COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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SENT VIA EMAIL

November 15, 2016

Ms. Claire Grady
OUSD(AT&L)
Director, Defense Procurement and Acquisition Policy
Room 3B941
3060 Defense Pentagon
Washington, DC 20301-3060

RE: Request to Suspend DFARS Case 2016-D002, Enhancing the Effectiveness of Independent Research and Development (IR&D)

Dear Ms. Grady:

On behalf of CODSIA[1], we respectfully request that DPAP immediately suspend implementation of this final rule until sufficient guidance is put in place for the acquisition workforce and for industry to manage the implementation required in the final rule published on November 4, 2016.

History

The November 4, 2016 rule stemmed from ongoing policy efforts at DoD to gain insight into IR&D investments by the defense industrial base and to draw stronger links between contractor IR&D projects and DoD's strategic planning. This rulemaking effort began with final DFARS rules early in 2012 that required major contractors to report IR&D project summaries and other in-process information to the Defense Technical Information Center (DTIC) as a condition for reimbursement of IR&D costs. We believe that this system is operating as envisioned, and that communication about projects of interest to DoD is being carried out by all parties.

The expanded IR&D policy gained momentum with the issuance of the Better Buying Power (BBP) 2.0 and BBP 3.0 initiatives. It has been a topic of constant DoD and industry attention since then, both because of differing interpretations of the governing statute, and because of industry's concern that DoD oversight would unfairly infringe on the independence of contractors to choose which technologies to pursue, in violation of 10 USC 2372(f), "Independent Research and Bid and Proposal Costs; payments to contractors."

A White Paper issued in August 2015 by Under Secretary (AT&L) Frank Kendall specified that the appropriate way to draw better linkage between DoD objectives and contractor IR&D investment was to require contractors to exchange information with DoD personnel about the

[1] The Council of Defense and Space Industry Associations (CODSIA) was formed in 1964 by industry associations with common interests in federal procurement policy issues, at the suggestion of the Department of Defense. CODSIA consists of six associations – the Aerospace Industries Association, the American Council of Engineering Companies, the Information Technology Alliance for Public Sector (ITAPS), the National Defense Industrial Association, the Professional Services Council and the U.S. Chamber of Commerce. CODSIA acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. Combined these associations represent thousands of government contractors and subcontractors. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

project prior to initiation, in addition to reporting the projects to DTIC. Consequently, the DAR Council was ordered to draft new regulations, which limited IR&D cost allowability and acted as a check on a contractor's investment strategy in any research area that DoD determined was not relevant.

By law, regulation and DoD policy, contractor IR&D investments are indirect costs under CAS 420 and allowable when they meet the requirements of FAR 31.205 and DFARS 231.205-18. Based on the limits placed on DoD in 10 USC 2372(f) and repeated in the Kendall White Paper and the final DFARS rule, IR&D costs are not directed by the government and are identified by individual companies and intended to advance a company's ability to develop and deliver superior and more competitive products to the warfighter.

Rulemaking

Within this context, the subject DFARS proposed rule was published on February 16, 2016. The rule required a technical interchange between contractor and DoD personnel before IR&D costs were generated using the DTIC on-line application to memorialize the interaction between the parties. Even though the final rules were not published until November 4, 2016, we are surprised that the proposed rule still requires compliance beginning in contractor fiscal year 2017, which could be as early as January 2017 for many contractors. Despite the extensive comments in the industry responses to the rulemaking, we are disappointed that the final rule made no substantive changes to the proposed rule (except to add a vague instruction to contact OASD R&E for situations where the contractor does not have a point of contact for interaction with DoD).

DoD dismissed or failed to address many industry questions, comments or recommendations to make the process more administratively efficient and the core elements of the final rule did not change from the proposed rule. Moreover, both the proposed and the final rules failed to appreciate the immediate administrative and process burdens imposed on industry to comply with the new requirements by fiscal year 2017, nor did they provide a roadmap for projects that may be subject to the new rule that are about to begin.

Conclusion

Given the importance of IR&D investment for both DoD and the defense industrial base, CODSIA strongly recommends that DPAP immediately suspend the implementation of the final rule and open a case to address the due process concerns posed in the industry comment letters. DPAP should also collaborate with industry to resolve the concerns addressed in the Attachment to this letter with a goal of publishing additional guidance or FAQs prior to January 2017, and/or issue detailed PGI instructions to address the practical issues posed by industry in the comment letters and as set forth in the Attachment.

Finally, even where DoD chooses to proceed with the current rule with additional guidance, a phase-in period of 6-12 months should be allowed for contractors to develop processes and procedures to implement the new requirements.

We thank you for your attention to our comments and your consideration of our recommendations. We would welcome the opportunity to meet with you to discuss the matter

further. In the interim, if you have any questions, or need any additional information, please do not hesitate to contact Mr. Ryan Ouimette, who serves as our project officer for this case, at rouimette@ndia.org.

Sincerely,

John Luddy
Vice President National Security
Aerospace Industries Association

Jessica Salmoiraghi
Senior Policy Director
American Council of Engineering Companies

A.R "Trey" Hodgkins, III, CAE
Senior Vice President, Public Sector
Information Technology Alliance for the Public Sector

Alexander Zemek
Vice President for Policy,
National Defense Industrial Association

Alan Chvotkin
Executive Vice President and Counsel
Professional Services Council

R. Bruce Josten
Executive Vice President *for Government Affairs*
U.S. Chamber of Commerce

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Attachment

Industry concerns unaddressed in the final rule include the following:

General

1. Clarify the meaning of "DoD Government employee".
2. What are the obligations imposed on a "DoD Government employee" when dealing with multiple projects with multiple contractors?
3. What happens where a "DoD Government employee" reviews multiple IR&D investment projects from one or more contractors and is required to provide "feedback" to each?
4. What sanctions are in place to prevent deliberate or inadvertent disclosure of proprietary information to other less expensive or more favored contractors to develop the technology?
5. How are classified project investments to be handled?

Technical Interchanges

1. Describe what constitutes a sufficient "technical interchange" under the rule as well as what constitutes the appropriate level of detail needed for "DoD Government employee" oversight purposes. What are DoD's obligations with respect to the "technical interchange" and how will the process work?
2. When are "technical interchange(s)" to be conducted in the continuum of time "before IR&D costs are generated"? Requiring "technical interchange(s)" before "IR&D costs are generated" is inconsistent with the statute and impractical for innovation and business model purposes.
3. How does a contractor conduct "technical interchange(s)" on the relevance of technology investments "before IR&D costs are generated" when the project has yet to be started?
4. How will any "DoD Government employee" provide a demand signal about the technology being developed throughout the "technical interchange" process or otherwise communicate approval or disapproval of the investment or does the rule require any such communication by DoD? Does the rule even require a positive or negative response?
5. What constitutes "awareness of and feedback by" a DoD Government employee? The rule appears to presuppose some level of technical expertise by the DoD employee but does not make that clear. Does a negative response by the "DoD Government employee", or even the lack of an endorsement, conflict with the statute's prescription that DoD cannot direct a contractor's IR&D investments?
6. How will DoD protect information from being transfused to industry competitors?
7. Does DoD have the resources to provide timely and expert "technical interchange(s)"?

IR&D costs

1. What does "before IR&D costs are generated" mean?

2. Some companies were in their FY17 fiscal year before the rules were finalized and had already begun accruing costs for IR&D projects; if a technical interchange is required before costs are generated, such costs are now de facto unallowable since they were generated after the beginning of the contractor fiscal year – will DoD create a safe harbor for any contractor investing IR&D funds in FY 17 projects started before the final rules went into place?
3. The rule repeatedly emphasizes that the "technical interchange" is not an approval process, but requiring the "technical interchange" to occur "before IR&D costs are generated" implies that it is a de facto approval process since the "DoD Government employee" has the role of confirming whether the "technical interchange" took place and whether it is technology DoD is interested in.
4. Does the mere occurrence of the "technical interchange" make the costs allowable without anything further?
5. Are the costs to conduct "technical interchange(s)" allowable as IR&D costs?
6. What happens if the IR&D investment into a project changes or the project itself evolves into something targeted for DoD purposes? Does the initial "technical interchange" also serve for meeting the compliance requirement where the project changes shape?