THE PATENT SECTION OF FAR

- FAR will be a government-wide regulation which obsoletes and controls all other procurement regulations. It covers only contract transactions, not assistance grants and cooperative agreements. The proposed patent provisions of FAR have been initially drafted to use two different patent rights clauses.

- One clause covers contracts with small business/nonprofit organizations and the other contracts with the remaining performers. This has been done despite the President's instruction to treat all performers "the same or substantially the same" as small business and nonprofit organizations under P.L. 96-517.

- Each of the two clauses is substantially different from the other. Moreover, the small business/nonprofit clause is different from the clause developed in consultation with the agencies, small business, universities and other nonprofit organizations to implement P.L. 96-517 for all awarding mechanisms.

- If left uninterrupted, final issuance of FAR will result in all agencies being required to administer three different patent policies:

  one for contracts with small business and nonprofit organizations,

  one for contracts with other performers and,

  one for grants and cooperative agreements with small business/nonprofits and other performers who receive assistance funding.

  This will create unending administrative problems.

- In addition to the fact that the three policy approach is in itself a major deviation from the President's direction to treat all performers "the same or substantially the same" under all awarding mechanisms, there are numerous additional examples in FAR on how the President's Memo, P.L. 96-517 and OMB Circular A-124 are being ignored.

- Here are some of the major problems selected from dozens of identified conflicts with the small business/nonprofit treatement under P.L. 96-517.

  a) 27.302-4a of FAR attempts to overturn section 202(a) of P.L. 96-517. The statute says that agencies may

withhold the right of contractor ownership for only three limited reasons including contractor operation of a Government-owned facility (GOCO's). The FAR draft basically replaces may withhold with shall withhold, thus absolutely precluding agencies from leaving title with GOCO laboratories. Many agencies other than DOE have been using or intend to use the discretionary right of the statute to leave ownership with GOCO contractors. The FAR will end this liberalizing trend.

The FAR draft is also opposite to the Administration's legislative position of contractor ownership of inventions producted in GOCO's. If this provision of the FAR were to go to final, the Administration would find it difficult to support GOCO ownership on a reintroduced Schmitt bill.

b) The President's Memorandum and OMB Circular A-124 require agencies to protect the confidentiality of contractor invention reports. This responds directly to the Business-Higher Education report recommendation to change laws and regulations to assure protection of proprietary rights. The FAR provisions for large and intermediate size contractors not only makes no reference to this provision of the President's Memo and A-124 but Part 52,227-11(3)(#) specifically reverses it by including a provision that permits agency disclosure of invention reports at agency discretion. Under the FAR provision a third party request for such a report under the Freedom of Information Act would most likely not be withheld.

The FAR Part 52.227-11(a)(3) also opposes the A-124 small business/nonprofit requirement to maintain invention utilization reports obtained from other contractors in confidence. Again the FAR is exactly the opposite of what is called for by the Business-Higher Education Report.

c) 27.302-6(a) of FAR attempts to overturn section 202(f)(1) of P.L. 96-517. The law specifically precludes agencies from acquiring compulsory licensing rights in contractor background inventions as a condition of the contract unless permitted by the agency head. The statute specifically precludes the aency head from delegating his approval. If a contractor is to retain ownership of inventions made under a contract, there is little agency need for any rights in contractor background inventions for the

purpose of commanding licensing of third parties. The provision of the statute was included in response to numerous complaints from contractors who were required to relinquish third party license rights in background inventions as a condition of getting a contract.

Notwithstanding the statutory prohibition on delegation, the FAR permits the decision to be made by the agency head or a designee. The intent is to clearly revert to an outlawed practice.

d) Part 27.5 of FAR sets out for the first time in government-wide regulations a provision which permits the agency to acquire compulsory licensing rights in contractor background inventions and technical data. This boilerplate provision plus the reversal of the need for agency head sign off on its use (discussed in c) is an open invitation for a government-wide policy of obtaining compulsory licensing rights in contractor background inventions and technical data. We can think of nothing more out of keeping with this Administration's position on contractor ownership than permitting across-the-board acquisition of contractor background rights.

e) The FAR clause presented at 52.227-13 for small business and nonprofit organizations is not the clause prescribed by OMB Circular A-124. The Circular says that each funding agreement shall contain the standard patent clause prescribed in Attachment A to the Circular.

The FAR clause includes extensive unauthorized changes to the prescribed clause besides those covered in this analysis. Many of the changes are substantive.

Since the statute specifically mandates that a single standard clause be established by the Office of Federal Procurement Policy, and the A-124 clause was created under this mandate, small businesses and universities would have grounds for legal action. Since the Department of Commerce is the lead agency for monitoring Government-wide implementation of OMB Circular A-124, we must advise Office of Federal Procurement Policy that the proposed FAR clause is not an acceptable implementation of the Circular or P.L. 96-517.

f) Parts 52.227-11(1) and 52.227-13(1) of the two FAR clauses allow individual agencies to specify all

reporting forms, while the A-124 standard clause specifically allows contractors to use their own formats for initial invention reports, and requires use of forms to be developed by the Department of Commerce for invention use reports. The provision of the FAR clause conflicts both with OMB report control policies and the intent of A-124 to minimize the number of forms imposed on contractors.

g) Part 13 OMB Circular A-124 provides for a specific due process procedure that an agency must follow before the "march-in" on small business/nonprofit contractor ownership provisions of the law could be used. The purpose of the procedures was to give contractors/developers a clear indication that their investment in development would not be capriously endangered by an arbitrary agency march-in action. Part 27.301-4(c) of the FAR reduces this protection, for other contractors, thereby increasing the contractor/developers' perception of risk and reduces the likelihood of major investment.

h) Part 14 A-124 guarantees a series of appeals to small business/nonprofit contractors on agency actions that affect the contractor's right of ownership. The FAR arbitrarily eliminates these appeal rights thereby decreasing the contractor's right to preserve its ownership rights.

i) Part 27.301-3(a)(1) of the FAR extends the policy of contractor ownership to only those large and intermediate size U.S. contractors performing in the United States, its possessions, or Puerto Rico. There is no such limitation in P.L. 96-517, OMB Circular A-124 or the President's Memorandum. A final FAR could therefore result in agency denial of ownership to U.S. contractors doing research on ocean subjects, research on diseases prevalent outside the U.S., etc. There is no justification for this difference either in law, treaty or policy.

j) FAR does not extend the other contractors, the invention reporting criteria prescribed by the legislative history of P.L. 96-517 and OMB Circular A-124 which requires reporting only after the small business/nonprofit contractor learns of the invention from the inventor. Under Part 52.227-11(G)(2) of the FAR, if the other contractor fails to report an invention six months thereafter, the contractor may be required to forfeit title event if he has not heard

from the inventor. Further, since conception is difficult to verify and commercial evaluation cannot usually be done in the periods prescribed, industry spokesmen have advised that the requirements are unworkable and will place a cloud over the ownership of numerous inventions. Also, the legislative history of P.L. 96-517 specifically indicate that these requirements result in lost invention rights and were not to be used in implementing the Act. Dozens of comments received during the development of A-124 rejected a proposed FAR-type provision in favor of the clause finally adopted in A-124.

k) The President's Memorandum permits agencies to waive any of the conditions of ownership required by P.L. 96-517 in collaborative research projects where the contractor contributes substantial resources to the project. This authority was provided to agencies to enable them to respond to the equities of a collaborative project. While the FAR at 27.301-4(b) provides for such waivers, it requires the agency to establish a procedure involving clearance of a written justification by the highest level agency procurement officials. This burdensome procedure will all but eliminate the use of the waiver of authority.

l) P.L. 96-517 and its implementation were based on a policy of using incentives and working with the normal processes of R&D performers to increase the reporting, protection, and commercialization of inventions while safeguarding the Federal interest. Government control and intervention were kept to a minimum to create a cooperative environment conductive to innovation. Early evidence from universities indicates that the policy is working as intended. The FAR draft, with its onerous emphasis on short deadlines, penalties, contractor recordkeeping, agency surveillance, and fewer due process protections would create an adversarial relationship that is the opposite of what the President's Memorandum was intended to produce. We were working toward industry-government cooperation--not creation of a new barrier to innovation.

GOVERNMENT PATENT POLICY

Issue: The patent portion of the Federal Acquisition Regulation (FAR) recently published in the Federal Register for agency and public comment, contains many provisions that will hinder the commercialization of inventions developed by contractors with Federal R&D funding.

Background: One of the Commerce objectives is to increase private sector use of the results of Federal research and development. The largest share of the $40 billion annual effort is performed by universities and private sector firms. The best way to stimulate commercialization of inventions by these organizations is to allow them to own the inventions.

For this reason, P.L. 96-517 gave small business and nonprofit organizations the right to own their Federally funded inventions. OMB Circular A-124 prescribes the Government-wide rules and a standard patent rights clause to be used in all R&D funding agreements covered by the statute. OMB designated Commerce as the lead agency to monitor Government-wide implementation of the Circular, and asked us to extend its principles to all other R&D recipients. Early experience of the universities indicates that despite reduced funding, the number of reported inventions, patents, and licenses are up as a result of the law and circular.

For several years, the agencies with procurement statutes have been developing a single regulation--the FAR-- to direct the procurement activities of all agencies. Part 27 of the FAR is to be devoted to patents, copyrights, and technical data. To guide the drafters of Part 27, Commerce obtained a Presidential Memorandum, dated February 18, 19 8, that directed all agencies to extend to all R&D contractors, the same or substantially the same policies of ownership that 96-517 provides to small business and nonprofit organizations.

A draft of Part 27 has been published for public and agency comments, which are due on July 20. The draft contains provisions that are in violation of

96-517, the OMB Circular, and the President's Memorandum. The draft was developed by the senior patent attorneys of DOD, NASA, and Energy without consultation with other agencies, and is designed to maintain patent attorney control over who owns and is given the right to use inventions.

The comments from most of the domestic agencies, the private sector, and even parts of DOD are expected to be overwhelmingly negative. It is not known how the final decisions on Part 27 will be made. If the procurement and patent staffs that are pushing the present draft are allowed to decide, the result will be a setback for the economy.

Agency Concerns on S.1657 Treatment of Reporting and Electing Subject Inventions and Filing Patent Applications Thereon

The view of some agencies (notably DoD, DoE and NASA) is that inventions conceived or first actually reduced to practice with government funding should be reported, elected and patent applications filed thereon, within a "reasonable time" after they are "made". "Made" is defined by these agencies as conception or first actual reduction to practice of an invention in performance of a Federally funded research and development contract. A "reasonable time" is defined (as a minimum) to be prior to any act which would preclude obtaining foreign patent profection. (While the March 8, 1982 Administration mark-up of S.1657 does not provide for this, it is the apparent intent of these agencies to make provision for this by regulation at a later time).

In comparison, Sec. 305 of S.1657 rejects the agency approach in favor of time periods for reporting, election and filing patent applications triggered from report of an invention conceived or first actually reduced to practice with government funding to contractor personnel responsible for patent administration rather than from "made". Further, the time of election and filing is to be completed by the contractor (at a minimum), prior to any statutory bar date for obtaining U.S. patent protection rather than foreign patent protection as suggested by the agencies.

The two points of S.1657 questioned by the agencies were developed taking into consideration not only agency comments but those of contractors who would need to function under S.1657.

It was clear from this review that the position of the agencies is unrealistic and would not serve the objectives of S.1657 or the interests of the public.

Discussion of the two points of S.1657 in controversy follows.

1. "Conception" is not an appropriate point in time to trigger reporting of inventions generated at government expense.

Federal regulation have traditionally and ostensibly required reporting within six months from the time the invention is "made". "Made," as noted, is conception or first actual reduction to practice of an invention generated at government expense. Thus "making" can be triggered by either "conception" or "first actual reduction to practice." In most instances, "conception" will occur prior to "reduction

to practice" under a contract. In some instances, "conception" may occur outside of the contract leaving "reduction to practice" to trigger contractor obligations. Notwithstanding, it is apparent that under the agency position, the definition of "conception" is the main focus in determining when the contractor's obligations are triggered.

"Conception" while not defined by the agencies in their arguments has been generally defined as the documentation necessary to establish a diligent patent applicant as the "first-to-invent" in a contest with another applicant for the same invention in the Patent Office. (See 35 U.S.C. 102(g)) A mere mental conception is obviously not contemplated by the agencies since it could not serve as a trigger for reporting due to the difficulty in identifying the point in time that it occurred.

While a documented "conception" of the type discussed would establish a time certain, albeit difficult to establish in practice, requiring the contractor to report within six months (or for that matter at any point from that time) creates an obvious dilemna for the contractor that does not meet the objectives of S.1657.

Clearly a documented "concept" coupled with reasonable diligence is important to the contractor for the purpose of establishing itself as the first-to-invent. However, to require a report to the government within a specific time after such documentation defeats the contractor's ability to properly evaluate and modify the concept in order to develop a potentially useful product or process. The most important aspect of this issue is the agencies failure to recognize the iterative and improving nature of the invention process. While of doubtful enforceability, the agency position would require the report of numerous inventive concepts to the agencies which are later determined to be of doubtful value or patentability. Carried to its ultimate conclusion contractors would be in breach of the agency amendment of S.1657, unless the contractor reported every inventive concept recorded in its laboratory note books. It is more likely under the agency suggestion that the contractor to limit needless paperwork would avoid documenting inventive concepts, or if documented, withhold reporting notwithstanding specified reporting times until its feasibility evaluations were complete and the perfected invention identified. Under present FPR and DAR regulations it would undoubtedly be found that hundreds of contractors have breached the duty of reporting

government supported inventions within six months of their "conception". Carried into S.1657 this treatment of the agency position would place a cloud over contractor title to many inventions which could create a disincentive to private investment in their future development. Thus, the agency position if implemented could defeat the main objective of the bill.

Sec. 305 clearly avoids this dilemma by requiring the report of inventions conceived or first actually reduced to practice in performance of government support after it is reported to contractor personnel responsible for patent matters. This anticipates the report of only inventive concepts that have perfected potential while eliminating those that have been shown to have doubtful utility and patentable significance. It is clear that such reporting will occur only after the contractor is satisfied it has reached the point of report for patent purposes rather than being forced to report (or delay reporting) on the basis of an arbitrary time period. Thus, the potential of a cloud on the contractor's title due to delayed reporting is obviated.

Arguments that the contractor will delay reporting indefinitely fly in the face of the contractors need to pursue the invention diligently if he is to be designated the first-to-invent. (See 35 U.S.C. 102(g))

The S.1657 treatment is consistent with the practice developed under P.L. 96-517 and OMB Circular A-124 and is suggested in the legislative history of that Act. The Judiciary Committee indicated on page 27 of Senate Report 96-480, that:

> "The committee is concerned that standard Federal Procurement Regulations and Defense Acquisition Regulations provisions may force premature decisions, and may literally require the reporting of inventions within times that are not consistent with normal operational practices and capabilities. For example, current requrements to report invention, within six months after they are "made" could lead to forfeiture of rights in numerous inventions if literally applied. Many inventions are not actually recognized as useful inventions for long periods after their technical "conception".

2. Requiring that government funded inventions be reported, elected and patent applications filed thereon within a reasonable time but prior to any act which would preclude obtaining foreign protection serves no identified government need and endangers the contractor's right to U.S. patents.

Under S.1657 the contractor is given what is considered a reasonable time to elect and file, with the proviso that elections and filings can be required prior to the date that any statutory bar may take place under the U.S. patent laws. Thus, S.1657 fully meets the requirements of the agencies to sometimes obtain patent protection in the United States for defensive purposes on inventions that the contractor elects not to file on.

However, the agencies apparently are not satisfied that S.1657 gives it adequate means to assure that it will receive a worldwide, royalty-free license, and the opportunity to file foreign applications for defensive purposes when the contractor fails to do so. They suggest a concern that the contractor might publish the invention, which in some countries might create an immediate bar to patenting (unlike United States law in which there is a one year period after publication within which to file patent applications.)

The agency concerns have little validity in the context of S.1657 which is primarily aimed at large, commercial contractors. These contractors normally discourage and control rather than encourage publication by their scientists and engineers so as to protect their companies secrets. It is accordingly, very unlikely that many agency contractors would have any incentive to publish research findings so as to destroy both their own and agency opportunity to file foreign patents. Instead, they would normally, even if they allowed a publication, first screen it and file an initial patent application. This, then, would fully protect both the company and the agencies.

It is important to note that even if S.1657 was amended to operate as requested by the agencies, it would still be the contractor who would exercise the first right of refusal and the agency would only have the right to file on rejected inventions. Since most DoE and NASA contracts now contain patent clauses giving the agency the first right of refusal to inventions made in performance of their contracts it appears safe to assume that the foreign patent

applications now in their patent portfolio were not rejected first by the contractor. (NASA and DoE are the only executive agencies that have been involved in filing more than insignificant numbers of foreign patent applications.) Redrafting S.1657 to encourage foreign filing on rejected inventions in an era of budgetary restraint should require greater justification than furnished.

DoD has never had a perceptible foreign filing program, so that S.1657 would have no perceived effect on them under any circumstances. The DoD position as it relates to effect of publication on foreign filings seems implausible. Presumably, the problem only arises in situations in which a publication would constitute a bar to patenting in the foreign country. However, it ought to be obvious that if the publication did establish a bar, then DoD's defensive concern would be fully satisfied because no one could then obtain a patent in that country. This being the case, there is really only one hypothetical set for facts under which the DoD concern would have any real validity. That is foreign filing in countries with immediate publication bars could only be justified on the basis that someone else may have filed an application on the same invention prior to the publication date, so filing by DoD could establish its place in interference and its possible entitlement to the patent in that foreign country.

As noted, the Defense Department has filed very few foreign patent applications in the past. None that we know of were brought into interference. Even if there were any, how many of these involved inventions that were ultimately purchased and practiced by DoD in that foreign country? It would no doubt be cheaper for DoD to ignore foreign filings altogether and to litigate or pay a royalty in the few cases, if any, that they or their suppliers are sued under foreign patent laws.

In conclusion, the only perceptible benefit to be gained by the agencies in requiring the right to reporting, election and filing of patent applications by the contractor prior to any act barring the ability to obtain foreign patent protection is the right in some few instances to file foreign patent applications on inventions rejected by the contractor. Conversely, such a right would negatively effect the contractor by permitting the agency to take U.S. patent rights on the basis of an unauthorized publication or disclosure by a contractor employee. This would be unlikely given the fact that

S.1657 covers large profit-making contractors. Further the agency position would conceivably force the contractor to file or forego filing of patent applications with insufficient information due to an impending publication. This would defeat the intent of S.1657 to give meaningful ownership of government funded inventions to contractors.

United States Senate

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February 21, 1984

The Honorable David A. Stockman
Director
Office of Management and Budget
Executive Office Building
The White House
Washington, D.C. 20503

Dear David:

My staff has reviewed the current draft of the patent procurement provisions of the Federal Acquisition Regulation and finds it significantly improved over the version produced last fall. It is probably about as good as can be expected under existing statutes, but it leaves much to be desired and shows the need for "The Uniform Patent Procedures Act" (S. 2171) which I recently introduced.

One aspect of the current draft disturbs me, however, as it could affect the way S. 2171 will eventually be implemented and it will definitely diminish the effectiveness of the new regulation. The draft contains two clauses that agencies would use in R & D contracts to allow contractors to own any resulting inventions. One clause, the Short Form, is nearly identical to the clause contained in OMB Circular A-124, and would be used by all agencies other than the Department of Defense, Department of Energy, and NASA in all R & D contracts with all classes of contractors. I like it.

The second clause, the Long Form, contains what appears to be an excess of reporting requirements and provisions for Federal surveillance. The instructions accompanying the regulations specify that the Department of Defense is to use the Long Form in R & D contracts with large and intermediate size businesses. In my view, the Long Form is unnecessary to ensure protection of the government's rights in defense contracts and will needlessly complicate the procurement process.

The attached letter from the Chief Patent Counsel of the Air Force Systems Command shows that I am not alone in my opinion of the Long Form. The Systems Command is responsible for about half of the R & D funded by DOD, but its views were not seriously considered by most of those who drafted the new FAR patent part.

I recommend that OMB use its regulatory review authority to assess the burdens imposed by the Long Form. At minimum, OMB should insist on a change in the current draft to allow the individual Services of DOD to make their own decisions on whether to use the Short or the Long Form.

Sincerely yours,

BOB DOLE
United States Senate

cc: Bruce Merrifield
Dept. of Commerce

United States Senate

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DOUGLAS B. COMER, CHIEF COUNSEL AND STAFF DIRECTOR
ARTHUR B. BRISKMAN, MINORITY CHIEF COUNSEL

February 21, 1984

The Honorable George Bush
Vice President
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20501

Dear Mr. Vice President:

My staff has reviewed the current draft of the patent procurement provisions of the Federal Acquisition Regulation and finds it significantly improved over the version produced last fall. It is probably about as good as can be expected under existing statutes, but it leaves much to be desired and shows the need for "The Uniform Patent Procedures Act" (S. 2171) which I recently introduced.

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Sincerely yours,

BOB DOLE
United States Senate

cc: Bruce Merrifield
Dept. of Commerce

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE SYSTEMS COMMAND
ANDREWS AIR FORCE BASE, DC 20334

12 JAN 1983

The Honorable Robert Dole
United States Senate
Chairman, Subcommittee on Courts
Committee on the Judiciary
Hart Senate Office Building, Room 327
Washington, D. C. 20510

Dear Senator Dole:

In response to your inquiries concerning Part 27 of the Federal Acquisition Regulations (FAR), following the withdrawal of the original draft on the ground that the President's clear policy goal of applying the principles of P.L. 96-517 to all federal contractors was honored more in the breach than in the observance, we in Air Force Systems Command (AFSC) welcome this opportunity to put forth our position on a particularly important aspect of the present FAR draft.

The present FAR draft, like its withdrawn predecessor, continues its non-uniform treatment of large firms and small firms and nonprofits and continues to burden large firms with more extensive reporting requirements than are imposed on small firms and nonprofits. While the Feb. 18, 1983 Presidential Memorandum on Government Patent Policy qualified its direction "to the extent permitted by law," we in AFSC feel that unlike the statutory agencies of NASA and DOE, there are no constraints imposed by law to except military departments and agencies under the DOD umbrella from utilizing a single patent rights clause for large firms and small firms and nonprofits alike.

The use of a single patent rights clause which accords with P.L. 96-517 for retention of rights by all contractors would not only permit AFSC to fully comply with the Presidential Memorandum but would permit AFSC to more simply and efficiently carry out the patent administration function.

The increased housekeeping burden associated with a dual clause policy as set forth in the present draft of FAR Part 27 assumes a manpower adequacy on the part of the agencies expressly excepted in para 27.303(a)(1)(i). While the draft does provide flexibility in para 27.303(c)(2) with respect to the excepted statutory agencies of NASA and DOE in permitting them to specify in their supplemental regulations use of a modified clause, no

such flexibility is provided in the draft with respect to agencies under the DOD umbrella. This flexibility is extremely important and urgently required in the case of AFSC which, like many federal agencies, is laboring under budgetary and manpower constraints that impede the performance of all but essential mission oriented services.

It should be noted that AFSC formulates and exceeds an annual budget of approximately $26 billion, nearly one-third of the Air Force's budget, and administers more than 42,000 contracts having a total face value of more than $100 billion. In this regard, it is clear that the draft fails to reflect a significant minority position.

Sincerely yours,

Frank A Lukasik

FRANK A. LUKASIK
Chief, Patent Law Division
Office of the Staff Judge Advocate