information or technology, are expected to be involved in the performance of a contract, or when there is a possibility that export-controlled items, including information or technology, may come to be involved during the period of performance of the contract. Specifically, the interim rule amends 48 CFR Part 252 (Solicitation Provisions and Contract Clauses) to include two new sections (252.204-7008 and 252.204.7009):

**252.204-7008** - provides requirements for contracts involving export-controlled items

**252.204-7009** - provides requirements regarding potential access to export-controlled items.

As noted above, this interim rule took effect on July 21, 2008. DoD has requested comments from the public concerning the changes in this interim rule by September 19, 2008.

Should you have any questions concerning this interim rule or seek guidance on submitting comments to DoD, please contact a Barnes/Richardson attorney.

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