

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

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.

(g) DECISION BY CONTRACTING OFFICER.—(1) Upon a failure by the contractor or subcontractor to submit any response under subsection (d)(3), the contracting officer shall issue a decision pertaining to the validity of the asserted restriction.

(2) After review of any justification submitted in response to the notice provided pursuant to subsection (d)(3), the 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.

(h) CLAIMS.—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 chapter 71 of title 41.

(i) RIGHTS AND LIABILITY UPON FINAL DISPOSITION.—(1) If, upon final disposition, the contracting officer's challenge to the use or release restriction is sustained—

(A) the restriction shall be cancelled; and

(B) if the asserted restriction is found not to be substantially justified, the contractor or subcontractor asserting the restriction 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 use or release restriction 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 asserted restriction if the challenge by the United States is found not to be made in good faith.

(j) USE OR RELEASE RESTRICTION DEFINED.—In this section, the term “use or release restriction”, with respect to technical data delivered to the United States under a contract subject to this section, means a restriction by the contractor or subcontractor on the right of the United States—

(1) to use such technical data; or

(2) to release or disclose such technical data to persons outside the Government or permit the use of such technical data by persons outside the Government.

(Added Pub. L. 98-525, title XII, §1216(a), Oct. 19, 1984, 98 Stat. 2597; amended Pub. L. 99-500 §101(c) [title X, §953(b)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-171, and Pub. L. 99-591, §101(c) [title X, §953(b)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-171; Pub. L. 99-661, div. A, title IX, formerly title IV, §953(b), Nov. 14, 1986, 100 Stat. 3951, renumbered title IX, Pub. L. 100-26, §3(5), Apr. 21, 1987, 101 Stat. 273, Pub. L. 100-26, §7(a)(5), Apr. 21, 1987, 101 Stat. 276; Pub. L. 100-180, div. A, title XII, §1231(6), Dec. 4, 1987, 101 Stat. 1160; Pub. L. 103-35, title II, §201(g)(4), May 31, 1993, 107 Stat. 100; Pub. L. 103-355, title VIII, §8106(b), Oct. 13, 1994, 108 Stat. 3393; Pub. L. 109-364, div. A, title VIII, §802(b), Oct. 17, 2006, 120 Stat. 2313; Pub. L. 110-181, div. A, title VIII, §815(a)(2), Jan. 28, 2008, 122 Stat. 223; Pub. L. 111-350, §5(b)(18), Jan. 4, 2011, 124 Stat. 3844; Pub. L. 111-383, div. A, title VIII, §824(c), Jan. 7, 2011, 124 Stat. 4269; Pub. L. 112-81, div. A, title VIII, §815(b), Dec. 31, 2011, 125 Stat. 1492; Pub. L. 113-291, div. A, title X, §1071(a)(5), Dec. 19, 2014, 128 Stat. 3504; Pub. L. 114-92, div. A, title VIII, §813(a), Nov. 25, 2015, 129 Stat. 891.)

CODIFICATION

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

Another section 2321 of this title was contained in chapter 138 and was renumbered section 2341 of this title.

AMENDMENTS

2015—Subsec. (f)(2). Pub. L. 114-92 amended par. (2) generally. Prior to amendment, par. (2) read as follows: “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 (other than technical data for a commercially available off-the-shelf item as defined in section 104 of title 41) 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 restriction shall be sustained unless information provided by the contractor or subcontractor demonstrates that the item was developed exclusively at private expense.”

2014—Subsec. (f)(2). Pub. L. 113-291 substituted “section 104 of title 41” for “section 35(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 431(c))”.

2011—Subsec. (d)(2)(A). Pub. L. 112-81, §815(b)(1)(A), substituted “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” for “Except as provided in subparagraph (C), a challenge to an asserted

use or release restriction may not be made under paragraph (1) after the end of the three-year period” in introductory provisions.

Pub. L. 111-383, § 824(c)(1), substituted “Except as provided in subparagraph (C), a challenge” for “A challenge” in introductory provisions.

Subsec. (d)(2)(A)(iv). Pub. L. 112-81, § 815(b)(1)(B)-(D), added cl. (iv).

Subsec. (d)(2)(B). Pub. L. 112-81, § 815(b)(2), substituted “six-year period” for “three-year period” in two places in introductory provisions.

Subsec. (d)(2)(C). Pub. L. 112-81, § 815(b)(3), struck out subpar. (C) which read as follows: “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.”

Pub. L. 111-383, § 824(c)(2), added subpar. (C).

Subsec. (h). Pub. L. 111-350 substituted “chapter 71 of title 41” for “the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.)”.

2008—Subsec. (f)(2). Pub. L. 110-181 substituted “(other than technical data for a commercially available off-the-shelf item as defined in section 35(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 431(c)))” for “(whether or not under a contract for commercial items)”.

2006—Subsec. (f). Pub. L. 109-364 substituted “Expense” for “Expense for Commercial Items Contracts” in heading, designated existing provisions as par. (1), substituted “Except as provided in paragraph (2), in” for “In”, and added par. (2).

1994—Subsecs. (f) to (j). Pub. L. 103-355 added subsec. (f) and redesignated former subsecs. (f) to (i) as (g) to (j), respectively.

1993—Subsec. (d)(1)(B). Pub. L. 103-35 substituted “adherence” for “adherance”.

1987—Subsec. (a). Pub. L. 100-26, § 7(a)(5)(A)(ii), added subsec. (a) and struck out former subsec. (a) which read as follows: “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.”

Subsec. (b). Pub. L. 100-26, § 7(a)(5)(A)(ii), added subsec. (b) and struck out former subsec. (b) which read as follows:

“(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.”

Subsec. (c). Pub. L. 100-26, § 7(a)(5)(A)(ii), added subsec. (c). Former subsec. (c) redesignated (e).

Subsec. (d). Pub. L. 100-26, § 7(a)(5)(A)(ii), added subsec. (d). Former subsec. (d) redesignated (f).

Subsec. (d)(4)(A). Pub. L. 99-180, § 1231(6)(A), substituted “subsection” for “paragraph”.

Subsec. (e). Pub. L. 100-26, § 7(a)(5)(A)(i), (B), redesignated former subsec. (c) as (e), inserted heading, and substituted “If a contractor or subcontractor asserting a use or release restriction” for “If a contractor or subcontractor asserting a restriction subject to this section”. Former subsec. (e) redesignated (g).

Subsec. (f). Pub. L. 100-26, § 7(a)(5)(A)(i), (C), redesignated former subsec. (d) as (f), inserted heading, and substituted “subsection (d)(3)” for “subsection (b)” in two places. Former subsec. (f) redesignated (h).

Subsec. (g). Pub. L. 100-26, § 7(a)(5)(A)(i), (D), redesignated former subsec. (e) as (g) and inserted heading.

Subsec. (h). Pub. L. 100-26, § 7(a)(5)(A)(i), (E)(i), redesignated former subsec. (f) as (h) and inserted heading.

Subsec. (h)(1). Pub. L. 100-26, § 7(a)(5)(E)(ii)-(iv), substituted “the use or release restriction” for “the restriction on the right of the United States to use such technical data” in introductory provisions, struck out “on the right of the United States to use the technical data” after “the restriction” in subpar. (A), and substituted “asserting the restriction” for “, as appropriate,” in subpar. (B).

Subsec. (h)(2). Pub. L. 100-26, § 7(a)(5)(E)(v), substituted “the use or release restriction” for “the restriction on the right of the United States to use such technical data” in introductory provisions.

Subsec. (i). Pub. L. 100-180, § 1231(6)(B), inserted “or subcontractor” in introductory provisions.

Pub. L. 100-26, § 7(a)(5)(F), added subsec. (i).

1986—Subsecs. (a), (b). Pub. L. 99-500, Pub. L. 99-591, and Pub. L. 99-661 amended generally subsecs. (a) and (b) identically. Prior to amendment, subsecs. (a) and (b) 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—

“(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—

“(1) state the grounds for challenging the asserted restriction; and

“(2) require a response within 60 days justifying the current validity of the asserted restriction.”

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. 100-26, §12(d)(1), Apr. 21, 1987, 101 Stat. 289, provided that: “The amendments to section 2321 of title 10, United States Code, made by section 7(a)(5) shall apply to contracts for which solicitations are issued after the end of the 210-day period beginning on October 18, 1986.”

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-500, Pub. L. 99-591, and Pub. L. 99-661 applicable to contracts for which solicitations are issued after end of 210-day period beginning Oct. 18, 1986, see section 101(c) of Pub. L. 99-500 and Pub. L. 99-591, and section 953(e) of Pub. L. 99-661, set out as a note under section 2320 of this title.

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.

§ 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 licens-

ing 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.