2101 Wilson Boulevard, Suite 700, Arlington, VA 22201-3060 • (703) 522-1820 • (703) 522-1885 Fax • NDIA.org

Ms. Jennifer D. Johnson
Editor/Publisher
Defense Acquisition Regulations System
Department of Defense

Electronic Submission: *www.regulations.gov, DFARS Case 2018-D074*

Re: NDIA Comments on Inapplicability of Additional Defense-Unique Laws and Certain Non-Statutory DFARS Clauses to Commercial Item Contracts (DFARS Case 2018-D074)

Dear Ms. Johnson,

The National Defense Industrial Association (NDIA) appreciates the opportunity to provide comments on the proposed rule for DFARS Case 2018-D074, Inapplicability of Additional Defense-Unique Laws and Certain Non-Statutory DFARS Clauses to Commercial Item Contracts.

NDIA is the nation's oldest and largest defense industry association, representing nearly 1,700 corporate and over 65,500 individual members from small, medium, and large contractors, a majority of which are small businesses. NDIA members design, manufacture, apply, and maintain the cutting-edge technologies, systems, and platforms that our armed forces rely upon to deter aggression and defend our nation and its interests. As such, our members' professional and informed views on this request for information reflect the complexity and nuance of the issues under discussion.

Improved Transparency Regarding "Written Determinations" Required by Statute

NDIA is concerned about a lack of transparency in the "written determinations" required by 10 USC 3452 relative to changes to DFARS 212.301 and 212.370. NDIA has observed that the DAR Council generally does not discuss the applicability of 10 USC 3452 in DFARS rulemaking or indicate whether a "written determination" has been made "that it would not be in the best interest of the Department of Defense to exempt" subcontracts for the procurement of commercial products and commercial services – or contracts and subcontracts for the procurement of commercially available off-the-shelf (COTS) items – from the applicability of the provision of law or contract clause requirement. NDIA also notes that once those rules have been finalized, the proposed rule for updating DFARS 212.301 and 212.370 also does not discuss why it is in the best interest of the Department of Defense to include or remove particular regulations from these provisions.

In the case of data rights and data rights-related rulemaking, it appears that DoD presumptively applies provisions of law and contract clause requirements to commercial products and services – including COTS items – even though, as DoD stated in the Federal Register notice for this proposed rule, "*No provisions or clauses were identified as implementing statutes that specifically referred to 10 U.S.C. 3452.*" Since no provisions of law or contract clauses specifically refer to 10 USC 3452 as required by

paragraph (e)(3) of that statute, DoD is required to perform the written determinations required by that statute before applying or flowing down the provision of law or contract clause to contracts and subcontracts for commercial products or services (unless the provision of law otherwise provides for criminal or civil penalties).

While pre-decisional analyses and writings may be withheld pursuant to the Deliberative Process Privilege incorporated into Exemption 5 of the Freedom of Information Act (5 USC 552), Exemption 5 generally does not itself prevent the Government from voluntarily disclosing this information and also does apply to factual information (such as whether the "written determination" has or has not been made) or post-decisional documents such as final opinions.

To improve transparency, NDIA recommends that the DAR Council do the following in future rulemaking related to the applicability of DoD-unique laws or contract clauses to commercial products or services procured at the contract or subcontract level: (1) expressly acknowledge whether there is a requirement for written determination(s) as required by 10 USC 3452 in advance notices of proposed rulemaking (ANPRs) and proposed rules (PRs), as applicable; (2) utilize the ANPR and PR process to gather industry inputs for consideration by DoD in its written determinations; and (3) publish a final opinion regarding DoD's written determination as part of final DFARS rulemaking.

Similarly, NDIA recommends that DoD include in the final rule for this DFARS Case 2018-D074 a summary listing of the provisions of law and contract clauses for which DoD determined "there is a specific reason not to eliminate the regulation" along with the "specific reason." These recommendations would improve transparency and support FASA's objectives.

Connection to Proposed Rules Example: Implementation of MOSA in Commercial Products or Services

In NDIA's recent comments in response to the advance notice of proposed rulemaking (ANPR) for DFARS Case 2021-D005 (Modular Open Systems Approaches (MOSA)), NDIA outlined concerns related to the proposed implementation of MOSA requirements to commercial products and services and the disconnect between the DAR Council's proposed MOSA implementation and longstanding DFARS policy regarding the acquisition of commercial technical data and commercial computer software.

Although DFARS 227.7102-1 requires that the Government shall only acquire the technical data the contractor normally provides in the commercial marketplace but has listed exceptions, the draft proposed DFARS changes included in the MOSA DFARS Case would include a new exception for technical data "related to a modular system interface." However, the Government only needs access to the technical data *defining* the modular system interface, which is specifically defined in 10 USC 4401, as opposed to any technical data *related to* such interfaces. Moreover, to obtain the necessary rights to use such modular system interfaces, 10 USC 3771 requires that the contractors be put on notice of and

agree to the modular system interface in a particular MOSA by including the modular system interfaces in the solicitation and the contract.

NDIA is also concerned that the draft proposed MOSA implementation approach would apply MOSA requirements to both "commercial products" and "other than commercial products" in the same way, which may have an adverse effect on attracting nontraditional and commercial contractors into the defense industrial base. On the contrary, less-invasive means to implement MOSA in commercial products and services, including the performance of business case analyses or trade-off analyses with input from commercial industry as part of the "written determinations" required by 10 USC 3452 would enable tailored implementation to ensure "commercial services or commercial products… may be procured to fulfill those requirements…" as required by the statutory preference for the acquisition of commercial products and commercial services (41 USC 3307(b)(2)).

As also noted in the Advisory Panel on Streamlining and Codifying Acquisition Regulations (Section 809 Panel), the customary commercial practice on data rights would be to negotiate the license and the content, and that "[a]dopting policies aligned with commercial practice will remove barriers to greater access to innovations in the commercial market" (Volume 1, Recommendation 4). This would also ensure that commercial suppliers are not unnecessarily dissuaded from offering commercial products or services through requirements to re-architect their commercial products unnecessarily to meet a chosen MOSA, potentially adding weight or lag into the larger weapons system. In contrast, through negotiations, the Government and commercial suppliers could reach an optimal solution relative to modular system interfaces and required definition data without unintended consequences.

NDIA recommended that the DAR Council revise the draft proposed MOSA implementation approach for commercial products and services (to include commercial computer software) to ensure alignment with longstanding DFARS policy regarding the acquisition of commercial technical data and software, the statutory preference for the acquisition of commercial products and commercial services, and the objectives of the Federal Acquisition Streamlining Act (FASA) of 1994 (P. L. 103-355) to improve access to commercial products and services and reduce the regulatory burden on contracts and subcontracts for the acquisition of commercial products and services. Moreover, as discussed in the section below, it's also unclear whether the DoD performed the necessary "written determination" required by 10 USC 3452 related to MOSA implementation in commercial products and services.

NDIA also recommended that the DAR Council implement the recommendations in Volume I of the Section 809 Panel report, including the recommendations to remove DFARS 252.227-7013, -7015, and -7037 from the listing of clauses in DFARS 212.301 (see Volume I, Table F-6 on pages A-55 and A-56).

Once the draft proposed MOSA implementation approach is finalized and ready for consideration of updating DFARS 212.301 and 212.370 in a new proposed rule, NDIA requests that the analysis used in the proposed rule be updated and an explanation of the factual basis for the written determination be

2101 Wilson Boulevard, Suite 700, Arlington, VA 22201-3060 • (703) 522-1820 • (703) 522-1885 Fax • NDIA.org

included in the proposed rule to ensure that the implementation does not unnecessarily impact commercial and commercial off-the-shelf contractors.

NDIA and its membership firmly appreciate the government's desire to promote a strong, dynamic, and robust small business industrial base. We do, however, have concerns surrounding certain aspects of this and other proposed rules. For these reasons, we respectively suggest changes to ensure compliance with applicable statutory requirements, improve access to commercial technologies and reduce the regulatory burden on the commercial supply chain. NDIA stands ready to assist in the following stages of rulemaking and welcomes this collaboration.

NDIA appreciates the opportunity to address our concerns about this matter. If you have any questions related to these comments, please contact Michael Seeds at mseeds@ndia.org.

Sincerely,

National Defense Industrial Association