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[FR Doc. 2020–18633 Filed 8–28–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 227 and 252

[Docket DARS–2019–0048]

RIN 0750–AK71

Defense Federal Acquisition Regulation Supplement: Validation of Proprietary and Technical Data (DFARS Case 2018–D069)

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

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2019, which amended the statutory presumption of development exclusively at private expense for commercial items in the procedures governing the validation of asserted restrictions on technical data.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before October 30, 2020, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018–D069, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Search for ''DFARS Case 2018–D069.'' Select ''Comment Now'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2018–D069'' on any attached documents.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2018–D069 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Jennifer D. Johnson, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, telephone 571–372–6100.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement section 865 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232), which repeals several years of congressional adjustments to the statutory presumption of development at private expense for commercial items in the validation procedures at paragraph (f) of 10 U.S.C. 2321. DoD hosted public meetings to obtain the views of interested parties with notice published in the **Federal Register** on August 16, 2019, at 84 FR 41953. In addition, DoD published an advance notice of proposed rulemaking (ANPR) on September 13, 2019, at 84 FR 48513, providing draft DFARS revisions and requesting any written public comments by November 12, 2019.

The presumption of development funding at private expense for commercial items was established in 1994 by section 8106 of the Federal Acquisition Streamlining Act (FASA) (Pub. L. 103–355). This statutory presumption has been amended numerous times, including by section 802(b) of the NDAA for FY 2007 (Pub. L. 109–364), section 815(a)(2) of the NDAA for FY 2008 (Pub. L. 110–181), section 1071(a)(5) of the NDAA for FY 2015 (Pub. L. 113–291), section 813(a) of the NDAA for FY 2016 (Pub. L. 114–92), and most recently by section 865.

The DFARS implementation of this mandatory presumption has evolved accordingly to track the statutory changes, with the primary coverage found at paragraph (c) of section 227.7103–13, Government right to review, verify, challenge, and validate asserted restrictions, and paragraph (b) of the clause at 252.227–7037, Validation of Restrictive Markings on Technical Data. There is no DFARS coverage applying such a presumption regarding development funding for 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.,* section 227.7203–13, Government right to review, verify, challenge, and validate asserted restrictions, and the clause at 252.227–7019, Validation of Asserted Restrictions—Computer Software).

II. Discussion and Analysis

DoD reviewed the public comments submitted in writing, and also as discussed by the attendees at the public meeting on November 15, 2019, in the development of the proposed rule. Only one respondent provided a written public comment. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes From the ANPR

Language was added to clarify DFARS 227.7103–13(c). The proposed revisions clarify that the statutory threshold for all challenges, including those for commercial items, is that a contracting officer must have reasonable grounds to question the validity of the asserted restriction. In recognition of the higher burden to sustain a challenge for commercial items, the text was revised to require a contracting officer to include, to the maximum extent practicable, sufficient information in the challenge notice to reasonably demonstrate that the commercial item was not developed exclusively at private expense. The proposed revisions require the contracting officer to provide, in order to sustain a challenge, information demonstrating that the commercial item was not developed exclusively at private expense. Additionally, a change to DFARS 227.7103–13(d)(4) is proposed, in the case of commercial item acquisitions, to direct the contracting officer to DFARS 227.7103–13, paragraph (c)(2).

Changes were made to 252.227–7037(b) to clarify that the presumption of development at private expense for commercial items applies to the issuance of a challenge. A revision is proposed in paragraph (e)(1)(i) of DFARS 252.227–7037 to clarify that, for commercial items, the challenge notice will include, to the maximum extent practicable, sufficient information to reasonably demonstrate that the commercial item was not developed at private expense. In paragraphs (f) and (g)(2)(i) of 252.227–7037, revisions are proposed to explain that, in order to sustain a challenge for commercial items, the contracting officer will provide information demonstrating that the commercial item was not developed exclusively at private expense.

B. Analysis of Public Comments

Comment: The respondent requests two specific changes: (1) A substitution of language so that a contracting officer

needs to provide information to the contractor that a commercial item was not developed exclusively at private expense before challenging an assertion in DFARS 227.7103–13(c), and (2) replacement of the word ''will'' with the word ''shall'' in paragraph (b) of the clause at DFARS 252.227–7037. The respondent recommends a change to clarify that a contracting officer must provide information to the contractor that a commercial item was not developed exclusively at private expense in order to challenge an assertion.

Response: DoD generally agrees that, as a matter of policy, sufficient information should be provided to a contractor to reasonably demonstrate that the commercial item was not developed exclusively at private expense. Therefore, paragraph (c) in DFARS 227.7103–13 is revised to clarify a need for transparency, to the maximum extent practicable, when a contracting officer challenges any assertion.

Regarding the respondent's recommended change of the word ''will'' to the word ''shall'' in paragraph (b) of the clause, the requested changes cannot be made pursuant to the FAR drafting conventions regarding the use of the terms ''shall'' and ''will'' in clauses and provisions. For consistency in the regulations, ''shall'' is the preferred term to use in provisions and clauses to indicate an obligation to act on the part of an offeror or contractor. To indicate an obligation for the Government to act, the term ''will'' is used. Accordingly, the word ''shall'' is replaced with ''will'' throughout the clause at DFARS 252.227–7037, where the Government is to perform an action.

C. Technical Amendments

References in the DFARS text to ''subsection'' are changed to ''section''. One editorial correction is made to a cross-reference in the introductory text to clause 252.227–7037. The reference to ''27.7104(e)(5)'' is corrected to read ''227.7104(e)(5)''. In the clause, ''shall'' is changed to ''will'' when providing direction to the contracting officer.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

DoD intends to apply the requirements of section 865 of the NDAA for FY 2019 to contracts at or below the simplified acquisition threshold and to acquisitions of commercial items, including commercially available off-the-shelf (COTS) items.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

Title 41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. Title 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

DoD has determined that it is in the best interest of the Federal Government to apply the statutory requirements regarding the presumption of development at private expense for commercial items in validations of asserted restrictions to acquisitions at or below the simplified acquisition threshold; *i.e.,* the section 865 revisions to the presumption scheme do not alter the applicability of the underlying validation procedures. The validation procedures are necessary to ensure that the license rights granted to the Government are consistent with the applicable data rights clauses, and therefore affect both parties' substantive legal rights. Moreover, within the validation procedures, the presumption of development at private expense for commercial items is designed primarily to protect the contractors' interests and thus should remain applicable to acquisitions at or below the simplified acquisition threshold.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

Title 10 U.S.C. 2375 governs the applicability of laws to DoD contracts and subcontracts for the acquisition of commercial items (including COTS items) and is intended to limit the applicability of laws to contracts for the acquisition of commercial items, including COTS items. Title 10 U.S.C. 2375 provides that if a provision of law contains criminal or civil penalties, or if the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Due to delegations of authority from USD(A&S), the Principal Director, DPC, is the appropriate authority to make this determination.

Therefore, given that the requirements of section 865 of the NDAA for FY 2019 were enacted to return to a presumption of development exclusively at private expense for commercial items, DoD has determined that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of commercial items, including COTS items, as defined at FAR 2.101. An exception for contracts for the acquisition of commercial items, including COTS items, would exclude contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

IV. 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 not a significant regulatory action and, therefore, was not 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.

V. Executive Order 13771

This rule is not expected to be subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because implementation of section 865 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 provides for a presumption of development exclusively at private expense under a contract for commercial items. Section 865 clarifies that burden is shifted to the Government to provide information that

the commercial item was not developed exclusively at private expense. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to implement section 865 of the NDAA for FY 2019 (Pub. L. 115–232), which revised 10 U.S.C. 2321. Section 865 repeals amendments to 10 U.S.C. 2321(f) made by the NDAAs for FY 2007 through FY 2016. The impact is to return the coverage at DFARS 227.7103–13 and 252.227–7037 substantially back to the original Federal Acquisition Streamlining Act-implementing language with regard to the presumption of development exclusively at private expense. Section 865 also codifies and revises DoD challenges to contractor-asserted restrictions on technical data pertaining to a commercial item, *i.e.,* DoD is required to presume that the contractor or subcontractor has justified the asserted restriction on the basis that the item was developed exclusively at private expense, regardless of whether the contractor or subcontractor submits a justification in response to the Government's challenge notice. In such a case, the challenge to the use or release restriction may be sustained only if information provided by DoD demonstrates that the item was not developed exclusively at private expense.

The objective of the proposed rule is to implement section 865 of the NDAA for FY 2019.

This proposed rule will apply to small entities that have contracts with DoD requiring delivery of technical data. Based on data from Electronic Data Access for FY 2017 through FY 2019, DoD estimates that 43,939 contractors may be impacted by the changes in this proposed rule. Of those entities, approximately 23,181 (53 percent) are small entities.

This proposed rule does not impose any new reporting, recordkeeping or other compliance requirements for small entities. The DFARS text and clause that are proposed to be amended are covered by OMB Control Number 0704–0369. The changes in this proposed rule are expected to have negligible impact on the burdens already covered by the OMB clearance.

This proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives which would accomplish the stated objectives of the applicable statute.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2018–D069), in correspondence.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply to this rule; however, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 0704–0369, entitled ''DFARS: Subparts 227.71, Rights in Technical Data; and Subpart 227.72, Rights in Computer Software and Computer Software Documentation, and related provisions and clauses of the Defense Federal Acquisition Regulation Supplement (DFARS).''

List of Subjects in 48 CFR Parts 227 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 227 and 252 are proposed to be amended as follows:

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

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

PART 227—PATENTS, DATA, AND COPYRIGHTS

■ 2. Amend section 227.7103–13 by—

■ a. In paragraph (c)(1) removing the third sentence;

■ b. Revising paragraph (c)(2); and

■ c. In paragraphs (d)(2)(i) and (d)(4), removing ''subsection'' wherever it appears and adding ''section'' in each place; and

■ d. In paragraph (d)(4), adding a sentence after the first sentence.

The revision and addition read as follows:

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

* * * * *

(c) * * *

(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 can specifically state the reasonable grounds to question the validity of the assertion. The challenge notice shall, to the maximum extent practicable, include sufficient information to reasonably demonstrate that the commercial item was not developed exclusively at private expense. In order to sustain the challenge, the contracting officer shall provide information demonstrating that the commercial item was not developed exclusively at private expense. 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.

(d) * * *

(4) * * * For commercial items, also see paragraph (c)(2) of this section.

* * *

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PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Amend section 252.227–7037 by—

■ a. In the introductory text, removing ''27.7104(e)(5)'' and adding ''227.7104(e)(5)'' in its place;

■ b. Removing the clause date ''(SEP 2016)'' and adding ''(DATE)'' in its place;

■ c. Revising paragraph (b);

■ d. In paragraph (c), removing ''paragraph (b)(1)'' and adding ''paragraph (b)'' in its place;

■ e. In paragraphs (d)(2), (e)(1) introductory text, (e)(2) and (4), (g)(1), and (h)(2)(i) and (ii), removing ''shall'' and adding ''will'' in its place wherever it appears; and

■ f. Revising paragraphs (e)(1)(i), (f), and (g)(2)(i).

The revisions read as follows:

252.227–7037 Validation of Restrictive Markings on Technical Data.

* * * * *

(b) *Commercial items—presumption regarding development exclusively at private expense.* The Contracting Officer will presume that the Contractor's or a subcontractor's asserted use or release restrictions with respect to a commercial item are justified on the basis that the item was developed exclusively at private expense. The Contracting Officer will not issue a challenge unless there are reasonable grounds to question the validity of the assertion that the commercial item was

not developed exclusively at private expense.

* * * * *

(e) * * *

(1) * * *

(i) State the specific grounds for challenging the asserted restriction, including, for commercial items, to the maximum extent practicable, sufficient information to reasonably demonstrate that the commercial item was not developed exclusively at private expense;

* * * * *

(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 the Disputes clause of this contract. In order to sustain the challenge for commercial items, the Contracting Officer will provide information demonstrating that the commercial item was not developed exclusively at private expense. This final decision will 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.

(g) * * *

(2)(i) If the Contracting Officer determines that the validity of the restrictive marking is not justified, the Contracting Officer will issue a final decision to the Contractor or subcontractor in accordance with the Disputes clause of this contract. In order to sustain the challenge for commercial items, the Contracting Officer will provide information demonstrating that the commercial item was not developed exclusively at private expense. Notwithstanding paragraph (e) of the Disputes clause, the final decision will 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.

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[FR Doc. 2020–18640 Filed 8–28–20; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 227 and 252

[Docket DARS–2019–0043]

RIN 0750–AK84

Defense Federal Acquisition Regulation Supplement: Small Business Innovation Research Program Data Rights (DFARS Case 2019–D043)

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

ACTION: Advance notice of proposed rulemaking.

SUMMARY: DoD is seeking information that will assist in the development of a revision to the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the data rights portions of the Small Business Innovation Research Program and Small Business Technology Transfer Program Policy Directives.

DATES: Interested parties should submit written comments to the address shown below on or before October 30, 2020, to be considered in the formation of any proposed rule.

ADDRESSES: Submit written comments identified by DFARS Case 2019–D043, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Search for ''DFARS Case 2019–D043.'' Select ''Comment Now'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2019–D043'' on any attached documents.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2019–D043 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Jennifer D. Johnson, OUSD(A–S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, telephone 571–372–6100.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is seeking information from experts and interested parties in Government and the private sector to assist in the development of a revision to the DFARS to implement the intellectual property (*e.g.,* data rights) portions of the revised Small Business Innovation Research (SBIR) Program and Small Business Technology Transfer (STTR) Program Policy Directives. The Small Business Administration (SBA) issued a notice of proposed amendments to the SBIR Program and STTR Program policy directives, which included combining the two directives in a single document, on April 7, 2016, at 81 FR 20483. The final combined SBIR/STTR Policy Directive was published on April 2, 2019, at 84 FR 12794, and became effective on May 2, 2019.

The final Policy Directive includes several revisions affecting the data rights coverage, which require corresponding revisions to the DFARS. For example, the new Policy Directive:

- Establishes a single, non-extendable, 20-year SBIR/STTR data protection period, rather than a 4-year period that can be extended indefinitely;
- Grants the Government licensed use for Government purposes after the expiration of the SBIR/STTR data protection period, rather than unlimited rights;
- Establishes or revises several important definitions to harmonize the terminology used in the Policy Directive and the Federal Acquisition Regulations (FAR) and DFARS implementations, while allowing for agency-specific requirements (*e.g.,* agency-specific statutes).

In drafting these revisions, DoD also considered the recommendations of the Government-Industry Advisory Panel on Technical Data Rights (Section 813 Panel) established by section 813 of the National Defense Authorization Act for FY 2016. The Section 813 Panel addressed SBIR data rights issues in its final report at Paper 21, ''Small Business Innovation Research (SBIR) (Flow-down to Suppliers; Inability to Share with Primes; Evaluation).''

DoD also hosted a public meeting on December 20, 2019, to obtain the views of interested parties in accordance with the notice published in the **Federal Register** on November 25, 2019, at 84 FR 64878.

II. Discussion and Analysis

An initial draft of the proposed revisions to the DFARS to implement