6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

48 CFR Parts 1539 and 1552

[EPA-HQ-OARM-2018-0743; FRL-10000-34-OMS]

Environmental Protection Agency Acquisition Regulation (EPAAR); Open Source Software

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is writing a new EPAAR clause to address open source software requirements at EPA, so that the EPA can share open source software developed under its procurements.

DATES: Comments must be received on or before *[insert date 60 days after date of publication in the* Federal Register*]*.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OARM-2018-0743, at http://www.regulations.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public

comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit http://www2.epa.gov/dockets/commenting-epa-dockets.

FOR FURTHER INFORMATION CONTACT: Thomas Valentino, Policy, Training and Oversight Division, Acquisition Policy and Training Branch (3802R), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564-4522; email address: valentino.thomas@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

1. *Submitting Classified Business Information*. Do not submit CBI to EPA website https://www.regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI, and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments*. When submitting comments, remember to:

■ Identify the rulemaking by docket number and other identifying information (subject heading, *Federal Register* date and page number).

■ Follow directions — The Agency may ask you to respond to specific questions or organize comments by referencing a *Code of Federal Regulations* (CFR) Part or section number.

■ Explain why you agree or disagree, suggest alternatives, and substitute language for

your requested changes.

■Describe any assumptions and provide any technical information and/or data that you used.

■If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

■Provide specific examples to illustrate your concerns, and suggest alternatives.

■Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

■Make sure to submit your comments by the comment period deadline identified.

II. Background

The EPA is writing a new EPAAR clause to address open source software requirements at EPA, so that the EPA can share custom-developed code as open source code developed under its procurements, in accordance with Office of Management and Budget's (OMB) Memorandum M-16-21, *Federal Source Code Policy: Achieving Efficiency, Transparency, and Innovation through Reusable and Open Source Software.* In meeting the requirements of Memorandum M-16-21 the EPA will be providing an enterprise code inventory indicating if the new code (source code or code) was custom-developed for, or by, the agency; or if the code is available for Federal reuse; or if the code is available publicly as open source code; or if the code cannot be made available due to specific exceptions.

III. Proposed Rule

The proposed rule amends EPA Acquisition Regulation (EPAAR) Part 1539, *Acquisition of Information Technology*, by adding Subpart 1539.2, *Open Source Software;* and §1539.2071, *Contract clause*. EPAAR Subpart 1552.2, *Texts of Provisions and Clauses*, is amended by

adding EPAAR §1552.239-71, *Open Source Software*.

1. EPAAR Subpart 1539.2 adds the new subpart.

2. EPAAR §1539.2071 adds the prescription for use of §1552.239-71 in all procurements where open-source software development/custom development of software will be required.

3. EPAAR §1552.239-71, *Open Source Software*, provides the terms and conditions for open source software code development and use.

IV. Statutory and Executive Orders Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a "significant regulatory action" under the terms of Executive Order (E.O.) 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the E.O.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute; unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impact of this proposed rule on small entities, "small entity" is defined as: (1) A small business that meets the definition of a small business found in the Small Business

Act and codified at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. After considering the economic impacts of this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, because the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the proposed rule on small entities" 5 U.S.C. 503 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule. This action establishes a new EPAAR clause that will not have a significant economic impact on a substantial number of small entities. We continue to be interested in the potential impacts of the rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, Local, and Tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of the Title II of the UMRA) for State, Local, and Tribal governments or the private sector. The rule imposes no enforceable duty on any State, Local or Tribal governments or the private sector. Thus, the rule is not subject to the requirements of sections

202 and 205 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and Local officials in the development of regulatory policies that have federalism implications. "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." This rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government as specified in Executive Order 13132.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This rule does not have tribal implications as specified in Executive Order 13175.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045, entitled "Protection of Children from Environmental Health and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be economically significant as defined under E.O. 12886, and (2) concerns an environmental health or safety risk that may have a proportionate effect on children. This rule is not subject to E.O.

13045 because it is not an economically significant rule as defined by Executive Order 12866, and because it does not involve decisions on environment health or safety risks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use" (66 FR 28335 (May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act of 1995 (NTTAA)

Section 12(d) (15 U.S.C. 272 note) of the National Technology Transfer and Advancement Act of 1995, Public Law 104-113, directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-

income populations in the United States. EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment in the general public.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a major rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804(2) defines a "major rule" as any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in (1) an annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. EPA is not required to submit a rule report regarding this action under section 801 as this is not a major rule by definition.

List of Subjects in 48 CFR Parts 1539 and 1552

Environmental protection, Government procurement, Reporting and recordkeeping requirements.

Dated: September 17, 2019.

Kimberly Y. Patrick,

Director, Office of Acquisition Solutions.

For the reasons set forth in the preamble, EPA proposes to amend EPAAR Parts 1539 and 1552 as follows:

PART 1539 - ACQUISITION OF INFORMATION TECHNOLOGY

1. Authority: The authority citations for part 1539 continue to read as follows:

Authority: 5 U.S.C. 301 and 41 U.S.C. 418b.

2. Part 1539, as proposed to be added at 84 FR 48856 (September 17, 2019), is proposed to be further amended by adding subpart 1539.2, consisting of 1539.2071 to read follows:

Subpart 1539.2 – OPEN SOURCE SOFTWARE

Section 1539.2071 Contract clause.

(a) Contracting Officers shall use clause 1552.239-71, *Open Source Software,* for all procurements where open-source software development/custom development of software will be required; including, but not limited to, multi-agency contracts, Federal Supply Schedule orders, Governmentwide Acquisition Contracts, interagency agreements, cooperative agreements and student services contracts.

(b) In addition to clause 1552.239-71, Contracting Officers must also select the appropriate version* of Federal Acquisition Regulation (FAR) clause 52.227-14, *Rights in Data – General*, to include in the subject procurement in accordance with FAR 27.409. (**Important note: Alternate IV of clause 52.227-14 is NOT suitable for open-source software procurement use because it gives the contractor blanket permission to assert copyright.)*

PART 1552 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Authority: The authority citations for part 1552 continue to read as follows:

Authority: 5 U.S.C. 301 and 41 U.S.C. 418b.

4. Add Section 1552.239-71 to read as follows:

Section 1552.239-71 Open source software.

As prescribed in 1539.2071 insert the following clause:

OPEN SOURCE SOFTWARE (*date*)

(a) *Definitions.*

"Custom-Developed Code" means code that is first produced in the performance of a federal contract or is otherwise fully funded by the federal government. It includes code, or segregable portions of code, for which the government could obtain unlimited rights under Federal Acquisition Regulation (FAR) Part 27 and relevant agency FAR Supplements. Custom-developed code also includes code developed by agency employees as part of their official duties. Custom-developed code may include, but is not limited to, code written for software projects, modules, plugins, scripts, middleware and Application Programming Interfaces (API); it does not, however, include code that is truly exploratory or disposable in nature, such as that written by a developer experimenting with a new language or library.

"Open Source Software (OSS)" means software that can be accessed, used, modified and shared by anyone. OSS is often distributed under licenses that comply with the definition of "Open Source" provided by the Open Source Initiative at https://opensource.org/osd or equivalent, and/or that meet the definition of "Free Software" provided by the Free Software Foundation at: https://www.gnu.org/philosophy/free-sw.html or equivalent.

"Software" means:

(1) Computer programs that comprise a series of instructions, rules, routines or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations; and

(2) Recorded information comprising source code listings, design details, algorithms, processes, flow charts, formulas and related material that would enable the computer program to be produced, created or compiled. Software does not include computer databases or computer software documentation.

"Source Code" means computer commands written in a computer programming language that is meant to be read by people. Generally, source code is a higher-level representation of computer commands written by people, but must be assembled, interpreted or compiled before a computer can execute the code as a program.

(b) (1) *Policy.* It is the EPA policy that new custom-developed code be made broadly available for reuse across the federal government, subject to the exceptions provided in (b)(3) of this section. The policy does not apply retroactively so it does not require existing custom-developed code also be made available for Government-wide reuse or as OSS. However, making such code available for government-wide reuse or as OSS, to the extent practicable, is strongly encouraged. The EPA also supports the Office of Management and Budget's (OMB) Federal Source Code Policy provided in OMB Memorandum M-16-21, *Federal Source Code Policy: Achieving Efficiency, Transparency, and Innovation through Reusable and Open Source Software,* by:

(i) Providing an enterprise code inventory (e.g., code.json file) that lists new and applicable custom-developed code for, or by, the EPA;

(ii) Indicating whether the code is available for Federal reuse; or

(iii) Indicating if the code is available publicly as OSS.

(2) *Exemption*: Source code developed for National Security Systems (NSS), as defined in 40 U.S.C. § 11103, is exempt from the requirements herein.

(3) *Exceptions*: Exceptions may be applied in specific instances to exempt EPA from sharing custom-developed code with other government agencies. Any exceptions used must be approved and documented by the Chief Information Officer (CIO) or his or her designee for the purposes of ensuring effective oversight and management of IT resources. For excepted software, EPA must provide OMB a brief narrative justification for each exception, with redactions as appropriate. Applicable exceptions are as follows:

(i) The sharing of the source code is restricted by law or regulation, including – but not limited to – patent or intellectual property law, the Export Asset Regulations, the International Traffic in Arms Regulation and the federal laws and regulations governing classified information.

(ii) The sharing of the source code would create an identifiable risk to the detriment of national security, confidentiality of government information or individual privacy.

(iii) The sharing of the source code would create an identifiable risk to the stability, security or integrity of EPA's systems or personnel.

(iv) The sharing of the source code would create an identifiable risk to EPA mission, programs or operations.

(v) The CIO believes it is in the national interest to exempt sharing the source code.

(c) The Contractor shall deliver to the Contracting Officer (CO) or Contracting Officer's Representative (COR) the underlying source code, license file, related files, build instructions, software user's guides, automated test suites, and other associated documentation as applicable.

(d) In accordance with OMB Memorandum M-16-21 the Government asserts its unlimited rights - including rights to reproduction, reuse, modification and distribution of the custom source code, associated documentation, and related files – for reuse across the federal government and as open source software for the public. These unlimited rights described above attach to all code furnished in the performance of the contract, unless the parties expressly agree otherwise in the contract.

(e) The Contractor is prohibited from reselling code developed under this contract without express written consent of the EPA Contracting Officer. The Contractor must provide at least 30 days advance notice if it intends to resell code developed under this contract.

(f) Technical guidance for EPA's OSS Policy should conform with the "EPA's Open Source Code Guidance" that will be maintained by the Office of Mission Support (OMS) at https://developer.epa.gov/guide/open-source-code/ or equivalent.

(g) The Contractor shall identify all deliverables and asserted restrictions as follows:

(1) The Contractor shall use open source license either:

(i) Identified in the contract, or

(ii) Developed using one of the following licenses:

(A) Creative Commons Zero (CC0);

(B) MIT license;

(C) GNU General Public License version 3 (GPL v3);

(D) Lesser General Public License 2.1 (LGPL-2.1);

(E) Apache 2.0 license; or

(F) Other open source license subject to Agency approval.

(2) The Contractor shall provide a copy of the proposed commercial license agreement to the Contracting Officer prior to contracting for commercial data/software.

(3) The Contractor shall identify any data that will be delivered with restrictions.

(4) The Contractor shall deliver the data package as specified by the EPA.

(5) The Contractor shall deliver the source code to the EPA-specified version control repository and source code management system.

(h) The Contractor shall comply with software and data rights requirements and provide all licenses for software dependencies as follows:

(1) The Contractor shall ensure all deliverables are appropriately marked with the applicable restrictive legends.

(2) The EPA is deemed to have received unlimited rights when data or software is delivered by the Contractor with restrictive markings omitted.

(3) If the delivery is made with restrictive markings that are not authorized by the contract, then the marking is characterized as "nonconforming." In accordance with Federal Acquisition Regulation (FAR) 46.407, *Nonconforming supplies or services*, the Contractor will be given the chance to correct or replace the nonconforming supplies within the required delivery schedule. If the Contractor is unable to deliver conforming supplies, then the EPA is deemed to have received unlimited rights to the nonconforming supplies.

(i) The Contractor shall include this clause in all subcontracts that include custom-developed code requirements.

(End of clause)

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