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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 227 and 252

[Docket DARS-2016-0010]

RIN 0750-AI91

Defense Federal Acquisition Regulation Supplement: Rights in Technical Data (DFARS Case 2016-D008)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2016 that addresses rights in technical data relating to major weapon systems, expanding application of the presumption that a commercial item has been developed entirely at private expense.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2016-D008, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit

comments via the Federal eRulemaking portal by entering "DFARS Case 2016-D008" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2016-D008." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2016-D008" on your attached document.

- o Email: osd.dfars@mail.mil. Include DFARS Case 2016-D008 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: Ms. Amy G. Williams, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement section 813(a) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114-92) that modifies 10 U.S.C. 2321(f) to address rights in technical data relating to major weapon systems.

The validation of asserted restrictions on technical data is based on statutory requirements, codified primarily at 10 U.S.C. 2321, which are implemented in the DFARS at 227.7102-3 for commercial technical data and at 227.7103-13 for noncommercial technical data, and incorporated into individual contracts via the clause DFARS 252.227-7037, Validation of Restrictive Markings on Technical Data, for both commercial technical data and noncommercial technical data. By long-standing policy, these requirements and procedures are adapted and applied to noncommercial computer software (see 227.7203-13 and clause 252.227-7019, Validation of Asserted Restrictions—Computer Software), but are not applied to commercial computer software.

Since 1995, these validation procedures have included specialized presumptions and procedures for commercial technical data. For discussion purposes, these specialized requirements will be referred to as the "Commercial Rule" (see 10 U.S.C. 2320(b)(1) and 2321(f)). Under the Commercial Rule, a contracting officer is required to presume that a commercial item has been developed entirely at private expense, unless

shown otherwise in accordance with the procedures at 10 U.S.C. 2321(f).

Subsequently, section 802(b) of the NDAA for FY 2007, as amended by section 815(a)(2) of the NDAA for FY 2008, modified 10 U.S.C. 2321(f)(2) to establish another specialized set of procedures for technical data related to major systems (including subsystems or components thereof). For discussion purposes, this second set of specialized requirements has been referred to as the "Major Systems Rule." Under the Major Systems Rule, a contracting officer's challenge to asserted restrictions on technical data relating to a major system shall be sustained unless the contractor or subcontractor submits information demonstrating that the item was developed exclusively at private expense; except for commercially available off-the-shelf (COTS) items, which remained subject to the Commercial Rule in all cases.

The Major Systems Rule, as an exception to the Commercial Rule, was implemented in the DFARS via DFARS Case 2007-D003, which was published for comments as a proposed rule in the Federal Register on May 07, 2010 (75 FR 25161), and subsequently became effective via a final rule published on September 20, 2011 (76 FR 58144). As a result, the Commercial Rule was implemented for technical data at DFARS 227.7103-13(c)(1) and in the clause at DFARS 252.227-7037(b)(1), and the Major Systems

Rule was implemented at 227.7103-13(c) (2) and 252.227-7037(b) (2). Additionally, the Major Systems Rule was applied to noncommercial computer software at 227.7203-13(d) and in the clause at 252.227-7019(f), although in the noncommercial computer software implementation the Major Systems Rule stands alone, rather than as an exception to the Commercial Rule, because neither the Commercial Rule, nor any element of the validation procedures overall, has been applied to commercial computer software.

Section 813(a) revised 10 U.S.C. 2321(f) to amend both the Commercial Rule and the Major Systems Rule in two primary ways:

(1) The major systems rule was narrowed to apply only to major weapon systems – essentially converting the Major Systems Rule into the Major Weapon Systems Rule.

(2) The COTS exception to the Major Systems Rule was expanded to include three additional exceptions. More specifically, the formerly COTS-only exception was expanded to include–

(i) COTS items with modifications of a type customarily available in the commercial marketplace or minor modifications made to meet Federal Government requirements;

(ii) Commercial subsystems or components of a major weapon system, if the major weapon system was acquired as a commercial item in accordance with 10 U.S.C. 2379(a); and

(iii) Components of a subsystem, if the subsystem was acquired as a commercial item in accordance with 10 U.S.C. 2379(b).

II. Discussion and Analysis

A. Implementation of the Statutory Changes for Validation of Asserted Restrictions on Technical Data.

Because the DFARS already included an implementation of the Commercial Rule and Major Systems Rule, and section 813(a) revised only particular characteristics and subelements of the Major Systems Rule, the implementation of the statutory changes is relatively straightforward. More specifically, the Major Systems Rule is amended to apply only in the case of a major weapon system (see revised DFARS 227.7103-13(c)(2)(ii), and 252.227-7037(b)(2)), and the exception to the Major Systems Rule that previously referenced only COTS items, was expanded to include the three new exceptions, as well (see new DFARS 227.7103-13(c)(2)(ii)(1) through (3), and 252.227-7037(b)(2)(i)).

In addition, a minor change was made to the coverage for the Commercial Rule, which had previously referred to COTS items as always being covered by the Commercial Rule. Under the new schema, which includes four categories of items that are exceptions to the Major Weapon Systems Rule, and thereby are always governed by the Commercial Rule, it was deemed to be too

complicated to refer to all four exceptions in both the coverage for the Commercial Rule and the Major Weapon Systems Rule. Accordingly, the exceptions are listed only within the Major Weapon Systems Rule, and the Commercial Rule merely cross-references that coverage as an exception to the Commercial Rule. In addition to avoiding unnecessary duplication in the coverage, this approach provides an advantage in circumstances involving an assertion regarding any type of commercial item that is not part of a major weapon system or subsystem thereof, such that there would be no need to parse through the entire Major Weapon Systems Rule only to find that the item is covered by one of the exceptions to the Major Weapon Systems Rule, and thus still covered by the Commercial Rule.

B. Application of the Revised Requirements and Procedures to Validation of Asserted Restrictions on Computer Software.

DoD has made no additional edits to extend the section 813(a) construct to noncommercial computer software, and has deleted the baseline coverage of noncommercial computer software in major systems, currently at DFARS 227.7203-13(d) and 252.227-7019(f), because the purpose for the Major Weapon Systems Rule is to function as an exception to the Commercial Rule; but in the context of computer software, these validation procedures do not apply to commercial computer software, and the coverage for noncommercial computer software is concerned only with the Major

Weapon Systems Rule procedures for noncommercial computer software. In the end, the application of the Major Weapon Systems Rule in those cases is extremely unlikely to reach a result that is any different from the application of the "normal" rules for noncommercial computer software. More specifically, in all cases the Government cannot initiate a challenge unless it has a reasonable basis to do so (see DFARS 227.7203-13(a) and (e) (3) (i), and 252.227-7019(d) (3) and (e) (1) for noncommercial computer software; see also 227.7103-13(a), (c) (1), and (d) (4), and 252.227-7037(d) (2) for technical data). After a challenge is initiated, both the Major Weapon Systems Rule and the "normal" validation procedures would result in the challenge being sustained unless the contractor provides information to demonstrate that the noncommercial computer software was developed exclusively at private expense.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This proposed rule does not add any new provisions or clauses or add new requirements to existing provision or clauses. Rather, when acquiring major weapon systems, it expands the circumstances relating to commerciality in which the contracting officer shall presume that development was exclusively at private expense.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This proposed rule was initiated to implement section 813(a) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114-92).

The objective of this rule is to reduce the requirement to respond to Government challenges of restricted rights, by

expanding the applicability of the presumption regarding development exclusively at private expense in accordance with section 813(a) of the NDAA for FY 2016.

DoD cannot accurately determine the number of small entities that will be affected by this change in the regulations, because DoD does not have sufficient information about subcontract awards of subsystems and components of major weapon systems. However, DoD estimates an annual reduction of 50 prechallenge requests for information and 2 challenges of asserted technical data restrictions. DoD further estimates, based on data from the DoD FY 2014 Small Business Procurement Scorecard, that this reduction in challenges will affect about 17 small businesses (52 prechallenges/challenges x 33 percent of subcontract awards to small businesses).

The proposed rule reduces the requirement to respond to Government challenge of restricted rights. Under current regulations, the presumption regarding development exclusively at private expense does not apply to major systems or subsystems or components thereof, except for commercially available off-the-shelf items. This rule expands applicability of the presumption regarding development exclusively at private expense with regard to a major weapon system, or a subsystem or component thereof, to cover-

- A commercial subsystem or component of a major weapon system, if the major weapon system was acquired as a commercial item in accordance with DFARS subpart 234.70 (10 U.S.C. 2379(a));

- A component of a subsystem, if the subsystem was acquired as a commercial item in accordance with DFARS subpart 234.70 (10 U.S.C. 2379(b)); and

- Commercially available off-the-shelf items with modifications of a type customarily available in the commercial marketplace or minor modifications made to meet Federal Government requirements.

The classes of small entities that will be affected by this reduction are small businesses that provide any items in the above categories that are not challenged due to the new statute.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

This rule reduces the burden on small entities to the maximum extent permitted by the statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in

accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2016-D008), in correspondence.

VI. Paperwork Reduction Act

This rule affects the information collection requirements in the provisions at DFARS 252.227-7019 and 252.227-7037, currently approved under OMB Control Number 0704-0369, entitled "Defense Federal Acquisition Regulation Supplement (DFARS): Rights in Technical Data and Computer Software," in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35). The rule is expected to result in a reduction of 1,040 hours in the total estimated burden hours. DoD will submit a change request to OMB to document the reduction in burden hours at the final rule stage.

A. Based on the advice of DoD subject matter experts, DoD currently estimates approximately 500 prechallenge requests for information and approximately 20 challenges per year associated with DFARS clause 252.227-7019, Validation of Asserted Restrictions-Computer Software, and 252.227-7037, Validation of Restrictive Markings on Technical Data. Including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information, the estimated average burden to respond to a prechallenge request for information is

10 hours, and the estimated average burden to respond to each challenge, is 270 hours, resulting in a weighted average of approximately 20 hours per response.

Under current regulations, the presumption regarding development exclusively at private expense does not apply to major systems or subsystems or components thereof, except for commercially available off-the-shelf items. This rule expands applicability of the presumption regarding development exclusively at private expense with regard to a major weapon system, or a subsystem or component thereof, to cover—

- A commercial subsystem or component of a major weapon system, if the major weapon system was acquired as a commercial item in accordance with DFARS subpart 234.70 (10 U.S.C. 2379(a));

- A component of a subsystem, if the subsystem was acquired as a commercial item in accordance with DFARS subpart 234.70 (10 U.S.C. 2379(b)); and

- Commercially available off-the-shelf items with modifications of a type customarily available in the commercial marketplace or minor modifications made to meet Federal Government requirements.

Therefore, DoD estimates a reduction of about 10 percent in the estimated number of prechallenge requests for information

and challenges under DFARS 252.227-7019 and 252.227-7037 as follows:

	<u>Current Requirement:</u>	<u>Revised:</u>	<u>Delta:</u>
<u>Respondents:</u>	520	468	52
<u>Responses per respondent:</u>	1	1	1
<u>Total annual responses:</u>	520	468	52
<u>Preparation hours per response:</u>	20	20	20
<u>Total response burden hours:</u>	10,400	9,360	1,040

B. Request for Comments Regarding Paperwork Burden.

Written comments and recommendations on the proposed information collection, including suggestions for reducing this burden, should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, or email [Jasmeet K. Seehra@omb.eop.gov](mailto:Jasmeet.K.Seehra@omb.eop.gov), with a copy to the Defense Acquisition Regulations System, Attn: Ms. Amy G. Williams, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060. Comments can be received from 30 to 60 days after the date of this proposed rule, but comments to OMB will be most useful if received by OMB within 30 days after the date of this proposed rule.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the DFARS, and will have practical

utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Acquisition Regulations System, Attn: Ms. Amy G. Williams, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060, or email osd.dfars@mail.mil. Include DFARS Case 2016-D008 in the subject line of the message.

List of Subjects in 48 CFR Parts 227 and 252

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 227 and 252 is proposed to be amended as follows:

1. The authority citation for parts 227 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 227—PATENT, DATA, AND COPYRIGHTS

2. Amend section 227.7103-13 by—

- a. In paragraph (c) (1), removing “commercial item , component, or process” and adding “commercial item” in its place and removing “the item, component or process” and adding “that item” in its place; and
- b. Revising paragraphs (c) (2) (i) and (ii).

The revisions read as follows:

227.7103-13 Government right to review, verify, challenge and validate asserted restrictions.

* * * * *

(c) * * *

(2) * * *

(i) Commercial items. Except as provided in paragraph (c) (2) (ii) of this subsection, contracting officers shall presume that a commercial item was developed exclusively at private expense whether or not a contractor or subcontractor submits a justification in response to a challenge notice. When a challenge is warranted, a contractor's or subcontractor's failure to respond to the challenge notice cannot be the sole basis for issuing a final decision denying the validity of an asserted restriction.

(ii) Major weapon systems. When the contracting officer challenges an asserted restriction regarding technical data for a

major weapon system or a subsystem or component thereof on the basis that the technology was not developed exclusively at private expense—

(A) The presumption in paragraph (c)(2)(i) of this subsection applies to—

(1) A commercial subsystem or component of a major weapon system, if the major weapon system was acquired as a commercial item in accordance with subpart 234.70 (10 U.S.C. 2379(a));

(2) A component of a subsystem, if the subsystem was acquired as a commercial item in accordance with subpart 234.70 (10 U.S.C. 2379(b)); and

(3) Any other component, if the component is a commercially available off-the-shelf item or a commercially available off-the-shelf item with modifications of a type customarily available in the commercial marketplace or minor modifications made to meet Federal Government requirements; and

(B) In all other cases, the contracting officer shall sustain the challenge unless information provided by the contractor or subcontractor demonstrates that the item was developed exclusively at private expense.

* * * * *

227.7203-13 [Amended]

3. Section 227.7203-13 is amended by removing paragraph (d) and redesignating paragraphs (e), (f), and (g) as paragraphs (d), (e), and (f), respectively.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Amend section 252.227-7019 by—

a. Removing the clause date "(SEPT 2011)" and adding "(DATE)" in its place;

b. Removing paragraph (f);

c. Redesignating paragraphs (g), (h), (i), and (j) as paragraphs (f), (g), (h), and (i), respectively;

d. In newly redesignated paragraph (f)(5)—

i. Removing "(g)(1)" and adding "(f)(1)" in its place;

ii. Removing "Officer will" and adding "Officer shall" in its place; and

iii. Removing "paragraph (f) of this clause and";

f. In newly redesignated paragraph (f)(6) introductory text, removing "the written explanation furnished pursuant to paragraph (f)(1) of this clause, or any other" and adding "any" in its place;

g. In newly redesignated paragraph (g)(1) introductory text, removing "(h)(3)" and adding "(g)(3)" in its place; and

h. In newly redesignated paragraph (g)(3), removing "(h)(1)" and adding "(g)(1)" in its place.

5. Amend section 252.227-7037 by—

- a. Removing the clause date "(JUN 2013)" and adding "(DATE)" in its place; and
- b. Revising paragraphs (b) (1) and (2).

The revision reads as follows:

252.227-7037 Validation of restrictive markings on technical data.

(b) * * *

(1) Commercial items. (i) Except as provided in paragraph (b) (2) of this clause, the Contracting Officer will presume that the Contractor's or a subcontractor's asserted use or release restrictions with respect to a commercial item is justified on the basis that the item was developed exclusively at private expense.

(ii) The Contracting Officer will not challenge such assertions unless the Contracting Officer has information that demonstrates that the commercial item was not developed exclusively at private expense.

(2) Major weapon systems. In the case of a challenge to a use or release restriction that is asserted with respect to data of the Contractor or a subcontractor for a major weapon system or a subsystem or component thereof on the basis that the major weapon system, subsystem, or component was developed exclusively at private expense—

(i) The presumption in paragraph (b) (1) of this clause applies to—

(A) A commercial subsystem or component of a major weapon system, if the major weapon system was acquired as a commercial item in accordance with DFARS subpart 234.70 (10 U.S.C. 2379(a));

(B) A component of a subsystem, if the subsystem was acquired as a commercial item in accordance with DFARS subpart 234.70 (10 U.S.C. 2379(b)); and

(C) Any other component, if the component is a commercially available off-the-shelf item or a commercially available off-the-shelf item with modifications of a type customarily available in the commercial marketplace or minor modifications made to meet Federal Government requirements; and

(ii) In all other cases, the challenge to the use or release restriction will be sustained unless information provided by the Contractor or a subcontractor demonstrates that the item or process was developed exclusively at private expense.

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