Export Control: How to keep or lose the Fundamental Research Exclusion

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Learning Objectives

At the end of this session you will:

• Know when to ask for an export review (contracting officers)
• Know what an export and deemed export are in the regulatory context
• Be able to define Fundamental Research (FRE) and understand what Exclusions exist for universities
• Understand what can cause a project to loose FRE
• Understand risk of using students or foreign nationals on controlled research
General Overview

• The U.S. Government restricts the release of critical technologies, including technical data, to foreign nationals through regulations.

• U.S. entities are required to obtain an export license before providing foreign nationals with access to software or technology that is subject to export licensing requirements.

• Export control is a “team sport” as you can see from the number of presenters in front of you today.
What proposals need Export Review?

- Foreign sponsor (pre-submission)
- Foreign collaboration (pre-submission)
- Foreign Travel (pre-submission)
- Contract restrictions (at time of award)
  - In particular military and industry contracts
  - Foreign National Restrictions
  - Publication Restrictions
- Add on proposals with foreign collaborators (post award)
What is an export?

• Expansive definition of “export” in this context
  • **Export**: Transfer/disclosure of items, materials, information, software, technology or other unclassified but restricted data to any person outside U.S. (including U.S. citizen abroad)
  • **NOTE**: OFAC includes any services; ITAR includes defense services as Exports
What is a “Deemed Export?”

An export of technology or code when released to a foreign national within the U.S.

- Release is making technology or software available to non-U.S. persons, either visually, orally or by practice or application under guidance of persons with knowledge of the technology or software.

- Includes “use technology” – information on the operation, installation, maintenance, repair, overhaul, and refurbishing of controlled equipment. “Release” requires all six elements & access to proprietary manual.
Export Control Regulations

- EXPORT CONTROL REGULATIONS
  - International Traffic in Arms Regulations (ITAR)
    - Relates to military technology
  - Export Administration Act (EAR)
    - Relates to commercial technology
- Other Controls
  - Department of Treasury Office of Assets Control (OFAC) enforces trade embargoes that may also affect research activities.
Foreign National

- An individual is not a foreign national for export purposes if he or she:
  - Has a green card,
  - Holds U.S. Citizenship, or
  - Is under protection of U.S. (Political Asylum).

- Note: this is NOT the same for classified programs.
Higher Learning Exclusions

- Many university activities and research projects are NOT subject to export controls/foreign national restrictions due to regulatory exclusions:
  - Public domain information
  - Educational information
  - Fundamental research
Public Domain or Publicly Available Information
(22 CFR § 120.11) and (15 CFR§ 734.7)

- Materials available in newspapers and libraries, presented at publicly available conferences, trade shows
- Websites accessible to the public for free and without the host’s knowledge or control of who visits
Educational Information
(22 CFR § 120.11 & 15 CFR § 734.9)

- General science, math, and engineering commonly taught at schools and universities (ITAR)
- Information conveyed in courses listed in course catalogues and in their associated teaching labs of any academic institution (EAR)
Fundamental Research
(15 CFR § 734.2, 8 & 11, CFR 22 CFR § 120.11.a.8, and 125.1.a.1)

- Basic or applied research at an accredited U.S. institution of higher learning
- No publication restrictions
- If federally funded, no access and dissemination restrictions on results
- As long as the above conditions are met, the results of your research are not subject to ITAR/EAR license restrictions
What is Fundamental Research?

NSDD -189 NATIONAL POLICY ON THE TRANSFER OF SCIENTIFIC, TECHNICAL AND ENGINEERING INFORMATION

I. PURPOSE

• This directive establishes national policy for controlling the flow of science, technology, and engineering information produced in federally-funded fundamental research at colleges, universities, and laboratories.

Fundamental research is defined as follows:

• "Fundamental research' means basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons."

NSDD: National Security Decision Directive
Why the concern about awards outside of the Fundamental Research Exclusion (FRE)?

- Non-U.S. persons \textit{generally} may not work on any project ineligible for FRE without a license.
- Students (including U.S. citizens) \textit{generally} may not work on any project ineligible for FRE for their theses or dissertations.
Risk for using students on EC

- Thesis Graduate and Undergraduate Students
  - Risk to graduation - not theoretical
- Faculty & Department Head warned in Technology Control Plan (TCP)
- Students sign acknowledgement of TCP
- Faculty must be able to assemble US Persons review committee
- Publication Risks...
  - Publications (including but not limited to theses, dissertations and journal publications) may be delayed or denied based on the approval of the sponsor and/or Principal Investigator.
But the PI says it is still FRE???

Check the contract! An award with any of the following will no longer qualify for FRE:

- Publication Approval (e.g. 252.204-7000)
- Publication Review (fewer than 90 days)
- Foreign National Restriction
- Foreign National Approval or Notification
- Export Controlled/ITAR (e.g. 5352.227-9000)
- Controlled Unclassified Information (CUI, e.g. 1852.237-72)
- NDA with export controlled information
Terms & Conditions

- Scenarios: If you accept these Terms and Conditions will you be doing research outside FRE?
252.204-7000 Disclosure of Information.
As prescribed in 204.404-70(a), use the following clause:
DISCLOSURE OF INFORMATION (DEC 1991)
(a) The Contractor shall not release to anyone outside the Contractor's organization any unclassified information, regardless of medium (e.g., film, tape, document), pertaining to any part of this contract or any program related to this contract, unless—
(1) The Contracting Officer has given prior written approval; or
(2) The information is otherwise in the public domain before the date of release.
(b) Requests for approval shall identify the specific information to be released, the medium to be used, and the purpose for the release. The Contractor shall submit its request to the Contracting Officer at least 45 days before the proposed date for release.
(c) The Contractor agrees to include a similar requirement in each subcontract under this contract. Subcontractors shall submit requests for authorization to release through the prime contractor to the Contracting Officer.....
(End of clause)
Problem Clause

- DFAR 252.204-7000 Disclosure of Information – requires Contracting Officer APPROVAL

- When the Contractor will have access to or generate unclassified information that may be sensitive and inappropriate for public release, include the clause DFARS 252.204-7000.

- Approval requirement destroys fundamental research exclusion, *export licensing may be necessary for foreign national participation in research*
SOLUTIONS to Problem Clause DFAR 252.204-7000

• Subcontract must include “substantially similar” clause

• Strategies for dealing with DFAR 252.204-7000 in flow-down contracts
  • Satisfy the clause with Contracting Officer’s prior written authorization
  • Negotiate local deviation
  • Inject self-destruct clause
  • Insert “substantially similar” clause with no pub restriction for university subcontract
  • Set up separate contract direct from government w/o clause
SOLUTION to Problem Clause DFAR 252.204-7000
“Substantially similar clause”

Requests for approval review shall identify the specific information to be released, the medium to be used, and the purpose of the release. The Contractor shall submit its request to the Contracting Officer at least 45 days before the proposed date for release.
SOLUTION: Local Alternative- never approved through FAR deviation procedure

252.204-7000 Release of Information (DEC 1991)
Deviation

The contractor shall be free to publish, permit to be published, or distribute for public consumption, any information, oral or written, concerning the results or conclusions made pursuant to performance of this contract; provided, however, that it shall provide copies of any such publication or release of information to the government's contracting officer for review and comment at least thirty (30) days prior to any such release.
SOLUTION: Local Alternative- USAMRAA

- REPORTS, MANUSCRIPTS AND PUBLIC RELEASES (DEC 2006) (USAMRAA)
  a. Contractors are encouraged to publish results of research supported by the US Army Medical Research and Materiel Command (USAMRMC) in appropriate media forum. Any publication, report or public release, which may create a statutory bar to the issuance of a patent on any subject invention, shall be coordinated with appropriate patent counsel.
  b. Manuscripts intended for publication in any media shall be submitted to the Contracting Officer and Contracting Officer's Representative (COR), simultaneously with submission for publication. Review of such manuscripts is for comment to the Principal Investigator, not for approval or disapproval. Courtesy copies of the reprint shall be forwarded to the Contracting Officer and COR, even though publication may be subsequent to the expiration of the contract.
  c. The Contractor shall notify the Contracting Officer of planned news releases, planned publicity, advertising material concerning contract work, and planned presentations to scientific meetings, prior to public release. This is not intended to restrict dissemination of research information but to allow USAMRMC advance notice in order to adequately respond to inquiries.
  d. Manuscripts, reports, public releases and abstracts, which appear in professional journals, media and programs, shall include the following statements:
    (1) "This work is supported by the US Army Medical Research and Materiel Command under Contract No.XXXXXXXXXXXXXXXX"
    (2) "The views, opinions and/or findings contained in this report are those of the author(s) and should not be construed as an official Department of the Army position, policy or decision unless so designated by other documentation."

April 26, 2010
Terms & Conditions Scenario: 2

- Subcontractor agrees to comply with all U.S. export control laws and regulations, specifically including but not limited to, the requirements of the Arms Export Control Act, 22 U.S.C. 2751-2794, including the International Traffic in Arms Regulation (ITAR), 22 C.F.R. 120 et seq.; and the Export Administration Act, 50 U.S.C. app. 2401-2420, including the Export Administration Regulations, 15 C.F.R. 730-774; including the requirement for obtaining any export license or agreement, if applicable.
Terms & Conditions Scenario: 3

Research project with U.S. sponsor contains the following clause:

- “Special Provision: The technology within this Contract is restricted under the International Traffic in Arms Regulation (ITAR). This controls the export and import of defense-related material and services. GT must disclose any proposed use of foreign nationals, their country of origin and what tasks each would accomplish in the Statement of Work.”
1852.208-81 Restrictions on Printing and Duplicating.
As prescribed in 1808.870, insert the following clause:


(b) The Contractor shall not perform, or procure from any commercial source, any printing in connection with the performance of work under this contract. The term "printing" includes the processes of composition, platemaking, presswork, duplicating, silk screen processes, binding, microform, and the end items of such processes and equipment.

(c) This clause does not preclude writing, editing, preparation of manuscript copy, or preparation of related illustrative material as a part of this contract, or administrative duplicating/copying (for example, necessary forms and instructional materials used by the Contractor to respond to the terms of the contract). ...(End of clause)
Terms & Conditions Scenario: 5

- **352.204-9000 DISCLOSURE OF Information**
  - (a) The recipient organization of the Request for Proposal shall not, unless authorized elsewhere in this RFP, disclose any information concerning the request or its sponsorship to anyone other than those officers and employees of the recipient organization who require the information in order to prepare and submit a proposal or a response.
  - (b) The recipient organization may obtain necessary subcontracting and purchasing data from prospective vendors or subcontractors, provided that: sponsorship of this Request for Proposal is not disclosed; and, where required, the appropriate security regulations are observed.
  - (c) Any disclosure, other than that described in Paragraphs [a] and (b) above, considered necessary by the recipient organization may be made only with the written consent of the Contracting Officer.
  - (End of Clause)
Terms & Conditions Scenario: 6

- As prescribed by 1835.070(d)(1), insert the following as paragraph (e) of the basic clause:

  (e) The data resulting from this research activity is “fundamental research” which will be broadly shared within the scientific community. No foreign national access or dissemination restrictions apply to this research activity. The Contractor may publish, release, or otherwise disseminate data produced during the performance of this contract, including the final report, without prior review by NASA for export control or national security purposes. However, NASA retains the right to review the final report to ensure that proprietary information, which may have been provided to the Contractor, is not released without authorization and for consistency with NASA publication standards. Additionally, the Contractor is responsible for reviewing any publication, release, or dissemination of the data for conformance with other restrictions expressly set forth in this contract, and to the extent it receives or is given access to data necessary for the performance of the contract which contain restrictive markings, for compliance with such restrictive markings.

(End of clause)
Terms & Conditions Scenario: 7

- DoD Directive 5230.24 "Distribution Statements on Technical Documents"

- Statement A: "Approved for public release; distribution is unlimited."

- Note: No other markings or notations to be cited with this statement.
252.204-7009  Requirements regarding potential access to export-controlled items. As prescribed in 204.7305(b), use the following clause:

Requirements Regarding Potential Access to Export–Controlled Items (JUL 2008)

(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 (22 CFR Parts 120–130). The term includes...

(b) The parties do not anticipate that, in the performance of this contract, the Contractor will generate or need access to export–controlled items.

(c) If, during the performance of this contract, the Contractor becomes aware that the Contractor will generate or need access to export–controlled items...

(End of clause)

NOTE: Should NO Longer be used as of 4/04/10
Export Roles and Responsibilities
Pre-award

- Negotiate terms that support open access and freedom to publish and inclusion of foreign nationals in accordance with campus policies.
- Document “Fundamental Research Exclusion”
- Forward to export review and compliance program.
- Screen for denied parties and entities.
Do I need to be concerned about export controls in this contract?

1. Public domain, and
   a) No equipment, encrypted software, listed-controlled chemicals, bio-agents or toxins, or other restricted technologies are involved, and
   b) Information/software is already published, and
   c) There is no contractual restriction on export, or

2. Fundamental Research
   (note definitions and caveats associated with this exemption)

   **NO**

1. Equipment or encrypted software is involved, or
2. Technology is not in the public domain, and
3. Technology may be exposed to foreign nations (even on campus) or foreign travel is involved, and
   a) The equipment, software or technology is on the Commerce Control List, or
   b) Information or instruction is provided about software, technology, or equipment on the CCL, or
   c) The foreign nationals are from or the travel is to an embargoed country
4. And the contract has terms e.g. a publication restriction that effect the Fundamental Research Exemption

   **Probably**
   (further review is required)
   **License May Be Required**

1. Equipment, software, chemical, bio-agent, or technology is on the US Munitions List (ITAR), or
2. Equipment, software, chemical, bio-agent or technology is designed or modified for military use, use in outer space, or there is reason to know it will be used for or in weapons of mass destruction, or
3. Chemicals, bio-agents or toxins on the Commerce Control List are involved, or
4. The contract contains a restriction on export or access by foreign nationals

   **YES**
   License Will Be Required

11/3/2010 JDG
DoD Guidance, aka “John Young Memo”

On May 24, 2010 the DOD Undersecretary for Acquisition issued a new memorandum on Fundamental Research. The memo reinforces an earlier (6/26/08) memorandum on Contracted Fundamental Research and provides additional clarifying guidance. The intention is to assure that DOD fundamental research awards are “fully compliant with National Security Decision Directive (NSDD) 189.”

III. POLICY
It is the policy of this Administration that, to the maximum extent possible, the products of fundamental research remain unrestricted. It is also the policy of this Administration that, where the national security requires control, the mechanism for control of information generated during federally funded fundamental research in science, technology and engineering at colleges, universities and laboratories is classification......No restriction may be placed upon the conduct or reporting of federally funded fundamental research that has not received national security classification, except as provided in applicable U.S. Statutes.
Why is THIS so important?

Failure to comply with U.S. export control rules can result in severe penalties both for the individual and the entity

- Criminal Penalties
  - Fines: $1,000,000 per violation and imprisonment of up to 10 years in prison.
- Civil
  - Fines: $250,000 per violation or twice the monetary amount of the underlying transaction which ever is greater
  - (ITAR=$500,000 per violation)
- Loss of Export Privileges
- Negative publicity

1. ITAR, EAR and OFAC all impose criminal and civil penalties although the ranges of the penalties vary.
ROTH

- Convicted of criminal charges:
  - 15 counts of violating the Arms Export Control Act
  - 1 count conspiracy to violate the AECA
  - 1 count wire fraud
- Sentenced to 4 years in prison
- *Sentence upheld in Appeals court*
Additional Resources

- **GT webpage:** [www.export.gatech.edu](http://www.export.gatech.edu)

- [http://tinyurl.com/exportresources](http://tinyurl.com/exportresources):

- The COGR-AAU Troublesome Clauses report. Condoleezza Rice Letter on NSDD-189
- ITAR for Program Managers SIA
- John Young Memo_DOD_NSDD-189_06-26-08
- NSDD-189 SBU Library of Congress
"You spelled ‘confidential’ wrong."