252.227–7036

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 60 FR 33605, June 28, 1995]

252.227–7034—252.227–7036 [Reserved]

252.227–7037 Validation of restrictive markings on technical data.

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

VALIDATION OF RESTRICTIVE MARKINGS ON TECHNICAL DATA (SEP 1999)

(a) Definitions. The terms used in this clause are defined in the Rights in Technical Data—Noncommercial Items clause of this contract.

(b) Contracts for commercial items—presumption of development at private expense. Under a contract for a commercial item, component, or process, the Department of Defense shall presume that a Contractor’s asserted use or release restrictions are justified on the basis that the item, component, or process was developed exclusively at private expense. The Department shall not challenge such assertions unless information the Department provides demonstrates that the item, component, or process was not developed exclusively at private expense.

(c) Justification. The Contractor or subcontractor at any tier is responsible for maintaining records sufficient to justify the validity of its markings that impose restrictions on the Government and others to use, duplicate, or disclose technical data delivered or required to be delivered under the contract or subcontract. Except under contracts for commercial items, the Contractor or subcontractor shall be prepared to furnish to the Contracting Officer a written justification for such restrictive markings in response to a challenge under paragraph (e) of this clause.

(d) Prechallenge request for information. (1) The Contracting Officer may request the Contractor or subcontractor to furnish a written explanation for any restriction asserted by the Contractor or subcontractor on the right of the United States or others to use technical data. If, upon review of the explanation submitted, the Contracting Officer remains unable to ascertain the basis of the restrictive marking, the Contracting Officer may further request the Contractor or subcontractor to furnish additional information in the records of, or otherwise in the possession of or reasonably available to, the Contractor or subcontractor to justify the validity of any restrictive marking on technical data delivered or to be delivered under the contract or subcontract (e.g., a statement of facts accompanied with supporting documentation). The Contractor or subcontractor shall submit such written data as requested by the Contracting Officer within the time required or such longer period as may be mutually agreed.

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

(3) If the Contractor or subcontractor fails to respond to the Contracting Officer’s request for information under paragraph (d)(1) of this clause, and the Contracting Officer determines that continued adherence to the marking would make impracticable the subsequent competitive acquisition of the item, component, or process to which the technical data relates, the Contracting Officer may challenge the validity of the marking as described in paragraph (e) of this clause.

(e) Challenge. (1) Notwithstanding any provision of this contract concerning inspection and acceptance, if the Contracting Officer determines that a challenge to the restrictive marking is warranted, the Contracting Officer shall send a written challenge notice to the Contractor or subcontractor asserting the restrictive markings. Such challenge shall—

(i) State the specific grounds for challenging the asserted restriction;

(ii) Require a response within sixty (60) days justifying and providing sufficient evidence as to the current validity of the asserted restriction;

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

(iv) State that failure to respond to the challenge notice may result in issuance of a final decision pursuant to paragraph (f) of this clause.

(2) The Contracting Officer shall extend the time for response as appropriate if the Contractor or subcontractor submits a written request showing the need for additional time to prepare a response.

(3) The Contractor’s or subcontractor’s written response shall be considered a claim within the meaning of the Contract Disputes
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Act of 1978 (41 U.S.C. 601, et seq.), and shall be certified in the form prescribed at 33.207 of the Federal Acquisition Regulation, regardless of dollar amount.

(f) Final decision when Contractor or subcontractor fails to respond. Upon a failure of a Contractor or subcontractor to submit any response to the challenge notice, other than a failure to respond under a contract for commercial items, the Contracting Officer will issue a final decision to the Contractor or subcontractor in accordance with the Disputes clause of this contract pertaining to the validity of the asserted restriction. This final decision shall be issued as soon as possible after the expiration of the time period of paragraph (f)(1)(i) or (f)(2) of this clause.

(g) Final decision when Contractor or subcontractor responds. (i) If the Contracting Officer determines that the Contractor or subcontractor has justified the validity of the restrictive marking, the Contracting Officer shall issue a final decision to the Contractor or subcontractor sustaining the validity of the restrictive marking, and stating that the Government will continue to be bound by the restrictive marking. This final decision shall be issued within sixty (60) days after receipt of the Contractor’s or subcontractor’s response to the challenge notice, or within such longer period that the Contracting Officer has notified the Contractor or subcontractor of the longer period that the Government will require. The notification of a longer period for issuance of a final decision will be made within sixty (60) days after receipt of the response to the challenge notice.

(ii) The Government agrees that it will continue to be bound by the restrictive marking of a period of ninety (90) days from the issuance of the Contracting Officer’s final decision under paragraph (g)(2)(i) of this clause. The Contractor or subcontractor agrees that, if it intends to file suit in the United States Claims Court, it will provide a notice of intent to file suit to the Contracting Officer within ninety (90) days from the issuance of the Contracting Officer’s final decision under paragraph (g)(2)(i) of this clause. If the Contractor or subcontractor fails to appeal, file suit, or provide a notice of intent to file suit to the Contracting Officer within the ninety (90)-day period, the Government may cancel or ignore the restrictive markings, and the failure of the Contractor or subcontractor to take the required action constitutes agreement with such Government action.

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

(iv) The Government agrees that it will be bound by the restrictive marking where an appeal or suit is filed pursuant to the Contract Disputes Act until final disposition by an agency Board of Contract Appeals or the
United States Claims Court. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, following notice to the Contractor that a restrictive marking has been made on technical data, the Contractor or subcontractor may, however, challenge a re- 

termination to challenge the restriction. The 

Officer may review and make a written de- 

terminion of delivery of the technical data to the Gov- 

erment on a contract or within three (3) years 

period within three (3) years of final pay- 

the Contractor or subcontractor. During the 

be delivered under a contract, asserted by 

marking, if the challenge by the Government 

tractor or subcontractor in defending the 

fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Con- 

tractor or subcontractor for payment of 

incurred by the Government in challenging the 

marking, unless special circumstances 

make such payment unjust. 

(2) If the Contractor or subcontractor ap- 

peals or files suit and if, upon final disposi- 

ion of the appeal or suit, the Contracting 

Officer's decision is not sustained— 

(i) The Government shall continue to be 

bound by the restrictive marking; and 

(ii) The Government shall be liable to the 

Contractor or subcontractor for payment of 

fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Con- 

tractor or subcontractor in defending the 

marking, if the challenge by the Government 

is found not to have been made in good faith. 

(1) Duration of right to challenge. The Gov- 

ernment may review the validity of any re-

striction on technical data, delivered or to 

be delivered under a contract, asserted by 

the Contractor or subcontractor. During the 

period within three (3) years of final pay- 

ment on a contract or within three (3) years 

of delivery of the technical data to the Gov- 

ernment, whichever is later, the Contracting 

Officer may review and make a written de-

termination to challenge the restriction. The 

Government may, however, challenge a re-

striction on the release, disclosure or use of 

technical data at any time if such technical 

data— 

(1) Is publicly available; 

(2) Has been furnished to the United States 

without restriction; or 

(3) Has been otherwise made available 

without restriction. Only the Contracting 

Officer's final decision resolving a formal 

challenge by sustaining the validity of a re-

strictive marking constitutes “validation” as addressed in 10 U.S.C. 2321. 

(j) Decision not to challenge. A decision by 

the Government, or a determination by the 

Contracting Officer, to not challenge the re-

strictive marking or asserted restriction 

shall not constitute “validation.” 

(k) Privity of contract. The Contractor or 

subcontractor agrees that the Contracting 

Officer may transact matters under this 

clause directly with subcontractors at any 

tier that assert restrictive markings. How- 

ver, this clause neither creates nor implies 

privity of contract between the Government 

and subcontractors. 

(i) Flowdown. The Contractor or subcon- 

tractor agrees to insert this clause in contrac- 
tual instruments with its subcontractors or sup- 
pliers at any tier requiring the delivery of tech- 

ical data, except contractual instruments for 

commercial items or commercial components. 

(End of clause) 

[60 FR 33505, June 28, 1995, as amended at 60 

FR 61502, Nov. 30, 1995; 64 FR 51077, Sept. 21, 

1999; 69 FR 31912, June 8, 2004] 

252.227–7038 Patent Rights—Ownership by the Contractor (Large Business). 

As prescribed in 227.303(2), use the following clause: 

PATENT RIGHTS—OWNERSHIP BY THE CONTRACTOR (LARGE BUSINESS) (DEC 2007) 

(a) Definitions. As used in this clause—In- 

vention means— 

(1) Any invention or discovery that is or 

may be patentable or otherwise protectable 

under Title 35 of the United States Code; or 

(2) Any variety of plant that is or may be 

protectable under the Plant Variety Protec- 
tion Act (7 U.S.C. 2321, et seq.). 

Made— 

(1) When used in relation to any invention 

other than a plant variety, means the con- 

ception or first actual reduction to practice 

of the invention; or 

(2) When used in relation to a plant vari- 

ey, means that the Contractor has at least 

tentatively determined that the variety has 

been reproduced with recognized characteris-

tics. 

Nonprofit organization means— 

(1) A university or other institution of 

higher education; 

(2) An organization of the type described 
in the Internal Revenue Code at 26 U.S.C. 

501(c)(3) and exempt from taxation under 26 

U.S.C. 501(a); or 

End of clause)