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Defense Acquisition Regulations System

48 CFR Parts 212, 227, et al.

**Defense Federal Acquisition Regulation
Supplement; Patents, Data, and
Copyrights (DFARS Case 2010-D001);
Proposed Rule**

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 212, 227, 246, and 252**

RIN 0750-AG62

Defense Federal Acquisition Regulation Supplement; Patents, Data, and Copyrights (DFARS Case 2010-D001)

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

ACTION: Proposed rule with request for comments.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to update text on patents, data, and copyrights. The proposed rule removes text and clauses that are obsolete or unnecessary; relocates and integrates the coverage for computer software and computer software documentation with the coverage for technical data to eliminate redundant coverage for these subjects while retaining the necessary distinctions; eliminates or combines the clauses associated with technical data and computer software, consistent with the revised and streamlined regulatory coverage; relocates, reorganizes, and clarifies the coverage for rights in works; and relocates to the DFARS companion resource, Procedures, Guidance, and Information (PGI), text that is not regulatory in nature and does not impact the public.

DATES: Comments on the proposed rule should be submitted to the address shown below on or before November 26, 2010, to be considered in the formulation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2010-D001, using any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *E-mail:* dfars@osd.mil. Include DFARS Case 2010-D001 in the subject line of the message.
- *Fax:* 703-602-0350.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD (AT&L) DPAP (DARS), Room 3B855, 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 <http://www.regulations.gov> approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

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FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, 703-602-0328.

SUPPLEMENTARY INFORMATION:**A. Background**

This proposed rule is intended to simplify and clarify DFARS part 227, Patents, Data, and Copyrights, and move to PGI text that does not impact the public. These proposed DFARS changes are discussed in detail, followed by a list of specific issues or topics on which public comment is sought.

1. Subpart 212.2, Special Requirements for the Acquisition of Commercial Items.

Subpart 212.2 is revised to update cross-references to the reorganized subpart 227.71 for technical data and computer software. In addition, a new section 212.270 is added to provide appropriate cross-reference to the DFARS policies and procedures for rights in works at subpart 227.72.

2. Subpart 212.5, Applicability of Certain Laws to the Acquisition of Commercial Items.

Section 212.504 is revised to eliminate the statutory sections 10 U.S.C. 2320 and 2321 from the list of statutes that are inapplicable to subcontracts for commercial items. The Federal Acquisition Streamlining Act (FASA) required the FAR to identify statutes that do not apply to contracts or subcontracts for commercial items (see FAR 12.503 and 12.504, and DFARS 212.503 and 212.504). The current DFARS implementation of this authority makes 10 U.S.C. 2320 and 2321 applicable to prime contracts for commercial items, but not to subcontracts (see 212.504(a)(iii) and (iv)), which results in the DFARS clauses used in prime contracts not being flowed down to subcontracts, pursuant to current 227.7102-3.

However, this approach fails to recognize that intellectual property rights create a direct relationship between the Government and subcontractors. Intellectual property rights are one area in which there is a direct legal relationship created between the Government and subcontractors, at any tier. The Government's license rights are granted directly from the subcontractor, as the owner of the deliverable intellectual property; the Government and subcontractor are allowed to transact business directly with one another; and the higher-tier contractors are prohibited from using

their position to acquire rights in subcontractor technology (i.e., other than by mutual agreement in an arms length negotiation). This concept is recognized explicitly in the statutes governing acquisition of intellectual property:

- **Inventions and Patents.** The Bayh-Dole Act (35 U.S.C. 200-212) explicitly states that its requirements apply to subcontracts. The regulatory implementation specifically addresses this issue at FAR 27.304-4, and in the clauses at FAR 52.227-11(k), 52.227-12, and 52.227-13(i).

- **Technical Data.** 10 U.S.C. 2320 and 2321 explicitly apply to subcontracts, provide that the subcontractor may transact business directly with one another, and explicitly address rights and procedures applicable for commercial items (see, e.g., 2320(a) & (b)(1), and 2321(f)). These procedures are discussed and implemented at current DFARS 227.7103-13 and -15, and in the current clauses at DFARS 252.227-7013(k), and 252.227-7037(b), (k), and (l).

These proposed revisions, which now apply these statutory requirements to subcontracts for commercial items, also require corresponding changes to the flowdown of the proposed revised clauses at DFARS 252.227-7013, -7015, and -7037.

3. Subpart 227.3, Patent Rights under Government Contracts, and associated clause 252.227-7039, Patents—Reporting of Subject Inventions.

The proposed rule deletes the requirement for DFARS clause 252.227-7034, Patents—Subcontractor. This clause provided for flowdown of the 52.227-12 clause to large business subcontractors. This clause is unnecessary because the original defect in the 1984 clause was fixed in the late 1980s, and that fix was further improved in the FAR part 27 rewrite (FAR Case 1999-402). Under that case, FAR clause 52.227-12 was deleted. The FAR clause was replaced by DFARS clause 252.227-7038, Patent Rights—Ownership by the Contractor (Large Business) (DFARS Case 2001-D015, 72 FR 69159).

4. Subpart 227.4, Rights in Data and Copyrights.

There are no substantive changes in subpart 227.4.

5. Subpart 227.6, Foreign Intellectual Property Exchanges and Licenses.

The language of this subpart has been edited to use plain language when possible. This revision proposes to relocate to PGI—

- Assistance with patent rights and royalty payments in the U.S. European Command; and

- Information on the laws and regulations governing export control of intellectual property.

6. Subpart 227.70, Infringement Claims, Licenses, and Assignments.

- Requirements for filing an infringement claim.

Section 227.7004 (now 227.7002) establishes requirements for a private party to file a valid patent or copyright infringement claim or secrecy order claim against the United States. This subject matter is not necessarily limited to FAR/DFARS-based contracts.

However, the DAR Council was unable to identify any other appropriate regulation in which to include this subject matter, and therefore proposes to retain it in the DFARS. This subject matter directly affects the legal rights and remedies of private parties and therefore, must be kept in a regulation.

The proposed rewrite differentiates between the requirements for filing a claim for patent infringement and for filing a claim for copyright infringement. The current DFARS only references copyright infringement claims generically. More specific guidance is required so that the department or agency affected can more appropriately respond to a claim for copyright infringement. Moreover, these sections were revised such that the section concerning indirect notification of a claim submitted to a contractor rather than the Government was revised to state that such notice is defective.

- Guidance for processing and settling claims.

The remaining subject matter in subpart 225.70 provides guidance for investigating and settling any intellectual property infringement claims using a specialized form of acquisition instrument, more commonly referred to as settlement agreements, licenses, or releases. The following information has been moved to PGI:

- Addresses for filing an administrative claim.
- Examples of disposition of trademark infringement claims.
- Sample denial of an administrative claim.

The section on notification and disclosure to claimants (now 227.7004) was completely rewritten to positively state that it is the Government's policy to settle meritorious claims, that the agency making such a determination should coordinate with other agencies on their potential liability, and that if a claim is to be denied, the responsible agency should notify the claimant and provide a basis for the denial.

The DFARS clauses 252.227–7000 through 252.227–7012, currently prescribed in DFARS subpart 227.70,

have been eliminated. These clauses were all provided just as examples, which could be modified or omitted. Section 227.7006 now provides a sample settlement agreement for patent infringement. This settlement agreement may be tailored as appropriate for copyright infringement releases, settlement agreements, license agreements, or assignment. Cognizant legal counsel must be consulted in such circumstances.

7. Subpart 227.71, Rights in Technical Data and Computer Software.

The current version of DFARS part 227 was issued in 1995, as the result of a joint Government-industry committee that was formed by section 807 of the National Defense Authorization Act for FY 1991. The section 807 committee revised nearly the entire part 227 and clauses, and established separate coverage for the treatment of technical data at subpart 227.71, and for computer software and computer software documentation at subpart 227.72. In addition, within each of these subparts, the materials were organized to provide separate sections for commercial technologies (227.7102 and 227.7202) and for noncommercial technologies (227.7103 and 227.7203).

As a result of this structure, the current DFARS coverage for computer software at subpart 227.72 is primarily a duplication of the text covering technical data at 227.71. Similarly, the current clause for noncommercial computer software at 252.227–7014 is nearly a duplicate of the clause governing noncommercial technical data at 252.227–7013. With this structure, it can be more difficult to distinguish the actual differences between the treatment of technical data vice computer software because so much of the coverage is identical.

One of the objectives in this proposed rule is to identify and eliminate the redundancy between current subparts 227.71 and 227.72, and associated clauses. After consolidating the technical data and computer software coverage at subpart 227.71, the entire subpart was reorganized and streamlined to improve clarity, eliminate unnecessary or obsolete coverage, and relocate appropriate materials to the PGI. In general, materials were grouped into sections with related purposes or policies, and to the extent possible, discussed sequentially in order to more closely parallel the chronological sequence in which these issues are presented in a typical acquisition (e.g., starting with acquisition planning, specifying delivery requirements and asserting restrictions as early as possible,

accepting and validating markings on deliverables, and the use, safeguarding, and handling of those materials).

This subpart is now divided into the following sections:

a. 227.7100 Scope of subpart.

The subpart has been expanded to include computer software and no longer includes rights in works.

b. 227.7101 Definitions.

The definitions in this section and the associated clauses at 252.227–7013, 252.227–7014, and 252.227–7015 are revised to incorporate definitions applicable to computer software (e.g., “restricted rights”), and are further revised as to be consistent with statutory definitions. For example, the definitions of “computer software” and “computer software documentation” were revised to reclassify some types of recorded information as “computer software documentation” rather than “computer software.” The items “design details, algorithms, processes, flow charts, formulas, and related material that describe the design, organization, or structure” of computer software had been added to the current definition of “computer software” in the 1995 rewrite, but these types of recorded information are more legitimately characterized as “technical data that pertains to an item” (in this case, the item being computer software). However, another type of recorded information that was retained from the 1995-era redefinition of “computer software” is “source code listings”—the human-readable versions of computer programs for which there is no analog in the world of technical data. Thus, “source code” is more appropriately characterized as “computer software.”

c. 227.7102 Policy.

The policy section expands in most cases the statutory requirements for technical data at 10 U.S.C. 2320 and 2321 to cover computer software as well. It combines the policy for both commercial and noncommercial items or processes.

d. 227.7103 Acquisition of technical data and computer software.

Associated clauses:

- 252.227–7026, Deferred Delivery of Technical Data or Computer Software; and

- 252.227–7027, Deferred Ordering of Technical Data or Computer Software.

Proposed subsection 227.7103–1 addresses acquisition planning and provides a pointer to additional guidance in PGI.

Proposed subsections 227.7103–2, Preparation of solicitation, and 227.7103–3, Identification and assessment of Government minimum needs, are primarily the consolidation of

coverage from the following current DFARS sections: 227.7103–2 for noncommercial technical data; and 227.7203–1 for noncommercial computer software. Because these materials focus on the Government's determination of its delivery requirements, and the evaluation of offered deliverables, they are equally applicable to commercial technical data and computer software, subject to the commercial-specific policies at proposed revised 227.7102. Procedures for Government personnel to identify minimum needs have been moved to PGI.

Proposed subsection 227.7103–4 is the consolidation of the coverage for deferred delivery and deferred ordering at delivery at current DFARS 227.7103–8 for noncommercial technical data, and 227.7203–8 for noncommercial computer software. The associated clauses at 252.227–7026 and 252.227–7027 are revised for clarity, with no substantive changes.

e. 227.7104 License rights in technical data and computer software.

Associated clauses:

- 252.227–7013, Rights in Technical Data and Computer Software—Noncommercial.

- 252.227–7014, Rights in Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program. (moved from 252.227–7018)

- 252.227–7015, Rights in Technical Data and Computer Software—Commercial.

This section 227.7104 consolidates all of the existing DFARS coverage of the allocation of rights between the parties (i.e., the Government, contractors, subcontractors, and third parties) for the various categories of technical data and computer software.

(i) Acquisition of rights in technical data and computer software—noncommercial.

Proposed subsection 227.7104–1, General, is based on the consolidation of current 227.7103–4 for noncommercial technical data, and 227.7203–4 for noncommercial computer software. These materials are adapted and clarified as follows:

- Paragraph (a) addresses Grant of license to the Government. Much of this information is moved to PGI.

- Paragraph (b) clarifies the doctrine of segregability, which is used to determine the license rights (or license rights scheme) that is most appropriate for each segregable element of a technical data computer software. This concept is further reinforced later at 227.7104–8, in prescribing multiple rights clauses for contracts that involve multiple types of technical data and

computer software (e.g., both commercial and noncommercial).

- Paragraph (c), Activities covered, clarifies the scope of the license that is granted to the Government. At paragraph (c)(1), the term “access” is added to the well-established list of activities that are covered by the standard license grant for noncommercial technical data and computer software, in recognition of the emerging practice of providing the Government with remote (e.g., Internet-based) access to technical data or computer software that is maintained by the contractor, as an alternative to traditional delivery methods (e.g., delivery on static electronic media such as CD-ROM or DVD). Paragraph (c)(2) recognizes and clarifies that commercial licenses involve a wide variety of licensed activities, which may not cover all of the activities covered by the grant of license for noncommercial technical data or computer software.

- Paragraph (d) clarifies the types of intellectual property covered by the license grant.

Proposed 227.7104–2, Rights in technical data and computer software of third parties (including subcontractors), is based on the consolidation of current 227.7103–9 and 227.7103–15 for noncommercial technical data; and 227.7203–9 and 227.7203–15 for noncommercial computer software.

Proposed 227.7104–3, Rights in noncommercial technical data and noncommercial computer software, is a consolidation of current 227.7103–5 for noncommercial technical data, and 227.7203–5 for noncommercial computer software.

The corresponding clause at 252.227–7013 is a consolidation of the current 252.227–7013, which covers only noncommercial technical data, and 252.227–7014, which covers noncommercial computer software and computer software documentation. The new 252.227–7013 clause is a complete replacement for the current 252.227–7013 clause and 252.227–7014, with several key improvements:

In addition to the revised definitions discussed in section A.7.b. of this notice, the proposed 252.227–7013 clause clarifies limitations on the Government's right to release or disclose technical data or computer software in which it has limited rights, restricted rights, or Government-purpose rights. In all cases, such release or disclosure is permitted only under certain conditions (e.g., the recipient of the technical data or computer software is subject to a prohibition on further disclosure of the materials). In the current 252.227–7013 and 252.227–7014 clauses, these

limitations are set forth primarily in the definitions of limited rights and restricted rights (with one additional limitation specified within the license grant at paragraph (b) of the clause), but for Government-purpose rights, these restrictions are set forth entirely within the license grant (see current 252.227–7013(b)(2)(iii) and 252.227–7014(b)(2)(iii)). This discrepancy is remedied by listing all such restrictions on the Government's rights within the definition of the license rights; this reformatting also streamlines the grant of license rights at paragraph (b) of the proposed clause.

A nearly identical paragraph regarding limitations on negotiated special licenses was relocated from the current DFARS clause language granting limited rights (see current 252.227–7013(b)(3)(iii)), and restricted rights (see current 252.227–7014(b)(3)(ii)), and integrated in a streamlined format within the grant of negotiated license rights (see proposed 252.227–7013(b)(5)).

At proposed paragraph (f) of the clause, the substance of the requirements governing post-award identification and assertion of restrictions (paragraph (e) of the current 252.227–7013 and 252.227–7014 clauses) was relocated to a new stand-alone clause 252.227–7018, which serves as the post-award complement to the pre-award identification and assertion clause 252.227–7017.

At paragraph (g)(2), the proposed clause establishes a new unlimited rights marking that is optional whenever unlimited rights are applicable, and is required when the unlimited rights apply and the contractor also uses the copyright legend permitted by 17 U.S.C. 401 or 402 (the copyright notice). This new unlimited rights legend will help resolve any ambiguities regarding the Government's rights in materials that are marked with a copyright notice “only.” The copyright notice, standing alone, does not qualify as a restrictive marking on noncommercial technical data or computer software, but could serve as restrictive marking on commercial technical data or computer software (e.g., where it is usually accompanied by additional language such as “All rights reserved” and thus may indicate the “standard” commercial license rights or other license more restrictive than unrestricted rights). This new unrestricted rights marking, *required* only for noncommercial technical data or computer software that is both subject to unrestricted rights and which is also marked with a copyright notice, would be distinguishable from other commercial technical data or

computer software with confusingly similar copyright notices.

The clause 252.227–7032, Rights in Technical Data and Computer Software (Foreign), previously prescribed in 227.7103 for optional use in lieu of 252.227–7013 in contracts with foreign contractors, has been eliminated. It is an unnecessary clause that was not frequently used. Furthermore, it predates 10 U.S.C. 2320 and is inconsistent with that statute.

(ii) License rights under the Small Business Innovation Research (SBIR) Program.

Proposed section 227.7104–4 is the revised and updated version of the current 227.7104 and 227.7204. The associated clause at 252.227–7014, Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program, is based on the current 252.227–7018 clause and is revised to include several key statutory and policy updates. The SBIR Program Reauthorization Act of 2000, Public Law 106–554, amended section 9 of the Act (codified at 15 U.S.C. 638(j)(3)(A)) to require that the Small Business Administration (SBA) modify the SBIR policy directives to provide that SBIR data rights apply to Phase III SBIR awards, as well as Phase I and II awards. The SBA issued its policy directive on September 24, 2002, and is currently in the process of revising and updating that policy directive, including the treatment of intellectual property rights, which will also be published for public comment under a separate rulemaking action. Thus, the Department of Defense is working with the SBA to harmonize the DFARS sections on SBIR data rights and the SBIR Policy Directive. SBA has advised that it intends to clarify and revise the SBIR Policy Directive regarding these issues soon.

- **Definitions.** A definition of “SBIR data” was added to the proposed clause. This new definition is based on the definition of “SBIR Technical Data” in section 3(bb) of the SBIR Policy Directive, i.e., all data generated during the performance of an SBIR award. The definition of “SBIR data rights” was revised and simplified to provide the Government with limited rights in SBIR technical data, and restricted rights in SBIR computer software, as the most straightforward mechanism to achieve the objective of allowing the SBIR contractor to assert proprietary data restrictions during the SBIR data protection period. The term “computer software” was added to the definition because SBIR data rights also apply to both technical data and computer

software generated under an SBIR award.

- **SBIR data rights protection period.** Normally, SBIR data rights end upon the date five years after acceptance of the last deliverable. However, any SBIR data that are appropriately referenced and protected in a subsequent SBIR award during the five-year period of this contract remain protected through the protection period of that subsequent SBIR award. This serves to implement the requirement of the Policy Directive that SBIR data rights may be extended throughout multiple future awards if the SBIR data is appropriately referenced and protected in subsequent SBIR awards. In addition, with this new procedure, it may be impossible for the contractor, under any particular award, to know the expiration date of the SBIR data generated under that award. For this reason the proposed clause eliminates any reference to a date-certain expiration of the SBIR data rights period. The SBIR clause continues to provide the Government with unlimited rights upon expiration of the SBIR data protection period. However, the SBA has advised that although its current SBIR Policy Directive provides that after the protection period expires the Government may disclose SBIR data, and may use and authorize others to use SBIR data on behalf of the Government, this does not authorize the Government or third parties to use the data for commercial purposes without the consent of the awardee. SBA has advised that it intends to clarify and revise the SBIR Policy Directive regarding these issues soon. Public comments regarding the merits of the DFARS approach (i.e., unlimited rights after the expiration of the protection period) or the SBA’s interpretation of its current policy directive are specifically requested.

- **Identification and assertion of SBIR data rights restrictions.** To facilitate the identification and assertion of restrictions on all SBIR data being delivered to the Government, including the extension of the SBIR data protection period through subsequent SBIR awards, the revised clause 252.227–7017 and new clause 252.227–7018, have been expanded in scope to cover all deliverable SBIR data.

- **Prohibition against requiring negotiated licenses as a condition of award.** Paragraph (b)(6)(i) of the proposed 252.227–7014 clause implements the requirements of section (b)(4) of the Policy Directive by prohibiting the contracting officer from negotiating for special license rights as an element of any SBIR Phase I, Phase

II, or Phase III award. However, after award, the parties may voluntarily negotiate special license rights, or even the assignment of rights, by mutual agreement.

(iii) License rights for commercial technical data and commercial computer software.

Proposed 227.7104–5 is the consolidation of current 227.7102–2 for commercial technical data, and current 227.7202–3 and –4 for commercial computer software. The associated clause 252.227–7015 is based on the current 252.227–7015 (which covers only commercial technical data), adapted to include the policies governing rights in commercial computer software from current 227.7202–2 and –3, and to include several other key revisions:

- The inclusion of clause language allocating rights in commercial computer software and computer software documentation is a noteworthy change. The current 227.7202 provides no clause for commercial computer software, instead specifying that the Government receives the rights specified in the standard commercial license agreement that is “customarily provided to the public unless such licenses are inconsistent with federal procurement law or do not otherwise meet the agencies needs.”

- The proposed rule preserves this policy at 252.227–7015(b)(1), and strengthens and clarifies it by expressly incorporating this requirement into the contract clause.

- In addition, the proposed language resolves a long-standing issue regarding potential inconsistency between the commercial license and Federal procurement law. The proposed 252.227–7015(b)(1) clarifies that the inconsistent language is considered stricken from the license, and the remainder of the license remains in effect—effectively incorporating a “severability” provision equivalent to those contained in most commercial license agreements.

- The clause also encourages the parties to promptly enter into negotiations to resolve any issues raised by striking the inconsistent provisions. Of course, the proposed 252.227–7015(b)(4) also preserves the parties’ ability to negotiate specialized license provisions by mutual agreement.

- The proposed clause is revised to remove a specialized definition of “commercial item” that excluded commercial computer software from this statutorily defined term. The statutory definition of commercial item contains no such exclusion, leaving no authority for this regulatory limitation.

Commercial computer software that otherwise meets the definition of commercial item must be treated as a commercial item; which clarifies that commercial computer software documentation is merely a specialized subtype of commercial technical data, which remains subject to statutory mandates of 10 U.S.C. 2320.

- The proposed clause establishes a more consistent policy regarding DoD receiving the same license rights that are customarily provided to the public as long as the license rights are consistent with procurement law. This was already the clear statement of policy as applied to commercial computer software at 227.7202, and is generally consistent with the overall themes and policies governing acquisition of commercial items at FAR part 12. However, the regulatory and clause coverage for technical data pertaining to commercial items contained inconsistent guidance: most of the coverage appears to implement the general policy governing commercial acquisitions (e.g., only the customary commercial deliverables are required except when DoD has special needs), but then rather than granting DoD the standard commercial license rights, the clause specifies a DoD-unique license that provides only the minimum rights in technical data that are required by the statute, 10 U.S.C. 2320. There is no clear rationale for requiring DoD to accept lesser rights than an ordinary consumer would receive in a standard, arms-length, commercial transaction for the same technology. The Government should take the standard commercial terms and conditions except when Government-unique requirements (including Federal procurement law) require specialized treatment. The standard terms and conditions should be tailored only as necessary to meet the Government's needs.

- DoD's minimum license rights were corrected to conform to the statutory minimum rights. More specifically, in addition to the license rights specified in the current clause, 10 U.S.C. 2320 also requires that the DoD have the right to disclose certain technical data to foreign governments for evaluation or information, and that both this type of release, and a release for emergency repair or overhaul of the commercial item, are permitted only when the recipient of the data is subject to a prohibition on further release of the data, and the contractor (i.e., owner of the data) is notified of the release. These statutory requirements are added to the minimum rights required for commercial technical data.

- The proposed clause language now clarifies the requirement that

commercial technical data and computer software to be delivered with less than unlimited rights must be marked with an appropriate restrictive legend (proposed 252.227-7015(d)). This requirement is contained expressly in the current 252.227-7015(d) in the form of a release of liability for any Government use or disclosure of technical data that is not restrictively marked. This revision clarifies the rule for commercial technical data, and expressly establishes such a requirement for commercial computer software. Although the current DFARS is silent regarding any mandatory restrictive legends or notices for commercial computer software, best commercial practices always require restrictive markings or notices—and this is a keystone requirement in both copyright and trade secret law. The proposed clause allows any restrictive legend or notice that accurately characterizes the restrictions on the Government's use and is consistent with best commercial practices.

(iv) Prescriptions for primary rights allocation clauses.

The proposed 227.7104-8 combines and clarifies all of the current DFARS language prescribing the primary rights-allocation clauses. In addition, 227.7104-8(d) reinforces the application of the doctrine of segregability to the use of clauses when multiple types of technical data and/or computer software are involved in a single contract.

f. 227.7105, Contractor assertion of restrictions on technical data and computer software—early identification and marking requirements.

Associated provision and clauses at—

- 252.227-7016, Rights in Bid or Proposal Information;

- 252.227-7017, Pre-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software; and

- 252.227-7018, Post-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software.

Proposed section 227.7105 consolidates coverage from current DFARS 227.7103-3 and 227.7103-10 for noncommercial technical data, and 227.7202-3 and 227.7202-10 for noncommercial computer software. The associated clauses 252.227-7017 (pre-award) and the new clause at 252.227-7018 (post-award) consolidate the current DFARS clause requirements of 252.227-7017, pre-award assertions for technical data and computer software; 252.227-7013(e), post-award assertions for technical data; 252.227-7014(e), post-award assertions for computer software; and 252.227-7028,

identification of technical data and computer software previously delivered to the Government.

The proposed clauses create a comprehensive and consistent scheme to enable the contractor to identify and assert restrictions on technical data and computer software. This improved two-clause combination overcomes the shortcomings in the current DFARS by ensuring that these procedures govern all technical data and computer software under the contract (i.e., now including all deliverable SBIR data, commercial technical data, and commercial computer software), and clarifying the instructions for identifying these restrictions—which resulted in widespread confusion and noncompliance with the listing requirement.

Another change to the original 252.227-7017 clause is the removal of the mandatory chart format for reporting the Government's restrictions on use, release, or disclosure of data. This requirement was restrictive and needlessly burdensome for the contractor. Instead, the contractor may now present the required information to the contracting officer in any understandable format, so long as the required information is presented and understandable. Thus, the proposed revisions to the clause and provision aid the contractor by lessening the burden in preparing these documents.

Contractors, under this proposed regime, will no longer have to create an entirely different identification system just for Government customers. Rather, the contractor will be able to submit its materials to the Government in the same manner that it does for its commercial customers.

The original 252.227-7017 clause requirements regarding negotiated, commercial, or non-standard licenses place a large burden upon the contractor to (1) identify the requirements of these licenses and (2) describe the terms of these licenses to the satisfaction of the contracting officer. Therefore, in an effort to alleviate a portion of this burden, the contractor is now required to submit copies of the licenses, etc., with its assertion of restrictions.

A further change benefiting both the contractor and the Government is the integration of the requirements of the current 252.227-7028 clause with the requirements of the 252.227-7017 clause, which avoids the unnecessary duplication of information when the contract will involve the delivery of technical data or computer software with restrictions (required to be identified under current 252.227-7017, and 252.227-7013(e) or 252.227-

7014(e)) that have also been previously delivered to the Government (identified again under the 252.227–7028 clause). However, now that the consolidated 252.227–7017 and 252.227–7018 clauses apply also to commercial technical data and computer software, these commercial technical data and computer software are exempted from the requirement to identify previous deliveries to the Government when such technical data or computer software was and is offered with the standard commercial license rights, eliminating the need for 252.227–7028, Technical Data or Computer Software Previously Delivered to the Government.

Additionally, pre-and post-award restriction identifications have been separated into two distinct clauses. In order to streamline this process, the 252.227–7018 clause tracks the language of the 252.227–7017 clause very closely. Thus, both clauses are easy to understand and apply, as they are quite similar in nature.

g. 227.7106, Conformity, acceptance, warranty, and validation of asserted restrictions on technical data and computer software.

And associated clauses at—

- 252.227–7030, Technical Data and Computer Software—Withholding of Payment; and
- 252.227–7037, Validation of Restrictive Markings in Technical Data and Computer Software.

Proposed subsection 227.7106 is the consolidation of coverage from the following current DFARS sections: 227.7103–11, –12, –13, and –14 for noncommercial technical data; and 227.7203–11, –12, –13, and –14 for noncommercial computer software. The associated clause 252.227–7037, Validation of Restrictive Markings on Technical Data and Computer Software, combines the current clauses at 252.227–7037 (applicable to all technical data), and 252.227–7019 (noncommercial computer software).

The two current DFARS clauses: DFARS 252.227–7037 Validation of Restrictive Markings on Technical Data (which governs both commercial and noncommercial technical data and is based on 10 U.S.C. 2321) and DFARS 252.227–7019, Validation of Asserted Restrictions—Computer Software (which governs noncommercial computer software and is not based directly on the technical data statute) have been combined into proposed DFARS 252.227–7037 Validation of Restrictive Markings on Technical Data and Computer Software, hereinafter referred to as the “proposed clause”. In addition, coverage for the validation of asserted restrictions on commercial computer

software has been added to the proposed clause.

i. Definitions.

The definition of “Contractor” from the current 252.227–7019 computer software clause was retained in the proposed clause. This definition was not present in the current 252.227–7037 technical data clause.

ii. Challenge for commercial computer software.

The proposed clause has added a challenge procedure for “commercial computer software.” The current 252–227–7037 technical data clause provided for challenge of technical data relating to a commercial item, component, or process. This “commercial technical data” challenge procedure was extended to cover commercial computer software in the proposed clause, thereby harmonizing the challenge procedures for both commercial computer software and commercial technical data.

iii. Commercial presumption.

The presumption in contracts for commercial items, components, or processes that the asserted use and release restrictions are justified on the basis that the commercial items, components, or processes were developed at private expense remains in the proposed clause. Notwithstanding this presumption, the proposed clause allows the Government to challenge the asserted use and release restrictions on commercial technical data and commercial computer software. However, the Government can only use information the Government provides as a basis for challenging these asserted use and release restrictions. In addition, the Government may request information from the contractor on these asserted use and release restrictions, but the contractor is not required to provide such information. See (d)(1) of the proposed clause. Moreover, as provided in section (e)(2) of the proposed clause, the contractor’s failure to provide a timely response or to provide sufficient information to such a request will not constitute reasonable grounds for questioning the validity of the asserted restrictions.

In addition, the record keeping requirements in paragraph (c) of the proposed clause are not required for “contracts for commercial items, components, or processes (including “commercial computer software.”

iv. Criteria for Challenge.

The two criteria for a challenge provided in the current 252.227–7037 clause (which governs technical data only) have been extended in the proposed clause to cover computer software. In the current 252.227–7019

clause only the “reasonable grounds” criteria was provided. In the proposed clause the contracting officer may challenge the marking on both technical data and computer software if reasonable grounds exist to question the validity of the marking, and continued adherence to the marking would make impracticable subsequent competitive acquisition of the computer software, item, component, or process.

Note 10 U.S.C. 2321 (d)(1)(A) and (B) require both grounds for technical data. Accordingly, in order to harmonize the criteria for technical data and computer software, the two criteria were extended to cover computer software.

v. Urgent and compelling circumstances.

The proposed clause allows an agency head, at any time after a contracting officer’s final decision, to declare that urgent and compelling circumstances exist. This allows the agency to use or release the data “as necessary to address the urgent and compelling circumstances.” However, the recipient of this data will be required to sign a non-disclosure agreement at DFARS 227.7103–7 or be performing work under a contract containing the clause at DFARS 252.227–7025, Government-Furnished Information Marked with Restrictive Legends. The urgent and compelling circumstances procedure which currently exists in the current 252.227–7019 clause but not in the current 252.227–7037 clause has been extended to cover technical data in the combined clause, thereby harmonizing the procedures for both technical data and computer software.

The proposed clause allows the agency to use or release the data “as necessary to address the urgent and compelling circumstances”. This language replaces language in the current 252.227–7019 clause providing specific rights for specific rights category data. The new language provides more flexibility for the agency and is less confusing than the current language.

vi. Written response considered a claim within the meaning of the Contract Disputes Act.

The proposed clause provides, that for both technical data and computer software, a contractor’s (includes subcontractors and suppliers at any tier) written response to a contracting officer’s challenge “shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601, *et seq.*), and shall be certified—regardless of dollar amount.” This provision is contained in the current 252.227–7037 clause as mandated by 10 U.S.C. 2321(h). Note that the statute

does not prohibit application of this requirement for computer software. Sections (f)(3) through (6) of the current 252.227-7019 clause provide an analogous requirement which was subject to the rigors of a formal rulemaking process. Accordingly, in order to harmonize the requirements for both technical data and computer software in the proposed clause, the language of the current 252.227-7037 clause was extended to cover computer software in the proposed clause.

vii. Flowdown.

The proposed clause provides for flowdown of this clause for both technical data and computer software, commercial as well as noncommercial, to subcontractors, at any tier, or suppliers. This flowdown is mandated by 10 U.S.C. 2321. Note as part of this case that the prohibition against 10 U.S.C. 2321 applying to subcontracts for commercial items will be eliminated.

viii. Privity of contract.

This proposed clause tracks the privity of contract language contained in the new proposed DFARS 252.227-7013 Rights in Technical Data and Computer Software—noncommercial items. Note privity of contract with subcontractors, at any tier, and suppliers is mandated by 10 U.S.C. 2321 for technical data. Further, both the current 252.227-7019 and the current 252.227-7037 clause contain a privity of contract provision for subcontractors, at any tier, and suppliers that were subject to the rigors of a formal rulemaking process.

ix. The related regulatory material.

Current 227.7103-12 and 227.7103-13 have been revised and relocated at 227.7106-4 and -5, respectively. Revisions were made to streamline existing language and to eliminate material that was duplicative of material in the proposed clause at DFARS 252.227-7037, Validation of Restrictive Markings on Technical Data and Computer Software.

h. 227.7107, Safeguarding, use, and handling of technical data and computer software.

Associated clause at 252.227-7025, Government-Furnished Information Marked with Restrictive Legends.

Proposed 227.7107 is the consolidation of coverage from the following current DFARS sections: 227.7103-7, and -16, and 227.7202-16 regarding the safeguarding and release of restricted information outside the Government; and 227.7108 and 227.7208 regarding contractor data repositories.

Perhaps most importantly, this new coverage harmonizes and clarifies the operation of the nondisclosure agreement provided at current

227.7103-7 (see proposed 227.7107-2), and its clause equivalent at 252.227-7025. In both cases, the scope of the nondisclosure agreement/clause was expanded to cover commercial technical data or computer software marked with a restrictive legend. This expansion helps clarify the Government's obligation to protect such restricted and valuable commercial information by applying a consistent protection and release scheme to all forms of technical data and computer software, regardless of whether the material is commercial or noncommercial. In view of the wide variety of potential restrictive legends, and associated license restrictions, for commercial technical data and computer software, these new requirements are modeled after the procedures used to handle negotiated license agreements for noncommercial technical data and computer software: The recipient is expressly limited to those uses authorized by the applicable license, which the Government is required to identify in an attachment prior to release of the information.

8. Subpart 227.72, Rights in Works.

The treatment of special works, existing works, and architect-engineer services was moved out of current 227.71 to entirely replace the material of subpart 227.72. This was done because special works, existing works, and architect-engineer services, are not technical data, which is exclusively covered by 10 U.S.C. 2320 and subpart 227.71, or computer software, also covered by subpart 227.71. To avoid confusion, technical data, computer software documentation, and computer software, are excluded from the coverage of special works and existing works. No exclusion was deemed necessary for architect-engineer services because plans for buildings and other structures, and the structures themselves, are not normally considered to be technical data, i.e., recorded information of a scientific or technical nature. The material was reorganized. Instead of differentiating between special works and existing works, the proposed regulations are differentiated based on whether the contract is for the acquisition of—

- Works and the assignments of rights in works (section 227.7202 and associated clause at 252.227-7020, Rights in Works—Ownership; or

- Works and license rights in works (section 227.7203 and associated clause at 227.7021, Rights in Works—License.

These clauses replace the current clauses 252.227-7020 and 252.227-7021.

There is also a new section on safeguarding, use, and handling of

works, which parallels the section 227.7107 on safeguarding, use, and handling of technical data and computer software. The associated new clause is 252.227-70YY, Government-Furnished Works Marked with Restrictive Legends.

The existing section 227.7107 on Contracts for architect-engineer services has been expanded to cover rights in architectural designs, shop drawings, or similar information related to architect-engineer services and construction. The associated clauses are—

252.227-7022, Government Rights (Unlimited);

252.227-7024, Notice and Approval of Restricted Designs;

252.227-7033, Rights in Shop Drawings.

Of particular note is the inclusion of architectural works in the list of examples of works in the clauses at 252.227-7020 and 252.227-7021. The acquisition of a unique architectural design of a building, a monument, or construction of similar nature, which for artistic, aesthetic or other special reasons the Government does not want duplicated, is actually a special work which should be included within the coverage of special works and not under the general coverage of contract for architect-engineer services (now at 227.7205).

The clause at 252.227-7023, Drawings and other Data to Become the Property of the Government has been deleted, as the requirement is now covered in the proposed revised Rights in Works—Ownership clause at 252.227-7020.

9. Request for Public Comment on Additional Issues.

In addition to comments on any of the subject matter covered by these proposed revisions, DoD seeks comments on the following additional issues related to this subject matter:

- A new clause containing all definitions relevant to DFARS Part 227 (or subpart 227.71 and/or 227.72).

Paragraph (a) of the primary rights-allocation clauses (252.227-7013, -7014, and -7015) largely duplicate each other, and many of the other clauses repeat these definitions. Combining all definitions into a single clause would significantly shorten these clauses collectively by avoiding duplication. However, the drawback is that one requires the definitions clause in order to interpret the rights-clauses, and many people will not even realize that so many of the terms used in the rights-clause are actually defined, and thus would not be motivated to seek out the additional clause.

- A single prescriptive section covering all clauses in subpart 227.71.

In the proposed rule, the clause prescriptions are distributed throughout the sections. It may be preferred to combine all of the relevant clause prescriptions into a single, all-encompassing prescriptive section (e.g., a new 227.7108).

- *Renumbering the clauses.*

The proposed clauses have retained their current numbering, except for 252.227–7018 (now 252.227–7014) (and in cases where clauses have been merged, the new combined clause uses the number applicable to the current clause that applies to technical data).

However, the clauses could be renumbered to coincide with the general order in which the clauses are discussed and prescribed in the regulation, without necessitating any significant changes for the most well-known and critical clauses. For example:

Current/proposed 252.227–	Prescribed at:	Renumbered
7013	227.7104–8(a)	7013
7018/7014	227.7104–8(b)	7014
7015	227.7104–8(c)	7015
7016	227.7105–3(a)	7016
7017	227.7105–3(b)	7017
(new)	227.7105–3(c)	7018
7030	227.7106–5(a)	7023
7037	227.7106–5(b)	7024
7025	227.7107–4	7025
7020	227.7202–3	7030
7021	227.7203–3	7031
7022	227.7205–2(a)	7032
7033	227.7205–2(b)	7033
7024	227.7205–2(c)	7034
7038	227.303(2)	7038
7039	227.303(1)	7039

Would the benefits of a more logical sequence outweigh the administrative difficulty of the number changes?

- *Addition of a “Scope” section to the primary rights-allocation clauses.*

Would this assist with the application of the doctrine of segregability? When more than one rights-allocation clause is used in the contract, issues may arise as to which clause applies to which deliverable-technical data or computer software.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

DoD does not expect this 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.*, because the rule updates and clarifies DFARS text, but makes no significant change to DoD policy regarding patents, data, and copyrights. However, DoD has performed an initial regulatory flexibility analysis, which is summarized as follows:

The objective of the rule is to clarify and update the coverage on patents, data, and copyrights in DFARS part 227.

Statutes pertaining to administrative claims of infringement in DoD include the following: The Foreign Assistance Act of 1961, 22 U.S.C. 2356 (formerly the Mutual Security Acts of 1951 and 1954); the Invention Secrecy Act, 35 U.S.C. 181–188; 10 U.S.C. 2386; 28 U.S.C. 1498; and 35 U.S.C. 286.

Subpart 227.71 implements the following laws and Executive order:

- (1) 10 U.S.C. 2302(4).
- (2) 10 U.S.C. 2305(d)(4).
- (3) 10 U.S.C. 2320.
- (4) 10 U.S.C. 2321.
- (5) 10 U.S.C. 7317.
- (6) 17 U.S.C. 1301, *et seq.*
- (7) Executive Order 12591 (paragraph 1(b)(7)).

The SBIR Program Reauthorization Act of 2000 (Pub. L. 106–554) amended section 9 of the Act (codified at 15 U.S.C. 638(j)(3)(A)) to require that the Small Business Administration (SBA) modify the SBIR policy directives to provide that SBIR data rights apply to phase III SBIR awards, as well as phase I and II awards. The SBA issued its policy directive on September 24, 2002, and is currently in the process of revising and updating that policy directive, including the treatment of intellectual property rights, which will also be published for public comment under a separate rulemaking action. Thus, DoD is working with SBA to harmonize the DFARS sections on SBIR data rights and the SBIR policy directive. SBA has advised that it intends to clarify and revise the SBIR policy directive regarding these issues soon.

This rule applies to small businesses awarded contracts—

- That anticipate the delivery of technical data or computer software;
- When technical data or computer software will be generated during performance of contracts under the SBIR program;
- When the Government has a specific need to control the distribution

of works first produced, created, or generated in the performance of a contract; or

- For architect-engineer services and for construction involving architect-engineer services.

DoD does not have an overall estimate of the number of small entities receiving awards in these categories, but there are approximately 3,000 awards per year in the SBIR program in recent years.

The clause at 252.227–7038, Patent Rights—Ownership by the Contractor (Large Business) is only used if the contractor is other than a small business or nonprofit organization.

It is not known how many of the respondents are small business concerns. Certainly the respondents to the requirements of DFARS 252.227–7018, Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program are small businesses, but the burdens for that clause have not been separately calculated from the burdens for the other clauses addressing technical data rights.

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

There are no known alternatives that would reduce the burden on small business and still meet the objectives of the rule.

DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2010–D001.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply. The information collection requirements associated with part 227 that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*, have been extended under OMB Control Number 0704-0369 (55,000 respondents, approximately 1.5 million burden hours). This proposed rule does not change DoD's estimates of the associated information collection requirement. The proposed rule deletes 17 clauses that did not have information collection requirements. Two clauses that had information collection requirements have been incorporated into other clauses (252.225-7014 into 252.225-7013, 252.227-7019 into 252.227-7037), without affecting the associated information collection requirements. The SBIR clause at 252.227-7018 has been renumbered as 252.227-7014.

List of Subjects at 48 CFR Parts 212, 227, 246, and 252.

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, DoD proposes to amend 48 CFR parts 212, 227, 246, and 252 as follows:

1. The authority citation for 48 CFR parts 212, 227, 246, and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

2. Section 212.211 is revised to read as follows:

212.211 Technical data.

The DoD policies and procedures for acquiring technical data related to commercial items are at subpart 227.71.

3. Section 212.212 is revised to read as follows:

212.212 Computer software.

The DoD policies and procedures for acquiring commercial computer software are at subpart 227.71.

4. Section 212.271 is added to subpart 212.2 to read as follows:

212.271 Works.

The DoD policies and procedures for acquiring rights in works, including architectural designs, shop drawings, or other information resulting from or related to architect-engineer services and construction, are at subpart 227.72.

Section 212.504 [Amended]

5. Section 212.504 is amended by removing and reserving paragraphs (a)(iii) and (a)(iv).

6. Revise part 227 to read as follows:

PART 227—PATENTS, DATA, AND COPYRIGHTS

Subpart 227.3—Patent Rights Under Government Contracts

227.303 Contract clauses.

227.304 Procedures.

227.304-1 General.

Subpart 227.4—Rights in Data and Copyrights

227.400 Scope of subpart.

Subpart 227.6—Foreign License and Technical Assistance Agreements

227.670 Foreign intellectual property agreements and licenses.

§ 227.670-1 General.

§ 227.670-2 Policy.

§ 227.670-3 Procedures.

§ 227.670-4 Export control of intellectual property.

Subpart 227.70—Infringement Claims, Licenses, and Assignments

§ 227.7000 Scope.

§ 227.7001 Statutes pertaining to administrative claims of infringement.

§ 227.7002 Requirements for filing an administrative claim for patent or copyright infringement or a secrecy order claim.

§ 227.7003 Investigation and administrative disposition of claims.

§ 227.7004 Notification and disclosure to claimants.

§ 227.7005 Settlement of indemnified claims.

§ 227.7006 Settlement agreements.

Subpart 227.71—Rights in Technical Data and Computer Software

§ 227.7100 Scope of subpart.

§ 227.7101 Definitions.

§ 227.7102 Policy.

§ 227.7103 Acquisition of technical data and computer software.

§ 227.7103-1 Acquisition planning.

§ 227.7103-2 Preparation of solicitation.

§ 227.7103-3 Identification and assessment of Government minimum needs.

§ 227.7103-4 Deferred delivery and deferred ordering of technical data or computer software.

§ 227.7103-5 Contract clauses.

§ 227.7104 License rights in technical data and computer software.

§ 227.7104-1 General.

§ 227.7104-2 Rights in technical data and computer software of third parties (including subcontractors).

§ 227.7104-3 Rights in noncommercial technical data and noncommercial computer software.

§ 227.7104-4 Rights in technical data and computer software—Small Business Innovation Research (SBIR) Program.

§ 227.7104-5 Rights in commercial technical data and computer software.

§ 227.7104-6 Rights in derivative technical data and computer software.

§ 227.7104-7 Retention of rights by offerors, contractors, or third parties.

§ 227.7104-8 Contract clauses.

§ 227.7105 Contractor assertion of restrictions on technical data and computer software—early identification and marking requirements.

§ 227.7105-1 Early identification.

§ 227.7105-2 Marking requirements.

§ 227.7105-3 Solicitation provision and contract clauses.

§ 227.7106 Conformity, acceptance, warranty, and validation of asserted restrictions on technical data and computer software.

§ 227.7106-1 Conformity and acceptance.

§ 227.7106-2 Warranty

§ 227.7106-3 Unjustified and nonconforming markings.

§ 227.7106-4 Government right to review, verify, challenge and validate asserted restrictions.

§ 227.7106-5 Contract clauses.

§ 227.7107 Safeguarding, use, and handling of technical data and computer software.

§ 227.7107-1 Government procedures for protecting technical data and computer software.

§ 227.7107-2 Use and non-disclosure agreement.

2§ 227.7107-3 Contractor technical data or computer software repositories.

§ 227.7107-4 Contract clause.

Subpart 227.72—Rights in Works

§ 227.7200 Scope of subpart.

§ 227.7201 Definitions.

§ 227.7202 Contracts for the acquisition of works and the assignment of rights in works.

§ 227.7202-1 Policy.

§ 227.7202-2 Procedures.

§ 227.7202-3 Contract clause.

§ 227.7203 Contracts for the acquisition of works and license rights in works.

§ 227.7203-1 Policy.

§ 227.7203-2 Procedures.

§ 227.7203-3 Contract clause.

§ 227.7204 Safeguarding, use, and handling of works.

§ 227.7204-1 Procedures.

§ 227.7204-2 Contract clause.

§ 227.7205 Rights in architectural designs, shop drawings, or similar information related to architect-engineer services and construction.

§ 227.7205-1 Scope.

§ 227.7205-2 Contract clauses.

Subpart 227.3—Patent Rights Under Government Contracts

227.303 Contract clauses.

(1) Use the clause at 252.227-7039, Patents—Reporting of Subject Inventions, in solicitations and contracts containing the clause at FAR 52.227-11, Patent Rights—Ownership by the Contractor.

(2)(i) Use the clause at 252.227-7038, Patent Rights—Ownership by the Contractor (Large Business), instead of the clause at FAR 52.227-11, in

solicitations and contracts for experimental, developmental, or research work if—

(A) The contractor is other than a small business concern or nonprofit organization; and

(B) No alternative patent rights clause is used in accordance with FAR 27.303(c) or (e).

(ii) Use the clause with its Alternate I if—

(A) The acquisition of patent rights for the benefit of a foreign government is required under a treaty or executive agreement;

(B) The agency head determines at the time of award that it would be in the national interest to acquire the right to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement; or

(C) Other rights are necessary to effect a treaty or agreement, in which case Alternate I may be appropriately modified.

(iii) Use the clause with its Alternate II in long-term contracts if necessary to effect treaty or agreements to be entered into.

§ 227.304 Procedures.

§ 227.304–1 General.

Interim and final invention reports and notification of all subcontracts for experimental, developmental, or research work (FAR 27.304–1(e)(2)(ii)) may be submitted on DD Form 882, Report of Inventions and Subcontracts. For additional guidance and information on invention reporting, see PGI 227.304–1.

Subpart 227.4—Rights in Data and Copyrights

§ 227.400 Scope of subpart.

DoD activities shall follow the requirements in subparts 227.71 and 227.72 instead of FAR subpart 27.4.

Subpart 227.6—Foreign License and Technical Assistance Agreements

§ 227.670 Foreign intellectual property agreements and licenses.

§ 227.670–1 General.

In furtherance of the national defense, the Government may develop foreign additional sources of defense services or products that may be accomplished through the use of intellectual property rights or technical assistance agreements. Under such agreements, a domestic concern (“domestic source”), agrees to furnish to a foreign concern or government (“foreign source”), intellectual property rights and other foreign technical assistance needed to

enable the foreign source to produce particular supplies or perform particular services.

§ 227.670–2 Policy.

(a) It is DoD policy not to pay for rights for intellectual property to which the Government holds a royalty-free license or otherwise has title to use or disclose.

(b) This policy shall be applied by agencies in negotiating consideration for foreign license technical assistance agreements or supply contracts with foreign sources.

(c) The consideration for foreign intellectual property agreements may be in the form of a lump sum payment, payments for each item manufactured by the foreign source, an agreement to exchange intellectual property rights on improvements made to the article or service, capital stock transactions, or any combination of these. The domestic source’s bases for computing such consideration may include actual costs; charges for the use of the intellectual property rights and the domestic source’s “price” for setting up a foreign source. The compensation to be paid for in such agreements is referred to as a royalty or license fee.

§ 227.670–3 Procedures.

(a) *Negotiation of intellectual property agreements.* When negotiating or reviewing the terms of an intellectual property exchange or license agreement between the Government and a domestic source, between the Government and a foreign source, or between a domestic source and a foreign source—

(i) *Intellectual property agreements between the Government and a domestic source.*

(A) Intellectual property agreements between the Government and a domestic source (a domestic contractor) shall—

(1) Specify the intellectual property rights to be supplied to the foreign source (a foreign concern or government);

(2) Provide, in connection with any separate agreement between the domestic source and the foreign source, a statement referring to the contract between the Government and the domestic source; and

(3) Conform to the requirements of export control laws and regulations. See PGI 227.670–4.

(B) In negotiating the price paid to the domestic source, the actual cost of the intellectual property rights, the extent of the Government’s contribution to the development of the supplies and services, and the Government’s

intellectual property rights shall be considered.

(ii) *Intellectual property agreements between the Government and a foreign source.* In negotiating contract prices with a foreign source, the agency concerned shall obtain from the foreign source a detailed statement (see FAR 27.204–1(a)(2)) of royalties, license fees, and other compensation paid to a domestic source (or any of its subcontractors) for intellectual property rights and other technical assistance provided to the foreign source, including identifications and descriptions. Examples of charges for intellectual property that are not acceptable include any charge or royalty to which the Government already has title or license or has paid for in an agreement with a domestic source.

(iii) *Reviewing intellectual property agreements between a domestic source and a foreign source.*

(A) In reviewing foreign licenses or technical assistance agreements between domestic and foreign sources, the agency concerned shall indicate whether the intellectual property exchange or agreement meets the requirements of 22 CFR sections 124.07–124.10 (of the International Traffic in Arms Regulations).

(B) When the Government anticipates that it will purchase foreign supplies or services involved in the agreement from the foreign source, the following guidance applies:

(1) The agency concerned shall evaluate the amount of the reduction in charges necessary to account for the Government’s intellectual property rights, and shall determine whether it is fair and reasonable in the circumstances, before indicating its approval.

(2) If the agreement does not specify any reduction in charges, however, or otherwise fails to give recognition to the Government’s intellectual property rights, the agency concerned shall evaluate the agreement and condition its approval upon amendment of the agreement to reflect a reduction, in accordance with 22 CFR 124.10.

(C) When the Government does not anticipate that it will purchase the foreign supplies or services involved in the agreement from the foreign source, the following guidance applies:

(1) If the agreement provides for charges to the foreign source for data or patent rights, it may suffice to fulfill the requirements of 22 CFR 124.10 insofar as the Department of Defense is concerned if—

(i) The domestic source and the Government negotiate the appropriate reduction in the domestic source’s

charges to the foreign source considering any rights the Government may have in the intellectual property.

(ii) The foreign source shall pass any reduction in purchase price on to the Government.

(2) Even though no charge is to be made to the foreign source for intellectual property rights, the agency concerned shall—

(i) Evaluate the acceptability of the provision before indicating its approval; or

(ii) Explicitly condition its approval on the right to evaluate the acceptability of the provision at a later time.

(D) Any agreement between the domestic and foreign sources shall reflect the arrangements contemplated by any technical assistance agreement between the Government and the domestic source.

(E) Every agreement shall provide that any license rights transferred under the agreement are subject to existing rights of the Government.

(F) In connection with every agreement referred to in paragraph (b) of this section, a request shall be made to the domestic source—

(1) To identify the intellectual property rights to be provided to the foreign source by the domestic source or any of its subcontractors, and

(2) To identify any intellectual property rights of which the domestic source may be aware.

(G) The agency concerned shall notify the domestic source that the approval of any agreement is not an approval of the charges, and is not an approval of any business arrangements in the agreement. However, the agency may approve any charges or business arrangements if it is in the Government's best interests. In any event, a disclaimer should be made to charges or business terms not affecting any purchase made by or for the Government.

(b) For assistance with patent rights and royalty payments in the United States European Command, see PGI 227.670–3(b).

§ 227.670–4 Export control of intellectual property.

The laws and regulations governing the export of intellectual property are numerous. These laws and regulations are referenced at PGI 227.670–4.

Subpart 227.70—Infringement Claims, Licenses, and Assignments

§ 227.7000 Scope.

(a) This subpart prescribes—

(1) The policy regarding patent and copyright infringement and secrecy order claims; and

(2) Provides instructions on how the public must submit these claims.

(b) This subpart 227.70 does not apply to licenses or assignments acquired by the Department of Defense. Moreover, this subpart does not apply to other forms of intellectual property infringement other than patent, copyright, and secrecy order claims.

§ 227.7001 Statutes pertaining to administrative claims of infringement.

Statutes pertaining to administrative claims of infringement in the Department of Defense include the following: The Foreign Assistance Act of 1961, 22 U.S.C. 2356 (formerly the Mutual Security Acts of 1951 and 1954); the Invention Secrecy Act, 35 U.S.C. 181–188; 10 U.S.C. 2386; 28 U.S.C. 1498; and 35 U.S.C. 286.

§ 227.7002 Requirements for filing an administrative claim for patent or copyright infringement or a secrecy order claim.

(a) A patent or copyright infringement claim or a secrecy order claim, asserted against the United States under any of the applicable statutes cited in 227.7001, must be in writing and actually communicated to and received by an agency, organization, office, or field establishment within the Department of Defense. Claims shall include the following:

(1) An allegation of infringement;

(2) The requested remedy;

(3) An identification of the patent(s), or copyrighted work(s) alleged to be infringed;

(4) An identification of the alleged infringing use, including a statement of the acts allegedly committed by the Government, and the time period during which the alleged acts occurred; or

(5) As an alternative to paragraph (a)(4) of this section, a declaration that the claimant has made a bona fide attempt to determine the alleged infringing use, but was unable to do so, giving reasons, and stating a reasonable basis for its belief that its patent(s) or copyrighted work(s) allegedly are being infringed;

(6) Any additional information that will expedite the resolution of the claim; and

(7) A declaration that the claimant is the owner or exclusive licensee of the patent(s) or copyrighted work(s) alleged to be infringed, or otherwise has standing to sue.

(b) If the correspondence alleging infringement does not meet the requirements set forth in this paragraph, the sender shall be advised in writing—

(1) That the claim for infringement has not been satisfactorily presented, and

(2) What is necessary to establish a claim.

(c) In addition to the information listed in paragraph (a) of this section, the following material and information is generally necessary in the course of processing an infringement claim. Claimants are encouraged to furnish this information at the time of filing a claim to permit the most expeditious processing and settlement of the claim.

(1) For patent infringement claims—

(i) A copy of the allegedly infringed patent(s) and a designation of all claims alleged to be infringed.

(ii) Identification of all alleged infringements known to the claimant that involve the patented item or process, including the identity of the vendor or contractor and the Government procuring activity.

(iii) A detailed identification of the alleged infringement, particularly where the infringement relates to a component or subcomponent of the item procured. This should include an element-by-element comparison of a representative claim(s) with the allegedly infringing product or process. Further, this identification should include documentation and drawings in suitable detail to enable verification of the infringement.

(iv) Names and addresses of all past and present licensees under the patent(s), and copies of all license agreements and releases involving the patent(s).

(v) A brief description of all litigation in which the patent(s) has been or is now involved, and the present status thereof.

(vi) A list of all persons to whom notices of infringement have been sent, including all agencies of the Government, and a statement of the ultimate disposition of each.

(vii) A description of Government employment or military service of the inventor(s).

(viii) A list of all Government contracts or agreements under which the inventor, patent owner, or their agents have performed work relating to the patents.

(ix) A copy of the U.S. Patent and Trademark Office (PTO) file wrapper of each patent if available to claimant.

(x) A list of any corresponding foreign patent applications.

(xi) Pertinent prior art known to claimant, not contained in the PTO file wrapper, such as prior art cited in corresponding foreign patent prosecutions.

(2) For copyright infringement claims—

(i) A copy of the copyrighted work(s) alleged to be infringed.

(ii) A detailed identification of the allegedly infringing work, including a copy, if available.

(iii) Names and addresses of all past and present licensees and assignees under the copyrighted work, and copies of all licenses and assignments involving the copyrighted work(s).

(iv) A brief description of all litigation in which the copyrighted work(s) has been or is now involved, and the present status.

(v) A list of all persons and organizations to whom notices of infringement have been sent, including all agencies of the Government, and a statement of the ultimate disposition of each.

(vi) A description of Government employment or military service of the author.

(vii) A list of all Government contracts under which the work was produced.

(viii) Copies of registration records for the copyrighted works. (Registration of the work with the U.S. copyright office is not required to file an administrative claim).

(d) *Secrecy order claims.* In addition to the information listed in paragraph (a) of this section, the following material or information is generally necessary in the course of processing a secrecy order claim.

(1) An identification of the damages sought from imposition of the secrecy order and/or use of the invention by the Government while the secrecy order was pending.

(2) A copy of the secrecy order, the notice of allowability and any PTO licenses for foreign filing or modifications of the secrecy order.

(3) An identification of the sponsor of the secrecy order.

(4) An identification of the serial number and filing date of the patent application under secrecy order and any corresponding foreign patent application.

(5) Documentation for any claim for damages.

(6) An indication of when and where the Government allegedly used the invention.

(e) Claimants must submit their claims to the appropriate agency at the addresses at PGI 227.7002(e). Any agency receiving an allegation of infringement which meets the requirements of paragraph (a) of this section shall—

(1) Acknowledge the receipt of the allegation; and

(2) Supply the other agencies that may have an interest with a copy of the allegation and the acknowledgement.

(f) A communication making a proffer of a license in which no infringement is

alleged shall not be considered as a claim for infringement.

227.7003 Investigation and administrative disposition of claims.

(a) Whenever a claim of infringement of an intellectual property right is asserted against the Department of Defense, or its contractors acting with the authorization and consent of the Government, all necessary steps shall be taken to investigate, and to settle administratively, deny, or otherwise dispose of such claim prior to suit against the United States.

(b) *Agency procedures.* An investigation and administrative determination (denial or settlement) of each claim shall be made in accordance with instructions and procedures established by each agency, subject to the following:

(1) The agency responsible for purchasing the alleged infringing item or process shall have sole responsibility for the disposition of the infringement claim when the funds of that agency alone will be charged. However, when funds of another agency are to be charged, in whole or in part, the agreement of such agency shall be obtained, and each agency concerned shall execute any settlement agreement.

(2) When two or more agencies are responsible for purchasing the alleged infringing item or process, and the funds of both agencies are to be charged in the settlement, the agency with the predominant financial interest in the claim shall be responsible for the disposition of the claim, or as jointly agreed upon by the agencies concerned. The agency responsible for negotiation shall, throughout the negotiation, coordinate with the other agencies concerned and keep them advised of the status of the negotiation. Each agency concerned shall execute any settlement agreement.

(c) *Disposition of trademark infringement claims.* See PGI 227.7003(c) for examples of various ways a trademark infringement claim might be disposed of.

227.7004 Notification and disclosure to claimants.

(a) Before settling any claim—

(1) Contact any other agencies that might have an interest in the settlement of the claim; and

(2) Send the claimant a letter stating the limits of the Government's liability, for patent or copyright infringement, and indicate that any settlement agreement will take the general form found at PGI 227.7006(b).

(b) If a claim is denied, the department or agency responsible for the determination of the claim shall—

(1) Notify the claimant or authorized representative in writing;

(2) Provide a basis for denying the claim; and

(3) Draft the notification to avoid any admissions against the Government's interest. Additionally, the notification should not waive any evidentiary privileges that the Government may have, and it should state that the denial is a final agency action. An example letter of denial of an administrative claim may be found at PGI 227.7004(b)(3).

227.7005 Settlement of indemnified claims.

Settlement of claims involving payment for past infringement should not be made without the consent of, and equitable contribution by, each indemnifying contractor involved, unless such settlement is determined to be in the best interests of the Government.

227.7006 Settlement agreements.

Settlement of claims for intellectual property infringement can take many forms. Sometimes, the appropriate manner in which to settle a claim or litigation is through use of a settlement agreement.

(a) *Required FAR clauses for settlement agreements.* The following FAR clauses shall be included in any settlement agreement:

(1) FAR 52.203–5, Covenant Against Contingent Fees.

(2) FAR 52.203–3, Gratuities.

(3) FAR 52.232–23, Assignment of Claims.

(4) FAR 52.233–1, Disputes.

(b) *Sample settlement agreement for patent infringement.* This patent infringement settlement agreement may be tailored as appropriate for copyright infringement releases, settlement agreements, license agreements, or assignments.

PATENT LICENSE AND RELEASE CONTRACT

THIS CONTRACT is effective as of the ____ day of [month, year,] between the UNITED STATES OF AMERICA (hereinafter called the Government), and ____ (hereinafter called the Contractor), (a corporation organized and existing under the laws of the State of ____), (a partnership consisting of ____), (an individual trading as ____), of the City of ____, in the State of ____.

WHEREAS, the Contractor warrants that it has the right to grant the within license and release, and the Government desires to procure the same, and

WHEREAS, this contract is authorized by law, including 10 U.S.C. 2386. NOW THEREFORE, in consideration of the grant, release and agreements hereinafter recited, the parties have agreed as follows:

FIRST OPTION FOR ARTICLES 1 AND 2

ARTICLE 1. License Grant.*

(a) The Contractor hereby grants to the Government an irrevocable, nonexclusive, nontransferable, and paid-up license, under the following intellectual property rights, to practice by or for the Government, throughout the world, any and all of the inventions hereunder, in the manufacture and use of any article or material, in the use of any method or process, and in the disposition of any article or material in accordance with law:

U.S. Patent No. _____ Date _____

Application Serial No. _____ Filing Date _____

(b) No rights are granted or implied by the agreement under any other patents other than as provided above or by operation of law.

(c) Nothing contained herein shall limit any rights which the Government may have obtained by virtue of prior contracts or by operation of law or otherwise.

ARTICLE 2. License Term.*

ALTERNATE I

The license hereby granted shall remain in full force and effect for the full term of the intellectual property referred to in the "License Grant" clause of this contract and any and all intellectual property hereafter issued.

ALTERNATE II

The license hereby granted shall terminate on the _____ day of _____, _____ provided, however, that termination is without prejudice to the completion of any Government contract entered into prior to termination or to the subsequent use or disposition of any articles or materials manufactured by or for the Government under this license.

SECOND OPTION FOR ARTICLES 1 AND 2

ARTICLE 1. License Grant—Running Royalty.*

(a) The Contractor hereby grants to the Government, as represented by the Secretary of _____, an irrevocable, nonexclusive, nontransferable license, under the following intellectual property rights, to practice by or for [agency], throughout the world, any and all of the inventions hereunder in the manufacture and use of any article or

material, in the use of any method or process, and in the disposition of any article or material in accordance with law:

U.S. Patent No. _____ Date _____

Application Serial No. _____ Filing Date _____

(b) No rights are granted or implied by the agreement under any other patents other than as provided above or by operation of law.

(c) Nothing contained herein shall limit any rights which the Government may have obtained by virtue of prior contracts or by operation of law or otherwise.

(d) Computation of Royalties.

Subject to the following conditions, royalties shall accrue to the Contractor under this agreement on all articles or materials embodying, or manufactured by the use of, any or all inventions claimed under any unexpired United States patent licensed herein, upon acceptance thereof by [agency], at the rate of _____ percent of the net selling price of such articles or materials (amount) per (name of item) * whether manufactured by the Government or procured under a fixed-price contract, and at the rate of (amount) per (name of item) acquired or manufactured by a Contractor performing under a cost-reimbursement contract. With respect to such articles or materials made by [agency], "net selling price," as used in this paragraph, means the actual cost of direct labor and materials without allowance for overhead and supervision.

(e) Reporting and Payment of Royalties.

(1) The (procuring office) shall, on or before the sixtieth (60th) day following the end of each yearly * period ending _____ deliver to the Contractor a written report furnishing necessary information relative to royalties which have accrued under this contract during stated period.

(2) Royalties which have accrued under this contract during the yearly* period ending _____ shall be paid to the Contractor (if appropriations therefore are available or become available) within sixty (60) days following the receipt of a voucher from the Contractor submitted in accordance with the report referred to above; provided, that the Government shall not be obligated to pay, in respect of any such yearly period, on account of the combined royalties accruing under this contract directly and under any separate licenses granted pursuant to the "License to Other Government Agencies" clause (if any) of this contract, an amount greater than _____ dollars (\$ _____). If such combined royalties exceed the said maximum

yearly obligation, each agency shall pay a pro-rata share as determined by the proportion its accrued royalties bear to the combined total of accrued royalties.

(f) License to Other Government Agencies.

The Contractor hereby agrees to grant a separate license under the intellectual property rights referred to in the "License Grant" clause of this contract, on the same terms and conditions as appear in this license contract, to any other agency of the Government at any time on receipt of a written request for such a license; provided, however, that each agency make payments directly to the Contractor for royalties which accrue under the separate licenses. The Contractor shall promptly notify the Licensee upon receipt of any request for a license.

ARTICLE 2. License Term—Running Royalty.*

The license hereby granted shall remain in full force and effect for the full term of each of the intellectual property referred to in the "License Grant" clause of this contract and any and all intellectual property hereafter issued unless terminated sooner, as elsewhere herein provided.

ARTICLE 3. Release of Past

Infringement.

The Contractor hereby releases each and every claim and demand which it now has or may hereafter have against the Government for the manufacture or use by or for the Government prior to the effective date of this contract, of any inventions covered by (i) any patents and patent applications identified in this contract, and (ii) any other patents or patent applications owned or hereafter acquired by it, insofar as and only to the extent that such other patents or patent applications cover the manufacture, use, or disposition of (description of subject matter).

ARTICLE 4. Non-Estoppel.

The Government reserves the right at any time to contest the enforceability, validity, scope of, or the title to any intellectual property herein licensed without waiving or forfeiting any right under this contract.

ARTICLE 5. FAR Clauses.

Insert the following FAR clauses:

(a) Covenant Against Contingent Fees, FAR 52.203–5.

(b) Gratuities, FAR 52.203–3.

(c) Assignment of Claims, FAR 52.232–23.

(d) Disputes, FAR 52.233–1.

ARTICLE 6. Termination.

Notwithstanding any other provision of this contract, the Government shall

have the right to terminate the license, in whole or in part, by giving the Contractor at least thirty (30) days written notice of the termination date; provided, however, that the obligation of the Government to pay royalties which have accrued prior to the effective date of termination shall not be affected.

ARTICLE 7. Payment.

The Contractor shall be paid the sum of _____ Dollars (\$) in full compensation for the rights herein granted and agreed to be granted.

ARTICLE 8. Readjustment of Payments.

(a) The Government shall be entitled to the benefit of more favorable terms with respect to all royalties accruing under a contract when any license, under substantially the same intellectual property and authorizing substantially the same acts which are authorized under this contract, has been or shall hereafter be granted within the United States. The Contractor shall promptly notify the Secretary in writing of the granting of such more favorable terms.

(b) In the event any licensed intellectual property is held invalid by decision of a court of competent jurisdiction, the requirement to pay royalties under this contract shall be interpreted in conformity with the court's decision as to the scope of validity of such intellectual property; provided, however, that in the event such decision is modified or reversed on appeal, the requirement to pay royalties under this contract shall be interpreted in conformity with the final decision rendered on such appeal.

ARTICLE 9. Successors and Assignees.

This Agreement shall be binding upon the Contractor, its successors (when the Contractor is an individual, change "successors" to "heirs"; if a partnership, modify appropriately) and assignees, but nothing contained in this Article shall authorize an assignment of any claim against the Government other than as permitted by law.

IN WITNESS WHEREOF, the parties hereto have executed this contract.

THE UNITED STATES OF AMERICA

By _____
Date _____

(Signature and Title of Contractor Representative)

By _____
Date _____

(Signature and Title of Government Representative)

Contract Number _____

* If only a release is procured, delete those articles marked with an *.

(c) Assignment. If an assignment is procured, the following provides sample language that may be used to assign patent rights to the Government.

The Contractor hereby conveys to the Government, as represented by the Secretary of _____, the entire right, title, and interest in and to the following patents (and applications for patent), in and to the inventions thereof, and in and to all claims and demands whatsoever for infringement thereof heretofore accrued, the same to be held and enjoyed by the Government through its duly appointed representatives to the full end of the term of said patents (and to the full end of the terms of all patents which may be granted upon said applications for patent, or upon any division, continuation-in-part or continuation thereof):

U.S. Patent No. _____ Date _____

Name of Inventor _____

U.S. Application Serial No. _____

Filing Date _____

Name of Inventor _____

Subpart 227.71—Rights in Technical Data and Computer Software

227.7100 Scope of subpart.

This subpart—

(a) Prescribes policies and procedures for—

(1) The acquisition of technical data and computer software; and

(2) The rights to use, modify, reproduce, release, perform, display, or disclose technical data and computer software.

(b) It implements requirements of the following laws and Executive order:

(1) 10 U.S.C. 2302(4).

(2) 10 U.S.C. 2305(d)(4).

(3) 10 U.S.C. 2320.

(4) 10 U.S.C. 2321.

(5) 10 U.S.C. 7317.

(6) 17 U.S.C. 1301, et seq.

(7) Executive Order 12591 (paragraph 1(b)(7)).

(c) Does not apply to rights in works (see subpart 227.72).

227.7101 Definitions.

As used in this subpart—

(a) Unless otherwise specifically indicated, the terms *offeror* and *contractor* include an offeror's or contractor's subcontractors or suppliers, or potential subcontractors or suppliers, at any tier.

(b) Other terms are defined in the clauses at—

(1) 252.227–7013, Rights in Technical Data and Computer Software—Noncommercial;

(2) 252.227–7014, Rights in Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program; and

(3) 252.227–7015, Rights in Technical Data and Computer Software—Commercial.

227.7102 Policy.

(a) It is DoD policy to acquire only the technical data and computer software, and the rights in that data and software, that are necessary to satisfy agency needs. Significant elements of the materials discussed in this section are based on 10 U.S.C. 2320 and 2321. Although these statutes apply only to technical data, they are expanded by policy in most cases to cover computer software as well.

(b) To encourage offerors and contractors to offer or use commercial products to satisfy military requirements, offerors and contractors shall not be required to—

(1) Furnish technical information related to commercial items that is not customarily provided to the public except technical data or computer software that—

(i) Are form, fit, or function data (applies only to technical data);

(ii) Are required for repair or maintenance of commercial items or processes, or for the proper installation, operating, or handling of a commercial item, either as a stand-alone unit or as a part of a military system, when such information is not customarily provided to commercial users or the data provided to commercial users is not sufficient for military purposes; or

(iii) Describe the modification of a commercial item made at Government expense to meet the requirements of a Government solicitation; or

(2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose commercial technical data or commercial computer software except for a transfer of rights mutually agreed upon.

(c) Commercial technical data and commercial computer software shall be acquired—

(1) Under the licenses customarily provided to the public unless such licenses are inconsistent with Federal procurement law or do not otherwise satisfy user needs; and

(2) Competitively, to the maximum extent practicable, using firm-fixed-price contracts or firm-fixed-priced orders under available pricing schedules.

(d) Solicitations and contracts shall—

(1) Specify the technical data and computer software to be delivered under

a contract and the delivery schedules for that data and software (10 U.S.C. 2320(b)(2)).

(2) Whenever practicable, identify—
(i) The type and quantity of the technical data and computer software (including requirements for multiple users at one site, or multiple site licenses)

(ii) The format and media in which the data or software will be delivered; and

(iii) The place of delivery for each deliverable item of technical data;

(3) Establish or reference procedures for determining the acceptability of technical data and computer software (10 U.S.C. 2320(b)(3));

(4) Establish separate contract line items, to the extent practicable, for the technical data and computer software to be delivered under a contract (10 U.S.C. 2320(b)(4)) (this requirement may be satisfied by listing each deliverable item on an attachment to the contract);

(5) Require offerors and contractors to price separately each deliverable data or software item (10 U.S.C. 2320(b)(4));

(6) Require offerors to identify and assert, to the maximum extent practicable, restrictions on deliverable technical data and computer software as early as possible in the acquisition, and in all cases require the identification and assertion prior to delivery (10 U.S.C. 2320(b)(5)).

(e) Offerors shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in technical data or computer software related to items, or processes developed at private expense, except for the types of data or software for which the Government receives unlimited rights regardless of the source of funding (10 U.S.C. 2320(a)(2)(F)).

(f) Offerors and contractors shall not be prohibited or discouraged from furnishing or offering to furnish items, processes, or computer software developed at private expense solely because the Government's rights to access, use, modify, reproduce, release, perform, display, or disclose technical data pertaining to those items may be restricted. (10 U.S.C. 2320(a)(2)(F)).

(g) Solicitations for major systems development contracts shall not require offerors to submit proposals that would permit the Government to acquire competitively items identical to items developed at private expense unless a determination is made at a level above the contracting officer that—

(1) The offeror will not be able to satisfy program schedule or delivery requirements; or

(2) The offeror's proposal to meet mobilization requirements does not satisfy mobilization needs. (10 U.S.C. 2305)

(h) For acquisitions involving major weapon systems or subsystems of major weapon systems, the acquisition plan shall address acquisition strategies that provide for technical data and computer software, and the associated license rights, in accordance with 207.106(S–70).

(i) The Government's rights in a vessel design, and in any useful article embodying a vessel design, must be consistent with the Government's rights in technical data pertaining to the design (10 U.S.C. 7317; 17 U.S.C. 1301(a)(3)).

(j) Solicitations and contracts establish a limited form of privacy between the Government and subcontractors or suppliers regarding technical data and computer software, and rights in that data or software. Subcontractors and suppliers at any tier—

(1) Shall not be required to relinquish rights in technical data or computer software to the prime contractor or a higher-tier subcontractor; and

(2) May transact directly with the Government in matters relating to technical data and computer software. (10 U.S.C. 2320 and 2321)

(k) DoD shall protect technical data and computer software from unauthorized access, use, reproduction, modification, release, performance, display, and disclosure. For additional information on the protection of technical data and computer software from unauthorized activities, see PGI 227.7102(i).

227.7103 Acquisition of technical data and computer software.

227.7103–1 Acquisition planning.

Requirements for technical data and computer software, and rights in that data and software, shall be fully addressed in acquisition planning, including through compliance with 207.106(S–70) for acquisitions of major weapons systems or subsystems thereof. Restrictions on the Government's rights to access, use, modify, reproduce, perform, display, release, or disclose technical data or computer software may have a significant impact on other elements of the acquisition plan, such as the ability to release data or software in connection with the competitive re-procurement of additional quantities of the item or process, or the competitive selection of life cycle support, maintenance, or for future upgrades or technical refresh of the technologies.

For additional information on incorporating technical data and computer software considerations into acquisition planning, see PGI 227.7103–1.

227.7103–2 Preparation of solicitation.

Contracting officers shall work closely with data managers, software managers, and requirements personnel to ensure that requirements included in solicitations and contracts for technical data and computer software are consistent with the policies at 227.7102.

227.7103–3 Identification and assessment of Government minimum needs.

(a) Data managers, software managers, and other requirements personnel are responsible for identifying the Government's minimum needs for technical data and computer software, and for rights in that data or software. Follow the procedures at PGI 227.7103–3(a) to identify and assess the Government's minimum needs.

(b) When reviewing offers received in response to a solicitation or other request for technical data or computer software, data managers must balance the original assessment of the Government's data and software needs with the associated prices contained in the offer. Information provided by offerors in response to the solicitation provision may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use or disclose technical data, consistent with the policies of this subpart.

227.7103–4 Deferred delivery and deferred ordering of technical data or computer software.

(a) *Deferred delivery.* The contracting officer shall—

(1) Specify in the contract which technical data or computer software is subject to deferred delivery; and

(2) Notify the contractor sufficiently in advance of the desired delivery date in order to permit timely delivery of the technical data or computer software.

(b) *Deferred ordering.* When computer software or technical data are to be procured through deferred ordering, the contracting officer shall—

(1) Negotiate the delivery dates with the contractor; and

(2) Compensate the contractor only for—

(i) Converting the data into the prescribed form;

(ii) Reproduction costs; and

(iii) Delivery costs.

227.7103–5 Contract clauses.

(a) Use the clause at 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 or computer software.

(b) Use the clause at 252.227–7027, Deferred Ordering of Technical Data or Computer Software, when a firm requirement for a particular data item(s) has not been established prior to contract award but there is a potential need for the data.

227.7104 License rights in technical data and computer software.**227.7104–1 General.**

(a) *Grant of license.* The Government obtains rights in technical data and computer software under an irrevocable license granted or obtained for the Government by the contractor. The contractor (or licensor) retains all rights in the data not granted to the Government.

(b) *Doctrine of segregability.* Determinations of the rights in technical data and computer software may be made at the lowest practicable segregable portion of the data or software. See PGI 227.7104–1(b) for examples of making this determination on the segregable portion.

(c) Activities covered.

(1) *Noncommercial licenses.* The license granted for noncommercial technical data and noncommercial computer software under the clauses covers the following activities:

- (i) Access;
- (ii) Use;
- (iii) Reproduction;
- (iv) Modification;
- (v) Release;
- (vi) Performance;
- (vii) Display; and
- (viii) Disclosure.

(2) *Commercial licenses.* Due to the wide variety of terms and conditions used in commercial license agreements, some of the licenses customarily offered to the public might not expressly address all of the individual activities listed in paragraph (c)(1) of this subsection. Contracting officers must ensure that the license rights covering commercial technical data or commercial computer software satisfy the Government's minimum needs—including the need to engage in any or all of the activities listed in paragraph (c)(1) of this subsection.

(d) Scope of the license.

(1) Except as specified in paragraph (c)(2) of this subsection, the Government's license rights cover all forms of intellectual property interest

that, absent the license, would restrict the ability of the Government to engage in any of the activities listed in paragraph (c) of this subsection. The most common examples are copyright and trade secret.

(2) The license does not cover—

(i) Rights in inventions (*see* FAR subpart 27.3 and DFARS subpart 227.3); and

(ii) Rights in trademarks, service marks, collective marks, certification marks, or any other mark.

(e) *Additional information.* For additional information on the nature of the Government's license, *see* PGI 227.7104–1(e).

227.7104–2 Rights in technical data and computer software of third parties (including subcontractors).**(a) Third parties.**

(1) Under the standard data rights clauses (*e.g.*, 252.227–7013, –7014, –7015), a contractor must grant or obtain for the Government the same license rights in a third party's technical data and computer software delivered under the contract that the contractor must grant the Government under the clauses.

(2) When non-standard license rights in technical data or computer software are negotiated, also negotiate the extent of a third party's intellectual property license commensurate with those non-standard license rights negotiations. An intellectual property license with a third party must provide the Government with at least the minimum rights required by the applicable rights-allocation clause.

(3) Only grant approval to use a third party's intellectual property (excluding patents) in which the Government will not receive a license when the Government's requirements cannot be satisfied without the third party material or when the use of the third party material will result in cost savings to the Government which outweigh the lack of a license.

(b) Subcontractors.

(1) Subcontractors or suppliers at any tier cannot be required to relinquish any rights in technical data to a contractor, a higher tier subcontractor, or to the Government, as a condition for award of any contract, subcontract, purchase order, or similar instrument except for the rights obtained by the Government under the standard rights clause contained in the contractor's contract with the Government.

(2) The Government may transact directly with a subcontractor on matters relating to the validation of its asserted restrictions on the Government's rights to use or disclose technical data. The clause at 252.227–7037 obtains a

contractor's agreement that the direct transaction of validation or challenge matters with subcontractors at any tier does not establish or imply privity of contract for matters not covered by the clause. When a subcontractor or supplier exercises its right to transact validation matters directly with the Government, contracting officers shall deal directly with such persons, as provided at 227.7106–5.

227.7104–3 Rights in noncommercial technical data and noncommercial computer software.

(a) The Government's license rights in noncommercial technical data and noncommercial computer software are governed by the clause at 252.227–7013, Rights in Technical Data and Computer Software—Noncommercial.

(b) For noncommercial technical data and noncommercial computer software, the scope of the license is generally determined by the source of funds used to develop the item, process, or software.

(1) *Technical data pertaining to items or processes.* Contractors or licensors may, with some exceptions (*see* paragraphs (b)(1)(iii) through (xi) of the clause at 252.227–7013), restrict the Government's rights to use, modify, release, reproduce, perform, display, or disclose technical data pertaining to items or processes developed exclusively at private expense (limited rights). They may not restrict the Government's rights to technical data pertaining to items or processes developed exclusively at Government expense (unlimited rights) without the Government's approval. When an item or process is developed with mixed funding, the Government may use, modify, release, reproduce, perform, display, or disclose the data pertaining to such items or processes within the Government without restriction, but may release or disclose the data outside the Government only for government purposes (government purpose rights).

(2) *Technical data that do not pertain to items or processes.* Technical data may be created during the performance of a contract for a conceptual design or similar effort that does not require the development, manufacture, construction, or production of items or processes. The Government generally obtains unlimited rights in such data when the data were created exclusively with Government funds, government purpose rights when the data were created with mixed funding, and limited rights when the data were created exclusively at private expense.

(c) In unusual situations, the standard rights may not satisfy the Government's

needs or the Government may be willing to accept lesser rights in data in return for other consideration. In those cases, a special license may be negotiated. However, the licensor is not obligated to provide the Government greater rights and the contracting officer is not required to accept lesser rights than the rights provided in the standard grant of license. The situations under which a particular grant of license applies are enumerated in paragraphs (c)(1) through (c)(4) of this subsection.

(1) *Unlimited rights.* The Government obtains unlimited rights in technical data or computer software when the technical data or computer software, or the items or processes to which the technical data pertain, are developed exclusively with Government funds, or that qualify under certain criteria for which the source of development funding is irrelevant. See paragraph (b)(1) of the clause at 252.227-7013.

(2) *Government purpose rights.*

(i) The Government obtains Government purpose rights in noncommercial technical data and noncommercial computer software when the technical data or computer software, or the items or processes to which the technical data pertain, are developed with mixed funding—except when the Government is entitled to unlimited rights regardless of the source of development funding, as provided in paragraph (c)(1) of this subsection.

(ii) The period during which Government purpose rights are effective is negotiable. The clause at 252.227-7013 provides a nominal five-year period, but either party may request a different period. Changes to the Government purpose rights period may be made by mutual agreement at any time prior to delivery of the technical data or computer software without consideration from either party. Longer periods should be negotiated when a five-year period does not provide sufficient time to apply the data for commercial purposes or when necessary to recognize subcontractors' interests in the data.

(iii) During the Government purpose rights period, the Government may not use, or authorize other persons to use, technical data marked with Government purpose rights legends for commercial purposes. The Government shall not release or disclose data in which it has Government purpose rights to any person, or authorize others to do so, unless—

(A) Prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at 227.7107-2; or

(B) The intended recipient is a Government contractor receiving access to the data for performance of a Government contract that contains the clause at 252.227-7025, Government-Furnished Information Marked with Restrictive Legends.

(iv) See 227.7107-1 for Government procedures for protecting data and computer software.

(v) Upon expiration of the Government purpose rights period, the Government has unlimited rights in the data including the right to authorize others to use the data for commercial purposes.

(3) *Limited rights.* (i) The Government obtains limited rights in noncommercial technical data, when the technical data, or the items or processes to which the technical data pertain, is developed exclusively at private expense—except when the Government is entitled to unlimited rights as provided in paragraphs (b)(1)(iii) through (xi) of the clause at 252.227-7013.

(ii) Data in which the Government has limited rights may not be used, released, or disclosed outside the Government without the permission of the contractor asserting the restriction except for a use, release, or disclosure that is—

(A) Necessary for emergency repair and overhaul; or

(B) To a foreign government, other than detailed manufacturing or process data, when use, release, or disclosure is in the interest of the United States and is required for evaluational or informational purposes.

(iii) 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, disclosure, or use for emergency repair or overhaul, which shall be made as soon as practicable.

(iv) When the person asserting limited rights permits the Government to release, disclose, or have others use the data subject to restrictions on further use, release, or disclosure, or for a release under paragraph (c)(3)(ii)(A) or (B) of this subsection, the intended recipient must complete the use and non-disclosure agreement at 227.7107-2 prior to release or disclosure of the limited rights data.

(4) *Restricted rights.* The Government obtains restricted rights in noncommercial computer software required to be delivered or otherwise provided to the Government under a contract that was developed exclusively at private expense.

(5) *Negotiated license rights.*

(i) *General.*

(A) The standard license rights granted to the Government under paragraphs (c)(1) through (4) of this subsection (including the period during which the Government shall have Government purpose rights) may be modified only by mutual written agreement.

(B) Negotiate specific licenses when the parties agree to modify the standard license rights granted to the Government or when the Government wants to obtain rights in data in which it does not have rights. If either party desires to negotiate specialized license rights in technical data or computer software, the other party agrees to promptly enter into good faith negotiations to determine whether there are acceptable terms for transferring such rights.

(C) In no event may the negotiated license provide the Government lesser rights than limited rights in technical data, or restricted rights in computer software.

(D) The negotiated license rights must stipulate what rights the Government has to release or disclose the technical data or computer software to other persons or to authorize others to use the technical data or computer software.

(E) Identify all negotiated rights in a license agreement made part of the contract.

(ii) *Technical data.*

(A) When negotiating to obtain, relinquish, or increase the Government's rights in technical data, consider the acquisition strategy for the item or process, including logistics support and other factors which may have relevance for a particular procurement.

(B) Generally, if technical data was acquired with Government purpose or limited rights, the contracting officer should negotiate for additional rights only if there is a need to disclose the data outside the Government or if the additional rights are required for competitive repurchase and the anticipated savings expected to be obtained through competition are estimated to exceed the acquisition cost of the additional rights. Prior to negotiating for additional rights in limited rights data, consider alternatives such as—

(1) Using performance specifications and form, fit, and function data to acquire or develop functionally equivalent items or processes;

(2) Obtaining a contractor's contractual commitment to qualify additional sources and maintain adequate competition among the sources; or

(3) Reverse engineering, or providing items from Government inventories to contractors who request the items to

facilitate the development of equivalent items through reverse engineering.

(6) *Pre-existing license rights.* When the Government has previously obtained license rights in the technical data or computer software, the Government retains those same rights, unless—

(i) The parties have agreed otherwise; or

(ii) Any restrictions on the Government's rights have expired.

227.7104-4 Rights in technical data and computer software—Small Business Innovation Research (SBIR) Program.

(a) Pursuant to 15 U.S.C. 638(j)(1)(B)(v), (2)(A), (3)(A), and the Small Business Innovation Research Program Policy Directive, small business concerns in the performance of SBIR Phase I, II, and III awards may create technical data and computer software categorized as "SBIR data." SBIR Phase III includes activities that derive from, extend, or logically conclude efforts performed under prior SBIR awards, but are funded by sources other than the SBIR program. SBIR contractors retain proprietary rights to SBIR data for a limited protection period (5 years after acceptance of the last deliverable), but grant specific license rights to the Government (SBIR data rights). This protection period is extended for any SBIR data that is appropriately referenced and protected in any subsequent SBIR award made prior to the expiration of the protection period. SBIR data rights attach to all SBIR data even if the data would otherwise qualify for unlimited rights or government purpose rights based on development exclusively or partially with Government funds (*see* 10 U.S.C. 2320). For additional information on the SBIR program, *see* PGI 227.7104-4.

(b) The contracting officer shall not negotiate for special license rights as an element of any SBIR Phase I, Phase II, or Phase III award. However, after award, the parties may negotiate special license rights by mutual agreement.

227.7104-5 Rights in commercial technical data and commercial computer software.

(a) The clause at 252.227-7015, Rights in Technical Data and Computer Software—Commercial, provides the Government specific license rights in commercial technical data and commercial computer software. The Government takes the same license rights as are customarily offered to the public, to the extent that the commercial license is consistent with Federal procurement law and meets DoD minimum needs (*see* 252.227-7015(b)(1)).

(1) Notwithstanding any terms or conditions to the contrary in the

commercial license agreement, the Government shall have—

(i) Unlimited rights in certain types of technical data listed at 252.227-7015(b)(2); and

(ii) At least certain minimum rights (similar to limited rights in noncommercial technical data) in all technical data listed at 252.227-7015(b)(3).

(2) If the commercial license customarily offered to the public is inconsistent with Federal procurement law or does not otherwise meet DoD needs, the contracting officer will negotiate with the contractor as provided for at 252.227-7015(b)(1) and (b)(4).

(b) If additional rights are needed, the contracting officer must negotiate with the contractor to obtain such rights. The specific additional rights granted to the Government shall be enumerated in a license agreement made part of the contract.

(c) *See* PGI 227.7104-5(c) for guidance regarding determining whether a license is consistent with Federal procurement law and meets the agency's needs, including open source software as a special type of commercial computer software, (*see* PGI 227.7104-5(c)).

227.7104-6 Rights in derivative technical data and computer software.

The clauses at 252.227-7013 and 252.227-7014 protect the Government's rights in technical data and computer software, or portions thereof, that the contractor subsequently uses to prepare derivative data or software or subsequently embeds or includes in other data or software. The Government retains the rights it obtained under the development contract in the unmodified portions of the derivative data or software.

227.7104-7 Retention of rights by offerors, contractors, or third parties.

The offeror, contractor, or other third party owner or licensor retains all intellectual property rights (including ownership) in technical data and computer software except those rights granted to the Government.

227.7104-8 Contract clauses.

(a)(1) Use the clause at 252.227-7013, Rights in Technical Data and Computer Software—Noncommercial, in solicitations and contracts when the successful offeror(s) will be required to deliver noncommercial technical data or noncommercial computer software to the Government, except when contracting under the Small Business Innovation Research Program (*see* paragraph (b) of this subsection).

(2) Also use the clause at 252.227-7013 in all solicitations and contracts when the contractor will be required to deliver commercial technical data or commercial computer software (in addition to the clause at 252.227-7015), if the Government will pay any portion of the costs of development or modification of a commercial item, commercial technical data, or commercial computer software.

(3) Use the clause at 252.227-7013 with its Alternate I in research contracts when the contracting officer determines, in consultation with counsel, that public dissemination by the contractor would be—

(i) In the interest of the Government; and

(ii) Facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

(4) Use the clause at 252.227-7013 with its Alternate II in contracts for the development or delivery of a vessel design or any useful article embodying a vessel design.

(b)(1) Use the clause at 252.227-7014, Rights in Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program, when SBIR data will be generated during performance of Phase I, II, or III awards or activities under the SBIR program (227.7104-4).

(2) Use the clause at 252.227-7014 with its Alternate I in research contracts when the contracting officer determines that public dissemination of SBIR data by the contractor would be—

(i) In the interest of the Government; and

(ii) Facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

(c)(1) Use the clause at 252.227-7015, Technical Data and Computer Software—Commercial, in all solicitations and contracts when the contractor will be required to deliver commercial technical data or commercial computer software.

(2) Use the clause at 252.227-7015 with its Alternate I in contracts for the development or delivery of a vessel design or any useful article embodying a vessel design.

(d) *Doctrine of segregability and applicability to subcontractors.* To the maximum extent practicable, when the prescriptions at paragraphs (a) through (c) of this subsection require the use of more than one clause, the contract will specify which deliverables are governed by each clause. In addition, the clauses

prescribed at paragraphs (a) through (c) of this subsection require the contractor to use the appropriate clause(s) in subcontracts, and to notify the Government if a clause is used that is not already included in the prime contract. For additional guidance on using the doctrine of segregability to manage the application of multiple rights-determinative clauses under a single contract, *see* PGI 227.7104–8(d).

227.7105 Contractor assertion of restrictions on technical data and computer software—early identification and marking requirements.

227.7105–1 Early identification.

(a) The solicitation provision at 252.227–7017, Pre-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software, requires offerors to identify to the contracting officer, prior to contract award, all technical data and computer software that the offeror asserts should be provided to the Government with restrictions on use, modification, reproduction, release, or disclosure. The notification and identification must be submitted as an attachment to the offer.

(1) The contracting officer shall specify that pre-award identification is intended to require the identification of situations in which an offeror or contractor anticipates using a commercial or nondevelopmental technology (or any technology for which restrictions are likely to be asserted), but the specific subcontractor, supplier, or the specific asserted restrictions, have not yet been identified. For example, to ensure that the latest and best technology is used for a particular application, the offeror may propose delaying the selection of the particular technology or source for that technology, until shortly before the technology is required to be integrated into the systems or deliverables—often referred to as “just in time” technology insertion. In this case, the offeror’s pre-award list shall identify the technical data or computer software that it anticipates delivering with restrictions, and provide as much information as possible about the nature of the anticipated restrictions, the basis for the asserted restrictions, and the potential source(s) of the technology (*e.g.*, commercial technologies, or noncommercial technologies developed exclusively or partially at private expense).

(2) The pre-identification list of assertions must be consistent with the offeror’s proposal regarding the use of commercial or nondevelopmental technologies and the need to develop new technologies, as reflected in the

remainder of the technical and cost portions of the proposal. Even such a rudimentary identification will place the contracting officer on notice that rights may be restricted in the technical data or computer software, thereby permitting the Government to more accurately evaluate the offer.

(3) After contract award, the contractor is required to provide the more specific information (*e.g.*, the asserted restrictions, basis for assertion, and entity asserting restrictions) as soon as the information is available, pursuant to 252.227–7018, Post-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software.

(b) If an offeror fails to submit the attachment or fails to complete the attachment in accordance with the requirements of the solicitation provision, such failure shall constitute a minor informality. The contracting officer shall provide an offeror an opportunity to remedy a minor informality in accordance with the procedures at FAR 14.405 or 15.307. An offeror’s failure to correct the informality within the time prescribed by the contracting officer shall render the offer ineligible for award.

(c) The procedures for correcting minor informalities shall not be used to obtain information regarding asserted restrictions or an offeror’s suggested asserted rights category. Questions regarding the justification for an asserted restriction or asserted rights category must be pursued in accordance with the procedures at 227.7106–3.

(d) The restrictions asserted by a successful offeror shall be attached to its contract unless, in accordance with the procedures at 227.7103–13, the parties have agreed that an asserted restriction is not justified.

(e) Subsequent to contract award, the clause at 252.227–7018, Post-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software, permits the contractor to make additional assertions under certain conditions, in accordance with the procedures and in the format prescribed by that clause.

(f) Neither the pre- or post-award assertions made by the contractor, or the fact that certain assertions are identified in the attachment to the contract, determine the respective rights of the parties. As provided at 227.7106–4, the Government has the right to review, verify, challenge, and validate restrictive markings.

(g) Information provided by offerors in response to the solicitation provision may be used in the source selection process to evaluate the impact on

evaluation factors that may be created by restrictions on the Government’s ability to use or disclose technical data, consistent with the policies of this subpart.

227.7105–2 Marking requirements.

(a) *Contractor marking requirements.* The clause at 252.227–7013, Rights in Technical Data and Computer Software—Noncommercial—

(1) Requires a contractor that desires to restrict the Government’s rights in technical data or computer software to place restrictive markings on the data or software, provides instructions for the placement of the restrictive markings, and authorizes the use of certain restrictive markings; and

(2) Requires a contractor to deliver, furnish, or otherwise provide to the Government any technical data or computer software in which the Government has previously obtained rights with the Government’s pre-existing rights in that data or software unless the parties have agreed otherwise or restrictions on the Government’s rights to use, modify, reproduce, release, perform, display, or disclose the data have expired. When restrictions are still applicable, the contractor is permitted to mark the data or software with the appropriate restrictive legend for which the data or software qualifies.

(b) *Unmarked technical data or computer software.*

(1) Technical data or computer software delivered or otherwise provided under a contract without restrictive markings shall be presumed to have been delivered with unlimited rights and may be released or disclosed without restriction. To the extent practicable, if a contractor has requested permission (*see* paragraph (b)(2) of this subsection) to correct an inadvertent omission of markings, do not release or disclose the technical data or computer software pending evaluation of the request.

(2) A contractor may request permission to have appropriate legends placed on unmarked technical data or computer software at its expense. The request must be received by the contracting officer within six months following the furnishing or delivery of such data or software, or any extension of that time approved by the contracting officer. The person making the request must—

(i) Identify the technical data or computer software that should have been marked;

(ii) Demonstrate that the omission of the marking was inadvertent and that the proposed marking is justified and conforms with the requirements for the

marking of technical data and computer software contained in the relevant clause(s); and

(iii) Acknowledgment, in writing, that the Government has no liability with respect to any disclosure, reproduction, or use of the technical data or computer software made prior to the addition of the marking or resulting from the omission of the marking.

(3) Contracting officers should grant permission to mark only if the technical data or computer software were not distributed outside the Government or were distributed outside the Government with restrictions on further use or disclosure.

227.7105-3 Solicitation provision and contract clauses.

(a) Use the clause 252.227-7016, Rights in Bid or Proposal Information, in all solicitations and contracts that anticipate the delivery of technical data or computer software.

(b) Use the provision 252.227-7017, Pre-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software, in all solicitations that anticipate the delivery of technical data or computer software.

(c) Use the clause 252.227-7018, Post-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software, in all solicitations and contracts that anticipate the delivery of technical data or computer software.

227.7106 Conformity, acceptance, warranty, and validation of asserted restrictions on technical data and computer software.

227.7106-1 Conformity and acceptance.

(a) Solicitations and contracts requiring the delivery of technical data or computer software shall specify the requirements the data or software must satisfy to be acceptable. Contracting officers, or their authorized representatives, are responsible for determining whether technical data and computer software tendered for acceptance conform to the contractual requirements.

(b) The clause at 252.227-7030, Technical Data and Computer Software—Withholding of Payment, provides for withholding up to 10 percent of the contract price pending correction or replacement of the nonconforming technical data or negotiation of an equitable reduction in contract price. The amount subject to withholding may be expressed as a fixed dollar amount or as a percentage of the contract price. In either case, the amount shall be determined giving consideration to the relative value and

importance of the data. For examples on the amount subject to withholding, see PGI 227.7106-1(b).

(c) Do not accept technical data or computer software that do not conform to the contractual requirements in all respects. Except for nonconforming restrictive markings (see paragraph (d) of this subsection), correction or replacement of nonconforming data or software, or an equitable reduction in contract price when correction or replacement of the nonconforming data or software is not practicable or is not in the Government's interests, shall be accomplished in accordance with—

(1) The provisions of a contract clause providing for inspection and acceptance of deliverables and remedies for nonconforming deliverables; or

(2) The procedures at FAR 46.407(c) through (g), if the contract does not contain an inspection clause providing remedies for nonconforming deliverables.

(d) Follow the procedures at 227.7106-3 if nonconforming markings are the sole reason technical data or computer software fails to conform to contractual requirements. The clause at 252.227-7030, as prescribed at 227.7106-5, may be used to withhold an amount from payment, consistent with the terms of the clause, pending correction of the nonconforming markings.

227.7106-2 Warranty.

(a) *Noncommercial technical data.* The intended use of the technical data and the cost, if any, to obtain the warranty should be considered before deciding to obtain a data warranty (see FAR 46.703). The fact that a particular item or process is or is not warranted shall not be a consideration in determining whether or not to obtain a warranty for the technical data that pertain to the item or process.

(1) A data warranty should be considered if the Government intends to repair or maintain an item and defective repair or maintenance data would impair the Government's effective use of the item or result in increased costs to the Government.

(2) As prescribed in 246.710, use the clause at 252.246-7001, Warranty of Data, and its alternates, or a substantially similar clause when the Government needs a specific warranty of technical data.

(b) *Noncommercial computer software.*

(1) *Weapon systems.* Computer software that is a component of a weapon system or major subsystem shall be addressed as part of the weapon

system warranty. Follow the procedures at 246.710.

(2) *Non-weapon systems.* Approval of the chief of the contracting office must be obtained to use a computer software warranty other than a weapon system warranty. Consider the factors at FAR 46.703 in deciding whether to obtain a computer software warranty. When approval for a warranty has been obtained, the clause at 252.246-7001, Warranty of Data, and its alternates, may be appropriately modified for use with computer software or a procurement-specific clause may be developed.

(c) *Commercial technical data and commercial computer software.* Follow FAR part 12 and DFARS part 212 regarding warranties for commercial technical data and commercial computer software.

227.7106-3 Unjustified and nonconforming markings.

(a) *Unjustified markings.* (1) An unjustified marking is an authorized marking that does not accurately depict restrictions applicable to the Government's use, modification, reproduction, release, performance, display, or disclosure of the marked technical data or computer software. For an example, see PGI 227-7106-3(b).

(2) The correction of unjustified markings on technical data or computer software is governed by 252.227-7013(i)(1). However, at any time during performance of a contract and notwithstanding existence of a challenge, the contracting officer and the party that has asserted a restrictive marking may agree that the restrictive marking is not justified.

(b) *Nonconforming markings.* (1) A nonconforming marking is a marking that does not comply with the form or content that is authorized by the clause governing the technical data or computer software.

(i) For noncommercial technical data and noncommercial computer software, authorized markings are identified in the clause at 252.227-7013, Rights in Technical Data and Computer Software—Noncommercial. All other noncommercial markings which differ from those identified in 252.227-7013, whether in form or substance, are nonconforming markings.

(ii) For commercial technical data and commercial computer software, the clause at 252.227-7015, Rights in Technical Data and Computer Software—Commercial does not specify the form or content of restrictive legends. However, any restrictive marking that does not accurately describe the Government's license rights shall be considered an unjustified

marking under paragraph (b) of this subsection.

(2) The correction of nonconforming markings on technical data or computer software is governed by 252.227–7013(i)(2). To the extent practicable, the contracting officer should return technical data or computer software bearing nonconforming markings to the person who has placed the nonconforming markings on such technical data or computer software to provide that person an opportunity to correct or strike the nonconforming marking at that person's expense.

227.7106–4 Government right to review, verify, challenge, and validate asserted restrictions.

(a) *General.* All challenges must be made in accordance with the provisions of 252.227–7037, Validation of Restrictive Markings on Technical Data and Computer Software.

(1) The Government has the right to challenge asserted restrictions on technical data (*see* 10 U.S.C. 2321) and computer software when—

(i) There are reasonable grounds to question the validity of the assertion; and

(ii) Continued adherence to the assertion would make it impractical to later procure competitively the item to which the technical data or computer software pertain.

(2) However, there is a mandatory presumption that commercial items are developed at private expense. (*See* 10 U.S.C. 2320(b)(1), and 2321(f)). Therefore, do not challenge a contractor's assertion that a commercial item or process was developed at private expense unless the Government can demonstrate that it contributed to development of the item, component, or process.

(b) *Pre-award considerations.* (1) The challenge procedures may significantly delay awards under competitive procurements. Therefore, avoid challenging asserted restrictions prior to a competitive contract award unless resolution of the assertion is essential for successful completion of the procurement.

(2) *Transacting challenge matters directly with subcontractors, at any tier, or suppliers.* The clause at 252.227–7037 includes the contractor's agreement that the Government may transact matters under the clause directly with a subcontractor, at any tier, or supplier without creating or implying privity of contract for matters not covered under the clause. Contracting officers should permit a

subcontractor or supplier to transact challenge and validation matters directly with the Government when—

(i) A subcontractor's or supplier's business interests in its technical data would be compromised if the data were disclosed to a higher-tier contractor;

(ii) There is reason to believe that the contractor will not respond in a timely manner to a challenge and an untimely response would jeopardize a subcontractor's or supplier's right to assert restrictions; or

(iii) Requested to do so by a subcontractor or supplier.

227.7106–5 Contract clauses.

Use the following clauses in solicitations and contracts that anticipate the delivery of technical data or computer software:

(a) 252.227–7030, Technical Data and Computer Software—Withholding of Payment; and

(b) 252.227–7037, Validation of Restrictive Markings on Technical Data and Computer Software.

227.7107 Safeguarding, use, and handling of technical data and computer software.

227.7107–1 Government procedures for protecting technical data and computer software.

(a) DoD personnel, including acquisition personnel, are required to protect technical data and computer software from unauthorized or inappropriate access, use, modification, reproduction, release, performance, display, and disclosure. This protection includes—

(1) Restrictions that are based on an offeror's, contractor's, or licensor's intellectual property rights; and

(2) Restrictions based on other laws, policies, or regulations (e.g., export-controlled information or technology, information subject to withholding under the FOIA, privacy information).

(b) Contracting activities shall establish procedures to assure that technical data or computer software marked with restrictive legends are released or disclosed, including a release or disclosure through a Government solicitation, only to authorized persons subject to appropriate use and non-disclosure restrictions. Solicitations or public announcements must provide notice of the use and non-disclosure requirements.

(c)(1) Class use and non-disclosure agreements (e.g., agreements covering all solicitations received by a company within a reasonable period) are

authorized for Government purpose rights technical data or computer software, and may be obtained at any time prior to release or disclosure of the technical data or computer software.

(2) Documents transmitting Government purpose rights technical data or computer software to persons under class agreements shall identify the technical data or computer software subject to Government purpose rights and the class agreement under which the technical data or computer software are provided.

227.7107–2 Use and non-disclosure agreement.

(a) Except as provided in paragraph (c) of this subsection, technical data or computer software delivered to the Government with restrictions on access, use, modification, reproduction, release, performance, display, or disclosure may not be provided to third parties unless the intended recipient completes and signs the use and non-disclosure agreement (Agreement) at paragraph (d) of this subsection prior to release or disclosure of the data or software.

(b) An attachment to the Agreement will identify—

(1) The technical data and computer software that the Government intends to furnish to the recipient with restrictions on access, use, modification, reproduction, release, performance, display, or disclosure; and

(2) The specific conditions under which the recipient is authorized to access, use, modify, reproduce, release, perform, display, or disclose the following:

(i) Technical data subject to limited rights;

(ii) Computer software subject to restricted rights;

(iii) SBIR data subject to SBIR data rights; and

(iv) Technical data or computer software subject to—

(A) Negotiated license rights; or

(B) Other license restrictions, including commercial license rights.

(c) The requirement for the Agreement does not apply to Government contractors which require access to a third party's technical data or computer software for the performance of a Government contract that contains the clause at 252.227–7025, Government-Furnished Information Marked with Restrictive Legends.

(d) The prescribed use and non-disclosure agreement is as follows:

BILLING CODE 5001–08–P

Use and Non-Disclosure Agreement

The undersigned, (Insert Name), an authorized representative of the (Insert Company Name), (hereinafter referred to as the "Recipient") requests the Government to provide the Recipient with technical data or computer software (hereinafter referred to as "Government-furnished information") in which the Government's access, use, modification, reproduction, release, performance, display, or disclosure rights are restricted. That Government-furnished information is identified in an attachment to this Agreement. In consideration for receiving such Government-furnished information, the Recipient agrees to use the Government-furnished information strictly in accordance with this Agreement:

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

(1) *Owner-Licenser* means the person whose name appears in the restrictive legend or is otherwise identified as asserting restrictions on the access, use, modification, reproduction, release, performance, display, or disclosure of technical data or computer software.

(2) Other terms are defined in the following clause(s):

(i) DFARS 252.227-7013, Rights in Technical Data and Computer Software—Noncommercial;

(ii) DFARS 252.227-7014, Rights in Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program; or
(iii) DFARS 252.227-7015, Rights in Technical Data and Computer Software—Commercial.
(b) <i>Attachment</i> . An attachment to the Agreement will identify—
(1) The technical data and computer software that the Government intends to furnish to the Recipient with restrictions on access, use, modification, reproduction, release, performance, display, or disclosure; and
(2) The specific conditions under which the Recipient is authorized to access, use, modify, reproduce, release, perform, display, or disclose the following:
(i) Technical data subject to limited rights;
(ii) Computer software subject to restricted rights; and
(iii) Technical data or computer software subject to—

(A) Negotiated license rights; or
(B) Other license restrictions, including commercial license rights.
(c) <i>Government-furnished information provided with restrictions.</i> Technical data or computer software provided to the Recipient under this Agreement are subject to restrictions on access, use, modification, reproduction, release, performance, display, or disclosure as follows:
(1) <i>Government-furnished information marked with government purpose rights legends.</i> The Recipient shall access, use, modify, reproduce, release, perform, display, or disclose Government-furnished information marked with government purpose rights legends for government purposes only and shall not do so for any commercial purpose. The Recipient shall not, without the express written permission of the Owner-Licensors, release, perform, display, or disclose the Government-furnished information to, or allow access by, any person other than its subcontractors or suppliers, or prospective subcontractors or suppliers, who require the Government-furnished information to submit offers for, or perform, subcontractor or supplier obligations under contracts with the Recipient for purposes authorized by this paragraph. The Recipient shall ensure compliance with paragraph (d) of this Agreement.

(2) *Technical data marked with limited rights legends or SBIR data rights legends.* The Recipient shall access, use, modify, reproduce, release, perform, display, or disclose technical data marked with limited rights legends or SBIR data rights legends only as specified in the Attachment to this Agreement.

(i) The Recipient shall not, unless expressly authorized in the Attachment to this Agreement or by express written permission of the Owner-Licensors, release or disclose such Government-furnished information to, or allow access by, any other person. The Recipient shall ensure compliance with paragraph (d) of this Agreement.

(ii) The Recipient shall promptly notify the Owner-Licensors of the execution of this Agreement and identify the Owner-Licensors' technical data or computer software that has been or will be provided to the Recipient, the date and place such Government-furnished information were or will be received, and the name and address of the Government office that has provided or will provide the Government-furnished information.

(3) *Computer software marked with restricted rights legends or SBIR data rights legends.* The Recipient shall access, use, modify, reproduce, release, perform, display, or disclose computer software marked with restricted rights legends or SBIR data rights legends only as specified in the Attachment to this Agreement.

(i) The Recipient shall not, unless expressly authorized in the Attachment to this Agreement or by express written permission of the Owner-Licensors, release or disclose such computer software to, or allow access by, any other person. The Recipient shall ensure compliance with paragraph (d) of this Agreement.

(ii) The Recipient shall promptly notify the computer software Owner-Licensors of the execution of this Agreement and identify the computer software that has been or will be provided to the Recipient, the date and place the computer software were or will be received, and the name and address of the Government office that has provided or will provide the computer software.

(4) *Government-furnished information marked with negotiated license rights legends.* The Recipient shall access, use, modify, reproduce, release, perform, or display Government-furnished information marked with negotiated license rights legends only as permitted in the negotiated license, which is specified in the Attachment to this Agreement. The Recipient shall not, unless expressly authorized in the Attachment or by express written permission of the Owner-Licensors, release or disclose such Government-furnished information to, or allow access by, any person. The Recipient shall ensure compliance with paragraph (d) of this Agreement.

(5) *Government-furnished information marked with other restrictive legends, or otherwise subject to restrictions.* The Recipient shall access, use, modify, reproduce, release, perform, display, or disclose Government-furnished information that are marked with other restrictive legends, or that are otherwise identified in the Attachment to this Agreement as subject to restrictions, only as specified in the Attachment. The Recipient shall ensure compliance with paragraph (d) of this Agreement.

(d) *Recipient procedures for safeguarding, use, and handling of* Government-furnished information. The Recipient agrees to adopt or establish operating procedures and physical security measures to protect the Government-furnished information from inadvertent release or disclosure to unauthorized third parties. The Recipient shall not release or disclose Government-furnished information to, or allow access by, any person outside the Recipient's organization unless the intended third-party recipient—

(1) Is authorized to access or receive the Government-furnished information; and

(2) Has executed a copy of this use and nondisclosure agreement, which shall incorporate the restrictions contained in the Attachment specified at paragraph (a) of this Agreement, prior to receiving the Government-furnished information.

(e) *Disclaimer of Warranty.* The Recipient agrees to accept the Government-furnished information "as is" without any Government representation as to suitability for intended use or warranty whatsoever. This disclaimer does not affect any obligation the Government may have regarding Government-furnished information specified in a contract for the performance of that contract.

(f) The Recipient may enter into any agreement directly with the Contractor with respect to the use, modification, reproduction, release, performance, display, or disclosure of the Government-furnished information.

(g) *Indemnification.* The Recipient agrees to indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorneys fees, court costs, and expenses arising out of, or in any way related to, the unauthorized access, use, modification, reproduction, release, performance, display, or disclosure of the Government-furnished information by the Recipient or any person to whom the Recipient has released or disclosed the Government-furnished information.

(h) *Owner-Licensor as third-party beneficiary.* The Recipient is executing this Agreement for the benefit of the Owner-Licensor. The Owner-Licensor, in addition to any other rights it may have, as a third party beneficiary of this Agreement, has the rights of direct action against the Recipient or any other person to whom the Recipient has released or disclosed the Government-furnished information, to seek damages from any breach of this Agreement or to otherwise enforce this Agreement.

(i) *Disposition of Government-furnished information.* The Recipient agrees to destroy or return the Government-furnished information, and all copies of the Government-furnished information in its possession, no later than 30 days after the date shown in paragraph (j) of this Agreement, to have all persons to whom it released the Government-furnished information do so by that date, and to notify the Contractor that the Government-furnished information has been destroyed.

(j) *Effective date and duration of obligations.* This Agreement shall be effective for the period commencing with the Recipient's execution of this Agreement and ending upon _____ (Insert Date)_____. The obligations imposed by this Agreement shall survive the expiration or termination of the Agreement.

Recipient's Business Name

By _____

Authorized Representative

Date

Representative's Typed Name

and Title

(End of use and non-disclosure agreement)

BILLING CODE 5001-08-C

227.7107-3 Contractor technical data or computer software repositories.

(a) Contractor technical data or computer software repositories may be established when permitted by agency procedures. The contractual instrument establishing each repository must require, as a minimum, the repository management contractor to—

(1) Establish and maintain adequate procedures for protecting technical data and computer software delivered to or stored at the repository from unauthorized release or disclosure;

(2) Establish and maintain adequate procedures for controlling the release or disclosure of technical data and computer software from the repository to third parties consistent with the Government's rights in such data;

(3) When required by the contracting officer, deliver technical data or computer software to the Government on paper or in other specified media;

(4) Be responsible for maintaining the currency of technical data and computer software delivered directly by Government contractors or subcontractors to the repository;

(5) Obtain use and non-disclosure agreements (*see* 227.7107-2) from all persons to whom government purpose rights technical data or computer software is released or disclosed; and

(6) Indemnify the Government from any liability to technical data and computer software owners or licensors resulting from, or as a consequence of, a release or disclosure of data or software made by the repository contractor or its officers, employees, agents, or representatives.

(b) If the contractor is or will be the repository manager, the contractor's technical data and computer software management and distribution responsibilities must be identified in the contract or the contract must reference the agreement between the Government and the contractor that establishes those responsibilities.

(c) If the contractor is not and will not be the repository manager, do not require a contractor or subcontractor to deliver technical data marked with limited rights legends, or computer software marked with restricted rights legends, to a repository managed by another contractor unless the contractor or subcontractor who has asserted the limited rights or restricted rights agrees to release the data or software to the repository or has authorized, in writing, the Government to do so.

(d) Repository procedures may provide for the acceptance, delivery, and subsequent distribution of technical data or computer software in storage media other than paper, including direct electronic exchange of data between two computers. The procedures must provide for the identification of any portions of the data provided with restrictive legends, when appropriate. The acceptance criteria must be consistent with the authorized delivery format.

227.7107-4 Contract clause.

(a) Use the clause at 252.227-7025, Government-Furnished Information Marked with Restrictive Legends, in solicitations and contracts when it is anticipated that the Government will provide the contractor, for performance of its contract, technical data or computer software marked with another party's restrictive legend(s).

(b) When technical data marked with Government purpose rights legends will be released or disclosed to a Government contractor performing a contract that does not include the clause at 252.227-7025, the contract may be modified, prior to release or disclosure, to include that clause in lieu of requiring the contractor to complete a use and non-disclosure agreement.

Subpart 227.72—Rights in Works

227.7200 Scope of subpart.

This subpart—

(a) Prescribes policies and procedures for the acquisition of, and Government rights in—

- (1) Copyrightable works;
- (2) Other works; and

(3) Architectural designs, shop drawings, or similar information resulting from or related to construction or architect-engineer services; and

(b) Does not apply to technical data (including computer software documentation) or computer software (see subpart 227.71). For additional information concerning the acquisition of works versus the acquisition of technical data and computer software, see PGI 227.7200(b).

227.7201 Definitions.

As used in this subpart—

(a) Unless otherwise specifically indicated, the terms *offeror* and *contractor* include an offeror's or contractor's subcontractors or suppliers, or potential subcontractors or potential suppliers, at any tier.

(b) Other terms are defined in the clause at—

(1) 252.227-7020, Rights in Works—Ownership; and

(2) 252.227-7021, Rights in Works—License.

227.7202 Contracts for the acquisition of works and the assignment of rights in works.

227.7202-1 Policy.

The Government shall require assignment of the entire right, title, and interest, including the intellectual property rights (other than patent rights), in works first created, developed, generated, originated, prepared, or produced in the performance of a contract where it has a need to control—

(a) The use, modification, reproduction, release, distribution, performance, or display, of the works; and

(b) The preparation of derivative works from the works.

227.7202-2 Procedures.

(a) Solicitations and contracts shall specify—

(1) The works to be first produced, created, or generated;

(2) The intellectual property rights to be assigned; and

(3) The delivery schedule for both the works and the assignment instruments.

(b) Use the procedures at subpart 227.71 if the Government has a need to control technical data (including computer software documentation), computer software, and architectural works that comprise technical data or computer software.

227.7202-3 Contract clause.

(a)(1) Use the clause at 252.227-7020, Rights in Works—Ownership, in solicitations and contracts—

(i) For architect-engineer services, or for construction involving architect-engineer services, when the Government requires the exclusive control of the data pertaining to design for a unique architectural design of a building, a monument, or construction of similar nature, which for artistic, aesthetic, or other special reasons the Government does not want duplicated; and

(ii) When the successful offeror(s) will be required to assign to the Government the entire right, title, and interest, including the intellectual property rights, to the entirety of works first created, developed, generated, originated, prepared, or produced in the performance of the contract.

(2) The following are examples of copyright assignments.

The assignment instruments should be tailored to the particular work and the rights being assigned.

Copyright Assignment

Title of Work: _____

Contract No.: _____

Assignor's Name: _____

Assignor's Address: _____

For good and valuable consideration, receipt of which is hereby acknowledged, [name of assignor] ("Assignor"), hereby irrevocably transfers and assigns to [name of assignee] ("Assignee"), located at [insert address], its successors and assigns, in perpetuity, all right (whether now known or hereinafter created), title, and interest, throughout the world, including any copyrights and renewal or extensions thereto, in [title and short description of work, created under Contract No.: _____, including, if available, copyright registration number].

IN WITNESS THEREOF, Assignor has duly executed this Agreement.

By: _____

[Authorized signature]

Typed Name: _____

Title: _____

[Assignor's title]

Date: _____

AUTHOR COPYRIGHT ASSIGNMENT
AGREEMENT

BETWEEN THE (name of agency)

AND

This Copyright Assignment Agreement, (hereinafter called "AGREEMENT") is made and entered into by and between the United States of America as represented by the Secretary of the (name of agency) (hereinafter called "GOVERNMENT") and (AUTHOR's name), at _____ (AUTHOR's Address) (hereinafter called "AUTHOR") and governs a Work(s) already prepared or to be prepared by the AUTHOR with the intention that the contribution has been or shall be included in a United States Government produced textbook, website, spreadsheet calculator, or other teaching or reference material, titled:

1. The AUTHOR hereby sells, grants, conveys, assigns and transfers to the GOVERNMENT, its entire right, title and interest in and to the Work(s), including, without limitation, copyrights, renewals and/or extensions thereof for all territories of the world, and all derivative works resulting from the Work(s) covered by this Agreement in consideration for payment of the Work(s) made under Contract No. _____ and subject to the retained rights set forth in Paragraph 2. Such assigned rights include, but are not limited to, the rights throughout the world to:

(a) Edit, print, publish, republish, and distribute the Work(s) and to prepare, edit, print, publish, republish and distribute derivative works based thereon, in any language and in all media of expression now known or later developed; and

(b) To license and permit others to do so.

2. The AUTHOR retains the rights to:

(a) Reproduce or authorize others to reproduce the Work(s), material extracted verbatim from the Work(s), or create derivative works, for the AUTHOR's business purposes, but shall not use these rights for purposes that directly compete with the GOVERNMENT's use of the Work(s).

(b) Make limited distribution of all or portions of the Work(s) if the AUTHOR informs the GOVERNMENT in advance of the nature and extent of such limited distribution.

(c) First refusal for the creation of any derivative works resulting from the generation of this Work(s).

3. GOVERNMENT agrees:

(a) To abide by accepted academic standards in the use of the Work(s), specifically the Work(s) will be published with the name of the Author(s) attached to the Work(s).

(b) No part of the Work(s) will be used in a subsequent or derivative work without both a citation of the source and, if a large amount of material is used, without the name of the Author(s) attached.

(c) If a portion of the Work(s) is to be modified, updated, changed, or otherwise used in another Work(s), the AUTHOR will be given an opportunity to update the material and will be compensated for this update effort at a fair and reasonable rate. For such updates, the GOVERNMENT agrees to exert reasonable efforts to contact the recipient. If the AUTHOR declines or is unable to update the Work(s) within a reasonable period of time, the GOVERNMENT is authorized to engage an alternate author to update the Work(s). When the Work(s) is being updated by an alternate author, the chapter, section, or material in question will include the original author's name with an appropriate inscription, such as "based on," or "updated from."

4. The AUTHOR represents and warrants that the Work(s):

(a) Is original or has in part been obtained from copyrighted works for which the AUTHOR has obtained written permission from the copyright owner, has not been previously published and is not in the public domain.

(b) Is owned by the AUTHOR who has the right to convey all rights herein conveyed to the GOVERNMENT.

(c) Contains no libelous material or material which may infringe upon or violate the copyright, trademark, trade secret or other right of another.

(d) And that all statements asserted as facts in the Work(s) are either true or based upon generally accepted

professional research practices and principles.

5. This Agreement shall commence on the Effective Date and shall continue for the duration of the existing copyright term of the Work(s), and the duration of any renewals or extensions thereof. The Effective Date shall be the latest of the dates after which both parties have signed this Agreement.

6. If any part of this Agreement is held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of any other part or provision of this Agreement, which other part or provision shall remain in full force and effect.

7. This Agreement shall be governed by and construed in accordance with the laws of the United States, as applicable to contracts made and to be performed within the United States, and all disputes had by one party against the other shall be brought in a court of competent jurisdiction in the United States under Federal Acquisition Regulation (FAR) clause 52.233-1, Disputes, which is hereby incorporated into this agreement (found in full at <http://www.farsite.hill.af.mil>).

8. The waiver of any provision of this Agreement by either party, or the failure of either party to require performance of any provision of this Agreement shall not be construed as a waiver of its rights to insist on performance of that same provision, or any other provision, at some other time. Any effective waiver, modification or amendment must be in writing and signed by both parties.

9. This Agreement constitutes the entire agreement between the parties concerning the subject matter hereof, and expressly supersedes any prior written or oral understandings or agreements between them with respect to the subject matter hereof.

SIGNED:

Author: _____

Date: _____

Printed Name _____

Street Address _____

City, State, Zip Code _____

Phone Number _____

GOVERNMENT (Contracting Officer): _____

Date: _____

Printed Name _____

(b)(1) When the clause at 252.227-7020, Rights in Works-Ownership, is used in accordance with 227.7202-

3(a)(1), other appropriate rights in technical data and computer software or rights in works clauses may be required, as prescribed at 227.7104-8(a), 227.7104-8(b), 227.7104-8(c), or 227.7203-3(a), when the successful offeror(s) will be required to deliver to the Government—

(i) Technical data or computer software; or

(ii) Works created, developed, generated, originated, prepared, or produced outside of contract award.

(2) The contracting officer must identify which works and deliverables are subject to which clauses when the clause at 252.227-7020, Rights in Works-Ownership, is used in addition to the clauses at 252.227-7013, Rights in Technical Data and Computer Software-Noncommercial; 252.227-7014, Rights in Technical Data and Computer Software-Small Business Innovation Research (SBIR) Program; 252.227-7015 Rights in Technical Data and Computer Software-Commercial; or 252.227-7021, Rights in Works-License.

227.7203 Contracts for the acquisition of works and license rights in works.

227.7203-1 Policy.

When the Government does not require assignment of ownership in works (*see* 227.7202) and does not require modification to existing works, such works shall be acquired under licenses customarily provided to the public unless such licenses are inconsistent with Federal procurement law or do not otherwise satisfy user needs.

227.7203-2 Procedures.

(a) Solicitations and contracts shall specify the works to be delivered under the contract, and the delivery schedule for the works.

(b) Use the procedures at subpart 227.71 if the Government desires to obtain technical data (including computer software documentation) or computer software.

227.7203-3 Contract clause.

(a) Use the clause at 252.227-7021, Rights in Works-License in solicitations and contracts when the successful offeror(s) will be required to deliver to the Government—

(1) Works first created, developed, generated, originated, prepared, or produced outside of contract award; or

(2) Modifications made by the successful offeror(s) to works first created, developed, generated, originated, prepared, or produced outside of contract award;

(b)(1) When the clause at 252.227–7021, Rights in Works-License, is used in accordance with 227.7203–3(a), other appropriate rights in technical data and computer software or rights in works clauses may be required, as prescribed at 227.7104–8(a), 227.7104–8(b), 227.7104–8(c), or 227.7202–3(a) when the successful offeror(s) will be required to—

(i) Deliver to the Government technical data or computer software; or

(ii) Assign to the Government the entire right, title and interest, including the intellectual property rights, to the entirety of works first created, developed, generated, originated, prepared, or produced in the performance of the contract.

(2) The contracting officer must identify which works and deliverables are subject to which clauses when the clause at 252.227–7021, Rights in Works-License, is used in addition to the clauses at 252.227–7013, Rights in Technical Data and Computer Software-Noncommercial; 252.227–7014, Rights in Technical Data and Computer Software-Small Business Innovation Research (SBIR) Program; 252.227–7015, Rights in Technical Data and Computer Software-Commercial; or 252.227–7020, Rights in Works-Ownership.

227.7204 Safeguarding, use, and handling of works.

227.7204–1 Procedures.

(a) DoD personnel, including acquisition personnel, are required to protect works from unauthorized or inappropriate access, use, modification, reproduction, release, performance, display, and disclosure. This protection includes—

(1) Restrictions that are based on an offeror's, contractor's, or licensor's intellectual property rights; and

(2) Restrictions based on other laws, policies, or regulations (e.g., export—controlled information or technology, information subject to withholding under the FOIA, privacy information).

(b) Contracting activities shall establish procedures to assure that works marked with restrictive legends are released or disclosed, including a release or disclosure through a Government solicitation, only to authorized persons subject to appropriate use and non-disclosure restrictions. Solicitations or public announcements must provide notice of the use and non-disclosure requirements.

(c)(1) Class use and non-disclosure agreements (e.g., agreements covering all solicitations received by a company within a reasonable period) are

authorized for Government purpose rights works and may be obtained at any time prior to release or disclosure of the works.

(2) Documents transmitting Government purpose rights works to persons under class agreements shall identify the works subject to Government purpose rights and the class agreement under which the works are provided.

227.7204–2 Contract clause.

(a) Use the clause at 252.227–70YY, Government-Furnished Works Marked with Restrictive Legends, in solicitations and contracts when it is anticipated that the Government will provide the contractor, for performance of its contract, works marked with another party's restrictive legend(s).

(b) When works marked with government license rights legends will be released or disclosed to a Government contractor performing a contract that does not include the clause at 252.227–70YY, the contract may be modified, prior to release or disclosure, to include that clause, in lieu of requiring the contractor to complete a use and non-disclosure agreement.

227.7205 Rights in architectural designs, shop drawings, or similar information related to architect-engineer services and construction.

227.7205–1 Scope.

(a) This section provides clauses for data, copyrights, and restricted designs unique to the acquisition of architect-engineer services and construction.

(b) It does not apply when the acquisition is limited to supply contracts for the acquisition of construction supplies or materials; or experimental, developmental, or research work, or test and evaluation studies of structures, equipment, processes, or materials for use in construction. For such acquisitions, use the provisions and clauses required by 227.7104–8.

227.7205–2 Contract clauses.

(a) Use the clause at 252.227–7022, Government Rights in Works (Unlimited), except as provided in paragraphs (b) and (d) of this subsection, in solicitations and contracts for architect-engineer services and for construction involving architect-engineer services.

(b) Use the clause at 252.227–7024, Notice and Approval of Restricted Designs, in architect-engineer contracts when necessary for the Government to make informed decisions concerning noncompetitive aspects of the design.

(c) Use the clause at 252.227–7033, Rights in Shop Drawings, in solicitations and contracts calling for delivery of shop drawings.

(d) When the Government requires the exclusive control of the data pertaining to the design of a building, monument, or a construction of a similar nature, *see* 227.7202–2(a)(2).

PART 246—QUALITY ASSURANCE

246.710 Contract clauses.

7. Section 246.710 is amended at paragraph (1) by removing “Rights in Technical Data and Computer Software” and adding in its place “Rights in Technical Data and Computer Software—Noncommercial”.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.227–7000 [Removed and reserved.]

8. Section 252.227–7000 is removed and reserved.

252.227–7001 [Removed and reserved.]

9. Section 252.227–7001 is removed and reserved.

252.227–7002 [Removed and reserved.]

10. Section 252.227–7002 is removed and reserved.

252.227–7003 [Removed and reserved.]

11. Section 252.227–7003 is removed and reserved.

252.227–7004 [Removed and reserved.]

12. Section 252.227–7004 is removed and reserved.

252.227–7005 [Removed and reserved.]

13. Section 252.227–7005 is removed and reserved.

252.227–7006 [Removed and reserved.]

14. Section 252.227–7006 is removed and reserved.

252.227–7007 [Removed and reserved.]

15. Section 252.227–7007 is removed and reserved.

252.227–7008 [Removed and reserved.]

16. Section 252.227–7008 is removed and reserved.

252.227–7009 [Removed and reserved.]

17. Section 252.227–7009 is removed and reserved.

252.227–7010 [Removed and reserved.]

18. Section 252.227–7010 is removed and reserved.

252.227–7011 [Removed and reserved.]

19. Section 252.227–7011 is removed and reserved.

252.227–7012 [Removed and reserved.]

20. Section 252.227–7012 is removed and reserved.

21. Section 252.227–7013 is revised to read as follows:

252.227–7013 Rights in Technical Data and Computer Software—Noncommercial.

As prescribed in 227.7104–8(a), use the following clause:

RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE—NONCOMMERCIAL (DATE)

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

(1) *Commercial computer software* means computer software that is a commercial item.

(2) *Commercial technical data* means technical data that is or pertains to a commercial item.

(3) *Computer database or database* means a collection of recorded information in a form capable of, and for the purpose of, being stored in, or processed by a computer. The term does not include computer software.

(4) *Computer program* means a set of instructions, rules, routines, or statements, regardless of the form or method of recording, that is capable of causing a computer to perform a specific operation or series of operations. Examples include firmware, object code, and any form of executable code.

(5) *Computer software* means computer programs; and source code, source code listings, and similar human-readable, recorded information that can be compiled to generate a computer program. The term does not include computer database or computer software documentation.

(6) *Computer software documentation* means technical data relating to computer software.

(i) The term includes—

(A) Computer software design documentation, such as design details, algorithms, processes, flow charts, formulas, and related information that describe the design, organization, or structure of computer software; and

(B) Computer software user's documentation, such as user's or owner's manuals, installation instructions, operating instructions, and similar information that explains the capabilities of the computer software or provides instructions for using or maintaining the computer software.

(ii) The term does not include computer software.

(7) *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 to perform a process.

(8) *Developed* means that—

(i) An item or process exists and is workable. Workability is generally established when the item or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the 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 or process, and the state of the art. To be considered *developed*, the item 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 or process actually be reduced to practice within the meaning of title 35 of the United States Code.

(ii) 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;

(iii) 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 computer software can reasonably be expected to perform its intended purpose; or

(iv) Computer software user's documentation required to be delivered or otherwise provided under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

(9) *Developed exclusively at private expense* means development was accomplished entirely with costs not paid or reimbursed by the Government, or costs paid or reimbursed by the Government through indirect cost pools, or any combination thereof.

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

(ii) Under fixed-price contracts, when total costs are greater than the firm 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.

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

(11) *Developed with mixed funding* means development was accomplished partially with costs not paid or reimbursed by the Government or costs paid or reimbursed by the Government through indirect cost pools, and partially with costs paid or reimbursed directly by the Government.

(12) *Form, fit, and function data* means technical data that describes the required overall physical, 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 and functionally interchangeable items.

(13) *Government purpose* means any activity in which the United States Government is a party.

(i) The term includes competitive procurement and any agreements or contracts with, or sales or transfers to, international or multi-national defense organizations or foreign governments.

(ii) The term does not include the rights to access, use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or to authorize others to do so.

(14) *Government purpose rights* means the rights to—

(i) Access, use, modify, reproduce, release, perform, display, or disclose technical data or computer software within the Government without restriction; and

(ii) Release or disclose technical data or computer software outside the Government and authorize persons to whom release or disclosure has been made to access, use, modify, reproduce, release, perform, display, or disclose that data for Government purposes. However, the Government shall not release or disclose the technical data or computer software outside the Government unless—

(A) Prior to release or disclosure (or in emergency situations, as soon as practicable), the intended recipient has executed the non-disclosure agreement at 227.7107–2 with its required attachments; or

(B) The recipient is a Government contractor receiving access to the technical data or computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachments required by that clause.

(15) *Limited rights* means the rights to access, 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 accessed or used by another party, unless—

(i) The reproduction, release, disclosure, access, or use is—

(A) Necessary for emergency repair and overhaul;

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

(C) A release or disclosure of computer software design documentation to, or access by, a contractor or subcontractor performing a service contract (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use such computer software documentation 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 or for emergency repair or overhaul of items or processes;

(ii) Prior to release or disclosure (or in emergency situations, as soon as practicable thereafter), the intended recipient—

(A) Has executed the use and non-disclosure agreements at 227.7107–2, with its required attachment(s); or

(B) Is a Government contractor receiving access to the technical data for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachment(s) required by that clause;

(iii) The recipient for emergency repair or overhaul is required to destroy the technical data and all copies in its possession promptly following completion of the emergency repair or overhaul, and to notify the Contractor that

the data or computer software have been destroyed; and

(iv) The Contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, access, or use.

(16) *Noncommercial computer software* means computer software that does not qualify as commercial computer software.

(17) *Noncommercial technical data* means technical data that does not qualify as commercial technical data.

(18) *Restricted rights* apply only to noncommercial computer software and mean the Government's rights to—

(i) Install and use computer software on one computer at a time. The computer software may not be time shared or accessed by more than one terminal or central processing unit unless otherwise permitted by this contract;

(ii) Transfer computer software within the Government without further permission of the Contractor so long as the transferred computer software remain subject to the provisions of this clause;

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

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

(A) Use the modified computer software only as provided in paragraphs (a)(18)(i) and (iii) of this clause; and

(B) Not release or disclose the modified computer software except as provided in paragraphs (a)(18)(ii), (v) and (vi) of this clause;

(v) 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 or for emergency repair or overhaul of items or processes, provided that—

(A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

(B) Such contractors or subcontractors—

(1) Have executed the use and non-disclosure agreement at DFARS 227.7107–2, with its required attachments; or

(2) Are Government contractors receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachment(s) required by that clause;

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

(D) Such use is subject to the limitation in paragraph (a)(18)(i) of this clause; and

(vi) 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, provided that—

(A) The intended recipient—

(1) Has executed the use and non-disclosure agreement at DFARS 227.7107–2, with its required attachments; or

(2) Is a Government contractor receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025, and the attachments required by that clause;

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

(C) The Government shall require a recipient of restricted rights computer software for emergency repair or overhaul to destroy any copies of the computer software in its possession promptly following completion of the emergency repair/overhaul and to notify the Contractor that the computer software has been destroyed.

(19) *SBIR data* means all—

(i) Technical data—

(A) Pertaining to items or processes developed under a Small Business Innovation Research (SBIR) award; or

(B) Created under a SBIR award that does not require the development of items or processes; and

(ii) Computer software developed under a SBIR award.

(20) *SBIR data rights* mean the Government's rights during the SBIR data protection period (specified at 252.227–7014(b)(5)(ii)) to access, use, modify, reproduce, release, perform, display, or disclose SBIR data as follows:

(i) Limited rights in SBIR data that is technical data; and

(ii) Restricted rights in SBIR data that is computer software.

(21) *Technical data* means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. Recorded information of a scientific or technical nature that is included in computer databases is also technical data.

(22) *Unlimited rights* means the rights to access, use, modify, reproduce, perform, display, release, or disclose technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Government Rights.* The Contractor grants or shall obtain for the Government the following paid-up, world-wide, nonexclusive, irrevocable license rights in technical data and computer software:

(1) Unlimited rights. The Government shall have unlimited rights in—

(i) Technical data (that does not pertain to an item or process) or computer software

developed exclusively with Government funds;

(ii) Technical data pertaining to an item or process that has been or will be developed exclusively with Government funds;

(iii) Studies, analyses, test data, or similar data produced for this contract, when the study, analysis, test, or similar work was specified as an element of performance;

(iv) Form, fit, and function data;

(v) Technical data necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);

(vi) Corrections or changes to technical data or computer software furnished to the Contractor by the Government;

(vii) Technical data or computer software otherwise publicly available or that has been released or disclosed by the Contractor or subcontractor without restrictions;

(viii) Technical data or computer software in which the Government has obtained unlimited rights under another Government contract or as a result of negotiations;

(ix) Technical data or computer software furnished to the Government, under this or any other Government contract or subcontract with restrictive conditions and the restrictive conditions have expired (e.g., Government purpose rights, SBIR data rights, or negotiated license rights);

(x) Computer software user's documentation required to be delivered or otherwise provided under this contract; and

(xi) Technical data or computer software delivered or otherwise provided to the Government without any restrictive markings (see paragraph (g) of this clause).

(2) *Government purpose rights.*

(i) The Government shall have Government purpose rights for a five-year period, or such other period as may be negotiated in—

(A) Technical data (that does not pertain to an item or process) or computer software developed with mixed funding; and

(B) Technical data pertaining to items or processes developed with mixed funding;

(ii) The five-year period, or such other period as may have been negotiated under paragraph (b)(5) of this clause, shall commence upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required development of the computer software, development of the items or processes, or creation of the technical data. Upon expiration of the five-year or other negotiated period, the Government shall have unlimited rights in the technical data or computer software.

(3) *Limited rights.* Except as provided in paragraphs (b)(1)(iii) through (b)(1)(xi) of this clause, the Government shall have limited rights in technical data—

(i) Pertaining to items or processes developed exclusively at private expense and marked with the limited rights legend prescribed in paragraph (f) of this clause; or

(ii) Created exclusively at private expense in the performance of a contract that does not require the development, manufacture, construction, or production of items or processes.

(4) *Restricted rights.* The Government shall have restricted rights in noncommercial

computer software that was developed exclusively at private expense and is required to be delivered or otherwise provided to the Government under this contract.

(5) *Negotiated license rights.* (i) The standard license rights granted to the Government under paragraphs (b)(1) through (b)(4) of this clause (including the period during which the Government shall have Government purpose rights) may be modified only by mutual written agreement.

(ii) If either party desires to negotiate specialized license rights in technical data or computer software, the other party agrees to enter into negotiations.

(iii) However, in no event may the negotiated license provide the Government lesser rights than limited rights in technical data, or restricted rights in computer software.

(iv) Any license rights negotiated under this paragraph shall be identified in a license agreement attached to this contract.

(6) *Prior Government rights.* Technical data and computer software that will be delivered or otherwise provided to the Government under this contract, in which the Government has previously obtained rights, shall be delivered or otherwise provided with the pre-existing rights, unless—

(i) The parties have agreed otherwise; or

(ii) Any restrictions on the Government's rights to access, use, modify, reproduce, release, perform, display, or disclose the technical data or computer software have expired.

(7) *Rights in derivative technical data and computer software.* The Government shall retain its rights in the unchanged portions of any technical data and computer software delivered or otherwise provided under this contract that the Contractor uses to prepare, or includes in, derivative technical data or computer software.

(c) *Contractor rights in technical data or computer software.* The Contractor (or other third party owner or licensor) retains all intellectual property rights for technical data and computer software (including ownership) developed under this contract except those granted to the Government as specified under paragraph (b) of this clause.

(d) *Third party technical data or computer software.* (1) The Contractor shall not incorporate any third party owned or licensed technical data or computer software in the technical data or computer software to be delivered or otherwise provided under this contract unless—

(i) The Contractor has obtained for the Government the license rights necessary to perfect a license in the deliverable technical data or computer software of the appropriate scope set forth in paragraph (b) of this clause; or

(ii) The Contracting Officer has granted specific written approval to do so.

(2) The Contractor shall ensure that any such license rights obtained from third parties and granted to the Government are identified and asserted pursuant to paragraph (f) of this clause, and such technical data and computer software are appropriately marked pursuant to paragraph (g) of this clause.

(e) *Release from liability.* In the event that an authorized recipient of technical data or

computer software delivered or otherwise provided to the Government under this contract engages in any unauthorized activities with such technical data or computer software, the Contractor agrees to—

(1) Release the Government from liability for any licensed use of technical data or computer software made in accordance with the Government's license rights granted pursuant to paragraph (b) of this clause; and

(2) Seek relief solely from the party who has improperly accessed, used, modified, reproduced, released, performed, displayed, or disclosed Contractor technical data or computer software marked with restrictive legends.

(f) *Identification and delivery of technical data and computer software to be furnished with restrictions.* The Contractor shall not deliver any technical data or computer software with restrictive markings unless the technical data or computer software are listed on an Attachment to this contract in accordance with—

(1) The provision at DFARS 252.227-7017, Pre-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software; and

(2) The clause at DFARS 252.227-7018, Post-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software.

(g) *Marking requirements.* The Contractor, and its subcontractors or suppliers, shall assert restrictions on the Government's rights to access, use, modify, reproduce, release, perform, display, or disclose technical data or computer software delivered or otherwise provided under this contract only by marking the deliverable that is subject to restriction.

(1) *General marking instructions.* The Contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark all technical data or computer software with the appropriate legends.

(i) The authorized legends shall be placed on the transmittal document or storage media, and on each page of the printed material containing technical data or computer software for which restrictions are asserted. If only portions of a page are subject to the asserted restrictions, the Contractor shall identify the restricted portions (e.g., by circling or underscoring with a note or other appropriate identifier).

(ii) Technical data or computer software transmitted directly from one computer or computer terminal to another shall contain a notice of asserted restrictions.

(iii) The Contractor shall not use instructions that interfere with or delay the operation of the computer program in order to display an authorized legend in computer software that will or might be used in combat or situations that simulate combat conditions, unless the Contracting Officer's written permission to deliver such computer software has been obtained prior to delivery.

(iv) Reproductions of technical data or computer software, or any portions thereof, subject to asserted restrictions shall also include the asserted restrictions.

(2) *Unlimited rights markings.* Technical data or computer software that is delivered or otherwise provided to the Government with unlimited rights, and that is marked

with a copyright legend prescribed under 17 U.S.C. 401 or 402, shall also be marked as follows:

The U.S. Government has Unlimited Rights in this technical data or computer software pursuant to the clause at DFARS 252.227-7013. Any reproduction of technical data or computer software, or portions thereof, marked with this legend must also reproduce these markings.

(End of legend)

(3) *Government purpose rights markings.* Technical data or computer software delivered or otherwise provided to the Government with Government purpose rights shall be marked as follows:

GOVERNMENT PURPOSE RIGHTS

Contract No. _____
Contractor Name _____
Contractor Address _____
Expiration Date _____

The Government's rights to access, use, modify, reproduce, release, perform, display, or disclose these technical data or computer software are restricted by paragraph (b)(2) of the Rights in Technical Data and Computer Software—Noncommercial clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of technical data or computer software or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(4) *Limited rights markings.* Technical data delivered or otherwise provided to the Government with limited rights shall be marked with the following legend:

LIMITED RIGHTS

Contract No. _____
Contractor Name _____
Contractor Address _____

The Government's rights to access, use, modify, reproduce, release, perform, display, or disclose these technical data or computer software are restricted by paragraph (b)(3) of the Rights in Technical Data and Computer Software—Noncommercial clause contained in the above identified contract. Any reproduction of technical data or computer software or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such technical data or computer software shall promptly notify the above named Contractor.

(End of legend)

(5) *Restricted rights markings.* Computer software delivered or otherwise provided to the Government with restricted rights shall be marked with the following legend:

RESTRICTED RIGHTS

Contract No. _____
Contractor Name _____
Contractor Address _____

The Government's rights to access, use, modify, reproduce, release, perform, display,

or disclose this computer software are restricted by paragraph (b)(4) of the Rights in Technical Data and Computer Software—Noncommercial clause contained in the above identified contract. Any reproduction of computer software or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such computer software shall promptly notify the above named Contractor.

(End of legend)

(6) *Negotiated license rights markings.*

(i) Except as noted in paragraph (g)(6)(ii) of this clause, technical data and computer software in which the Government's rights stem from a negotiated license shall be marked with the following legend:

NEGOTIATED LICENSE RIGHTS

The Government's rights to access, use, modify, reproduce, release, perform, display, or disclose these technical data or computer software are restricted by Contract No. (Insert contract number), License No. (Insert license identifier). Any reproduction of technical data or computer software or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(ii) For purposes of marking, negotiated licenses do not include Government purpose rights for which a different restrictive period has been negotiated (see paragraph (g)(3) of this clause), or Government purpose license rights acquired under a prior contract (see paragraph (g)(7) of this clause).

(7) *Pre-existing technical data or computer software markings.* If the terms of a prior contract or license permitted the Contractor to restrict the Government's rights in technical data or computer software, the Contractor may mark such technical data or computer software with the appropriate restrictive legend in accordance with the marking procedures in paragraph (g)(1) of this clause.

(8) *Authorized markings.* Except as provided in paragraph (g)(7) of this clause, only the following legends are authorized under this contract:

(i) The unlimited rights legend at paragraph (g)(2) of this clause.

(ii) The Government purpose rights legend at paragraph (g)(3) of this clause.

(iii) The limited rights legend at paragraph (g)(4) of this clause.

(iv) The restricted rights legend at paragraph (g)(5) of this clause.

(v) The negotiated license rights legend at paragraph (g)(6) of this clause.

(vi) The notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(h) *Contractor procedures and records.* Throughout performance of this contract, the Contractor and its subcontractors or suppliers that will deliver technical data or computer software with other than unlimited rights, shall—

(1) Assure that restrictive markings are used only when authorized by the terms of this clause; and

(2) Maintain records sufficient to justify the validity of any restrictive markings on technical data or computer software delivered under this contract.

(i) *Removal of unjustified and nonconforming markings.*

(1) Unjustified technical data or computer software markings. The rights and obligations of the parties regarding the validation of restrictive markings on technical data or computer software provided or to be provided under this contract are contained in the clause at 252.227–7037. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may ignore or, at the Contractor's expense, correct or strike a marking if a restrictive marking is determined to be unjustified.

(2) Nonconforming technical data or computer software markings. A nonconforming marking is a marking placed on technical data or computer software delivered or otherwise provided to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to the clause at 252.227–7037. If the Contracting Officer notifies the Contractor of a nonconforming marking and the Contractor fails to remove or correct such marking

within sixty (60) days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming marking.

(j) *Relation to patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(k) *Applicability to subcontractors or suppliers.*

(1) The Contractor shall recognize and protect the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320, 10 U.S.C. 2321, and the identification, assertion, and delivery processes of paragraph (e) of this clause.

(2)(i) Whenever any technical data or computer software will be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause (or other appropriate clause(s) prescribed at DFARS 227.7104–8), in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties as follows:

(A) References to the Government are not changed.

(B) The subcontractor or supplier has all rights and obligations of the Contractor in the clause.

(ii) No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher-tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data or computer software except by mutual agreement of the parties whose rights are affected.

(iii) If the clause used with a subcontractor or supplier is not a clause that is used in the prime contract (or higher-tier subcontract), the Contractor shall notify the Government of the use of the clause and, if appropriate pursuant to DFARS 227.7104–8(d), the Contracting Officer will modify the prime contract to include the new clause.

(3) Technical data or computer software required to be delivered by a subcontractor

or supplier shall normally be delivered to the next higher-tier contractor, subcontractor, or supplier. However, when there is a requirement in the prime contract for technical data or computer software to be submitted with other than unlimited rights, then a subcontractor or supplier may fulfill its requirement by submitting the technical data or computer software directly to the Government.

(4) The Contractor and higher-tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in technical data or computer software from their subcontractors or suppliers.

(5) In no event shall the Contractor use its obligation to recognize and protect subcontractor or supplier rights in technical data or computer software as an excuse for failing to satisfy its contractual obligation to the Government.

(End of clause)

ALTERNATE I (DATE)

As prescribed in 227.7104–8(a)(3), add the following paragraph (l) to the basic clause:

(l) *Publication for sale.*

(1) This paragraph only applies to technical data or computer software in which the Government has obtained unlimited rights or a license to make an unrestricted release of technical data or computer software.

(2) The Government shall not publish, or authorize others to publish on its behalf, deliverable technical data or computer software if the Contractor publishes the technical data or computer software for sale prior to the Government's intended publication. Before the Contractor publishes any technical data or computer software, the Contractor shall promptly notify the Contracting Officer of such publication(s). The Government's publication restrictions shall not apply after twenty-four (24) months following the delivery date specified in this contract, or the removal of any national security or export control restrictions, whichever is later.

(3) This limitation on the Government's right to publish for sale shall continue as long as the data are reasonably available to the public for purchase.

ALTERNATE II (DATE)

As prescribed in 227.7104–8(a)(4), add the following paragraphs (a)(23) and (b)(8) to the basic clause:

(a)(23) *Vessel design* means the design of a vessel, boat, or craft, and its components, including the hull, decks, superstructure, and the exterior surface shape of all external shipboard equipment and systems. The term includes designs covered by 10 U.S.C. 7317, and designs protectable under 17 U.S.C. 1301, *et seq.*

(b)(8) *Vessel designs.* For a vessel design (including a vessel design embodied in a useful article) that is developed or delivered under this contract, the Government shall have the right to make and have made any useful article that embodies the vessel design, to import the article, to sell the

article, and to distribute the article for sale or to use the article in trade, to the same extent that the Government is granted rights in the technical data pertaining to the vessel design.

22. Section 252.227–7014 is revised to read as follows:

252.227–7014 Rights in technical data and computer software—small business innovation research (SBIR) program.

As prescribed in 227.7104–8(b), use the following clause:

RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE—SMALL BUSINESS INNOVATION RESEARCH (SBIR) PROGRAM (DATE)

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

(1) *Commercial computer software* means computer software that is a commercial item.

(2) *Commercial technical data* means technical data that is or pertains to a commercial item.

(3) *Computer database* or *database* means a collection of recorded information in a form capable of, and for the purpose of being stored in, or processed by a computer. The term does not include computer software.

(4) *Computer program* means a set of instructions, rules, routines, or statements, regardless of the form or method of recording, that is capable of causing a computer to perform a specific operation or series of operations. Examples include firmware, object code, and any form of executable code.

(5) *Computer software* means computer programs; and source code, source code listings, object code listings, and similar human-readable, recorded information, that can be compiled to generate a computer program. The term does not include computer databases or computer software documentation.

(6) *Computer software documentation* means technical data relating to computer software.

(i) The term includes—

(A) Computer software design documentation, such as design details, algorithms, processes, flow charts, formulas, and related information that describe the design, organization, or structure of computer software; and

(B) Computer software user's documentation such as user's or owner's manuals, users, manuals, installation instructions, operating instructions, and other similar information that explains the capabilities of the computer software or provides instructions for using or maintaining the computer software.

(ii) The term does not include computer software.

(7) *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 to perform a process.

(8) *Developed* means that—

(i) An item or process exists and is workable. Workability is generally

established when the item 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 or process, and the state of the art. To be considered *developed*, the item or process need not be at the stage where it could be offered for sale or sold on the commercial market, or must the item or process actually be reduced to practice within the meaning of title 35 of the United States Code;

(ii) 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;

(iii) 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 computer software can reasonably be expected to perform its intended purpose; or

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

(9) *Developed exclusively at private expense* means development was accomplished entirely with costs not paid or reimbursed by the Government, or costs paid or reimbursed by the Government through indirect cost pools, or any combination thereof.

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

(ii) 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.

(10) *Form, fit, and function data* means technical data that describe the required overall physical, 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 and functionally interchangeable items.

(11) *Government purpose* means any activity in which the United States Government is a party.

(i) The term includes the competitive procurement and any agreements or contracts with, or sales or transfers to, international or multi-national defense organizations or foreign governments.

(ii) The term does not include the rights to access, use, modify, reproduce, release, perform, display, or disclose technical data or computer software for commercial purposes or authorize others to do so.

(12) *Government purpose rights* means the rights to—

(i) Access, use, modify, reproduce, release, perform, display, or disclose technical data or computer software within the Government without restriction; and

(ii) Release or disclose technical data or computer software outside the Government and authorize persons to whom release or disclosure has been made to access, use, modify, reproduce, release, perform, display, or disclose that data for Government purposes. However, the Government shall not release or disclose the technical data or computer software outside the Government unless—

(A) Prior to release or disclosure (or in emergency situations, as soon as practicable thereafter), the intended recipient has executed the non-disclosure agreement at 227.7107–2 with its required attachments; or

(B) The recipient is a Government contractor receiving access to the technical data or computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachments required by that clause.

(13) *Limited rights* means the rights to access, use, modify, reproduce, release, perform, display, or disclose noncommercial 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 accessed or used by another party, unless—

(i) The reproduction, release, disclosure, access, or use is—

(A) Necessary for emergency repair and overhaul;

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

(C) A release or disclosure of computer software documentation to a contractor or subcontractor performing a service contract (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use such computer software documentation 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 or for emergency repair or overhaul of items or processes;

(ii) Prior to release or disclosure (or in emergency situations, as soon as practicable thereafter), the intended recipient—

(A) Has executed the use and non-disclosure agreements at 227.7101–2, with its required attachment(s); or

(B) Is a Government contractor receiving access to the technical data for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachment(s) required by that clause;

(iii) The recipient of limited rights data for emergency repair or overhaul is required to destroy the technical data and all copies in its possession promptly following completion of the emergency repair or overhaul and to notify the Contractor that the data have been destroyed; and

(iv) The Contractor or subcontractor asserting the restriction is notified of such

reproduction, release, disclosure, access, or use.

(14) *Noncommercial computer software* means computer software that does not qualify as commercial computer software.

(15) *Noncommercial technical data* means technical data that does not qualify as commercial technical data.

(16) *Restricted rights* apply only to noncommercial computer software and mean the Government's rights to—

(i) Install and use computer software on one computer at a time. The computer software may not be shared or accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;

(ii) Transfer computer software within the Government without further permission of the Contractor so as long as the transferred computer software remains subject to the provisions of this clause;

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

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

(A) Use the modified computer software only as provided in paragraphs (a)(13)(i) and (iii) of this clause; and

(B) Not release or disclose the modified computer software except as provided in paragraphs (a)(13)(ii), (v) and (vi) of this clause;

(v) 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, provided that—

(A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

(B) Such contractors or subcontractors—

(1) Have executed the use and non-disclosure agreement at 227.7107–2, with its required attachment(s); or

(2) Are Government contractors receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025;

(C) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the computer software, or use computer software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(16)(iv) of this clause, for any other purpose; and

(D) Such use is subject to the limitation in paragraph (a)(16)(i) of this clause.

(vi) 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, provided that—

(A) The intended recipient—

(1) Has executed the use and non-disclosure agreement at DFARS 227.7107–2, with its required attachment(s); or

(2) Is a Government contractor receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the required attachment(s);

(B) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the computer software, or use computer software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(16)(iv) of this clause, for any other purpose; and

(C) The Government shall require a recipient of restricted rights computer software for emergency repair or overhaul is required to destroy any copies of the computer software in its possession promptly following completion of the emergency repair/overhaul and to notify the Contractor that the computer software has been destroyed.

(17) *SBIR data* means all—

(i) Technical data—

(A) Pertaining to items or processes developed under a SBIR award; or

(B) Created under a SBIR award that does not require the development of items or processes; and

(ii) Computer software developed under a SBIR award.

(18) *SBIR data rights* mean the Government's rights during the SBIR data protection period (specified at paragraph (b)(5)(ii) of this clause) to access, use, modify, reproduce, release, perform, display, or disclose SBIR data as follows:

(i) Limited rights in SBIR data that is technical data; and

(ii) Restricted rights in SBIR data that is computer software.

(19) *Technical data* means recorded information, (regardless of the form or method of the recording), of a scientific or technical nature (including computer databases and computer software documentation). This term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. Recorded information of a scientific or technical nature that is included in computer databases is also technical data.

(20) *Unlimited rights* means the rights to access, use, modify, reproduce, perform, display, release, or disclose, technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Government Rights.* The Contractor grants or shall obtain for the Government the following paid-up, world-wide, nonexclusive, irrevocable license rights in technical data and noncommercial computer software.

(1) *Unlimited rights.* The Government shall have unlimited rights in—

(i) Form, fit, and function data;

(ii) Technical data necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);

(iii) Corrections or changes to technical data or computer software furnished to the Contractor by the Government;

(iv) Technical data or computer software otherwise publicly available or have been released or disclosed by the Contractor or a subcontractor without restrictions;

(v) Technical data or computer software in which the Government has obtained unlimited rights under another Government contract or a result of negotiations;

(vi) SBIR data upon expiration of the SBIR data rights Technical data or computer software delivered or otherwise provided to the Government, under this or any other Government contract or subcontract in which the restrictive condition(s) has or have expired;

(vii) Computer software user's documentation required to be delivered or otherwise provided under this contract; and

(viii) Technical data or computer software delivered or otherwise provided to the Government without any restrictive markings.

(2) *Limited rights.* Except as provided in paragraphs (b)(1) of this clause, the Government shall have limited rights in technical data—

(i) Pertaining to items or processes developed exclusively at private expense and marked with the limited rights legend prescribed in paragraph (g)(4) of this clause; or

(ii) Created exclusively at private expense in the performance of a contract that does not require the development, manufacture, construction, or production of items or processes.

(3) *Restricted rights in computer software.* The Government shall have restricted rights in noncommercial computer software required to be delivered or otherwise provided to the Government under this contract that were developed exclusively at private expense and were not created or developed under this contract.

(4) *Rights in commercial technical data and computer software.* The Government shall have the rights specified by the clause at 252.227–7015 in commercial technical data and commercial computer software required to be delivered or otherwise provided to the Government under this contract.

(5) *SBIR data rights.*

(i) Except as provided in paragraph (b)(1) of this clause, the Government shall have SBIR data rights in—

(A) All SBIR data created or developed under this contract; and

(B) All relevant SBIR data created or developed under other SBIR contracts where such SBIR data is specifically referenced and protected under the 252.227–7017 and –7018 clauses of this contract.

(ii) *Protection Period.* The Government's SBIR data rights commence with contract award and end upon the date five years after acceptance of the last deliverable under this contract. However, any SBIR data that is appropriately referenced and protected in a subsequent SBIR award during the five year period of this contract shall remain protected through the protection period of that subsequent SBIR award. After the expiration

of the applicable protection period, the Government shall have unlimited rights pursuant to paragraph (b)(1)(vi) of this clause.

(6) *Negotiated license rights.*

(i) *SBIR Data.* The SBIR Data rights license granted to the Government under paragraph (b)(5) of this clause may, after award, be modified or transferred by mutual agreement only in writing under a separate agreement.

(ii) *Technical Data and Computer Software other than SBIR Data.*

(A) The standard license rights granted to the Government under paragraphs (b)(1) through (b)(3) and (b)(5) of this clause (including the period during which the Government shall have Government purpose rights) may be modified only by mutual written agreement.

(B) If either party desires to negotiate specialized license rights in technical data or computer software, the other party agrees to enter into negotiations for transferring such rights.

(iii) However, in no event may the negotiated license provide the Government lesser rights than limited rights in technical data, or restricted rights in computer software.

(iv) Any license rights negotiated under this paragraph shall be identified in a license agreement attached to this contract.

(7) *Prior Government rights.* Technical data, including computer software documentation, or computer software that will be delivered or otherwise provided to the Government under this contract, in which the Government has previously obtained rights shall be delivered or provided with the pre-existing rights, unless—

(i) The parties have agreed otherwise; or

(ii) Any restrictions on the Government's rights to access, use, modify, release, perform, display, or disclose the technical data or computer software have expired or no longer apply.

(8) *Rights in derivative computer software or computer software documentation.* The Government shall retain its rights in the unchanged portions of any technical data and computer software delivered or otherwise provided under this contract that the Contractor uses to prepare, or includes in, derivative technical data or computer software.

(c) *Contractor rights in technical data or computer software.* The Contractor retains all intellectual property rights for technical data and computer software (including ownership) developed under this contract except those granted to the Government as specified under paragraph (b) of this clause.

(d) *Third party copyrighted technical data and computer software.* (1) The Contractor shall not incorporate any third party copyrighted technical data or computer software in the technical data or computer software to be delivered or otherwise provided under this contract unless—

(i) The Contractor has obtained, for the Government the license rights necessary to perfect a license or licenses in the deliverable technical data or computer software of the appropriate scope set forth in paragraph (b) of this clause; or

(ii) The Contracting Officer has granted specific written approval to do so.

(2) The Contractor shall ensure that any such license rights obtained from third parties and granted to the Government are identified and asserted pursuant to paragraph (f) of this clause, and such technical data and computer software are appropriately marked pursuant to paragraph (g) of this clause.

(e) *Release from liability.*

(1) The Contractor agrees that the Government, and other persons to whom the Government may have released or disclosed technical data or computer software delivered or otherwise provided under this contract, shall have no liability for any release or disclosure of technical data or computer software that are not marked to indicate that these technical data or computer software are licensed data subject to access, use, modification, reproduction, release, performance, display, or disclosure restrictions.

(2) In the event that an authorized recipient of technical data or computer software delivered or otherwise provided to the Government under this contract engages in any unauthorized activities with such technical data or computer software, the Contractor agrees to—

(i) Release the Government from liability for any release or disclosure of technical data or computer software made in accordance with the Government's license rights granted pursuant to paragraph (b) of this clause; and

(ii) Seek relief solely from the party who has improperly accessed, used, modified, reproduced, released, performed, displayed, or disclosed Contractor data marked with restrictive legends.

(f) *Identification and delivery of technical data or computer software to be provided with restrictions.* The Contractor shall not deliver or otherwise provide any technical data or computer software with restrictive markings unless the technical data or computer software are listed in an Attachment to this contract in accordance with—

(1) The provision at DFARS 252.227-7017, Pre-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software; and

(2) The clause at DFARS 252.227-7018, Post-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software.

(g) *Marking requirements.* The Contractor, and its subcontractors or suppliers, shall assert restrictions on the Government's rights to access, use, modify, reproduce, release, perform, display, or disclose technical data or computer software to be delivered or otherwise provided under this contract only by marking the deliverable that is subject to restriction.

(1) *General marking instructions.* The Contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark all technical data and computer software with the appropriate legends.

(i) The authorized legends shall be placed on each page of the printed material or media containing the computer software or the transmittal document or storage container to which the restrictions apply. If only portions of a page are subject to the asserted restrictions, the Contractor shall identify the

restricted portions (e.g., by circling or underscoring with a note or other appropriate identifier).

(ii) Technical data or computer software transmitted directly from one computer or computer terminal to another shall contain a notice of asserted restrictions.

(iii) The Contractor shall not use instructions that interfere with or delay the operation of the computer program in order to display an authorized legend in computer software that will or might be used in combat or situations that simulate combat conditions, unless the Contracting Officer's written permission to deliver such computer software has been obtained prior to delivery.

(iv) Reproductions of technical data or computer software, or any portions thereof, subject to asserted restrictions shall also include the asserted restrictions.

(2) *Unlimited rights markings.* Technical data or computer software that is delivered or otherwise provided to the Government with unlimited rights, and that is marked with a copyright legend prescribed under 17 U.S.C. 401 or 402, shall also be marked as follows:

The U.S. Government has Unlimited Rights in this technical data or computer software pursuant to the clause at DFARS 252.227-7018. Any reproduction of technical data or computer software, or portions thereof, marked with this legend must also reproduce these markings.
(End of legend)

(3) *SBIR data rights markings.* Technical data or computer software that is delivered or otherwise provided to the Government with SBIR data rights shall be marked with the following legend:

SBIR DATA RIGHTS

Contract No. _____

Contractor Name _____

Contractor Address _____

The Government's rights to access, use, modify, reproduce, release, perform, display, or disclose technical data or computer software marked with this legend are restricted during the protection period described at paragraph (b)(5) of the Rights in Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program clause contained in the above identified contract. The Government has unlimited rights after the expiration of the protection period. Any reproduction of technical data, computer software or portions thereof marked with this legend must also reproduce the markings.
(End of legend)

(4) *Limited rights markings.* Technical data delivered or otherwise provided to the Government with limited rights shall be marked with the following legend:

LIMITED RIGHTS

Contract No. _____

Contractor Name _____

Contractor Address _____

The Government's rights to access, use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(2) of the Rights in Technical

Data and Computer Software—Small Business Innovative Research (SBIR) Program clause contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such technical data shall promptly notify the above named Contractor.

(End of legend)

(5) *Restricted rights markings.* Computer software delivered or otherwise provided to the Government with restricted rights shall be marked with the following legend:

RESTRICTED RIGHTS

Contract No. _____

Contractor Name _____

Contractor Address _____

(End of legend)

(6) *Negotiated license rights markings.*

(i) Except as provided in paragraph (g)(6)(ii) of this clause, technical data or computer software in which the Government's rights stem from a negotiated license shall be marked with the following legend:

NEGOTIATED LICENSE RIGHTS

The Government's rights to access, use, modify, reproduce, release, perform, display, or disclose this technical data or computer software are restricted by Contract No.

____ (Insert contract number) ____, License No. ____ (Insert license identifier) _____. Any reproduction of technical data, computer software, or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(ii) For purposes of marking, negotiated licenses do not include Government purpose license rights acquired under a prior contract (see paragraph (b)(7) of this clause).

(7) *Pre-existing data markings.* If the terms of a prior contract or license permitted the Contractor to restrict the Government's rights in technical data or computer software, the Contractor may mark such technical data or computer software with the appropriate restrictive legend in accordance with the marking procedures in paragraph (g)(1) of this clause.

(8) Except as provided in paragraph (g)(7) of this clause, only the following legends are authorized under this contract:

(i) The SBIR data rights legend at paragraph (g)(3) of this clause.

(ii) The limited rights legend at paragraph (g)(4) of this clause.

(iii) The restricted rights legend at paragraph (g)(5) of this clause, or the negotiated license rights legend at paragraph (g)(6) of this clause.

(iv) A notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(h) *Contractor procedures and records.* Throughout performance of this contract, the Contractor, and its subcontractors or suppliers that will deliver technical data or computer software with other than unlimited rights, shall—

(1) Assume that restrictive markings are used only when authorized by the terms of this clause; and

(2) Maintain records sufficient to justify the validity of any restrictive markings on technical data or computer software delivered under this contract.

(i) *Removal of unjustified and nonconforming markings.*

(1) Unjustified technical data or computer software markings. The rights and obligations of the parties regarding the validation of restrictive markings on technical data or computer software provided or to be provided under this contract are contained in the clause at 252.227–7037. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may ignore or, at the Contractor's expense, correct or strike a marking if a restrictive marking is determined to be unjustified.

(2) Nonconforming technical data or computer software markings. A nonconforming marking is a marking placed on technical data or computer software delivered or otherwise provided to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to the clause at 252.227–7037. If the Contracting Officer notifies the Contractor of a nonconforming marking and the Contractor fails to remove or correct such markings within sixty (60) days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming markings.

(j) *Relation to patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(k) *Applicability to subcontractors or suppliers.*

(1) The Contractor shall assure that the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320, 10 U.S.C. 2321, 15 U.S.C. 638, and the identification, assertion, and delivery processes required by paragraph (f) of this clause are recognized and protected.

(2) Whenever any technical data or computer software is to be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall—

(i) Use—

(A) This same clause in the subcontract or other contractual instrument with a small business concern for SBIR data; or

(B) The appropriate clause prescribed at DFARS 227.7104–8 with other than a small business concern, or for commercial or other non SBIR data; and

(ii) Require its subcontractors or suppliers to do so at all tiers, without alteration, except to identify the parties as follows:

(A) References to the Government are not changed.

(B) The subcontractor or supplier has all rights and obligations of the contractor in the clause; and

(iii) If the clause used with a subcontractor or supplier is not a clause that is used in the prime contract (or higher-tier subcontract), the Contractor shall notify the Government of the use of the clause and, if appropriate pursuant to DFARS 227.7104–8(d), the Contracting Officer will modify the prime contract to include the new clause.

(3) No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher-tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data or computer software.

(4) Technical data required to be delivered by a subcontractor or supplier shall normally be delivered to the next higher-tier Contractor, subcontractor, or supplier. However, when there is a requirement in the prime contract for technical data which may be submitted with other than unlimited rights by a subcontractor or supplier, then said subcontractor or supplier may fulfill its requirement by submitting such technical data directly to the Government, rather than through a higher-tier contractor, subcontractor, or supplier.

(5) The Contractor and higher-tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in technical data or computer software from their subcontractors or suppliers.

(6) In no event shall the Contractor use its obligation to recognize and protect subcontractor or supplier rights in technical data or computer software as an excuse for failing to satisfy its contractual obligation to the Government.

(End of clause)

ALTERNATE I (DATE)

As prescribed in 227.7104–8(b)(2), add the following paragraph (l) to the basic clause:

(l) *Publication for sale.*

(1) This paragraph applies only to technical data or computer software delivered to the Government with SBIR data rights.

(2) Upon expiration of the SBIR data rights, the Government will not exercise its right to publish or authorize others to publish an item of technical data or computer software identified in this contract as being subject to paragraph (l) of this clause if the Contractor, prior to the expiration of the SBIR data rights, or within two years following delivery of the technical data or computer software, or within two years following the removal of any national security or export control restrictions, whichever is later, publishes such technical data or computer software and promptly notifies the Contracting Officer in writing of such publication(s). Any such publication(s) shall include a notice identifying the number of this contract and the Government's rights in the published data.

(3) This limitation on the Government's right to publish for sale shall continue as long as the technical data or computer software are reasonably available to the public for purchase.

23. Section 252.227–7015 is revised to read as follows:

252.227–7015 Rights in technical data and computer software—commercial.

As prescribed in 227.7104–8(c), use the following clause:

RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE— COMMERCIAL (DATE)

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

(1) *Commercial computer software* means computer software that is a commercial item.

(2) *Commercial technical data* means technical data that is or pertains to a commercial item.

(3) *Computer database* or *database* means a collection of recorded information in a form capable of, and for the purpose of, being stored in, or processed by a computer. The term does not include computer software.

(4) *Computer program* means a set of instructions, rules, routines, or statements, regardless of the form or method of recording, that is capable of causing a computer to perform a specific operation or series of operations. Examples include firmware, object code, and any form of executable code.

(5) *Computer software* means computer programs; and source code, source code listings, and similar human-readable, recorded information that can be compiled to generate a computer program. The term does not include computer databases or computer software documentation.

(6) *Computer software documentation* means technical data relating to computer software.

(i) The term includes—

(A) Computer software design documentation, such as design details, algorithms, processes, flow charts, formulas, and related information that describe the design, organization, or structure of computer software; and

(B) Computer software user's documentation, such as user's or owner's manuals, installation instructions, operating instructions, and similar information that explains the capabilities of the computer software or provides instructions for using or maintaining the computer software.

(ii) The term does not include computer software.

(7) *Form, fit, and function data* means technical data that describes the required overall physical, 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 and functionally interchangeable items.

(8) *Technical data* means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. Recorded information of a scientific or technical nature that is included in computer databases is also technical data. (See 10 U.S.C. 2302(4)).

(9) *Unlimited rights* means the rights to access, use, modify, reproduce, perform, display, release, or disclose technical data or computer software in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Government rights.* The Government shall have the following license rights in commercial computer software, commercial computer software documentation, and technical data relating to a commercial item that is delivered under this contract:

(1) *Standard commercial license rights.* Except as provided in paragraphs (b)(2) through (b)(4) of this clause, the Government shall have the same rights as those in the standard commercial license customarily provided to the public unless such rights are inconsistent with Federal procurement law. Any portions of the standard commercial license that are inconsistent with Federal procurement law shall be considered stricken from the license and the remaining portions of the license shall remain in effect. The parties will promptly enter into negotiations to resolve any issues raised by the elimination of license terms or conditions that are inconsistent with Federal procurement law. The resulting license shall be attached to the contract.

(2) *Government right to require up to unlimited rights in certain types of technical data.* Notwithstanding paragraph (b)(1) of this clause, the Government shall have the right to require the Contractor to grant additional rights (up to and including unlimited rights) pursuant to paragraph (b)(4) of this clause, in technical data that—

(i) Have been provided to the Government or others without restrictions on—

(A) Further disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the technical data to another party; or

(B) The sale or transfer of some or all of a business entity or its assets to another party;

(ii) Are form, fit, and function data;

(iii) Are a correction or change to technical data furnished to the Contractor by the Government;

(iv) Are necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data); or

(v) Have been provided to the Government under a prior contract or licensing agreement through which the Government has acquired the rights to access, use, modify, reproduce, release, perform, display, or disclose the data without restrictions.

(3) *Government's minimum rights in technical data.* Notwithstanding any limitations in the standard commercial license granted by paragraph (b)(1) of this clause, the Government may access, use, modify, reproduce, release, perform, display, or disclose commercial technical data (including computer software documentation) within the Government. However, unless specifically authorized by the commercial license granted under paragraph (b)(1) of this clause or a negotiated license under paragraph (b)(4) of this clause, the Government shall not—

(i) Use the technical data to manufacture additional quantities of the commercial items; or

(ii) Release, perform, display, disclose, or authorize access or use of the technical data outside the Government without the Contractor's written permission unless—

(A) The release, disclosure or permitted access or use is—

(1) Necessary for emergency repair or overhaul of the commercial items delivered or otherwise provided under this contract; or

(2) A release or disclosure of technical data (other than detailed manufacturing or process data) to, or access or use of such data by, a foreign government that is in the interest of the Government and is required for evaluational or informational purposes;

(B) Prior to the release or disclosure, the intended recipient—

(1) Has executed the use and non-disclosure agreement at 227.7107–2, with its required attachment(s); or

(2) Is a Government contractor receiving access to the technical data for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachment(s) required by that clause; and

(C) The Contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, access, or use.

(4) *Negotiated license rights.*

(i) Except as permitted by paragraph (b)(4)(ii) of this clause, the standard license rights granted to the Government under paragraphs (b)(1) through (b)(3) of this clause may be modified only by mutual written agreement.

(ii) For the types of data covered by paragraph (b)(2) of this clause, the Government may require the Contractor to grant the Government license rights up to and including unlimited rights; however, if the Government requires such additional rights under this paragraph, the Contractor shall be entitled to reasonable compensation for granting any rights in addition to those provided in the Contractor's standard commercial license. In all other cases, if either party desires to negotiate specialized license rights in technical data or computer software, the other party agrees to enter into negotiations.

(iii) However, in no event may the negotiated license provide the Government lesser rights than specified at paragraph (b)(3) of this clause.

(iv) Any license rights negotiated under this paragraph of the clause shall be identified in a license agreement attached to this contract.

(c) *Contractor Rights.* The Contractor retains all intellectual property rights (including ownership) not granted to the Government in paragraph (b) of this clause.

(d) *Restrictive Markings and Notices Required.* All commercial technical data and commercial computer software to be delivered or otherwise provided to the Government with restrictions are—

(1) Identified in an attachment to this contract, in accordance with—

(i) The provision at DFARS 252.227–7017, Pre-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software; and

(ii) The clause at DFARS 252.227–7018, Post-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software; and

(2) Marked to indicate that these technical data or computer software are licensed

subject to access, use, modification, reproduction, release, performance, display, or disclosure restrictions. The form of the marking or notice must be consistent with best commercial practices, and must accurately describe the Government's rights. Validation of the marking is governed by DFARS 252.227-7037, Validation of Restrictive Markings on Technical Data and Computer Software.

(e) *Release from liability.*

(1) The Contractor agrees that the Government, and other persons to whom the Government may have released or disclosed technical data or computer software delivered or otherwise furnished under this contract, shall have no liability for any release or disclosure of technical data or computer software that are not marked to indicate that these technical data or computer software are licensed data subject to use, modification, reproduction, release, performance, display, or disclosure restrictions.

(2) In the event that an authorized recipient of technical data or computer software delivered or otherwise provided to the Government under this contract engages in any unauthorized activities with such technical data or computer software, the Contractor agrees to—

(i) Release the Government from liability for any release or disclosure of technical data or computer software made in accordance with the Government's license rights granted pursuant to paragraph (b) of this clause; and

(ii) Seek relief solely from the party who has improperly used, modified, reproduced, released, performed, displayed, or disclosed Contractor data marked with restrictive legends.

(f) *Applicability to subcontractors or suppliers.*

(1) The Contractor shall recognize and protect the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320, 10 U.S.C. 2321, and the identification, assertion, and delivery processes of paragraph (d) of this clause.

(2) Whenever any technical data or computer software will be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause (or other appropriate clause(s) prescribed at DFARS 227.7104-8) in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties as follows:

(i) References to the Government are not changed.

(ii) The subcontractor or supplier has all rights and obligations of the Contractor in the clause.

(3) If the clause used with a subcontractor or supplier is not a clause that is used in the prime contract (or higher-tier subcontract), the Contractor shall notify the Government of the use of the clause and, if appropriate pursuant to DFARS 227.7104-8(d), the Contracting Officer will modify the prime contract to include the new clause.

(End of clause)

ALTERNATE I (DATE)

As prescribed in 227.7104-8(c)(2), add the following paragraphs (a)(10) and (b)(5) to the basic clause:

(a)(10) *Vessel design* means the design of a vessel, boat, or craft, and its components, including the hull, decks, superstructure, and the exterior surface shape of all external shipboard equipment and systems. The term includes designs covered by 10 U.S.C. 7317, and designs protectable under 17 U.S.C. 1301, *et seq.*

(b)(5) *Vessel designs.* For a vessel design (including a vessel design embodied in a useful article) that is developed or delivered under this contract, the Government shall have the right to make and have made any useful article that embodies the vessel design, to import the article, to sell the article, and to distribute the article for sale or to use the article in trade, to the same extent that the Government is granted rights in the technical data pertaining to the vessel design.

24. Section 252.227-7016 is revised to read as follows:

252.227-7016 Rights in bid or proposal information.

As prescribed in 227.7105-3(a), use the following clause:

RIGHTS IN BID OR PROPOSAL INFORMATION (DATE)

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

(1) *Offeror* includes an offeror's subcontractors or suppliers, or potential subcontractors or suppliers, at any tier.

(2) *Computer software* and *technical data* are defined in the following clause(s) contained in this solicitation:

(i) 252.227-7013, Rights in Technical Data and Computer Software—Noncommercial;

(ii) 252.227-7014, Rights in Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program; or

(iii) 252.227-7015, Rights in Technical Data and Computer Software—Commercial

(b) *Government rights prior to contract award.* By submission of its offer, the offeror agrees that the Government—

(1) May reproduce the bid or proposal, or any portions thereof, to the extent necessary to evaluate the offer.

(2) Except as provided in paragraph (d) of this clause, shall use information contained in the bid or proposal only for evaluational purposes and shall not disclose, directly or indirectly, such information to any person including potential evaluators, unless that person has been authorized by the head of the agency, his or her designee, or the Contracting Officer to receive such information.

(c) *Government rights subsequent to contract award.* The Contractor agrees—

(1) Except as provided in paragraphs (c)(2), (d), and (e) of this clause, the Government shall have the rights to access, use, modify, reproduce, release, perform, display, or disclose information contained in the Contractor's bid or proposal within the Government. The Government shall not release, perform, display, or disclose such

information outside the Government without the Contractor's written permission.

(2) The Government's right to access, use, modify, reproduce, release, perform, display, or disclose information that is technical data or computer software required to be delivered under this contract are determined by the Rights in Technical Data and Computer Software—Noncommercial, Rights in Technical Data and Computer—Commercial, or Rights in Technical Data and Computer Software—Small Business Innovative Research (SBIR) Program clause(s) of this contract.

(d) *Government-furnished information.* The Government's rights with respect to technical data or computer software contained in the Contractor's bid or proposal that were provided to the Contractor by the Government are subject only to restrictions on access, use, modification, reproduction, release, performance, display, or disclosure, if any, imposed by the developer or licensor of such technical data or computer software.

(e) *Information available without restrictions.* The Government's rights to access, use, modify, reproduce, release, perform, display, or, disclose information contained in a bid or proposal, including technical data or computer software, and to permit others to do so, shall not be restricted in any manner if such information has been released or disclosed to the Government or to other persons without restrictions other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the information to another party or the sale or transfer of some or all of a business entity or its assets to another party.

(f) *Flowdown.* The Contractor shall include this clause in all subcontracts or similar contractual instruments and require its subcontractors or suppliers to do so without alteration, except to identify the parties as follows:

(1) References to the Government are not changed; and

(2) The subcontractor or supplier has all rights and obligations of the Contractor in the clause.

(End of clause)

25. Section 252.227-7017 is revised to read as follows:

252.227-7017 Pre-award identification and assertion of license restrictions—technical data and computer software.

As prescribed in 227.7105-3(b), use the following provision:

PRE-AWARD IDENTIFICATION AND ASSERTION OF LICENSE RESTRICTIONS—TECHNICAL DATA AND COMPUTER SOFTWARE (DATE)

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

(1) *Commercial computer software* means computer software that is a commercial item.

(2) *Commercial technical data* means technical data that is or pertains to a commercial item.

(3) *Computer database* or database means a collection of recorded information in a form capable of, and for the purpose of, being stored in, or processed by a computer. The term does not include computer software.

(4) *Computer program* means a set of instructions, rules, routines, or statements, regardless of the form or method of recording, that is capable of causing a computer to perform a specific operation or series of operations. Examples include firmware, object code, and any form of executable code.

(5) *Computer software* means computer programs; and source code, source code listings, and similar human-readable, recorded information that can be compiled to generate a computer program. The term does not include computer database or computer software documentation.

(6) *Computer software documentation* means technical data relating to computer software.

(i) The term includes—

(A) Computer software design documentation, such as design details, algorithms, processes, flow charts, formulas, and related information that describe the design, organization, or structure of computer software; and

(B) Computer software user's documentation, such as user's or owner's manuals, installation instructions, operating instructions, and similar information that explains the capabilities of the computer software or provides instructions for using or maintaining the computer software.

(ii) The term does not include computer software.

(7) *Developed* means that—

(i) An item or process exists and is workable. Workability is generally established when the item or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the 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 or process, and the state of the art. To be considered "developed," the item 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 or process be actually reduced to practice within the meaning of Title 35 of the United States Code.

(ii) 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;

(iii) 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 computer software can reasonably be expected to perform its intended purpose; or

(iv) Computer software user's documentation required to be delivered or otherwise provided under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

(8) *Developed exclusively at private expense* means development was accomplished entirely with costs not paid or reimbursed by the Government, or costs paid or reimbursed by the Government through

indirect cost pools, or any combination thereof.

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

(ii) Under fixed-price contracts, when total costs are greater than the firm-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.

(9) *Government purpose* means any activity in which the United States Government is a party.

(i) The term includes competitive procurement and any agreements or contracts with, or sales or transfers to, international or multi-national defense organizations or foreign governments.

(ii) The term does not include the rights to access, use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or to authorize others to do so.

(10) *Government purpose rights* means the rights to—

(i) Access, use, modify, reproduce, release, perform, display, or disclose technical data or computer software within the Government without restriction; and

(ii) Release or disclose technical data or computer software outside the Government and authorize persons to whom release or disclosure has been made to access, use, modify, reproduce, release, perform, display, or disclose that data for Government purposes. However, the Government shall not release or disclose the technical data or computer software outside the Government unless—

(A) Prior to release or disclosure (or in emergency situations, as soon as practicable thereafter), the intended recipient has executed the non-disclosure agreement at 227.7107-2 with its required attachments; or

(B) The recipient is a Government contractor receiving access to the technical data or computer software for performance of a Government contract that contains the clause at DFARS 252.227-7025 and the attachments required by that clause.

(11) *Limited rights* means the rights to access, 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 accessed or used by another party, unless—

(i) The reproduction, release, disclosure, access, or use is—

(A) Necessary for emergency repair and overhaul;

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

(C) A release or disclosure of computer software design documentation to, or access by, a contractor or subcontractor performing a service contract (see 37.101 of the Federal

Acquisition Regulation) in support of this or a related contract to use such computer software documentation 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 or for emergency repair or overhaul of items or processes;

(ii) Prior to release or disclosure (or in emergency situations, as soon as practicable thereafter), the intended recipient—

(A) Has executed the use and non-disclosure agreements at 227.7107-2, with its required attachment(s); or

(B) Is a Government contractor receiving access to the technical data for performance of a Government contract that contains the clause at DFARS 252.227-7025 and the attachment(s) required by that clause;

(iii) The recipient for emergency repair or overhaul is required to destroy the technical data and all copies in its possession promptly following completion of the emergency repair or overhaul, and to notify the Contractor that the data or computer software have been destroyed; and

(iv) The Contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, access, or use.

(12) *Noncommercial computer software* means computer software that does not qualify as commercial computer software.

(13) *Noncommercial technical data* means technical data that does not qualify as commercial technical data.

(14) *Offeror* includes an offeror's subcontractors or suppliers, or potential subcontractors or suppliers, at any tier.

(15) *Restricted rights* apply only to noncommercial computer software and mean the Government's rights to—

(i) Install and use computer software on one computer at a time. The computer software may not be time shared or accessed by more than one terminal or central processing unit unless otherwise permitted by this contract;

(ii) Transfer computer software within the Government without further permission of the Contractor so long as the transferred computer software remain subject to the provisions of this clause;

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

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

(A) Use the modified computer software only as provided in paragraphs (a)(18)(i) and (iii) of this clause; and

(B) Not release or disclose the modified computer software except as provided in paragraphs (a)(18)(ii), (v), and (vi) of this clause;

(v) 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 or for emergency repair or overhaul of items or processes, provided that—

(A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

(B) Such contractors or subcontractors—

(1) Have executed the use and non-disclosure agreement at DFARS 227.7107–2, with its required attachments; or

(2) Are Government contractors receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachment(s) required by that clause;

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

(D) Such use is subject to the limitation in paragraph (a)(18)(i) of this clause; and

(vi) 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, provided that—

(A) The intended recipient—

(1) Has executed the use and non-disclosure agreement at DFARS 227.7107–2, with its required attachments; or

(2) Is a Government contractor receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025, and the attachments required by that clause;

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

(C) The Government shall require a recipient of restricted rights computer software for emergency repair or overhaul to destroy any copies of the computer software in its possession promptly following completion of the emergency repair/overhaul and to notify the Contractor that the computer software has been destroyed.

(16) *SBIR data* means all—

(i) Technical data—

(A) Pertaining to items or processes developed under a Small Business Innovation Research (SBIR) award; or

(B) Created under a SBIR award that does not require the development of items or processes; and

(ii) Computer software developed under a SBIR award.

(17) *SBIR data rights* mean the Government's rights during the SBIR data protection period (specified at 252.227–7014(b)(5)(ii)) to access, use, modify, reproduce, release, perform, display, or disclose SBIR data as follows:

(i) Limited rights in SBIR data that is technical data; and

(ii) Restricted rights in SBIR data that is computer software.

(18) *Technical data* means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. Recorded information of a scientific or technical nature that is included in computer databases is also technical data.

(19) *Unlimited rights* means the rights to access, use, modify, reproduce, perform, display, release, or disclose technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Scope*. The identification and assertion requirements in this provision apply only to technical data and computer software to be delivered or otherwise provided with other than unlimited rights.

(c) *Pre-award identification*. Offers submitted in response to this solicitation shall identify—all technical data or computer software that the offeror asserts will be delivered or otherwise provided to the Government with restrictions on access, use, modification, reproduction, release, performance, display, or disclosure. The offeror's pre-award identification shall be submitted as an attachment to its offer and shall contain the following information:

(1) *Title*. Place the following title at the top of the first page of the attachment: “PRE-AWARD IDENTIFICATION AND ASSERTION OF LICENSE RESTRICTIONS—TECHNICAL DATA AND COMPUTER SOFTWARE.”

(2) *Statement of Assertion*. Include the following statement: “The offeror asserts for itself, or the persons identified in paragraph (4)(iv) of this attachment, that the Government's rights to access, use, modify, reproduce, release, perform, display, or disclose only the following technical data or computer software should be restricted:”

(3) *Identification of the technical data or computer software to be delivered or otherwise provided with restrictions*. For technical data (other than computer software documentation) pertaining to items or processes, identify both the deliverable technical data and each such item or process as specifically as possible (e.g., by referencing specific sections of the proposal, data item numbers or item numbers, or specific technology or components). For computer software or computer software documentation, identify the software or documentation by specific name or module or item number. The offeror must identify all technical data or computer software that it asserts or anticipates will be delivered or otherwise provided with restrictions, including cases in which the offeror is unable to provide a complete listing of the detailed information required by paragraph (c)(4) of this provision (e.g., when the specific restrictions or identity of the entity asserting restrictions is not yet known).

(4) *Detailed description of the asserted restrictions*. For each of the technical data or

computer software identified above in paragraph (c)(3) of this provision, identify the following information:

(i) *Asserted rights*. Identify the asserted rights category for the technical data or computer software as specified in paragraph (b) of the applicable clauses.

(A) For noncommercial technical data or noncommercial computer software, the applicable clause(s) are at DFARS 252.227–7013, Rights in Technical Data and Computer Software—Noncommercial, or DFARS 252.227–7014, Rights in Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program (e.g., Government purpose rights; limited rights; restricted rights; negotiated licenses; or rights under prior Government contracts, including SBIR data rights for which the protection period has not expired); and

(B) For commercial technical data or computer software, the applicable clause is at 252.227–7015, Rights in Technical Data and Computer Software—Commercial. (e.g., a standard commercial license, a negotiated license, or the Government's minimum rights in or technical data).

(ii) *Copies of negotiated, commercial, and other non-standard licenses*. The offeror shall attach to its offer for each listed item copies of all proposed negotiated license(s), the offeror's standard commercial license(s), and any other asserted restrictions other than Government purpose rights; limited rights; restricted rights; rights under prior Government contracts, including SBIR data rights for which the protection period has not expired; or Government's minimum rights as specified in the clause at 252.227–7015, Rights in Technical Data and Computer Software—Commercial.

(iii) *Specific basis for assertion*. Identify the specific basis for the assertion. For example:

(A) Development at private expense, either exclusively or partially. For technical data, development refers to development of the item or process to which the data pertains (see paragraphs (a)(8) through (a)(11) of the clause at DFARS 252.227–7013). For computer software, development refers to the development of the computer software (see paragraphs (a)(8) through (a)(11) of the clause at DFARS 252.227–7013). Indicate whether development was accomplished exclusively or partially at private expense.

(B) Rights under a prior Government contract, including SBIR data rights for which the protection period has not expired (see paragraphs (a)(7) through (a)(8) of the clause at DFARS 252.227–7014 and paragraph (c)(4)(v) of this provision).

(C) Standard commercial license customarily provided to the public (see paragraph (b)(1) of the clause at DFARS 252.227–7015).

(D) Negotiated license rights (see paragraph (c)(4)(ii) of this provision).

(iv) *Entity asserting restrictions*. Identify the corporation, partnership, individual, or other person, as appropriate, asserting the restrictions.

(v) *Previously delivered technical data or computer software*. The offeror shall identify the technical data or computer software that are identical or substantially similar to

technical data or computer software that the offeror has produced for, delivered to, or is obligated to deliver or otherwise provide to the Government under any other contract or subcontract. The offeror need not identify commercial technical data or computer software that were, or will be, delivered or otherwise provided subject to a standard commercial license.

(5) *Signature(s)*. The attachment must—
(i) Be signed and dated by—

(A) An official authorized to contractually obligate the offeror; and

(B) An official authorized to obligate each entity or person identified above in paragraph (4)(iv) of this attachment, except that no signature is required under this paragraph (B) when the item being provided is commercial technical data or commercial computer software and is being offered with the standard commercial license rights.

(ii) Include the printed name and title of each official.

(d) *Supplemental information*. When requested by the Contracting Officer, the offeror shall provide sufficient information to enable the Contracting Officer to evaluate the offeror's assertions. Sufficient information should include, but is not limited to, the following:

(1) The contract number under which the technical data or computer software were produced;

(2) The contract number under which, and the name and address of the organization to whom, the technical data or computer software were most recently delivered or will be delivered; and

(3) Identification of the expiration date for any limitations on the Government's rights to access, use, modify, reproduce, release, perform, display, or disclose the technical data or computer software, when applicable.

(e) *Ineligibility for award*. An offeror's failure to submit, complete, or sign the identifications and assertions required by paragraph (c) of this provision with its offer may render the offer ineligible for award.

(f) *Award*. If the offeror is awarded the contract, the Contracting Officer will attach the offeror's list of assertions to the resulting contract.

(g) *Post-award amendment of assertions*. After contract award, amendments to the offeror's assertions may only be accomplished in accordance with the clause at 252.227–7018 Post-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software. Alternatively, a modified list of assertions may be included by mutual agreement.

(h) *Applicability to subcontractors and suppliers*. Whenever any technical data or computer software will be obtained from a subcontractor or supplier for delivery to the Government under this contract, the offeror shall use this same provision in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties as follows:

(1) References to the Government are not changed; and

(2) The subcontractor or supplier has all rights and obligations of the offeror in the provision.

(End of provision)

26. Section 252.227–7018 is revised to read as follows:

252.227–7018 Post-award identification and assertion of license restrictions—technical data and computer software.

As prescribed in 227.7105–3(c), use the following clause:

POST-AWARD IDENTIFICATION AND ASSERTION OF LICENSE RESTRICTIONS—TECHNICAL DATA AND COMPUTER SOFTWARE (DATE)

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

(1) *Commercial computer software* means computer software that is a commercial item.

(2) *Commercial technical data* means technical data that is or pertains to a commercial item.

(3) *Computer database* or *database* means a collection of recorded information in a form capable of, and for the purpose of, being stored in, or processed by a computer. The term does not include computer software.

(4) *Computer program* means a set of instructions, rules, routines, or statements, regardless of the form or method of recording, that is capable of causing a computer to perform a specific operation or series of operations. Examples include firmware, object code, and any form of executable code.

(5) *Computer software* means computer programs; and source code, source code listings, and similar human-readable, recorded information that can be compiled to generate a computer program. The term does not include computer database or computer software documentation.

(6) *Computer software documentation* means technical data relating to computer software.

(i) The term includes—

(A) Computer software design documentation, such as design details, algorithms, processes, flow charts, formulas, and related information that describe the design, organization, or structure of computer software; and

(B) Computer software user's documentation, such as user's or owner's manuals, installation instructions, operating instructions, and similar information that explains the capabilities of the computer software or provides instructions for using or maintaining the computer software.

(ii) The term does not include computer software.

(7) *Contractor* includes the Contractor's subcontractors or suppliers, or potential subcontractors or suppliers, at any tier.

(8) *Developed* means that—

(i) An item or process exists and is workable. Workability is generally established when the item or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the 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 or process, and the state of the art. To be considered *developed*, the item or process need not be at the stage

where it could be offered for sale or sold on the commercial market, or must the item or process be actually reduced to practice within the meaning of title 35 of the United States Code.

(ii) 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;

(iii) 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 computer software can reasonably be expected to perform its intended purpose; or

(iv) Computer software user's documentation required to be delivered or otherwise provided under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

(9) *Developed exclusively at private expense* means development was accomplished entirely with costs not paid or reimbursed by the Government, or costs paid or reimbursed by the Government through indirect cost pools, or any combination thereof.

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

(ii) Under fixed-price contracts, when total costs are greater than the firm-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.

(10) *Government purpose* means any activity in which the United States Government is a party.

(i) The term includes competitive procurement and any agreements or contracts with, or sales or transfers to, international or multi-national defense organizations or foreign governments.

(ii) The term does not include the rights to access, use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or to authorize others to do so.

(11) *Government purpose rights* means the rights to—

(i) Access, use, modify, reproduce, release, perform, display, or disclose technical data or computer software within the Government without restriction; and

(ii) Release or disclose technical data or computer software outside the Government and authorize persons to whom release or disclosure has been made to access, use, modify, reproduce, release, perform, display, or disclose that data for Government purposes. However, the Government shall not release or disclose the technical data or computer software outside the Government unless—

(A) Prior to release or disclosure (or in emergency situations, as soon as practicable thereafter), the intended recipient has executed the non-disclosure agreement at 227.7107–2 with its required attachments; or

(B) The recipient is a Government contractor receiving access to the technical

data or computer software for performance of a Government contract that contains the clause at DFARS 252.227-7025 and the attachments required by that clause.

(12) *Limited rights* means the rights to access, 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 accessed or used by another party, unless—

(i) The reproduction, release, disclosure, access, or use is—

(A) Necessary for emergency repair and overhaul;

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

(C) A release or disclosure of computer software design documentation to, or access by, a contractor or subcontractor performing a service contract (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use such computer software documentation 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 or for emergency repair or overhaul of items or processes;

(ii) Prior to release or disclosure (or in emergency situations, as soon as practicable thereafter), the intended recipient—

(A) Has executed the use and non-disclosure agreements at 227.7107-2, with its required attachment(s); or

(B) Is a Government contractor receiving access to the technical data for performance of a Government contract that contains the clause at DFARS 252.227-7025 and the attachment(s) required by that clause;

(iii) The recipient for emergency repair or overhaul is required to destroy the technical data and all copies in its possession promptly following completion of the emergency repair or overhaul, and to notify the Contractor that the data or computer software have been destroyed; and

(iv) The Contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, access, or use.

(13) *Noncommercial computer software* means computer software that does not qualify as commercial computer software.

(14) *Noncommercial technical data* means technical data that does not qualify as commercial technical data.

(15) *Restricted rights* apply only to noncommercial computer software and mean the Government's rights to—

(i) Install and use computer software on one computer at a time. The computer software may not be time shared or accessed by more than one terminal or central processing unit unless otherwise permitted by this contract;

(ii) Transfer computer software within the Government without further permission of the Contractor so long as the transferred computer software remain subject to the provisions of this clause;

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

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

(A) Use the modified computer software only as provided in paragraphs (a)(18)(i) and (iii) of this clause; and

(B) Not release or disclose the modified computer software except as provided in paragraphs (a)(18)(ii), (v), and (vi) of this clause;

(v) 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 or for emergency repair or overhaul of items or processes, provided that—

(A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

(B) Such contractors or subcontractors—

(1) Have executed the use and non-disclosure agreement at DFARS 227.7107-2, with its required attachments; or

(2) Are Government contractors receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227-7025 and the attachment(s) required by that clause;

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

(D) Such use is subject to the limitation in paragraph (a)(18)(i) of this clause; and

(vi) 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, provided that—

(A) The intended recipient—

(1) Has executed the use and non-disclosure agreement at DFARS 227.7107-2, with its required attachments; or

(2) Is a Government contractor receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227-7025, and the attachments required by that clause;

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

(C) The Government shall require a recipient of restricted rights computer software for emergency repair or overhaul to destroy any copies of the computer software in its possession promptly following completion of the emergency repair/overhaul and to notify the Contractor that the computer software has been destroyed.

(16) *SBIR data* means all—

(i) Technical data—

(A) Pertaining to items or processes developed under a Small Business Innovation Research (SBIR) award; or

(B) Created under a SBIR award that does not require the development of items or processes; and

(ii) Computer software developed under a SBIR award.

(17) *SBIR data rights* mean the Government's rights during the SBIR data protection period (specified at 252.227-7014(b)(5)(ii)) to access, use, modify, reproduce, release, perform, display, or disclose SBIR data as follows:

(i) Limited rights in SBIR data that is technical data; and

(ii) Restricted rights in SBIR data that is computer software.

(18) *Technical data* means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. Recorded information of a scientific or technical nature that is included in computer databases is also technical data.

(19) *Unlimited rights* means the rights to access, use, modify, reproduce, perform, display, release, or disclose technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Scope*. The identification and assertion requirements in this clause apply only to technical data and computer software to be delivered with other than unlimited rights.

(c) *Pre-award assertion list*. This contract contains the list of all deliverable technical data or computer software that the Contractor asserted should be delivered or otherwise provided to the Government with restrictions pursuant to the provision at 252.227-7017, *Pre-Award Identification and Assertion of License Restrictions—Technical Data and Computer Software*.

(d) *Restrictions on delivery*. Except as permitted by paragraph (e) of this clause, Contractors shall not deliver or otherwise provide any technical data or computer software with restrictive markings unless the technical data or computer software is identified in the list of assertions referenced in paragraph (c) of this clause.

(e) *Post-award assertions*.

(1) Post-award assertions may be identified after award only when based on—

(i) New information; or

(ii) Inadvertent omissions, unless the inadvertent omissions would have materially affected the source selection decision.

(2) The post-award identification and assertion shall be submitted to the

Contracting Officer as soon as practicable and shall be prior to the scheduled date for delivery of the technical data or computer software.

(f) *Form of contractor's post-award assertions.* Contractor's post-award assertions shall be submitted as identifications in a separate attachment. A pre-award identification may be submitted as a post-award identification only if the pre-award identification is being amended. Contractor's post-award identification shall contain the following information:

(1) *Title.* Place the following title at the top of the first page of the attachment: "POST-AWARD IDENTIFICATION AND ASSERTION OF LICENSE RESTRICTIONS—TECHNICAL DATA AND COMPUTER SOFTWARE."

(2) *Statement of Assertion.* Include the following statement(s): "The Contractor asserts for itself, or the persons identified in paragraph (4)(iv) of this clause, that the Government's rights to access, use, modify, reproduce, release, perform, display, or disclose only the following technical data or computer software should be restricted:"

(3) *Identification of the technical data or computer software to be delivered or otherwise provided with restrictions.* For technical data (other than computer software documentation) pertaining to items or processes, identify both the deliverable technical data and each such item or process as specifically as possible (e.g., by referencing specific sections of the proposal, data item numbers or item numbers, or specific technology or components). For computer software or computer software documentation, identify the computer software or computer software documentation by specific name or module or item number. The Contractor must identify all technical data or computer software that it asserts or anticipates will be delivered or otherwise provided with restrictions, including cases in which the Contractor is unable to provide a complete listing of the detailed information required by paragraph (f)(4) of this clause (e.g., when the specific restrictions or identity of the entity asserting restrictions is not yet known).

(4) *Detailed description of the asserted restrictions.* For each of the technical data or computer software identified above in paragraph (3) of this clause, identify the following information:

(i) *Asserted rights.* Identify the asserted rights category for the technical data or computer software as specified in paragraph (b) of the applicable clauses.

(A) For noncommercial technical data or noncommercial computer software, the applicable clause(s) are at DFARS 252.227–7013, Rights in Technical Data and Computer Software—Noncommercial, or DFARS 252.227–7014, Rights in Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program (e.g., Government purpose rights; limited rights; restricted rights; negotiated licenses; or rights under prior Government contracts, including SBIR data rights for which the protection period has not expired); and

(B) For commercial technical data or computer software, the applicable clause is at

252.227–7015, Rights in Technical Data and Computer Software—Commercial (e.g., a standard commercial license, a negotiated license, or the Government's minimum rights in technical data).

(ii) *Copies of negotiated, commercial, and other non-standard licenses.* Contractor shall provide copies of all proposed negotiated license(s), Contractor's standard commercial license(s), and any other asserted restrictions other than Government purpose rights; limited rights; restricted rights; rights under prior Government contracts, including SBIR data rights for which the protection period has not expired; or Government's minimum rights as specified in the clause at 252.227–7015, Rights in Technical Data and Computer Software—Commercial.

(iii) *Specific basis for assertion.* Identify the specific basis for the assertion. For example:

(A) Development at private expense, either exclusively or partially. For technical data, development refers to development of the item or process to which the data pertains (see paragraphs (a)(8) through (a)(11) of the clause at DFARS 252.227–7013). For computer software, development refers to the development of the computer software (see paragraphs (a)(8) through (a)(11) of the clause at DFARS 252.227–7013). Indicate whether development was accomplished exclusively or partially at private expense.

(B) Rights under a prior Government contract, including SBIR data rights for which the protection period has not expired (see paragraphs (a)(7) through (a)(8) of the clause at DFARS 252.227–7014 and paragraph (4)(v) of this clause)

(C) Standard commercial license customarily provided to the public (see paragraph (b)(1) of the clause at DFARS 252.227–7015).

(D) Negotiated license rights (see paragraph (4)(ii) of this clause).

(iv) *Entity asserting restrictions.* Identify the corporation, partnership, individual, or other person, as appropriate, asserting the restrictions.

(v) *Previously delivered technical data or computer software.*

(A) *Identification requirements.* The Contractor shall indicate the technical data or computer software that are identical or substantially similar to technical data or computer software that the Contractor has produced for, delivered to, or is obligated to deliver or otherwise provide to the Government, under any other contract or subcontract.

(B) *Scope.* This requirement applies to—

(1) All noncommercial technical data and noncommercial computer software; and

(2) Only those commercial technical data and commercial computer software that were, or will be, delivered or otherwise provided are subject to a negotiated license.

(vi) *Amendment or modification of pre-award assertions.* Indicate whether the asserted restrictions amend or affect any of the pre-award assertions on the list specified in paragraph (c) of this clause. If so, specifically identify what information contained within the pre-award assertions is superseded by the amendments or modifications.

(5) *Signature(s).* The list of assertions must—

(i) Be signed and dated by—

(A) An official authorized to contractually obligate the Contractor; and

(B) An official authorized to obligate each entity or person identified in paragraph (4)(iv) of this clause except that no signature is required under this paragraph (B) when the item being provided is commercial technical data or commercial computer software and is being offered with the standard commercial license rights.

(ii) Include the printed name and title of each official.

(g) *Supplemental information.* When requested by the Contracting Officer, the Contractor shall provide sufficient information to enable the Contracting Officer to evaluate the Contractor's original and additional assertions. Sufficient information should include, but is not limited to, the following:

(1) The contract number under which the technical data or computer software were produced;

(2) The contract number under which, and the name and address of the organization to whom, the technical data or computer software were most recently delivered or will be delivered; and

(3) Any limitations on the Government's rights to access, use, modify, reproduce, release, perform, display, or disclose the technical data or computer software, including, when applicable, identification of the earliest date the limitations expire.

(h) *Withholding of payment.* A Contractor's failure to submit, complete, or sign the identifications and assertions required by paragraphs (c) and (e) of this clause with its performance may result in a withholding of payment under the clause at 252.227–7030, Technical Data and Computer Software—Withholding of Payment.

(i) *Applicability to subcontractors and suppliers.* Whenever any technical data or computer software will be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties as follows:

(1) References to the Government are not changed; and

(2) The subcontractor or supplier has all rights and obligations of the Contractor in the clause.

(End of clause)

252.227–7019 [Removed and reserved]

27. Section 252.227–7019 is removed and reserved.

28. Section 252.227–7020 is revised to read as follows:

252.227–7020 Rights in works—ownership.

As prescribed in 227.7202–3, use the following clause:

RIGHTS IN WORKS—OWNERSHIP (DATE)

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

(1) *Architectural works* means the design of a building, a monument, or construction of similar nature as embodied in any tangible medium of expression, including all architectural plans, models, drawings, notes, specifications, and other data pertaining to the design as well as the building, monument, or construction of similar nature.

(2) *Computer database* or *database* means a collection of recorded information in a form capable of, and for the purpose of, being stored in, or processed by a computer. The term does not include computer software.

(3) *Computer software* means computer programs; and source code, source code listings, and similar human-readable, recorded information that can be compiled to generate a computer program. The term does not include computer database or computer software documentation.

(4) *Computer software documentation* means technical data relating to computer software.

(i) The term includes—

(A) Computer software design documentation, such as design details, algorithms, processes, flow charts, formulas, and related information that describe the design, organization, or structure of computer software; and

(B) Computer software user's documentation, such as user's or owner's manuals, installation instructions, operating instructions, and similar information that explains the capabilities of the computer software or provides instructions for using or maintaining the computer software.

(ii) The term does not include computer software.

(5) *Technical data* means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. Recorded information of a scientific or technical nature that is included in computer databases is also technical data.

(6) The term *works*—

(i) Includes the following:

(A) Databases.

(B) Literary works.

(C) Musical works, including any accompanying words.

(D) Dramatic works, including any accompanying music.

(E) Pantomimes and choreographic works.

(F) Pictorial, graphic, and sculptural works.

(G) Motion pictures and other audiovisual works.

(H) Sound recordings.

(I) Architectural works.

(J) Mask works.

(K) Original designs.

(ii) The term does not include technical data (including computer software documentation) and computer software.

(b) *Government rights*. The Contractor shall assign to the Government the entire right, title, and interest, including the intellectual property rights (other than patent rights) in—

(1) Works first produced, created, generated, or delivered under this contract to the Government; and

(2) Works not first produced, created, or generated under this contract that are incorporated into a contract deliverable.

(c) *Contractor rights*. The Contractor shall not retain any rights in works first produced, created, generated, or delivered under this contract unless specified in an agreement negotiated in accordance with paragraph (g) of this clause.

(d) *Third party works*. The Contractor shall not incorporate, without the written approval of the Contracting Officer, any third party works, in whole or in part, into the works that are produced, created, generated, or delivered under this contract, unless the Contractor has obtained for the Government the rights set forth in paragraph (b) of this clause.

(e) *Indemnification*. The Contractor shall indemnify and save and hold harmless the Government, and its officers, agents, and employees acting for the Government, against any liability, including costs and expenses:

(1) For violation of proprietary rights, copyrights, or rights of privacy or publicity, arising out of the creation, delivery, access, use, modification, reproduction, release, performance, display, or disclosure of any works first produced, created, generated, or delivered under this contract, or

(2) Based upon any libelous or other unlawful matter contained in such works.

(f) *Marking*. The Contractor, unless directed to the contrary by the Contracting Officer, shall place on works first produced, created, generated, or delivered under this contract the following notice: “(designator(s)) (year of creation) United States Government, as represented by the Secretary of (department). All rights reserved.” The designator element of the notice shall indicate all designators appropriate to the work, such as “C” for a copyright work, a “P” for phonorecords, or a “D” for original designs.

(g) *Negotiated rights*. The rights granted to the Government under paragraph (b) of this clause, the Contractor rights under paragraph (c) of this clause, and the requirement for indemnification under paragraph (e) of this clause, may be modified by mutual agreement. Any rights so negotiated shall be identified in a separate license agreement made part of this contract.

(h) *Contractor retention of architectural works*. Unless otherwise specified, for a period of three (3) years after completion of the project, the Contractor shall retain all architectural works and furnish them upon the request of the Contracting Officer. Unless otherwise provided in this contract, the Contractor shall have the right to retain copies of all architectural works beyond this period.

(i) *Applicability to subcontractors or suppliers*. Whenever any works will be first produced, created, generated, or delivered, in whole or in part, by a subcontractor or supplier under this contract, the Contractor shall use this same clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties as follows:

(1) References to the Government are not changed.

(2) The subcontractor or supplier has all rights and obligations of the Contractor in the clause.

(End of clause)

28. Section 252.227–7021 is revised to read as follows:

252.227–7021 Rights in works license.

As prescribed at 27.7203-3, use the following clause:

RIGHTS IN WORKS-LICENSE (DATE)

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

(1) *Computer database* or *database* means a collection of recorded information in a form capable of, and for the purpose of, being stored in, or processed by a computer. The term does not include computer software.

(2) *Computer software* means computer programs; and source code, source code listings, and similar human-readable, recorded information that can be compiled to generate a computer program. The term does not include computer database or computer software documentation.

(3) *Computer software documentation* means technical data relating to computer software.

(i) The term includes—

(A) Computer software design documentation, such as design details, algorithms, processes, flow charts, formulas, and related information that describe the design, organization, or structure of computer software; and

(B) Computer software user's documentation, such as user's or owner's manuals, installation instructions, operating instructions, and similar information that explains the capabilities of the computer software or provides instructions for using or maintaining the computer software.

(ii) The term does not include computer software.

(4) *Developed* means produced, created, or generated.

(5) *Government purposes* means any activities to which the United States Government is a party.

(6) *Government license rights* means the rights to—

(i) Access, use, modify, reproduce, release, perform, display, or disclose works within the Government without restriction; and

(ii) Release or disclose works outside the Government and authorize persons to whom release or disclosure has been made to access, use, modify, reproduce, release, perform, display, or disclose those works for Government purposes. However, the Government shall not release or disclose works outside the Government unless the recipient is a Government contractor receiving access to the works for performance of a Government contract that contains the clause at DFARS 252.227–70YY.

(7) *Technical data* means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration.

Recorded information of a scientific or technical nature that is included in computer databases is also technical data.

(8) *Unlimited rights* means the rights to access, use, modify, reproduce, perform, display, release, or disclose a work in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.

(9) The term *works*—

(i) Includes the following:

(A) Databases.

(B) Literary works.

(C) Musical works, including any accompanying words.

(D) Dramatic works, including any accompanying music.

(E) Pantomimes and choreographic works.

(F) Pictorial, graphic, and sculptural works.

(G) Motion pictures and other audiovisual works.

(H) Sound recordings.

(I) Architectural works.

(J) Mask works.

(K) Original designs.

(ii) Does not include technical data (including computer software documentation) and computer software.

(b) *Government rights*. The Government shall have the following license rights in a work that is delivered or developed under this contract:

(1) Except as provided in paragraphs (b)(2) and (b)(3) of this clause, the Government shall have the same rights as those in the standard commercial license customarily provided to the public unless such rights are inconsistent with Federal procurement law. Any portions of the standard commercial license that are inconsistent with Federal procurement law shall be considered stricken from the license and the remaining portions of the license shall remain in effect. The parties will promptly enter into negotiations to resolve any issues raised by the elimination of license terms or conditions that are inconsistent with Federal procurement law. The resulting license shall be attached to the contract.

(2) Unlimited rights in all portions of a work that are first developed under the contract that are segregable from any sections of the work developed prior to contract award.

(3) Government license rights in all portions of the work first developed under the contract and that are not segregable from sections of the work that were developed prior to contract award.

(4) Negotiated license rights.

(i) The license rights granted to the Government under paragraphs (b)(1), (b)(2), or (b)(3) of this clause may be modified only by mutual written agreement.

(ii) If the Government desires to obtain rights in a work in addition to those specified in paragraph (b)(1), (b)(2), or (b)(3), the Contractor agrees to enter into good faith negotiations with the Contracting Officer to determine whether there are acceptable terms for transferring such rights.

(iii) Any work in which the Contractor has granted the Government rights under paragraph (b)(3)(ii) of this clause shall be listed or described in a separate license agreement made part of this contract. The

license shall enumerate the rights granted the Government.

(c) *Contractor rights*. The Contractor retains all intellectual property rights (including ownership) not granted to the Government in paragraph (b) of this clause.

(d) *Restrictive markings and notices required*. (1) The Contractor shall ensure that any works to be delivered or otherwise provided to the Government with restrictions are marked to indicate that the works are licensed subject to access, use, modification, reproduction, release, performance, display, or disclosure restrictions. The form of the marking or notice must be consistent with best commercial practices, and must accurately describe the Government's rights.

(2) *Government license rights markings*. Works delivered or otherwise furnished to the Government with Government license rights shall be marked as follows:

GOVERNMENT LICENSE RIGHTS

Contract No. _____

Contractor Name _____

Contractor Address _____

Expiration Date _____

The Government's rights to access, use, modify, reproduce, release, perform, display, or disclose these works are restricted by paragraph (b)(3) of the Rights in Works—License clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of works or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(e) *Release from liability*.

(1) The Contractor agrees that the Government, and other persons to whom the Government may have released or disclosed a work delivered or otherwise furnished under this contract, shall have no liability for any release or disclosure of the work that is not marked to indicate that the work is licensed subject to access, use, modification, reproduction, release, performance, display, or disclosure restrictions.

(2) In the event that an authorized recipient of a work delivered or otherwise provided to the Government under this contract engages in any unauthorized activities with respect to the work, the Contractor agrees to—

(i) Release the Government from liability for any release or disclosure of the work made in accordance with the Government's license rights granted pursuant to paragraph (b) of this clause; and

(ii) Seek relief solely from the party who has improperly accessed, used, modified, reproduced, released, performed, displayed, or disclosed the work marked with restrictive legends.

(f) *Indemnification*.

(1) The Contractor shall indemnify and save and hold harmless the Government, and its officers, agents and employees acting for the Government, against any liability, including costs and expenses,

(i) For violation of proprietary rights, copyrights, or rights of privacy or publicity, arising out of the creation, delivery, access, use, modification, reproduction, release,

performance, display, or disclosure of any works first produced, created or generated under this contract, or

(ii) Based upon any libelous or other unlawful matter contained in such works.

(2) The requirement for indemnification may be modified by mutual agreement. Any rights so negotiated shall be identified in a separate agreement made part of this contract.

(g) *Applicability to subcontractors or suppliers*. Whenever any works will be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties as follows:

(1) References to the Government are not changed.

(2) The subcontractor or supplier has all rights and obligations of the Contractor in the clause.

(End of clause)

30. Section 252.227–7022 is revised to read as follows:

252.227–7022 Government rights in works (unlimited).

As prescribed at 227.7205–2(a), use the following clause:

GOVERNMENT RIGHTS IN WORKS (UNLIMITED) (DATE)

The Government shall have unlimited rights, in all drawings, designs, specifications, notes, and other works developed in the performance of this contract, including the right to use same on any other Government design or construction without additional compensation to the Contractor. The Contractor hereby grants to the Government a paid-up license throughout the world to all such works to which he may assert or establish any claim under copyright laws. The Contractor for a period of three (3) years after completion of the project, agrees to furnish the original or copies of all such works on the request of the Contracting Officer.

(End of clause)

252.227–7023 [Removed and reserved]

31. Section 252.227–7023 is removed and reserved.

32. Section 252.227–7024 is amended by revising the introductory text of the clause to read as follows:

252.227–7024 Notice and approval of restricted designs.

As prescribed at 227.7205–2(b), use the following clause:

* * * * *

33. Section 252.227–7025 is revised to read as follows:

252.227–7025 Government-furnished information marked with restrictive legends.

As prescribed in 227.7107–4, use the following clause:

GOVERNMENT-FURNISHED INFORMATION MARKED WITH RESTRICTIVE LEGENDS (DATE)

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

(1) *Commercial computer software* means computer software that is a commercial item.

(2) *Commercial technical data* means technical data that is or pertains to a commercial item.

(3) *Computer database* or *database* means a collection of recorded information in a form capable of, and for the purpose of, being stored in, or processed by a computer. The term does not include computer software.

(4) *Computer program* means a set of instructions, rules, routines, or statements, regardless of the form or method of recording, that is capable of causing a computer to perform a specific operation or series of operations. Examples include firmware, object code, and any form of executable code.

(5) *Computer software* means computer programs; and source code, source code listings, and similar human-readable, recorded information that can be compiled to generate a computer program. The term does not include computer database or computer software documentation.

(6) *Computer software documentation* means technical data relating to computer software.

(i) The term includes—

(A) Computer software design documentation, such as design details, algorithms, processes, flow charts, formulas, and related information that describe the design, organization, or structure of computer software; and

(B) Computer software user's documentation, such as user's or owner's manuals, installation instructions, operating instructions, and similar information that explains the capabilities of the computer software or provides instructions for using or maintaining the computer software.

(ii) The term does not include computer software.

(7) *Contractor* includes the Contractor's subcontractors or suppliers, or potential subcontractors or suppliers, at any tier.

(8) *Government purpose* means any activity in which the United States Government is a party.

(i) The term includes competitive procurement and any agreements or contracts with, or sales or transfers to, international or multi-national defense organizations or foreign governments.

(ii) The term does not include the rights to access, use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or to authorize others to do so.

(9) *Government purpose rights* means the rights to—

(i) Access, use, modify, reproduce, release, perform, display, or disclose technical data or computer software within the Government without restriction; and

(ii) Release or disclose technical data or computer software outside the Government and authorize persons to whom release or disclosure has been made to access, use, modify, reproduce, release, perform, display,

or disclose that data for Government purposes. However, the Government shall not release or disclose the technical data or computer software outside the Government unless—

(A) Prior to release or disclosure (or in emergency situations, as soon as practicable thereafter), the intended recipient has executed the non-disclosure agreement at 227.7107–2 with its required attachments; or

(B) The recipient is a Government contractor receiving access to the technical data or computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachments required by that clause.

(10) *Limited rights* means the rights to access, 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 accessed or used by another party, unless—

(i) The reproduction, release, disclosure, access, or use is—

(A) Necessary for emergency repair and overhaul;

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

(C) A release or disclosure of computer software design documentation to, or access by, a contractor or subcontractor performing a service contract (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use such computer software documentation 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 or for emergency repair or overhaul of items or processes;

(ii) Prior to release or disclosure (or in emergency situations, as soon as practicable thereafter), the intended recipient—

(A) Has executed the use and non-disclosure agreements at 227.7107–2, with its required attachment(s); or

(B) Is a Government contractor receiving access to the technical data for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachment(s) required by that clause;

(iii) The recipient for emergency repair or overhaul is required to destroy the technical data and all copies in its possession promptly following completion of the emergency repair or overhaul, and to notify the Contractor that the data or computer software have been destroyed; and

(iv) The Contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, access, or use.

(11) *Noncommercial computer software* means computer software that does not qualify as commercial computer software.

(12) *Noncommercial technical data* means technical data that does not qualify as commercial technical data.

(13) *Owner-Licenser* means the person whose name appears in the restrictive legend or is otherwise identified as asserting restrictions on the access, use, modification, reproduction, release, performance, display, or disclosure of technical data or computer software.

(14) *Restricted rights* apply only to noncommercial computer software and mean the Government's rights to—

(i) Install and use computer software on one computer at a time. The computer software may not be time shared or accessed by more than one terminal or central processing unit unless otherwise permitted by this contract;

(ii) Transfer computer software within the Government without further permission of the Contractor so long as the transferred computer software remain subject to the provisions of this clause;

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

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

(A) Use the modified computer software only as provided in paragraphs (a)(18)(i) and (iii) of this clause; and

(B) Not release or disclose the modified computer software except as provided in paragraphs (a)(18)(ii), (v), and (vi) of this clause;

(v) 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 or for emergency repair or overhaul of items or processes, provided that—

(A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

(B) Such contractors or subcontractors—

(1) Have executed the use and non-disclosure agreement at DFARS 227.7107–2, with its required attachments; or

(2) Are Government contractors receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025 and the attachment(s) required by that clause;

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

(D) Such use is subject to the limitation in paragraph (a)(18)(i) of this clause; and

(vi) 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, provided that—

(A) The intended recipient—

(1) Has executed the use and non-disclosure agreement at DFARS 227.7107–2, with its required attachments; or

(2) Is a Government contractor receiving access to the computer software for performance of a Government contract that contains the clause at DFARS 252.227–7025, and the attachments required by that clause;

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

(C) The Government shall require a recipient of restricted rights computer software for emergency repair or overhaul to destroy any copies of the computer software in its possession promptly following completion of the emergency repair/overhaul and to notify the Contractor that the computer software has been destroyed.

(15) *SBIR data* means all—

(i) Technical data—

(A) Pertaining to items or processes developed under a Small Business Innovation Research (SBIR) award; or

(B) Created under a SBIR award that does not require the development of items or processes; and

(ii) Computer software developed under a SBIR award.

(16) *SBIR data rights* mean the Government's rights during the SBIR data protection period (specified at 252.227–7014(b)(5)(ii)) to access, use, modify, reproduce, release, perform, display, or disclose SBIR data as follows:

(i) Limited rights in SBIR data that is technical data; and

(ii) Restricted rights in SBIR data that is computer software.

(17) *Technical data* means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. Recorded information of a scientific or technical nature that is included in computer databases is also technical data.

(18) *Unlimited rights* means the rights to access, use, modify, reproduce, perform, display, release, or disclose technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Attachment*. An attachment to the contract will identify—

(1) The technical data and computer software that the Government intends to furnish to the Contractor with restrictions on access, use, modification, reproduction, release, performance, display, or disclosure; and

(2) The specific conditions under which the Contractor is authorized to access, use,

modify, reproduce, release, perform, display, or disclose the following:

(i) Technical data subject to limited rights;

(ii) Computer software subject to restricted rights;

(iii) SBIR data subject to SBIR data rights; and

(iv) Technical data or computer software subject to—

(A) Negotiated license rights; or

(B) Other license restrictions, including commercial license rights.

(c) *Government-furnished information provided with restrictions*. Technical data or computer software provided to the Contractor as Government-furnished information, under this contract are subject to restrictions on access, use, modification, reproduction, release, performance, display, or disclosure as follows:

(1) *Government-furnished information marked with Government purpose rights legends*. The Contractor shall access, use, modify, reproduce, release, perform, display, or disclose Government-furnished information marked with Government purpose rights legends for Government purposes only and shall not do so for any commercial purpose. The Contractor shall not, without the express written permission of the Owner-Licensor, release, perform, display, or disclose such Government-furnished information to, or allow access by, a person other than its subcontractors, suppliers, or prospective subcontractors or suppliers, who require the Government-furnished information to submit offers for, or perform, subcontracts or supplier obligations under this contract. The Contractor shall ensure compliance with paragraph (j) of this clause.

(2) *Government-furnished information (technical data) marked with limited rights legends or SBIR data rights legends*. The Contractor shall access, use, modify, reproduce, release, perform, or display Government-furnished information (technical data) marked with limited rights legends only in the performance of this contract, as specified in the Attachment to this contract.

(i) The Contractor shall not, unless expressly authorized in the Attachment to this contract or by express written permission of the Owner-Licensor, release or disclose such technical data to, or allow access by, any other person. The Contractor shall ensure compliance with paragraph (j) of this clause.

(ii) The Contractor shall promptly notify the Owner-Licensor of the execution of this contract and identify the Owner-Licensor's technical data or computer software that has been or will be provided to the Contractor, the date and place the Government-furnished information were or will be received, and the name and address of the Government office that has provided or will provide the Government-furnished information.

(3) *Government-furnished information (computer software) marked with restricted rights legends or SBIR data rights legends*. The Contractor shall access, use, modify, reproduce, release, perform, display, or disclose Government-furnished information (computer software) marked with restricted rights legends only in the performance of this

contract, as specified in the Attachment to this contract.

(i) The Contractor shall not, unless expressly authorized in the Attachment to this contract or by express written permission of the Owner-Licensor, release or disclose such Government-furnished information to, or allow access by, any person. The Contractor shall ensure compliance with paragraph (j) of this clause.

(ii) The Recipient shall promptly notify the software Owner-Licensor 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.

(4) *Government-furnished information marked with negotiated license rights legends*. The Contractor shall access, use, modify, reproduce, release, perform, or display Government-furnished information marked with negotiated license rights legends only as permitted in the negotiated license, which is specified in the Attachment to this contract. The Contractor shall not, unless expressly authorized in the Attachment or by express written permission of the Owner-Licensor, release or disclose such Government-furnished information to, or allow access by, any person. The Contractor shall ensure compliance with paragraph (j) of this clause.

(5) *Government-furnished information marked with other restrictive legends, or otherwise subject to restrictions*. The Contractor shall access, use, modify, reproduce, release, perform, display, or disclose Government-furnished information that are marked with other restrictive legends, or that are otherwise identified in the Attachment as subject to restrictions, only as specified in the Attachment to this contract. The Contractor shall ensure compliance with paragraph (j) of this clause.

(d) *Contractor procedures for safeguarding, use, and handling of Government-furnished information*. Contractor shall adopt operating procedures and physical security measures sufficient to protect the Government-furnished information from unauthorized access, use, modification, reproduction, release, performance, display, or further disclosure; including through compliance with the requirements of paragraph (j) of this clause.

(e) *Disclaimer of warranty*. Unless specifically stated elsewhere in this contract, the Government is providing the requested technical data and computer software to the recipient "as is" and free of all warranties and representations, including suitability for intended purpose.

(f) The Contractor may enter into any agreement directly with the Owner-Licensor with respect to the access, use, modification, reproduction, release, performance, display, or disclosure of these technical data or computer software.

(g) *Indemnification and creation of third party beneficiary rights*. The Contractor agrees—

(1) To indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorneys

fees, court costs, and expenses, arising out of, or in any way related to, the unauthorized access, use, modification, reproduction, release, performance, display, or disclosure of the Government-furnished information by the Contractor or any person to whom the Contractor has released or disclosed such data or software; and

(2) The Owner-Licenser, in addition to any other rights it may have, is a third party beneficiary of this clause and has the right of direct action against the Contractor, or any person to whom the Contractor has released or disclosed the Government-furnished information, for the unauthorized access, use, modification, reproduction, release, performance, display, or disclosure of Government-furnished information subject to restrictive legends.

(h) *Disposition of Government-furnished information.* Recipient agrees to destroy or return the original and all copies of the Government-furnished information released to the recipient within 30 days following the expiration of the use and non-disclosure agreement.

(i) *Survival of obligations.* The obligations imposed by this clause shall survive the expiration or termination of this contract.

(j) *Subcontractor flowdown and release or disclosure outside the Contractor's organization.* (1) The Contractor shall not release or disclose Government-furnished information to, or allow access by, any person outside the Contractor's organization unless the intended recipient is—

(i) Authorized to access or receive the Government-furnished information; and

(ii) Subject to appropriate prohibitions on unauthorized access, use, modification, reproduction, release, performance, display, or disclosure, in accordance with paragraph (j)(2) of this clause.

(2) The Contractor shall either—

(i) Use this same clause (including the restrictions contained in the Attachment specified at paragraph (b) of this clause) in the subcontract or other contractual instrument with an intended recipient who is a subcontractor or supplier, and require that subcontractor or supplier to do so, without alteration except to identify the parties, as follows:

(A) References to the Government are not changed; and

(B) The intended recipient (subcontractor or supplier) has all rights and obligations of the Contractor in the clause; or

(ii) Require the intended recipient to execute the standard use and nondisclosure agreement in accordance with DFARS 227.7107–2, which shall incorporate the restrictions contained in the Attachment specified at paragraph (b) of this clause.

(End of clause)

34. Section 252.227–7026 is revised to read as follows:

252.227–7026 Deferred delivery of technical data or computer software.

As prescribed at 227.7103–5(a), use the following clause:

DEFERRED DELIVERY OF TECHNICAL DATA OR COMPUTER SOFTWARE (DATE)

The Government shall have the right to require, at any time during the performance of this contract, within two (2) years after either acceptance of all items (other than technical data or computer software) to be delivered or otherwise provided under this contract or termination of this contract, whichever is later, delivery of any technical data or computer software item identified in this contract as “deferred delivery” data or computer software. The obligation to furnish such technical data required to be prepared by a subcontractor and pertaining to an item obtained from him shall expire two (2) years after the date Contractor accepts the last delivery of that item from that subcontractor for use in performing this contract.

(End of clause)

35. Section 252.227–7027 is revised to read as follows:

252.227–7027 Deferred ordering of technical data or computer software.

As prescribed at 227.7103–5(b), use the following clause:

DEFERRED ORDERING OF TECHNICAL DATA OR COMPUTER SOFTWARE (DATE)

(a) In addition to technical data or computer software specified elsewhere in this contract to be delivered, the Government may order any technical data or computer software created or developed in the performance of this contract or any subcontract hereunder.

(b) The Government's deferred ordering rights under paragraph (a) of this clause shall expire three (3) years after acceptance of all items (other than technical data or computer software) to be delivered or otherwise provided under this contract, or the termination of this contract, whichever is later. However, the obligation to deliver technical data or computer software created or developed by a subcontractor shall expire three (3) years after the date the Contractor accepts the last delivery of that computer software, or the item to which the technical data pertains, from that subcontractor.

(c) When the technical data or computer software is ordered, the Contractor shall be compensated for converting the technical data or computer software into the prescribed form for reproduction and delivery.

(d) The Government's rights to access, use, modify, reproduce, release, perform, display, or disclose the delivered technical data or computer software shall be determined pursuant to the appropriate data rights clause:

(1) DFARS 252.227–7013, Rights in Technical Data and Computer Software—Noncommercial;

(2) DFARS 252.227–7014, Rights in Technical Data and Computer Software—Small Business Innovation Research (SBIR); or

(3) DFARS 252.227–7015, Rights in Technical Data and Computer Software—Commercial.

(End of clause)

252.227–7028 [Removed and reserved]

36. Section 252.227–7028 is removed and reserved.

37. Section 252.227–7030 is revised to read as follows:

252.227–7030 Technical data and computer software—withholding of payment.

As prescribed at 227.7106–5(a), use the following clause:

TECHNICAL DATA AND COMPUTER SOFTWARE—WITHHOLDING OF PAYMENT (DATE)

(a) If technical data or computer software specified to be delivered under this contract are not delivered within the time specified by this contract or are deficient upon delivery (including having restrictive markings not identified in the list described in the clause at 252.227–7013(f) or 252.227–7014(f) of this contract), the Contracting Officer may, until such data or software is accepted by the Government, withhold payment to the Contractor of ten percent (10%) of the total contract price or amount unless a lesser withholding is specified in the contract. Payments shall not be withheld or any other action taken pursuant to this paragraph when the Contractor's failure to make timely delivery or to deliver such data or software without deficiencies arises out of causes beyond the control and without the fault or negligence of the Contractor.

(b) The withholding of any amount or subsequent payment to the Contractor shall not be construed as a waiver of any rights accruing to the Government under this contract.

(End of clause)

252.227–7032 [Removed and reserved]

38. Section 252.227–7032 is removed and reserved.

39. Section 252.227–7033 is revised to read as follows:

252.227–7033 Rights in shop drawings.

As prescribed at 227.7205–2(c), use the following clause:

RIGHTS IN SHOP DRAWINGS (DATE)

(a) Shop drawings for construction means drawings, submitted to the Government by the Construction Contractor, subcontractor or any lower-tier subcontractor pursuant to a construction contract, showing in detail (i) the proposed fabrication and assembly of structural elements and (ii) the installation (i.e., form, fit, and attachment details) of materials or equipment. The Government may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

(b) The Contractor shall include this clause, including this paragraph (b), in all subcontracts hereunder.

(End of clause)

252.227–7034 [Removed]

40. Reserved section 252.227–7034 is removed.

41. Section 252.227–7037 is revised to read as follows:

252.227–7037 Validation of restrictive markings on technical data and computer software.

As prescribed in 227.7106–5(b), use the following clause:

VALIDATION OF RESTRICTIVE MARKINGS ON TECHNICAL DATA AND COMPUTER SOFTWARE (DATE)*(a) Definitions.*

(1) As used in this clause, unless otherwise specifically indicated, the term *Contractor* means the Contractor and its subcontractors or suppliers, or potential subcontractors or suppliers, at any tier.

(2) The other terms used in this clause are defined in the Rights in Technical Data and Computer Software—Noncommercial clause of this contract.

(b) Contracts for commercial items—presumption of development at private expense. Under a contract for a commercial item (including commercial computer software), the Department of Defense shall presume that a Contractor's asserted use or release restrictions are justified on the basis that the commercial item was developed exclusively at private expense. The Department shall not challenge such assertions unless information the Department provides demonstrates that the commercial item was not developed exclusively at private expense.

(c) Justification. Except under contracts for commercial items (including commercial computer software), the Contractor shall—

(1) Maintain records sufficient to justify the validity of any markings that assert restrictions on the Government's and others' right to access, use, modify, reproduce, perform, display, release, or disclose technical data or computer software delivered or required to be delivered under the contract or subcontract; and

(2) Be prepared to furnish to the Contracting Officer a written justification for such restrictive markings in response to a challenge under paragraph (d) of this clause or in response to a request for information under paragraph (e) of this clause.

(d) Notwithstanding any provision of this contract concerning inspection and acceptance, the Contracting Officer may challenge the Contractor's assertion of restrictions if the Contracting Officer determines that—

(1) Reasonable grounds exist to question the current validity of the marking; and

(2) Continued adherence to the marking would make impracticable subsequent competitive acquisition of the computer software or item or process.

(e) Challenge process.

(1) For other than commercial items, the Contracting Officer may request the Contractor to provide a written explanation for any asserted restriction sufficient to enable the Contracting Officer to evaluate the Contractor's asserted restrictions and

determine whether a challenge is warranted. Such written explanation shall be based upon the records required by this clause or other information reasonably available to the Contractor.

(2) The Contractor's failure to provide a timely response to a Contracting Officer's request for information or failure to provide sufficient information to enable the Contracting Officer to evaluate an asserted restriction shall constitute reasonable grounds for questioning the validity of an asserted restriction.

(3) The Contracting Officer will review the explanation submitted and—

(i) Request the Contractor to furnish additional information within the time required or such longer period as may be mutually agreed upon;

(ii) Determine that the asserted marking is valid and so notify the Contractor in writing; or

(iii) Challenge that the asserted marking is not valid.

(4) When the Contracting Officer challenges that the asserted marking is not valid, and the Contractor notifies the Contracting Officer that it agrees with that determination, the Contracting Officer may—

(i) Strike or correct the unjustified marking at the Contractor's expense; or

(ii) Return the computer software or technical data to the Contractor for correction at the Contractor's expense. If the Contractor fails to correct or strike the unjustified restriction and return the corrected computer software or technical data to the Contracting Officer within sixty (60) days following receipt of the computer software or technical data, the Contracting Officer may correct or strike the markings at the Contractor's expense.

(5) When the Contracting Officer challenges that the asserted marking is not valid, and the Contractor does not notify the Contracting Officer that it agrees with this determination, the Contracting Officer will send a written challenge notice to the Contractor asserting the restrictive markings. Such challenge shall—

(i) State the specific grounds for challenging the asserted restriction;

(ii) Require a response within sixty (60) days justifying and providing sufficient evidence as to the current validity of the asserted restriction;

(iii) State that it is a justification of the asserted restriction if—

(A) A DoD Contracting Officer's final decision issued pursuant to paragraph (e)(9) of this clause, or action of a court of competent jurisdiction or Board of Contract Appeals, has sustained the validity of a restrictive marking identical to the asserted restriction;

(B) Such decision or action occurred within the three-year period preceding the challenge; and

(C) The validated restriction was asserted by the same Contractor (or any licensee of such Contractor) to which such notice is being provided; and

(iv) State that failure to respond to the challenge notice may result in issuance of a final decision pursuant to paragraph (e)(8) of this clause.

(6) In response to the written challenge notice, the Contractor shall—

(i) Submit a written request showing the need for additional time to respond to the challenge notice. In such cases, the Contracting Officer will grant sufficient additional time to permit the response; or

(ii) Submit a written response that seeks to justify an asserted restriction on technical data and computer software. This written response shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601, *et seq.*), and shall be certified in the form prescribed at 33.207 of the Federal Acquisition Regulation, regardless of dollar amount.

(7) A Contractor receiving challenges to the same asserted restrictions from more than one Contracting Officer will notify each Contracting Officer of the other challenges and identify which Contracting Officer initiated the first in time unanswered challenge. The Contracting Officer initiating the first in time unanswered challenge after consultation with the Contractor and the other Contracting Officers, shall formulate and distribute a schedule that provides the Contractor a reasonable opportunity for responding to each challenge.

(8) If the Contractor fails to respond to the Contracting Officer's challenge notice, the Contracting Officer will issue a final decision pertaining to the validity of the asserted restriction. This final decision shall be issued as soon as possible after the expiration of the time period of paragraph (e)(5)(ii) of this clause. Following issuance of the final decision, the Contracting Officer will comply with the procedures in paragraph (f) of this clause.

(9) After receipt of the Contractor's written response that seeks to justify the asserted restriction, the Contracting Officer will—

(i) Request additional supporting documentation if, in the Contracting Officer's opinion, the Contractor's explanation does not provide sufficient evidence to justify the validity of the asserted restrictions. The Contractor shall promptly respond to the Contracting Officer's request for additional supporting documentation; or

(ii) Issue a final decision validating the asserted restriction. The decision shall state that the Government will continue to be bound by the restrictive marking; or

(iii) Issue a final decision denying the validity of the asserted restriction and follow the procedures in paragraph (f) of this clause.

(f) Contractor appeal.

(1) The Government agrees that, notwithstanding a Contracting Officer's final decision denying the validity of an asserted restriction and except as provided in paragraph (f)(3) of this clause, it will honor the asserted restriction—

(i) For a period of ninety (90) days from the date of the Contracting Officer's final decision to allow the Contractor to appeal to the appropriate Board of Contract Appeals or to file suit in an appropriate court;

(ii) For a period of one year from the date of the Contracting Officer's final decision if, within the first ninety (90) days following the Contracting Officer's final decision, the Contractor has provided notice to the Contracting Officer of an intent to file suit in an appropriate court; or

(iii) Until final disposition by the appropriate Board of Contract Appeals or court of competent jurisdiction, if the Contractor has—

(A) Appealed to the Board of Contract Appeals or filed suit in an appropriate court within ninety (90) days; or

(B) Submitted, within ninety (90) days, a notice of intent to file suit in an appropriate court and filed suit within one year.

(2) The Contractor agrees that the Government may strike, correct, or ignore the restrictive markings if the Contractor fails to—

(i) Appeal to a Board of Contract Appeals within ninety (90) days from the date of the Contracting Officer's final decision;

(ii) File suit in an appropriate court within ninety (90) days from such date; or

(iii) File suit within one year after the date of the Contracting Officer's final decision if the Contractor had provided notice of intent to file suit within ninety (90) days following the date of the Contracting Officer's final decision.

(3) *Exception for urgent and compelling circumstances.*

(i) The agency head, on a nondelegable basis, may determine that urgent or compelling circumstances do not permit awaiting the filing of suit in an appropriate court, or the rendering of a decision by a court of competent jurisdiction or Board of Contract Appeals. In that event, the agency head shall notify the Contractor of the urgent or compelling circumstances. The agency head's determination may be made at any time after the date of the Contracting Officer's final decision and shall not affect the Contractor's right to damages against the United States, or other relief provided by law, if its asserted restrictions are ultimately upheld.

(ii) Notwithstanding paragraph (f)(1) of this clause, the Contractor agrees that the agency may access, use, modify, reproduce, release, perform, display, or disclose computer software or technical data as necessary to address the urgent and compelling circumstances.

(iii) The Government agrees not to release or disclose Contractor's restrictively marked technical data or computer software unless, prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at 227.7107-2 of the Defense Federal Acquisition Regulation Supplement (DFARS), or is a Government contractor receiving access to the technical data or computer software for performance of a Government contract that contains the clause at DFARS 252.227-7025, Government-Furnished Information Marked with Restrictive Legends.

(g) *Final disposition of appeal or suit.* If the Contractor appeals or files suit and if, upon final disposition of the appeal or suit, the Contracting Officer's decision is—

(1) Sustained—

(i) Any restrictive marking on the technical data or computer software shall be cancelled, corrected or ignored; and

(ii) If the restrictive markings are found not to be substantially justified, the Contractor shall be liable to the Government for payment of the cost to the Government of

reviewing the restrictive markings and the fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Government in challenging the marking, unless special circumstances would make such payment unjust; or

(2) Not sustained—

(i) The Government shall continue to be bound by the restrictive markings; and

(ii) The Government shall be liable to the Contractor for payment of fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Contractor in defending the marking, if the challenge by the Government is found not to have been made in good faith.

(h) *Duration of right to challenge.* The Government has the right to challenge the validity of any Contractor asserted restrictions on technical data or computer software delivered or to be delivered under a contract or otherwise provided to the Government in the performance of this contract. The Contracting Officer may exercise this right during the period within three (3) years of final payment on a contract or within three (3) years of delivery of the technical data or computer software to the Government, whichever is later. The Government may, however, challenge a restriction on the release, disclosure or use of technical data and computer software at any time if such technical data or computer software—

(1) Is publicly available;

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

(3) Has been otherwise made available without restriction.

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

(j) *Privacy of contract.* The Contractor agrees that the Contracting Officer may transact matters under this clause directly with subcontractors or suppliers at any tier that assert restrictive markings. However, neither this clause, nor any action taken by the Government under this clause, creates or implies privacy of contract between the Government and subcontractors or suppliers for matters not covered by this clause.

(k) *Flowdown.* The Contractor shall insert this clause, including this paragraph (k), in contractual instruments with its subcontractors requiring the delivery of technical data or computer software.

(End of clause)

42. Section 252.227-70YY is added to read as follows:

252.227-70YY Government-furnished works marked with restrictive legends.

As prescribed in 227.7204-2, use the following clause:

GOVERNMENT-FURNISHED WORKS MARKED WITH RESTRICTIVE LEGENDS (DATE)

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

(1) Contractor includes the Contractor's subcontractors or suppliers, or potential subcontractors or suppliers, at any tier.

(2) *Owner-Licenser* means the person whose name appears in the restrictive legend or is otherwise identified as asserting restrictions on the access, use, modification, reproduction, release, performance, display, or disclosure of works.

(3) Other terms are defined in the clause at DFARS 252.227-7021, Rights in Works—License.

(b) *Attachment.* An attachment to the contract will identify—

(1) The works that the Government intends to furnish to the Contractor with restrictions on access, use, modification, reproduction, release, performance, display, or disclosure; and

(2) The specific conditions under which the Contractor is authorized to access, use, modify, reproduce, release, perform, display, or disclose the works.

(c) *Government-furnished works provided with restrictions.* If the Government furnishes Government-furnished works, such works are subject to restrictions on access, use, modification, reproduction, release, performance, display, or disclosure as follows:

(1) *Government-furnished works marked with Government purpose rights legends.* The Contractor shall access, use, modify, reproduce, release, perform, display, or disclose Government-furnished works marked with Government license rights legends for Government purposes only and shall not do so for any commercial purpose. The Contractor shall not, without the express written permission of the Owner-Licenser, release or disclose such Government-furnished works to, or allow access by, a person other than its subcontractors, suppliers, or prospective subcontractors or suppliers, who require the Government-furnished works to submit offers for, or perform, subcontracts or supplier obligations under this contract. The Contractor shall ensure compliance with paragraph (j) of this clause.

(2) *Government-furnished works marked with other restrictive legends, or otherwise subject to restrictions.* The Contractor shall access, use, modify, reproduce, release, perform, display, or disclose Government-furnished works that are marked with other restrictive legends, or that are otherwise identified in the attachment as subject to restrictions, only as specified in the attachment to this contract. The Contractor shall ensure compliance with paragraph (j) of this clause.

(d) *Contractor procedures for safeguarding, use, and handling of Government-furnished works.* Contractor shall adopt operating procedures and physical security measures sufficient to protect the Government-furnished works from unauthorized access, use, modification, reproduction, release, performance, display, or further disclosure.

(e) *Disclaimer of warranty.* Unless specifically stated elsewhere in this contract,

the Government is providing the identified works to the recipient "as is" and free of all warranties and representations, including suitability for intended purpose.

(f) The Contractor may enter into any agreement directly with the Owner-Licenser with respect to the access, use, modification, reproduction, release, performance, display, or disclosure of these works.

(g) *Indemnification and creation of third party beneficiary rights.* The Contractor agrees—

(1) To indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorneys fees, court costs, and expenses, arising out of, or in any way related to, the unauthorized access, use, modification, reproduction, release, performance, display, or disclosure of works received from the Government with restrictive legends by the Contractor or any person to whom the Contractor has released or disclosed such works; and

(2) That the party whose name appears on the restrictive legend, in addition to any other rights it may have, is a third party

beneficiary who has the right of direct action against the Contractor, or any person to whom the Contractor has released or disclosed the Government-furnished works, for the unauthorized access, use, modification, reproduction, release, performance, display, or disclosure of Government-furnished works subject to restrictive legends.

(h) *Disposition of Government-furnished works.* Recipient agrees to destroy or return of all copies of the works released to the recipient within 30 days following the expiration of the use and non-disclosure agreement.

(i) *Survival of obligations.* The obligations imposed by this clause shall survive the expiration or termination of this contract.

(j) *Applicability to subcontractors and suppliers and release or disclosure outside the Contractor's organization.*

(1) The Contractor shall not release or disclose Government-furnished works to, or allow access by, any person outside the Contractor's organization unless the intended recipient is—

(i) Authorized to access or receive the Government-furnished works; and

(ii) Subject to appropriate prohibitions on unauthorized access, use, modification, reproduction, release, performance, display, or disclosure, in accordance with paragraph (2) of this clause.

(2) The Contractor shall use this same clause (including the restrictions contained in the Attachment specified at paragraph (b) of this clause) in the subcontract or other contractual instrument with an intended recipient who is a subcontractor or supplier, and require that subcontractor or supplier to do so, without alteration except to identify the parties, as follows:

(i) References to the Government are not changed; and

(ii) The intended recipient (subcontractor or supplier) has all rights and obligations of the Contractor in the clause.

(End of clause)

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