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PRATT'S GOVERNMENT CONTRACTING LAW REPORT



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Victoria Prussen Spears

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Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexus.com

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DOD Class Deviation Rescinds IR&D “Technical Interchanges” Requirement

*By Michael W. Mutek, Paul R. Hurst, and Thomas P. Barletta**

The Department of Defense recently issued a class deviation relating to implementation of the Defense Federal Acquisition Regulation Supplement's rule, “Enhancing the Effectiveness of Independent Research and Development.” As a result of this deviation, certain technical interchange requirements are no longer required in the determination of whether a major contractor's annual independent research and development costs are allowable. The authors of this article discuss the class deviation.

Major contractors¹ no longer must address the Defense Federal Acquisition Regulation Supplement's (“DFARS”) technical interchange requirement to ensure the allowability of costs for independent research and development (“IR&D”). Defense contractors typically pursue and invest in IR&D projects for the purposes of advancing their ability to develop and deliver a superior and more competitive product to the U.S. Department of Defense (“DOD”) and the warfighter. The interchanges were intended to promote transparency and dialogue between IR&D participants and DOD to ensure that interested stakeholders had sufficient awareness of each other's efforts and an opportunity for feedback.

In what appears to be an action consistent with the Trump administration's desire to cut regulations, the DOD issued a class deviation² relating to implementation of the DFARS rule *Enhancing the Effectiveness of Independent*

* Michael W. Mutek is senior counsel at Steptoe & Johnson LLP, where his practice spans the areas of government contracts, compliance and ethics, bid protests, claims, internal investigations and disclosures, formation and dissolution of teaming agreements, and dispute resolution. Paul R. Hurst, a partner at the firm, is a member of the Litigation Department and the Government Contracts Group, focusing on litigation and investigations involving government contracts. Thomas P. Barletta is a partner at the firm and a member of the Litigation Department and Intellectual Property group, concentrating his practice in government procurement law and policy matters. The authors may be contacted at mmutek@steptoe.com, phurst@steptoe.com, and tbarletta@steptoe.com, respectively.

¹ DFARS 231.205-18(a)(iii) defines “major contractor” as any contractor whose covered segments allocated a total of more than \$11 million in IR&D/B&P costs to covered contracts during the preceding fiscal year. For purposes of calculating the dollar threshold amounts to determine whether a contractor meets the definition of “major contractor,” the calculation does not include contractor segments allocating less than \$1.1 million of IR&D/B&P costs to covered contracts.

² http://www.acq.osd.mil/dpap/policy/policyvault/Class_Deviation_2017-O0010.pdf.

Research and Development,³ which was issued and effective on November 4, 2016. As a result of this deviation, the technical interchange requirements found at DFARS 23 I.205-18(c)(iii)(C)(4) are no longer required in the determination of whether a major contractor's annual IR&D costs are allowable. However, contractors still must report IR&D projects to the Defense Technical Information Center ("DTIC") using the DTIC's online input form and instructions.

WHAT DOES THE CLASS DEVIATION DO?

This class deviation states that, effective immediately, "contracting officers shall not require a major contractor . . . to engage in or document a technical interchange, as described in DFARS 23 I.205-18(c)(iii)(C)(4), as part of the criteria for determining a contractor's annual independent research and development (IR&D) costs to be allowable."

Before this class deviation, in order for annual IR&D costs to be determined allowable for IR&D projects initiated in the contractor's fiscal year ("FY") 2017 and later, DFARS 23 I.205-18(c)(iii)(C)(4) required that a major contractor:

- Engage in a technical interchange with a technical or operational government employee prior to the generation of IR&D costs; and
- Document the interchange on the online input form for IR&D projects reported to the DTIC.

This class deviation is effective until it is incorporated in the DFARS or until this class deviation is otherwise rescinded.

TECHNICAL INTERCHANGES

DOD had said that the original requirement for technical interchanges was viewed as an extension of DOD's long-standing policy to engage in robust communication with all entities supporting the defense industrial base and promote engagement with IR&D participants regarding research and development. This policy is outlined in DOD Instruction 3204.01, "DoD Policy for Oversight of Independent Research and Development."

Consistent with that policy, the use of technical interchanges was seen as supporting the Better Buying Power 3.0 IR&D initiative, which notes that to improve the effectiveness of IR&D investments reimbursed as allowable costs, both the DOD and the defense industrial base need to work together and ensure DOD has visibility into the opportunities created by government-reimbursed IR&D efforts performed by defense contractors. Interestingly, in

³ <https://www.federalregister.gov/documents/2016/11/04/2016-26366/defense-federal-acquisition-regulation-supplement-enhancing-the-effectiveness-of-independent>.

opposing the 2016 implementation of this requirement for technical interchanges, some commentators expressed concern that the rule would adversely impact innovative ideas, tend to favor traditional defense contractors, and otherwise create barriers to innovation and entry to the marketplace. It seems that similar concerns might be driving this rollback of the requirement.

EARLIER DEVIATION

This is the second class deviation issued on this DFARS rule. The first deviation was issued on December 1, 2016, in order to change the IR&D cost principle for purposes of determining the allowability of IR&D costs for projects initiated in a contractor’s FY 2017. It removed the requirement in the final rule that required a technical interchange to occur “before IR&D costs are generated,” and instead required that the interchange take place “sometime during the contractor’s fiscal year 2017.”