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LTC Andrew Lunoff
Office of the Assistant Secretary of Defense (Acquisition)
3090 Defense Pentagon
Washington, DC 20301-3090

Subject: Aerospace Industries Association (AIA) Comments on Government-Industry
Advisory Panel Meeting on June 7, 2016

Dear LTC Lunoff:

The Aerospace Industries Association (AIA) appreciates this opportunity to comment on the May 26, 2016 *Federal Register* Notice providing information on the June 7, 2016 meeting of the Government-Industry Advisory Panel (the "Panel"). AIA represents over 350 of the nation's major manufacturers of commercial, military and business aviation products such as aircraft, helicopters, aircraft engines, missiles, spacecraft and related components and equipment.

As a point of clarification, the Notice appears to narrow the scope of the Panel to those factors listed in 813(b)(3) of the FY16 National Defense Authorization Act (NDAA) (Public Law 114-92). However, the scope of the Panel under 813(b)(3) is encompassed by 813(b)(1) in relation to "reviewing sections 2320 and 2321 of title 10, United States Code, regarding rights in technical data and the validation of proprietary data restrictions and the regulations implementing such sections, for the purpose of ensuring that such statutory and regulatory requirements are best structured to serve the interests of the taxpayers and the national defense." The factors listed in 813(b)(3) do not define the scope of the Panel. Instead, the Panel must appropriately consider the factors when conducting the review under 813(b)(1).

AIA provides the following comments on topics that the Panel should discuss within each Agenda item:

(1) Planning/initial discussions on issues or concerns with 10 U.S.C. 2320 and 2321

It is important to understand the purpose of these statutes, including the extent to which Congress intended the statutes to apply to commercial items, as well as the legislative history and evolution of the statutes over time. To accomplish this, the

Panel should consider inviting guests with historical knowledge to speak at future Panel meetings, to walk the Panel through how the law came into being, and why the protections were set up in the way they were. Possible witnesses include: Ralph Nash, Jon Etherton, Bill Anderson and Bob Brunette.

AIA also recommends that the Panel consider inviting a guest from the venture capital/technology investment industry to provide input on how intellectual property (IP) affects company valuations and venture capital investment decisions.

We also want to ensure that statutory factors identified in 813(b) of the FY2016 NDAA are uniformly applied. Specifically, the Panel needs to define the following factors, and to the extent practical, provide data and information which supports the definitions. In particular, the Panel should explore factor (1) below to determine the intent and examples of where DoD believes it is paying more than once for the same work:

- (1) Ensuring that the Department of Defense (DoD) does not pay more than once for the same work
- (2) Ensuring that the DoD contractors are appropriately rewarded for their innovation and invention
- (3) Providing for cost-effective re-procurement, sustainment, modification, and upgrades to DoD systems
- (4) Encouraging the private sector to invest in new products, technologies, and processes relevant to the missions of the DoD, and
- (5) Ensuring that the DoD has appropriate access to innovative products, technologies, and processes developed by the private sector for commercial use.

The Panel should also consider the following administrative issues:

- Whether the Panel should request a moratorium to the issuance of new regulations and/or changes to existing regulations and guidance, to the extent the regulations or guidance are within the scope of the Panel's review. This will ensure that Congress has an opportunity to consider the Panel's recommendations in amending 10 USC 2320 and 2321, minimize impacts that may result from premature implementation of statutory requirements which may be subject to further change, and limit confusion for our mutual workforce.
- How the Panel should be coordinated with two other IP-related panels/reviews required by the FY16 NDAA:
 - 809 Panel – Advisory panel on streamlining and codifying acquisition regulations
 - 875 Review – Review of Government access to IP rights of private sector firms

(2) Planning/initial discussions on implementing DFARS regulations (Subparts 227.71 and 221.72, and associated clauses)

AIA recommends the Panel should review the regulations in the context of the protections outlined in 10 USC 2320 and 2321 to ensure the statutes are accurately

reflected in the regulations. The Panel should also consider how the regulations could be streamlined to improve the extent to which non-experts are able to practically implement them. The Panel should review the proposal and contract execution processes to comply with the requirements of DFARS 252.227-7013, 252.227-7014, DFARS 252.227-7017, DFARS 252.227-7019 and 252.227-7037, and determine whether the identification, assertion, marking and records-keeping processes and requirements accomplish the Government's needs without undue regulatory burdens or expense.

As discussed below, the Panel should review the rationale for extending 10 USC 2320 and 2321 to software, and whether this extension is consistent with the rationale behind the various statutory protections included in 10 USC 2320 and 2321. AIA further suggests the Panel should review the applicability of 10 USC 2320 and 2321 to contracts and subcontracts for the procurement of commercial items.

Of special concern is the lack of enforcement for CDRL definitions as required under 10 USC 2320(b)(2) and (4). The regulations do not reflect this requirement which is necessary for contractual certainty, nor is there a feedback mechanism which disincentivizes personnel from relying on vague CDRL requirements and deferred ordering strategies as opposed to executing a defined IP Strategy needed for various phases of life cycle management as required under DoD Instruction 5000.02 and DoD 5010.12-M.

It is also important to reconcile the implementing DFARS regulations with other regulations, such as 252.204-7000, (Disclosure of Information), 252.225.7048 (Export Controlled Items), and other security-related clauses or requirements which may restrict or otherwise impair the ability of contractors to exercise their IP rights and commercialize technologies with dual use applications.

Lastly, any review of DFARS policies on implementation should also review other related statutes which drive data delivery requirements, such as 10 U.S.C. 2305 and 10 U.S.C. 2460.

(3) Planning/initial discussions on DoD's policy and guidance on IP strategy and management

The Panel should review Defense Department policies and associated policy guidance and their impacts on contractor ownership rights as well as Defense Department needs. Specifically, the Panel should review:

- (a) The IP Strategy requirements of DoD Instruction 5000.02, and how to reconcile the Defense Department's needs for private and commercial investment with long term sustainment needs and depot work requirements
- (b) The potential conflict between Distribution Statement requirements under DoD Instruction 5230.24 versus contractor ownership of the underlying data.
- (c) The potential conflict between Cybersecurity requirements versus contractor ownership rights
- (d) The potential conflict between Government contract imposed Operational Security requirements versus contractor ownership rights

(e) DoD-wide and agency-specific policy guidance which may conflict with, or circumvent, 10 USC 2320 and 2321. Examples include—

- The Air Force Space & Missile Systems Center’s handbook entitled, “Acquiring and Enforcing the Government’s Rights in Technical Data and Computer Software Under Department of Defense Contracts: A Practical Handbook for Acquisition Professionals” (7th Edition, dated August 2015, accessible at: <https://acc.dau.mil/CommunityBrowser.aspx?id=431675&lang=en-US>) and
- The “Open Systems Architecture Contract Guidebook for Program Managers” (Version 1.1, dated May 2013, accessible at [http://www.acqnotes.com/Attachments/Open%20System%20Architecture%20\(OSA\)%20Contract%20Guidebook%20for%20Program%20Managers%20June%202013.pdf](http://www.acqnotes.com/Attachments/Open%20System%20Architecture%20(OSA)%20Contract%20Guidebook%20for%20Program%20Managers%20June%202013.pdf)).

(4) Planning/initial discussions on DoD personnel preparation for implementation of DoD’s IP policy and guidance

The Panel should conduct a review of current training and standard tools for ensuring that relevant DoD personnel are proficient in technology maintenance, including planning for IP needs, through the entire lifecycle.

Included in such training should be an understanding of the importance to the defense community of DoD compliance with current guidance in ensuring appropriateness of technical data ordering, and to dissuade reliance on open-ended or uncertain technical data ordering mechanisms (such as deferred ordering processes under DFARS 252.227-7027 or Data Accession Lists). Contractual certainty is extremely important in attracting investment and ensuring program execution, and the training needs to emphasize the importance of planning at specific phases over the lifecycle of a platform to ensure such compliance as well as promoting a healthy supply chain that is incentivized to invest.

(5) Planning/initial discussion of regulation of extending and adapting the scheme of 10 U.S.C. 2320 and 2321 to apply to computer software

The Panel should review the basis for the current policy of linking rights in technical data to software. Further, the Panel should review how modularity is addressed in the current DFARS 252.227-7014 for object and source code, and whether the current clause sufficiently addresses unique topics such as embedded software and ICDs/APIs used in modular or open architectures.

(6) Planning/initial discussion on applicability of 10 U.S.C. 2320 and 2321, and implementing DFARS requirements and clauses, to contracts and subcontracts for commercial items

The Panel should review the extent to which Congress intended 10 USC 2320 and 2321 to apply to contracts and subcontracts for commercial items and the purpose and intent of the Federal Acquisition Streamlining Act (FASA). AIA members have significant concerns about the regulatory burden on the commercial supply chain, to

include the recent increase in mandatory IP flow-downs to “subcontractors” and “suppliers” which furnish commercial items. The Panel should perform cost/benefit analyses of such broad-brushed mandatory IP flow-downs, and consider whether it may be appropriate to limit flow-down requirements or narrowly define “subcontractor” and “supplier” to: (1) encourage commercial and non-traditional contractors to participate in the defense industrial base and (2) leverage the efficiency and cost savings of company-wide and other long-term procurement agreements that are often implemented by higher level contractors for use across multiple product lines, and which are not identifiable to any particular commercial sale or government prime contract. As part of this review, the Panel should examine the DAR Council’s “written determination” in accordance with 41 USC 1906(c)(3) that it would not be in the best interest of the government to exempt subcontracts for the procurement of commercial items from the applicability of 10 USC 2320 and 2321 (see DFARS Case 2007-D003, Presumption of Development Exclusively at Private Expense). The Panel should also review the extent to which the implementing DFARS regulations conflict with other laws and regulations such as 10 USC 2375-2377, FAR Part 12 and DFARS Subpart 212.3.

It would be helpful for the Panel to review and obtain witness testimony from OEM supply chain managers and sub-tier suppliers at OEM facilities since such suppliers (especially small- and medium-sized businesses) are unlikely to be able to attend a Panel meeting at the Pentagon.

Many of the topics outlined in item (7), below, would be applicable to the discussion on supply chain issues for commercial items.

(7) Planning/initial discussions on practices used by DoD in acquiring IP from non-traditional contractors, commercial contractors, and traditional contractors

This discussion would be greatly aided by separating the discussion into separate topics since the IP acquisition practices would vary depending on the type of contractor and its position in the supply chain.

For commercial items, the following are major issues which the Panel should be addressing, ideally based on data:

- (1) Whether the current interpretation of 10 USC 2320 and 2321 is appropriately applied to commercial items, both in direct sales as well as when included in the supply chain
- (2) How commercial item OEMs handle long term obsolescence issues, and the extent to which current requirements for commercial IP conflict with normal commercial practices
- (3) Whether commercial technical data licenses as expressed under DFARS 252.227-7015 are consistent with existing commercial practices
- (4) Determining who has the burden of proof in establishing whether commercial IP rules apply or non-commercial IP rules apply
- (5) Whether the doctrine of segregability should be applied to commercial IP

- (6) The extent to which market research required under 10 USC 2377 has been obtained to develop new specifications and examples of cases: (a) in which commercial items could meet the agency's requirements if those requirements were modified to a reasonable extent or (b) instances in which requirements were found to not be stated in terms of functions to be performed, performance required or essential physical characteristics and instead, or in addition, were directed at IP rights.
- (7) Whether the existing system for commercial IP encourages or discourages the use of commercial technology in defense systems
- (8) Determining how commercial IP should be treated when a commercial item no longer meets the requirements of FAR 2.101, and whether such treatment discourages commercial companies from proposing commercial solutions for defense platforms having long-term sustainment needs
- (9) Commercial marking practices and Department of Defense marking needs
- (10) How to simplify the commercial software license process while maintaining flexibility to broaden and simplify Defense Department usage of commercial software
- (11) Whether data rights assertions for commercial IP is appropriate
- (12) Whether the Government's benefit in applying the validation requirements of DFARS 252.227-7019 (in practice) and 252.227-7037 (via mandatory flow down) to commercial items outweighs the burden imposed on the commercial supply chain and the commercial supply chain's need for certainty in their commercial dealings with the Government
- (13) The potential for the commercial supply chain to be forced to relinquish rights in commercial technical data and software if they are unable to produce records which substantiate private expense development, and whether the government can compel commercial suppliers to produce records that they have no requirement to maintain for commercial purposes.

The Panel should review which IP practices dissuade non-traditional contractors from participating at any tier in the defense industry. The Panel should examine whether more flexible contracting instruments are more appropriate for non-traditional contractors, and whether other issues (such as speed to development) are also drivers in whether a non-traditional contractor is dissuaded from entering the defense industry. The Panel should consider receiving input from DIUx, SBA, ACC, IPO, and PTAP to obtain this information.

Potential witnesses could include the following individuals:

- Jason Lemmon, President/CEO Onboard Systems International – Jason attended and spoke at the AIA/NDIA 2014 Data Rights Forum and was a participant on the Commercial Items Panel
- Bill Maffucci, VPGM, Government Programs, Kopin Corporation, Westborough, MA. Bill represents a small commercial displays company that also supplies to

DoD. Kopin's military product customers include, Rockwell Collins, UTC, L-3, Raytheon, BAE and Thales.

- John Warther, VP Government Programs, Green Hills Software, a small commercial business, software focused company, located in the greater DC Area.
- David Kessler, Senior Director, Legal Department-Public Sector, McAfee Corporation

While AIA appreciates the emphasis on obtaining additional entrants to enhance the defense sector supply chain, the Panel should also review whether such efforts are creating a two-tier system for compliance with DoD policies.

(8) Planning/initial discussion on DoD's policy, guidance and practices linking technical data management and other IP considerations with open systems architecture (OSA) and/or modular open systems approaches (MOSA)

The Panel should investigate how the private sector operates in standards-setting processes, and the extent to which the Government should provide interfaces as GFI to suppliers, or act in the creation of standard-setting bodies which establish consortiums to share necessary interfaces.

The Panel should review best practices for establishing a balanced approach to allocating rights in "interface data" to ensure that contractors are incentivized to develop new modules at private expense. A more complete discussion on AIA's comments on open system architecture is included in the AIA's comments on the OSA Contract Guidebook dated December 1, 2015, a copy of which is attached.

(9) Planning/initial discussions on sections 1701 and 1705 of House Armed Services Committee markup of H.R. 4909, The National Defense Authorization Act for Fiscal Year 2017

The Panel should review these items, including industry's legislative recommendations for the FY17 NDAA. Many of the issues will also be reviewed in the context of other agenda items previously mentioned. The Panel should also review page 66 of the Bill Summary of the Chairman's Mark of H.R. 4909:

"It is the committee's intent that any contractor would be able to develop a major system component that properly integrates into and meets the form, fit, and function requirements of a weapon system. The committee also intends that detailed technical data internal to privately funded major system components remain proprietary so that industry can protect the intellectual property of their components."

(10) Additional agenda item

Request for proposal and invitation to bid process and practices, and its effect on competition and investment incentives: This discussion should be data driven to identify practices which discourage competition. An example would be evaluation factors which discourage claiming IP restrictions. Another issue would be how to value IP in the proposal phase and whether IP licensing options can be supported by DCAA audit processes.

Thank you for soliciting our comments on this Panel's agenda. Representatives from AIA would be pleased to answer any additional questions you may have regarding our submission or to meet with you separately on this topic if requested.

Thank you,



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