EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

FEB 29 1988

Honorable Robert B. Costello
Under Secretary of Defense
for Acquisition
Department of Defense
The Pentagon - Room 3E808
Washington, D.C. 20301-1000

Dear Dr. Costello:

As you know, we have been working with members of your staff to coordinate several matters concerning the Government's policies on rights to technical data. These matters include, from our side, the review of the paperwork associated with technical data under the Paperwork Reduction Act of 1980, as amended, and the development of policy guidance to permit Federal contractors to retain rights to software, engineering drawings, and other technical data developed under Government contracts in exchange for royalty-free use by or on behalf of the Government as required by Executive Order No. 12591 "Facilitating Access to Science and Technology" and as authorized by the Office of Federal Procurement Policy Act, as amended. From your side, these matters include the promulgation of a new technical data rights policy including the so-called "Dixon amendments" (section 808, P.L. 100-180).

We appreciate the opportunity that your staff has afforded us to review the draft technical data rule on which they are working, and the many staff meetings that have been held to coordinate our activities. I know that your staff is aware of the policy that we have drafted but I wanted to ensure that you also are aware of our draft policy. I also wanted you to know that I do not believe that the draft rule sufficiently implements the President's policies as set forth in Executive Order No. 12591. Enclosed to this letter is a copy of our draft policy for your consideration.

Although I consider the draft rule to be inadequate, I do not believe that the changes that are needed to make it adequate for public comment are difficult to include. Changes to your draft rule to implement the Dixon amendments are not necessary prior to publication of the draft rule for public comment. However, the discussion in the draft rule of the

standard rights of the parties in technical data and of how the other rights in data are to be negotiated between the Government and the contractor needs to be clarified.

Specifically, the discussion of the assignment of rights in technical data between the Government and the contractor fails to provide sufficiently detailed guidance to assure that the commercialization objectives of the Executive Order will be achieved. The rule should make clear that the Government will not acquire technical data -- regardless of the source of the funding for the development of the data-- unless: (1) the Government has identified a specific need for such data, and (2) the need cannot be met through other means, such as through direct licensing or nondisclosure agreements. The rule should also provide that the Government will not acquire technical data if: (1) the original item is commercially available, (2) a readily introducible substitute will meet the performance objectives, or (3) performance specifications or samples of the original item will provide sufficient information.

Finally, a draft of your rule sets forth tests to determine whether it is "impracticable" for the Government to negotiate with the contractor on rights to commercialize technology. These tests are not well drafted and could be used to undercut the purposes of the Executive Order. For example, the first test would provide that a backlog of work in Government offices would allow the Government to avoid negotiating with a contractor over the rights to technical data. A work backlog should not be a basis for failing to carry out the President's policies. The second test would allow the Government to avoid negotiating if the Government claimed that it was uncertain of Government's need for the technical data. This uncertainty should be handled in the sections of the rule pertaining to deferred delivery and deferred ordering. Neither of these tests should allow the goal of encouraging commercialization to be so easily circumvented.

I would prefer to work with you to draft a proposal for public comment that sets forth our policy proposals as well as your proposals to implement the Dixon amendments rather than to propose for public comment, for example, a draft rule from the Department of Defense and a draft policy from the Office of Federal Procurement Policy. While not impossible, the effort to coordinate at the time of final promulgation would be difficult because of the statutory deadlines involved and the pending expiration of the paperwork clearances. Furthermore, two proposals for comment would dilute the value of public comment.

As always, we are eager to hear your views on you think how we should proceed and we invite your further comments on the enclosed draft policy.

Sincerely,

Robert P. Bedell
Administrator

Enclosure

DRAFT

Basic Regulatory Requirements

I. GOVERNMENT ACQUISITION OF TECHNICAL DATA AND RIGHTS IN TECHNICAL DATA

General. A fundamental acquisition objective is to ensure that Government procurement is cost-effective, i.e., that the Government can meet the specified procurement objectives at the lowest overall cost. Generally, this is accomplished by ensuring, wherever practicable, that there is competition. To ensure competition, the Government sometimes must acquire the right to disclose and provide technical data to its potential contractors. However, the acquisition of technical data will not always result in cost-effective procurements. In many cases such acquisition may be unnecessary to achieve competition for a specific Government procurement. Such acquisition may also unnecessarily diminish the property and economic interests of the contractor and stifle the development of new products for the private and Government markets.

Furthermore, the Government's ability to prevent disclosure or dissemination of technical data is limited. Often this means that if such technical data are acquired by the Government, they will be available to the public.

Therefore, if the Government can meet its particular needs without acquiring technical data or rights in technical data, it should. If the Government does not acquire technical data or rights in technical data, then the commercial value of the technology will not be diminished by the Government and the necessary incentives for technological development will remain.

Acquisition Requirements. Regardless of the source of funding for development of the item, component, identifiable subpart thereof, or process, before acquiring technical data or rights in technical data pertaining to that item, component, subpart, or process, except where statutorily required:

(a) The Government should not acquire technical data or rights therein, unless the contracting officer determines that the Government will need to reprocure the item, component, identifiable subpart, or process pertaining to the technical data and none of the following conditions apply:

(i) The original item, component, subpart, or process or readily introducable substitute that will meet the performance objectives is commercially available;

(ii) Performance specifications or samples of the original item, component, or subpart or demonstrations of the process will provide sufficient information to potential contractors;

(iii) The contractor or subcontractor developing the technical data will permit through direct licensing or nondisclosure agreements other potential competitive sources of supply to use the technical data to furnish the item, component, subpart, or process to the Government.

(b) The Government should assess whether the expected savings from meeting the Government's clearly specified objectives through such an acquisition are likely to exceed:

(i) The full costs of acquiring such data or rights in data, including the additional costs to the Government; and

(ii) The full costs of other alternatives (identified in consultation with the contractor or subcontractor) that may meet the specified performance objectives.

The Government should consider actively those alternatives for which the expected net savings (expected savings minus expected full costs) are likely to be maximized.

If the expected savings do not exceed the expected costs for an alternative, the Government should omit such alternative(s) from active consideration.

In evaluating responses to its proposals, the Government should consider the full costs of procuring the item, component, process, or subpart over the life of the system.

(c) To ensure effective and efficient production, operation, or reprocurement, the Government, when the requirements (a) and (b) have been met, should identify and negotiate during the research and development phase of the contract to acquire such rights in technical data as will be necessary for initial and subsequent production of an item, component, or subpart, or for subsequent development of an item, component, subpart, or process. When the requirements of (a) and (b) have

been met and the Government has concluded that the acquisition of technical data or rights in technical data is necessary, then it should negotiate to acquire and use the technical data or rights in technical data to meet its specific performance needs in a manner that is least damaging to the contractor's identified property and economic interests.

II. RIGHTS IN TECHNICAL DATA

Technical Data Developed at Private Expense

General. The rights in technical data pertaining to an item, component, identifiable subpart thereof, or process developed at private expense belong to the contractor, unless otherwise required by statute. The Government will have limited rights to such data, except where the technical data are:

(i) Prepared or required to be delivered under any Government contract or subcontract that constitute corrections or changes to Government-furnished data;

(ii) Form, fit, or function data pertaining to end-items, components, or processes prepared or required to be delivered under any Government contract;

(iii) Prepared or required to be delivered under a Government contract or subcontract necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data); or

(iv) Are otherwise publicly available or have been released or disclosed by the contractor without restriction or further release or disclosure.

Statutory Prohibitions. A contractor or subcontractor (or a prospective contractor or subcontractor) shall not be required, as a condition of being responsive to a solicitation or as a condition for the award of a contract, to sell or otherwise relinquish rights in technical data developed at private expense, unless otherwise required by statute. A contractor or subcontractor (or a prospective contractor or subcontracto) shall not be required to refrain from offering to use or from using an item or process to which the contractor is entitled to restrict the rights in technical data. The right of a contractor or subcontractor to receive a fee or royalty from a third party for use of technical data pertaining to an item or process developed exclusively at private expense, unless otherwise specified by law.

Acquisition of Greater Rights. If, in accordance the requirements of Section I, the Government concludes that acquisition of greater rights in technical data developed at private expense is necessary, the Government should negotiate and enter into a separate agreement with the contractor. When such an acquisition is necessary, the Government shall include as an express contract provision all limitations or restrictions on its right to disclose the technical data outside the Government so as not to compromise a contractor's property rights or economic interests in the technical data.

Prenotification and Verification. When technical data developed at private expense are to be used in a Government contract, the contractor, to the maximum practicable extent, must declare the use of such technical data before the initial contract agreement is signed. The Government may challenge in a timely manner the rights in technical data asserted by the owner(s) of the data, unless the Government has otherwise recognized in a contract that the technical data were developed at private expense. As part of this challenge, the Government will provide to the owner(s) specific written evidence of reasonable doubt as to the current validity of any assertion that the technical data were developed at private expense.

Technical Data Developed Exclusively with Government Funds

General. It is the policy of the Government to encourage use of technologies developed under Government contracts for commercialization. When an item, component, identifiable subpart, or process was developed exclusively with Government funds and access by or on behalf of the Government to the technical data pertaining to that item, component, subpart, or process is necessary, the Government will obtain Government Purpose License Rights in the technical data pertaining to such development if: the contractor or subcontractor notifies the contracting officer of its intent to commercialize the technology depicted or described by the technical data, unless the Government concludes that the technical data must be publicly disclosed to meet the Government's objective and the requirements of Section I have been met.

If the requirements of Section I have been met and the Government concludes that the acquisition of technical data or rights in technical data pertaining to an item, component, identifiable subpart, or process developed exclusively with Government funds is necessary, then the Government should not impose any limitations or restrictions on the contractor or subcontractor's concurrent right to also use the technical data for its own

commercial purposes (unless specifically prohibited from doing so by statute or for national security reasons). Any release or disclosure by the Government to a third party or use by a third party for Government purposes of the technical data to which the developing contractor or subcontractor has retained exclusive commercial rights will be made subject to a prohibition that the third party may not further release, disclose, or use these technical data for commercial purposes unless otherwise permitted by the developing contractor or subcontractor.

Conditions of Commercial Rights. Government Purpose License Rights shall be royalty-free to the Government and subject to reasonable time limitations as agreed to by the parties. Time limitations are necessary to ensure that the technology embodied in the technical data is not suppressed or abandoned and to offer commercial opportunities to other parties. Time limitations may be determined in part by the contractor's contribution to the development of the technology, the contractor's past history of commercialization of technologies developed under Government contract (if known), likely economic life of the technology, and an assessment of the potential net social benefits that may be provided by an expansion of commercial opportunities to other parties.

If the developing contractor or subcontractor does not notify the Government regarding its intent to commercialize the technology depicted or described by the technical data; does not agree to commercialize the technology within a reasonable time period; does not agree, where appropriate, to reasonable conditions for distribution of the technical data on behalf of the Government; or fails to comply with any agreements concerning use of the technical data by or on behalf of the Government, then the Government may obtain unlimited rights in such technical data and all requirements in these regulations that pertain to unlimited rights data will apply.

Royalty and Access Agreements. As appropriate, based on the nature and extent of the contractor's contribution to the development of the item, component, process, or identifiable subpart, the Government may negotiate as part of the contract for development of the technical data any royalty payments or recoupment to the Government based on commercial sales of the item, component, identifiable subpart, or process to which the technical data pertain.

The Government, in accordance with the requirements of Section I, should negotiate with the developing contractor any procedures (for example, those to be specified in any direct licensing or nondisclosure agreements) that may be required to ensure that the Government has the necessary access to technical data developed

exclusively with Government funds to meet the Government's competition objectives. These procedures should be specified in an agreement as soon as practicable during the research and development phase of the contract under which the technical data are developed. Such agreements may include an option for any future licensee to purchase technical assistance from the developing contractor. The contracting officer should negotiate payment to be made to the developing contractor in accordance with the costs of providing technical assistance and that contractor's contribution to the development of the technical data.

Nonreimbursable Costs. All costs incurred by the developing contractor to negotiate the rights to commercialize a technology developed with Government funds and any procedures to provide Government access to the technical data are not reimbursable by the Government.

Technical Data Developed in Part with Government Funds and in Part with Private Funds

When an item, component, identifiable subpart, or process has been developed in part with Government funds and in part with private funds, the respective rights of the Government and the contractor or subcontractor in the technical data pertaining to such item, component, identifiable subpart, or process will be established as early in the research and development phase of the contract as is practicable. The determination of the rights in such technical data will be based on the requirements of Section I, the contractor or subcontractor's resource contribution under the contract, and the negotiations between the contractor or subcontractor and the Government.

Deferred Ordering of Technical Data Developed Exclusively with Government Funds

If the requirements of Section I have been met and the Government concludes that the acquisition of technical data or rights in technical data developed with Government funds but not required to be delivered under any previous contract, the Government will be entitled to limited rights in such technical data. The Government may order such technical data or computer software during the performance of the contract and within a period of three years after acceptance of all items (other than technical data or computer software) to be delivered under the contract or the termination of the contract, whichever is later.

III. RIGHTS IN COMPUTER SOFTWARE

General. The same basic policies set forth in Section II with respect to technical data also apply to computer software.

Acquisition. Because computer software is also an end item, particular care should be taken in procuring software. The contract should specify Government needs for computer software and documentation and assuring that the software is to be furnished, with attendant rights regarding its use and disclosure, so that the Government's program objectives can be achieved.

Prior to contract, the Government, to maximum extent possible, should identify and acquire any commercially available computer software that may be needed to fulfill contractual requirements. The Government, to the extent possible, should limit it's rights in computer software to a license for use in a specific application or specific site and thereby achieve a cost-effective procurement.

For software that does not have broad commercial distribution, the Government, in accordance with the requirements of Section I, should consider alternatives to acquiring any necessary rights in the software to ensure the agency's access to software documentation and tools. When practical and in accord with industry practice, the agency may consider entering into escrow agreements with the contractor or negotiating rights that allow for competitive maintenance and enhancement of the software.

Agreements. In addition, in recognition of standard commercial practices in contracting for computer software, agencies in all cases should agree in the contract to restrict the use and disclosure to specified sites, locations, or designated computers within the Government or those acting on behalf of the Government.

Where agency program needs require a more expanded use and disclosure, such requirements should be specifically identified in the contract and fair and reasonable compensation should be provided as appropriate to the owner(s) for such uses.

IV. FLOW DOWN REQUIREMENTS

Through their contracts with the Government, prime contractors will be responsible for flowing down to its subcontractors the appropriate provisions of this policy. Prime contractors and

higher-tier subcontractors shall not use their power to award subcontracts as economic leverage to acquire rights in the technical data of their subcontractors for their own use or the use of the Government unless otherwise authorized by this policy. Accordingly, the owner(s) of the technical data may furnish rights in technical data directly to the Government rather than through the prime contractor.

V. DEFINITIONS

227.471 Definitions

"Commercial computer software" means computer software which is used regularly for other than Government purposes and is sold, licensed, or leased in significant quantities to the general public at established market or catalog prices.

"Commercialize" means use by the contractor or subcontractor of technical data developed under a Government contract in any manner for private, Government, or foreign military purposes for the development of: (i) significant improvements in items, components, identifiable subparts thereof, processes, or computer software; or (ii) new items, components, identifiable subparts thereof, processes, or computer software.

"Computer data base" means a collection of data in a form capable of being processed and operated on by a computer.

"Computer program" means a series of instructions or statements in a form acceptable to a computer, designed to cause the computer to execute an operation or operations. Computer programs include operating systems, assemblers, compilers, interpreters, data management systems, utility programs, sort-merge programs, and ADPE maintenance/diagnostic programs, as well as applications programs such as payroll, inventory control, and engineering analysis programs. Computer programs may be either machine-dependent or machine-independent, and may be general-purpose in nature or be designed to satisfy the requirements of a particular user.

"Computer software" means computer programs and computer software documentation and manuals.

"Computer software documentation" means computer listings and printouts, in human-readable form that: (a) document the design or details of computer software, (b) explain the capabilities of the software, or (c) provide operating instructions for using the software to obtain desired results from a computer.

"Detailed manufacturing or process data" means technical data necessary to enable manufacture of end-items, components, subparts, and modifications or to enable the performance of processes.

"Developed" means that the item, component, identifiable subpart thereof, or process exists and is workable. Thus, the item, component, or subpart must have been constructed or the process practiced. Workability is generally established when the item, component, process, or identifiable subpart has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, process, or identifiable subpart and the state of the art. To be considered "developed", the item, component, process, or subpart need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component, process, or subpart be actually reduced to practice within the meaning of Title 35 of the United States Code.

"Developed Exclusively with Government Funds" means that the direct costs of development of the item, component, identifiable subpart thereof, or process have been paid in whole by the Government and that such development was specified as an element of performance under a Government contract.

"Form, fit or function data" means technical data pertaining to items, components, processes for the purpose of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics and performance requirements (e.g., specification control drawings, catalog sheets, envelope drawings, qualification requirements, etc.).

"Government Purpose License Rights" means the right to have access to technical data in whole or in part and to have or permit others to have access to technical data for Government purposes only. Government Purpose License Rights includes the right to have access to the technical data for competitive reprocurement of a specific item, component, identifiable subpart thereof, or process developed under a Gpvernment contract. Under Government Purpose License Rights, the developing contractor or subcontractor has the right to use, release, or disclose the technical data for any commercial purpose, including the development of new or significantly improved items, components, subparts, or processes for private, Government, and foreign military sales.

"Limited rights" means the right to use, duplicate, or disclose technical data, in whole or in part by or for the Government, with the express limitation that such technical data shall not without the written permission of the party asserting limited rights be: released or disclosed in whole or in part outside the Government; used in whole or in part by the Government for manufacture, or in the case of computer software documentation for preparing the same or similar software; or used by a party other than the Government, except when:

(a) Release, disclosure, or use is necessary for emergency repair or overhaul; provided that such release, disclosure, or use thereof outside the Government shall be made subject to a prohibition against further use, release, or disclosure, and that the party asserting limited rights be notified by the contracting officer of such release, disclosure, or use; or
(b) Release or disclosure to a foreign government, that is in the interest of the United States and is required for evaluational or informational purpose under the conditions of (a) above, except that such release or disclosure may not include detailed manufacturing or process data.

"Private expense" means that any of the direct costs of development of the item, component, identifiable subpart thereof, or process in which the technical data are embodied has not been paid in whole or in part by the Government. Government-sponsored independent research and development and bid and proposal costs are not to be considered Government funds. Payments to the contractor for indirect costs incurred under a Government contract are not to be considered Government funds when the direct costs of developing the item, component, identifiable subpart thereof, or process in which the technical data are embodied has not been exclusively funded by the Government.

"Technical data" means recorded information regardless of the form or method of the recording of a scientific or technical nature. Such term does not include computer software or data incidental to contract administration, such as financial, management, cost or pricing information.

"Unlimited rights" means rights to use, duplicate, release, or disclose technical data or computer software in whole or in part in any manner and for any purpose whatsoever and to have or permit others to do so.

"Unpublished" means that technical data or computer software have not been released to the public or furnished to others without restriction on further use or disclosure. For the purpose of this definition, delivery of other than unlimited rights technical data or computer software to or for the Government under a contract does not in itself constitute release to the public.