rule does not impose additional information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 211 and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, DoD proposes to amend 48 CFR parts 211 and 252 as follows:

1. The authority citation for 48 CFR parts 211 and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 211—DESCRIBING AGENCY NEEDS

211.274–5 [Redesignated as 211.274–6]

2. Redesignate section 211.274–5 as 211.274–6.

3. Add section 211.274–5 to read as follows:

211.274–5 Policy for tagging, labeling, or marking of Government-furnished property.

(a) It is DoD policy that the appropriate tagging, labeling, or permanent marking of Government-furnished property, based on DoD marking standards (MIL Standard 130) or other standards, be required for Government-furnished property items where the requiring activity determines that such items are subject to serialized item management (serially-managed items).

(b) *Exceptions.* The contractor will not be required to tag, label, or mark Government-furnished property if such items were previously tagged, labeled, or marked.

3. In newly redesignated 211.274–6, add paragraph (c) to read as follows:

211.274–6 Contract clauses.

* * * * *

(c) Use the clause at 252.211–70YY, Tagging, Labeling, and Marking of Government-furnished Property, in solicitations and contracts that contain the clause at—

(1) FAR 52.245–1, Government Property; or

(2) FAR 52.245–2, Government Property Installation Operation Services.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Add section 252.211–70YY to read as follows:

252.211–70YY Tagging, Labeling, and Marking of Government-furnished Property.

As prescribed in 211.274–6(c), use the following clause:

TAGGING, LABELING, AND MARKING OF GOVERNMENT–FURNISHED PROPERTY (DATE)

(a) *Definitions.* As used in this clause—

Government-furnished property means property in the possession of, or directly acquired by, the Government and subsequently furnished to the contractor for performance of a contract, including performance by subcontractors and at Prime Contractor Alternate locations. Government-furnished property includes reparables, e.g., spares and property furnished for repair, maintenance, overhaul, or modification; and Government-furnished material that is requisitioned from Government supply sources without reimbursement by the contractor.

Serially-managed item means an item designated by DoD to be uniquely tracked, controlled, or managed in maintenance, repair, and/or supply systems by means of its serial number.

(b) The Contractor shall tag, label, or mark Government-furnished property items identified in the contract when the requiring activity determines that such items are subject to serialized item management (serially-managed items).

(c) *Exceptions.* Paragraph (b) of this clause does not apply to—

(1) Government-furnished property that was previously marked;

(2) Contractor-acquired property;

(3) Property under any statutory leasing authority;

(4) Property to which the Government has acquired a lien or title solely because of partial, advance, progress, or performance-based payments;

(5) Intellectual property or software; or

(6) Real property.

(End of clause)

[FR Doc. 2010–10763 Filed 5–6–10; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[DFARS Case 2007–D003]

48 CFR Parts 212, 227, and 252

RIN 0750–AF84

Defense Federal Acquisition Regulation Supplement; Presumption of Development at Private Expense

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

ACTION: Proposed rule with request for comments.

SUMMARY: DoD proposes to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 802(b) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2007 and section 815(a)(2) of the NDAA for FY 2008. This proposed 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.

DATES: Comments on the proposed rule should be submitted to the address shown below on or before July 6, 2010, to be considered in the formulation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2007–D003, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *E-mail: dfars@osd.mil*. Include DFARS Case 2007–D003 in the subject line of the message.
- *Fax:* 703–602–0350.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD(AT&L)DPAP(DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301–3060.

All comments received will be posted generally without change to *http://www.regulations.gov*, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, 703–602–0328.

SUPPLEMENTARY INFORMATION:

A. Background

Section 802(b) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2007 (Pub. L. 109–364) modified 10 U.S.C. 2321(f) with regard to the presumption of development at private expense for major systems; and section 815(a)(2) of the NDAA for FY 2008 (Pub. L. 110–181) revised 10 U.S.C. 2321(f)(2) to exempt commercially available off-the-shelf items from the requirements that section 802(b) had established for major systems. This proposed 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 proposed rule affects these validation procedures in the context of two special categories of items: Commercial items, (including commercially available off-the-shelf items); and major systems (including subsystems and components of major systems).

1. Procedures and Presumptions Regarding Development at Private Expense—Technical Data

The validation of asserted restrictions on technical data is based on statutory requirements, codified primarily at 10 U.S.C. section 2321. In 1994, the Federal Acquisition Streamlining Act (Pub. L. 103–355) revised these requirements to include specialized presumptions and procedures for technical data related to commercial items. For discussion purposes, these specialized requirements will be referred to as the "Commercial Rule" (*see* 10 U.S.C. 2320(b)(1) and 2321(f)).

Under the Commercial Rule, a contracting officer is required to presume that a commercial item has been developed entirely at private expense, unless shown otherwise in accordance with the procedures at 10 U.S.C. 2321(f). The detailed procedures at 10 U.S.C. 2321(f)(1) require the contracting officer to presume that the asserted restrictions have been justified (on the basis that the item was developed exclusively at private expense), whether or not the contractor or subcontractor submits a justification in response to the challenge notice issued by the contracting officer. The contracting officer's challenge may be sustained only if information provided by DoD demonstrates that the item was not developed exclusively at private expense.

Section 802(b) of the FY 2007 NDAA established another set of procedures for technical data related to major systems (including subsystems or components thereof). For discussion purposes, these specialized requirements will be referred to as the "Major Systems Rule." Under the Major Systems Rule, codified at 10 U.S.C. 2321(f)(2), a contracting officer's challenge to asserted restrictions on technical data relating to a major system shall be sustained unless the contractor or subcontractor submits information demonstrating that the item was developed exclusively at private expense. In the initial statutory implementation of section 802(b), the Major Systems Rule also covered all contracts for commercial items (*i.e.,* serving as a complete exception to the otherwise applicable Commercial Rule).

However, section 815(a)(2) of the FY 2008 NDAA altered the relationship between these two special rules in cases of overlap—revising the Major Systems Rule so that it does not apply to commercially available off-the-shelf (COTS) items (as defined at 41 U.S.C. 431(c)). Since COTS items are a subtype of commercial items, this change results in COTS items being governed by the Commercial Rule in all cases, regardless of whether the COTS items are included in a major system.

The proposed implementation in the DFARS of these special rules for technical data is modeled closely after this two-pronged statutory scheme. The detailed requirements for each special rule, and the relationship between the two rules, are consolidated in the regulatory coverage at 227.7103–13(c), and in the associated clause language at 252.227–7037(b). In each case, the implementing language combines the relevant preexisting DFARS coverage (*e.g.*, for the Commercial Rule, or for validation procedures generally) with the additional language necessary to implement the new Major Systems Rule and to clarify which rule governs in cases of overlap.

For example, preexisting DFARS coverage for the Commercial Rule at 227.7102 is relocated primarily to new 227.7103–13(c)(2), where it is combined with new language to address the Major Systems Rule (new paragraph (c)(2)(ii)). The language at proposed new 227.7103–13(c)(1) is a combination of preexisting language regarding initiation of challenges from preexisting 227.7102 and 227.7103–13(c) (the latter is redesignated as paragraph (d)).

Several other conforming or clarifying revisions are included. Preexisting language from 227.7102 is adapted to serve as proposed new subsection 227.7102–3, which highlights and cross-references the regulatory coverage for validation of asserted restrictions on technical data for commercial items, which is now consolidated at 227.7103–13. The prescriptive language at proposed 227.7102–4 and 227.7103–6(a) was revised for clarity and consistency. The language "other than a failure to respond under a contract for commercial items" was deleted from 252.227–7037(f) in order to eliminate confusion as to when a contracting officer is required to issue a final decision. The contracting officer must issue a final decision, even when the contractor or subcontractor fails to respond to a challenge notice under a contract for commercial items. Paragraph (f) of 252.227–7037 was amended to state positively that the contracting officer's final decision will adhere to the requirements set forth in paragraph (b) of the clause.

2. Flowdown of Requirements to Subcontracts for Commercial Items—Technical Data

The Federal Acquisition Streamlining Act (FASA) requires the FAR to identify statutes that are not to apply to contracts or subcontracts for commercial items (*see* FAR 12.503 and 12.504). The corresponding DFARS implementation of these requirements at 212.503 and 212.504 made 10 U.S.C. 2320 and 2321 inapplicable to subcontracts for commercial items, even though these requirements remained applicable to such acquisitions at the prime contract level. Accordingly, the associated technical data clauses used in prime contracts have not been flowed down to lower tier subcontracts for commercial items, pursuant to current 227.7102–3, 252.227–7013(k)(2), and 252.227–7037(l). DoD has reviewed the merits of this approach and has determined that these statutory requirements should remain applicable to acquisitions of technical data related to commercial items regardless of whether that data is provided by the prime contractor or by a lower tier subcontractor.

It is well established policy and practice in Federal and DoD acquisitions that the treatment of intellectual property rights creates a special, direct, relationship between the Government and subcontractors (at any tier). For example, the Government's license rights may be granted directly from the subcontractor to the Government, and the Government and subcontractor are allowed to transact business directly with one another on issues related to the subcontractor's intellectual property (such as delivery of technical data directly to the Government, and regarding the validation of asserted restrictions).

Detailed review of the statutory provisions also supports the conclusion that these requirements are intended to apply to all acquisitions of technical data, including both commercial and noncommercial, and at both the prime contract level and lower tier subcontract level. 10 U.S.C. 2320 and 2321 have always applied expressly to prime contractors and subcontractors. When FASA amended these sections to address special requirements for technical data related to commercial items (*e.g.*, the Commercial Rule discussed previously), the statutory amendments retained this approach, explicitly applying at the prime contract and subcontract levels (*see* 10 U.S.C. 2320(a) and (b)(1), and 2321(f)).

This congressional intent is reinforced by the recent amendments to these statutes. Section 802(b) of the FY07 NDAA, which created the new Major Systems Rule, expressly and explicitly cited application to prime contractors and subcontractors "whether or not under a contract for commercial items." Section 815(a)(2) retained all of the language that expressly applies to subcontracts, and revised the language

only to clarify that the Major Systems Rule is not intended to apply to COTS items, which, under the existing statutory language, would be covered under the Commercial Rule at both the prime contract and subcontract level.

Accordingly, this proposed rule revises section 212.504 to eliminate 10 U.S.C. 2320 and 2321 from the list of statutes that are inapplicable to subcontracts for commercial items, and makes corresponding changes to the flowdown requirements at 227.7102–4, and to the associated clauses at 252.227–7013(k)(2), –7015(e), and –7037(l).

3. Procedures and Presumptions Regarding Development at Private Expense—Computer Software

Although 10 U.S.C. 2320 and 2321 apply only to technical data and not to computer software (which is expressly excluded from the definition of technical data), it is longstanding Federal and DoD policy and practice to apply the same or analogous requirements to computer software, whenever appropriate. Many issues are common to both technical data and computer software, and in such cases, conformity of coverage between technical data and computer software is desirable.

For example, although the DFARS provides separate coverage for technical data and computer software—subparts 227.71 and 227.72, respectively—the policies and procedures are identical or analogous in most respects. Regarding the procedures for validation of asserted restrictions on computer software, the DFARS adapts the technical data procedures only for application to noncommercial computer software (*see* 227.7203–13 and 252.227–7019), but provides no similar or analogous coverage for commercial computer software (*see* 227.7202). This applicability model is used to guide the implementation of revisions analogous to those discussed previously for technical data (*i.e.*, analogous revisions are made to the validation procedures only for noncommercial technologies).

Accordingly, it is only the new Major Systems Rule that is applicable to, and implemented for, the validation procedures for noncommercial computer software. These new procedures are added at proposed 227.7203–13(d) and the associated clause at 252.227–7019(f). In each case, the paragraph numbers in the affected coverage are revised to incorporate the new paragraph. In addition, a conforming amendment is also made at 252.227–7019(g)(5) to state positively that the contracting officer's final decision will adhere to the new requirements.

This rule was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD does not expect this 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.*, based on the historically low incidence of formal challenges to validate asserted restrictions by small businesses on major systems or subsystems or components thereof. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

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 2007–D003) in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the DFARS do not create new information collection requirements, and do not affect the scope of existing information collection requirements in a manner that may require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 212, 227, and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, DoD proposes to amend 48 CFR parts 212, 227, and 252 as follows:

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

Authority: 41 U.S.C. 421 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

212.504 [Amended]

2. Amend section 212.504 by removing and reserving paragraphs (a)(v) and (a)(vi).

PART 227—PATENTS, DATA, AND COPYRIGHTS

227.7102 [Removed]

3. Remove section 227.7102.

227.7102–3 [Redesignated as 227.7102–4]

4. Redesignate section 227.7102–3 as section 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 newly designated section 227.7102–4 to read as follows:

227.7102–4 Contract clause.

(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 lieu of the clause at 252.227–7015 if the Government has paid or will pay any portion of the development costs of a commercial item.

(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.

7. Amend section 227.7103–6 by revising 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 has paid or will pay any portion of the development costs. 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.

* * * * *

8. Amend section 227.7103–13 as follows:

a. By redesignating paragraph (c) as paragraph (d);

b. By adding new paragraph (c);

c. By revising newly redesignated paragraph (d) introductory text;

d. By revising the first sentence of (d)(2)(i); and

e. By revising paragraph (d)(4).

The addition 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. Sections 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. Section 431(c)) in all cases, and for all other commercial items except as provided in paragraph (c)(2)(ii) of this section, 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 section). 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) * * *

(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 . * * *

* * * * *

(4) *Challenge notice.* The contracting officer will 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 section. Challenge notices shall be in writing and issued to the contractor or, after consideration of the situations described in paragraph (d)(3) of this section, the person asserting the restriction. The challenge notice shall include the information in paragraph (e) of the clause at 252.227–7037.

* * * * *

9. Revise section 227.7203–13 by redesignating paragraphs (d), (e), and (f) as (e), (f), and (g) respectively; and by adding 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

8. Amend section 252.227–7013 by revising the clause date and paragraph (k)(2) to read as follows:

252.227–7013 Rights in Technical Data—Noncommercial Items.

* * * * *

RIGHTS IN TECHNICAL DATA—NONCOMMERCIAL ITEMS (DATE)

* * * * *

(k) * * *

(2) Whenever any technical data 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. 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.

* * * * *

9. Amend section 252.227–7015 by revising the clause date and the introductory text, and adding new paragraph 227.7015(e) to read as follows:

252.227–7015 Technical Data-Commercial Items.

As prescribed in 227.7102–4(a)(1), use the following clause:

TECHNICAL DATA—COMMERCIAL ITEMS (DATE)

* * * * *

(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 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.

(End of clause)

10. Amend section 252.227–7019 by revising the clause date; redesignating paragraphs (f) through (i) as (g) through (j) respectively; adding new paragraph (f); and revising newly redesignated paragraphs (g)(5), (h)(1), and (h)(3) to read as follows:

Validation of Asserted Restrictions—Computer Software

* * * * *

VALIDATION OF ASSERTED RESTRICTIONS—COMPUTER SOFTWARE (DATE)

* * * * *

(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 shall 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 shall 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.

* * * * *

(h) * * *

(1) The Government agrees that, notwithstanding a Contracting Officer's final decision denying the validity of an asserted restriction and except as provided in paragraph (h)(3) of this clause, it will honor the asserted restriction—

* * * * *

(3) The agency head, on a nondelegable basis, may determine that urgent or compelling circumstances do not permit awaiting the filing of suit in an appropriate court, or the rendering of a decision by a court of competent jurisdiction or Board of Contract Appeals. In that event, the agency head will notify the Contractor of the urgent or compelling circumstances. Notwithstanding paragraph (h)(1) of this clause, the Contractor agrees that the agency may use, modify, reproduce, release, perform, display, or disclose computer software marked with government purpose legends for any purpose, and authorize others to do so; or restricted or special license rights for government purposes only. The Government agrees not to release or disclose such software unless, prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at 227.7103–7 of the Defense Federal Acquisition Regulation Supplement (DFARS), or is a Government contractor receiving access to the software for performance of a Government contract that contains the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. The agency head's determination may be made at any time after the date of the Contracting Officer's final decision and shall not affect the Contractor's right to damages against the United States, or other relief provided by law, if its asserted restrictions are ultimately upheld.

* * * * *

11. Amend section 252.227–7037 by revising the clause date and revising paragraphs (b), (c), (f), and (l) to read as follows:

* * * * *

252.227–7037 Validation of Restrictive Markings on Technical Data.

* * * * *

VALIDATION OF RESTRICTIVE MARKINGS ON TECHNICAL DATA (DATE)

* * * * *

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

(1) *Commercial items.* For commercially available off-the-shelf items (defined at 41 U.S.C. Section 431(c)) in all cases, and for all other commercial items except as provided in paragraph (b)(2) of this clause, the Contracting Officer shall presume that a Contractor's asserted use or release restrictions are justified on the basis that the item, component, or process was developed exclusively at private expense. The Contracting Officer shall not challenge such assertions unless information provided by the Contracting Officer 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 shall 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) 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 shall 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 shall 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.

(End of clause)

[FR Doc. 2010–10764 Filed 5–6–10; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[DFARS Case 2008–D027]

48 CFR Parts 215, 234, 242, and 252

Defense Federal Acquisition Regulation Supplement; Cost and Software Data Reporting System

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

ACTION: Proposed rule with request for comments.

SUMMARY: DoD proposes to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to set forth DoD Cost and Software Data Reporting system requirements for major defense acquisition programs and major automated information system programs.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before July 6, 2010, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2008–D027, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *E-mail: dfars@osd.mil*. Include DFARS Case 2008–D027 in the subject line of the message.
- *Fax:* 703–602–0350.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Mary Overstreet, OUSD(AT&L)DPAP(DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://*