



# ANPR Public Meeting

## DFARS Case 2018-D069

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# DFARS Case 2018-D069: Validation of Proprietary and Technical Data

AIA and its member companies appreciate the opportunity to participate in the rulemaking process and provide input prior to the development of a proposed rule.

AIA commends the DAR Council for hosting public meetings and issuing ANPRs as a first step in the rulemaking process for critical policy issues such as data rights.

These additional steps enhance dialogue between Government and industry representatives on key policy issues and ensure DoD is as informed as possible about industry views and concerns, prior to developing its rulemaking approaches.



# Statutory Change for Proposed Rule

Implements Current 10 USC 2321(f) Presumption of Development Exclusively at Private Expense.—

In the case of a challenge to a use or release restriction that is asserted with respect to technical data of a contractor or subcontractor under a contract for commercial items, the contracting officer shall presume that the contractor or subcontractor has justified the restriction on the basis that the item was developed exclusively at private expense, whether or not the contractor or subcontractor submits a justification in response to the notice provided pursuant to subsection (d)(3). In such a case, the challenge to the use or release restriction may be sustained only if information provided by the Department of Defense demonstrates that the item was not developed exclusively at private expense.

Essentially reverts to version in existence in 1994

# Change to DFARS 252.227-7037

## Comparison to 1999 version

- (b) ~~Contracts for commercial~~ Commercial items—presumption ~~of regarding~~ development exclusively at private expense. Under a contract for a commercial item, component, or process, the Department of Defense shall ~~The Contracting Officer will~~ presume that a the Contractor's or a subcontractor's asserted use or release restrictions are with respect to a commercial item is justified on the basis that the item, component, or process was developed exclusively at private expense. The Department shall Contracting Officer will not challenge such assertions unless the Contracting Officer has information ~~the Department provides that~~ demonstrates that the commercial item, component, or process was not developed exclusively at private expense.

“Commercial item” change ties more clearly to DFARS 252.227-7015 definition

Improved readability

# Change to DFARS 227

Draft Revisions to DFARS 227.7103-13(c)(2) does not give appropriate guidance on the requirement for the Department of Defense to **provide** information that “demonstrates that the item was not developed exclusively at private expense”

Existing DFARS 227.7103-13(c)(1) also uses the undefined term “development” instead of the defined term “developed”

Suggest implementing in regulations for contracting officers in one of two ways

# DFARS 227.7103-13(c) Option 1:

(c) Challenge considerations and presumption.

(1) Requirements to initiate a challenge. Contracting officers shall have reasonable grounds to challenge the validity of an asserted restriction. Before issuing a challenge to an asserted restriction, carefully consider all available information pertaining to the assertion. The contracting officer shall not challenge a contractor's assertion that a commercial item was developed exclusively at private expense unless the Government ~~can demonstrate~~ provides information demonstrating that it contributed to development of that item the commercial item was not developed exclusively at private expense.

## DFARS 227.7103-13(c) Option 2:

(2) Commercial items—presumption regarding development exclusively at private expense. 10 U.S.C. 2320(b)(1) and 2321(f) establish a presumption and procedures regarding validation of asserted restrictions for technical data related to commercial items-on the basis of development exclusively at private expense. Contracting officers shall presume that a commercial item was developed exclusively at private expense whether or not a contractor or subcontractor submits a justification in response to a challenge notice. The contracting officer shall not challenge a contractor's assertion that a commercial item was developed exclusively at private expense unless the Government provides information demonstrating that the commercial item was not developed exclusively at private expense. When a challenge is warranted for a commercial item, a contractor's or subcontractor's failure to respond to the challenge notice cannot be the sole basis for issuing a final decision denying the validity of an asserted restriction.

# Conforming DFARS 252.227-7037

DFARS 227-7103 instructions likely sufficient

Ideally instructions are reflected in contract

DFARS 252.227-7037(b):

- (b) Commercial items—presumption regarding development exclusively at private expense. The Contracting Officer ~~will~~ shall presume that the Contractor's or a subcontractor's asserted use or release restrictions with respect to a commercial item is justified on the basis that the item was developed exclusively at private expense. The Contracting Officer ~~will~~ shall not challenge such assertions unless the Contracting Officer ~~has~~ provides information that demonstrates that the commercial item was not developed exclusively at private expense.

# PGI for Commercial Computer Software

*ANPR clarifies that “there is no DFARS coverage applying such a presumption of development funding to commercial computer software because, as a matter of policy also dating back to the FASA time frame, the underlying procedures for challenging and validating asserted restrictions have not been applied to commercial computer software—only to noncommercial computer software (e.g., DFARS section 227.7203–13 and the clause at DFARS 252.227–7019)”*

Confusion in both industry and DoD regarding applicability of DFARS 252.227–7019 to commercial computer software

Add PGI to clarify applicability and that disputes over license rights are governed by the terms of the commercial software license

# Related Recommendations

Recognize ANPR limited to statutory change

Status of non-statutory recommendations related to validation and data assertions from the Section 809 and Section 813 panel reports, including:

- The Validation Process is Cumbersome and Confusing (Section 813 Panel Report, Paper 18)
- Mandatory flow-down (commercial subs and suppliers) (Section 813 Panel Report, Paper 19)
- The Data Assertion List is a Burden on Both Contractor and the Government (Section 813 Panel Report, Paper 23)
- Section 809 Panel Recommendation #4, “Revise DFARS sections related to rights in technical data for commercial products”

Thank you for your consideration



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