Audit Report

OFFICE OF THE INSPECTOR GENERAL

VALIDATION OF TECHNICAL DATA RIGHTS RESTRICTIONS FOR SPARE PARTS AT THE DEFENSE LOGISTICS AGENCY

Report No. 94-106

May 19, 1994

Department of Defense

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Acronyms

DCSC	Defense Construction Supply Center
DESC	Defense Electronics Supply Center
DFARS	Defense Federal Acquisition Regulation Supplement
DGSC	Defense General Supply Center
DLA	Defense Logistics Agency

INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-2884

May 19, 1994

MEMORANDUM FOR DIRECTOR, DEFENSE LOGISTICS AGENCY

SUBJECT: Audit Report on Validation of Technical Data Rights Restrictions for Spare Parts at the Defense Logistics Agency (Report No. 94-106)

We are providing this audit report for your review and comment. This is the first of two reports we plan to issue on technical data with limited rights assertions. We considered comments provided by the Director, Defense Logistics Agency, in preparing this report.

DoD Directive 7650.3 requires that audit recommendations be resolved promptly. We consider the Director, Defense Logistics Agency, comments to be only partially responsive. Therefore, we request additional comments on all recommendations by July 18, 1994.

The courtesies extended to the audit staff are appreciated. If you have any questions on this report, please contact Ms. Patricia Brannin, Audit Program Director, at (703) 692-3206 (DSN 222-3206) or Mr. Michael Perkins, Audit Project Manager, at (703) 692-3027 (DSN 222-3027). The report distribution is in Appendix H. The audit team members are listed in the back cover of this report.

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Report No. 94-106
(Project No. 3CD-0022)

May 19, 1994

VALIDATION OF TECHNICAL DATA RIGHTS RESTRICTIONS FOR SPARE PARTS AT THE DEFENSE LOGISTICS AGENCY

EXECUTIVE SUMMARY

Introduction. A complete technical data package with unlimited rights is needed to fully compete spare parts procurements. A contractor's limited rights assertion on technical data prevents the Government from using the technical data to competitively procure spare parts. As part of the spare parts breakout screening process, the Defense Federal Acquisition Regulation Supplement requires that limited rights assertions on technical data be challenged if the assertions cannot be substantiated. The Defense Logistics Agency supply centers receive technical data from the Military Departments and use the data to procure spare parts.

Objectives. The primary audit objective was to evaluate the adequacy of reviews by DoD contracting activities of technical data packages with limited rights assertions. We also evaluated internal controls related to the review and challenge of limited rights assertions and management's implementation of the DoD Internal Management Control Program as it applied to our audit objective. This report addresses the results of the audit at the Defense Logistics Agency. A report on the results of the audit at the Military Departments will be issued at a later date.

Audit Results. The Defense Logistics Agency supply centers did not adequately validate limited rights assertions on technical data for 1,303 spare parts purchased on contracts valued at $84 million. The supply centers were not making maximum use of informal requests and were not challenging technical data with limited rights assertions. As a result, the spare parts were purchased without full and open competition, without challenges to limited rights assertions, and without breakout screening. If technical data rights are obtained, competitive contracting can reduce costs by about 25 percent over sole-source contracting.

Internal Controls. Internal controls were inadequate to validate the limited rights assertions on technical data packages and to identify, select, and screen spare parts with limited rights assertions for competitive procurement. We consider these weaknesses to be material. See Part I for the internal controls reviewed and Part II for details on the weaknesses.

Potential Benefits of Audit. Benefits include improved procedures for the review, validation, and challenge of limited rights assertions on technical data. If supply centers perform breakout screening and challenges, if contractors remove limited rights restrictions, and if supply centers purchase spare parts on competitive contracts, the Government could avoid an estimated $900,000 in future contract costs on forecasted buys of $3.6 million for 61 weapon system spare parts. The improved internal control procedures should permit increased competitive contracting and reduced contract prices. We are not claiming monetary benefits because of the uncertainty associated with obtaining unlimited rights and the uncertainty associated with other elements needed for competitive procurements of individual spare parts. Appendix F summarizes the potential benefits resulting from the audit.

Summary of Recommendations. We recommend that the Director, Defense Logistics Agency, reinstate the Defense Logistics Agency Program for Validating Restrictive Markings on Technical Data and direct the supply centers to establish a performance measurement system for the validation program. We also recommend that the commanders of the Defense Logistics Agency supply centers include challenge procedures for limited rights assertions in internal management control reviews and risk assessments.

Management Comments. The Principal Deputy Director, Defense Logistics Agency, agreed to reinstate the Program for Validating Restrictive Markings on Technical Data and established a performance measurement system for the validation program. The Principal Deputy Director did not agree that the procedures for challenging limited rights assertions should be a part of Defense Logistics Agency Internal Management Control Program because the Defense Logistics Agency is not responsible for acquiring data and challenging the limited rights assertions. A discussion of the responsiveness of management comments is in Part II of this report. The complete text of management comments in Part IV.

Audit Response. We request the Principal Deputy Director, Defense Logistics Agency, to reconsider his position on including challenge procedures as part of the Defense Logistics Agency Internal Management Control Program. We also request that the Principal Deputy Director provide clarifying comments on implementation of the Defense Logistics Agency Program for Validating Restrictive Markings on Technical Data and establishment of the performance measurement system. We request the comments to be provided by July 18, 1994.

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This report was prepared by the Contract Management Directorate, Office of the Assistant Inspector General for Auditing, DoD.

Part I - Introduction

Background

Technical Data. Technical data are recorded information of a scientific or technical nature that relate to experimental, developmental, or engineering works. The data can be used to define an engineering or manufacturing process or to design, procure, produce, support, maintain, operate, repair, or overhaul material. Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, catalog-item identifications, and computer software documentation.

Technical Data Rights. All contracts that require technical data to be produced, furnished, acquired, or specifically used in meeting contract performance requirements must contain terms that delineate the respective rights and obligations of the Government and the contractor regarding the use, duplication, and disclosure of technical data. Three basic types of technical data rights are:

o unlimited rights that allow the Government to use, duplicate, release, or disclose technical data in any manner and for any purpose and to have or permit others to do so;

o limited rights that allow the Government to use, duplicate, or disclose technical data by or for the Government, but not outside the Government; and

o Government-purpose license rights that allow the Government to use, duplicate, or disclose technical data in any manner for Government purposes only, including competitive procurements, but not for commercial purposes.

Defense Federal Acquisition Regulation Supplement (DFARS) 252.227-7013(j), "Notice of Limitations on Government Rights," requires that contractors identify data that will have limited rights and, upon request, provide justification to the contracting officer for the assertion of limited rights.

Challenging Limited Rights Assertions. To use full and open competition in the procurement of spare parts, the Government must have a complete and adequate technical data package and must have unlimited rights to the technical data in the package.

DFARS Appendix E, "DoD Spare Parts Breakout Program," recognizes the need for unlimited rights to the technical data when considering spare parts for the breakout program. DFARS Appendix E requires the Government to challenge all limited rights that cannot be substantiated. Prechallenges and formal challenges to the limited rights assertions shall be performed in

accordance with DFARS 252.227-7037, "Validation of Restrictive Markings on Technical Data." The Government contracting officer may issue a prechallenge or formal challenge letter to a contractor or may choose an informal request procedure.

o A prechallenge review is a systematic evaluation of the propriety of a limited rights assertion. This review considers all information available to the Government and includes asking the contractor to support its limited rights claim.

o A formal challenge is written notification to a contractor that contests the use of a limited rights assertion on a specific document. The basis for the challenge is that the data are either not protectable or not developed at private expense.

o An informal request is an optional procedure that asks the contractor to voluntarily remove a limited rights legend. This request is sometimes called the "postage stamp persuasion" program. The informal request is not part of the prechallenge and formal challenge procedures and would precede the prechallenge and formal challenge procedures.

Defense Logistics Agency Supply Centers Management Role. Defense Logistics Agency (DLA) supply centers manage weapon system spare parts transferred to them from the Military Departments. DLA supply centers are responsible for purchasing spare parts at the best value for the Military Departments. Obtaining spare parts at the best value can be done by using the available technical data packages and competitive acquisition procedures. When management responsibility for a spare part is transferred to a DLA supply center, the Military Departments should also transfer the currently available technical data for the spare part and should ensure the data are complete.

Increase in Spare Parts Managed by Defense Logistics Agency Supply Centers. The Military Departments are transferring the responsibility for managing approximately one million spare parts to DLA as a result of Defense Management Report Decision 926, July 3, 1990. This transfer was started in FY 1991 to achieve management efficiencies and savings on personnel costs. The first phase of the transfer will end in FY 1994. DLA assumed responsibility for 471,000 spare parts as of FY 1993.

Increase in Spare Parts Not Competitively Procured. The DLA 1992 Competition Achievement Report stated that if trends continued, fewer than 10 percent of the new spare parts being transferred to DLA for procurement would be competitively procured. The report stated that the inadequate or lack of technical data is the most significant impediment to competition. Further, the report stated that lack of sufficient technical data was a recurring problem to DLA supply centers. The transfer of inadequate or no

technical data is expected to negatively impact DLA supply centers' efforts to increase competitive acquisitions. A DLA supply center also reported in its FY 1992 Competition Savings Report that the lack of reprocurement technical data was a drawback to increasing the competition rate.

Objectives

The primary audit objective was to evaluate the adequacy of reviews by DoD contracting activities of technical data packages with limited rights assertions. We also evaluated internal controls related to the review and challenge of limited rights assertions and management's implementation of the DoD Internal Management Control Program as it applied to our audit objective. This report addresses the results of the audit at DLA. A report on the results of the audit at the Military Departments will be issued at a later date.

Scope and Methodology

Weapon Systems Selection. We selected a weapon system from each Military Department and based the system selection on the production status and the estimated funding for the weapon system spare parts. We judgmentally selected three weapon systems: the Air Force F-15 Eagle aircraft, the Army AH-64 Apache helicopter, and the Navy F/A-18 Hornet aircraft. We selected the weapon systems from the 128 major acquisition programs that were part of the Selected Acquisition Reporting process.

Time Period Selection. We selected the three weapon systems to ensure that data for the audit would encompass FYs 1987 through 1993. This period was selected to have at least 3 years of contract data in which to determine any affect the 3-year validation rule[1] would have on the results of the audit. However, the 3-year validation rule did not affect the results of the audit.

Audit Locations. We conducted the audit at three of six DLA supply centers. The Defense Construction Supply Center (DCSC), Columbus, Ohio; the Defense Electronics Supply Center (DESC), Dayton, Ohio; and the Defense

[1]The DFARS states that reviews of the validity of any restriction on technical data asserted by the contractor should be done within 3 years of final payment on a contract or within 3 years of delivery of the technical data to the Government, whichever is later.

General Supply Center (DGSC), Richmond, Virginia, were selected based on the number of spare parts managed, dollar value of procurements, and dollar value of inventory.

We did not review weapon system spare parts at the remaining three DLA supply centers because the spare parts at the Defense Industrial Supply Center, Philadelphia, Pennsylvania, did not have a high dollar value and the Defense Fuel Supply Center, Cameron Station, Virginia, and the Defense Personnel Support Center, Philadelphia, Pennsylvania, did not acquire weapon system spare parts. Organizations visited or contacted are in Appendix G.

Data Reviewed. We evaluated the challenge procedures used to determine the validity of the limited rights asserted by contractors and the efforts taken by DLA to obtain data with unlimited rights.

Data Codes. To select spare parts to be included in the review, we used the acquisition method suffix codes used by DoD to code technical data. The code is a single digit alphabetic code assigned by a DoD activity that provides the contracting officer and other Government personnel with engineering, manufacturing, and technical information about the data. We selected spare parts with codes that would include data with limited rights assertions:

o "P" designates technical data with limited rights assertions. These data cannot be used to purchase the part from other than the current source.

o "H" designates technical data that are not sufficient, accurate, or legible and, therefore, cannot be used to purchase the part from other than the current source. The H code may include technical data with limited rights assertions.

o "O" designates technical data that did not have an assigned code when the part was entered into the inventory. The O code may include technical data with limited rights assertions.

Data Selected. For the three weapon systems, we selected 61 high dollar spare parts with technical data coded P, H, and O and meeting the DLA supply centers planned acquisition dollar criteria for breakout review. Appendix A summarizes the information for the 61 selected weapon system spare parts. DLA spent $7.4 million on purchases of the 61 spare parts. We determined whether DLA challenged the limited rights assertions and performed breakout screening for the spare parts. We also obtained a list of spare parts buys with technical data packages coded P for January 1987 through July 1993. The list of spare parts buys, valued at $109 million, included 3,036 different spare parts. We determined whether DLA supply centers screened the spare

parts as part of the DoD Spare Parts Breakout Program. Appendix B summarizes the spare parts screened by the DLA supply centers.

Computer-processed Data. The data on the 61 weapon system spare parts were obtained from three different computer systems maintained by each DLA supply center. The list of all spare parts buys for breakout were obtained from the DLA integrated data base. The data we selected from the data bases were adequate for the purposes of this audit.

Audit Standards. We performed this economy and efficiency audit from February through September 1993. The audit was made in accordance with auditing standards issued by the Comptroller General of the United States as implemented by the Inspector General, DoD. Accordingly, we included such tests of internal controls as were considered necessary.

Internal Controls

Internal Controls Reviewed. We evaluated procedures used by DLA supply center personnel to validate limited rights assertions claimed by contractors and subcontractors on spare parts as required by United States Code, title 10, section 2321, "Validation of Proprietary Data Restrictions," DFARS 252.227-7037, and DFARS Appendix E.

Internal Control Weaknesses Identified. Procedures used by contracting officers and breakout screening personnel were not adequate to validate the restrictive markings on technical data as required by DFARS 252.227-7037 and the "Users' Guide for the Management of Technical Data and Computer Software," April 1, 1987.[2] Specifically, the DLA supply centers did not make maximum use of informal requests and did not perform prechallenge and formal challenges of contractors' assertions of limited rights data. Also, breakout screening personnel did not adequately identify, select, and screen spare parts with limited rights assertions as required by DFARS Appendix E. DLA supply centers performed limited breakout screening for spare parts that were coded P and that met the dollar criteria for breakout review. The lack of challenging and breakout screening prevented the supply centers from reducing contract costs through the maximum use of competitive procurements.

[2]The "Users' Guide for the Management of Technical Data and Computer Software," is a joint guide for the Military Departments and DLA. The Air Force Materiel Command is the office of primary responsibility.

Two of the three supply centers, DCSC and DGSC, did not evaluate the data challenge procedures as part of their internal management control reviews and risk assessments. DESC reviewed the data challenge procedures as part of its internal management control reviews but did not identify a problem.

The DLA supply centers did not adequately implement the provisions of DoD Directive 5010.38, "DoD Internal Management Control Program." Had the requirements of the directive been correctly implemented, the internal control weaknesses uncovered by this audit would most probably have been discovered previously by management, and corrective actions would have been undertaken. In the future, DLA supply centers should implement more comprehensive internal management control review programs.

Recommendation 2., if implemented, will correct the weaknesses in the challenging procedures. We could not readily determine the potential monetary benefits to be realized by implementing the recommendations. The benefits to be realized would be based on the removal of restrictions on technical data and use of the technical data to purchase spare parts through full and open competition. However, we could not identify the specific spare parts that would be competed if the limited rights assertions were removed. The potential benefits are summarized in Appendix F. A copy of the report will be provided to the senior official in charge of internal controls for DLA.

Prior Audits and Other Reviews

Since 1988, 10 audit reports have addressed technical data issues. The reports are listed in Appendix C.

Part II - Finding and Recommendations

Reviews of Limited Rights on Technical Data

DLA supply centers did not adequately validate limited rights assertions on technical data for 1,303 spare parts. Because DLA deemphasized the need to challenge limited rights assertions, the supply centers did not make maximum use of informal requests, prechallenges, and formal challenges and did not perform breakout screening on spare parts that had technical data with limited rights assertions. As a result, between January 1987 and July 1993, 1,303 spare parts, valued at $84 million, were purchased on contracts awarded without full and open competition, without challenges being issued, and without full breakout screening being performed. If challenges and breakout screening are performed, if limited rights assertions are removed, and if the spare parts are purchased on competitive contracts, the Government can potentially avoid about $900,000 in future contract costs on forecasted buys of $3.6 million for 61 spare parts for the three weapon systems we reviewed.

Substantiation of Limited Rights Assertions

The DLA supply centers did not make maximum use of informal requests and did not issue prechallenges and formal challenges on contractors' limited rights assertions. The DLA supply centers had not used informal requests, prechallenges, and formal challenges for any of the 61 spare parts for the three weapon systems selected for review.

Use of Informal Requests. DLA supply centers could reduce the amount of technical data with limited rights by greater use of the postage-stamp persuasion program. During FYs 1987 and 1993, DCSC, DESC, and DGSC sent 340, 3,228, and 218 informal requests, respectively.

Success Rate of Informal Requests. The use of informal requests was successful in reducing the amount of technical data with limited rights assertions. According to Headquarters, DLA, and the three supply centers, of the 3,786 informal requests issued, 1,376 (36 percent) resulted in the removal of limited rights assertions. The following table shows the success rate at the individual supply centers.

Informal Requests Issued by DLA Supply Centers

Supply Center	Requests Issued	Responses		
		Successful	Unsuccessful	None
DCSC	340	158	127	55
DESC	3,228	1,183	925	1,120
DGSC	218	35	80	103
Total	3,786	1,376	1,132	1,278
Percent		36	30	34

DLA did not document why the limited rights assertions were removed. The contractor could have agreed to remove the assertions because the technical data had been incorrectly marked or because the contractor was no longer interested in controlling the release of the technical data. In either case, the Government will be able to consider the spare parts for competitive procurement.

Informal requests should be issued on all technical data with limited rights assertions. An informal request is an inexpensive and quick way of asking the contractor to voluntarily relinquish restrictive rights. The use of informal requests can and has resulted in the removal of limited rights assertions.

We could not determine how many informal requests could have been issued because there is no way of knowing the total number of parts with limited rights technical data coded P, H, and O. However, we were able to determine that DCSC and DGSC could have issued at least twice as many, about 561, additional informal requests for spare parts purchased between January 1992 and July 1993 that had technical data coded P. Data were not available to make a similar determination at DESC.

Followup on Unsuccessful Informal Requests. Of the 3,786 informal requests issued by the DLA supply centers, 2,410 (64 percent) did not result in the removal of limited rights assertions. The supply centers did not follow up on any of the 1,132 responses refusing to remove limited rights assertions or any of the 1,278 nonresponses to the informal requests.

The DLA supply centers should follow up with a prechallenge letter on all refusals to remove limited rights and on nonresponses to requests when the Government does not have substantiating evidence to validate the limited rights assertions. The prechallenge letter should request the contractor to furnish evidence to show that the continued restriction of the Government's use of the data is justified.

Use of Prechallenges and Formal Challenges. A prechallenge letter should be issued before a formal challenge letter is sent. DESC and DGSC did not issue any prechallenge letters that requested the contractor to provide documentation

supporting the limited rights assertion. DCSC issued one prechallenge letter, which did not result in the removal of the limited rights assertion. DLA supply centers did not initiate any formal challenge letters.

During January 1987 through July 1993, DLA awarded 3,036 different spare parts contracts, valued at about $109.2 million, without full and open competition. The contracts had technical data coded P and were awarded without any prechallenge or formal challenge letters being issued.

Defense Logistics Agency Guidance. Headquarters, DLA, on July 8, 1987, initiated the DLA Program for Validating Restrictive Markings on Technical Data (the Program). The Program directed that the DLA supply centers issue informal requests or prechallenges as appropriate. Also, Headquarters, DLA, required the DLA supply centers to report on a quarterly basis the results of implementing the Program. However, DLA supply centers did not report the results of the Program, and Headquarters, DLA, did not follow up on the reasons why the supply centers were not reporting.

Headquarters, DLA, on June 12, 1989, discontinued the emphasis on the Program. Headquarters, DLA, instructed the supply centers to take whatever action the supply centers felt was necessary to validate limited rights assertions on technical data and to report on an annual basis. Before discontinuing emphasis on challenging limited rights assertions, Headquarters, DLA, did not analyze the effect on performance at the DLA supply centers or whether productivity measures showed that the Program was not useful.

During an August 1992 technical data managers' meeting, Headquarters, DLA, requested the supply centers to resume submitting quarterly reports showing the results of the efforts toward validating technical data rights. As of September 1993, DESC was the only supply center that furnished the quarterly reports.

During a September 1993 technical data managers' meeting, Headquarters, DLA, reemphasized the program and stated that guidelines would be forthcoming. DLA took this action after we informed them of the results of our audit.

Reasons for Not Challenging Limited Rights Assertions. Personnel from the DLA supply centers gave the following reasons for not pursuing removal of limited rights:

o Challenging contractor limited rights assertions was not considered a high priority by the DLA supply centers.

o Challenging the limited rights assertions on technical data was not worthwhile if the technical data package was not otherwise complete and accurate.

o The Military Departments did not and could not provide the necessary contractual information to allow DLA supply centers to form a basis for issuing challenge letters. Missing information included from what contract the spare part originated, who paid for the development of the spare part, what technical data were bought, and what technical data were delivered. Without a basis for challenging, DLA supply center personnel believed that only the originating contracting officer could issue a prechallenge letter to validate the limited rights assertions. However, DFARS 252.227-7037 clauses (c) and (d) do not restrict the issuance of a prechallenge request for information or a challenge to limited rights assertions to only the originating contracting officer.

General Accounting Office Report No. NSIAD-91-53, "Defense Procurement: Not Providing Technical Data May Limit Defense Logistics Agency Competition," January 1991, recommended that DoD require the Military Departments to ensure the completeness of the technical data transferred to DLA supply centers. DoD concurred with the recommendation. As a result, DLA negotiated memorandums of agreement with the Headquarters of the Army, the Navy, and the Air Force to govern the transfer of technical data from the Military Departments to DLA.

Breakout Screening

During January 1987 through July 1993, DLA supply centers purchased 1,303 spare parts out of a possible 1,496 spare parts without screening the individual spare parts for adequacy of the technical data packages and the limited rights assertion. The 1,303 unscreened spare parts met the individual DLA supply centers criteria for breakout review.[3] The spare parts were purchased for $84 million. See Appendix B for the individual supply center totals of spare parts buys and breakout screening for January 1987 through July 1993. Only 1 of the 61 weapon system spare parts selected for review was screened for breakout.

[3]The DLA supply centers established the annual buy thresholds for spare parts above which breakout is considered: DCSC reviewed spare parts with an estimated buy of more than $10,000 in FYs 1987 through 1993, DESC reviewed spare parts with an estimated buy of more than $10,000 in FYs 1987 through 1992 and more than $5,000 for buys in FY 1993, and DGSC reviewed spare parts with an estimated buy of more than $10,000 in FYs 1987 through 1989 and more than $5,000 in FYs 1990 through 1993.

Screening Procedures. DFARS Appendix E establishes limited and full screen procedures for spare parts identified and selected for screening. Data evaluation is one of the six phases of the full screen breakout process. The data evaluation phase is the most crucial stage of the whole review process because it involves the determination of the adequacy of the technical data package and the Government's rights to use the technical data for acquisition purposes. The data evaluation phase includes but is not limited to:

o a brief but intensive analysis of available data and documents regarding both technical matters and data rights leading to a decision whether to proceed with screening; and

o work necessary to produce an adequate technical data package, including research of contract provisions, engineering work on technical data and drawings, and requests to contractors for additional data.

Breakout Screening Rationale. Personnel from the DLA supply centers stated that they try to review those spare parts that have the highest potential for breakout. Personnel assign resources and give priority to those spare parts with the greatest expected return considering the spare part's annual buy value and the likelihood of successful breakout. If two spare parts were otherwise equal, the spare part with unlimited rights would likely be selected for breakout over the part with limited rights. Those spare parts with unlimited rights would be selected for breakout because challenging would not be required. Further, DLA supply center personnel accepted without challenge the code P assigned to the spare parts by the Military Departments even though the DLA supply center personnel never substantiated the validity of the code P or had data to support the code P.

Supply center personnel stated that they are unable to review all spare parts buys because of a lack of resources. However, despite the lack of resources, DESC and DGSC reduced their thresholds for breakout screening from $10,000 to $5,000. We were not able to determine why DESC reduced its threshold. DGSC was told by Headquarters, DLA, to reduce its threshold for breakout screening. However, DGSC was not able to provide any written documentation from Headquarters, DLA, on why the dollar threshold was changed. DGSC reduced its threshold for screening from FYs 1990 through 1993. Reducing the dollar threshold increased the DLA supply center work load for breakout screening personnel.

Action to Improve. Breakout improvement efforts should continue through the life cycle of a spare part to improve its breakout status or until such time as the spare part can be competitively procured. The assignment of code P to a spare part should never be considered fixed. A prior technical constraint may be overcome by new technology, and a contractor's limited rights assertions may become less important with time. The supply center personnel should not

exclude an item from breakout consideration because of limited rights assertions without first making an effort either to have the assertions removed or to obtain substantiation for the assertions from the cognizant Military Department and the contractor.

Internal Controls

The three DLA supply centers did not consider the challenge of technical data rights as an assessable internal control unit within the internal management control reviews. The DCSC and DGSC did not evaluate the challenge procedures in their internal management control reviews and risk assessments. DESC, however, included technical data challenges as an element in its internal management control reviews in 1990 but did not identify a problem even though DESC had not requested information supporting any restricted rights assertions since 1987. DESC, in its FYs 1991 and 1992 risk assessment reports, assigned a low risk rating for the technical data management division. The supply center personnel stated that they did not have control over what technical data the Military Departments transferred to them; therefore, they did not consider the failure to challenge the technical data as an internal control weakness.

We believe that including the challenge procedures as a part of the DLA Internal Management Control Program could increase the number of spare parts that are competitively procured. Management should include problems associated with challenging limited rights on technical data in the annual statement of assurance to elevate and focus attention on the problem. Such attention and focus can result in actions to solve the problems. The attention and focus is especially needed because the number of spare parts coded P at the DLA supply centers increased from 7,342 in FY 1989 to 14,459 as of March 1993 (Appendix D). As additional spare parts are transferred from the Military Departments, limited rights data could increase accordingly.

Potential Monetary Benefits

We could not determine the potential monetary benefits of challenging contractor assertions of limited technical data rights. Removing the limited rights assertions and screening for breakout will not guarantee that the parts will be competitively procured. Other factors must be considered to determine whether a part can be competed. However, if the limited rights assertions are not removed and breakout screening is not performed, competition can not be

considered even if all the other factors for competition are present. Although we could not confirm that competition was possible or that it would always produce a lower price, the potential for reduced prices exists.

If the 61 weapon system spare parts procurements we reviewed at the DLA supply centers were competed, we calculate that the Government could avoid about $900,000 in future contract costs. This calculation is based on a 25 percent savings factor applied to the $3.6 million in projected future buys for these spare parts. DFARS Appendix E states that a savings factor of 25 percent will be used to estimate breakout savings if another factor based on local conditions and experience is not available. Appendix E of this report summarizes by supply center the estimated savings for the 61 weapon system spare parts.

Between January 1987 and July 1993, DLA purchased 1,303 separate spare parts for $84 million without issuing challenges to the contractors and without performing breakout screening. The 1,303 spare parts may have been considered for competitive procurements if DLA had successfully challenged the limited rights assertions and performed full breakout screening. The Government could have avoided an estimated $21 million in contract costs by competitively procuring these spare parts. The $21 million potential savings is based on multiplying $84 million by the standard savings factor of 25 percent. The $84 million represents the contract value of purchases for the spare parts awarded without challenges being issued and breakout screening being performed.

Conclusion

DoD needs technical data packages with sufficient rights to allow the Government to compete spare parts procurement and obtain reasonable prices. On the other hand, major contractors, specialty subcontractors, and small businesses that have invested significant funds in developing new products for DoD as well as for the commercial market want to protect their technical data to recover their investment and maintain their competitive position in the domestic and international market. The companies that generally perform little development work but that have proven to be efficient manufacturers of spare parts need technical data to win contracts for the manufacture of spare parts.

We believe that the growing number of spare parts that cannot be acquired through competitive procedures at DLA and the natural conflict in the needs for technical data makes it imperative that DoD procurement personnel verify that limited rights assertions are adequately supported and that technical data problems receive priority attention at the highest levels of DoD.

DLA supply centers should develop a performance measurement system that will, at a minimum, provide information about the efficiency and effectiveness of challenging and breakout screening efforts. The system should measure the resources used to challenge contractor assertions of rights to technical data relative to the results of the challenge. The system should include thresholds for issuing prechallenges and formal challenges and for performing breakout screening. In our opinion, a performance measurement system would enhance the use of limited personnel resources and raise performance.

Recommendations, Management Comments, and Audit Response

1. We recommend that the Director, Defense Logistics Agency:

a. Reinstate the Defense Logistics Agency Program for Validating Restrictive Markings on Technical Data that requires the supply centers to issue informal requests and conduct prechallenges and formal challenges on technical data with restrictive markings.

Management Comments. DLA partially concurred, stating that DLA would reinstate the policy guidance for validating restrictive markings on technical data and would issue challenges when reasonable grounds existed to question the validation of the restrictions. However, DLA stated that the contracting officer who procured the data, or the originating contracting officer, is the only one who can issue a prechallenge or formal challenge. DLA also stated that, without having a copy of the contract on which the data were procured, it is unlikely that DLA personnel could identify data to the right contract. Consequently, DLA believed that DLA was not in a position to formally challenge restrictive markings.

Audit Response. We consider the DLA comments to be partially responsive to the intent of the recommendation to reinstate the policy guidance for validating restrictive markings on technical data. We do not agree that only the originating contracting officer can issue a prechallenge or formal challenge. DFARS 227.403-73(b)(2) states that a contracting officer should request advice concerning prechallenge requests for information from the cognizant Government activity having interest in the validity of the markings. In addition,

DFARS 252.227-7073(d) indicates that challenges can be instigated by other than the originating contracting officer. For example, the DFARS gives guidance to contractors or subcontractors who receive challenges to the same restrictive markings from more than one Government contracting officer. The DFARS states that the challenges should be coordinated by the first contracting officer who made the challenge. It does not say that only the original contracting officer would make the challenge or coordinate the challenges.

We are also aware of DLA's inability to obtain contract data. This problem will be addressed in a future report on the validation of technical data with limited rights in the Military Departments. However, in numerous instances, the DLA supply centers were able to obtain contract data or at least know the name of the contractor or subcontractor that asserted limitations to the data. In these instances, we believe that, at a minimum, DLA should make maximum use of informal requests and issue prechallenge requests for information. The information received as a result of the informal or prechallenge requests would form the reasonable grounds needed to issue a formal request.

We request that DLA clarify that DLA will not unnecessarily restrict the reinstated Program for Validating Restrictive Markings on Technical Data because of the incorrect assumption that the DLA supply centers cannot make prechallenge or formal challenges. Also, we request that DLA specify the effective date of the reinstatement in its comments on the final report.

b. Establish a supply center performance measurement system for the Program for Validating Restrictive Markings on Technical Data and the DoD Spare Parts Breakout Program to identify measures to gauge performance input and outcomes and to establish and monitor targets and benchmarks for performance measures.

Management Comments. DLA concurred and stated that DLA had already established a performance measurement system as recommended.

Audit Response. We consider the DLA comments responsive. We request that DLA provide the date the performance measurement system was established and the key elements of the system in its comments on the final report.

2. We recommend that the commanders of the Defense Construction Supply Center, the Defense Electronics Supply Center, and the Defense General Supply Center include challenging procedures for limited rights assertions in risk assessments and internal management control reviews.

Management Comments. DLA nonconcurred, stating that, during internal management reviews, the technical data areas have not been rated as high risk because the supply centers were following the rules prescribed in the DFARS.

Audit Response. We believe that DLA contracting offices and the originating contracting offices should be working together to validate the restrictive markings. By including the validation of restrictive markings and challenging procedures as part of the DLA Internal Management Control Program, management can elevate and focus attention on the problems such as getting contract data from Military Department contracting officers. High-level management attention and focus can result in actions to solve problems and can result in increasing the number of spare parts that are competitively awarded. We request DLA to reconsider its comments on the recommendation in its comments on the final report.

Part III - Additional Information

Appendix A. Weapon System Spare Parts Selection

The tables below show the 61 weapon system spare parts (12 at DCSC, 34 at DESC, and 15 DGSC) reviewed for each weapon system at the DLA supply centers. Each table is followed by a brief narrative describing the selection process.

Table A-1. Weapon System Spare Parts Reviewed at DCSC

Weapon System	P	H	Total
F-15 Aircraft	0	5	5
AH-64 Helicopter	1	2	3
F/A-18 Aircraft	1	3	4
Total	2	10	12

We reviewed 12 weapon system spare parts from the DCSC list of spare parts coded P and H for the F-15, AH-64, and the F/A-18. No parts were coded O for the three weapon systems at DCSC. We judgmentally selected a sample of high dollar spare parts coded P and H from a list of spare parts meeting the DCSC $10,000 criterion for breakout screening. One part coded H was screened for breakout. None of the remaining parts were screened for breakout and no informal requests, prechallenges, or formal challenges were issued for these spare parts. DLA spent $4,185,159 for these spare parts since they were transferred from the Military Departments.

Table A-2. Weapon System Spare Parts Reviewed at DESC

Weapon System	P	H	O	Total
F-15 Aircraft	3	3	5	11
AH-64 Helicopter	0	1	0	1
F/A-18 Aircraft	6	16	0	22
Total	9	20	5	34

We reviewed 34 weapon system spare parts from the DESC list of spare parts coded P, H, and O for the F-15, AH-64, and the F/A-18. We selected all the parts coded P for the weapon systems. We judgmentally selected a sample of high dollar spare parts coded H and O from a list of spare parts meeting the DESC $10,000 criterion for breakout screening. No informal requests, prechallenges, or formal challenges were issued for these 34 spare parts. Only three spare parts were screened for breakout. DLA spent $259,065 for these spare parts since they were transferred from the Military Departments.

Table A-3. Weapon System Spare Parts Reviewed at DGSC

Weapon System	P	Total
F-15 Aircraft	0	0
AH-64 Helicopter	2	2
F/A-18 Aircraft	13	13
Total	15	15

We reviewed 15 weapon system spare parts from the DGSC list of spare parts coded P for the F-15, AH-64, and the F/A-18. The spare parts met DGSC dollar criteria for breakout screening and were taken from a universe of 93 parts coded P. None of the spare parts were screened for breakout and no informal requests, prechallenges, or formal challenges were issued. DLA spent $2,952,777 for these spare parts since they were transferred from the Military Departments.

Appendix B. Spare Parts Buys and Breakout Screening

Organization Visited	Number of Different Spare Parts Purchased[1]	Value of the Spare Parts	Number of Spare Parts Meeting Breakout Criterion[2]	Spare Parts Not Reviewed[3]	Value of Spare Parts Not Reviewed
DCSC	567	$ 29,744,396	276	250	$24,344,268
DESC	1,233	42,779,389	520	383	28,384,365
DGSC	1,236	36,684,956	700	670	31,292,230
Total	3,036	$109,208,741	1,496	1,303	$84,020,863

[1]Represents the number of different spare parts purchased. We were unable to determine the quantity of each spare part purchased.
[2]The supply centers established the annual buy thresholds for spare parts above which breakout was considered:

- o DCSC reviewed items with an estimated buy of more than $10,000.
- o DESC reviewed items with an estimated buy of more than $10,000 in FYs 1987 through 1992 and more than $5,000 for buys in FY 1993.
- o DGSC reviewed items with an estimated buy of more than $10,000 in FYs 1987 through 1989 and more than $5,000 in FYs 1990 through 1993.

[3]The 1,303 spare parts not reviewed include the 26 spare parts coded P from the 61 weapon system spare parts selection.

Appendix C. Summary of Prior Audits and Other Reviews

General Accounting Office

Report No. NSIAD-92-23 (OSD Case No. 8891), "Defense Procurement: Improvement Needed in Technical Data Management," February 1992. The report stated that the Military Departments and DLA repositories could neither evaluate timeliness nor determine the status of requests they had received. The report recommended that Military Department Secretaries and the Director of DLA require that each Military Department and DLA technical data repository managers ensure compliance with the appropriate internal control documentation necessary to measure how quickly technical data requests are filled and permit repository managers to determine the status of in-process requests. The report also stated that data quality, such as illegible drawings, obsolete data, and inaccurate or incomplete information, continued to inhibit contractors from competing for Government work or completing the work after a contract was awarded. The report also recommended that Military Department Secretaries and the Director of DLA reinforce their guidance to the organizations and entities charged with analyzing and accepting technical data for DoD to ensure that technical data accepted during the acquisition process are as current, accurate, and complete as possible. DoD concurred with the first recommendation and stated that the computer-aided acquisition and logistics support initiative will improve the capability of its engineering repositories to provide current and complete technical data in a timely manner to both Government and industry users. For the second recommendation, repository managers stated that data quality problems originate during the acquisition process and that they cannot fix these problems. Repositories are mainly responsible for receiving, storing, and distributing technical data.

Report No. NSIAD-91-313 (OSD Case No. 8813), "Defense Procurement: Acquiring Technical Data for Spare Parts Reprocurement," September 1991. The report stated that, for 11 of the 14 systems reviewed, program managers had purchased the technical data for their systems. For the remaining three systems, the program managers were either in the process of buying the technical data (two systems) or did not anticipate any further reprocurements (one system). The report also stated that, because the spare parts procurement process is so complex, assessing DoD progress toward increased spare parts competition is difficult. The report did not contain any recommendations. DoD officials agreed with the facts presented in the report.

Report No. NSIAD-91-53 (OSD Case No. 8531), "Defense Procurement: Not Providing Technical Data May Limit Defense Logistics Agency Competition," January 1991. The report stated that the DGSC did not identify the nature and extent of technical data available to the Government on spare parts being solicited. The report recommended that the *Commerce Business Daily* notices for part-numbered solicitations at DGSC more clearly identify the nature and extent of technical data available to the Government and the extent to which potential offerers may appropriately have access to such data. The report also stated that the DGSC procurement officials did not always receive access to all technical data reported to be available on spare parts when purchasing responsibility for the spare parts was transferred from the Military Departments to the DGSC. As a result, opportunities for competition are being missed. The report recommended that DoD require the Military Departments to ensure the completeness of the technical data transferred to DLA supply centers. DoD concurred with all the recommendations in the report. DLA negotiated memorandums of agreement with the Headquarters of the Army, the Navy, and the Air Force to govern the transfer of technical data from the Military Departments to DLA.

Inspector General, DoD

Report No. 94-071, "Transfer of the Management of Consumable Items to the Defense Logistics Agency," March 31, 1994. The report stated that the Military Departments did not transfer essential logistics management data in a timely manner, or when transferred, the receiving DLA inventory managers did not always use the data. As a result, to the extent that the conditions occur and DLA inventory managers do not correct them, weapon systems availability could be adversely affected. The report recommended that DLA establish a tracking system to initiate timely follow-up actions when the essential weapon system data have not been submitted and to reconcile the number of technical data packages that are overdue from the Military Departments. DLA concurred with the recommendations. The report also recommended that the Military Departments and DLA resolve the issues preventing the transfer and support of program requirements for items transferred under the Consumable Items Transfer Program. The Navy, the Air Force, and DLA concurred with the recommendation. The Army partially concurred, but proposed actions that were responsive to the recommendation.

Report No. 92-072, "Quick-Reaction Report on Acquiring Competitive Technical Data Packages for Engine Spare Parts Used on the UH-60 Black Hawk Helicopter," April 6, 1992. The report stated that the Army Aviation Systems Command did not take advantage of a contractual provision that would enable it to obtain, at no additional cost, competitive technical data packages for

54 spare parts classified as "high consumption dollar spare parts." The report stated that the command could have potentially avoided $1.9 million in procurement costs for 27 of the 54 spare parts if it had obtained the technical data packages. The report recommended obtaining the competitive technical data packages for the 27 spare parts and constraining future sole-source procurements for the 27 spare parts that did not have technical data packages to the quantities required to fulfill immediate operational needs until the technical data packages were obtained and competition established. The Army Contracting Support Agency concurred with the recommendations. However, the agency disagreed with the estimated potential future cost benefits of $4.7 million because simply having a technical data package does not guarantee that spare parts can be competed. Monetary benefits were not realized because only 1 of 27 parts were procured.

Army Audit Agency

Report SR 92-207, "Technical Data Packages," August 10, 1992. The report stated that the Army did not adequately plan for the acquisition of technical data packages, did not actively pursue Government purpose license rights to technical data, and did not effectively use reverse engineering to develop technical data packages needed to increase competition and reduce costs. The report also stated that Army procedures for identifying open contracts and planned awards for parts affected by changes to technical data were not adequate and that the Army needed to better manage the implementation of its automated data repositories. The report recommended that the Assistant Secretary of the Army (Research, Development, and Acquisition) develop guidance on materiel developers' planning for technical data acquisitions and participate in the Government - Industry Committee on rights in technical data. The office of the Assistant Secretary of the Army (Research, Development, and Acquisition) concurred with both recommendations. The report also recommended that Army Materiel Command establish a permanent Army-wide reverse engineering program and develop plans and milestones to implement a standard automated system identifying open contracts and planned awards affected by the engineering changes to spare parts in technical data packages throughout the command. The Army Materiel Command agreed with both recommendations.

Report SR 92-200, "Technical Data Packages: Fort Monmouth, New Jersey," January 7, 1992. The report stated that the Communication-Electronics Command did not adequately use technical data to increase competition. The acquisition plans for systems were budgeted for about $3.4 billion in future years; however, the plans did not explain clearly how technical data would be used for competition or address restrictions on data rights. The report recommended that the program executive officers develop detailed instructions

for project managers explaining how to address competition in acquisition plans. The office of the program executive officer for Communications Systems did not concur with the recommendation. The office believed that its current policy was adequate and the recommendation could go beyond the requirements of the Federal Acquisition Regulation. During the resolution process, the Army agreed to include requirements and procedures needed to buy technical data and technical data rights when updating Army regulations to implement DoD acquisition directives. The Communications-Electronics Command instituted a formal coordination policy on acquisition plans and developed additional internal guidance on review responsibilities.

Report SR 92-200, "Technical Data Packages: U.S. Army Missile Command Huntsville, Alabama," December 2, 1991. The report stated that a review of acquisition plans and strategies for three major weapon systems showed that system developers did not prepare cost-benefit analyses to support decisions to acquire technical data packages and did not identify the resources needed to acquire and maintain technical data. The report recommended that system developers, when planning for future acquisitions of technical data, perform cost-benefit analyses supporting technical data acquisition and specify in financial plans the resources needed to acquire technical data and maintain it. The program executive offices partially concurred with these recommendations and proposed acceptable alternative actions to satisfy the recommendations.

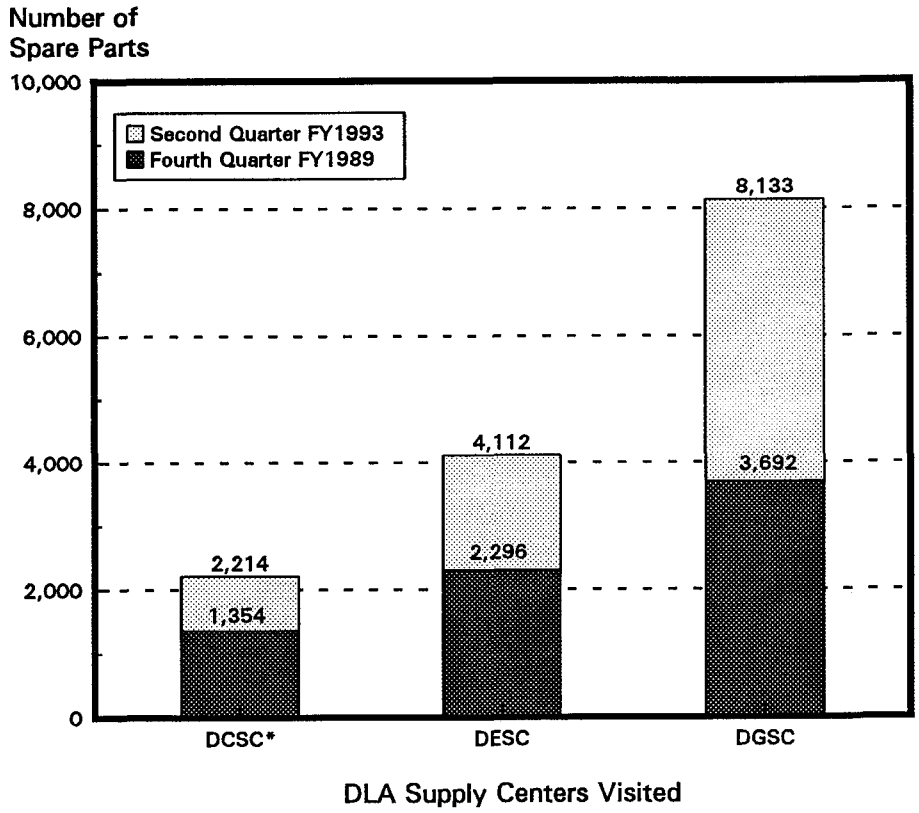
Report EC 91-205, "Technical Data Package: U.S. Army Tank-Automotive Command, Warren, Michigan," August 12, 1991. The report stated that materiel developers did not always adequately address plans to buy technical data or include required information in acquisition plans to justify the type of technical data the Army was buying. The report recommended requiring acquisition planning for technical data that adequately addresses future requirements for vehicles, components, and repair parts; extent of restricted data and plans for obtaining rights to the data; cost and benefit analyses; resource requirements; and the consequences of not buying competitive technical data. The program executive officer concurred with the recommendations.

Air Force Audit Agency

Project No. 0046412, "Air Force Management of Rights in Technical Data," September 20, 1990. The report stated that data managers and contracting officers were not formally challenging and resolving whether the contractor's limited rights claims were valid. The report recommended that Air Force Regulation 800-34, "Engineering Data Acquisition," be revised to establish time limits for resolving contractor data rights claims. The report also recommended

that contracting officers formally challenge contractor data rights claims when the contractor failed to respond to data managers informal inquiries. The Air Force concurred with the recommendations. The replacement regulation to Federal Acquisition Regulation 800-34 will require data managers to request a formal contracting officer challenge to the data rights claims when informal attempts to resolve the claims are unsuccessful. Contracting officers should unilaterally determine whether the contractor's data rights claims are valid if the contractor did not submit substantiating documentation to support the claims within a specified period. The Federal Acquisition Regulation technical data policy is currently being rewritten. The proposed revision will allow the contracting officer to make a determination on the validity of the data rights claim if the contractor fails to respond or furnish sufficient information explaining the contractor's limited rights assertions.

Appendix D. Increase in Number of Spare Parts With Limited Rights Assertions



*For DCSC, we are unable to get the number of spare parts coded P for the first or second quarter of FY 1993. This figure is for the fourth quarter of FY 1992.

Appendix E. Potential Benefits of Unlimited Technical Data Rights

DLA Supply Centers Visited	Weapon System Forecasted Buys F-15 Aircraft	AH-64 Helicopter	F/A-18 Aircraft	Total	Potential Benefits[1]
DCSC[2]	$57,672	0	$ 299,837	$ 357,509	$ 89,377
DESC[2]	9,097	0	489,380	498,477	124,619
DGSC[3]	0	$2,458,749	328,148	2,786,897	696,724
Total	$66,769	$2,458,749	$1,117,365	$3,642,883	$910,720

[1]DFARS Appendix E states that a savings factor of 25 percent will be used to estimate breakout savings if another factor based on local conditions and experience is not available.
[2]DCSC and DESC forecasted the future buys for the life of the spare parts.
[3]DGSC forecasted the future buys for the spare parts for FYs 1994, 1995, and 1996.

Appendix F. Summary of Potential Benefits Resulting From Audit

Recommendation Reference	Description of Benefit	Amount and/or Type of Benefit
1.a.	Economy and Efficiency. Increases the possibility that the contractor will relinquish limited rights assertions or provide documentation substantiating the assertion.	Undeterminable.*
1.b.	Program Results. Increases performance by allowing the comparison of actual performance against expectations and establishes targets against which to measure performance.	Undeterminable.*
2.	Internal Controls. Reduces the risk of contractors unjustifiably asserting limited rights on technical data.	Nonmonetary.

*We could not readily determine the potential monetary benefits to be realized by implementing the recommendations. The benefits to be realized would be based on the removal of restrictions on technical data and from using that technical data to acquire spare parts through use of full and open competition procedures.

Appendix G. Organizations Visited or Contacted

Office of the Secretary of Defense

Under Secretary of Defense for Acquisition and Technology, Washington, DC
Director of Defense Procurement, Washington, DC

Defense Organizations

Defense Logistics Agency, Alexandria, VA
- Defense Construction Supply Center, Columbus, OH
- Defense Electronics Supply Center, Dayton, OH
- Defense Fuel Supply Center, Alexandria, VA
- Defense General Supply Center, Richmond, VA
- Defense Industrial Supply Center, Philadelphia, PA
- Defense Personnel Support Center, Philadelphia, PA

Appendix H. Report Distribution

Office of the Secretary of Defense

Under Secretary of Defense for Acquisition and Technology
Comptroller of the Department of Defense
Director, Defense Procurement
Assistant to the Secretary of Defense (Public Affairs)
Deputy Under Secretary of Defense (Logistics)

Department of the Army

Secretary of the Army
Auditor General, Department of the Army

Department of the Navy

Secretary of the Navy
Assistant Secretary of the Navy (Financial Management)
Auditor General, Naval Audit Service

Department of the Air Force

Secretary of the Air Force
Assistant Secretary of the Air Force (Financial Management and Comptroller)
Auditor General, Air Force Audit Agency

Defense Organizations

Director, Defense Contract Audit Agency
Director, Defense Logistics Agency
- Commander, Defense Construction Supply Center
- Commander, Defense Electronics Supply Center
- Commander, Defense General Supply Center
- Commander, Defense Industrial Supply Center
- Commander, Defense Fuel Supply Center

Defense Organizations (cont'd)

Commander, Defense Personnel Support Center
Inspector General, Defense Intelligence Agency
Inspector General, National Security Agency
Director, Defense Logistics Studies Information Agency

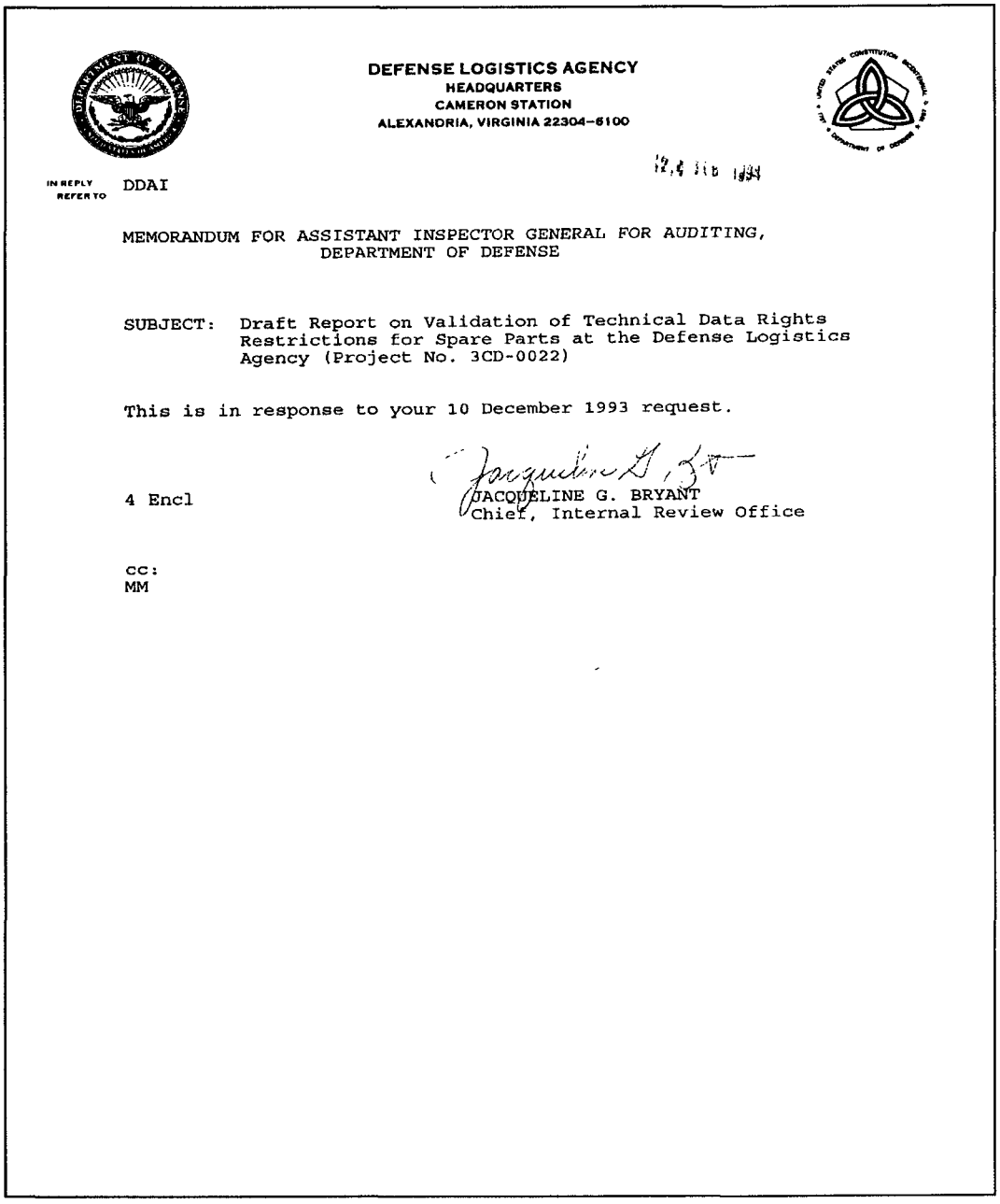
Non-Defense Federal Organizations

Office of Management and Budget
Technical Information Center, National Security and International Affairs Division, General Accounting Office

Chairman and Ranking Minority Member of Each of the Following Congressional Committees and Subcommittees:
- Senate Committee on Appropriations
- Senate Subcommittee on Defense, Committee on Appropriations
- Senate Committee on Armed Services
- Senate Committee on Governmental Affairs
- House Committee on Appropriations
- House Subcommittee on Defense, Committee on Appropriations
- House Committee on Armed Services
- House Committee on Government Operations
- House Subcommittee on Legislation and National Security, Committee on Government Operations

Part IV - Management Comments

Defense Logistics Agency Comments



DEFENSE LOGISTICS AGENCY
HEADQUARTERS
CAMERON STATION
ALEXANDRIA, VIRGINIA 22304-6100

IN REPLY REFER TO DDAI

12 FEB 1994

MEMORANDUM FOR ASSISTANT INSPECTOR GENERAL FOR AUDITING, DEPARTMENT OF DEFENSE

SUBJECT: Draft Report on Validation of Technical Data Rights Restrictions for Spare Parts at the Defense Logistics Agency (Project No. 3CD-0022)

This is in response to your 10 December 1993 request.

4 Encl

JACQUELINE G. BRYANT
Chief, Internal Review Office

cc:
MM

TYPE OF REPORT: AUDIT DATE OF POSITION: 22 FEB 1994

PURPOSE OF INPUT: INITIAL POSITION

AUDIT TITLE AND NO: Draft Report on Validation of Technical Data Rights Restrictions for Spare Parts at the Defense Logistics Agency (Project No. 3CD-0022)

FINDING: REVIEWS OF LIMITED RIGHTS ON TECHNICAL DATA. DLA supply centers did not adequately validate limited rights assertions on technical data for 1,303 spare parts. Because DLA deemphasized the need to challenge limited rights assertions, the supply centers did not make maximum use of informal requests, prechallenges, and formal challenges and did not perform breakout screening on spare parts that had technical data with limited rights assertions. As a result, between January 1987 and July 1993, 1,303 spare parts valued at $84 million were purchased on contracts awarded without full and open competition, without challenges being issued, and without full breakout screening being performed. If challenges and breakout screening are performed, if limited rights assertions removed, and if the spare parts are purchased on competitive contracts, the Government can potentially avoid about $900,000 in future contract costs on forecasted buys of $3.6 million for 61 spare parts for the three weapon systems we reviewed.

DLA COMMENTS: Partial Concurrence. The findings are based on the premise that DLA has the legal right to perform prechallenges and formal challenges. DLA is not buying the technical data. DLA is only buying the spare parts. The DoD IG has based this finding on the language of the clause at DFARS 252.227-7037 instead of the prescription for use of the clause at DFARS 227.403-73(a). That prescription dictates that the clause at 252.227-7037 "shall be included in all solicitations and contracts which require the delivery of technical data." This clearly excludes contracts issued by DLA. The Military Services procuring the weapon systems and associated data have the authority to challenge the contractor before acceptance of the technical data deliverable under the Military Services' contracts but not later than three years after final payment or three years after the delivery of the technical data to the Government, whichever is later. DLA does not normally receive the data for seven years or more and the contract may no longer exist since contract files are retired and eventually destroyed. Without having a copy of the contract on which data has been procured, and very likely not being able to identify the data to a contract, DLA is not in a position to formally challenge restrictive markings, unless the data is publicly available, has been furnished to the U.S. without restriction, or has otherwise been made available without restriction.

DLA will increase emphasis on the informal request "postage stamp persuasion" and perform prechallenges and formal challenges when we can substantiate that we are within the bounds of the DFARS and that there is some potential return for our investment. DFARS E-303.5(b)(2) permits this return rate to be "one determined under local conditions and experience," rather than the blanket 25% used in the DoD IG analysis.

Enclosure 1

DFARS 252.227-7037(g)(2)(ii) states that the Government shall be liable to the contractor or subcontractor for payment of fees and other expenses incurred in defending the marking, if the challenge by the Government is found not to have been made in good faith. This makes it quite clear that we cannot embark upon a wholesale challenge program without having adequate documentation to substantiate our challenges.

Further, AMSC P coded items should not have been included in the analysis, since DFARS E-203(a) states that AMSC P is a relatively permanent code, i.e., one with little potential for improvement. DLA is being held responsible for acquisition decisions outside its control.

INTERNAL MANAGEMENT CONTROL WEAKNESSES:
( ) Nonconcur.
(X) Concur; however, weakness is not considered material.
( ) Concur; weakness is material and will be reported in the DLA Annual Statement of Assurance.

MONETARY BENEFITS:
DLA COMMENTS:
ESTIMATED REALIZATION DATE:
AMOUNT REALIZED:
DATE BENEFITS REALIZED:

ACTION OFFICER: Jan Hutchens/Anthony Berta, MMSLP, x46775, 2 Feb 94
REVIEW/APPROVAL: James J. Grady, Jr., Deputy Executive Director, Supply Management, MMSD, x70509, 7 Feb 94
COORDINATION: Thomas J. Henthorn, DCSC-S, 27 Jan 94
James A. Gambert, DESC-S, 30 Dec 93
Harold Halversen, DGSC-S, 24 Jan 94
Thomas D. Ray, AQPL, 27 Jan 94
Col Allen Hoppe, GC, 28 Jan 94
Anthony Broadnax, DDAI, 8 Feb 94
J. Bryant, DDAI, 8 Feb 94

DLA APPROVAL:

22 FEB 1994

LAWRENCE P. FARRELL, JR.
Major General, USAF
Principal Deputy Director

Enclosure 1
Page 2 of 2

TYPE OF REPORT: AUDIT DATE OF POSITION: 22 FEB 1994

PURPOSE OF INPUT: INITIAL POSITION

AUDIT TITLE AND NO: Draft Report on Validation of Technical Data Rights Restrictions for Spare Parts at the Defense Logistics Agency (Project No. 3CD-0022)

RECOMMENDATION 1.A.: We recommend that the Director, Defense Logistics Agency reinstate the Defense Logistics Agency Program for Validating Restrictive Markings on Technical Data that requires the supply centers to issue informal requests and conduct prechallenges and formal challenges on technical data with restrictive markings.

DLA COMMENTS: Partial Concurrence. HQ DLA is reinstating the policy guidance for validating restrictive markings on technical data that requires the Supply Centers to issue informal requests and conduct prechallenges and formal challenges on technical data with restrictive markings. Challenges to the validity of restrictive markings will be undertaken when reasonable grounds exist to question the validity of the restriction and that continued adherence to the restriction is not in the Government's best interests. DFARS Part 227.403-73 sets forth criteria for the contracting officer on prechallenges and formal challenges. The contracting officer is the one who procured the data. Without having a copy of the contract on which data has been procured, we are not in a position to formally challenge restrictive markings, unless the data is publicly available, has been furnished to the U.S. without restriction, or has been otherwise made available without restriction. DLA is not buying the technical data. DLA is only buying the spare part.

DISPOSITION:
(X) Action is ongoing. Estimated Completion Date: 30 Nov 94
( ) Action is considered complete.

INTERNAL MANAGEMENT CONTROL WEAKNESSES:
( ) Nonconcur.
(X) Concur; however, weakness is not considered material.
( ) Concur; weakness is material and will be reported in the DLA Annual Statement of Assurance.

MONETARY BENEFITS:
DLA COMMENTS:
ESTIMATED REALIZATION DATE:
AMOUNT REALIZED:
DATE BENEFITS REALIZED:

ACTION OFFICER: Jan Hutchens, MMSLP, x46775, 2 Feb 94
REVIEW/APPROVAL: James J. Grady, Jr., Deputy Executive Director, Supply Management, MMSD, x70509, 7 Feb 94

Enclosure 2

TYPE OF REPORT: AUDIT DATE OF POSITION: 22 FEB 1994

PURPOSE OF INPUT: INITIAL POSITION

AUDIT TITLE AND NO: Draft Report on Validation of Technical Data Rights Restrictions for Spare Parts at the Defense Logistics Agency (Project No. 3CD-0022)

RECOMMENDATION 1.B.: We recommend that the Director, Defense Logistics Agency establish a supply center performance measurement system for the Program for Validating Restrictive Markings on Technical Data and the DoD Spare Parts Breakout Program to identify measures to gauge performance input and outcomes and to establish and monitor targets and benchmarks for performance measures.

DLA COMMENTS: Concur, however, no additional DLA action is required. We have already established a Supply Center performance measurement system for both Validating Restrictive Marketings on Technical Data and the DoD Spare Parts Breakout Program.

DISPOSITION:
( ) Action is ongoing. Estimated Completion Date:
(X) Action is considered complete.

INTERNAL MANAGEMENT CONTROL WEAKNESSES:
( ) Nonconcur.
(X) Concur; however, weakness is not considered material.
( ) Concur; weakness is material and will be reported in the DLA Annual Statement of Assurance.

MONETARY BENEFITS:
DLA COMMENTS:
ESTIMATED REALIZATION DATE:
AMOUNT REALIZED:
DATE BENEFITS REALIZED:

ACTION OFFICER: Jan Hutchens/Anthony Berta, MMSLP, x6775, 2 Feb 94
REVIEW/APPROVAL: James J. Grady, Jr., Deputy Executive Director, Supply Management, MMSD, x70509, 7 Feb 94
COORDINATION: Thomas J. Henthorn, DCSC-S, 27 Jan 94
James A. Gambert, DESC-S, 30 Dec 93
Harold Halversen, DGSC-S, 24 Jan 94
Thomas D. Ray, AQPL, 27 Jan 94
Col Allen Hoppe, GC, 28 Jan 94
Anthony Broadnax, DDAI, 8 Feb 94
J. Bryant, DDAI, 8 Feb 94

DLA APPROVAL:

22 FEB 1994

LAWRENCE P. FARRELL, JR.
Major General, USAF
Principal Deputy Director

Enclosure 3

COORDINATION: Thomas J. Henthorn, DCSC-S, 27 Jan 94
James A. Gambert, DESC-S, 30 Dec 93
Harold Halversen, DGSC-S, 24 Jan 94
Thomas D. Ray, AQPL, 27 Jan 94
Col Allen Hoppe, GC, 28 Jan 94
Anthony Broadnax, DDAI, 8 Feb 94
J. Bryant, DDAI, 8 Feb 94

DLA APPROVAL:

LAWRENCE P. FARRELL, JR.
Major General, USAF
Principal Deputy Director

Enclosure 3
Page 2 of 2

TYPE OF REPORT: AUDIT DATE OF POSITION: 22 FEB 1994

PURPOSE OF INPUT: INITIAL POSITION

AUDIT TITLE AND NO: Draft Report on Validation of Technical Data Rights Restrictions for Spare Parts at the Defense Logistics Agency (Project No. 3CD-0022)

RECOMMENDATION 2: We recommend the Commanders of the Defense Construction Supply Center, the Defense Electronics Supply Center, and the Defense General Supply Center include challenging procedures for limited rights assertions in risk assessments and internal management control reviews.

DLA COMMENTS: Nonconcur. The Defense Supply Centers safeguard the limited rights data. During internal management reviews, the technical data areas have not been rated as high risk because they were following the rules as prescribed in DFARS.

DISPOSITION:
( ) Action is ongoing. Estimated Completion Date:
(X) Action is considered complete.

INTERNAL MANAGEMENT CONTROL WEAKNESSES:
(X) Nonconcur.
( ) Concur; however, weakness is not considered material.
( ) Concur; weakness is material and will be reported in the DLA Annual Statement of Assurance.

MONETARY BENEFITS:
DLA COMMENTS:
ESTIMATED REALIZATION DATE:
AMOUNT REALIZED:
DATE BENEFITS REALIZED:

ACTION OFFICER: Jan Hutchens, MMSLP, x46775, 2 Feb 94
REVIEW/APPROVAL: James J. Grady, Jr., Deputy Executive Director, Supply Management, MMSD, x70509, 7 Feb 94
COORDINATION: Thomas J. Henthorn, DCSC-S, 27 Jan 94
James A. Gambert, DESC-S, 30 Dec 93
Harold Halversen, DGSC-S, 24 Jan 94
Thomas D. Ray, AQPL, 27 Jan 94
Col Allen Hoppe, GC, 28 Jan 94
Anthony Broadnax, DDAI, 8 Feb 94
J. Bryant, DDAI, 8 Feb 94

DLA APPROVAL:

FEB 7.

LAWRENCE P. FARRELL, JR.
Major General, USAF
Principal Deputy Director

Enclosure 4

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