Report to Congress
on
Pilot Program on Intellectual Property Evaluation for Acquisition Programs
Section 801 of the National Defense Authorization Act for Fiscal Year 2020 (P.L. 116-92)

Office of the Under Secretary of Defense for Acquisition and Sustainment

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TABLE OF CONTENTS

1. Introduction **4**

1.1 Background: The Section 813 Government-Industry Advisory Panel, and Section 875 Independent Review (NDAA for FY 2016) 5

1.1.1 The Section 813 Government-Industry Advisory Panel 5

1.1.2 The Section 875 Independent Review of Government Access to IP of Private Sector Firms 6

1.1.3 The Department of Defense's Consolidated Response 6

1.2 DoD-Wide IP Policy and the Cadre of IP Experts (10 U.S.C. § 2322) 7

1.3 Acquisition Innovation Research Center (AIRC) 8

1.4 Objectives and Expectations 9

2. Section 801 IP Pilot Implementation Planning **9**

2.1 Foundational Considerations 9

2.1.1 IP Evaluation in its Many Forms and Contexts 9

2.1.2 IP Valuation: Use and Adaptation of Commercially Available Analysis and Techniques 10

2.1.3 Timing Challenges: Earlier Planning for Longer-Term Needs 11

2.1.4 The Adaptive Acquisition Framework 11

2.1.5 Measures & Metrics to Establish the Baseline 12

2.1.6 Earlier, More Frequent, and More Robust Industry Engagement 12

2.1.7 Training for the Acquisition Workforce 13

2.2 Establishment of the Pilot Program for IP Evaluation Working Group (PPIPEWG) 13

2.3 Three Pathways for DoD Acquisition Program Participation 14

2.3.1 The Case Study Pathway 14

2.3.2 Aggregated Data Call(s) 15

2.3.3 Life-cycle Retrospective Pathway 15

2.4 Measures and Metrics for Data-Driven Analytics 16

2.5 PPIPEWG's Management and Coordination of Planned Pilot Activities 17

3. Section 801 Annual Reporting Elements **18**

3.1 Description of the Acquisition Programs Selected 18

3.1.1 Army Program 18

3.1.2 Navy Programs 18
3.1.3 Air Force Programs 19
3.1.4 Additional Programs 20
3.2 Description of the Specific Activities Performed Under Each Program 21
3.2.1 Army Program 21
3.2.2 Navy Programs 22
3.2.3 Air Force Programs 23
3.2.4 Additional Programs 23
3.3 Assessment of the Effectiveness of the Activities 23
3.3.1 Army Program 23
3.3.2 Navy Programs 23
3.3.3 Air Force Programs 24
3.3.4 Additional Programs 24
3.4 Assessment of Improvements to Acquisition or Sustainment Activities Related to the Pilot Program 24
3.4.1 Army Program 24
3.4.2 Navy Programs 24
3.4.3 Air Force Programs 24
3.4.4 Additional Programs 24
3.5 Assessment of the Results Related to the Pilot Program 24
3.5.1 Army Programs 24
3.5.2 Navy Programs 25
3.5.3 Air Force Programs 25
3.5.4 Additional Programs 25

4. Enclosures 25

(1) Section 801 of the NDAA for FY 2020
(2) Request for Information
(3) Section 801 Pilot Program Data Call
(4) Excerpts from Section 813 Government-Industry Advisory Panel Final Report: Executive Summary; Tension Point Paper #4, *Data Rights as an Evaluation Factor*; Tension Point Paper #5, *Intellectual Property (IP) Valuation*
(5) Executive Summary from Section 875 Report - Department of Defense Access to Intellectual Property for Weapon Systems Sustainment
(6) USD(A&S) letter providing DoD recommendations based on the reports of the Section 813 Government-Industry Panel and Section 875 Independent Review, February 3, 2019

1. Introduction

This report is the first annual report to the congressional defense committees pursuant to section 801 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Public Law 116-92) (Enclosure 1). Section 801(a) authorizes the Secretaries of Defense and Military Departments (MILDEPs) to jointly carry out a pilot program to assess intellectual property (IP) evaluation techniques, including commercial valuation methods, in Department of Defense (DoD) acquisition programs to better understand the benefits of these mechanisms on—

(1) The development of cost-effective IP strategies;
(2) The assessment and management of IP value and acquisition costs during acquisition and sustainment activities (including source selection evaluation factors) throughout the life-cycle; and
(3) The use of commercial and non-developmental technologies as an alternative to new development for DoD requirements.

Section 801(b) authorizes several specific pilot activities, including: establishing a team of DoD and private sector IP experts (including the DoD IP Cadre) to advise the selected programs; assessing commercial valuation methods, agency-level oversight, contracting mechanisms, acquisition planning for IP delivery and rights needed over the entire life-cycle; and engaging industry to develop and assess IP requirements and strategies, and develop innovative IP evaluation, valuation, and prioritization techniques.

Section 801(c) requires the Secretary of Defense and the Secretaries of the MILDEPs to submit to the congressional defense committees joint annual reports on the Pilot Program that include a description of the acquisition programs selected to participate in the Pilot Program; a description of the Pilot Program activities that were performed under each program; an assessment of the effectiveness of the activities; an assessment of improvements to acquisition or sustainment activities related to the Pilot Program; and 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.

The first annual report was to be submitted no later than November 1, 2020, with subsequent reports due on November 1 of each year through 2023. The Department submitted an interim response on November 9, 2020, indicating that due to the constrained work environment resulting from the COVID-19 pandemic, additional time was needed to complete the implementation planning for the pilot, and anticipated completing that initial report by the end of February 2021.

This initial report summarizes the Department's activities during FY 2020 in developing an implementation plan for the pilot activities, and identifying an initial group of programs to participate in the pilot. The report is organized in three sections:

Section 1, Introduction, summarizes the recent legal, regulatory, policy, and federal advisory committee activities leading up to these pilot activities.

Section 2, Implementation Planning, summarizes the Department's activities during FY 2020 and early 2021 in developing an implementation plan for the pilot activities, including the creation of the Pilot Program for IP Evaluation Working Group to manage the pilot activities and reporting during the 2021 through 2023 assessment and reporting cycles.

Section 3 (Reporting Elements) includes subsections to provide content responsive to each of the required annual report elements specified in section 801(c).

1.1 Background: The Section 813 Government-Industry Advisory Panel, and Section 875 Independent Review (NDAA for FY 2016)

1.1.1 The Section 813 Government-Industry Advisory Panel

The origins of the Section 801 IP Pilot Program can be traced to the recommendations of the Government-Industry Advisory Panel (813 Panel), established by the Secretary of Defense pursuant to section 813 of the NDAA for FY 2016 to review sections 2320 and 2321 of title 10, United States Code (U.S.C.), regarding rights in technical data and the validation of proprietary data restrictions, and the regulations implementing such sections, to ensure that such statutory and regulatory requirements are best structured to serve the interests of the taxpayers and the national defense. The 813 Panel's final report, *Government-Industry Advisory Panel on Technical Data Rights,* dated November 13, 2018, is comprised primarily of a collection of thirty papers, each focused on a particular topic that the panel characterized as a "tension point" between the Department and industry.[1] The 813 Panel's report Executive Summary categorizes the tension point papers into eight broad areas: business model, acquisition planning and requirements, source selection and post source selection IP licensing, balancing the interests of the parties, implementation, compliance and administrative, data acquisition, and modular open systems approaches (MOSA).

Most applicable to this Pilot Program are tension point papers No. 4, *Data Rights as an Evaluation Factor*, and No. 5, *Intellectual Property (IP) Valuation*; the 813 Panel's Final Report Executive Summary, and Papers Nos. 4 and 5 are provided at Enclosure 5. The report's Executive Summary describes these papers as follows:

> Source Selection and Post Source Selection IP Licensing. The Panel identified four separate tension points and consolidated them into three papers. One deals with evaluating IP during source selection. The Panel was provided a variety of examples used in source selections and their impacts; some good, some bad. The Panel agreed the Government should create regulations reflecting specific principles to increase transparency and to ensure IP is properly valued when used as an evaluation factor without mandating offerors to relinquish their IP. *Because of the wide range of major weapon system requirements, the Panel was unable to coalesce on a single method and recommends a pilot program for IP evaluation in acquisition planning and source selection (see Paper No. 4)*. … The third paper deals with IP valuation. The panel discussed challenges with determining how to negotiate a fair and reasonable price for IP rights, such as in situations where the Government seeks to acquire greater IP rights, or additional IP deliverables, than is customarily provided in the commercial marketplace. The panel recommends the use of broadly accepted best practices, norms, and standards

[1] The 813 Panel's Final report, "Government-Industry Advisory Panel on Technical Data Rights," dated November 13, 2018, is available at https://gsa-geo.my.salesforce.com/sfc/p/t0000000Gyj0/a/t00000005uqS/pKjrftA5N3_gPg2jqYZMO6Kd7oRLztvss3UboS9uiCc

in IP valuation by both the Government and industry (see Paper No. 5). (*Emphasis added*).

More specifically, Paper No. 4, *Data Rights as an Evaluation Factor*, recommended that the Department should not adopt a "one size fits all" approach to IP evaluation in source selections. The 813 Panel stated that industry feedback should be actively encouraged on evaluation factors and the Government should incorporate the feedback to ensure the factors represent the best value to DoD for a given solicitation as informed by the program's IP Strategy. The 813 Panel recommended the inclusion of a new section in the NDAA for FY 2020 regarding a pilot program for intellectual property evaluation in acquisition planning and source selection regarding certain Major Defense Acquisition Programs. Suggested statutory wording was included in tension point Paper No. 4 and appears to have formed a significant basis of the authority and requirements enacted in section 801 of the NDAA for FY 2020.

1.1.2 The Section 875 Independent Review of Government Access to IP of Private Sector Firms

Section 875 of the NDAA for FY 2016 required the Secretary of Defense to contract with an "independent entity" to review DoD regulations, practices, and sustainment requirements related to Government access to and use of IP rights of private sector firms, as well as DoD practices related to the procurement, management, and use of IP rights to facilitate competition in sustainment of weapon systems throughout their life-cycle. The independent entity was also required to consult with the National Defense Technology and Industrial Base Council (see title 10, U.S.C. § 2502) and each Center of Industrial and Technical Excellence (see title 10, U.S.C. § 2474). On March 2, 2016, the Department awarded a contract to the Institute for Defense Analyses (IDA), a nonprofit corporation that operates three federally funded research and development centers, to conduct this independent study. As a result of the review, IDA reached eight conclusions, identified four "broader challenges," and made six recommendations, in its final report entitled "Department of Defense Access to Intellectual Property for Weapon Systems Sustainment," dated May 2017.[2] Enclosure (6), the Executive Summary of the Section 875 Report, is included for reference.

1.1.3 The Department of Defense's Consolidated Response

Sections 813 and 875 of the NDAA for FY 2016 each required the Secretary of Defense to submit to the congressional defense committees any comments or recommendations on the findings contained in the separate reports of the Section 813 Panel and the Section 875 Independent Review. Given the close relationship between the subject matters of those reports, the Department consolidated its comments in a single response letter to the congressional defense committees on February 3, 2019 (Enclosure 7).

The Department expressed agreement and support for the general findings contained in both the Section 813 Panel and Section 875 reports, including the Section 813 Panel report recommendation for an IP evaluation pilot that laid the foundation for this Section 801 Pilot Program. In addition, the Department's response reaffirmed a commitment to improving communications and outreach to industry (e.g., by implementing an innovative "early engagement" approach to public rulemaking for numerous pending efforts to update the Defense Federal Acquisition Regulation Supplement (DFARS) data rights coverage, which will allow

[2] Available at https://www.ida.org/research-and-publications/publications/all/d/de/department-of-defense-access-to-intellectual-property-for-weapon-systems-sustainment

industry to participate earlier than usual in the drafting process). Finally, the Department's response identified numerous cross-cutting principles and threads that would form the basis of the new DoD-wide IP policy, and established a preliminary IP Working Group that would take the lead in drafting that policy issuance and establishing the cadre of IP experts newly required by 10 U.S.C. § 2322.

1.2 DoD-Wide IP Policy and the Cadre of IP Experts (10 U.S.C. § 2322)

On October 16, 2019, the Department published new DoD Instruction (DoDI) 5010.44, *Intellectual Property (IP) Acquisition and Licensing*.[3] This DoDI created a DoD-wide policy to govern and unify the acquisition, licensing, and management of IP, including by implementing the statutory requirements of 10 U.S.C. § 2322(a). A critical element for supporting a consistent implementation of these policies and best practices, the DoDI also established the DoD IP Cadre, a DoD-wide, cross-functional team of IP experts. The DoD IP Cadre is organized using a federated structure, with a new office established within the Office of the Secretary of Defense (OSD) to coordinate with other offices and functional experts throughout the OSD, the MILDEPs, and other DoD components to advise and support DoD programs and the acquisition workforce. The DoD IP Cadre will also support a more robust approach to early-and-often communications and engagement with industry on IP matters.

For a more thorough discussion of the new DoD IP policy, and the organization and structure of the new OSD IP Cadre office within the OUSD(A&S) and the federated organizational model to establish the DoD-wide IP Cadre structure that will operate as a cross-functional team of experts, see the Department's Report to Congress on Intellectual Property Policy and the Cadre of IP Experts, pursuant to section 838 of the NDAA for FY 2020. This report is posted[4] on IP Cadre subpage[5] of the Defense Acquisition University (DAU) IP/Data Rights (IP/DR) Community of Practice site.[6]

The Air Force, considering 10 U.S.C. § 2322, formed its own IP Cadre of Experts to address the tension points between the Air and Space Forces and industry. The Cadre's established mission is to ensure the Air Force and Space Force enable cost-effective acquisitions by obtaining mission-essential IP and associated license rights at the proper time. To accomplish its mission the Air Force IP Cadre is seeking to:

- Strengthen IP capabilities to drive innovation, ensure readiness, cost-effectively modernize, and enable the warfighter to fly, fight, and win in air, space, and cyberspace;
- Provide the government enterprise a military strategic advantage with effective and efficient IP "cradle to grave" life-cycle management strategies; and
- Disseminate repeatable, consistent best practices to acquire, use, and leverage IP across the whole of the Federal Government.

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[3] Available at https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/501044p.PDF?ver=2019-10-16-144448-070

[4] The report is available at https://www.dau.edu/cop/IPDR/DAU Sponsored Documents/Lord_IP-Policy-IP-Cadre-Sec-838-FY20-NDAA_Report-to Congress May 2020.pdf?Web=1

[5] The IP Cadre subpage is available at https://www.dau.edu/cop/IPDR/Pages/Topics/IPDR-Cadre.aspx

[6] The DAU IP/DR CoP is available at https://www.dau.edu/cop/ipdr/Pages/Default.aspx

As the Air Force IP Cadre implements policies across programs, it collects data to report its effectiveness at year end.

1.3 Acquisition Innovation Research Center (AIRC)

Section 835 of the NDAA for FY 2020 added 10 U.S.C. § 2361a, "Extramural Acquisition Innovation and Research Activities". Section 2361a requires the Secretary of Defense, acting through the USD(A&S) and in coordination with the Under Secretary of Defense for Research and Engineering (USD(R&E)), to establish and maintain extramural acquisition innovation and research activities including an acquisition research organization within a civilian college or university. The entity is to provide academic analyses and policy alternatives for innovation in defense acquisition policies and practices.

In September 2020, a contract was awarded to a Department of Defense University Affiliated Research Center, the Systems Engineering Research Center (SERC), to establish the AIRC and provide for program management activities associated with the AIRC in collaboration with the SERC consortium of universities. Included in the initial taskings in that awarded contract, are two IP related activities.

- IP Evaluation and Valuation Study: this task will include efforts to research, examine and assess IP evaluation and valuation measures and metrics, including in support of this Section 801 IP Evaluation Pilot, and the objectives of 10 U.S.C. § 2322, and DoDI 5010.44. The AIRC efforts will focus on technical data, copyrights and trade secrets IP. The full tasking provides overarching themes for the effort and identifies specific outcomes for IP evaluation and valuation activities.

- IP Best Practices Electronic Repository: this task will include efforts to design and pilot an electronic information repository (e.g., online database) for models, samples, templates, and other forms of exemplars of IP acquisition, licensing, and management, in support of the objectives and activities implementing 10 U.S.C. § 2322 and DoDI 5010.44. The full tasking provides overarching themes for the effort and identifies specific outcomes for the electronic repository.

Both of these taskings will contribute to the assessments and analyses under this Pilot Program. For example, the IP Valuation and Evaluation task will allow the Department to accelerate its analysis of existing IP policies, practices and procedures to manage IP effectively. It will also improve the Department's ability to make available any such models or samples of IP evaluation and valuation best practices that are identified as part of the Section 801 Pilot Program to DoD acquisition programs and the acquisition workforce overall. The AIRC's efforts will be vital to the Section 801 Pilot Program data gathering, data consolidation, outreach to industry and data analysis activities.

1.4 Objectives and Expectations

The Department expects that lessons learned from the Section 801 Pilot will:

- Drive IP strategic planning earlier in the program life-cycle, with a focus on proactively preserving flexibility and competitive options to address uncertainty in the early assessments of long-term IP needs throughout the entire life-cycle;
- Reinforce the critical need for a program's IP Strategy to be tailored to balance the interests of DoD and Industry, including using Specially Negotiated Licenses and MOSA; and
- Demonstrate the need to identify and tailor IP Strategy models for each pathway in the Adaptive Acquisition Framework - for example, distinguishing IP best practices for software-intensive programs versus hardware-intensive programs.

By leveraging the findings from the reports required by sections 813, 838, and 875 and in combination with the expected section 801 lessons learned, updated policy, and additional workforce IP training, the 801 Pilot Program activities will instill a broader understanding of IP issues and positive culture change.

2. Section 801 IP Pilot Implementation Planning

As stated above in Section 1, this initial report is an implementation plan that will elaborate on Pilot Program activities, and the path forward, laying the groundwork for a successful multiple year effort. The participant acquisition programs will also incorporate recent updates to the Defense Acquisition System (DAS) 5000 Series re-write.

2.1 Foundational Considerations

Before addressing the detailed implementation planning, several foundational issues and observations are identified and expected to cut across the overall implementation and reporting activities.

2.1.1 IP Evaluation in its Many Forms and Contexts

Section 801 does not expressly define the specific scope or form of IP evaluation activities, or stated another way, does not identify the scope of IP evaluation “events” that are to be assessed during the pilot. However, it is clear that, at a minimum, an assessment of source selection evaluation factors for IP is within the intended scope of the pilot activities (see 801(a)(2)). The following is a non-exhaustive list of program activities in which IP evaluations may be required or desired, and thus may be assessed during this pilot:

Source Selection Evaluations. The most logical and structured activity in which IP evaluation occurs is during source selection when IP considerations are normally included in the evaluation factors. In addition to being expressly identified for assessment in section 801(a)(2), source selection activities are foundational context in the Section 813 Panel’s report, including Paper No. 4 that also recommended the statutory call for this IP Pilot.

Sole Source Awards. IP evaluation and valuation considerations are typically an element or basis for sole source Justification and Approval (J&A) documents (e.g., the lack of IP deliverables or associated license rights necessary for competition). Similarly, IP should be considered a critical element in negotiations leading to a sole source award.

Strategic Planning: IP Strategies, Acquisition Strategies, Systems Engineering Plan, Product Support Strategy (Life-Cycle Support Plans). The effectiveness of a program's strategic planning activities (including the program documentation capturing the results of such planning) will necessarily involve IP evaluation and valuation to varying degrees, depending on the nature of the program, the stage in the life-cycle, and the relevant pathway(s) of the AAF, as applicable.

Negotiation of Specialized Licenses and Delivery Requirements. Regardless of whether IP negotiation activity is occurring prior to award (e.g., in conjunction with source selection or negotiation of a sole source award), or post-award, any such negotiations will necessarily involve all parties to the negotiation engaging in IP evaluation and valuation activities. Such negotiation activities will be a major focus area for the Department prospectively, including as the Department implements the statutory preference for specially negotiated licenses.[7]

Exercise of Contract Options. When the contract provides the Government with an option to acquire additional IP deliverables or associated license rights, the decision whether to exercise such an option (e.g., whether discretionary or based on determining if defined conditions have occurred) should be informed by an updated evaluation and valuation of the relevant IP deliverables and rights. These events can take many forms, including separately priced option contract line items, the right of the Government's to place a deferred order (e.g., under DFARS 252.227-7027), and the exercise or assertion of defined release conditions in an escrow agreement.

Challenge/Validation of Asserted Restrictions (or Other IP Disputes). Given the potentially significant time, effort, and resources required to resolve a challenge or validation of data rights assertions (e.g., under DFARS 252.227-7019 or 252.227-7037), all parties involved will need to engage in evaluation and valuation of the relevant IP in order to fully inform their assessment of risk, and likelihood of succeeding on the merits.

This implementation plan provides flexibility for each participating program the full scope of IP evaluation activities or events that will be conducted and assessed for this pilot. However, the potential consideration of IP evaluation activities in any or all of the listed contexts is listed here to assist in creating a full-spectrum analysis of IP evaluation occurring at any stage of the life for participating programs, regardless of which participation pathway may be used for any given program.

2.1.2 IP Valuation: Use and Adaptation of Commercially Available Analysis and Techniques

Section 801 includes a significant focus on assessing "commercially available" or "commercial" IP valuation techniques. While not defining these techniques in more detail in the statutory language, there is a significant body of literature and expertise broadly recognizing the three primary IP valuation techniques: the market method, the income method, and the cost method. Section 801, as well as Paper No. 5 of the Section 813 Panel report (described above), also recognizes that commercially available valuation techniques recognized in the commercial

[7] See 10 U.S.C. § 2320(f), as revised by section 867 of the NDAA for FY 2019 (Pub. L. 115-232).

or non-defense industry sectors may need to be adapted for application to DoD acquisitions and identifying the need, nature, and character of such adaptions will be one of the challenges addressed during this pilot.

2.1.3 Timing Challenges: Earlier Planning for Longer-Term Needs

A point of consistent emphasis in the DoD IP acquisition statutory scheme, DoD policy, and the implementing regulations and guidance, is that DoD programs must engage in more robust program planning to address IP issues. Moreover, programs should do so as early as possible in the program life-cycle, with the objective of anticipating and proactively addressing the program needs over the entire life-cycle. As DoD programs strive to do so, these efforts will increase the time between such earlier planning efforts and the program activities being planned for in the latest stages of the program life-cycle. The emphasis on such earlier, longer-term, planning typically results in increased uncertainty and risk when seeking to accurately anticipate program needs late in the life-cycle.

Managing the uncertainty and risk in such long lead-time planning efforts requires consistent efforts to reevaluate the program's IP posture and make appropriate adjustments to the IP Strategy and other program planning documentation as circumstances change. Ideally, the program planning would have mechanisms in place to preserve decision-making flexibility when these updates occur (e.g., priced contract options for IP deliverables and associated rights to allow for varying sustainment approaches; appropriate implementation of MOSA to enable timely and agile modernization with emerging or disruptive technologies). However, even with the most diligent efforts to preserve flexibility, and reassess and update the program strategies, the most accurate assessment of the effectiveness of those early planning efforts is not likely to fully reveal itself until late in the life-cycle.

One way to characterize these timing challenges is that there is a significant delay in the "feedback loop" to assess the effectiveness of planning efforts. These delays exacerbate efforts to assess the effectiveness of novel or innovative IP acquisition and management approaches, such as may be planned for testing in a pilot program such as this one. For example, if a participating program is early in its life-cycle and implements a novel approach to IP evaluation and/or valuation, including mechanisms to preserve flexibility, the true assessment of those efforts may not be possible during the period of even a multi-year pilot program. Recognizing this challenge is one of the reasons this implementation plan includes the life-cycle retrospective pathway for program participation: to assess a program later in its life-cycle, looking retrospectively at previously documented IP planning and program management activities, including IP evaluation and valuation.

2.1.4 The Adaptive Acquisition Framework

Another foundational consideration that will affect the conduct of these pilot activities is that it will be done in the midst of the most transformational change in DoD acquisition policy in decades: the creation of the Adaptive Acquisition Framework (AAF). This massive transformation of the policy and guidance framework will be a boon for improving IP acquisition practices by increasing the emphasis on tailoring program IP activities to more closely match the program's needs and circumstances, including those of the contractors, subcontractors, and relevant commercial suppliers.

For example, this transformation has enabled a significant increase in the overall amount of IP guidance available to programs and the acquisition workforce. However, the AAF also ensures that this guidance is delivered to the acquisition workforce in a more focused, tailored, manner (e.g., distributed across the pathway policies, functional policies, and guidance documents) so that a program only need focus on those IP practices that are tailored for their circumstances. Accordingly, as the Department assesses IP evaluation and valuation techniques during this Pilot, these analyses and any resulting recommendations will need to be framed for tailored integration into the AAF policies and guidance.

2.1.5 Measures & Metrics to Establish the Baseline

The final foundational consideration that must be recognized is that there is a lack of established data, measures, and metrics to characterize the current and historical "baseline" of DoD program activity and effectiveness regarding IP acquisition and management. Regarding the baselining and analysis of IP strategies, in accordance with DoDI 5010.44, all programs, regardless of dollar threshold, are required to have an IP strategy as part of the program's acquisition strategy (AS) at program inception. All programs are required to transfer their IP strategy to the program's product support strategy, upon entrance into the operations and sustainment phase. Pursuant to 10 U.S.C. § 2337, major defense acquisition programs (MDAPs) will include their program's product support inputs into the IP strategy within the program life-cycle sustainment plan (LCSP) prior to milestone B or similar decision point.[8]
All acquisition strategies, product support strategies, and LCSPs are reviewed at key program decision points, over the complete life-cycle. As part of those reviews, all IP strategies will be reviewed for IP content (e.g., including by IP subject matter experts such as the OSD IP Cadre for OSD level reviews, or MILDEP IP Cadre or similar subject matter experts (SMEs) for MILDEP/Component level reviews).

While the Department is focused on a data-driven analysis approach to its acquisition program management, and this IP Pilot is committed to doing so, the ability to assess and document the effectiveness of particular pilot activities is significantly hampered by not having an established body of data and metrics for program IP activities. Recognizing this challenge was one of the motivating reasons for creating the Aggregated Data Call pathway for program participation in this pilot program.

2.1.6 Earlier, More Frequent, and More Robust Industry Engagement

Early, frequent, robust, and open communications and engagement with industry on IP matters is one of the core principles in the DoD IP Policy (DoDI 5010.44), is a cross-cutting recommendation of the Section 813 Panel, and will be a governing principle in the conduct of this Pilot Program. There will be numerous mechanisms used during the Pilot to engage with industry, academia, and the general public. For example, section 801(b)(1) authorizes the establishment of a team of DoD and private subject matter experts (SMEs), which will occur through the Pilot Program for IP Evaluation Working Group. The Pilot Program also plans to issue one or more request for information (RFI) to obtain the views and recommendations of industry, academia, and the public without requiring participation in the PPIPEWG activities. The Section 801 Pilot activities are not solely centered around the practices of DoD programs,

[8] As amended by section 802 of the NDAA for FY 2021.

but seek to involve industry to gain a better understanding of commercial products, commercial services and commercial IP valuation techniques.

2.1.7 Training for the Acquisition Workforce

One cross-cutting theme arising from all of the recent reviews, panels, reports, and analyses is the critical need to improve IP education and training for all relevant career fields in the acquisition workforce. Accordingly, the Defense Acquisition University (DAU) is a critical partner and member of the DoD IP Cadre. DAU is undergoing a significant reform in the way it provides educational and training resources through its "Back-to-Basics" initiative.

For example, in September 2020, DAU released a new Foundational IP Credential, which is available to all career fields in the acquisition workforce.[9] The new credential will recognize those professionals having the knowledge and skills necessary to effectively acquire, license, and manage IP. Significantly, the IP Credential includes a module on IP Valuation which focuses on the basic concepts of IP valuation and provides the acquisition workforce with tools to address issues critical to successful acquisitions, including when IP valuations should occur during the Acquisition Life-Cycle, how contractors place a value on their IP, and the importance of IP valuation and licensing rights in developing an IP Strategy, in accordance with DoDI 5010.44. Professionals who complete the credential requirements will understand how to utilize IP in their respective career fields to better protect core DoD interests over the entire program and technology life-cycle. In addition, DAU is developing a video series on Government-industry perspectives on IP, and continues to solicit IP best practice scenarios from DoD personnel.[10]

Accordingly, DAU is a critical partner and member of the DoD IP Cadre, and the Pilot Program for IP Evaluation Working Group (PPIPEWG) established for this Pilot Program, to help facilitate training of the acquisition workforce and ensure acquisition professionals understand how IP matters can impact and relate to their official duties. The assessments and recommendations generated under this Pilot will be conducted with an eye towards not only identifying best practices, but also on mechanisms to enable the acquisition workforce to implement these practices as quickly and effectively as possible.

2.2 Establishment of the Pilot Program for IP Evaluation Working Group (PPIPEWG)

Section 801(b)(1) authorizes the Department to create a team of DoD and private sector subject matter experts (SMEs), which may include the DoD IP Cadre required by 10 U.S.C. § 2322, to -

(A) recommend acquisition programs to be selected for the Pilot Program;

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

[9] The IP Credential is available at https://icatalog.dau.edu/onlinecatalog/CredentialConceptCard.aspx?crs_id=8
[10] The DAU-Industry IP Series – Boeing video perspectives on IP is available at https://media.dau.edu/media/DAU-Industry+Intellectual+Property+Series+-+Boeing+video+perspectives+on+IP/1_ku9sb7yl

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

A Charter for the PPIPEWG will establish the team to manage and conduct Section 801 Pilot Program activities, including annual reporting requirements, on behalf of the Secretary of Defense and Secretaries of the MILDEPs. The overarching model for this team of SMEs is to leverage, to the maximum extent practicable, the new DoD IP Cadre established initially and organizationally through DoDI 5010.44. The DoD IP Cadre will be supplemented with private sector SMEs to provide additional expertise consistent with the section 801 goals and objective.

The Charter for the PPIPEWG, while designed to be a flexible and agile entity, is necessary to provide the structure, responsibilities, and guidelines to allow the PPIPEWG to accomplish its objective. More specifically, the Charter will-

- Identify the authority and purpose of the PPIPEWG;
- Identify the PPIPEWG's responsibilities to manage the implementation and conduct of the Pilot Program, including annual reporting requirements;
- Provide for the PPIPEWG governance structure and organization, including—
    - A Steering Group;
    - A Government Cross-Functional SME Team;
    - Representatives of the Participant Programs; and
        - Private Sector contributors, including representatives of the AIRC;
- Identify PPIPEWG member responsibilities;
- Require appropriate safeguards to ensure classified information or controlled unclassified information is provided only to authorized persons and subject to appropriate information security protections.

The PPIPEWG plans to perform data driven analyses to identify best practices, increase acquisition innovation, and support Adaptive Acquisition Framework Pathways. Accordingly, the IPPWG will employ agile data collection techniques including (but not be limited to) data calls and RFIs. Additional information regarding the composition and activities of the Section 801 IP Pilot Program is provided as Enclosure 2 of this report.

2.3 Three Pathways for DoD Acquisition Program Participation

There are various pathways by which DoD programs can participate in the Section 801 Pilot Program: 1) case studies; 2) data calls; and 3) life-cycle retrospective studies. As discussed, the Section 801 Pilot Program focuses on data-driven IP valuation and evaluation strategies and data-driven recommendations. Each of these pathways reflects this approach.

2.3.1 The Case Study Pathway

The case study pathway provides an opportunity for programs with exemplary IP strategies to spotlight these best practices or lessons learned. The case study or spotlight programs will be nominated by the specific DoD component.

At the time of drafting of this initial report, the following programs have been nominated:

- Army
  - Future Long-Range Assault Aircraft (FLRAA) (Anticipated ACAT I, Middle Tier Acquisition program)
- Navy
  - Multi-Engine Trainer System (METS) (ACAT III)
  - Shipboard Air Traffic Radar (SATR) (ACAT IV)
  - Multi-Mode Radar (MMR)
- Air Force
  - The Air Force has chosen not to select any specific programs for case study at this time. The Air Force and Space Force have a broad range of programs focused on unique technologies manufactured by a diverse group of industry contractors ranging from large aerospace companies to specialty software providers. Focusing on several programs will not give an overall view of the IP landscape. Therefore, the Air Force feels it can derive more useful information from a ubiquitous IP strategy that can be implemented enterprise wide, as a mindset for acquisition. Consequently, instead of earmarking particular programs for case studies, the Air and Space Force have chosen to take a holistic approach and work across the enterprise, with many programs as needed. Accordingly, the Air Force will collect and aggregate data, analyze trends and measure the overall effectiveness of IP strategy, to report its effectiveness at year end.
- Additional Programs
  - Joint Artificial Intelligence Center (JAIC) Tradewind Project.

2.3.2 Aggregated Data Call(s)

Because there may be a limited number of spotlight programs, the data call approach provides a more robust data set to learn about a broader spectrum of programs and better analysis of trends in strategies and outcomes. Furthermore, the approach encourages maximum participation by DoD components because not all programs wish to be identified by name.

For the data call method, the OSD IP Cadre developed a data call (Enclosure 4) that allows DoD programs to provide their perspective on their IP strategies, outcomes, and obstacles. The data call questions are crafted to highlight commonalities with other programs and to facilitate aggregation of data. The data call includes questions about program milestones, ACAT levels, technology areas, types of contract vehicles, types of data deliverables, validation or dispute procedures used, negotiation of special licenses, alternatives to formal delivery of data, and the quality of IP training and support. For ease of use, the data call questions will include multiple choice answers (to the maximum extent practicable) and frequently asked questions (to provide context for the data call).

2.3.3 Life-cycle Retrospective Pathway

Lastly, the longitudinal study of legacy systems provides insight into a system in sustainment with respect to long-term IP strategies and downstream outcomes of these strategies.

For example, under the case study pathway, only the short-term results of any specific IP evaluation and valuation activities will be available for assessment during the limited period of the Pilot Program. In an effort to gain insights into the longer-term effectiveness of such activities, the Pilot will include an opportunity for participation and assessment of programs that are later in their life-cycles, allowing for an assessment of the effectiveness of IP evaluation and valuation activities (and strategic planning) that occurred earlier in the program life-cycle. The structure of any such life-cycle retrospective study may be conducted as a case study of individual programs, or aggregated data calls covering multiple programs, or a combination of both approaches.

For example, as part of its efforts the Air Force IP Cadre will be working with legacy system programs and will gain insight into system sustainment with respect to the long-term IP strategies that it implements as well as the downstream outcomes of these strategies. These insights will be documented and reported at year-end.

2.4 Measures and Metrics for Data-Driven Analytics

For all these pathways, it is important to identify measures and metrics that track achievement of expected IP evaluation and valuation outcomes using objectives and thresholds. All of these methodologies should: 1) identify objective outcomes of IP evaluation and valuation strategies via measures and metrics to the maximum extent practicable (e.g., cost avoidance savings, enabling competitive procurement, and objective impacts on schedule and budget); 2) utilize a broad spectrum of data collection methods, including queries of existing databases and other information repositories, data calls, internal government data calls, and RFIs to the public; and 3) capture a meaningful sample size and diverse collection of programs (e.g., major and non-major systems, commercial and non-commercial technology, and programs representing various technology areas, milestones, and technology readiness levels). The breadth and depth of the data set is critical to ensuring that the data (and the resulting analysis of trends) is representative.

In addition to the Government Data Call, the Acquisition Innovation Research Center (AIRC) will design and pilot an electronic information repository for models, samples, templates, and other forms of exemplars of IP acquisition, licensing, and management, in support of the objectives and activities implementing section 801 of the NDAA for FY 2020 as well as 10 U.S.C. § 2322 and DoDI 5010.44. Section 1.3 of this report elaborates further on the AIRC and its activities.

2.5 PPIPEWG's Management and Coordination of Planned Pilot Activities

Using the mechanisms outlined in this section of the report, the PPIPEWG will manage the overall strategic planning and conduct of specific activities in support of the Pilot Program. While most of the effort leading up to this initial report has been focused on establishing the DoD IP Cadre staffing, resourcing, and organizational and functional relationships that will serve as the foundation for the PPIPEWG, it is anticipated that the DoD IP Cadre will reach its planned initial operating capability in the third quarter of FY 2021. Anticipated activities include the release of an RFI to collect industry and public initial views on both the conduct of the Pilot Program, as well as analyses and recommendations on IP evaluation and valuation topics within the scope of the Pilot. The DoD representatives already designated as PPIPEWG members will also coordinate outreach to industry, academia, and other private sector SMEs to identify appropriate representatives for participating in or otherwise supporting the PPIPEWG and Pilot activities.

As these public SME outreach activities are occurring, the PPIPEWG members will engage with the DoD programs participating in the Pilot in any of the three identified pathways (case studies; aggregated data call; and life-cycle retrospective). For example, the PPIPEWG will identify an appropriate approach to perform an initial data collection using the Government Data Call (Enclosure 4).

As this initial data is collected from the DoD programs, public RFI responses, input from the private sector, and other such appropriate mechanisms, the PPIPEWG will further define and refine the detailed implementation plan for specific Pilot activities to be conducted during the FY 2021 reporting cycle. These activities will include the following as authorized by section 801(b):

- Assessment of commercial valuation techniques for IP for use by the Department of Defense;
- Assessment of the feasibility of agency-level oversight to standardize IP evaluation practices and procedures;
- Assessment of contracting mechanisms to speed delivery of IP or reduce sustainment costs;
- Assessment of agency acquisition planning to ensure procurement of appropriate IP deliverables and associated license rights necessary for Government-planned sustainment activities;
- Engagement with the private sector to -
  - Support the development of strategies and program requirements to aid in acquisition planning for intellectual property;
  - Support the development and improvement of intellectual property strategies as part of life-cycle sustainment plans; and
  - Propose and implement alternative and innovative methods of IP valuation, prioritization, and evaluation techniques; and

- Making recommendations to the program manager of an acquisition program participating in the pilot, including evaluation techniques and contracting mechanisms for acquisition and sustainment activities.

3. Section 801 Annual Reporting Elements

3.1 Description of the Acquisition Programs Selected

The primary named acquisition programs include the Army's Future Long Range Assault Aircraft (FLRAA) (Anticipated ACAT I level Middle Tier Acquisition program), the Navy's Multi-Engine Trainer System (METS) (ACAT III), Shipboard Air Traffic Radar (SATR) (ACAT IV), and Multi-Mode Radar (MMR) programs. Additionally, the Joint Artificial Intelligence Center (JAIC) Tradewind Project will be a participating program.

3.1.1 Army Program

3.1.1.1 Future Long-Range Assault Aircraft – ACAT 1 level Middle Tier Acquisition Program

The Future Vertical Lift FLRAA Capability Set 3 is a pre-Major Defense Acquisition Program (ACAT IC) commissioned to develop and field the next generation of affordable vertical lift tactical assault / utility aircraft for the Army and SOCOM. This medium lift tactical assault, aerial command and control, and medical evacuation aircraft will augment the Army's H-60 Black Hawk utility helicopter fleet to provide the Warfighter with long-range, high-speed options that are survivable in contested environments.

3.1.2 Navy Programs

3.1.2.1 Multi-Engine Trainer System - ACAT III

METS is a follow-on replacement program for the T-44C Pegasus fleet which will modernize multi-engine aircraft training. Multi-Engine Training System provides an intermediate and advanced training platform for accession into P-8, EP-3, KC-130, E-6, E-2, CMV-22 and MV-22 aircraft. This program will procure a Commercial Aircraft, a ground-based trainer system, support equipment and miscellaneous essential training, support materials and services to include systems engineering and contractor logistics support. The Navy selected this program for inclusion in the Pilot Program due to the early stage of this procurement and the ability to obtain and evaluate the technical data and associated data rights as part of the competition.

3.1.2.2 Shipboard Air Traffic Radar - ACAT IV

The National Defense Strategy of the United States of America calls for military forces to assure allies and friends, dissuade potential adversaries, deter aggression and counter coercion, and defeat adversaries in order to accomplish our national objectives. The SATR AN/SPN-50(V)1 (hereinafter referred to as AN/SPN-50(V)1) supports these objectives and will be the primary Air Traffic Control (ATC) surveillance radar onboard Nimitz Class Aircraft Carrier (CVN) and Amphibious (LHA and LHD (LH)) type ships. The launch and recovery of aircraft, to include ATC, is a primary function of aircraft carriers and amphibious landing platforms. The surveillance function provides weather and radar data to air traffic controllers supporting aviation operations of all Navy, Marine Corps, joint and allied aviation assets within the assigned airspace. This data is utilized by air traffic controllers to provide a variety of ATC services such as ATC radar approach and departure services, which includes aircraft separation, airspace monitoring, navigational assistance, emergency vectoring, traffic calls, and vectoring and sequencing to the final approach point. Reliable and accurate ATC surveillance radar enhances overall mission and training effectiveness, and safety for aircrews and aircraft alike. The SPN-50 Capability Development Document was signed March 2015 and Milestone B was held September 2015 where the Milestone Decision Authority (MDA) designated the SPN-50 Program as an ACAT 4(T). The SPN-50 Capability Production Document was signed November 2018. Milestone C was conducted in September 2020 and initial operational capability is planned for 4th Quarter 2022. The AN/SPN-50(V) inventory objective is 25 systems (seven LRIPs, and 18 Full-Rate Production (FRP)). The Navy selected this program for inclusion in the Pilot Program because it is evaluating both competing and/or utilizing organic capabilities to perform its sustainment requirements and will be working with the contractor to ensure delivery of the necessary technical data and associated data rights.

3.1.2.3 Multi-Mode Radar

The MMR is a Navy Type/Navy-Owned sensor system for both United States Coast Guard (USCG) and United States Navy (USN) platforms. The MMR is the USCG Offshore Patrol Cutter's primary sensor for air surveillance, surface surveillance, and gun weapon system cueing. MMR also serves as the surveillance system for the Expeditionary Sea Base ships to support multiple missions, such as air mine counter measures, counter-piracy operations, maritime security operations, humanitarian aid and disaster-relief missions, and crisis response operations. In addition, the Littoral Combat Ships will utilize MMR in support of mine countermeasures, anti-submarine, or surface warfare missions in near shore and open ocean environments. MMR shares a substantial number of system elements with NAVAIR's SATR AN/SPN-50(V)1 program and was selected for inclusion in the Pilot Program by the Navy for the same reasons.

3.1.3 Air Force Programs

The Air Force has chosen not to select any specific programs for case study at this time. The Air Force and Space Force will name and describe some of the IP Strategies that it will be implementing across several programs described below.

- Flip the Script: The Air Force's approach to data rights acquisition seeks to incentivize digital engineering and remove the defense industry's reliance on a sustainment business model. Included in the flip the script approach are IP best practices that include, among other things, drafting Request for Proposal (RFPs) such that the program owns all major technology interfaces, paying for sustainment data up front or as developed to incorporate into simulated sustainment later, incorporating monetary incentives into the contract for major intellectual property milestones.
- Air Force Intellectual Property Guidebook: The Air Force IP Cadre has formed an extended team of subject matter experts to update the Air Force Intellectual Property Guidebook. The Guidebook will provide a guide for handling particular challenges to acquiring intellectual property in different types and phases of contracting, incorporating the Cadre's Flip the Script approaches.

- Justification & Approval (J&A) Template: The Air Force will be revising its J&A processes and procedures to require a more detailed analysis of IP justifications to prime programs for future new and follow-on procurements.
- Bayh-Dole Act Pilot Program: As part of an ongoing review and updating of AF IP procurement policies and practices, the AF IP Cadre is spearheading an effort to analyze contractor IP evaluation methods used to ensure compliance with contract requirements (e.g., disclosure, election of title) for inventions made in performance of DoD contracts. This will enable a better understanding of contractor IP evaluation and management practices in order to propose methods to increase efficiency and innovation, and ultimately improve return on investment for DoD-funded IP development.

3.1.4 Additional Programs

3.1.4.1 The Joint Artificial Intelligence Center (JAIC) Tradewind Project

The JAIC was established in 2018 to seize upon the transformative potential of Artificial Intelligence (AI) technology for the benefit of America's national security. One of the JAIC's goals is building a world-class system to procure, develop and deliver AI capabilities to the warfighter at scale by enabling integrated collaboration among academia, industry, and other leading AI organizations. For the JAIC to succeed in its mission of ensuring efficient and rapid AI procurement at scale, its strategy must include an ecosystem of acquisition vehicles and communication platforms that are independent, but also seamlessly connected. The JAIC refers to this ecosystem as the Tradewind Project.

The Tradewind Project provides an end-to-end acquisition solution that is tailored to meet the AI needs of DoD Components, as well as provide a robust communication network to maximize constructive dialog and collaboration with industry and academia. The Tradewind Project focuses on rapid contracting processes, as well rapid delivery by assisting the DoD in adopting agile methodologies (such as design thinking, immediate delivery to end users, and continuous iterations based on warfighter feedback). Thus, the Tradewind Project utilizes both Federal Acquisition Regulations (FAR) and various non-FAR acquisition tools to maximize acquisition agility, provides a platform to collaborate on DoD AI solutions, and applies a complete approach that delivers AI solutions from ideation to tangible solutions to be placed in the hands of the warfighter.

In addition, a core principle of the Tradewind AS is balancing the DoD's need for open architectures and flexibility with the desire to embrace and protect the intellectual property rights of the DoD's industry partners. Accordingly, the JAIC is working with the DoD IP Cadre to develop platforms, tools, and guides that enable negotiation and tailoring of terms and conditions (including intellectual property terms) for the procurement of AI products. Because the OSD IP Cadre was already providing support for the JAIC, the OSD IP Cadre recommended the Tradewind Project as a case study for the Section 801 IP Pilot Program.

3.2 Description of the Specific Activities Performed Under Each Program

3.2.1 Army Program

3.2.1.1 Future Long-Range Assault Aircraft – (ACAT I Middle Tier Acquisition program)

The Army released its new IP policy (Army Directive 2018-26, *Enabling Modernization through the Management of Intellectual Property*) in December 2018 and subsequently initiated a number of implementation efforts, including identifying select "pathfinder programs" to demonstrate the new policy and establishing a temporary team of IP SMEs sourced from across the Army. FLRAA was selected as an Army pathfinder program in 2019 and has been supported by the Army's IP SME team since that time.

Shortly after its selection as a pathfinder program, the FLRAA Program Management Office (PMO) assembled a team of government personnel and private sector experts to develop strategies to aid in acquisition planning. The team focused on obtaining the data and associated license rights required to sustain the FLRAA weapons system throughout the planned life-cycle. This included carefully assessing and identifying the government's life-cycle data requirements and associated license rights as prescribed in 10 U.S.C. §2320. As a result, the FLRAA PMO developed a list of IP "Crown Jewels", which were identified as the most critical license rights requirements for the program. This list will be valuable in negotiating the price of the technical data for the program of record contract, in accordance with 10 U.S.C. §2439.

In addition, the program is using innovative methods to obtain its needed data and license rights, including employing MOSA. To this end, the FLRAA PMO developed a Government Furnished Information (GFI) model which subsumes the relevant libraries and profiles from the FVL Architecture Framework (FAF) Enterprise-level and Family of System Level Architecture requirements, libraries and profiles. Incorporation of those FAF assets ensures a common strategy for defining Air Vehicle Functions, Mission Systems Functions, Component Definition profiles, Digital Backbone Requirements and Common Weapon System Capabilities, creating standardization for the achievement of MOSA. The GFI model was provided in the Competitive Demonstration and Risk Reduction (CD&RR) effort as well as in the draft RFP for the future program of record.

The PMO has also taken a proactive approach to evaluating vendor assertions, early in the life-cycle, during its CD&RR effort. The FLRAA PMO required delivery of a vendor assessment of the impact of its data right assertions on the Government's ability to meet FLRAA life-cycle affordability, sustainment, and modification goals. Those deliveries were followed by joint intellectual property working group sessions between the government and the vendors to discuss the assessments. At the time of development of this report, the working group sessions are ongoing. Based on the discussions at those sessions, the PMO will further assess the impact of the vendor's data rights assertions on the Government's ability to meet FLRAA life-cycle goals.

The PMO released the FLRAA program of record draft RFP on December 14, 2020, for industry comment. The limited sources draft RFP clearly identified the government's need and priority for license rights to delivered technical data and computer software. The draft RFP detailed an innovative use case approach to the valuation of technical data and intellectual property rights while allowing considerations for MOSA components utilizing the FAF and GFI model, as directed in 10 U.S.C. §2320 and §2446. In addition, the draft RFP clearly identified

Operations, Maintenance, Installation, and Training technical data and computer software and the associated rights which are entitled as established in 10 U.S.C. §2320.

Ultimately, the PMO plans to assess rights within intellectual property as an evaluation factor at source selection. As directed within 10 U.S.C. §2439, the PMO plans to assess the cost and value of obtaining data and associated license rights by requiring the vendors to assert their current intellectual property rights and conduct detailed analysis to determine the value of the asserted data. The PMO anticipates using a specially negotiated license agreement to achieve a tailored solution.

3.2.2 Navy Programs

3.2.2.1 Multi-Engine Trainer System - ACAT III

The METS Program Office did not perform relevant activities in FY 2020, but is currently developing competitive Request for Proposal packages for FY 2021 and intends to include intellectual property and associated rights in its evaluations.

3.2.2.2 Shipboard Air Traffic Radar - ACAT IV

Fiscal Year (FY) 2020 activities included a Schedule Risk Assessment (SRA) (10 March 2020), Technical Interchange Meeting (TIM) (March 2020), Program Management Review (PMR) (June 2020), Functional Configuration Audit (FCA) and Production Readiness Review (PRR) (August 2020), and Milestone C Review and Low Rate Initial Production (LRIP) Contract Award (September 2020). During the FCA, PRR, Milestone C Review, and LRIP Contract evaluation, the SATR AN/SPN-50(V)1 program reviewed data delivered and planned for procurement to ensure that it received the correct level of rights and had the data required for its sustainment plan. Weekly progress and status reviews and bi-weekly combined Government/Original Equipment Manufacturer Team meetings were conducted throughout FY 2020 and will continue in FY 2021. Data to be procured was a topic of discussion during all of the above listed activities for FY 2020. The SATR AN/SPN-50(V)1 program has also regularly reviewed markings included on contract data requirements list (CDRL) deliverables (including requesting that the Contractor correct nonconforming markings) throughout FY 2020 and FY 2021 and will continue to do so. Additionally, the program coordinated with the MMR program to evaluate the Government's rights in data common to the MMR and SATR AN/SPN-50(V)1 systems as well as how that data can be used to support the production and sustainment strategies of both programs. The program plans to continue that coordination in FY 2021.

In FY 2021, a post award conference was conducted (November 2020) and a combined Ship Integration PMR and TIM was conducted (December 2020). A PMR was held in January 2021. The Government / Physical Configuration Audit (PCA) is currently 90 percent complete with the final report expected in early March 2021. An LRIP option execution is expected in March 2021. Data was and will continue to be discussed with the Contractor and evaluated by the SATR AN/SPN-50(V)1 program during each event to ensure the Government receives the appropriate rights in the data and will be able to fulfill the production and sustainment goals approved in the Milestone C AS.

3.2.2.3 Multi-Mode Radar

The MMR program is seeking to fill in gaps in the Technical Data Package (TDP) that its supplier has already provided for MMR. In FY 2020, the MMR program identified those areas of the TDP that did not fully support a competitive production/sustainment strategy and attempted to remedy these gaps. The MMR program's FY 2020 efforts included: pooling technical data with NAVAIR's SATR AN/SPN-50(V)1 program to fill gaps in their respective TDPs, pursuing contractual remedies against Saab for incomplete TDP deliveries, and seeking to acquire sufficient rights/data in the TDP to support the competitive production/sustainment approach. Since these efforts do not appear sufficient to support a timely competitive production and sustainment strategy, in FY 2021, the MMR is pursuing contracting approaches to develop alternative source(s) to supplement key areas of the TDP to allow the Government to compete its future MMR requirements. Additionally, in FY 2021, the MMR program and NAVAIR's SATR AN/SPN-50(V)1 programs intend to continue to collaborate on and share common technical data.

3.2.3 Air Force Programs

The Air Force has nothing to report at this time.

3.2.4 Additional Programs

The Joint Artificial Intelligence Center (JAIC) Tradewind Project. The Tradewind Project did not have specific activities during FY 2020 for assessment and as such these assessments will be provided along with the FY 2021 annual report.

3.3 Assessment of the Effectiveness of the Activities

3.3.1 Army Program

The FLRAA CD&RR efforts informed the development of the architecture requirements captured in the FAF. The PMO will use the FAF, along with the System Performance specification, System Engineering Plan, and Program of Record Statement of Work to inform the contractor-developed Open Systems Management Plan, the System Engineering Management Plan, and the system architecture that will be evaluated for alignment to the FLRAA MOSA Strategy.

Upon receipt, the FLRAA PMO will use the feedback from the CD&RR efforts to further assess the impact of the vendor's data right assertions on the Government's ability to meet FLRAA life-cycle affordability, sustainment and modification goals.

3.3.2 Navy Programs

The METS Program and MMR Program did not have specific activities during FY 2020 that can be assessed for this pilot. Assessment of these program's FY 2021 activities will be provided with the FY 2021 annual report.

As a result of the activities during FY 2020, the SATR AN/SPN-50(V)1 program was able to ensure that it is able to use deliverables received under its contracts as planned.

Additionally, it was able to determine whether it has the level of rights in the data required to fulfill its planned production and sustainment activities.

3.3.3 Air Force Programs

The Air Force has nothing to report at this time.

3.3.4 Additional Programs

The JAIC Tradewind Project did not have specific activities during FY 2020 for assessment and as such these assessments will be provided with the FY 2021 annual report.

3.4 Assessment of Improvements to Acquisition or Sustainment Activities Related to the Pilot Program

3.4.1 Army Program

The FLRAA PMO released its draft RFP in December 2020; as a result, there are no assessments to report at this time. Assessments will be provided in the FY 2021 annual report.

3.4.2 Navy Programs

The METS Program did not have specific activities during FY 2020 for assessment and as such these assessments will be provided with the FY 2021 annual report.

No changes to acquisition or sustainment activities are planned for the SATR AN/SPN-50(V)1 program at this time. The program will continue to evaluate data to ensure it has the data required to fulfill its planned acquisition and sustainment strategy.

The MMR program did not have specific activities during FY 2020 that it can assess for this pilot. Assessment of its FY 2021 activities will be provided with the FY 2021 annual report.

3.4.3 Air Force Programs

The Air Force has nothing to report at this time.

3.4.4 Additional Programs

The JAIC Tradewind Project did not have specific activities during FY 2020 for assessment and as such these assessments will be provided with the FY 2021 annual report.

3.5 Assessment of the Results Related to the Pilot Program

3.5.1 Army Programs

The FLRAA PMO released its draft RFP in December 2020; as a result, there are no assessments to report at this time. Assessments will be provided in the FY 2021 annual report.

3.5.2 Navy Programs

The METS Program did not have specific activities during FY 2020 for assessment and as such these assessments will be provided with the FY 2021 annual report.

Results of the SATR AN/SPN-50(V)1 program activities related to the Pilot Program have helped ensure the SATR AN/SPN-50(V)1 program will meet its planned acquisition and sustainment goals. Additional results of the Pilot Program as related to the SATR AN/SPN-50(V)1 program cannot be measured at this early stage and will be included in the FY 2021 annual report.

The MMR program did not have specific activities during FY 2020 that it can assess for this pilot. Assessment of its FY 2021 activities will be provided with the FY 2021 annual report.

3.5.3 Air Force Programs

The Air Force has nothing to report at this time.

3.5.4 Additional Programs

The JAIC Tradewind Project did not have specific activities during FY 2020 for assessment and as such these assessments will be provided with the FY 2021 annual report.

4. Enclosures

(1) Section 801 of the NDAA for FY 2020

(2) Request for Information (RFI) for Sec. 801 of NDAA for FY 2020

(3) Section 801 Pilot Program Data Call

(4) Excerpts from Section 813 Government-Industry Advisory Panel Final Report: Executive Summary; Tension Point Paper No. 4, *Data Rights as an Evaluation Factor*; Tension Point Paper No. 5, *Intellectual Property (IP) Valuation*

(5) Executive Summary from Section 875 Report - Department of Defense Access to Intellectual Property for Weapon Systems Sustainment

(6) USD(A&S) letter providing DoD recommendations based on the reports of the Section 813 Government-Industry Panel and Section 875 Independent Review, February 3, 2019

133 STAT. 1481

"…. PUBLIC LAW 116–92—DEC. 20, 2019

SEC. 801. PILOT PROGRAM ON INTELLECTUAL PROPERTY EVALUATION FOR ACQUISITION PROGRAMS. 10 USC 2322 note.

(a) PROGRAM.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense and the Secretaries of the military departments may jointly carry out a pilot program to assess mechanisms to evaluate intellectual prop- erty (such as technical data deliverables and associated license rights), including commercially available intellectual property valu- ation analysis and techniques, in acquisition programs for which each such Secretary is responsible to be the benefits associated with these mechanisms on— Deadline.

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

(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 section103 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 nondevelop-mental items.

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

Recommenda- tions. (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 nondevelop- mental items that can used as an alternative to a product or service to be specifically developed for a selected acquisi-tion 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 deploy-ment, and operations and support phases for 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.

Recommendations.

(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.

Coordination.

Assessments.

(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 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…"[1]

[1] P.L. 116-92, Dec.20. 2019.

REQUEST FOR INFORMATION

Office of the Under Secretary of Defense for Acquisition & Sustainment (A&S)

[Month Day, 2021]

Attachment 1. Question List.

Abstract: This Request for Information (RFI) is a preliminary set of questions for the public (including but not limited to the private sector, academia, and other interested parties) regarding the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020, Section 801 Pilot Program on Intellectual Property Evaluation for Acquisition Programs. Given the broad functional, technical, and operational considerations of the Department of Defense (DoD or Department) and the assessment scope spanning Intellectual Property (IP) evaluation and valuation methods and techniques, interested parties do not need to respond to every question. Interested parties may respond to questions pertinent to their organization's technical focus, expertise, and evaluation and/or valuation capabilities. Submitted responses are voluntary and should include only public information (e.g., do not include proprietary, business sensitive, or other forms of controlled unclassified information).

(1) General: Identifying Distinguishing Factors in Responses.

The following guidance applies generally to all responses to questions in topic areas (2) through (7) below.

a. Each response should consider and identify the extent to which the response may be limited or otherwise affected by—

- The particular industry or academic sector;
- The particular technologies involved;
- The type of IP protections governing the technology;
- The particular type of contract or contracting vehicle used;
- Whether your organization is responding as an IP/technology purchaser, seller, or both; and
- Whether your organization is a prime contractor, subcontractor, or both.

b. Responses should include only public information (e.g., do not include proprietary, business sensitive, or other forms of controlled unclassified information). However, if applicable, the response may indicate that additional responsive information may be available but is not being provided because it is non-public and would be subject to confidentiality restrictions. Preferably, in such cases the response will provide information in a more abstract or generic form that may still provide information responsive to the question, but would not contain any detailed, non-public information.

(2) Assessment Mechanisms for Program IP Evaluation.

a. What IP evaluation mechanisms and techniques used by your organization, or your industry or academic sector in general, could be adapted for use in the Department of Defense acquisition programs? [Sec. 801(a)]

- Please rank the IP evaluation mechanisms identified in your answer above from the most beneficial to those that are less promising, and provide any relevant examples and rationale for such ranking.

b. What commercially available IP valuation analysis and methods used by your organization, or your industry or academic sector in general, could be adapted for use in Department of Defense acquisition programs? [Sec. 801(a)]

- Please rank the IP valuation analysis and methods identified in your answer above from the most beneficial to those that are less promising, and provide any relevant examples and rationale for such ranking.

c. Please identify any other emerging, innovative, novel, or otherwise "outside of the box" methods for IP valuation, prioritization, and IP evaluation techniques not identified above (in your responses to questions 2a. or 2b.) that could be adapted for use in DoD acquisition programs. [Sec. 801(b)(6)(A)]

d. Please identify acquisition planning and technology assessment techniques used by your organization, or your industry or academic sector in general, to analyze the use of a commercial product or service or non-developmental item as an alternative to acquiring a product or service that must be specifically developed for a particular DoD acquisition program. [Sec. 801(a)(3); (b)(1)(B); and (b)(2)]

(3) Development of Cost-effective IP Strategies

a. What does your organization, or your industry or academic sector in general, consider best practices for utilizing IP valuation and evaluation methods to develop cost-effective IP strategies? [Sec. 801(a)(1)]

b. What factors should DoD consider in developing IP strategies that plan for uncertainties (*e.g.,* design, requirement changes; emergence of disruptive technologies; selection of particular vendors; defining the sustainment strategy) associated with predicting downstream events, and for identifying appropriate flexibility and other potential options, when these uncertainties become more defined? [Sec. 801(a)(2); Sec. 801(b)(6)(C)]

(4) Assessment and Management of IP Value and Costs.

a. Given the specialized mechanisms governing IP acquisitions in the national defense mission space, how can the Department of Defense best identify, assess, and validate the value of different kinds of IP across the acquisition lifecycle? [Sec. 801 (a)(2); Sec. 801 (b)(C)(2)]

(5) Cross-Functional Team of Subject Matter Experts.

a. Does your organization, or your industry or academic sector in general, utilize a designated group or team of subject matter experts to identify and manage IP issues on behalf of the organization (e.g., an IP Management Team; or a cadre of cross-functional subject matter experts analogous to that required for DoD at 10 USC 2322(b))? [Sec. 801(b)(1)]

b. If so, how is such team or group structured, and what functional areas of subject matter expertise are represented (e.g., intellectual property, law, engineering, contracting, program management, product support and sustainment, financial analysis)? [Sec. 801(b)(1)]

(6) Engagement with the Private Sector.

a. In conducting the Sec. 801 Pilot Program, how can the Department best engage the public (including but not limited to the private sector, academia, and other interested parties) to support and inform the development of IP strategies? [Sec. 801(b)(6)(A)]

b. In general, what processes and procedures can the Department implement to enable its acquisition programs to better engage with interested parties in identifying appropriate IP evaluation methods in the development of IP strategies, preservation of program flexibility, increases in cost-effectiveness, and improvements in sustainment efforts? [Sec. 801(b)(6)(B)]

(7) Future Activities.

a. What specific topics and questions not discussed above should the Department consider including as part of future RFIs related to this IP Pilot Program?

b. Please provide any additional comments or recommendations regarding the Section 801 Pilot Program that were not included in your answers above that may improve DoD's acquisition of IP.

c. Although this initial RFI is limited to responses having only publicly available information, the Department recognizes that respondents may have non-public information that would otherwise have been responsive to one or more questions. Please indicate whether your organization possesses any such non-public information (e.g., proprietary, business sensitive, or other forms of controlled unclassified information) that your organization may be willing to share with the Department in support of this IP Pilot Program effort in the future, provided that such information could be shared subject to appropriate confidentiality protections. If so, please identify the nature or type of confidentiality protections that would be necessary to allow for such sharing (e.g., use and disclosure authorized only for particular purposes or to particular categories of organizations or individuals).

Sec. 801 Pilot Program Data Call

The results of this data call will be analyzed and aggregated in the Sec. 801 Pilot Program FY21 annual report; the aggregated data (collected from this data call) will not include program names. This form should take 15-60 minutes to complete. We recommend completing this form with direct assistance from technical, acquisition, and legal subject matter experts. In addition, we recommend referencing existing information in the program's acquisition strategy. Questions with asterisks require a response.

Section 1

Tell Us About Your Program

1. **DoD Component**
   - ○ Army
   - ○ Navy
   - ○ Air Force
   - ○ Other DoD Agencies

2. **Type(s) of Agreements Used**
   - ☐ FAR-Based Contract
   - ☐ OTA
   - ☐ CRADA
   - ☐ TSA
   - ☐ No-Cost Agreement
   - ☐ Cooperative Agreement
   - ☐

3. **Technology Area**

Select one or more applicable technology areas

- ☐ Advanced Electronics (Electronic Integration, EO/IR components, Micro/Nano electronics, RF components)
- ☐ Air Platforms (e.g., aircraft)
- ☐ Artificial Intelligence
- ☐ Autonomy
- ☐ Biotechnology and Biomedical Technology
- ☐ Business Systems
- ☐ C4I
- ☐ Counter-IED and Counter-WMD
- ☐ Cyber
- ☐ Directed Energy
- ☐ Electronic Warfare
- ☐ Energy and Power Technologies
- ☐ Ground and Sea Platforms (e.g., ground and sea vehicles)
- ☐ Guns, Artillery, and Kinetic Energy Weapons
- ☐ Human Systems (Training, Warfighter Protection and Performance Products, Human-Technology Interfaces)
- ☐ Materials and Manufacturing Processes
- ☐ Sensors
- ☐ Space
- ☐ Other Technology Area

4. **AAF Pathway**

- ☐ Major Capabilities Acquisition
- ☐ Urgent Capability Acquisition
- ☐ Middle Tier of Acquisition
- ☐ Software Acquisition
- ☐ Defense Business Systems
- ☐ Acquisition of Services

5. **Major Capability Acquisition Milestone (last achieved)**
   - N/A
   - Materiel Development Decision
   - Milestone A
   - Milestone B
   - Milestone C
   - Initial Operational Capability
   - Full Operational Capability
   - Operations & Sustainment
6. **Urgent Capability Acquisition Milestone (last achieved)**
   - N/A
   - Pre-Development
   - Development
   - Production & Development
   - Disposition Decision
   - Operations & Sustainment
7. **Software Acquisition Phase**
   - N/A
   - Planning Phase
   - Execution Phase
8. **Middle Tier of Acquisition Phase**
   - N/A
   - Rapid Prototyping: Planning Phase
   - Rapid Prototyping: Execution Phase
   - Rapid Prototyping: Completion Phase
   - Rapid Fielding: Planning Phase
   - Rapid Fielding: Execution Phase
   - Rapid Fielding: Completion Phase
   - Operations and Sustainment

9. **Defense Business Systems Phase**
   - N/A
   - Capability Need Identification Phase
   - Functional Requirements and Acquisition Planning Phase
   - Acquisition, Testing, and Development Phase
   - Capability Support Phase

10. **Acquisition of Services Phase**
    - N/A
    - Planning Phase: Forming the Team
    - Planning Phase: Reviewing Current Strategy
    - Planning Phase: Performing Market Research
    - Development Phase: Defining Requirements
    - Development Phase: Developing Acquisition Strategy
    - Execution Phase: Executing Strategy
    - Execution Phase: Managing Performance

11. **Technology Readiness Level**
    - [ ] 1
    - [ ] 2
    - [ ] 3
    - [ ] 4
    - [ ] 5
    - [ ] 6
    - [ ] 7
    - [ ] 8
    - [ ] 9

12. **Commerciality of Product Baseline**
    - Based Primarily on Commercial Technology
    - Based Primarily on Noncommercial Technology

Section 2

Tell us about Your Acquisition Planning

13. What types of technical data or software deliverables were required under the contract(s) for this program?

- ☐ Technical Data Necessary for Operation, Installation, Maintenance, and Training
- ☐ Form, Fit, and Function Data
- ☐ Test Data, Studies, and Analyses
- ☐ Technical Data Necessary for Production
- ☐ Software Documentation and Executables
- ☐ Source Code and Software Tools that facilitate sustainment
- ☐

14. How was the Intellectual Property (IP) strategy structured within the Program Acquisition Strategy?

- ○ N/A
- ○ No IP Acquisition Strategy
- ○ Stand-alone Paragraph
- ○ Stand-alone Section
- ○ Embedded through the Acquisition Strategy

15. Is the IP Strategy addressed in the Product Support Strategy?

- ○ N/A
- ○ Yes
- ○ No

16. Does your PM have established procedures for ensuring that contracts implement or account for the IP Strategy?

- ○ Yes
- ○ No

17. What IP Strategies worked or did not work?

Please indicate N/A if this question does not apply to your program.

Section 3

Tell Us About Your IP Evaluation Activities in Source Selections

18. Were there IP-related evaluation criteria in your Source Selection Evaluation Plan?

- Yes
- No

19. What was the impact of the IP-related evaluation criteria?

- N/A
- Negative Impact on Mission Goals
- No Impact on Mission Goals
- Positive Impact on Mission Goals
- Impact on Mission Goals cannot be determined at this time

20. If the IP-related evaluation criteria had a positive or negative impact, please briefly describe this impact.

Please indicate N/A if this question does not apply to your program.

21. Did the Government receive broader or narrower IP license rights than the IP license rights that the Government may normally require?

- N/A
- Yes
- No

22. Did the Contractor identify additional costs associated with the broader IP license rights discussed in Question 21?

- N/A
- Yes
- No

23. Did the Contractor identify reduced costs (or other consideration) associated with the narrower IP license rights discussed in Question 21?

- N/A
- Yes
- No

24. Were any additional costs (associated with IP license rights) considered as part of the evaluation of the cost proposal?

- ☐ Yes
- ☐ No

25. How were the IP-related technical evaluation criteria structured?

- ☐ N/A
- ☐ As a Stand-alone Factor
- ☐ As a subfactor
- ☐ As a part of multiple considerations within a Subfactor
- ☐

26. Did technical data or software items have individually priced option CLINs?

- ☐ Yes
- ☐ No

Section 4

Tell Us About Your IP Evaluation Activities in Sole Source Awards

27. If there were sole source contracts and the J&A asserted IP and/or IP license rights in support of the sole source justification, what was the justification based on?

- ☐ N/A
- ☐ Late Delivery of Technical Data or Software in Another Contract
- ☐ Deficient or Insufficient Technical Data or Software Possessed by the Government
- ☐ Insufficient License Rights in Technical Data or Software Possessed by the Government
- ☐ Cost Prohibitive to Negotiate for Additional IP or IP License Rights
- ☐

28. Did the Government provide a plan in the J&A to fill any deficiencies in IP and/or IP license rights for future procurements?

- ○ N/A
- ○ Yes
- ○ No

29. What could have prevented vendor lock?

Please indicate N/A if this question does not apply to your program.

30. Did the Government consider reverse engineering the product in the J&A?

- ○ N/A
- ○ Yes
- ○ No

Section 5

What Obstacles were encountered related to Technical Data, Software, or IP License Rights?

31. What Obstacles did you encounter related to Technical Data, Software, or IP License Rights?

- ☐ N/A
- ☐ Deficient Technical Data or Software
- ☐ Contractor's Refusal to deliver Technical Data or Software (required in solicitation or contract)
- ☐ Discrepancies in Data Rights Assertions
- ☐ Discrepancies with Restrictive Markings on Technical Data or Software
- ☐ Contractor's Refusal to Negotiate Specially Negotiated Licenses
- ☐ Cost Prohibitive to Negotiate for Additional IP or IP License Rights
- ☐

32. If there were discrepancies in the data right assertions, what were these discrepancies?

- ☐ N/A
- ☐ Form, Fit, and Function Data was provided with restrictions
- ☐ Operation, Maintenance, Installation, Training Data was provided with Restrictions
- ☐ Inaccurate Assertions of Development Funding
- ☐ Assertions Include Items that are Not Deliverables
- ☐ Vague/Ambiguous Assertions
- ☐

33. If discrepancies were found in the data rights assertions, what was the impact of resolving these discrepancies?

- ☐ N/A
- ☐ Enabled competitive Procurement of HW or SW Sustainment Services
- ☐ Enabled Competitive Procurement of Hardware Procurement
- ☐

34. **If discrepancies were found in the data rights assertions, what was the impact of the process of resolving these discrepancies?**

- N/A
- No Impact on Schedule
- Minimal Impact on Schedule
- Significant Impact on Schedule
- Critical Impact on Schedule

35. **If any formal validation procedures or other dispute procedures (e.g., show cause letter or cure notice) were used to resolve discrepancies related to technical data, software, or IP license rights, what was the basis for the dispute?**

- ☐ N/A
- ☐ Technical Data or Software was deficient
- ☐ The Contractor refused to provide the IP license rights required under the DFARS clauses
- ☐ The Restrictive markings were deficient
- ☐ Contractor's changes to Data Rights Assertions would have impacted the source selection
- ☐ Loss of Access to Technical Data or Software in Contractor-controlled Repositories
- ☐

Section 6

How did You address Gaps/Deficiencies in Technical Data, Software, or IP License Rights?

36. Did you negotiate license rights in:

- ☐ N/A
- ☐ Technical Data
- ☐ Software

37. What was the overall purpose of the negotiations?

- ☐ N/A
- ☐ Facilitating Transition to Sustainment
- ☐ Facilitating Modernization
- ☐ Facilitating Transition to a Program of Record
- ☐ Facilitating Competitive Procurement of an End Item
- ☐ Securing an Enterprise-wide License
- ☐ Removing Commercial License Terms that conflict with Federal procurement law
- ☐ Removing Commercial License Terms that conflict with User Needs
- ☐

38. Was the Government negotiating for broader IP license rights than it was allowed to require?

- ○ N/A
- ○ Yes
- ○ No

39. If there was a cost associated with a specially negotiated license (SNL), what was it?

- ○ N/A
- ○ No Cost
- ○ Minimal Cost
- ○ More Cost Effective than the standard license
- ○ Within budget, but not cost effective
- ○ Cost Prohibitive

40. What valuation method was used in assessing the license fee?

- ☐ N/A
- ☐ Market Approach
- ☐ Income Approach
- ☐ Cost Approach
- ☐

41. If the Government negotiated for narrower IP license rights than it was allowed to require, what was the consideration/trade-off for this negotiation?

Please indicate N/A if this question does not apply to your program.

42. If the Government negotiated narrower or broader IP license rights than it was allowed to require, what was the approximate impact on product cost? Please indicate the percentage increase or decrease in product cost.

Please enter N/A if this question does not apply to your program.

43. What impact did the negotiations have on the program's schedule?

- ◯ N/A
- ◯ No impact on schedule
- ◯ Minimal impact on schedule
- ◯ Significant impact on schedule
- ◯ Critical impact on schedule

44. Was this negotiated before or after contract award?

- ◯ N/A
- ◯ Before Contract Award
- ◯ After Contract Award

45. Did the Government negotiate any other IP license rights (e.g., patent or trademark license rights)?

- ◯ N/A
- ◯ Yes
- ◯ No

Section 7

How did You address Uncertain Future Needs?

46. Did you use alternatives to definite, standard, or formal delivery of technical data or software?

Escrow Agreements require deferred delivery of technical data or software upon the occurrence of specific events indicated in the contract (e.g., the contractor's cease of sale or support of products or bankruptcy). Access agreements permit the Government to view or access technical data or software in contractor-controlled repositories or facilities.

- ☐ N/A
- ☐ Optional CLINs
- ☐ Access Agreements
- ☐ Escrow Agreements
- ☐ Use of the Deferred Ordering Clause
- ☐

47. Did these tools meet the Government's needs?

- ○ N/A
- ○ Yes
- ○ No

48. How would you characterize the cost for these alternatives?

- ○ N/A
- ○ No Cost
- ○ Minimal Cost
- ○ More Cost Effective than Standard Delivery
- ○ Within Budget, But Not Cost Effective
- ○ Cost Prohibitive

"…. Executive Summary

The Panel recognizes that the Department of Defense (DoD) and industry have different business models, which at times may be in conflict. In exploring common ground, the Panel members received the testimony of many defense and industry officials, reviewed the history of relevant legislation and identified "tension points" of disagreement between the Government and industry. Following extensive deliberations, Panel members (listed in Appendix B) prepared white papers to address the tension points and to make recommendations for legislative, regulatory, and policy changes that recognize and seek to balance the equities of both parties. In addition, the Panel identified several issues viewed as outside the purview of the Panel that were more appropriate to be considered by the FY 2016 NDAA, Section 809, Advisory Panel on Streamlining & Codifying Acquisition (the 809 Panel).

The Panel, as a whole, believes the topic of Intellectual Property (IP) (both rights and delivery requirements), while nuanced and complex, is a topic acquisition professionals must understand. Training, as recommended by the Panel, should help in this endeavor. Central to the issue is the fact that DoD does not always articulate its needs for upgrade and sustainment clearly enough and early enough in the system life cycle to allow industry to respond appropriately during the competitive and early planning stages. Some confuse IP delivery requirements with license rights. The Government's (or any end user's) license rights are of no value unless and until the data or software (e.g., IP deliverables) to which the license rights attach are requested and received. In addition, the training provided must address how the various federal organizations (e.g. Internal Revenue Service, the Federal Trade Commission, the Securities and Exchange Commission, and the International Trade Commission, the Federal Judiciary) and industry value IP. Best practices and standards in the field of IP valuation have been evolving over the past several decades among federal agencies, the courts, IP valuation specialty companies, and operating companies, and there is a body of literature reflecting these best practices and standards with which DoD acquisition professionals should be familiar. This will facilitate future negotiations and will help Government and industry reach a mutually acceptable position.

Tension Points

The Panel's white papers to address tension points are categorized into eight broad areas: business model, acquisition planning and requirements, source selection and post source selection IP licensing, balancing the interests of the parties, implementation, compliance/administrative, data acquisition, and modular open systems approaches (MOSA). The Panel also identified several issues viewed as outside the purview of the Panel that were more appropriate to be considered by the 809 Panel. Appendix C is a spreadsheet that addresses the tension points, originally identified by the Panel, and their disposition.

1. Business Model: The Panel identified four separate tension points and consolidated them into one paper. The Panel does not believe legislative changes are required in this area but recommends the Government's long term requirements for sustainment and upgrade be included in solicitations early in the acquisition cycle, consider whether specially negotiated license rights (SNLR) are appropriate, and the impact of the Government's requirements on the potential for future competition (see Paper 1).

2. Acquisition Planning and Requirements: The Panel identified eight separate tension points, but in its final deliberation, wrote two papers and consolidated the others into papers in other areas of the report. The Panel does not believe legislative changes are needed in this area. One paper deals with access to information where a contract-required data requirement (Contract Data Requirements List (CDRL)) is either inappropriate or may not be possible (e.g., cyber security breach reviews). The other deals with streamlining data requirements for research contracts using Budget Authority 6.1 and 6.2 funds (see Papers 2 and 3).

3. Source Selection and Post Source Selection IP Licensing: The Panel identified four separate tension points and consolidated them into three papers. One deals with evaluating IP during source selection. The Panel was provided a variety of examples used in source selections and their impacts; some good, some bad. The Panel agreed the Government should create regulations reflecting specific principles to increase transparency and to ensure IP is properly valued when used as an evaluation factor without mandating offerors to relinquish their IP. Because of the wide range of major weapon system requirements, the Panel was unable to coalesce on a single method and recommends a pilot program for IP evaluation in acquisition planning and source selection (see Paper 4). The second paper deals with the treatment of special clauses developed to implement IP strategies. The Panel recommends the Cadre of IP Experts required by 10 USC 2322 be tasked to clarify the use of these clauses (see Paper 6). The third paper deals with IP valuation. The panel discussed challenges with determining how to negotiate a fair and reasonable price for IP rights, such as in situations where the Government seeks to acquire greater IP rights, or additional IP deliverables, than is customarily provided in the commercial marketplace. The panel recommends the use of broadly accepted best practices, norms, and standards in IP valuation by both the Government and industry (see Paper 5).

4. Balancing the Interests of the Parties: The Panel identified nine separate tension points and consolidated them into six papers divided into two sets. The first set addressed how development is funded. The Panel recommends retaining the current source of funding policy (see Paper 8), but was unable to reach agreement on how independent research and development (IR&D) and other indirect costs should be treated for purposes of determining the Government's IP rights and recommends further study (see Paper 7). The final paper of this set deals with modifications made to commercial items to meet Government unique needs and the Panel recommends several changes to the Defense Federal Acquisition Regulation Supplement (DFARS) to clarify how the issue should be addressed (see Paper 9). The second set addresses data rights in relation to needs. One paper deals with changes to policy required to align commercial license requirements

with Government needs (see Paper 10). Another recommends a statutory change to limit segregation or reintegration data to the end item level or higher (see Paper 11). The last paper addresses the form of data and data rights necessary to fulfill maintenance and sustainment requirements for equipment and software and expressly recommends software maintenance be defined (see Paper 12).

5. Implementation: The Panel identified 12 separate issues and consolidated them into seven papers. In two papers there was a disagreement among Panel members and minority positions were prepared (see Papers 14 and 19). One paper deals with technical data and computer software and recommends that the differences be clearly defined in regulation (see Paper 13). The next paper deals with development versus adaptation and is related to the source of funding discussion above (see Paper 14 and minority position). Another paper deals with data necessary for operation, maintenance, installation, or training (OMIT), and the exclusion of detailed manufacturing or process data (DMPD) from the definition of OMIT data, and recommends clearer definitions in policy (see Paper 15). One paper encourages the use of SNLRs when appropriate (see Paper 16). One paper recommends DoD create standard data definitions for specific data categories tied to unlimited rights, such as form fit function (FFF), OMIT (excluding DMPD), computer software documentation, and other categories (see Paper 17). One paper deals with the validation process required by 10 USC 2321 and recommends a statutory change to simplify and clarify how validation is accomplished and challenged for both contractors and subcontractors (see Paper 18). The final paper recommends changes to the mandatory flow down of clauses to commercial subcontractors and suppliers (see Paper 19 and minority position).

6. Compliance/Administrative: The Panel identified four separate issues. They involve CDRLs, Small Business Innovation Research (SBIR), training and data assertion lists. One paper recommends policy changes to address mechanisms to keep data current throughout the life cycle of a system (see Paper 20). The second recommends a statutory change to make clear that when SBIR regulations apply, the development will be treated, during the SBIR data rights protection period, as if it were developed at private expense (see Paper 21). The third deals with the lack of trained personnel and recommends training for the acquisition workforce and the creation of a cadre of subject matter experts. The Panel notes that the 2018 NDAA adopted the Panel's recommendation and required the creation of such a cadre at 10 USC 2322 (see Paper 22). The final paper recommends several regulatory changes to simplify and clarify the requirements for data assertion during source selection and contract execution (see Paper 23).

7. Data Acquisition: The Panel identified six separate issues and consolidated them into five papers. In one paper there was a disagreement among the members and a minority position paper was provided (see Paper 24). The first paper deals with deferred ordering. The Panel recommended a statutory change that would allow the Government to exempt, at their discretion, data from deferred ordering, which is consistent with the current regulation. The minority position recommends the Government follow the 10 USC 2320 as it stands (albeit unimplemented), without changes, in regard to deferred ordering (see Paper 24 and minority paper). The next paper recommends a statutory change to extend the time period for priced options for delivery of data rights (see Paper 25). Another paper recommends regulatory changes to make clear the limits of deferred ordering in the context of interface data (see Paper 26). One paper recommends regulatory changes that should improve the early identification of required data and thus reduce the need for deferred ordering of data (see Paper 27). The final paper recommends regulatory changes to discuss escrow agreements that would reduce the need for deferred ordering (see Paper 28).

8. Modular Open Systems Approaches (MOSA): The Panel identified three separate issues and consolidated them into two papers. The first deals with GPR in major system interfaces and makes several regulatory recommendations that should clarify the statutory intent, and therefore reduce execution risk (see Paper 29). The second deals with GPR in interfaces (other than major system interfaces) developed with mixed funding and makes a statutory recommendation to clarify the intent of the legislation (see Paper 30).

9. The 809 Panel: Members of the 813 Panel met with the 809 Panel and shared eight areas where the 813 Panel believed it would be more appropriate for the 809 Panel to make recommendations based on their charter (see below).

Appendix A is the line-in/line-out of 10 USC 2320 and 2321 recommended by the Panel. Each recommendation for change is linked to a paper (Appendix D).

The eight papers with recommendations for statutory changes to 10 USC 2320 and 2321 are:

- Authorized release and use of limited rights technical data (Paper 11) (10 USC 2320)
- Development versus Adaptation (Paper 14a) (10 USC 2320 & 2321) with Minority report (Paper 14b)
- The Validation Process is Cumbersome and Confusing (Paper 18a) (10 USC 2321) and line-in/line-out (Paper 18b)
- Mandatory flow-down (commercial subs and suppliers) (Paper 19a) with Minority report (Paper 19b) (10 USC 2320 & 2321)
- Small Business Innovation Research (SBIR) (Flow-down to Suppliers; Inability to Share with Primes; Evaluation) (Paper 21) (10 USC 2320)
- Deferred ordering period: 6 years (rather than perpetual) and Deferred Ordering Part 1: only data "generated" under the contract (Paper 24a) (10 USC 2320) with Minority Report (Paper 24b)
- Time Limits on Priced Contract Options (Paper 25) (10 USC 2320)
- GPR in Interfaces Developed with Mixed Funding (Paper 30) (10 USC 2320)

Three papers have recommendations for statute other than 10 USC 2320 and 2321. They are:

1) Lack of Trained Personnel (Paper 22) (partially implemented in the FY2018 NDAA)
2) Data Rights as an Evaluation Factor (Paper 4)

3) Treatment of Independent Research and Development (IR&D) versus Self-Funded Research and Development (SFR&D) for Intellectual Property (IP) rights determinations; IR&D risk correct for limited/restricted rights? (Paper 7)

The remaining papers make recommendations for changes to policy or regulation that do not require statutory change. Of note, the Defense Acquisition Regulation Council (DARC) agreed during the Panel's deliberations that, as an exception to their normal process, industry would be invited to participate in the rule making using public meetings. Industry will be invited to participate in the actual drafting of the rule and the adjudication of the comments received from the public.

The 19 recommendations for changes to policy or regulation are:

1) Different Business Models in Government and Industry result in different objectives (Paper 1)

2) Access for limited purposes (cyber review; airworthiness; approvals) versus delivery as a Contract Data Requirements List (CDRL) (Paper 2)

3) Contract Data Requirements List (CDRL) requirements for Budget Activities 6.1 and 6.2 Research Programs versus CDRL requirements for Production/Sustainment (Paper 3)

4) Intellectual Property (IP) Valuation (Paper 5)

5) Contract Requirements in Section H Should not be treated like Standard Clauses (Paper 6)

6) Is Source of Funding the Best Way to Determine Rights to Technical Data? (Paper 8)

7) Commercial vs. Noncommercial Items (Paper 9)

8) Commercial Software License versus Government-unique Requirements (Paper 10)

9) Are existing rights sufficient for maintenance and sustainment? (Paper 12)

10) Software versus Technical Data (Paper 13)

11) Operation, Maintenance, Installation, and Training (OMIT) Data versus Detailed Manufacturing or Process Data (DMPD), including such data pertaining to a major system component (Paper 15)

12) Rigid Intellectual Property (IP) requirements versus Flexible Arrangements (Paper 16)

13) Poor Data Item Description (DID) Alignment with Statutory/regulatory Categories Form, Fit and Function (FFF) and Operation, Maintenance, Installation or Training (OMIT) (Paper 17)

14) How to keep CDRL deliverable up-to-date (Paper 20)

15) The Data Assertion List is a Burden on Both Contractor and the Government (Paper 23)

16) Deferred Ordering Part 2: all interface or major systems interface data may be ordered regardless of U.S. Government development (Paper 26)

17) 17) Failure to Define and Order CDRLs (Reliance on Deferred Ordering and DAL to Obtain
18) Data (Paper 27)
19) Escrow as a Form of Deferred Delivery (Paper 28)
20) Government Purpose Rights (GPR) in Major System Interface (MSI) (Developed Exclusively at Private Expense (DEPE) or with Mixed Funding) (Paper 29)

The topics discussed with the 809 Panel were:

- **a)** Poor alignment between 10 USC 2320 and other marking clauses (distribution statements in DFARS 252.204-7000) and contract attachments such as DIDs and the DAL
- **b)** Complexity of the IP scheme versus the ability of commercial and small business to comply.
- **c)** Synchronization of sustainment policies and data rights. (10 USC 2460 vs 2320)
- **d)** Maintaining currency in training certifications.
- **e)** Strategy and plans development; who should be engaged? Who is engaged?
- **f)** Multiple definitions of commercial item in statute.
- **g)** Applicability of flow down in clauses.
- **h)** No definition of subcontractor versus supplier.

Conclusion

The above are, in the Panel's opinion, the major issues addressed.

Government and industry recognize that they have differing positions on certain IP issues. However, they are united regarding the important contributions of both parties to ensure that our Nation's warriors are equipped with state of the art equipment to defend the nation. DoD recognizes that private industry plays a vital role in ensuring that innovative technologies continue to be developed to support the ever changing needs of the warfighter. Industry recognizes that DoD must ensure that support of the Warfighter is accomplished in a cost-effective way while protecting the interests of the taxpayer…"[2]

[2] 2018 Report Government-Industry Advisory Panel On Technical Data Rights November 13, 2018.

“…. [Tension Point Paper] 4. Data Rights as an Evaluation Factor

Tension Point

Source selections in the past often failed to include an evaluation factor for technical data or computer software (collectively, “data”), and the associated license rights (a.k.a. “data rights”), so the value of intellectual property in an innovative proposal was overlooked or not used to discriminate among proposals. A recent trend in source selections is to include provisions seeking a certain level of data rights, e.g., Government Purpose Rights (GPR), for all deliverabledata, with no ability for industry to trade off the sought-after level of data rights for another benefit to the Government, such as reduced cost of a commercial product or increased innovationin the proposed solution. Industry perceives this trend as an arbitrary use of competitive pressures to obtain unnecessarily broad licensing terms, which discourages industry investment and may be contrary to 10 U.S.C. 2320(a)(2)(H) or 15 U.S.C. 638(j)(2).

Discussion

It is an inherently governmental function for the Government to determine its requirements and to select the evaluation factors that it will employ during a source selection in order to reach the “best value” determination while ensuring such evaluation factors drive multiple offers in satisfaction of competition requirements. This concept has been confirmed repeatedly by the General Accountability Office in its bid protests decisions. To carry out their missions and to meet certain statutory requirements (e.g., Competition in Contracting Act), Government agenciesrequire access to certain data either from an original equipment manufacturer (OEM) contractor or subcontractor, or generated from Government sources. Government agencies are required by statute to always evaluate price or cost during a source selection. Since two thirds of the price/cost of an item typically occurs in the sustainment phase of the acquisition, Government agencies need to identify the necessary data and intellectual property licenses in the necessary data during a source selection, and should be accounting for such intellectual property to accurately assess the total lifecycle cost/price of the item from each bidder in the competition.

The Department of Defense (DoD) must respect the cutting-edge technology of innovative companies, particularly where the technology was developed with private investment. When a private company is not willing to share proprietary details regarding its technology with the DoDat any price, the DoD may seek a different technical solution – one that enables organic or competitively-awarded life-cycle sustainment and modernization of the item.

The Panel discussed that the Government cannot require potential contractors to relinquish to theGovernment, as a condition of contract award, data rights greater than those authorized by 10 U.S.C. 2320 or 15 U.S.C. 638(j)(2). Under these provisions, DoD cannot include a proposal or bid requirement that the winning contractor must grant the Government a broad license, such as GPR, when the statutory regimes would allow the contractor to assert a more restrictive license, such as Limited Rights, Small Business Innovation Research (SBIR) data rights, or commercial license rights. The Panel reviewed the history of 10 U.S.C. 2320, which was enacted, in part, toprotect industry from certain DoD practices which industry believed discouraged industry investment incentives and competition. Industry members also noted to the Panel that even expressing a preference for specific Defense Federal Acquisition Regulation Supplement (DFARS)-defined license rights may chill competition. The industry Panel members support anexpansive interpretation of the concepts included in 10 U.S.C. 2320(a)(2)(H) or 15 U.S.C.

638(j)(2), which they perceive as encouraging competition and private investment.

The Panel also discussed DoD's needs to find a way to evaluate the data licenses each offeror proposes for a contract, and notes that 10 U.S.C. 2305 discusses the use of evaluation of data licenses in specific situations. The Government Panel members believe, the correct balance is to allow evaluation of each offeror's data deliverables and associated licenses during source selection, which may provide a better value for the Government and, since the offerors are voluntarily proposing the data licenses, the Government is not forcing a particular offeror to giveup any license rights in violation of 10 U.S.C. 2320(a)(2)(H) or 15 U.S.C. 638(j)(2).

Industry has previously proposed that the DoD be prohibited from evaluating a contractor's proposal based on the contractor's willingness to relinquish greater rights than the Government isentitled to require under the law. This proposal was born of practices which industry believes effectively devalued intellectual property to the extent that it deters private investment in militarytechnologies, and also increased bid and proposal prices with little benefit.

The Panel noted that past source selections often failed to include an evaluation factor for data deliverables, and associated data rights, so the value of intellectual property in an innovative industry proposal may be overlooked or not used to discriminate among proposals. In other source selections, the *quantity,* instead of the *quality,* of data deliverables and data rights was evaluated, which may result in 1) a more expensive solution in terms of total life cycle costs, and

2) a less innovative solution being offered and selected instead of more innovative, commercialor proprietary, solutions that deliver less data and data rights but provide substantially greater cost savings over the acquisition life cycle.

The Panel also discussed one recently used model where the evaluation factor assigned a monetary value that reduced the total evaluated price of offers that provided at least GPR for a set of listed components. Under this model, offerors received a benefit for ensuring the Government received license rights to allow the data to be used for competitive life-cycle support, and the offeror was effectively given a competitive benefit if it offered the sought-afterlicense right. The Panel noted that such an example has potential downsides since lower-tier suppliers (especially those providing commercial or entirely privately developed technologies) are unlikely to agree to such terms even if the prime offeror is willing; if there are lower-tier supplier exceptions, the evaluation scheme provides greater rights from vertically integrated companies who use fewer suppliers which is not considered in the evaluation factor; and the evaluation factors need to account for the actual value received as compared to the default rights.The model highlights the issues which need to be balanced to ensure best value for the Government and fairness to the offerors.

The Panel further noted that the DoD has failed to provide uniform source selection procedures for the evaluation of data deliverables and data rights, preferring instead to leave this decision with program personnel who can tailor requirements to the needs of individual programs. The Panel is also concerned that there is a lack of DoD-level or agency-level oversight of these individually tailored source selections. The Panel believes that DoD source selections should consistently communicate the Government's acquisition and sustainment requirements in clear, meaningful ways to encourage Industry to propose the best possible array of noncommercial and commercial solutions (including intellectual property). In turn, this allows the Government to make meaningful distinctions amongst those disparate proposals, and ensure that the award represents the best value to the Warfighter and the Nation. DoD has also not evaluated the increased bid and proposal costs associated with complex evaluation factors, and has not provided guidance on intellectual property valuation techniques which allow the evaluation factors to bear a meaningful relationship to the market value of the data licenses to prevent over or under payment for such licenses. The DoD has also not provided guidance on when such evaluation factors might not be appropriate, such as where source selection is by other than best value involving trade-offs (e.g., intellectual property may be harder to evaluate or discriminate meaningfully when using lowest price technically acceptable procedures). Also, there is no guidance on allowing offerors to submit counter proposals which may result in improved technical data packages with license rights tailored to the Government's actual needs, as opposedto using Government Purpose Rights as the only possible choice.

The DoD should not adopt a "one size fits all" approach to intellectual property evaluation in source selections. Clear criteria to meaningfully discriminate between offers using data licensesas an evaluation factor should be provided to offerors, such as reduced cost and schedule of development from commercially available items, or reduced sustainment costs when the Government receives sufficient data deliverables and data rights for organic sustainment, the intellectual property valuation techniques used by the Government, and the analysis of the effecton cost/price due to the effects on competition caused by increased license requirement. Sourceselections should be carefully structured to avoid "paying more than once for" the value of intellectual property and should be structured in a way that does not devalue industry's ability to provide innovative solutions.

The Panel believes industry feedback should be actively encouraged on evaluation factors and the Government should incorporate the feedback to ensure the factors represent the best value toDoD for a given solicitation as informed by the Intellectual Property Strategy adopted by the program under DoD Instruction 5000.02. The offerors should provide a detailed discussion of their intellectual property valuation techniques and assumptions and should also be made aware of any formulas used by the Government in calculating the evaluation factors which often revealsubtle preferences offerors need to be aware of to meet the Department's needs. Industry's viewis the lack of pre-award protest is not indicative of the appropriateness or effectiveness of the evaluation factors. Post award, Government debriefings should provide offerors the key aspectsof how their offer was evaluated under the evaluation factor using the same formulas and assumptions used for all proposals in order to have meaningful feedback.

Recommendation

The Panel recommends no change to 10 U.S.C. 2320 or 10 U.S.C. 2321 to address this issue.

The Panel recommends a new section in the Fiscal Year 2020 (FY20) National Defense Authorization Act (NDAA), section 8xx regarding a pilot program for intellectual property evaluation in acquisition planning and source selection regarding certain Major Defense Acquisition Programs, as follows:

FY20 NDAA, section 8xx PILOT PROGRAM ON INTELLECTUAL PROPERTY EVALUATION FOR MAJOR DEFENSE ACQUISITION PROGRAMS

(a) PILOT PROGRAM.—Not later than 180 days after the date of enactment of this act, the Secretary of Defense and the Secretaries of the military departments may jointly carry out a pilotprogram to assess mechanisms to evaluate intellectual property (e.g., technical data deliverables and associated license rights), including commercially available intellectual property valuation analysis and techniques, in the major defense acquisition programs for which they are the milestone decision authority to better understand the benefits associated with these techniques on—

(1) The development of cost-effective intellectual property strategies, and

(2) Assessment and management of the value and costs of intellectual property during acquisition and sustainment activities (including source selection evaluation factors) throughoutthe acquisition lifecycle for any major defense acquisition program selected by the Secretary concerned.

(b) ACTIVITIES.—Activities under the pilot program may include the following—

(1) Establishing a team of Department of Defense and private sector subject matter experts to identify, to the maximum extent practicable at each milestone for the selected major

defense acquisition programs, intellectual property evaluation techniques to obtain quantitativeand qualitative analysis related to the value of intellectual property during the procurement, production & deployment, and operations & support phases of the acquisition of the systems under the program.

(2) Assessment of commercial valuation techniques for intellectual property for use bythe Department of Defense.

(3) Assessment of feasibility of agency-level oversight to standardize intellectualproperty evaluation practices and procedures.

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

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

(6) Engagement with the commercial industry to—

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

(B) Support the development and improvement of intellectual property strategiesas 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) Recommend to the cognizant program manager for a major defense acquisition program such evaluation techniques and contracting mechanisms for implementation into theacquisition and sustainment activities of that major defense acquisition program.

(c) ACQUISITION OF COMMERCIAL, SMALL BUSINESS INNOVATION RESEARCH- DEVELOPED, AND NONDEVELOPMENTAL ITEMS, PRODUCTS, OR SERVICES.—The pilot program shall provide criteria to ensure the evaluation of Small Business Innovation Research (SBIR)-developed products, commercial items, and nondevelopmental items are appropriately considered against items to be specifically developed for the major defense acquisition program and the benefits of reduced risk regarding cost, schedule and performance ofcommercial, SBIR-developed, and nondevelopmental items, products, or services are appropriately valued.

(d) ASSESSMENT.—Not later than one year after the commencement of the pilot program, and annually thereafter through 2023, the Secretaries concerned shall provide on July 1st of that year through the Secretary of Defense to the congressional defense committees a joint report on the pilot program required under paragraph (a) of this section. The report shall, at a minimum, include, —

(1) A description of the major defense acquisition programs selected by the Secretary concerned;

(2) A description of the specific activities in paragraph (b) that were performed undereach 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 cost-savings from the activities related to the pilot program, including any improvement to mission-success during the operations & support phase of theprogram.

(e) AVAILABILITY OF FUNDS.—The Secretary of Defense and the Secretaries of each of theMilitary Departments are authorized to expend funds to carry out the pilot program in paragraph

(a) from funds authorized and appropriated to the Department of Defense for fiscal years 2018 through 2025.

(f) SUNSET.—The authority to carry out the pilot program under this section shall expire on September 30, 2025.

The Panel recommends the Department draft regulations to be implemented when using intellectual property as an evaluation factor which reflect a common set of principles andprocedures for competitive source selections. Such principles should include:

- Avoiding use in source selections when there is limited ability to meaningfully discriminate between varying intellectual property proposals (e.g., intellectual propertymay be harder to evaluate or discriminate meaningfully when using lowest priced technically acceptable procedures).

- Transparency to all offerors as to the evaluation factors and the calculation of the datarights license value affecting the evaluation factors based on identified valuation techniques.

- Ensuring such evaluation factors do not unnecessarily limit commercial and non-commercial competition, and are in compliance with the spirit of 10 U.S.C. 2320(a)(2)(H),15 U.S.C. 638(j)(2), and 10 U.S.C. 2305.

- Ensuring the evaluation factors allow for multiple license rights offerings to meet specified Government objectives for the use of such data, including requirements for Modular Open Systems Approaches, interfaces, and long term sustainment and upgradeneeds at specific locations and agencies.

- Ensuring such evaluation factors account for commercial items, SBIR products, andsupply chain issues in requiring specific license rights.

- Ensuring such evaluation factors shall consider only license rights the DoD actually needs to perform its mission, to ensure return on its technology development investments,and to account for the Government's existing licenses to prevent effectively paying twice for the same intellectual property.

- Ensuring the valuation of rights when used in an evaluation factor shall be assessed in accordance with best practices and consensus based standards and norms, by DoD personnel who have received extra training in valuation techniques or are experts in thefield of intellectual property valuation.

The Panel recommends such factors be incorporated into the DFARS, and the DoD establish apanel of intellectual property valuation and financial analysis experts within DoD to determine(or to vet methodologies used to determine) relative values of sustainment solutions and intellectual property rights over a product's life cycle to aid in evaluating such factors.

The Panel recommends DFARS part 212 and DFARS 215.506, respectively, include a new section on debriefings for evaluation factors which evaluate data rights licenses. The new section needs to ensure offerors are given full access to proposal neutral facts used by the Government and applied to all the offers for the same evaluation factor, including any formulasand valuation assumptions used by the Government in such evaluations.

The Panel recommends an update to the guidance in Defense Acquisition Guidebook at https://dag.dau.mil/ and Department of Defense Source Selection Procedures to recognize and reinforce the necessity to use, when appropriate, intellectual property, as an evaluation factor. Mandate that DoD component (e.g., Defense Advanced Research Projects Agency, Army, Navy,Air Force) guidance on source selection be updated accordingly. The Panel recommends that theDepartment obtain, post award from offerors, information on the amount of time and effort required to comply with proposal evaluation factors based on intellectual property, and update this guidance to minimize the impact.

[Tension Point Paper] 5. Intellectual Property (IP) Valuation

Tension Point

DoD requires sufficient rights to technical data to upgrade and sustain its systems and to compete future acquisitions. There is no current agreement on how to value IP and thus determine a fair and reasonable price. This creates problems in both competitive and non-competitive situations.

Discussion

Many articles and books have been written on the most appropriate methodologies for valuing IP across a wide diversity of circumstances and fact patterns. There are many experts in the field of IP valuation, employed by a wide variety of boutique specialty firms, international financial consulting and accounting firms, and government agencies. As a result of regulation developed by the Federal Trade Commission, the Securities and Exchange Commission, the International Trade Commission, the Internal Revenue Service, and case law developed by the courts, and innovations developed by IP valuation experts inside and outside academia, there isa remarkable body of best practices available to students and practitioners.

Two organizations have developed and are developing standards in the field of IP valuation. The first is an already existing standard on the valuation of trademarks and brands that was developed by the International Organization for Standardization (ISO) entitled, "ISO 10688: Brand Valuation—Requirements for Monetary Brand Valuation." The second is a standard being developed by LES Standards, a voluntary consensus standards body, which is part of thenon-profit, professional association called the Licensing Executives Society USA and Canada, or LES. LES Standards has been accredited by the American National Standards Institute (ANSI), the unique body in the US that accredits voluntary consensus standards developers.

ANSI has accredited over 250 such organizations, such as IEEE, ASTM, SAE, and the AMA. LES Standards is developing an IP valuation standard that should undergo broad review andcomment toward the end of 2018 and that is projected to be issued as an ANSI standard in 2019.

An issue for DoD and its industrial partners is that in many cases, neither DoD program offices nor their potential industrial partners, are aware of best practices in the field of IP valuation andare not aware that a standard is being developed that attempts to capture those best practices in a singular document.

In the competitive phase, DoD has the most leverage to obtain the IP rights it is interested in ata fair and reasonable price. Since DoD has difficulty articulating, prior to development, its longterm sustainment strategy, it frequently requests broad rights such as government purpose rights or unlimited rights. Granting DoD rights either in commercial technology or technology otherwise developed exclusively at private expense can destroy the value of that IP. Paper 4 addresses IP as an evaluation factor in competitions.

Once a contract is awarded issues also arise when contractors identify new data assertionsduring program performance, such as when new information is introduced, or, when DoD changes its technical requirements or sustainment strategy.

The Panel believes in both the competitive and non-competitive situations solutions likely existthat will meet DoD's requirements, will not deter commercial firms from participating in the market place and will provide a fair and reasonable return to industry on its IP investment.

Paper 16 recommends greater use of specially negotiated license rights and the potential for additional IP license templates to be provided to the acquisition community. Potential examplesare 1) breaking the IP strategy into five elements: upgrade, spare parts, Government only depotmaintenance, depot maintenance with third party contractor support, and third party commercialsupport; 2) defining for each element the Government's requirement; 3) the use of escrow accounts (paper 14), 4) limiting GPR like licenses to just the specific program or to the specific Service of DoD and 5) use a company's existing commercial license as the base and make the minimal changes necessary to meet DoD requirements. Approaches such as these would meetDoD's requirements, limit the availability of industry's IP to third parties, and leave intact much of the value of industry's IP and thus reduce the amount DoD would pay to get the necessary rights.

Whether or not DoD seeks to use SNLR as suggested above, when either industry identifies new data assertions after contract award or when DoD changes its requirement or sustainment needs, the parties have struggled to determine a fair and reasonable price for the IP. The Panelbelieves training needs to be developed for the acquisition community that addresses how industry values IP and determines a reasonable return for its investment.

Contracting officers are tasked to develop solutions and prices that are fair to both parties. To do so, they must understand how commercial firms value their IP. Today, if the contracting officer and a company cannot reach agreement, the contracting officer can issue a final determination. The company can file suit in the Federal Court of Contract Appeals to have the determination adjudicated. To avoid such an action, the Panel believes contracting officers should be directed to consider commercial guidelines and standards that are widely accepted tofind solutions that work for both parties.

Because of DoD's unique mission, it often has legitimate needs for IP rights that are beyond those provided commercially. Potential solutions might be to limit the rights sought to the particular program or to limit the rights to particular uses or for limited periods of time on that program. This would limit the value of rights destroyed for the commercial firm to that programalone, and it might be sufficient to limit the price that DoD would pay (and that the industry partner would expect) for those rights to the bare minimum. Doing so would provide DoD's industrial partners with adequate compensation for granting such rights, without breaking the bank. Such partners, having been fairly compensated, would then have no reason to avoid DoDin the future, but would rather seek to serve DoD, since they would have the expectation of fair compensation in the future for the commercially unusual rights DoD needs.

Recommendation

The Panel recommends no changes to 10 U.S.C. 2320 or 10 U.S.C. 2321 to address this issue.

The Panel does recommend the following changes be made:

1. Develop a DAU course on IP valuation that covers best practices and availablestandards.

2. Consider the value of DoD's IP needs in Government estimates.

3. Require contracting officers to consider commercial IP valuation practices and standardswhen determining a fair and reasonable price for the requested IP.

4. Include IP as a topic in industry day presentations when appropriate.

5. Require industry to provide the basis for their requested IP valuation that is consistentwith best practices, norms, and standards in the field of IP valuation.

6. DoD should provide comment to LES when they publish their standard for approval…"[3]

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3 2018 Report Government-Industry Advisory Panel On Technical Data Rights November 13, 2018.

Enclosure 5: Executive Summary from Section 875 Report

"…. Executive Summary

This paper reports the findings of a project requested by the Office of the Secretary of Defense (OSD), Defense Procurement and Acquisition Policy to comply with Section 875 of the Fiscal Year 2016 National Defense Authorization Act, which called for a review of:

a) "Department of Defense (DOD) regulations, practices, and *sustainment requirements* related to Government access to and use of intellectual property rights of private sector firms; and

b) DOD practices related to the procurement, management, and use of intellectual property rights to facilitate *competition in sustainment* of weapon systems throughout their lifecycle."

Intellectual Property (IP) Law and Defense Acquisition

IP comprises four categories: patents, copyrights, trademarks, and trade secrets. Protection of private sector IP is recognized as crucial for fostering innovation. However, prior to 1984, data rights pertaining to DOD contracts were not explicitly stated in statute; rather, they were covered in departmental regulations. The 1984 Defense Procurement Reform Act, which became §2320 and §2321 of Title 10 United States Code (U.S.C.), provided specific rights in technical data and procedures to delineate the rights claimed by contractors, as well as those provided to the government.

In addition, concerning sustainment, 10 U.S.C. §2464 requires DOD to maintain core depot capabilities for key weapon systems adequate to support expansion for wartime operations, and §2466 places a 50 percent limitation on the funds made available to a mil- itary department or defense agency that can be used to contract for performance by non- Federal Government personnel (the "50/50 rule").

DOD regulations regarding IP have expanded considerably over the years, and today are quite robust. An IP section of the Acquisition Strategy is a statutory requirement at DOD acquisition Milestone A. An IP strategy annex must become part of the Life-Cycle Sustainment Plan during the operations and support phase.

Advances in technology, expanded use of commercial components, and increasing software content in DOD weapon systems have made IP issues more contentious between DOD and its contractors, especially original equipment manufacturers (OEMs). This is due in part to ambiguities in determining whether and how much a contractor or the government funded particular developments. Contractors seek to protect IP to maintain their competi- tive position, while the DOD sees that the unavailability of IP can limit the ability to per- form maintenance in DOD depots and reduce competition in providing parts and services to sustain weapon systems. For many key systems, there are only two or three capable suppliers and once a selection is made, the sole-source provider has a great deal of leverage in negotiations with the government over IP. Given the long-term value of these contracts, firms will sometimes bid low on development and/or production under the assumption that they will provide profitable support over many years. Acquisition program management offices (PMOs) are challenged to balance delivering desired performance within near-term cost and schedule constraints (and sometimes meeting pressing operational demands) against future operations and maintenance costs.

DOD has a substantial inventory of "commercial derivative aircraft (CDA)." For civil aircraft, the Federal Aviation Administration (FAA) requires that OEMs provide airworthiness maintenance data to owners and are available to maintainers. While operations of DOD aircraft are not governed by FAA regulations, DOD can take steps to have such air- craft certified to be eligible for the FAA data. Commercial maintenance, repair, and over- haul (MRO) firms seeking to access DOD sustainment business claim that DOD should make greater use of that option.

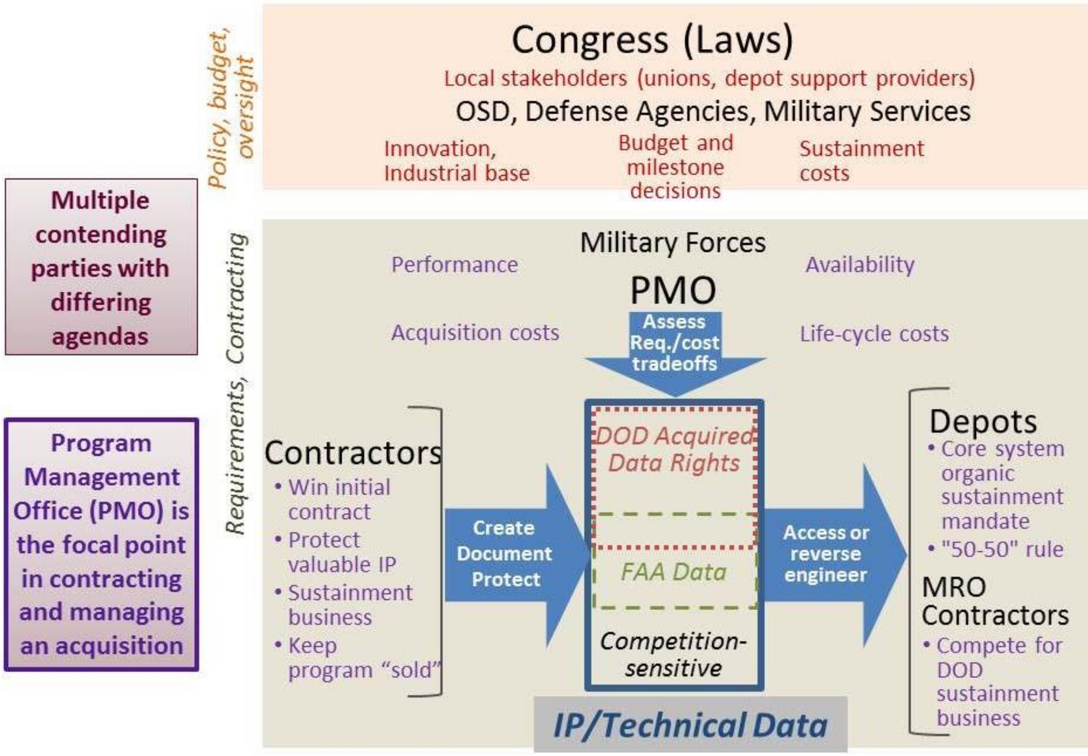
DOD Practices and Issues Regarding IP

The figure at the top of the next page depicts the intersecting and often competing relationships among stakeholders involved in determining and employing IP rights for the sustainment of weapon systems. DOD—primarily through acquisition program manage- ment—must balance these competing interests in seeking to achieve the best results in acquisition and sustainment of DOD weapons systems.

From interviews, questionnaire responses, and review of literature, including other studies on the topic, the following issues were identified regarding IP and the sustainment of defense weapon systems:

Process Participation

Although the military departments have mechanisms for bringing sustainment exper- tise into the acquisition process, DOD organizations for acquisition and sustainment are largely separate, with a resulting lack of focus on sustainment in the acquisition process.



Interrelationships and Stakeholders in IP and Sustainment

Difficulties Obtaining IP Data and Rights

Provisions and approaches stated in acquisition planning to access IP for sustainment frequently have not been realized in subsequent contracts, either because contractors refuse to agree to provide the data and rights or because of budget, time, and staffing constraints on the PMO.

Data Provided With Disputed Assertion of Rights

Technical data and related materials submitted by contractors may have rights markings that DOD contends to be either erroneous or inappropriate, but the challenge process can be arduous, lengthy, and burdensome to both the contractor and DOD, and DOD must abide by the contractor markings until issues are resolved.

Obtaining Technical Data and Rights to Establish and Maintain Core Logistics Capabilities

Many programs have had difficulty establishing organic core depot sustainment, as required by 10 U.S.C. §2464, due to the lack of technical data and software and rights thereto.

Ability to Compete for Parts Procurement

Sole-source procurement of subsystems and parts often results from DOD programs not having obtained sufficient IP data or rights to permit third-party suppliers to produce qualified replacements.

Training and Availability of Supporting Expertise

PMOs lack personnel sufficiently trained in IP issues and related contractual requirements and sustainment, and access to such expertise outside PMO is very limited. Staff capabilities in this area have diminished over the past several years.

Conclusions

- In the past, acquisition decision-makers in both OSD and the military departments have failed to focus sufficient attention on identifying and accessing the IP needed for weapon systems sustainment. There is recent evidence of improvement, but it is too early to assess whether those efforts are sufficient.

- Lack of access to IP data with appropriate rights inhibits DOD's ability to use competitive contracting for repair parts, maintenance and follow-on production, and likely translates into higher long-term sustainment costs.

- Acquisition program management often has not given IP for sustainment adequate or appropriate attention.

- Depot maintenance capabilities required by law may not be met because of a lack of necessary technical data and software; the use of OEM-based, public-private partnerships do not ameliorate that deficiency, since in general such partnerships do not provide the government sufficient technical data and rights to perform the full range of depot maintenance without the private partner's participation.

- Ambiguous terms and loosely defined constructs impair the implementation of IP for sustainment.

- Use of FAA maintenance data for DOD CDA can be expanded and could result in substantially lower sustainment costs for these aircraft.

- Buy-in development and production contracts can result in OEM lock-in of sole-source sustainment franchises.

Broader Challenges

Renewed focus in DOD on reducing sustainment costs may provide incentives for programs to address IP early, but this creates broader challenges:

- There is a vast legacy of defense systems, amounting to billions of dollars in sustainment costs, for which the necessary IP data and rights for organic depot or competitive sustainment were not acquired.

- Future defense systems for which there is little, if any, competition will give DOD little leverage to negotiate acquisition of IP early in the program.

- Although fostering innovation, systems developed by a defense vendor exclusively at their own expense, as was the case for several unmanned air systems, often provide limited data rights to DOD, hindering sustainment by anyone other than the OEM.

- Purely commercial technologies, including a vast array of software products that DOD is increasingly using, provide only the same access to IP that commercial customers have, unless DOD can negotiate more extensive rights. This challenges DOD sustainment concepts.

These challenges, largely the result of the diminished competitive environment for defense weapon systems, raise the question: Has the point been reached at which the under- lying assumptions of competitively bid contracts are of decreasing validity? If true, this presents DOD with a serious problem that would require new thinking about the laws and regulations governing IP for DOD weapon systems and their sustainment.

Recommendations

- Make sustainment and acquisition of related IP data and rights an explicitly stated high-priority in DOD management and oversight of acquisition programs.

- Establish or expand existing organizational capabilities within the DOD components (with OSD support) to provide expertise in the acquisition of IP data and rights to program managers throughout their programs' lifecycles, as well as other staff involved in weapon systems acquisition.

- Require DOD acquisition programs that are largely dependent on sole-source con- tracts to OEMs for sustainment to conduct a Business Case Analysis of options to transition to a competitive model for sustainment (maintenance and supply). The results should be forwarded to the component acquisition executive with a recommended plan to obtain the necessary IP data and rights.

- State as a matter of policy that DOD acquisition programs that use CDA should maximize use of data provided for FAA-certified aircraft under FAA regulations to facilitate competition for maintenance and supply of parts for systems and components.

- Establish under OSD auspices an ongoing DOD advisory group to identify and, in consultation with industry, seek resolution of ambiguities and disagreements in terms and provisions related to DOD sustainment needs, particularly those involving access to and use of IP. The group should be tasked to develop an appendix to the Defense Federal Acquisition Regulations that would specify in greater detail the meaning of such terms as "operation, maintenance, installation and training" data; "form, fit and function" data; and "detailed manufacturing and process" data4

- DOD should support and fund an assessment of DOD acquisition and sustainment specifically focused on alternative approaches for contracting and overseeing the development, procurement, and sustainment of weapon systems under severely limited competition…."[5]

[4] A model for such an appendix is the appendixes to FAA regulations regarding Instructions for Continued Airworthiness Data (14 Code of Federal Regulations (CFR), Part 33).
[5] Executive Summary from Section 875 Report - Department of Defense Access to Intellectual Property for Weapon Systems Sustainment

THE UNDER SECRETARY OF DEFENSE
3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

ACQUISITION AND SUSTAINMENT

FEB -3 2019

The Honorable Nita M. Lowey
Chairwoman
Committee on Appropriations
United States House of Representatives
Washington, DC 20515

Dear Madam Chairwoman:

Sections 813 and 875 of the National Defense Authorization Act (NDAA) for FY 2016 (Public Law (P.L.) 114-92) each require the Secretary of Defense to submit to the congressional defense committees any comments or recommendations on the findings contained in the separate reports created pursuant to those sections by a joint Government-industry advisory panel and an independent entity, respectively, regarding the statutes, regulations, policies, and practices related to the Department's acquisition of intellectual property (IP). Given the close nexus between the subject matters of these independent reports, the Department is consolidating its comments in this response letter, as stated in our letter to the committees on May 24, 2017.

Overview of the Section 813 and 875 Reviews

The Section 813 Government-Industry Advisory Panel

Section 813(b) of the NDAA for FY 2016, as amended by section 809 of the NDAA for FY 2017 (P.L. 114-328), directed the Secretary of Defense to establish a Government-Industry Advisory Panel (813 Panel) to review, and provide recommendations for any changes to, sections 2320 and 2321 of title 10, U.S.C., and the implementing regulations regarding rights in technical data and validation of proprietary data restrictions. The 813 Panel was charged to ensure the governing statutes and regulations are best structured to serve the interests of the taxpayers and the national defense, including by giving appropriate consideration to—

- Ensuring that the Department does not pay more than once for the same work;
- Ensuring that Department of Defense (DoD) contractors are appropriately rewarded for their innovation and invention;
- Providing for cost-effective reprocurement, sustainment, modification, and upgrades to DoD systems;
- Encouraging the private sector to invest in new products, technologies, and processes relevant to DoD missions;
- Ensuring that the Department has appropriate access to innovative products, technologies, and processes developed by the private sector for commercial use; and
- Ensuring that the Department and DoD contractors have the technical data rights necessary to support the Modular Open System Approach (MOSA) requirement set forth in title 10, U.S.C., section 2446a, taking into consideration the distinct characteristics of

major system platforms, major system interfaces, and major system components developed exclusively with Federal funds, exclusively at private expense, and with a combination of Federal funds and private expense.

The panel began its work in June 2016, with a balanced membership of panelists from industry and the Government. In accordance with the Federal Advisory Committee Act (FACA), the panel's meetings, information collected and generated, and other deliberative activities, were open to the public and are publicly available at https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=al OtOOOOOOlgzjuAAA. The panel's final report, "Government-Industry Advisory Panel on Technical Data Rights," dated November 13, 2018, was submitted to my office, as well as to the congressional defense committees, in mid-November 2018.

The panel's final report is comprised primarily of a collection of thirty white papers, each focused on a particular topic that the panel characterized as a "tension point" between the Department and industry. The report's Executive Summary categorizes the white papers into eight broad areas: business model, acquisition planning and requirements, source selection and post source selection IP licensing, balancing the interests of the parties, implementation, compliance/administrative, data acquisition, and MOSA. In most cases, the individual papers conclude with the panel's consensus recommendations regarding policy, regulatory, or practical action to address the issues raised in each paper; however, eight of the papers include statutory recommendations for specific revisions to title 10, U.S.C., section 2320 and 2321 (Appendix A of the report consolidates all of the individual consensus/majority recommendations in redlined versions of those sections),.and three papers recommend legislative action not directed to those sections (e.g., provisions recommended for inclusion in a forthcoming NOAA). For three of the tension points with statutory recommendations (papers 14, 19, and 24), the panel did not reach consensus and thus the report includes two papers for each topic - one representing the panel's majority position, and the other representing the minority position.

The Section 875 Independent Review of Government Access to IP of Private Sector Firms

Section 875 of the NOAA for FY 2016 required the Secretary of Defense to contract with an "independent entity" to review DoD regulations, practices, and sustainment requirements related to Government access to and use of IP rights of private sector firms, as well as DoD practices related to the procurement, management, and use of IP rights to facilitate competition in sustainment of weapon systems throughout their life-cycle. The independent entity was also required to consult with the National Defense Technology and Industrial Base Council (see title 10, U.S.C., section 2502) and each Center of Industrial and Technical Excellence (see title 10, U.S.C., section 2474). On March 2, 2016, the Department awarded a contract to the Institute for

Defense Analyses (IDA), a nonprofit corporation that operates three federally funded research and development centers, to conduct this independent study. As a result of the review, IDA reached eight conclusions, identified four "broader challenges," and made six recommendations, in its final report entitled "Department of Defense Access to Intellectual Property for Weapon Systems Sustainment," dated May 2017, which we forwarded to the congressional committees on May 24, 2017, and although this independent review was not subject to FACA, the report is available at https://www.ida.org/idamedia/Corporate/Files/Publications/lDA_Documents/SFRD/201 7/P- 8266.pdf. IDA's recommendations may all be characterized as directed to policy, regulatory, or practical matters, and do not include any specific statutory or legislative recommendations.

Department of Defense Comments and Recommendations

The Department agrees with and supports the general findings and recommendations in both the section 813 and section 875 reports. We recognize that a foundational challenge in this area is that the Department has insufficient organizational capacity to provide expertise in the acquisition of IP to support program managers throughout their programs' lifecycles (as well as other staff involved in weapon systems acquisition). This has hindered our ability to facilitate re-procurement, sustainment, modification, and upgrades to DoD systems throughout their lifecycle. We also recognize that fostering innovation for both national security and the economy overall must be a central tenet of our IP policy and procedures.

To address these challenges, I have formed an Intellectual Property Working Group (IPWG) at the Department level, including cross-functional representation (e.g., acquisition, sustainment, research & development, engineering, contracting, legal) from the Office of the Secretary of Defense and the Military Departments. In addition to further assessing and implementing the statutory, regulatory, policy, and practical recommendations from the section 813 and 875 reports, the IPWG will also coordinate Department-wide efforts to implement the requirements of title 10, U.S.C., section 2322, (resulting from section 802 of the NOAA for FY 2018), which align with and support the overall recommendations of those reports.

Statutory and Legislative Recommendations

The Department generally supports the statutory and legislative recommendations by the section 813 Panel to amend title 10, U.S.C., section 2320 and 2321, and for additional legislation not directed to those sections. Regarding the three tension points for which the section 813 Panel did not reach consensus, the Department supports the panel's majority position, and believes that the concerns identified in the minority position can be effectively addressed through appropriate implementation of the policy, regulatory, and practical recommendations.

We also note and support the two statutory recommendations from the section 813 Panel report that have already been addressed in recent NDAAs: The recommendation (paper # 22) to form a cadre of IP experts was addressed in section 802 of the NOAA for FY 2018 (P.L. 115- 91), now codified at title 10, U.S.C., section 2322; and the recommendation (paper # 19) to clarify the mandatory presumption of development at private expense for commercial items in the procedures for challenging and validating asserted restrictions on technical data was addressed in section 865 of the John S. McCain NOAA for FY 2019 (P. L. 115-232) (amending title 10, U.S.C., section 2321(f)).

Regulatory, Policy, and Practical Recommendations

During the short term, while the statutory recommendations are pending in the legislative process, the IPWG will focus its efforts on implementation of the section 813 and 875 regulatory, policy, and practical recommendations. Specific attention will focus on requirements of existing statutes, including title 10, U.S.C., section 2322, and recent changes to title 10,

U.S.C., section 2320 and 2321 that have not yet been fully implemented, as well as addressing the concerns raised by the 813 Panel's minority positions for three tension points where the panel failed to reach consensus.

The Department will address the contracting recommendations primarily through the Defense Federal Acquisition Regulation Supplement (DFARS) rulemaking process. As recommended by the 813 Panel, and as an exception to the most common rulemaking procedures, industry will be invited to participate earlier than usual in the rulemaking via public meetings, which will provide an opportunity for industry to participate in the actual drafting of both the proposed and final rules.

Regarding the policy recommendations, the Department will review existing policy guidance to identify revisions necessary to accommodate the gaps and emerging issues identified in the 813 and 875 reports. In addition, we will identify new and potentially more effective ways to communicate IP policy. For example, the Department of the Army recently issued its new IP policy, Army Directive 201 8-26, "Enabling Modernization Through the Management of Intellectual Property," dated December 7, 2018 (available at https://annypubs.anny.mil/epubs/DR_pubs/DR_a/pdf/web/ARNI4261_AD201 8_26_Final.pdf), and will be issuing implementing guidance early in 2019, which may serve as a model for not only the other military departments, but also for an overarching Department-level policy and guidance issuances.

Regarding the practical recommendations, this may be the area in which the most significant improvements can be made. Regardless of how well-crafted the statutory, regulatory, and policy framework, the Department recognizes that a critical element in addressing the identified issues and challenges is in ensuring that our personnel are provided with all the necessary tools to make it all work in the real world.

Cross-cutting Principles and Threads

Throughout these efforts to address the regulatory, policy, and practical recommendations, there are a number of key principles and threads that cut across all of these activities, which the Department will be relying on to guide its efforts. These include:

Delivery Requirements-Not Just Data Rights. The Department must reemphasize the importance of addressing its detailed requirements for the delivery of technical data and computer software, as a necessary complement to the license rights. The DFARS coverage focuses almost entirely on allocating license rights, leaving the issue of delivery requirements to be addressed on a case-by-case in each individual contract. As one element to address these challenges, the Department will update and clarify its guidance on managing data delivery requirements, including DoD Manual 5010.12, "Procedures for the Acquisition and Management of Technical Data."

- Timing: Start Early, Plan for Later. The Department's long-standing policy has been to address IP issues early in the program life cycle, and to plan to meet the Department's future needs, e.g., for re-procurement, sustainment, and upgrades. Too frequently, when faced with challenges of long-term planning without ready access to a crystal ball, programs succumb to this uncertainty by either deferring the decision regarding delivery requirements until later in the life cycle when plans are more certain, or by "asking for everything" up-front in order to preserve flexibility. Neither of these approaches is the best answer. The Department must emphasize the criticality of long-term planning during the earlier, more competitive phases of the program, while preserving flexibility to address developments in the program sustainment strategy. For example, by more widespread and consistent use of conditional or contingency-based mechanisms such as priced contract options, and escrow arrangements.

Modular Open Systems Approaches (MOSA). Addressing IP requirements is a critical element of utilizing MOSA, including in meeting the statutory requirements at title 10, U.S.C., section 2446a et seq. In addition, MOSA is a natural complement to the DoD data rights legal and regulatory framework, which for decades has used a modular licensing scheme (a.k.a. the "doctrine of segregability. More widespread use of MOSA will better enable the balancing of Government's desire for greater competition with industry's critical need to protect their proprietary IP interests, e.g., by allowing proprietary modules within a system to be treated as a "black box." In addition, several recent statutory changes that better enable MOSA (e.g., addressing interfaces necessary for segregation and reintegration activities, and major systems interfaces), have not yet been implemented in the DFARS, and thus will be a focus of the Department's efforts going forward.

Specially Negotiated Licenses. Another core thread in recent legislative revisions that is further emphasized in the section 813 and 875 reports is to increase emphasis on specially negotiated licenses, rather than relying on the more limited number of standard license categories. In addition to presenting the opportunity for a tailored set of deliverables and associated license rights that better balance the parties' interests, such case-by-case negotiations are more consistent with commercial practices, and should be more effective at attracting non-traditional sources to do business with the Department. A key challenge in encouraging greater use of specially negotiated licenses is the need to train appropriate elements of the acquisition workforce regarding effective IP negotiations, which can become complex. See also, title 10, U.S.C., section 2320(f), and 2439.

IP Strategies. The Department requires programs to establish and maintain an IP Strategy to identify and manage the full spectrum of IP issues from the inception of a program and throughout the life cycle. The IP strategy is a critical tool for synthesizing the various considerations and tradeoffs when managing a program's IP issues, and can provide a framework for more effectively communicating the Departments' approach to program IP with industry (e.g., industry days, draft solicitations), and for evaluating IP during source selection. The Department has been working to develop additional guidance for the acquisition workforce regarding the creation and continuous management of effective IP Strategies, and will be working to finalize and publish this new guidance as part of these implementation activities. See also, title 10, U.S.C., section § 2320(e), 2322(a)(3) and (b)(3)(B), and 2431a(c)(2)(F).

Education and Training. The Department recognizes the critical need to provide better training for its acquisition workforce to address IP issues. The Defense Acquisition University will review its curriculum to identify additional training opportunities, through integrating IP topics into existing courses, or developing additional IP focused training, as appropriate. The Department will seek to find the appropriate balance of broad-based training for all relevant functional areas in the acquisition workforce to enable earlier and more effective identification and resolution of the most common IP issues, combined with developing and leveraging a cadre of IP experts (see title 10, U.S.C., section § 2322(b)) to help programs address the more sophisticated challenges. In all of these efforts, the Department will seek to move away from training merely for the traditional acquisition workforce certifications, toward an approach that focuses on currency and just-in-time learning, and results in educating our workforce to exercise sound judgment, rather than merely training on topics, techniques, and tactics.

Conclusion

We recognize that Government and Industry have different views of IP and data rights.

However, both are united in the desired outcome of our acquisition system delivering to the warfighter state of the art systems to defend the nation. A balanced IP approach that meets the needs of the warfighter while incentivizing private sector pa1ticipation towards that end, is our goal. We will implement specific changes based on the recommendations that achieve that balance.

An identical letter has been sent to the other congressional defense committees.

Sincerely,

Ellen M. Lord

Ellen M. Lord

cc:
The Honorable Kay Granger
Ranking Member