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April 18, 2016

**Via Regulations.gov**

Defense Acquisition Regulations System  
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**Re: DFARS Case 2016-D002; Proposed Rule, Enhancing the Effectiveness of Independent Research and Development, 81 Fed. Reg. 7721 (February 16, 2016)**

Dear Mr. Gomersall:

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments on the Proposed Rule cited above.<sup>1</sup> The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the ABA’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the policy of the ABA.<sup>2</sup>

<sup>1</sup> Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Heather K. Weiner, member of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

<sup>2</sup> This letter is available in pdf format at [http://www.americanbar.org/groups/public\\_contract\\_law/resources/prior\\_section\\_comments.html](http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html) under the topics “Acquisition Reform and Emerging Issues” and “Accounting, Cost and Pricing.”

## I. INTRODUCTION

The Department of Defense's ("DoD's") discussion of the Proposed Rule indicates that the objective to be met by revising DFARS 231.205-18 is to "ensure that both IR&D [Independent Research and Development] performers and their potential DoD customers have sufficient awareness of each other's efforts and to provide industry with some feedback on the relevance of proposed and completed IR&D work." 81 Fed. Reg. at 7722. The Section agrees that both the Government and industry benefit from sharing information regarding their respective research and development activities. This is accomplished today, in part, through the combination of the current regulatory framework under which major contractors provide information to the Government available through channels such as submissions to the Defense Technical Information Center ("DTIC") and DoD efforts to engage with industry on its strategic research and development plans. For example, through its Long Range Research and Development Plan ("LRRDP"), DoD currently is taking steps to "identify high pay-off enabling technology investments that could provide an opportunity to shape key future US material investments, offer opportunities to shape the trajectory of future competition for technical superiority, and . . . focus on technology that can be moved into development programs within the next five years." Memorandum from Frank Kendall, Under Secretary of Defense, "Long Range Research and Development Plan (LRRDP) Direction and Tasking," at 1 (Oct. 29, 2014). DoD also has expressed its commitment to soliciting and assessing input on the LRRDP from industry and academia. *Id.* at 2. The Section applauds these efforts and agrees that engagement between and among Government, industry, and academia should foster future innovation and technological developments.

That said, the Section is concerned with certain aspects of the additional reporting requirements proposed under the Proposed Rule. In particular, DoD proposes to modify DFARS 231.205-18(c)(iii)(C) to require "technical interchanges" for IR&D projects that contractors initiate beginning in their respective fiscal years for 2017:

(5) For IR&D projects initiated in the contractor's fiscal year 2017 and later, as a prerequisite for the subsequent determination of allowability, major contractors must—

(i) Engage in a technical interchange with a technical or operational DoD Government employee before IR&D costs are generated so that contractor plans and goals for IR&D projects benefit from the awareness of and feedback by a DoD employee who is informed of related ongoing and future potential interest opportunities; and

(ii) Use the online input form for IR&D projects reported to DTIC to document the technical interchange, which includes the name of the DoD Government employee and the date the technical interchange occurred.

The Section believes that additional disclosure requirements are not necessary given the current opportunities for engagement available to Government, industry, and academia. The Section further believes that allowability of IR&D costs should not be tied to the timing of such engagements. DoD's desire for more insight into contractors' IR&D programs must be balanced against its obligation to refrain from infringing upon the independent nature of its contractors' IR&D efforts and further to protect contractors' confidential or proprietary, trade secret, commercial, or financial information.

For reasons discussed below, the Section recommends that DoD withdraw the Proposed Rule. If DoD chooses not to withdraw the proposed rule, the Section recommends that DoD revise the proposed rule to adequately address the concerns discussed in these Comments.

## II. COMMENTS

### A. DoD Should Not Make Allowability of IR&D Costs Contingent on the Timing of Technical Exchange Meetings.

Under the Proposed Rule, IR&D costs would be unallowable if a contractor incurs such IR&D costs before a technical interchange with technical or operational DoD employees is held.<sup>3</sup> This proposed rule appears to be inconsistent with the longstanding policy that the Government should not direct contractor IR&D projects, which is embodied in 10 U.S.C. § 2372(f) and recognized in the Proposed Rule's preamble. It is unclear why the current procedures, incorporated into the regulations a few years ago, do not provide adequate opportunities for DoD and its contractors to gain awareness of each other's efforts and provide effective feedback channels between the various stakeholders. Further, the proposed addition of disclosure, discussion, and feedback requirements may have the unfortunate and unintended effect of preventing, delaying, or otherwise impeding innovation and technological developments.<sup>4</sup>

The proposed language at DFARS 231.205-18(c)(iii)(C)(5) would establish engagement by contractor and DoD personnel in a technical interchange as "a prerequisite for the subsequent determination of allowability." Such a requirement would interrupt the natural flow of research and development programs by requiring a technical interchange meeting before a contractor could initiate a new phase, change course, or revise research objectives from that which

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<sup>3</sup> The Proposed Rule states that the technical interchange must be held with "a technical or operational DoD Government employee." 81 Fed. Reg. at 7723. Yet such personnel may not be readily available to meet with a contractor. See Memorandum from Frank Kendall, Under Secretary of Defense, "Implementation Directive for Better Buying Power 3.0 – Achieving Dominant Capabilities through Technical Excellence and Innovation," at 28 (April 9, 2015) (noting that DoD relies extensively on contracted services for technical management and other engineering services). The Section would also note in this regard that the DoD currently uses Science, Engineering, Technology and Assistance ("SETA") personnel from contractors to fill its science, engineering, and technology personnel gaps now. Thus, it is unclear whether DoD would even have the employees needed to review and approve such projects in a timely basis.

<sup>4</sup> Since the Proposed Rule would require contractors to await government employee availability and approval before proceeding with a project, when such employees are not available to approve the project promptly (during a time when a contractor has the incentive, personnel, time and money available to proceed with it), the delay may result in a contractor's deciding not to proceed with that IR&D project in the near or longer term.

previously was briefed to DoD. Such an impact would be contrary to the express provisions of 10 U.S.C. § 2372(f), since it would infringe on the contractor's ability to choose where and when a particular IR&D project will be conducted.<sup>5</sup> The Proposed Rule should be revised to remove the requirement that the technical interchange be held "before IR&D costs are generated" in order to eliminate this potential delay and disruption to valuable IR&D programs and to be consistent with the above statutory provision.

Currently, substantial communications regarding research and development programs take place between DoD and its major contractors, as illustrated by the following examples:

- DoD engages with its contractors through various channels, including program-related technical-interchange meetings, industry-group meetings, and other DoD communications about its research-and-development budget and planned programs.
- Major contractors provide annual input to DTIC regarding their IR&D programs and update that information when each project is completed.
- The cognizant administrative contracting officer ("ACO") and Defense Contract Audit Agency ("DCAA") already have access under existing rules. "[C]opies of the input and updates must be made available for review by the cognizant [ACO] and the cognizant [DCAA] auditor to support the allowability of the costs." DFARS 231.205-18(c)(iii)(C). Under this regulatory framework, the ACO is expected to consult with technical or other experts when specialized expertise is required in making such a determination. 77 Fed. Reg. 4632, 4634 (January 30, 2012). In 2012, DoD determined that this requirement for input and updates provided sufficient information for ACOs to make the required allowability determination. *Id.*<sup>6</sup>

Thus, the current system provides both required and voluntary access to DoD when they are ready and available to review the projects, without making allowability of IR&D costs contingent on the timing of the proposed review. The Section believes that the limited benefit to be gained by having such IR&D kick-off meetings between DoD and a contractor is more than offset by the negative impact that this likely will have on the progress and timing of IR&D programs and established law and policy.

#### **B. The Proposed Rule Needs to Better Protect Contractor Information.**

For decades, government contractors have made significant technological advancements through investment in IR&D. The vast majority of contractors treat IR&D projects with strictest confidence, because these projects inherently involve the contractor's valuable intellectual property, including competition-sensitive and proprietary information, the release of which

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<sup>5</sup> 10 U.S.C. § 2372(f) ("Regulations prescribed pursuant to subsection (c) may not include provisions that would infringe on the independence of a contractor to choose which technologies to pursue in its independent research and development program.")

<sup>6</sup> In this regard, the current rule is clear that "Departments/agencies shall not supplement this regulation in any way that limits IR&D/[bid and proposal] cost allowability." DFARS 231.205-18(c)(i).

would cause substantial competitive harm.<sup>7</sup> Indeed, companies routinely strive to gain a competitive advantage by developing new and innovative systems, leveraging existing technology for creative solutions, and refreshing prior research and development efforts. Any public disclosure, even of the general nature of the development project, could enable a competitor to gain valuable insights into new technologies and product developments and result in its gaining an unfair competitive advantage.

In addition, trade secret theft has increased dramatically.<sup>8</sup> The risk of disclosure (whether intentional, inadvertent, or through economic espionage), therefore, may discourage contractors from investing in and developing innovative solutions to meet the Government's needs at a time when DoD is seeking to encourage participation by non-traditional government contractors.

Although the Proposed Rule would establish requirements for contractors to engage in technical interchange meetings, it does not expressly establish protocols to be followed by DoD personnel to ensure protection of contractor IR&D-related information. Given the type of valuable, highly sensitive information that likely will be provided at these technical interchanges and the significant harm that will occur to both the contractor and DoD if the information is released, DoD needs to take appropriate steps to protect against unauthorized use or disclosure of the information.<sup>9</sup>

If DoD decides to issue a final rule based upon the Proposed Rule, the Section recommends that DoD take the following steps to protect this proprietary and confidential trade-secret information:

- DoD technical and operational employees should not be allowed to retain a copy of the information received at the technical interchange beyond the summary information reported to the DTIC.<sup>10</sup> To date, DoD has relied on the data submitted to DTIC for tracking IR&D projects and for making allowability determinations.
- In addition, to protect such information, any DoD employee/personnel receiving the information cannot be allowed to participate in technical interchanges with competitors. If the same employee is evaluating and providing feedback on IR&D projects planned by companies that compete against each other in the commercial or DoD marketplace, the employee will be put in a position in which technical transfusion and leveling will be at a

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<sup>7</sup> The Senate Committee on the Judiciary recently recognized the importance of protecting trade secret information: “[T]rade secrets are an integral part of the operation, competitive advantage, and financial success of many U.S.-based companies.” Senate Report No. 114-220 at 1 (2016).

<sup>8</sup> The cost of trade secret theft has been estimated at over \$300 billion and may reach \$400 billion. *Id.* at 2 (“Protecting trade secrets has become increasingly difficult given ever-evolving technological advancements.”).

<sup>9</sup> Such protections are consistent with the obligations under the Trade Secrets Act, 18 U.S.C. § 1905, which prohibits the Government from releasing private information in its possession, unless law otherwise authorizes the release.

<sup>10</sup> If DoD employees obtain copies of the technical interchange documentation, they should be required to maintain such information in confidence regardless of any marking on the document. DoD also should issue guidance to DoD employees to store such information only in appropriate locations that are sufficiently secure to protect the highly confidential and trade-secret contractor information.

high risk. Indeed, by indicating that a key purpose of the Proposed Rule is to allow contractors to benefit from the “awareness of and feedback by a DoD employee who is informed of related ongoing and future potential interest opportunities,” the Proposed Rule could be read to suggest that the DoD employee is *expected* to share information he or she may have about other companies’ planned IR&D activities. Therefore, DoD should clarify that the “feedback” provided in the interchanges will not include discussion of competitors’ planned IR&D projects learned about through other interchanges, even if the DoD employee at issue did not directly participate in an interchange with a competing company.

- If a technical transfusion or leveling occurs, such as through impermissible “transfer” of a company’s information to competitors, or is used by the Government for purposes other than review and approval of IR&D,<sup>11</sup> the company must have appropriate remedies, including both declaratory, monetary and equitable relief, as well as attorneys’ fees and costs for seeking such relief.
- Furthermore, if DoD implements the Proposed Rule through a final rule, DoD should revise provisions in order to avoid imposing on contractors the burden and expense of resisting public release under the Freedom of Information Act (“FOIA”) of information shared during the technical interchange meetings.

Accordingly, the Section suggests that the Proposed Rule be revised to make clear that the submission of IR&D information is voluntary, that there is a presumption that any information provided during the technical-interchange meetings is confidential and that the provider of the information would suffer substantial competitive harm if such information were to be released to the public, and that the provider has the right to seek declaratory, monetary, and equitable relief following unauthorized release.<sup>12</sup>

### **C. The Proposed Rule Would Impose Administrative Burdens on Contractors, ACOs, and Other DoD Personnel.**

Before taking further action on the Proposed Rule, the Section recommends that DoD also consider the administrative burden the rule would impose on contractors, ACOs, and DoD personnel. If the Proposed Rule is finalized, contractors would need to coordinate the technical interchange meetings, often across multiple business units for larger IR&D projects, to ensure the information that is shared is accurate and relevant and meets the objectives of this rule. This would involve contractor management personnel, as well as personnel from functions such as engineering, manufacturing, quality assurance, and many others.

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<sup>11</sup> Although such instances are rare, there have been reports of companies obtaining information from the Government about their competitors’ technological developments. *See* 75th Anniversary of the Original Jeep Patent avail at <http://www.ipwatchdog.com/2016/04/07/original-jeep-patent/id=68132/>.

<sup>12</sup> Adding such guidance is consistent with relevant law and judicial decisions. 5 U.S.C. § 552(b)(4) (supporting the proposition that voluntary technical reports are exempt from disclosure under FOIA); *Critical Mass Energy Project v. NRC*, 942 F.2d 799, 877-79 (D.C. Cir. 1991) (protecting information voluntarily provided to an agency).

Mr. Mark Gomersall

April 18, 2016

Page 7

In addition to the impact on contractors, the Proposed Rule, if promulgated as a final rule, would impose administrative burdens on ACOs and other DoD personnel. ACOs as well as DoD technical and operational personnel will need to be available to meet with contractors on a timely basis in order to limit potential schedule impact to planned IR&D programs; to support the technical interchanges; and to be prepared to provide the contractor with feedback regarding related ongoing and future potential interest opportunities.

## II. CONCLUSION

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,



David G. Ehrhart

Chair, Section of Public Contract Law

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