National Defense Industrial Association

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Defense Acquisition Regulations System
ATTN: Mr. Mark Gomersall
OUSD(AT&L) DPAP/DARS
Room 3B941
3060 Defense Pentagon
Washington, DC 20301-3060

SUBJECT: NDIA Comments on DFARS Case 2016-D002, Proposed Rule, "Enhancing the Effectiveness of Independent Research and Development," (February 16, 2016).

Dear Mr. Gomersall,

On behalf of the more than 1,600 member companies and the nearly 90,000 individual members that comprise the National Defense Industrial Association (NDIA), I offer the following comments on the subject proposed rule:

The proposed rule does not contain an explicit exception for classified IRAD projects. The proposed rule would require a technical interchange with "DoD Government employees" prior to independent research and development (IRAD) project initiation starting in the contractor's fiscal year 2017. This technical interchange would then have to be documented in the Defense Technical Information Center (DTIC) database. With respect to classified IRAD projects, these new requirements would be extremely difficult for contractors to implement. The DTIC database does not currently have the ability to receive classified inputs from contractors. More importantly, forcing the contractor to identify a "technical or operational" DoD employee with the appropriate clearances- especially at the secure compartmented information (SCI) or special access program (SAP) level- and "need to know" for an initial technical interchange would place an undue burden on the contractor and could create unintended security-related problems. The proposed rule should explicitly state that the new requirements only apply to unclassified IRAD projects.

The proposed rule does not adequately define the term "DoD Government employee." Again, the proposed rule requires an interchange with a technical or operational "DoD Government employee." The stated purpose of this interchange is "that contractor plans and goals for IRAD projects benefit from the awareness of and feedback by a *DoD employee who is informed of related ongoing and future potential interest opportunities*." (emphasis added). However, the rule does not provide any further specifics on the qualifications of these "DoD Government employees" including the required status (civilian or military), grade (e.g. GS-15, O-6, etc), education level or duties. Without the rule providing further details regarding who constitutes a "DoD Government employee," contractors could find the quality/sufficiency of their technical engagements second-guessed- substantially after the fact- by the administrative

contract officer (ACO) and Defense Contract Audit Agency (DCAA) auditor during the allowable cost review.

The proposed rule creates practical, time, resource and data disclosure challenges for conducting these technical interchanges. The rule requires industry to engage in these technical interchanges for IRAD projects initiated in the contractor's fiscal year 2017. For certain member companies, the required interchanges would span hundreds of individual IRAD projects and begin as early as January 1, 2017. Our member companies are concerned that the Military Services and Defense Agencies will not have an adequate number of personnel designated to conduct all of these technical interchanges in the time mandated. Moreover, our members are concerned about the potential unauthorized release- inadvertent or otherwise- of proprietary data by government personnel during these technical interchanges.

NDIA would like to understand more about DoD's plan to implement these new requirements before the rule is finalized. How will DoD avoid disruption to continuing IRAD projects during the implementation of this rule? Perhaps a dollar threshold could be established to reduce the number of IRAD projects subject to this technical interchange requirement. Or perhaps, a temporal threshold could be established to require government action once a technical interchange has been requested by the contractor. For example, the government could be required to conduct the interchange within 15 calendar days of a request by the contractor or else the required interchange (and favorable feedback from the government) would be automatically deemed to have occurred. If so, such thresholds should be included in the proposed rule. Moreover, if the Military Services and Defense Agencies plan to offer technical interchanges for more than one IRAD project at a time, our member companies would like to see that explicitly authorized in the proposed rule.

NDIA would also like to better understand DoD's plan to safeguard member companies' proprietary data. How much technical information will have to be reported into DTIC? How will the services and defense agencies safeguard this proprietary information? How will the services and defense agencies enforce compliance by government personnel handling this proprietary information? Perhaps, the government should consider excluding support contractor personnel from these technical interchanges involving proprietary data. Additionally, the government should consider requiring that all government employees, who conduct a technical interchange, sign nondisclosure agreements with the companies providing their proprietary data.

The proposed rule restricts the allowability of the costs of the mandatory technical interchanges. The proposed rule currently states that the contractor must engage in a technical interchange "before IRAD costs are generated." This approach ignores the fact that there are costs associated with preparing for and engaging in the technical interchange. The rule should be changed so that these costs are made explicitly allowable. For example, the proposed rule could be amended to allow the contractor to start incurring reimbursable IRAD costs at the time the contractor requests a technical interchange. The rule may then require that the interchange must have occurred and be entered into DTIC prior to the allowability determination by the ACO.

The proposed rule does not address the effect of a negative response from the "DoD Government employee" from these mandatory technical interchanges. As drafted, the

proposed rule is silent as to whether the contractor may engage another government employee for a "second opinion" or have any other form of recourse from a negative response by the "DoD Government employee." The proposed rule also does not clarify whether a negative response during the technical interchange would affect the ACO's allowability determination (i.e. whether the project meets the "of potential interest to DoD" standard.). If a negative response from the government employee would affect the allowability determination, this outcome would infringe on the independence of a contractor to choose which technologies to pursue in its IRAD program, as guaranteed by 10 U.S.C. §2372 (f). The proposed rule should clarify what recourse the contractor has if the "DoD Government employee" indicates that the proposed IRAD project is not "of interest" to DoD.

I hope that these comments are helpful to you as you refine your thinking on this proposed approach. NDIA recognizes the value of continuous communication between the DoD science & technology community and industry regarding IRAD projects. However, NDIA also recognizes that industry must continue to have independence in choosing projects of interest to the DoD. IRAD cannot be treated as another source of government-directed projects, especially if industry is expected to continue to innovate and drive potentially disruptive approaches. Finally, NDIA urges that these new requirements be implemented with adequate government resources (especially enough government personnel made available) and in a manner that minimizes any delay or disruption to ongoing industry research efforts.

Feel free to contact me at jthomas@ndia.org or (703) 247-2598 if you have any questions.

Sincerely,

James Thomas
Director, Legislative Policy