SEC. ___. USE OF DETAILED MANUFACTURING AND PROCESS INFORMATION.

Section 2320(a)(2)(D)(i) of title 10, United States Code, is amended—

(1) in subclause (II), by striking "; or" and inserting a semicolon;

(2) in subclause (III), by striking the semicolon and inserting "; or"; and

(3) by adding at the end the following new subclause:

"(IV) is a release, disclosure, or use of detailed manufacturing or process data necessary for operation, maintenance (including depot-level maintenance, repair, and overhaul), installation, training, airworthiness determinations, testing and evaluation, or accident or incident investigations;".

[Please note: The "Changes to Existing Law" section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

DOD has a substantial inventory of manned and unmanned aircraft that must be maintained in an airworthy condition, including a growing inventory of "commercial derivative aircraft (CDA)." For civil aircraft, Title 14 of the Code of Federal Regulations (Federal Aviation Administration (FAA) Regulations) requires that original equipment manufacturers (OEMs) provide airworthiness maintenance data, known as Instructions for Continued Airworthiness (ICA), to owners and maintainers. *See* "Department of Defense Access to Intellectual Property for Weapon Systems Sustainment," Institute for Defense Analysis, IDA Paper P-8266, submitted pursuant to Section 875 of the fiscal year 2016 National Defense Authorization Act. This provision is intended to enable the release, disclosure or use of operation, maintenance, installation or training data, including ICA data, that is detailed manufacturing or process data to commercial maintenance, repair, and overhaul firms, seeking to compete for DoD maintenance and repair work, including depot-level maintenance, provided the person to whom the data is released or disclosed is subject to a prohibition on the further release, disclose, or use of such data and the owner of the data is notified of such release, disclosure or use. In addition, this provision would enable DoD to share detailed manufacturing or process data with firms seeking to compete for contracts to support engineering analysis, testing and evaluation, training, airworthiness determinations, and data necessary to conduct accident or incident investigations, provided the person to whom the data is released or disclosed is subject to a prohibition on the further release, disclose, or use such data and the owner of the data is notified of such release, disclosure or use.

Budget Implications: This proposal has no significant budgetary impact. Resources impacted are incidental in nature and amount, and are included within the Fiscal Year (FY) 2021 President's Budget Request.

Changes to Existing Law: This proposal would make the following changes to section 2320 of title 10, United States Code:

§2320. Rights in technical data

(a)(1) The Secretary of Defense shall prescribe regulations to define the legitimate interest of the United States and of a contractor or subcontractor in technical data pertaining to an item or process. Such regulations shall be included in regulations of the Department of Defense prescribed as part of the Federal Acquisition Regulation. Such regulations may not impair any right of the United States or of any contractor or subcontractor with respect to patents or copyrights or any other right in technical data otherwise established by law. Such regulations also may not impair the right of a contractor or subcontractor to receive from a third party a fee or royalty for the use of technical data pertaining to an item or process developed exclusively at private expense by the contractor or subcontractor, except as otherwise specifically provided by law.

(2) Such regulations shall include the following provisions:

(A) Development exclusively with federal funds.—In the case of an item or process that is developed by a contractor or subcontractor exclusively with Federal funds (other than an item or process developed under a contract or subcontract to which regulations under section 9(j)(2) of the Small Business Act (15 U.S.C. 638(j)(2)) apply), the United States shall have the unlimited right to—

(i) use technical data pertaining to the item or process; or

(ii) release or disclose the technical data to persons outside the government or permit the use of the technical data by such persons.

(B) Development exclusively at private expense.—Except as provided in subparagraphs (C), (D), and (G), in the case of an item or process that is developed by a contractor or subcontractor exclusively at private expense, the contractor or subcontractor may restrict the right of the United States to release or disclose technical data pertaining to the item or process to persons outside the government or permit the use of the technical data by such persons.

(C) Exception to subparagraph (b).—Subparagraph (B) does not apply to technical data that—

(i) constitutes a correction or change to data furnished by the United States;

(ii) relates to form, fit, or function;

(iii) is necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data, including such data pertaining to a major system component); or

(iv) is otherwise publicly available or has been released or disclosed by the contractor or subcontractor without restriction on further release or disclosure.

(D) Exception to subparagraph (b).—Notwithstanding subparagraph (B), the United States may release or disclose technical data to persons outside the Government, or permit the use of technical data by such persons, if—

(i) such release, disclosure, or use—

(I) is necessary for emergency repair and overhaul;

(II) is a release, disclosure, or use of technical data pertaining to an interface between an item or process and other items or processes necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes; ~~or~~

(III) is a release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the United States and is required for evaluational or informational purposes; <u>or</u>

<u>(IV) is a release, disclosure, or use of detailed manufacturing or process data necessary for operation, maintenance (including depot-level maintenance, repair, and overhaul), installation, training, airworthiness determinations, testing and evaluation, or accident or incident investigations;</u>

(ii) such release, disclosure, or use is made subject to a prohibition that the person to whom the data is released or disclosed may not further release, disclose, or use such data; and

(iii) the contractor or subcontractor asserting the restriction is notified of such release, disclosure, or use.

(E) Development with mixed funding.—Except as provided in subparagraphs (F) and (G), in the case of an item or process that is developed in part with Federal funds and in part at private expense, the respective rights of the United States and of the contractor or subcontractor in technical data pertaining to such item or process shall be established as early in the acquisition process as practicable (preferably during contract negotiations) and shall be based on negotiations between the United States and the contractor, except in any case in which the Secretary of Defense determines, on the basis of criteria established in the regulations, that negotiations would not be practicable. The establishment of such rights shall be based upon consideration of all of the following factors:

(i) The statement of congressional policy and objectives in section 200 of title 35, the statement of purposes in section 2(b) of the Small Business Innovation Development Act of 1982 (15 U.S.C. 638 note), and the declaration of policy in section 2 of the Small Business Act (15 U.S.C. 631).

(ii) The interest of the United States in increasing competition and lowering costs by developing and locating alternative sources of supply and manufacture.

(iii) The interest of the United States in encouraging contractors to develop at private expense items for use by the Government.

(iv) Such other factors as the Secretary of Defense may prescribe.

(F) Interfaces developed with mixed funding.—Notwithstanding subparagraph (E), the United States shall have government purpose rights in technical data pertaining to an interface between an item or process and other items or processes that was developed

in part with Federal funds and in part at private expense, except in any case in which the Secretary of Defense determines, on the basis of criteria established in the regulations, that negotiation of different rights in such technical data would be in the best interest of the United States.

(G) Major system interfaces developed exclusively at private expense or with mixed funding.—Notwithstanding subparagraphs (B) and (E), the United States shall have government purpose rights in technical data pertaining to a major system interface developed exclusively at private expense or in part with Federal funds and in part at private expense and used in a modular open system approach pursuant to section 2446a of this title, except in any case in which the Secretary of Defense determines that negotiation of different rights in such technical data would be in the best interest of the United States. Such major system interface shall be identified in the contract solicitation and the contract. For technical data pertaining to a major system interface developed exclusively at private expense for which the United States asserts government purpose rights, the Secretary of Defense shall negotiate with the contractor the appropriate and reasonable compensation for such technical data.

(H) A contractor or subcontractor (or a prospective contractor or subcontractor) may not be required, as a condition of being responsive to a solicitation or as a condition for the award of a contract—

(i) to sell or otherwise relinquish to the United States any rights in technical data except—

(I) rights in technical data described in subparagraph (A) for which a use or release restriction has been erroneously asserted by a contractor or subcontractor;

(II) rights in technical data described in subparagraph (C); or

(III) under the conditions described in subparagraph (D); or

(ii) to refrain from offering to use, or from using, an item or process to which the contractor is entitled to restrict rights in data under subparagraph (B).

(I) The Secretary of Defense may—

(i) negotiate and enter into a contract with a contractor or subcontractor for the acquisition of rights in technical data not otherwise provided under subparagraph (C) or (D), if necessary to develop alternative sources of supply and manufacture;

(ii) agree to restrict rights in technical data otherwise accorded to the United States under this section if the United States receives a royalty-free license to use, release, or disclose the data for purposes of the United States (including purposes of competitive procurement); or

(iii) permit a contractor or subcontractor to license directly to a third party the use of technical data which the contractor is otherwise allowed to restrict, if necessary to develop alternative sources of supply and manufacture.

(3) The Secretary of Defense shall define the terms "developed", "exclusively with Federal funds", and "exclusively at private expense" in regulations prescribed under paragraph (1). In defining such terms, the Secretary shall specify the manner in which indirect costs shall be treated and shall specify that amounts spent for independent research and development and bid and proposal costs shall not be considered to be Federal funds for the purposes of the definitions under this paragraph.

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