

FY 2007 NDAA § 802 –Additional requirements relating to rights in technical data

Legislative History and Related Materials

PART I - WHAT CAME OUT OF THE LEGISLATIVE PROCESS

1. § 802 from FY07 NDAA (Pub.L. 109-364, 10/17/2006):

Sec. 802. Additional Requirements Relating To Technical Data Rights.

(a) Additional Requirements Relating to Technical Data Rights- Section 2320 of title 10, United States Code, is amended by adding at the end the following new subsection:

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

- “(1) be developed before issuance of a contract solicitation for the weapon system or subsystem;
- “(2) address the merits of including a priced contract option for the future delivery of technical data that were not acquired upon initial contract award;
- “(3) address the potential for changes in the sustainment plan over the life cycle of the weapon system or subsystem; and
- “(4) apply to weapon systems and subsystems that are to be supported by performance-based logistics arrangements as well as to weapons systems and subsystems that are to be supported by other sustainment approaches.’.

(b) Modification of Presumption of Development Exclusively at Private Expense- Section 2321(f) of title 10, United States Code, is amended—

- (1) by striking ‘Expense for Commercial Items Contracts- In’ and inserting ‘Expense- (1) Except as provided in paragraph (2), in’; and

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

“(2) In the case of a challenge to a use or release restriction that is asserted with respect to technical data of a contractor or subcontractor (whether or not under a contract for commercial items) for a major system or a subsystem or component thereof on the basis that the major system, subsystem or component was developed exclusively at private expense, the challenge to the use or release restriction shall be sustained unless information provided by the contractor or subcontractor demonstrates that the item was developed exclusively at private expense.’.

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

2. Text from Conf. Report 109-702:

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

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

The Senate amendment contained no similar provision.

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

PART II – EARLIER STAGES OF THE LEGISLATIVE PROCESS

3. HR 5122 (EH - engrossed as agreed or passed by the House), Section 802:

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

(a) Additional Requirements Relating to Technical Data Rights - Section 2320 of title 10, United States Code, is amended by adding at the end the following new subsection:

“(e) Additional Regulations- (1) Regulations prescribed under subsection (a) shall ensure, at a minimum, that—

“(A) in the case of a major system that is developed exclusively with Federal funds, in part with Federal funds and in part at private expense, or exclusively at private expense, rights are acquired in full by the United States to technical data necessary to support competition for contracts required for sustainment of the system; and

`(B) any contract for a major system includes price and delivery options for acquiring, at any point during the life cycle of the system, major elements of technical data not acquired at the time of initial contract award.

`(2) Regulations prescribed under subsection (a) also shall establish a standard for acquiring rights in technical data that supports the purchase of data rights appropriate to minimize life cycle costs.

`(3) The Under Secretary of Defense for Acquisition, Technology, and Logistics shall ensure that members of the acquisition workforce working with any contract in an amount greater than \$5,000,000 and involving the acquisition of rights in technical data be provided information and formal training sufficient to carry out the regulations prescribed under subsection (a) to implement this subsection.'

(b) Regulations- Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall revise regulations under section 2320 of title 10, United States Code, to implement subsection (e) of such section (as added by this section).

4. H.Rpt. 109-452, page 354: Section-by-section analysis

Section 802-Additional Requirements Relating to Technical Data Rights

This section would require the Secretary of Defense to establish regulations to ensure that a major system developed with federal or private funds acquires sufficient technical data to allow competition for contracts required for sustainment of the system. This section would also require any contract for a major system to include price and delivery options for acquiring, at any point during the lifecycle of the system, major elements of technical data not acquired at the time of initial contract award. The regulations would establish a standard for acquiring rights in technical data to enable the lowest possible lifecycle cost for the item or process acquired. The committee notes, in recent years, acquisition program managers have minimized their purchases of technical data rights for new weapons systems. The committee understands that guidance issued in the 1990s intentionally sought to reverse the previous policy on technical data rights, which may have inappropriately assumed that all rights to technical data should be purchased, even in unnecessary situations. This section would require program managers to negotiate price options for acquiring additional data rights, at the time of award, when the government has maximum leverage in negotiations. The committee believes that this balanced approach will require program managers to buy those data rights necessary to minimize lifecycle cost without requiring the purchase of unneeded technical data rights.

PART III – RELATED MATERIALS

5. H.Rpt. 109-452, page 22 - Items of Special Interest

Joint cargo aircraft

The committee supports the decision to establish a joint program office and to utilize a single capability development document as the basis for requirements for the Joint Cargo

Aircraft (JCA). The committee believes that cost control is the most critical factor in determining the likelihood for success of the JCA program, and that the imperative for cost containment will necessitate a strict control of requirements and the use of maximum jointness and commonality in training, sustainment and maintenance. The committee recommends that the joint program office work to develop an acquisition and sustainment strategy for JCA that is joint in all phases of the program. The acquisition and sustainment strategy should address the purchase of sufficient rights in technical data required to provide competition in maintaining and sustaining the aircraft throughout its complete lifecycle. The committee notes that it has included a provision (section 802) that would require acquisition programs to acquire sufficient technical data required for lifecycle sustainment. The committee also notes that the core logistics capability for cargo aircraft currently in the Department of Defense (DOD) inventory resides largely in the Air Force Air Logistics Centers and the committee believes the JCA should be identified as a core logistics capability under subsection (a)(2) of section 2464 of title 10, United States Code, with no waiver under subsection (b), if the JCA is acquired in sufficient numbers to warrant such a designation. At a minimum, the Department should acquire the technical data necessary to enable the government to utilize its core logistics capability to maintain the JCA, if required.

The committee directs the Secretary of Defense to submit to the congressional defense committees a report on the plan to acquire and sustain the JCA. The committee directs that the report be delivered no later than 60 days after the acquisition and sustainment strategy is approved by the appropriate milestone decision authority. The committee further directs that the report shall include [Page 23] DOD's recommendations regarding whether or not the JCA will be identified as a core logistics capability under subsection (a)(2) of section 2464 of title 10, United States Code, and if so identified, whether the Department intends to waive the limitation on contracting under subsection (b) of such section for the JCA.

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