1984–2018

TECHNICAL DATA RIGHTS LEGISLATION COMPENDIUM

House & Senate Report Language and Final Enacted Legislation Relating to 10 USC 2320 & 10 USC 2321

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Calendar No. 944

98TH CONGRESS
2d Session

SENATE

REPORT
98-500

OMNIBUS DEFENSE AUTHORIZATION ACT, 1985

REPORT

[To accompany S. 2723]

ON

AUTHORIZING APPROPRIATIONS FOR FISCAL YEAR 1985 FOR THE ARMED FORCES FOR PROCUREMENT, FOR RESEARCH, DEVELOPMENT, TEST, AND EVALUATION, AND FOR OPERATION AND MAINTENANCE, TO PRESCRIBE PERSONNEL STRENGTHS FOR SUCH FISCAL YEAR FOR THE ARMED FORCES AND FOR CIVILIAN EMPLOYEES OF THE DEPARTMENT OF DEFENSE, TO AUTHORIZE APPROPRIATIONS FOR SUCH FISCAL YEAR FOR CIVIL DEFENSE, TO AUTHORIZE CERTAIN CONSTRUCTION AT MILITARY INSTALLATIONS FOR SUCH FISCAL YEAR, TO AUTHORIZE APPROPRIATIONS FOR THE DEPARTMENT OF ENERGY FOR NATIONAL SECURITY PROGRAMS FOR SUCH FISCAL YEAR, AND FOR OTHER PURPOSES

together with

ADDITIONAL VIEWS

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

MAY 31, 1984.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
34-685 O WASHINGTON : 1984

TECHNICAL DATA TO BE SPECIFIED IN PROPOSALS

In addition to requiring that statements regarding intent to deliver technical data free from encumbrances be included as factors in deciding contract award, the committee believes it is equally important that the head of an agency issue regulations requiring all offers to include a statement on the extent of data and rights in data to be delivered to the United States with purchase. This information so furnished will then become one factor in deciding contract award.

The committee does not intend that only competitive contracts include provisions regarding technical data. Even if the original system is procured on a non-competitive basis, it is imperative that procurement personnel begin planning for competitive procurement of spare parts at the time of initial contract.

SPECIFICATION OF TECHNICAL DATA TO BE PURCHASED IN CONTRACTS

The committee has concluded that the most credible evidence of prior planning for the treatment of technical data will be evidenced by contractual provisions explicitly detailing the treatment of technical data, regardless of whether such data is purchased for the purpose of eventual competitive procurement or for some other reason. For this reason the statute requires that the contract specify the data to be purchased, establish criteria for acceptability of the data, establish a separate payment line for the data, and define the respective rights of the government and the contractor in the data.

The committee has also provided the authority to the government to withhold progress payments to contractors who have not complied with their contractual commitments regarding technical data.

Whenever a contractor or subcontractor asserts a limitation over any data, that party should be prepared to defend such assertion in writing to the contracting officer within 60 days. The committee does however recognize that there may be occasions when the contractor was not able to properly identify an item as proprietary at the time of contract. When such omission was inadvertent the committee does provide for later protection of such claim by the Department.

This section also includes provisions to require the development and implementation of systems to better manage technical data in the covered agencies.

VALIDATING PROPRIETARY DATA RESTRICTIONS

This section establishes the process by which the contractor and the government may reach an agreement regarding proprietary data restrictions that have been challenged. In particular when the government challenges a proprietary restriction that is found to be not substantially justified, then the government's cost of such challenge shall be reimbursed by the contractor. The committee does not intend that in every case where a challenge is successful the government's cost should be reimbursed. The language is provided as a deterrent against parties who would force the Government to

formally challenge designations that are substantially without merit.

SEC. 199A, COMPUTER MANAGEMENT OF SPARE PARTS

This section would require that the Department submit to the Congress within 180 days a plan for upgrading its computer capability so as to increase its management tools to deal with spare parts issues.

SEC. 199B, PROCUREMENT TECHNICAL ASSISTANCE

This section provides for cooperative agreements to be made between the Department of Defense and state and local governments and nonprofit organizations that provide technical assistance to firms that seek to bid for defense procurements. Such existing technical assistance centers have increased competition for defense contracts and subcontracts, including spare parts, and to ensure the capability of businesses to perform defense contracts. Under this section, the Department of Defense will enter into cost-sharing, cooperative agreements with existing procurement technical assistance centers and with new centers that will be formed as a result of these agreements. These agreements will be entered into on a competitive basis, in which state and local governments and other recipients will submit applications to the Secretary of Defense. Such applications will include a description of the geographic area to be served, assurances that the applicant will furnish a matching amount of funds to carry out the agreement, assurances that the applicant will not pay more than 10 percent of the monies for private consultant services, and such other information as the Secretary may require. In the case of existing centers, applicants will be required to submit additional information relating to program experience.

To insure that the benefits of this program are nationwide in scope, there should be no less than one such cooperative agreement in each Defense contract administration services region. Additionally, each procurement center should be located sufficiently close to an appropriate Defense contract administration services region office to receive necessary staff training and other appropriate assistance.

SEC. 199C, REVISIONS OF REQUIREMENTS FOR SELECTION ACQUISITION REPORTS AND UNIT COST REPORTS

This section would amend sections 139a and 139b of title 10 of the United States Code. Section 139a deals with the Selected Acquisition Report (SAR) system and section 139b deals with the Unit Cost Report system.

The amendments to existing law, most of which are technical in nature, would make the following changes:

1. establishes a minimum dollar threshold of $2,000,000 on major contracts for which SAR reporting is required;

2. requires quarterly SARs only when there is a 5 percent or greater change in total program cost, or when there is a 3 month or greater delay in any of the baseline SAR milestones;

98TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
98-1080

DEPARTMENT OF DEFENSE AUTHORIZATION ACT, 1985

THE COMMITTEE OF CONFERENCE

SUBMITTED THE FOLLOWING

CONFERENCE REPORT

[To accompany H.R. 5167]

SEPTEMBER 26, 1984.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

38-729 O

WASHINGTON : 1984

"(6) The requirements of subsection (b) also apply before enforcement of any qualified products list, qualified manufacturers list, or qualified bidders list.

"(d)(1) If the number of qualified sources or qualified products available to compete actively for an anticipated future requirement is fewer than two actual manufacturers or the products of two actual manufacturers, respectively, the head of the agency concerned shall—

"(A) periodically publish notice in the Commerce Business Daily soliciting additional sources or products to seek qualification unless the contracting officer determines that such publication would compromise national security; and

"(B) bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement, but such costs may be borne only if the head of the agency determines that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to amortize the costs incurred by the agency within a reasonable period of time considering the duration and dollar value of anticipated future requirements.

"(2) The head of an agency shall require a prospective contractor requesting the United States to bear testing and evaluation costs under paragraph (1)(B) to certify as to its status as a small business concern under section 3 of the Small Business Act.

"(e) Within seven years after the establishment of a qualification requirement under subsection (b) or within seven years following an agency's enforcement of a qualified products list, qualified manufacturers list or qualified bidders list, any such qualification requirement shall be examined and revalidated in accordance with the requirements of subsection (b). The preceding sentence does not apply in the case of a qualification requirement for which a waiver is in effect under subsection (c)(2).

"(f) Except in an emergency as determined by the head of the agency, whenever the head of the agency determines not to enforce a qualification requirement for a solicitation, the agency may not thereafter enforce that qualification requirement unless the agency complies with the requirements of subsection (b).

"§ 2320. Rights in technical data

"(a) The legitimate proprietary interest of the United States and of a contractor in technical or other data shall be defined in regulations prescribed as part of the single system of Government-wide procurement regulations as defined in section 4(4) of the Office of Federal Procurement Policy Act. Such regulations may not impair any right of the United States or of any contractor with respect to patents or copyrights or any other right in technical data otherwise established by law. The following factors shall be considered in prescribing such regulations:

"(1) Whether the technical data was developed—

"(A) exclusively with Federal funds;

"(B) exclusively at private expense; or

"(C) in part with Federal funds and in part at private expense.

"(2) The statement of congressional policy and objectives in section 200 of title 35, the statement of purposes in section 2(b) of the Small Business Innovation Development Act of 1982 (Public Law 97-219; 15 U.S.C. 638 note), and the declaration of policy in section 2 of the Small Business Act (15 U.S.C. 631).

"(3) The interest of the United States in increasing competition and lowering costs by developing and locating alternative sources of supply and manufacture.

"(4) The policy set forth in section 1202(6) of the Defense Spare Parts Procurement Reform Act.

"(b) Regulations prescribed under paragraph (1) shall require that, whenever practicable, a contract for supplies or services entered into by an agency named in section 2303 of this title contain appropriate provisions relating to technical data, including provisions—

"(1) defining the respective rights of the United States and the contractor or subcontractor (at any tier) regarding any technical data to be delivered under the contract;

"(2) specifying the technical data, if any, to be delivered under the contract and delivery schedules for such delivery;

"(3) establishing or referencing procedures for determining the acceptability of technical data to be delivered under the contract;

"(4) establishing separate contract line items for the technical data, if any, to be delivered under the contract;

"(5) to the maximum practicable extent, identifying, in advance of delivery, technical data which is to be delivered with restrictions on the right of the United States to use such data;

"(6) requiring the contractor to revise any technical data delivered under the contract to reflect engineering design changes made during the performance of the contract and affecting the form, fit, and function of the items specified in the contract and to deliver such revised technical data to an agency within a time specified in the contract;

"(7) requiring the contractor to furnish written assurance at the time the technical data is delivered or is made available that the technical data is complete and accurate and satisfies the requirements of the contract concerning technical data;

"(8) establishing remedies to be available to the United States when technical data required to be delivered or made available under the contract is found to be incomplete or inadequate or to not satisfy the requirements of the contract concerning technical data; and

"(9) authorizing the head of the agency to withhold payments under the contract (or exercise such other remedies as the head of the agency considers appropriate) during any period if the contractor does not meet the requirements of the contract pertaining to the delivery of technical data.

"(c) Nothing in this section or in section 2305(d) of this title prohibits the Secretary of Defense from prescribing standards for determining whether a contract entered into by the Department of Defense shall provide for a time to be specified in the contract after which the United States shall have the right to use (or have used) for any purpose of the United States all technical data required to be delivered to the United States under the contract or providing for such a period of time (not to exceed 7 years) as a negotiation objective.

"(d) The Secretary of Defense shall by regulation establish programs which provide domestic business concerns an opportunity to purchase or borrow replenishment parts from the United States for the purpose of design replication or modification, to be used by such concerns in the submission of subsequent offers to sell the same or like parts to the United States. Nothing in this paragraph limits the authority of the head of an agency to impose restrictions on such a program related to national security considerations, inventory needs of the United States, the improbability of future purchases of the same or like parts, or any additional restriction otherwise required by law.

"§ 2321. Validation of proprietary data restrictions

"(a) A contract for supplies or services entered into by the Department of Defense which provides for the delivery of technical data, shall provide that—

"(1) a contractor or subcontractor at any tier shall be prepared to furnish to the contracting officer a written justification for any restriction asserted by the contractor or subcontractor on the right of the United States to use such technical data; and

"(2) the contracting officer may review the validity of any restriction asserted by the contractor or by a subcontractor under the contract on the right of the United States to use technical data furnished to the United States under the contract if the contracting officer determines that reasonable grounds exist to question the current validity of the asserted restriction and that the continued adherence to the asserted restriction by the United States would make it impracticable to procure the item competitively at a later time.

"(b) If after such review the contracting officer determines that a challenge to the asserted restriction is warranted, the contracting officer shall provide written notice to the contractor or subcontractor asserting the restriction. Such notice shall state—

"(1) the grounds for challenging the asserted restriction; and

"(2) the requirement for a response within 60 days justifying the current validity of the asserted restriction.

"(c) If a contractor or subcontractor asserting a restriction subject to this section submits to the contracting officer a written request, showing the need for additional time to comply with the requirement to justify the current validity of the asserted restriction, additional time to adequately permit the submission of such justification shall be provided by the contracting officer as appropriate. If a party asserting a restriction receives notices of challenges to restrictions on technical data from more than one contracting officer, and

notifies each contracting officer of the existence of more than one challenge, the contracting officer initiating the first in time challenge, after consultation with the party asserting the restriction and the other contracting officers, shall formulate a schedule of responses to each of the challenges that will afford the party asserting the restriction with an equitable opportunity to respond to each such challenge.

"(d)(1) Upon a failure by the contractor or subcontractor to submit any response under subsection (b), the contracting officer shall issue a decision pertaining to the validity of the asserted restriction.

"(2) If after review of any justification submitted in response to the notice provided pursuant to subsection (b), the contracting officer determines that the justification for the restriction on the right of the United States to use technical data does not support adequately the asserted restriction on the technical data, a contracting officer shall within 60 days of receipt of any justification submitted, issue a decision or notify the party asserting the restriction of the time within which a decision will be issued.

"(e) If a claim pertaining to the validity of the asserted restriction is submitted in writing to a contracting officer by a contractor or subcontractor at any tier, such claim shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.).

"(f)(1) If, upon final disposition, the contracting officer's challenge to the restriction on the right of the United States to use such technical data is sustained—

"(A) the restriction on the right of the United States to use the technical data shall be cancelled; and

"(B) if the asserted restriction is found not to be substantially justified, the contractor or subcontractor, as appropriate, shall be liable to the United States for payment of the cost to the United States of reviewing the asserted restriction and the fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the United States in challenging the asserted restriction, unless special circumstances would make such payment unjust.

"(2) If, upon final disposition, the contracting officer's challenge to the restriction on the right of the United States to use such technical data is not sustained—

"(A) the United States shall continue to be bound by the restriction; and

"(B) the United States shall be liable for payment to the party asserting the restriction for fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the party asserting the restriction in defending the assertive restriction if the challenge by the United States is found not to be made in good faith.

"§ 2322. Limitation on small business set-asides

"(a) The head of an agency may not authorize a procurement to be set-aside for participation only by small business concerns in the case of a procurement under the Foreign Military Sales program, if the foreign purchaser specifies the sources qualified to meet the requirement and only one of those sources is a small business concern.

bidders' lists, and to any qualification requirement established after the effective date of this provision.

The House amendment would also preclude the Department of Defense from denying an offeror the opportunity to submit and have its bid considered solely because the potential offeror was not on a qualified bidders' list, qualified manufacturers' list or qualified products list, if the potential offeror can demonstrate before the date of contract award that it meets the prescribed standards. This provision specifically states that it does not require referral to the Small Business Administration of an agency's decision that an offeror has not met the qualification requirement.

For all qualification requirements other than qualified bidders' lists, qualified manufacturers' lists and qualified products lists, the amendment would authorize the head of the purchasing office to waive the requirement that the agency specify in writing all requirements that must be satisfied by a potential offeror for a renewable two-year period if the head of the purchasing office, after review by the appropriate competition advocate, determines that it is unreasonable, because of cost, inability to acquire, or other circumstances, to specify the standards for qualification that a prospective offeror or its product must satisfy.

Rights in technical data.—The House bill contained two provisions (secs. 808, 812) addressing the issue of rights in technical data. One provision stated the situations in which the government would acquire unlimited rights in technical data, required the contractor to warrant that the data it provided was complete and accurate, would provide that the government may ignore, correct or cancel any improper restriction on the release of data if the contractor failed to satisfactorily substantiate the propriety of the restriction, and would require the Secretary of Defense to prescribe regulations for determining whether a defense contract would contain a time limit (not to exceed seven years) on a contractor's right to limit the government's use of technical data.

An additional provision in the House bill would require the Secretary of Defense to prescribe by regulation what constitutes the legitimate proprietary interest of a contractor in technical data. In prescribing such regulations, the Secretary of Defense would be directed to give consideration to the statement and objectives of numerous statutes relating to Small Business where appropriate, on the placement of a time limit on the right of a company to limit release of technical data developed at private expense, or in whole or in part with Federal funds, requiring a contractor to include in development and production contracts provisions pertaining to technical data, and directing the department to establish programs to provide domestic concerns an opportunity to purchase or borrow parts for design replication.

The Senate amendment contained similar provisions except with respect to the delineation of the situations in which the government acquired unlimited rights in technical data and the proscription of a time limit on the contractor's ability to restrict use of technical data.

The House recedes with an amendment.

The conferees aknowledge that legislation which would accommodate in every case of the government's interest in being able to

use contractors' technical data to allow other potential competitors to produce the item as well as a contractor's right to protect data relating to items or processes it developed at its own expense, is virtually impossible. The conferees believe that the direction to the Department of Defense provided in the conference amendment to prescribe regulations defining the legitimate interests of the United States and of a contractor to be implemented in the system of government-wide procurement regulations will afford the best opportunity to reach a fair and reasonable balance of these competing interests. The amendment further requires that the regulations take into consideration the policies with respect to technical data enunciated by the Congress in this and other legislation. The latter provision was intended to ensure that legislative policies otherwise enunciated are not disregarded when implementing the policies of this act.

The House amendment broadens the scope of the Senate provision which would require contracts to contain appropriate provisions relating to technical data so that the provision now applies to all items, not just major systems. The Senate provision authorizing the Secretary of Defense to establish in a solicitation or as a negotiation objective a date after which the government will acquire the right to use technical data, was amended to authorize the Secretary to establish a set period of time (not to exceed seven years) as a negotiation objective.

Validation of proprietary data restrictions.—The House bill contained a provision (sec. 808(b)) that would require a contract for the acquisition of supplies (that includes a requirement for technical data) to require the contractor to possess an approved data management system before the United States accepts any data to be delivered under the contract. It would also permit the United States to ignore, cancel or correct any restriction on the release of technical data if the contractor fails to substantiate the restriction within 60 days of a request to do so. The contractor would also be required to pay the government's costs in challenging such a restriction if the contractor's asserted restriction was not substantially justified, but the government could not assert any right to challenge such restrictions beyond the three-year period after final payment under the contract.

The Senate amendment contained a similar provision (sec. 199(a)).

The House recedes with an amendment specifying a procedure for both the United States and a contractor or subcontractor at any tier to equitably resolve challenges to asserted restrictions on the government's right to use technical data. The amendment would also provide for an extension of the 60-day time period for submitting information justifying the asserted restriction if good cause is shown and require the United States to pay the costs incurred by a party defending such restriction if the challenge by the government of the contractor's asserted restriction on technical data was not in good faith.

Commercial pricing for supplies.—The House bill contained a provision (sec. 812) that would preclude the Department of Defense from entering into a contract using other than competitive procedures for the purchase of spare or replacement parts having a com-

rupted? We will start in the morning. The Senator from Delaware is here, and he has five amendments.

Mr. BYRD. Mr. President, as to tomorrow, the cloture on the DOD bill will be up.

Mr. NUNN. It is my hope that that would not be necessary. Everyone has helped and cooperated and no one has tried to hold up this bill, and I believe we can continue this way. I hope we will not have to have a vote on the DOD bill.

Mr. BYRD. Mr. President, if the cloture votes on the Byrd amendment and on the Dole amendment to the Byrd amendment are put over and those votes occur tomorrow and they fail—both of them—then the next vote immediately would be on the cloture motion to shut off debate on the DOD bill. That is what the distinguished Senator from Georgia is hoping to avoid, and I would like to avoid it, too, because there is no desire to filibuster these bills.

Mr. HARKIN. Mr. President, reserving the right to object——

Mr. DOLE. Mr. President, let us get our agreement, if we can.

The PRESIDING OFFICER. Is there objection to the unanimous-consent request propounded by the majority leader?

Mr. HARKIN. Mr. President, reserving the right to object, I inquire of the majority leader: Did he say that they might be back on the floor yet this evening with the unanimous-consent agreement, or will you do it tomorrow morning?

Mr. DOLE. I would like to do it this evening, or we would take about an hour of the time tomorrow from the DOD bill.

Mr. GOLDWATER. Mr. President, we have been here all day. We have worked hard on this bill all this week, and this kind of tactic just delays and delays and delays. I think it is time we knock it off and go home.

We have two amendments of the Senator from Ohio that will not take long. We have an agreement with the distinguished Senator from Massachusetts for a vote tomorrow. We have an understanding with the Senator from Delaware that we will be in and we will be ready to get on the road as soon as 9 o'clock comes and we have had a vote on cloture, if you want to have a vote on cloture.

I would like to see if we can stop the discussion now and get on with the business; and the majority leader and the minority leader can get back in their little hole and talk about it. [Laughter.]

The PRESIDING OFFICER. Is there objection to the unanimous-consent request propounded by the majority leader? The Chair hears none, and it is so ordered.

Mr. GLENN. Mr. President, I have sent an amendment to the desk, and I ask for its immediate consideration.

Mr. GOLDWATER. Mr. President, may we have order?

The PRESIDING OFFICER. The Senate will be in order.

The question recurs now on the Wilson amendment, No. 2595.

Mr. GLENN. I ask unanimous consent that that amendment be set aside for the consideration of these two amendments.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

The Senator from Ohio is recognized.

Mr. GLENN. Mr President, may we have order?

The PRESIDING OFFICER. All those who wish to carry on conversations will please retire to the cloakroom.

□ 2300

Mr. DOLE. Mr President, will the Senator from Ohio yield?

Mr. GLENN. I yield.

Mr. DOLE. Mr President, let me indicate that we are going to convene at 8 o'clock in the morning, which means the cloture vote, if it will occur, will be at 9.

The PRESIDING OFFICER. The Senator from Ohio is recognized.

AMENDMENT NO. 2641

(Purpose: To establish rights relating to the use, release, and disclosure of technical data)

Mr. GLENN. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

The Senator from Ohio [Mr. GLENN] proposes an amendment numbered 2641.

Mr. GLENN. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 186, between lines 9 and 10, insert the following new section:

SEC. 963. RIGHTS RELATING TO THE USE, RELEASE, AND DISCLOSURE OF TECHNICAL DATA.

(a) RIGHTS IN TECHNICAL DATA.—Subsection (a) of section 2320 of title 10, United States Code, is amended to read as follows:

"(a)(1) The Secretary of Defense shall prescribe regulations to define the legitimate interest of the United States and of a contractor or subcontractor in technical data pertaining to a product or process. Such regulations shall be included in regulations of the Department of Defense prescribed as part of the Federal Acquisition Regulation. Such regulations may not impair any right of the United States or of any contractor or subcontractor with respect to patents or copyrights or any other right in technical data otherwise established by law.

"(2) Such regulations shall include the following provisions:

"(A) In the case of a product or process that is developed by a contractor or subcontractor exclusively with Federal funds, the United States shall have the unlimited right to use, release, or disclose technical data pertaining to the product or process.

"(B) In the case of a product or process that is developed by a contractor or subcontractor exclusively at private expense, the contractor or subcontractor may limit the right of the government to use (for other than internal operations and maintenance purposes), release, or disclose to persons outside the Government technical data pertaining to the product or process.

"(C) Notwithstanding subparagraph (B), the Government may use, release, or disclose technical data pertaining to a product or process to persons outside the Government if such technical data is otherwise publicly available or if—

"(i) such use, release, or disclosure—

"(I) is necessary for emergency repair and overhaul; or

"(II) is a use, release, or disclosure to a foreign government that is in the interest of the United States and is required for evaluational or informational purposes;

"(ii) such use, release, or disclosure is made subject to a prohibition that the person to whom the data is released or disclosed may not further use, release, or disclose such data; and

"(iii) the contractor or subcontractor asserting the restriction is notified of such use, release, or disclosure.

"(D) In the case of a product or process that is developed in part with Federal funds and in part at private expense, rights in technical data pertaining to such product or process shall be negotiated as early in the acquisition process as practicable (preferably during contract negotiations), based upon consideration of the following factors:

"(i) The statement of congressional policy and objectives in section 200 of title 35, the statement of purposes in section 2(b) of the Small Business Innovation Development Act of 1982 (15 U.S.C. 638 note), and the declaration of policy in section 2 of the Small Business Act (15 U.S.C. 631).

"(ii) The interest of the United States in increasing competition and lowering costs by developing and locating alternative sources of supply and manufacture.

"(iii) The interest of the United States in encouraging contractors to develop at private expense items for use by the Government.

"(E) A contractor or subcontractor, or a prospective contractor or subcontractor, that develops a product or process exclusively at private expense may not be required, as a condition of being responsive to a solicitation or as a condition of being responsive to a solicitation or as a condition for the award of a contract, to sell or otherwise relinquish to the United States any rights in technical data that would permit the use by, or release or disclosure of, such data to persons outside the Government except under the conditions described in paragraph (2)(C).

"(F) The Secretary of Defense may—

"(i) negotiate with a contractor or subcontractor to contract for the acquisition of rights in technical data pertaining to a product or process developed by such contractor or subcontractor exclusively at private expense if necessary to develop alternative sources of supply and manufacture; or

to limit rights of the United
echnical data pertaining to a
process developed entirely or in
ederal funds if the United States
royalty-free license to use, re-
sclose the data for purposes of
States (including purposes of
procurement).
is subsection, the term 'Federal
Regulation' means the single
Government-wide procurement
as defined in section 4(4) of the
ederal Procurement Policy Act
03(4)).".
ATION OF PROPRIETARY DATA RE-
—Section 2321 of title 10, United
, is amended—
section (a)(2), by inserting ", at
fore the end of the 3-year period
m the date the final payment is
e contract," after "may review";

section (b)—
nserting "specific" after "state
se (1); and
riking out "and" at the end of

riking out the period at the end
) and inserting in lieu thereof ";

dding at the end the following

that evidence of acceptance by
l agency of a restriction identical
rted restriction within the 3-year
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acceptance occurred after a
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accepted restriction was asserted
e contractor or subcontractor to
notice is being provided.".
FORMING AMENDMENTS.—Section
Department of Defense Authori-
1985 (10 U.S.C. 2301 note), is

serting "and" at the end of para-

riking out "; and" at the end of
(5) and inserting in lieu thereof a

iking out paragraph (6).
LINE FOR REVISION OF REGULA-
e regulations required by section
of title 10, United States Code (as
y subsection (a)), shall be pre-
later than 180 days after the
enactment of this Act.

ENN. Mr. President, I rise for
leration of an amendment to
authorization bill concerning
data rights. This amendment
to legislation passed by the
mmittee on Armed Services
troversial.
ackard Commission report
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st recognize the delicate and nec-
nce between the Government's
t for technical data and the ben-
Nation that comes from protect-
vate sector's proprietary rights.
ce must be struck so as to foster
al innovation and private invest-
h is so important in developing
tal to our defense.

wholeheartedly with that ob-

ntly drafted, title 10, United
de, sections 2320 and 2321,

which were enacted as part of the Defense Procurement Reform Act, title XII of the fiscal year 1985 DOD authorization bill, establish the parameters for DOD regulations on the right to use technical data provided the Government by its contractors.

There are two problem areas with the exiting language which my amendment addresses in order to preserve the delicate balancing of interests between the Government's need to acquire the right to release technical data to ensure competition and the contractor's interest in preserving valuable property rights in data on products which they develop at their own expense.

First, my amendment would amend section 2320 of title 10 to clarify that: if the item to which the technical data relates was developed at private expense, the contractor retains the unlimited rights in data and cannot be required, as a condition of bidding on a Government contract, to give the Government the right to release to other contractors technical data relating to items the contractor developed at its own expense. This intent was not made clear in the original language.

For those items developed at Government expense, the Government has unlimited rights in the technical data. With respect to items developed with a mixture of Government and contractor money, my amendment states that the Government's rights to use, release, or disclose technical data must be negotiated in the contract for delivery of the item to which the data relates or as soon thereafter as practicable. The determination of such rights should be based on consideration of pertinent factors such as the Government's need to retain the right to use, release, or disclose the data in order to complete future requirements, and the contractor's interest in retaining rights in data relating to innovative products or processes, including those related to items for sale to the general public.

Second, this legislation will amend section 2321 of title 10: First, to prohibit the Government from challenging a contractor's restriction on the release of technical data at any time after the 3-year period beginning on the date the final payment is made; second, to require the Government to state the specific grounds for challenging the asserted restriction; and third, to allow the contractor to assert in response to a challenge, that a Federal agency has reviewed the same data within the 3-year period preceding the challenge, and found the contractor's restriction appropriate.

Mr. President, I am concerned that in our zeal to expand competition in the defense sector and obtain data rights for the Government, we could be causing great damage to private industry. I strongly feel that it is essential to protect the legitimate rights in its privately developed technology. I believe this legislation goes a long way toward providing the balance of the Government's need for technical data and the need to protect the private sector's proprietary rights.

Mr. President, the Packard Commission made certain recommedations with regard to technical data rights that companies should have in the interest of promoting more investment in research and development.

I have put those recommendations into legislative language. We have discussed it with both sides of the aisle. I believe the floor managers are both prepared to accept this.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. GOLDWATER. Mr. President, We have looked at his amendment and find nothing wrong with it. We will accept it.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Ohio.

The amendment (No. 2641) was agreed to.

Mr. GLENN. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. GOLDWATER. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 2642

(Purpose: To grant access to the Secretary of Defense to all informatoin regarding nuclear proliferation matters)

Mr. GLENN. Mr. President, I send to the desk another amendment and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

The Senator from Ohio [Mr. GLENN] proposes an amendment numbered 2642.

Mr. GLENN. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 229, between lines 14 and 15, insert the following new section:

SEC. 1221. NUCLEAR NON-PROLIFERATION INFORMATION.

Section 602 of the Nuclear Non-Proliferation Act of 1978 (22 U.S.C. 3281) is amended—

(1) in subsection (c), by inserting "the Department of Defense," after "Department of State,"; and

(2) by adding at the end the following new subsection:

"(f) Upon request, the Secretary of Defense shall have access to all information regarding nuclear proliferation matters which the Secretary of State or the Secretary of Energy has or is entitled to have, including all communications, materials, documents, and records relating to such matters, including cables from United States diplomatic missions.".

99TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
99-718

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1987

REPORT

OF THE

COMMITTEE ON ARMED SERVICES
U.S. HOUSE OF REPRESENTATIVES

ON

H.R. 4428

together with

ADDITIONAL AND DISSENTING VIEWS

[Including cost estimate of the Congressional Budget Office]

JULY 25, 1986.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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61-677 O

WASHINGTON : 1986

as it has been in 1981. The committee agreed to an increase in the threshold in Public Law 98-525 based on statements by the Defense Department that, although the certification would be required for contracts between $100,000 and $500,000, the Defense Department would not routinely require pre-award audits before awarding contracts between that amount. The committee is concerned that audits prior to award are being routinely requested, even when not necessary to ensure the reasonableness of the contractor's price. The committee believes this contributes to the lengthening of the acquisiton lead time and recommends a reevaluation of the guidance provided Defense Department personnel on use of pre-award audits. Furthermore, the Defense Department is directed to report to the committee on the impact and cost effectiveness of making contracts between $100,000 to $500,000 subject to this Act.

SECTION 913—RIGHTS IN TECHNICAL DATA

Sections 2320 and 2321, Title 10, United States Code, added as part of the Defense Procurement Reform Act, Title XII of the fiscal year 1985 Defense Authorization Act (Public Law 98-525), establish the parameters for Department of Defense regulations on the right to use technical data provided the government by its contractors. The committee is concerned that the Department of Defense, in its regulations and in certain acquisitions, has upset the delicate balancing of interests between the government's need to acquire the right to release technical data to ensure competition and the contractor's interest in preserving valuable property rights in data on products that they develop at their own expense. The committee is also aware of the continuing need fo the Department of Defense to maintain its access to advanced technologies developed at private expense.

Although Congress has mandated increased competition in the Defense Department's acquisition of goods and services, the committee believes many alternatives exist to achieve that goal, and do so more effectivcly, without coercing contractors and subcontractors into relinquishing legitimate rights in technical data. For example, greater use of licensing arrangements, agreements to require a contractor to maintain and update technical data, and the government's use of data to evaluate the acceptability of a potential offeror's product could result in a much fairer accommodation of the interests of all parties.

The committee is also concerned that the proposed Defense Department regulations published by the Department of Defense for public comment September 10, 1985 defines the term "developed" in an excessively stringent manner by requiring an "actual reduction to practice"—a term of art used to establish eligibility for a patent. The Committee believes that, for purposes of determining whether an item has been developed at private expense, an item or process should generally be considered "developed" if the item or process exists and reasonable persons skilled in the applicable art would conclude that the item will work as intended with a high probability. The committee recognizes that circumstances may exist under which such a definition would not be appropriate, for instance, in the area of basic research.

Due to the need to craft a definition that may be different, depending on the type of data involved, and the divergent views of experts on this subject, as well as the absence of hearings on this specific issue, the committee believes that to define the term legislatively would be unappropriate. Instead, the committee has directed the Secretary of Defense to craft the specific limitations of the term. For similar reasons the committee has directed the Secretary to determine through regulations what constitutes "private expense."

In addition, the committee believes that challenges to restrictions on the release of data should be made promptly and only when a restriction is believed to be inappropriate. To expect a contractor to maintain indefinitely detailed accounting records that would be necessary to prove that a contractor paid for development of an item is unreasonable.

Section 913 would amend section 2320 of title 10 to clarify that, if the item to which the technical data relates was developed at private expense, the contractor retains the unlimited rights in data and cannot be required, as a condition of bidding on a government contract, to give the government the right to release to other contractors technical data relating to items the contractor developed at its own expense. For those items developed at government expense, the government has unlimited rights in the technical data. With respect to items developed with a mixture of government and contractor money, the committee believes that the government's rights to use, release or disclose technical data must be established in the contract for delivery of the item to which the data relates or as soon thereafter as practicable. The determination of such rights should be based on consideration of pertinent factors such as the government's need to retain the right to use, release or disclose the data in order to compete future requirements, and the contractor's interest in retaining rights in data relating to innovative products or processes, including those related to items for sale to the general public.

Section 913 relates to ascertainment of the rights to use, release or disclose data and is not intended as direction to the Defense Department on the issue of whether technical data must be delivered. For example, there are many circumstances exist in which the government does not need to acquire technical data. Nor is this section intended to preclude the government and its contractors from agreeing to alter the rights accorded either party under this section. For example, the government may agree to give a contractor a license to use data developed at government expense provided the government retains the right to use, release, or disclose the data for government purposes, including competitive acquisition; or the government may negotiate for the right to use, release or disclose data developed at private expense.

Section 913 would also amend section 2321(a)(2) of title 10: (1) to prohibit the government from challenging a contractor's restriction on the release of technical data at any time after the three-year period after final payment under the contract or delivery of the data, whichever is later; (2) to require the government to state the specific grounds for challenging an asserted restriction; and (3) to allow the contractor to assert in response to a challenge that the

Defense Department has reviewed the same data within the last three years and found the contractor's restriction appropriate.

SECTION 914—PRICES FOR PRODUCTS SOLD COMMERCIALLY

A provision of the Defense Procurement Improvement Act (Public Law 99-145) which requires the government to purchase at the lowest commercial price, has resulted in significant problems for companies desiring to provide commercial products to the government. Industry has objected to the standards utilized by the Department of Defense in establishing the contractors' commercial price. In addition, contractors are seriously concerned about maintaining the confidentiality of data relating to the pricing of products sold in the commercial market.

After consideration of these objections and review of the policy behind adoption of the provision, the committee recommends a provision (sec. 914) that would specifically exclude the following considerations when determining the company's lowest commercial price: (1) sales to the Federal government; (2) intracompany sales or transfers; (3) sales to dealers, distributors, or original equipment manufacturers, unless the government can demonstrate that the sale is under the same terms and conditions as a sale to a dealer, distributor or original equipment manufacturer; (4) sales to foreign purchasers; and (5) sales to educational institutions for educational purposes. This change would ensure that the government is offered a product at a price equal to or better than the company's lowest "market determined" price.

The provision would also clarify that the data underlying the prices of products sold commercially are not subject to disclosure under the audit rights available to government agencies. Such pricing data is highly sensitive and includes financial information that the government does not need in order to enforce the law.

Finally, the committee wishes to clarify that this section is not intended to be applied to contracts or orders under the multiple award schedule programs administered by the General Services Administration and the Veterans Administration. In this regard the committee recognizes the unique nature and the special procurement procedures utilized in establishing the multiple award schedule.

SECTION 915—FUNDING OF PROCUREMENT TECHNICAL ASSISTANCE PROGRAMS SERVING DISTRESSED AREAS

In the fiscal year 1986 Department of Defense authorization act (Public Law 99-145) Congress authorized the Department of Defense to pay up to 75 percent of a procurement technical assistance center's costs if the center was in a distressed area and was sponsored by a local government. The committee believes that any center which serves a distressed area should be entitled to the higher funding amount.

The committee recommends that the Department of Defense be authorized to pay up to 75 percent of the cost of running an outreach center sponsored by any state, local government or private, nonprofit organization, if the center *serves* an area with an unemployment rate one percent higher than the national average.

99TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
99-1001

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1987

CONFERENCE REPORT

TO ACCOMPANY

S. 2638

OCTOBER 14, 1986.—Ordered to be printed

"(ii) at the current rate prescribed by the Secretary of the Treasury under section 6621 of the Internal Revenue Code of 1954; and

"(B) if the submission of such defective data was a knowing submission, for an additional amount equal to the amount of the overpayment.

"(2) Except as provided under subsection (d), the liability of a contractor under this subsection shall not be affected by the contractor's refusal to submit a certification under subsection (a)(2) with respect to the cost or pricing data involved.

"(f) RIGHT OF UNITED STATES TO EXAMINE CONTRACTOR RECORDS.—(1) For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this section with respect to a contract or subcontract, the head of the agency, acting through any authorized representative of the head of the agency who is an employee of the United States or a member of the armed forces, shall have the right to examine all records of the contractor or subcontractor related to—

"(A) the proposal for the contract or subcontract;

"(B) the discussions conducted on the proposal;

"(C) pricing of the contract or subcontract; or

"(D) performance of the contract or subcontract.

"(2) The right of the head of an agency under paragraph (1) shall expire three years after final payment under the contract or subcontract.

"(3) In this subsection, the term 'records' includes books, documents, and other data.

"(g) COST OR PRICING DATA DEFINED.—In this section, the term 'cost or pricing data' means all information that is verifiable and that, as of the date of agreement on the price of a contract (or the price of a contract modification), a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.".

(b) CONFORMING AMENDMENTS.—(1) Subsection (f) of section 2306 of such title is amended to read as follows:

"(f) So-called 'truth-in-negotiations' provisions relating to cost or pricing data to be submitted by certain contractors and subcontractors are provided in section 2306a of this title.".

(2) Section 934(a) of the Defense Procurement Improvement Act of 1985 (title IX of Public Law 99-145; 99 Stat. 700) is repealed.

(c) CLERICAL AMENDMENTS.—(1) The heading of section 2306 of title 10, United States Code, is amended to read as follows:

"§2306. Kinds of contracts".

(2) The table of sections at the beginning of chapter 137 of such title is amended by striking out the item relating to section 2306 and inserting in lieu thereof the following:

"2306. Kinds of contracts.
"2306a. Cost or pricing data: truth in negotiations.".

(d) EFFECTIVE DATES.—(1) Except as provided in paragraph (2), section 2306a of title 10, United States Code (as added by subsection

(a)), and the amendment and repeal made by subsection (b), shall apply with respect to contracts or modifications on contracts entered into after the end of the 120-day period beginning on the date of the enactment of this Act.

(2) Subsection (e) of such section shall apply with respect to contracts or modifications on contracts entered into after November 7, 1985.

SEC. 953. RIGHTS IN TECHNICAL DATA

(a) RIGHTS IN TECHNICAL DATA.—Subsection (a) of section 2320 of title 10, United States Code, is amended to read as follows:

"(a)(1) The Secretary of Defense shall prescribe regulations to define the legitimate interest of the United States and of a contractor or subcontractor in technical data pertaining to an item or process. Such regulations shall be included in regulations of the Department of Defense prescribed as part of the Federal Acquisition Regulation. Such regulations may not impair any right of the United States or of any contractor or subcontractor with respect to patents or copyrights or any other right in technical data otherwise established by law.

"(2) Such regulations shall include the following provisions:

"(A) In the case of an item or process that is developed by a contractor or subcontractor exclusively with Federal funds, the United States shall have the unlimited right to—

"(i) use technical data pertaining to the item or process; or

"(ii) release or disclose the technical data to persons outside the government or permit the use of the technical data by such persons.

"(B) Except as provided in subparagraphs (C) and (D), in the case of an item or process that is developed by a contractor or subcontractor exclusively at private expense, the contractor or subcontractor may restrict the right of the United States to release or disclose technical data pertaining to the item or process to persons outside the government or permit the use of the technical data by such persons.

"(C) Subparagraph (B) does not apply to technical data that—

"(i) constitutes a correction or change to data furnished by the United States;

"(ii) relates to form, fit, or function;

"(iii) is necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data); or

"(iv) is otherwise publicly available or has been released or disclosed by the contractor or subcontractor without restriction on further release or disclosure.

"(D) Notwithstanding subparagraph (B), the United States may release or disclose technical data to persons outside the Government, or permit the use of technical data by such persons, if—

"(i) such release, disclosure, or use—

"(I) is necessary for emergency repair and overhaul; or

"(II) is a release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the United States and is required for evaluational or informational purposes;

"(ii) such release, disclosure, or use is made subject to a prohibition that the person to whom the data is released or disclosed may not further release, disclose, or use such data; and

"(iii) the contractor or subcontractor asserting the restriction is notified of such release, disclosure, or use.

"(E) In the case of an item or process that is developed in part with Federal funds and in part at private expense, the respective rights of the United States and of the contractor or subcontractor in technical data pertaining to such item or process shall be agreed upon as early in the acquisition process as practicable (preferably during contract negotiations), based upon consideration of all of the following factors:

"(i) The statement of congressional policy and objectives in section 200 of title 35, the statement of purposes in section 2(b) of the Small Business Innovation Development Act of 1982 (15 U.S.C. 638 note), and the declaration of policy in section 2 of the Small Business Act (15 U.S.C. 631).

"(ii) The interest of the United States in increasing competition and lowering costs by developing and locating alternative sources of supply and manufacture.

"(iii) The interest of the United States in encouraging contractors to develop at private expense items for use by the Government.

"(F) A contractor or subcontractor (or a prospective contractor or subcontractor) may not be required, as a condition of being responsive to a solicitation or as a condition for the award of a contract, to sell or otherwise relinquish to the United States any rights in technical data except—

"(i) rights in technical data described in subparagraph (C); or

"(ii) under the conditions described in subparagraph (D).

"(G) The Secretary of Defense may—

"(i) negotiate and enter into a contract with a contractor or subcontractor for the acquisition of rights in technical data pertaining to an item or process developed by such contractor or subcontractor exclusively at private expense if necessary to develop alternative sources of supply and manufacture; or

"(ii) agree to restrict rights of the United States in technical data pertaining to an item or process developed entirely or in part with Federal funds if the United States receives a royalty-free license to use, release, or disclose the data for purposes of the United States (including purposes of competitive procurement).

"(3) The Secretary of Defense shall define the terms 'developed' and 'private expense' in regulations prescribed under paragraph (1).

"(4) For purposes of this subsection, the term 'Federal Acquisition Regulation' means the single system of Government-wide procure-

ment regulations as defined in section 4(4) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(4)).".

(b) VALIDATION OF PROPRIETARY DATA RESTRICTIONS.—Subsections (a) and (b) of section 2321 of title 10, United States Code, are amended to read as follows:

"(a) A contract for supplies or services entered into by the Department of Defense which provides for the delivery of technical data shall provide that a contractor or subcontractor at any tier shall be prepared to furnish to the contracting officer a written justification for any restriction asserted by the contractor or subcontractor on the right of the United States to use such technical data.

"(b)(1) The Secretary of Defense shall ensure that there is a thorough review of the appropriateness of any restriction on the right of the United States to release or disclose technical data delivered under a contract to persons outside the Government, or to permit the use of such technical data by such persons. Such review shall be conducted before the end of the three-year period beginning on the date on which final payment is made on a contract under which technical data is required to be delivered, or the date on which the technical data is delivered under such contract, whichever is later.

"(2)(A) If the Secretary determines, at any time before the end of the three-year period beginning on the date on which final payment is made on a contract under which technical data is required to be delivered, or the date on which the technical data is delivered under such contract, whichever is later, that a challenge to a restriction is warranted, the Secretary shall provide written notice to the contractor or subcontractor asserting the restriction. Such a determination shall be based on a finding by the Secretary that reasonable grounds exist to question the current validity of the asserted restriction and that the continued adherence to the asserted restriction by the United States would make it impracticable to procure the item competitively at a later time. Such notice shall—

"(i) state the specific grounds for challenging the asserted restriction;

"(ii) require a response within 60 days justifying the current validity of the asserted restriction; and

"(iii) state that evidence of a validation by the Department of Defense of a restriction identical to the asserted restriction within the three-year period preceding the challenge shall serve as justification for the asserted restriction if—

"(I) the validation occurred after a review of the validated restriction under this subsection; and

"(II) the validated restriction was asserted by the same contractor or subcontractor (or any licensee of such contractor or subcontractor) to which such notice is being provided.

"(B) Notwithstanding subparagraph (A), the United States may challenge a restriction on the release, disclosure, or use of technical data delivered under a contract at any time if such technical data—

"(i) is publicly available;

"(ii) has been furnished to the United States without restriction; or

"(iii) has been otherwise made available without restriction.".

(c) CONFORMING AMENDMENTS.—Section 1202 of the Department of Defense Authorization Act, 1985 (10 U.S.C. 2301 note), is amended—

(1) by inserting "and" at the end of paragraph (4);

(2) by striking out "; and" at the end of paragraph (5) and inserting in lieu thereof a period; and

(3) by striking out paragraph (6).

(d) DEADLINE FOR REVISION OF REGULATIONS.—(1) Proposed regulations under section 2320(a)(1) of title 10, United States Code (as amended by subsection (a)), shall be published in the Federal Register for comment not later than 90 days after the date of the enactment of this Act.

(2) Proposed final regulations under such section shall be published in the Federal Register not later than 180 days after the date of the enactment of this Act.

(e) EFFECTIVE DATE.—The amendments made by subsections (a) and (b) shall apply to contracts for which solicitations are issued after the end of the 210-day period beginning on the date of the enactment of this Act.

SEC. 954. RECOVERY OF COSTS TO PROVIDE TECHNICAL DATA

(a) IN GENERAL.—(1) Chapter 137 of title 10, United States Code, is amended by adding after section 2327 (as added by section 951) the following new section:

"§2328. Release of technical data

"(a) IN GENERAL.—(1) The Secretary of Defense shall, if required to release technical data under section 552 of title 5 (relating to the Freedom of Information Act), release technical data to a person requesting such a release if the person pays all reasonable costs attributable to search and duplication.

"(2) The Secretary of Defense shall prescribe regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees under this section.

"(b) DISPOSITION OF COSTS.—An amount received under this section—

"(1) shall be retained by the Department of Defense or the element of the Department of Defense receiving the amount; and

"(2) shall be merged with and available for the same purpose and the same time period as the appropriation from which the costs incurred in complying with requests for technical data were paid.

"(c) WAIVER.—The Secretary of Defense shall waive the payment of costs required by subsection (a) which are in an amount greater than the costs that would be required for such a release of information under section 552 of title 5 if—

"(1) the request is made by a citizen of the United States or a United States corporation, and such citizen or corporation certifies that the technical data requested is required to enable such citizen or corporation to submit an offer or determine whether it is capable of submitting an offer to provide the product to which the technical data relates to the United States or a contractor with the United States (except that the Secretary may require the citizen or corporation to pay a deposit in an amount

government that, even if the required data had been provided, the government would not have agreed to a price increase. Finally, the section would restructure the existing Truth in Negotiations Act language to clarify its application.

The Senate recedes to the House with an amendment that would prohibit an offset, if the contractor intentionally withheld from the government information that would indicate a higher cost for an item or service and, thus, certified that the cost or pricing data it submitted was accurate, complete and current when, in fact, the contractor knew it to be false. The amendment would also clarify that a subcontractor may be required to provide cost or pricing data even though the requirement has been waived for the prime contractor or higher-tier subcontractor. The conferees acknowledge the practice of the Department of Defense to waive the requirement for certified cost or pricing data for universities under cost no-fee contracts but to require such data from subcontractors of the university.

The conferees were very concerned with clarifying the definition of cost or pricing data that a contractor is not required to provide and certify to data relating to judgments, business strategies, plans for the future or estimates. A contractor is required, on the other hand, to disclose any information relating to execution or implementation of any such strategies or plans. For example, a corporate decision to attempt to negotiate a new labor wage rate structure with its employee union, although verifiable, is not cost or pricing data for purposes of this section. If the company has made an offer to the union, the fact that an offer has been made, and the details and status of the offer, on the other hand, is information that should be conveyed to the government. Finally, this provision was amended to clarify that it applies to contracts and modifications to contracts entered into after the effective date of this Act.

Thus, the provisions of this Act apply only as to information provided to support a new contract or the exercise of an option or modification of an existing contract but not to the cost or pricing data provided to support an existing contract entered into prior to the effective date.

Rights in technical data (sec. 953)

The Senate bill contained a provision (sec. 953) that would require the Secretary of Defense to prescribe regulations defining the rights of the United States, its contractors and subcontractors, in technical data relating to items sold to the Department of Defense.

The House amendment contained a similar provision (sec. 913).

The Senate recedes with an amendment.

The conferees agreed to the House provision which would require the Department of Defense to publish regulations defining the terms "developed" and "at private expense". Efforts to define the terms have been ongoing since 1962 without resolution. Because of the lack of definitions in the Federal Acquisition Regulations and the Defense Supplement to those regulations, the military departments have differed in their approach on the issue. The conferees agreed that a uniform approach throughout the Department of Defense was desirable and necessary. In addition, the conferees believe that every effort should be made to make the policy and defi-

nitions similar in the Department of Defense and the civilian agencies to the extent the agencies are dealing with similar items.

Although agreeing that some flexibility in defining terms is necessary, the conferees believe that a statement of congressional intent is appropriate. The conferees believe that previously proposed Department of Defense regulations published for public comment September 10, 1985, defined the term "developed" in an excessively stringent manner by requiring an "actual reduction to practice"—a term of art used to establish an inventor's priority rights under the patent laws. The conferees agree that, for purposes of determining whether an item or process has been developed at private expense, an item should generally be considered "developed" if the item or process exists and reasonable persons skilled in the applicable art would conclude that a high probability exists that the item or process will work as intended. The conferees determined, however, that, because circumstances may exist in which such a standard may be inappropriate, crafting of more exact parameters would be better accomplished through the regulatory process.

In addition, the conferees agree that as a matter of general policy "at private expense" development was accomplished without direct government payment. Payments by the government to reimburse a contractor for its indirect costs would not be considered in determining whether the government had funded the development of an item. Thus, reimbursement for Independent Research and Development expenses and other indirect costs (capital funds and profits), although such payments are in indirect support of a development effort, are treated for purposes of this Act as contractor funds.

The conferees also agreed that, although Congress has mandated increased competition in the Department of Defense's acquisition of goods and services, many alternatives exist to achieve that goal and do so more effectively, without coercing contractors and subcontractors into relinquishing legitimate rights in technical data. On the other hand, where the government is likely to purchase a substantial number of these items in the future, the government should attempt to acquire unlimited rights in data for items developed at private expense.

The Department of Defense should generally seek to acquire the same rights in data that a commercial customer would in acquiring the same product. For example, if a contractor were to purchase an item in the commercial sector, it would not receive unlimited rights to use, release or disclose technical data necessary to manufacture the item or perform the necessary processes to manufacture the item. If a contractor paid for a modification to an existing item, it may acquire rights in data to the modification but not the rights to use, release or disclose data to the underlying product. If, on the other hand, one contractor pays another contractor to develop a new item, the purchasing contractor, to some extent, is paying for the expertise of the developing contractor and, if so, is likely to acquire the rights to manufacture or release and disclose the data to someone else to manufacture. In the event funds are mixed in such a way that no clear allocation of funds from either party to the development of a segregable item can be determined, the par-

ties should agree to the rights to be accorded each party. The same applies to the government in contracting with its suppliers.

When entering into a contract with a supplier for which the government will fund directly a portion of the development costs, the government must evaluate whether its contribution is substantial enough to warrant the government's unlimited rights to use, release or disclose technical data pertaining to that item. The Department of Defense should establish by policy negotiation objectives to be used as guidance in determining whether the government should acquire rights when the contractor would be entitled to retain them and the trade-off when paying for some portion of the development. Such guidance should factor into account the number of items to be purchased in the future, the amount of funding contributed by the government, if any, and other variables that would take into account the benefit to be achieved by the government acquiring unlimited rights to use, release or disclose such data. The conferees agree that such guidance should also provide that, with exception, the government should not require a contractor to provide technical data relating to commercial products, except that data necessary for maintenance, repair and training.

Notwithstanding the above, the government should continue to evaluate, in determining which contractor should receive a contract, whether the government will have the ability to compete the item in future acquisitions—either through the acquisition of data rights or a requirement to develop alternative sources.

The conferees agreed to make the provisions of this section applicable in 210 days. The Department of Defense is required to issue proposed regulations within 90 days and final regulations within 180 days. This will allow the public to comment on the proposed regulations, as well as review the final regulations 30 days prior to their effective date. The conferees hope that with the requirement to publish the final rules 30 days before they become effective the public will have the opportunity to review the regulations as they have been adjusted from the initial proposed regulations, prior to their becoming effective. Finally, the amendment would clarify that the validation procedures required under this section apply only as to technical data delivered under contracts entered into after the effective date of this Act. As to data required to be delivered under contracts entered into prior to the effective date, the standards in effect on the date the contract was entered into continue to apply.

The conferees also agreed to the Senate provision requiring notification to a contractor that technical data delivered with restricted rights was released or disclosed under section 2320(D). The conferees wish to make clear that the notification need not be made prior to the government's release, but should be made as soon as reasonably possible.

Recovery of costs to provide technical data (sec. 954)

The House amendment contained a provision (sec. 935) that would authorize the government to charge those who do not need the technical data to bid on a government contract an amount equal to the true administrative cost of searching for and reproducing the data. The provision would require the release of data at no

Calendar No. 646

100TH CONGRESS
2d Session

SENATE

REPORT
100–326

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1989

REPORT

[TO ACCOMPANY S. 2355]

ON

AUTHORIZING APPROPRIATIONS FOR FISCAL YEAR 1989 FOR MILITARY ACTIVITIES OF THE DEPARTMENT OF DEFENSE, FOR MILITARY CONSTRUCTION, AND FOR DEFENSE ACTIVITIES OF THE DEPARTMENT OF ENERGY, TO PRESCRIBE PERSONNEL STRENGTHS FOR SUCH FISCAL YEAR FOR THE ARMED FORCES, AND FOR OTHER PURPOSES

TOGETHER WITH

ADDITIONAL AND SUPPLEMENTAL VIEWS

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

MAY 4, 1988.—Ordered to be printed

Filed under authority of the order of the Senate of April 27 (legislative day, April 25), 1988

In addition, the legislation codifies and revises a requirement established last year requiring approval by the Under Secretary of Defense for Acquisition of certain firm-fixed price development contracts valued at more than $10,000,000. The committee emphasizes that this dollar-value, and the reference to firm-fixed price contracts, relates solely to the approval authority of the Under Secretary, and does not reflect a judgment that fixed-price development contracts are appropriate simply because they are of a lesser value or involve a contract form other than firm fixed-price. The committee recognizes that there are circumstances in which fixed-price development contracts are appropriate (e.g., when costs and forseeable program risks can be reasonably anticipated), and the committee expects the Department to establish clear guidelines under this section for use of such contracts.

It is the intent of the committee that this section be applied in a manner that best serves the government's interests in the long-term health of the defense industry, and that this section not be used as the basis for litigating the propriety of an otherwise valid contract. Nothing in this section shall be construed to affect the requirements of section 8118 of the Department of Defense Appropriations Act, 1988.

INCENTIVES FOR INNOVATION

Section 803 amends 10 U.S.C. 2305 which recognizes the value to the Nation of innovation by defense contractors using private funding. Private expense development for defense purposes enhances our ability to pursue a defense strategy based on technological superiority. As a consequence, the government has an interest in preserving an incentive for private industry to accept the risks inherent in such investment.

The amendment to section 2305 would prohibit the government from requiring that a prime contractor provide for competition between identical items in cases where an item has been developed exclusively at private expense. The amendment would allow the head of an agency to require such competition in cases in which he determines that the price of an privately-developed item is unreasonable or that the developer of the item cannot meet the program schedule or delivery requirements. The amendment also provides for the satisfaction of mobilization needs through negotiations between the government and the developer of the item. Finally, subparagraph (C) is intended to ensure that those prime contractors who choose to rely on privately-developed items in the products they offer to the government are not placed at a disadvantage in the proposal evaluation process for a contract.

The amendment would not restrict the government's ability to pursue competition for privately-developed items through the use of performance specifications, reverse engineering, or form, fit and function standards. It would, however, provide a necessary counterbalance to the presumptions in the current law, which have resulted in mandatory requirements for innovative subcontractors to disclose the results of privately-funded research to competitors.

100TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
100-753

NATIONAL DEFENSE AUTHORIZATION ACT, FISCAL YEAR 1989

CONFERENCE REPORT

TO ACCOMPANY

H.R. 4264

JULY 7, 1988.—Ordered to be printed

(2) In developing the recommendations, the advisory committee shall address the following issues:

(A) How the Department of Defense can best be assured that it receives the best quality services for the amounts expended and that the contractors supplying such services follow sound personnel management practices and observe established labor-management policies and regulations.

(B) Whether contract competitions should be structured in a manner that requires offerors to compete on the basis of factors other than the number of hours per week its professional and technical employees of similar annual salaries work.

(C) Whether the Department of Defense can allow contractors to maintain different accounting systems (for example, 40-hour work week, full time accounting) and still allow the Department to evaluate proposals on the basis of a work rate of 40 hours per week and 2,080 hours per year.

SEC. 805. PROCUREMENT OF CRITICAL AIRCRAFT AND SHIP SPARE PARTS

(a) IN GENERAL.—(1) Chapter 141 of title 10, United States Code, is amended by inserting after section 2382 the following:

"§ 2383. Procurement of critical aircraft and ship spare parts: quality control

"(a) In procuring any spare or repair part that is critical to the operation of an aircraft or ship, the Secretary of Defense shall require the contractor supplying such part to provide a part that meets all appropriate qualification and contractual quality requirements as may be specified and made available to prospective offerors. In establishing the appropriate qualification requirements, the Secretary of Defense shall utilize those requirements, if available, which were used to qualify the original production part, unless the Secretary of Defense determines in writing that any or all such requirements are unnecessary.

"(b) In this section, the term 'spare or repair part' has the meaning given such term by section 2323(f) of this title.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2382 the following new item:

"2383. Procurement of critical aircraft and ship spare parts: quality control on second sources.".

(b) EFFECTIVE DATE.—Section 2383 of title 10, United States Code, as added by subsection (a), shall apply with respect to contracts entered into after the end of the 180-day period beginning on the date of the enactment of this Act.

SEC. 806. INCENTIVES FOR INNOVATION

(a) IN GENERAL.—(1) Section 2305(d) of title 10, United States Code, is amended by adding at the end the following:

"(4)(A) Whenever the head of an agency requires that proposals described in paragraph (1)(B) or (2)(B) be submitted by an offeror in its offer, the offeror shall not be required to provide a proposal that enables the United States to acquire competitively in the future an identical item if the item was developed exclusively at private expense unless the head of the agency determines that—

"(i) the original supplier of such item will be unable to satisfy program schedule or delivery requirements; or

"(ii) proposals by the original supplier of such item to meet the mobilization requirements are insufficient to meet the agency's mobilization needs.

"(B) In considering the responses to solicitations requiring proposals described in paragraph (1)(B) or (2)(B), the head of an agency shall base any evaluation of items developed exclusively at private expense on an analysis of the total value, in terms of innovative design, life cycle costs, and other pertinent factors, of incorporating such items in the system.".

(2) Section 2305(d)(3) of such title is amended by adding at the end the following: "Such objectives may not impair the rights of prospective contractors or subcontractors otherwise provided by law.".

(b) CLARIFYING AMENDMENT.—Paragraphs (1)(B) and (2)(B) of such section are each amended by inserting "response to" before "a solicitation".

SEC. 807. REGULATIONS ON USE OF FIXED-PRICE DEVELOPMENT CONTRACTS

(a) IN GENERAL.—(1) Not later than 120 days after the date of the enactment of this Act, the Secretary of Defense shall revise the Department of Defense regulations that provide for the use of fixed-price type contracts in a development program. The regulations shall provide that a fixed-price contract may be awarded in such a program only if—

(A) the level of program risk permits realistic pricing; and

(B) the use of a fixed-price contract permits an equitable and sensible allocation of program risk between the United States and the contractor.

(2)(A) The regulations also shall provide that a firm fixed-price contract in excess of $10,000,000 may not be awarded for the development of a major system.

(B) A waiver of the requirement prescribed in regulations under subparagraph (A) may be granted by the Secretary of Defense, acting through the Under Secretary of Defense for Acquisition, but only if the Secretary determines and states in writing that the award is consistent with the criteria specified in clauses (A) and (B) of paragraph (1) and the regulations prescribed under such paragraph. The Secretary may delegate the authority in the preceding sentence only to a person who holds a position in the Office of the Secretary of Defense at or above the level of Assistant Secretary of Defense.

(b) DEFINITIONS.—In this section, the term "major system" has the meaning given such term by section 2302(5) of such title.

(c) EXPIRATION.—Paragraph (2) of subsection (a) shall cease to be effective two years after the date of the enactment of this Act.

SEC. 808. DEPARTMENT OF DEFENSE ADVISORY PANEL ON GOVERNMENT-INDUSTRY RELATIONS

(a) ESTABLISHMENT OF ADVISORY PANEL.—Not later than 30 days after the date of the enactment of this Act, the Secretary of Defense shall establish an advisory panel to study and make recommendations to the Secretary on ways to enhance cooperation between the

Procurement of critical spare parts (sec. 805)

The House bill contained a provision (sec. 808) that would require the Secretary of Defense to procure critical spare or repair parts for ships and aircraft that meet the same quality and inspection requirements as the original parts.

The Senate amendment contained a provision (sec. 822) that would require the Secretary of Defense to use, in procuring critical spare or repair parts for aircraft, qualification and quality requirements that were at least as stringent as those that applied to the original or original redesigned parts.

The Senate recedes with an amendment requiring that the head of an agency, when purchasing critical spare or repair parts, use all appropriate quality and qualification requirements as may be specified and made available to potential offerors. In determining the appropriate qualification and quality requirements, the head of an agency is required to utilize the requirements used to qualify the original production part, unless he determines in writing that any or all such requirements are unnecessary.

The conferees support the efforts by the Services to increase significantly competition in the procurement of critical spare or repair parts and this provision is not intended to supersede any law or regulation, including section 2319 of title 10, United States Code. However, the conferees are equally concerned that quality and safety not be compromised in procuring critical spare or repair parts. They recognize that there are circumstances in which it may not be necessary to apply the same qualification and quality requirements used during the development or early production stages of a defense program to a part procured to support a fielded system. They also recognize that as technology changes qualification requirements change. However, the qualification and quality requirements applied to critical original production parts should serve as the baseline and subsequent modifications should be documented.

The conferees intend to continue monitoring this issue and direct the General Accounting Office to prepare and submit a report within one year on the implementation of this section and the procedures used by the Services to ensure the necessary level of quality in critical spare parts procurement. The review should focus on parts procured from original equipment manufacturers as well as parts procured from other sources. The report should review any criteria used to designate parts as critical parts and, to the extent that quality deficiencies in such critical parts can be traced and documented, any organizational or systemic causes which might lead to the procurement of critical parts of insufficient quality.

Incentives for innovation (sec. 806)

The Senate amendment contained a provision (sec. 803) that would prevent the Government from requiring that a prime contractor provide for competition between identical items in cases where an item has been developed exclusively at private expense. The Senate provision would allow the head of an agency to require such competition in certain circumstances. In addition, the Senate provision would require the Department of Defense to evaluate pro-

posals from prime contractors who rely on privately-developed items in a manner that accommodates the objectives of this provision.

The House bill contained no similar provision.

The House recedes with an amendment that makes technical changes and that requires DOD, in considering the responses to proposals described in subparagraphs (1)(B) or (2)(B) of section 2305(d) of title 10, United States Code, to evaluate items developed exclusively at private expense on the basis of an analysis of the total value of incorporating such items in the system.

Regulations on use of fixed price development contracts (sec. 807)

The Senate amendment contained a provision (sec. 802) that would require the Secretary of Defense to prescribe guidelines limiting the use of fixed price contracts for development programs. The Senate provision also would preclude use of firm-fixed price development contracts in excess of $10 million unless approved by the Under Secretary of Defense for Acquisition.

The House bill contained no similar provision.

The House recedes with a clarifying amendment.

The conferees note that current Department of Defense rules discourage the use of fixed price development contracts, but do not provide sufficient guidance for assessment of the relationship between pricing and program risk, and for the allocation of risk between the United States and the contractor. The conferees expect the revised regulations to provide a greater level of detail with respect to these matters.

The conferees emphasize that the expiration of the $10 million statutory limit on firm-fixed price contracts after two years does not signal any intent or expectation that the regulatory limitations will be changed substantially at that time; rather, it reflects a belief that a two-year statutory period is sufficient to focus the Department's attention on this problem. The Congress can monitor the Department's performance after that period through the oversight process without the necessity for mandatory involvement by the Under Secretary in specific cases, except to the extent that the Under Secretary believes at that time that such continuing involvement is necessary.

Department of Defense Advisory Panel on government-industry relations (sec. 808)

The Senate amendment contained a provision (sec. 811) that would require the Secretary of Defense to establish an advisory panel on government-industry relations.

The House bill contained no similar provision.

The House recedes.

Report on simplification and streamlining of acquisition procedures (sec. 809)

The Senate amendment contained a provision (sec. 810) requiring the Under Secretary of Defense for Acquisition to submit to Congress a report on the Under Secretary's programs regarding simplification of procedures governing the acquisition process.

Calendar No. 169

102D CONGRESS
1st Session

SENATE

REPORT
102-113

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEARS 1992 AND 1993

REPORT

[TO ACCOMPANY S. 1507]

ON

AUTHORIZING APPROPRIATIONS FOR FISCAL YEARS 1992 AND 1993 FOR MILITARY ACTIVITIES OF THE DEPARTMENT OF DEFENSE, FOR MILITARY CONSTRUCTION, AND FOR DEFENSE ACTIVITIES OF THE DEPARTMENT OF ENERGY, TO PRESCRIBE PERSONNEL STRENGTHS FOR SUCH FISCAL YEARS FOR THE ARMED FORCES, AND FOR OTHER PURPOSES

TOGETHER WITH

ADDITIONAL VIEWS

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

JULY 19 (legislative day, JULY 8), 1991.—Ordered to be printed

the term "domestically manufactured" is defined to mean manufactured in a facility located in the United States or Canada by an entity more than 50 percent of which is owned or controlled by U.S. or Canadian citizens.

Since this provision was enacted into law, a great deal of concern has been raised over its potential effects. In particular, the provision creates a monopoly for the single U.S. manufacturer of this material. The committee is concerned that the price, quality, and delivery of materials to the Defense Department or its contractors could be unfairly controlled by a monopoly producer. Another concern with section 2507(e) is that its bar on foreign ownership discourages foreign-owned manufacturers of carbonyl iron powders from establishing a production facility in the United States or Canada. The committee does not believe that such a prohibition on foreign ownership is justified in this case.

In light of these concerns, the committee recommends a provision that would amend section 2507(e) in two ways. First, it would advance the date after which the Secretary of Defense may terminate this restriction from September 30, 1994 to September 30, 1992. Second, it would allow a foreign-owned manufacturing facility located in the United States or Canada to supply carbonyl iron powders to the Defense Department or its contractors.

ADVISORY COMMITTEE ON RIGHTS IN TECHNICAL DATA

Balancing contractor and government rights in technical data is a problem that has concerned Congress, DOD and industry throughout the 1980s. Since 1984, the Congress has significantly amended the statute on technical data (10 U.S.C. 2320) three times. An interim regulation has been in effect since October 1988. The absence of a final regulation reflects deep divisions as to the appropriate balance of these interests.

The committee recommends a provision that would establish an Advisory Committee on Rights in Technical Data in an effort to resolve current differences. The committee would be composed of 16 members, half from government and half from the private sector. The committee would submit a report containing a proposed regulation by May 1, 1992. The Secretary of Defense would be required to give thorough consideration to the Advisory Committee's proposal, and issue a final regulation by June 1, 1992.

The committee intends that the Secretary ensure that other agencies of government with a significant interest in technical data rights, such as the Office of Federal Procurement Policy, are represented. To ensure the recommendations of the advisory committee receive full consideration, the Department of Defense should not issue any comprehensive revisions to the current regulations on technical data until the work of the advisory committee is completed.

DEFENSE CRITICAL TECHNOLOGIES PLAN

The third annual *Defense Critical Technologies Plan* was issued on May 1, 1991. The committee commends the Defense Department on the progress they have over the past year in preparing this plan and especially in the strong participation of industry evident in it.

102D CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

REPORT
102-311

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEARS 1992 AND 1993

CONFERENCE REPORT

TO ACCOMPANY

H.R. 2100

NOVEMBER 13, 1991.—Ordered to be printed

graph (2) and may include recommendations pertaining to any of the following:

(A) Statutory and regulatory changes providing payment protections for subcontractors and suppliers (other than a construction prime contractor subject to the provisions of sections 3903(b) and 3905 of title 31, United States Code) that the Comptroller General believes to be desirable and feasible.

(B) Proposals to assess the desirability and utility of a specific payment protection on a test basis.

(C) Such other recommendations as the Comptroller General considers appropriate in light of the matters assessed pursuant to paragraph (2).

(4) The report required by paragraph (1) shall be submitted not later than by February 1, 1993, to the Committees on Armed Services and on Small Business of the Senate and House of Representatives.

(f) INSPECTOR GENERAL REPORT.—(1) The Inspector General of the Department of Defense shall submit to the Secretary of Defense a report on payment protections for subcontractors and suppliers under contracts entered into with the Department of Defense. The report shall include an assessment of the extent to which available judicial and administrative remedies, as well as suspension and debarment procedures, have been used (or recommended for use) by officials of the Department to deter false statements relating to (A) payment bonds provided by individuals pursuant to the Miller Act, and (B) certifications pertaining to payment requests by construction contractors pursuant to section 3903(b) of title 31, United States Code. The assessment shall cover actions taken during the period beginning on October 1, 1989, and ending on September 30, 1992.

(2) The report required by paragraph (1) shall be submitted to the Secretary of Defense not later than March 1, 1993. The report may include recommendations by the Inspector General on ways to improve the effectiveness of existing methods of preventing false statements.

(g) MILLER ACT DEFINED.—For purposes of this section, the term "Miller Act" means the Act of August 24, 1935 (40 U.S.C. 270a–270d).

SEC. 807. GOVERNMENT-INDUSTRY COMMITTEE ON RIGHTS IN TECHNICAL DATA.

(a) REGULATIONS.—(1) Not later than September 15, 1992, the Secretary of Defense shall prescribe final regulations required by subsection (a) of section 2320 of title 10, United States Code, that supersede the interim regulations prescribed before the date of the enactment of this Act for the purposes of that section.

(2) In prescribing such regulations, the Secretary shall give thorough consideration to the recommendations of the government-industry committee appointed pursuant to subsection (b).

(3) Not less than 30 days before prescribing such regulations, the Secretary shall—

(A) transmit to the Committees on Armed Services of the Senate and House of Representatives a report containing such regulations, the recommendations of the committee, and any matters required by subsection (b)(4); and

(B) publish such regulations for comment in the Federal Register.

(4) The regulations shall apply to contracts entered into on or after November 1, 1992, or, if provided in the regulations, an earlier date. The regulations may be applied to any other contract upon the agreement of the parties to the contract.

(b) GOVERNMENT-INDUSTRY COMMITTEE.—(1) Not later than 60 days after the date of the enactment of this Act, the Secretary of Defense shall appoint a government-industry committee for the purpose of developing regulations to recommend to the Secretary of Defense for purposes of carrying out subsection (a).

(2) The membership of the committee shall include, at a minimum, representatives of the following:

(A) The Under Secretary of Defense for Acquisition.

(B) The acquisition executives of the military departments.

(C) Prime contractors under major defense acquisition programs.

(D) Subcontractors and suppliers under major defense acquisition programs.

(E) Contractors under contracts other than contracts under major defense acquisition programs.

(F) Subcontractors and suppliers under contracts other than contracts under major defense acquisition programs.

(G) Small businesses.

(H) Contractors and subcontractors primarily involved in the sale of commercial products to the Department of Defense.

(I) Contractors and subcontractors primarily involved in the sale of spare or repair parts to the Department of Defense.

(J) Institutions of higher education.

(3) Not later than June 1, 1992, the committee shall submit to the Secretary a report containing the following matters:

(A) Proposals for the regulations to be prescribed by the Secretary pursuant to subsection (a).

(B) Proposed legislation that the committee considers necessary to achieve the purposes of section 2320 of title 10, United States Code.

(C) Any other recommendations that the committee considers appropriate.

(4) If the Secretary omits from the regulations prescribed pursuant to subsection (a) any regulation proposed by the advisory committee, any regulation proposed by a minority of the committee in any minority report accompanying the committee's report, or any part of such a proposed regulation, the Secretary shall set forth his reasons for each such omission in the report submitted to Congress pursuant to subsection (a)(3)(A).

(c) RESTRICTION.—(1) Before the date described in paragraph (2), the Secretary may not revise or supersede the interim regulations implementing section 2320 of title 10, United States Code, prescribed before the date of the enactment of this Act, except to the extent required by law or necessitated by urgent and unforeseen circumstances affecting the national defense.

(2) The date referred to in paragraph (1) is the date 30 days following the date on which the report required by subsection (a)(3) is

transmitted to the Committees on Armed Services of the Senate and House of Representatives.

(d) DEFINITION.—In this section, the term "major defense acquisition program" has the meaning given such term by section 2430 of title 10, United States Code.

SEC. 808. CONTROL OF GOVERNMENT PERSONNEL WORK PRODUCT.

(a) REQUIREMENT.—The Secretary of Defense shall prescribe regulations to ensure that—

(1) a Department of Defense employee or member of the armed forces with an appropriate security clearance who is engaged in oversight of an acquisition program of the Department of Defense (including a program involving highly sensitive information) maintains control of the employee's or member's work product; and

(2) procedures for protecting unauthorized disclosure of classified information by contractors do not require such an employee or member to relinquish control of his or her work product to any such contractor.

(b) REGULATIONS.—The Secretary of Defense shall prescribe the regulations required by subsection (a) not later than 120 days after the date of the enactment of this Act.

(c) SUNSET.—This section shall cease to be effective on September 30, 1992.

SEC. 809. STATUS OF THE DIRECTOR OF DEFENSE PROCUREMENT.

For the purposes of the amendment made by section 807 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510; 104 Stat. 1593) to section 25(b)(2) of the Office of Federal Procurement Policy Act (41 U.S.C. 421(b)(2)), the Director of Defense Procurement of the Department of Defense shall be considered to be an official at an organizational level of an Assistant Secretary of Defense within the Office of the Under Secretary of Defense for Acquisition.

PART B—ACQUISITION ASSISTANCE PROGRAMS

SEC. 811. PROCUREMENT TECHNICAL ASSISTANCE COOPERATIVE AGREEMENT PROGRAM.

(a) AVAILABILITY OF AUTHORIZED APPROPRIATIONS.—Of the amounts authorized to be appropriated pursuant to section 301 for Defense Agencies for fiscal years 1992 and 1993 for operation and maintenance, $9,000,000 shall be available for each such fiscal year for carrying out the provisions of chapter 142 of title 10, United States Code.

(b) SPECIFIC PROGRAMS.—Of the amounts provided for in subsection (a), $600,000 shall be available for each of fiscal years 1992 and 1993 for the purpose of carrying out programs sponsored by eligible entities referred to in subparagraph (D) of section 2411(1) of title 10, United States Code, that provide procurement technical assistance in distressed areas referred to in subparagraph (B) of section 2411(2) of such title. If there is an insufficient number of satisfactory proposals for cooperative agreements in such distressed areas to allow for effective use of the funds made available in accordance with this subsection in such areas, the funds shall be allocated among

dies, as well as suspension and debarment procedures, have been used to deter false statements and false payment certifications.

Government-industry committee on rights in technical data (sec. 807)

The Senate amendment contained a provision (sec. 834) that would establish a government-industry committee on rights in technical data in an effort to resolve current differences concerning the appropriate balance between contractor and government rights in such data.

The House bill contained no similar provision.

The House recedes with an amendment that would make clarifying changes in the provision and that would ensure that the Department of Defense not issue a new technical data rights regulation until the Secretary has considered the recommendations of the government-industry committee.

Control of government personnel work product (sec. 808)

The House bill contained a provision (sec. 814) that would require the Department of Defense to ensure that appropriately cleared Department of Defense personnel engaged in oversight of acquisition programs, including classified programs, maintain control of their work product.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment. The conferees agree that oversight personnel should not relinquish control of their work product to contractors who are the subject of their oversight. The conferees understand that the Department of Defense has been developing guidance, but has been slow in issuing the necessary regulation. Accordingly, this provision would require issuance of such a regulation. The conferees note that after an appropriate regulation is issued, a statutory requirement will no longer be necessary. Therefore, the conferees agree to "sunset" the provision on September 30, 1992, but expect the Department of Defense to ensure that an effective regulation continues in effect after that date. In the event that an appropriate regulation is not issued, the conferees agree that detailed legislative guidance may be required.

Status of the Director of Defense Procurement (sec. 809)

The Senate amendment contained a provision (sec. 822) that would authorize the Under Secretary of Defense for Acquisition to delegate the Under Secretary's responsibility to represent the Department at the Federal Acquisition Regulatory Council to the Director of Defense Procurement.

The House bill contained no similar provision.

The House recedes.

Procurement technical assistance cooperative agreement program (sec. 811)

The Senate amendment contained a provision (sec. 825) that would authorize $9.0 million for the procurement technical assistance cooperative agreement program in each of fiscal years 1992 and 1993.

The House bill contained a similar provision (sec. 801).

109TH CONGRESS
2nd Session

HOUSE OF REPRESENTATIVES

REPORT
109–452

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2007

REPORT

OF THE

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES

ON

H.R. 5122

together with

ADDITIONAL AND DISSENTING VIEWS

[Including cost estimate of the Congressional Budget Office]

MAY 5, 2006.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

tribute to the outcomes of MDAPs. This section would require the Under Secretary of Defense for Acquisition, Technology and Logistics to ensure compliance with the training program.

Section 802—Additional Requirements Relating to Technical Data Rights

This section would require the Secretary of Defense to establish regulations to ensure that a major system developed with federal or private funds acquires sufficient technical data to allow competition for contracts required for sustainment of the system. This section would also require any contract for a major system to include price and delivery options for acquiring, at any point during the lifecycle of the system, major elements of technical data not acquired at the time of initial contract award. The regulations would establish a standard for acquiring rights in technical data to enable the lowest possible lifecycle cost for the item or process acquired.

The committee notes, in recent years, acquisition program managers have minimized their purchases of technical data rights for new weapons systems. The committee understands that guidance issued in the 1990s intentionally sought to reverse the previous policy on technical data rights, which may have inappropriately assumed that all rights to technical data should be purchased, even in unnecessary situations. This section would require program managers to negotiate price options for acquiring additional data rights, at the time of award, when the government has maximum leverage in negotiations. The committee believes that this balanced approach will require program managers to buy those data rights necessary to minimize lifecycle cost without requiring the purchase of unneeded technical data rights.

Section 803—Study and Report on Revisions to Selected Acquisition Report Requirements

This section would require the Under Secretary of Defense for Acquisition, Technology and Logistics, in coordination with the service acquisition executives of each military department, to conduct a study on revisions to requirements related to Selected Acquisition Reports (SARs), as set forth in section 2432 of title 10, United States Code.

The SAR provides the committee with a critical tool for providing oversight of major defense acquisition programs. The SAR gives the committee access to clear and regular information on program progress, including information of a classified nature. The committee understands that the elements currently required to be included in the SAR have not been updated for a number of years. Some important elements of program progress are not included in the current SAR, and in some cases, information which may have previously been a good measure of program progress may no longer be as relevant to program oversight.

The committee recognizes that in order for the SAR to be useful to both the Department of Defense (DOD) and the committee, it should focus on those measures of program progress for major defense acquisition programs that are the most useful for oversight across a broad range of programs, without placing an undue reporting burden. One element in the current SAR that is clearly critical

109TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
109–702

JOHN WARNER NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2007

CONFERENCE REPORT

TO ACCOMPANY

H.R. 5122

SEPTEMBER 29, 2006.—Ordered to be printed

subject to chapter 87 of title 10, United States Code, who contribute significantly to other types of acquisitions by the Department of Defense.

(b) APPLICABILITY.—Effective on and after September 30, 2008, a member of the Armed Forces or an employee of the Department of Defense with authority to generate requirements for a major defense acquisition program may not continue to participate in the requirements generation process unless the member or employee successfully completes the certification training program developed under this section.

(c) REPORTS.—The Secretary of Defense shall submit to the Committees on Armed Services of the Senate and House of Representatives an interim report, not later than March 1, 2007, and a final report, not later than March 1, 2008, on the implementation of the training program required under this section.

SEC. 802. ADDITIONAL REQUIREMENTS RELATING TO TECHNICAL DATA RIGHTS.

(a) ADDITIONAL REQUIREMENTS RELATING TO TECHNICAL DATA RIGHTS.—Section 2320 of title 10, United States Code, is amended by adding at the end the following new subsection:

"(e) The Secretary of Defense shall require program managers for major weapon systems and subsystems of major weapon systems to assess the long-term technical data needs of such systems and subsystems and establish corresponding acquisition strategies that provide for technical data rights needed to sustain such systems and subsystems over their life cycle. Such strategies may include the development of maintenance capabilities within the Department of Defense or competition for contracts for sustainment of such systems or subsystems. Assessments and corresponding acquisition strategies developed under this section with respect to a weapon system or subsystem shall—

"(1) be developed before issuance of a contract solicitation for the weapon system or subsystem;

"(2) address the merits of including a priced contract option for the future delivery of technical data that were not acquired upon initial contract award;

"(3) address the potential for changes in the sustainment plan over the life cycle of the weapon system or subsystem; and

"(4) apply to weapon systems and subsystems that are to be supported by performance-based logistics arrangements as well as to weapons systems and subsystems that are to be supported by other sustainment approaches.".

(b) MODIFICATION OF PRESUMPTION OF DEVELOPMENT EXCLUSIVELY AT PRIVATE EXPENSE.—Section 2321(f) of title 10, United States Code, is amended—

(1) by striking "EXPENSE FOR COMMERCIAL ITEMS CONTRACTS.—In" and inserting "EXPENSE.—(1) Except as provided in paragraph (2), in"; and

(2) by adding at the end the following new paragraph:

"(2) In the case of a challenge to a use or release restriction that is asserted with respect to technical data of a contractor or subcontractor (whether or not under a contract for commercial items) for a major system or a subsystem or component thereof on the basis that the major system, subsystem or component was developed exclusively at private expense, the challenge to the use or release re-

striction shall be sustained unless information provided by the contractor or subcontractor demonstrates that the item was developed exclusively at private expense.".

(c) REGULATIONS.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall revise regulations under section 2320 of title 10, United States Code, to implement subsection (e) of such section (as added by this section), including incorporating policy changes developed under such subsection into Department of Defense Directive 5000.1 and Department of Defense Instruction 5000.2.

SEC. 803. STUDY AND REPORT ON REVISIONS TO SELECTED ACQUISITION REPORT REQUIREMENTS.

(a) STUDY REQUIREMENT.—The Secretary of Defense, acting through the Under Secretary of Defense for Acquisition, Technology, and Logistics in coordination with the service acquisition executives of each military department, shall conduct a study on revisions to requirements relating to Selected Acquisition Reports, as set forth in section 2432 of title 10, United States Code.

(b) MATTERS COVERED.—The study required under subsection (a) shall—

(1) focus on incorporating into the Selected Acquisition Report those elements of program progress that the Department of Defense considers most relevant to evaluating the performance and progress of major defense acquisition programs, with particular reference to the cost estimates and program schedule established when a major defense acquisition program receives Milestone B approval;

(2) address the need to ensure that data provided through the Selected Acquisition Report is consistent with data provided through internal Department of Defense reporting systems for management purposes; and

(3) include any recommendations to add to, modify, or delete elements of the Selected Acquisition Report, consistent with the findings of the study.

(c) REPORT.—Not later than March 1, 2007, the Secretary shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on the results of the study, including such recommendations as the Secretary considers appropriate.

SEC. 804. BIANNUAL UPDATES ON IMPLEMENTATION OF ACQUISITION REFORM IN THE DEPARTMENT OF DEFENSE.

(a) BIANNUAL UPDATES REQUIREMENT.—Not later than January 1 and July 1 of each year, beginning with January 1, 2007, the Secretary of Defense shall provide to the Committees on Armed Services of the Senate and the House of Representatives a report containing an update on the implementation of plans to reform the acquisition system in the Department of Defense.

(b) MATTERS COVERED.—Each report provided under subsection (a) shall cover the implementation of reforms of the processes for acquisition, including generation of requirements, award of contracts, and financial management. At a minimum, the reports shall take into account the recommendations made by the following:

(1) The Defense Acquisition Performance Assessment Panel.

(2) The Defense Science Board Summer Study on Transformation, issued in February 2006.

that all personnel with responsibility for developing such requirements receive certification training by September 30, 2008.

The conferees believe that the training program established in accordance with this provision should address:

(1) the interrelationship between the requirements, budget, and acquisition processes;

(2) the importance of developing requirements that facilitate joint operations;

(3) the need to ensure that requirements are developed early in a program and the adverse effect of introducing new requirements after the commencement of system development and demonstration;

(4) the linkage between requirements and capability shortfalls identified by combatant commanders;

(5) the need for sound analysis of alternatives, realistic technical assessments based on technology readiness levels, and consultation with production engineers on the cost, schedule, and technical feasibility of requirements;

(6) the need for engineering feasibility assessments that weigh the technology readiness, integration, cost, and schedule impacts of proposed changes to requirements;

(7) the importance of developing requirements that are technologically mature, feasible, and achievable; and

(8) the importance of stable requirements to provide the baseline for successful program execution.

Additional requirements relating to technical data rights (sec. 802)

The House bill contained a provision (sec. 802) that would require the acquisition of full data rights necessary to support competition for contracts for sustainment of each major weapon system that is developed with federal or private funds. The provision would also require that any contract for a major system include options for acquiring, at any point during the life cycle of the system, major elements of technical data not acquired at the time of the initial contract award.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment that would direct the Under Secretary of Defense for Acquisition, Technology, and Logistics to require program managers to assess long-term technical data needs and establish corresponding acquisition strategies to ensure availability of technical data rights for major weapon system life cycle sustainment. The amendment would also modify title 10 of the United States Code to distinguish between commercial items and major weapon systems, subsystems, and components of major weapon systems (regardless of whether they may be characterized as commercial or non-commercial). In the case of a challenge made to a claim that the latter group of systems or components was developed exclusively at private expense, the burden of proof would be on the contractor or subcontractor.

Study and report on revisions to Selected Acquisition Report requirements (sec. 803)

The House bill contained a provision (sec. 803) that would require the Under Secretary of Defense for Acquisition, Technology,

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111TH CONGRESS *1st Session*	SENATE	REPORT 111–35

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2010

REPORT

[TO ACCOMPANY S. 1390]

ON

AUTHORIZING APPROPRIATIONS FOR FISCAL YEAR 2010 FOR MILITARY ACTIVITIES OF THE DEPARTMENT OF DEFENSE, TO PRESCRIBE MILITARY PERSONNEL STRENGTHS FOR FISCAL YEAR 2010, AND FOR OTHER PURPOSES

TOGETHER WITH

ADDITIONAL VIEWS

COMMITTEE ON ARMED SERVICES UNITED STATES SENATE

JULY 2, 2009.—Ordered to be printed
Filed, under authority of the order of the Senate of June 25, 2009

Department of Defense training for acquisition and audit personnel.

Subtitle C—Contractor Matters

Authority for government support contractors to have access to technical data belonging to prime contractors (sec. 821)

The committee recommends a provision that would authorize the Department of Defense (DOD) to provide access to technical data delivered under a DOD contract to a support contractor, to enable the support contractor to furnish independent and impartial advice or technical assistance to DOD in support of DOD's management and oversight of the contract. The provision requires the support contractor to make a series of commitments, including exposure to criminal, civil, administrative, and contractual penalties, to ensure that such access is not abused.

Extension and enhancement of authorities on the Commission on Wartime Contracting in Iraq and Afghanistan (sec. 822)

The committee recommends a provision that would provide a 1-year extension for the Commission on Wartime Contracting in Iraq and Afghanistan, established pursuant to section 841 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181), in order to achieve expanded review and investigation into wartime contracting consistent with the Commission's charter.

The Commission shall continue to receive administrative support from the Washington Headquarters Service of the Department of Defense and may continue to receive support from other federal agencies to facilitate its work. The Department of Defense is directed to provide support to the Commission, on a non-reimbursable basis, for its investigatory work conducted in combat theaters including travel and lodging.

Prohibition on interrogation of detainees by contractor personnel (sec. 823)

The committee recommends a provision that would require the Secretary of Defense to issue regulations providing that the interrogation of detainees during or in the aftermath of hostilities is an inherently governmental function that cannot be transferred to private sector contractors. The regulations would become effective 1 year after the date of the enactment of this Act, to provide the Department of Defense time to comply.

The interrogation of detainees entails the exercise of substantial discretion in applying government authority and has frequently had a significant impact on the life and liberty of the individuals questioned. The committee concludes that the conduct of such interrogations is an inherently governmental function that should be performed exclusively by military or civilian employees of the Department.

111TH CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

REPORT
111–288

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2010

CONFERENCE REPORT

TO ACCOMPANY

H.R. 2647

OCTOBER 7, 2009.—Ordered to be printed

party concerning such acquisition under any other requirement of law or regulation.

(2) DISCLOSURE.—Nothing in this section shall be construed to require the public availability of information that is exempt from public disclosure under section 552(b) of title 5, United States Code, or is otherwise restricted from public disclosure by law or Executive order.

(3) ISSUANCE OF SOLICITATION.—Nothing in this section shall be construed to require a contracting officer to delay the issuance of a solicitation in order to meet the requirements of subsection (a) if the expedited issuance of such solicitation is otherwise authorized under any other requirement of law or regulation.

Subtitle C—Contractor Matters

SEC. 821. AUTHORITY FOR GOVERNMENT SUPPORT CONTRACTORS TO HAVE ACCESS TO TECHNICAL DATA BELONGING TO PRIME CONTRACTORS.

(a) AUTHORITY FOR ACCESS TO TECHNICAL DATA.—Subsection (c) of section 2320 of title 10, United States Code, is amended—

(1) in paragraph (1), by striking "or" at the end;

(2) by redesignating paragraph (2) as paragraph (3); and

(3) by inserting after paragraph (1) the following new paragraph (2):

"(2) notwithstanding any limitation upon the license rights conveyed under subsection (a), allowing a covered Government support contractor access to and use of any technical data delivered under a contract for the sole purpose of furnishing independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of the program or effort to which such technical data relates; or".

(b) COVERED GOVERNMENT SUPPORT CONTRACTOR DEFINED.—Such section is further amended by adding at the end the following new subsection:

"(f) In this section, the term 'covered Government support contractor' means a contractor under a contract the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), which contractor—

"(1) is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

"(2) executes a contract with the Government agreeing to and acknowledging—

"(A) that proprietary or nonpublic technical data furnished will be accessed and used only for the purposes stated in that contract;

"(B) that the covered Government support contractor will enter into a non-disclosure agreement with the contractor to whom the rights to the technical data belong;

"(C) that the covered Government support contractor will take all reasonable steps to protect the proprietary and nonpublic nature of the technical data furnished to the covered Government support contractor during the program or effort for the period of time in which the Government is restricted from disclosing the technical data outside of the Government;

"(D) that a breach of that contract by the covered Government support contractor with regard to a third party's ownership or rights in such technical data may subject the covered Government support contractor—

"(i) to criminal, civil, administrative, and contractual actions in law and equity for penalties, damages, and other appropriate remedies by the United States; and

"(ii) to civil actions for damages and other appropriate remedies by the contractor or subcontractor whose technical data is affected by the breach; and

"(E) that such technical data provided to the covered Government support contractor under the authority of this section shall not be used by the covered Government support contractor to compete against the third party for Government or non-Government contracts.".

SEC. 822. EXTENSION AND ENHANCEMENT OF AUTHORITIES ON THE COMMISSION ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN.

(a) DATE OF FINAL REPORT.—Subsection (d)(3) of section 841 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181; 122 Stat. 230) is amended by striking "two years" and inserting "three years".

(b) ASSISTANCE FROM FEDERAL AGENCIES.—Such section is further amended—

(1) by redesignating subsections (f) and (g) as subsections (g) and (h), respectively; and

(2) by inserting after subsection (e) the following new subsection (f):

"(f) ASSISTANCE FROM FEDERAL AGENCIES.—

"(1) DEPARTMENT OF DEFENSE.—The Secretary of Defense shall provide to the Commission administrative support for the performance of the Commission's functions in carrying out the requirements of this section.

"(2) TRAVEL AND LODGING IN COMBAT THEATERS.—The administrative support provided the Commission under paragraph (1) shall include travel and lodging undertaken in combat theaters, which support shall be provided through funds made available for that purpose through the Washington Headquarters Services or on a non-reimbursable basis, as appropriate.

"(3) OTHER DEPARTMENTS AND AGENCIES.—In addition to the support required by paragraph (1), any department or agency of the Federal Government may provide to the Commission such services, funds, facilities, staff, and other support services

The Senate recedes with an amendment that would require the publication of a notification that is consistent with existing requirements and includes a brief description of the benefits that are expected as a result of the bundling.

Subtitle C—Contractor Matters

Authority for Government support contractors to have access to technical data belonging to prime contractors (sec. 821)

The Senate amendment contained a provision (sec. 821) that would authorize the Department of Defense (DOD) to provide access to technical data delivered under a DOD contract to a support contractor providing advice and assistance to the government.

The House bill contained no similar provision.

The House recedes with an amendment that would: (1) delete the criminal penalties for disclosure of information; and (2) require the support contractor to agree to enter into a non-disclosure agreement with the contractor to whom the technical data rights belong. This modification would result in civil enforcement, rather than criminal enforcement, for violations of the non-disclosure requirements in the provision.

Extension and enhancement of authorities on the Commission on Wartime Contracting in Iraq and Afghanistan (sec. 822)

The Senate amendment contained a provision (sec. 822) that would extend the life of the Commission on Wartime Contracting in Iraq and Afghanistan and clarify the nature of the support to be provided to the Commission by the Department of Defense and other federal agencies.

The House bill contained no similar provision.

The House bill recedes with a clarifying amendment.

Authority for Secretary of Defense to reduce or deny award fees to companies found to jeopardize health or safety of Government personnel (sec. 823)

The House bill contained a provision (sec. 824) that would prohibit the payment of award and incentive fees to any defense contractor that has been determined to have caused the death or serious bodily injury of Department of Defense personnel.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment that would: (1) require the Secretary of Defense to consider any such contractor misconduct in assessments of contractor performance; and (2) authorize the Secretary to withhold or recover all or part of award fees for the relevant period of time on the basis of the negative impact of such misconduct on contractor performance.

Subtitle D—Acquisition Workforce Matters

Enhancement of expedited hiring authority for defense acquisition workforce positions (sec. 831)

The House bill contained a provision (sec. 821) that would clarify the expedited hiring authority for the defense acquisition workforce in section 1705 of title 10, United States Code.

Calendar No. 414

111TH CONGRESS *2d Session*	SENATE	REPORT 111–201

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2011

REPORT

[TO ACCOMPANY S. 3454]

ON

AUTHORIZING APPROPRIATIONS FOR FISCAL YEAR 2011 FOR MILITARY ACTIVITIES OF THE DEPARTMENT OF DEFENSE AND FOR MILITARY CONSTRUCTION, TO PRESCRIBE MILITARY PERSONNEL STRENGTHS FOR SUCH FISCAL YEAR, AND FOR OTHER PURPOSES

TOGETHER WITH

ADDITIONAL VIEWS

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

JUNE 4, 2010.—Ordered to be printed
Filed, under authority of the order of the Senate of May 28 (legislative day, May 26), 2010

clusively at private expense to meet validated military requirements.

The committee notes that the streamlined acquisition procedures developed under this section may have a particular utility in the Department's efforts to rapidly field military capabilities in response to urgent operational needs.

Competition for production and sustainment and rights in technical data (sec. 832)

The committee recommends a provision that would require the Secretary of Defense to issue guidance on rights in technical data to ensure that the Department of Defense (DOD) preserves the option of competition for contracts for the production and sustainment of systems or subsystems that are developed exclusively with Federal funds or without significant contribution by a contractor or subcontractor and that the United States is not required to pay more than once for the same technical data. The provision would also provide DOD with improved tools to address situations in which a contractor has erroneously asserted a restriction on the use or release of technical data that was developed exclusively with Federal funds or without significant contribution by the contractor or subcontractor.

Elimination of sunset date for protests of task and delivery order contracts (sec. 833)

The committee recommends a provision that would amend section 2304c of title 10, United States Code, to eliminate the sunset date for protests of task and delivery orders under Department of Defense contracts. The sunset date was included in section 2304c to provide the committee an opportunity to adjust the provision if the new protest authority resulted in a surge of bid protests. In April 2009, the Government Accountability Office reported that only a handful of bid protests are attributable to the new authority. The committee concludes that no adjustment to the authority is needed.

Inclusion of option amounts in limitations on authority of the Defense Advanced Research Projects Agency to carry out certain prototype projects (sec. 834)

The committee recommends a provision that would clarify that the dollar thresholds applicable to prototype projects carried out pursuant to section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103–160) include all option amounts.

Enhancement of Department of Defense authority to respond to combat and safety emergencies through rapid acquisition and deployment of urgently needed supplies (sec. 835)

The committee recommends a provision that would amend section 806 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (Public Law 107–314), as amended by section 811 of the Ronald W. Reagan National Defense Authorization Act for Fiscal year 2005 (Public Law 108–375), to enhance the authority

111TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
111–491

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2011

R E P O R T

OF THE

COMMITTEE ON ARMED SERVICES HOUSE OF REPRESENTATIVES

ON

H.R. 5136

together with

ADDITIONAL VIEWS

[Including cost estimate of the Congressional Budget Office]

MAY 21, 2010.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Undefinitized Contractual Actions

The committee notes that section 809 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181) requires the Secretary of Defense to issue guidance to ensure the implementation and enforcement of requirements applicable to undefinitized contractual actions (UCA). UCAs expose the Department to substantial risk in terms of cost and of contract performance, and section 809 was intended to address the length and proliferation of UCAs. The committee notes that the Department issued its guidance in August 2008 and substantially updated it in October 2009. This guidance instituted a semi-annual reporting requirement that allows the Department to track UCAs and ensure their compliance with the relevant requirements. The committee believes that the updated guidance, together with additional modifications adopted in accord with recent Government Accountability Office (GAO) recommendations, has worked substantially to address the concerns that led to the enactment of section 809. At the same time, the committee was troubled that GAO found several instances where UCAs that qualified for inclusion were not in the latest semi-annual report. The committee urges the Department to ensure that local commands are informed of, and properly motivated to comply with, the Department's guidance on UCAs.

LEGISLATIVE PROVISIONS

SUBTITLE A—ACQUISITION POLICY AND MANAGEMENT

Section 801—Disclosure to Litigation Support Contractors

This section would amend section 2320 of title 10, United States Code, to allow the Secretary of Defense to disclose technical data to a litigation support contractor for the purpose of assisting the Department of Defense in preparing for litigation. This section would require that the litigation support contractor: use the technical data only for the purpose of fulfilling its contract with the Department; take all reasonable steps to protect the technical data; and not use the technical data to compete with the owner of the technical data on any government or non-government contract. This section would take effect 120 days after the date of enactment of this Act.

Section 802—Designation of F135 and F136 Engine Development and Procurement Programs as Major Subprograms

This section would require the Secretary of Defense, within 30 days of the date of enactment of this Act, to designate the F135 and F136 engine development and procurement programs as major subprograms in accordance with section 2430a of title 10, United States Code, and would require the Secretary to use the milestone B decision for the F135 and F136 engine development and procurement programs as the baseline for the reporting requirements referred to in section 2430a(b) of title 10, United States Code.

This section would specify the application of section 2433a of title 10, United States Code, (commonly referred to as Nunn-McCurdy) to the engine subprograms designated under this section. If an engine subprogram designated under this section were to breach one

111TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

HASC No.
5

IKE SKELTON NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2011

COMMITTEE PRINT

OF THE

COMMITTEE ON ARMED SERVICES HOUSE OF REPRESENTATIVES

LEGISLATIVE TEXT AND
JOINT EXPLANATORY STATEMENT

TO ACCOMPANY

H.R. 6523

PUBLIC LAW 111–383

DECEMBER 2010

Subtitle A—Acquisition Policy and Management

SEC. 801. DISCLOSURE TO LITIGATION SUPPORT CONTRACTORS.

(a) IN GENERAL.—Section 2320 of title 10, United States Code, is amended—

(1) in subsection (c)(2)—

(A) by striking "subsection (a), allowing" and inserting "subsection (a)—

"(A) allowing"; and

(B) by adding at the end the following new subparagraph:

"(B) allowing a covered litigation support contractor access to and use of any technical, proprietary, or confidential data delivered under a contract for the sole purpose of providing litigation support to the Government in the form of administrative, technical, or professional services during or in anticipation of litigation; or"; and

(2) by inserting after subsection (f) the following:

"(g) In this section, the term 'covered litigation support contractor' means a contractor (including an expert or technical consultant) under contract with the Department of Defense to provide litigation support, which contractor executes a contract with the Government agreeing to and acknowledging—

"(1) that proprietary or nonpublic technical data furnished will be accessed and used only for the purposes stated in that contract;

"(2) that the covered litigation support contractor will take all reasonable steps to protect the proprietary and nonpublic nature of the technical data furnished to the covered litigation support contractor; and

"(3) that such technical data provided to the covered litigation support contractor under the authority of this section shall not be used by the covered litigation support contractor to compete against the third party for Government or non-Government contracts.".

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall take effect on the date that is 120 days after the date of the enactment of this Act.

SEC. 802. DESIGNATION OF ENGINE DEVELOPMENT AND PROCUREMENT PROGRAM AS MAJOR SUBPROGRAM.

(a) DESIGNATION AS MAJOR SUBPROGRAM.—Not later than 30 days after the date of the enactment of this Act, the Secretary of

(D) The actions the Department of Defense has taken to identify alternatives to fire resistant rayon fiber for the production of military uniforms.

(E) The extent to which such alternatives provide an adequate substitute for fire resistant rayon fiber for the production of military uniforms.

(F) The impediments to the use of such alternatives, and the actions the Department has taken to overcome such impediments.

(G) The extent to which uncertainty regarding the future availability of fire resistant rayon fiber results in instability or inefficiency for elements of the United States textile industry that use fire resistant rayon fiber, and the extent to which that instability or inefficiency results in less efficient business practices, impedes investment and innovation, and thereby results or may result in higher costs, delayed delivery, or a lower quality of product delivered to the Government.

(H) The extent to which any modifications to existing law or regulation may be necessary to ensure the efficient acquisition of fire resistant fiber or alternative fire resistant products for the production of military uniforms.

SEC. 822. REPEAL OF REQUIREMENT FOR CERTAIN PROCUREMENTS FROM FIRMS IN THE SMALL ARMS PRODUCTION INDUSTRIAL BASE.

(a) REPEAL.—Section 2473 of title 10, United States Code, is repealed.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 146 of such title is amended by striking the item relating to section 2473.

SEC. 823. REVIEW OF REGULATORY DEFINITION RELATING TO PRODUCTION OF SPECIALTY METALS.

(a) REVIEW REQUIRED.—The Secretary of Defense shall review the regulations specified in subsection (b) to ensure that the definition of the term "produce" in such regulations complies with the requirements of section 2533b of title 10, United States Code. In carrying out the review, the Secretary shall seek public comment, consider congressional intent, and revise the regulations as the Secretary considers necessary and appropriate.

(b) REGULATIONS SPECIFIED.—The regulations referred to in subsection (a) are any portion of subpart 252.2 of the defense supplement to the Federal Acquisition Regulation that includes a definition of the term "produce" for purposes of implementing section 2533b of title 10, United States Code.

(c) COMPLETION OF REVIEW.—The Secretary shall complete the review required by subsection (a) and any necessary and appropriate revisions to the defense supplement to the Federal Acquisition Regulation not later than 270 days after the date of the enactment of this Act.

SEC. 824. GUIDANCE RELATING TO RIGHTS IN TECHNICAL DATA.

(a) REVIEW OF GUIDANCE.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall review guidance issued by the military departments on the imple-

mentation of section 2320(e) of title 10, United States Code, to ensure that such guidance is consistent with the guidance issued by the Under Secretary of Defense for Acquisition, Technology, and Logistics and the requirements of this section. Such guidance shall be designed to ensure that the United States—

(1) preserves the option of competition for contracts for the production and sustainment of systems or subsystems that are developed exclusively with Federal funds as defined in accordance with the amendments made by this section; and

(2) is not required to pay more than once for the same technical data.

(b) RIGHTS IN TECHNICAL DATA.—Section 2320(a) of title 10, United States Code, is amended—

(1) in paragraph (2)(F)(i)—

(A) by redesignating subclauses (I) and (II) as subclauses (II) and (III), respectively; and

(B) by inserting before subclause (II), as so redesignated, the following new subclause (I):

"(I) rights in technical data described in subparagraph (A) for which a use or release restriction has been erroneously asserted by a contractor or subcontractor;"; and

(2) in paragraph (3), by striking "for the purposes of definitions under this paragraph" and inserting "for the purposes of paragraph (2)(B), but shall be considered to be Federal funds for the purposes of paragraph (2)(A)".

(c) VALIDATION OF PROPRIETARY DATA RESTRICTIONS.—Section 2321(d)(2) of title 10, United States Code, is amended—

(1) in subparagraph (A), by striking "A challenge" and inserting "Except as provided in subparagraph (C), a challenge"; and

(2) by adding at the end the following new subparagraph (C):

"(C) The limitation in this paragraph shall not apply to a case in which the Secretary finds that reasonable grounds exist to believe that a contractor or subcontractor has erroneously asserted a use or release restriction with regard to technical data described in section 2320(a)(2)(A) of this title.".

SEC. 825. EXTENSION OF SUNSET DATE FOR CERTAIN PROTESTS OF TASK AND DELIVERY ORDER CONTRACTS.

Paragraph (3) of section 2304c(e) of title 10, United States Code, is amended to read as follows:

"(3) Paragraph (1)(B) and paragraph (2) of this subsection shall not be in effect after September 30, 2016.".

SEC. 826. INCLUSION OF OPTION AMOUNTS IN LIMITATIONS ON AUTHORITY OF THE DEPARTMENT OF DEFENSE TO CARRY OUT CERTAIN PROTOTYPE PROJECTS.

Section 845 of the National Defense Authorization Act for Fiscal Year 1994 (10 U.S.C. 2371 note) is amended—

(1) in subsection (a)(2)—

(A) in subparagraph (A), by inserting "(including all options)" after "not in excess of $100,000,000"; and

(B) in subparagraph (B), by inserting "(including all options)" after "in excess of $100,000,000"; and

(2) in subsection (e)(3)(A), by inserting "(including all options)" after "does not exceed $50,000,000".

dence by military occupation. The amendment would also require the secretaries of the military departments to provide a copy of any assessments, studies, findings, plans, and reports to the centers of excellence established by sections 1621 and 1622 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181).

Licensed mental health counselors and the TRICARE program (sec. 724)

The House bill contained a provision (sec. 729) that would express the sense of Congress that the Secretary of Defense should implement the recommendations made by the Institute of Medicine in its congressionally-mandated report regarding the credentials, preparation, and training of licensed mental health counselors in order for them to practice independently under the TRICARE program, as well as the study's recommendations regarding TRICARE's implementation of a comprehensive quality management system for all of its mental health professionals.

The Senate committee-reported bill contained a provision (sec. 703) that would include licensed mental health counselors in the list of providers who are authorized to diagnose and treat patients under the TRICARE program. The provision would also require the Secretary of Defense to issue regulations setting forth the specific requirements that such counselors must meet in order to practice independently under TRICARE.

The agreement includes the Senate provision with an amendment that would require the Secretary of Defense to issue regulations in accordance with section 717 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181) no later than June 20, 2011.

TITLE VIII—ACQUISITION POLICY, ACQUISITION MANAGEMENT, AND RELATED MATTERS

Subtitle A—Acquisition Policy and Management

Disclosure to litigation support contractors (sec. 801)

The House bill contained a provision (sec. 801) that would amend section 2320 of title 10, United States Code, to address the protections applicable when non-public information is disclosed to litigation support contractors.

The Senate committee-reported bill contained no similar provision.

The agreement includes the House provision with a clarifying amendment.

Designation of engine development and procurement program as major subprogram (sec. 802)

The House bill contained a provision (sec. 802) that would require the Secretary of Defense to designate the F135 and F136 engine development and procurement programs as major subprograms of the F–35 Lightning II aircraft major defense acquisition program, in accordance with section 2430a of title 10, United States Code.

The agreement includes a provision combining elements of the House and Senate provisions.

Subtitle C—Amendments to General Contracting Authorities, Procedures, and Limitations

Provisions relating to fire resistant fiber for production of military uniforms (sec. 821)

The House bill contained a provision (sec. 811) that would extend to 2021 the authority in section 829 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181) for the Department of Defense to procure fire resistant rayon fiber that is manufactured in a foreign country under certain circumstances.

The Senate committee-reported bill contained a provision (sec. 856) that would require a comprehensive study of the issue.

The agreement includes the House provision with an amendment that would extend the authority in section 829 for 2 years and require a comprehensive study of the issue.

Repeal of requirement for certain procurements from firms in the small arms production industrial base (sec. 822)

The House bill contained a provision (sec. 812) that would amend section 2473 of title 10, United States Code.

The Senate committee-reported bill contained a provision (sec. 817) that would repeal section 2473 of title 10, United States Code.

The agreement includes the Senate provision.

Review of regulatory definition relating to production of specialty metals (sec. 823)

The House bill contained a provision (sec. 813) that would define the term "produced" for the purposes of section 2533b of title 10, United States Code, relating to the production of specialty metals within the United States.

The Senate committee-reported bill contained no similar provision.

The agreement includes a provision that would require the Secretary of Defense to review and, if necessary, revise the definition of the term "produced" currently included in the regulations implementing section 2533b to ensure that the definition is consistent with the language of the statute and congressional intent in enacting the provision.

Guidance relating to rights in technical data (sec. 824)

The Senate committee-reported bill contained a provision (sec. 832) that would require the Secretary of Defense to revise guidance on rights in technical data to promote competition and ensure that the United States is not required to pay more than once for the same technical data.

The House bill contained no similar provision.

The agreement includes the provision with a clarifying amendment.

Calendar No. 80

112TH CONGRESS *1st Session*	SENATE	REPORT 112–26

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012

REPORT

[TO ACCOMPANY S. 1253]

ON

TO AUTHORIZE APPROPRIATIONS FOR FISCAL YEAR 2012 FOR MILITARY ACTIVITIES OF THE DEPARTMENT OF DEFENSE AND FOR MILITARY CONSTRUCTION, TO PRESCRIBE MILITARY PERSONNEL STRENGTHS FOR FISCAL YEAR 2012, AND FOR OTHER PURPOSES

TOGETHER WITH

ADDITIONAL VIEWS

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

JUNE 22, 2011.—Ordered to be printed

Subtitle C—Amendments Relating to General Contracting Authorities, Procedures, and Limitations

Treatment for technical data purposes of independent research and development and bid and proposal costs (sec. 841)

The committee recommends a provision that would clarify the treatment of independent research and development (IR&D) and bid and proposal (B&P) costs for the purposes of section 2320 of title 10, United States Code, governing rights in technical data. The provision recommended by the committee would ensure government-purpose rights (the right to use the data to ensure competition for future government purchases) in technical data for an item or process that is developed through the expenditure of IR&D and B&P costs in the case of: (1) an item or process for which the contractor contributed less than 10 percent of the cost of development; or (2) an item or process that is integrated into a major system and either: (a) cannot be segregated from the system as a whole; or (b) was developed predominantly at government expense.

Extension to all management employees of applicability of the senior executive benchmark compensation amount for purposes of allowable cost limitations under government contracts (sec. 842)

The committee recommends a provision that would amend section 2324 of title 10, United States Code, to extend the existing cap on allowable costs for defense contractor executive compensation to apply to all contractor management employees. Under current law, the cap applies only to the five most highly-compensated management employees in each segment of the company. The committee concludes that the extension of the provision is justified to ensure that the Department is not required to reimburse defense contractors for unreasonable or excessive compensation paid to company executives.

Covered contracts for purposes of requirements on contractor business systems (sec. 843)

The committee recommends a provision that would amend section 893 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111–383) to clarify which defense contracts are covered contracts for the purpose of the authority to withhold payments under section 893.

Compliance with defense procurement requirements for purposes of internal controls of non-defense agencies for procurements on behalf of the Department of Defense (sec. 844)

The committee recommends a provision that would clarify the standards that a non-defense agency would have to meet to be suitable for interagency contracting by the Department of Defense. The provision recommended by the committee would require a non-defense agency to certify that the agency is compliant with: (1) the Federal Acquisition Regulation and other laws and regulations that apply to the procurement of property and services by federal agen-

112TH CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

REPORT
112–78

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012

R E P O R T

OF THE

COMMITTEE ON ARMED SERVICES HOUSE OF REPRESENTATIVES

ON

H.R. 1540

together with

ADDITIONAL VIEWS

[Including cost estimate of the Congressional Budget Office]

MAY 17, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

66–252 WASHINGTON : 2011

LEGISLATIVE PROVISIONS

SUBTITLE A—ACQUISITION POLICY AND MANAGEMENT

Section 801—Requirements Relating to Core Logistics Capabilities for Milestone A and Milestone B and Elimination of References to Key Decision Points A and B

This section would amend section 2366a and 2366b of title 10, United States Code, to require the Milestone Decision Authority to certify that a preliminary analysis of core logistics capabilities for each major weapons system has been performed as entrance criteria for entering the technology development phase of a major defense acquisition program (milestone A) and that the core logistics requirements and associated sustaining workloads for the weapons system have been determined as entrance criteria for entering the engineering and manufacturing development phase (milestone B). This section also would require certification that relevant sustainment criteria and alternatives were sufficiently evaluated and addressed in the initial capabilities document to support an analysis of alternatives and the development of key performance parameters for sustainment of the program throughout its projected life cycle. Furthermore, this section would require certification that life-cycle sustainment planning has identified and evaluated relevant sustainment costs through development, production, operation, sustainment, and disposal of the program, and any alternatives, and that such costs are reasonable and have been accurately estimated.

The committee is aware that the Secretary issued formal guidance on the operation of the defense acquisition system on October 18, 2010, which directed space systems to be subject to milestone A and milestone B requirements. Therefore, this section also would strike references to "key decisions points" in section 2366a and 2366b of title 10, United States Code.

Section 802—Revision to Law Relating to Disclosures to Litigation Support Contractors

This section would amend title 10, United States Code, to include a new section relating to the disclosure of confidential commercial, financial or proprietary information, technical data, or other privileged information to a litigation support contractor for the sole purpose of providing litigation support. This section would require the litigation support contractor to execute a contract with the Government agreeing to or acknowledging that any information furnished will be used only for the purpose stated in the contract, that the litigation support contractor will take all precautions necessary to protect the sensitive information, that the sensitive information will not be used by the litigation support contractor to compete against the third party for contracts, and that a violation of any of the above would be basis for the Government to terminate the contract. This section would also repeal a superseded provision in section 2320 of title 10, United States Code.

112TH CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

REPORT
112–329

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012

CONFERENCE REPORT

TO ACCOMPANY

H.R. 1540

DECEMBER 12, 2011.—Ordered to be printed

sion Point approval in the case of a space program," each place it appears in subparagraphs (B) and (C).

SEC. 802. REVISION TO LAW RELATING TO DISCLOSURES TO LITIGATION SUPPORT CONTRACTORS.

(a) IN GENERAL.—

(1) REVISED AUTHORITY TO COVER DISCLOSURES UNDER LITIGATION SUPPORT CONTRACTS.—Chapter 3 of title 10, United States Code, is amended by inserting after section 129c the following new section:

"§ 129d. Disclosure to litigation support contractors

"(a) DISCLOSURE AUTHORITY.—An officer or employee of the Department of Defense may disclose sensitive information to a litigation support contractor if—

"(1) the disclosure is for the sole purpose of providing litigation support to the Government in the form of administrative, technical, or professional services during or in anticipation of litigation; and

"(2) under a contract with the Government, the litigation support contractor agrees to and acknowledges—

"(A) that sensitive information furnished will be accessed and used only for the purposes stated in the relevant contract;

"(B) that the contractor will take all precautions necessary to prevent disclosure of the sensitive information provided to the contractor;

"(C) that such sensitive information provided to the contractor under the authority of this section shall not be used by the contractor to compete against a third party for Government or non-Government contracts; and

"(D) that the violation of subparagraph (A), (B), or (C) is a basis for the Government to terminate the litigation support contract of the contractor.

"(b) DEFINITIONS.—In this section:

"(1) The term 'litigation support contractor' means a contractor (including an expert or technical consultant) under contract with the Department of Defense to provide litigation support.

"(2) The term 'sensitive information' means confidential commercial, financial, or proprietary information, technical data, or other privileged information.".

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 129c the following new item:

"129d. Disclosure to litigation support contractors.".

(b) REPEAL OF SUPERSEDED PROVISIONS ENACTED IN PUBLIC LAW 111–383.—Section 2320 of such title is amended—

(1) in subsection (c)(2)—

(A) by striking "subsection (a)" and all that follows through "a covered Government" and inserting "subsection (a), allowing a covered Government"; and

(B) by striking subparagraph (B); and

(2) by striking subsection (g).

United States Code, for the acquisition of right-hand drive passenger sedans is included on the list of dollar thresholds that are subject to adjustment for inflation in accordance with the requirements of section 1908 of title 41, United States Code, and is adjusted pursuant to such provision, as appropriate.

SEC. 815. RIGHTS IN TECHNICAL DATA AND VALIDATION OF PROPRIETARY DATA RESTRICTIONS.

(a) RIGHTS IN TECHNICAL DATA.—Section 2320 of title 10, United States Code, is amended—

(1) in subsection (a)—

(A) in paragraph (2)(D)(i)—

(i) in subclause (I), by striking "or" at the end;

(ii) by redesignating subclause (II) as subclause (III); and

(iii) by inserting after subclause (I) the following new subclause (II):

"(II) is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes; or";

(B) in paragraph (2)(E), by striking "and shall be based" and all that follows through "such rights shall" and inserting ". The United States shall have government purpose rights in such technical data, except in any case in which the Secretary of Defense determines, on the basis of criteria established in such regulations, that negotiation of different rights in such technical data would be in the best interest of the United States. The establishment of any such negotiated rights shall"; and

(C) in paragraph (3), by striking "for the purposes of paragraph (2)(B), but shall be considered to be Federal funds for the purposes of paragraph (2)(A)" and inserting "for the purposes of the definitions under this paragraph"; and

(2) in subsection (b)—

(A) in paragraph (7), by striking "and" at the end;

(B) in paragraph (8), by striking the period and inserting a semicolon; and

(C) by adding at the end the following new paragraphs:

"(9) providing that, in addition to technical data that is already subject to a contract delivery requirement, the United States may require at any time the delivery of technical data that has been generated or utilized in the performance of a contract, and compensate the contractor only for reasonable costs incurred for having converted and delivered the data in the required form, upon a determination that—

"(A) the technical data is needed for the purpose of reprocurement, sustainment, modification, or upgrade (including through competitive means) of a major system or subsystem thereof, a weapon system or subsystem thereof, or any noncommercial item or process; and

"(B) the technical data—

"(i) pertains to an item or process developed in whole or in part with Federal funds; or

"(ii) is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes; and

"(10) providing that the United States is not foreclosed from requiring the delivery of the technical data by a failure to challenge, in accordance with the requirements of section 2321(d) of this title, the contractor's assertion of a use or release restriction on the technical data.".

(b) VALIDATION OF PROPRIETARY DATA RESTRICTIONS.—Section 2321(d)(2) of such title is amended—

(1) in subparagraph (A)—

(A) in the matter preceding clause (i), by striking "Except as provided in subparagraph (C)" and all that follows through "three-year period" and inserting "A challenge to a use or release restriction asserted by the contractor in accordance with applicable regulations may not be made under paragraph (1) after the end of the six-year period";

(B) in clause (ii), by striking "or" at the end;

(C) in clause (iii) by striking the period and inserting "; or"; and

(D) by adding at the end the following new clause:

"(iv) are the subject of a fraudulently asserted use or release restriction.";

(2) in subparagraph (B), by striking "three-year period" each place it appears and inserting "six-year period"; and

(3) by striking subparagraph (C).

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section shall take effect on the date of the enactment of this Act.

(2) EXCEPTION.—The amendment made by subsection (a)(1)(C) shall take effect on January 7, 2011, immediately after the enactment of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111–383), to which such amendment relates.

SEC. 816. COVERED CONTRACTS FOR PURPOSES OF REQUIREMENTS ON CONTRACTOR BUSINESS SYSTEMS.

Paragraph (3) of section 893(f) of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111–383; 124 Stat. 4312; 10 U.S.C. 2302 note) is amended to read as follows:

"(3) The term 'covered contract' means a contract that is subject to the cost accounting standards promulgated pursuant to section 1502 of title 41, United States Code, that could be affected if the data produced by a contractor business system has a significant deficiency.".

SEC. 817. COMPLIANCE WITH DEFENSE PROCUREMENT REQUIREMENTS FOR PURPOSES OF INTERNAL CONTROLS OF NON-DEFENSE AGENCIES FOR PROCUREMENTS ON BEHALF OF THE DEPARTMENT OF DEFENSE.

Section 801(d) of the National Defense Authorization Act for Fiscal Year 2008 (10 U.S.C. 2304 note) is amended by striking "with the requirements" and all that follows and inserting "with the following:

The House recedes.

The conferees understand that the Department is preparing to move ahead with this transfer.

TITLE VIII—ACQUISITION POLICY, ACQUISITION MANAGEMENT, AND RELATED MATTERS

Subtitle A—Acquisition Policy and Management

Requirements relating to core depot-level maintenance and repair capabilities for Milestone A and Milestone B and elimination of references to Key Decision Points A and B (sec. 801)

The House bill contained a provision (sec. 801) that would amend sections 2366a and 2366b of title 10, United State Code, to incorporate certification requirements for core logistics capabilities and to eliminate obsolete references to Key Decision Points A and B for Space Programs.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment that would ensure that life cycle sustainment planning, to include core depot-level maintenance and repair capabilities, is considered at applicable milestones for major defense acquisition programs.

Revision to law relating to disclosures to litigation support contractors (sec. 802)

The House bill contained a provision (sec. 802) that would clarify the authority of the Department of Defense to disclose sensitive information to litigation support contractors.

The Senate amendment contained no similar provision.

The Senate recedes.

Extension of applicability of the senior executive benchmark compensation amount for purposes of allowable cost limitations under defense contracts (sec. 803)

The House bill contained a provision (sec. 803) that would expand the limitation on allowable compensation for defense contractor employees to any individual performing under a covered contract.

The Senate amendment contained a provision (sec. 842) that would expand the limitation to contractor and subcontractor employees and reduce the ceiling amount to the annual amount paid to the President of the United States under section 102 of title 3, United States Code.

The House recedes with an amendment that would expand the limitation to all contractor employees, subject to the authority of the Secretary of Defense to establish narrowly-targeted exceptions for scientists and engineers upon a determination that such exceptions are needed to ensure that the Department of Defense has continued access to needed skills and capabilities. The Secretary is directed to report to the congressional defense committees on whether there are any additional categories of employees for whom such authority may be needed. The conferees understand that the term "contractor employees" includes employees of a subcontractor.

Annual report on single-award task and delivery order contracts (sec. 809)

The Senate amendment contained a provision (sec. 824) that would streamline reporting requirements for single-award task and delivery order contracts.

The House bill contained no similar provision.

The House recedes.

Subtitle B—Amendments to General Contracting Authorities, Procedures, and Limitations

Calculation of time period relating to report on critical changes in major automated information systems (sec. 811)

The House bill contained a provision (sec. 811) that would clarify the trigger for determining whether a major automated information system has achieved full deployment decision in a timely manner.

The Senate amendment contained no similar provision.

The Senate recedes with a technical amendment based on comments from the Department of Defense.

Change in deadline for submission of Selected Acquisition Reports from 60 to 45 days (sec. 812)

The House bill contained a provision (sec. 812) that would adjust the deadline for submission of Selected Acquisition Reports.

The Senate amendment contained no similar provision.

The Senate recedes.

Extension of sunset date for certain protests of task and delivery order contracts (sec. 813)

The House bill contained a provision (sec. 813) that would extend the sunset date for certain protests of task and delivery order contracts.

The Senate amendment contained no similar provision.

The Senate recedes.

Clarification of Department of Defense authority to purchase right-hand drive passenger sedan vehicles and adjustment of threshold for inflation (sec. 814)

The House bill contained a provision (sec. 814) that would clarify Department of Defense authority to purchase right-hand drive passenger sedans.

The Senate amendment contained a similar provision (sec. 884).

The House recedes with a technical amendment.

Rights in technical data and validation of proprietary data restrictions (sec. 815)

The Senate amendment contained a provision (sec. 841) that would clarify the treatment of independent research and development and bid and proposal costs for purposes of section 2320 of title 10, United States Code, governing rights in technical data.

The House bill contained no similar provision.

The House recedes with an amendment that would clarify the circumstances in which the United States has government-purpose rights in technical data and the extent to which the United States may require the delivery of technical data to which it already has rights, but the delivery of which was not required in the contract.

Covered contracts for purposes of requirements on contractor business systems (sec. 816)

The Senate amendment contained a provision (sec. 843) that would clarify what contracts are covered for the purposes of withholding funds under section 893 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111–383).

The House bill contained no similar provision.

The House recedes.

Compliance with defense procurement requirements for purposes of internal controls of non-defense agencies for procurements on behalf of the Department of Defense (sec. 817)

The Senate amendment contained a provision (sec. 844) that would amend section 801 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181) to clarify that when the Department of Defense makes purchases through non-defense agencies the other agencies are expected to comply with the requirements of the Federal Acquisition Regulation and other laws and regulations that apply to procurements by all federal agencies and with laws and regulations applicable to inter-agency transactions by the Department of Defense, but not with internal Department of Defense procurement rules.

The House bill contained no similar provision.

The House recedes.

Detection and avoidance of counterfeit electronic parts (sec. 818)

The Senate amendment contained a provision (sec. 848) that would strengthen the detection, avoidance, notification, and remediation of counterfeit and suspect counterfeit electronic parts in defense systems.

The House bill contained no similar provision.

The House recedes with a clarifying amendment.

The conferees note that the authority provided to the Secretary of the Treasury to share information under this provision should not be interpreted to suggest that any other government agency lacks the authority to share similar information with the owner of a copyright or registered mark.

Modification of certain requirements of the Weapon Systems Acquisition Reform Act of 2009 (sec. 819)

The House bill contained a provision (sec. 841) that would amend certain provisions of acquisition law to provide additional flexibility to the Department of Defense.

The Senate amendment contained a similar provision (sec. 802).

The House recedes.

Calendar No. 88

114TH CONGRESS *1st Session*	SENATE	REPORT 114–49

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2016

REPORT

[TO ACCOMPANY S. 1376]

ON

TO AUTHORIZE APPROPRIATIONS FOR FISCAL YEAR 2016 FOR MILITARY ACTIVITIES OF THE DEPARTMENT OF DEFENSE AND FOR MILITARY CONSTRUCTION, TO PRESCRIBE MILITARY PERSONNEL STRENGTHS FOR SUCH FISCAL YEAR, AND FOR OTHER PURPOSES

TOGETHER WITH

ADDITIONAL VIEWS

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

MAY 19, 2015.—Ordered to be printed

million but more than the current threshold of $750,000, the Department of Defense (DOD) would be required to establish a risk-based contracting approach, under which certified cost or pricing data would be required for a risk-based sample of contracts, to ensure that DOD is getting fair and reasonable prices for such contracts.

The committee believes that a 100 percent review of certified cost or pricing data on thousands of small contracts is not the best use of DOD's limited acquisition and auditing resources, particularly for those contracts that have been awarded based on a technical competition. By enabling DOD to adopt a risk-based contracting approach, this provision should free up significant resources to be applied in areas where they are likely to achieve a better return. In addition, the provision will enable non-traditional contractors to participate in innovative DOD research projects valued at less than $5.0 million without triggering government-unique contracting procedures, enhancing DOD's access to cutting-edge technologies developed by companies that might otherwise be unwilling to do business with the government.

Limitation of the use of reverse auctions and lowest priced technically acceptable contracting methods (sec. 824)

The committee recommends a provision that would: (1) Prohibit the use of reverse auctions and lowest priced technically acceptable (LPTA) contracting methods for the procurement of personal protective equipment where the level of quality needed or the failure of the item could result in combat casualties; and (2) establish a preference for best value contracting methods when procuring such equipment. The committee is concerned that an overarching bias towards reducing prices paid by the Department of Defense (DOD) to the exclusion of other factors could result in DOD buying low cost products that have the potential to negatively impact the safety of U.S. troops. This could be a particular problem with the quality of personal protective equipment such as helmets, body armor, eye protection, and other similar individual equipment issued to U.S. military personnel. While LPTA and reverse auction contracting techniques are appropriate for some type of purchases, the committee believes that lowest price is not always the best strategy when quality and innovation are needed. In these cases, the committee believes a best value acquisition approach is more appropriate.

Rights in technical data (sec. 825)

The committee recommends a provision that: (1) Would clarify procedures for the validation of rights in technical data for subsystems and components of major weapon systems; and (2) establish a government-industry advisory panel on rights in technical data.

The provision would amend section 2321 of title 10, United States Code, that establishes procedures for the validation of rights in technical data. Subsection (f) of this section, added by the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355), endeavored to protect intellectual property rights in commercial items by adding a presumption that commercial items are devel-

oped exclusively at private expense. Because almost all major weapon systems are developed at government expense, section 802 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109–364) added an exception to the presumption in subsection (f) in the case of items other than commercially available off-the-shelf (COTS) items that are included in major weapon systems.

The exception for major weapon systems in subsection 2321(f) has created two potential problem areas. First, although almost all major weapon systems are developed at government expense, a few major weapon systems and subsystems of major weapon systems are purchased as commercial items—for example, modified civilian aircraft that are purchased for military uses. Section 2321(f) requires the contractor to demonstrate that components of weapon systems were developed at private expense even in the case of commercial-derivative aircraft, commercial-derivative engines, and other weapon systems and subsystems that are purchased as commercial items.

Second, although subsection 2321(f) includes an exception for COTS items that are included in major weapon systems, this exception does not apply if the COTS item is modified in any way for government use. Consequently, it the government insists on a minor modification of a COTS item for the purpose of including it in a weapon system, the burden will fall on the contractor to demonstrate that the item was developed exclusively at private expense.

The provision recommended by the committee would address these problems by clarifying that the presumption that a commercial item was developed exclusively at private expense applies in the case of: (1) A component of a weapon system or subsystem that was acquired as a commercial item; and (2) any other component that is a COTS item or a COTS item with modifications of a type customarily available in the commercial market place or minor modifications made to meet government requirements.

Procurement of supplies for experimental purposes (sec. 826)

The committee recommends a provision that would update the experimental acquisition authority in section 2373 of title 10, United States Code, to apply to transportation, energy, medical, and space flight and to clarify when provisions of Chapter 137 of title 10 apply to such procurements. The committee believes that the authorities of section 2373 (in addition to other transaction authority in section 2371 and section 845 other transaction prototype authority) offer an alternative acquisition path for the Department of Defense to pursue technologies and solutions from non-traditional contractors to maintain technological superiority in the future.

114TH CONGRESS
1st Session

COMMITTEE PRINT

NO. 2

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2016

LEGISLATIVE TEXT
AND
JOINT EXPLANATORY STATEMENT

TO ACCOMPANY

S. 1356

PUBLIC LAW 114–92

NOVEMBER 2015

Printed for the use of the Committee on
Armed Services of the House of Representatives

Subtitle B—Amendments to General Contracting Authorities, Procedures, and Limitations

SEC. 811. AMENDMENT RELATING TO MULTIYEAR CONTRACT AUTHORITY FOR ACQUISITION OF PROPERTY.

Subsection (a)(1) and subsection (i)(4) of section 2306b of title 10, United States Code, are each amended by striking "substantial" and inserting "significant".

SEC. 812. APPLICABILITY OF COST AND PRICING DATA AND CERTIFICATION REQUIREMENTS.

Section 2306a(b)(1) of title 10, United States Code, is amended—

(1) in subparagraph (B), by striking "; or" and inserting a semicolon;

(2) in subparagraph (C), by striking the period at the end and inserting "; or"; and

(3) by adding at the end the following new subparagraph:

"(D) to the extent such data—

"(i) relates to an offset agreement in connection with a contract for the sale of a weapon system or defense-related item to a foreign country or foreign firm; and

"(ii) does not relate to a contract or subcontract under the offset agreement for work performed in such foreign country or by such foreign firm that is directly related to the weapon system or defense-related item being purchased under the contract.".

SEC. 813. RIGHTS IN TECHNICAL DATA.

(a) RIGHTS IN TECHNICAL DATA RELATING TO MAJOR WEAPON SYSTEMS.—Paragraph (2) of section 2321(f) of title 10, United States Code, is amended to read as follows:

"(2) In the case of a challenge to a use or release restriction that is asserted with respect to technical data of a contractor or subcontractor for a major system or a subsystem or component thereof on the basis that the major weapon system, subsystem, or component was developed exclusively at private expense—

"(A) the presumption in paragraph (1) shall apply—

"(i) with regard to a commercial subsystem or component of a major system, if the major system was acquired as a commercial item in accordance with section 2379(a) of this title;

"(ii) with regard to a component of a subsystem, if the subsystem was acquired as a commercial item in accordance with section 2379(b) of this title; and

"(iii) with regard to any other component, if the component is a commercially available off-the-shelf item or a commercially available off-the-shelf item with modifications of a type customarily available in the commercial marketplace or minor modifications made to meet Federal Government requirements; and

"(B) in all other cases, the challenge to the use or release restriction shall be sustained unless information provided by the

contractor or subcontractor demonstrates that the item was developed exclusively at private expense.".

(b) GOVERNMENT-INDUSTRY ADVISORY PANEL.—

(1) ESTABLISHMENT.—Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense, acting through the Under Secretary of Defense for Acquisition, Technology, and Logistics, shall establish a Government-industry advisory panel for the purpose of 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.

(2) MEMBERSHIP.—The panel shall be chaired by an individual selected by the Under Secretary, and the Under Secretary shall ensure that—

(A) the government members of the advisory panel are knowledgeable about technical data issues and appropriately represent the three military departments, as well as the legal, acquisition, logistics, and research and development communities in the Department of Defense; and

(B) the private sector members of the advisory panel include independent experts and individuals appropriately representative of the diversity of interested parties, including large and small businesses, traditional and non-traditional government contractors, prime contractors and subcontractors, suppliers of hardware and software, and institutions of higher education.

(3) SCOPE OF REVIEW.—In conducting the review required by paragraph (1), the advisory panel shall give appropriate consideration to the following factors:

(A) Ensuring that the Department of Defense does not pay more than once for the same work.

(B) Ensuring that Department of Defense contractors are appropriately rewarded for their innovation and invention.

(C) Providing for cost-effective reprocurement, sustainment, modification, and upgrades to Department of Defense systems.

(D) Encouraging the private sector to invest in new products, technologies, and processes relevant to the missions of the Department of Defense.

(E) Ensuring that the Department of Defense has appropriate access to innovative products, technologies, and processes developed by the private sector for commercial use.

(4) FINAL REPORT.—Not later than September 30, 2016, the advisory panel shall submit its final report and recommendations to the Secretary of Defense. Not later than 60 days after receiving the report, the Secretary shall submit a copy of the report, together with any comments or recommendations, to the congressional defense committees.

are directly-related to the weapon systems of defense-related item being purchased under the contract.

Rights in technical data (sec. 813)

The Senate amendment contained a provision (sec. 825) that would clarify procedures for the validation of rights in technical data for subsystems and components of major weapon systems; and establish a government-industry advisory panel to review sections 2320 and 2321 of title 10, United States Code.

The House bill contained no similar provision.

The House recedes.

Procurement of supplies for experimental purposes (sec. 814)

The Senate amendment contained a provision (sec. 826) that would update the experimental acquisition authority in section 2373 of title 10, United States Code, to apply to transportation, energy, medical, and space flight and to clarify when provisions of Chapter 137 of title 10 apply to such procurements.

The House bill contained no similar provision.

The House recedes.

Amendments to other transaction authority (sec. 815)

The House bill contained a provision (sec. 853) would make permanent the other transactions authority (OTA) for contracting established in section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103–160), as modified most recently by section 812 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113–291). The provision would also make changes to the authority to use such mechanisms.

The Senate amendment contained a similar provision (section 804) that modified the authority, as well as modifying the definition of a "non-traditional" defense contractor.

The House recedes with an amendment that would: (1) make section 845 authority permanent; (2) clarify the authority to use section 845 authority to acquire prototypes or follow-on production items to be provided to contractors as government-furnished equipment; (3) ensure that innovative small business firms are authorized to participate in other transactions under section 845 without the requirement for a cost-share (except where the small business is partnered with a large business in a transaction); and (4) clarify the use of follow-on production contracts or other transactions authority. The provision further requires the Department of Defense to study the benefits of permitting not-for-profit entities to enter into other transactions agreements without the requirement for cost sharing.

We believe that the flexibility of the OTA authorities of section 2371 of title 10, United States Code, and the related and dependent authorities of section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103–160) as modified and codified in this provision, can make them attractive to firms and organizations that do not usually participate in government contracting due to the typical overhead burden and "one size fits all" rules. We believe that expanded use of OTAs will support Depart-

114TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
114–537

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2017

R E P O R T

OF THE

COMMITTEE ON ARMED SERVICES HOUSE OF REPRESENTATIVES

ON

H.R. 4909

together with

ADDITIONAL VIEWS

[Including cost estimate of the Congressional Budget Office]

MAY 4, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Section 1704—Transparency in Major Defense Acquisition Programs

This section would require the milestone decision authority for a major defense acquisition program to provide a new "acquisition scorecard" report to the congressional defense committees and, when appropriate, to congressional intelligence committees at each milestone decision point. The scorecards would present key decision metrics, including the program's cost and fielding targets, cost and schedule estimates, and evaluations of technical risks. The scorecards would include both military service and independent assessments, thereby highlighting any differing views of programmatic, schedule, or technical risks. Importantly, the decision metrics in the scorecards would be extracted from reports and assessments conducted for milestone decisions pursuant to other statute. The committee therefore intends that scorecards will be short (2–3 pages) summary documents produced with very limited data collection or bureaucracy.

Section 1705—Amendments Relating to Technical Data Rights

This section would make several amendments to technical data rights set forth in section 2320 of title 10, United States Code. First, this section would delineate types of interfaces and specify the rights provided to the U.S. Government in such interfaces. The U.S. Government would have government purpose rights in technical data related to a major system interface developed either at private expense or with a mix of Federal and private funds and used in a modular open system approach (MOSA) required elsewhere in this title. This section also would clarify that the U.S. Government has limited rights to technical data pertaining to a general interface between an item or process and other items or processes developed exclusively at private expense. The U.S. Government would have government purpose rights in the technical data of a general interface developed with a mix of Federal and private funds unless the Secretary of Defense determines that the negotiation of different rights would be in the best interest of the United States.

Second, this section would specify that the U.S. Government has limited rights to the detailed manufacturing and process data of major system components used in MOSA and developed exclusively at private expense. Third, this section would require the U.S. Government and Department of Defense contractors to negotiate for data rights when items or processes are developed with a mix of Federal and private funds. Currently, the U.S. Government is entitled to government purpose rights when items or processes are developed with mixed funding unless the Secretary determines negotiated rights are in the best interest of the United States. Finally, this section would limit deferred ordering of technical data to 6 years after delivery of the last item on a contract and to technical data generated, not utilized, in the performance of the contract. Currently, the Department may require the delivery of technical data generated or utilized in the performance of a contract at any time after completion of the contract. The committee expects the Department to develop its sustainment strategies and plans for

technical data earlier in the acquisition process so it depends upon deferred ordering less frequently.

The committee notes that the use of MOSA required elsewhere in this title relies upon the ability of major system components to be added, removed, or replaced as needed throughout the life cycle of the major weapon system due to evolving technology, threats, sustainment, and other factors. Therefore, major system interfaces that share a boundary between major system components and major system platforms are critical, and it is imperative that the government have appropriate access to the technical data of such interfaces. 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. The committee understands the importance of technical precision in the implementation of MOSA, particularly with regard to establishing clear delineation of major system platforms, major system interfaces, and major system components. As such, the committee urges the Department to carefully consider and take input from industry on the meanings and implications of these key terms. The committee expects the Department to include this consideration in its review of the MOSA authorities and its briefing on the implementation of MOSA required elsewhere in this report.

The committee notes that section 813 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114–92) established a government-industry advisory panel to review the rights in technical data conveyed in sections 2320 and 2321 of title 10, United States Code, and the regulations implementing such sections. The committee directs the Secretary of Defense to extend the duration of the panel and to provide the panel's final report and the Secretary's recommendations to the congressional defense committees by March 1, 2017. Additionally, the committee directs the panel to develop recommendations for changes to sections 2320 and 2321 of title 10, United States Code, and the regulations implementing such sections. In conducting its review, the committee directs the panel to consider the appropriate technical data rights for the U.S. Government and Department of Defense contractors to support the modular open system approach required elsewhere in this title.

TITLE XVIII—MATTERS RELATING TO SMALL BUSINESS PROCUREMENT

ITEMS OF SPECIAL INTEREST

Nonapplicability to Defense Production Act

The committee notes that nothing in this title shall be construed to affect the operations of title III of the Defense Production Act of 1950 (50a U.S.C. 2091) as in effect before the enactment of this Act.

114TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
114–840

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2017

CONFERENCE REPORT

TO ACCOMPANY

S. 2943

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"(7) The term 'major system component' has the meaning given that term in section 2446a(b)(3) of this title.

"(8) The term 'congressional intelligence committees' has the meaning given that term in section 437(c) of this title.".

(c) MILESTONE C REPORT.—

(1) IN GENERAL.—Chapter 139 of such title is amended by inserting after section 2366b the following new section:

"§ 2366c. Major defense acquisition programs: submissions to Congress on Milestone C

"(a) BRIEF SUMMARY REPORT.—Not later than 15 days after granting Milestone C approval for a major defense acquisition program, the milestone decision authority for the program shall provide to the congressional defense committees and, in the case of intelligence or intelligence-related activities, the congressional intelligence committees a brief summary report that contains the following:

"(1) The estimated cost and schedule for the program established by the military department concerned, including—

"(A) the dollar values estimated for the program acquisition unit cost, average procurement unit cost, and total life-cycle cost; and

"(B) the planned dates for initial operational test and evaluation and initial operational capability.

"(2) The independent estimated cost for the program established pursuant to section 2334(a)(6) of this title, and any independent estimated schedule for the program, including—

"(A) the dollar values estimated for the program acquisition unit cost, average procurement unit cost, and total life-cycle cost; and

"(B) the planned dates for initial operational test and evaluation and initial operational capability.

"(3) A summary of any production, manufacturing, and fielding risks associated with the program.

"(b) ADDITIONAL INFORMATION.—At the request of any of the congressional defense committees or, in the case of intelligence or intelligence-related activities, the congressional intelligence committees, the milestone decision authority shall submit to the committee further information or underlying documentation for the information in a brief summary report submitted under subsection (a), including the independent cost and schedule estimates and the independent technical risk assessments referred to in that subsection.

"(c) CONGRESSIONAL INTELLIGENCE COMMITTEES DEFINED.—In this section, the term 'congressional intelligence committees' has the meaning given that term in section 437(c) of this title.".

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2366b the following new item:

"2366c. Major defense acquisition programs: submissions to Congress on Milestone C.".

SEC. 809. AMENDMENTS RELATING TO TECHNICAL DATA RIGHTS.

(a) RIGHTS RELATING TO ITEM OR PROCESS DEVELOPED EXCLUSIVELY AT PRIVATE EXPENSE.—Subsection (a)(2)(C)(iii) of section 2320 of title 10, United States Code, is amended by inserting after

"or process data" the following: ", including such data pertaining to a major system component".

(b) RIGHTS RELATING TO INTERFACE OR MAJOR SYSTEM INTERFACE.—Subsection (a)(2) of section 2320 of such title is further amended—

(1) by redesignating subparagraphs (F) and (G) as subparagraphs (H) and (I), respectively;

(2) in subparagraph (B), by striking "Except as provided in subparagraphs (C) and (D)," and inserting "Except as provided in subparagraphs (C), (D), and (G),";

(3) in subparagraph (D)(i)(II), by striking "is necessary" and inserting "is a release, disclosure, or use of technical data pertaining to an interface between an item or process and other items or processes necessary";

(4) in subparagraph (E)—

(A) by striking "In the case" and inserting "Except as provided in subparagraphs (F) and (G), in the case"; and

(B) by striking "negotiations). The United States shall have" and all that follows through "such negotiated rights shall" and inserting the following: "negotiations) and shall be based on negotiations between the United States and the contractor, except in any case in which the Secretary of Defense determines, on the basis of criteria established in the regulations, that negotiations would not be practicable. The establishment of such rights shall"; and

(5) by inserting after subparagraph (E) the following new subparagraphs (F) and (G):

"(F) INTERFACES DEVELOPED WITH MIXED FUNDING.—Notwithstanding subparagraph (E), the United States shall have government purpose rights in technical data pertaining to an interface between an item or process and other items or processes that was developed in part with Federal funds and in part at private expense, except in any case in which the Secretary of Defense determines, on the basis of criteria established in the regulations, that negotiation of different rights in such technical data would be in the best interest of the United States.

"(G) MAJOR SYSTEM INTERFACES DEVELOPED EXCLUSIVELY AT PRIVATE EXPENSE OR WITH MIXED FUNDING.—Notwithstanding subparagraphs (B) and (E), the United States shall have government purpose rights in technical data pertaining to a major system interface developed exclusively at private expense or in part with Federal funds and in part at private expense and used in a modular open system approach pursuant to section 2446a of this title, except in any case in which the Secretary of Defense determines that negotiation of different rights in such technical data would be in the best interest of the United States. Such major system interface shall be identified in the contract solicitation and the contract. For technical data pertaining to a major system interface developed exclusively at private expense for which the United States asserts government purpose rights, the Secretary of Defense shall negotiate with the contractor the appropriate and reasonable compensation for such technical data.".

(c) AMENDMENT RELATING TO DEFERRED ORDERING.—Subsection (b)(9) of section 2320 of such title is amended—

(1) by striking "at any time" and inserting ", until the date occurring six years after acceptance of the last item (other than technical data) under a contract or the date of contract termination, whichever is later,";

(2) by striking "or utilized in the performance of a contract" and inserting "in the performance of the contract"; and

(3) by striking clause (ii) of subparagraph (B) and inserting the following:

"(ii) is described in subparagraphs (D)(i)(II), (F), and (G) of subsection (a)(2); and".

(d) DEFINITIONS.—Section 2320 of such title is further amended—

(1) in subsection (f), by inserting "COVERED GOVERNMENT SUPPORT CONTRACTOR DEFINED.—" before "In this section"; and

(2) by adding at the end the following new subsection:

"(g) ADDITIONAL DEFINITIONS.—In this section, the terms 'major system component', 'major system interface', and 'modular open system approach' have the meanings provided in section 2446a of this title.".

(e) AMENDMENTS TO ADD CERTAIN HEADINGS FOR READABILITY.—Section 2320(a) of such title is further amended—

(1) in subparagraph (A) of paragraph (2), by inserting after "(A)" the following: "DEVELOPMENT EXCLUSIVELY WITH FEDERAL FUNDS.—";

(2) in subparagraph (B) of such paragraph, by inserting after "(B)" the following: "DEVELOPMENT EXCLUSIVELY AT PRIVATE EXPENSE.—";

(3) in subparagraph (C) of such paragraph, by inserting after "(C)" the following: "EXCEPTION TO SUBPARAGRAPH (B).—";

(4) in subparagraph (D) of such paragraph, by inserting after "(D)" the following: "EXCEPTION TO SUBPARAGRAPH (B).—"; and

(5) in subparagraph (E) of such paragraph, by inserting after "(E)" the following: "DEVELOPMENT WITH MIXED FUNDING.—".

(f) GOVERNMENT-INDUSTRY ADVISORY PANEL AMENDMENTS.—Section 813(b) of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114–92; 129 Stat. 892) is amended—

(1) by adding at the end of paragraph (1) the following: "The panel shall develop recommendations for changes to sections 2320 and 2321 of title 10, United States Code, and the regulations implementing such sections.";

(2) in paragraph (3)—

(A) by redesignating subparagraphs (D) and (E) as subparagraphs (E) and (F), respectively; and

(B) by inserting after subparagraph (C) the following new subparagraph (D):

"(D) Ensuring that the Department of Defense and Department of Defense contractors have the technical data rights necessary to support the modular open system approach requirement set forth in section 2446a of title 10, United States Code, taking into consideration the distinct characteristics of major system platforms, major system interfaces, and major system components developed exclu-

sively with Federal funds, exclusively at private expense, and with a combination of Federal funds and private expense."; and

(3) by amending paragraph (4) to read as follows:

"(4) FINAL REPORT.—Not later than February 1, 2017, the advisory panel shall submit its final report and recommendations to the Secretary of Defense and the congressional defense committees. Not later than 60 days after receiving the report, the Secretary shall submit any comments or recommendations to the congressional defense committees.".

Subtitle C—Amendments to General Contracting Authorities, Procedures, and Limitations

SEC. 811. MODIFIED RESTRICTIONS ON UNDEFINITIZED CONTRACTUAL ACTIONS.

Section 2326 of title 10, United States Code, is amended—

(1) in subsection (e)—

(A) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B);

(B) by inserting "(1)" before "The head"; and

(C) by adding at the end the following new paragraph:

"(2) If a contractor submits a qualifying proposal to definitize an undefinitized contractual action and the contracting officer for such action definitizes the contract after the end of the 180-day period beginning on the date on which the contractor submitted the qualifying proposal, the head of the agency concerned shall ensure that the profit allowed on the contract accurately reflects the cost risk of the contractor as such risk existed on the date the contractor submitted the qualifying proposal.";

(2) by redesignating subsections (f) and (g) as subsections (h) and (i), respectively;

(3) by inserting after subsection (e) the following new subsections:

"(f) TIME LIMIT.—No undefinitized contractual action may extend beyond 90 days without a written determination by the Secretary of the military department concerned, the head of the Defense Agency concerned, the commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition, Technology, and Logistics (as applicable) that it is in the best interests of the military department, the Defense Agency, the combatant command, or the Department of Defense, respectively, to continue the action.

"(g) FOREIGN MILITARY CONTRACTS.—(1) Except as provided in paragraph (2), a contracting officer of the Department of Defense may not enter into an undefinitized contractual action for a foreign military sale unless the contractual action provides for agreement upon contractual terms, specifications, and price by the end of the 180-day period described in subsection (b)(1)(A).

"(2) The requirement under paragraph (1) may be waived in accordance with subsection (b)(4)."; and

(4) in subsection (i), as redesignated by paragraph (2)—

(A) in paragraph (1)—

(i) by striking subparagraph (A); and

identified at Milestone A or B that are associated with the program.

Amendments relating to technical data rights (sec. 809)

The House amendment contained a provision (sec. 1705) that would make several amendments to technical data rights conferred in section 2320 of title 10, United States Code. Among other things, the provision would delineate types of interfaces and specify the rights provided to the U.S. Government in such interfaces. It would require the U.S. Government and Department of Defense contractors to negotiate for data rights when items or processes are developed with a mix of Federal and private funds. The provision also would limit deferred ordering of technical data to 6 years after delivery of the last item on a contract and to technical data generated, not utilized, in the performance of the contract.

The Senate bill contained no similar provision.

The Senate recedes with an amendment that would allow the Secretary of Defense to negotiate for rights other than government purpose rights for technical data relating to major system interfaces if it would be in the best interest of the United States. The amendment would require the Department of Defense to identify major system interfaces in contract solicitations and contracts. For major system interfaces developed exclusively at private expense, the amendment would clarify that the Secretary shall negotiate with the developer appropriate compensation for the technical data. The conferees understand that section 2320 sets forth various rights in technical data, and that the price for acquiring technical data to which the U.S. Government is entitled is determined through negotiations between the Department and contractors. The conferees believe that in the case of privately funded major system interfaces for which the Department asserts government purpose rights it is necessary to explicitly require negotiation for compensation. Notwithstanding this amendment, the conferees expect the standard practice of negotiating prices for technical data to continue for all other categories of rights and circumstances set forth in section 2320.

The amendment also would specify the U.S. Government's rights to technical data pertaining to privately funded general interfaces necessary for the segregation and reintegration of an item or process. Finally, the amendment would extend the duration of the government-industry advisory panel established in section 813 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114–92) and require the advisory panel to consider the technical data rights necessary to support the modular open system approach (MOSA) required elsewhere in this Act. The conferees are aware that the advisory panel has not yet completed its review of sections 2320 and 2321 of title 10, United States Code. The conferees recognize there are many issues in technical data rights that this conference agreement does not address, and are encouraged that the panel's comprehensive and thoughtful analysis thus far will yield promising recommendations.

Additionally, the conferees understand that successful implementation of MOSA necessitates the allocation of technical data rights in major system interfaces, a new concept under MOSA. The

use of MOSA relies upon the ability of major system components to be added, removed, or replaced as needed throughout the life cycle of the major weapon system due to evolving technology, threats, sustainment, and other factors. Therefore, major system interfaces that share a boundary between major system components and major system platforms are critical, and it is imperative that the government have appropriate access to the technical data of such interfaces. The conferees understand the importance of technical precision in establishing clear delineation of major system platforms, major system interfaces, and major system components. As such, the conferees urge the Department to carefully consider and take input from the advisory panel and industry on the meanings and implications of these key terms. The conferees expect the Department to include this consideration in its review of the MOSA authorities and its briefing on the implementation of MOSA required in the House report accompanying H.R. 4909 (H. Rept. 114–537) of the National Defense Authorization Act for Fiscal Year 2017.

The conferees also note that the Department recently issued a proposed rule that would implement amendments to section 2320 of title 10, United States Code, enacted in section 815 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81). Various representatives of industry have expressed concern about the effects on defense acquisition of the amendments made in Public Law 112–81 and the Department's implementation of such amendments. Therefore, the conferees believe the amendments to technical data rights included in this conference agreement are necessary at this time.

Subtitle C—Amendments to General Contracting Authorities, Procedures, and Limitations

Modified restrictions on undefinitized contractual actions (sec. 811)

The Senate bill contained a provision (sec. 816) that would amend section 2326 of title 10, United States Code, to revise policies regarding undefinitized contractual actions (UCAs). Over the past decade the use of UCAs by the services and defense agencies has grown significantly while the speed at which these UCAs are definitized has lagged. To address this situation, the provision would: (1) require a written determination by senior officials to extend a UCA beyond 90 days; (2) require UCAs to be awarded on a fixed-price level-of-effort basis; and (3) extend the 180 day definitization requirement to contracts in support of Foreign Military Sales cases.

The House amendment contained a similar provision (sec. 802).

The House recedes with an amendment that would eliminate the requirement that undefinitized contractual actions be awarded on a fixed-price basis, ensure that allowable profit reflects the cost risk at the time that a contractor submits a qualifying proposal to definitize a contract, and specify that such a proposal contain the information necessary to conduct a meaningful audit of the proposal.

115TH CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

REPORT
115–200

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2018

R E P O R T

OF THE

COMMITTEE ON ARMED SERVICES HOUSE OF REPRESENTATIVES

ON

H.R. 2810

together with

ADDITIONAL VIEWS

[Including cost estimate of the Congressional Budget Office]

JULY 6, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

PART II—EARLY INVESTMENTS IN ACQUISITION PROGRAMS

Section 811—Requirement to Emphasize Reliability and Maintainability in Weapon System Design

This section would emphasize reliability and maintainability (R&M) in the system design of a major defense acquisition program (MDAP). First, the section would require the Secretary of Defense to include R&M as attributes of the existing key performance parameter on sustainment during the requirements development process. Second, when contracting for engineering and manufacturing development (EMD) or production of an MDAP, the program manager would be required to include clearly defined and measurable requirements for engineering activities and design specifications for R&M in the contract solicitation and contract terms unless he or she determines R&M should not be a contract requirement. Third, the section would require the Secretary to encourage the use of objective R&M criteria in the source selection process. Fourth, the section would authorize the use of incentive fees and would require the use of recovery options when practicable to encourage contractor performance in R&M for EMD and production contracts. The Department would be able to exercise incentive fees and recovery options until the date of acceptance of the last item under the contract. Finally, the section would establish a program through which program managers would compete for additional funding to invest in R&M during the EMD or production of an MDAP to reduce future operating and support (O&S) costs.

The committee notes that the design of a major weapon system directly affects its life-cycle sustainment activities and consequently drives its O&S costs. Elements of sustainment that are highly dependent on the system design, namely R&M, are easier and less costly to address during the development of an MDAP than after a weapon system is fielded. Therefore, the committee believes the Department should emphasize R&M in early engineering decisions.

Section 812—Licensing of Appropriate Intellectual Property to Support Major Weapon Systems

This section would require the Department of Defense to work with contractors to determine prices for technical data the Department plans to acquire or license before selecting a contractor for the engineering and manufacturing development phase or the production phase of a major weapon system. Obtaining prices for technical data while competition exists among contractors encourages the Department to plan early for the technical data it needs to maintain a weapon system and affords the Department more competitive prices than it might pay later during the sustainment phase. Additionally, this section would encourage program managers to negotiate with industry to obtain the custom set of technical data necessary to support each major defense acquisition program rather than, as a default approach, seeking greater rights to more extensive, detailed technical data than is necessary.

The committee believes that acquiring broad rights to most or all of the technical data in a weapon system can be cost-prohibitive and deter contractors from bidding on defense programs. Not ac-

quiring enough technical data, however, can reduce subsequent competition and increase sustainment costs. Therefore, the committee urges program managers when seeking technical data to consider the particular data that is required, the level of detail necessary, the purpose for which it will be used, with whom the government needs to share it, and for how long the government needs it. Program managers should also consider the unique characteristics of the weapon system and its components, the product support strategy for the weapon system, the organic industrial base strategy of the military department, and the commercial market.

Section 813—Management of Intellectual Property Matters within the Department of Defense

This section would create a small cadre of experts in intellectual property (IP) that would advise, assist, and provide resources to program offices as they develop their IP strategies and negotiate with industry. The section would also establish a centralized Office of Intellectual Property within the Department of Defense to standardize the Department's approach toward obtaining technical data, promulgate policy on IP, oversee the cadre of IP experts, and serve as a single point of contact for industry on IP matters. Finally, this section would add IP positions to the acquisition workforce and would revise the training provided to the acquisition workforce on IP matters.

The committee has observed within the Department divergent philosophies toward acquiring technical data and varying knowledge of IP matters, including laws, regulations, and best practices. The committee is concerned that this inconsistency and lack of coordination disadvantages the Department. Additionally, because a provision elsewhere in this title would establish a preference for "specially negotiated licenses" to obtain the appropriate technical data customized to each weapon system, the committee believes the Department requires tools to improve its ability to negotiate with industry. A centralized Office of Intellectual Property and cadre of IP experts are warranted to address these issues. The committee intends that the office and cadre would provide advice and assistance to facilitate acquisitions. This section would not require the office or cadre to approve IP strategies, contracting actions, or other program office activities.

The committee also intends for the Office of Intellectual Property to maintain Department of Defense policy on Small Business Innovation Research (SBIR) data rights, particularly as it pertains to the transition from Phase I and II awards to Phase III awards, and to serve as a liaison between the Department of Defense and SBIR companies when IP issues arise related to SBIR.

Section 814—Improvement of Planning for Acquisition of Services

This section would require the Secretary of Defense to ensure that the appropriate information is available and that the right factors are considered to enable the most effective business decisions regarding the procurement of services. This section would require the Secretaries of the Department of Defense and of the military departments to analyze spending patterns and projected future requirements for contracted services and use this analysis to inform

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1st Session

HOUSE OF REPRESENTATIVES

REPORT
115–404

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2018

CONFERENCE REPORT

TO ACCOMPANY

H.R. 2810

NOVEMBER 9, 2017.—Ordered to be printed

SEC. 802. MANAGEMENT OF INTELLECTUAL PROPERTY MATTERS WITHIN THE DEPARTMENT OF DEFENSE.

(a) MANAGEMENT OF INTELLECTUAL PROPERTY.—

(1) IN GENERAL.—Chapter 137 of title 10, United States Code, is amended by inserting after section 2321 the following new section:

"§ 2322. Management of intellectual property matters within the Department of Defense

"(a) POLICY REQUIRED.—The Secretary of Defense, acting through the Under Secretary of Defense for Acquisition and Sustainment, shall develop policy on the acquisition or licensing of intellectual property—

"(1) to enable coordination and consistency across the military departments and the Department of Defense in strategies for acquiring or licensing intellectual property and communicating with industry;

"(2) to ensure that program managers are aware of the rights afforded the Federal Government and contractors in intellectual property and that program managers fully consider and use all available techniques and best practices for acquiring or licensing intellectual property early in the acquisition process; and

"(3) to encourage customized intellectual property strategies for each system based on, at a minimum, the unique characteristics of the system and its components, the product support strategy for the system, the organic industrial base strategy of the military department concerned, and the commercial market.

"(b) CADRE OF INTELLECTUAL PROPERTY EXPERTS.—(1) The Secretary of Defense, acting through the Under Secretary of Defense for Acquisition and Sustainment, shall establish a cadre of personnel who are experts in intellectual property matters. The purpose of the cadre is to ensure a consistent, strategic, and highly knowledgeable approach to acquiring or licensing intellectual property by providing expert advice, assistance, and resources to the acquisition workforce on intellectual property matters, including acquiring or licensing intellectual property.

"(2) The Under Secretary shall establish an appropriate leadership structure and office within which the cadre shall be managed, and shall determine the appropriate official to whom members of the cadre shall report.

"(3) The cadre of experts shall be assigned to a program office or an acquisition command within a military department to advise, assist, and provide resources to a program manager or program executive officer on intellectual property matters at various stages of the life cycle of a system. In performing such duties, the experts shall—

"(A) interpret and provide counsel on laws, regulations, and policies relating to intellectual property;

"(B) advise and assist in the development of an acquisition strategy, product support strategy, and intellectual property strategy for a system;

"(C) conduct or assist with financial analysis and valuation of intellectual property;

"(D) assist in the drafting of a solicitation, contract, or other transaction;

"(E) interact with or assist in interactions with contractors, including communications and negotiations with contractors on solicitations and awards; and

"(F) conduct or assist with mediation if technical data delivered pursuant to a contract is incomplete or does not comply with the terms of agreements.

"(4)(A) In order to achieve the purpose set forth in paragraph (1), the Under Secretary shall ensure the cadre has the appropriate number of staff and such staff possesses the necessary skills, knowledge, and experience to carry out the duties under paragraph (2), including in relevant areas of law, contracting, acquisition, logistics, engineering, financial analysis, and valuation. The Under Secretary, in coordination with the Defense Acquisition University and in consultation with academia and industry, shall develop a career path, including development opportunities, exchanges, talent management programs, and training, for the cadre. The Under Secretary may use existing authorities to staff the cadre, including those in subparagraphs (B), (C), (D), and (F).

"(B) Civilian personnel from within the Office of the Secretary of Defense, Joint Staff, military departments, Defense Agencies, and combatant commands may be assigned to serve as members of the cadre, upon request of the Director.

"(C) The Under Secretary may use the authorities for highly qualified experts under section 9903 of title 5, to hire experts as members of the cadre who are skilled professionals in intellectual property and related matters.

"(D) The Under Secretary may enter into a contract with a private-sector entity for specialized expertise to support the cadre. Such entity may be considered a covered Government support contractor, as defined in section 2320 of this title.

"(E) In establishing the cadre, the Under Secretary shall give preference to civilian employees of the Department of Defense, rather than members of the armed forces, to maintain continuity in the cadre.

"(F) The Under Secretary is authorized to use amounts in the Defense Acquisition Workforce Development Fund for the purpose of recruitment, training, and retention of the cadre, including paying salaries of newly hired members of the cadre for up to three years.".

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

"2322. Management of intellectual property matters within the Department of Defense.".

(b) ADDITIONAL ACQUISITION POSITION.—Subsection 1721(b) of title 10, United States Code, is amended by adding at the end the following new paragraph:

"(12) Intellectual property.".

SEC. 803. PERFORMANCE OF INCURRED COST AUDITS.

(a) IN GENERAL.—Chapter 137 of title 10, United States Code, is amended by inserting after section 2313a the following new section:

SEC. 835. LICENSING OF APPROPRIATE INTELLECTUAL PROPERTY TO SUPPORT MAJOR WEAPON SYSTEMS.

(a) NEGOTIATION OF PRICE FOR TECHNICAL DATA BEFORE DEVELOPMENT OR PRODUCTION OF MAJOR WEAPON SYSTEM.—

(1) REQUIREMENT.—Chapter 144 of title 10, United States Code, is amended by inserting after section 2438 the following new section:

"§ 2439. Negotiation of price for technical data before development or production of major weapon systems

"The Secretary of Defense shall ensure that the Department of Defense, before selecting a contractor for the engineering and manufacturing development of a major weapon system, or for the production of a major weapon system, negotiates a price for technical data to be delivered under a contract for such development or production.".

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2438 the following new item:

"2439. Negotiation of price for technical data before development or production of major weapon systems.".

(3) EFFECTIVE DATE.—Section 2439 of title 10, United States Code, as added by paragraph (1), shall apply with respect to any contract for engineering and manufacturing development of a major weapon system, or for the production of a major weapon system, for which the contract solicitation is issued on or after the date occurring one year after the date of the enactment of this Act.

(b) WRITTEN DETERMINATION FOR MILESTONE B APPROVAL.—

(1) IN GENERAL.—Subsection (a)(3) of section 2366b of title 10, United States Code, is amended—

(A) by striking "and" at the end of subparagraph (M); and

(B) by inserting after subparagraph (N) the following new subparagraph:

"(O) appropriate actions have been taken to negotiate and enter into a contract or contract options for the technical data required to support the program; and".

(2) EFFECTIVE DATE.—Section 2366b(a)(3)(O) of title 10, United States Code, as added by paragraph (1), shall apply with respect to any major defense acquisition program receiving Milestone B approval on or after the date occurring one year after the date of the enactment of this Act.

(c) PREFERENCE FOR NEGOTIATION OF CUSTOMIZED LICENSE AGREEMENTS.—Section 2320 of title 10, United States Code, is amended—

(1) by redesignating subsections (f) and (g) as subsections (g) and (h), respectively; and

(2) by inserting after subsection (e) the following new subsection (f):

"(f) PREFERENCE FOR SPECIALLY NEGOTIATED LICENSES.—The Secretary of Defense shall, to the maximum extent practicable, negotiate and enter into a contract with a contractor for a specially negotiated license for technical data to support the product support strategy of a major weapon system or subsystem of a major weapon system. In performing the assessment and developing the cor-

responding strategy required under subsection (e) for such a system or subsystem, a program manager shall consider the use of specially negotiated licenses to acquire customized technical data appropriate for the particular elements of the product support strategy.".

SEC. 836. CODIFICATION OF REQUIREMENTS PERTAINING TO ASSESSMENT, MANAGEMENT, AND CONTROL OF OPERATING AND SUPPORT COSTS FOR MAJOR WEAPON SYSTEMS.

(a) CODIFICATION AND AMENDMENT.—

(1) IN GENERAL.—Chapter 137 of title 10, United States Code, is amended by inserting after section 2337 the following new section:

"§ 2337a. Assessment, management, and control of operating and support costs for major weapon systems

"(a) GUIDANCE REQUIRED.—The Secretary of Defense shall issue and maintain guidance on actions to be taken to assess, manage, and control Department of Defense costs for the operation and support of major weapon systems.

"(b) ELEMENTS.—The guidance required by subsection (a) shall, at a minimum—

"(1) be issued in conjunction with the comprehensive guidance on life-cycle management and the development and implementation of product support strategies for major weapon systems required by section 2337 of this title;

"(2) require the military departments to retain each estimate of operating and support costs that is developed at any time during the life cycle of a major weapon system, together with supporting documentation used to develop the estimate;

"(3) require the military departments to update estimates of operating and support costs periodically throughout the life cycle of a major weapon system, to determine whether preliminary information and assumptions remain relevant and accurate, and identify and record reasons for variances;

"(4) establish policies and procedures for the collection, organization, maintenance, and availability of standardized data on operating and support costs for major weapon systems in accordance with section 2222 of this title;

"(5) establish standard requirements for the collection and reporting of data on operating and support costs for major weapon systems by contractors performing weapon system sustainment functions in an appropriate format, and develop contract clauses to ensure that contractors comply with such requirements;

"(6) require the military departments—

"(A) to collect and retain data from operational and developmental testing and evaluation on the reliability and maintainability of major weapon systems; and

"(B) to use such data to inform system design decisions, provide insight into sustainment costs, and inform estimates of operating and support costs for such systems;

"(7) require the military departments to ensure that sustainment factors are fully considered at key life-cycle management decision points and that appropriate measures are taken to reduce operating and support costs by influencing sys-

acquisition process, and result in sub-optimal capabilities being developed and deployed to operational forces.

The House bill contained no similar provision.

The House recedes.

Management of intellectual property matters within the Department of Defense (sec. 802)

The House bill contained a provision (sec. 813) that would create a small cadre of experts in intellectual property (IP) that would advise, assist, and provide resources to program offices as they develop their IP strategies and negotiate with industry. This provision would also establish a centralized Office of Intellectual Property within the Department of Defense to standardize the Department's approach toward obtaining technical data, promulgate policy on IP, oversee the cadre of IP experts, and serve as a single point of contact for industry on IP matters. Finally, this provision would add IP positions to the acquisition workforce and would revise the training provided to the acquisition workforce on IP matters.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment that would require the Under Secretary of Defense for Acquisition and Sustainment to establish an appropriate organizational structure to support the cadre of intellectual property experts.

The conferees intend the Department of Defense to leverage the designation of the intellectual property workforce as part of the acquisition workforce to focus significant attention and resources on the development and professionalization of the workforce, for example by using resources from the Defense Acquisition Workforce Development Fund to expand access to training and educational opportunities.

The conferees expect the Under Secretary to foster communications with industry and designate a central point of contact within the Department of Defense for communications with contractors on intellectual property matters. As part of such communications, the Department of Defense shall regularly engage with appropriately representative entities, including large and small businesses, traditional and nontraditional Government contractors, prime contractors and subcontractors, and maintenance repair organizations.

Performance of incurred cost audits (sec. 803)

The House bill contained a provision (sec. 802) that would require the Secretary of Defense to adhere to commercial standards for risk and materiality when auditing costs incurred under flexibly priced contracts; would authorize the Secretary of Defense to use qualified private auditors under certain conditions; sets new targets for timely completion of incurred cost audits; and would require that the Defense Contract Audit Agency undergo a peer review by a commercial auditor; and would direct a review by the Comptroller General of the United States evaluating the Department's performance of incurred cost audits, to include the use of qualified private auditors.

The Senate amendment contained no similar provision.

The Senate recedes with amendments that increase the Department's flexibility to use multi-year auditing; encourage the De-

Licensing of appropriate intellectual property to support major weapon systems (sec. 835)

The House bill contained a provision (sec. 812) that would require the Department of Defense to work with contractors to determine prices for technical data the Department plans to acquire or license before selecting a contractor for the engineering and manufacturing development phase or the production phase of a major weapon system. Additionally, this provision would encourage program managers to negotiate with industry to obtain the custom set of technical data necessary to support each major defense acquisition program rather than, as a default approach, seeking greater rights to more extensive, detailed technical data than is necessary.

The Senate amendment contained no similar provision.

The Senate recedes.

Codification of requirements pertaining to assessment, management, and control of operating and support costs for major weapon systems (sec. 836)

The House bill contained a provision (sec. 852) that would codify section 832 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 10 U.S.C. 2430 note) on assessing and controlling operating and support costs for major weapons systems.

The Senate amendment contained no similar provision.

The Senate recedes with technical amendments and an amendment that would allow the Under Secretary of Defense for Acquisition and Sustainment to direct the military departments to collect and retain information necessary to support the database on operating and support costs.

Should-cost management (sec. 837)

The Senate amendment contained a provision (sec. 803) that would require the Secretary of Defense, within 180 days after the date of enactment of this Act, to amend the Defense Supplement to the Federal Acquisition Regulation to provide for the appropriate use of the should-cost review process in a manner that is transparent, objective, and provides for the efficiency of the systems acquisition process in the Department of Defense. The regulations required would incorporate, at a minimum, the following elements: (1) a description of the feature distinguishing a should-cost review and the analysis of program direct and indirect costs; (2) establishment of a process for communicating with the contractor the elements of a proposed should-cost review; (3) a method for ensuring that identified should-cost savings opportunities are based on accurate, complete, and current information and are associated with specific engineering or business changes that can be quantified and tracked; (4) a description of the training, skills, and experience, including cross functional experience, that Department of Defense and contractor officials carrying out a should-cost review should process; (5) a method for ensuring appropriate collaboration with the contractor throughout the review process; (6) establishment of review process requirements that provide for sufficient analysis and minimize any impact on program schedule; and (7) a requirement that any separate audit or review carried out in connection

Calendar No. 439

115TH CONGRESS *2d Session*	SENATE	REPORT 115–262

THE JOHN S. McCAIN NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2019

REPORT

[TO ACCOMPANY S. 2987]

ON

TO AUTHORIZE APPROPRIATIONS FOR FISCAL YEAR 2019 FOR MILITARY ACTIVITIES OF THE DEPARTMENT OF DEFENSE AND FOR MILITARY CONSTRUCTION, TO PRESCRIBE MILITARY PERSONNEL STRENGTHS FOR SUCH FISCAL YEAR, AND FOR OTHER PURPOSES

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

JUNE 5, 2018.—Ordered to be printed

court, would help resolve smaller and generally simpler cases commensurate with their value while preserving the right to an independent protest.

Continuation of technical data rights during challenges (sec. 812)

The committee recommends a provision that would amend section 2321(i) of title 10, United States Code, to clarify that the government may continue to exercise rights in technical data and noncommercial computer software during the course of a challenge with an incumbent contractor under section 2321(d) of title 10, United States Code, or under procedures established by the Department of Defense, to meet Department of Defense mission requirements and readiness needs during the course of the challenge.

Increased micro-purchase threshold (sec. 813)

The committee recommends a provision that would amend section 1902(a)(1) of title 41, United States Code, to align the micro-purchase threshold for the Department of Defense to the micro-purchase threshold for all government agencies at $10,000.

Modification of limitations on single source task or delivery order contracts (sec. 814)

The committee recommends a provision that would amend section 2304a(d)(3)(A) of title 10, United States Code, to clarify the applicable standard for task or delivery order contract awards.

Preliminary cost analysis requirement for exercise of multiyear contract authority (sec. 815)

The committee recommends a provision that would amend section 2306b(i)(2)(B) of title 10, United States Code, to require that the preliminary findings of the agency head be supported by a preliminary cost analysis by the Director of Cost Assessment and Program Evaluation (CAPE).

Currently, section 2306b(i)(2)(B) of title 10, United States Code, requires preliminary findings of the agency head to be made after the completion of a cost analysis performed by the Director of CAPE.

The intent of this provision is to streamline the multiyear procurement contract legislative proposal process through the Director of CAPE and the agency head's conducting cost analysis simultaneously, rather than sequentially, to enable timely submission and ample consideration of such legislative proposals by the congressional defense committees.

Inclusion of best available information regarding past performance of subcontractors and joint venture partners (sec. 816)

The committee recommends a provision that would require the Secretary of Defense, in consultation with the Federal Acquisition Regulatory Council and the Administrator for Federal Procurement Policy, within 180 days after the date of enactment of this Act, to develop policies for the Department of Defense (DOD) to ensure the best information regarding past performance of certain subcontrac-

end, the committee supports broadening the Department's microelectronics initiatives to include the broader electronics industrial base in order to more comprehensively address gaps across the electronics supply chain.

Support for defense manufacturing communities to support the defense industrial base (sec. 863)

The committee recommends a provision that would provide the Secretary of Defense with authority to establish a program to make long-term investments in critical skills, infrastructure, research and development, and small business support in order to strengthen the national security innovation base, working in coordination with the defense manufacturing institutes.

Subtitle G—Other Transactions

Change to notification requirement for other transactions (sec. 871)

The committee recommends a provision that would clarify the congressional notification requirements for the use of Other Transactions.

Data and policy on the use of other transactions (sec. 872)

The committee recommends a provision that would direct the Under Secretary of Defense for Research and Engineering, the Under Secretary of Defense for Acquisition and Sustainment, and the Service Acquisition Executives of the military departments to collect data on the use of other transactions. The data should be stored in a manner that affords to the Assistant Secretary of Defense for Acquisition access at any time. The provision would also require the Assistant Secretary of Defense for Acquisition to analyze and leverage these data to update policy and guidance related to the use of other transactions.

Subtitle H—Development and Acquisition of Software Intensive and Digital Products and Services

Clarifications regarding proprietary and technical data (sec. 881)

The committee recommends a provision that would amend section 2321(f) of title 10, United States Code, to clarify the application of rights in technical data relating to major weapons systems. This provision would also amend section 2320 of title 10, United States Code, to clarify the application of licensing of appropriate intellectual property to support major weapons systems with regard to preferences for specially negotiated licenses.

The committee notes that both government and industry stakeholders continue to express concern over conflicting legal interpretations based on changes to rights in technical data made by section 813 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114–92) and changes to rights in proprietary data made by section 835 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115–91). Therefore, the committee recommends a return to previous law and encourages the

Department of Defense to give clear guidance on the use of technical data and intellectual property in support of major weapons systems in conjunction with the recommendations provided by the government-industry advisory panel created by section 813 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114–92).

Implementation of recommendations of the final report of the Defense Science Board Task Force on the Design and Acquisition of Software for Defense Systems (sec. 882)

The committee recommends a provision that would direct the Secretary of Defense to implement certain recommendations of the Defense Science Board Task Force in their report on the Design and Acquisition of Software for Defense Systems.

The report contained seven recommendations on how to improve software acquisition in defense systems, to include the idea of the software factory, which underpins all other actions the Department of Defense might take in this area. The committee agrees with the report's emphasis on shifting the Department of Defense's treatment of software as solely a development activity to understanding that it is enduring and that, therefore, traditional models of hardware sustainment are not suited to the treatment of software in the acquisition process. Further recommendations pertained to iterative development, how to incorporate metrics in program management for software, risk reduction activities, the role of machine learning and autonomy in programs, and necessary competency within the acquisition workforce.

The committee believes that it is critically important to consider the findings and recommendations of this report.

Implementation of pilot program to use agile or iterative development methods under section 873 of the National Defense Authorization Act for Fiscal Year 2018 (sec. 883)

The committee recommends a provision that would provide additional direction to the Secretary of Defense in implementing the pilot program established under section 873 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115–91).

The committee is encouraged that the Department of Defense has established the pilot program as directed under section 873. However, the committee is disappointed that, despite being directed to identify four major software-intensive warfighting systems and between four to eight defense business systems, only one system has been identified for realignment.

Accordingly, the committee is selecting the systems and directing the Secretary of Defense to consider them as candidates in accordance with section 873.

The committee notes that some of the systems have recently begun transition to agile methods or have committed to doing so and, as such, their inclusion in the pilot program will allow the Department of Defense to use lessons learned for other systems that have not yet started realignment under the pilot program.

115TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
115–874

JOHN S. MCCAIN NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2019

CONFERENCE REPORT

TO ACCOMPANY

H.R. 5515

JULY 25, 2018.—Ordered to be printed

cided by a vote conducted in accordance with section 409(e) of the Internal Revenue Code of 1986; and".

Subtitle G—Provisions Related to Software and Technical Data Matters

SEC. 865. VALIDATION OF PROPRIETARY AND TECHNICAL DATA.

Section 2321(f) of title 10, United States Code, is amended—

(1) by striking "(1) Except as provided in paragraph (2), in" and inserting "In"; and

(2) by striking paragraph (2).

SEC. 866. CONTINUATION OF TECHNICAL DATA RIGHTS DURING CHALLENGES.

(a) EXERCISE OF RIGHTS IN TECHNICAL DATA BEFORE FINAL DISPOSITION OF A CHALLENGE.—Section 2321(i) of title 10, United States Code, is amended—

(1) in the subsection heading, by inserting "PRIOR TO AND" after "RIGHTS AND LIABILITY";

(2) by redesignating paragraphs (1) and (2) as paragraphs (2) and (3), respectively; and

(3) by inserting before paragraph (2), as so redesignated, the following new paragraph:

"(1) Upon filing of a suit or appeal under the contract dispute statute by a contractor or subcontractor in an agency Board of Contract Appeals or United States Claims Court related to a decision made by a contracting officer under subsection (g), the Secretary of Defense, or a Secretary of a military department for programs for which milestone decision authority has been delegated, on a non-delegable basis, may, following notice to the contractor or subcontractor, authorize use of the technical data in dispute if the Secretary determines in writing that compelling mission readiness requirements will not permit awaiting the final decision by the agency Board of Contract Appeals or the United States Claims Court.".

(b) REVISION OF THE DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall revise the Defense Federal Acquisition Regulation Supplement, by interim or final rule, to implement the amendments made by subsection (a).

(c) EFFECTIVE DATE.—The amendments made by subsection (a) and the revision required by subsection (b) shall become effective on the date of publication of the interim or final rule (whichever is earlier) required by subsection (b) and shall apply to solicitations issued by Department of Defense contracting activities after that date unless the senior procurement executive of the agency concerned grants a waiver on a case-by-case basis.

(d) GUIDANCE ON TECHNICAL DATA RIGHT NEGOTIATION.—The Secretary of Defense shall develop policies on the negotiation of technical data rights for noncommercial software that reflects the Department of Defense's needs for technical data rights in the event of a protest or replacement of incumbent contractor to meet defense requirements in the most cost effective manner.

SEC. 867. REQUIREMENT FOR NEGOTIATION OF TECHNICAL DATA PRICE BEFORE SUSTAINMENT OF MAJOR WEAPON SYSTEMS.

Section 2439 of title 10, United States Code, is amended—

Subtitle G—Provisions Related to Software and Technical Data Matters

Validation of proprietary and technical data (sec. 865)

The Senate amendment contained a provision (sec. 881) that would amend section 2321(f) of title 10, United States Code, to clarify the application of rights in technical data relating to major weapons systems. This provision would also amend section 2320 of title 10, United States Code, to clarify the application of licensing of appropriate intellectual property to support major weapons systems with regard to preferences for specially negotiated licenses.

The House bill contained no similar provision.

The House recedes with an amendment that would amend only section 2321(f) of title 10, United States Code. The conferees note that Specially Negotiated Licenses are a new concept in government technical data rights and are being interpreted in many different ways by industry and government alike. Therefore, the conferees direct the Under Secretary of Defense for Acquisition and Sustainment, in conjunction with the Service Acquisition Executives, to develop guidelines, training, and policy for the usage and application of specially negotiated licenses to clarify the terms under which such licenses should be used when considering a product support strategy of a major weapon system or subsystem of a major weapon system. The Under Secretary of Defense for Acquisition and Sustainment is directed to brief the resulting guidelines and other actions to the congressional defense committees no later than 180 days after the date of enactment of this Act.

Continuation of technical data rights during challenges (sec. 866)

The Senate amendment contained a provision (sec. 812) that would amend section 2321(i) of title 10, United States Code, to clarify that the government may continue to exercise rights in technical data and noncommercial computer software during the course of a challenge with an incumbent contractor under section 2321(d) of title 10, United States Code, or under procedures established by the Department of Defense, to meet Department of Defense mission requirements and readiness needs during the course of the challenge.

The House bill contained no similar provision.

The House recedes with an amendment that would clarify the circumstances in which the Secretary of Defense or a service secretary, for programs for which milestone decision authority has been delegated, may authorize use of technical data in dispute by issuing notice and a written determination that compelling mission readiness requirements will not permit awaiting the final decision.

Requirement for negotiation of technical data price before sustainment of major weapon systems (sec. 867)

The House bill contained a provision (sec. 827) that would provide the Department of Defense with additional flexibility on negotiations for appropriate technical data.

The Senate amendment contained no similar provision.