rights in the technical data pertaining to it (see recommended DFARS 227.403-5(c)). Limited rights data could not be used for competitive purposes as the data could not be disclosed or released outside the Government (see recommended DFARS 252.227-7013(a)(13)).

Moreover, even where only a *portion* of development is claimed to have been at private expense, the Government would automatically have only Government Purpose Rights (GPR) in the data for five years (see recommended DFARS 227.403-5(b)) as opposed to unlimited rights unless otherwise negotiated under existing regulations. Under the proposed regulations, an OEM would be able to limit DOD to GPR by paying for (or charging as an indirect cost) an insignificant portion of development while DOD funds the rest. Although a competitor could use GPR data to compete for DOD contracts, it could not use it to compete for commercial or direct foreign government sales (see recommended DFARS 252.227-7013(a)(11),(12)). Competition on DOD procurements would also be limited under the Committee's recommended changes because there is no mechanism in place or provided for to permit potential competitors timely access to GPR data. Specifically, in order to compete, alternate sources need access to pertinent technical data *before* a solicitation is issued to obtain necessary source approvals and to submit a timely bid or proposal. Small business manufacturers currently use the Freedom of Information Act and agency "cash sales" programs to obtain this data before a solicitation is issued. Since GPR data are proprietary to the OEM, that data could be withheld under FOIA Exemption 4 governing confidential business information and not releasable under "cash sales" programs.

Thus, under the Committee's recommendations, DOD would be entitled to *unlimited rights*—i.e., the right to use, modify, reproduce, perform, display, release, or disclose technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so (see recommended DFARS 227.252.7013(a)(15))—*only* in data pertaining to items, components, or processes paid for *in full* by the Government as a *direct cost* under a particular contract. Allocating technical data rights on the basis of the classification of the underlying costs as direct or indirect will severely limit the availability of technical data to spare parts manufacturers. This will in turn limit competition for these parts and facilitate pricing abuses. It follows, therefore, that when the OEMs speak of protecting *"their"* data, they are now referring to data whose development costs were charged to DOD as indirect expenses and *paid for by the taxpayer.* In other words, "what's mine is mine and what's yours is mine."

The current FAR cost principles, the Cost Accounting Standards, and the case law permit OEMs to charge what can be significant amounts of design and development costs to indirect accounts. No accounting changes may be needed for OEMs to charge certain development costs indirect and thereby preclude competition. For example, OEMs commonly charge the development of manufacturing process specifications essential for competition to DOD as indirect manufacturing and production engineering (M&PE) costs under FAR 31.205-25. So long as the Government's rights in technical data did not turn on the manner in which M&PE was charged, how OEMs charged them was not critical from a competition standpoint. Where as now, however, the Committee has recommended changing the method for allocating technical data rights, the OEM's practice is crucial. It is not surprising, therefore, that OEMs fought stridently to have indirect costs, particularly M&PE, characterized as private expense and to thereby limit the Government's rights in the data and competition.

Costs other than M&PE expenses also may be charged indirectly. FAR 31.202(b) and CAS 402.50(e) permit "minor" amounts of otherwise direct costs, such as the costs of design development activity, to be charged indirect for reasons of practicality. This provides another means for an OEM to preclude data, whose development was paid for by the Government, from being used for competitive procurement purposes. The "minor" amounts of otherwise direct costs that can be charged indirect under this rule can be substantial. In *Sperry Gyroscope Co.*, ASBCA 9700, 1964 BCA ¶ 4514, the Board held that $136,000 in otherwise direct pre-1964 development dollars could be charged indirect under this exception. How far the OEMs will be able to push this "minor amount" exception to direct charging in order to claim rights in data paid for by DOD is unclear.

Furthermore, costs that the Government

views as direct development costs may nonetheless be chargeable indirectly in accordance with an OEM's disclosed accounting practices. CAS 418.30(a) defines a "direct cost" as any cost that "is identified specifically with a particular final cost objective." Thus, "[a]ll costs *identified specifically with a contract* are *direct costs* of that contract," and "[a]ll costs *identified specifically with other final cost objectives* of the contractor are *direct costs of those cost objectives*" (emphasis added). Although the case law is murky, significant amounts may be chargeable indirect under this definition and under cases holding that cost objectives are determined by a contractor's accounting system rather than contract requirements (see *Texas Instruments*, ASBCA 18621, 79-1 BCA ¶ 13800, *affd.*, 79-2 BCA ¶ 14184, and *Boeing Co. v. U.S.*, 862 F.2d 290 (Fed. Cir. 1988), 7 FPD ¶ 160; see also, Goodrich, "Identifying Final Cost Objectives & Classifying Direct Costs," 91-7 CP&A Report 3 (July 1991)). Costs charged to a cost objective other than a contract are considered indirect costs unless a contractor *elects* to reallocate them from an intermediate cost pool to the contract as a direct charge (see Shapiro, "Direct vs. Indirect Costs—A Choice," 89-2 CP&A Report 3, 8–9 (Feb. 1989)). Accordingly, a contractor could treat development expenses as indirect costs provided those costs benefit multiple final cost objectives under the contractor's accounting system.

Additionally, the CAS do not preclude a contractor from changing its accounting practices to charge costs previously charged direct indirectly, thereby preventing DOD from obtaining rights in data necessary for competition notwithstanding that the items, components, or processes were developed at taxpayer expense (see FAR 30.602-3). The CAS only require advance notice of a change and that the contractor absorb any increase in contract price. DOD is without authority to withhold approval of a change unless the system, as changed, would not comply with the CAS or with the FAR cost principles (see FAR 30.602-3 and FAR 30.202-7).

Finally, the Committee's recommendations also could be used by an OEM to preclude competition on previously competed spare parts. OEMs continually revise manufacturing process specifications during the life of a weapon system. From time to time, they also make minor design changes. These manufacturing process and design changes typically are paid for by DOD under component improvement programs. An OEM could preclude competition on previously competed spare parts by charging all or part of the development costs for these minor revisions to DOD as an indirect expense.

In light of the foregoing, it is evident that the Committee's recommendation to allocate technical data rights on the basis of the classification of development costs as direct or indirect will have a detrimental effect on competition and the price of spare parts and presents a serious potential source of charging abuse.

Effect on Commercial and Foreign Government Buyers—Small business contractors use Government-owned technical data to compete for domestic commercial sales and direct sales to friendly foreign governments in addition to DOD requirements. (Direct sales are where a U.S. company sells directly to a foreign government. They are distinguished from sales under the Foreign Military Sales program, in which DOD acts as the purchaser for a foreign government.) If the Committee's recommendations are adopted and OEMs can claim limited rights in data by charging the costs of all development indirect, data currently available to small business contractors would no longer be available to them and they would be precluded from competing on a large number of commercial and foreign government procurements.

Furthermore, under the Committee's proposal, (a) GPR data could not be disclosed by DOD for use in connection with commercial or direct foreign government sales (see recommended DFARS 227.252.7013(b)(2)), and (b) an OEM could limit DOD's rights in data to GPR for five years where it pays for as little as $1 of development costs itself, or worse, charges that $1 to DOD as an indirect cost. Therefore, competition by small business contractors on commercial and foreign government procurements would be further eroded at a minimum for the five-year period GPR data would be protected.

The absence of competition will increase costs to commercial and foreign government buyers. Since many direct foreign government sales are funded with U.S. grants-in-aid, the Committee's recommendations would correspondingly increase

costs to the U.S. taxpayer.

Loss of U.S. Jobs and Manufacturing Capability—The inability of small business parts manufacturers to obtain vital information as a result of the Committee's recommendations will likely result in the loss of many jobs. Specifically, an often-overlooked fact is that small businesses rather than OEMs are U.S. manufacturing capability. The OEMs for the most part are not manufacturers but rather are "assemblers," "dealers," or "importers." They purchase parts from others and then assemble them into weapon systems or, after adding a hefty markup, merely resell them as replacement parts.

Until recently, the OEMs purchased parts from domestic small business manufacturers. Increasingly, however, they have been entering into offset agreements with foreign governments that require them, as a condition of sale, to subcontract abroad. As a result of these offset agreements and other arrangements, OEMs are increasingly purchasing parts abroad. If the § 807 Committee recommendations are adopted, contracts previously awarded to domestic small business parts manufacturers will be awarded noncompetitively to OEMs because small businesses will be unable to obtain critical manufacturing information.The OEMS will subcontract their work abroad. U.S. jobs and manufacturing capability will be lost forever causing substantial harm to the U.S. economy and defense industrial base.

Conclusion—The recommendations of the § 807 Committee will result in increased costs to the taxpayer, as well as a loss of U.S. jobs and manufacturing capability. As stated in the Minority Report of Committee Member Nick Reynolds, President of the Independent Defense Contractors Association: "Given a reduced defense budget, one would think that the politically astute thing for DOD to do would be to take steps to maximize its 'bang for the buck'. In today's economic scenario, DOD does not serve itself well playing Santa Claus to large defense contractors at the expense of the taxpayer."

The foregoing comment was prepared for THE GOVERNMENT CONTRACTOR *by and contains the opinions of* **Paul J. Seidman.** *Mr. Seidman is a principal in the law firm of Seidman & Associates, P.C., McLean, VA, and represents companies competing against OEMs for spare parts procurements. He serves as procurement policy counsel to the Independent Defense Contractors Association.*