New Department of Defense Clause Does Little to Educate Suppliers of Export Control Obligations

On April 8, 2010, the Department of Defense (DOD) amended the Defense Federal Acquisition Regulation Supplement (DFARS) to roll out a single export controls clause for use in DOD contracts.

DOD claims the single clause addresses export compliance by putting the onus on contractors to identify export restrictions in their contracts. In reality, contractors have borne this burden since the introduction of U.S. export control laws and regulations decades ago, with or without a DFARS clause notifying them of this obligation.

The new clause at a base level, however, may be useful in putting smaller, less export-savvy contractors on notice that they have an obligation to comply with U.S. export control laws and regulations. On the other hand, because the new clause will be included in all solicitations and contracts, and because the clause is silent as to the parties' expectations as to the applicability of specific export control laws, it is doubtful that the new clause will adequately raise contractor awareness in a given DOD procurement. This may be especially true for inexperienced or smaller DOD contractors and subcontractors who do not have comprehensive export control policies and procedures.

The April 8 amendment replaces an interim rule adopting the use of one of two alternate DFARS clauses indicating when export-controlled items may be involved in a DOD contract. The April 8 amendment does away with the two-clause approach. The resulting single clause merely notifies the supplier that the contract might involve export-controlled items (goods, technology and software) or services. It does not render any guidance about whether the contract actually does involve export-controlled items or under which relevant export regulations the items or services are controlled.

Contractor Requirements Under the 'Export Controlled-Items' Clause

Effective April 8, 2010, the new clause (DFARS 252.204-7008), Export-Controlled Items (April 2010) requires contractors to undertake the following.

- Comply with "all applicable laws and regulations regarding export-controlled items,"
- Register under the International Traffic in Arms Regulations (ITAR) with the U.S. Department of State, Directorate of Defense Trade Controls (DDTC), if necessary under the relevant export laws,
- Consult with DDTC for ITAR-related questions (defense articles and services),

- Consult with the U.S. Department of Commerce, Bureau of Industry and Security (BIS) for questions relating to the Export Administration Regulations (commercial or dual-use items), and
- Include flow-down clauses encompassing the substance of the new clause in all DOD subcontracts.

DOD Will Need to Cooperate With Contractors

Beyond simply requiring inclusion of the clause in DOD contracts, the new clause makes clear that the DOD does not have the authority to advise contractors as to the applicability of export controls laws. This approach eliminates potential ambiguities in the enforcement of export control laws by other agencies like DDTC and BIS by making clear that DOD is not an arbiter on the applicability of those laws.

While the clause does not shed light on whether DOD considers a given contract to involve export-controlled items, contractors will be required nonetheless to interface directly and elicit feedback from DOD to ascertain the specific end-users, end-uses, and applications related to the contract. Information related to the end-use, applications and platforms is frequently critical for a contractor to make a successful determination of which export control laws and regulations apply. Classifying items, technology and services, or obtaining export licenses, can be time consuming, especially where the contractor does not know which agency has jurisdiction over the subject items, technology or services. Accordingly, contractors must allow time in their bidding and production schedules to classify such items and to obtain any necessary licenses or authorizations before exports take place. It remains to be seen whether under the single DFARS clause approach, DOD contracting officers will remain cooperative in providing the information necessary for contractors to make accurate determinations about the applicability of export control laws and regulations.

Clause is a Reminder to Contractors to Tune-Up Export Compliance Programs

In order for contractors to effectively comply with the DFARS clause requirements, DOD contractors and subcontractors must have effective export compliance programs, so that they are equipped to accurately determine what export control laws and regulations apply to a given contract.

Key elements of a successful export compliance program include activities such as:

- maintaining and implementing written policies and procedures;
- properly classifying items, technology and services;
- determining licensing requirements;
- analyzing availability of license exceptions or exemptions;
- seeking, obtaining and maintaining licenses or other authorizations;
- restricting personnel access as needed and staffing export-controlled projects with U.S. persons or foreign persons licensed by DDTC or BIS;
- training employees; and
- complying with recordkeeping requirements.

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