DeLauer Praises IR&D Program

Throughout the hearing, DeLauer strongly endorsed the IR&D program, calling it one of the most valuable and the best managed element of indirect costs within DOD.

DeLauer described IR&D a "necessary cost of doing business" and an important means of encouraging the development of innovative concepts, particularly in high technology areas. He said DOD's support of IR&D is no different from the way the cost of General Electric's R&D on a new refrigerator is passed on to consumer.

Besides, DeLauer insisted, IR&D is a bargain for the government, in view of the fact that while DOD has been reimbursing contractors for about 42 percent of their IR&D/B&P costs, it reaps the benefit of all the IR&D activities in which contractors engage.

DeLauer said DOD's implementation of PL 91-441 has been "too restrictive" and has contributed to the decline in the nation's research efforts.

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PROPRIETARY DATA: OFPP URGES GSA TO ABANDON DRAFT REGS ON RIGHTS IN DATA, DEVELOP FAR COVERAGE INSTEAD

The Office of Federal Procurement Policy has asked the General Services Administration to shelve its draft Federal Procurement Regulations on rights in data in favor of developing corresponding coverage in the upcoming Federal Acquisition Regulation. GSA, however, is going ahead with the proposals.

The GSA draft defines protectible data as that which constitutes a trade secret, and relates to items, components, processes or technical designs developed at private expense. Computer software is considered protectible data if it is developed at private expense and is protected by the contractor from unrestricted use, duplication, or disclosure to others.

Another highlight of the draft is a provision which allows contractors to withhold protectible data from the government. However, the contractor would be obligated to identify the data being withheld and to furnish appropriate "form, fit and function" data in its place. "Form, fit and function" refers to data describing sources, size, configuration and other functional characteristics of technical design, the draft says.

OFPP's Views

"We have reviewed the proposed regulations and suggest that further consideration be set aside in favor of developing corresponding Federal Acquisition Regulation coverage, OFPP Associate Administrator LeRoy J. Haugh told GSA, in commenting on the rules. "The proposed regulations suggest a handling of data and copyright policy different from that followed by in the Defense Acquisition Regulation and many civilian agencies." No supporting rationale is provided for these differences, and they aren't identified with sufficient detail to enable appropriate public discussion, Haugh observed.

According to OFPP, the definition of "protectible data" that is used in the GSA draft is too narrow. The Reagan Administration, in proposing reform of Freedom of Information Act Exemption 4, has recommended that protectible data include trade secrets, financial information, and other commercially valuable information (903 FCR A-22, D-1), Haugh pointed out. "We believe that proprietary or protectible data to be covered by the FAR should encompass all data developed at private expense which is protected from unrestricted use, duplication or disclosure by others."

Limiting proprietary data to that which can be classified as a trade secret will create unnecessary uncertainty among contractors, Haugh maintained. The federal courts have not uniformly defined the term "trade secret." For example, an agency may consider data to be a trade secret even though it does not give the owner an advantage over competitors, he explained. However, a court which requires a showing of competitive advantage for the data to be considered a trade secret could conceivably overturn the agency's decision. This kind of uncertainty is less likely under more definitive criteria, he maintained.

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Moreover, copyright ownership of data generated during the performance of federal contracts should be vested in the contractor, subject to a government license, OFPP observes. This has been the policy of most agencies for a number of years, and is consistent with the Administration's intent to enable contractors to find commercial uses for inventions developed under federal contracts, Haugh said. However, the proposed GSA regulations would require agencies to review contractors' requests for copyright ownership on a case-by-case basis, regardless of whether the data is scheduled for delivery. "This is not consistent with the general policy in this area; it creates an unnecessary burden and a disincentive to public dissemination by the contractor," he said.

Responding to GSA's rejection of the request to shelve the FPR, OFPP Administrator Donald Sowle told GSA that the views set forth by Haugh "will find substantial acceptance in the user community." The draft definition of "protectible data" doesn't follow the Administration's public position, he said. In addition, the draft handling of copyright ownership is inconsistent with most agency policy, and there is "virtually no indication that it need be changed," Sowle concluded.

GSA's Response

There appears to be a misunderstanding, GSA Deputy Administrator Ray Kline said. In an April 27 letter to OFPP, he emphasized that GSA intends to use its FPR proposal to develop one regulation for both the FPR and the FAR. "In view of the fact that the FAR, at best, will not become operative until well into 1983, we plan to publish the regulation in the FPR," Kline said.

The draft FPR proposal was developed by the assistant general counsel for patents at the National Aeronautics and Space Administration, Kline pointed out. Moreover, Executive Order 12352 (3/18/82), requires DOD, GSA and NASA to continue consolidating their procurement regulations into the FAR by the end of this year. "With respect to conflicting views, we do not anticipate such problems and, therefore, do not expect to need to request your assistance," Kline told OFPP.

DOE Comments

The development of an FPR data regulation may be more difficult than similiar efforts to create a government-wide patent policy, Department of Energy Assistant General Counsel James Denny cautions. Moreover, federal agencies have differing mission responsibilities, he points out, in commenting on the FPR proposal. The data needs of the military departments are vastly different from those of the civilian agencies, Denny said. The military departments have developed hardware for their own use according to their own specifications, and take into account the need for comnpetitive reprocurement, Denny observes. The civilian agencies, though, have frequently developed items for commercial use, which were designed to specifications dictated by commercial markets.

"The military departments have a substantial history of working with a data policy and regulation which specifically addresses the particular needs of their type of research and development (R&D) procurement," Denny added. Civilian agencies, however, have never had the opportunity to develop such a policy, he observed. These agencies have generally operated under "individual patch work policies of an informal nature," with the exception of DOE and the National Aeronautics and Space Administration, he maintained. "Hence, the creation of an FPR data regulation prior to the development of a Federal Acquisition Regulation will permit civilian agencies to develop an approach designed for their particular needs prior to an attempt to combine such a regulation with that of the Defense Acquisition Regulation."

The proposed FPR data provisions, which use the "building block" concept to begin with a simplified, all-purpose clause and then include additional clauses to address more complex situations, is the only possible approach that will allow a government-wide data policy to be developed in the FAR, Denny declared. "My major concern over the proposed draft is that it does not go far enough with this building block concept," he said. "The basic clause, or clauses, addressing the normal rights in data under R&D contracts are too computer

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software-oriented for this agency, and I suspect, for other civilian agencies as well." Accordingly, there should be an even more simplified basic clause and separate clauses to address the more specialized computer software problems, he recommended.

The elimination of training and instruction manual from the proposed definition of proprietary data is another example of unnecessary detail in the basic clause, Denny said.. This is a problem for the military departments, which must have the capability to repair equipment which they purchase, he acknowledged. "Such an approach, however, is unnecessary and would inhibit government-industrial cooperation in the construction of a synfuels demonstration facility where the industrial contractor is providing substantial cost sharing."

Other Agencies' Comments Mixed

Although the Department of Defense had not yet submitted comments, many other federal agencies endorsed the GSA draft. "We believe that these regulations will be of great benefit to the agencies when dealing in that area," Department of Labor Grants and Procurement Policy Director Theodore Goldberg said. Eight other agencies, including the Departments of Justice, HUD, Commerce and Interior, either concurred in the proposal or expressed no negative comments.

However, several agencies, including the Environmental Protection Agency and the General Accounting Office, urged GSA to make major changes in the proposed rules.

Although agreeing on the need for regulations governing rights in data, EPA cautioned that GSA's numerous clauses and optional provisions would complicate the procurement process. They should be combined to the greatest extent possible, EPA spokesman Paul A. Martin observed.

Martin, who is acting director of EPA's Procurement and Contracts Management Division, also warned that GSA's definition of protectible data could create problems. "Agencies will have to make numerous determinations as to whether items of data are in fact trade secrets; this will impose an unreasonable workload on contracting officers as well as scientific and legal personnel." Thus, perhaps the best approach would be one which requires protectible data to be delivered to the government in all cases, subject to the contractor's limited rights, he suggested.

GAO supports efforts to establish uniform civilian agency policies regarding rights in data, Acting General Counsel Harry Van Cleve told GSA. However, GAO is concerned about the failure to index all references to computer software. Agencies which are procuring software will be aided if all applicable clauses are specifically identified in a table of contents or in an FPR section devoted exclusively to software, he said.

Furthermore, the FPR should contain specific guidance on the government's rights to contractors' data developed using IR&D funds, Van Cleve said. Some clarification of FOIA requirements may also be needed, he suggested. "Contractors have expressed alarm to us over new technology they make available to the government being made available to their competitors under FOIA."

Industry Views

The definition of protectible data should not refer to trade secrets, Computer & Communications Industry Association President A. G. W. Biddle told GSA. Traditionally, the government has protected contractors' unpublished data that was developed at private expense, and has not required the contractor to prove that it qualifies as a trade secret, he observed. Moreover, the Defense Acquisition Regulation does not require contractors to prove the existence of a trade secret before restrictions may be imposed on disclosure.

The term "trade secret" will create more confusion, and will detract from the regulation's ability to provide clear criteria for determining rights to proprietary data, he maintained. Since the regulation treats computer software which is not a trade secret as

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protectible data, "there is no reason why the criteria for protecting data should be more stringent than the criteria for protecting software."

Other trade groups also expressed negative views. The Council on Governmental Relations, a group of universities, said that some of the policies and clauses proposed by GSA were not in the best interests of the academic community. GSA should utilize a broader definition of "protectible data," and should further restrict the situations where the government would have unlimited rights in data, COGR Executive Director Milton Goldberg recommended.

Goldberg also warned that allowing the government unilaterally to amend, cancel, or ignore a contractor's notice concerning protectible data could result in the contractor losing proprietary rights. Furthermore, he indicated that GSA's proposal to give the government full control over the release of data developed under a federal contract would not be acceptable to universities. "Freedom to publish is a well-established provision," he observed.

While the present DAR clauses covering rights in data are not perfect, they have been in effect for some time and contractors understand them, Caterpillar Tractor Co. spokesman L.E. Desmond commented. It would therefore seem to be in everyone's interest for GSA to adopt the DAR language, he said. This would permit easy transition to new FPR subparts, which would then be in effect until publication of the Federal Acquisition Regulation.

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SMALL BUSINESS: FORMER BACKERS OF R&D SET ASIDE BILL URGE OTHER COSPONSORS TO WITHDRAW SUPPORT

A bipartisan group of congressmen are urging fellow cosponsors to withdraw their support for a bill (HR 4326) requiring 3 percent of federal agencies' research and development budgets to be set aside for small business (923 FCR A-19; 904 FCR A-26).

According to the letter sent by Reps. Vic Fazio (D-Calif), Tom Lantos (D-Calif), Joel Pritchard (R-Wash) and Henry Hyde (R-Ill), the bill had been presented as the answer to problems facing small high technology companies while maintaining sufficient federal funds for basic research. However, now that the committee process has been completed (926 FCR C-1; 924 FCR C-1; 923 FCR A-19), a different picture has emerged, they say.

"Six authorizing committees have examined the impact of this bill in their jurisdictions, and four of them say that it requires major changes—changes that disputes the core of its rationale," according to the four congressmen. Moreover, the bill would force federal agencies to spend an additional 3 percent on top of what they already devote to small business R&D, they point out. Furthermore, the Congressional Budget Office has estimated that $193 million will be needed over the next five years to administer the bill's provisions. "That money has to come from somewhere: the agencies existing R&D budgets. In effect, HR 4326 would be a tax on research," they concluded.

House committees have given HR 4326 "the scrutiny that the Senate never did," and found there is no inequitable distribution of research and development funds between small and large businesses, Rep. Fazio observed. "The committee findings lead me to the conclusion that HR 4326 would not so much contribute to innovation and jobs so much as it would simply engender a new group of special interests."

Small businesses employ 5.5 percent of private sector scientists, but received 6.8 percent of total federal R&D expenditures in 1980, he noted. In addition, while a 3 percent set aside seems small in comparison with the total federal R&D budget, it would be added to the R&D funds which small businesses now receive. "We are thus moving from a fair situation to an unfair one," according to Fazio. Moreover, set aside programs are "simply bad government," he added. "I feel it would be better to let Congress continue to appropriate for research according to its judgment and for the agencies to make awards according to theirs."

Cosponsors can't take their names off HR 4326 because the bill has already been reported out of committee, but they can withdraw their endorsement, a Fazio staffer told FCR

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