

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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December 14, 2016

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

Subject: Request to Suspend DFARS Case 2016-D017, Independent Research and Development (IR&D) Expenses

Dear Mr. Gomersall:

On behalf of CODSIA¹, we respectfully request that the DAR Council immediately suspend the comment process to properly address the predicate administrative requirements of Executive Order (EO) 12866 and 13563 prior to moving forward with the rulemaking. In the alternative, we request that the public comment period be extended until January 31, 2017.

The proposed rule follows the completion in April 2016 of the public comment cycle of the DFARS Advanced Notice of Proposed Rulemaking (ANPR), Independent Research and Development Expenses (same regulatory case number). Based on our review of the proposed rule, CODSIA believes that the industry comments in response to the ANPR were not adequately considered, that the proposed rule is being unfairly rushed towards final implementation, and that the proposed rule does not comply with the due process requirements of the rulemaking process. The proposed rule represents a gigantic shift in IR&D policy and a break from procurement and oversight processes in place for many years. It thus deserves extensive and deliberate consideration before finalizing, including meeting all relevant regulatory requirements for a significant regulatory action.

CODSIA disagrees with DoD that the proposed rule is not “significant” and recommends that it be submitted to the Office of Information and Regulatory Affairs (OIRA) for review of and compliance with the requirements of EO 12866 because the rule may (in pertinent part):

- a. Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- b. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- c. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

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.

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- d. Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

The proposed rule meets the criteria for review under the EO because it impacts contractor IR&D investment in DoD technology innovation and future warfighting; the largest ten DoD prime contractors each have annual investments of well over \$100 million, to which a change in the existing rules may materially and adversely affect the economy, including the aerospace and defense sectors and the nation's workforce. The proposed rule is also inconsistent with the existing statutes governing the use of IR&D expenses² and, if implemented, will lead to inconsistent regulatory approaches to IR&D in the FAR and DFARS.

E.O. 13563 requires agencies to quantify anticipated benefits and costs of proposed significant rules, and to ensure that any scientific and technological information used to support the regulatory actions are objective. Considering the proposed rule meets the standard for review by OIRA as a significant regulatory action under EO 12866, and that no cost/benefit analysis was conducted per E.O. 13563 because DoD classified the proposed rule as not significant, we assert that DoD should submit the proposed rule to OIRA for regulatory review prior to moving forward.

In the alternative, CODSIA requests the comment period be extended until January 31, 2017 to recognize the challenge with collecting public comments during sequential end-of-year holiday periods, as well as the uncertainty about the incoming Presidential administration's policy priorities and newly enacted changes to IR&D policy in the Fiscal Year 2017 National Defense Authorization Act. CODSIA intends to submit detailed comments to address the merits of the rule.

Conclusion

Given the importance of IR&D investment for DoD, the defense industrial base and the nation, CODSIA strongly recommends that DPAP suspend the comment process for the proposed rule for the reasons herein or, in the alternative, extend the comment period until January 31, 2017. We thank you for your consideration of our request. 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

² 10 USC 2372(f), Independent Research and Bid and Proposal Costs; payments to contractors; Limitations on Regulations

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