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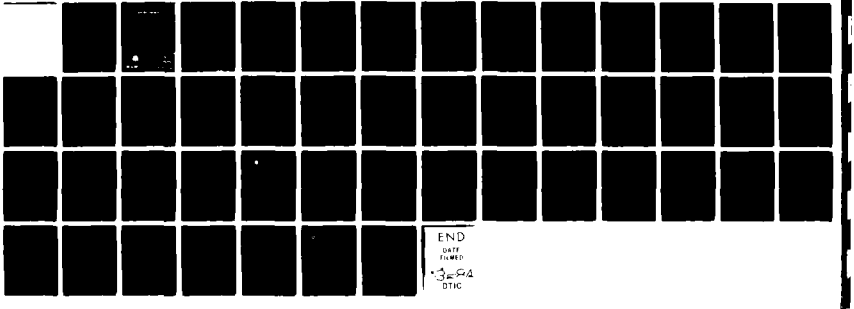
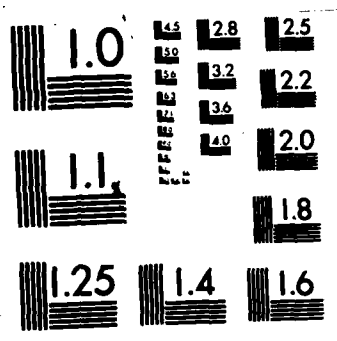




REPORT BY THE

Comptroller General

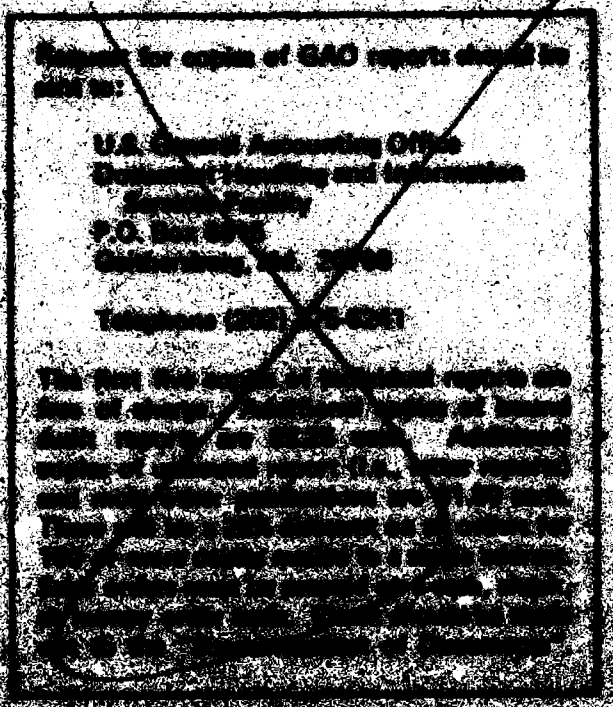
OF THE UNITED STATES

Major Federal Research And Development Agencies Are Implementing The Patent And Trademark Amendments Of 1980

The Patent and Trademark Amendments of 1980 (Public Law 96-517) established a uniform patent policy for small businesses and nonprofit organizations that gives them, with limited exceptions, the option to retain title to inventions resulting from federally sponsored research projects. This is the second annual report submitted by the Comptroller General on how federal agencies are carrying out this law.

Major federal research and development agencies have incorporated provisions of the law and Office of Management and Budget (OMB) guidance into their procurement regulations to ensure uniform implementation throughout the agencies. Only two agencies--the Department of Energy (DOE) and the National Aeronautics and Space Administration (NASA)--have rejected determinations to withhold from certain inventors the rights to inventions resulting from agency-sponsored projects.

GAO concludes that DOE's and NASA's determinations to withhold [illegible] from their decisions. However, GAO believes that, in cases of [illegible] in which DOE withheld rights from the inventors, failing this [illegible] the rights would have been given in keeping with the [illegible] Public Law 96-517. Also, implementation instructions DOE [illegible] the grant on the inventor by withholding [illegible] provided by the patent clause.



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-207939

The Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate

The Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
House of Representatives

This is the second annual report submitted by the Comptroller General under Chapter 18 of the Patent and Trademark Amendments of 1980 (Public Law 96-517). Our first annual report discussed the legislative history of Chapter 18, the development of regulations to ensure uniform implementation of the law, and the exceptional circumstance provision included in the law. Chapter 18 establishes a uniform patent policy for assigning title to inventions made by small businesses and nonprofit organizations under federally sponsored research projects.

The Comptroller General was assigned two primary responsibilities under Public Law 96-517. First, the Comptroller General is required to report, at least once a year, to your committees on how federal agencies are carrying out Chapter 18 and other aspects of government patent policies and practices as he believes appropriate. Second, the Comptroller General is responsible for reviewing federal agencies' written statements, commonly called exceptional circumstance determinations, for not allowing small businesses and nonprofit organizations the option of retaining title to inventions resulting from federally sponsored research projects. The Comptroller General must review these statements and inform the agency head if any pattern of exceptional circumstance determinations by a federal agency is contrary to the policy and objectives of Chapter 18. In addition, he must inform the agency head if he believes that an agency's policies or practices are otherwise not in conformance with the law.

OBJECTIVES, SCOPE, AND METHODOLOGY

Accordingly, we have reviewed (1) federal research and development (R&D) agencies' implementation of Public Law 96-517 and Office of Management and Budget (OMB) Circular A-124 entitled "Patents-Small Business Firms and Non-Profit Organizations," (2) the Department of Commerce's (DOC's) efforts to fulfill its lead agency responsibilities outlined in OMB's circular, and (3) federal R&D agencies' exceptional circumstance determinations. (Our detailed analysis of these determinations is included in app. I.) This report also provides an update on President Reagan's proposed changes in government patent policy to make Public Law 96-517 provisions applicable to all contractors.

We included the five major federal R&D agencies in our review: the Departments of Defense (DOD), Energy (DOE), and Health and Human Services (HHS); the National Aeronautics and Space Administration (NASA); and the National Science Foundation (NSF). Overall, these agencies spent more than 90 percent of the total federal funds budgeted for R&D activities in fiscal year 1982. We reviewed the five agencies' patent activities subject to Public Law 96-517 between February 1, 1982, and June 1, 1983. We also included DOC in our review because of the monitoring and reporting responsibilities assigned to that agency under OMB Circular A-124. We conducted this effort in accordance with generally accepted government auditing standards.

To complete our audit work, we

--interviewed patent officials in the General Counsel, Judge Advocate General, and/or procurement offices in the five R&D agencies;

--reviewed and analyzed the five agencies' policies and regulations for allowing small businesses and nonprofit organizations the right to retain title to inventions resulting from federally sponsored research projects;

--interviewed DOC officials to discuss their efforts to implement the monitoring and reporting requirements of Public Law 96-517 as set forth in Cirular A-124; and

--reviewed and analyzed seven exceptional circumstance determinations sent to the Comptroller General through December 1, 1983.

BACKGROUND

The federal government's efforts to establish a uniform patent policy began in 1963, when former President John F. Kennedy issued a Presidential memorandum that included a statement of government patent policy. This statement identified common patent policy objectives and criteria and set forth the minimum rights that government agencies should acquire with regard to inventions made under federally sponsored research projects. The policy was quite flexible and did not give special consideration to small businesses and nonprofit organizations. Federal agencies interpreted the policy and assigned title to inventions in a variety of ways for almost 17 years before the Congress passed legislation to provide uniformity in agencies' practices.

On December 12, 1980, President Carter signed Public Law 96-517 to establish a uniform patent policy for inventions made by small businesses and nonprofit organizations under federally sponsored research projects. This law, which became effective on July 1, 1981, gives small businesses and nonprofit organizations, with limited exceptions, the option to retain title to inventions they make under federal grants, contracts, and cooperative agreements (hereafter, these three categories are referred to as funding agreements). Public Law 96-517 takes precedence over approximately 26 conflicting statutory and administrative patent policies.

On June 30, 1981, OMB issued interim regulations entitled "Patents--Small Business Firms and Non-Profit Organizations" (OMB Bulletin 81-22) for agencies to follow in carrying out Public Law 96-517. The bulletin became effective on July 1, 1981. OMB issued final regulations (OMB Circular A-124) on February 10, 1982, which became effective on March 1, 1982. This circular applies to all federal R&D funding agreements entered into with small businesses and nonprofit organizations on or after its effective date. The circular requires that each funding agreement contain a standard patent rights clause except for those agreements in which an R&D agency elects to retain title. The standard clause gives small businesses and nonprofit organizations the right to retain title to inventions resulting from federally funded research projects and establishes the rights and obligations of small businesses, nonprofit organizations, and federal agencies. A modified patent rights clause is included in funding agreements when an R&D agency plans to retain title.

On February 18, 1983, President Reagan signed a Presidential memorandum directing federal agencies to adopt and implement the same or substantially the same policies for all contractors as those set forth in Public Law 96-517 for small businesses and nonprofit organizations. Because of its lead agency designation under Circular A-124, DOC submitted to OMB on April 13, 1983, a proposed amendment to the circular for implementing the President's memorandum. In addition, the General Services Administration (GSA), because of its responsibility for developing Federal Procurement Regulations (FPR), published proposed changes to FPR in the Federal Register on April 15, 1983, for implementing the memorandum. On June 8, 1983, OMB requested public comments on DOC's proposed amendment to the circular and GSA's proposed changes to FPR. Since the comments were due on August 8, 1983, after our field work was completed, we were not able to include a summary of the comments or OMB's actions on the comments in this report.

FEDERAL AGENCIES' EFFORTS TO IMPLEMENT PUBLIC LAW 96-517

We found that all five federal R&D agencies incorporated provisions of Public Law 96-517 and OMB's interim or final regulations (Bulletin 81-22 or Circular A-124, respectively) into their procurement regulations. All but one agency, DOD, included Circular A-124 guidance in their agency's procurement regulations. DOD's regulations included guidance presented in Bulletin 81-22. However, DOD officials told us that they are currently revising the Defense Acquisition Regulations (DAR) to include Circular A-124 guidance and President Reagan's directive to adopt and implement the policies set forth in Public Law 96-517 for all contractors.

In each agency, officials told us that all funding agreements entered into with small businesses and nonprofit organizations after the July 1, 1981, effective date of the law, contain the standard patent rights clause, except those where the agency decided to invoke the exceptional circumstance exception. Officials at the two agencies that made exceptional circumstance determinations--DOE and NASA--told us that those funding agreements under which their agencies retained title contained a modified patent rights clause. We did not review any agreements to verify the officials' statements. However, we plan to verify that funding agreements contain the required clause as a part of our work for the next annual report.

DEPARTMENT OF COMMERCE'S EFFORTS TO IMPLEMENT OMB CIRCULAR A-124

Under OMB Circular A-124, DOC is responsible for (1) monitoring federal agencies' regulations and procedures for consistency with Public Law 96-517 and the circular; (2) consulting with representatives of agencies and contractors to obtain advice on the development of a reporting system by which contractors can report on their use of inventions and changes needed under the circular; (3) accumulating, maintaining, and publishing statistics and analyses on the utilization and activities regarding patent policies and practices outlined in the circular; and (4) making recommendations to OMB on changes needed in the circular. This responsibility was given to the Office of Productivity, Technology and Innovation within DOC.

We found that DOC is monitoring federal agencies' regulations and procedures for implementing Public Law 96-517. On September 16, 1982, DOC asked 13 federal R&D agencies to provide copies of (1) their regulations, instructions, or guidance for implementing the law and OMB Circular A-124 and (2) the standard patent clause used in funding agreements with small businesses and nonprofit organizations. As of December 1, 1983, DOC had received responses from 11 agencies. Ten of the eleven agencies submitted documentation to DOC. One agency, DOD, did not submit documentation but responded orally to the request because it was following OMB's interim regulations (Bulletin 81-22). DOD officials told DOC officials that Circular A-124 guidance will be incorporated in the revised DAR. The date when DOD will officially issue DAR has not been set.

DOC officials told us that they have analyzed documentation submitted by the 10 agencies and found that the regulations and procedures are consistent with the law and the circular. As mentioned earlier, Circular A-124 requires DOC to develop a periodic reporting system on contractors' utilization of inventions. DOC has not developed the system because it is uncertain whether DOC or the federal R&D agencies will collect the needed data from contractors. DOC officials hope that this issue will be resolved in the next few months.

Regarding the requirement that DOC recommend necessary changes to the circular, DOC officials commented that they drafted a proposed amendment to Circular A-124 that would provide agencies with policies, procedures, and guidelines for adopting and implementing the same or substantially the same policies for all contractors as those set forth in Public Law 96-517. As previously stated, this amendment was submitted to OMB on April 13, 1983, in response to the February 18, 1983, Presidential memorandum.

OMB is reviewing DOC's efforts to implement Circular A-124. For example, on April 19, 1983, OMB sent a letter to DOC requiring the agency to submit a report on its activities to date under its lead agency role. The letter also requires DOC to submit progress reports every 6 months on its activities. OMB plans to review these reports to determine the adequacy of DOC's monitoring efforts and plans to set a date for completing the periodic reporting system based on that review.

EXCEPTIONAL CIRCUMSTANCES DETERMINATIONS

Chapter 18 of Public Law 96-517 provides that each nonprofit organization or small business firm may elect to retain title to any invention made under federal support except

--when the funding agreement is for the operation of a government-owned research or production facility,

--in exceptional circumstances when it is determined by the agency that restricting or eliminating the right to retain title to any subject invention will better promote the policy and objectives of [the law], or

--when a government authority authorized by statute or Executive order to conduct foreign intelligence or counter-intelligence activities determines that restricting or eliminating the right to retain title to any subject invention is necessary to protect the security of such activities.

Any determination using the exceptional circumstances provision must be written and accompanied by a statement of facts justifying the determination. The agency must send the determination and its justification to the Comptroller General within 30 days after the award of the applicable funding agreement. If we find a pattern of such determinations contrary to the policy and objectives of the law, or if the policies or practices of a federal agency are otherwise not in conformance with the law, the Comptroller General is required to advise the head of the agency involved. He/she then has 120 days to advise GAO of any action taken or planned in response to the matters raised.

As of December 1, 1983, the Comptroller General had received seven exceptional circumstance determinations, six from DOE and one from NASA. On the basis of our analysis of these determinations, we differ with DOE on some aspects of how it applied the exceptional circumstance provision. However, these differences notwithstanding, it is clear to us that no pattern of determinations contrary to the policy or objectives of the law exists. In addition, we found no indication, either in connection with the exceptional circumstances determinations or in other agency patent activities which we reviewed, that any of the agencies had policies or practices not in conformance with the law. Our analysis of the seven determinations is summarized in the following sections and discussed in detail in appendix I.

DOE's exceptional circumstance determinations

There were two cases (see items 2 and 7 of app. I) in which, for different reasons, we disagreed with DOE's reasoning for withholding patent rights. In these two cases, we believe the better view to be that the circumstances cited by DOE did not warrant withholding patent rights. We recognize that these determinations represent judgment calls within the scope of DOE's discretion under the law; however, we do not believe that DOE's actions in these cases gave maximum effect to the law's policies.

In item 2, DOE invoked exceptional circumstances for jointly funded cooperative research agreements between the government and private participants. This meant that these private participants were given royalty-free license rights (amounting to the equivalent of title) to any inventions by small businesses or nonprofit subcontractors under these agreements. The situation may be unusual in that the act was passed in response to the withholding of rights by the government for itself; here the rights are not being retained by the government but would remain in the private sector.

DOE reasoned that private participation in these cooperative agreements was important to the government and that the private entities in item 2 would not participate unless they could receive licenses to any inventions. Without denying that private entities' refusal to participate might have been the consequence, we nevertheless believe that DOE would have been more in keeping with the policies underlying the law if it had granted patent rights in their inventions to small business and nonprofit subcontractors in this case. The act expressly covers cooperative agreements: if the private participant in a cooperative agreement could condition its participation on its ability to have ownership of inventions by small business or nonprofit subcontractors, those subcontractors could routinely be deprived of the benefits the act intended for them.

In item 7, DOE invoked exceptional circumstances to withhold patent rights from a nonprofit private organization in a funding agreement concerning nuclear waste disposal and storage. DOE stated its intention to fund the technology to the point of "practical utilization" and to commercialize it "if found desirable." An agency's intention to fully fund and promote a product or process to the marketplace is one of the reasons given in the

legislative history as possibly constituting exceptional circumstances. However, DOE admitted that it had no present intention to transfer the waste disposal technology to the marketplace. In fact, as DOE acknowledged, such a plan would require major changes in government policy concerning the storage of nuclear waste which, in turn, might require legislation.

DOE stated that the federal government would, in effect, commercialize the technology by building the waste repositories and then selling the federal service of storing the waste to the private sector. We rejected this argument. "Funding to the marketplace" is in our view an effort by the government to develop a technology to the point where the private sector would be willing to continue further development.

Neither the act nor its legislative history lists factors an agency must consider before invoking exceptional circumstances. The act, however, does evince a strong policy allowing small businesses and nonprofit organizations to retain title to inventions created under funding agreements. Furthermore, the legislative history states that the exceptional circumstances exception should be used sparingly. DOE's belief, that invoking exceptional circumstances in these two instances was consistent with the act, was not without some reasonable basis. We believe, however, that the policy considerations reflected in the act and its legislative history militate against invoking exceptional circumstances in such situations.

In the other four DOE cases, we agree with the agency's use of the exceptional circumstances provision. Specifically, in two cases (items 1 and 3), rights to the inventions of subcontractors, including small businesses and nonprofit organizations, were granted to prime contractors before the law's enactment. DOE cannot unilaterally abrogate those rights. In the remaining two cases (items 4 and 5), DOE's determinations that exceptional circumstances exist were justified by its intention to fund the technologies to the marketplace. However, we believe that the circumstances in these latter two instances do not justify withholding all patent rights from the contractors, as DOE did. We suggest that, consistent with a suggestion in the legislative history of Public Law 96-517, DOE define the specific fields of use in which it needs to retain rights to any inventions so that it does not destroy the contractors' incentives to further develop any inventions in fields of use that DOE is not interested in. In addition, DOE could consider providing for reversion of rights to the inventors if the agency decides not to fund the technology to the marketplace.

NASA's exceptional circumstances determination

In the NASA case (item 6), we agree with the agency's use of the exceptional circumstances exception.[1] The contractor, a university, had asked NASA to invoke exceptional circumstances for inventions under a contract signed before the law's enactment, to clear up doubts the contractor believed might otherwise exist concerning title to inventions. The contractor intended to seek title in particular cases by asking NASA to waive the government's rights. Since the contractor was not obligated to retain title under the law and it was at the contractor's request that NASA retained title, we agree that the exception was appropriately used.

CONCLUSIONS

The five major federal R&D agencies have incorporated provisions of the law and OMB guidance into their procurement regulations. These agencies have also established policies and practices for allowing small businesses and nonprofit organizations to retain title to inventions.

To date, we found that no pattern of exceptional circumstance determinations exists that is contrary to the policy or objectives of the law. Also, only two agencies have made use of the exceptional circumstance determinations. In addition, we found no agency policies or practices not in conformance with the law.

AGENCY COMMENTS AND GAO RESPONSE

NSF, HHS, DOE, NASA, DOD, and DOC reviewed and commented on a draft of this report. Each of these agencies concurred with the conclusions stated in the preceding section. However, DOE disagreed with the methods we used to analyze its justifications for making certain exceptional circumstance determinations. We recognize that the methods used and results obtained by DOE in making these determinations were within the agency's discretion under the law. However, we believe that DOE would have been more in keeping with the policies underlying the law if it had granted patent rights to the inventions to small business and nonprofit subcontractors in these cases. (DOE's specific comments and our responses are included in app. II.) Additionally, as discussed below, three other agencies had comments on some of the specific issues included in this report. (The agency comments and our responses are included in apps. III through VII.)

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[1]NASA informed us recently that, in a subsequent renewal of the contract, NASA has provided that the contractor would retain the rights to its inventions. We believe, however, that commenting on NASA's exceptional circumstance determination is still appropriate.

DOC described the report as an accurate and fair presentation of the subject, although it suggests that an agency that uses the exceptional circumstances exception on the basis of its intention to commercialize be required to show why its plans to commercialize would be more successful than the efforts of the inventing organization. We agree that there is a need to carefully scrutinize an agency's claim of intent to commercialize, as we have in fact done. (See app. I, items 4, 5, and 7.) At the same time, we believe that the law does not require the kind of showing by an agency which DOC suggests nor would it be practical to do so. Our position is more fully set forth in appendix VI.

NASA and HHS expressed some concern over DOC's effort to implement the periodic reporting system on the utilization of inventions. DOC officials told us they are attempting to resolve the issue of who will collect the data. We plan to monitor DOC's efforts and comment on its progress in our next annual report.

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We are sending copies of this report to appropriate committees of both Houses; the Directors of the Offices of Management and Budget and Science and Technology; the Administrator, Small Business Administration; and the chief officials of federal research and development agencies. We will also make copies available to interested organizations and individuals, as appropriate, on request.

Comptroller General
of the United States

Contents

ABBREVIATIONS

CIT	California Institute of Technology
DAR	Defense Acquisition Regulation
DOC	Department of Commerce
DOD	Department of Defense
DOE	Department of Energy
EPRI	Electric Power Research Institute
FAR	Federal Acquisition Regulation
GAO	General Accounting Office
GOCO	goverment-owned contractor-operated

GRI	Gas Research Institute
ICF	inertial confinement fusion
LLNL	Lawrence Livermore National Laboratory
KMS	KMS Fusion, Inc.
NASA	National Aeronautics and Space Administration
NWTS	National Waste Terminal Storage
OMB	Office of Management and Budget
R&D	research and development

"EXCEPTIONAL CIRCUMSTANCES" DETERMINATIONS UNDER PUBLIC LAW 96-517

Section 6 of the Patent and Trademark Amendments of 1980, Public Law 96-517 (enacting 35 U.S.C. §§ 200-211), gives nonprofit organizations and small businesses the right to elect to retain title to any inventions they conceive or first reduce to practice under a funding agreement with a federal agency. An agency may provide otherwise in a funding agreement in "exceptional circumstances" when it determines ". . . that restriction or elimination of the right to retain title to any subject invention will better promote the policy and objectives of [the law]."

Should an agency invoke this exceptional circumstances exception, it must send GAO a copy of its written determination and justification. If GAO finds (1) a pattern of such determinations by an agency that is contrary to the policy and objectives of the law or (2) policies or practices otherwise not in conformance with the law, it must so inform the head of the agency, who has 120 days to advise GAO of any action taken or planned in response to the matters raised (35 U.S.C. § 202).

As of December 1, 1983, the Comptroller General had received seven exceptional circumstance determinations, six from the Department of Energy (DOE) and one from the National Aeronautics and Space Administration (NASA).

The following is our detailed analysis of the DOE and NASA determinations in chronological order.

ITEM 1

On September 22, 1981, DOE informed us that it invoked the exception for any subsequent subcontracts with small business firms or nonprofit organizations that might be awarded under six then-existing funding agreements, including four grants, a cooperative agreement, and a contract. These all predated the enactment of Public Law 96-517 (also referred to below as "the act"). DOE's justification was that under all these agreements, the grantees, cooperator, and prime contractor had been allowed, in advance, the right to inventions made by their subcontractors, in accordance with the waiver provisions of section 9 of the Federal

Nonnuclear Research and Development Act of 1974.[1] DOE believes that any subcontracts under these funding agreements entered into after July 1, 1981--the effective date of the relevant provisions of Public Law 96-517--were either outside the scope of the law or subject to exceptional circumstances.

DOE pointed out that after July 1, 1981, subcontracts with small businesses or nonprofit organizations under these six funding agreements, which allowed them patent rights, ". . . would violate existing contract rights." The agency agreed to forward to us any objections to the disposition of rights under the six agreements. All six agreements have since expired, with no objections having been received by us.

When DOE made its determination, the governing regulation was Office of Management and Budget (OMB) Bulletin 81-22. This was an interim document intended to be effective only until a final policy statement was issued. Bulletin 81-22, as DOE pointe out in its comments to OMB on a published draft of the bulletin, did not make clear whether its requirements were intended to appl to post-July 1, 1981, subcontracts. Thus, DOE at that time was not without some justification for the position that such subcontracts were not covered.

The ambiguity in Bulletin 81-22 was intended to be resolved in the final regulation, OMB Circular A-124, effective March 1, 1982. Small businesses and nonprofit organizations awarded subcontracts after July 1, 1981, are to receive rights in their inventions that are consistent with Public Law 96-517 and the Circular (OMB Circular A-124, Secs. 5, 7.c.(2)). While the Circular recognizes that agencies cannot unilaterally amend an existing contract, it makes clear that some effort is required of agencies to acquire for small business or nonprofit subcontractors the rights mandated by the act. This can be done, the Circular suggests, by either requiring that the right be granted to the subcontractor as a condition of agency approval of a subcontract or by renegotiating the prime funding agreements (Sec. 7.c.(2)). (Neither technique is without some problem, as discussed in item 3.)

We agree with OMB's interpretation: subcontracts after July 1, 1981, under prime funding agreements entered into before that date should, to the extent practicable, incorporate the required clause, giving rights in their inventions to small busines and nonprofit subcontractors. However, we are persuaded that the

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[1]Section 9 (42 U.S.C. §5908 (1976)) provides generally that title to inventions conceived under certain contracts shall vest in the United States, but that the government's rights may be waived, on the basis of a determination on the record, after considering criteria specified in the statute (42 U.S.C. §5908(d)(1)-(11)), that the interests of the United States and the general public will best be served by a waiver.

award of subcontracts under these six funding agreements was within the scope of the exceptional circumstances clause because the rights were not retained by the government but were granted to private parties under a procedure authorized by then applicable law, on the basis of a finding that to do so was in the best interests of the government and the general public.[2]

The act was intended to change the former practice under which patent rights, instead of remaining with the inventor, were owned by the government and not actively commercialized, as well as to benefit small businesses and nonprofit organizations:

> "In general, the [former] patent policies require contractors and grantees to allow the funding agency to own any patentable discoveries made under research and development supported by the Federal Government unless the contractor or grantee successfully completes lengthy waiver procedures justifying why patent rights should be left to the inventor. (Senate Report No. 96-480, 2 (1979).)"

This is not a case of the government's retaining patent rights with the resulting impediments to commercialization. The grantees, contractor, and cooperator in these six instances successfully completed the waiver procedures under section 9 of the Federal Nonnuclear Energy Research and Development Act of 1974, and DOE waived its rights to any inventions that they or their subcontractors might conceive or reduce to practice under their funding agreements.[3]

It would be more consistent with Public Law 96-517 for subcontractors that are nonprofit organizations or small businesses to keep the rights to their inventions. However, that result could not be achieved under these six funding agreements because, before enactment of Public Law 96-517, the rights to these inventions had already been granted to the private entities that were parties to the agreements. Those private entities were expressly granted these rights after satisfying criteria under the law, then in effect, designed to establish that allowing them to re-

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[2]In addition, as discussed in item 3, situations like this justify the use of the exceptional circumstances exception because DOE cannot abrogate existing contractual rights.

[3]Public Law 96-517 takes precedence, by its terms, over section 9 of the Federal Nonnuclear Energy Research and Development Act to the extent section 9 would require a disposition of rights in inventions of small businesses or nonprofit organizations inconsistent with Public Law 96-517 (35 U.S.C. § 210 (a)). However, we do not read Public Law 96-517 as retroactively depriving contractors of rights granted under section 9 (as was the case here) before enactment of Public Law 96-517.

tain the right to inventions would best serve the interests of the United States and the general public (42 U.S.C. § 5908 (c)-(e)).

Moreover, at least some of the objectives of the act--to promote utilization, commercialization, and public availability of federally supported inventions--would not be thwarted by allowing the six agreements to remain unchanged. Accordingly, we agree with DOE that under these six agreements, exceptional circumstances exist, justifying the failure to secure patent rights for subcontractors.

ITEM 2

On October 9, 1981, DOE notified us that it was invoking the exceptional circumstance exception in the case of funding agreements or subcontracts that are funded in part by the Electric Power Research Institute (EPRI) or the Gas Research Institute (GRI). DOE had entered into Participation Agreements with EPRI and GRI before July 1, 1981. These agreements provide that if DOE enters into a funding agreement with a small business or nonprofit organization, EPRI or GRI will share the cost and management responsibility. (However, the Participation Agreements explicitly provide that DOE will have ". . . ultimate responsibility for the securing of proposals and their evaluation, the selection of the contractor, negotiation of the contract, and its subsequent management.")

The Participation Agreements provide further that EPRI and GRI, their member utilities, and other United States utilities, would receive an irrevocable, nonexclusive, and royalty-free license in connection with the research, development, production, or supply of commercial electric power or gaseous fuel, respectively, to make, use, and sell any invention or discovery made or conceived in the course of jointly funded efforts and covered by a U.S. patent. DOE informed us that contracts, grants, or cooperative agreements negotiated after the act's effective date could include the same licensing provisions.

DOE concludes that these licensing provisions ". . . may impinge so greatly on the value of the patent rights involved that they could be considered a derogation of the patent rights reserved to contractors under Pub. Law 96-517." We agree. Not only would the originators not receive royalties, but the licenses would be available even to nonmembers of EPRI and GRI, possibly leaving the originators without any potential customers for their inventions. It is noteworthy, however, that the rights are not being withheld for use by the government; they would remain in the private sector, although not with the inventors.

EPRI and GRI maintain that their members should receive licenses since they are contributing to the funding that supports

the inventions and since ". . . such license provisions are important to Internal Revenue Service approval of [EPRI and GRI] tax status." DOE suggests that if the choice is between either granting the licenses to EPRI or GRI or not getting a contract, small businesses and nonprofit organizations would prefer to relinquish the patent rights.

With regard to DOE's arguments that small businesses and nonprofit organizations would rather relinquish title to their inventions than not receive federal funding, the point of the act is that they should not be faced with such a choice. The other reasons given to support a finding of exceptional circumstances are that because of their contribution to the funding, EPRI and GRI members should receive a license to any inventions, and that EPRI's and GRI's tax status is somehow related to the license provisions. With regard to EPRI's and GRI's participation in funding, "funding agreement" is defined as ". . . any contract, grant, or cooperative agreement entered into between any federal agency and any person for the performance of . . . research work funded in whole or in part by the federal government . . . ." (Emphasis added.) Thus, the act contemplates private participation in government funding agreements. Similarly, the potential effect of the act's requirements on EPRI's and GRI's willingness or ability to participate in these projects must be subordinate to accomplishing the act's objectives.

As for the effect of the assignment of patent rights on EPRI's and GRI's tax status, it is not clear to us why that should be the case. DOE has not elaborated on that point. In any event, this possible consequence does not, in our view, constitute the kind of exceptional circumstance that would justify departing from the requirement for small businesses and nonprofit organizations to have the right to own inventions that they develop.

ITEM 3

On October 9, 1981, DOE notified us of prospective exceptional circumstance determinations for any subcontracts with small business firms or nonprofit organizations awarded under four contracts for work on the Clinch River Breeder Reactor Project. The four contracts contain a patent rights clause that gives DOE the right to determine the disposition of title to any invention by the contractors. But the clause also grants to certain parties (Project Management Corporation, Breeder Reactor Corporation, and each of the utilities that has executed a Utility Contribution Agreement with Breeder Reactor Corporation) ". . . an irrevocable, nonexclusive, royalty-free license with respect to any patent issued on any invention or discovery made or conceived in the course of or under this contract or any subcontract hereunder."

DOE states, and we agree, that this licensing provision may ". . . substantially lessen the value of title to inventions . . . ." The basis for DOE's finding of exceptional circumstances is that the licenses have been reserved by contracts entered into before July 1, 1981, and that not to reserve such licenses in subcontracts would violate these existing contract rights.

As discussed in item 1, OMB Circular A-124 states that any subcontracts at any tier with nonprofit organizations or small business firms executed after July 1, 1981, are to include rights to subject inventions consistent with Public Law 96-517. Thus, the execution of the four contracts in question before July 1, 1981, does not alone constitute an exceptional circumstance. We recognize, nevertheless, that the licenses have been given, under the existing contracts, to third-party beneficiaries (Project Management Corporation, Breeder Reactor Corporation, and the participating utilities). This situation raises a difficult issue under the statute: how can funding agreements entered into after enactment of the statute be reconciled with pre-existing contracts that grant patent rights which are inconsistent with it? (The question should become moot as pre-existing funding agreements expire.)

OMB Circular A-124 does not solve the problem. It calls on agencies to

> ". . . take appropriate action to ensure that small business firms or domestic nonprofit organization subcontractors under such prime funding agreements that received their subcontracts after July 1, 1981, will receive rights in their subject inventions that are consistent with P.L. 96-517 and this Circular."

However, it does not explain how to deal with the existing enforceable contractual rights of a contractor, grantee, cooperator, or third-party beneficiary. Thus, examples in the circular of "appropriate actions" to secure patent rights for subcontractors in these circumstances are (1) amending the prime contract, which of course cannot be done unilaterally by the government or (2) "requiring the inclusion of the clause [giving patent rights to the subcontractor] as a condition of agency approval of a subcontract," a course of action that the prime contractor might see as a breach of contract by the government.

Moreover, we see a difference between a pre-July 1, 1981, prime funding agreement that reserves patent rights to the prime contractor (or a third-party beneficiary) and one that reserves these rights to the government. Certainly, in the latter case, the presumption is that, rather than being held by the government, these rights should be ceded to a small business or nonprofit organization subcontractor. This can be accomplished

without interfering with the prime contractor's rights. In the former case, however, a number of the statutory objectives--to promote the utilization of inventions arising from federally supported research or development, to promote the commercialization and public availability of inventions, and to ensure that the government obtains sufficient rights in federally supported inventions to meet the needs of the government and protect the public--can still, depending on the terms of the contract, be achieved although the prime contractor holds title to the invention. The other statutory objectives--to encourage maximum participation of small business firms in federally supported research and development efforts, to promote collaboration between commercial concerns and nonprofit organizations, and to ensure that inventions made by nonprofit organizations and small business firms are used in a manner to promote free competition and enterprise--are, if not fully achieved when the prime contractor gets title to the invention, at least not entirely defeated either. The small business firms and nonprofit organizations can still participate in the federally funded activities and, if the prime funding agreements are properly drawn, the government can promote commercialization and free competition by use of march-in rights.

Thus, exceptional circumstances may be said to exist here in that DOE is effectively without power unilaterally to deprive a third-party beneficiary of pre-existing contractual rights.

ITEM 4

On February 2, 1982, DOE informed us of its determination of exceptional circumstances in a contract with KMS Fusion, Inc. KMS is a support contractor under the direction of a DOE agency, Lawrence Livermore National Laboratory (LLNL), in a number of areas relating to laser fusion. According to DOE,

> "In addition to being almost totally funded by the Government over a long period of time, the KMS laser fusion efforts are in the nature of support for a major Government-controlled program, i.e., the inertial fusion program. This program, which had its beginnings in weapons-related research and which remains largely a classified program, is mainly conducted by LLNL, a Government-owned contractor-operated (GOCO) facility. The services of KMS are to assist LLNL, and the work by KMS will be based on and will build upon work done by others at Government expense. While much of the KMS work will be on KMS property using KMS-owned equipment, the work will still be under the direction of LLNL and will be based on classified information which was not developed by KMS and to which KMS alone, as a Government contractor, has access through its work for LLNL."

DOE believes that limited commercialization opportunities are available to private industry for this laser technology. DOE states that it has nearly total control of the laser fusion technology and that, if the technology is declassified, private commercialization efforts can be undertaken. At that time, because of government ownership, the rights to technology supported by the government will be equally available to all of industry. DOE believes that ". . . if KMS were allowed to retain exclusive rights . . . such wide-spread availability of the research results could not be made."

DOE characterizes the role of KMS as much like that of the operator of a GOCO:

> "GOCO facilities are typically operated under long-term contracts funded entirely at Government expense, and under the control and direction of Government [personnel] on Government-designated tasks. Also, the work performed under the designated tasks is not advertised procurement, but sole-source to the GOCO, and in this case, the KMS contract itself was sole-sourced. Section 202(a)(i) of P.L. 96-517 specifically excepts funding agreements for the operation of a Government-owned research or production facility from its provisions granting rights to the contractor and, as part of the overall policy guidance in P.L. 96-517, supports making an exception to the normal disposition of rights for the KMS contract."

Because DOE intends to commercialize the laser fusion technology, the KMS situation constitutes an exceptional circumstance as envisioned by the law. However, DOE's restriction of patent rights goes beyond what the situation seems to require.

Before discussing commercialization, we will comment on the other arguments that DOE adduces for exceptional circumstances, which we reject. Neither the law itself nor the legislative history supports DOE's suggestion that a contractor's exclusive access to information not developed by it--whether classified or not--justifies an exceptional circumstance determination. As for the argument that KMS is similar to a GOCO, while both Public Law 96-517 and OMB Circular A-124 permit agencies to retain title to inventions when the funding agreement is for the operation of a GOCO research or production facility, agencies are not required to do so: ". . . agencies are not precluded from also allowing such contractors to retain rights to inventions." (Senate Report No. 96-480, supra, 31.) KMS' asserted similarity to a GOCO does not alone justify a departure from the general rule of the statute when, even if KMS were a GOCO, the agency could still allow it to keep the patent rights.

In any event, KMS only partially resembles a GOCO facility. DOE concedes that "much of the KMS work will be on KMS property using KMS-owned equipment," and KMS points out that it has ". . . invested more than $25,000,000 in private funds in ICF [inertial confinement fusion] research and development, laboratories, equipment and staff," thus creating "a self-sufficient organization" to conduct the kind of research that its contract with DOE covers. Government control and direction and sole sourcing, while they may be characteristic of GOCOs, are certainly not unique to them. Furthermore, we do not agree that granting KMS title to inventions would prevent widespread availability of research results, as suggested by DOE. On the contrary, the issuance of a patent assures that information regarding the inventions will be publicly available.

DOE suggests that KMS' exclusive access to work outside its contract ". . . will make it extremely difficult to determine originality of research between KMS and LLNL or to prevent KMS from utilizing the results of the LLNL work as a basis for its own." As DOE concedes, this kind of building on another's work ". . . should normally be encouraged." The difficulty within the patent system of determining originality is not unique to this situation. Certainly, it does not constitute an "exceptional circumstance," nor does the reported history of disputes between DOE (and its predecessor agencies) and KMS over the ownership of inventions under previous contracts.

DOE contends that, if commercialization is undertaken, the rights to technology supported by the government will be made available to all on an equal basis but that, if KMS were allowed to retain exclusive rights, ". . . such wide-spread availability of the research results could not be made." Arguably, the statute prevents this latter result by allowing the United States to exercise "march-in rights," whereby it can compel the owner of the invention to license it on reasonable terms, in a variety of circumstances, one of which is that the contractor has not taken "effective steps to achieve practical application of the subject invention" in a field of use. In this connection, KMS states that it is willing to grant licenses on reasonable terms and conditions.

DOE argues finally that it intends to fund this laser fusion technology "to the point of eventual commercialization," and cites this as an exceptional circumstance. One example given in the legislative history of exceptional circumstances is when the funding agreement calls for developmental work on a product or process that the agency plans to fully fund and promote to the marketplace (Senate Report No. 96-480, supra, 32). The report does not require use of the exception in these circumstances, however.

Presumably, the justification for invoking exceptional circumstances in such cases lies in the agency's need, if it is to be able to transfer the technology to the marketplace, to transfer rights to the entire process. The Senate report goes on to point out that,

> "[In] such cases, . . . it would be within the spirit of the Act for the agency to either define specific fields of use to which it will obtain rights in any inventions at the time of contracting or to carefully structure any deferred determinations so that the agency does not destroy the incentives for further development of any inventions in fields of use not of interest to the agency."

DOE has apparently not attempted, as the Senate report urges, to carve out fields of use in which it can retain ownership while giving KMS rights to inventions in all other fields of use that do not interest DOE. KMS says that one such important field of use, using the same technology, is the generation of synthetic gas, and that it has attracted private investment in this field and will be hampered in further efforts to raise capital for its own substantial investment in the technology without ownership of inventions.

The Office of Small Business Advocacy, Small Business Administration, argues that these facts do not justify an exceptional circumstance determination. We believe that the basis for such a determination exists in DOE's intent to commercialize this technology. But, the legislative history suggests that, even when an agency retains rights to inventions, the agency should make efforts to carve out fields of use in which it needs ownership of patent rights and allow the inventor the rights to inventions in all other fields of use. We find no indication that DOE has done so in this case. Also, some provision could be made for reversion of rights to its inventions to KMS, if the agency decides not to fund and promote this technology to the marketplace.

ITEM 5

On February 4, 1982, DOE notified us of an exceptional circumstance determination concerning a funding agreement with the University of Virginia. The contract calls for basic research and development of gas centrifuge uranium enrichment technology. DOE based its exceptional circumstance determination on three factors. First, the gas centrifuge enrichment program is classified. The technology is, at present, entirely owned and controlled by the government. The University has unique and full access to classified data on gas centrifuge technology, and its inventions could therefore be based on classified work performed under other DOE contracts.

Second, DOE states that the University acts much like a GOCO in that the University carries out no gas centrifuge research and development on its own and is totally dependent on government support. DOE owns more than 95 percent of the equipment in the University facility and pays all costs. The work is carried out under government direction.

Third, consideration is being given to transferring centrifuge enrichment technology to private industry. DOE believes that ownership of the technology should remain with DOE and not be "fragmented," to preserve the government's ability to transfer the technology to a purchaser.

As discussed in connection with KMS, neither the University's access to classified information nor the fact that inventions by University personnel might be "based upon classified work performed under other DOE contracts, to which the University personnel have preferred access" justifies an exceptional circumstances determination. Nothing in the law or its legislative history suggests that a contractor's preferred access to classified data developed by other contractors constitutes an exceptional circumstance. Provision is made elsewhere in the patent laws both to guard against the release of classified information, consistent with the rights of inventors (35 U.S.C. § 181), and to resolve questions of who created an invention.

The act and OMB Circular A-124 do provide for the government to retain title to subject inventions made by GOCO facilities. The University in certain respects closely resembles a GOCO. As discussed, status as a GOCO does not alone require agencies to invoke the exceptional circumstances exception. However, the government's possible transfer of this technology to private hands may justify abridging the rights intended by the Congress to be assigned to nonprofit organizations or small businesses under Public Law 96-517. The legislative history cites, as an example of an appropriate use of the exceptional circumstances determination, a funding agreement calling for ". . . developmental work on a product or process that the agency plans to fully fund and promote to the marketplace." (Senate Report No. 96-480, supra, 32). This would appear to be such a case.

However, as discussed above, the legislative history suggests that when withholding rights from the inventor, the agency should seek to carve out fields of use in which it needs rights to commercialize the gas centrifuge enrichment technology and allow the University the rights to inventions in all other fields of use. Also, DOE could provide for reversion of rights to the University in the event DOE does not fund this technology to the marketplace.

ITEM 6

In its letter of September 24, 1982, NASA informed us that it invoked the exception for all inventions under an ongoing contract, entered into before the enactment of section 6 of the act, with the California Institute of Technology (CIT), until the contract was renewed or replaced by a new contract. NASA has since informed us that the contract has been renewed, and this exceptional circumstances determination is no longer operative. NASA could not immediately confirm whether, before the latest contract modification, the government, in fact, took title to any of CIT's inventions that CIT would have retained except for the exceptional circumstances determination. But a NASA official said that that had occurred, in all probability. Accordingly, we believe that it is still appropriate to comment on NASA's exceptional circumstances determination.

Under their original agreement, which predated the act, title to inventions by CIT went to NASA. NASA, at CIT's request, could, under the law then in effect, waive its rights and give title to CIT. (See section 305, National Aeronautics and Space Act of 1958, as amended, 42 U.S.C. § 2457.)

NASA modified the contract to be consistent with the act. CIT reportedly remained concerned that, because of varying Office of Management and Budget interpretations of the applicability of the law to a contract such as this one signed before the effective date of the act, the validity of CIT's title to inventions under the modified contract could be questioned.

At CIT's request, therefore, NASA invoked exceptional circumstances for all inventions under the contract. CIT, if it wanted title to a particular invention, intended to petition NASA for a waiver of the government's right to title, a procedure still provided for in NASA's patent waiver regulations for pre-act contracts (14 C.F.R. § 1245.118).

We have no objection to the exceptional circumstances determination made by NASA. There is no statutory duty under the act that nonprofit organizations and small business firms retain title to their inventions. Section 202(a) of Title 35, U.S. Code, as added by section 6 of the act, states that

> "(a) Each nonprofit organization or small business firm may, within a reasonable time after disclosure . . . elect to retain title to any subject invention . . . . [Emphasis added.]"

During a transition period, the contractor chose to forgo the benefits of the act because of what it saw as a potential cloud on a title secured through a contract predating the act.

Without necessarily sharing the contractor's concern, we agree with NASA's judgment that these unique conditions justified the use of the exceptional circumstances determination.

Furthermore, while the Administrator of NASA was not required under the contract to grant title to an invention to CIT upon its application, the applicable waiver regulation, 14 C.F.R. §1245.118, is intended by NASA ". . . to apply the basic tenets of Public Law 96-517 to inventions made after July 1, 1981, under contracts awarded prior to July 1, 1981, with a nonprofit organization or small business firm." This regulation permits the Administrator to waive the government's right to title upon timely application by the contractor, without making the detailed findings normally required as a precondition to waiver (14 C.F.R. § 1245. 105). (A NASA official estimated that the waiver was granted to CIT 90 to 100 percent of the time.)

ITEM 7

By letter of January 28, 1983, the Department of Energy notified us that it was making an exceptional circumstances determination in connection with a funding agreement with the Battelle Memorial Institute, a nonprofit organization. The funding agreement is a proposed contract with Battelle's Project Management Division, for "a research, development, and program management activity" in support of DOE's National Waste Terminal Storage (NWTS) program. Specifically, Battelle is

> ". . . to identify potential geological waste repository sites and associated facilities for long-term disposal of nuclear waste and to insure that the necessary research is performed to develop the technology for the permanent isolation of radioactive waste in geologic formations."

Within the NWTS program, Battelle will focus on potential salt media sites in which to build storage facilities. Other contractors are investigating the potential of other media.

According to DOE, work in the field of nuclear waste disposal and storage has been and will be almost entirely funded by the government. Private incentives are not now promoting commercialization to any significant extent. DOE is responsible for developing programs for the treatment, management, storage, and disposal of nuclear waste. It expects the Congress to mandate the construction of facilities by DOE. The funding will continue to the pointof "practical utilization." DOE says that when this technology habeen fully developed by the government ". . . and if it is found desirable to commercialize the technology, then . . . private commercialization efforts can be undertaken by all of industry." DOE points out further that

"Battelle's role in designing the NWTS and participating in the selection among the candidate repositories should not be open to influence by its retention of rights in a particular area [of technology]."

We disagree with DOE's arguments for invoking "exceptional circumstances" in this case. We will comment separately on each argument DOE adduces for exceptional circumstances.

DOE believes that, should the government retain the rights to the technology, it will be available to all of industry on an equal basis. If Battelle were allowed to retain exclusive rights, DOE says, ". . . such widespread availability might not be readily effected." DOE made the same argument for retaining ownership rights to inventions resulting from certain laser fusion technologies rather than granting KMS title to the inventions. (See item 4.)

As we said in the KMS situation, rather than preventing widespread availability of research results, the issuance of patents assures that information regarding the inventions will be publicly available. In any event, widespread availability of research results is assured since the United States can exercise "march-in rights." The government can compel the owner of the invention to license it on reasonable terms in a variety of circumstances, one of which is that the contractor has not taken "effective steps to achieve practical application of the subject invention" in a field of use.

DOE argues that it intends to fund the nuclear storage technology "to the point of practical utilization" and to commercialize it "if found desirable." It has no present intention to transfer the technology to the marketplace, and indeed, present policy would preclude such a transfer. However, DOE maintains that the government must be able to transfer the patent rights ". . . in the event it is decided to turn nuclear waste storage over to private industry or sell the technology abroad."

DOE points to the legislative history of the act as supporting this reason for invoking "exceptional circumstances." One example given in the legislative history of exceptional circumstances is when ". . . the funding agreement calls for developmental work on a product or process that the agency plans to fully fund and promote to the marketplace." (S. Rep. No. 96-480 (1979), at 32.) Presumably, the justification for invoking "exceptional circumstances" in such cases lies in the agency's need, if it is to be able to transfer the technology to the marketplace, to transfer rights to the entire process.

By DOE's own admission, however, it has no plans to fully fund and promote the high-level waste storage technology to the marketplace at this time. Indeed, DOE states that federal regulations require that highly radioactive waste from both

commercial and defense sources ". . . be permanently disposed of in a federally licensed, federally owned facility."[4] The premise of the Nuclear Waste Policy Act of 1982 (P.L. 97-425) is that the federal government has the ultimate responsibility for high-level nuclear waste disposal (H.R. Rep. No. 97-491, Part 1, 30 (1982)). Under these circumstances, a decision to commercialize the technology would only occur after major changes in current policy, possibly requiring legislation. Whether such a policy change will ever be made is highly speculative.

In discussions with DOE officials, they acknowledged that without a major policy change, the possibility of commercialization was remote. They told us that the federal government would itself, in effect, commercialize the technology by building the waste repositories and then selling the federal service of storing the waste to the private sector.

We do not believe that the exceptional circumstances exception encompasses this type of situation. DOE, in invoking exceptional circumstances in other cases, had stated its intention to commercialize the technology. (See items 4 and 5.) We agreed with these determinations because, consistent with the legislative history, DOE planned to fund and promote the technology to the marketplace, that is, the private sector. (See S. Rep. No. 96-480, at 32.) In this case, however, DOE has no plans to fund to the marketplace.

Moreover, we do not believe that utilization of inventions by the government alone, with the government's providing the product or service to buyers, meets the test of "funding and promoting to the marketplace." Rather, funding to the marketplace is an effort by the government to develop a technology to the point where the private sector would be willing to continue further development.

DOE has the responsibility to build the repositories where generators of highly radioactive nuclear waste will store the waste. Since DOE will be the only entity to utilize the technology involved in building the repositories, DOE officials argue that Battelle would gain nothing by retaining ownership of the inventions. We do not believe that operation of the statutory requirement for small businesses and nonprofit organizations to keep their inventions was intended to be contingent on the funding agency's judgment of the value of the rights.

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[4]Although such a facility could possibly be contractor-operated, that is not what we understand is meant by "funding to the marketplace." In any event, DOE's argument that it needs the patent rights to be able to transfer the technology to the marketplace would not apply to contractor operation of a government-owned plant since, in those circumstances, transferring the patent rights to the contractor would not be needed.

In conclusion, Battelle, in our view, should have been given ownership rights to its inventions. DOE would still have been able to utilize Battelle's inventions since, under Public Law 96-517, the government retains a nonexclusive, nontransferable, irrevocable, paid-up license in any invention in which the contractor elects rights (35 U.S.C. § 202(c)(4)).

DOE'S COMMENTS AND GAO'S RESPONSE

Department of Energy
Washington, D.C. 20585

AUG 10 1983

Mr. J. Dexter Peach
Director, Resources, Community and
Economic Development Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Peach:

The Department of Energy (DOE) appreciates the opportunity to review and comment on the General Accounting Office (GAO) draft of a proposed report entitled "Major Federal Research and Development Agencies Are Implementing the Patent and Trademark Amendments of 1980." This report was prepared as a second annual report to be submitted by the GAO under Chapter 18 of the Patent and Trademark Amendments of 1980 (Public Law 96-517).

The draft report finds that the Federal R&D agencies that were reviewed, including DOE, have incorporated provisions of Public Law 96-517 into their regulations and that DOE has implemented Office of Management and Budget Circular A-124. In addition, after reviewing the six "exceptional circumstances" determinations submitted by DOE to the Comptroller General under the Public Law, the draft report finds no pattern of determinations contrary to the policies, objectives and requirements of the law. The draft report also concludes that DOE's policies and practices are otherwise in conformance with the law. The Department is in agreement with these aspects of the draft report.

Although the purpose of reviewing "exceptional circumstances" determinations of an agency is to identify a pattern that is contrary to the Public Law (which was not found), and although the draft report recognizes that each individual determination represents a judgment call within the discretion of the deciding agency, the drafters of the report nevertheless indicated that in certain situations they would have exercised discretion differently than did this Department. We do not believe it necessary to comment upon the alternative methods for applying agency discretion and will allow the justification for each determination made by this Department, which was forwarded to GAO, to represent this Department's position. Nevertheless, I have enclosed some general comments which the Department's staff has prepared that address certain general approaches to the analysis of individual "exceptional circumstances" determinations made by the GAO staff.

We again appreciate the opportunity to comment on this draft report.

Sincerely,

Martha O. Hesse
Assistant Secretary
Management and Administration

Enclosure

GENERAL COMMENTS ON THE GAO ANALYSIS OF DOE EXCEPTIONAL CIRCUMSTANCE DETERMINATIONS

1. In regard to Item 2 of Appendix I (See GAO note below), it was DOE's purpose to effectuate the policy and objectives of Public Law 96-517 of promoting utilization of inventions arising from federally supported research. We believe it is fully within the purpose and objectives of the Public Law to encourage advance commitment to commercialization, as well as simply encouraging commercialization of technology after its creation. Contrary to the suggestion in the GAO analysis, therefore, we do not believe a mere presumption of more effective commercialization should outweigh a concrete action towards commercialization by the up-front investment of substantial risk capital. The Gas Research Institute and the Electric Power Research Institute over the last several years have contributed millions of dollars in cooperative R&D programs with DOE. To discourage such investments and cooperation in commercializing Government-sponsored technology by denying the direct sponsor even a royalty-free license would appear to be antithetical to the basic purpose of the Public Law. It must be noted that the patent rights in the exceptional circumstances of Item 2 were not being retained by the Federal Government, but by members of industrial associations that were contributing to the development of the technology and which would be the direct users of the technology. (Some of these points appear to be recognized in the penultimate paragraph of Item 3).

2. In analyzing the exceptional circumstances, particularly those identified as Items 4 and 5, the GAO identified several facts within each exceptional circumstance and analyzed them individually to determine whether or not each separate factual element justified an exceptional circumstance. Through this analysis, the GAO agreed with the exceptional circumstance determinations made by DOE, even though statements were made that many of the factual elements believed relevant by DOE were not considered so by the GAO.

We would like to emphasize that usually there is not any one single fact that would create a "per se" exceptional circumstance, but that it is the overall effect of the total factual situation that should be reviewed. For example, the analysis indicates that the fact that the two contractors were "GOCO-like" does not support the possibility of an exceptional circumstance because the Public Law does not require the Government to retain title to GOCO inventions.

While the law does not require a different patent policy be applied to Government-owned, contractor-operated (GOCO) facility contracts, the fact that it does provide a GOCO exception is some indication that the policy considerations arising from the unique characteristics of GOCO contracts are different from those for ordinary R&D contracts. When such characteristics exist with respect to any contract, it would appear appropriate to consider them along with all the other facts in determining whether exceptional circumstances exist, particularly in view of the existence of an alternate statutory patent policy that would apply in DOE's case if the contract were determined to be a GOCO contract. We would be glad to supply additional legal analysis on the applicability of

[GAO note: The appendix referred to in this paragraph was renumbered to correspond with its location in this final report.]

DOE's statutory patent policy to GOCO contracts, if desired. We agree with the GAO comment that simply being GOCO-like is not sufficient "per se" for an exceptional circumstance determination. We do not agree, however, that it is not relevant. We believe that exceptional circumstances must be determined by taking into account all of the facts involving the contractor and contractual situation, collectively.

3. In the analysis of at least two of the exceptional circumstance determinations, Items 4 and 7, the GAO suggests that the application of "march-in" rights can be used to achieve widespread availability of the research results. It should be recognized that although "march-in" rights can be utilized to insure commercialization either by the contractor itself or a licensee of the contractor, such action would not insure the availability of the research results to a wide segment of industry.

4. In the analysis of at least three exceptional circumstance determinations, Items 4, 5 and 7, the GAO suggests that in situations where the Government is intending to commercialize the technology, at least initially, it should make provisions to transfer rights to inventions back to the contractor if the Government decided to no longer fund the technology to the marketplace. The three exceptional circumstance determinations were directed towards projects which are primarily Government activities (Items 5 and 7) or capital intensive, long-term research activities that are currently being undertaken by the Government (Item 4). In such situations, if the Government decided not to further fund the research activities to the marketplace but allow industry to do so, retention of patent rights by the Government would preserve an additional incentive to those organizations which are going to continue the funding. If such rights reverted to the contractors, the ability of the Government to offer this incentive would be lost.

5. In Item 7, the GAO analysis seems to equate "the marketplace" with "the private sector." In this exceptional circumstance the Government, at the direction of Congress, is going to provide radioactive waste storage facilities to the private nuclear industry. The analysis seems to imply that this is not "the marketplace" as discussed in the legislative history of the Public Law. We do not agree. In certain areas, Congress or the Executive Branch has identified DOE as having the responsibility of providing materials or facilities to the private sector of our economy in lieu of depending upon such activities being undertaken by private industry. Examples are the production of heavy water, the production of enriched uranium, and the provision of radioactive waste storage. In these areas, the Government activity is "the marketplace."

GAO'S RESPONSE TO DOE'S COMMENTS

1. DOE disagrees with our analysis in item 2 of appendix I, where we differed on some aspects of how it applied the exceptional circumstance provision. DOE believes that its existing arrangements, called Participation Agreements, with the Electric Power Research Institute (EPRI) and the Gas Research Institute (GRI), further the act's purposes.

Under the agreements, EPRI and GRI will share the cost and management responsibilities if DOE enters into a funding agreement with a small business or nonprofit organization. In exchange, EPRI and GRI, their member utilities, and other U.S. utilities would receive irrevocable, nonexclusive, and royalty-free licenses to make, use, and sell any invention or discovery made or conceived by the small business or nonprofit organization. DOE, in its original submission, recognized that such a license could be considered to be in derogation of patent rights of the small businesses and nonprofit organizations.

DOE points out that EPRI and GRI have "contributed millions of dollars in cooperative R&D programs with DOE" and believes that, should royalty-free licenses be denied EPRI and GRI, investment and cooperation in commercializing government-sponsored technology will be discouraged. DOE suggests that EPRI's and GRI's investments in the R&D programs represent an "advance commitment" to commercialization and that DOE's actions further the purpose of the law by ". . . promoting utilization of inventions arising from federally supported research." This is not a case of the government's retaining patent rights for itself, as were the situations with which the Congress was primarily concerned in enacting Public Law 96-517; the license rights here remain in the private sector. However, the result is still to limit small businesses' or nonprofit institutions' ability under government funding to exploit their inventions.

In essence, DOE's argument is that EPRI and GRI will be encouraged to invest in the development of government-sponsored technology and will commercialize the resulting technology if given royalty-free licenses to inventions developed by small business or nonprofit subcontractors, and that ". . . to discourage such investments and cooperation by denying the sponsor even a royalty-free license would appear to be antithetical to the basic purpose of the Public Law."

We find nothing in the stated purposes of the law (35 U.S.C. § 200) that is inconsistent with the notion that sponsors of joint research with the federal government must agree to allow small business or nonprofit subcontractors to retain rights to their inventions.

Whether EPRI and GRI would indeed be discouraged from participating in funding this research if they cannot get royalty-free licenses for their members is conjectural. That possibility would presumably exist any time a private party considers participating with the government in research. The statutory requirement for title to inventions to go to small business or nonprofit subcontractors expressly covers situations like this in which the research is funded only in part by the government.

2. DOE objected to the method of analysis, particularly in items 4 and 5, whereby GAO evaluated each "fact" individually to decide whether exceptional circumstances existed. DOE ". . . would like to emphasize that usually there is not any one single fact that would create a 'per se' exceptional circumstance, but that it is the overall effect of the total factual situation that should be reviewed."

As an example, DOE points to our analysis in items 4 and 5, where we rejected the assertion of DOE that, because the contractors were "GOCO-like," invoking exceptional circumstances was justified. (We did find that exceptional circumstances existed in both cases since DOE intended to fund the technology involved to the point of commercialization.) DOE states that the existence of a "GOCO exception" in the act is evidence that different policy considerations arise out of GOCO contracts. Should a contract have GOCO characteristics, they should, in DOE's view, be considered along with all other "facts" in determining whether exceptional circumstances exist.

What DOE characterizes as a "fact"--that the two contractors in items 4 and 5 were "GOCO-like"--was a judgment by DOE. We agreed with DOE in item 5 that the contractor in certain respects closely resembled a GOCO. The similarity between the contractor in item 4 and a GOCO was much less apparent to us.

We agree in principle with DOE that a combination of factors, none of which alone would suffice, might in concert support a finding that exceptional circumstances exist. Moreover, the unique characteristics of a particular contract that resembled a GOCO arrangement could support a finding of exceptional circumstances. However, this would occur because the characteristics were in some fashion exceptional, rather than because of the resemblance alone.

We do not agree that the assertion that the contractors resembling GOCOs in the two particular cases under discussion supports the conclusion that exceptional circumstances exist. DOE maintains that in items 4 and 5, the contractors were so

similar to GOCOs that, while the specific statutory GOCO exception[1] cannot be invoked, it would be within the spirit of the act to invoke exceptional circumstances. The exceptional circumstances exception, however, is to be strictly construed. The legislative history states that the exception is to be used "sparingly" and lists only two specific examples when the exceptional circumstances exception would be appropriate to use, neither of which applies here. (See S. Rep. No. 96-480, 32 (1979).)

3. DOE objects to GAO's conclusion in items 4 and 7 that the application of "march-in" rights will assure the widespread availability of research results.

"March-in" rights are to be exercised by a federal agency if a contractor is not making reasonable efforts to achieve practical application of an invention. We cited the possible exercise of march-in rights in response to DOE's contention that giving patent rights to a small business subcontractor would prevent the kind of widespread availability of research results that would take place if the government commercialized the technology. DOE asserts that ". . . although 'march-in' rights can be utilized to insure commercialization either by the contractor itself or a licensee of the contractor, such action would not insure the availability of the research results to a wide segment of industry."

We believe march-in rights can be used to assure widespread availability of research results if that is determined to be desirable; the federal agency can, within its discretion, give or require the contractor to give a nonexclusive license to any responsible applicant (35 U.S.C. § 203).

4. DOE asserts that in at least three exceptional circumstance determinations--items 4, 5, and 7--in which DOE has decided to retain the rights to inventions, GAO has suggested that DOE should consider providing for reversion of rights to the small businessess or nonprofit organizations in the event it does not ultimately fund the particular technology to the marketplace. (Actually, we raise this possibility only in items 4 and 5. We do not believe DOE should have retained the rights in item 7.)

By way of pointing out the deficiencies of the reversion approach, DOE postulates a situation in which an agency decides to revise its initial decision to fund to the marketplace and, instead, decides to allow industry to do so. Where

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[1]"[W]hen the funding agreement is for the operation of a Government-owned research or production facility," the agency may withhold patent rights from small business or nonprofit subcontractors (35 U.S.C. § 202(a)(1)).

the projects are primarily government activities or capital-intensive, long-term research activities, DOE believes that, should an agency retain the rights to inventions, it would be able to offer the private organization, which might continue the funding, an additional incentive to do so.

We do not disagree with DOE's point. As we said in item 7, ". . . funding to the marketplace is an effort by the government to develop a technology to the point where the private sector would be willing to continue further development." DOE describes exactly that situation. Should DOE fund a project to the point where private industry, with the package of patent rights from DOE, is willing to continue the funding, DOE has "funded to the marketplace." The reversion provision we suggested in items 4 and 5 would be invoked in those situations where the government has decided not to fund the technology to that point.

5. A government determination to fund a technology "to the marketplace" is included in the legislative history of the Patent and Trademark Amendments of 1980 as an example of exceptional circumstances (S. Rep. No. 96-480, 32 (1979)). DOE rejects GAO's equation in item 7 of "the marketplace" with "the private sector." *DOE states that*

> ". . . in certain areas, Congress or the Executive Branch has identified DOE as having the responsibility of providing materials or facilities to the private sector of our economy in lieu of depending upon such activities being undertaken by private industry . . . . In these cases, the Government activity is the 'marketplace.'"

The term "marketplace" as used in the legislative history appears to be synonomous with the "private sector." We believe that the justification for invoking exceptional circumstances in cases where the agency plans to fully fund and promote to the marketplace lies in the agency's need, if it is to be able to transfer the technology to the marketplace, to transfer the rights to the entire process. Such a justification does not exist in situations where the government expects to commercialize the technology itself. Furthermore, the government need not retain the rights to inventions when it intends to commercialize the technology since it retains a nonexclusive, nontransferable, irrevocable, paid-up license in any invention in which the small business or nonprofit organization elects rights (35 U.S.C. § 202(c)(4)).

APPENDIX III

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Inspector General

Washington, D.C. 20201

AUG - 9 1983

Mr. Richard L. Fogel
Director, Human Resources
Division
United States General
Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Fogel:

This refers to your July 8 request for the Department's review and comment on your draft report, "Major Federal Research and Development Agencies Are Implementing the Patent and Trademark Amendments of 1980."

The Department's sole comment relates to the periodic reporting system on use of inventions, discussed on pages 4-5 of the draft report. The report notes there is some uncertainty as to whether the Department of Commerce or the Federal Research and Development (R&D) agencies will collect the data needed from contractors. We believe such collections would be more appropriately performed by the Federal R&D agencies (based on guidance provided by the Department of Commerce), as part of their effort to ensure appropriate transfer of the technology developed by their research.

We appreciate the opportunity to review the draft report and provide our comments.

Sincerely yours,

Richard P. Kusserow
Inspector General

[GAO note: The page references in the second paragraph of this letter have been changed to reflect their location in this final report.]

APPENDIX IV

National Aeronautics and
Space Administration

Washington, D.C.
20546

Reply to Attn of NSM-23

AUG 4 1983

Mr. Frank C. Conahan
Director
National Security and International
Affairs Division
United States General Accounting Office
Washington, DC 20548

Dear Mr. Conahan:

Thank you for the opportunity to comment on the GAO draft report entitled, "Major Federal Agencies Are Implementing the Patent and Trademark Amendments of 1980."

NASA is in agreement with the GAO discussion of the "exceptional circumstance" determination made by NASA under Chapter 18 of Public Law 96-517. However, there is some concern over the role of the Department of Commerce. Specific agency comments are provided in the enclosure to the letter.

Sincerely,

Louis M. Ludwig

Ann P. Bradley
Acting Associate Administrator
for Management

Enclosure

APPENDIX IV

NASA Comments on "Major Federal Research and Development Agencies Are Implementing the Patent and Trademark Amendments of 1980"

NASA has reviewed, and is in agreement with, the GAO discussion of the one "exceptional circumstance" determination made by NASA to date under Chapter 18 of Public Law 96-517 (Item 6 of Appendix II to the Report). Also, as indicated in the body of the Report, NASA has followed both the intent and the letter of Chapter 18 of Public Law 96-517 by promptly issuing and applying implementing regulations effective as of July 1, 1981 (initially under OMB Bulletin 81-22 and subsequently under OMB Circular A-124 when it issued). NASA is, however, concerned over the fact that, as discussed on pages 4-5 of the draft report, NASA is unaware of any initiatives by the Department of Commerce to date to develop a uniform reporting system, to accumulate data, or to publish any analysis on the utilization and activities regarding the policies and practices outlined in OMB Circular A-124. Further, Circular A-124 prohibits agencies from accumulating any data without authorization of DOC, which has not been given. This notwithstanding, DOC is now proposing that OMB Circular A-124 be expanded and made applicable to all contracting situations by all agencies.

Prior to the enactment of P.L. 96-517, and even now in situations not covered by Circular A-124, NASA has conducted, and conducts, periodic surveys of its contractors to obtain information on the utilization and commercialization of inventions for which the contractor receives title. This information, and the analysis thereof, is very useful in assessing the effectiveness of NASA's policies and practices regarding the disposition of patent rights, which are oriented towards expediting the utilization and commercial adoption of NASA-funded technology. Thus we find it surprising that DOC is purporting to make policy decisions on behalf of the mission agencies which will clearly impact their policies and practices in this regard without consulting with those agencies, acquiring adequate data, conducting any meaningful analysis of the effectiveness of Circular A-124, or assessing its impact on an agency's mission objectives.

/ Neil Hosenball

S. Neil Hosenball
General Counsel

[GAO note: The appendix and page references cited in the first paragraph of this page have been changed to correspond with their locations in this final report.]

APPENDIX IV

GAO'S RESPONSE TO NASA'S COMMENTS

Although NASA agreed with our report, agency officials expressed concern about DOC's effort to implement the uniform reporting system for utilization of inventions. DOC officials told us they are attempting to resolve the issue of whether DOC or the federal R&D agencies will collect the needed data. We plan to monitor DOC's effort and report on its progress in our next annual report.

NATIONAL SCIENCE FOUNDATION
WASHINGTON, D.C. 20550

OFFICE OF AUDIT
AND OVERSIGHT

26 [illegible]

Mr. Morton A. Myers
Director
Program Analysis Division
U. S. General Accounting Office
Washington, DC 20548

Subject: GAO Draft of a Proposed Report, "Major Federal Research and Development Agencies Are Implementing the Patent and Trademark Amendments of 1980 (JC 974193)" -- Your July 5, 1983 Request for Comments

Dear Mr. Myers:

The National Science Foundation has no objection to the draft report.

The Foundation is specifically mentioned only once, in the list of included agencies. All statements referring to NSF and other included agencies are accurate insofar as they apply to us.

We cannot concur in the draft report's disagreement with DOE's determination of "exeptional circumstances" in the situation described in item 2 of appendix I. The draft report, however, correctly states the important point -- that such determinations are legally within the discretion of the agency -- so we will not attempt to debate the issue here.

If you have any questions regarding these comments, please call John Chester, NSF Intellectual Property Attorney, at 357-9447.

Sincerely yours,

Jerome H. Fregeau
Director
Office of Audit & Oversight

cc: Edward A. Knapp, Director, NSF

[GAO note: The appendix referred to in the third paragraph of this letter has been changed to correspond with its location in this final report.]

DOC'S COMMENTS AND GAO'S RESPONSE

UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Productivity, Technology and Innovation
Washington, D C 20230
(202) 377-1984

AUG 3 1983

Mr. J. Dexter Peach
Director, Resources, Community
and Economic Development Division
General Accounting Office
Washington, D. C. 20548

Dear Mr. Peach:

We have reviewed the draft report, "Major Federal Research and Development Agencies are Implementing the Patent and Trademark Amendments of 1980," and believe it is an accurate and fair presentation of the subject.

However, we do have one comment. On pages 6-8 and in Appendix I, the General Accounting Office appears to endorse the concept of "exceptional circumstance" determinations which will result in Government ownership on the basis of a simple claim that an agency intends to fund commercialization of inventions resulting from the award. We believe that the proof of such commercialization should be held to a higher standard than a mere statement of intent. We would suggest that an agency wishing to use the "exceptional circumstance" provision on the basis of its intention to commercialize provide a specific plan and reasons why the plan would be more successful in accomplishing commercialization than the efforts of the inventing organization.

We appreciate this opportunity to comment.

Sincerely,

Bruce Merrifield

D. Bruce Merrifield

[GAO note: The page and appendix referred to in the second paragraph of this letter have been changed to correspond with their location in this final report.]

APPENDIX VI

UNITED STATES DEPARTMENT OF COMMERCE
The Inspector General
Washington, D C 20230

August 5, 1983

Mr. J. Dexter Peach
Director, Resources, Community
and Economic Development Division
U. S. General Accounting Office
Washington, D. C. 20548

Dear Mr. Peach:

This is in reply to your letter of July 7, 1983, requesting comments on the draft report entitled "Major Federal Research and Development Agencies are Implementing the Patent and Trademark Amendments of 1980."

We have reviewed the enclosed comments of the Assistant Secretary for Productivity, Technology and Innovation, and believe they are responsive to the matters discussed in the report.

Sincerely,

Sherman M. Funk
Inspector General

Enclosure

GAO'S RESPONSE TO DOC'S COMMENTS

DOC objects to GAO's agreeing that exceptional circumstances exist when an agency claims that it intends to fund a technology to the point of commercialization. DOC suggests that

> ". . .an agency wishing to use the 'exceptional circumstances' provision on the basis of its intentions to commercialize [should] provide a specific plan and reasons why the plan would be more successful in accomplishing commercialization than the efforts of the inventing organization."

In our view, the act does not require the agency to prove that its statement of intent to commercialize is true, nor can we envision any way that it could reasonably do so. Similarly, the law does not support a requirement that a government intention to commercialize be shown to have a better chance of achieving its purpose than private efforts.

We recognize our responsibility, as part of our review of agency determinations of exceptional circumstances based on government intention to fund to the marketplace, to scrutinize carefully the agency's justification, as we did with the three determinations submitted citing that justification. (Items 4, 5, and 7 in app. I.)

However, at present, we see no need for stricter controls on the invocation of exceptional circumstances based on intent to commercialize. Any action by an agency to use this as a "loophole" to deprive contractors of rights under the statute would sooner or later become apparent when the projected commercialization did not take place. This would not go unnoticed because contractors who had been denied patent rights on the basis of future commercialization would presumably complain.

APPENDIX VII

THE UNDER SECRETARY OF DEFENSE

WASHINGTON D C 20301

RESEARCH AND ENGINEERING

20 SEP 1983

Mr. Morton A. Myers
Director, Program Analysis Division
United States General Accounting Office
Washington, DC 20548

Dear Mr. Myers:

This is the Department of Defense (DoD) response to your Draft Report "Major Federal Research and Development Agencies are Implementing the Patent and Trademark Amendments of 1980" dated July 5, 1983, (GAO Code 974193) OSD Case No. 6298.

The findings and conclusion of the draft report, and the DoD position on each, is set forth below.

FINDING A: Federal Agencies' Efforts to Implement Public Law 96-517. GAO found that all five Federal R&D agencies incorporated provisions of P.L. 96-517 and OMB regulations into their procurement regulations. All but one agency, DoD, included Circular A-124 guidance in their agency's procurement regulations. DoD's regulations included OMB's interim regulations. However, DoD officials told us that they are currently revising the Defense Acquisition Regulation (DAR) to include Circular A-124 guidance and President Reagan's directive to adopt and implement the policies set forth in P.L. 96-517 for all contractors (p. 4, Final Report).

DoD POSITION: Concur. It is the practice of the DAR Council to issue amendments on a priority basis only on major changes, or where urgently needed. As the report states, the DAR was promptly amended to reflect the OMB interim regulations (Bulletin 81-22). The differences between the Bulletin and Circular A-124 were minor. Hence, the refinements to the coverage to precisely match A-124 are being handled on a routine basis.

FINDING B: Department of Commerce's Efforts to Implement OMB Circular A-124. GAO found that DOC recently began to monitor Federal agencies' regulations and procedures for implementing P.L. 96-517. On September 16, 1982, DOC asked 13 Federal R&D agencies to provide copies of (1) their regulations, instructions, or guidance for implementing the law and OMB Circular A-124 and (2) the standard patent clause used in funding agreements with small businesses and nonprofit organizations. As of June 1, 1983, DOC had received responses from 11 agencies. Ten agencies submitted documentation to DOC. One agency, DoD, did not submit documentation but responded orally to the request. According to DOC officials, DoD is currently following OMB's interim regulations (Bulletin 81-22). DoD officials told DOC's officials that Circular A-124 guidance will be incorporated in the revised DAR. The date when DoD will officially issue the DAR has not been set (p. 5, Final Report).

[See GAO note, p. 33.]

APPENDIX VII

DoD Position: Concur. As stated in connection with Finding A, above, the minor changes to the existing coverage in order to precisely comport with A-124 are being routinely processed. This is going forward with an eye to the coverage concurrently under consideration for the proposed new Federal Acquisition Regulation (FAR).

CONCLUSION: Incorporation of Provisions of the Law into Procurement Regulations. In connection with Findings A and B GAO concludes that the five major Federal R&D agencies have incorporated provisions of the law and OMB guidance into their procurement regulations. These agencies have also established policies and practices for allowing small businesses and nonprofit organizations to retain title to inventions. To date, we found that no pattern of determinations exist that is contrary to the law (p. 9, Final Report).

DoD Position: Concur.

We appreciate the opportunity to comment on the draft report.

Sincerely,

James P. Wade, Jr.

James P. Wade, Jr.
Acting

[GAO note: Page references in this letter have been changed to reflect their position in this final report.]

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