

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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May 2, 2011

Mr. Mark Gomersall
OUSD(AT&L) DPAP/DARS
3060 Defense Pentagon
Room 3B855
Washington, DC 20301-3060

Subject: DFARS Case 2010-D011, Independent Research and Development Technical Descriptions
CODSIA Case 06-11

Dear Mr. Gomersall:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA)¹ appreciate the opportunity to comment on the proposed rule entitled “Independent Research and Development Technical Descriptions” that was published in the Federal Register on March 2, 2011. The proposed rule—which was issued in response to the Under Secretary of Defense (Acquisition, Technology and Logistics) memorandum of November 3, 2010 providing guidance on obtaining greater efficiency and productivity in defense spending—would revise requirements for reporting to the Defense Technical Information Center (DTIC) any independent research and development (IR&D) projects that generate annual costs in excess of \$50,000. DoD has indicated that the proposed reporting requirements are mandated by 10 U.S.C. § 2372 and will provide in-process information from DoD-sponsored IR&D projects to increase effectiveness by providing visibility into the technical content of industry IR&D activities to meet needs and promote the technical prowess of the industry. DoD also asserts that, without the collection of this information, it will be unable to maximize the value of the IR&D funds the DoD disburses without infringing on the independence of contractors to choose which technologies to pursue in IR&D programs.

We are opposed to the rule. We believe that the revised requirements proposed in this case misapply the requirements of 10 U.S.C § 2372 and that the absence of details concerning the treatment of reported data places contractors in jeopardy of losing their rights in data acquired under other statutes and regulations or having their IR&D/bid and proposal (B&P) costs declared unallowable. This proposed requirement will increase the Government’s costs and could chill technological innovation.

¹ “CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy at the suggestion of the Department of Defense. DoD believed that industry should unite their efforts to present a single voice to issues impacting the broader government acquisition community. CODSIA currently consists of six industry trade associations and thus represents the comments of thousands of federal government contractors and hundreds of thousands of contractor employees nationwide on acquisition policy issues. A CODSIA comment letter is not a letter from a single organizational entity, but from thousands of affected stakeholders. This unique status as the conveyor of regulatory comments for some of the largest trade associations working on acquisition policy also represents the collective expertise of these associations and the companies they represent.”

A. 10 U.S.C. § 2372 Does Not Mandate IR&D Reporting and the Information Is Already Required

Contrary to the statement in the background section of the proposed rule, 10 U.S.C § 2372 does not mandate any particular form of IR&D reporting. On the contrary, IR&D reporting is permissive. Specifically, 10 U.S.C § 2372, subsection (c) states "... the regulations prescribed pursuant to subsection (a) may [emphasis added] include the following provisions: ... (3) Implementation of regular reporting methods for transmission -- ... (B) from contractors to the Department of Defense, in a reasonable manner, [emphasis added] of information regarding progress by the contractor on the contractor's independent research and development programs."

Additionally, section I. Background of the supplementary information reads, "... provide in-process information from DoD-sponsored IR&D projects." IR&D is not DoD-sponsored. IR&D is a cost of doing business for industry, especially for those in high technology markets, which DoD recognizes and, therefore, includes as an indirect cost element when purchasing products using military pricing.

In addition, this information is already required under DFARS 231.205-18 for purposes of determining allowability of IR&D costs. Additional reporting information is not and should not be required. Specifically, the Government already is provided the data and is responsible for reviews of IR&D projects that are of potential interest to DOD under the DFARS clause.

B. The Proposed Rule Jeopardizes Contractor of Data Rights

The proposed rule does not address several key issues associated with implementing the proposed reporting requirement:

- Who will have access to this database? The proposed rule states that the database " ... serves the DoD community as the largest central resource for DoD and government-funded scientific, technical, engineering, and business related information available today ..." Thus the database described in the proposed rule appears to be uncontrolled and may violate FAR and DFARS data right clauses that require the government to protect contractor intellectual property in the government's possession.
- How will data be protected? Even assuming that access to the data is controlled, a single database with all reportable IR&D projects will create a potential target for any military or economic espionage interests. The proposed rule does not address cyber security issues associated with safeguarding this sensitive data.
- How does DoD intend to ensure enforcement of contractual data rights and the protection of individual company's propriety data when it is warehoused in the DTIC? The proposed rule does not address who will have access to the database. In addition, many DoD funded projects derive their scientific, technical, engineering, and business related information underpinnings from company funded sources. Improper disclosure could jeopardize such funding.
- How is data verified for accuracy and input verified for timeliness?

The proposed rule should make clear that the Government cannot release or disclose proprietary IR&D submissions outside the Government without the data owners' written authorization. Further, contractors should be able to restrict the internal Government use of such IR&D data to DoD only. If DoD needs to share such proprietary IR&D data with support contractors – such as "covered Government support contractors" furnishing independent and impartial advice or technical assistance directly to DoD – then DoD should be required to obtain the data owner's written permission to do so. For clarity purposes, DFARS Case 2009-D031 applies only to deliverable technical data and software, and does not apply to proprietary IR&D data.

C. DoD Should Not Make IR&D Cost Allowability Contingent on Reporting

Under the proposed rule, IR&D costs would be unallowable for projects exceeding \$50,000 unless the project(s) are reported in the DTIC. Using the disallowance of costs to enforce the proposed reporting requirement is unnecessary and unreasonable and would result in sanctions that are disproportional to the potential harm to the DoD. Normally, if a contract fails to comply with such a contractual reporting requirement, the non-compliance would be treated as a breach of contract judged on the basis of its materiality. Moreover, claimed contractor IR&D costs are currently auditable by the Defense Contract Audit Agency to support G&A rate audits. The DoD already is protected from improper charging including the remedy of double damages and interest on “expressly unallowable” costs.

D. The Proposed Rule set an Arbitrary and a Significantly Low Reporting Threshold

The \$50,000 threshold for reporting individual projects is significantly low and for many contractors will, in effect, require 100% reporting of IR&D projects. In addition, this threshold is not mandated by 10 U.S.C. 2372. It is unclear as to how the \$50,000 threshold was selected.

Moreover, contrary to the statement in the Regulatory Flexibility Act section “that the reporting requirements will not apply to a significant number of small businesses,” the extremely low threshold will likely impose these burdensome reporting requirements on many small businesses that may not have the capacity to comply.

Unless the threshold is significantly increased, this reporting requirement will add an unreasonable burden to both small contractors and large contractors alike. As such, we recommend that the threshold for reporting be set at \$1.1 million. This threshold is consistent with the threshold set forth in the definition of “Major Contractor” in DFARS 231.205-18 Independent Research and Development and Bid and Proposal Cost and will target those companies that have significant IR&D projects and will prevent small businesses and other contractors with insignificant IR&D projects from having to comply with the burdensome reporting requirements.

E. The Proposed Rule Will Increase DoD Costs

The scope and sweep of this proposed rule is not well defined and left open to conflicting interpretations. As such, it is difficult for companies to assess the costs of compliance or judge “the accuracy of the burden of the proposed information collected” without further specificity. For example the term “project” is undefined. It is not uncommon for contractors to account for their IR&D costs not on a “project” basis but only as charge numbers or cost centers. Individual efforts may have certain development characteristics in common but are accounted for separately. Contractors likely will be forced to create new accounting systems or significantly alter the systems they currently operate, which in turn, will increase indirect costs ultimately charged to the Government.

The supplemental information does not state who or how many reviewers will be required to review the reports or take into account the burden this will place on DoD.

The proposed rule also would require that contractor DTIC “input and updates” be made available to the DCAA “to support the allowability of the costs.” When there is a “vacuum” as to specificity of standards to support allowability, DCAA often issues guidance that may add new requirements or interpret the rule in an unintended way. At a minimum, this may substantially increase contractor effort and cost in supporting any added requirements or “interpretations” and may lead to additional disputes.

F. The Proposed Rule's Reporting Thresholds Are Unclear

DFARS 231.205-18(c)(iii) states that the limitations in the new subparagraph (c)(ii)(C) apply to "Major Contractors." "Major Contractors" are defined in the definitional section as "any contractor whose covered segments allocated a total of \$11 million in IR&D/B&P costs to covered contracts during the preceding fiscal year." The new subparagraph (c)(ii)(C) then uses the term "contractor" and not "Major Contractor," which is confusing as to the applicability of the new subparagraph. It also states the threshold for reporting is "annual IR&D costs in excess of \$50,000." The background section of the proposed rule suggests that this threshold was intended to be applied on a per IR&D project basis. Yet the text of the proposed regulation appears to apply the threshold on a cumulative or aggregate basis. We recommend that DoD revise the rule to clarify that reporting should be on a per project, per year basis.

G. If DoD Retains the Reporting Obligation, It Should Increase The Dollar-Value Threshold Above Which It Applies

As discussed above, the background section of the proposed rule suggests that DoD intended a threshold be set for reporting individual IR&D projects. For Major Contractors with an IR&D /B&P spend of \$11 million or more, \$50,000 is not material to their overall expenses. Further, the \$50,000 threshold is so low that it likely will capture even minor IR&D projects that are not the intended target of the rule and for which imposing an onerous reporting obligation will provide minimal benefit to the Government. The proposed rule does not explain why DoD is proposing to impose the requirements at the \$50,000 level. Before adopting such a low threshold, DoD should conduct a cost-benefit analysis to determine whether the benefits of tracking IR&D expenses at such low dollar values is worth the increased costs to the Government and contractors associated with the effort required to do so or, alternatively, whether a higher dollar value threshold would provide sufficient tracking of IR&D expenses without unnecessary costs. We believe that such an analysis would demonstrate that the \$50,000 threshold is inefficient and will discourage investment and that a higher threshold is in the Government's best interest. Accordingly, in addition to clarifying or revising the rule to indicate that the threshold should be applied to particular projects, we recommend that DoD adopt a \$500,000 for reporting, instead of the proposed \$50,000 threshold.

H. The Proposed Rule Impacts Small Businesses

The proposed rule's Regulatory Flexibility Act section states that "the reporting requirements will not apply to a significant number of small businesses." Although the applicability of the \$50,000 threshold is not clear for the reasons discussed above, if the reporting requirement is not limited to Major Contractors and is not on a per project basis, this low threshold likely will capture many small businesses. Given the current state of DoD contracting and the complex systems required to support DoD, there are very few IR&D projects that can be performed for less than \$50,000 and thus the requirements, in effect, will apply to most IR&D, including those performed by small businesses. We, therefore, respectfully disagree with DoD's suggestion that the requirements will not apply to a significant number of small businesses.

I. The Proposed Reporting Requirements Are Unclear

The proposed rule requires contractors to use "the DTIC's on-line input form and instructions." The current form and instructions can be found at: <http://www.dtic.mil/dtic/submit/gSubmit/index.html>. The form and instructions are not static. The DoD could change, without notice, the form or instructions by, for example, adding reporting requirements, removing/modifying the minimal protection of proprietary information, adding rules allowing for broader distribution, or even making the reports public. This is a very open ended reporting process and poses substantial risk to the important and often critical intellectual property of contractors.

If this proposed rule is implemented, industry should receive feedback on each report to provide industry with specific DoD views on a given topic or research.

Additional concerns with the reporting requirements are included in Attachment A.

J. DoD Should Hold A Public Hearing

As explained in these comments, the proposed rule raises many issues and leaves many questions unanswered. In light of this, we request that DoD hold a public hearing to further discuss the proposed rule and obtain additional comments.

If you have any questions, please contact the CODSIA project officer, Richard Sylvester, Vice President, Acquisition Policy, AIA, at 703-358-1045 or Bettie McCarthy, Administrative Officer, CODSIA, at 703-875-8059.

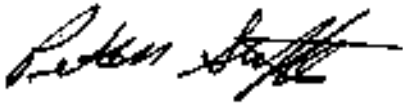
Sincerely,



Richard Sylvester
Vice President, Acquisition Policy
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Richard L. Corrigan
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Vice President, Government Policy
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ATTACHMENT A REPORTING REQUIREMENTS

The proposed rule would require the electronic submission of in-process and final reports for IR&D projects to the DTIC, using the automated on-line submission system. The system has been in place for several years, and its use is currently optional. Industry recommends a reasonable adjustment period to implement this rule. Industry also recommends that DoD modify the DTIC form(s) and associated submission instructions to: (1) streamline the submittal process, reduce the associated administrative burden and minimize costs, and (2) enable Contractors to modify the form to include proprietary or other appropriate restrictive markings. These necessary changes are not currently addressed by the notice.

1. The proposed rule requires contractors to report information about IR&D projects, but it does not specify the required submission contents. Instead, the rule only directs contractors to use DTIC's on-line input form and instructions. The current DTIC on-line input form and instructions do not specify what information is *required* to meet the proposed rule. Instead, the DTIC Independent Research & Development Database Contributors Guide (the "Guide") identifies information that "should" be furnished and the same or additional information that is "optional." The information identified in the Guide as that which contractors "should" furnish will likely impose an undue burden on Industry. Chapter 2 of the Guide says that each company "should" submit: (1) descriptive project summaries for each IR&D project, and (2) *two* overview files describing the structure and scope of the companies' IR&D program – Overview File A (OVA) and Overview File B (OVB), which include redundant information. Although the DTIC instructions say that contractors "should" submit both OVA and OVB, the instructions also go on to say that OVB is "optional." For consistency purposes, and to best ensure DoD receives useful IR&D information, the proposed rule should specify the minimum information required in IR&D submissions, and DoD should include the input form with any subsequent rule to permit reasonable assessment of the burden of the reporting requirement.
2. Although the proposed form is not included in the proposed rule, the current DTIC on-line input form does not permit Intellectual Property ownership or data right claims to be asserted and discussed as part of the submittal. This makes it impossible to assert preexisting Intellectual Property claims (as when past innovations developed at private expense are used as a basis or contributing factor in the current research). Industry recommends that the form be amended to permit assertions of Intellectual Property ownership or data right claims.
3. The current DTIC on-line input form is inflexible and does not permit contractors to mark the contents of the report with proprietary or other restrictive markings, which would protect the Intellectual Property interests of the company when the database of reports is disseminated within the Government. The proposed rule and DTIC form should be modified to include such marking.
4. The rule mentions progress reports but does not make it clear how frequently the reports will be required for each IR&D project. This makes it impossible to assess the reporting burden associated with the reporting requirement. We recommend that a schedule of progress reports be published to guide submission of the reports.
5. The rule does not include guidelines for the quality and amount of information that must be reported to enable a determination of allowability. In the absence of defined criteria for the reported information, it will be difficult for contractors to ensure that proper determination of allowability will be made on a consistent basis. We recommend that the Government clarify

the type and amount of information required to be reported, and provide criteria that can be used to judge what information needs to be included to ensure that costs will be allowable.

6. If the proposed rule is adopted, we recommend that the reports should focus solely on progress achieved in the previous year and not include the approach for the current year, which is subject to change for both technical and programmatic reasons.