DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 227, and 252

[Docket DARS–2016–0017]

RIN 0750–AI95

Defense Federal Acquisition Regulation Supplement: Rights in Technical Data and Validation of Proprietary Data Restrictions (DFARS Case 2012–D022)

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 2012 that revises the sections of title 10 of the United States Code (U.S.C.) that address technical data rights and validation of proprietary data restrictions.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before September 14, 2016, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2012–D022, using any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by entering ''DFARS Case 2012–D022'' under the heading ''Enter keyword or ID'' and selecting ''Search.'' Select the link ''Submit a Comment'' that corresponds with ''DFARS Case 2012–D022.'' Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''DFARS Case 2012–D022'' on your attached document.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2012–D022 in the subject line of the message.
- *Fax:* 571–372–6094.
- *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 815 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012, which—

- Adds special provisions for handling technical data that are necessary for segregation and reintegration activities;
- Codifies and revises the policies and procedures regarding deferred ordering of technical data necessary to support DoD major systems or subsystems, weapon systems, or noncommercial items or processes;
- Expands the period in which DoD can challenge an asserted restriction on technical data from 3 years to 6 years;
- Rescinds changes to 10 U.S.C. 2320 from the NDAA for FY 2011; and
- Codifies Government purpose rights as the default rights for technical data related to technology developed with mixed funding.

In accordance with the statutory changes, this rule provides better clarity, extended time periods, and enhanced rights for the Government to require delivery of (including through deferred ordering), and to assert rights in, technical data and computer software that are developed in whole or in part with Government funding or that are needed for segregation and reintegration activities, including under commercial items authorities. The rule also provides extended time periods and enhanced rights for the Government to challenge proprietary data legends and markings in order to enable competitive follow-on acquisitions for Government-funded items or processes. However, the rule affirmatively states that there is no requirement in the revised deferred ordering scheme for the contractor to retain the technical data or computer software beyond a reasonable time. While the anticipated costs associated with this rule are not quantifiable in dollar amounts, DoD anticipates that any such impact will be outweighed by the expected benefits of this rule.

II. Discussion and Analysis

A. Scope of the New Requirements—Applicability to Computer Software and to Commercial Technologies

Section 815 revised 10 U.S.C. 2320 and 2321, which cover only technical data (both commercial technical data and noncommercial technical data), and do not expressly cover computer software, which is expressly excluded from the definition of ''technical data.'' However, it is longstanding Federal and DoD policy and practice to apply the same or analogous requirements to computer software. Many issues are common to both technical data and computer software. Accordingly, conformity of coverage between technical data and computer software is desirable.

Further, it is also longstanding policy and practice to recognize that acquisition of technical data or computer software that is, or is related to, commercial technologies involves special considerations that may require adaptation of the policies and practices otherwise applicable to noncommercial technologies. For example, the DFARS coverage for commercial technical data at 227.7102 implements the statutory requirements as applicable to commercial technical data, but otherwise follows the overarching Federal and DoD policy for acquisition of commercial technical data and commercial computer software: That the Government will generally acquire the same deliverables, and the same associated license rights, that are customarily provided to the public, as long as those customary practices are consistent with Federal law and satisfy the agency's needs. For commercial computer software, the DFARS implementation at 227.7202 is even more closely aligned with that overarching policy, and minimizes the extension of DoD-specific requirements derived from the technical data statutes to only a few limited principles, such as allowing DoD to require delivery of computer software documenting modifications made at Government expense to meet the requirements of a Government solicitation (see 227.7202–1(c)(1)).

Accordingly, the implementation of these new statutory authorities also follows these general guidelines, applying and adapting the technical data-specific statutory revisions to computer software as appropriate. The specific determinations regarding such applicability and adaptations are discussed on a case-by-case basis throughout this preamble.

B. Segregation or Reintegration Data

Section 815(a)(1) amended 10 U.S.C. 2320(a)(2)(D)(i) to add a new (fourth) exception to the restriction on sharing outside of DoD any technical data relating to an item or process developed exclusively at private expense. The new exception is framed in the same manner

as the three other preexisting exceptions: They are defined by a specific activity or purpose for which the release is necessary (10 U.S.C. 2320(a)(2)(D)(i)(I)–(IV)); the recipient must be subject to a prohibition on any further use or release of the information (10 U.S.C. 2320(a)(2)(D)(ii)); and the person asserting restrictions on the technical data (hereafter ''the data owner'') must be notified of the release or use (10 U.S.C. 2320(a)(2)(D)(iii)). The new exception covers a new purpose or activity, when the release or use ''is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes.''

C. Approach to Implementation

In the case of technical data, the mandatory statutory revisions are inserted into the baseline DFARS coverage where the rest of the statutory scheme has been implemented. More specifically, revisions are inserted in the context of commercial technical data at DFARS 227.7102–2, and associated clause at 252.227–7015(b)(2)(ii); and for noncommercial technical data in the context of limited rights, as described at DFARS 227.7103–5(c)(2), and defined at DFARS 252.227–7013(a)(14) and 252.227–7018(a)(15).

Regarding computer software, the statutory scheme recognizing certain limited exceptions to the restriction on disclosure of information outside the Government has been extended to noncommercial computer software in the context of the restricted rights, defined at DFARS 252.227–7014(a)(15). Accordingly, the new exception authorizing releases for segregation and reintegration activities has been applied to noncommercial computer software by revising the definition of ''restricted rights.'' Adding this additional exception also provided an opportunity to clarify and streamline the existing baseline list of such exceptions that have been added to restricted rights over the years, and during that process the definition had become unnecessarily long and complex. The definition of ''restricted rights'' has thus been clarified and streamlined, with all of the special circumstances in which releases outside the Government are authorized now consolidated under subparagraph (v)(A), while retaining all of the substantive and procedural protections for each such circumstance at subparagraphs (v)(B) through (v)(E).

In order to streamline the regulations, DoD defined a new term ''segregation or reintegration data'' to mean data that otherwise meets all of the statutory criteria (see the definition at DFARS 227.001, and in paragraph (a) of the associated clauses at 252.227–7013, –7014, –7015, –7018, and new –7029(a)). Creating such a defined term also allows the DFARS implementation to proactively address a major concern expressed by industry and academia in various forums after the enactment of section 815; namely, that the new statutory scheme does not provide a definition for the new concept of data necessary for segregation or reintegration, and thus there is likely to be widespread confusion, uneven and inconsistent interpretations, and potential for disagreement, if the DFARS implementation does not provide additional clarity. More specifically, it is unclear how such segregation or reintegration data relates to the ''form, fit, and function data,'' which would appear to cover already the vast majority of data that would be necessary for segregation or reintegration activities, with at least one critical difference: The Government is entitled to unlimited rights in form, fit, and function data, while section 815 clearly contemplates that segregation or reintegration data could be subject to limited rights, which is completely at the other end of the data rights spectrum from segregation or reintegration unlimited rights. Accordingly, establishing a definition for the term ''segregation or reintegration data'' allows the DFARS implementation to provide additional definitional criteria and clarifying guidance to address these concerns.

To achieve these objectives, the proposed definition for the new term ''segregation or reintegration data'' should both (1) incorporate all of the statutory criteria, and (2) supplement the statutory criteria with additional guidance to ensure clarity and consistency. The first objective is satisfied by incorporating the statutory performance-based language as the core of the primary definitional statement (*i.e.,* ''segregation or reintegration data'' means . . . ''(insert statutory criteria).'')

Regarding the supplementary definitional language needed to address the concerns raised by industry and academia, the proposed definition leverages existing DFARS definitional approaches, terminology, and clarifying language to harmonize the new term with the existing DFARS scheme. First, as previously noted, it is important to identify and clarify how the new term, segregation or reintegration data, relates to the established definition for ''form, fit, and function data.'' In addition, DoD understands that part of the underlying concern that led to the statutory creation of the concept of segregation or reintegration data was based on a number of situations in which DoD and contractors faced challenges in finding mutual agreement regarding what type of data is appropriately characterized as being form, fit, and function data (*e.g.,* the level of technical detail that is required and appropriate). These challenges are exacerbated in situations in which the underlying item or process being described by the form, fit, and function data has been developed exclusively at private expense and is thus treated as proprietary technology by the contractor (*e.g.,* a contractor is less willing to share detailed technical information regarding a privately developed technology, especially when the Government will be granted unlimited rights in that data, which can then be released openly to the public).

To address this foundational issue, DoD compared the statutory language describing segregation or reintegration data with the existing regulatory definition of ''form, fit, and function data.'' In doing so, it is important to note that the Federal Acquisition Regulation (FAR) and DFARS each define ''form, fit, and function data,'' but use different definitions. Although the majority of the definitions may be objectively similar or consistent (*e.g.,* focusing on physical, functional, and performance characteristics to support the interchangeability of items or processes), there is a key distinction between the definitions: The FAR definition (see FAR 52.227–14(a)) covers data relating to computer software, where the DFARS definition refers only to technical data relating to items or processes. The basis for this distinction is not readily apparent, *e.g.,* to define a generic data type that describes the functional or performance characteristics of an item or process at a low level of detail, there may be no reason to exclude data because the underlying item or process is implemented by computer software, rather than hardware alone. Furthermore, it is not clear what result would or should be achieved under the DFARS definition if the item or process being described is comprised of a combination of hardware and software elements. Perhaps this is part of the reason for the challenges in applying the DFARS definition.

After careful consideration, the proposed rule amends the DFARS definition of ''form, fit, and function data'' to harmonize more effectively and predictably with the FAR definition (*e.g.,* covering computer software as well as technical data), including by incorporating express limitations that will more clearly address any concern

that form, fit, and function data could be extended to cover data or software that includes such a degree of technical detail that it is not appropriate to be treated as form, fit, and function data that will be subject to unlimited rights (*e.g.,* the revised definition expressly excludes ''computer software source code, or detailed manufacturing or process data''). See DFARS 227.001, and associated clauses at 252.227–7013(a), –7014(a), –7015(a), –7018(a), and new –7029(a).

Next, building on this clarified and harmonized definition of ''form, fit, and function data,'' the definition of ''segregation or reintegration data'' then incorporates a series of additional elements to address the concerns previously identified:

1. *Relation to form, fit, and function data.* The definition expressly states that segregation or reintegration data is data that is ''more detailed than form, fit, and function data'' but otherwise meets the statutory criteria, and cites by way of example such data that describes the physical, logical, or operational interface or similar functional relationship between items or components.

2. *Objective Standard for Level of Detail Required.* The definition expressly states that, unless mutually agreed otherwise by the parties, the level of detail necessary to support the segregation or reintegration activities will be determined by an objective standard—that required for ''persons reasonably skilled in the art.'' This objective standard is modeled after the well-established objective standards used for the term ''developed'' at baseline DFARS 252.227–7013(a)(7), and –7014(a)(7).

3. *Segregation/Reintegration at Any Practical Level.* The definition recognizes that the segregation or reintegration of an item or process is permitted to be performed at ''any practical level, including down to the lowest practical level. . . .'' This terminology (and the additional examples included in the definition) is adapted from the baseline DFARS coverage regarding the segregation of items or processes for the determination of source of funding for development (*i.e.,* ''the doctrine of segregability''), and the definition of ''developed exclusively at private expense'' (see baseline DFARS 227.7103–4(b), 227.7203–4(b), 252.227–7013(a)(8)(i), and –7014(a)(8)(i)).

4. *Detailed manufacturing or process data and source code.* The definition also recognizes expressly that the application of the definitional elements would not typically require detailed manufacturing or process data or source code, but they may be included.

D. Deferred Ordering

Section 815 also added new paragraph (b)(9) to 10 U.S.C. 2320, which provides that the Government shall have the post-contract-award right to order technical data under certain conditions. Although such a ''deferred ordering'' right has been recognized in the DFARS for decades, section 815 was the first time that such a right has been expressly addressed in the statutory coverage. The baseline DFARS coverage for deferred ordering at 227.7103–8(b), 227.7203–8(b), and associated clause 252.227–7027, was used as the point of departure for implementing the new statutory scheme. However, to avoid any potential confusion, the baseline clause number (DFARS 252.227–7027) is being reserved, and the new statutorily based deferred ordering framework is implemented at the next available DFARS clause number, 252.227–7029.

The new statutory deferred ordering scheme is codified at 10 U.S.C. 2320(b)(9), amongst a list of elements that are required to be included in the DFARS ''whenever practicable.'' The new statutory framework also states that the Government may place a deferred order ''at any time,'' provided that certain conditions are met (*e.g.,* covering only certain types of data, and the Government must make a required determination that additional criteria are met in each case). Accordingly, the clause implementing the new statutory deferred ordering scheme is deemed to be required in all contracts for which the deferred ordering criteria could be met. The clause should therefore be prescribed in all contracts except those in which it would be per se impracticable to meet the statutory criteria. To avoid scenarios in which the clause criteria could be met, but the clause would not have been included up-front, the clause is prescribed for use in all solicitations and contracts using other than FAR part 12 procedures and in those using FAR part 12 procedures for the acquisition of commercial items that are being acquired for (i) a major system or subsystem thereof, or (ii) a weapon system or subsystem thereof. See DFARS 227.7102–4(d), 227.7103–8(c)(2), 227.7104(e)(4), 227.7202–4(c), and 227.7203–8(c)(2); see also new 212.301(f)(xi)(D).

The new DFARS clause at 252.227–7029 is structured to implement the statutory scheme's set of criteria that must be met in order for the Government to place a deferred order—

1. The data must have been ''generated or utilized'' in the performance of a contract or subcontract;

2. The Government must determine that the data is needed for an important sustainment or other life cycle support activity for a DoD system; and

3. The Government must determine that the data either—

a. Result from development activities funded in whole or in part by the Government; or

b. Is segregation or reintegration data.

DFARS 252.227–7029(a), in addition to the new or revised definitions discussed above, provides a new definition for a phrase that is used only in this clause, *i.e.,* ''technical data or computer software generated or utilized in the performance of this contract or any subcontract hereunder.'' The term includes a series of subelements that are intended to provide clarity and predictability in interpreting whether this criterion is met, with inclusive, and exclusive, statements.

DFARS 252.227–7029(b) implements the new statutory requirements (10 U.S.C. 2320(b)(9)(A) and (B)) for the Government to determine that certain criteria are satisfied, as a prerequisite to making a deferred order. However, DoD also concluded that it was unlikely that the legislative intent was to completely preclude the Government from having any form of deferred ordering right in basic or applied research contracts where it would be unlikely that the Government could make one of the otherwise-required determinations, *i.e.,* that the technical information is needed for sustainment of a major system, weapon system, or noncommercial item (see 252.227–7029(b)(1)(i)). Accordingly, the requirement for those specific elements of a determination are waived for basic or applied research activities (see 252.227–7029(b)(2), when the nature of the contract is such that it is likely to be impracticable to require such a determination, but the circumstances are still directly related to a core objective of the statutory scheme (*e.g.,* to ensure that the Government has access to data related to development funded in whole or in part by the Government)).

DFARS 252.227–7029(c) addresses assertions by the contractor that technical data or computer software pertains to an item or process developed exclusively at private expense. To the extent that disputes might arise regarding the Government's determination that the data related to technologies developed in whole or in part at Government expense, those disputes will be governed by the existing procedures governing the validation of asserted restrictions based

on the source of development funding. Any other dispute arising under the clause will be governed by the applicable disputes clause of the contract.

DFARS 252.227–7029(d) clarifies that the obligation to deliver data to the Government under an appropriate deferred order is not intended to create an implied obligation to preserve data in cases when it would otherwise be unreasonable to do so. However, this also is not intended to preclude any individual contract from including a requirement to preserve any such data for a specified period.

DFARS 252.227–7029(e) implements the statutory limitation on compensation for the contractor's compliance with an appropriate deferred order.

DFARS 252.227–7029(f) preserves and clarifies the long standing rule, which is not affected by the statutory changes, that the Government's rights in the technical data or computer software that are subject to a deferred order are determined in accordance with the applicable rights-allocation clauses in the contract (*i.e.,* the license rights are unrelated to whether the requirement for delivery was established through deferred ordering, through a delivery requirement included in the contract at award, or in any other manner for that matter).

DFARS 252.227–7029(g) clarifies that the deferred ordering clause is not intended to limit or affect in any way the ability for the Government to order through other authorized mechanisms, such as mutual agreement, or bilateral or unilateral modification of the contract.

DFARS 252.227–7029(h) implements the statutory language (at 10 U.S.C. 2320(b)(10)) that clarifies that the Government's ability to require delivery of technical data or computer software is not affected by whether the Government exercises its rights to validate asserted restrictions on such technical data or computer software.

DFARS 252.227–7029(i) clarifies that the parties' rights and obligations established in the clause will survive the end of the contract.

DFARS 252.227–7029(j) requires the clause to be flowed down to lower tier subcontracts in the same manner as the clause is prescribed for use in the prime contract.

Given that segregation or reintegration data is eligible for deferred ordering, the regulation must also recognize that such data is available for ordering up-front. References to segregation or reintegration data are therefore included at DFARS 227.7102–1(a)(2), 227.7103–2(b), 227.7202–1(c)(1) and –3(b)(1), and 227.7203–2(b)(1).

E. Validation of Asserted Restrictions

There are two primary changes required by the revisions to 10 U.S.C. 2321:

1. The standard duration of the Government's right to challenge the validity of an asserted restriction is extended to 6 years, rather than the current 3 years (see revised DFARS 252.227–7037(i)); and

2. For technical data that are the subject of fraudulently asserted restrictions, there is no time limit on the right to challenge asserted restrictions (see new DFARS 252.227–7037(i)(4)).

Equivalent revisions were also made to the procedures governing validation of asserted restrictions on computer software pursuant to the DFARS clause 252.227–7019 (see revised paragraph 252.227–7019(e)(1), and new paragraph 252.227–7019(e)(1)(D)). The new paragraphs 252.227–7019(e)(1)(A)–(C) are merely a relocation of those elements, which are embedded within paragraph (e)(1) in the baseline. This nonsubstantive revision is intended to clarify these exceptions to the standard 6 year limit using a preferred paragraph structure analogous to that in the baseline at DFARS 252.227–7037(i)(1) through (3).

F. Additional Technical Amendments

• Restructured the paragraphs in the definition of ''restricted rights'' regarding authorized release/use outside the Government—to streamline, eliminate redundancy/complexity, without substantive changes—other than the incorporation of segregation or reintegration data.

• Corrected references to Small Business Innovation Research (SBIR) data in the standard use and non-disclosure agreement at DFARS 227.7103–7, to conform to changes previously made to the DFARS clause 252.227–7025, to recognize that SBIR data is restricted and handled in a manner equivalent to limited rights technical data and/or restricted rights computer software.

• Clarified the prescribed use of the standard use and non-disclosure agreement and DFARS 252.227–7025: the clause is used in contracts (and not the standard use and non-disclosure agreement), and the standard use and non-disclosure agreement is used for authorized release in any/every other situation other than under a procurement contract.

• Clarified in DFARS clause 252.227–7025 (see new paragraphs (b)(1)(ii) for limited rights/restricted rights/Small Business Innovation Research (SBIR), and (b)(4)(ii) for commercial) and standard use and non-disclosure agreement, and related up-front coverage (*e.g.,* DFARS 227.7103–5(c)(3), note no equivalent discussion of notice/timing for restricted rights at DFARS 227.7203–5(c)) the timing for mandatory notice to the technical data/computer software owner, recognizing that there are three different time frames (although only 2 relevant to standard use and non-disclosure agreement, which cannot be used for a covered Government support contractor), depending on the circumstances of the release—

1. Prior to the release, except as noted in 2. and 3.;

2. As soon as practicable, but not more than 30 days after release to a covered Government support contractor (this is not new, already in baseline DFARS 252.227–7025(b)(5)(iii); but not applicable to standard use and non-disclosure agreement); and

3. As soon as practicable, in cases of emergency repair or overhaul.

• Added an affirmative obligation for the recipient of limited rights/restricted rights/SBIR or commercial data to either destroy the data, or to return to the Government (at the Government's discretion), after completion of the authorized activity. See DFARS 252.227–7025(b)(1)(iii) and (b)(4)(iii).

• Clarified in standard use and non-disclosure agreement and DFARS 252.227–7025 that the recipient of limited rights/restricted rights/SBIR, and commercial data, can use the data only as authorized—(i) in the attachment to the standard use and non-disclosure agreement; and (ii) in performance of the contract and only for activities that are authorized by the relevant license rights (*e.g.,* emergency repair or overhaul, segregation or reintegration data, or covered Government support contractor).

• Clarified that the obligations of the parties regarding use/handling of technical data/computer software in the DFARS 252.227–7025 clause, and regarding deferred ordering in the DFARS 252.227–7029 clause, survive the termination, expiration, or completion of the contract. See revisions at DFARS 252.227–7025(e) and 252.227–7029(i).

• Revised DFARS 252.227–7037(j) to include a sentence relocated from end of 252.227–7037(i)(3), where it appears to have been misplaced, as the topic (the criteria for what constitutes a ''validation'') is more appropriately aligned with (j).

• Revised DFARS 252.227–7019 and 252.227–7037 throughout to be consistent when referring to the

validation of ''asserted restrictions'' (nomenclature currently dominating 252.227–7019, and also used in 10 U.S.C. 2321, although 252.227–7037 used a mix of referring to validating the asserted restrictions and validating the restrictive markings in other cases), as distinguished from specific procedures that are directed to the associated restrictive markings. No substantive change is intended, just consistent use of the nomenclature. See revisions at 252.227–7019; and 252.227–7037(c), (d)(1) through (3).

• Amended DFARS 252.227–7019 and 252.227–7037 to clarify that disputes under new 252.227–7029(c) are handled under the validation procedures in those clauses.

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 rule creates one new DFARS clause 252.227–7029, Deferred Ordering of Technical Data or Computer Software, to implement 10 U.S.C. 2320(b)(9) and (10), which DoD is proposing to apply to contracts at or below the SAT, and sometimes to the acquisition of commercial items (including COTS items), but not contracts solely for commercial items (including COTS items) unless acquiring for a major system or subsystem thereof or a weapon system or subsystem thereof.

10 U.S.C. 2320 and 2321 have established the applicability of rights in technical data and validity of proprietary data restrictions to noncommercial technical data and commercial technical data. It is longstanding Federal and DoD policy and practice to apply the same or analogous requirements to computer software.

This proposed rule also modifies existing provisions and clauses that implement 10 U.S.C. 2320 and 2321, or provide analogous treatment of computer software, but does not modify the applicability of these provisions and clause to contracts at or below the SAT or contracts for the acquisition of commercial items, including COTS items.

DFARS clause	Applies below the SAT	Applies to commercial items (including COTS items)
252.227–7013, Rights in Technical Data—Noncommercial Items	YES	Sometimes, only if a portion of the commercial item was developed at Government expense.
252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation.	YES	NO.
252.227–7015, Technical Data—Commercial items	YES	YES.
252.227–7018, Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program.	YES	NO.
252.227–7019, Validation and Asserted Restrictions—Computer Software.	NO	NO.
252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.	YES	YES.
252.227–7037, Validation of Asserted Restrictions on Technical Data	YES	YES.

A. Applicability to Contracts at or Below the SAT

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the SAT. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Director, Defense Procurement and Acquisition Policy (DPAP), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

DoD is proposing to apply the requirements of 10 U.S.C. 2320(b)(9) and (10) in the new clause 252.227–7019 to contracts and subcontracts at or below the SAT, but will make the final determination after receipt and analysis of public comments.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. 41 U.S.C. 1906 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Likewise, 41 U.S.C. 1907 governs the applicability of laws to COTS items, with the Administrator for Federal Procurement Policy as the decision authority to determine that it is in the best interest of the Government to apply a provision of law to acquisitions of COTS items in the FAR. The Director, DPAP, is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

Section 815 has added a new statutory requirement at 10 U.S.C. 2320(b), paragraphs (9) and (10), with regard to deferred ordering of technical data. As amended, 10 U.S.C. 2320(b)(9)(A) specifies that one of the criteria for the right of the Government to require the delivery of technical data at any time is whether the technical data is needed for the purpose of reprocurement, sustainment, modification, or upgrade of a major system or subsystem thereof, a weapon system or subsystem thereof, or any noncommercial item or process. Consistent with the statutory requirements, DoD is proposing to prescribe the new clause that implements 10 U.S.C. 2320(b)(9) and (10) for use in solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items that are being acquired for (i) a major system or subsystem thereof, or (ii) a weapon system or subsystem thereof. DoD will make the final determination with regard to application to commercial items after receipt and analysis of public comments.

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 (IRFA) has been performed and is summarized as follows:

This proposed rule was initiated to implement section 815 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114–92) that revised 10 U.S.C. 2320 and 2321. Section 815 of the NDAA for FY 2012—

- Adds special provisions for handling technical data that is necessary for segregation and reintegration activities;
- Codifies and revises the policies and procedures regarding deferred ordering of technical data;
- Expands the period in which DoD can challenge an asserted restriction on technical data from 3 years to 6 years;
- Rescinds changes to 10 U.S.C. 2320 from the NDAA for FY 2011; and
- Codifies Government purpose rights as the default rights for technical data related to technology developed with mixed funding.

Based on FY 2015 Federal Procurement Data System data, DoD estimates that 60,400 offerors, contractors, and subcontractors may be impacted by the proposed changes in this rule, of which approximately 40,500 (67 percent) may be small entities.

The provisions and clauses that are proposed to be amended by this rule are covered by OMB Clearance 0704–0368, which is currently being renewed for a total of 941,528 response hours (75,250 respondents) and 90,600 recordkeeping hours (60,400 recordkeepers). However, the changes in this rule are expected to have negligible impact on the burdens already covered by the OMB clearance.

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

DoD was unable to identify any alternatives that would meet the requirements of the statute and reduce the burden on small entities.

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 2012–D022), in correspondence.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply to this rule; however, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 0704–0369, entitled ''DFARS: Subparts 227.71, Rights in Technical Data; and Subpart 227.72, Rights in Computer Software and Computer Software Documentation, and related provisions and clauses of the Defense Federal Acquisition Regulation Supplement (DFARS).''

List of Subjects in 48 CFR Parts 212, 227, and 252

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 227, and 252 are proposed to be amended as follows;

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

■ 1. The authority citation for parts 212, 227, and 252 continues to read as follows:

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

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 212.301 by—

■ a. In paragraph (f)(xii)(A), removing ''227.7103–6(a)'' and adding ''227.7103–6(a), to comply with 10 U.S.C. 2320'' in its place;

■ b. Redesignating (f)(xii)(C) as (f)(xii)(E);

■ c. Adding paragraphs (f)(xii)(C) and (D); and

■ d. In newly redesignated paragraph (f)(xii)(E), removing ''227.7102–4(c)'' and adding ''227.7102–4(e)'' in its place; The additions read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(xii) * * *

(C) Use the clause at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information with Restrictive Legends or Markings, as prescribed in 227.7102–4(c) or 227.7202–4(b), to comply with 10 U.S.C. 2320.

(D) Use the clause at 252.227–7029, Deferred Ordering of Technical Data or Computer Software, as prescribed in 227.7102–4(d), 227.7103–8(c)(2), 227.7202–4(c), or 227.7203–8(c)(2), to comply with 10 U.S.C. 2320(b)(9).

* * * * *

PART 227—PATENTS, DATA, AND COPYRIGHTS

■ 3. Add section 227.001 preceding subpart 227.3 to read as follows:

227.001 Definitions.

As used in this part—

Computer database means a collection of recorded data in a form capable of being processed by a computer. The term does not include computer software.

Computer program means a set of instructions, rules, or routines recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

Computer software means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer databases or computer software documentation.

Computer software documentation means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

Covered Government support contractor means a contractor (other than a litigation support contractor covered by the clause at DFARS 252.204–7014, Limitations on the Use or Disclosure of Information by Litigation

Support Contractors) under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), provided that the contractor—

(1) Is not affiliated with the prime contractor or a first-tier subcontractor on the program or effort, or with any direct competitor of such prime contractor or any such first-tier subcontractor in furnishing end items or services of the type developed or produced on the program or effort; and

(2) Receives access to technical data or computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information with Restrictive Legends or Markings.

Developed is defined at 227.7101 for technical data and at 227.7201 for computer software and computer software documentation.

Developed exclusively at private expense means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a Government contract, or any combination thereof.

(1) Private expense determinations should be made at the lowest practicable level.

(2) Under fixed-price contracts, when total costs are greater than the firm-fixed-price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at Government, private, or mixed expense.

Developed exclusively with Government funds means development was not accomplished exclusively or partially at private expense.

Developed with mixed funding means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a Government contract, and partially with costs charged directly to a Government contract.

Form, fit, and function data means technical data or computer software that describes the required overall physical, logical, configuration, mating, attachment, interface, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item or process to the extent necessary to permit identification of physically or functionally equivalent items or processes. The term does not include computer software source code, or detailed manufacturing or process data.

Government purpose and *Government purpose rights* are defined at 227.7101 for technical data and at 227.7201 for computer software and computer software documentation.

Segregation or reintegration data means technical data or computer software that is more detailed than form, fit, and function data and that is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes.

(1) Unless agreed otherwise by the Government and the contractor, the nature, quality, and level of technical detail necessary for these data or software shall be that required for persons reasonably skilled in the art to perform such segregation or reintegration activities.

(2) The segregation or reintegration of any such an item or process may be performed at any practical level, including down to the lowest practicable segregable level, *e.g.,* a subitem or subcomponent level, or any segregable portion of a process, computer software (*e.g.,* a software subroutine that performs a specific function), or documentation.

(3) The term—

(i) Includes data or software that describes in more detail (than form, fit, and function data) the physical, logical, or operational interface or similar functional interrelationship between the items or processes; and

(ii) May include, but would not typically require, detailed manufacturing or process data or computer software source code to support such segregation or reintegration activities.

Unlimited rights is defined at 227.7101 for technical data and at 227.7201 for computer software and computer software documentation.

■ 4. In section 227.7101, revise paragraph (b) to read as follows:

227.7101 Definitions.

* * * * *

(b) Other terms used in this subpart are defined at 227.001 and as follows:

Commercial item does not include commercial computer software (see 227.7202 for coverage regarding commercial computer software documentation).

Detailed manufacturing or process data means technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

Developed means that an item, component, or process exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered ''developed,'' the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component, or process be actually reduced to practice within the meaning of title 35 of the United States Code.

Government purpose means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or authorize others to do so.

Government purpose rights means the rights to—

(1) Use, modify, reproduce, release, perform, display, or disclose technical data within the Government without restriction; and

(2) Release or disclose technical data outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose that data for United States Government purposes.

Limited rights means the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or authorize the technical data to be used by another party, except that the Government may reproduce, release, or disclose such data or authorize the use or reproduction of the data by persons outside the Government if—

(1) The reproduction, release, disclosure, or use is—

(i) Necessary for emergency repair and overhaul;

(ii) Necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes; and such reproduction, release, disclosure, or use involves only segregation or reintegration data; or

(iii) A release or disclosure to—

(A) A covered Government support contractor in performance of its covered Government support contract for use, modification, reproduction, performance, display, or release or disclosure to a person authorized to receive limited rights technical data; or

(B) A foreign government, of technical data other than detailed manufacturing or process data, when use of such data by the foreign government is in the interest of the Government and is required for evaluational or informational purposes;

(2) The recipient of the technical data is subject to a prohibition on the further reproduction, release, disclosure, or use of the technical data; and

(3) The contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, or use.

Small Business Innovation Research (SBIR) data rights means the Government's rights during the SBIR data protection period to use, modify, reproduce, release, perform, display, or disclose technical data or computer software generated under a SBIR award as follows:

(1) Limited rights in such SBIR technical data.

(2) Restricted rights in such SBIR computer software.

Technical data means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

Unlimited rights means rights 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.

■ 5. Revise section 227.7102 heading to read as follows:

227.7102 Commercial items.

■ 6. Amend section 227.7102–1 by—

■ a. In paragraph (a) introductory text, removing ''commercial item or process'' and adding ''commercial item'' in its place;

■ b. In paragraph (a)(1), removing ''fit, or function'' and adding ''fit, and function'' in its place;

■ c. Redesignating paragraphs (a)(2) and (3) as (a)(3) and (4), respectively;

■ d. Adding new paragraph (a)(2);

■ e. In newly redesignated paragraph (a)(3), removing ''commercial items or processes'' and adding ''commercial items'' in its place, and removing ''stand alone unit'' and adding ''stand-alone unit'' in its place;

■ f. In the newly redesignated paragraph (a)(4), removing ''commercial item or process'' and adding ''commercial item'' in its place;

■ g. In paragraph (b), removing ''commercial products'' and adding ''commercial items'' in its place;

■ h. In paragraph (b)(1), removing ''commercial items or processes'' and adding ''commercial items'' in its place; and

■ i. In paragraph (b)(2), removing ''commercial items or processes'' and adding ''commercial items'' in its place.

The addition reads as follows:

227.7102–1 Policy.

(a) * * *

(2) Are segregation or reintegration data;

* * * * *

■ 7. Amend section 227.7102–2 by revising paragraph (a) to read as follows:

227.7102–2 Rights in technical data.

(a) The clause at 252.227–7015, Technical Data–Commercial Items, provides the Government specific license rights in technical data pertaining to commercial items. DoD may use, modify, reproduce, release, perform, display, or disclose data only within the Government. The data may not be used to manufacture additional quantities of the commercial items. Except for emergency repair or overhaul, segregation or reintegration, foreign government evaluational or informational purposes (other than detailed manufacturing or process data), or covered Government support contractor activities, the data may not be released or disclosed to, or used by, third parties without the contractor's written permission. Those restrictions do not apply to the technical data described in 227.7102–1(a).

* * * * *

■ 8. Amend section 227.7102–4 by—

■ a. Redesignating paragraph (c) as (e);

■ b. Adding new paragraphs (c) and paragraph (d); and

■ c. In the newly redesignated paragraph (e), removing ''Validation of Restrictive Markings'' and adding ''Validation of Asserted Restrictions'' in its place.

The additions read as follows:

227.7102–4 Contract clauses.

* * * * *

(c) Use the clause at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information with Restrictive Legends or Markings, in solicitations and contracts when it is anticipated that the Government will provide the contractor (other than a litigation support contractor covered by the clause at 252.204–7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors), for performance of its contract, technical data marked with another contractor's restrictive legend(s) or marking(s).

(d) Use the clause at 252.227–7029, Deferred Ordering of Technical Data or Computer Software, in all solicitations and contracts using other than FAR part 12 procedures, and in all solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items that are being acquired for—

(1) A major system or subsystem thereof; or

(2) A weapon system or subsystem thereof.

* * * * *

■ 9. Amend section 227.7103–2 by revising paragraph (b)(1) to read as follows:

227.7103–2 Acquisition of technical data.

* * * * *

(b)(1) Data managers or other requirements personnel are responsible for identifying the Government's minimum needs for technical data. Data needs must be established giving consideration to the contractor's economic interests in data pertaining to items or processes that have been developed at private expense; the return on the Government's investment in the development of items or processes (including technology transfer/transition to other programs); the Government's costs to acquire, maintain, store, retrieve, and protect the data; the Government's short-term and long-term reprocurement and sustainment needs, including repair, maintenance, overhaul, spare and repair parts, and technology upgrade/insertion; and whether procurement of the items or processes (or physical or functional equivalents thereof) can be accomplished on a form, fit, and function or segregation or reintegration basis. When it is anticipated that the Government will obtain unlimited or Government purpose rights in technical data that will be required for

competitive reprocurement or sustainment activities, such data should be identified as deliverable data items. Reprocurement needs may not be a sufficient reason to acquire detailed manufacturing or process data when privately developed items or processes (or physical or functional equivalents thereof) can be acquired using performance specifications, form, fit, and function data, segregation or reintegration data, or when there are a sufficient number of alternate sources that can reasonably be expected to provide such items on a performance specification, form, fit, and function, or segregation or reintegration basis.

* * * * *

■ 10. Amend section 227.7103–5 by—

■ a. In paragraph (b)(4) introductory text, removing ''government purpose rights'' and adding ''Government purpose rights'' wherever it appears;

■ b. In paragraph (b)(4)(ii), removing ''Information Marked with Restrictive Legends'' and adding ''Information with Restrictive Legends or Markings'' in its place;

■ c. In paragraphs (c)(1)(i) and (ii), removing ''items, components, or processes'' and adding ''items or processes'' in both places;

■ d. Redesignating paragraphs (c)(2)(ii) and (iii) as (c)(2)(iii) and (iv), respectively;

■ e. Adding new paragraph (c)(2)(ii);

■ f. Revising paragraph (c)(3); and

■ g. In paragraph (c)(4), removing ''(c)(2)(i), (ii), or (iii)'' and adding ''(c)(2)'' in its place; and removing ''Information Marked with Restrictive Legends'' and adding ''Information with Restrictive Legends or Markings'' in its place.

The addition and revision reads as follows:

227.7103–5 Government rights.

* * * * *

(c) * * *

(2) * * *

(ii) Necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes;

* * * * *

(3) The person asserting limited rights must be notified of the Government's intent to release, disclose, or authorize others to use such data prior to release or disclosure of the data, except notification of an intended release or disclosure for—

(i) Covered Government support contractor activities, which shall be made as soon as practicable, but not later than 30 days after such release or disclosure; and

(ii) Emergency repair or overhaul, which shall be made as soon as practicable.

* * * * *

■ 11. Amend section 227.7103–6 by—

■ a. Revising paragraph (c); and

■ b. In paragraph (e)(3), removing ''Validation of Restrictive Markings'' and adding ''Validation of Asserted Restrictions'' in its place.

The revision reads as follows:

227.7103–6 Contract clauses.

* * * * *

(c) Use the clause at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information with Restrictive Legends or Markings, in solicitations and contracts when it is anticipated that the Government will provide the contractor, for performance of its contract, technical data marked with another contractor's restrictive legend(s) or marking(s). The clause shall be incorporated into the contract prior to the Government releasing any such technical data to the contractor. See 227.7103–7 when releasing such technical data to offerors or to any person other than the contractor.

* * * * *

■ 12. Amend section 227.7103–7 by—

■ a. In paragraph (a)(1), removing ''limited rights'' and adding ''limited rights or SBIR data rights,'' in its place, and removing ''restricted rights'' and adding ''restricted rights or SBIR data rights,'' in its place;

■ b. Revising paragraph (b); and

■ c. Revising paragraph (c)(1).

The revisions read as follows:

227.7103–7 Use and non-disclosure agreement.

* * * * *

(b) Do not use the use and non-disclosure agreement at paragraph (c) for releases to Government contractors. Such releases are authorized only under contracts that contain the clause at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information with Restrictive Legends or Markings.

(c) * * *

(1) The Recipient shall—

(a) Use, modify, reproduce, release, perform, display, or disclose Data marked with Government purpose rights legends only for Government purposes and shall not do so for any commercial purpose. The Recipient shall not release, perform, display, or disclose these Data, without the express written permission of the contractor whose name appears in the restrictive legend (the ''Contractor''), to any person other than its subcontractors or suppliers, or prospective subcontractors or suppliers, who require these Data to submit offers for, or perform, contracts with the Recipient. The Recipient shall require its subcontractors or suppliers, or prospective subcontractors or suppliers, to sign a use and non-disclosure agreement prior to disclosing or releasing these Data to such persons. Such agreement must be consistent with the terms of this agreement.

(b) Use, modify, reproduce, release, perform, display, or disclose technical data marked with limited rights or SBIR data rights legends only as authorized in the attachment to this Agreement. Release, performance, display, or disclosure to other persons is not authorized unless specified in the attachment to this Agreement or expressly permitted in writing by the Contractor. The Recipient shall promptly notify the Contractor of the execution of this Agreement and identify the Contractor's Data that has been or will be provided to the Recipient, the date and place the Data were or will be received, and the name and address of the Government office that has provided or will provide the Data. This notice shall be made prior to such release or disclosure to the Recipient, except in cases of emergency repair or overhaul activities, in which case such notice must be made as soon as practicable. The Recipient shall destroy (or return to the Government at the request of the Government) the technical data and all copies in its possession promptly following completion of the authorized activities, and shall notify the Contractor that the data have been destroyed (or returned to the Government).

(c) Use computer software marked with restricted rights or SBIR data rights legends only as authorized in the attachment to this Agreement. The recipient shall not, for example, enhance, decompile, disassemble, or reverse engineer the software; time share, or use a computer program with more than one computer at a time. The recipient shall not release, perform, display, or disclose such software to others unless authorized in the attachment to this Agreement or expressly permitted in writing by the Contractor. The Recipient shall promptly notify the Contractor of the execution of this Agreement and identify the software that has been or will be provided to the Recipient, the date and place the software were or will be received, and the name and address of the Government office that has provided or will provide the software. This notice shall be made prior to such

release or disclosure to the Recipient, except in cases of emergency repair or overhaul activities, in which case such notice must be made as soon as practicable. The Recipient shall destroy (or return to the Government at the request of the Government) the software and all copies in its possession promptly following completion of the authorized activities, and shall notify the Contractor that the software has been destroyed (or returned to the Government).

(d) Use, modify, reproduce, release, perform, display, or disclose Data marked with special license rights legends (to be completed by the contracting officer. See 227.7103–7(a)(2). Omit if none of the Data requested is marked with special license rights legends).

(e) Use, modify, reproduce, perform, or display technical data that is or pertains to a commercial item and is received from the Government with commercial restrictive markings (i.e., marked to indicate that such data are subject to use, modification, reproduction, release, performance, display, or disclosure restrictions) only in the performance of this contract and only for activities authorized in the commercial limited rights license (defined at DFARS 252.227–7015(a)(2)) for recipients of the technical data. The Contractor shall not, without the express written permission of the party asserting such restrictions, use the technical data to manufacture additional quantities of the commercial items or for any other unauthorized purpose, or release or disclose such data to any unauthorized person. The Contractor will ensure that the party asserting restrictions is notified prior to such authorized release or disclosure, except that notice of such emergency repair or overhaul activities shall be made as soon as practicable. The Contractor shall destroy (or return to the Government at the request of the Contracting Officer) the data and all copies in its possession promptly following completion of the authorized activities under this contract, and shall notify the party asserting restrictions that the data have been destroyed (or returned to the Government).

(f) Use, modify, reproduce, perform, or display commercial computer software, or segregation or reintegration data pertaining to commercial computer software, received from the Government with commercial restrictive markings (i.e., marked to indicate that such software are subject to use, modification, reproduction, release, performance, display, or disclosure restrictions) only in the performance of this contract and only for activities, if any, that are authorized in the applicable commercial license or any additional specially negotiated license rights (pursuant to DFARS 227.7202–3). The Contractor shall not, without the express written permission of the party asserting such restrictions, use the computer software for any other unauthorized purpose, or release or disclose such software to any unauthorized person. The Contractor will ensure that the party asserting restrictions is notified prior to such authorized release or disclosure. The Contractor shall destroy (or return to the Government at the request of the Contracting Officer) the software and all copies in its possession promptly following completion of the authorized activities under this contract, and shall notify the party asserting restrictions that the data or software has been destroyed (or returned to the Government).

* * * * *

■ 13. Revise section 227.7103–8 to read as follows:

227.7103–8 Deferred delivery and deferred ordering of technical data.

(a) *Deferred delivery.* The clause at 252.227–7026, Deferred Delivery of Technical Data or Computer Software, permits the contracting officer to require the delivery of technical data or computer software identified as ''deferred delivery'' data at any time until 2 years after acceptance by the Government of all items (other than technical data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors or suppliers to deliver such technical data or computer software expires 2 years after the date the prime contractor accepts the last item from the subcontractor or supplier for use in the performance of the contract. The contract must specify which technical data or computer software is subject to deferred delivery. The contracting officer shall notify the contractor sufficiently in advance of the desired delivery date for such data to permit timely delivery.

(b) *Deferred ordering.* The clause at 252.227–7029, Deferred Ordering of Technical Data or Computer Software, allows the contracting officer to order certain technical data or computer software that was not delivered or otherwise furnished under a contract, but that were generated or utilized in the performance of a contract. The availability of deferred ordering procedures under this clause, however, does not diminish or alter the Government's responsibility for advance planning and proactive management of program needs for technical data in accordance with 227.7103–1 and –2, and computer software in accordance with 227.7203–1 and –2. Follow the procedures and requirements at PGI 227.7103–8(b).

(c) *Contract clauses.* Use the clause at—

(1) 252.227–7026, Deferred Delivery of Technical Data or Computer Software, when it is in the Government's interests to defer the delivery of technical data; and

(2) 252.227–7029, Deferred Ordering of Technical Data or Computer Software, in all solicitations and contracts using other than FAR part 12 procedures, and in all solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items that are being acquired for—

(i) A major system or subsystem thereof; or

(ii) A weapon system or subsystem thereof.

■ 14. Amend section 227.7103–13 by—

■ a. In paragraph (d) introductory text, removing ''Validation of Restrictive Markings'' and adding ''Validation of Asserted Restrictions'' in its place;

■ b. In paragraph (d)(1) removing ''three years'' and adding ''6 years'' in two places, and removing ''restrictive markings'' and adding ''asserted restrictions'' in its place;

■ c. In paragraph (d)(1)(ii), removing ''or'';

■ d. In paragraph (d)(1)(iii), removing the period at the end of the sentence, and adding a semicolon and the word ''or'' in its place; and

■ e. Adding paragraph (d)(1)(iv).

The addition reads as follows:

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

* * * * *

(d) * * *

(1) * * *

(iv) Are the subject of a fraudulently asserted use or release restriction.

* * * * *

227.7103–15 [Amended]

■ 15. Amend section 227.7103–15 in paragraph (c)(2) by removing ''Information Marked with Restrictive Legends'' and adding ''Information with Restrictive Legends or Markings'' in its place.

■ 16. Amend section 227.7104 by—

■ a. Redesignating paragraphs (e)(4) and (5) as (e)(5) and (6);

■ b. Adding new paragraph (e)(4);

■ c. In the newly redesignated paragraph (e)(6), removing ''Validation of Restrictive Markings'' and adding

''Validation of Asserted Restrictions'' in its place; and

■ d. In paragraph (f)(1), removing ''Information Marked with Restrictive Legends'' and adding ''Information with Restrictive Legends or Markings'' in its place.

The addition reads as follows:

227.7104 Contracts under the Small Business Innovation Research (SBIR) Program.

(e) * * *

(4) 252.227–7029, Deferred Ordering of Technical Data or Computer Software;

* * * * *

■ 17. Amend section 227.7201 by revising paragraph (b) to read as follows:

227.7201 Definitions.

* * * * *

(b) Other terms used in this subpart are defined at 227.001 and as follows:

Commercial computer software means any computer software that is a commercial item.

Developed means that—

(1) A computer program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that the program can reasonably be expected to perform its intended purpose;

(2) Computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the software can reasonably be expected to perform its intended purpose; or

(3) Computer software documentation required to be delivered under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

Government purpose means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation for commercial purposes or authorize others to do so.

Government purpose rights means the rights to—

(1) Use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation within the Government without restriction; and

(2) Release or disclose computer software or computer software documentation outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose the software or documentation for United States Government purposes.

Minor modification means a modification that does not significantly alter the nongovernmental function or purpose of the software or is of the type customarily provided in the commercial marketplace.

Noncommercial computer software means software that does not qualify as commercial computer software under paragraph (a)(1) of the clause at 252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation.

Restricted rights apply only to noncommercial computer software and mean the Government's rights to—

(1) Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;

(2) Transfer a computer program to another Government agency without the further permission of the Contractor if the transferor destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer. Transferred programs remain subject to the provisions of the clause at DFARS 252.227–7014;

(3) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;

(4) Modify computer software provided that the Government may—

(i) Use the modified software only as provided in paragraphs (a)(15)(i) and (iii) of the clause at 252.227–7014; and

(ii) Not release or disclose the modified software except as provided in paragraph (a)(15)(ii) or (v) of the clause at 252.227–7014; and

(5) Reproduce and release or disclose the computer software outside the Government only if—

(i) The reproduction, release, or disclosure is necessary to—

(A) Permit contractors or subcontractors performing service contracts (see FAR 37.101) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations;

(B) Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made;

(C) Permit covered Government support contractors in the performance of covered Government support contracts to use, modify, reproduce, perform, display, or release or disclose the computer software to a person authorized to receive restricted rights computer software; or

(D) Permit contractors or subcontractors to use, modify, reproduce, perform, display, or release or disclose segregation or reintegration data to segregate computer software from, or reintegrate that software (or functionally equivalent software) with, other computer software;

(ii) Each recipient contractor or subcontractor ensures that the party that has granted restricted rights is notified of such release or disclosure;

(iii) Such contractors or subcontractors are subject to the use and non-disclosure agreement at DFARS 227.7103–7 or are Government contractors receiving access to the software for performance of a Government contract that contains the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information with Restrictive Legends or Markings;

(iv) The Government does not permit the recipient to use, decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(15)(iv) of the clause at 252.227–7014, for any purpose other than those authorized in paragraph (a)(15)(v)(A); and

(v) The recipient's use of the computer software is subject to the limitations in paragraphs (a)(15)(i) through (iv) of the clause at 252.227–7014.

Unlimited rights means rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

227.7202–1 [Amended]

■ 18. Amend section 227.7202–1 in paragraph (c)(1) by removing ''except for information'' and adding ''except for

form, fit, and function data, segregation or reintegration data, or information'' in its place.

■ 19. Amend section 227.7202–3 by—

■ a. In paragraph (a), removing ''The Government'' and adding ''Except as provided in paragraphs (b) and (c) of this section, the Government'' in its place;

■ b. Redesignating paragraph (b) as paragraph (c);

■ c. Adding new paragraph (b); and

■ d. In the newly redesignated paragraph (c), removing ''rights not conveyed'' and adding ''rights that are not conveyed'', and removing ''provided to the public'' and adding ''provided to the public and are not authorized to be required by paragraph (b) of this section'' in its place.

The addition reads as follows:

227.7202–3 Rights in commercial computer software or commercial computer software documentation.

* * * * *

(b)(1) For segregation and reintegration data, the Government may require that its license rights include the right for the Government to use, modify, reproduce, release, perform, display, or disclose that data to the extent necessary for the segregation of the commercial computer software from, or the reintegration of that commercial computer software (or functionally equivalent computer software) with, other computer software, items, or processes. Unless the parties agree otherwise in accordance with paragraph (c) of this section, the license shall authorize the Government to release the segregation and reintegration data outside the Government only if—

(i) The recipient of the data is subject to a prohibition on the further reproduction, release, disclosure, or use of that data; and

(ii) The contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, or use.

(2) Follow the procedures and requirements at PGI 227.7202–3(b).

* * * * *

■ 20. Amend section 227.7202–4 by—

■ a. Revising the section heading;

■ b. Designating the introductory text as paragraph (a); and

■ c. Adding paragraphs (b) and (c).

The revision and additions read as follows:

227.7202–4 Contract clauses.

* * * * *

(b) Use the clause at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information with Restrictive Legends or Markings, in solicitations and contracts when it is anticipated that the Government will provide the contractor (other than a litigation support contractor covered by 252.204–7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors), for performance of its contract, technical data or computer software marked with another contractor's restrictive legend(s) or marking(s).

(c) Use the clause at 252.227–7029, Deferred Ordering of Technical Data or Computer Software, in all solicitations and contracts using other than FAR part 12 procedures, and in all solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items that are being acquired for—

(1) A major system or subsystem thereof; or

(2) A weapon system or subsystem thereof.

■ 21. Amend section 227.7203–2 by revising paragraph (b)(1) to read as follows:

227.7203–2 Acquisition of noncommercial computer software and computer software documentation.

* * * * *

(b)(1) Data managers or other requirements personnel are responsible for identifying the Government's minimum needs. In addition to desired software performance, compatibility, or other technical considerations, needs determinations should consider such factors as multiple site or shared use requirements; whether the Government's software operation or sustainment will require the right to modify or have third parties modify the software; contractor's economic interests in computer software developed at private expense; the return on the Government's investment in the development of computer software (including technology transfer/transition to other programs); the Government's costs to acquire, maintain, store, retrieve, and protect the software or documentation; the Government's short-term and long-term reprocurement and sustainment needs, including repair, maintenance, overhaul, spare and repair parts, and technology upgrade/insertion; whether procurement of the software (or functional equivalents thereof) can be accomplished on a form, fit, and function or segregation or reintegration basis; and any special computer software documentation requirements.

* * * * *

227.7203–5 [Amended]

■ 22. Amend section 227.7203–5 by—

■ a. In paragraph (b)(4) introductory text, removing ''government purpose rights'' and adding ''Government purpose rights'' in its place wherever it appears; and

■ b. In paragraph (b)(4)(ii) removing ''Information Marked with Restrictive Legends'' and adding ''Information with Restrictive Legends or Markings'' in its place.

■ 23. Amend section 227.7203–6 by—

■ a. Revising the section heading;

■ b. Revising paragraph (d); and

■ c. In paragraph (f) by removing ''Validation of Restrictive Markings'' and adding ''Validation of Asserted Restrictions'' in its place.

The revisions read as follows:

227.7203–6 Solicitation provision and contract clauses.

* * * * *

(d) Use the clause at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information with Restrictive Legends or Markings, in solicitations and contracts when it is anticipated that the Government will provide the contractor (other than a litigation support contractor covered by 252.204–7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors), for performance of its contract, computer software or computer software documentation marked with another contractor's restrictive legend(s) or marking(s). The clause must be incorporated into the contract prior to the Government releasing any such computer software or computer software documentation to the Contractor.

* * * * *

■ 24. Revise section 227.7203–8 to read as follows:

227.7203–8 Deferred delivery and deferred ordering of computer software and computer software documentation.

(a) *Deferred delivery.* The clause at 252.227–7026, Deferred Delivery of Technical Data or Computer Software, permits the contracting officer to require the delivery of computer software or computer software documentation identified as ''deferred delivery'' data at any time until 2 years after acceptance by the Government of all items (other than technical data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors or suppliers to deliver such data expires 2 years after the date the prime contractor accepts the last item from the subcontractor or supplier for use in the performance of the contract. The contract must specify the computer software or computer software documentation that is subject

to deferred delivery. The contracting officer shall notify the contractor sufficiently in advance of the desired delivery date for such software or documentation to permit timely delivery.

(b) *Deferred ordering.* The clause at 252.227–7029, Deferred Ordering of Technical Data or Computer Software, allows the contracting officer to order certain technical data or computer software that was not delivered or otherwise furnished under a contract, but that was generated or utilized in the performance of a contract. The availability of deferred ordering procedures under this clause, however, does not diminish or alter the Government's responsibility for advance planning and proactive management of program needs for technical data and computer software in accordance with 227.7103–1 and –2, and 227.7203–1 and –2, respectively. Follow the procedures and requirements at PGI 227.7103–8(b).

(c) *Contract clauses.* Use the clause at—

(1) 252.227–7026, Deferred Delivery of Technical Data or Computer Software, when it is in the Government's interests to defer the delivery of computer software or computer software documentation; and

(2) 252.227–7029, Deferred Ordering of Technical Data or Computer Software, in all solicitations and contracts using other than FAR part 12 procedures, and in all solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items that are being acquired for—

(i) A major system or subsystem thereof; or

(ii) A weapon system or subsystem thereof.

227.7203–13 [Amended]

■ 25. Amend section 227.7203–13 in paragraph (e)(3)(i) by removing ''three years'' and adding ''6 years'' in two places, and removing ''or has been otherwise made available without restrictions'' and adding ''has been otherwise made available without restrictions, or is the subject of a fraudulently asserted use or release restriction'' in its place.

227.7203–15 [Amended]

■ 26. Amend section 227.7203–15 by—

■ a. In paragraph (c)(1), removing the semicolon and replacing it with a period;

■ b. In paragraph (c)(2), removing the semicolon and replacing it with a period; and

■ c. In paragraph (c)(3), removing ''Information Marked with Restrictive Legends; and'' and adding ''Information with Restrictive Legends or Markings.'' in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 27. Amend section 252.227–7013 by—

■ a. Removing the clause date ''(FEB 2014)'' and adding ''(DATE)'' in its place;

■ b. In paragraph (a)—

i. Removing paragraph number designations;

ii. In the definition of ''Covered Government support contractor'' removing ''covered by 252.204–7014'' and adding ''covered by the clause at DFARS 252.204–7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors,'' in its place; redesignating (i) and (ii) as (1) and (2), respectively; and in the newly redesignated (2), removing ''252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends'' and adding ''DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information with Restrictive Legends or Markings'' in its place;

iii. In the definition of ''Developed exclusively at private expense'', removing in the introductory text the word ''government'' and adding ''Government'' in its place; redesignating paragraphs (i) and (ii) as (1) and (2), respectively; and, in the newly redesignated paragraph (2) removing the word ''government'' and adding ''Government'' in its place;

iv. In the definition of ''Developed exclusively with government funds'' removing the word ''government'' and adding ''Government'' in its place;

v. In the definition of ''Developed with mixed funding'' removing the word ''government'' and adding ''Government'' in its place in two places;

vi. Revising the definition of ''Form, fit and function data'';

vii. In the definition of ''Government purpose rights'' redesignating paragraphs (i) and (ii) as (1) and (2), respectively; and in the newly redesignated paragraph (2) removing ''government purposes'' and adding ''Government purposes'' in its place;

viii. In the definition of ''Limited rights'', redesignating paragraph (i) introductory text, paragraphs (ii), and (iii) as paragraph (1) introductory text, paragraphs (2), and (3), respectively; in the newly redesignated paragraph (1), redesignating paragraphs (1)(A) and (B) introductory text as paragraphs (1)(i) and (iii) introductory text, respectively; adding paragraph (1)(ii); in the newly redesignated paragraph (1)(i), removing ''or''; and in the newly redesignated paragraph (1)(iii), redesignating paragraphs (1)(iii)(*1*) and (*2*) as paragraphs (1)(iii)(A) and (B), respectively; and

ix. Adding, in alphabetical order, the definition for ''Segregation or reintegration data'';

■ c. In paragraph (b)(2)(i), removing ''government purpose'' and adding ''Government purpose'' in its place; and removing ''five-year'' and adding ''5-year'' in its place;

■ d. In paragraph (b)(2)(iii) removing ''government purpose'' and adding ''Government purpose'' in its place;

■ e. In paragraph (b)(2)(iii)(B), removing ''Information Marked with Restrictive Legends'' and adding ''Information with Restrictive Legends or Markings'' in its place;

■ f. In paragraph (b)(2)(iv), removing ''government purpose'' and adding ''Government purpose'' in its place in two places;

■ g. In paragraphs (b)(3)(i)(A) and (B), removing ''items, components, and processes'' and adding ''items or processes'' in both places;

■ h. Revising paragraph (b)(3)(ii);

■ i. Redesignating paragraphs (b)(3)(iii) and (iv) introductory text as (b)(3)(iv) and (v) introductory text, respectively;

■ j. Adding paragraph (b)(3)(iii);

■ k. Amending paragraph (b)(3)(v)(D) by removing ''252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends'' and adding ''DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information with Restrictive Legends or Markings'' in its place;

■ l. Amending paragraph (b)(4) by removing ''government purpose'' and adding ''Government purpose'' in its place;

■ m. Amending paragraph (b)(5) heading by removing ''*government''* and adding ''*Government''* in its place;

■ n. Amending paragraph (f) by removing ''government purpose'' and adding ''Government purpose'' in its place;

■ o. Amending paragraph (f)(4)(ii) by removing ''government purpose'' and adding ''Government purpose'' in its place; and

■ p. In Alternate II—

■ i. Revising the clause date and the introductory text; and

■ ii. In paragraph (a), removing ''(a)(17)'' and adding ''(a)'' in its place.

The revision and additions read as follows:

252.227–7013 Rights in Technical Data—Noncommercial Items.

* * * * *

(a) * * *

Form, fit, and function data means technical data or computer software that describes the required overall physical, logical, configuration, mating, attachment, interface, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item or process to the extent necessary to permit identification of physically or functionally equivalent items or processes. The term does not include computer software source code, or detailed manufacturing or process data.

* * * * *

Limited rights * * *

(1) * * *

(ii) Necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes; and such reproduction, release, disclosure, or use involves only segregation or reintegration data; or

* * * * *

Segregation or reintegration data means technical data or computer software that is more detailed than form, fit, and function data and that is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes.

(1) Unless agreed otherwise by the Government and the contractor, the nature, quality, and level of technical detail necessary for these data or software shall be that required for persons reasonably skilled in the art to perform such segregation or reintegration activities.

(2) The segregation or reintegration of any such an item or process may be performed at any practical level, including down to the lowest practicable segregable level, *e.g.,* a subitem or subcomponent level, or any segregable portion of a process, computer software (*e.g.,* a software subroutine that performs a specific function), or documentation.

(3) The term—

(i) Includes data or software that describes in more detail (than form, fit, and function data) the physical, logical, or operational interface or similar functional interrelationship between the items or processes; and

(ii) May include, but would not typically require, detailed manufacturing or process data or computer software source code to support such segregation or reintegration activities.

* * * * *

(b) * * *

(3) * * *

(ii) The Government shall require a recipient of limited rights data for emergency repair or overhaul to destroy (or return to the Government at the request of the Contracting Officer) the data and all copies in its possession promptly following completion of the emergency repair/overhaul and to notify the Contractor that the data have been destroyed (or returned to the Government).

(iii) The Government shall require a recipient of limited rights data for segregation or reintegration activities to destroy the data and all copies in its possession promptly following completion of the segregation or reintegration activities in performance of the contract under which such data were received, and to notify the Contractor that the data have been destroyed.

* * * * *

ALTERNATE II (DATE)

As prescribed in 227.7103–6(b)(2), add to the basic clause the following definition of ''vessel design'' in paragraph (a) and the following paragraph (b)(7):

* * * * *

■ 28. Amend section 252.227–7014 by—

■ a. Removing the clause date ''(FEB 2014)'' and adding ''(DATE)'' in its place;

■ b. In paragraph (a)—

■ i. Removing paragraph number designations;

■ ii. Revising the definition of ''Commercial computer software'';

■ iii. In the definition of ''Covered Government support contractor'' removing from the introductory text ''covered by 252.204–7014'' and adding ''covered by the clause at DFARS 252.204–7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors,'' in its place; redesignating paragraphs (i) and (ii) as (1) and (2), respectively; in the newly redesignated paragraph (2) removing ''252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends'' and adding ''DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information with Restrictive Legends or Markings'' in its place;

■ iv. In the definition of ''Developed'' redesignating paragraphs (i), (ii), and (iii) as (1), (2), and (3), respectively;

■ v. In the definition of ''Developed exclusively at private expense'' removing from the introductory text ''government'' and adding ''Government'' in its place; redesignating paragraphs (i) and (ii) as (1) and (2), respectively; and in the newly redesignated paragraph (2) removing ''government'' and adding ''Government'' in its place;

■ vi. In the definition of ''Developed exclusively with government funds'' removing ''*government*'' and adding ''*Government*'' in its place;

■ vii. In the definition of ''Developed with mixed funding'' removing ''government'' and adding ''Government'' in its place in two places;

■ viii. Adding a definition for ''Form, fit, and function data'';

■ ix. In the definition of ''Government purpose rights'' redesignating paragraphs (i) and (ii) as (1) and (2), respectively; and in the newly redesignated paragraph (2) removing ''government purposes'' and adding ''Government purposes'' in its place;

■ x. In the definition of ''Restricted rights'' redesignating paragraphs (i), (ii), (iii), (iv) introductory text, and (v) introductory text as (1), (2), (3), (4) introductory text, and (5) introductory text, respectively; removing paragraphs (vi) and (vii); in the newly redesignated paragraph (4), redesignating paragraphs (4)(A) and (B) as (4)(i) and (ii), respectively; in the newly redesignated paragraph (4)(ii) removing ''(a)(15)(ii), (v), (vi) and (vii)'' and adding ''(a)(15)(ii) or (v)'' in its place; and revising the newly redesignated paragraph (5);

■ xi. Adding, in alphabetical order, a definition of ''Segregation or reintegration data'';

■ c. Amending paragraph (b)(1)(vi)(A) by removing ''government'' and adding ''Government'' in its place;

■ d. Amending paragraph (b)(2)(i) by removing ''government purpose'' and adding ''Government purpose'' in its place;

■ e. Amending paragraph (b)(2)(ii) by removing ''five years'' and adding ''5 years'' in its place in two places, and removing ''government purpose'' and adding ''Government purpose'' in its place;

■ f. Amending (b)(2)(iii) by removing ''government purpose'' and adding ''Government purpose'' in its place;

■ g. Amending (b)(2)(iii)(B) by removing ''Information Marked with Restrictive Legends'' and adding ''Information with Restrictive Legends or Markings'' in its place;

■ h. Amending (b)(3)(iii)(D) by removing ''252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends'' and adding

''DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information with Restrictive Legends or Markings'' in its place;

■ i. Amending (b)(4) by removing ''government purpose'' and adding ''Government purpose'' in its place;

■ j. Amending (b)(5) heading by removing ''*government*'' and adding ''*Government''* in its place; and

■ k. Amending (f) introductory text, (f)(2), and (f)(4)(ii) by removing ''government purpose'' and adding ''Government purpose'' in its place wherever it appears.

The additions and revisions read as follows:

252.227–7014 Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation.

* * * * *

(a) * * *

Commercial computer software means any computer software that is a commercial item.

* * * * *

Form, fit, and function data means technical data or computer software that describes the required overall physical, logical, configuration, mating, attachment, interface, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item or process to the extent necessary to permit identification of physically or functionally equivalent items or processes. The term does not include computer software source code, or detailed manufacturing or process data.

* * * * *

Restricted rights * * *

(5) Reproduce and release or disclose the computer software outside the Government only if—

(i) The reproduction, release, or disclosure is necessary to permit—

(A) Contractors or subcontractors performing service contracts (see FAR 37.101) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations;

(B) Contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made;

(C) Covered Government support contractors in the performance of covered Government support contracts to use, modify, reproduce, perform, display, or release or disclose the computer software to a person authorized to receive restricted rights computer software; or

(D) Contractors or subcontractors to use, modify, reproduce, perform, display, or release or disclose segregation or reintegration data to segregate computer software from, or reintegrate that software (or functionally equivalent software) with, other computer software;

(ii) Each recipient contractor or subcontractor ensures that the party that has granted restricted rights is notified of such release or disclosure;

(iii) Such contractors or subcontractors are subject to the use and non-disclosure agreement at DFARS 227.7103–7 or are Government contractors receiving access to the software for performance of a Government contract that contains the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information with Restrictive Legends or Markings;

(iv) The Government shall not permit the recipient to use, decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(15)(iv) of this clause, for any purpose other than those authorized in paragraph (a)(15)(v)(A); and

(v) The recipient's use of the computer software is subject to the limitations in paragraphs (a)(15)(i) through (iv) of this clause.

Segregation or reintegration data means technical data or computer software that is more detailed than form, fit, and function data and that is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes.

(1) Unless agreed otherwise by the Government and the contractor, the nature, quality, and level of technical detail necessary for these data or software shall be that required for persons reasonably skilled in the art to perform such segregation or reintegration activities.

(2) The segregation or reintegration of any such an item or process may be performed at any practical level, including down to the lowest practicable segregable level, *e.g.,* a subitem or subcomponent level, or any segregable portion of a process, computer software (*e.g.,* a software subroutine that performs a specific function), or documentation.

(3) The term—

(i) Includes data or software that describes in more detail (than form, fit, and function data) the physical, logical, or operational interface or similar functional interrelationship between the items or processes; and

(ii) May include, but would not typically require, detailed manufacturing or process data or computer software source code to support such segregation or reintegration activities.

* * * * *

■ 29. Amend section 252.227–7015 by—

■ a. Removing the clause date ''(FEB 2014)'' and adding ''(DATE)'' in its place;

■ b. In paragraph (a)—

■ i. Removing paragraph number designations;

■ ii. Revising the definition of ''Commercial item'';

■ iii. Adding, in alphabetical order, the definition of ''Commercial limited rights'';

■ iv. Adding, in alphabetical order, the definition of ''Commercial unlimited rights'';

■ v. In the definition of ''Covered Government support contractor'' removing ''252.204–7014'' and adding ''the clause at DFARS 252.204–7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors'' in its place; redesignating paragraphs (i) and (ii) as (1) and (2), respectively; and in the newly redesignated paragraph (2) removing ''252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends'' and adding ''DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information with Restrictive Legends or Markings'' in its place;

■ vi. Revising the definition of ''Form, fit, and function data'';

■ vii. Removing ''The term *item* includes components or processes.''; and

■ viii. Adding, in alphabetical order, the definition of ''Segregation or reintegration data'';

■ c. Revising the paragraph (b)(1) introductory text;

■ d. Revising paragraph (b)(2);

■ e. In paragraph (b)(3)(iv), removing ''252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends'' and adding ''DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished

Information with Restrictive Legends or Markings'' in its place;
■ f. Redesignating paragraph (e) as paragraph (f);
■ g. Adding a new paragraph (e);
■ h. In the newly redesignated paragraph (f), remove the last sentence of paragraph (f)(2); and
■ i In Alternate II—
■ i. Revising the clause date and the introductory text; and
■ ii. In paragraph (a), removing ''(a)(6)'' and adding ''(a)'' in its place.

The revisions and additions read as follows:

252.227–7015 Technical Data–Commercial Items.

* * * * *

Commercial item does not include commercial computer software (see DFARS 227.7202 for coverage regarding commercial computer software documentation).

Commercial limited rights means the rights to use, modify, reproduce, release, perform, display, or disclose, in whole or in part within the Government, technical data pertaining to commercial items. The Government may not, without the written permission of the party asserting commercial limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture of additional quantities of the commercial items, or authorize the technical data to be used by another party, except that the Government may reproduce, release, or disclose such data or authorize the use or reproduction of the data by persons outside the Government if—

(1) The reproduction, release, disclosure, or use is—

(i) Necessary for emergency repair and overhaul;

(ii) Necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes; and such reproduction, release, disclosure, or use involves only segregation or reintegration data; or

(iii) A release or disclosure to—

(A) A covered Government support contractor, for use, modification, reproduction, performance, display, or release or disclosure to authorized person(s) in performance of a Government contract; or

(B) A foreign government, of technical data, other than detailed manufacturing or process data, when use of such data by the foreign government is in the interest of the Government and is required for evaluational or informational purposes;

(2) The recipient of the technical data is subject to a prohibition on the further reproduction, release, disclosure, or use of the technical data; and

(3) The contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, or use.

Commercial unlimited rights means rights 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.

* * * * *

Form, fit, and function data means technical data or computer software that describes the required overall physical, logical, configuration, mating, attachment, interface, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item or process to the extent necessary to permit identification of physically or functionally equivalent items or processes. The term does not include computer software source code, or detailed manufacturing or process data.

Segregation or reintegration data means technical data or computer software that is more detailed than form, fit, and function data and that is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes.

(1) Unless agreed otherwise by the Government and the contractor, the nature, quality, and level of technical detail necessary for these data or software shall be that required for persons reasonably skilled in the art to perform such segregation or reintegration activities.

(2) The segregation or reintegration of any such an item or process may be performed at any practical level, including down to the lowest practicable segregable level, *e.g.,* a subitem or subcomponent level, or any segregable portion of a process, computer software (*e.g.,* a software subroutine that performs a specific function), or documentation.

(3) The term—

(i) Includes data or software that describes in more detail (than form, fit, and function data) the physical, logical, or operational interface or similar functional interrelationship between the items or processes; and

(ii) May include, but would not typically require, detailed manufacturing or process data or computer software source code to support such segregation or reintegration activities.

* * * * *

(b) *License.* (1) The Government shall have commercial unlimited rights in technical data that pertain to commercial items and—

* * * * *

(2) Except as provided in paragraphs (b)(1) and (e) of this clause, the Government shall have commercial limited rights in technical data pertaining to commercial items.

* * * * *

(e) *Applicability to development at private expense.* This clause will govern the technical data pertaining to any portion of a commercial item that was developed exclusively at private expense. The clause at DFARS 252.227–7013, Rights in Technical Data–Noncommercial Items, will govern the technical data pertaining to any portion of a commercial item that was developed in any part at Government expense.

* * * * *

ALTERNATE I (DATE)

As prescribed in 227.7102–4(a)(2), add to the basic clause the following definition of ''vessel design'' in paragraph (a) and the following paragraph (b)(4):

* * * * *

■ 30. Amend section 252.227–7018 by—
■ a. Removing the clause date ''(FEB 2014)'' and adding ''(DATE)'' in its place;
■ b. In paragraph (a)—
■ i. Removing paragraph number designations;
■ ii. In the definition of ''Commercial computer software'' redesignating paragraphs (i) through (iv) as (1) through (4), respectively;
■ iii. In the definition of ''Covered Government support contractor'' introductory text, removing ''252.204–7014'' and adding ''the clause at DFARS 252.204–7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors'' in its place; redesignating paragraphs (i) and (ii) as (1) and (2), respectively; and in the newly redesignated paragraph (2) removing ''252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends'' and adding ''DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information with Restrictive Legends or Markings'' in its place;
■ iv. In the definition of ''Developed'' redesignating paragraphs (i) thorough (iv) as (1) through (4), respectively;
■ v. In the definition of ''Developed exclusively at private expense'' introductory text, removing ''government'' and adding

''Government'' in its place; redesignating paragraphs (i) and (ii) as (1) and (2), respectively; and in the newly redesignated paragraph (2) removing ''government'' and adding ''Government'' in its place;

■ vi. In the definition of ''Developed exclusively with government funds'' removing ''*government*'' and adding ''*Government*'' in its place;

■ vii. In the definition of ''Developed with mixed funding'' removing ''government'' and adding ''Government'' in its place in two places.

■ viii. Revising the definition of ''Form, fit and function data'';

■ ix. In the definition of ''Limited rights'' redesignating paragraph (i) introductory text, paragraphs (ii), and (iii) as paragraph (1) introductory text, paragraphs (2), and (3), respectively; in the newly redesignated paragraph (1), redesignating paragraphs (1)(A) and (B) introductory text as (1)(i) and (iii) introductory text, respectively; adding paragraph (1)(ii); in the newly redesignated (1)(i), removing ''or''; in the newly redesignated (1)(iii), redesignating paragraphs (1)(iii)(*1*) and (*2*) as (1)(iii)(A) and (B), respectively.

■ x. In the definition of ''Restricted rights'' redesignating paragraphs (i), (ii), (iii), (iv) introductory text and (v) introductory text as (1), (2), (3), (4) introductory text, and (5) introductory text, respectively; removing paragraphs (vi) and (vii); in the newly redesignated paragraph (4) redesignating paragraphs (4)(A) and (B) as (4)(i) and (ii), respectively; in the newly redesignated paragraph (4)(ii) removing ''(a)(18)(ii), (v), (vi) and (vii of this clause;)'' and adding ''(a)(18)(ii) or (v) of this clause; and''; and revising the newly redesignated paragraph (5);

■ xi. In the definition of ''SBIR data rights'' redesignating paragraphs (i) and (ii) as (1) and (2); and

■ xii. Adding, in alphabetical order, a definition for ''Segregation or reintegration data'';

■ c. In paragraph (b)(8)(iv), removing ''252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends'' and adding ''DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information with Restrictive Legends or Markings'' in its place; and

■ d. In paragraph (f)(5)(ii), removing ''government'' and adding ''Government'' in its place.

The revisions and additions read as follows:

252.227–7018 Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program.

* * * * *

Form, fit, and function data means technical data or computer software that describes the required overall physical, logical, configuration, mating, attachment, interface, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item or process to the extent necessary to permit identification of physically or functionally equivalent items or processes. The term does not include computer software source code, or detailed manufacturing or process data.

* * * * *

Limited rights * * *

(1) * * *

(ii) Necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes; and such reproduction, release, disclosure, or use involves only segregation or reintegration data; or

* * * * *

Restrictive rights * * *

(5) Reproduce and release or disclose the computer software outside the Government only if—

(i) The reproduction, release, or disclosure is necessary to—

(A) Permit contractors or subcontractors performing service contracts (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations;

(B) Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made;

(C) Permit covered Government support contractors in the performance of covered Government support contracts to use, modify, reproduce, perform, display, or release or disclose the computer software to a person authorized to receive restricted rights computer software; or

(D) Permit contractors or subcontractors to use, modify, reproduce, perform, display, or release or disclose segregation or reintegration data to segregate computer software from, or reintegrate that software (or functionally equivalent software) with, other computer software;

(ii) Each recipient contractor or subcontractor notifies the party that has granted restricted rights that a release or disclosure was made;

(iii) Such contractors or subcontractors are subject to the use and non-disclosure agreement at DFARS 227.7103–7 or are Government contractors receiving access to the software for performance of a Government contract that contains the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information with Restrictive Legends or Markings;

(iv) The Government shall not permit the recipient to use, decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(18)(iv) of this clause, for any purpose other than those authorized in paragraph (a)(18)(v)(A); and

(v) The recipient's use of the computer software is subject to the limitations in paragraphs (a)(18)(i) through (iv) of this clause.

* * * * *

Segregation or reintegration data means technical data or computer software that is more detailed than form, fit, and function data and that is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes.

(1) Unless agreed otherwise by the Government and the contractor, the nature, quality, and level of technical detail necessary for these data or software shall be that required for persons reasonably skilled in the art to perform such segregation or reintegration activities.

(2) The segregation or reintegration of any such an item or process may be performed at any practical level, including down to the lowest practicable segregable level, *e.g.,* a subitem or subcomponent level, or any segregable portion of a process, computer software (*e.g.,* a software subroutine that performs a specific function), or documentation.

(3) The term—

(i) Includes data or software that describes in more detail (than form, fit, and function data) the physical, logical, or operational interface or similar functional interrelationship between the items or processes; and

(ii) May include, but would not typically require, detailed manufacturing or process data or computer software source code to support such segregation or reintegration activities.

* * * * *

■ 31. Amend section 252.227–7019 by—

■ a. Removing the clause date ''(SEP 2011)'' and adding ''(DATE)'' in its place;

■ b. Revising paragraph (b);

■ c. In paragraph (d)(1), removing ''asserted restrictions'' and adding ''asserted restrictions (including as assertion under paragraph (c) of DFARS 252.227–7029, Deferred Ordering of Technical Data or Computer Software)'' in its place;

■ d. In paragraph (d)(2)(i)(B), removing ''restriction'' and adding ''marking'' in its place; removing ''sixty (60) days'' and adding ''60 days'' in its place; and removing ''the markings'' and adding ''the marking'' in its place;

■ e. Revising paragraph (e)(1);

■ f. In paragraph (e)(2), removing ''sustain'' and adding ''sustains'' in its place;

■ g. In paragraph (g)(1)(ii), removing ''sixty (60) days'' and adding ''60 days'' in its place;

■ h. In paragraph (g)(1)(iv), removing ''three-year'' and adding ''3-year'' in its place;

■ i. In paragraph (h)(1)(i), removing ''ninety (90) days'' and adding ''90 days'' in its place;

■ j. In paragraph (h)(1)(ii), removing ''one year'' and adding ''1 year'' in its place; and removing ''ninety (90) days'' and adding ''90 days'' in its place;

■ k. In paragraph (h)(1)(iii), removing ''ninety (90) days'' and adding ''90 days'' in its place in two places; and removing ''one year'' and adding ''1 year'' in its place;

■ l. In paragraph (h)(2)(i), removing ''ninety (90) days'' and adding ''90 days'';

■ m. In paragraph (h)(2)(ii), removing ''ninety (90) days'' and adding ''90 days'';

■ n. In paragraph (h)(2)(iii), removing ''one year'' and adding ''1 year'' in its place; and removing ''ninety (90) days'' and adding ''90 days'' in its place;

■ o. In paragraph (h)(3), removing ''government'' and adding ''Government'' in its place in two places; removing ''227.7103–7 of the Defense Federal Acquisition Regulation Supplement (DFARS)'' and adding ''DFARS 227.7103–7'' in its place; and removing ''Information Marked with Restrictive Legends'' and adding ''Information with Restrictive Legends or Markings'' in its place.

The revisions read as follows:

252.227–7019 Validation of Asserted Restrictions—Computer Software.

* * * * *

(b) *Justification.* The Contractor shall maintain records sufficient to justify the validity of any asserted restrictions on the Government's rights to use, modify, reproduce, perform, display, release, or disclose computer software delivered, required to be delivered, or otherwise provided to the Government under this contract and shall be prepared to furnish to the Contracting Officer a written justification for such asserted restrictions in response to a request for information under paragraph (d) of this clause or a challenge under paragraph (f) of this clause.

* * * * *

(e) * * *

(1) The Government, when there are reasonable grounds to do so, has the right to review and challenge the validity of any restrictions asserted by the Contractor on the Government's rights to use, modify, reproduce, release, perform, display, or disclose computer software delivered, to be delivered under this contract, or otherwise provided to the Government in the performance of this contract. The Government may exercise this right within 6 years after the date(s) the software is delivered or otherwise furnished to the Government, or 6 years following final payment under this contract, whichever is later. The Government may, however, challenge a restriction on the release, disclosure or use of computer software at any time if such software—

(A) Is publicly available;

(B) Has been furnished to the United States without restriction;

(C) Has been otherwise made available without restriction; or

(D) Is the subject of a fraudulently asserted use or release restriction.

* * * * *

■ 32. Amend 252.227–7025 by—

■ a. Revising the heading, introductory text, clause title, and clause date;

■ b. In paragraph (a)(1), removing ''252.227–7013'' and adding ''DFARS 252.227–7013'' in its place;

■ c. In paragraph (a)(2), removing ''government purpose rights,'' and adding ''Government purpose rights,'' in its place and removing ''252.227–7014'' and adding ''DFARS 252.227–7014'' in its place;

■ d. In paragraph (a)(3), removing ''252.227–7018'' and adding ''DFARS 252.227–7018'';

■ e. Revising paragraph (b)(1)(i);

■ f. Redesignating paragraph (b)(1)(ii) as paragraph (b)(1)(iv);

■ g. Adding new paragraph (b)(1)(ii) and paragraph (b)(1)(iii);

■ h. In the newly redesignated (b)(1)(iv), removing ''(b)(5)'' and adding ''(b)(6)'' in its place; and adding a period at the end of the sentence;

■ i. In paragraph (b)(2), removing ''government'' and adding ''Government'' in its place wherever it appears; and removing ''227.7103–7'' and adding ''DFARS 227.7103–7'' in its place;

■ j. In paragraph (b)(3)(i) removing ''227.7103–7'' and adding ''DFARS 227.7103–7'' in its place;

■ k. In paragraph (b)(3)(ii), removing ''(b)(5)'' and adding ''(b)(6)'' in its place;

■ l. Revising paragraph (b)(4);

■ m. Redesignating paragraph (b)(5) as (b)(6);

■ n. Adding new paragraph (b)(5);

■ o. In the newly redesignated (b)(6) introductory text, removing ''legends'' and adding ''legends or markings'' in its place;

■ p. Revising paragraph (b)(6)(iii); and

■ q. Adding paragraph (e).

The revisions and additions read as follows:

252.227–7025 Limitations on the Use or Disclosure of Government-Furnished Information with Restrictive Legends or Markings.

As prescribed in 227.7102–4(c), 227.7103–6(c), 227.7104(f)(1), 227.7202–4(b), or 227.7203–6(d), use the following clause:

LIMITATIONS ON THE USE OR DISCLOSURE OF GOVERNMENT–FURNISHED INFORMATION WITH RESTRICTIVE LEGENDS OR MARKINGS (DATE)

* * * * *

(b) * * *

(1) * * *

(i) The Contractor shall use, modify, reproduce, perform, or display technical data received from the Government with limited rights legends, computer software received with restricted rights legends, or SBIR technical data or computer software received with SBIR data rights legends (during the SBIR data protection period) only in the performance of this contract and only for activities authorized in the license for recipients of the data or software. The Contractor shall not, without the express written permission of the party whose name appears in the legend, use the data or software for any unauthorized purpose or release or disclose the data or software to any unauthorized person.

(ii) The Contractor shall ensure that the party whose name appears in the legend is notified prior to such

authorized release or disclosure, except that notice regarding—

(A) Covered Government support contractor activities shall be made as soon as practicable, but not later than 30 days after such release or disclosure; and

(B) Emergency repair or overhaul activities shall be made as soon as practicable.

(iii) The Contractor shall destroy (or return to the Government at the request of the Contracting Officer) the data or software and all copies in its possession promptly following completion of the authorized activities under this contract, and shall notify the party whose name appears in the legend that the data or software has been destroyed (or returned to the Government).

* * * * *

(4) *GFI technical data marked with commercial restrictive markings.*

(i) The Contractor shall use, modify, reproduce, perform, or display technical data that is or pertains to a commercial item and is received from the Government with commercial restrictive markings (*i.e.,* marked to indicate that such data are subject to use, modification, reproduction, release, performance, display, or disclosure restrictions) only in the performance of this contract and only for activities authorized in the commercial limited rights license (defined at DFARS 252.227–7015(a)(2)), or any additional specially negotiated license rights (pursuant to 252.227–7015(c)), for recipients of the technical data. The Contractor shall not, without the express written permission of the party asserting such restrictions, use the technical data to manufacture additional quantities of the commercial items or for any other unauthorized purpose, or release or disclose such data to any unauthorized person.

(ii) The Contractor shall ensure that the party asserting restrictions is notified prior to such authorized release or disclosure, except that notice regarding—

(A) Covered Government support contractor activities shall be made as soon as practicable, but not later than 30 days after such release or disclosure; and

(B) Emergency repair or overhaul activities shall be made as soon as practicable.

(iii) The Contractor shall destroy (or return to the Government at the request of the Contracting Officer) the data and all copies in its possession promptly following completion of the authorized activities under this contract, and shall notify the party asserting restrictions that the data has been destroyed (or returned to the Government).

(iv) If the Contractor is a covered Government support contractor, the Contractor is also subject to the additional terms and conditions at paragraph (b)(6) of this clause.

(5) *GFI commercial computer software marked with commercial restrictive markings.*

(i) The Contractor shall use, modify, reproduce, perform, or display commercial computer software, or segregation or reintegration data pertaining to commercial computer software, received from the Government with commercial restrictive markings (*i.e.,* marked to indicate that such software are subject to use, modification, reproduction, release, performance, display, or disclosure restrictions) only in the performance of this contract and only for activities, if any, that are authorized in the applicable commercial license or any additional specially negotiated license rights (pursuant to DFARS 227.7202–3). The Contractor shall not, without the express written permission of the party asserting such restrictions, use the computer software for any other unauthorized purpose, or release or disclose such software to any unauthorized person.

(ii) The Contractor shall ensure that the party asserting restrictions is notified prior to such authorized release or disclosure.

(iii) The Contractor shall destroy (or return to the Government at the request of the Contracting Officer) the software and all copies in its possession promptly following completion of the authorized activities under this contract, and shall notify the party asserting restrictions that the data or software has been destroyed (or returned to the Government).

(6) * * *

(iii) The Contractor will ensure that the party whose name appears in the legend or marking is notified of the release or disclosure as soon as practicable, but not later than 30 days after such release or disclosure;

* * * * *

(e) The rights and obligations of the parties under this clause shall survive the termination, expiration, or completion of this contract.

252.227–7027 [Removed and Reserved.]

■ 33. Remove and reserve section 252.227–7027.

■ 34. Add section 252.227–7029 to read as follows:

252.227–7029 Deferred Ordering of Technical Data or Computer Software.

As prescribed at 227.7102–4(d), 227.7103–8(c)(2), 227.7104(e)(4), 227.7202–4(c), and 227.7203–8(c)(2), use the following clause:

DEFERRED ORDERING OF TECHNICAL DATA OR COMPUTER SOFTWARE (DATE)

(a) *Definitions.* As used in this clause—

Applied research and *development* are defined at FAR 35.001.

Commercial computer software, computer software, computer software documentation, detailed manufacturing or process data, developed, developed exclusively at private expense, developed exclusively with Government funds, developed with mixed funding, form, fit, and function data, segregation or reintegration data, and *technical data* are defined in the DFARS at—

(1) 252.227–7013, Rights in Technical Data—Noncommercial Items;

(2) 252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation;

(3) 252.227–7015, Technical Data—Commercial Items; and

(4) 252.227–7018, Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program.

Commercially available off-the-shelf software means computer software that is a commercially available off-the-shelf item.

Form, fit, and function data means technical data or computer software that describes the required overall physical, logical, configuration, mating, attachment, interface, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item or process to the extent necessary to permit identification of physically or functionally equivalent items or processes. The term does not include computer software source code, or detailed manufacturing or process data.

Segregation or reintegration data means technical data or computer software that is more detailed than form, fit, and function data and that is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes.

(1) Unless agreed otherwise by the Government and the contractor, the nature, quality, and level of technical detail necessary for these data or software shall be that required for persons reasonably skilled in the art to

perform such segregation or reintegration activities.

(2) The segregation or reintegration of any such an item or process may be performed at any practical level, including down to the lowest practicable segregable level, *e.g.,* a subitem or subcomponent level, or any segregable portion of a process, computer software (*e.g.,* a software subroutine that performs a specific function), or documentation.

(3) The term—

(i) Includes data or software that describes in more detail (than form, fit, and function data) the physical, logical, or operational interface or similar functional interrelationship between the items or processes; and

(ii) May include, but would not typically require, detailed manufacturing or process data or computer software source code to support such segregation or reintegration activities.

Technical data or computer software generated or utilized in the performance of this contract or any subcontract hereunder means—

(1) Technical data or computer software developed in the performance of this contract or any subcontract hereunder;

(2) Technical data pertaining to an item or process that is developed, delivered, or incorporated into the design of a system, in the performance of this contract or any subcontract hereunder;

(3) Computer software or computer software documentation pertaining to computer software designed, developed, or delivered in the performance of this contract or any subcontract hereunder;

(4) Technical data or computer software used to provide services in the performance of this contract or any subcontract hereunder; or

(5) Technical data or computer software, other than commercially available off-the-shelf software, necessary to access, use, reproduce, modify, perform, display, release, or disclose any of the technical data or computer software identified in paragraphs (1) through (4) of this definition.

(b) In addition to technical data or computer software specified elsewhere in this contract to be delivered or otherwise furnished hereunder, the Government may at any time order technical data or computer software as follows:

(1) Except as provided in paragraph (b)(2) of this clause, the Government may require delivery of any technical data or computer software generated or utilized in the performance of this contract or any subcontract hereunder, upon a determination by the Government that the technical data or computer software—

(i) Is needed for the purpose of development, production, reprocurement, sustainment, modification, or upgrade (including through competitive means) of—

(A) A major system or subsystem thereof;

(B) A weapon system or subsystem thereof;

(C) Any noncommercial item; or

(D) Any portion of a commercial item that was either developed exclusively with Government funds or developed with mixed funding, or that was a modification made at Government expense; and

(ii) Either—

(A) Pertains to an item or process that was either developed exclusively with Government funds or developed with mixed funding;

(B) Was generated either exclusively with Government funds or with mixed funding in cases when contract performance did not involve the development of an item or process; or

(C) Is form, fit, and function data, or segregation or reintegration data.

(2) For technical data or computer software resulting from basic research or applied research, the Government is not required to make the determination that such technical data or computer software is needed for the purposes set forth at paragraph (b)(1)(i).

(c) If the Contractor asserts in writing to the Contracting Officer that technical data or computer software that is or may be covered by a determination in paragraph (b)(1)(ii)(A) or (B) of this clause pertains to an item or process developed exclusively at private expense, the contractor's assertion shall include information sufficient for the Contracting officer to evaluate the assertion, and that assertion shall be governed by the applicable procedures for validation of asserted restrictions at DFARS 252.227–7019, Validation of Asserted Restrictions—Computer Software, or 252.227–7037, Validation of Asserted Restrictions on Technical Data. Any other assertion or disagreement shall be governed by the applicable disputes clause.

(d) This clause shall not be interpreted as imposing an obligation on the Contractor to preserve any technical data or computer software covered by this clause for longer than a reasonable period. However, this does not restrict the Government from including a contract requirement for the Contractor to preserve such technical data or computer software for a specific period.

(e) When technical data or computer software is ordered under paragraph (b) of this clause, the Contractor shall be compensated only for reasonable costs incurred for converting and delivering the technical data or computer software into the required form.

(f) The Government's rights to use such technical data or computer software shall be pursuant to the applicable rights in technical data and computer software clause(s), or pursuant to DFARS 227.7202 in the case of commercial computer software, in effect as of the date of award of this contract.

(g) The Government may exercise its deferred ordering rights by any means available for ordering technical data or computer software, including unilateral contract modification. Nothing contained in this clause shall be construed as altering or limiting the ability of the Government to order technical data (including computer software documentation) or computer software by mutual agreement with the Contractor. The rights provided to the Government in this clause are in addition to and do not limit any rights afforded to the Government by any other clause of this contract.

(h) The Government is not foreclosed from requiring the delivery of the technical data or computer software by a failure to challenge, in accordance with the requirements of the applicable validation of asserted restrictions or restrictive markings clause, the contractor's assertion of a use or release restriction on the technical data or computer software.

(i) The rights and obligations of the parties under this clause shall survive the termination, expiration, or completion of this contract.

(j) *Flowdown.* The Contractor or subcontractor shall insert this clause in contractual instruments with its subcontractors or suppliers at any tier, including subcontracts for commercial items, except for subcontracts solely for commercial items that are not being acquired for—

(1) A major system or subsystem thereof; or

(2) A weapon system or subsystem thereof.

(End of clause)

■ 35. Amend section 252.227–7037 by—

■ a. Revising the heading, introductory text, clause title, and clause date;

■ b. Revising paragraph (c);

■ c. Revising paragraph (d)(1);

■ d. Revising paragraph (d)(2);

■ e. In paragraph (d)(3), removing ''marking'' and adding ''asserted restriction'' in its place wherever it appears; and removing ''item,

component, or process'' and adding ''item or process'' in its place;
■ f. Revising paragraph (e)(1) introductory text;
■ g. In paragraph (e)(1)(ii), removing ''sixty (60) days'' and adding ''60 days'' in its place;
■ h. Revising paragraph (e)(1)(iii);
■ i. In paragraph (e)(4), removing ''restrictive markings'' and adding ''asserted restrictions'' in its place;
■ j. In paragraph (g)(1), removing ''restrictive marking'' and adding ''asserted restriction'' in its place wherever it appears; and removing ''sixty (60) days'' and adding ''60 days'' in its place in two places;
■ k. In paragraph (g)(2)(i), removing ''restrictive marking'' and adding ''asserted restriction'' in its place; and removing ''sixty (60) days'' and adding ''60 days'' in its place in two places;
■ l. Revising paragraph (g)(2)(ii);
■ m. Revising paragraph (g)(2)(iii);
■ n. In paragraph (g)(2)(iv), removing ''restrictive markings'' and adding ''asserted restrictions'' in its place in two places;
■ o. In paragraph (h)(1)(i), removing ''restrictive marking'' and adding ''restrictive marking supported by the asserted restrictions'' in its place;
■ p. Revising paragraph (h)(1)(ii);
■ q. Revising paragraph (i);
■ r. Revising paragraph (j); and
■ s. Revising paragraph (k).

The revisions read as follows:

252.227–7037 Validation of Asserted Restrictions on Technical Data.

As prescribed in 227.7102–4(e), 227.7103–6(e)(3), 227.7104(e)(5), or 227.7203–6(f), use the following clause:

VALIDATION OF ASSERTED RESTRICTIONS ON TECHNICAL DATA (DATE)

* * * * *

(c) *Justification.* The Contractor or subcontractor at any tier is responsible for maintaining records sufficient to justify the validity of its asserted restrictions on the rights of the Government and others to use, duplicate, release or disclose technical data delivered; required to be delivered, or otherwise provided to the Government under the contract or subcontract. Except as provided in paragraph (b)(1) of this clause, the Contractor or subcontractor shall be prepared to furnish to the Contracting Officer a written justification for such asserted restrictions in response to a challenge under paragraph (e) of this clause.

(d) * * *

(1) The Contracting Officer may request the Contractor or subcontractor to furnish a written explanation for any asserted restriction on the right of the United States or others to use, disclose, or release technical data, or an assertion under paragraph (c) of DFARS 252.227–7029, Deferred Ordering of Technical Data or Computer Software. If, upon review of the explanation submitted, the Contracting Officer remains unable to ascertain the basis of the asserted restriction, the Contracting Officer may further request the Contractor or subcontractor to furnish additional information in the records of, or otherwise in the possession of or reasonably available to, the Contractor or subcontractor to justify the validity of any asserted restriction on technical data delivered, to be delivered, or otherwise provided to the Government under the contract or subcontract (*e.g.,* a statement of facts accompanied with supporting documentation). The Contractor or subcontractor shall submit such written data as requested by the Contracting Officer within the time required or such longer period as may be mutually agreed.

(2) If the Contracting Officer, after reviewing the written data furnished pursuant to paragraph (d)(1) of this clause, or any other available information pertaining to the validity of an asserted restriction, determines that reasonable grounds exist to question the current validity of the asserted restriction and that continued adherence to the asserted restriction would make impracticable the subsequent competitive acquisition of the item or process to which the technical data relates, the Contracting Officer shall follow the procedures in paragraph (e) of this clause.

* * * * *

(e) * * *

(1) Notwithstanding any provision of this contract concerning inspection and acceptance, if the Contracting Officer determines that a challenge to the asserted restriction is warranted, the Contracting Officer shall send a written challenge notice to the Contractor or subcontractor making the asserted restriction. Such challenge shall—

* * * * *

(iii) State that a DoD Contracting Officer's final decision, issued pursuant to paragraph (g) of this clause, sustaining the validity of a prior asserted restriction identical to the current asserted restriction, within the 3-year period preceding the current challenge, shall serve as justification for the current asserted restriction if the prior validated restriction was asserted by the same Contractor or subcontractor (or any licensee of such Contractor or subcontractor) to which such notice is being provided; and

* * * * *

(g) * * *

(2) * * *

(ii) The Government agrees that it will continue to be bound by the asserted restriction for a period of 90 days from the issuance of the Contracting Officer's final decision under paragraph (g)(2)(i) of this clause. The Contractor or subcontractor agrees that, if it intends to file suit in the United States Claims Court it will provide a notice of intent to file suit to the Contracting Officer within 90 days from the issuance of the Contracting Officer's final decision under paragraph (g)(2)(i) of this clause. If the Contractor or subcontractor fails to appeal, file suit, or provide a notice of intent to file suit to the Contracting Officer within the 90-day period, the Government may cancel or ignore the restrictive markings supported by the asserted restriction, or may require delivery of the technical data or computer software covered by the asserted restriction pursuant to DFARS 252.227–7029, Deferred Ordering of Technical Data or Computer Software, and the failure of the Contractor or subcontractor to take the required action constitutes agreement with such Government action.

(iii) The Government agrees that it will continue to be bound by the asserted restriction where a notice of intent to file suit in the United States Claims Court is provided to the Contracting Officer within 90 days from the issuance of the final decision under paragraph (g)(2)(i) of this clause. The Government will no longer be bound, and the Contractor or subcontractor agrees that the Government may strike or ignore the restrictive markings supported by the asserted restrictions, if the Contractor or subcontractor fails to file its suit within 1 year after issuance of the final decision. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, that urgent or compelling circumstances will not permit waiting for the filing of a suit in the United States Claims Court, the Contractor or subcontractor agrees that the agency may, following notice to the Contractor or subcontractor, authorize release or disclosure of the technical data. Such agency determination may be made at any time after issuance of the final decision and will not affect the Contractor's or subcontractor's right to damages against the United States where its asserted restrictions are

ultimately upheld or to pursue other relief, if any, as may be provided by law.

* * * * *

(h) * * *

(1) * * *

(ii) If the asserted restriction is found not to be substantially justified, the Contractor or subcontractor, as appropriate, shall be liable to the Government for payment of the cost to the Government of reviewing the asserted restriction supporting the restrictive marking and the fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Government in challenging the asserted restriction supporting the restrictive marking, unless special circumstances would make such payment unjust.

* * * * *

(i) *Duration of right to challenge.* The Government may review the validity of any restriction on technical data, delivered, to be delivered, or otherwise provided to the Government under a contract, asserted by the Contractor or subcontractor. During the period within 6 years of final payment on a contract or within 6 years of delivery of the technical data to the Government, whichever is later, the Contracting Officer may review and make a written determination to challenge the asserted restriction. The Government may, however, challenge an asserted restriction on the release, disclosure or use of technical data at any time if such technical data—

(1) Are publicly available;

(2) Have been furnished to the United States without restriction;

(3) Have been otherwise made available without restriction; or

(4) Are the subject of a fraudulently asserted use or release restriction.

(j) *Decision not to challenge.* A decision by the Government, or a determination by the Contracting Officer, to not challenge the asserted restriction supporting a restrictive marking shall not constitute ''validation.'' Only the Contracting Officer's final decision or actions of an agency Board of Contract Appeals or a court of competent jurisdiction that sustains the validity of an asserted restriction constitute validation of the restriction.

(k) *Privity of contract.* The Contractor or subcontractor agrees that the Contracting Officer may transact matters under this clause directly with subcontractors at any tier that assert restrictions on the right of the United States or others to use, disclose or release technical data. However, this clause neither creates nor implies privity of contract between the Government and subcontractors.

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