

(4) Nothing contained in this subsection requires the referral of an offer to the Small Business Administration pursuant to section 8(b)(7) of the Small Business Act (15 U.S.C. 637(b)(7)) if the basis for the referral is a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with such requirement.

(5) The head of an agency need not delay a proposed procurement in order to comply with subsection (b) or in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification.

(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 (15 U.S.C. 632).

(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).

(g) DEFINITIONS.—In this section:

(1) The term "aviation critical safety item" means a part, an assembly, installation equipment, launch equipment, recovery equipment, or support equipment for an aircraft or aviation weapon system if the part, assembly, or equipment contains a characteristic any failure, malfunction, or absence of which could cause a catastrophic or critical failure resulting in the loss of or serious damage to the aircraft or weapon system, an unacceptable risk of personal injury or loss of life, or an uncommanded engine shutdown that jeopardizes safety.

(2) The term "ship critical safety item" means any ship part, assembly, or support equipment containing a characteristic the failure, malfunction, or absence of which could cause a catastrophic or critical failure resulting in loss of or serious damage to the ship or unacceptable risk of personal injury or loss of life.

(3) The term "design control activity", with respect to an aviation critical safety item or ship critical safety item, means the systems command of a military department that is specifically responsible for ensuring the airworthiness of an aviation system or equipment, or the seaworthiness of a ship or ship equipment, in which such item is to be used.

(Added Pub. L. 98-525, title XII, §1216(a), Oct. 19, 1984, 98 Stat. 2593; amended Pub. L. 100-26, §7(d)(5), (i)(4), (k)(3), Apr. 21, 1987, 101 Stat. 281, 282, 284; Pub. L. 108-136, div. A, title VIII, §802(d), Nov. 24, 2003, 117 Stat. 1541; Pub. L. 109-364, div. A, title I, §130(d), Oct. 17, 2006, 120 Stat. 2110.)

AMENDMENTS

2006—Subsec. (c)(3). Pub. L. 109-364, §130(d)(1), inserted "or ship critical safety item" after "aviation critical safety item".

Subsec. (g)(2), (3). Pub. L. 109-364, §130(d)(2), added par. (2), redesignated former par. (2) as (3), inserted "or ship critical safety item" after "aviation critical safety item" and ", or the seaworthiness of a ship or ship equipment," after "or equipment", and substituted "such item" for "the item".

2003—Subsec. (c)(3). Pub. L. 108-136, §802(d)(1), inserted "(or, in the case of a contract for the procurement of an aviation critical safety item, the head of the design control activity for such item)" after "the contracting officer".

Subsec. (g). Pub. L. 108-136, §802(d)(2), added subsec. (g).

1987—Subsec. (a). Pub. L. 100-26, §7(k)(3), inserted "the term" after "In this section,".

Subsec. (c)(1), (3). Pub. L. 100-26, §7(i)(4), substituted "October 19, 1984," for "the date of the enactment of the Defense Procurement Reform Act of 1984".

Subsec. (c)(4). Pub. L. 100-26, §7(d)(5)(A), inserted "(15 U.S.C. 637(b)(7))" after "Small Business Act".

Subsec. (d)(2). Pub. L. 100-26, §7(d)(5)(B), inserted "(15 U.S.C. 632)" after "Small Business Act".

EFFECTIVE DATE

Pub. L. 98-525, title XII, §1216(c)(2), Oct. 19, 1984, 98 Stat. 2599, provided that: "Sections 2319, 2320, and 2321 of title 10, United States Code (as added by subsection (a)), shall apply with respect to solicitations issued after the end of the one-year period beginning on the date of the enactment of this Act [Oct. 19, 1984]."

§ 2320. Rights in technical data

(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. Such regulations also may not impair the right of a contractor or subcontractor to receive from a third party a fee or royalty for the use of technical data pertaining to an item or process developed exclusively at private expense by the contractor or subcontractor, except as otherwise specifically provided by law.

(2) Such regulations shall include the following provisions:

(A) DEVELOPMENT EXCLUSIVELY WITH FEDERAL FUNDS.—In the case of an item or process that is developed by a contractor or subcontractor exclusively with Federal funds (other than an item or process developed under a contract or subcontract to which regulations under section 9(j)(2) of the Small Business Act (15 U.S.C. 638(j)(2)) apply), 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) DEVELOPMENT EXCLUSIVELY AT PRIVATE EXPENSE.—Except as provided in subparagraphs (C), (D), and (G), 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) EXCEPTION TO SUBPARAGRAPH (B).—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, including such data pertaining to a major system component); 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) EXCEPTION TO SUBPARAGRAPH (B).—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;
 - (II) is a release, disclosure, or use of technical data pertaining to an interface

between an item or process and other items or processes 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

(III) 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) DEVELOPMENT WITH MIXED FUNDING.—Except as provided in subparagraphs (F) and (G), 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 established as early in the acquisition process as practicable (preferably during contract 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 be 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.

(iv) Such other factors as the Secretary of Defense may prescribe.

(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.

(H) 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—

(i) to sell or otherwise relinquish to the United States any rights in technical data except—

(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;

(II) rights in technical data described in subparagraph (C); or

(III) under the conditions described in subparagraph (D); or

(ii) to refrain from offering to use, or from using, an item or process to which the contractor is entitled to restrict rights in data under subparagraph (B).

(I) 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 not otherwise provided under subparagraph (C) or (D), if necessary to develop alternative sources of supply and manufacture;

(ii) agree to restrict rights in technical data otherwise accorded to the United States under this section 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); or

(iii) permit a contractor or subcontractor to license directly to a third party the use of technical data which the contractor is otherwise allowed to restrict, if necessary to develop alternative sources of supply and manufacture.

(3) The Secretary of Defense shall define the terms “developed”, “exclusively with Federal funds”, and “exclusively at private expense” in regulations prescribed under paragraph (1). In defining such terms, the Secretary shall specify the manner in which indirect costs shall be treated and shall specify that amounts spent for

independent research and development and bid and proposal costs shall not be considered to be Federal funds for the purposes of the definitions under this paragraph.

(b) Regulations prescribed under subsection (a) 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 and providing that, in the case of a contract for a commercial item, the item shall be presumed to be developed at private expense unless shown otherwise in accordance with section 2321(f);

(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) 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;

(8) 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;

(9) providing that, in addition to technical data that is already subject to a contract delivery requirement, the United States may require, 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, the delivery of technical data that has been generated in the performance of the 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 reprourement, 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 described in subparagraphs (D)(i)(II), (F), and (G) of subsection (a)(2); 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.

(c) Nothing in this section or in section 2305(d) of this title prohibits the Secretary of Defense from—

(1) 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;

(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

(3) prescribing reasonable and flexible guidelines, including negotiation objectives, for the conduct of negotiations regarding the respective rights in technical data of the United States and the contractor.

(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 subsection 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.

(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 De-

fense 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.

(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 corresponding 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.

(g) COVERED GOVERNMENT SUPPORT CONTRACTOR DEFINED.—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.

(h) **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.

(Added Pub. L. 98-525, title XII, §1216(a), Oct. 19, 1984, 98 Stat. 2595; amended Pub. L. 98-577, title III, §301(b), Oct. 30, 1984, 98 Stat. 3076; Pub. L. 99-145, title IX, §961(d)(1), Nov. 8, 1985, 99 Stat. 703; Pub. L. 99-500, §101(c) [title X, §953(a)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-169, and Pub. L. 99-591, §101(c) [title X, §953(a)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-169; Pub. L. 99-661, div. A, title IX, formerly title IV, §953(a), Nov. 14, 1986, 100 Stat. 3949, renumbered title IX, Pub. L. 100-26, §3(5), Apr. 21, 1987, 101 Stat. 273; Pub. L. 100-26, §7(a)(4), Apr. 21, 1987, 101 Stat. 275; Pub. L. 100-180, div. A, title VIII, §808(a), (b), Dec. 4, 1987, 101 Stat. 1128, 1130; Pub. L. 101-189, div. A, title VIII, §853(b)(2), Nov. 29, 1989, 103 Stat. 1518; Pub. L. 103-355, title VIII, §8106(a), Oct. 13, 1994, 108 Stat. 3393; Pub. L. 108-136, div. A, title VIII, §844, Nov. 24, 2003, 117 Stat. 1553; Pub. L. 109-364, div. A, title VIII, §802(a), Oct. 17, 2006, 120 Stat. 2312; Pub. L. 111-84, div. A, title VIII, §821, Oct. 28, 2009, 123 Stat. 2411; Pub. L. 111-383, div. A, title VIII, §§801(a), 824(b), Jan. 7, 2011, 124 Stat. 4253, 4269; Pub. L. 112-81, div. A, title VIII, §§802(b), 815(a), Dec. 31, 2011, 125 Stat. 1485, 1491; Pub. L. 114-328, div. A, title VIII, §809(a)–(e), Dec. 23, 2016, 130 Stat. 2266, 2267; Pub. L. 115-91, div. A, title VIII, §835(c), Dec. 12, 2017, 131 Stat. 1471.)

CODIFICATION

Pub. L. 99-591 is a corrected version of Pub. L. 99-500.

AMENDMENTS

2017—Subsecs. (f) to (h). Pub. L. 115-91 added subsec. (f) and redesignated former subsecs. (f) and (g) as (g) and (h), respectively.

2016—Subsec. (a)(2)(A). Pub. L. 114-328, §809(e)(1), inserted heading.

Subsec. (a)(2)(B). Pub. L. 114-328, §809(b)(2), (e)(2), inserted heading and substituted “Except as provided in subparagraphs (C), (D), and (G),” for “Except as provided in subparagraphs (C) and (D),” in text.

Subsec. (a)(2)(C). Pub. L. 114-328, §809(e)(3), inserted heading.

Subsec. (a)(2)(C)(iii). Pub. L. 114-328, §809(a), inserted “, including such data pertaining to a major system component” after “or process data”.

Subsec. (a)(2)(D). Pub. L. 114-328, §809(e)(4), inserted heading.

Subsec. (a)(2)(D)(i)(II). Pub. L. 114-328, §809(b)(3), substituted “is a release, disclosure, or use of technical data pertaining to an interface between an item or process and other items or processes necessary” for “is necessary”.

Subsec. (a)(2)(E). Pub. L. 114-328, §809(b)(4), (e)(5), inserted heading and, in introductory provisions, substituted “Except as provided in subparagraphs (F) and (G), in the case” for “In the case” and “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” for “negotiations). 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”.

Subsec. (a)(2)(F) to (I). Pub. L. 114-328, §809(b)(1), (5), added subpars. (F) and (G) and redesignated former subpars. (F) and (G) as (H) and (I), respectively.

Subsec. (b)(9). Pub. L. 114-328, §809(c)(1), (2), in introductory provisions, substituted “, 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,” for “at any time” and “in the performance of the contract” for “or utilized in the performance of a contract”.

Subsec. (b)(9)(B)(ii). Pub. L. 114-328, §809(c)(3), added cl. (ii) and struck out former cl. (ii) which read as follows: “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”.

Subsec. (f). Pub. L. 114-328, §809(d)(1), inserted heading.

Subsec. (g). Pub. L. 114-328, §809(d)(2), added subsec. (g).

2011—Subsec. (a)(2)(D)(i)(II), (III). Pub. L. 112-81, §815(a)(1)(A), added subcl. (II) and redesignated former subcl. (II) as (III).

Subsec. (a)(2)(E). Pub. L. 112-81, §815(a)(1)(B), substituted “. 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” for “and shall be based upon 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”.

Subsec. (a)(2)(F)(i). Pub. L. 111-383, §824(b)(1), added subcl. (I) and redesignated former subcls. (I) and (II) as (II) and (III), respectively.

Subsec. (a)(3). Pub. L. 112-81, §815(a)(1)(C), substituted “for the purposes of the definitions under this paragraph” for “for the purposes of paragraph (2)(B), but shall be considered to be Federal funds for the purposes of paragraph (2)(A)”.

Pub. L. 111-383, §824(b)(2), substituted “for the purposes of paragraph (2)(B), but shall be considered to be Federal funds for the purposes of paragraph (2)(A)” for “for the purposes of definitions under this paragraph”.

Subsec. (b)(9), (10). Pub. L. 112-81, §815(a)(2), added pars. (9) and (10).

Subsec. (c)(2). Pub. L. 112-81, §802(b)(1), substituted “subsection (a),” for “subsection (a)—”, struck out “(A)” before “allowing”, and struck out subpar. (B) which read as follows: “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”.

Pub. L. 111-383, §801(a)(1), substituted “subsection (a)—” for “subsection (a),”, inserted “(A)” before “allowing”, and added subpar. (B).

Subsec. (g). Pub. L. 112-81, §802(b)(2), struck out subsec. (g) which defined “covered litigation support contractor” for purpose of this section.

Pub. L. 111-383, §801(a)(2), added subsec. (g).

2009—Subsec. (c)(2), (3). Pub. L. 111-84, §821(a), added par. (2) and redesignated former par. (2) as (3).

Subsec. (f). Pub. L. 111-84, §821(b), added subsec. (f).

2006—Subsec. (e). Pub. L. 109-364 added subsec. (e).

2003—Subsec. (b)(7) to (9). Pub. L. 108-136 redesignated pars. (8) and (9) as (7) and (8), respectively, and struck out former par. (7) which read as follows: “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;”.

1994—Subsec. (b)(1). Pub. L. 103-355 inserted before semicolon at end “and providing that, in the case of a contract for a commercial item, the item shall be presumed to be developed at private expense unless shown otherwise in accordance with section 2321(f)”.

1989—Subsec. (a)(4). Pub. L. 101-189 struck out par. (4) which provided that for purposes of this subsection, the term “Federal Acquisition Regulation” means the single system of Government-wide procurement regulations as defined in section 4(4) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(4)).

1987—Subsec. (a)(1). Pub. L. 100-180, §808(a)(1), inserted at end “Such regulations also may not impair the right of a contractor or subcontractor to receive from a third party a fee or royalty for the use of technical data pertaining to an item or process developed exclusively at private expense by the contractor or subcontractor, except as otherwise specifically provided by law.”

Subsec. (a)(2)(A). Pub. L. 100-26, §7(a)(4)(A), inserted “(other than an item or process developed under a contract or subcontract to which regulations under section 9(j)(2) of the Small Business Act (15 U.S.C. 638(j)(2)) apply)” after “Federal funds”.

Subsec. (a)(2)(E). Pub. L. 100-180, §808(a)(2), in introductory provisions, substituted “established” for “agreed upon”, struck out comma after “negotiations” and inserted in lieu “and shall be based upon 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 be”, and added cl. (iv).

Subsec. (a)(2)(F). Pub. L. 100-180, §808(a)(3), amended subpar. (F) generally. Prior to amendment, subpar. (F) read as follows: “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).”

Subsec. (a)(2)(G)(i). Pub. L. 100-180, §808(a)(4)(A), substituted “not otherwise provided under subparagraph (C) or (D),” for “pertaining to an item or process developed by such contractor or subcontractor exclusively at private expense” and struck out “or” at end.

Subsec. (a)(2)(G)(ii). Pub. L. 100-180, §808(a)(4)(B), substituted “this section” for “such regulations” and “; or” for period at end.

Pub. L. 100-26, §7(a)(4)(B), substituted “in technical data otherwise accorded to the United States under

such regulations” for “of the United States in technical data pertaining to an item or process developed entirely or in part with Federal funds”.

Subsec. (a)(2)(G)(iii). Pub. L. 100-180, §808(a)(4)(C), added cl. (iii).

Subsec. (a)(3). Pub. L. 100-180, §808(a)(5), substituted “, exclusively with Federal funds”, and “exclusively at private expense” for “and private expense” and inserted at end “In defining such terms, the Secretary shall specify the manner in which indirect costs shall be treated and shall specify that amounts spent for independent research and development and bid and proposal costs shall not be considered to be Federal funds for the purposes of definitions under this paragraph.”

Subsec. (c). Pub. L. 100-180, §808(b), substituted “from—” for “from”, designated existing provisions beginning with “prescribing standards” as par. (1), and added par. (2).

1986—Subsec. (a). Pub. L. 99-500, Pub. L. 99-591, and Pub. L. 99-661 amended generally subsec. (a) substantially identically, substituting provision that regulations to define the legitimate interest of the United States and of a contractor or subcontractor in technical data be included in regulations of the Department of Defense prescribed as part of the Federal Acquisition Regulation for provision that such regulations define the legitimate proprietary interest of the United States and a contractor and be part of the single system of Government-wide procurement regulations, detailed what such regulations must contain if the item or process is developed exclusively with Federal funds, exclusively with private funds, or partly with Federal funds and partly with private funds, inserted provision relating to relinquishment of rights in data to the United States, directed the Secretary of Defense to define “developed” and “private expense”, and defined “Federal Acquisition Regulation”. Text reflects amendment by Pub. L. 99-661, which was executed last.

1985—Subsec. (a)(1). Pub. L. 99-145 substituted “the item or process to which the technical data pertains” for “the technical data”.

1984—Subsec. (a). Pub. L. 98-577 substituted “in regulations of the Department of Defense prescribed as part” for “in regulations prescribed as part” in text preceding par. (1).

EFFECTIVE DATE OF 2011 AMENDMENT

Pub. L. 112-81, div. A, title VIII, §815(c), Dec. 31, 2011, 125 Stat. 1493, provided that:

“(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section [amending this section and section 2321 of this title] shall take effect on the date of the enactment of this Act [Dec. 31, 2011].

“(2) EXCEPTION.—The amendment made by subsection (a)(1)(C) [amending this section] 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.”

Pub. L. 111-383, div. A, title VIII, §801(b), Jan. 7, 2011, 124 Stat. 4254, provided that: “The amendments made by subsection (a) [amending this section] shall take effect on the date that is 120 days after the date of the enactment of this Act [Jan. 7, 2011].”

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 2302 of this title.

EFFECTIVE DATE OF 1987 AMENDMENT

Pub. L. 100-180, div. A, title VIII, §808(c), Dec. 4, 1987, 101 Stat. 1130, provided that: “The amendments made by this section [amending this section] shall take effect on the earlier of—

“(1) the last day of the 120-day period beginning on the date of the enactment of this Act [Dec. 4, 1987]; or

“(2) the date on which regulations are prescribed and made effective to implement such amendments.”

EFFECTIVE DATE OF 1986 AMENDMENT

Pub. L. 99-500, §101(c) [title X, §953(e)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-172, Pub. L. 99-591, §101(c) [title X, §953(e)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-172, and Pub. L. 99-661, div. A, title IX, formerly title IV, §953(e), Nov. 14, 1986, 100 Stat. 3952, renumbered title IX, Pub. L. 100-26, §3(5), Apr. 21, 1987, 101 Stat. 273, provided that: “The amendments made by subsections (a) and (b) [amending this section and section 2321 of this title] 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 [Oct. 18, 1986].”

EFFECTIVE DATE

Section applicable with respect to solicitations issued after the end of the one-year period beginning Oct. 19, 1984, see section 1216(c)(2) of Pub. L. 98-525, set out as a note under section 2319 of this title.

REGULATIONS

Pub. L. 109-364, div. A, title VIII, §802(c), Oct. 17, 2006, 120 Stat. 2313, provided that: “Not later than 180 days after the date of the enactment of this Act [Oct. 17, 2006], 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.”

Pub. L. 99-500, §101(c) [title X, §953(d)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-172, Pub. L. 99-591, §101(c) [title X, §953(d)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-172, and Pub. L. 99-661, div. A, title IX, formerly title IV, §953(d), Nov. 14, 1986, 100 Stat. 3952, renumbered title IX, Pub. L. 100-26, §3(5), Apr. 21, 1987, 101 Stat. 273, required that proposed regulations under subsec. (a)(1) of this section be published in Federal Register for comment not later than 90 days after Oct. 18, 1986, and that proposed final regulations be published in Federal Register not later than 180 days after Oct. 18, 1986.

GUIDANCE RELATING TO RIGHTS IN TECHNICAL DATA

Pub. L. 111-383, div. A, title VIII, §824(a), Jan. 7, 2011, 124 Stat. 4269, provided that: “Not later than 180 days after the date of the enactment of this Act [Jan. 7, 2011], the Secretary of Defense shall review guidance issued by the military departments on the implementation 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 [amending this section and section 2321 of this title]. 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.”

TECHNICAL DATA RIGHTS UNDER NON-FAR AGREEMENTS

Pub. L. 110-417, [div. A], title VIII, §822, Oct. 14, 2008, 122 Stat. 4532, as amended by Pub. L. 111-383, div. A, title X, §1075(e)(13), Jan. 7, 2011, 124 Stat. 4375, provided that:

“(a) POLICY GUIDANCE.—Not later than 270 days after the date of the enactment of this Act [Oct. 14, 2008], the Secretary of Defense shall issue policy guidance with respect to rights in technical data under a non-FAR agreement. The guidance shall—

“(1) establish criteria for defining the legitimate interests of the United States and the party concerned in technical data pertaining to an item or process to be developed under the agreement;

“(2) require that specific rights in technical data be established during agreement negotiations and be based upon negotiations between the United States and the potential party to the agreement, except in any case in which the Secretary of Defense determines, on the basis of criteria established in such policy guidance, that the establishment of rights during or through agreement negotiations would not be practicable; and

“(3) require the program manager for a major weapon system or an item of personnel protective equipment that is to be developed using a non-FAR agreement to assess the long-term technical data needs of such system or item.

“(b) REQUIREMENT TO INCLUDE PROVISIONS IN NON-FAR AGREEMENTS.—A non-FAR agreement shall contain appropriate provisions relating to rights in technical data consistent with the policy guidance issued pursuant to subsection (a).

“(c) DEFINITIONS.—In this section:

“(1) The term ‘non-FAR agreement’ means an agreement that is not subject to laws pursuant to which the Federal Acquisition Regulation is prescribed, including—

“(A) a transaction authorized under section 2371 of title 10, United States Code; and

“(B) a cooperative research and development agreement.

“(2) The term ‘party’, with respect to a non-FAR agreement, means a non-Federal entity and includes any of the following:

“(A) A contractor and its subcontractors (at any tier).

“(B) A joint venture.

“(C) A consortium.

“(d) REPORT ON LIFE CYCLE PLANNING FOR TECHNICAL DATA NEEDS.—Not later than 270 days after the date of enactment of this Act [Oct. 14, 2008], the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on the implementation of the requirements in section 2320(e) of title 10, United States Code, for the assessment of long-term technical data needs to sustain major weapon systems. Such report shall include—

“(1) a description of all relevant guidance or policies issued;

“(2) a description of the extent to which program managers have received training to better assess the long-term technical data needs of major weapon systems and subsystems; and

“(3) a description of one or more examples, if any, where a priced contract option has been used on major weapon systems for the future delivery of technical data and one or more examples, if any, where all relevant technical data were acquired upon contract award.”

GOVERNMENT-INDUSTRY COMMITTEE ON RIGHTS IN TECHNICAL DATA

Pub. L. 102-190, div. A, title VIII, §807, Dec. 5, 1991, 105 Stat. 1421, as amended by Pub. L. 102-484, div. A, title VIII, §814, Oct. 23, 1992, 106 Stat. 2454; Pub. L. 105-85, div. A, title X, §1073(d)(3), Nov. 18, 1997, 111 Stat. 1905, provided that not later than Sept. 15, 1992, the Secretary of Defense was to prescribe final regulations required by subsec. (a) of this section that supersede the interim regulations prescribed before Dec. 5, 1991, for the purposes of this section and contained various provisions relating to a government-industry advisory committee, reports to Congress, publication of the regulations, and application of the regulations.

CONTROL OF GOVERNMENT PERSONNEL WORK PRODUCT

Pub. L. 102-190, div. A, title VIII, §808, Dec. 5, 1991, 105 Stat. 1423, required Secretary of Defense to prescribe regulations ensuring that any Department of Defense employee or member of the armed forces with an appropriate security clearance who is engaged in oversight of

an acquisition program maintains control of the employee's or member's work product, provided that 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, required implementing regulations not later than 120 days after Dec. 5, 1991, and provided that this section would cease to be effective on Sept. 30, 1992.

§ 2321. Validation of proprietary data restrictions

(a) **CONTRACTS COVERED BY SECTION.**—This section applies to any contract for supplies or services entered into by the Department of Defense that includes provisions for the delivery of technical data.

(b) **CONTRACTOR JUSTIFICATION FOR RESTRICTIONS.**—A contract subject to this section shall provide that a contractor under the contract and any subcontractor under the contract at any tier shall be prepared to furnish to the contracting officer a written justification for any use or release restriction (as defined in subsection (i)) asserted by the contractor or subcontractor.

(c) **REVIEW OF RESTRICTIONS.**—(1) The Secretary of Defense shall ensure that there is a thorough review of the appropriateness of any use or release restriction asserted with respect to technical data by a contractor or subcontractor at any tier under a contract subject to this section.

(2) The review of an asserted use or release restriction under paragraph (1) shall be conducted before the end of the three-year period beginning on the later of—

(A) the date on which final payment is made on the contract under which the technical data is required to be delivered; or

(B) the date on which the technical data is delivered under the contract.

(d) **CHALLENGES TO RESTRICTIONS.**—(1) The Secretary of Defense may challenge a use or release restriction asserted with respect to technical data by a contractor or subcontractor at any tier under a contract subject to this section if the Secretary finds that—

(A) reasonable grounds exist to question the current validity of the asserted restriction; and

(B) the continued adherence by the United States to the asserted restriction would make it impracticable to procure the item to which the technical data pertain competitively at a later time.

(2)(A) 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 described in subparagraph (B) unless the technical data involved—

- (i) are publicly available;
- (ii) have been furnished to the United States without restriction;
- (iii) have been otherwise made available without restriction; or
- (iv) are the subject of a fraudulently asserted use or release restriction.

(B) The six-year period referred to in subparagraph (A) is the six-year period beginning on the later of—

(i) the date on which final payment is made on the contract under which the technical data are required to be delivered; or

(ii) the date on which the technical data are delivered under the contract.

(3) If the Secretary challenges an asserted use or release restriction under paragraph (1), the Secretary shall provide written notice of the challenge to the contractor or subcontractor asserting the restriction. Any such notice shall—

(A) state the specific grounds for challenging the asserted restriction;

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

(C) state that evidence of a justification described in paragraph (4) may be submitted.

(4) It is a justification of an asserted use or release restriction challenged under paragraph (1) that, within the three-year period preceding the challenge to the restriction, the Department of Defense validated a restriction identical to the asserted restriction if—

(A) such validation occurred after a challenge to the validated restriction under this subsection; and

(B) the validated restriction was asserted by the same contractor or subcontractor (or a licensee of such contractor or subcontractor).

(e) **TIME FOR CONTRACTORS TO SUBMIT JUSTIFICATIONS.**—If a contractor or subcontractor asserting a use or release restriction 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.

(f) **PRESUMPTION OF DEVELOPMENT EXCLUSIVELY AT PRIVATE EXPENSE.**—(1) Except as provided in 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 under a contract for commercial items, the contracting officer shall presume that the contractor or subcontractor has justified the restriction on the basis that the item was developed exclusively at private expense, whether or not the contractor or subcontractor submits a justification in response to the notice provided pursuant to subsection (d)(3). In such a case, the challenge to the use or release restriction may be sustained only if information provided by the Department of Defense demonstrates that the item was not developed exclusively at private expense.

(2) In the case of a challenge to a use or release restriction that is asserted with respect to