

shall provide that bid and proposal costs shall be allowable as indirect expenses on covered contracts, as defined in section 3741 of this title, to the extent that those costs are allocable, reasonable, and not otherwise unallowable by law or under the Federal Acquisition Regulation.

(c) GOAL FOR REIMBURSABLE BID AND PROPOSAL COSTS.—The Secretary shall establish a goal each fiscal year limiting the amount of reimbursable bid and proposal costs paid by the Department of Defense to an amount equal to not more than one percent of the total aggregate industry sales to the Department of Defense. To achieve such goal, the Secretary may not limit the payment of allowable bid and proposal costs for the covered year.

(d) PANEL.—(1) If the Department of Defense exceeds the goal established under subsection (c) for a fiscal year, within 180 days after exceeding the goal, the Secretary shall establish an advisory panel. The panel shall be supported by the Defense Acquisition University and the National Defense University, including administrative support.

(2) The panel shall be composed of nine individuals who are recognized experts in acquisition and procurement policy appointed by the Secretary. In making such appointments, the Secretary shall ensure that the members of the panel reflect diverse experiences in the public and private sector.

(3) The panel shall review laws, regulations, and practices that contribute to the expenses incurred by contractors for bids and proposals in the fiscal year concerned and recommend changes to such laws, regulations, and practices that may reduce expenses incurred by contractors for bids and proposals.

(4)(A) Not later than six months after the establishment of the panel, the panel shall submit to the Secretary and the congressional defense committees an interim report on the findings of the panel.

(B) Not later than one year after the establishment of the panel, the panel shall submit to the Secretary and the congressional defense committees a final report on the findings of the panel.

(5) The panel shall terminate on the day the panel submits the final report under paragraph (4)(B).

(6) The Secretary of Defense may use amounts available in the Department of Defense Acquisition Workforce Development Fund established under section 1705 of this title to support the activities of the panel established under this subsection.

(e) EFFECTIVE DATE.—The regulations prescribed under subsection (a) shall apply to indirect costs incurred on or after October 1, 2017.

(Added Pub. L. 114-328, div. A, title VIII, § 824(b)(1), Dec. 23, 2016, 130 Stat. 2278, § 2372a; renumbered § 3763 and amended Pub. L. 116-283, div. A, title XVIII, § 1832(j)(2), (4), Jan. 1, 2021, 134 Stat. 4225.)

Editorial Notes

AMENDMENTS

2021—Pub. L. 116-283, § 1832(j)(2), renumbered section 2372a of this title as this section.

Subsec. (b). Pub. L. 116-283, § 1832(j)(4), substituted “section 3741” for “section 2324(l)”.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2021 AMENDMENT

Amendment by Pub. L. 116-283 effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, see section 1801(d) of Pub. L. 116-283, set out as a note preceding section 3001 of this title.

CHAPTER 275—PROPRIETARY CONTRACTOR DATA AND RIGHTS IN TECHNICAL DATA

Subchapter		Sec.
I.	Rights in Technical Data	3771
II.	Validation of Proprietary Data Restrictions	3781
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Editorial Notes

PRIOR PROVISIONS

A prior chapter 275 “PROPRIETARY CONTRACTOR DATA AND TECHNICAL DATA”, as added by Pub. L. 115-232, div. A, title VIII, § 801(a), Aug. 13, 2018, 132 Stat. 1828, and consisting of reserved section 3771, was repealed by Pub. L. 116-283, div. A, title XVIII, § 1833(a)(1), Jan. 1, 2021, 134 Stat. 4225.

SUBCHAPTER I—RIGHTS IN TECHNICAL DATA

Sec.	
3771.	Rights in technical data: regulations.
3772.	Rights in technical data: provisions required in contracts.
3773.	Domestic business concerns: programs for replenishment parts.
3774.	Major weapon systems and subsystems: long-term technical data needs.
3775.	Definitions.

§ 3771. Rights in technical data: regulations

(a) REGULATIONS REQUIRED.—

(1) IN GENERAL.—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.

(2) OTHER RIGHTS NOT IMPAIRED.—Regulations prescribed under paragraph (1) may not impair—

(A) 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; or

(B) 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.

(b) REQUIRED PROVISIONS.—Regulations prescribed under subsection (a) shall include the following provisions:

(1) 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—

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

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

(2) DEVELOPMENT EXCLUSIVELY AT PRIVATE EXPENSE.—Except as provided in paragraphs (3), (4), and (7), 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.

(3) EXCEPTION TO PARAGRAPH (2).—Paragraph (2) does not apply to technical data that—

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

(B) relates to form, fit, or function;

(C) 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

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

(4) EXCEPTION TO PARAGRAPH (2).—Notwithstanding paragraph (2), 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—

(A) 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;

(B) 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

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

(5) DEVELOPMENT WITH MIXED FUNDING.—

(A) IN GENERAL.—Except as provided in paragraphs (6) and (7), 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.

(B) FACTORS TO BE CONSIDERED.—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.

(6) INTERFACES DEVELOPED WITH MIXED FUNDING.—Notwithstanding paragraph (5), 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.

(7) MODULAR SYSTEM INTERFACES DEVELOPED EXCLUSIVELY AT PRIVATE EXPENSE OR WITH MIXED FUNDING.—

(A) Notwithstanding paragraphs (2) and (5), the United States shall have government purpose rights in technical data pertaining to a modular 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 4401 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.

(B) Such modular system interface shall be identified in the contract solicitation and the contract.

(C) For technical data pertaining to a modular 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.

(8) LIMITATIONS ON REQUIREMENTS RELATED TO CONTRACTOR OR SUBCONTRACTOR RIGHTS IN TECHNICAL DATA.—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—

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

(i) rights in technical data described in paragraph (1) for which a use or release restriction has been erroneously asserted by a contractor or subcontractor;

(ii) rights in technical data described in paragraph (3); or

(iii) under the conditions described in paragraph (4); or

(B) 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 paragraph (2).

(9) ACTIONS AUTHORIZED IF NECESSARY TO DEVELOP ALTERNATIVE SOURCES OF SUPPLY AND MANUFACTURE.—The Secretary of Defense may—

(A) negotiate and enter into a contract with a contractor or subcontractor for the acquisition of rights in technical data not otherwise provided under paragraph (3) or (4), if necessary to develop alternative sources of supply and manufacture;

(B) agree to restrict rights in technical data otherwise accorded to the United States under this subchapter 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

(C) 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.

(c) SECRETARY OF DEFENSE TO DEFINE TERMS.—The Secretary of Defense shall define the terms “developed”, “exclusively with Federal funds”, and “exclusively at private expense” in regulations prescribed under subsection (a). In defining such terms, the Secretary—

(1) shall specify the manner in which indirect costs shall be treated; and

(2) 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 subsection.

(Added and amended Pub. L. 116–283, div. A, title XVIII, § 1833(a)(1), (b), Jan. 1, 2021, 134 Stat. 4226.)

Editorial Notes

CODIFICATION

The text of subsec. (a) of section 2320 of this title, which was transferred to this section and amended by

Pub. L. 116–283, § 1833(b), was based on Pub. L. 98–525, title XII, § 1216(a), Oct. 19, 1984, 98 Stat. 2595; 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), Dec. 4, 1987, 101 Stat. 1128; Pub. L. 101–189, div. A, title VIII, § 853(b)(2), Nov. 29, 1989, 103 Stat. 1518; Pub. L. 111–383, div. A, title VIII, § 824(b), Jan. 7, 2011, 124 Stat. 4269; Pub. L. 112–81, div. A, title VIII, § 815(a)(1), Dec. 31, 2011, 125 Stat. 1491; Pub. L. 114–328, div. A, title VIII, § 809(a), (b), (e), Dec. 23, 2016, 130 Stat. 2266, 2267; Pub. L. 116–283, div. A, title VIII, § 804(b)(2)(A)(i), Jan. 1, 2021, 134 Stat. 3738. Pub. L. 99–500, Pub. L. 99–591, and Pub. L. 99–661 generally amended section 2320(a) substantially identically; as executed, text reflected amendment by Pub. L. 99–661.

AMENDMENTS

2021—Pub. L. 116–283, § 1833(b)(1), (2)(A), transferred subsec. (a) of section 2320 of this title to this section, effectively redesignated par. (1) as subsec. (a), and redesignated pars. (2) and (3) as subsecs. (b) and (c), respectively.

Subsec. (a). Pub. L. 116–283, § 1833(b)(2)(A), (B)(i), after redesignation of par. (1) of section 2320(a) of this title as subsec. (a) of this section, inserted subsec. heading and, in existing provisions, designated first two sentences as par. (1) and the remainder as par. (2) and inserted par. headings. Amendment designating “the third sentence as paragraph (2)” was executed by including the fourth sentence within par. (2) as well, to reflect the probable intent of Congress.

Subsec. (a)(2). Pub. L. 116–283, § 1833(b)(2)(B), substituted “Regulations prescribed under paragraph (1) may not” for “Such regulations may not”, inserted dash after “impair”, reorganized remainder of text into designated subpars. (A) and (B), and, at end of subpar. (A), substituted “by law; or” for “by law. Such regulations also may not impair”.

Subsec. (b). Pub. L. 116–283, § 1833(b)(3)(A), (B), after redesignation of par. (2) of section 2320(a) of this title as subsec. (b) of this section, inserted heading, substituted “Regulations prescribed under subsection (a)” for “Such regulations” in introductory provisions, and redesignated subpars. (A) to (I) as pars. (1) to (9), respectively.

Subsec. (b)(1). Pub. L. 116–283, § 1833(b)(3)(C), redesignated cls. (i) and (ii) as subpars. (A) and (B), respectively.

Subsec. (b)(2). Pub. L. 116–283, § 1833(b)(3)(D), substituted “paragraphs (3), (4), and (7)” for “subparagraphs (C), (D), and (G)”.

Subsec. (b)(3). Pub. L. 116–283, § 1833(b)(3)(E), substituted “paragraph (2)” for “subparagraph (b)” in heading and “Paragraph (2) does not” for “Subparagraph (B) does not” in introductory provisions and redesignated cls. (i) to (iv) as subpars. (A) to (D), respectively.

Subsec. (b)(4). Pub. L. 116–283, § 1833(b)(3)(F), substituted “paragraph (2)” for “subparagraph (b)” in heading and “Notwithstanding paragraph (2)” for “Notwithstanding subparagraph (B)” in introductory provisions and redesignated cl. (i), its subcls. (I) to (III), cl. (ii), and cl. (iii) as subpar. (A), cls. (i) to (iii), subpar. (B), and subpar. (C), respectively.

Subsec. (b)(5). Pub. L. 116–283, § 1833(b)(3)(G), in existing provisions, designated first sentence as subpar. (A), inserted heading, and substituted “Except as provided in paragraphs (6) and (7),” for “Except as provided in subparagraphs (F) and (G),” and designated second sentence as subpar. (B), inserted heading, and realigned margin.

Subsec. (b)(6). Pub. L. 116–283, § 1833(b)(3)(H), substituted “paragraph (5)” for “subparagraph (E)”.

Subsec. (b)(7). Pub. L. 116-283, §1833(b)(3)(I), in existing provisions, designated first sentence as subpar. (A) and substituted “Notwithstanding paragraphs (2) and (5)” for “Notwithstanding subparagraphs (B) and (E)” and “section 4401” for “section 2446a” and designated second and third sentences as subpars. (B) and (C), respectively.

Subsec. (b)(8). Pub. L. 116-283, §1833(b)(3)(J)(i), (ii), inserted heading and redesignated cls. (i) and (ii) as subpars. (A) and (B), respectively.

Subsec. (b)(8)(A). Pub. L. 116-283, §1833(b)(3)(J)(iii)–(vi), redesignated subcl. (I) as cl. (i) and substituted “paragraph (1)” for “subparagraph (A)”, redesignated subcl. (II) as cl. (ii) and substituted “paragraph (3)” for “subparagraph (C)”, and redesignated subcl. (III) as cl. (iii) and substituted “paragraph (4)” for “subparagraph (D)”.

Subsec. (b)(8)(B). Pub. L. 116-283, §1833(b)(3)(J)(vii), substituted “paragraph (2)” for “subparagraph (B)”.

Subsec. (b)(9). Pub. L. 116-283, §1833(b)(3)(K), inserted heading, redesignated cl. (i) as subpar. (A) and substituted “paragraph (3) or (4)” for “subparagraph (C) or (D)”, redesignated cl. (ii) as subpar. (B) and substituted “this subchapter” for “this section”, and redesignated cl. (iii) as subpar. (C).

Subsec. (c). Pub. L. 116-283, §1833(b)(4), inserted heading, substituted “subsection (a)” for “paragraph (1)” and “this subsection” for “this paragraph”, inserted dash after “terms, the Secretary”, and reorganized remainder of text into designated pars. (1) and (2).

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE

Section and amendment by Pub. L. 116-283 effective Jan. 1, 2022, with additional provisions for delayed implementation and applicability of existing law, see section 1801(d) of Pub. L. 116-283, set out as an Effective Date of 2021 Amendment note preceding section 3001 of this title.

§ 3772. Rights in technical data: provisions required in contracts

(a) CONTRACT PROVISIONS RELATING TO TECHNICAL DATA.—Regulations prescribed under section 3771 of this title shall require that, whenever practicable, a contract for supplies or services entered into by an agency named in section 3063 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 product, the product shall be presumed to be developed at private expense unless shown otherwise in accordance with section 3784;

(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—

(A) 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

(B) 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—

(A) to be incomplete or inadequate; or

(B) 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 procurement, sustainment, modification, or upgrade (including through competitive means) of a major system or subsystem thereof, a weapon system or subsystem thereof, or any noncommercial product 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 paragraphs (4)(A)(ii), (6), and (7) of section 3771(b) of this title; 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 3782 of this title, the contractor’s assertion of a use or release restriction on the technical data.

(b) Nothing in this subchapter or in section 3208 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;