approved under OMB clearance 0704–0229 from the point of contact identified in this notice. Please cite OMB Control Number 0704–0229, in all correspondence.

List of Subjects in 48 CFR Part 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 252 is amended as follows:

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 1. The authority citation for 48 CFR part 252 is revised to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

252.212–7001 [Amended].

■ 2. In section 252.212–7001, remove the clause date ''(DEC 2011)'' and add ''(JANUARY 2012)'' in its place and in paragraph (b)(13)(i) remove the clause date ''(OCT 2011)'' and add ''(JANUARY 2012)'' in its place.

■ 3. In section 252.225–7021, remove the clause date ''(OCT 2011)'' and add ''(JAN 2012)'' in its place and in paragraph (a), in the definition for ''Designated country'', revise paragraph (i) to read as follows:

252.225–7021 Trade agreements.

* * * * *

(a) * * *

Designated country * * *

(i) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Armenia, Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as ''the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu'' (Chinese Taipei)), or the United Kingdom);

* * * * *

■ 4. In section 252.225–7045, remove the clause date ''(JUN 2011)'' and add ''(JAN 2012)'' in its place and in paragraph (a), in the definition for ''Designated country'', revise paragraph (1) to read as follows:

252.225–7045 Balance of Payments Program—Construction Material Under Trade Agreements.

* * * * *

(a) * * *

Designated country * * *

(1) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Armenia, Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as ''the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu'' (Chinese Taipei)), or the United Kingdom);

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[FR Doc. 2012–1488 Filed 1–27–12; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 231

RIN 0750–AG96

Defense Federal Acquisition Regulation Supplement; Independent Research and Development Technical Descriptions (DFARS Case 2010–D011)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to require major contractors to report independent research and development (IR&D) projects.

DATES: *Effective date:* January 30, 2012.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, (703) 602–0302.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule at 76 FR 11414 on March 2, 2011, to revise requirements for reporting IR&D projects to the Defense Technical Information Center (DTIC). Beginning in the 1990s, DoD reduced its technical exchanges with industry, in part to ensure independence of IR&D. The result has been a loss of linkage between funding and technological purpose. The reporting requirements of this rule, issued in accordance with 10 U.S.C. 2372, will provide in-process information from IR&D projects, for which reimbursement, as an allowable indirect cost, is sought from DoD, to increase effectiveness by providing visibility into the technical content of industry IR&D activities to meet DoD needs and promote the technical prowess of our industry. Without the collection of this information, DoD will be unable to maximize the value of the IR&D funds it disburses without infringing on the independence of contractors to choose which technologies to pursue in IR&D programs. The public comment period closed May 2, 2011. Four respondents submitted comments on the proposed rule. A discussion of the comments is provided in Section II.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Threshold

Comment: The proposed rule should clarify whether the reporting requirement is triggered by a major contractor's aggregate IR&D costs or the costs of an individual IR&D project. The threshold for triggering the reporting requirement is low and should be increased. The low threshold of $50,000 magnifies the burden to contractors, ACOs, and DCAA auditors, as this threshold would require the reporting of almost any IR&D project. Respondents recommended a number of alternative thresholds.

Response: The $50,000 contractor annual IR&D threshold has been removed from the final rule. DFARS 231.205–18(c)(iii) applies only to major contractors, which are defined as those contractors whose covered segments allocated a total of more than $11,000,000 in IR&D/Bid and Proposal (B&P) costs to covered contracts during the preceding fiscal year. However, contractors who do not meet the threshold as a major contractor are encouraged to use the DTIC on-line input form to report IR&D projects to provide DoD with visibility into the technical content of the contractors' IR&D activities.

B. Proprietary Information

Comment: The proposed rule should ensure that contractor trade secret and proprietary information is protected. It is apparent that DoD is seeking to

collect more than high-level, basic information regarding each IR&D project. Moreover, the proposed rule seeks to incentivize and encourage the voluntary disclosure by contractors of competition-sensitive, proprietary information. The respondent understands that DoD has had concerns with the security of proprietary information contained in the DTIC database, as discussed in a September 2008 presentation by the Deputy Undersecretary of Defense, International Technology Security. Therefore the respondent made the following suggestions:

(1) DoD should first assure that the DTIC database is capable of protecting contractor trade secret and proprietary information. How can DoD assure contractors that the data will not be compromised? The sensitive nature of the data should require encryption at the very least.

(2) DoD should ensure that provisions are in place that provide assurance that only DoD personnel will have access to this data. If any third party contractors have access, ensure that assurances/restrictions are in place to ensure that none of a contractor's proprietary IR&D data is disclosed outside of DoD.

(3) The respondent suggested that the on-line input information be high level only and if the area has interest to DoD, contact the contractor to obtain more detail. This will limit the sensitive information in the database and still allow DoD to obtain the information it seeks.

(4) DoD should reconsider the requirement that the submission of IR&D data be exclusively by means of the DTIC's on-line input form, and alternative means for submission should be permitted.

(5) The rule should be revised so as to avoid imposing on contractors the burden and expense of resisting public release under the Freedom of Information Act (''FOIA'') of information entered into the DTIC database.

(6) The rule should be revised to make clear that the submission of IR&D information is voluntary, and that there is a presumption that information entered into and maintained in the DTIC database pursuant to the rule is confidential, and that its release is likely to cause the provider of the information substantial competitive harm if such information were to be released to the public. This would make it clear that the information entered into the DTIC database is within the scope of FOIA exemption (b)(4) and, therefore, not subject to public disclosure. The Trade Secrets Act, 18 U.S.C. § 1905, prohibits the Government from releasing private information within its possession, unless law otherwise authorizes the release.

(7) DoD should ensure that processes are in place to verify data for accuracy and verify input for timeliness.

(8) The proposed rule should make clear that the Government cannot release or disclose proprietary IR&D submissions outside the Government without the data owner's 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.

Response: (1) Information protection. DTIC advises that adequate controls are in place to protect information from compromise. Only unclassified IR&D project summary information should be provided. Both database screens and printouts will be marked ''Proprietary.'' Any markings on attachments provided by a contractor would not be altered.

(2) Access control. DTIC advises that sufficient measures are being employed to limit access to authorized DoD users.

(3) Inputs. Firms have discretion regarding presentation of information they regard as sensitive when they submit project summaries.

(4) Submission format. The DTIC on-line input form has been established to provide contractors with a template for reporting on their IR&D projects. This format allows for submission of additional information as attachments.

(5) FOIA exemption. Information submitted is within the scope of FOIA exemption (b)(4).

(6) FOIA exemption and trade secrets. Information submitted is within the scope of FOIA exemption (b)(4).

(7) Timeliness and accuracy. Providing updates on an annual basis will ensure timeliness of the information submitted. Firms will be responsible for the accuracy of their submissions.

(8) Proprietary information controls. The rule makes no changes to existing laws and regulations dealing with Government use of proprietary information.

C. DTIC On-Line Form

Comment: The rule should include a copy of the proposed DTIC on-line input form. The proposed rule does not address the nature of the information that must be provided through the proposed DTIC on-line input form and the means of transmission of the form. The respondent recommended that DoD include in any final rule a copy of the DTIC form and instructions for completing the form. By doing so, relevant DoD personnel, including Administrative Contracting Officers (''ACOs'') and Defense Contract Audit Agency (''DCAA'') auditors, and contractors would be provided some certainty regarding the information that would be required to be entered into the DTIC database by contractors and the nature of the form as it may be revised. Unless the rule includes the form, contractors must monitor the form each year and may be subjected to increased reporting from the DTIC without proper notice or opportunity to comment.

Response: DFARS 231.205–18(v) sets forth that the cognizant contract administration office shall furnish contractors with guidance on financial information needed to support IR&D/B&P costs and on technical information needed from major contractors to support the potential interest to DoD determination. To that extent, the DTIC on-line input form has been established to provide contractors with a template for reporting on their IR&D projects, and a process to provide such reporting that is designed to minimize the administrative burden on contractors. The DTIC on-line form includes reporting elements such as project title, project number, anticipated expenditures, project description, keywords, and technology readiness level. The DTIC on-line form can be found at *http://www.dtic.mil/ird/dticdb/index.html*.

D. Classified information

Comment: The proposed rule fails to address issues relating to the reporting of classified information. The proposed rule does not address how contractors should handle the reporting of classified information should a contractor's classified IR&D project trigger the reporting requirement. The respondent recommended that DoD address this issue, including whether contractors would be required to report classified IR&D projects and, if such a requirement exists, how contractors would report this information. For example, it is unclear to the respondent whether classified information may properly be transmitted through the DTIC's on-line input form or whether the DTIC database is cleared to maintain classified IR&D project information.

Response: Only unclassified IR&D project summary information should be

provided. Both database screens and printouts will be marked ''Proprietary.''

E. Technical expertise

Comment: The proposed rule includes DCAA in the process to identify IR&D projects having potential interest to DoD, but fails to consider needed technical expertise. ACOs have responsibility for determining whether IR&D projects are of potential interest to DoD and thus satisfy that test for allowability. The proposed rule, however, suggests that DCAA may play some role in the determination process, but it is not clear to the respondent what role DCAA is expected to play. Further, to the extent that the purpose of making the DTIC input and updates available to DCAA is to facilitate assistance to ACOs in making potential interest determinations, this raises the question whether DCAA auditors, or even ACOs, have the necessary technical expertise to properly evaluate IR&D project descriptions to make these determinations. The respondent recommended that DoD clarify what role, if any, DCAA is to play in determining whether IR&D projects are of potential interest to DoD. Further, given the increasing technical complexity of many IR&D projects, should the proposed rule be finalized, the respondent recommended that DoD consider mandating the use of a Defense Contract Management Agency (DCMA) or other technical representative to assist ACOs and, as applicable, DCAA auditors, in evaluating contractor IR&D project descriptions and making potential interest determinations.

Response: This rule does not place additional oversight responsibilities onto DCAA and DCMA. Further, contracting personnel will make appropriate determinations whether IR&D projects are of potential interest to DoD and thus satisfy that test for allowability, in accordance with this rule. However, when specialized expertise is required, contracting officers are expected to consult with auditors and other individuals with specialized experience, as necessary, to ensure a full understanding of issues.

F. Administrative Burden

Comment: The proposed rule would impose administrative burdens on contractors, ACOs, and DCAA auditors. Contractors would need to coordinate the review and approval of the data reported, often across multiple business units for larger IR&D projects, to ensure the information is accurate and relevant and meets the reporting objectives. This would involve contractor management personnel, as well as personnel from functions such as engineering, manufacturing, quality assurance, and many others. In addition to the impact on contractors, the rule would impose administrative burdens on ACOs and DCAA auditors.

Response: The reporting requirements in this rule will provide in-process information to allow DoD to maximize the value of the IR&D funds it disburses without infringing on the independence of contractors to choose which technologies to pursue in IR&D programs. DoD will employ procedures that minimize the administrative burden on contractors.

G. Intent of IR&D Reporting

Comment: A respondent questioned what DoD really intends to do with the information and how much detail will be required to evaluate the ''technical content'' of IR&D projects.

Response: The objective is to support DoD science and technology and acquisition program planning personnel by providing visibility into the technical content of industry IR&D activities to ensure that they meet DoD needs and promote the technical prowess of our industry. For this purpose, only a concise one-and-a-half to two-page overview is needed.

H. DoD-sponsored IR&D

Comment: The phrase ''DoD-sponsored IR&D'' is inconsistent with the concept that IR&D is developed at private expense. The respondent suggested eliminating the phrase DoD-sponsored IR&D.

Response: The phrase ''DoD-sponsored IR&D'' is not used in the DFARS. For clarity, this notice references IR&D projects for which reimbursement, as an allowable indirect cost, is sought from DoD.

I. Patent Issues

Comment: The proposed rule may force contractors to file patent applications on early-stage technologies prematurely. Depending on the specificity of the information required, the proposed rule may also require contractors to seek patent protection for disclosed technologies at an earlier date than would otherwise be the case in order to avoid the bar to patentability provided for in 35 U.S.C. 102. This would entail additional and possibly unnecessary expense, as further development of early-stage technologies often leads to the conclusion that the technology isn't viable and hence does not justify the expense of a patent application. Expressly providing that the submitted information will be accorded confidential treatment may avoid this result, but that isn't clear to the respondent in the proposed rule in its present form.

Response: Firms control the specificity of information submitted. Therefore, this rule will not force contractors to file patent applications on early-stage technologies prematurely. Information submitted will be safeguarded as addressed in responses to comment B.

J. Not a Mandated Statutory Requirement

Comment: 10 U.S.C. 2372 does not mandate IR&D reporting. 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. 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.

Response: 10 U.S.C 2372 subsection (a), Regulations, states that the Secretary of Defense shall prescribe regulations governing the payment, by the Department of Defense, of expenses incurred by contractors for independent research and development and bid and proposal costs. To that extent, subsection (c), Additional controls, states that the regulations prescribed pursuant to subsection (a) may include implementation of regular methods for transmission from contractors to the Department of Defense, in a reasonable manner, of information regarding progress by the contractor on the contractor's independent research and development programs. The requirement to determine the allowability of IR&D costs is a pre-established requirement in 231.205–18(c)(iii)(B), which sets forth that allowable IR&D/B&P costs are limited to those for projects that are of potential interest to DoD. The reporting requirements of this rule will provide necessary information to DoD cognizant administrative contracting officers to make the required allowability determinations.

K. Allowability of IR&D Costs

Comment: 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 DoD. Normally, if a contract fails to comply with such a contractual reporting requirement, the noncompliance 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. DoD already is protected from improper charging including the remedy of double damages and interest on expressly unallowable costs.

Response: The requirement to determine the allowability of IR&D costs is a pre-established requirement in the DFARS. Specifically, 231.205–18(c)(iii)(B) sets forth that allowable IR&D/B&P costs are limited to those costs for projects that are of potential interest to DoD. Further, 231.205–18(c)(iv) states that for major contractors, the cognizant ACO or corporate ACO shall determine whether IR&D/B&P projects are of potential interest to DoD. This rule establishes reporting requirements to provide necessary information to DoD cognizant ACOs to make the required allowability determinations.

L. Impacts to Small Businesses

Comment: The proposed rule's Regulatory Flexibility Act section states that the reporting requirements will not apply to a significant number of small businesses. If the reporting requirement is not limited to major contractors and is not on a per project basis, the 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. The respondent, therefore, respectfully disagreed with DoD's suggestion that the requirements will not apply to a significant number of small businesses.

Response: DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because 231.205–18(c)(iii) applies only to major contractors, which are defined as those whose covered segments allocated a total of more than $11,000,000 in IR&D/B&P costs to covered contracts during the preceding fiscal year. The $50,000 contractor annual IR&D threshold has been removed from the final rule. However, DoD has included a new sentence in the rule to encourage small businesses to submit their project description since there may be an advantage to any size business to have its projects included.

M. Increased Costs

Comment: The scope and sweep of this proposed rule is not well defined and is 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.

Response: The IR&D cost principle at FAR 31.205–18(b) states ''The requirements of 48 CFR 9904.420, Accounting for independent research and development costs and bid and proposal costs, are incorporated in their entirety * * *.'' The cost accounting standard at 48 CFR 9904.420–40, Fundamental requirement, paragraph (a) states, ''The basic unit for identification and accumulation of Independent Research and Development (IR&D) and Bid and Proposal (B&P) costs shall be the individual IR&D or B&P project.'' The proposed rule used terms in long use with understood meanings. Further, for contractors to account for their IR&D costs on other than a project basis would result in noncompliant reporting of IR&D costs if the amount of IR&D costs were determined to be material in amount.

N. Public Hearing

Comment: The proposed rule raises many issues and leaves many questions unanswered. In light of this, one respondent requested that DoD hold a public hearing to further discuss the proposed rule and obtain additional comments.

Response: DoD acknowledges the respondent's recommendation. However, DoD has determined that a public meeting is not necessary at this time. Through the public comments received in response to the proposed rule, DoD has determined that it has a clear understanding of public issues and concerns.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD has prepared a final regulatory flexibility analysis consistent with 5 U.S.C. 604. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

DoD does not expect this final rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because reporting the IR&D projects utilizing the DTIC on-line input form does not require contractors to expend significant effort or cost. Furthermore, since 231.205–18(c)(iii) applies only to major contractors, which are defined as those whose covered segments allocated a total of more than $11,000,000 in IR&D/B&P costs to covered contracts during the preceding fiscal year, the IR&D project reporting requirements will not apply to a significant number of small entities. Reporting the IR&D projects will utilize the DTIC on-line input form, which does not require contractors to expend significant effort or cost. No alternatives to the rule that would meet the stated objectives were identified by the agency.

V. Paperwork Reduction Act

The rule contains information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). OMB has cleared this information collection requirement through January 31, 2015 under OMB Control Number 0704–0483, titled: Defense Federal Acquisition Regulation Supplement (DFARS) Part 231, Contract Cost Principles and Procedures.

List of Subjects in 48 CFR Part 231

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 231 is amended as follows:

PART 231— CONTRACT COST PRINCIPLES AND PROCEDURES

■ 1. The authority citation for 48 CFR part 231 is revised to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. In section 231.205–18, add paragraph (c)(iii)(C) and revise paragraph (c)(iv) introductory text to read as follows:

231.205–18 Independent research and development and bid and proposal costs.

* * * * *

(c) * * *

(iii) * * *

(C) For a contractor's annual IR&D costs to be allowable, the IR&D projects generating the costs must be reported to the Defense Technical Information Center (DTIC) using the DTIC's on-line input form and instructions at *http://www.dtic.mil/ird/dticdb/index.html.* The inputs must be updated at least annually and when the project is completed. Copies of the input and updates must be made available for review by the cognizant administrative contracting officer (ACO) and the cognizant Defense Contract Audit Agency auditor to support the allowability of the costs. Contractors that do not meet the threshold as a major contractor are encouraged to use the DTIC on-line input form to report IR&D projects to provide DoD with visibility into the technical content of the contractors' IR&D activities.

(iv) For major contractors, the ACO or corporate ACO shall—

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