

1 DFARS Case 2018-D071
2 (S) Negotiation of Price for Technical Data and Preference for Specially
3 Negotiated Licenses
4 Advance Notice of Proposed Rulemaking
5

6 Baseline is DFARS as of October 31, 2019.
7 Changes are shown as [additions] and deletions.
8

9
10 PART 207-ACQUISITION PLANNING

11 * * * * *

12
13 SUBPART 207.1-ACQUISITION PLANS
14

15 * * * * *

16
17 207.106 Additional requirements for major systems.
18

19 * * * * *

20
21 (S-70)(4) In accordance with [10 U.S.C. 2320(e) and (f), 10 U.S.C. 2439,]Section
22 802(a) of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364)
23 and DoD policy requirements[—
24

25 (1) Acquisition plans for major weapon systems and subsystems of major weapon
26 systems shall—
27

28 (i) Assess the long-term technical data and computer software needs of those
29 systems and subsystems; and
30

31 (ii) Establish acquisition strategies that provide for the technical data
32 deliverables and associated license rights needed to sustain those systems and
33 subsystems over their life cycle. The strategy may include—
34

35 (A) The development of maintenance capabilities within DoD; or
36

37 (B) Competition for contracts for sustainment of the systems or subsystems.
38

39 (2) Assessments and corresponding acquisition strategies developed under this
40 section shall—
41

42 (i) Be developed before issuance of a solicitation for the weapon system or
43 subsystem;
44

45 [(ii) Consider the use of specially negotiated licenses to acquire
46 customized technical data, computer software, and associated license rights,
47 appropriate for the particular elements of the product support strategy (e.g.,
48 as described in the life cycle sustainment plan);]
49

50 (ii[i]) Address the merits of including a priced contract option for the future
51 delivery of technical data and computer software, and associated license rights, that
52 were not acquired upon initial contract award;
53
54

55 (i[v]ii) Address the potential for changes in the sustainment plan over the life
56 cycle of the weapon system or subsystem; ~~and~~

57
58 (iv) Apply to weapon systems and subsystems that are to be supported by
59 performance-based logistics arrangements as well as to weapon systems and
60 subsystems that are to be supported by other sustainment approaches; ~~and~~

61
62 (vi) Identify, to the maximum extent practicable, the estimated cost for
63 technical data, computer software, and associated license rights as required
64 by FAR 7.105(b)(14)(iii) and summarize how the contracting officer intends to
65 negotiate a price for the data, software, and license rights. See 215.470(a)
66 regarding the negotiation of a price for the data, software, and license rights.]

Commented [MRBCOOA1]: Examine the terminology used in this paragraph and compare to the FAR and see if it needs to be updated. —Rick Tschampel -Navy

67
68 * * * * *

69 PART 212—ACQUISITION OF COMMERCIAL ITEMS

70
71 * * * * *

72 73 74 SUBPART 212.2—SPECIAL REQUIREMENTS FOR THE ACQUISITION OF 75 COMMERCIAL ITEMS

76
77 * * * * *

78 79 212.209 Determination of price reasonableness.

80
81 * * * * *

82 83 212.211 Technical data.

84 The DoD policy for acquiring technical data for commercial items is at 227.7102. [See
85 215.470 regarding the negotiation of a price for technical data and associated
86 license rights.]

87 88 212.212 Computer software.

89
90 (1) Departments and agencies shall identify and evaluate, at all stages of the
91 acquisition process (including concept refinement, concept decision, and technology
92 development), opportunities for the use of commercial computer software and other non-
93 developmental software in accordance with Section 803 of the National Defense
94 Authorization Act for Fiscal Year 2009 (Pub. L. 110-417).

95
96 (2) See Subpart 208.74 when acquiring commercial software or software
97 maintenance. See 227.7202 for policy on the acquisition of commercial computer
98 software and commercial computer software documentation.

99
100 [(3) See 215.470 regarding the negotiation of a price for computer software
101 and associated license rights.]

Commented [MRBCOOA2]: Kelly Kyes – AIA – Applicability to commercial computer software.

102
103 * * * * *

104 105 PART 215—CONTRACTING BY NEGOTIATION

106
107 * * * * *

108 109 SUBPART 215.4—CONTRACT PRICING

110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164

215.470 Estimated [and negotiated prices for]data-prices[and associated license rights].

(a) [The contracting officer shall]DoD requires [that offerors provide] estimates of the prices of data [and associated license rights] in order to evaluate the cost to the Government of data items in terms of their management, product, or engineering value. [To the maximum extent practicable, before making a source selection decision or awarding a sole-source contract, the contracting officer shall negotiate a price for data (including technical data and computer software) and associated license rights to be delivered or otherwise provided under a contract for the development, production, or sustainment of a system, subsystem, or component; or services. (See 10 U.S.C. 2439.) Consistent with FAR 15.404-1(b) and (c), 212.209, and 215.404-1(b), such negotiations should be based upon the use of appropriate intellectual property valuation practices and standards.]

Commented [MRBCOOA3]: David Rikkers AIA – Assumes compliance with 10 USC 2320.

Commented [MRBCOOA4]: Kelly Kyes AIA – Does this create a requirement for rights and non technical data? (application of clauses to non technical data).

Commented [MRBCOOA5]: Linda Neilson – Validate compliance with current DODD

Commented [MRBCOOA6]: Is this section intended to require negotiation of prices for rights in non-technical data Kelly Kyes AIA

(b) When data are required to be delivered under a contract, include DD Form 1423, Contract Data Requirements List, in the solicitation. See PGI 215.470(b) for guidance on the use of DD Form 1423.

(c) The contracting officer [should normally]shall ensure that the contract does not include a requirement for data that the contractor has delivered [or otherwise provided,] or is obligated to deliver [or otherwise provide] to the Government under another contract or subcontract, and that the successful offeror identifies any such data required by the solicitation. However, where duplicate data are desired, the contract price shall include the costs of duplication, but not of preparation, of such data.

PART 227—PATENTS, DATA, AND COPYRIGHTS

SUBPART 227.71—RIGHTS IN TECHNICAL DATA

227.7102 Commercial items, components, or processes.

227.7102-1 Policy.

(a) DoD shall acquire only the technical data customarily provided to the public with a commercial item or process, except technical data that—

(1) Are form, fit, or function data;

(2) 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 data are not customarily provided to commercial users or the data provided to commercial users is not sufficient for military purposes; or

165
166 (3) Describe the modifications made at Government expense to a commercial
167 item or process in order to meet the requirements of a Government solicitation.

168
169 (b) To encourage offerors and contractors to offer or use commercial products to
170 satisfy military requirements, offerors and contractors shall not be required, except for
171 the technical data described in paragraph (a) of this subsection, to—

172
173 (1) Furnish technical information related to commercial items or processes that
174 is not customarily provided to the public; or

175
176 (2) Relinquish to, or otherwise provide, the Government rights to use, modify,
177 reproduce, release, perform, display, or disclose technical data pertaining to commercial
178 items or processes except for a transfer of rights mutually agreed upon.

179
180 (c) The Government's rights in a vessel design, and in any useful article embodying
181 a vessel design, must be consistent with the Government's rights in technical data
182 pertaining to the design (10 U.S.C. 7317; 17 U.S.C. 1301(a)(3)).

183
184 **[(d) See 215.470 regarding the negotiation of a price for technical data and
185 associated license rights.]**

186
187 **227.7102-2 Rights in technical data.**

188
189 (a) **[Standard license rights.]** The clause at [252.227-7015](#), Technical Data—
190 Commercial Items, provides the Government specific license rights in technical data
191 pertaining to commercial items or processes. DoD may use, modify, reproduce, release,
192 perform, display, or disclose data only within the Government. The data may not be
193 used to manufacture additional quantities of the commercial items and, except for
194 emergency repair or overhaul and for covered Government support contractors, may not
195 be released or disclosed to, or used by, third parties without the contractor's written
196 permission. Those restrictions do not apply to the technical data described in [227.7102-](#)
197 [1\(a\)](#).

198
199 (b) **[Specially negotiated license rights.]**

200
201 (1) **The parties should [shall, to the maximum extent practicable,]**
202 **negotiate special license rights [in support of the Government's product**
203 **support strategy (e.g., as described in the life cycle sustainment plan)]**
204 **whenever doing so will more equitably address the parties' interests than the**
205 **standard license rights provided in the clause. To the maximum extent**
206 **practicable, if either party desires a special license, the parties shall enter**
207 **into good faith negotiations.]** If additional rights are needed, contracting activities
208 ~~must negotiate with the contractor to determine if there are acceptable terms for~~
209 ~~transferring such rights. [However, the licensor is not obligated to provide the~~
210 ~~Government greater rights, and the contracting officer is not required to~~
211 ~~accept lesser rights, than the rights provided in the standard grant of~~
212 ~~license.]~~ The specific additional [license] rights granted to the Government shall be
213 enumerated in a license agreement made part of the contract, **and shall—**

214
215 **(i) Support the Government's product support strategy (e.g., as**
216 **described in the life cycle sustainment plan); and**

217
218 **(ii) Provide the Government with no lesser rights than are**
219 **enumerated in paragraph (b)(2) of the clause at 252.227-7015.**

Commented [MRBCOOA7]: John Ralston Navy – Does this include the concept of good faith?

Commented [MRBCOOA8]: Should versus shall. –Kelly Kyes AIA.

Commented [MRBCOOA9]: Lynn Williams Boeing

Commented [MRBCOOA10]: John Ralston Navy – Does this include the concept of good faith?

Commented [MRBCOOA11]: Jonathon Etherton – EthertonandAssociates – FAR or DFARS should include a general statement that negotiations are to be conducted in good faith.

Commented [MRBCOOA12]: Do we need to say good faith? – Rick Tschampel Navy OGC

Commented [MRBCOOA13]: Adriana Luedke AIA – The language is fine.

Commented [MRBCOOA14]: Kelly Kyes AIA – clarify that that is a requirement for Government.

220
221 (2) The contracting officer should verify that the contractor assertions
222 upon which the special license is based are justified before entering into the
223 special license. The basis for assertions (e.g., development at private expense)
224 remains subject to challenge pursuant to the clause at 252.227-7037.]

Commented [MRBCOOA15]: Kelly Kyes AIA – This paragraph does not seem to fit with the language of DFARS case 2018-D069.

Commented [MRBCOOA16]: In AIA presentation, questions whether there needs to be a basis for assertions. Kelly Kyes AIA

225
226 * * * * *

227
228 **227.7103 Noncommercial items or processes.**

229
230 **227.7103-1 Policy.**

231
232 (a) DoD policy is to acquire only the technical data, and the rights in that data,
233 necessary to satisfy agency needs.

234
235 (b) Solicitations and contracts shall—

236
237 (1) Specify the technical data to be delivered under a contract and delivery
238 schedules for the data;

239
240 (2) Establish or reference procedures for determining the acceptability of
241 technical data;

242
243 (3) Establish separate contract line items, to the extent practicable, for the
244 technical data to be delivered under a contract and require offerors and contractors to
245 price separately each deliverable data item; and

246
247 (4) Require offerors to identify, to the extent practicable, technical data to be
248 furnished with restrictions on the Government's rights and require contractors to
249 identify technical data to be delivered with such restrictions prior to delivery.

250
251 (c) Offerors shall not be required, either as a condition of being responsive to a
252 solicitation or as a condition for award, to sell or otherwise relinquish to the
253 Government any rights in technical data related to items, components or processes
254 developed at private expense except for the data identified at [227.7103-5](#)(a)(2) and (a)(4)
255 through (9).

256
257 (d) Offerors and contractors shall not be prohibited or discouraged from furnishing
258 or offering to furnish items, components, or processes developed at private expense
259 solely because the Government's rights to use, modify, release, reproduce, perform,
260 display, or disclose technical data pertaining to those items may be restricted.

261
262 (e) As provided in 10 U.S.C. 2305, solicitations for major systems development
263 contracts shall not require offerors to submit proposals that would permit the
264 Government to acquire competitively items identical to items developed at private
265 expense unless a determination is made at a level above the contracting officer that—

266
267 (1) The offeror will not be able to satisfy program schedule or delivery
268 requirements; or

269
270 (2) The offeror's proposal to meet mobilization requirements does not satisfy
271 mobilization needs.
272

273 (f) For acquisitions involving major weapon systems or subsystems of major weapon
274 systems, the acquisition plan shall address acquisition strategies that provide for
275 technical data and the associated license rights in accordance with [207.106\(S-70\)](#).

276
277 (g) The Government's rights in a vessel design, and in any useful article embodying
278 a vessel design, must be consistent with the Government's rights in technical data
279 pertaining to the design (10 U.S.C. 7317; 17 U.S.C. 1301(a)(3)).

280
281 **[(h) See 215.470 regarding the negotiation of a price for technical data and**
282 **associated license rights.]**

283
284 **227.7103-2 Acquisition of technical data.**

285
286 (a) Contracting officers shall work closely with data managers and requirements
287 personnel to assure that data requirements included in solicitations are consistent with
288 the policy expressed in [227.7103-1](#).

289
290 (b)(1) Data managers or other requirements personnel are responsible for
291 identifying the Government's minimum needs for technical data. Data needs must be
292 established giving consideration to the contractor's economic interests in data
293 pertaining to items, components, or processes that have been developed at private
294 expense; the Government's costs to acquire, maintain, store, retrieve, and protect the
295 data; reprourement needs; repair, maintenance and overhaul philosophies; spare and
296 repair part considerations; and whether procurement of the items, components, or
297 processes can be accomplished on a form, fit, or function basis. When it is anticipated
298 that the Government will obtain unlimited or government purpose rights in technical
299 data that will be required for competitive spare or repair parts procurements, such data
300 should be identified as deliverable data items. Reprourement needs may not be a
301 sufficient reason to acquire detailed manufacturing or process data when items or
302 components can be acquired using performance specifications, form, fit and function
303 data, or when there are a sufficient number of alternate sources which can reasonably
304 be expected to provide such items on a performance specification or form, fit, or function
305 basis.

306
307 (2) When reviewing offers received in response to a solicitation or other request
308 for data, data managers must balance the original assessment of the Government's data
309 needs with data prices contained in the offer.

310
311 (c) Contracting officers are responsible for ensuring that, wherever practicable,
312 solicitations and contracts—

313
314 (1) Identify the type and quantity of the technical data to be delivered under the
315 contract and the format and media in which the data will be delivered;

316
317 (2) Establish each deliverable data item as a separate contract line item (this
318 requirement may be satisfied by listing each deliverable data item on an exhibit to the
319 contract);

320
321 (3) Identify the prices established for each deliverable data item under a fixed-
322 price type contract;

323
324 (4) Include delivery schedules and acceptance criteria for each deliverable data
325 item; and
326

327 (5) Specifically identify the place of delivery for each deliverable item of
328 technical data.

329 * * * * *

330
331 **227.7103-4 License rights.**

332
333 (a) *Grant of license.* The Government obtains rights in technical data, including a
334 copyright license, under an irrevocable license granted or obtained for the Government
335 by the contractor. The contractor or licensor retains all rights in the data not granted to
336 the Government. For technical data that pertain to items, components, or processes,
337 the scope of the **[standard]** license is generally determined by the source of funds used
338 to develop the item, component, or process. When the technical data do not pertain to
339 items, components, or processes, the scope of the **[standard]** license is **[generally]**
340 determined by the source of funds used to create the data.
341

342 (1) *Technical data pertaining to items, components, or processes.* Contractors or
343 licensors may, with some exceptions (see [227.7103-5\(a\)\(2\)](#) and (a)(4) through (9)),
344 restrict the Government's rights to use, modify, release, reproduce, perform, display or
345 disclose technical data pertaining to items, components, or processes developed
346 exclusively at private expense (limited rights). They may not restrict the Government's
347 rights in items, components, or processes developed exclusively at Government expense
348 (unlimited rights) without the Government's approval. When an item, component, or
349 process is developed with mixed funding, the Government may use, modify, release,
350 reproduce, perform, display or disclose the data pertaining to such items, components,
351 or processes within the Government without restriction but may release or disclose the
352 data outside the Government only for government purposes (government purpose
353 rights).
354

355 (2) *Technical data that do not pertain to items, components, or processes.*
356 Technical data may be created during the performance of a contract for a conceptual
357 design or similar effort that does not require the development, manufacture,
358 construction, or production of items, components or processes. The Government
359 generally obtains unlimited rights in such data when the data were created exclusively
360 with Government funds, government purpose rights when the data were created with
361 mixed funding, and limited rights when the data were created exclusively at private
362 expense.
363

364 (b) *Source of funds determination.* The determination of the source of development
365 funds for technical data pertaining to items, components, or processes should be made
366 at any practical sub-item or sub-component level or for any segregable portion of a
367 process. Contractors may assert limited rights in a segregable sub-item, sub-
368 component, or portion of a process which otherwise qualifies for limited rights under the
369 clause at [252.227-7013](#), Rights in Technical Data–Noncommercial Items.
370

371 **227.7103-5 Government rights.**

372 The standard license rights that a licensor grants to the Government are unlimited
373 rights, government purpose rights, or limited rights. Those rights are defined in the
374 clause at [252.227-7013](#), Rights in Technical Data–Noncommercial Items. **[However,**
375 **the parties should negotiate special license rights whenever doing so will**
376 **more equitably address the parties' interests than the standard license rights**
377 **provided in the clause.]**~~In unusual situations, the standard rights may not satisfy~~
378 ~~the Government's needs or the Government may be willing to accept lesser rights in~~
379 ~~data in return for other consideration. In those cases, a special license may be~~
380 ~~negotiated. However, the licensor is not obligated to provide the Government greater~~
381

382 rights and the contracting officer is not required to accept lesser rights than the rights
383 provided in the standard grant of license. The situations under which a particular
384 grant of license applies are enumerated in paragraphs (a) through (d) of this subsection.

385
386 * * * * *

387
388 (d) ~~[Specially]~~*Specifically* negotiated license rights.

389 (1) ~~[To the maximum extent practicable, n]~~Negotiate specific licenses
390 when~~[whenever doing so will more equitably address the parties' interests~~
391 ~~than the standard license rights provided in the clause.]~~the parties agree to
392 modify the standard license rights granted to the Government or when the Government
393 wants to obtain rights in data in which it does not have rights. ~~[If either party~~
394 ~~desires a special license, the parties shall enter into good faith negotiations to~~
395 ~~determine if there are acceptable terms for transferring such rights.~~ ~~[~~
396 ~~However, the licensor is not obligated to provide the Government greater~~
397 ~~rights, and the contracting officer is not required to accept lesser rights, than~~
398 ~~the rights provided in the standard grant of license. The specific license~~
399 ~~rights granted to the Government shall be enumerated in a license agreement~~
400 ~~made part of the contract, and shall—~~

Commented [MRBCOOA17]: After the contractor provides the information per 252.227-7017 if either party desires to negotiate... Rick Tschanel Navy OGC

Commented [MRBCOOA18]:

403 (i) Support the Government's product support strategy (e.g., as
404 described in the life cycle sustainment plan); and

405 (ii) Provide the Government with no lesser rights than are
406 enumerated in paragraph (b)(3) of the clause.

407
408 (2) The contracting officer should verify that the contractor assertions
409 upon which the special license is based are justified before entering into the
410 special license. The basis for assertions (e.g., development at private expense)
411 remains subject to challenge pursuant to the clause at 252.227-7037.

412 (3) ~~[When negotiating to obtain, relinquish, or increase the Government's~~
413 ~~rights in technical data, consider the acquisition strategy for the item, component, or~~
414 ~~process, including logistics support and other factors which may have relevance for a~~
415 ~~particular procurement. The Government may accept lesser rights when it has~~
416 ~~unlimited or government purpose rights in data but may not accept less than limited~~
417 ~~rights in such data. The negotiated license rights must stipulate what rights the~~
418 ~~Government has to release or disclose the data to other persons or to authorize others to~~
419 ~~use the data. Identify all negotiated rights in a license agreement made part of the~~
420 ~~contract.~~

421
422
423 ([4]2) When the Government needs additional rights in data acquired with
424 government purpose or limited rights, the contracting officer must negotiate with the
425 contractor to determine whether there are acceptable terms for transferring such rights.
426 Generally, such negotiations should be conducted only when there is a need to disclose
427 the data outside the Government or if the additional rights are required for competitive
428 procurement and the anticipated savings expected to be obtained through competition
429 are estimated to exceed the acquisition cost of the additional rights. Prior to negotiating
430 for additional rights in limited rights data, consider alternatives such as—

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

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

438
439 (iii) Reverse engineering, or providing items from Government inventories
440 to contractors who request the items to facilitate the development of equivalent items
441 through reverse engineering.

442
443 **227.7103-6 Contract clauses.**

444
445 * * * * *

446
447 **227.7104 Contracts under the Small Business Innovation Research (SBIR)**
448 **Program.**

449
450 (a) Use the clause at [252.227-7018](#), Rights in Noncommercial Technical Data and
451 Computer Software—Small Business Innovation Research (SBIR) Program, when
452 technical data or computer software will be generated during performance of contracts
453 under the SBIR program.

454
455 (b) Under the clause at [252.227-7018](#), the Government obtains SBIR data rights in
456 technical data and computer software generated under the contract and marked with
457 the SBIR data rights legend. SBIR data rights provide the Government limited rights
458 in such technical data and restricted rights in such computer software during the SBIR
459 data protection period commencing with contract award and ending five years after
460 completion of the project under which the data were generated. Upon expiration of the
461 five-year restrictive license, the Government has unlimited rights in the SBIR technical
462 data and computer software.

463
464 (c) During the SBIR data protection period, the Government may not release or
465 disclose SBIR technical data or computer software to any person except as authorized
466 for limited rights technical data or restricted rights computer software, respectively.

467
468 **[(d)(1) After contract award, and to the maximum extent practicable,**
469 **negotiate special license agreement whenever doing so will more equitably**
470 **address the parties' interests than the standard license rights provided in the**
471 **clause. If either party desires a special license, the parties shall enter into**
472 **good faith negotiations to determine if there are acceptable terms for**
473 **transferring such rights. However, the licensor is not obligated to provide the**
474 **Government greater rights, and the contracting officer is not required to**
475 **accept lesser rights, than the rights provided in the standard grant of license.**
476 **The specific license rights granted to the Government shall be enumerated in**
477 **a license agreement made part of the contract, and shall—**

478
479 (i) Support the Government's product support strategy (e.g., as
480 described in the life cycle sustainment plan); and

481
482 (ii) Provide the Government with no lesser rights than are
483 enumerated in paragraph (b)(3) of the clause.

484
485 (2) The contracting officer should verify that the contractor assertions
486 upon which the special license is based are justified before entering into the
487 special license. The basis for assertions (e.g., SBIR data, development at
488 private expense) remains subject to challenge pursuant to the clause at
489 [252.227-7037](#).]
490

491 (d[e]) * * *

492

493 (e[f]) * * *

494

495 (f[g]) * * *

496

497 * * * * *

498

499 **SUBPART 227.72—RIGHTS IN COMPUTER SOFTWARE AND COMPUTER**
500 **SOFTWARE DOCUMENTATION**

501

502 * * * * *

503

504 **227.7202 Commercial computer software and commercial computer software**
505 **documentation.**

506

507 **227.7202-1 Policy.**

508

509 (a) Commercial computer software or commercial computer software documentation
510 shall be acquired under the licenses customarily provided to the public unless such
511 licenses are inconsistent with Federal procurement law or do not otherwise satisfy user
512 needs.

513

514 (b) Commercial computer software and commercial computer software
515 documentation shall be obtained competitively, to the maximum extent practicable,
516 using firm-fixed-price contracts or firm-fixed-priced orders under available pricing
517 schedules.

518

519 (c) Offerors and contractors shall not be required to—

520

521 (1) Furnish technical information related to commercial computer software or
522 commercial computer software documentation that is not customarily provided to the
523 public except for information documenting the specific modifications made at
524 Government expense to such software or documentation to meet the requirements of a
525 Government solicitation; or

526

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

531

532 **[(d) See 215.470 regarding the negotiation of a price for commercial**
533 **computer software and associated license rights.]**

534

535 **227.7202-2 Reserved.**

536

537 **227.7202-3 Rights in commercial computer software or commercial computer**
538 **software documentation.**

539

540 (a) The Government shall have only the rights specified in the license under which
541 the commercial computer software or commercial computer software documentation
542 was obtained.

543

544 (b) **[The parties should negotiate special license rights whenever doing so**
545 **will more equitably address the parties' interests than the standard license**

546 **rights provided in the license customarily provided to the public.**~~If the~~
547 ~~Government has a need for rights not conveyed under the license customarily provided~~
548 ~~to the public, the Government must negotiate with the contractor~~ **[To the maximum**
549 **extent practicable, if either party desires a special license, the parties shall**
550 **enter into good faith negotiations]**to determine if there are acceptable terms for
551 transferring such rights. The specific rights granted to the Government shall be
552 enumerated in the contract license agreement or an addendum thereto **[and shall,**
553 **support the Government's product support strategy (e.g., as described in the**
554 **life cycle sustainment plan)].**
555

556 **227.7202-4 Contract clause.**

557 A specific contract clause governing the Government's rights in commercial computer
558 software or commercial computer software documentation is not prescribed. As
559 required by [227.7202-3](#), the Government's rights to use, modify, reproduce, release,
560 perform, display, or disclose computer software or computer software documentation
561 shall be identified in a license agreement.
562

563 **227.7203 Noncommercial computer software and noncommercial computer**
564 **software documentation.**

565 **227.7203-1 Policy.**

566 (a) DoD policy is to acquire only the computer software and computer software
567 documentation, and the rights in such software or documentation, necessary to satisfy
568 agency needs.
569

570 (b) Solicitations and contracts shall—

571 (1) Specify the computer software or computer software documentation to be
572 delivered under a contract and the delivery schedules for the software or
573 documentation;

574 (2) Establish or reference procedures for determining the acceptability of
575 computer software or computer software documentation;

576 (3) Establish separate contract line items, to the extent practicable, for the
577 computer software or computer software documentation to be delivered under a
578 contract and require offerors and contractors to price separately each deliverable data
579 item; and
580

581 (4) Require offerors to identify, to the extent practicable, computer software or
582 computer software documentation to be furnished with restrictions on the
583 Government's rights and require contractors to identify computer software or computer
584 software documentation to be delivered with such restrictions prior to delivery.
585

586 (c) Offerors shall not be required, either as a condition of being responsive to a
587 solicitation or as a condition for award, to sell or otherwise relinquish to the
588 Government any rights in computer software developed exclusively at private expense
589 except for the software identified at [227.7203-5](#)(a)(3) through (6).
590

591 (d) Offerors and contractors shall not be prohibited or discouraged from furnishing
592 or offering to furnish computer software developed exclusively at private expense solely
593 because the Government's rights to use, modify, release, reproduce, perform, display, or
594 disclose the software may be restricted.
595

600

601 (e) For acquisitions involving major weapon systems or subsystems of major weapon
602 systems, the acquisition plan shall address acquisition strategies that provide for
603 computer software and computer software documentation, and the associated license
604 rights, in accordance with [207.106\(S-70\)](#).
605

606 **[(f) See 215.470 regarding the negotiation of a price for computer software
607 and associated license rights.]**
608

609 **227.7203-2 Acquisition of noncommercial computer software and computer
610 software documentation.**
611

612 (a) Contracting officers shall work closely with data managers and requirements
613 personnel to assure that computer software and computer software documentation
614 requirements included in solicitations are consistent with the policy expressed in
615 227.7203-1.
616

617 (b)(1) Data managers or other requirements personnel are responsible for
618 identifying the Government's minimum needs. In addition to desired software
619 performance, compatibility, or other technical considerations, needs determinations
620 should consider such factors as multiple site or shared use requirements, whether the
621 Government's software maintenance philosophy will require the right to modify or have
622 third parties modify the software, and any special computer software documentation
623 requirements.
624

625 (2) When reviewing offers received in response to a solicitation or other request
626 for computer software or computer software documentation, data managers must
627 balance the original assessment of the Government's needs with prices offered.
628

629 (c) Contracting officers are responsible for ensuring that, wherever practicable,
630 solicitations and contracts—
631

632 (1) Identify the types of computer software and the quantity of computer
633 programs and computer software documentation to be delivered, any requirements for
634 multiple users at one site or multiple site licenses, and the format and media in which
635 the software or documentation will be delivered;
636

637 (2) Establish each type of computer software or computer software
638 documentation to be delivered as a separate contract line item (this requirement may be
639 satisfied by an exhibit to the contract);
640

641 (3) Identify the prices established for each separately priced deliverable item of
642 computer software or computer software documentation under a fixed-price type
643 contract;
644

645 (4) Include delivery schedules and acceptance criteria for each deliverable item;
646 and
647

648 (5) Specifically identify the place of delivery for each deliverable item.
649

650 * * * * *

651 **227.7203-4 License rights.**
652

653 (a) *Grant of license.* The Government obtains rights in computer software or
654 computer software documentation, including a copyright license, under an irrevocable
655

656 license granted or obtained by the contractor which developed the software or
657 documentation or the licensor of the software or documentation if the development
658 contractor is not the licensor. The contractor or licensor retains all rights in the
659 software or documentation not granted to the Government. The scope of a computer
660 software license is generally determined by the source of funds used to develop the
661 software. Contractors or licensors may, with some exceptions, restrict the
662 Government's rights to use, modify, reproduce, release, perform, display, or disclose
663 computer software developed exclusively or partially at private expense (see [227.7203-](#)
664 [5\(b\)](#) and (c)). They may not, without the Government's agreement (see [227.7203-5\(d\)](#)),
665 restrict the Government's rights in computer software developed exclusively with
666 Government funds or in computer software documentation required to be delivered
667 under a contract.
668

669 (b) *Source of funds determination.* The determination of the source of funds used to
670 develop computer software should be made at the lowest practicable segregable portion
671 of the software or documentation (e.g., a software sub-routine that performs a specific
672 function). Contractors may assert restricted rights in a segregable portion of computer
673 software which otherwise qualifies for restricted rights under the clause at [252.227-](#)
674 [7014](#), Rights in Noncommercial Computer Software and Noncommercial Computer
675 Software Documentation.
676

677 **227.7203-5 Government rights.**

678 The standard license rights in computer software that a licensor grants to the
679 Government are unlimited rights, government purpose rights, or restricted rights. The
680 standard license in computer software documentation conveys unlimited rights. Those
681 rights are defined in the clause at [252.227-7014](#), Rights in Noncommercial Computer
682 Software and Noncommercial Computer Software Documentation. **[However, the
683 parties should negotiate special license rights whenever doing so will more
684 equitably address the parties' interests than the standard license rights
685 provided in the clause.]**~~In unusual situations, the standard rights may not satisfy
686 the Government's needs or the Government may be willing to accept lesser rights in
687 return for other consideration. In those cases, a special license may be negotiated.
688 However, the licensor is not obligated to provide the Government greater rights and the
689 contracting officer is not required to accept lesser rights than the rights provided in the
690 standard grant of license. The situations under which a particular grant of license
691 applies are enumerated in paragraphs (a) through (d) of this subsection.~~
692

693 * * * * *

694
695 (d) ~~Specifically~~**[Specially] negotiated license rights. [(1) To the maximum**
696 **extent practicable, n]Negotiate specific [special] licenses when[whenever doing**
697 **so will more equitably address the parties' interests than the standard license**
698 **rights provided in the clause.]**~~the parties agree to modify the standard license
699 rights granted to the Government or when the Government wants to obtain rights in
700 computer software in which it does not have rights. [If either party desires a
701 special license, the parties shall enter into good faith negotiations to
702 determine if there are acceptable terms for transferring such rights.
703 However, the licensor is not obligated to provide the Government greater
704 rights, and the contracting officer is not required to accept lesser rights, than
705 the rights provided in the standard grant of license. The specific rights
706 granted to the Government shall be enumerated in a special license
707 agreement made part of the contract, and shall—~~
708

709 (i) Support the Government's product support strategy (e.g., as
710 described in the life cycle sustainment plan); and

711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765

(ii) Provide the Government with no lesser rights than are enumerated in paragraph (b)(3) of the clause.

(2) The contracting officer should verify that the contractor assertions upon which the special license is based are justified before entering into the special license. The basis for assertions (e.g., development at private expense) remains subject to challenge pursuant to the clause at 252.227-7019.

(3)]When negotiating to obtain, relinquish, or increase the Government's rights in computer software, consider the planned software maintenance philosophy, anticipated time or user sharing requirements, and other factors which may have relevance for a particular procurement. [The Government may accept lesser rights when it has unlimited or government purpose rights in computer software but may not accept less than restricted rights in such software.]If negotiating to relinquish rights in computer software documentation, consider the administrative burden associated with protecting documentation subject to restrictions from unauthorized release or disclosure. ~~The negotiated license rights must stipulate the rights granted the Government to use, modify, reproduce, release, perform, display, or disclose the software or documentation and the extent to which the Government may authorize others to do so. Identify all negotiated rights in a license agreement made part of the contract.~~

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

SUBPART 252.2—TEXT OF PROVISIONS AND CLAUSES

252.227-7013 Rights in Technical Data—Noncommercial Items.

As prescribed in [227.7103-6](#)(a), use the following clause:

RIGHTS IN TECHNICAL DATA--NONCOMMERCIAL ITEMS (~~FEB 2014~~*[DATE]*)

(b) *Rights in technical data.* The Contractor grants or shall obtain for the Government the following royalty free, world-wide, nonexclusive, irrevocable license rights in technical data other than computer software documentation (see the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause of this contract for rights in computer software documentation):

(4) ~~Specifically~~ [**Specially**]negotiated license rights. [If either party desires a special license, the parties shall enter into good faith negotiations to determine if there are acceptable terms for transferring such rights.]The standard license rights granted to the Government under paragraphs (b)(1) through ~~(b)(3)~~ of this clause, including the period during which the Government shall have government purpose rights in technical data, may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the Government lesser rights than are enumerated in paragraph (a)(14) of this clause. Any

766 rights so negotiated shall be identified in a license agreement made part of this
767 contract. **[The contractor's asserted restrictions (e.g., development at private
768 expense) upon which the special license is based shall remain subject to
769 challenge pursuant to DFARS 252.227-7037.]**

770 * * * * *

771
772
773 **252.227-7014 Rights in Noncommercial Computer Software and
774 Noncommercial Computer Software Documentation.**

775 As prescribed in [227.7203-6](#)(a)(1), use the following clause:

776 RIGHTS IN NONCOMMERCIAL COMPUTER SOFTWARE AND
777 NONCOMMERCIAL COMPUTER SOFTWARE DOCUMENTATION (~~FEB~~
778 **2014**[DATE])
779

780 * * * * *

781
782 (b) *Rights in computer software or computer software documentation.* The
783 Contractor grants or shall obtain for the Government the following royalty free, world-
784 wide, nonexclusive, irrevocable license rights in noncommercial computer software or
785 computer software documentation. All rights not granted to the Government are
786 retained by the Contractor.
787

788 * * * * *

789
790 (4) ~~Specifically~~ **[Specially]** *negotiated license rights.*

791
792 (i) **[If either party desires a special license, the parties shall enter
793 into good faith negotiations to determine if there are acceptable terms for
794 transferring such rights.]** The standard license rights granted to the Government
795 under paragraphs (b)(1) through ~~(b)~~(3) of this clause, including the period during which
796 the Government shall have government purpose rights in computer software, may be
797 modified by mutual agreement to provide such rights as the parties consider
798 appropriate but shall not provide the Government lesser rights in computer software
799 than are enumerated in paragraph (a)(15) of this clause or lesser rights in computer
800 software documentation than are enumerated in paragraph (a)(14) of the Rights in
801 Technical Data--Noncommercial Items clause of this contract.
802

803
804 (ii) Any rights so negotiated shall be identified in a license agreement made
805 part of this contract.

806
807 **[(iii) The contractor's asserted restrictions (e.g., development at
808 private expense) upon which the special license is based shall remain subject
809 to challenge pursuant to DFARS 252.227-7019.]**

810 * * * * *

811
812
813 **252.227-7015 Technical Data--Commercial Items.**

814 As prescribed in [227.7102-4](#)(a)(1), use the following clause:

815 TECHNICAL DATA--COMMERCIAL ITEMS (~~FEB~~ **2014**[DATE])

816 * * * * *

817
818 (b) **[Standard license]** ~~License~~ *rights*.
819
820

821
822 (1) The Government shall have the unrestricted right to use, modify, reproduce,
823 release, perform, display, or disclose technical data, and to permit others to do so, that—
824
825 (i) Have been provided to the Government or others without restrictions on
826 use, modification, reproduction, release, or further disclosure other than a release or
827 disclosure resulting from the sale, transfer, or other assignment of interest in the
828 technical data to another party or the sale or transfer of some or all of a business entity
829 or its assets to another party;
830
831 (ii) Are form, fit, and function data;
832
833 (iii) Are a correction or change to technical data furnished to the Contractor
834 by the Government;
835
836 (iv) Are necessary for operation, maintenance, installation, or training
837 (other than detailed manufacturing or process data); or
838
839 (v) Have been provided to the Government under a prior contract or
840 licensing agreement through which the Government has acquired the rights to use,
841 modify, reproduce, release, perform, display, or disclose the data without restrictions.
842
843 (2) Except as provided in paragraph (b)(1) of this clause, the Government may
844 use, modify, reproduce, release, perform, display, or disclose technical data within the
845 Government only. The Government shall not—
846
847 (i) Use the technical data to manufacture additional quantities of the
848 commercial items; or
849
850 (ii) Release, perform, display, disclose, or authorize use of the technical data
851 outside the Government without the Contractor's written permission unless a release,
852 disclosure, or permitted use is necessary for emergency repair or overhaul of the
853 commercial items furnished under this contract, or for performance of work by covered
854 Government support contractors.
855
856 (3) The Contractor acknowledges that—
857
858 (i) Technical data covered by paragraph (b)(2) of this clause are authorized
859 to be released or disclosed to covered Government support contractors;
860
861 (ii) The Contractor will be notified of such release or disclosure;
862
863 (iii) The Contractor (or the party asserting restrictions as identified in a
864 restrictive legend) may require each such covered Government support contractor to
865 enter into a non-disclosure agreement directly with the Contractor (or the party
866 asserting restrictions) regarding the covered Government support contractor's use of
867 such data, or alternatively, that the Contractor (or party asserting restrictions) may
868 waive in writing the requirement for an non-disclosure agreement; and
869
870 (iv) Any such non-disclosure agreement shall address the restrictions on the
871 covered Government support contractor's use of the data as set forth in the clause at
872 [252.227-7025](#), Limitations on the Use or Disclosure of Government-Furnished
873 Information Marked with Restrictive Legends. The non-disclosure agreement shall not
874 include any additional terms and conditions unless mutually agreed to by the parties to
875 the non-disclosure agreement.

876
877 (c) ~~Additional~~ **[Specially negotiated]** license rights. **[If either party desires a**
878 **special license, the parties shall enter into good faith negotiations to**
879 **determine if there are acceptable terms for transferring such rights.**
880 **However, the Contractor is not obligated to provide the Government greater**
881 **rights, and the Contracting Officer is not required to accept lesser rights,**
882 **than the rights provided in the standard grant of license.]**~~The Contractor, its~~
883 ~~subcontractors, and suppliers are not required to provide the Government additional~~
884 ~~rights to use, modify, reproduce, release, perform, display, or disclose technical data.~~
885 ~~However, if the Government desires to obtain additional rights in technical data, the~~
886 ~~Contractor agrees to promptly enter into negotiations with the Contracting Officer to~~
887 ~~determine whether there are acceptable terms for transferring such rights. All~~
888 ~~technical data in which the Contractor has granted the Government additional rights~~
889 ~~shall be listed or described in a special license agreement made part of this contract.~~
890 ~~The license shall enumerate the additional rights granted the Government in such data.~~
891 **[The contractor's asserted restrictions (e.g., development at private expense)**
892 **upon which the special license is based shall remain subject to challenge**
893 **pursuant to DFARS 252.227-7037.]**

894 * * * * *

896
897 **252.227-7018 Rights in Noncommercial Technical Data and Computer**
898 **Software—Small Business Innovation Research (SBIR) Program.**

899 As prescribed in [227.7104](#)(a), use the following clause:

900
901 RIGHTS IN NONCOMMERCIAL TECHNICAL DATA AND COMPUTER
902 SOFTWARE—SMALL BUSINESS INNOVATION RESEARCH (SBIR) PROGRAM
903 (FEB 2014/DATE)

904 * * * * *

906
907 (b) *Rights in technical data and computer software.* * * *

909 (5) ~~Specifically~~ **[Specially]** negotiated license rights. **[After contract award,**
910 **if either party desires to negotiate a special license, the parties shall enter**
911 **into good faith negotiations to determine if there are acceptable terms for**
912 **transferring such rights.]**The standard license rights granted to the Government
913 under paragraphs (b)(1) through ~~(b)~~(4) of this clause may be modified by mutual
914 agreement to provide such rights as the parties consider appropriate but shall not
915 provide the Government lesser rights in technical data, including computer software
916 documentation, than are enumerated in paragraph (a)(15) of this clause or lesser rights
917 in computer software than are enumerated in paragraph (a)(18) of this clause. Any
918 rights so negotiated shall be identified in a license agreement made part of this
919 contract. **[The contractor's asserted restrictions (e.g., SBIR data, development**
920 **at private expense) upon which the special license is based shall remain**
921 **subject to challenge pursuant to DFARS 252.227-7019 and 252.227-7037, as**
922 **applicable.]**

923 * * * * *

924