In a confusing move, the DAR Council decided to issue a proposed rule that would revise the Defense Federal Acquisition Regulation Supplement (DFARS). DFARS Case No. 2016-D002, called "Enhancing the Effectiveness of Independent Research and Development," **was issued** on February 15, 2016—a national holiday. The timing of the issuance was confusing, since the Federal Register notice says the date of the issuance is February 16th. (We are typing this article on February 15th, being off work because of the holiday—yet the notice of proposed rulemaking is right there in front of us.
Weird
, right?)

The confusion regarding the date of issuance is just about the *least confusing* thing about the rule.

Readers with memories longer than the lifespan of a Mayfly will remember that we have been concerned—nay, *alarmed*—by the repetitive attempts by certain DoD individuals and entities to micro-manage contractors' R&D spend. In our last article on the topic, we had a moment of epiphany (aided by a friend's research into some of the history on this topic) and we asserted (with what we believed to be substantial supporting evidence) that the purpose of the various initiatives is *not* to curtail R&D spending, but instead to position the Pentagon to assert that the R&D spending is no longer "independent" and, thus, *position the DoD to snatch contractors' Intellectual Property (IP) rights*
. If the R&D is no longer "independent" then one of the main legal arguments that permits contractors to retain IP developed by their R&D projects is significantly weakened.

Our last article went into some detail and noted that the DoD is pursuing three separate but related initiatives to attack contractors' IP rights. The most recent activity was **issuance** of an Advance Notice of Proposed Rulemaking (ANPRM) with respect to track #3—i.e., using contractor IR&D spending as a price "adder" in competitive price evaluations. As we noted, there will be a public hearing and there is opportunity to provide written feedback to the DAR Council with respect to the ANPRM.

This latest notice of proposed rulemaking is not a duplicate of the ANPRM—though the public should be excused for thinking so.

Remember, there are three separate but related initiatives in play. Initiative #1 is the use of Technical Interchange Meetings (TIMs) between industry and DoD personnel so that the Pentagon may "gain enhanced DoD understanding and visibility into relevant IRAD." Initiative #3 is the use of R&D spending that is related to proposed contract awards being used as an adder in the price evaluations. And Initiative #2 is the coordination and management of contractor R&D spending by DoD.

This latest proposed rule is part of Initiative #2. Many people thought Initiative #2 was dead because of the strong opposition from industry. We weren't so sure, and we **told** our readers it might rise again, like a zombie in search of brains. Well, it has risen from the dead and now here we are with a proposed rule that looks to require that "proposed new IR&D efforts be communicated to appropriate DoD personnel prior to the initiation of these investments, and that results from these investments should also be shared with appropriate DoD personnel."

Did you notice the language? Did you notice that contractors will have to "propose new IR&D efforts" before they start? Do you see how that requirement not only slows down R&D efforts but—more insidiously—puts DoD in the position of approving such efforts and thus taking away the "independence" of such efforts? Do you see how that's going to work out when there is a legal wrangle over IP rights and technical data developed as a result of such efforts?

The proposed rule is careful to dispel any notions that there is a power grab going on as the result of any bilateral communication regarding R&D project content. It says—

The intent of such engagement is not to reduce the independence of IR&D investment selection, nor to establish a bureaucratic requirement for Government approval prior to initiating an IR&D project. Instead, the objective of this engagement is to ensure that both IR&D 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.

Yeah, sure.

The proposed rule would make such technical interchanges a condition of allowability. In other words, if a contractor fails to hold those interchanges, or fails to adequately document them,

then its IR&D spending will be determined to be unallowable. The proposed rule would revise the DFARS Cost Principle at 231.205-18 to state—

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.

As we've noted before, there are a myriad of problems associated with this requirement. Perhaps the most important of them is that the exact title, function or identity of the "technical or operational DoD Government employee" with whom the technical interchange is supposed to take place is notably missing from the rule. If contractors send an email to the Secretary of Defense and then note that email in their DTIC input, does that satisfy the requirement? If not, why not? *The ambiguity of this aspect of the proposed rule is astounding.*

And as we've noted before, some contractors have hundreds of IR&D projects going on simultaneously, in various stages of completion. To brief those projects and document the briefing is going to take time and money. Who's going to pay for that? Where does it get charged? Those questions are left unanswered in the proposed rule.

To sum this up: Another bad idea in a long string of bad ideas, brought to you by the same people. The same people who want to take your IP and use it to give your competitors an advantage, and not pay you for the privilege.

If you agree (or don't agree) and want to provide your comments to the DAR Council, you have

until April 18, 2016 to submit them. As always, there are several means of providing your input, and the proposed rule provides the details.