Minutes for Meeting #9 Government Industry Advisory Panel (10 Nov 16)

Section 813, FY16 NDAA, Rights in Technical Data

ATTENDEES:

- **Panel Members**: Richard Ginman (Chair), Richard Gray, Charles Harris, Kelly Kyes, James McEwen, Roger Hamerlinck, Sean O'Brien, Dora Hancock, Thomas Dee, Elliott Branch, Joseph Gordon, Bill Elkington, Alison Brown
- **Support Staff**: LTC Andrew Lunoff (DFO), Mike Canales
- **Public:** Samuel Borowski, Nancy Kremers, Karen Wilson, Josh Krotec, Jon Etherton
- **Public (On Telecon)**: George Winborne, James Haag, Jane Barrow, Bill Decker, Rob Williams, Kevin O'Brien, Nicholas Florio, Barry Edelberg

INTRODUCTIONS

- Introduced everyone – including those on the telephone

PRESENTATIONS:

Lou Von Thaer, Chief Executive Officer, Dyncorp International,

https://database.faca.gov/committee/meetingdocuments.aspx?flr=147540&cid=2561

- Sole source leverage offered by this arrangement has seen extraordinary price increases in recent years
    - Panel Question: In most of the instances is OEM still there? Yes, OEM still there and owns data rights but company may have changed
    - Panel Question: On cost contract or fixed price contracts? Both. Difficult for maintenance contracts on fixed price
- Price charging for parts are increasing at a 20% rate per year. Doing service and buying parts from OEM. Low cost industry. Fees range from 4-6%.
    - Industry is not recouping investment 20-40 years later.
    - Example: 8 competitors offered a license. Small margins in the same type contract for maintenance support. Had to win on best value, but really came down to price. Looking at trying to neutralize the owner of the IP.
- Panel Question: OEMs offering prices to bidders in different terms? Yes, they have seen that.
- Buying the parts from OEMs. Need to license the know-how and then have to get the parts
    - Panel Question: How often does the govt separately procure the parts? That is what we are recommending.

- Can't compel contractor to relinquish rights. Under circumstances in which contractor is willing to contract third party, licensing should be offered under fair and reasonable terms.
    - Provide the same license information to all bidders.
    - Have to do something about price escalation of parts. Issues could economic order qty, tooling, dwindling number.
    - Establishing a band within the fee structure.
- Dyncorp maintaining both commercial and military weapon systems.
- Panel Question: Are you doing depot level and intermediate level? All of the above.
    - Identified as depot level repairables.
    - Government buys by head count and part number instead of developing innovative ways to provide support.
    - Customers don't always have great data and is outdated.
- Panel Question: Are contracts performance based or paid by transaction?
    - Most paid by transaction and not always performance based.
- Information on slide five of presentation shows parts bought on a consistent basis from 2012 to 2016. What is the requirement and why the govt is not buying parts directly.
    - IP licensing would be maintenance manuals. Can't certify an aircraft for flight without certain licensing. Significant cost to the OEM to license and maintain the information.
    - Goes back to the conversations we have had on Life Cycle Sustainment Plan. Some items don't have enough quantity worldwide to establish parts plans. Some places buy locally, make fabricate or manufacture
- Proposed Solutions
    - Government negotiates directly with OEM for data rights and sole source parts costs – provides to competition as Government Furnished Property
        - Government has more leverage than contractor community since OEM's want to make future sales to same customers.
        - More effective & less expensive outcome for government to obtain data licenses due to non-disclosure requirements & government ownership of the aircraft
    - Government establishes a separate Contract Line Item that is cost-reimbursable & excluded from Total Evaluated Price applied to bidders
        - Allows all bidders, including OEM's, to be placed on an equal footing in the evaluation process.
        - Government reimburses contractors for cost determined to be allowable in accordance with cost principles.
        - Government could still support winning contractor in negotiations to get best price for the taxpayer.
- Understanding second recommendation: PBL contract in place to maintain C-12s. Exclude material from competition. Fixed price contract with material as a cost CLIN.
    - If OEM is going to have competitive advantage associated IP, then no incentive to license third party. If control IP, not willing to license.

- Panel Question: For first proposal, how to implement early in an acquisition life cycle?
    - If at some point time, Service was maintainer, then expected to turn to DLA or depot for parts. Sometimes keep a critical spare.
    - Some of the pricing associated to OPTEMPO issues not catching up. Dealing with older systems. Could be getting dumped into aftermarket. Possible that overhead getting charged to the aftermarket parts.
    - If history is good enough and can predict life left, can do life time buy. Requires govt to be active partner.
- Panel Question: What would we change in law or regulation?
    - Condition or time based licensing triggered by certain factors. Using copyright law or patent protection available. Tension point associated to when it would be available. Technical data package into escrow.
- Issue might be associated to training. In policy we would do well to put examples of these issues. Desktop instructions.
    - Why wouldn't we say that IP knowledge is a key capability to have in this group on both sides of the fence
- Taking a look at a third class of data rights. Could propose solution for this issue.
- Consider a recommendation of having trained cadre of individuals.
    - Detailed license rights to deal with solutions. Another category, several categories, templates. Simplification of the rules would help a lot. Getting to complex and simplify.

Public Comment:

First Aviation Services, Mr. Josh Krotec (Written Comments provided):

- Maintenance technical data rights. OI&D level maintenance data.
- 70-80% of maintenance contracts ultimately sole sourced. Justification not having rights to technical data to perform maintenance. Disconnect between how we read law and regulations and what is happening. Mistaken belief from contracting offices over maintenance technical data and contracts are being sole sourced
- Discussion on design data rights and detailed manufacturing data rights. Maintenance data rights. Do have maintenance technical data from DoD. As a third party involved in that process. Certain way to reverse engineer. Members of industry can invest to provide better solutions.
- If maintenance technical data, is or wasn't available, types of innovative after-market type solutions. Wouldn't know to invest resources to come up with solution.
- Protecting unlimited data and maintenance technical data for the life cycle sustainment of the weapon systems. Panel focusing on law or policy: two suggestions would be more teeth in law or regulation, DoD order to effectively prohibit sole source maintenance contracts due to lack maintenance technical data. Obtain unlimited rights up front.
- Panel Question: What is an approach that balances the equities? Should government be paying for unlimited rights up front? Commercial rights difference and more applicable to

FAA conditions in this case. Commercial world provide entitlement data. Not obligated to provide detailed data in commercial world. Commercial does not provide this level of detail. Government is different. Acknowledge there are differences in the market places.

- Don't rewrite that part of the law (2320), when contracting for maintenance services, figure out policy or regulation to not go sole source
- Depot does overhaul. Doesn't do manufacturing. Definition for detailed manufacturing and process data is significant to manufacturing. Sequences and processes to manufacture. To refurbish propeller do I need OMIT data or detailed manufacturing data? To some extent, need form, fit and function. Need some of the design data (DMWR).
- Panel Question: Do you need more than OMIT level data to do your depot repairs? OMIT level data, get to certain point and you have to go back to the OEMs to get a spare. Need SEs to get more data to get the certifications. Can't refurbish engine without underlying detailed manufacturing data. Depot needs more than what they have in OMIT. OMIT includes depot as long as it doesn't include re-manufacturing.
- Panel Question: Where does the line get drawn between depot level maintenance and the manufacturing world? It is not easily defined. What is the difference between depot level and manufacturing? Distinctions between levels of maintenance and what party is doing it.
- Panel Question: In every case, what level data are you willing to provide if OMIT data does not meet need. Can you use SNLR? If not good for purposes, then need to have other data rights as needed.
    - Could probably do organic depot maintenance with limited rights. Be difficult if given a DMWR with restricted markings. Gets published in different publication directorates.
- Commercial items. Don't want to do that from industry perspective. If black box is something that I could economically repair, will want data to get inside that box.
- Description of data, rights that go with it and parties talk about it at appropriate time. DFARS schemes is a default framework and provides the flexibility to negotiate any data rights or licensing. Govt doesn't seem to think they have that flexibility.
- Panel Question: How do you view the contractors that work at the depots? Third party just doing installation is different than somehow manufacturing the parts. Putting them in the business. Tell me what you mean by depot. Don't expect someone to manufacture the part. What does depot mean? Many times it means manufacturing parts. If doing it early in the life cycle is where we see issues with industry. Examples of depot level maintenance and details are most successful. As long as we tell industry what we want and clear, fine with the conversation.
- 2321 has opportunity for challenges by the government. Provide an opportunity for industry to make challenges also. Industry has the opportunity to challenge a J&A. They don't see the information behind a J&A. Public has no mechanism other than a bid protest, but they are expensive.

Public Comment:

George Winborne, AMC:

- Always assume there is contractor investment. First Aviation, sympathetic to comments.
- Data of not getting data related to OMITs. 2320 is a framework for establishing regulations to go into contracts. Requires two parties to agree to go into the contract. Contractors will say that won't agree to deliver data.
- OMIT rights sometimes become irrelevant. Part of the fundamental problem with 2320, nothing in there to require something to delivery.
- Deferred ordering requires what you can deliver. Seeing a lot of ignoring the regulations because it does not fit into the business models. We do fail to do so from a lack of planning and lack of thinking.
- Is this during the negotiation, won't sign the contract with CDRL in it? Here is the data that we won't. Will never agree to deliver this data. Represents a lot of investment and not going to get ever. People should not assume that we will get those unlimited rights and to get OMIT data. Can't get OMIT data if we just ask for it. How do we get the contractor to the table in this situation?

Panel Discussion: Rewrite vs Tension Points Approach

- Some members of the panel believe that the statute needs to be rewritten and then address the tension points. Other members would like to break down the tension points and prioritize them in a way that is manageable to effect policy.
- Evaluation stage and sustainment stage. Software channel and technical channel. Four box matrix. Contract negotiation, terms, data rights, sustainment (access to data, supplier evaluations).
- If source of funding not it, what are industry's needs and what are government's needs? If you don't need the commercial marketplace, and you see a proposal with a commercial item in it then what do you do.
- Patent clauses don't look at funding, but look at statement of work.
- Tension points are in the middle and with how to sustain over time. The one thing you know is that your sustainment plan is going to change. Having requirement to enable organic and competitive activities (longer option periods, escrow with fee based) but all negotiated up front.
- Could look at a patent clause or copyright clause for reference.
- Presented 2320 rewrite from Air Force. Will provide for reference.
    - Intent for protection of contractors as current statute in paragraph 2
    - Paragraph 4 looks like you can do everything you want. Thresh hold requirement. This statement does not include detailed manufacturing drawings. SD decided what OMIT is and write rules. Content for Operations and Maintenance information is there.
    - Statute is very prescriptive. How much needs to be in statute? What is bare minimum to make sure it works.

- Where is consideration for non-commercial investment?
- Consider we can craft (c)3 to make sure we can incentivize private investment, but how does that get translated into policy.
- Question on (c)1—intent to drive rights in data to an actual reduction in practice. Section is about enhancing economic development.
- Statue gets away from source of funding
- What do you do about software? Draft paragraph (d)
- Keep software and hardware separate. Duplicative language, but software and all other seem to be better separate.
- Put frameworks in the statute for software.
- Statute does put a lot of pressure on the rule making
- Speed of operations associated to software

Panel Discussion: What do we need to add back in to the statute:

- Under paragraph B, if govt paid for something, some entitlement to greater rights. Can't abandon the investment concept.
    - Similarly, entitled to restrict rights, proprietary, greater right to restrict rights govt doesn't have
- Requirement to plan in advance (currently 2320 e). Shall include explicit planning for organic, CLS and IP requirements. Factors that they have to address?
- Add software language make separate section D
- Put the Installation and Training back in paragraph b4. Maybe proprietary data associated to installation. Separate Operations, Installation and Training from Maintenance. What may not be restricted, delivery or rights? Encoat rights-right not to be seized by government. Rights that came in under a contract.
- 2320 b(1): trade secrets
- Source of funding should be a factor. Use words like investment. Development is not the end of the funding conversation. "resulting from investment". Trying to removed developed as a term. Did you have a commercial product at the start? You have to consider investments from all perspectives. Mixed funding and modifications brings everything to a halt. Need to have a recognition of mixed funding. Maybe be in paragraph b. Boundary and architecture that has been tested. Left hand side and right hand side without the middle. Just create boundaries without puttiing something in the middle. Own something if you paid us to do it for you. Various contributions of the parties. For the middle, might think of something between GPR and Limited a lot of the arguments go away. Timing of when rights become available. Adding the language of sustainment.
- Coverage for commercial items and private investments in (c)3
- Avoidance of consequential damages. Long term impacts.

Administration and Planning:

- Next time go through language as prepared (Hancock, Harris, Kyes)
- Group tension points into buckets
- Go through statute and make sure nothing needs to be in statute
    - Reserving ability to give to support contractor who is not competing with OEM for that kind of work. Keep putting that in statute and would be looking forward.
    - Prefer to not bring in actual reduction into practice
    - Should we include time phased data rights in the statute?
    - Limited is tech data and restricted is software.
- If this 2320 is the baseline, go through tension points and determine what has to be in here.
    - Combine a proposed statute with proposed framework for implementation, plus white paper on some background and inclination on what we are doing.

APPROVED: PANEL CHAIR, MR. RICHARD T. GINMAN _____