UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Productivity, Technology and Innovation
Washington, D.C. 20230
(202) 377-1984

MAR 18 1985

Honorable Mary Ann Gilleece
Deputy Under Secretary of Defense
(Acquisition Management)
Pentagon, Room 3E144
Washington, D. C. 20301

Dear Ms. Gilleece:

I have received the joint letter of March 4, 1985, concerning the efforts of the Federal Coordinating Council on Science, Engineering and Technology (FCCSET) Committee on Intellectual Property to develop a policy framework within which more detailed Government procurement and assistance regulations dealing with technical data would be drafted and evaluated. As you recall, this effort was initiated at the request of Dr. Keyworth, the President's Science Advisor, and I am enclosing a copy of his original request.

This effort is not intended to conflict with or in any way limit the Federal Acquisition Regulation (FAR) authorities of the National Aeronautics and Space Administration (NASA), the Department of Defense (DOD), and the General Services Administration (GSA). However, as I trust you agree, the FAR is written against a backdrop of statutory and administrative policies that are often set outside the FAR system as such. For example, the FAR patent provisions must conform to the President's Memorandum and applicable statutes, including Chapter 18 of Title 35 and regulations issued thereunder. Similarly, if FCCSET or another higher authority can reach agreement on basic technical data principles, there would appear to be no reason why the FAR drafters should not be expected to conform the FAR to those principles.

The concerns expressed in Dr. Keyworth's letter remain valid. For years it has proven impossible to develop Federal Procurement Regulations (FPR) or FAR coverage in the technical data area for the civilian agencies. And there have been significant differences in the approaches adopted by DOD, NASA, Department of Energy (DOE), and other agencies that have issued regulations or other policy directives. We believe a major reason for this is the failure to reach agreement on basic objectives and principles.

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"...ensure that persons that have developed products or processes offered or to be offered for sale to the public are not required, as a condition for the procurement of such products or processes by the Department of Defense, to provide to the United States technical data relating to the design, development, or manufacture of such products or processes (except for such data as may be necessary for the United States to operate and maintain the product or use the process if obtained by the United States as an element of performance under the contract)."

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Government Data Policy Statement (Revised 3/27/85)

This statement provides guidance concerning the acquisition of technical data and software under government grants and contracts, except prime contracts for the operation of government-owned research or production facilities. However, it applies to subcontracts under such contracts. It is intended to (i) provide agencies with the flexibility to acquire technical data and software needed to fulfill their missions (ii) avoid unnecessary costs that result from the ordering of unneeded technical data; (iii) encourage the commercialization of new products and processes by contractors through the protection of technical data; and (iv) encourage the most qualified commercial concerns to participate in government research and development programs. It does not affect the classification of technical data and software for national security purposes.

Section 1. Definitions. As used in this Statement--

(a) "technical data" means recorded information of a scientific or technical nature. It does not include software or financial, administrative, cost and pricing, management data, and other information incidental to contract administration;

(b) "manufacturing data" means technical data and software used for the manufacture of a product or performance of a process on a commercial scale;

(c) The term "contract" includes subcontracts and the term "contractor" includes subcontractors; and

(d) "software" means computer programs, computer data bases, and documentation thereof.

Section 2. Treatment of Proposals. Proposals that have not been incoporated in an award shall be treated as confidential and not disclosed outside the government without the submitter's permission except for evaluation purposes. Parts of proposals that are incorporated in awards and which contain trade secrets or commercial or financial information shall also be treated as confidential if properly marked. Agencies shall not discriminate against marked proposals.

Section 3. Scope of Data Rights Clauses. Technical data delivery requirements should normally be fully set out at the time of contracting, but deferred ordering provisions may be used to add additional deliverables. Any rights which the government obtains to technical data will be limited to rights in data specifically required to be delivered or prepared.

Section 4. Supply Contracts. Agencies procuring standard commercial products may obtain technical data necessary for operation, maintenance or repair but not for reprocurement purposes. Notwithstanding, manufacturing data should not normally be sought.

Section 5. Engineering Development Contracts. Contracts for engineering development should be structured to prevent the disclosure of proprietary technical data related to commercial products or processes developed at private expense by contractors. For example, agencies should normally accept form, fit, and function data in lieu of manufacturing data. Or, if manufacturing data is needed, the contractor shall be allowed to mark as proprietary any data that relates to commercial products or processes developed at private expense; and the right of the government to use and disclose the data shall be specified in the contract, and shall not include the right to use the data for reprocurement purposes (except for Defense Department contracts to which 10 USC 2320(c) is applied). Use of deferred delivery provisions should also be considered. A competitive procurement of an item developed under an engineering development contract should not include in the solicitation any proprietary manufacturing data that relates to a product or process developed at private expense by a contractor which is offered or to be offered for sale commercially by the contractor (except when 10 USC 2320(c) was applied to such data).

Any technical data delivered under an engineering development contract that relates to an item develped wholly under the contract shall be taken without restrictions if competitive acquisition of the item is anticipated. When competitive acquistion is not anticipated, the contractor will be allowed to retain ownership of any such data delivered, and the agency shall reserve an unrestricted, royalty-free right to use or have its contractors use the technical data for governmental purposes (excluding publication outside the government). However, if mission needs require and this is consistent with PL 98-525 or 577, agencies may also acquire publication and other rights. Other technical data not related directly to items developed under the contract normally shall be taken without restrictions.

Section 6. Contracts for Basic and Applied Research. Agencies will normally take technical data delivered under a basic or applied research contract with the unlimited right to use and publish such data, subject to any other provisions of the contract related to inventions and patents. However, if the research involves a contractor's privately developed products or processes or if it is otherwise agreed to by the parties, proprietary data of the contractor shall be protected.

Section 7. Assistance Awards. Agencies normally should not require delivery of technical data under grants or cooperative agreements except as necessary to verify the awardee's performance. The awardee normally will be allowed to retain all

rights in technical data delivered or produced under such awards, including the right to publish and/or assert copyright, although the agency may acquire a nonexclusive, royalty-free, and worldwide license to use such technical data that is delivered or published by the awardee for internal government purposes. When considered necessary to meet program objectives or statutory requirements, agencies may also (i) reserve the right to publish technical data delivered under a grant or cooperative agreement if the awardee fails to publish the results of the research within a reasonable time and/or (ii) expand the government's license to cover State and local governments.

Section 8. Software. Unless its delivery is specifically required, agencies shall not normally acquire rights in software generated under contracts or grants. Delivery of software shall not normally be required unless a purpose of the award is the creation of software. If software has commercial potential, agencies should normally accept license rights in lieu of ownership; and consideration should be given to allowing software documentation to be maintained on the contractor's premises.

When an agency acquires existing proprietary software, it shall accept appropriate conditions limiting its right to use and disclose the software. This includes cases when proprietary software is modified to accommodate particular agency needs.

Software within the definition of "manufacturing data" at section 1(b) is subject to sections 3-7 and not this section.

There is also legitimate concern whether existing regulations give sufficient weight to the policy objectives of this Administration. In particular, this Administration is strongly committed to the principle that private investment and development of Government supported research should be encouraged--as evidenced by the issuance of the President's 1983 Memorandum on Government Patent Policy.

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Sincerely,

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Dear Bruce:

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I believe that this is an issue of sufficient importance that any codification of the government's position on this issue, as in the technical data section of part 27 of the proposed Federal Acquisition Regulations, requires a thorough analysis and discussion by the various agencies, and by the private sector. I believe that the FCCSET Intellectual Property Committee would be an appropriate vehicle for examining the various kinds of technical data, for agreeing on the various government objectives in seeking access to, or protecting the proprietary nature of that data, and for developing the basis for an acceptable set of draft regulations for the government's rights to such data. Please keep me informed of your progress.

Yours truly,

Jay Keyworth

G. A. Keyworth
Science Advisor to the President

Dr. D. Bruce Merrifield
Assistant Secretary for Productivity,
Technology and Innovation
Department of Commerce
Washington, D.C. 20230

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D. BRUCE MERRIF

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The Assistant Secretary for Productivity, Technology and Innovation
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DRAFT

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UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Productivity, Technology and Innovation
Washington, D.C. 20230
(202) 377-1984

MAR 18 1985

Honorable Mary Ann Gilleece
Deputy Under Secretary of Defense
(Acquisition Management)
Pentagon, Room 3E144
Washington, D. C. 20301

Dear Ms. Gilleece:

I have received the joint letter of March 4, 1985, concerning the efforts of the Federal Coordinating Council on Science, Engineering and Technology (FCCSET) Committee on Intellectual Property to develop a policy framework within which more detailed Government procurement and assistance regulations dealing with technical data would be drafted and evaluated. As you recall, this effort was initiated at the request of Dr. Keyworth, the President's Science Advisor, and I am enclosing a copy of his original request.

This effort is not intended to conflict with or in any way limit the Federal Acquisition Regulation (FAR) authorities of the National Aeronautics and Space Administration (NASA), the Department of Defense (DOD), and the General Services Administration (GSA). However, as I trust you agree, the FAR is written against a backdrop of statutory and administrative policies that are often set outside the FAR system as such. For example, the FAR patent provisions must conform to the President's Memorandum and applicable statutes, including Chapter 18 of Title 35 and regulations issued thereunder. Similarly, if FCCSET or another higher authority can reach agreement on basic technical data principles, there would appear to be no reason why the FAR drafters should not be expected to conform the FAR to those principles.

The concerns expressed in Dr. Keyworth's letter remain valid. For years it has proven impossible to develop Federal Procurement Regulations (FPR) or FAR coverage in the technical data area for the civilian agencies. And there have been significant differences in the approaches adopted by DOD, NASA, Department of Energy (DOE), and other agencies that have issued regulations or other policy directives. We believe a major reason for this is the failure to reach agreement on basic objectives and principles.

There is also legitimate concern whether existing regulations give sufficient weight to the policy objectives of this Administration. In particular, this Administration is strongly committed to the principle that private investment and development of Government supported research should be encouraged--as evidenced by the issuance of the President's 1983 Memorandum on Government Patent Policy.

Because of the obvious interest your agency has in technical data issues, we hope that you will continue to provide input and comments during the development of the Statement.

Sincerely,

(signed)
Bruce Merrifield

D. Bruce Merrifield

Attachment

cc: Honorable George A. Keyworth II (White House)
Dr. Andrew Pettifor (OSTP)
Mr. Allan Beres (GSA)
Mr. Stuart J. Evans (NASA)

OPTI/FTMP/Norm Latker/Jesse Lasken/rh 3/14/85
bc: Dr. Merrifield
Egils Milbergs
Dr. Williams
Norm Latker
Chron
Read

THE WHITE HOUSE

WASHINGTON

March 19, 1984

Dear Bruce:

The allocation of rights to various technical data, developed in the performance of government contracts, is an issue with significant implications for future government-industry relationships. It is driven, for example, by the government's need to minimize the costs of the products and services it buys, as well as by industry's desire to maximize profits and maintain any competitive advantage. It is fundamental to the government's continued ability to obtain the services of the best of the private sector.

I believe that this is an issue of sufficient importance that any codification of the government's position on this issue, as in the technical data section of part 27 of the proposed Federal Acquisition Regulations, requires a thorough analysis and discussion by the various agencies, and by the private sector. I believe that the FCCSET Intellectual Property Committee would be an appropriate vehicle for examining the various kinds of technical data, for agreeing on the various government objectives in seeking access to, or protecting the proprietary nature of that data, and for developing the basis for an acceptable set of draft regulations for the government's rights to such data. Please keep me informed of your progress.

Yours truly,

G. A. Keyworth
Science Advisor to the President

Dr. D. Bruce Merrifield
Assistant Secretary for Productivity,
Technology and Innovation
Department of Commerce
Washington, D.C. 20230

RECEIVE
MAR 2 1984
D. BRUCE MERRIF

DRAFT

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