

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 204, 208, 209, 212, 213, 215, 216, and 252****[Docket DARS–2020–0027]****RIN 0750–AK44****Defense Federal Acquisition Regulation Supplement: Use of Supplier Performance Risk System (SPRS) Assessments (DFARS Case 2019–D009)****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 (DFARS) to update the policy and procedures for use of the Supplier Performance Risk System and to require contracting officers to consider SPRS risk assessments, if available, in the evaluation of a supplier's quotation or offer and to consider SPRS supplier risk assessments when determining contractor responsibility.

DATES: Effective March 22, 2023.**FOR FURTHER INFORMATION CONTACT:** Heather Kitchens, telephone 571–296–7152.**SUPPLEMENTARY INFORMATION:****I. Background**

DoD published a proposed rule in the *Federal Register* at 85 FR 53748 on August 31, 2020, to amend the DFARS to require contracting officers to consider Supplier Performance Risk System (SPRS) risk assessments during evaluation of quotations or offers and to consider the SPRS supplier risk assessment in the evaluation of contractor responsibility. Two respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. 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 Proposed Rule

As a result of public comments, there are changes from the proposed rule in the final rule to clarify applicability of the rule. Additionally, editorial and clarifying changes were made in the

final rule as discussed in paragraph C of this preamble.

B. Analysis of Public Comments**a. Solicitation Provision Applicability**

Comment: One respondent commented that the prescription for solicitation provision 252.204–70XX, Notice to Prospective Suppliers on the Use of the Supplier Performance Risk System in Performance Evaluations, should be updated at DFARS 204.7X04 to state that the provision is for use in solicitations using FAR part 13 simplified acquisition procedures, including solicitations for supplies and services using FAR part 12 procedures for the acquisition of commercial items, to align with DFARS 204.7X02, Applicability.

Response: The final rule revises DFARS 204.7602, Applicability, to align with the solicitation provision prescription at DFARS 204.7604 and the stated intent of the rule to move the coverage from part 213 to a new subpart 204.76, as described in the preamble of the proposed rule. Section 204.7602 states that use of SPRS risk assessments is required for the evaluation of quotations or offers in response to solicitations for supplies and services, including solicitations using FAR part 12 procedures for the acquisition of commercial products and commercial services. DFARS 204.7602, as revised, does not limit applicability of use of SPRS risk assessments to acquisitions using FAR part 13 simplified acquisition procedures; therefore, the recommended change to the solicitation provision prescription at DFARS 204.7604 will not be made.

The solicitation provision is prescribed for use in solicitations for supplies and services, including solicitations using FAR part 12 procedures for the acquisition of commercial products and commercial services. To clarify that the provision also applies to solicitations using FAR part 13 simplified acquisition procedures, the rule revises the language in part 213 at 213.106–2, paragraph (b)(i), to provide a cross-reference to 204.7603 and to require contracting officers to consider SPRS risk assessments as a basis of award for solicitations using FAR part 13 simplified acquisition procedures, and obsolete language is removed. Further, to more clearly reflect that the intended purpose of the provision extends beyond FAR part 13 actions, the provision title is revised to read as follows: 252.204–7024, Notice on the Use of the Supplier Performance Risk System.

The proposed rule, at sections I. and II. of the preamble, stated that SPRS is required to be used to evaluate quotes and offers received under all solicitations for supplies and services. To further clarify applicability of the procedures at DFARS 204.7603 to Federal Supply Schedules, commercial acquisitions, acquisitions using FAR part 13 simplified acquisition procedures, evaluation of offers under part 215, and indefinite-delivery contracts, cross-references to DFARS 204.7603 are added to—

- Subpart 208.4, Federal Supply Schedules;
- Subpart 212.2, Special Requirements for the Acquisition of Commercial Products and Commercial Services;
- Subpart 213.1, Procedures;
- 215.3, Source Selection; and
- Subpart 216.5, Indefinite-Delivery Contracts.

b. SPRS Website

Comment: One respondent commented that Government-Industry Data Exchange Program (GIDEP) alerts are not appropriate measures of quality performance and such data cannot be accurately translated into meaningful risk scores without dissecting each GIDEP report, including supplier letters and enclosures.

Response: GIDEP alerts are only used if they are Government-generated (Agency Action Notice) with a Commercial and Government Entity (CAGE) code reported explicitly for Suspected Counterfeit or Failure Experience. SPRS does not search GIDEP narratives or text. It only searches for data indicating that the item has been identified as suspected counterfeit or has been determined to be a material failure.

Comment: One respondent commented that Mechanization of Contact Administration Services (MOCAS) is not specifically intended to measure on-time delivery performance and will require substantial investment by industry and DoD buying commands to maintain its accuracy and reliability.

Response: SPRS only uses MOCAS records that provide a specific contractor's Commercial and Government Entity (CAGE) code, product service code (PSC), and a required delivery date on a contract line item that can be matched to an actual delivery date. This constrained usage mitigates the concerns the respondent identified.

Comment: One respondent commented that the SPRS system itself may not be able to handle the

administrative and logistical challenges that will arise under its expanded use.

Response: DoD does not expect any issues with increased user traffic as a result of this rule. SPRS has recently experienced a rapid increase in user activity without any system impacts. Publication of this rule will not adversely impact operation of the system or the program office.

C. Other Changes

The following are amplifying changes to the rule that are not based on public comments, but were made to add clarity:

- The term “overall risk assessments” at DFARS 204.7602 and 204.7603 was changed to “risk assessments” throughout the final rule to use language consistent with the SPRS website.

- Some instances of the terms “evaluated” and “evaluation” were replaced with the term “considered” and “shall consider” to clarify that risk assessments are not a mandatory, stand-alone, evaluation factor for source selections and that the contracting officer shall “consider” the risk assessments, if available, as part of broader evaluation factors during evaluation of quotations or offers and when determining contractor responsibility.

- DFARS 204.7603, Procedures, was updated to clarify the scope of SPRS risk assessments required to be considered when procuring supplies and services and the scope of SPRS risk assessments required to be considered when procuring an end product (see FAR 2.101) identified by an available material identifier (see Procedures, Guidance, and Information (PGI) 204.7603). The contracting officer shall consider price risk and supplier risk, if available, as part of the award decision. For the procurement of an end product identified by an available material identifier, the contracting officer shall also consider item risk.

- DFARS 204.7603, Procedures, was updated to clarify that contracting officers shall use their discretion in considering the information available in SPRS.

- DFARS 204.7603, Procedures, was updated under paragraph (a), Item Risk, to clarify that a SPRS item risk search is required for any end product that did not have an item risk search performed prior to solicitation to ensure that item risk searches in SPRS only occur if an end product did not have an item risk search performed prior to solicitation; and paragraph (b), Price Risk, applies when procuring a service or an end product identified by an available material identifier.

- An editorial change was made throughout to correct an administrative error by removing the words “or services” from the definition of “item risk”, as item risk does not apply to services.

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

This rule creates a new solicitation provision, DFARS 252.204–7024, Notice on the Use of the Supplier Performance Risk System. The provision at DFARS 252.204–7024 is prescribed at DFARS 204.7604 for use in solicitations for supplies and services, including solicitations using FAR part 12 procedures for the acquisition of commercial products and commercial services. The provision is applicable to acquisitions at or below the simplified acquisition threshold (SAT) and to acquisitions of commercial products, including commercially available off-the-shelf (COTS) items, and commercial services. Not applying this provision to contracts at or below the SAT and for the acquisition of commercial products, including COTS items, and commercial services would exclude contracts intended to be covered by this rule and undermine the overarching purpose of the rule. Consequently, DoD is applying the rule to contracts below the SAT, for the acquisition of commercial services, and for the acquisition of commercial products, including COTS items.

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.

V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional

Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This final rule is necessary to revise the Defense Federal Acquisition Regulation Supplement (DFARS) to incorporate the expanded capabilities of the Supplier Performance Risk System (SPRS), made possible by recent technical enhancements. SPRS is a DoD enterprise application that retrieves price, item, quality, delivery, and contractor performance data from Government reporting systems. SPRS collects quality and delivery data from Government systems to develop risk assessments. The system provides three risk assessments for contracting officer use in evaluations of quotations and offers: an item risk assessment, a price risk assessment, and a supplier risk assessment.

The objective of the final rule is to notify offerors, via the new solicitation provision at DFARS 252.204–7024, that SPRS collects performance data from a variety of Government sources on awarded contracts to develop item risk, price risk, and supplier risk assessments for contracting officers to consider during evaluation of quotations or offers. The final rule also requires contracting officers to consider the supplier risk assessment in the determination of contractor responsibility.

No comments were received in response to the initial regulatory flexibility analysis.

The Federal Procurement Data System indicates that in fiscal years 2020 through 2022, DoD awarded an average of 483,364 contracts per year for both products and services, of which an average of 338,039 (approximately 70 percent) were awarded to an average of 22,760 unique small businesses.

This rule does not require any specific reporting, recordkeeping, or compliance requirements.

No significant economic impact on small businesses is anticipated as a result of the final rule. DoD does not expect small entities will be materially affected by this rule. There are no

known significant alternatives to the rule.

VII. Paperwork Reduction Act

The rule does not contain 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 204, 208, 209, 212, 213, 215, 216, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 204, 208, 209, 212, 213, 215, 216, and 252 are amended as follows:

- 1. The authority citation for 48 CFR parts 204, 208, 209, 212, 213, 215, 216, and 252 continues to read as follows:

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

PART 204—ADMINISTRATIVE AND INFORMATION MATTERS

- 2. Add subpart 204.76 to read as follows:

Subpart 204.76—Supplier Performance Risk System

- 204.7600 Scope of subpart.
- 204.7601 Definitions.
- 204.7602 Applicability.
- 204.7603 Procedures.
- 204.7604 Solicitation provision.

Subpart 204.76—Supplier Performance Risk System

204.7600 Scope of subpart.

This subpart provides policies and procedures for use of the Supplier Performance Risk System (SPRS) risk assessments in the evaluation of a quotation or offer.

204.7601 Definitions.

As used in this subpart—

Item risk means the probability that a product, based on intended use, will introduce performance risk resulting in safety issues, mission degradation, or monetary loss.

Price risk means the measure of whether a proposed price for a product or service is consistent with historical prices paid for that item or service.

Supplier risk means the probability that an award may subject the procurement to the risk of unsuccessful performance or to supply chain risk (see 239.7301).

204.7602 Applicability.

Use of SPRS risk assessments is required for the evaluation of quotations or offers in response to solicitations for supplies and services, including solicitations using FAR part 12 procedures for the acquisition of commercial products and commercial services, excluding solicitations for the procurement of supplies or services exempted by the Department of Defense Instruction (DoDI) 5000.79, Defense-wide Sharing and Use of Supplier and Product Performance Information. SPRS retrieves item, price, quality, delivery, and contractor information from contracts in Government reporting systems in order to develop risk assessments of contractors. SPRS is available at <https://piee.eb.mil/>, and the SPRS user's guides are available at <https://www.sprs.csd.disa.mil/reference.htm>.

204.7603 Procedures.

The contracting officer shall consider price risk and supplier risk, if available in SPRS, as a part of the award decision. For procurement of an end product identified by a material identifier that is available as described at PGI 204.7603, the contracting officer shall also consider assessments of item risk, if available, as a part of the award decision. Offerors or quoters without a risk assessment in SPRS shall not be considered favorably or unfavorably. Contracting officers shall use their discretion in considering the information available in SPRS on item risk, price risk, and supplier risk as follows:

(a) *Item risk.* (1) Consider item risk to determine whether the procurement of products represents a high performance risk to the Government. If an item has a high risk rating, then the SPRS item risk report will display the reason(s) an item is identified as high risk.

(2) Before issuing a solicitation for the procurement of an end product identified by a material identifier that is available as described at PGI 204.7603, the contracting officer shall ensure a SPRS item risk search has been performed and shall consider any item risk warnings provided. When evaluating quotations or offers for an end product identified by a material identifier, a SPRS item risk search is required for any end product that did not have an item risk search performed prior to solicitation. If there are item risk warnings, the contracting officer shall consider strategies to mitigate risk, such as the following:

(i) Consulting with the program office.

(ii) Including mitigating requirements in the statement of work, as provided by the requiring activity.

(iii) Including FAR and DFARS clauses identified in the SPRS application, as appropriate.

(b) *Price risk.* (1) When procuring a service or an end product identified by a material identifier that is available as described at PGI 204.7603, the contracting officer shall consider price risk assessment in determining if a proposed price is consistent with historical prices paid for an item or otherwise creates a risk to the Government. Contracting officers shall not rely solely on the price risk assessment when determining prices to be fair and reasonable.

(2) The contracting officer shall consider strategies to mitigate price risk, such as the following:

(i) Not awarding to offerors or quoters with high risk price ratings unless there is a way to justify the price through additional price or cost analysis.

(ii) Utilizing appropriate price negotiation techniques and procedures.

(iii) Using price reasonableness or price realism techniques at FAR 13.106 or 15.4. See also 215.403–3 when making award decisions.

(c) *Supplier risk.* The contracting officer shall consider supplier risk, to assess the risk of unsuccessful performance and supply chain risk, in award decisions. Supplier risk assessments in SPRS include quality, delivery, and other contractor performance information.

204.7604 Solicitation provision.

Except for supplies or services exempted by DoDI 5000.79, use the provision at 252.204–7024, Notice on the Use of the Supplier Performance Risk System, in solicitations for supplies and services, including solicitations using FAR part 12 procedures for the acquisition of commercial products and commercial services.

PART 208—REQUIRED SOURCES OF SUPPLIES AND SERVICES

- 3. Amend section 208.405 by adding paragraph (4) to read as follows:

208.405 Ordering procedures for Federal Supply Schedules.

* * * * *

(4) See 204.7603 for procedures on the required use of the Supplier Performance Risk System (SPRS) risk assessments.

(i) The contracting officer shall ensure SPRS assessments of price risk and supplier risk are considered as a part of the award decision.

(ii) When placing an order with a schedule contractor for an end product identified by a material identifier that is available as described at PGI 204.7603, and item risk was not previously considered during award of the schedule contract, the contracting officer shall also consider SPRS assessments of item risk in the award decision.

(iii) Use the provision at 252.204–7024, Notice on the Use of the Supplier Performance Risk System, as prescribed in 204.7604 to the extent permitted by the Federal Supply Schedule.

PART 209—CONTRACTOR QUALIFICATIONS

■ 4. Amend section 209.105–1 by revising paragraph (2) to read as follows:

209.105–1 Obtaining information.

* * * * *

(2) A satisfactory performance record is a factor in determining contractor responsibility (see FAR 9.104–1(c)).

(i) One source of information relating to contractor performance is the Contractor Performance Assessment Reporting System (CPARS), available at <https://www.cpars.gov/>.

(ii) Information relating to contract terminations for cause and for default is also available through the Federal Awardee Performance and Integrity Information System (FAPIS) module of CPARS, available at <https://sam.gov> (see FAR subpart 42.15). This termination information is just one consideration in determining contractor responsibility.

(iii) Contracting officers shall consider the supplier risk assessment available in the Supplier Performance Risk System at <https://piee.eb.mil/> when determining responsibility. See 204.7603(c).

PART 212—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

■ 5. Amend section 212.203 by adding paragraph (3) to read as follows:

212.203 Procedures for solicitation, evaluation, and award.

* * * * *

(3) See 204.7603 for procedures on the required use of Supplier Performance Risk System risk assessments as part of the award decision.

■ 6. Amend section 212.301 by—

- a. Adding paragraph (f)(ii)(O);
- b. Removing paragraph (f)(v); and
- c. Redesignating paragraphs (f)(vi) through (xx) as paragraphs (f)(v) through (xix).

The addition reads as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial products and commercial services.

* * * * *

(f) * * *

(ii) * * *

(O) Use the provision at 252.204–7024, Notice on the Use of the Supplier Performance Risk System, as prescribed in 204.7604.

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PART 213—SIMPLIFIED ACQUISITION PROCEDURES

■ 7. Revise section 213.106–2 to read as follows:

213.106–2 Evaluation of quotations or offers.

(b)(i) See 204.7603 for procedures on the requirement for contracting officers to consider Supplier Performance Risk System risk assessments as a basis of award.

■ 8. Revise section 213.106–2–70 to read as follows:

213.106–2–70 Solicitation provision.

Use the provision at 252.204–7024, Notice on the Use of the Supplier Performance Risk System, as prescribed in 204.7604.

PART 215—CONTRACTING BY NEGOTIATION

■ 9. Amend section 215.304 by adding paragraph (c)(viii) to read as follows:

215.304 Evaluation factors and significant subfactors.

(c) * * *

(viii)(A) When procuring supplies or services, the contracting officer shall ensure Supplier Performance Risk System (SPRS) assessments of price risk and supplier risk are considered as a part of the award decision. See 204.7603.

(B) When procuring an end product identified by a material identifier that is available as described at PGI 204.7603, the contracting officer shall also consider SPRS assessments of item risk in the award decision.

■ 10. Amend section 215.404–1 by adding paragraph (b)(viii) to read as follows:

215.404–1 Proposal analysis techniques.

* * * * *

(b) * * *

(viii) When procuring a service or an end product identified by a material identifier that is available as described at PGI 204.7603, the contracting officer shall consider the Supplier Performance Risk System price risk assessments in

determining if a proposed price is consistent with historical prices paid for an item or otherwise creates a risk to the Government. See also 215.403–3(a)(1).

* * * * *

PART 216—TYPES OF CONTRACTS

■ 11. Amend section 216.505 by adding paragraph (a)(S–71) to read as follows:

216.505 Ordering.

(a) * * *

(S–71) See 204.7603 for procedures on the required use of the Supplier Performance Risk System (SPRS) risk assessments.

(i) The contracting officer shall ensure SPRS assessments of price risk and supplier risk are considered as a part of the award decision.

(ii) When placing an order for an end product identified by a material identifier that is available as described at PGI 204.7603, and item risk was not previously considered during award of the contract, the contracting officer shall also consider SPRS assessments of item risk in the award decision.

(iii) Use the provision at 252.204–7024, Notice on the Use of the Supplier Performance Risk System, as prescribed in 204.7604 to the extent permitted by the contract.

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PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 12. Add section 252.204–7024 to read as follows:

252.204–7024 Notice on the Use of the Supplier Performance Risk System.

As prescribed in 204.7604, use the following provision:

Notice on the Use of the Supplier Performance Risk System (Mar 2023)

(a) *Definitions.* As used in this provision—
Item risk means the probability that a product, based on intended use, will introduce performance risk resulting in safety issues, mission degradation, or monetary loss.

Price risk means a measure of whether a proposed price for a product or service is consistent with historical prices paid for that item or service.

Supplier risk means the probability that an award may subject the procurement to the risk of unsuccessful performance or to supply chain risk (see Defense Federal Acquisition Regulation Supplement 239.7301).

(b) The Supplier Performance Risk System (SPRS), available at <https://piee.eb.mil/>, will be used in the evaluation of the Quoter or Offeror's performance. SPRS retrieves item, price, quality, delivery, and contractor information on contracts from Government

reporting systems in order to develop risk assessments.

(c) The Contracting Officer will consider SPRS risk assessments during the evaluation of quotations or offers received in response to this solicitation as follows:

(1) Item risk will be considered to determine whether the procurement represents a high performance risk to the Government.

(2) Price risk will be considered in determining if a proposed price is consistent with historical prices paid for a product or a service or otherwise creates a risk to the Government.

(3) Supplier risk, including but not limited to quality and delivery, will be considered to assess the risk of unsuccessful performance and supply chain risk.

(d) SPRS risk assessments are generated daily. Quoters or Offerors are able to access their risk assessments by following the access instructions in the SPRS user's guide available at <https://www.sprs.csd.disa.mil/reference.htm>. Quoters and Offerors are granted access to SPRS for their own risk assessment classifications only. SPRS reporting procedures and risk assessment methodology are detailed in the SPRS user's guide. The method to challenge a rating generated by SPRS is also provided in the user's guide. SPRS evaluation criteria are available at https://www.sprs.csd.disa.mil/pdf/SPRS_DataEvaluationCriteria.pdf.

(e) The Contracting Officer may consider any other available and relevant information when evaluating a quotation or an offer.

(End of provision)

252.213-7000 [Removed and Reserved]

■ 13. Remove and reserve section 252.213-7000.

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 227, 237, 239, and 252

[Docket DARS-2019-0067]

RIN 0750-AK87

Defense Federal Acquisition Regulation Supplement: Noncommercial Computer Software (DFARS Case 2018-D018)

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 (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2018.

DATES: Effective March 22, 2023.

FOR FURTHER INFORMATION CONTACT: Mr. David E. Johnson, telephone 202-913-5764.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 87 FR 4546 on January 28, 2022, to implement section 871 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91). Section 871 established new direction at 10 U.S.C. 4576 (formerly 10 U.S.C. 2322a), Requirement for consideration of certain matters during acquisition of noncommercial computer software. The statute requires that DoD, as part of any negotiation for such software, consider all noncommercial computer software and related materials necessary to meet the needs of the agency throughout the life cycle of the software. This rule provides direction to DoD both to improve acquisition planning and to identify and negotiate for software deliverables and license rights at a fair and reasonable price before contract award. Eight respondents submitted public comments in response to the proposed rule. DoD also held a public meeting on March 10, 2022.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. 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 Proposed Rule

Based on comments received, DFARS 227.7203-2 and the clauses at DFARS 252.227-7014 and 252.227-7018 are revised as follows:

- DFARS 227.7203-2(c)(6)(ii)(A) and (B) and 227.7203-2(c)(6)(iii) are revised to state “license rights sufficient to meet the Government’s needs”, rather than “all necessary license rights.”
- The list of factors in DFARS 227.7203-2(b)(1)(ii) is revised to include the Government’s costs to develop computer software.
- Paragraph (iii) of the definition of “restricted rights” in DFARS 252.227-7014 and 252.227-7018 is revised to remove the purposes added in the proposed rule and to permit the Government to make a reasonable number of copies of computer software required for the other purposes authorized under the clause.
- Paragraphs (v) through (vii) of the definition of the of “restricted rights” in DFARS 252.227-7014 and 252.227-7018 are revised to expressly indicate that the Government has the right to use

computer software and other rights to computer software already provided to covered Government support contractors.

B. Analysis of Public Comments

1. Areas of Alignment With Industry

Comment: One of the respondents noted several areas of alignment between DoD and industry in the proposed rule, including: (1) removal of the definition of the term “data”; (2) consideration of development at private expense; (3) consideration of alternatives to the formal delivery of source code and software design details; and (4) conformance of the DFARS definition of “technical data” to the statutory definition at 10 U.S.C. 3013 (formerly 10 U.S.C. 2302).

Response: DoD acknowledges the respondent’s comments.

2. Application to Commercial Computer Software

Comment: Several respondents asserted that a plain language interpretation of 10 U.S.C. 4576 demonstrates that Congress intended for the provision to apply to only noncommercial computer software. Based on this interpretation, the respondents asserted that the proposed rule should not apply to commercial software, contrary to DoD’s proposed revisions in DFARS 227.7202-1(d). The respondents also asserted that application of the proposed rule to commercial software is detrimental to the availability of commercial software, creates a barrier for nontraditional contractors, and is inconsistent with the commercial software industry’s licensing models. Several respondents also asserted that the term “all necessary license rights” in DFARS 227.7203-2(b)(6)(ii)(A) and (B) may be improperly applied to commercial software or misconstrued to mean a government purpose rights license or an unlimited rights license.

Response: DoD acknowledges that 10 U.S.C. 4576 includes express references to noncommercial software and therefore must apply to noncommercial software. However, the statute does not prohibit the prescribed consideration of the Government’s life-cycle needs from applying to negotiations for commercial software. Contrary to the respondents’ interpretation, paragraph (a) of the statute directs the Government to consider the acquisition of “all software” and “related materials” necessary to satisfy the Government’s needs for certain activities throughout the life cycle of the noncommercial software being acquired, without any