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January 29, 2017

**VIA EMAIL: osd.dfars@mail.mil**

Mark Gomersall
Defense Acquisition Regulations Systems
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Room 3B941, 3030 Defense Pentagon
Washington, D.C. 20301-3060

**RE: DFARS Case 2016-D017; Proposed Rule, Independent Research and Development Expenses (81 Fed. Reg. 78014 (November 4, 2016))**

Dear Mr. Gomersall:

On behalf of Dentons US LLP ("Dentons"), we are submitting comments on the referenced Proposed Rule. Dentons, through a predecessor firm (McKenna Long & Aldridge (a/k/a McKenna & Cuneo and Sellers, Conner & Cuneo)), for decades, has been at the forefront of working with the Department of Defense ("DoD") regarding the development of sound laws, regulations and practices relating to independent research and development ("IR&D") costs. For the reasons discussed below, as well as those included in our prior comments submitted in response to the Advanced Notice of Proposed Rulemaking ("ANPR") on April 8, 2016—attached hereto and resubmitted for consideration—the referenced Proposed Rule should be withdrawn as unnecessary and harmful to the government's interest.

The Proposed Rule sets forth a proposed approach for evaluating future IR&D expenses in competitive procurements. Specifically, the Proposed Rule, through the proposed establishment of a new clause in the DoD Federal Acquisition Regulation Supplement ("DFARS"), DFARS 252.215-70XX, "Notification of Inclusion of Evaluation Criteria for Reliance Upon Future Government-reimbursed Independent Research and Development Investments," would require that for major defense acquisition programs and major automated information systems acquisitions: (1) an Offeror that "intends to use IR&D to meet the contract requirements . . . include documentation in its price proposal to support this proposed approach"; and (2) the Contracting Officer "[f]or evaluation purposes only . . . adjust the Offeror's total evaluated cost or price to include the amount that such future IR&D investments reduce the price of the proposal." 81 Fed. Reg. 78015 (Nov. 4, 2016). The alleged goal of the Proposed Rule is "to ensure that substantial future [IR&D] expenses, as a means to reduce evaluated bid prices in competitive source selections, are evaluated in a uniform way during competitive source selections." *Id*. at 78014.

Prior to the issuance of the Proposed Rule, in February 2016, DoD issued the ANPR as part of this same DFARS Case (2016-D017). Through the ANPR, DoD requested comments on whether its proposed approach "would achieve the objective of treating the proposed use of substantial future IR&D expenses as a means to reduce evaluated bid prices in competitive source selections in a uniform manner that is consistent with the objective of making IR&D an allowable cost." *Id*. at 6488-89. As previously stated, Dentons submitted comments in response to the ANPR on April 8, 2016.

Following issuance of the ANPR, on March 3, 2016, DoD held a public meeting to discuss the ANPR and invited suggested alternative solutions. During the public meeting, industry expressed numerous practical, legal, and policy concerns associated with the proposed method of valuing a contractor's IR&D. Nevertheless, despite the public meeting and the written comments submitted to DoD in response to the ANPR, including those of Dentons, and contrary to the requirements imposed on DoD when it engages in rulemaking, DoD published the Proposed Rule containing nearly identical language to the ANPR thereby failing to address, and effectively disregarding, the significant industry and public input that occurred. *See* Executive Order 13563, January 18, 2011, "Improving Regulation and Regulatory Review," 76 Fed. Reg. 3822; Executive Order 12866, September 30, 1993, "Regulatory Planning and Review," 58 Fed. Reg. 190. In light of the foregoing, Dentons resubmits its prior comments in their entirety, attached hereto, for reconsideration.

Indeed, consistently throughout the ANPR, the public meeting, and, now, the Proposed Rule, DoD has failed to state the problems it seeks to address with this rulemaking. It is possible that one purpose of the Proposed Rule may relate to protectionism of small businesses and a belief that large contractors with advanced IR&D programs have an unfair competitive advantage. The Proposed Rule does not resolve this concern. In fact, the Proposed Rule applies only to "major defense acquisition programs" and "major automated information systems acquisitions," which it expressly acknowledges are usually performed by large contractors—not small businesses.

Alternatively, and again based upon speculation because of DoD's failure to define the underlying problem, it also is possible that the purpose of the Proposed Rule is to attempt to address concerns within the Implementation Directive for Better Buying Power 3.0. Specifically, the Better Buying Power 3.0 expressed concerns when:

> [P]romised future IR&D expenditures are used to substantially reduce the bid price or competitive procurements. In these cases, development price proposals are reduced by using a separate source of government funding (allowable IR&D overhead expenses spread across the total business) to gain a price advantage in a specific competitive bid. This is not the intended purpose of making IR&D an allowable cost.

81 Fed. Reg. at 78014.

Unfortunately, the Better Buying Power 3.0 conclusion is incorrect. Obtaining a price advantage via reduced costs is at least an ancillary purpose acknowledged within the current IR&D statute. *See* 10 U.S.C. § 2372(g) (regulations must encourage contractors to engage in IR&D activities of potential interest to DoD, including activities intended to reduce acquisition costs and life-cycle costs of military systems); *see also Raytheon Co. v. United States*, 809 F.3d 590, 593 (Fed. Cir. 2015) ("The result [of

IR&D] is a 'cost reduction' for the particular contract without compromising the contractor's ability to fulfill its promises in that contract."). Moreover, if a contractor proposes future IR&D investment in a proposal and the proposal is selected, then the government will realize the benefit of the IR&D investment. In such a situation, the contractor simply is not exploiting a "separate source of government funding" to gain a price advantage. Instead, because IR&D costs are spread across multiple contracts, including potentially both commercial and government contracts, the government recovers a multiplier on its investment. Thus, regardless of the problems the Proposed Rule seeks to alleviate, its underlying reasoning is flawed.

In addition to the foundation the Proposed Rule is fabricated upon being erroneous, practical implementation of the Proposed Rule risks double-counting IR&D costs against a contractor. Indeed, many unanswered questions remain based upon the failure of DoD to define the manner in which the proposal would be "adjust[ed] . . . to include the amount that such future IR&D investments reduce the price of the proposal." Consequently, DoD should be concerned that the implementation of the Proposed Rule will result in IR&D costs being attributed in full and repetitively to every new program to which they relate, a result expressly feared by the U.S. Court of Appeals for the Federal Circuit. *See ATK Thiokol, Inc. v. United States*, 598 F.3d 1329, 1336 (Fed. Cir. 2010).

Based upon the above, if DoD artificially adjusts the initial bid for future IR&D cost, such an adjustment likely will make those proposals containing IR&D unaffordable and uncompetitive with lesser offerings.[1] As a result, IR&D efforts likely will decrease and DoD either will not have the benefit of the latest technology or will have to fully fund such efforts. Such a result is contrary to established Congressional policy and, therefore, must be avoided.

As one final supplemental note, which undoubtedly other industry comments will also point out, fundamental aspects underlying the Proposed Rule are currently being examined by two Congressionally-mandated panels. Thus, it is counterproductive to all stakeholders for DoD to make the Proposed Rule final at this time. This is especially true given the fact that the methodology suggested by the Proposed Rule would prevent many of the intended goals under the panels' consideration, thereby requiring reversal of, or significant revision to, the Proposed Rule.

In sum, the concept underlying the Proposed Rule of adding the costs of future IR&D efforts to the proposed costs of a benefiting contract is both bad policy and improper under DoD's existing IR&D policy and the applicable regulatory scheme, as further detailed in our prior comments submitted on April 8, 2016 in response to the ANPR and attached hereto for reconsideration in accordance with DoD's rulemaking obligations. The Proposed Rule, therefore, should be withdrawn. In its place, the government should rely upon its existing ability to assess technical risk in a proposal by evaluating the technical risks in how a contractor proposes to meet its contractual requirements, including technical risks involved in an IR&D project that will benefit the contract. Any other approach will disrupt the current regulatory scheme and more than likely create disincentives to contractors engaging in IR&D. Indeed, this may well be the conclusion reached by the two Congressionally-mandated panels if the Proposed Rule is made final since the Proposed Rule would prevent many of the intended goals under the panels' consideration.

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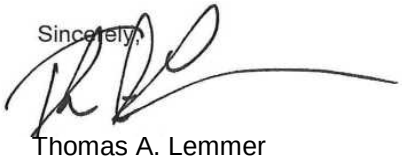
[1] It is also noteworthy that such an adjustment will infringe on the independence of a contractor to choose which technologies to pursue in its IR&D program, an effect that is contrary to 10 U.S.C. § 2372(f).

Sincerely,



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April 8, 2016

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**RE: DFARS Case 2016-D017; Advanced Notice of Proposed Rulemaking, Independent Research and Development Expenses (81 Fed. Reg. 6488 (Feb. 8, 2016))**

Dear Mr. Gomersall:

On behalf of Dentons US LLP ("Dentons"), we are submitting comments on the referenced Advanced Notice of Proposed Rulemaking ("ANPR"). Dentons, through a predecessor firm (McKenna Long & Aldridge (a/k/a McKenna & Cuneo and Sellers, Conner & Cuneo)), for decades, has been at the forefront of working with the Department of Defense ("DoD") regarding the development of sound laws, regulations and practices relating to independent research and development ("IR&D") costs. For the reasons discussed below, the referenced ANPR should be withdrawn as unnecessary because the current regulatory scheme provides a balanced approach to protecting the interests of both the government and contractors, while ensuring continued robust private investment in technological development. The ANPR suggests regulatory changes that may well unhinge this balance, raise costs and create disincentives for contractor investment in IR&D, each of which is harmful to the government's interest and fails to address the one step that would protect the government's interests: adequate technical assessment.

## I. INTRODUCTION

The ANPR sets forth a "proposed approach" for evaluating future IR&D expenses in competitive procurements. In a public meeting, the government also invited suggested alternative solutions. Neither in the ANPR nor in the public meeting, however, has the government stated the problems it seeks to address with this rulemaking. All that is clear is that Better Buying Power 3.0 expressed concerns when:

> [P]romised future IR&D expenditures are used to substantially reduce the bid price or competitive procurements. In these cases, development price proposal are reduced by using a separate source of government funding (allowable IR&D overhead expenses spread across the total business) to gain a price advantage in a specific competitive bid. This is not the intended purpose of making IR&D an allowable cost.

81 Fed. Reg. 6488 (Feb. 8, 2016).

Unfortunately, the Better Buying Power 3.0 conclusion is incorrect and appears to be based upon certain perceived risks. In its attempt to implement the Better Buying Power 3.0 Statement, the ANPR appears to have continued to be based upon these perceived risks. These perceived risks, however, do not exist under existing statutes, regulations and relevant policy. Thus, the ANPR should be withdrawn and, if redone, it should focus on technical assessment of the proposed technology derived from IR&D effort and not price evaluation adjustments.

DoD has summarized the ANPR as follows:

> DoD is seeking information that will assist in the development of a revision to the DFARS to ensure that substantial future independent research and development (IR&D) expenses as a means to reduce evaluated bid prices in competitive source selections are evaluated in a uniform way during competitive source selections. In addition to the request for written comments on this proposed rulemaking, DoD will hold a public meeting to hear the views of interested parties.

*Id.* In addition, the ANPR states that:

> DoD is considering a proposed approach whereby solicitations would require offerors to describe in detail the nature and value of prospective IR&D projects on which the offeror would rely to perform the resultant contract. Then, as a standard approach, DoD would evaluate proposals in a manner that would take into account that reliance by adjusting the total evaluated price to the Government, for evaluation purposes only, to include the value of related future IR&D projects.

*Id.* Through the ANPR, DoD has requested comments on this proposed approach and whether it "would achieve the objective of treating the proposed use of substantial future IR&D expenses as a means to reduce evaluated bid prices in competitive source selections in a uniform manner that is consistent with the objective of making IR&D an allowable cost." *Id.* at 6488-89.

## II. COMMENTS

Assessing whether the ANPR's suggested approach of "leveling competition" through price analysis techniques is appropriate to foster Congress' policy to encourage IR&D necessarily should begin with what is, and what is not, IR&D. This baseline then permits evaluating the merits of the ANPR's approach.

Importantly, the current regulations in the Cost Accounting Standards ("CAS") and Federal Acquisition Regulation ("FAR") that address IR&D costs reflect a policy balance developed some time ago to protect the government's interests while creating incentives for contractor investment in technological development. Other comments on the ANPR undoubtedly will address this balance at length, so our comments below focus on what the current regulations permit, and do not permit, to explain why the government's apparent perceptions of risk are misguided.

Nevertheless, we must note that the ANPR's proposed approach may well discourage contractor investment in IR&D. For those contractors choosing to invest in IR&D, DoD's proposed approach would increase the risk of lost procurement awards by: (a) artificially increasing the evaluated price of proposals; and (b) increasing the likelihood of losing an award due to a protest. Contractors perform IR&D work at their own expense initially and then may indirectly recover some of the costs for that work through their government and commercial contracts. IR&D, therefore, creates contractor risk. Contractors, however, are unlikely to accept additional IR&D risk by performing IR&D that will impair their ability to compete for and win government contracts, which is the reason to engage in IR&D in the first place.

**A. Defining IR&D**

Research and development ("R&D") effort is "independent research and development" effort when the effort is "not sponsored by a grant or . . . required in the performance of a contract." 48 C.F.R. § 9904.420-30(a)(6); FAR § 31.205-18(a). The cost of IR&D effort is an indirect cost, and not a direct grant or contract cost, under government cost accounting requirements because the benefits of IR&D run to the business as a whole and not exclusively to any particular contract, grant or other specific effort.

For ANPR purposes of potentially amending the DoD FAR Supplement ("DFARS"), the most relevant requirement for IR&D is that the R&D effort is not "required in the performance of a contract." R&D effort is required in the performance of a contract only when a contract "specifically requires" the performance of the R&D effort based upon: (1) intent of the parties to a contract that contract performance includes the R&D effort, as shown by, for example, the contract's (a) terms and conditions, (b) scope of work, (c) cost build-up for a noncommercial price or (d) lack of benefit to potential multiple cost objectives; and (2) the contractor's consistently applied cost accounting practices. *ATK Thiokol, Inc. v. United States*, 598 F.3d 1329 (Fed. Cir. 2010); *aff'g ATK Thiokol, Inc. v. United States*, 68 Fed. Cl. 612 (2005).

The facts underlying *ATK Thiokol* are especially relevant to the ANPR because *ATK Thiokol* involved a contractor performing R&D work in support of one immediate contract and potential future contracts. Specifically, ATK Thiokol intended to perform R&D that would result in the upgrade of capabilities of an existing rocket motor for the purpose of selling the upgraded motor to government and commercial buyers. Thus, ATK Thiokol began to market the upgraded motor prior to beginning the upgrade process with the intent to perform the R&D once a buyer had been identified. ATK Thiokol then identified a potential commercial buyer and began negotiations of the terms for selling the upgraded motor to the buyer. ATK Thiokol then began the upgrade effort and this effort occurred during the performance of the commercial contract that ultimately was negotiated.

The negotiated contract required that ATK Thiokol deliver upgraded motors at a per unit price by a specified delivery date that was based upon a cost build-up that did not include any R&D costs of the upgrade. The contract's Statement of Work also did not require the performance of any of the R&D necessary to develop the upgraded engine. Thus, while delivery of the upgraded motors was dependent upon ATK Thiokol successfully completing the R&D effort to achieve the upgraded performance that the contract required of the motors to be delivered, the contract did not specifically require ATK Thiokol to perform the R&D related to the upgrade. Of course, absent successful completion of the upgrade project, ATK Thiokol could not have performed the contract and would have been at risk of breaching its commercial contract.

Consistent with its disclosed cost accounting practice, ATK Thiokol classified the upgrade effort as IR&D. ATK Thiokol concluded that, while the R&D effort would be performed to support an existing commercial contract, this effort was not specifically required by the contract's language or pricing and ATK Thiokol reasonably considered the upgraded motor to be a product because it reasonably anticipated future sales under multiple contracts, including its first commercial contract sale.

The *ATK Thiokol* decisions cited above each concluded that the R&D effort was IR&D effort under CAS 420 and FAR § 31.205-18. These decisions reached this conclusion despite the facts that: (1) the IR&D effort was initiated because of an impending contractual opportunity; (2) the IR&D project would benefit that pending commercial contract; (3) the IR&D project was an incentive for the commercial buyer to contract with ATK Thiokol; (4) the IR&D costs were not included as part of the contract costs, thereby lowering the contract price; and (5) an ATK Thiokol failure to successfully perform the IR&D project would preclude ATK Thiokol from successfully performing the contract. What these decisions turned on instead was that the contract did not specifically require the R&D effort and that ATK Thiokol performed the R&D effort to develop a product for sale to customers under multiple contracts.

Based upon the *ATK Thiokol* decisions, the following circumstances, by themselves, do not preclude the existence of IR&D effort:

1. The effort is "necessary to," "related to," "implicitly required" in or "benefits" the performance of a contract. The effort must be specifically required.

2. The performance of a current contract will benefit from the R&D effort. IR&D effort may proceed in parallel to the performance of the benefiting contract to enhance a product.

3. The item being sold is not fully developed at the time of contract execution. A contract may require the delivery of a developmental product to be developed without specifically requiring the development effort.

Recently, the Federal Circuit confirmed *ATK Thiokol,* stating that IR&D is:

> [R]esearch conducted by the contractor but <u>not specifically for a particular government project</u>. *See* 48 C.F.R. §§ 31.205-18, 9904.420. Although such work is contract-independent, <u>its fruits can actually help the contractor deliver the goods or services promised in a particular contract.</u> When that is so, the <u>cost of work implicitly needed</u> for a particular contract, which otherwise might have been built into the price for that contract, <u>may instead be treated as an IR&D cost</u> . . . . <u>The result is a "cost reduction" for the particular contract without compromising the contractor's ability to fulfill its promises in that contract</u>.

*Raytheon Co. v. United States*, 809 F.3d 590, 593 (Fed. Cir. 2015) (emphasis added).

**B. <u>The ANPR Is Conceptually Flawed</u>**

As stated previously, the ANPR does not state what concerns underlie the perceived need to develop a uniform manner for evaluating a proposed cost/price of a contract that will benefit from future

IR&D efforts. Government actions and statements over the past 24 months, however, suggest that any of the concerns discussed below, or a combination of these concerns, may be the impetus for the ANPR. Each of these concerns, however, are already addressed by the current regulatory scheme regarding IR&D and do not support the ANPR.

1. **Using Future IR&D for Competitive Positioning on a Specific Procurement Is Improper**

- Competitive positioning is the very reason that contractors undertake IR&D. It places the contractor in the position of being able to develop technical capabilities and to achieve reduced costs for the contracts that will benefit from these capabilities. The Federal Circuit's *ATK Thiokol* and *Raytheon* decisions expressly recognize this benefit from IR&D. Thus, the contractor's competitive positioning through IR&D benefits the government.

- This benefit is not lost when IR&D effort will be performed in the future in the context of supporting a competitively awarded contract when the effort is correctly IR&D. In that circumstance, the competed contract is not the sole beneficiary of the effort because it is the potential benefit to multiple cost objectives that makes the effort IR&D. Thus, current regulatory and contractual requirements preclude abuse by "off-loading" contract costs onto "IR&D" projects or vice versa.

- Finally, the benefit to the contractor and the government of engaging in future IR&D effort to support a competitively awarded contract is not unfair because not all contractors can afford to perform the development as IR&D. The existence of financial and technical capability disparities between contractors has always existed and always will.

2. **IR&D Effort That Supports a Contract Is Really Contract Effort and Should Be Evaluated as Such**

- Both the *ATK Thiokol* and *Raytheon* decisions recognize that simply because R&D effort supports a contract does not render the effort contract effort. Rather, the test is what does the contract specifically require, including assessing the benefits of the effort to cost objectives other than the contract. This analysis applies whether the IR&D effort is ongoing when a contractual effort is proposed or whether the IR&D effort will begin in the future and run concurrently with the contractual effort.

- Focusing on how an R&D effort supports or benefits a contract to conclude whether the effort is contract effort and not IR&D is a vestige of how some in the government have viewed IR&D effort; i.e., if it is "necessarily" or "implicitly" required by a contract because the contract "needed" the results of the IR&D project to be performed, the effort is contract effort. The *ATK Thiokol* decision rejected "necessary" or

'implicit" as determinative tests for what is IR&D. The Federal Circuit confirmed this rejection when it stated in *Raytheon* regarding IR&D:

> [I]ts fruits can actually help the contractor deliver the goods or services promised in a particular contract. When that is so, the cost of work implicitly needed for a particular contract, which otherwise might have been built into the price for that contract, may instead be treated as an IR&D cost.

*Raytheon*, 809 F.3d at 593.

**3. The Contractor Has No Obligation to Perform an IR&D Project Which Means the Government Has Risk That the Project Will Not Be Completed and the Contractor Will Not Perform the Contract**

- It is accurate that a contractor has no contractual obligation to perform an IR&D project. To the extent a contractual obligation exists, the costs of the project, by definition, would be direct contract costs because these costs would relate to effort specifically required by a contract.

- When a contract and an IR&D project are to be performed in parallel or concurrently, the contract and the IR&D project are necessarily separate from each other or no IR&D project would exist pursuant to CAS 420 and FAR § 31.205-18. This means that the contractor's obligation under the relevant contract is distinct from the IR&D project. Thus, as the Federal Circuit recognized in *Raytheon*, a contractor failure to perform an IR&D project does not excuse the contractor's obligation to perform the contract or avoid a breach of contract and negative past performance. Importantly, this is no different than if the contract were to have specifically required the R&D, and the R&D proved unsuccessful. A delivery failure and contract breach could occur. The use of IR&D to support contract work, therefore, simply does not increase the government's risk of contract failures.

**4. IR&D Project Overruns Will Become Contract Costs**

- IR&D project costs may not be classified as direct contract costs under CAS 420 and FAR § 31.205-18. Indeed, the government has asserted fraud when a contractor attempts to make IR&D costs contract costs.

- The issue of contractors shifting costs from an IR&D project to a contract could only arise in the context of a cost reimbursement contract or a contract change. Shifting costs to a firm, fixed-price contract would not result in increased contractor recovery. Cost reimbursement contracts and contract changes, however, create a government obligation to

reimburse only allowable costs, but IR&D costs shifted to a contract are not allowable costs. FAR § 31.205-18. Moreover, FAR § 52.215-2 provides the government rights to audit claimed allowable costs. Thus, the performance of a prospective IR&D effort does not increase any risk of contract cost increases.

**5. The Use of IR&D to Support a Proposal Skews the Award Decision**

- The perception is that when one contractor proposes to support a contract with future IR&D effort and another contractor does not, the evaluation of the two offerors is somehow inherently unfair. This is incorrect.

- To the contrary, each contractor is free to classify its costs as direct or indirect based upon its business circumstances, so long as the contractor classifies like costs that it incurs in similar circumstances consistently. 48 C.F.R. § 9904.402; *ATK Thiokol*, 598 Fed. Cir. at 1332. By definition, direct costs are charged to a single contract and indirect costs are spread over two or more contracts. Thus, one contractor's decision to classify a cost as direct to a contract will cause that contractor's proposed costs to be different from a contractor that chooses to classify a similar cost incurred in similar circumstances as an indirect cost.

- Indeed, the government may not compel a contractor to change from one CAS-compliant practice to another. Similarly, the government may not change a contractor's proper cost classifications for evaluation purposes. This is why the government also does not "equalize" the disparity between contractor costs that result from two contractors using different accounting practices. Thus, a contractor's compliant classification of costs has never been viewed as skewing cost/price evaluations.

- These rules apply to R&D costs. One contractor might apply accounting practices that result in the costs of R&D necessary to a contract being classified as direct contract costs, while another contractor may apply accounting practices that result in the costs of such R&D being classified as indirect costs. This difference does not justify any government reclassification of IR&D costs.

- To avoid the impact of the fact that relevant accounting rules permit contractors to account for costs of similar efforts differently, DoD might consider developing Requests for Proposals that mandate R&D effort as a specific requirement of a contract. This approach, however, is simply bad policy.

- Contractors, for good reasons, such as the government obtaining data rights, may perform R&D differently when the R&D is specifically required in the performance of a contract, rather than for a product. This may well result in DoD losing the technological innovations it seeks to permit continued U.S. technological dominance for the warfighter.

- Mandating that R&D be considered a specific contract requirement also may well result in contractors, that already have performed IR&D that will benefit the contract, not submitting a proposal because that effort will have to be repeated for the contract, eliminating any competitive edge from having previously invested in IR&D and creating data rights issues.

**6. Understanding the Cost of an IR&D Project Assists in Evaluating Contract Technical Risk**

- Government assessment of an IR&D project to assess the technical risks inherent in performing a contract that will benefit from the IR&D project makes sense. It also makes sense that assessing the cost of an IR&D effort provides insight into the nature and scope of the intended effort and how it will, or will not, benefit a contract.

- Simply adding the cost of a future IR&D project to the proposed cost of a contract, however, makes no sense. It does not permit a better technical assessment of the relevant proposal. Moreover, it misstates the proposed contract's cost because the cost of the IR&D project, by definition, benefits more than one contract which requires that the cost of the IR&D project be prorated over the benefiting contracts. Of course, this is not reasonably feasible. Thus, adding the entire cost of IR&D projects that will benefit the contract to the contract's proposed cost makes no sense.

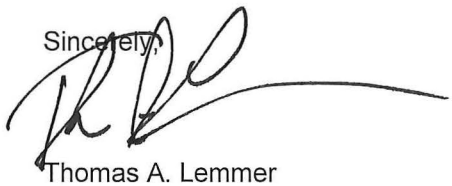
- Adding the cost of a future IR&D project also discriminates between contractors that will support a contract with the results of past IR&D efforts, where no costs would be added, and contractors that propose future IR&D efforts. This discriminatory effect will certainly create a disincentive to perform worthwhile IR&D projects because they will have a negative competitive impact.

## III. CONCLUSION

The concept underlying the ANPR of adding the costs of future IR&D efforts to the proposed costs of a benefiting contract is both bad policy and, indeed, improper under DoD's existing IR&D policy and the applicable regulatory scheme when a contractor proposes contract and IR&D costs that comply with CAS 420 and FAR § 31.205-18 and government review confirms that compliance. Thus, the ANPR

should be withdrawn. In its place, the government should rely upon its existing ability to assess technical risk in a proposal by evaluating the technical risks in how a contractor proposes to meet its contractual requirements, including technical risks involved in an IR&D project that will benefit the contract. Any other approach will disrupt the current regulatory scheme and more than likely create disincentives to contractors engaging in IR&D, a result contrary to Congressional policy.

Sincerely,



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