

upgraded components and would not contemplate maintaining and storing any special tooling for components that are no longer a part of the major system end item.

#### F. Repricing Ongoing Programs

*Comment:* A respondent stated its belief that “the final rule must allow contractors to reprice ongoing programs should the plans for preserving tooling for major defense acquisition programs add additional requirements on to existing programs.”

*Response:* The comment is outside the scope of this case. Further, whenever new or additional requirements are added to a contract, it can only be accomplished via a bilateral modification and with equitable consideration. This contract rule is not unique to MDAPs or tooling-preservation requirements. Therefore, this case need not address such a circumstance specifically with regard to the preservation of tooling. To do so would add inappropriate redundancy to the DFARS.

### III. Executive Order 12866

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

### IV. Regulatory Flexibility Act

DoD certifies that this final rule will not 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 addresses internal DoD procedural matters. Specifically, this implementation of section 815 of the National Defense Authorization Act for Fiscal Year 2009, “Preservation of Tooling for Major Defense Acquisition Programs,” requires that—

1. The DoD Milestone Decision Authority (MDA) approve a plan for the preservation and storage of unique tooling associated with the production of hardware for a major defense acquisition program through the end of the service life of the end item; and

2. The MDA periodically review the plan to ensure that it remains adequate and in the best interest of DoD.

### V. Paperwork Reduction Act

The rule does not impose information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

### List of Subjects in 48 CFR Part 207

Government procurement.

**Ynette R. Shelkin,**

*Editor, Defense Acquisition Regulations System.*

Therefore, 48 CFR part 207 is amended as follows:

#### PART 207—ACQUISITION PLANNING

■ 1. The authority citation for 48 CFR part 207 continues to read as follows:

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

■ 2. Add paragraph (S-73) to section 207.106 to read as follows:

#### 207.106 Additional requirements for major systems.

\* \* \* \* \*

(S-73) In accordance with section 815 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) and DoD policy requirements, acquisition plans for major weapons systems shall include a plan for the preservation and storage of special tooling associated with the production of hardware for major defense acquisition programs through the end of the service life of the related weapons system. The plan shall include the identification of any contract clauses, facilities, and funding required for the preservation and storage of such tooling. The Undersecretary of Defense for Acquisition, Technology, and Logistics (USD (AT&L)) may waive this requirement if USD (AT&L) determines that it is in the best interest of DoD.

[FR Doc. 2011-4529 Filed 3-1-11; 8:45 am]

**BILLING CODE 5001-08-P**

### DEPARTMENT OF DEFENSE

#### Defense Acquisition Regulations System

#### 48 CFR Parts 209, 227, 252

#### Defense Federal Acquisition Regulation Supplement; Government Support Contractor Access to Technical Data (DFARS Case 2009-D031)

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

**ACTION:** Interim rule.

**SUMMARY:** DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 821 of the National Defense Authorization Act for Fiscal Year 2010. Section 821

provides authority for certain types of Government support contractors to have access to proprietary technical data belonging to prime contractors and other third parties, provided that the technical data owner may require the support contractor to execute a non-disclosure agreement having certain restrictions and remedies.

Additionally, this interim rule amends the DFARS to provide needed editorial changes.

**DATES:** *Effective date:* March 2, 2011.

*Comment date:* Comments on the interim rule should be submitted to the address shown below on or before May 2, 2011, to be considered in the formation of the final rule.

**ADDRESSES:** You may submit comments, identified by DFARS Case 2009-D031, using any of the following methods:

○ *Regulations.gov:* <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting “DFARS Case 2009-D031” under the heading “Enter keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “DFARS Case 2009-D031.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “DFARS Case 2009-D031” on your attached document.

○ *E-mail:* [dfars@osd.mil](mailto:dfars@osd.mil). Include DFARS Case 2009-D031 in the subject line of the message.

○ *Fax:* 703-602-0350.

○ *Mail:* Defense Acquisition Regulations System, *Attn:* Ms. Amy G. 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).

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

#### SUPPLEMENTARY INFORMATION:

#### I. Background

Section 821 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84) was enacted October 28, 2009. Section 821 provides authority for certain types of Government support contractors to have access to proprietary technical data belonging to prime contractors and other third parties, provided that the technical data owner

may require the support contractor to execute a non-disclosure agreement having certain restrictions and remedies.

The DFARS scheme for acquiring rights in technical data is based on 10 U.S.C. 2320 and 2321. Section 2320 establishes the basic allocation of rights in technical data, and provides, among other things, that a private party is entitled to restrict the Government's rights to release or disclose privately-developed technical data outside the Government. This restriction is implemented in the DFARS as the "limited rights" license, which essentially limits the Government's use of such data only for in-house use, which does not include release to Government support contractors.

Historically, the statutorily based scheme has included only two categorical exceptions to the basic non-disclosure requirements for such privately-developed data:

- A "type" exception, in which the Government is granted unlimited rights in certain types of "top-level" data that are considered not to provide a competitive advantage by being treated as proprietary (e.g., form, fit, and function data; data necessary for operation, maintenance, installation, or training; publicly available data) (2320(a)(2)(C)); and
- A "special needs" exception for certain important Government activities that are considered critical to Government operations (e.g., emergency repair and overhaul; evaluation by a foreign government), and are allowed only when the recipient of the data is made subject to strict non-disclosure restrictions on any further release of the data. (2320(a)(2)(D))

Section 821 amends 10 U.S.C. 2320 to add a new third statutory exception to the prohibition on release of privately developed data outside the Government that provides—"notwithstanding any limitation upon the license rights conveyed under subsection (a), allowing a covered Government support contractor access to, and use of, any technical data delivered under a contract for the sole purpose of furnishing independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of the program or effort to which such technical data relates."

The statute also provides a definition of "covered Government support contractor" to mean—

"A contractor under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the

Government's management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), provided that the contractor—

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

(2) Executes a contract with the Government agreeing to and acknowledging—

(A) That proprietary or nonpublic technical data furnished will be accessed and used only for the purposes stated in that contract;

(B) That the covered Government support contractor will enter into a non-disclosure agreement with the contractor to whom the rights to the technical data belong;

(C) That the covered Government support contractor will take all reasonable steps to protect the proprietary and nonpublic nature of the technical data furnished to the covered Government support contractor during the program or effort for the period of time in which the Government is restricted from disclosing the technical data outside of the Government;

(D) That a breach of that contract by the covered Government support contractor with regard to a third party's ownership or rights in such technical data may subject the covered Government support contractor—

(i) To criminal, civil, administrative, and contractual actions in law and equity for penalties, damages, and other appropriate remedies by the United States; and

(ii) To civil actions for damages and other appropriate remedies by the contractor or subcontractor whose technical data is affected by the breach; and

(E) That such technical data provided to the covered Government support contractor under the authority of this section shall not be used by the covered Government support contractor to compete against the third party for Government or non-Government contracts.

## II. Discussion and Analysis

Due to the significant level of detail in section 821, the recognition that the subject matter involves important privately-held intellectual property rights, and that the apparent congressional intent is that the private parties will enter into a direct legal relationship (e.g., a non-disclosure agreement) regarding protections for same, DoD decided to utilize the original statutory language and to preserve maximum flexibility for the private parties to reach mutual agreement—without unnecessary interference from the Government.

Section 821 can be characterized as establishing two new requirements regarding DoD's acquisition and exercise of rights in proprietary technical data. The statute—

- Provides an exception to the statutorily authorized restrictions on the Government's rights to release privately-developed technical data outside the Government. The Government is now authorized to make limited releases of otherwise-proprietary data to certain types of support contractors that are supporting directly the Government's management and oversight of programs—subject to certain protections.

- Mandates specific restrictions for the Government support contractors that will receive the proprietary technical data, to ensure that this use does not threaten the data owner's competitive advantage due to the proprietary information, and to provide the data owner with a more direct legal remedy against the support contractor for any breach of those use restrictions.

### A. Scope and Applicability

Section 821 amended 10 U.S.C. 2320, which applies to technical data, but not to computer software (which is expressly excluded from the definition of technical data). There is no parallel statute that establishes regulatory requirements for DoD acquisition of computer software. However, it is longstanding Federal and DoD policy and practice to apply to computer software the same or analogous requirements that are used for technical data, whenever appropriate. Many issues are common to both technical data and computer software, and in such cases, conformity of coverage between technical data and computer software is desirable.

For example, although the DFARS provides separate coverage for technical data and computer software (subparts 227.71 and 227.72, respectively), the policies and procedures are identical or analogous in most respects. Regarding the allocation of rights in privately-developed technologies, and the release restrictions and procedures used to protect such proprietary information against unauthorized release to Government support contractors (or any third party, for that matter), the DFARS adapts the detailed technical data procedures for application to noncommercial computer software (see 227.7203), but does not apply those same detailed requirements to commercial computer software (see 227.7202). Therefore, analogous revisions are made in this interim rule to the DFARS coverage for noncommercial software.

### B. Revised Licensing and New Requirements for Owners of Proprietary Information

Section 821 creates a new exception to the statutory authorization for a private party to restrict the Government's ability to release or disclose privately-developed technical data outside the Government. See 10 U.S.C. 2320(c)(2). The Government is now authorized to release privately-developed technical data to any support contractors that meet the criteria for a "covered Government support contractor," provided that the covered Government support contractor's access and use of the data is for the "sole purpose of furnishing independent and impartial advice or technical assistance directly to the Government in support of the Government's management and oversight of the program or effort to which such technical data relates." 10 U.S.C. 2320(c)(2).

This interim rule incorporates the new exception into the definition of "limited rights" and adds a new definition for "covered Government support contractor" into the following primary rights-allocation clauses: 252.227-7013 (noncommercial technical data), 252.227-7014 (noncommercial software and software documentation), 252.227-7015 (commercial technical data), and 252.227-7018 (Small Business Innovation Research (SBIR)).

- The exception is inserted into the "limited rights" definition by adding "covered Government support contractors" to the existing lists of statutory exceptions to the prohibition against releasing limited rights data outside the Government. See 252.227-7013(a)(14) (formerly (13)); 252.227-7015(b)(2)(ii), which does not use the term "limited rights" but implements the same underlying statutory requirements; and 252.227-7018(a)(15) (formerly (14)). The revisions to 252.227-7013 and -7018 also required some minor restructuring of the listings of statutory exceptions.

- The new definition for "covered Government support contractor" is inserted into the cited clauses as new 252.227-7013(a)(5), 252.227-7014(a)(6), 252.227-7015(a)(2), and 252.227-7018(a)(6). In each case, the insertion of a new definition requires the renumbering of all subsequent definitions in the affected clauses. The term is defined using, nearly verbatim, the new statutory definition at 2320(f)—with one key modification: Rather than reproducing all of the required non-disclosure restrictions in the definition, the definition cross-references the

implementation of those same restrictions at revised 252.227-7025.

In addition, the clauses are revised to incorporate specific additional requirements that are important to support and enable the implementation of the new exception. In particular, the new statutory exception establishes the basic requirement that the covered Government support contractor must execute a contract with the Government, in which the covered Government support contractor agrees and acknowledges that it "will" enter into a non-disclosure agreement directly with the owner of the proprietary data, and thus the clause must also implement this direct non-disclosure agreement requirement within the rights and obligations of the owner of the data. Since this direct non-disclosure agreement requirement is created with the intent of protecting the proprietary rights of the data owner, DoD has implemented this by providing the data owner the *sole discretion* to require such a direct non-disclosure agreement or waive the non-disclosure agreement requirement in writing in each individual case. The protection offered by the new direct non-disclosure agreement requirement should not be implemented in a manner that it becomes an unwanted and unnecessary burden on the party it is intended to protect. Thus, the data owner may determine that executing a direct non-disclosure agreement with every covered Government support contractor, in every individual case, is unnecessary; provided such determinations are made in view of the multi-layered protection scheme to ensure that the data owner's rights are protected regardless of whether the parties execute a direct non-disclosure agreement, including the data owner already having a direct legal remedy against the covered Government support contractor for any unauthorized use or release pursuant to 252.227-7025(c)(2).

Accordingly, the data owner is notified of its rights and obligations regarding covered Government support contractors in proposed new coverage at 252.227-7013(b)(3)(iv), 252.227-7015(b)(3), and 252.227-7018(b)(8). In each case, the new coverage acknowledges the newly authorized release to covered Government support contractors; confirms that the data owner will be notified of such release; provides the data owner the discretion to require the covered Government support contractor to execute a direct non-disclosure agreement; and acknowledges that the data owner and covered Government support contractor may include additional terms and

conditions in such a non-disclosure agreement by mutual agreement, as long as the basic statutory requirements for the non-disclosure agreement are also addressed (these basic statutory requirements are provided at 252.227-7025).

In addition, these same requirements are also appropriate for adaptation to the corresponding DFARS coverage for noncommercial technical data. Thus, equivalent revisions are incorporated in 252.227-7014, including a new definition of "covered Government support contractor" at paragraph (a)(6), a revised definition of "restricted rights" (the computer software equivalent of limited rights for technical data) at (a)(15) (formerly (14)), and the supporting rights and procedures at new (b)(3)(iii). Because there is no current DFARS coverage for this subject matter in the context of commercial computer software, no revisions are made to 227.7202.

### C. New Requirements for Support Contractors Accessing Government-Furnished Proprietary Information

As discussed previously, section 821 allows covered Government support contractors to have access to third party proprietary technical data only when the covered Government support contractor is subject to specific prohibitions and requirements to protect that data. Although the statute incorporates these detailed protections within the definition of covered Government support contractor, DoD has implemented these protections within the existing DFARS coverage that implements use and non-disclosure requirements for recipients of Government-furnished information that is proprietary data or software, and has cross-referenced that implementation in the definition of covered Government support contractor.

This requires adaptation of the current DFARS coverage governing the Government's release to privately-owned proprietary data and software, found primarily at 227.7103-7, and in the clause at 252.227-7025. There are two key revisions to 252.227-7025:

- Paragraph (b)(1), regarding Government-furnished information marked with limited rights or restricted rights legends, is amended by adding new subparagraph (ii), which implements, nearly verbatim, the statutory requirements from 2320(f)(2), and also recognizes that the third party owner of the proprietary data or software has the sole discretion regarding whether a direct non-disclosure agreement will be required, and that the parties to the non-

disclosure agreement may incorporate additional terms and conditions by mutual agreement, provided that the basic statutory requirements are addressed.

- New paragraph (b)(4) is added to cover the Government-furnished information marked with commercial restrictive legends, as necessary to implement the new statutory requirements, rights, and obligations related to technical data pertaining to commercial items, and to support the previously discussed revisions to 252.227-7015. This new language parallels the revisions discussed above for noncommercial data and software at new (b)(1)(ii).

#### D. Miscellaneous

The revisions also require the covered Government support contractor to provide to the contracting officer, upon request, a copy of—

- Any non-disclosure agreement executed by the covered Government support contractor and the proprietary data owner; or

- Waiver of the non-disclosure agreement requirement by the proprietary data owner.

See 252.227-7013(b)(3)(iv)(E), 252.227-7014(b)(3)(iii)(E), 252.227-7015(b)(3)(v), and 252.227-7025(b)(1)(ii)(E) and (b)(4)(ii)(E). This language was adapted from a similar authority at FAR 9.505-4(b), which mandates that contracting officers obtain copies of relevant non-disclosure agreements.

Finally, to provide an appropriate link to these new requirements from the current FAR and DFARS coverage regarding non-disclosure agreement requirements for support contractors having access to third party proprietary information in performing advisory and assistance services, new DFARS 209.505-4 is added.

### III. Executive Order 12866

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

### IV. 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., but has nevertheless prepared an initial regulatory flexibility analysis, which is summarized as follows:

The objective of the rule is to provide policy and procedures to allow certain types of Government support contractors to have access to proprietary

technical data belonging to prime contractors and other third parties. Section 821 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84) provides the legal basis for the rule.

The rule affects small businesses that are Government support contractors that need access to proprietary technical data belonging to prime contractors and other third parties. It will also affect any small business that is the owner of “limited rights” technical data in the possession of the Government to which the support contractor will require access.

The statute provides that the support contractor must be willing to sign a non-disclosure agreement with the owner of the data. The rule has implemented this requirement in a way that preserves maximum flexibility for the private parties to reach mutual agreement without unnecessary interference from the Government. To reduce burdens, the rule permits the owner of the data to waive the requirement for a non-disclosure agreement, since the Government clauses already adequately deal with non-disclosure. Further, the rule provides that the support contractors cannot be required to agree to any conditions not required by statute. The Government support contractor must provide to the contracting officer, upon request, a copy of the non-disclosure agreement or the waiver of the requirement for a non-disclosure agreement (consistent with FAR 9.505-4(b)).

There are no known significant alternatives to the rule that would meet the requirements of the statute and minimize any significant economic impact of the rule on small entities. The impact of this rule on small business is not expected to be significant because the execution of a non-disclosure agreement is not likely to have a significant cost or administrative impact.

### V. Paperwork Reduction Act

The Paperwork Reduction Act applies because the DFARS rule affects DFARS clauses 252.227-7013, 252.227-7014, 252.227-7015, and 252.227-7025, which contain reporting or recordkeeping requirements that require the approval of the Office of Management and Budget under 44 U.S.C., chapter 35. These clauses are covered by an approved OMB control number 0704-0369 in the amount of approximately 1.76 million hours. The requirement for Government support contractors to provide to the contracting officer a copy of a non-disclosure agreement or a waiver of the non-

disclosure agreement requirement is only applicable if requested by the contracting officer. DoD has determined that the currently approved burden hours are sufficient to cover this minimal requirement. However, DoD will accept comments on how the interim rule would impact either the burden or other aspects of the approved information collection.

### VI. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment pursuant to 41 U.S.C. 1707 (formerly 41 U.S.C. 418b) and FAR 1.501-3(b). This interim rule implements section 821 of the National Defense Authorization Act for Fiscal Year 2010, enacted October 28, 2009. Section 821 provides authority for certain types of Government support contractors to have access to proprietary technical data belonging to prime contractors and other third parties, provided that the technical data owner may require the support contractor to execute a non-disclosure agreement having certain restrictions and remedies. Section 821 was effective upon enactment. This interim rule is necessary to provide the policies and procedures allowing a covered Government support contractor access to and use of any technical data delivered under a contract so that the contractor can furnish independent and impartial advice or technical assistance directly to the Government in support of the Government’s management and oversight of the program or effort to which such technical data relates. DoD will consider public comments received in response to this interim rule in the formulation of the final rule.

### List of Subjects in 48 CFR Parts 209, 227, and 252

Government procurement.

**Ynette R. Shelkin,**

*Editor, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 209, 227, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 209, 227, and 252 continues to read as follows:

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

## PART 209—CONTRACTOR QUALIFICATIONS

- 2. In section 209.403, paragraph (1), remove “Navy—The General Counsel of the Department of the Navy” and add in its place “Navy—The Assistant General Counsel (Acquisition Integrity)”.
- 3. Add sections 209.505 and 209.505–4 to subpart 209.5 to read as follows:

### 209.505 General rules.

#### 209.505–4 Obtaining access to proprietary information.

(b) Non-disclosure requirements for contractors accessing third party proprietary technical data or computer software are addressed at 227.7103–7(b), through use of the clause at 252.227–7025 as prescribed at 227.7103–6(c) and 227.7203–6(d). Pursuant to that clause, covered Government support contractors may be required to enter into non-disclosure agreements directly with the third party asserting restrictions on limited rights technical data, commercial technical data, or restricted rights computer software.

## PART 227—PATENTS, DATA, AND COPYRIGHTS

- 4. Revise section 227.7102–2, paragraph (a), to read as follows:

#### 227.7102–2 Rights in technical data.

(a) The clause at 252.227–7015, Technical Data—Commercial Items, provides the Government specific license rights in technical data pertaining to commercial items or processes. DoD may use, modify, reproduce, release, perform, display, or disclose data only within the Government. The data may not be used to manufacture additional quantities of the commercial items and, except for emergency repair or overhaul and for covered Government support contractors, may not be released or disclosed to, or used by, third parties without the contractor’s written permission. Those restrictions do not apply to the technical data described in 227.7102–1(a).

\* \* \* \* \*

- 5. Amend section 227.7103–5 as follows:

- (a) Revise paragraph (c)(2) as set forth below; and
- (b) Revise paragraph (c)(4) as set forth below.

#### 227.7103–5 Government rights.

\* \* \* \* \*

(c) \* \* \*

(2) 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—

- (i) Necessary for emergency repair and overhaul; or
- (ii) To a covered Government support contractor; or
- (iii) 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.

\* \* \* \* \*

(4) 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)(2)(i), (ii), or (iii) of this subsection, the intended recipient must complete the use and non-disclosure agreement at 227.7103–7, or receive the data for performance of a Government contract that contains the clause at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, prior to release or disclosure of the limited rights data.

\* \* \* \* \*

## PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 6. Amend section 252.212–7001 as follows:

- (a) Amend the clause date by removing “(JAN 2011)” and adding in its place “(MAR 2011)”;
- (b) In paragraph (b)(4), remove “(OCT 2010)” and add in its place “(JAN 2011)”;
- (c) In paragraph (b)(7), remove “(JUL 2009)” and add in its place “(JAN 2011)”;
- (d) In paragraph (b)(17), remove “(NOV 1995)” and add in its place “(MAR 2011)”.

- 7. Amend section 252.227–7013 as follows:

- (a) Amend the clause date by removing “(NOV 1995)” and adding in its place “(MAR 2011)”;
- (b) Amend the introductory text of paragraph (a) by removing “:” and adding in its place “—”;
- (c) Redesignate paragraphs (a)(5) through (a)(15) as paragraphs (a)(6) through (a)(16);
- (d) Add new paragraph (a)(5) to read as set forth below;
- (e) Revise newly designated paragraph (a)(14) to read as set forth below;
- (f) Add new paragraph (b)(3)(iv) to read as set forth below;
- (g) Amend the clause date for Alternate II by removing “(NOV 2009)” and adding in its place “(MAR 2011)”;

- (h) Amend the introductory text of Alternate II by removing “(a)(16)” and adding in its place “(a)(17)”;
- (i) Redesignate paragraph (a)(16) of Alternate II as paragraph (a)(17).

The additions and revisions read as follows:

#### 252.227–7013 Rights in technical data—noncommercial items.

\* \* \* \* \*

(a) \* \* \*

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

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

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

\* \* \* \* \*

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

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

(A) Necessary for emergency repair and overhaul; or

(B) A release or disclosure to—

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

(2) A foreign government, of technical data other than detailed manufacturing or process data, when use of such data

by the foreign government is in the interest of the Government and is required for evaluational or informational purposes;

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

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

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

(iv) The Contractor acknowledges that—

(A) Limited rights data is authorized to be released or disclosed to covered Government support contractors;

(B) The Contractor will be notified of such release or disclosure;

(C) The Contractor (or the party asserting restrictions as identified in the limited rights legend) may require each such covered Government support contractor to enter into a non-disclosure agreement directly with the Contractor (or the party asserting restrictions) regarding the covered Government support contractor's use of such data, or alternatively, that the Contractor (or party asserting restrictions) may waive in writing the requirement for a non-disclosure agreement;

(D) Any such non-disclosure agreement shall address the restrictions on the covered Government support contractor's use of the limited rights data as set forth in the clause at 252.227-7025, and shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement; and

(E) The Contractor shall provide a copy of any such non-disclosure agreement or waiver to the Contracting Officer, upon request.

\* \* \* \* \*

■ 8. Amend section 252.227-7014 as follows:

■ (a) Amend the clause date by removing "(JUN 1995)" and adding in its place "(MAR 2011)";

■ (b) Amend the introductory text of paragraph (a) by removing ":" and adding in its place "—";

■ (c) Redesignate paragraphs (a)(6) through (a)(15) as paragraphs (a)(7) through (a)(16);

■ (d) Add new paragraph (a)(6) to read as set forth below;

■ (e) Revise newly designated paragraphs (a)(15)(iv), (a)(15)(v)(C) and (D), and (a)(15)(vi)(B), and add (a)(15)(vii) to read as set forth below;

■ (f) Add paragraph (b)(3)(iii) to read as set forth below.

The additions and revisions read as follows:

**252.227-7014 Rights in noncommercial computer software and noncommercial computer software documentation.**

\* \* \* \* \*

(a) \* \* \*

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

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

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

\* \* \* \* \*

(15) \* \* \*

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

(A) Use the modified software only as provided in paragraphs (a)(15)(i) and (iii) of this clause; and

(B) Not release or disclose the modified software except as provided in paragraphs (a)(15)(ii), (v), (vi), and (vii) of this clause;

(v) \* \* \*

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

(D) Such use is subject to the limitation in paragraph (a)(15)(i) of this clause;

(vi) \* \* \*

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

(vii) Permit covered Government support contractors to use, modify, reproduce, perform, display, or release or disclose the computer software to authorized person(s) in the performance

of Government contracts that contain the clause at 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

(iii) The Contractor acknowledges that—

(A) Restricted rights computer software is authorized to be released or disclosed to covered Government support contractors;

(B) The Contractor will be notified of such release or disclosure;

(C) The Contractor (or the party asserting restrictions, as identified in the restricted rights legend) may require each such covered Government support contractor to enter into a non-disclosure agreement directly with the Contractor (or the party asserting restrictions) regarding the covered Government support contractor's use of such software, or alternatively, that the Contractor (or party asserting restrictions) may waive in writing the requirement for a non-disclosure agreement;

(D) Any such non-disclosure agreement shall address the restrictions on the covered Government support contractor's use of the restricted rights software as set forth in the clause at 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, and shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement; and

(E) The Contractor shall provide a copy of any such non-disclosure agreement or waiver to the Contracting Officer, upon request.

\* \* \* \* \*

■ 9. Amend section 252.227-7015 as follows:

■ (a) Amend the clause date by removing "(NOV 1995)" and adding in its place "(MAR 2011)";

■ (b) Revise paragraphs (a) and (b)(2), and add paragraph (b)(3) to read as set forth below; and

■ (c) Revise Alternate I to read as set forth below.

The additions and revisions read as follows:

**252.227-7015 Technical data—Commercial items.**

\* \* \* \* \*

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

(1) *Commercial item* does not include commercial computer software.

(2) *Covered Government support contractor* means a contractor under a

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

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

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

(3) *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, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(4) The term *item* includes components or processes.

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

(b) \* \* \*

(2) Except as provided in paragraph (b)(1) of this clause, the Government may use, modify, reproduce, release, perform, display, or disclose technical data within the Government only. 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 use of the technical data outside the Government without the Contractor's written permission unless a release, disclosure, or permitted use is necessary for emergency repair or overhaul of the commercial items furnished under this contract, or for performance of work by covered Government support contractors.

(3) The Contractor acknowledges that—

(i) Technical data covered by paragraph (b)(2) of this clause is

authorized to be released or disclosed to covered Government support contractors;

(ii) The Contractor will be notified of such release or disclosure;

(iii) The Contractor (or the party asserting restrictions as identified in a restrictive legend) may require each such covered Government support contractor to enter into a non-disclosure agreement directly with the Contractor (or the party asserting restrictions) regarding the covered Government support contractor's use of such data, or alternatively, that the Contractor (or party asserting restrictions) may waive in writing the requirement for a non-disclosure agreement;

(iv) Any such non-disclosure agreement shall address the restrictions on the covered Government support contractor's use of the data as set forth in the clause at 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, and shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement; and

(v) The Contractor shall provide a copy of any such non-disclosure agreement or waiver to the Contracting Officer, upon request.

\* \* \* \* \*

**Alternate I (Mar 2011)**

As prescribed in 227.7102-3(a)(2), add the following paragraphs (a)(6) and (b)(4) to the basic clause:

(a)(6) *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)(4) *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.

■ 10. Amend section 252.227-7018 as follows:

■ (a) Amend the clause date by removing "(JAN 2011)" and adding in its place "(MAR 2011)";

■ (b) Amend the introductory text of paragraph (a) by removing ":" and adding in its place "—";

■ (c) Redesignate paragraphs (a)(6) through (a)(20) as paragraphs (a)(7) through (a)(21);

■ (d) Add new paragraph (a)(6) to read as set forth below;

■ (e) Revise newly designated paragraph (a)(15) to read as set forth below;

■ (f) Revise newly designated paragraphs (a)(18)(iv) through (a)(18)(vi) to read as set forth below;

■ (g) Add new paragraph (a)(18)(vii) to read as set forth below; and

■ (h) Add paragraph (b)(8) to read as set forth below.

The additions and revisions read as follows:

**252.227-7018 Rights in noncommercial technical data and computer software—small business innovation research (SBIR) program.**

\* \* \* \* \*

(a) \* \* \*

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

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

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

\* \* \* \* \*

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

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

(A) Necessary for emergency repair and overhaul; or

(B) A release or disclosure to—

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

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

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

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

\* \* \* \* \*

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

\* \* \* \* \*

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

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

(B) Not release or disclose the modified 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, 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 are subject to the non-disclosure agreement at 227.7103-7 of the Defense Federal Acquisition Regulation Supplement or are Government contractors receiving access to the software for performance of a Government contract that contains the clause at 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends;

(C) The Government shall not permit the recipient to decompile, disassemble,

or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(18)(iv) of this clause, for any other purpose; and

(D) Such use is subject to the limitation in paragraph (a)(18)(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 is subject to the non-disclosure agreement at 227.7103-7 or is a Government contractor receiving access to the software for performance of a Government contract that contains the clause at 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends; and

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

(vii) Permit covered Government support contractors to use, modify, reproduce, perform, display, or release or disclose the computer software to authorized person(s) in the performance of Government contracts that contain the clause at 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

\* \* \* \* \*

(b) \* \* \*

(8) Covered Government support contractors. The Contractor acknowledges that—

(i) Limited rights technical data and restricted rights computer software are authorized to be released or disclosed to covered Government support contractors;

(ii) The Contractor will be notified of such release or disclosure;

(iii) The Contractor may require each such covered Government support contractor to enter into a non-disclosure agreement directly with the Contractor (or the party asserting restrictions as identified in a restrictive legend) regarding the covered Government support contractor's use of such data or software, or alternatively that the Contractor (or party asserting restrictions) may waive in writing the

requirement for a non-disclosure agreement;

(iv) Any such non-disclosure agreement shall address the restrictions on the covered Government support contractor's use of the data or software as set forth in the clause at 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, and shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement; and

(v) The Contractor shall provide a copy of any such non-disclosure agreement or waiver to the Contracting Officer, upon request.

\* \* \* \* \*

■ 11. Amend section 252.227-7025 as follows:

■ (a) Amend the clause date by removing "(JAN 2011)" and adding in its place "(MAR 2011)"; and

■ (b) Revise paragraphs (a) and (b) to read as set forth below.

**252.227-7025 Limitations on the use or disclosure of government-furnished information marked with restrictive legends.**

\* \* \* \* \*

(a)(1) For contracts in which the Government will furnish the Contractor with technical data, the terms "covered Government support contractor," "limited rights," and "Government purpose rights" are defined in the clause at 252.227-7013, Rights in Technical Data—Noncommercial Items.

(2) For contracts in which the Government will furnish the Contractor with computer software or computer software documentation, the terms "covered Government support contractor," "government purpose rights," and "restricted rights" are defined in the clause at 252.227-7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation.

(3) For Small Business Innovation Research program contracts, the terms "covered Government support contractor," "limited rights," and "restricted rights" are defined in the clause at 252.227-7018, Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program.

(b) Technical data or computer software provided to the Contractor as Government-furnished information (GFI) under this contract may be subject to restrictions on use, modification, reproduction, release, performance, display, or further disclosure.

(1) *GFI marked with limited or restricted rights legends.*

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

(ii) If the Contractor is a covered Government support contractor, the Contractor further agrees and acknowledges that—

(A) The data or software will be accessed and used only for the purposes stated in this contract and shall not be used to compete for any Government or non-Government contract;

(B) The Contractor will take all reasonable steps to protect the technical data or computer software against any unauthorized release or disclosure;

(C) The Contractor will ensure that the party whose name appears in the legend is notified of the Contractor's access or use of such data or software;

(D) The Contractor will enter into a non-disclosure agreement with the party whose name appears in the legend, if required to do so by that party, and that any such non-disclosure agreement will implement the restrictions on the Contractor's use of such data or software as set forth in this clause, and shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement;

(E) The Contractor shall provide a copy of any such non-disclosure agreement or waiver to the Contracting Officer, upon request; and

(F) That a breach of these obligations or restrictions may subject the Contractor to—

(1) Criminal, civil, administrative, and contractual actions in law and equity for penalties, damages, and other appropriate remedies by the United States; and

(2) Civil actions for damages and other appropriate remedies by the party whose name appears in the legend.

(2) *GFI marked with government purpose rights legends.* The Contractor shall use technical data or computer software received from the Government with government purpose rights legends for government purposes only. The Contractor shall not, without the express written permission of the party whose name appears in the restrictive legend, use, modify, reproduce, release, perform, or display such data or software for any commercial purpose or disclose such data or software to a person other than its subcontractors,

suppliers, or prospective subcontractors or suppliers, who require the data or software to submit offers for, or perform, contracts under this contract. Prior to disclosing the data or software, the Contractor shall require the persons to whom disclosure will be made to complete and sign the non-disclosure agreement at 227.7103-7.

(3) *GFI marked with specially negotiated license rights legends.* The Contractor shall use, modify, reproduce, release, perform, or display technical data or computer software received from the Government with specially negotiated license legends only as permitted in the license. Such data or software may not be released or disclosed to other persons unless permitted by the license and, prior to release or disclosure, the intended recipient has completed the non-disclosure agreement at 227.7103-7. The Contractor shall modify paragraph (1)(c) of the non-disclosure agreement to reflect the recipient's obligations regarding use, modification, reproduction, release, performance, display, and disclosure of the data or software.

(4) *GFI marked with commercial restrictive legends.*

(i) The Contractor shall use, modify, reproduce, perform, or display technical data that is or pertains to a commercial item and is received from the Government with a commercial restrictive legend (i.e., marked to indicate that such data are subject to use, modification, reproduction, release, performance, display, or disclosure restrictions) only in the performance of this contract. The Contractor shall not, without the express written permission of the party whose name appears in the legend, use the technical data to manufacture additional quantities of the commercial items, or release or disclose such data to any unauthorized person.

(ii) If the Contractor is a covered Government support contractor, the Contractor further agrees and acknowledges that—

(A) The data or software will be accessed and used only for the purposes stated in this contract and shall not be used to compete for any Government or non-Government contract;

(B) The Contractor will take all reasonable steps to protect the technical data against any unauthorized release or disclosure;

(C) The Contractor will ensure that the party whose name appears in the legend is or has been notified of the Contractor's access or use of such data;

(D) The Contractor will enter into a non-disclosure agreement with the party whose name appears in the legend, if

required to do so by that party, and that any such non-disclosure agreement will implement the restrictions on the Contractor's use of such data as set forth in this clause, and shall not include any additional terms and conditions unless mutually agreed to by the parties to the non-disclosure agreement;

(E) The Contractor shall provide a copy of any such non-disclosure agreement or waiver to the Contracting Officer, upon request; and

(F) That a breach of these obligations or restrictions may subject the Contractor to—

(1) Criminal, civil, administrative, and contractual actions in law and equity for penalties, damages, and other appropriate remedies by the United States; and

(2) Civil actions for damages and other appropriate remedies by the contractor or subcontractor whose technical data is affected by the breach.

\* \* \* \* \*

[FR Doc. 2011-4531 Filed 3-1-11; 8:45 am]

BILLING CODE 5001-08-P

## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 212, 232, and 252

RIN 0750-AG56

#### Defense Federal Acquisition Regulation Supplement; Payments in Support of Emergencies and Contingency Operations (DFARS Case 2009-D020)

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

**ACTION:** Final rule.

**SUMMARY:** DoD is adopting as a final rule, with minor changes, an interim rule that amended the Defense Federal Acquisition Regulation Supplement (DFARS) to implement exemptions from the Prompt Payment Act. The interim rule exempted military payments related to contingencies and certain payments related to emergencies and the release or threatened release of hazardous substances.

**DATES:** *Effective date:* March 2, 2011.

**FOR FURTHER INFORMATION CONTACT:** Mr. Julian E. Thrash, 703-602-0310.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

5 CFR part 1315 exempts from Prompt Payment Act compliance payments related to emergencies (defined in the