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DOD

Contractor Control Over IR&D May Decline Under DOD Policy Proposal, Analysts say

By DAVID HANSEN

Contractors will face new challenges in getting reimbursed for independent research and development (IR&D) costs if policies in a recent Defense Department white paper are implemented, analysts told Bloomberg BNA.

The white paper proposes that starting in fiscal 2017, every new IR&D project must be preceded by a meeting with DOD technical or operational staff to outline goals and plans. Contractors would share results with the DOD upon completion.

The goal is to ensure that contractors and their 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,” according to the Aug. 26 white paper issued by the Office of the Under Secretary of Defense for Acquisition, Technology and Logistics Frank Kendall.

But analysts say requiring contractors to meet with DOD staff to discuss a project before it begins could erode contractor independence regarding the direction of IR&D.

The white paper is the “opening salvo” in an attempt to undo previous regulations liberalizing government control of IR&D projects, Sheppard Mullin Partner John Chierichella told Bloomberg BNA Sept. 4.

“I think this is a horrible, horrible first step towards turning back the page of history on the way IR&D is administered,” he said. “They don’t call you in and ask you to review your project with them just because of some academic interest. They are doing it because they want influence over the direction of your R&D.”

The federal government could decline to reimburse IR&D costs if the contractor doesn’t review the project with the appropriate DOD staffer, Crowell & Moring LLP Partner Stephen McBrady told Bloomberg BNA in a Sept. 4 e-mail.

“It is not hard to imagine the Defense Contract Audit Agency disallowing IR&D costs on the flimsiest pretext if it declares that the Defense Technical Information Center file is inadequate,” McBrady wrote. “So, while the White Paper states that it seeks ‘renewed emphasis on engagement between government and industry,’ many contractors may fear—with good reason—that

the real increased engagement will come from the DCAA.”

Matching the initial notification of the research project and its final outcome will be difficult, Shulman Rogers Partner David Robbins told Bloomberg BNA in a Sept. 3 e-mail.

“Cutting edge research and development does not always proceed as expected,” he wrote. “All this will need to be ironed out if this White Paper proceeds toward final policy and rule.”

The white paper only requires a conversation where the DOD might suggest research areas, he noted. “The conversation/engagement is the key, not the approval,” Robbins wrote. “But we shall see how this changes over time.”

Proprietary Information at Risk? Contractors also should fear the loss of their proprietary information reported to the government, analysts said.

The intellectual property developed in IR&D comprises a firm’s “crown jewels” and will need state-of-the-art controls to keep it from being disclosed to other companies, Dentons Partner Phil Seckman told Bloomberg BNA Sept. 4. The Trade Secrets Act protects contractors, but there’s always the possibility that shared information will leak, he said.

“Unless it’s properly protected, the government will disseminate and use it,” Chierichella said.

Contractors spend much of their IR&D money on short-term commercial opportunities and investments that create intellectual property, Kendall wrote in the DOD’s Better Buying Power (BBP) 3.0 memo released in April (103 FCR 389, 4/14/15).

Modification of Previous Proposal. The white paper modifies a more stringent proposal in the BBP 3.0 memo.

The memo proposed annual meetings with industry to exchange information about ongoing IR&D programs.

It also proposed that an “appropriate technical DOD sponsor” endorse a project before it started. Once finished, contractors would send a written report about the results to the DOD.

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The DOD White Paper is available at:http://www.defenseinnovationmarketplace.mil/resources/USD%28ATL%29_IRD_White_Paper.pdf.