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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: Final rule.

SUMMARY: DoD is issuing a final rule 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: Effective [Insert date of publication in the **FEDERAL REGISTER**].

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

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the Federal Register at 81 FR 28812 on May 10, 2016, to implement section 813(a) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114-92). Section 813(a) modifies 10 U.S.C. 2321(f) to address rights in technical data relating to major weapon systems.

Until now, except for commercially available off-the-shelf (COTS) items, a contracting officer's challenge to asserted restrictions on technical data relating to a major system was sustained unless the contractor or subcontractor submitted information demonstrating that the item was developed exclusively at private expense.

Section 813(a) revised 10 U.S.C. 2321(f) in two primary ways: (1) the major systems rule was narrowed to apply only to major weapon systems; and (2) the exception to the major systems rule for commercially available off-the-shelf (COTS) items 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).

There were no public comments submitted in response to the proposed rule. There are no significant changes from the proposed rule made in the final rule.

Although there were no comments received on the substance of the proposed rule, DoD did receive a request to suspend the rulemaking process on any case (including this case) relating to rights in technical data until such time as the final report of the Government-Industry Advisory Panel (the Panel), established in accordance with section 813(b) of the NDAA for FY 2016, has been submitted to Congress. After consultation with the Chair of the Panel, DoD determined to proceed with publication of the final rule on this case. This case implements section 813(a) of the NDAA for FY 2016, the same section that set up the Panel, with no indication that DoD should delay implementation.

Furthermore, the law is very prescriptive and the proposed rule is a nearly verbatim implementation of the statutory language, so there could be no substantive change to this rule without a corresponding statutory change to 10 U.S.C. 2321. The statute was effective upon implementation, and is expected to be beneficial to industry, including small businesses.

II. Discussion and Analysis

In order to implement the statutory changes for validation of asserted restrictions on technical data, and apply the revised requirements and procedures to validation of asserted restrictions on computer software, this final rule amends—

- DFARS 227.7103-13, Government right to review, verify, challenge, and validate asserted restrictions;
- DFARS 227.7203-13, Government right to review, verify, challenge, and validate asserted restrictions;
- DFARS 252.227-7019, Validation of Asserted Restrictions—Computer Software; and
- DFARS 252.227-7037, Validation of Restrictive Markings on Technical Data.

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 final 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 not a significant regulatory action and, therefore, was not 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

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This 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.

There were no public comments in response to the initial regulatory flexibility analysis.

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 (52×0.33).

The final 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.

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

VI. Paperwork Reduction Act

This rule contains information collection requirements that have been approved by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). This information collection requirement has been assigned OMB Control Number 0704-0369, entitled "Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 227.71, Rights in Technical Data, and Subpart 227.72, Rights in Computer Software and Computer Software Documentation, and related provisions and clauses."

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 are 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—PATENTS, DATA, AND COPYRIGHTS

2. Amend section 227.7103-13 by—

a. Revising the section heading;

b. 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

c. 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 section, 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 section 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.

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227.7203-13 [Amended]

3. Amend section 227.7203-13 by—
 - a. In the section heading, adding a comma after “challenge”;
 - b. Removing paragraph (d); and
 - c. 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 “(SEP 2011)” and adding “(SEP 2016)” 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 "(SEP 2016)" in its place; and
- b. Revising paragraphs (b)(1) and (2).

The revisions read 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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