

sonable 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 2018 AMENDMENT

Amendment by section 836(c)(8) of Pub. L. 115-232 effective Jan. 1, 2020, subject to a savings provision, see section 836(h) of Pub. L. 115-232, set out as an Effective Date of 2018 Amendment; Savings Provision note under section 453b of Title 6, Domestic Security.

Pub. L. 115-232, div. A, title VIII, §866(c), Aug. 13, 2018, 132 Stat. 1901, which provided the effective date and applicability for amendments made to this section by section 866(a) of Pub. L. 115-232 and revisions required by section 866(b) of Pub. L. 115-232 (formerly set out below), was repealed by Pub. L. 116-92, div. A, title VIII, §808(a), Dec. 20, 2019, 133 Stat. 1486.

#### 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.

#### REVISION OF THE DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT

Pub. L. 115-232, div. A, title VIII, §866(b), Aug. 13, 2018, 132 Stat. 1901, which required the Secretary of Defense to revise the Defense Federal Acquisition Regulation Supplement to implement amendments to this section made by section 866(a) of Pub. L. 115-232, was repealed by Pub. L. 116-92, div. A, title VIII, §808(a), Dec. 20, 2019, 133 Stat. 1486.

#### GUIDANCE ON TECHNICAL DATA RIGHT NEGOTIATION

Pub. L. 115-232, div. A, title VIII, §866(d), Aug. 13, 2018, 132 Stat. 1901, which required the Secretary of Defense to develop certain policies on the negotiation of technical data rights for noncommercial software, was repealed by Pub. L. 116-92, div. A, title VIII, §808(a), Dec. 20, 2019, 133 Stat. 1486.

### § 2322. Management of intellectual property matters within the Department of Defense

(a) POLICY REQUIRED.—The Secretary of Defense, acting through the Under Secretary of De-

fense 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 en-

sure 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.

(Added Pub. L. 115-91, div. A, title VIII, §802(a)(1), Dec. 12, 2017, 131 Stat. 1450.)

#### PRIOR PROVISIONS

A prior section 2322, added Pub. L. 98-525, title XII, §1216(a), Oct. 19, 1984, 98 Stat. 2598; amended Pub. L. 100-26, §7(a)(6), Apr. 21, 1987, 101 Stat. 278; Pub. L. 100-180, div. A, title XII, §1231(7), Dec. 4, 1987, 101 Stat. 1160, limited small business set-asides under the Foreign Military Sales Program and provided that the section expired Jan. 17, 1987, prior to repeal by Pub. L. 102-484, div. A, title X, §1052(25)(A), Oct. 23, 1992, 106 Stat. 2500.

Another prior section 2322 was contained in chapter 138 and was renumbered section 2342 of this title.

#### PILOT PROGRAM ON INTELLECTUAL PROPERTY EVALUATION FOR ACQUISITION PROGRAMS

Pub. L. 116-92, div. A, title VIII, §801, Dec. 20, 2019, 133 Stat. 1481, provided that:

“(a) PILOT PROGRAM.—Not later than 180 days after the date of the enactment of this Act [Dec. 20, 2019], the Secretary of Defense and the Secretaries of the military departments may jointly carry out a pilot program to assess mechanisms to evaluate intellectual property (such as technical data deliverables and associated license rights), including commercially available intellectual property valuation analysis and techniques, in acquisition programs for which each such Secretary is responsible to better understand the benefits associated with these mechanisms on—

“(1) the development of cost-effective intellectual property strategies;

“(2) the assessment and management of the value and acquisition costs of intellectual property during acquisition and sustainment activities (including source selection evaluation factors) throughout the acquisition lifecycle for any acquisition program selected by such Secretary; and

“(3) the use of a commercial product (as defined in section 103 of title 41, United States Code, as in effect on January 1, 2020), commercial service (as defined in section 103a of title 41, United States Code, as in effect on January 1, 2020), or nondevelopmental item (as defined in section 110 of title 41, United States Code) as an alternative to a product or service to be specifically developed for a selected acquisition program, including evaluation of the benefits of reduced risk regarding cost, schedule, and performance associated with commercial products, commercial services, and nondevelopmental items.

“(b) ACTIVITIES.—Activities carried out under the pilot program may include the following:

“(1) Establishment of a team of Department of Defense and private sector subject matter experts (which may include the cadre of intellectual property experts established under section 2322(b) of title 10, United States Code) to—

“(A) recommend acquisition programs to be selected for the pilot program established under subsection (a);

“(B) recommend criteria for the consideration of types of commercial products, commercial services, or nondevelopmental items that can be used as an alternative to a product or service to be specifically developed for a selected acquisition program; or

“(C) identify, to the maximum extent practicable at each milestone established for each selected acquisition program, intellectual property evaluation techniques to obtain quantitative and qualitative analysis of intellectual property during the procurement, production and deployment, and operations and support phases for the each selected acquisition program.

“(2) Assessment of commercial valuation techniques for intellectual property for use by the Department of Defense.

“(3) Assessment of the feasibility of agency-level oversight to standardize intellectual property evaluation practices and procedures.

“(4) Assessment of contracting mechanisms to speed delivery of intellectual property to the Armed Forces or reduce sustainment costs.

“(5) Assessment of agency acquisition planning to ensure procurement of appropriate intellectual property deliverables and intellectual property rights necessary for Government-planned sustainment activities.

“(6) Engagement with the private sector to—

“(A) support the development of strategies and program requirements to aid in acquisition planning for intellectual property;

“(B) support the development and improvement of intellectual property strategies as part of life-cycle sustainment plans; and

“(C) propose and implement alternative and innovative methods of intellectual property valuation, prioritization, and evaluation techniques for intellectual property.

“(7) Recommendations to the relevant program manager of an acquisition program selected under subsection (a), including evaluation techniques and contracting mechanisms for acquisition and sustainment activities.

“(c) REPORT.—Not later than November 1, 2020, and annually thereafter through November 1, 2023, the Secretary of Defense, in coordination with the Secretaries concerned, shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a joint report on the pilot program conducted

under this section. The report shall, at a minimum, include—

“(1) a description of the acquisition programs selected by the Secretary concerned;

“(2) a description of the specific activities in subsection (c) that were performed under each program;

“(3) an assessment of the effectiveness of the activities;

“(4) an assessment of improvements to acquisition or sustainment activities related to the pilot program; and

“(5) an assessment of the results related to the pilot program, including any cost savings and improvement to mission success during the operations and support phase of the selected acquisition program.”

**§ 2322a. Requirement for consideration of certain matters during acquisition of noncommercial computer software**

(a) CONSIDERATION REQUIRED.—As part of any negotiation for the acquisition of noncommercial computer software, the Secretary of Defense shall ensure that such negotiations consider, to the maximum extent practicable, acquisition, at the appropriate time in the life cycle of the noncommercial computer software, of all software and related materials necessary—

(1) to reproduce, build, or recompile the software from original source code and required libraries;

(2) to conduct required computer software testing; and

(3) to deploy working computer software system binary files on relevant system hardware.

(b) DELIVERY OF SOFTWARE AND RELATED MATERIALS.—Any noncommercial computer software or related materials required to be delivered as a result of considerations in subsection (a) shall, to the extent appropriate as determined by the Secretary—

(1) include computer software delivered in a useable, digital format;

(2) not rely on external or additional software code or data, unless such software code or data is included in the items to be delivered; and

(3) in the case of negotiated terms that do not allow for the inclusion of dependent software code or data, sufficient documentation to support maintenance and understanding of interfaces and software revision history.

(Added Pub. L. 115–91, div. A, title VIII, § 871(a)(1), Dec. 12, 2017, 131 Stat. 1496.)

GUIDANCE

Pub. L. 115–91, div. A, title VIII, § 871(b), Dec. 12, 2017, 131 Stat. 1497, provided that: “Not later than 180 days after the date of the enactment of this Act [Dec. 12, 2017], the Secretary of Defense shall issue updated guidance to implement section 2322a of title 10, United States Code, as added by subsection (a).”

**[§ 2323. Repealed. Pub. L. 115–232, div. A, title VIII, § 812(a)(2)(A), Aug. 13, 2018, 132 Stat. 1846]**

Section, added and amended Pub. L. 102–484, div. A, title VIII, §§ 801(a)(1), (b)–(f), 802, Oct. 23, 1992, 106 Stat. 2442–2444, 2446; Pub. L. 103–35, title II, § 202(a)(6), May 31, 1993, 107 Stat. 101; Pub. L. 103–160, div. A, title VIII, § 811(a)–(c), (e), Nov. 30, 1993, 107 Stat. 1702; Pub. L. 103–355, title VII, § 7105, Oct. 13, 1994, 108 Stat. 3369; Pub.