Contract line, subline, or exhibit line item number	Location name	City	State	DoDAAC

(2) The following are excluded from the requirements of paragraph (b)(1) of this clause:

(i) Shipments of bulk commodities.

(ii) Shipments to locations other than Defense Distribution Depots when the contract includes the clause at FAR 52.213–1, Fast Payment Procedures.

(c) The Contractor shall—

(1) Ensure that the data encoded on each passive RFID tag are globally unique (*i.e.,* the tag ID is never repeated across two or more RFID tags) and conforms to the requirements in paragraph (d) of this clause;

(2) Use passive tags that are readable; and

(3) Ensure that the passive tag is affixed at the appropriate location on the specific level of packaging, in accordance with MIL–STD–129 (Section 4.9.2) tag placement specifications.

(d) *Data syntax and standards.* The Contractor shall encode an approved RFID tag using the instructions provided in the EPC™ Tag Data Standards in effect at the time of contract award. The EPC™ Tag Data Standards are available at *http://www.epcglobalinc.org/standards/*.

(1) If the Contractor is an EPCglobal™ subscriber and possesses a unique EPC™ company prefix, the Contractor may use any of the identifiers and encoding instructions described in the most recent EPC™ Tag Data Standards document to encode tags.

(2) If the Contractor chooses to employ the DoD identifier, the Contractor shall use its previously assigned Commercial and Government Entity (CAGE) code and shall encode the tags in accordance with the tag identifier details located at *http://www.acq.osd.mil/log/rfid/tag_data.htm.* If the Contractor uses a third-party packaging house to encode its tags, the CAGE code of the third-party packaging house is acceptable.

(3) Regardless of the selected encoding scheme, the Contractor with which the Department holds the contract is responsible for ensuring that the tag ID encoded on each passive RFID tag is globally unique, per the requirements in paragraph (c)(1) of this clause.

(e) *Advance shipment notice.* The Contractor shall use Wide Area WorkFlow (WAWF), as required by DFARS 252.232–7003, Electronic Submission of Payment Requests, to electronically submit advance shipment notice(s) with the RFID tag ID(s) (specified in paragraph (d) of this clause) in advance of the shipment in accordance with the procedures at *https://wawf.eb.mil/*.

(End of clause)

[FR Doc. 2011–23945 Filed 9–19–11; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 227, and 252

RIN 0750–AF84

Defense Federal Acquisition Regulation Supplement; Presumption of Development Exclusively at Private Expense (DFARS Case 2007–D003)

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule to amend the Defense Federal Acquisition Regulation Supplement to implement sections of the Fiscal Year (FY) 2007 and 2008 National Defense Authorization Act, including special requirements and procedures related to the validation of a contractor's or subcontractor's asserted restrictions on technical data and computer software.

DATES: *Effective date:* September 20, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Manuel Quinones, 703–602–8383.

SUPPLEMENTARY INFORMATION:

I. Background

This final rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 802(b) of the FY 2007 National Defense Authorization Act (NDAA) (Pub. L. 109–364) and section 815 of the FY 2008 NDAA (Pub. L. 110–181). Section 802(b) modified 10 U.S.C. 2321(f)(2) with regard to the presumption of development at private expense for major systems. Section 815 revised 10 U.S.C. 2321(f)(2) to exempt commercially available off-the-shelf items from the requirements that section 802(b) established for major systems.

This final rule implements special requirements and procedures related to the validation of a contractor's or subcontractor's asserted restrictions on technical data and computer software. More specifically, the final rule affects these validation procedures in the context of two special categories of items: Commercial items (including commercially available off-the-shelf items), which may be referred to as the ''Commercial Rule;'' and major systems (including subsystems and components of major systems), which may be referred to as the ''Major Systems Rule.''

DoD published a proposed rule with a request for comments in the **Federal Register** on May 7, 2010 (75 FR 25161). Two respondents provided comments.

II. Discussion and Analysis of the Public Comments

A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows.

A. Prescribing a Noncommercial Clause for Technical Data Related to a Commercial Item

Comment: Two respondents described the prescriptions at DFARS 227.7102–3(b) and 227.7103–6(a) as new requirements that exceed the changes necessary to implement the statute.

Response: The operative elements of the clause prescription at DFARS 227.7102–3(b) were a part of the last major revision of Part 227 in 1995. The substance of the prescription has not changed in the proposed rule; the requirement was redesignated as DFARS 227.7102–(4)(b) and revised to cross-reference the prescription added to DFARS 227.7103–6(a). This follows DFARS drafting principles to use only a single prescription for each clause, using cross-references when necessary. As such, the prescription at DFARS 227.7103–6(a) serves as the primary source for prescribing all uses of the clause at DFARS 252.227–7013, with a cross-reference at 227.7102–(4)(b).

Comment: A respondent recommended that the criteria ''or will pay any portion of the development costs'' should be eliminated because the Government should not receive the benefit of something it may or may not pay for in the future outside of the contract.

Response: The ''will pay'' criterion has been used since 1995. The term ''will'' is used to denote an anticipated future action or result, and there is no evidence that this criterion has been or should be interpreted as seeking to be used in a contract when the criteria used to invoke the clause has not, and is not, expected to occur during the contract.

Comment: Two respondents outlined specific concerns that prescribing use of the noncommercial clause for technical data related to a commercial item is unnecessarily burdensome with regard to the noncommercial marking requirements. One respondent argued that this could result in the contractor unintentionally forfeiting its intellectual property rights by delivering with commercial markings that do not comply with the DFARS noncommercial marking requirements.

Response: The prescription for the use of the clause at DFARS 252.227–7013 in this scenario already exists. Use of commercial restrictive markings would not directly result in the forfeiture of the contractor's intellectual property rights in cases in which the noncommercial marking rules were used. The restrictive marking required by the clause at DFARS 252.227–7015(d) for technical data related to commercial items should be sufficient to: (1) Preserve the contractor's rights under the noncommercial clause procedures for correcting ''nonconforming'' markings (see DFARS 252.227–7013(h)(1)) or (2) validate asserted restrictions under DFARS 252.227–7037, which is used regardless of whether the clauses at DFARS 252.227–7013 or 252.227–7015 are included.

The final rule is amended to address concerns about the desirability of requiring noncommercial markings for the entire technical data package, in cases where the Government may have funded only a small portion of the development. The final rule revises the prescriptions at DFARS 227.7102–4(b) and 227.7103–6(a), to clarify that in cases when the Government ''will have paid'' for any portion of the development of a commercial item, both the commercial clause at DFARS 252.227–7015 and the noncommercial clause at DFARS 252.227–7013 should be used together. In these cases, the noncommercial clause will apply only to the technical data related to those portions of the commercial item that were developed in some part at Government expense, and the commercial clause will remain applicable to the rest of the data. This preserves the preexisting allocation of rights between the parties, but avoids the necessity of applying noncommercial markings to data related to commercial technologies that were developed exclusively at private expense. In addition, the flowdown requirements of DFARS clause 252.227–7013(k) and clause 252.227–7015(e) are clarified to enable the use of the appropriate clause(s) to lower-tier subcontracts.

Comment: Two respondents commented that the proposed revisions result in a commercial item losing its commercial item status. One of these respondents recommended the elimination of the ''developed exclusively at private expense'' component of the proposed revisions to the clause at DFARS 252.227–7019, to avoid the application of the noncommercial clauses to commercial technologies.

Response: The prescription for the use of the clause at DFARS 252.227–7013 does not affect the commercial status of an item that otherwise meets the definition of commercial item at FAR 2.101 (based on 41 U.S.C. 403(12), and 10 U.S.C. 2302(3)(I)). If the item still qualifies as a commercial item, then it is a commercial item. If that commercial item was not developed exclusively at private expense, then the rules apply that govern the treatment of technical data deliverables and associated license rights related to that commercial item.

Comment: Two respondents identified several ways in which the prescribed use of the clause at DFARS 252.227–7013, instead of 252.227–7015, appears to be inconsistent with FAR and DFARS policies regarding data deliverables and data rights in commercial technologies. The respondents noted that DFARS 227.7102–1 states DoD's basic policy that DoD shall acquire only the technical data deliverables that are customarily provided to the public, with a few exceptions.

Response: The prescription for the use of the clause at DFARS 252.227–7013, when the item has been developed in part at Government expense but the item still qualifies as commercial, does not change the applicability of this policy statement. The policy provides exceptions, one of which allows the Government to require the delivery of technical data that describes modifications made at Government expense even if such data is not typically provided to the public (see DFARS 227.7102–1(a)(3)).

Comment: A respondent recommended the elimination of the ''developed exclusively at private expense'' component of the proposed revisions to the clause at DFARS 252.227–7019, to avoid the application of the noncommercial clauses to commercial technologies.

Response: The respondent's basis for concern is unclear in view of the limited applicability of the clause at DFARS 252.227–7019 to only noncommercial computer software, and the proposed revisions address only the noncommercial aspects of the Major Systems Rule. Accordingly, the proposed revisions to the validation procedures for noncommercial computer software at DFARS 227.7203–13 and 252.227–7019 are retained in the final rule.

Comment: One respondent noted that DFARS 227.7202–1 states the basic policy governing commercial computer software and computer software documentation is that the Government acquires the licenses customarily provided to the public unless such licenses are inconsistent with Federal procurement law or do not otherwise satisfy the agency's needs.

Response: The proposed rule creates no issues or conflicts with this policy since there are no changes proposed for any DFARS coverage related to commercial computer software or documentation.

B. Applying Data Rights Clauses to Subcontracts for Commercial Items

Comment: Two respondents recommended that 10 U.S.C. 2320 and 10 U.S.C. 2321 not be removed from the list of statutes set forth in DFARS 212.504(a), which prohibits their application to subcontracts for commercial items. One respondent concluded that removing these statutes from the list appears to ''unilaterally overturn the express intent of Congress and the FAR Council'' and that the proposed rule did not explain the basis for the decision to remove the statutes from the list.

Response: The proposed rule explains the basis for this determination. The decision to remove these statutes from the list is based on the appropriate statutory determinations that doing so is in the best interest of the Government. The proposed revisions to DFARS 212.504(a) are retained in the final rule.

C. Application of Statutory Technical Data Rules to Computer Software

Comment: A respondent argued that the proposed rule should not make any changes to the validation procedures for computer software; in particular, the clause at DFARS 252.227–7019, ''Validation of Asserted Restrictions—Computer Software,'' should not be amended to include the proposed new paragraph (f) that implements the ''Major Systems Rule.'' In addition, a respondent contended that the decision to cover software was flawed because: (1) There is no statutory basis for the change and (2) not all rights determinations are ''black and white.''

Response: (1) Although 10 U.S.C. 2320 and 2321 apply only to technical data and not to computer software, it is longstanding DoD policy and practice to

apply the same or analogous requirements to computer software, whenever appropriate. Accordingly, the proposed rule implements revisions to the validation procedures for computer software only to the extent that those procedures are based on the technical data validation procedures that are affected by the statutory changes. The result is that it is only the Major Systems Rule that is adapted for application only to noncommercial computer software. (2) The new Major Systems Rule is applicable only to challenges of contractor assertions that development was exclusively at private expense. Thus, the proposed adaptation of the new Major Systems Rule to noncommercial software validation also is not applicable to assertions based on mixed funds, and does not in any way restrict the ability to segregate mixed-funding development into its privately-funded and Government-funded portions.

D. Two Separate Standards for Civilian and DoD Agencies

Comment: One respondent stated that the proposed rule creates two separate standards for civilian and DoD agencies in that ''the practical result could be that an item will be treated as commercial for purposes of intellectual property rights by civilian agencies, and as non-commercial by the agencies of DoD.''

Response: Without analyzing the required treatment under the FAR of a commercial item by a civilian agency when the Government has paid a portion of the development costs, the proposed rule has not changed the criteria for whether an item is a commercial item (*i.e.,* under the definition at FAR 2.101). Since 1995, DFARS 227.7102–3(b) has required the use of the noncommercial clause at 252.227–7013 in lieu of the commercial clause at 252.227–7015 if the Government will pay any portion of the development costs of the commercial item. Although the proposed revision of the DoD validation scheme to include a ''Commercial Rule'' and a ''Major Systems Rule'' may have no equivalent in the civilian validation scheme, DoD's process is driven by the changes to 10 U.S.C. 2321, for which there is no equivalent in the civilian agency statute (41 U.S.C. 253d). No revisions are necessary.

E. Administrative, Technical and Typographical Issues

Comment: A respondent identified a citation error, which seeks to remove and reserve 212.504 paragraphs (a)(v) 10 U.S.C. 2324, Allowable Costs Under Defense Contracts and (a)(vi) 10 U.S.C. 2327, Reporting Requirements Regarding Dealings with Terrorist Countries, when it appears that the intent is to remove paragraphs (a)(iii) 10 U.S.C. 2320, Rights in Technical Data and (iv) 10 U.S.C. 2321, Validation of Proprietary Data Restrictions.

Response: The respondent is correct. This change is reflected in the final rule.

Comment: A respondent recommended changing the cross-reference in the second sentence of DFARS 252.227–7037(c) from paragraph (b) to (b)(1) for further clarification.

Response: The respondent is correct. This change is reflected in the final rule.

F. Changes to Rule Resulting From the Public Comments

Changes made in the final rule based on the public comments received, include the following:

- Removed DFARS 212.504 paragraphs (a)(iii) 10 U.S.C. 2320, Rights in Technical Data, and (a)(iv) 10 U.S.C. 2321, Validation of Proprietary Data Restrictions, instead of DFARS 212.504 paragraphs (a)(v) 10 U.S.C. 2324, Allowable Costs Under Defense Contracts and (a)(vi) 10 U.S.C. 2327, Reporting Requirements Regarding Dealings with Terrorist Countries.
- Revised the prescriptions at DFARS 227.7102–4(b) and 227.7103–6(a) to clarify that in cases when the Government ''will have paid'' for any portion of the development of a commercial item, both the commercial clause at DFARS 252.227–7015 and the noncommercial clause at DFARS 252.227–7013 shall be used together.
- Revised 252.212–7001(b) to add 252.227–7013 and 252.227–7037 to be used, as applicable.
- Revised 252.212–7001(c) to add 252.227–7013, 252.227–7015 and 252.227–7037 to be flowed down to subcontractors, as applicable.
- Revised the clause flowdown requirements of DFARS 252.227–7013(k) and 252.227–7015(e) to enable the use of the appropriate clause(s) to lower tier subcontracts.
- Changed the cross reference in the second sentence of the clause at DFARS 252.227–7037(c) from paragraph (b) to (b)(1).
- Revised 252.244–7000 to add 252.227–7015 and 252.227–7037 to be flowed down to subcontractors, as applicable.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, 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 significant economic impact on a substantial number of small entities within the meaning for the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because major systems or subsystems are generally not developed by small businesses. The rule only applies in the limited circumstances that there is a challenge to a use or release restriction for a major system or subsystem that the contractor or subcontractor claims was developed exclusively at private expense.

V. Paperwork Reduction Act

The rule does not impose any 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 Parts 212, 227, and 252

Government procurement.

Mary Overstreet,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 227, and 252 are amended as follows:

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

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

PART 212—ACQUISITION OF COMMERCIAL ITEMS

212.504 [Amended]

■ 2. Section 212.504 is amended as follows:

■ (a) By removing paragraphs (a)(iii) and (iv); and

■ (b) Redesignating paragraphs (a)(v) through (xix) as (a)(iii) through (xvii), respectively.

PART 227—PATENTS, DATA, AND COPYRIGHTS

■ 3. Amend section 227.7102 by removing the text, and republishing the section heading to read as follows:

227.7102 Commercial items, components, or processes.

■ 4. Redesignate section 227.7102–3 as 227.7102–4.

■ 5. Add new section 227.7102–3 to read as follows:

227.7102–3 Government right to review, verify, challenge and validate asserted restrictions.

Follow the procedures at 227.7103–13 and the clause at 252.227–7037, Validation of Restrictive Markings on Technical Data, regarding the validation of asserted restrictions on technical data related to commercial items.

■ 6. Revise the newly redesignated section 227.7102–4 to read as follows:

227.7102–4 Contract clauses.

(a)(1) Except as provided in paragraph (b) of this subsection, use the clause at 252.227–7015, Technical Data–Commercial Items, in all solicitations and contracts when the Contractor will be required to deliver technical data pertaining to commercial items, components, or processes.

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

(b) In accordance with the clause prescription at 227.7103–6(a), use the clause at 252.227–7013, Rights in Technical Data–Noncommercial Items, in addition to the clause at 252.227–7015, if the Government will have paid for any portion of the development costs of a commercial item. The clause at 252.227–7013 will govern the technical data pertaining to any portion of a commercial item that was developed in any part at Government expense, and the clause at 252.227–7015 will govern the technical data pertaining to any portion of a commercial item that was developed exclusively at private expense.

(c) Use the clause at 252.227–7037, Validation of Restrictive Markings on Technical Data, in all solicitations and contracts for commercial items that include the clause at 252.227–7015 or the clause at 252.227–7013.

■ 6. Amend section 227.7103–6 to revise paragraph (a) to read as follows:

227.7103–6 Contract clauses.

(a) Use the clause at 252.227–7013, Rights in Technical Data–Noncommercial Items, in solicitations and contracts when the successful offeror(s) will be required to deliver to the Government technical data pertaining to noncommercial items, or pertaining to commercial items for which the Government will have paid for any portion of the development costs (in which case the clause at 252.227–7013 will govern the technical data pertaining to any portion of a commercial item that was developed in any part at Government expense, and the clause at 252.227–7015 will govern the technical data pertaining to any portion of a commercial item that was developed exclusively at private expense). Do not use the clause when the only deliverable items are computer software or computer software documentation (see 227.72), commercial items developed exclusively at private expense (see 227.7102–4), existing works (see 227.7105), special works (see 227.7106), or when contracting under the Small Business Innovation Research Program (see 227.7104). Except as provided in 227.7107–2, do not use the clause in architect-engineer and construction contracts.

* * * * *

■ 7. Amend section 227.7103–13 by:

■ (a) Redesignating paragraph (c) as paragraph (d);

■ (b) Adding a new paragraph (c); and

■ (c) Amending redesignated paragraph (d) by revising the introductory text and paragraphs (d)(2)(i) and (d)(4).

The additions and revisions read as follows.

227.7103–13 Government right to review, verify, challenge and validate asserted restrictions.

* * * * *

(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, component, or process was developed exclusively at private expense unless the Government can demonstrate that it contributed to development of the item, component or process.

(2) *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, and to major systems, on the basis of development exclusively at private expense.

(i) *Commercial items.* For commercially available off-the-shelf items (defined at 41 U.S.C. 431(c)[104]) in all cases, and for all other commercial items except as provided in paragraph (c)(2)(ii) of this subsection, contracting officers shall presume that the items were developed exclusively at private expense whether or not a contractor submits a justification in response to a challenge notice. When a challenge is warranted, 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.

(ii) *Major systems.* The presumption of development exclusively at private expense does not apply to major systems or subsystems or components thereof, except for commercially available off-the-shelf items (which are governed by paragraph (c)(2)(i) of this subsection). When the contracting officer challenges an asserted restriction regarding technical data for a major system or a subsystem or component thereof on the basis that the technology was not developed exclusively at private expense, the contracting officer shall sustain the challenge unless information provided by the contractor or subcontractor demonstrates that the item was developed exclusively at private expense.

(d) *Challenge and validation.* All challenges shall be made in accordance with the provisions of the clause at 252.227–7037, Validation of Restrictive Markings on Technical Data.

* * * * *

(2) *Pre-challenge requests for information.*

(i) After consideration of the situations described in paragraph (d)(3) of this subsection, contracting officers may request the person asserting a restriction to furnish a written explanation of the facts and supporting documentation for the assertion in sufficient detail to enable the contracting officer to ascertain the basis of the restrictive markings. Additional supporting documentation may be requested when the explanation provided by the person making the assertion does not, in the contracting officer's opinion, establish the validity of the assertion.

* * * * *

(4) *Challenge notice.* The contracting officer shall not issue a challenge notice unless there are reasonable grounds to question the validity of an assertion. The contracting officer may challenge

an assertion whether or not supporting documentation was requested under paragraph (d)(2) of this subsection. Challenge notices shall be in writing and issued to the contractor or, after consideration of the situations described in paragraph (d)(3) of this subsection, the person asserting the restriction. The challenge notice shall include the information in paragraph (e) of the clause at 252.227–7037.

* * * * *

■ 8. Amend section 227.7203–13 by:

■ (a) Redesignating paragraphs (d) through (f) as (e) through (g), respectively; and

■ (b) Adding a new paragraph (d) to read as follows:

227.7203–13 Government right to review, verify, challenge and validate asserted restrictions.

* * * * *

(d) *Major systems.* When the contracting officer challenges an asserted restriction regarding noncommercial computer software for a major system or a subsystem or component thereof on the basis that the computer software was not developed exclusively at private expense, the contracting officer shall sustain the challenge unless information provided by the contractor or subcontractor demonstrates that the computer software was developed exclusively at private expense.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 9. Amend section 252.212–7001 by—

■ (a) Revising the introductory text;

■ (b) Amending the clause date by removing ''(AUG 2011)'' and adding in its place ''(SEP 2011)'';

■ (c) Redesignating paragraphs (b)(19) through (b)(28) as paragraphs (b)(20) through (b)(29);

■ (d) Adding new paragraph (b)(19);

■ (e) Amending newly redesignated paragraph (b)(20) by removing ''(MAR 2011)'' and adding in its place ''(SEP 2011)'';

■ (f) Amending newly redesignated paragraph (b)(21) by removing ''(SEP 1999)'' and adding in its place ''(SEP 2011), if applicable (see 227.7102–4(c)).'';

■ (g) Redesignating paragraphs (c)(2) through (c)(6) as paragraphs (c)(5) through (c)(9), respectively; and

■ (h) Adding new paragraphs (c)(2) through (c)(4).

The additions and revisions read as follows:

252.212–7001 Contract Terms and Conditions Required to Implement Statues or Executive Orders Applicable to Defense Acquisitions of Commercial Items.

As prescribed in 212.301(f)(iii) and 227.7103–6(a) and (e), use the following clauses as applicable:

* * * * *

(b) * * *

(19) 252.227–7013, Rights in Technical Data—Noncommercial Items (SEP 2011), if applicable (see 227.7103–6(a)).

* * * * *

(c) * * *

(2) 252.227–7013, Rights in Technical Data—Noncommercial Items (SEP 2011), if applicable (see 227.7103–6(a)).

(3) 252.227–7015, Technical Data—Commercial Items (SEP 2011), if applicable (see 227.7102–4(a)).

(4) 252.227–7037, Validation of Restrictive Markings on Technical Data (SEP 2011), if applicable (see 227.7102–4(c)).

* * * * *

■ 10. Amend section 252.227–7013 by—

■ (a) Amending the clause date by removing ''(MAR 2011)'' and adding in its place ''(SEP 2011)''; and

■ (b) Revising paragraph (k)(2) to read as follows:

252.227–7013 Rights in technical data–Noncommercial items.

* * * * *

(k) * * *

(2) Whenever any technical data for noncommercial items, or for commercial items developed in any part at Government expense, is to be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. This clause will govern the technical data pertaining to noncommercial items or to any portion of a commercial item that was developed in any part at Government expense, and the clause at 252.227–7015 will govern the technical data pertaining to any portion of a commercial item that was developed exclusively at private expense. No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher-tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data.

* * * * *

■ 11. Amend section 252.227–7015 by—

■ (a) Amending the clause date by removing ''(MAR 2011)'' and adding in its place ''(SEP 2011)''; and

■ (b) Adding new paragraph (e) to read as follows:

252.227–7015 Technical data–Commercial items.

* * * * *

(e) *Applicability to subcontractors or suppliers.*

(1) The Contractor shall recognize and protect the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320 and 10 U.S.C. 2321.

(2) Whenever any technical data related to commercial items developed in any part at private expense will be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. This clause will govern the technical data pertaining to any portion of a commercial item that was developed exclusively at private expense, and the clause at 252.227–7013 will govern the technical data pertaining to any portion of a commercial item that was developed in any part at Government expense.

* * * * *

■ 12. Amend section 252.227–7019 by—

■ (a) Amending the clause date by removing ''(JUN 1995)'' and adding in its place ''(SEP 2011)'';

■ (b) Redesignating paragraphs (f) through (i) as paragraphs (g) through (j), respectively;

■ (c) Adding new paragraph (f);

■ (d) Revising the newly redesignated paragraph (g)(5);

■ (e) Amending the newly redesignated paragraph (h)(1) introductory text by removing ''(g)(3)'', and adding in its place ''(h)(3)''; and

■ (f) Amending the newly redesignated paragraph h)(3) by removing ''(g)(1)'', and adding in its place ''(h)(1)''.

The additions and revisions read as follows:

252.227–7019 Validation of asserted restrictions–Computer software.

* * * * *

(f) *Major systems.* When the Contracting Officer challenges an asserted restriction regarding noncommercial computer software for a major system or a subsystem or component thereof on the basis that the computer software was not developed exclusively at private expense, the Contracting Officer will sustain the challenge unless information provided by the Contractor or subcontractor demonstrates that the computer software was developed exclusively at private expense.

(g) * * *

(5) If the Contractor fails to respond to the Contracting Officer's request for information or additional information under paragraph (g)(1) of this clause, the Contracting Officer will issue a final decision, in accordance with paragraph (f) of this clause and the Disputes clause of this contract, pertaining to the validity of the asserted restriction.

* * * * *

■ 13. Amend 252.227–7037 by—

■ (a) Amending the introductory text by removing ''227.7102–3(c)'' and adding in its place ''227.7102–4(c)'';

■ (b) Amending the clause date by removing ''(SEP 1999)'' and adding in its place ''(SEP 2011)''; and

■ (c) Revising paragraphs (b), (c), (f), and (l) to read as follows:

252.227–7037 Validation of restrictive markings on technical data.

* * * * *

(b) *Presumption regarding development exclusively at private expense.*

(1) *Commercial items.* For commercially available off-the-shelf items (defined at 41 U.S.C. 104) in all cases, and for all other commercial items except as provided in paragraph (b)(2) of this clause, the Contracting Officer will 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 Contracting Officer shall not challenge such assertions unless the Contracting Officer has information that demonstrates that the item, component, or process was not developed exclusively at private expense.

(2) *Major systems.* The presumption of development exclusively at private expense does not apply to major systems or subsystems or components thereof, except for commercially available off-the-shelf items (which are governed by paragraph (b)(1) of this clause). When the Contracting Officer challenges an asserted restriction regarding technical data for a major system or a subsystem or component thereof on the basis that the item, component, or process was not developed exclusively at private expense, the Contracting Officer will sustain the challenge unless information provided by the Contractor or subcontractor demonstrates that the item, component, or process was 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 as provided in paragraph (b)(1) of this clause, 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.

* * * * *

(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 the Contracting Officer will issue a final decision to the Contractor or subcontractor in accordance with paragraph (b) of this clause and 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 (e)(1)(ii) or (e)(2) of this clause. Following issuance of the final decision, the Contracting Officer will comply with the procedures in paragraphs (g)(2)(ii) through (iv) of this clause.

* * * * *

(l) *Flowdown.* The Contractor or subcontractor agrees to insert this clause in contractual instruments with its subcontractors or suppliers at any tier requiring the delivery of technical data.

* * * * *

■ 14. Amend section 252.244–7000 by—

■ (a) Amending the clause date by removing ''(AUG 2011)'' and adding in its place ''(SEP 2011)'';

■ (b) Redesignating paragraphs (c) through (h) as (e) through (j), respectively; and

■ (c) Adding new paragraphs (c) and (d) as follows:

252.244–7000 Subcontracts for commercial items and commercial components (DoD contracts).

* * * * *

(c) 252.227–7015, Technical Data—Commercial Items (SEP 2011), if applicable (see 227.7102–4(a)).

(d) 252.227–7037, Validation of Restrictive Markings on Technical Data (SEP 2011), if applicable (see 227.7102–4(c)).

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 213

RIN 0750–AH07

Defense Federal Acquisition Regulation Supplement; Ships Bunkers Easy Acquisition (SEA) Card® and Aircraft Ground Services (DFARS Case 2009–D019)

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement to allow the use of U.S. Government fuel cards in lieu of a Purchase Order-Invoice-Voucher for fuel, oil, and refueling-related items for purchases not exceeding the simplified acquisition threshold.

DATES: *Effective Date:* September 20, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Dustin Pitsch, telephone 703–602–0289.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal register** at 76 FR 21849 on April 19, 2011, to add language to Defense Federal Acquisition Regulation Supplement (DFARS) 213.306(a)(1)(A) to include purchases of marine fuel, oil, and refueling-related items up to the simplified acquisition threshold using the Ships Bunkers Easy Acquisition (SEA) Card® in lieu of the SF 44, Purchase Order-Invoice-Voucher. Additionally, this section is revised to include additional ground refueling-related services when using the AIR Card®. These changes for use of the AIR Card® and SEA Card® will improve the refueling capability of aircraft and smaller vessels at non-contract locations. No public comments were received in response to the proposed rule.

II. Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and