Part 227 - PATENTS, DATA, AND COPYRIGHTS

Subpart 227.3 - PATENT RIGHTS UNDER GOVERNMENT CONTRACTS

227.303 Contract clauses.

227.304 Procedures.

227.304-1 General.

Subpart 227.4 - RIGHTS IN DATA AND COPYRIGHTS

227.400 Scope of subpart.

Subpart 227.6 - FOREIGN LICENSE AND TECHNICAL ASSISTANCE AGREEMENTS

227.670 Scope.

227.671 General.

227.672 Policy.

227.673 Foreign license and technical assistance agreements between the Government and domestic concerns.

227.674 Supply contracts between the Government and a foreign government or concern.

227.675 Foreign license and technical assistance agreements between a domestic concern and a foreign government or concern.

227.675-1 International Traffic in Arms Regulations.

227.675-2 Review of agreements.

227.676 Foreign patent interchange agreements.

Subpart 227.70 - INFRINGEMENT CLAIMS, LICENSES, AND ASSIGNMENTS

227.7000 Scope.

227.7001 Policy.

227.7002 Statutes pertaining to administrative claims of infringement.

227.7003 Claims for copyright infringement.

227.7004 Requirements for filing an administrative claim for patent infringement.

227.7005 Indirect notice of patent infringement claims.

227.7006 Investigation and administrative disposition of claims.

227.7007 Notification and disclosure to claimants.

227.7008 Settlement of indemnified claims.

227.7009 Patent releases, license agreements, and assignments.

227.7009-1 Required clauses.

227.7009-2 Clauses to be used when applicable.

227.7009-3 Additional clauses—contracts except running royalty contracts.

227.7009-4 Additional clauses—contracts providing for payment of a running royalty.

227.7010 Assignments.

227.7011 Procurement of rights in inventions, patents, and copyrights.

227.7012 Contract format.

227.7013 Recordation.

Subpart 227.71 - TECHNICAL DATA AND ASSOCIATED RIGHTS

227.7100 Scope of subpart.

227.7101 Definitions.

227.7102 Commercial products, commercial, components, commercial services, or commercial processes.

227.7102-1 Policy.

227.7102-2 Rights in technical data.

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

227.7102-4 Contract clauses.

227.7103 Other than commercial products, commercial services, or commercial processes.

227.7103-1 Policy.

227.7103-2 Acquisition of technical data.

227.7103-3 Early identification of technical data to be furnished to the Government with restrictions on use, reproduction, or disclosure.

227.7103-4 License rights.

227.7103-5 Government rights.

227.7103-6 Contract clauses.

227.7103-7 Use and nondisclosure agreement.

227.7103-8 Deferred delivery and deferred ordering of technical data.

227.7103-9 Copyright.

227.7103-10 Contractor identification and marking of technical data to be furnished with restrictive markings.

227.7103-11 Contractor procedures and records.

227.7103-12 Government right to establish conformity of markings.

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

227.7103-14 Conformity, acceptance, and warranty of technical data.

227.7103-15 Subcontractor rights in technical data.

227.7103-16 Providing technical data to foreign governments, foreign contractors, or international organizations.

227.7103-17 Overseas contracts with foreign sources.

227.7104 Contracts under the Small Business Innovation Research Program and Small Business Technology Transfer Program.

227.7104-1 Policy.

227.7104-2 Rights in SBIR or STTR data.

227.7104-3 STTR program requirements.

227.7104-4 Solicitation provisions and contract clauses.

227.7105 Contracts for the acquisition of existing works.

227.7105-1 General.

227.7105-2 Acquisition of existing works without modification.

227.7105-3 Acquisition of modified existing works.

227.7106 Contracts for special works.

227.7107 Contracts for architect-engineer services.

227.7107-1 Architectural designs and data clauses for architect-engineer or construction contracts.

227.7107-2 Contracts for construction supplies and research and development work.

227.7107-3 Approval of restricted designs.

227.7108 Contractor data repositories.

Subpart 227.72 - COMPUTER SOFTWARE, COMPUTER SOFTWARE DOCUMENTATION, AND ASSOCIATED RIGHTS

227.7200 Scope of subpart.

227.7201 Definitions.

227.7202 Commercial computer software and commercial computer software documentation.

227.7202-1 Policy.

227.7202-2 Reserved.

227.7202-3 Rights in commercial computer software or commercial computer software documentation.

227.7202-4 Contract clause.

227.7203 Other than commercial computer software and other than commercial computer software documentation.

227.7203-1 Policy.

227.7203-2 Acquisition of other than commercial computer software and computer software documentation and associated rights.

227.7203-3 Early identification of computer software or computer software documentation to be furnished to the Government with restrictions on use, reproduction, or disclosure.

227.7203-4 License rights.

227.7203-5 Government rights.

227.7203-6 Solicitation provisions and contract clauses.

227.7203-8 Deferred delivery and deferred ordering of computer software and computer software documentation.

227.7203-9 Copyright.

227.7203-10 Contractor identification and marking of computer software or computer software documentation to be furnished with restrictive markings.

227.7203-11 Contractor procedures and records.

227.7203-12 Government right to establish conformity of markings.

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

227.7203-14 Conformity, acceptance, and warranty of computer software and computer software documentation.

227.7203-15 Subcontractor rights in computer software or computer software documentation.

227.7203-16 Providing computer software or computer software documentation to foreign governments, foreign contractors, or international organizations.

227.7203-17 Overseas contracts with foreign sources.

227.7204 Contracts under the Small Business Innovation Research Program.

227.7205 Contracts for special works.

227.7206 Contracts for architect-engineer services.

227.7207 Contractor data repositories.

Parent topic: Defense Federal Acquisition Regulation

Subpart 227.3 - PATENT RIGHTS UNDER GOVERNMENT CONTRACTS

227.303 Contract clauses.

(1) Use the clause at 252.227-7039 , Patents—Reporting of Subject Inventions, in solicitations and contracts containing the clause at FAR 52.227-11, Patent Rights—Ownership by the Contractor.

(2)(i) Use the clause at 252.227-7038 , Patent Rights—Ownership by the Contractor (Large Business), instead of the clause at FAR 52.227-11, in solicitations and contracts for experimental, developmental, or research work if—

(A) The contractor is other than a small business concern or nonprofit organization; and

(B) No alternative patent rights clause is used in accordance with FAR 27.303(c) or (e).

(ii) Use the clause with its Alternate I if—

(A) The acquisition of patent rights for the benefit of a foreign government is required under a treaty or executive agreement;

(B) The agency head determines at the time of award that it would be in the national interest to acquire the right to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement; or

(C) Other rights are necessary to effect a treaty or agreement, in which case Alternate I may be appropriately modified.

(iii) Use the clause with its Alternate II in long-term contracts if necessary to effect treaty or agreements to be entered into.

227.304 Procedures.

227.304-1 General.

Interim and final invention reports and notification of all subcontracts for experimental, developmental, or research work may be submitted on DD Form 882, Report of Inventions and Subcontracts.

Subpart 227.4 - RIGHTS IN DATA AND COPYRIGHTS

227.400 Scope of subpart.

DoD activities shall use the guidance in Subparts 227.71 and 227.72 instead of the guidance in FAR Subpart 27.4.

Subpart 227.6 - FOREIGN LICENSE AND TECHNICAL ASSISTANCE AGREEMENTS

227.670 Scope.

This subpart prescribes policy with respect to foreign license and technical assistance agreements.

227.671 General.

In furtherance of the Military Assistance Program or for other national defense purposes, the Government may undertake to develop or encourage the development of foreign additional sources of supply. The development of such sources may be accomplished by an agreement, often called a foreign licensing agreement or technical assistance agreement, wherein a domestic concern, referred to in this subpart as a “primary source,” agrees to furnish to a foreign concern or government, herein referred to as a “second source;” foreign patent rights; technical assistance in the form of data, know-how, trained personnel of the primary source, instruction and guidance of the personnel of the second source, jigs, dies, fixtures, or other manufacturing aids, or such other assistance, information, rights, or licenses as are needed to enable the second source to produce particular supplies or perform particular services. Agreements calling for one or more of the foregoing may be entered into between the primary source and the Government, a foreign government, or a foreign concern. The consideration for providing such foreign license and technical assistance may be in the form of a lump sum payment, payments for each item manufactured by the second source, an agreement to exchange data and patent rights on improvements made to the article or service, capital stock transactions, or any combination of these. The primary source's bases for computing such consideration may include actual costs; charges for the use of patents, data, or know-how reflecting the primary source's investment in developing and engineering and production techniques; and the primary source's “price” for setting up a second source. Such agreements often refer to the compensation to be paid as a royalty or license fee whether or not patent rights are involved.

227.672 Policy.

It is Government policy not to pay in connection with its contracts, and not to allow to be paid in connection with contracts made with funds derived through the Military Assistance Program or otherwise through the United States Government, charges for use of patents in which it holds a royalty-free license or charges for data which it has a right to use and disclose to others, or which is

in the public domain, or which the Government has acquired without restriction upon its use and disclosure to others. This policy shall be applied by the Departments in negotiating contract prices for foreign license technical assistance contracts (227.675) or supply contracts with second sources (227.674); and in commenting on such agreements when they are referred to the Department of Defense by the Department of State pursuant to Section 414 of the Mutual Security Act of 1954 as amended (22 U.S.C. 1934) and the International Traffic in Arms Regulations (see 227.675).

227.673 Foreign license and technical assistance agreements between the Government and domestic concerns.

(a) Contracts between the Government and a primary source to provide technical assistance or patent rights to a second source for the manufacture of supplies or performance of services shall, to the extent practicable, specify the rights in patents and data and any other rights to be supplied to the second source. Each contract shall provide, in connection with any separate agreement between the primary source and the second source for patent rights or technical assistance relating to the articles or services involved in the contract, that—

(1) The primary source and his subcontractors shall not make, on account of any purchases by the Government or by others with funds derived through the Military Assistance Program or otherwise through the Government, any charge to the second source for royalties or amortization for patents or inventions in which the Government holds a royalty-free license; or data which the Government has the right to possess, use, and disclose to others; or any technical assistance provided to the second source for which the Government has paid under a contract between the Government and the primary source; and

(2) The separate agreement between the primary and second source shall include a statement referring to the contract between the Government and the primary source, and shall conform to the requirements of the International Traffic in Arms Regulations (see 227.675-1).

(b) The following factors, among others, shall be considered in negotiating the price to be paid the primary source under contracts within (a) of this section:

(1) The actual cost of providing data, personnel, manufacturing aids, samples, spare parts, and the like;

(2) The extent to which the Government has contributed to the development of the supplies or services, and to the methods of manufacture or performance, through past contracts for research and development or for manufacture of the supplies or performance of the services; and

(3) The Government's patent rights and rights in data relating to the supplies or services and to the methods of manufacture or of performance.

227.674 Supply contracts between the Government and a foreign government or concern.

In negotiating contract prices with a second source, including the redetermination of contract prices, or in determining the allowability of costs under a cost-reimbursement contract with a second source, the contracting officer:

(a) Shall obtain from the second source a detailed statement (see FAR 27.204-1(a)(2)) of royalties, license fees, and other compensation paid or to be paid to a primary source (or any of his subcontractors) for patent rights, rights in data, and other technical assistance provided to the second source, including identification and description of such patents, data, and technical assistance; and

(b) Shall not accept or allow charges which in effect are—

(1) For royalties or amortization for patents or inventions in which the Government holds a royalty-free license; or

(2) For data which the Government has a right to possess, use, and disclose to others; or

(3) For any technical assistance provided to the second source for which the Government has paid under a contract between the Government and a primary source.

227.675 Foreign license and technical assistance agreements between a domestic concern and a foreign government or concern.

227.675-1 International Traffic in Arms Regulations.

Pursuant to Section 414 of the Mutual Security Act of 1954, as amended (22 U.S.C. 1934), the Department of State controls the exportation of data relating to articles designated in the United States Munitions List as arms, ammunition, or munitions of war. (The Munitions List and pertinent procedures are set forth in the International Traffic in Arms Regulations, 22 CFR, et seq.) Before authorizing such exportation, the Department of State generally requests comments from the Department of Defense. On request of the Office of the Assistant Secretary of Defense (International Security Affairs), each Department shall submit comments thereon as the basis for a Department of Defense reply to the Department of State.

227.675-2 Review of agreements.

(a) In reviewing foreign license and technical assistance agreements between primary and second sources, the Department concerned shall, insofar as its interests are involved, indicate whether the agreement meets the requirements of Sections 124.07-124.10 of the International Traffic in Arms Regulations or in what respects it is deficient. Paragraphs (b) through (g) of this subsection provide general guidance.

(b) When it is reasonably anticipated that the Government will purchase from the second source the supplies or services involved in the agreement, or that Military Assistance Program funds will be provided for the procurement of the supplies or services, the following guidance applies.

(1) If the agreement specifies a reduction in charges thereunder, with respect to purchases by or for the Government or by others with funds derived through the Military Assistance Program or otherwise through the Government, in recognition of the Government's rights in patents and data, the Department concerned shall evaluate the amount of the reduction to determine whether it is fair and reasonable in the circumstances, before indicating its approval.

(2) If the agreement does not specify any reduction in charges or otherwise fails to give recognition to the Government's rights in the patents or data involved, approval shall be conditioned upon amendment of the agreement to reflect a reduction, evaluated by the Department concerned as acceptable to the Government, in any charge thereunder with respect to purchases made by or for the Government or by others with funds derived through the Military Assistance Program or otherwise through the Government, in accordance with Section 124.10 of the International Traffic in Arms Regulations.

(3) If the agreement provides that no charge is to be made to the second source for data or patent rights to the extent of the Government's rights, the Department concerned shall evaluate the acceptability of the provision before indicating its approval.

(4) If time or circumstances do not permit the evaluation called for in (b)(1), (2), or (3) of this subsection, the guidance in (c) of this subsection shall be followed.

(c) When it is not reasonably anticipated that the Government will purchase from the second source the supplies or services involved in the agreement nor that Military Assistance Program funds will be provided for the purchase of the supplies or services, then the following guidance applies.

(1) If the agreement provides for charges to the second source for data or patent rights, it may suffice to fulfill the requirements of Section 124.10 insofar as the Department of Defense is concerned if:

(i) The agreement requires the second source to advise the primary source when he has knowledge of any purchase made or to be made from him by or for the Government or by others with funds derived through the Military Assistance Program or otherwise through the Government;

(ii) The primary source separately agrees with the Government that upon such advice to him from the second source or from the Government or otherwise as to any such a purchase or prospective purchase, he will negotiate with the Department concerned an appropriate reduction in his charges to the second source in recognition of any Government rights in patents or data; and

(iii) The agreement between the primary and second sources further provides that in the event of any such purchase and resulting reduction in charges, the second source shall pass on this reduction to the Government by giving the Government a corresponding reduction in the purchase price of the article or service.

(2) If the agreement provides that no charge is to be made to the second source for data or patent rights to the extent to which the Government has rights, the Department concerned shall:

(i) Evaluate the acceptability of the provision before indicating its approval; or

(ii) Explicitly condition its approval on the right to evaluate the acceptability of the provision at a later time.

(d) When there is a technical assistance agreement between the primary source and the Government related to the agreement between the primary and second sources that is under review, the latter agreement shall reflect the arrangements contemplated with respect thereto by the Government's technical assistance agreement with the primary source.

(e) Every agreement shall provide that any license rights transferred under the agreement are subject to existing rights of the Government.

(f) In connection with every agreement referred to in (b) above, a request shall be made to the primary source—

(1) To identify the patents, data, and other technical assistance to be provided to the second source by the primary source or any of his subcontractors,

(2) To identify any such patents and data in which, to the knowledge of the primary source, the Government may have rights, and

(3) To segregate the charges made to the second source for each such category or item of patents, data, and other technical assistance.

Reviewing personnel shall verify this information or, where the primary source does not furnish it, obtain such information from Governmental sources so far as practicable.

(g) The Department concerned shall make it clear that its approval of any agreement does not necessarily recognize the propriety of the charges or the amounts thereof, or constitute approval of any of the business arrangements in the agreement, unless the Department expressly intends by its approval to commit itself to the fairness and reasonableness of a particular charge or charges. In any event, a disclaimer should be made to charges or business terms not affecting any purchase made by or for the Government or by others with funds derived through the Military Assistance Program or otherwise through the Government.

227.676 Foreign patent interchange agreements.

(a) Patent interchange agreements between the United States and foreign governments provide for the use of patent rights, compensation, free licenses, and the establishment of committees to review and make recommendations on these matters. The agreements also may exempt the United States from royalty and other payments. The contracting officer shall ensure that royalty payments are consistent with patent interchange agreements.

(b) Assistance with patent rights and royalty payments in the United States European Command (USEUCOM) area of responsibility is available from HQ USEUCOM, ATTN: ECLA, Unit 30400, Box 1000, APO AE 09128; Telephone: DSN 430-8001/7263, Commercial 49-0711-680-8001/7263; Telefax: 49-0711-680-5732.

Subpart 227.70 - INFRINGEMENT CLAIMS, LICENSES, AND ASSIGNMENTS

227.7000 Scope.

This subpart prescribes policy, procedures, and instructions for use of clauses with respect to processing licenses, assignments, and infringement claims.

227.7001 Policy.

Whenever a claim of infringement of privately owned rights in patented inventions or copyrighted works is asserted against any Department or Agency of the Department of Defense, all necessary steps shall be taken to investigate, and to settle administratively, deny, or otherwise dispose of such claim prior to suit against the United States. This subpart 227.70 does not apply to licenses or assignments acquired by the Department of Defense under the Patent Rights clauses.

227.7002 Statutes pertaining to administrative claims of infringement.

Statutes pertaining to administrative claims of infringement in the Department of Defense include the following: the Foreign Assistance Act of 1961, 22 U.S.C. 2356 (formerly the Mutual Security Acts of 1951 and 1954); the Invention Secrecy Act, 35 U.S.C. 181-188; 10 U.S.C. 3793; 28 U.S.C. 1498; and 35 U.S.C. 286.

227.7003 Claims for copyright infringement.

The procedures set forth herein will be followed, where applicable, in copyright infringement claims.

227.7004 Requirements for filing an administrative claim for patent infringement.

(a) A patent infringement claim for compensation, asserted against the United States under any of the applicable statutes cited in 227.7002 , must be actually communicated to and received by a Department, agency, organization, office, or field establishment within the Department of Defense. Claims must be in writing and should include the following:

(1) An allegation of infringement;

(2) A request for compensation, either expressed or implied;

(3) A citation of the patent or patents alleged to be infringed;

(4) A sufficient designation of the alleged infringing item or process to permit identification, giving the military or commercial designation, if known, to the claimant;

(5) A designation of at least one claim of each patent alleged to be infringed; or

(6) As an alternative to (a)(4) and (5) of this section, a declaration that the claimant has made a bona fide attempt to determine the item or process which is alleged to infringe, but was unable to do so, giving reasons, and stating a reasonable basis for his belief that his patent or patents are being infringed.

(b) In addition to the information listed in (a) above, the following material and information is generally necessary in the course of processing a claim of patent infringement. Claimants are encouraged to furnish this information at the time of filing a claim to permit the most expeditious processing and settlement of the claim.

(1) A copy of the asserted patent(s) and identification of all claims of the patent alleged to be infringed.

(2) Identification of all procurements known to claimant which involve the alleged infringing item or process, including the identity of the vendor or contractor and the Government procuring activity.

(3) A detailed identification of the accused article or process, particularly where the article or process relates to a component or subcomponent of the item procured, an element by element comparison of the representative claims with the accused article or process. If available, this identification should include documentation and drawings to illustrate the accused article or process in suitable detail to enable verification of the infringement comparison.

(4) Names and addresses of all past and present licenses under the patent(s), and copies of all license agreements and releases involving the patent(s).

(5) A brief description of all litigation in which the patent(s) has been or is now involved, and the present status thereof.

(6) A list of all persons to whom notices of infringement have been sent, including all departments and agencies of the Government, and a statement of the ultimate disposition of each.

(7) A description of Government employment or military service, if any, by the inventor and/or patent owner.

(8) A list of all Government contracts under which the inventor, patent owner, or anyone in privity with him performed work relating to the patented subject matter.

(9) Evidence of title to the patent(s) alleged to be infringed or other right to make the claim.

(10) A copy of the Patent Office file of each patent if available to claimant.

(11) Pertinent prior art known to claimant, not contained in the Patent Office file, particularly publications and foreign art.

In addition in the foregoing, if claimant can provide a statement that the investigation may be limited to the specifically identified accused articles or processes, or to a specific procurement, it may materially expedite determination of the claim.

(c) Any department receiving an allegation of patent infringement which meets the requirements of this paragraph shall acknowledge the same and supply the other departments that may have an interest therein with a copy of such communication and the acknowledgement thereof.

(1) For the Department of the Army—Chief, Patents, Copyrights, and Trademarks Division, U.S. Army Legal Services Agency;

(2) For the Department of the Navy—the Patent Counsel for Navy, Office of Naval Research;

(3) For the Department of the Air Force—Chief, Patents Division, Office of the Judge Advocate General;

(4) For the Defense Logistics Agency—the Office of Counsel;

(5) For the National Security Agency— the General Counsel;

(6) For the Defense Information Systems Agency—the Counsel;

(7) For the Defense Threat Reduction Agency—the General Counsel; and

(8) For the National Geospatial-Intelligence Agency—the Counsel.

(d) If a communication alleging patent infringement is received which does not meet the requirements set forth in paragraph (c) of this section, the sender shall be advised in writing—

(1) That his claim for infringement has not been satisfactorily presented, and

(2) Of the elements considered necessary to establish a claim.

(e) A communication making a proffer of a license in which no infringement is alleged shall not be considered as a claim for infringement.

227.7005 Indirect notice of patent infringement claims.

(a) A communication by a patent owner to a Department of Defense contractor alleging that the contractor has committed acts of infringement in performance of a Government contract shall not be considered a claim within the meaning of 227.7004 until it meets the requirements specified therein.

(b) Any Department receiving an allegation of patent infringement which meets the requirements of 227.7004 shall acknowledge the same and supply the other Departments (see 227.7004 (c)) which may have an interest therein with a copy of such communication and the acknowledgement thereof.

(c) If a communication covering an infringement claim or notice which does not meet the requirements of 227.7004 (a) is received from a contractor, the patent owner shall be advised in writing as covered by the instructions of 227.7004 (d).

227.7006 Investigation and administrative disposition of claims.

An investigation and administrative determination (denial or settlement) of each claim shall be made in accordance with instructions and procedures established by each Department, subject to the following:

(a) When the procurement responsibility for the alleged infringing item or process is assigned to a single Department or only one Department is the purchaser of the alleged infringing item or process, and the funds of that Department only are to be charged in the settlement of the claim, that Department shall have the sole responsibility for the investigation and administrative determination of the claim and for the execution of any agreement in settlement of the claim. Where, however, funds of another Department are to be charged, in whole or in part, the approval of such Department shall be obtained as required by 208.7002 . Any agreement in settlement of the claim, approved pursuant to 208.7002 shall be executed by each of the Departments concerned.

(b) When two or more Departments are the respective purchasers of alleged infringing items or processes and the funds of those Departments are to be charged in the settlement of the claim, the investigation and administrative determination shall be the responsibility of the Department having the predominant financial interest in the claim or of the Department or Departments as jointly agreed upon by the Departments concerned. The Department responsible for negotiation shall, throughout the negotiation, coordinate with the other Departments concerned and keep them advised of the status of the negotiation. Any agreement in the settlement of the claim shall be executed by each Department concerned.

227.7007 Notification and disclosure to claimants.

When a claim is denied, the Department responsible for the administrative determination of the claim shall so notify the claimant or his authorized representative and provide the claimant a reasonable rationale of the basis for denying the claim. Disclosure of information or the rationale referred to above shall be subject to applicable statutes, regulations, and directives pertaining to security, access to official records, and the rights of others.

227.7008 Settlement of indemnified claims.

Settlement of claims involving payment for past infringement shall not be made without the consent of, and equitable contribution by, each indemnifying contractor involved, unless such settlement is determined to be in the best interests of the Government and is coordinated with the Department of Justice with a view to preserving any rights of the Government against the contractors involved. If consent of and equitable contribution by the contractors are obtained, the settlement need not be coordinated with the Department of Justice.

227.7009 Patent releases, license agreements, and assignments.

This section contains clauses for use in patent release and settlement agreements, license agreements, and assignments, executed by the Government, under which the Government acquires rights. Minor modifications of language (e.g., pluralization of “Secretary” or “Contracting Officer”) in multidepartmental agreements may be made if necessary.

227.7009-1 Required clauses.

(a) Covenant Against Contingent Fees. Insert the clause at FAR 52.203-5.

(b) Gratuities. Insert the clause at FAR 52.203-3.

(c) Assignment of Claims. Insert the clause at FAR 52.232-23.

(d) Disputes. Pursuant to FAR Subpart 33.2, insert the clause at FAR 52.233-1.

(e) Non-Estoppel. Insert the clause at 252.227-7000 .

227.7009-2 Clauses to be used when applicable.

(a) *Release of past infringement.* The clause at 252.227-7001, Release of Past Infringement, is an example which may be modified or omitted as appropriate for particular circumstances, but only upon the advice of cognizant patent or legal counsel. (See footnotes at end of clause.)

(b) *Readjustment of payments.* The clause at 252.227-7002, Readjustment of Payments, shall be inserted in contracts providing for payment of a running royalty.

(c) *Termination.* The clause at 252.227-7003, Termination, is an example for use in contracts

providing for the payment of a running royalty. This clause may be modified or omitted as appropriate for particular circumstances, but only upon the advice of cognizant patent or legal counsel (see 227.7004(c)).

227.7009-3 Additional clauses—contracts except running royalty contracts.

The following clauses are examples for use in patent release and settlement agreements, and license agreements not providing for payment by the Government of a running royalty.

(a) License Grant. Insert the clause at 252.227-7004 .

(b) License Term. Insert one of the clauses at 252.227-7005 Alternate I or Alternate II, as appropriate.

227.7009-4 Additional clauses—contracts providing for payment of a running royalty.

The clauses set forth below are examples which may be used in patent release and settlement agreements, and license agreements, when it is desired to cover the subject matter thereof and the contract provides for payment of a running royalty.

(a) *License grant—running royalty.* No Department shall be obligated to pay royalties unless the contract is signed on behalf of such Department. Accordingly, the License Grant clause at 252.227-7006 should be limited to the practice of the invention by or for the signatory Department or Departments.

(b) *License term—running royalty*. The clause at 252.227-7007 is a sample form for expressing the license term.

(c) *Computation of royalties.* The clause at 252.227-7008 providing for the computation of royalties, may be of varying scope depending upon the nature of the royalty bearing article, the volume of procurement, and the type of contract pursuant to which the procurement is to be accomplished.

(d) *Reporting and payment of royalties.*

(1) The contract should contain a provision specifying the office designated within the specific Department involved to make any necessary reports to the contractor of the extent of use of the licensed subject matter by the entire Department, and such office shall be charged with the responsibility of obtaining from all procuring offices of that Department the information necessary to make the required reports and corresponding vouchers necessary to make the required payments. The clause at 252.227-7009 is a sample for expressing reporting and payment of royalties requirements.

(2) Where more than one Department or Government Agency is licensed and there is a ceiling on the royalties payable in any reporting period, the licensing Departments or Agencies shall coordinate with respect to the pro rata share of royalties to be paid by each.

(e) *License to other government agencies.* When it is intended that a license on the same terms and conditions be available to other departments and agencies of the Government, the clause at 252.227-7010 is an example which may be used.

227.7010 Assignments.

(a) The clause at 252.227-7011 is an example which may be used in contracts of assignment of patent rights to the Government.

(b) To facilitate proof of contracts of assignments, the acknowledgement of the contractor should be executed before a notary public or other officer authorized to administer oaths (35 U.S.C. 261).

227.7011 Procurement of rights in inventions, patents, and copyrights.

Even though no infringement has occurred or been alleged, it is the policy of the Department of Defense to procure rights under patents, patent applications, and copyrights whenever it is in the Government's interest to do so and the desired rights can be obtained at a fair price. The required and suggested clauses at 252.227-7004 and 252.227-7010 shall be required and suggested clauses, respectively, for license agreements and assignments made under this paragraph. The instructions at 227.7010 concerning the applicability and use of those clauses shall be followed insofar as they are pertinent.

227.7012 Contract format.

The format at 252.227-7012 appropriately modified where necessary, may be used for contracts of release, license, or assignment.

227.7013 Recordation.

Executive Order No. 9424 of 18 February 1944 requires all executive Departments and agencies of the Government to forward through appropriate channels to the Commissioner of Patents and Trademarks, for recording, all Government interests in patents or applications for patents.

Subpart 227.71 - TECHNICAL DATA AND ASSOCIATED RIGHTS

227.7100 Scope of subpart.

This subpart—

(a) Prescribes policies and procedures for the acquisition of technical data and the rights to use, modify, reproduce, release, perform, display, or disclose technical data. It implements the following laws and Executive Order:

(1) 10 U.S.C. 3013.

(2) 10 U.S.C. 3208(d)).

(3) 10 U.S.C. 3771-3775.

(4) 10 U.S.C. 3781–3786.

(5) 10 U.S.C. 8687.

(6) 17 U.S.C. 1301, *et seq.*

(7) Public. Law. 103-355.

(8) Executive Order 12591 (subsection 1(b)(7)).

(b) Does not apply to—

(1) Computer software or technical data that is computer software documentation (see subpart 227.72); or

(2) Releases of technical data to litigation support contractors (see subpart 204.74).

227.7101 Definitions.

(a) As used in this subpart, unless otherwise specifically indicated, the terms “offeror” and “contractor” include an offeror's or contractor's subcontractors, suppliers, or potential subcontractors or suppliers at any tier.

(b) Other terms used in this subpart are defined in the clause at 252.227-7013 , Rights in Technical Data–Other Than Commercial Products and Commercial Services.

227.7102 Commercial products, commercial, components, commercial services, or commercial processes.

227.7102-1 Policy.

(a) DoD shall acquire only the technical data customarily provided to the public with a commercial product, commercial service, or commercial process, except technical data that—

(1) Are form, fit, or function data;

(2) Are required for repair or maintenance of commercial products or commercial processes, or for the proper installation, operating, or handling of a commercial product, either as a stand alone unit or as a part of a military system, when such data are not customarily provided to commercial users or the data provided to commercial users is not sufficient for military purposes; or

(3) Describe the modifications made at Government expense to a commercial product, commercial service, or commercial process in order to meet the requirements of a Government solicitation.

(b) To encourage offerors and contractors to offer or use commercial products to satisfy military requirements, offerors and contractors shall not be required, except for the technical data described in paragraph (a) of this subsection, to—

(1) Furnish technical information related to commercial products, commercial services, or processes that is not customarily provided to the public; or

(2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose technical data pertaining to commercial products, commercial services, or commercial processes except for a transfer of rights mutually agreed upon.

(c) The Government's rights in a vessel design, and in any useful article embodying a vessel design, must be consistent with the Government's rights in technical data pertaining to the design (10 U.S.C. 8687; 17 U.S.C. 1301(a)(3)).

227.7102-2 Rights in technical data.

(a) The clause at 252.227-7015 , Technical Data–Commercial Products and Commercial Services, provides the Government specific license rights in technical data pertaining to commercial products, commercial services, or commercial processes. DoD may use, modify, reproduce, release, perform, display, or disclose data only within the Government. The data may not be used to manufacture additional quantities of the commercial items and, except for emergency repair or overhaul and for covered Government support contractors, may not be released or disclosed to, or used by, third parties without the contractor's written permission. Those restrictions do not apply to the technical data described in 227.7102-1 (a).

(b) If additional rights are needed, contracting activities must negotiate with the contractor to determine if there are acceptable terms for transferring such rights. The specific additional rights granted to the Government shall be enumerated in a license agreement made part of the contract.

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 Asserted Restrictions on Technical Data, regarding the validation of asserted restrictions on technical data related to commercial products or commercial services.

227.7102-4 Contract clauses.

(a)(1) Except as provided in paragraph (b) of this subsection, use the clause at 252.227-7015 , Technical Data–Commercial Products and Commercial Services, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, when the contractor will be required to deliver technical data pertaining to commercial products, commercial components, or commercial services, or commercial processes.

(2) Use the clause at 252.227-7015 with its Alternate I in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, 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–Other Than Commercial Products and Commercial Services, in addition to the clause at 252.227-7015 , if the Government will have paid for any portion of the development costs of a commercial product or commercial service. The clause at 252.227-7013 will govern the technical data pertaining to any portion of a commercial product or commercial service that was developed in any part at Government expense, and the clause at 252.227-7015 will govern the technical data pertaining to any portion of a commercial product or commercial service that was developed exclusively at private expense.

(c) Use the clause at 252.227-7037, Validation of Asserted Restrictions on Technical Data, in solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services that include the clause at 252.227-7015 or the clause at 252.227-7013.

227.7103 Other than commercial products, commercial services, or commercial processes.

227.7103-1 Policy.

(a) DoD policy is to acquire only the technical data, and the rights in that data, necessary to satisfy agency needs.

(b) Solicitations and contracts shall -

(1) Specify the technical data to be delivered under a contract and delivery schedules for the data;

(2) Establish or reference procedures for determining the acceptability of technical data;

(3) Establish separate contract line items, to the extent practicable, for the technical data to be delivered under a contract and require offerors and contractors to price separately each deliverable data item; and

(4) Require offerors to identify, to the extent practicable, technical data to be furnished with restrictions on the Government's rights and require contractors to identify technical data to be delivered with such restrictions prior to delivery.

(c) Offerors shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in technical data related to items, components or processes developed at private expense except for the data identified at 227.7103-5(a)(2) and (a)(4) through (9).

(d) Offerors and contractors shall not be prohibited or discouraged from furnishing or offering to furnish items, components, or processes developed at private expense solely because the Government's rights to use, modify, release, reproduce, perform, display, or disclose technical data pertaining to those items may be restricted.

(e) As provided in 10 U.S.C. 3208, solicitations for major systems development contracts shall not require offerors to submit proposals that would permit the Government to acquire competitively items identical to items developed at private expense unless a determination is made at a level above the contracting officer that -

(1) The offeror will not be able to satisfy program schedule or delivery requirements; or

(2) The offeror's proposal to meet mobilization requirements does not satisfy mobilization needs.

(f) For acquisitions involving major weapon systems or subsystems of major weapon systems, the acquisition plan shall address acquisition strategies that provide for technical data and the associated license rights in accordance with 207.106(S-70).

(g) The Government's rights in a vessel design, and in any useful article embodying a vessel design, must be consistent with the Government's rights in technical data pertaining to the design (10 U.S.C. 8687; 17 U.S.C. 1301(a)(3)).

227.7103-2 Acquisition of technical data.

(a) Contracting officers shall work closely with data managers and requirements personnel to assure that data requirements included in solicitations are consistent with the policy expressed in 227.7103-1 .

(b)(1) Data managers or other requirements personnel are responsible for identifying the Government's life-cycle needs for technical data. Technical data needs must be established giving consideration to the offeror’s economic interests in technical data pertaining to items, components, or processes that have been developed at private expense (including the economic interests of small businesses and nontraditional contractors); the Government's costs to acquire, maintain, store, retrieve, and protect the technical data; reprocurement needs; repair, maintenance, and overhaul philosophies; spare and repair part considerations; and whether procurement of the items, components, or processes can be accomplished on a form, fit, or function basis. When it is anticipated that the Government will obtain unlimited or government purpose rights in technical data that will be required for competitive spare or repair parts procurements, such data should be identified as deliverable technical data items. Reprocurement needs may not be a sufficient reason to acquire detailed manufacturing or process data when items or components can be acquired using performance specifications, form, fit, and function data, or when there are a sufficient number of alternate sources that can reasonably be expected to provide such items on a performance specification or form, fit, or function basis.

(2) When reviewing offers received in response to a solicitation or other request for data, data managers must balance the original assessment of the Government's data needs with data prices contained in the offer.

(c) Contracting officers are responsible for ensuring that, wherever practicable, solicitations and contracts—

(1) Identify the type and quantity of the technical data to be delivered under the contract and the format and media in which the data will be delivered;

(2) Establish each deliverable data item as a separate contract line item (this requirement may be satisfied by listing each deliverable data item on an exhibit to the contract);

(3) Identify the prices established for each deliverable data item under a fixed-price type contract;

(4) Include delivery schedules and acceptance criteria for each deliverable data item; and

(5) Specifically identify the place of delivery for each deliverable item of technical data.

227.7103-3 Early identification of technical data to be furnished to the Government with restrictions on use, reproduction, or disclosure.

(a) 10 U.S.C. 3772(a) requires, to the maximum extent practicable, an identification prior to delivery of any technical data to be delivered to the Government with restrictions on use.

(b) Use the provision at 252.227-7017 , Identification and Assertion of Use, Release, or Disclosure Restrictions, in all solicitations that include the clause at 252.227-7013 , Rights in Technical Data—Other Than Commercial Products and Commercial Services. The provision requires offerors to identify any technical data for which restrictions, other than copyright, on use, release, or disclosure are asserted and to attach the identification and assertions to the offer.

(c) Subsequent to contract award, the clause at 252.227-7013 permits a contractor, under certain conditions, to make additional assertions of use, release, or disclosure restrictions. The prescription for the use of that clause and its alternate is at 227.7103-6 (a) and (b).

227.7103-4 License rights.

(a) *Grant of license*. The Government obtains rights in technical data, including a copyright license, under an irrevocable license granted or obtained for the Government by the contractor. The contractor or licensor retains all rights in the data not granted to the Government. For technical data that pertain to items, components, or processes, the scope of the license is generally determined by the source of funds used to develop the item, component, or process. When the technical data do not pertain to items, components, or processes, the scope of the license is determined by the source of funds used to create the data.

(1) *Technical data pertaining to items, components, or processes*. Contractors or licensors may, with some exceptions (see 227.7103-5 (a)(2) and (a)(4) through (9)), restrict the Government's rights to use, modify, release, reproduce, perform, display or disclose technical data pertaining to items, components, or processes developed exclusively at private expense (limited rights). They may not restrict the Government's rights in items, components, or processes developed exclusively at Government expense (unlimited rights) without the Government's approval. When an item, component, or process is developed with mixed funding, the Government may use, modify, release, reproduce, perform, display or disclose the data pertaining to such items, components, or processes within the Government without restriction but may release or disclose the data outside the Government only for government purposes (government purpose rights).

(2) *Technical data that do not pertain to items, components, or processes*. Technical data may be created during the performance of a contract for a conceptual design or similar effort that does not require the development, manufacture, construction, or production of items, components or processes. The Government generally obtains unlimited rights in such data when the data were created exclusively with Government funds, government purpose rights when the data were created with mixed funding, and limited rights when the data were created exclusively at private expense.

(b) *Source of funds determination.* The determination of the source of development funds for technical data pertaining to items, components, or processes should be made at any practical sub-item or subcomponent level or for any segregable portion of a process. Contractors may assert limited rights in a segregable sub-item, sub-component, or portion of a process which otherwise qualifies for limited rights under the clause at 252.227-7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services.

227.7103-5 Government rights.

The standard license rights that a licensor grants to the Government are unlimited rights, government purpose rights, or limited rights. Those rights are defined in the clause at 252.227-7013 , Rights in Technical Data–Other Than Commercial Products and Commercial Services. In unusual situations, the standard rights may not satisfy the Government's needs or the Government may be willing to accept lesser rights in data in return for other consideration. In those cases, a special license may be negotiated. However, the licensor is not obligated to provide the Government greater rights and the contracting officer is not required to accept lesser rights than the rights provided in the standard grant of license. The situations under which a particular grant of license applies are enumerated in paragraphs (a) through (d) of this section.

(a) *Unlimited rights*. The Government obtains unlimited rights in technical data that are—

(1) Data pertaining to an item, component, or process which has been or will be developed exclusively with Government funds;

(2) Studies, analyses, test data, or similar data produced in the performance of a contract when the study, analysis, test, or similar work was specified as an element of performance;

(3) Created exclusively with Government funds in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes;

(4) Form, fit, and function data;

(5) Necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);

(6) Corrections or changes to technical data furnished to the contractor by the Government;

(7) Publicly available or have been released or disclosed by the contractor or subcontractor without restrictions on further use, release or disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the software to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(8) Data in which the Government has obtained unlimited rights under another Government contract or as a result of negotiations; or

(9) Data furnished to the Government, under a Government contract or subcontract thereunder, with—

(i) Government purpose license rights or limited rights and the restrictive condition(s) has/have expired; or

(ii) Government purpose rights and the contractor's exclusive right to use such data for commercial purposes has expired.

(b) *Government purpose rights*.

(1) The Government obtains government purpose rights in technical data—

(i) That pertain to items, components, or processes developed with mixed funding except when the

Government is entitled to unlimited rights as provided in paragraphs (a)(2) and (a)(4) through (9) of this subsection; or

(ii) Created with mixed funding in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

(2) The period during which government purpose rights are effective is negotiable. The clause at 252.227-7013 provides a nominal five-year period. Either party may request a different period. Changes to the government purpose rights period may be made at any time prior to delivery of the technical data without consideration from either party. Longer periods should be negotiated when a five-year period does not provide sufficient time to apply the data for commercial purposes or when necessary to recognize subcontractors' interests in the data.

(3) The government purpose rights period commences upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required the development. Upon expiration of the Government rights period, the Government has unlimited rights in the data including the right to authorize others to use the data for commercial purposes.

(4) During the government purpose rights period, the Government may not use, or authorize other persons to use, technical data marked with government purpose rights legends for commercial purposes. The Government shall not release or disclose data in which it has government purpose rights to any person, or authorize others to do so, unless—

(i) Prior to release or disclosure, the intended recipient is subject to the use and nondisclosure agreement at 227.7103-7 ; or

(ii) The intended recipient is a Government contractor receiving access to the data for performance of a Government contract that contains the clause at 252.227-7025 , Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(5) When technical data marked with government purpose rights legends will be released or disclosed to a Government contractor performing a contract that does not include the clause at 252.227-7025 , the contract may be modified, prior to release or disclosure, to include that clause in lieu of requiring the contractor to complete a use and nondisclosure agreement.

(6) Contracting activities shall establish procedures to assure that technical data marked with government purpose rights legends are released or disclosed, including a release or disclosure through a Government solicitation, only to persons subject to the use and nondisclosure restrictions. Public announcements in the System for Award Management or other publications must provide notice of the use and nondisclosure requirements. Class use and nondisclosure agreements (e.g., agreements covering all solicitations received by the XYZ company within a reasonable period) are authorized and may be obtained at any time prior to release or disclosure of the government purpose rights data. Documents transmitting government purpose rights data to persons under class agreements shall identify the technical data subject to government purpose rights and the class agreement under which such data are provided.

(c) *Limited rights*.

(1) The Government obtains limited rights in technical data—

(i) That pertain to items, components, or processes developed exclusively at private expense except when the Government is entitled to unlimited rights as provided in paragraphs (a)(2) and (a)(4)

through (9) of this subsection; or

(ii) Created exclusively at private expense in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

(2) Data in which the Government has limited rights may not be used, released, or disclosed outside the Government without the permission of the contractor asserting the restriction except for a use, release, or disclosure that is—

(i) Necessary for emergency repair and overhaul;

(ii) To a covered Government support contractor; or

(iii) To a foreign government, other than detailed manufacturing or process data, when use, release, or disclosure is in the interest of the United States and is required for evaluational or informational purposes.

(3) The person asserting limited rights must be notified of the Government's intent to release, disclose, or authorize others to use such data prior to release or disclosure of the data except notification of an intended release, disclosure, or use for emergency repair or overhaul which shall be made as soon as practicable.

(4) When the person asserting limited rights permits the Government to release, disclose, or have others use the data subject to restrictions on further use, release, or disclosure, or for a release under paragraph (c)(2)(i), (ii), or (iii) of this subsection, the intended recipient must complete the use and nondisclosure agreement at 227.7103-7 , or receive the data for performance of a Government contract that contains the clause at 252.227-7025 , Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, prior to release or disclosure of the limited rights data.

(d) *Specifically negotiated license rights.*

(1) Negotiate specific licenses when the parties agree to modify the standard license rights granted to the Government or when the Government wants to obtain rights in data in which it does not have rights. When negotiating to obtain, relinquish, or increase the Government's rights in technical data, consider the acquisition strategy for the item, component, or process, including logistics support and other factors which may have relevance for a particular procurement. The Government may accept lesser rights when it has unlimited or government purpose rights in data but may not accept less than limited rights in such data. The negotiated license rights must stipulate what rights the Government has to release or disclose the data to other persons or to authorize others to use the data. Identify all negotiated rights in a license agreement made part of the contract.

(2) When the Government needs additional rights in data acquired with government purpose or limited rights, the contracting officer must negotiate with the contractor to determine whether there are acceptable terms for transferring such rights. Generally, such negotiations should be conducted only when there is a need to disclose the data outside the Government or if the additional rights are required for competitive reprocurement and the anticipated savings expected to be obtained through competition are estimated to exceed the acquisition cost of the additional rights. Prior to negotiating for additional rights in limited rights data, consider alternatives such as—

(i) Using performance specifications and form, fit, and function data to acquire or develop functionally equivalent items, components, or processes;

(ii) Obtaining a contractor's contractual commitment to qualify additional sources and maintain adequate competition among the sources; or

(iii) Reverse engineering, or providing items from Government inventories to contractors who request the items to facilitate the development of equivalent items through reverse engineering.

227.7103-6 Contract clauses.

(a) Use the clause at 252.227-7013, Rights in Technical Data-Noncommercial Other Than Commercial Products and Commercial Services, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, when the successful offeror(s) will be required to deliver to the Government technical data pertaining to other than commercial products or commercial services, or pertaining to commercial products or commercial services for which the Government will have paid for any portion of the development costs (in which case the clause at 252.227-7013 will govern the technical data pertaining to any portion of a commercial product or commercial service that was developed in any part at Government expense, and the clause at 252.227-7015 will govern the technical data pertaining to any portion of a commercial product or commercial service that was developed exclusively at private expense). Do not use the clause when the only deliverable items are computer software or computer software documentation (see 227.72), commercial products or commercial services developed exclusively at private expense (see 227.7102-4), existing works (see 227.7105), or special works (see 227.7106). When contracting under the Small Business Innovation Research (SBIR) Program or the Small Business Technology Transfer (STTR) Program, see 227.7104 . Except as provided in 227.7107-2 , do not use the clause in architect-engineer and construction contracts.

(b)(1) Use the clause at 252.227-7013 with its Alternate I in research solicitations and contracts, including research solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, when the contracting officer determines, in consultation with counsel, that public dissemination by the contractor would be—

(i) In the interest of the Government; and

(ii) Facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

(2) Use the clause at 252.227-7013 with its Alternate II in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, that are for the development or delivery of a vessel design or any useful article embodying a vessel design.

(c) Use the clause at 252.227-7025 , Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, in solicitations and contracts when it is anticipated that the Government will provide the contractor (other than a litigation support contractor covered by 252.204-7014), for performance of its contract, technical data marked with another contractor's restrictive legend(s).

(d) Use the provision at 252.227-7028 , Technical Data or Computer Software Previously Delivered to the Government, in solicitations when the resulting contract will require the contractor to deliver technical data. The provision requires offerors to identify any technical data specified in the solicitation as deliverable data items that are the same or substantially the same as data items the offeror has delivered or is obligated to deliver, either as a contractor or subcontractor, under any

other federal agency contract.

(e) Use the following clauses in solicitations and contracts that include the clause at 252.227-7013 :

(1) 252.227-7016, Rights in Bid or Proposal Information.

(2) 252.227-7030, Technical Data—Withholding of Payment.

(3) 252.227-7037, Validation of Asserted Restrictions on Technical Data (paragraph (e) of the clause contains information that must be included in a challenge).

227.7103-7 Use and nondisclosure agreement.

(a) Except as provided in paragraph (b) of this section, technical data or computer software delivered to the Government with restrictions on use, modification, reproduction, release, performance, display, or disclosure may not be provided to third parties, unless the intended recipient completes and signs the use and nondisclosure agreement at paragraph (c) of this subsection prior to release, or disclosure of the data.

(1) The specific conditions under which an intended recipient will be authorized to use, modify, reproduce, release, perform, display, or disclose technical data subject to limited rights or SBIR/STTR data rights, or computer software subject to restricted rights or SBIR/STTR data rights must be stipulated in an attachment to the use and nondisclosure agreement.

(2) For an intended release, disclosure, or authorized use of technical data or computer software subject to special license rights, modify paragraph (1)(d) of the use and nondisclosure agreement in paragraph (c) of this section to enter the conditions, consistent with the license requirements, governing the recipient's obligations regarding use, modification, reproduction, release, performance, display, or disclosure of the data or software.

(b) The requirement for use and nondisclosure agreements does not apply to Government contractors which require access to a third party's data or software for the performance of a Government contract that contains the clause at 252.227-7025 , Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(c) The prescribed use and nondisclosure agreement is:

Use and nondisclosure Agreement

The undersigned, _____(Insert Name)_____, an authorized representative of the _____(Insert Company Name)_____, (which is hereinafter referred to as the "Recipient") requests the Government to provide the Recipient with technical data or computer software (hereinafter referred to as "Data") in which the Government's use, modification, reproduction, release, performance, display or disclosure rights are restricted. Those Data are identified in an attachment to this Agreement. In consideration for receiving such Data, the Recipient agrees to use the Data strictly in accordance with this Agreement:

(1) The Recipient shall—

(a) Use, modify, reproduce, release, perform, display, or disclose Data marked with government purpose rights or SBIR/STTR data rights legends (after expiration of the SBIR/STTR data protection period provided in the SBIR/STTR data rights legend) only for government purposes and shall not do so for any commercial purpose. The Recipient shall not release, perform, display, or disclose these Data, without the express written permission of the contractor whose name appears in the restrictive legend (the “Contractor”), to any person other than its subcontractors or suppliers, or prospective subcontractors or suppliers, who require these Data to submit offers for, or perform, contracts with the Recipient. The Recipient shall require its subcontractors or suppliers, or prospective subcontractors or suppliers, to sign a use and nondisclosure agreement prior to disclosing or releasing these Data to such persons. Such agreement must be consistent with the terms of this agreement.

(b) Use, modify, reproduce, release, perform, display, or disclose technical data marked with limited rights or SBIR/STTR data rights legends only as specified in the attachment to this Agreement. Release, performance, display, or disclosure to other persons is not authorized unless specified in the attachment to this Agreement or expressly permitted in writing by the Contractor. The Recipient shall promptly notify the Contractor of the execution of this Agreement and identify the Contractor's Data that has been or will be provided to the Recipient, the date and place the Data were or will be received, and the name and address of the Government office that has provided or will provide the Data.

(c) Use computer software marked with restricted rights or SBIR/STTR data rights legends only in performance of Contract Number _____[*Insert contract number(s)*])_____. The recipient shall not, for example, enhance, decompile, disassemble, or reverse engineer the software; time share, or use a computer program with more than one computer at a time. The recipient may not release, perform, display, or disclose such software to others unless expressly permitted in writing by the licensor whose name appears in the restrictive legend. The Recipient shall promptly notify the software licensor of the execution of this Agreement and identify the software that has been or will be provided to the Recipient, the date and place the software were or will be received, and the name and address of the Government office that has provided or will provide the software.

(d) Use, modify, reproduce, release, perform, display, or disclose Data marked with special license rights legends. [To be completed by the contracting officer. See 227.7103-7 (a)(2). Omit if none of the data requested is marked with special license rights legends.].

(2) The Recipient agrees to adopt or establish operating procedures and physical security measures designed to protect these Data from inadvertent release or disclosure to unauthorized third parties.

(3) The Recipient agrees to accept these Data “as is” without any Government representation as to suitability for intended use or warranty whatsoever. This disclaimer does not affect any obligation the Government may have regarding Data specified in a contract for the performance of that contract.

(4) The Recipient may enter into any agreement directly with the Contractor with respect to the use, modification, reproduction, release, performance, display, or disclosure of these Data.

(5) The Recipient agrees to indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorney’s fees, court costs, and expenses arising out of, or in any way related to, the misuse or unauthorized modification, reproduction, release, performance, display, or disclosure of Data received from the Government with restrictive legends by the Recipient or any person to whom the Recipient has released or disclosed the Data.

(6) The Recipient is executing this Agreement for the benefit of the Contractor. The Contractor is a third party beneficiary of this Agreement who, in addition to any other rights it may have, is intended to have the rights of direct action against the Recipient or any other person to whom the Recipient has released or disclosed the Data, to seek damages from any breach of this Agreement or to otherwise enforce this Agreement.

(7) The Recipient agrees to destroy these Data, and all copies of the Data in its possession, no later than 30 days after the date shown in paragraph (8) of this Agreement, to have all persons to whom it released the Data do so by that date, and to notify the Contractor that the Data have been destroyed.

(8) This Agreement shall be effective for the period commencing with the Recipient's execution of this Agreement and ending upon _____(Insert Date)_____. The obligations imposed by this Agreement shall survive the expiration or termination of the Agreement.

Recipient's Business Name _____

By_____ _____
Authorized Representative Date

Representative’s Typed Name _____

and Title _____

(End of use and nondisclosure agreement)

227.7103-8 Deferred delivery and deferred ordering of technical data.

(a) *Deferred delivery*. Use the clause at 252.227-7026 , Deferred Delivery of Technical Data or Computer Software, when it is in the Government's interests to defer the delivery of technical data. The clause permits the contracting officer to require the delivery of technical data identified as “deferred delivery” data at any time until two years after acceptance by the Government of all items (other than technical data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors or suppliers to deliver such technical data expires two years after the date the prime contractor accepts the last item from the subcontractor or supplier for use in the performance of the contract. The contract must specify which technical data is subject to deferred delivery. The contracting officer shall notify the contractor sufficiently in advance of the desired delivery date for such data to permit timely delivery.

(b) *Deferred ordering*. Use the clause at 252.227-7027 , Deferred Ordering of Technical Data or Computer Software, when a firm requirement for a particular data item(s) has not been established prior to contract award but there is a potential need for the data. Under this clause, the contracting officer may order any data that has been generated in the performance of the contract or any subcontract thereunder at any time until three years after acceptance of all items (other than technical data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors to deliver such data expires three years after the date the contractor accepts the last item under the subcontract. When the data are ordered, the delivery dates shall be negotiated and the contractor compensated only for converting the data into the prescribed form, reproduction costs, and delivery costs.

227.7103-9 Copyright.

(a) *Copyright license.*

(1) The clauses at 252.227-7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services, and 252.227-7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, require a contractor to grant or obtain for the Government license rights which

permit the Government to reproduce data, distribute copies of the data, publicly perform or display the data or, through the right to modify data, prepare derivative works. The extent to which the Government, and others acting on its behalf, may exercise these rights varies for each of the standard data rights licenses obtained under the clauses. When non-standard license rights in technical data will be negotiated, negotiate the extent of the copyright license concurrent with negotiations for the data rights license. Do not negotiate a copyright license that provides less rights than the standard limited rights license in technical data.

(2) The clauses at 252.227-7013 and 252.227-7018 do not permit a contractor to incorporate a third party's copyrighted data into a deliverable data item unless the contractor has obtained an appropriate license for the Government and, when applicable, others acting on the Government's behalf, or has obtained the contracting officer's written approval to do so. Grant approval to use third-party copyrighted data in which the Government will not receive a copyright license only when the Government's requirements cannot be satisfied without the third-party material or when the use of the third-party material will result in cost savings to the Government which outweigh the lack of a copyright license.

(b) *Copyright considerations—acquisition of existing and special works.* See 227.7105 or 227.7106 for copyright considerations when acquiring existing or special works that are not SBIR/STTR data.

227.7103-10 Contractor identification and marking of technical data to be furnished with restrictive markings.

(a) *Identification requirements*.

(1) The solicitation provision at 252.227-7017 , Identification and Assertion of Use, Release, or Disclosure Restrictions, requires offerors to identify to the contracting officer, prior to contract award, any technical data that the offeror asserts should be provided to the Government with restrictions on use, modification, reproduction, release or disclosure. This requirement does not apply to restrictions based solely on copyright. The notification and identification must be submitted as an attachment to the offer. If an offeror fails to submit the attachment or fails to complete the attachment in accordance with the requirements of the solicitation provision, such failure shall constitute a minor informality. Provide offerors an opportunity to remedy a minor informality in accordance with the procedures at FAR 14.405 or 15.306. An offeror's failure to correct the informality within the time prescribed by the contracting officer shall render the offer ineligible for award.

(2) The procedures for correcting minor informalities shall not be used to obtain information regarding asserted restrictions or an offeror's suggested asserted rights category. Questions regarding the justification for an asserted restriction or asserted rights category must be pursued in accordance with the procedures at 227.7103-13 .

(3) The restrictions asserted by a successful offeror shall be attached to its contract unless, in accordance with the procedures at 227.7103-13, the parties have agreed that an asserted restriction is not justified. The contract attachment shall provide the same information regarding identification of the technical data, the asserted rights category, the basis for the assertion, and the name of the person asserting the restrictions as required by paragraph (d) of the solicitation provision at 252.227-7017. Subsequent to contract award, the clauses at 252.227-7013, Rights in Technical Data— Other Than Commercial Products and Commercial Services, and 252.227-7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation

Research Program and Small Business Technology Transfer Program, permit the contractor to make additional assertions under certain conditions. The additional assertions must be made in accordance with the procedures and in the format prescribed by that clause.

(4) Neither the pre- or post-award assertions made by the contractor, nor the fact that certain assertions are identified in the attachment to the contract, determine the respective rights of the parties. As provided at 227.7103-13 , the Government has the right to review, verify, challenge and validate restrictive markings.

(5) Information provided by offerors in response to the solicitation provision may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use or disclose technical data. However, contracting officers shall not—

(i) Prohibit offerors from offering products for which the offeror is entitled to provide the technical data with restrictions; or

(ii) Require offerors, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish rights in technical data except for the standard rights specified in the applicable clauses.

(b) *Contractor marking requirements.* The clauses at 252.227-7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services , and 252.227-7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program—

(1) Require a contractor that desires to restrict the Government's rights in technical data to place restrictive markings on the data, provide instructions for the placement of the restrictive markings, and authorize the use of certain restrictive markings; and

(2) Require a contractor to deliver, furnish, or otherwise provide to the Government any technical data in which the Government has previously obtained rights with the Government's preexisting in that data unless the parties have agreed otherwise or restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose the data have expired. When restrictions are still applicable, the contractor is permitted to mark the data with the appropriate restrictive legend for which the data qualified.

(c) *Unmarked technical data*.

(1) Technical data delivered or otherwise provided under a contract without restrictive markings shall be presumed to have been delivered with unlimited rights and may be released or disclosed without restriction. To the extent practicable, if a contractor has requested permission (see paragraph (c)(2) of this subsection) to correct an inadvertent omission of markings, do not release or disclose the technical data pending evaluation of the request.

(2) A contractor may request permission to have appropriate legends placed on unmarked technical data at its expense. The request must be received by the contracting officer within 6 months following the furnishing or delivery of such data, or any extension of that time approved by the contracting officer. The person making the request must:

(i) Identify the technical data that should have been marked;

(ii) Demonstrate that the omission of the marking was inadvertent, the proposed marking is justified

and conforms with the requirements for the marking of technical data contained in the clauses at 252.227-7013 and 252.227-7018; and

(iii) Acknowledge, in writing, that the Government has no liability with respect to any disclosure, reproduction, or use of the technical data made prior to the addition of the marking or resulting from the omission of the marking.

(3) Contracting officers should grant permission to mark only if the technical data were not distributed outside the Government or were distributed outside the Government with restrictions on further use or disclosure.

227.7103-11 Contractor procedures and records.

(a) The clauses at 252.227-7013, Rights in Technical Data— Other Than Commercial Products and Commercial Services, and 252.227-7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, require a contractor, and its subcontractors or suppliers that will deliver technical data with other than unlimited rights, to establish and follow written procedures to assure that restrictive markings are used only when authorized and to maintain records to justify the validity of asserted restrictions on delivered data.

(b) The clause at 252.227-7037, Validation of Restrictive Markings on Technical Data, requires contractors and their subcontractors at any tier to maintain records sufficient to justify the validity of restrictive markings on technical data delivered or to be delivered under a Government contract.

227.7103-12 Government right to establish conformity of markings.

(a) *Nonconforming markings.*

(1) Authorized markings are identified in the clauses at 252.227-7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services, and 252.227-7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program. All other markings are nonconforming markings. An authorized marking that is not in the form, or differs in substance, from the marking requirements in the clauses at 252.227-7013 and 252.227-7018 is also a nonconforming marking.

(2) The correction of nonconforming markings on technical data is not subject to 252.227-7037, Validation of Asserted Restrictions on Technical Data. To the extent practicable, the contracting officer should return technical data bearing nonconforming markings to the person who has placed the nonconforming markings on such data to provide that person an opportunity to correct or strike the nonconforming marking at that person’s expense. If that person fails to correct the nonconformity and return the corrected data within 60 days following the person’s receipt of the data, the contracting officer may correct or strike the nonconformity at that person’s expense. When it is impracticable to return technical data for correction, contracting officers may unilaterally correct any nonconforming markings at Government expense. Prior to correction, the data may be used in accordance with the proper restrictive marking.

(b) *Unjustified markings*.

(1) An unjustified marking is an authorized marking that does not depict accurately restrictions applicable to the Government's use, modification, reproduction, release, performance, display, or disclosure of the marked technical data. For example, a limited rights legend placed on technical data pertaining to items, components, or processes that were developed under a Government contract either exclusively at Government expense or with mixed funding (situations under which the Government obtains unlimited or government purpose rights) is an unjustified marking.

(2) Contracting officers have the right to review and challenge the validity of unjustified markings. However, at any time during performance of a contract and notwithstanding existence of a challenge, the contracting officer and the person who has asserted a restrictive marking may agree that the restrictive marking is not justified. Upon such agreement, the contracting officer may, at his or her election, either—

(i) Strike or correct the unjustified marking at that person's expense; or

(ii) Return the technical data to the person asserting the restriction for correction at that person's expense. If the data are returned and that person fails to correct or strike the unjustified restriction and return the corrected data to the contracting officer within 60 days following receipt of the data, the unjustified marking shall be corrected or stricken at that person's expense.

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

(a) *General*. An offeror's assertion(s) of restrictions on the Government's rights to use, modify, reproduce, release, or disclose technical data do not, by themselves, determine the extent of the Government's rights in the technical data. Under 10 U.S.C. 3782 Government has the right to challenge asserted restrictions when there are reasonable grounds to question the validity of the assertion and continued adherence to the assertion would make it impractical to later procure competitively the item to which the data pertain.

(b) *Pre-award considerations*. The challenge procedures required by 10 U.S.C. 3782 could significantly delay awards under competitive procurements. Therefore, avoid challenging asserted restrictions prior to a competitive contract award unless resolution of the assertion is essential for successful completion of the procurement.

(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.

(2) *Commercial products and commercial services–presumption regarding development exclusively at private expense.* 10 U.S.C. 3772(a)(1) and 3784 establish a presumption and procedures regarding validation of asserted restrictions for technical data related to commercial products or commercial services on the basis of development exclusively at private expense. Contracting officers shall presume that a commercial product or commercial service 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 product or commercial service 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 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 product or commercial service was not developed exclusively at private expense. The challenge notice and all related correspondence shall be subject to handling procedures for classified information and controlled unclassified information. 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) *Challenge and validation*. All challenges shall be made in accordance with the provisions of the clause at 252.227-7037, Validation of Asserted Restrictions on Technical Data.

(1) *Challenge period.* Asserted restrictions should be reviewed before acceptance of technical data deliverable under the contract. Assertions must be challenged within three years after final payment under the contract or three years after delivery of the data, whichever is later. However, restrictive markings may be challenged at any time if the technical data—

(i) Are publicly available without restrictions;

(ii) Have been provided to the United States without restriction; or

(iii) Have been otherwise made available without restriction other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the technical data to another party or the sale or transfer of some or all of a business entity or its assets to another party.

(2) Pre-challenge requests for information.

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

(ii) If the person asserting the restriction fails to respond to the contracting officer's request for information or additional supporting documentation, or if the information submitted or any other available information pertaining to the validity of a restrictive marking does not justify the asserted restriction, a challenge should be considered.

(3) *Transacting matters directly with subcontractors*. The clause at 252.227-7037 obtains the contractor's agreement that the Government may transact matters under the clause directly with a subcontractor, at any tier, without creating or implying privity of contract. Contracting officers should permit a subcontractor or supplier to transact challenge and validation matters directly with the Government when—

(i) A subcontractor's or supplier's business interests in its technical data would be compromised if the data were disclosed to a higher tier contractor;

(ii) There is reason to believe that the contractor will not respond in a timely manner to a challenge and an untimely response would jeopardize a subcontractor's or supplier's right to assert restrictions; or

(iii) Requested to do so by a subcontractor or supplier.

(4) *Challenge notice*. The contracting officer shall not issue a challenge notice unless there are reasonable grounds to question the validity of an assertion. For commercial products or commercial services, also see paragraph (c)(2) of this section. The contracting officer may challenge an assertion whether or not supporting documentation was requested under paragraph (d)(2) of this section. Challenge notices must be in writing and issued to the contractor or, after consideration of the situations described in paragraph (d)(3) of this subsection, the person asserting the restriction. The challenge notice must include the information in paragraph (e) of the clause at 252.227-7037 .

(5) *Extension of response time*. The contracting officer, at his or her discretion, may extend the time for response contained in a challenge notice, as appropriate, if the contractor submits a timely written request showing the need for additional time to prepare a response.

(6) *Contracting officer's final decision.* Contracting officers must issue a final decision for each challenged assertion, whether or not the assertion has been justified.

(i) A contracting officer's final decision that an assertion is not justified must be issued as soon as practicable following the failure of the person asserting the restriction to respond to the contracting officer's challenge within 60 days, or any extension to that time granted by the contracting officer.

(ii) A contracting officer who, following a challenge and response by the person asserting the restriction, determines that an asserted restriction is justified, shall issue a final decision sustaining the validity of the asserted restriction. If the asserted restriction was made subsequent to submission of the contractor's offer, add the asserted restriction to the contract attachment.

(iii) A contracting officer who determines that the validity of an asserted restriction has not been justified shall issue a contracting officer's final decision within the time frames prescribed in 252.227-7037 . As provided in paragraph (g) of that clause, the Government is obligated to continue to respect the asserted restrictions through final disposition of any appeal unless the agency head notifies the person asserting the restriction that urgent or compelling circumstances do not permit the Government to continue to respect the asserted restriction.

(7) *Multiple challenges to an asserted restriction*. When more than one contracting officer challenges an asserted restriction, the contracting officer who made the earliest challenge is responsible for coordinating the Government challenges. That contracting officer shall consult with all other contracting officers making challenges, verify that all challenges apply to the same asserted restriction and, after consulting with the contractor, subcontractor, or supplier asserting the restriction, issue a schedule that provides that person a reasonable opportunity to respond to each challenge.

(8) *Validation*. Only a contracting officer's final decision, or actions of an agency board of contract appeals or a court of competent jurisdiction, that sustain the validity of an asserted restriction constitute validation of the asserted restriction.

227.7103-14 Conformity, acceptance, and warranty of technical data.

(a) *Statutory requirements.* 10 U.S.C. 3772 -

(1) Provides for the establishment of remedies applicable to technical data found to be incomplete, inadequate, or not to satisfy the requirements of the contract concerning such data; and

(2) Authorizes agency heads to withhold payments (or exercise such other remedies an agency head

considers appropriate) during any period if the contractor does not meet the requirements of the contract pertaining to the delivery of technical data.

(b) *Conformity and acceptance*. (1) Solicitations and contracts requiring the delivery of technical data shall specify the requirements the data must satisfy to be acceptable. Contracting officers, or their authorized representatives, are responsible for determining whether technical data tendered for acceptance conform to the contractual requirements.

(2) The clause at 252.227-7030, Technical Data - Withholding of Payment, provides for withholding up to 10 percent of the contract price pending correction or replacement of the nonconforming technical data or negotiation of an equitable reduction in contract price. The amount subject to withholding may be expressed as a fixed dollar amount or as a percentage of the contract price. In either case, the amount shall be determined giving consideration to the relative value and importance of the data. For example -

(i) When the sole purpose of a contract is to produce the data, the relative value of that data may be considerably higher than the value of data produced under a contract where the production of the data is a secondary objective; or

(ii) When the Government will maintain or repair items, repair and maintenance data may have a considerably higher relative value than data that merely describe the item or provide performance characteristics.

(3) Do not accept technical data that do not conform to the contractual requirements in all respects. Except for nonconforming restrictive markings (see paragraph (b)(4) of this subsection), correction or replacement of nonconforming data or an equitable reduction in contract price when correction or replacement of the nonconforming data is not practicable or is not in the Government's interests, shall be accomplished in accordance with -

(i) The provisions of a contract clause providing for inspection and acceptance of deliverables and remedies for nonconforming deliverables; or

(ii) The procedures at FAR 46.407(c) through (g), if the contract does not contain an inspection clause providing remedies for nonconforming deliverables.

(4) Follow the procedures at 227.7103-12(a)(2) if nonconforming markings are the sole reason technical data fail to conform to contractual requirements. The clause at 252.227-7030 may be used to withhold an amount for payment, consistent with the terms of the clause, pending correction of the nonconforming markings.

(c) *Warranty.* (1) The intended use of the technical data and the cost, if any, to obtain the warranty should be considered before deciding to obtain a data warranty (see FAR 46.703). The fact that a particular item, component, or process is or is not warranted is not a consideration in determining whether or not to obtain a warranty for the technical data that pertain to the item, component, or process. For example, a data warranty should be considered if the Government intends to repair or maintain an item and defective repair or maintenance data would impair the Government's effective use of the item or result in increased costs to the Government.

(2) As prescribed in 246.710, use the clause at 252.246-7001, Warranty of Data, and its alternates, or a substantially similar clause when the Government needs a specific warranty of technical data.

227.7103-15 Subcontractor rights in technical data.

(a) 10 U.S.C. 3771 provides subcontractors at all tiers the same protection for their rights in data as is provided to prime contractors. The clauses at 252.227-7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services, and 252.227-7037, Validation of Asserted Restrictions on Technical Data, implement the statutory requirements.

(b) 10 U.S.C. 3782 permits a subcontractor to transact directly with the Government matters relating to the validation of its asserted restrictions on the Government's rights to use or disclose technical data. The clause at 252.227-7037 obtains a contractor's agreement that the direct transaction of validation or challenge matters with subcontractors at any tier does not establish or imply privity of contract. When a subcontractor or supplier exercises its right to transact validation matters directly with the Government, contracting officers shall deal directly with such persons, as provided at 227.7103-13 (c)(3).

(c) Require prime contractors whose contracts include the following clauses to include those clauses, without modification except for appropriate identification of the parties, in contracts with subcontractors or suppliers, at all tiers, who will be furnishing technical data for other than commercial products or commercial services in response to a Government requirement:

(1) 252.227-7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services.

(2) 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(3) 252.227-7028, Technical Data or Computer Software Previously Delivered to the Government.

(4) 252.227-7037, Validation of Asserted Restrictions on Technical Data.

(d) Do not require contractors to have their subcontractors or suppliers at any tier relinquish rights in technical data to the contractor, a higher tier subcontractor, or to the Government, as a condition for award of any contract, subcontract, purchase order, or similar instrument except for the rights obtained by the Government under the Rights in Technical Data–Other Than Commercial Products and Commercial Services clause contained in the contractor's contract with the Government.

227.7103-16 Providing technical data to foreign governments, foreign contractors, or international organizations.

Technical data may be released or disclosed to foreign governments, foreign contractors, or international organizations only if release or disclosure is otherwise permitted both by Federal export controls and other national security laws or regulations. Subject to such laws and regulations, the Department of Defense—

(a) May release or disclose technical data in which it has obtained unlimited rights to such foreign entities or authorize the use of such data by those entities; and

(b) Shall not release or disclose technical data for which restrictions on use, release, or disclosure have been asserted to foreign entities, or authorize the use of technical data by those entities, unless the intended recipient is subject to the same provisions as included in the use and nondisclosure

agreement at 227.7103-7 and the requirements of the clause at 252.227-7013 , Rights in Technical Data–Other Than Commercial Products and Commercial Services, governing use, modification, reproduction, release, performance, display, or disclosure of such data have been satisfied.

227.7103-17 Overseas contracts with foreign sources.

(a) The clause at 252.227-7032 , Rights in Technical Data and Computer Software (Foreign), may be used in contracts with foreign contractors to be performed overseas, except Canadian purchases (see paragraph (c) of this subsection), in lieu of the clause at 252.227-7013 , Rights in Technical Data–Other Than Commercial Products and Commercial Services, when the Government requires the unrestricted right to use, modify, reproduce, perform, display, release, or disclose all technical data to be delivered under the contract. Do not use the clause in contracts for existing or special works.

(b) When the Government does not require unlimited rights, the clause at 252.227-7032 may be modified to accommodate the needs of a specific overseas procurement situation. The Government should obtain rights in the technical data that are not less than the rights the Government would have obtained under the data rights clause(s) prescribed in this part for a comparable procurement performed within the United States or its outlying areas.

(c) Contracts for Canadian purchases shall include the appropriate data rights clause prescribed in this part for a comparable procurement performed within the United States or its outlying areas.

227.7104 Contracts under the Small Business Innovation Research Program and Small Business Technology Transfer Program.

227.7104-1 Policy.

(a) Do not require an offeror, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in technical data related to items, components, or processes developed under a SBIR/STTR contract or any rights in computer software generated under a SBIR/STTR contract except for the standard rights identified at 227.7104-2.

(b) Do not prohibit contractors and offerors from furnishing or offering to furnish items, components, or processes developed under a SBIR/STTR contract or computer software generated under a SBIR/STTR contract solely because the Government's rights to use, modify, release, reproduce, perform, display, or disclose such computer software or technical data pertaining to those items, components, or processes may be restricted.

(c) Consistent with the guidance in this section, 227.7103-10(a)(5),227.7203-10(a)(5), and other acquisition guidance applicable to SBIR/STTR solicitations, the Government may use information provided by offerors in response to a solicitation in the source selection process to evaluate the impact of proposed restrictions on the Government's ability to use or disclose technical data or computer software.

(d) SBIR/STTR data rights apply to SBIR/STTR data that are delivered, developed, or generated in the performance of a contract or agreement that is covered by SBIR/STTR policies, including

contracts and subcontracts that include phase III work. Phase III work refers to work that derives from, extends, or completes an effort made under prior SBIR/STTR contracts or agreements, and is funded by sources other than SBIR/STTR programs (see PGI 227.7104-1).

(e) For SBIR/STTR data that is other than commercial technical data, and other than commercial computer software and computer software documentation, see—

(1) 227.7103-9 and 227.7203-9 for guidance on copyright licenses;

(2) 227.7103-10 and 227.7203-10 for guidance on contractor identification and marking of technical data and computer software to be furnished with restrictive markings;

(3) 227.7103-11 and 227.7203-11 for guidance on maintenance of contractor records; and

(4) 227.7103-12 and 227.7203-12 for guidance on nonconforming and unjustified markings.

227.7104-2 Rights in SBIR or STTR data.

(a) Under the clause at 252.227-7018, Rights in Other Than Commercial Technical Data and Computer Software–Small Business Innovation Research Program and Small Business Technology Transfer Program, the Government obtains the following standard license rights:

(1) Unlimited rights in the technical data and computer software listed in paragraph (c)(1) of the clause.

(2) SBIR/STTR data rights in all other technical data and computer software developed or generated under the phase I, II, or III SBIR/STTR contract or subcontract and marked with the SBIR/STTR data rights marking. SBIR/STTR data rights provide the Government limited rights in such technical data and restricted rights in such computer software during the SBIR/STTR data protection period commencing on the date of contract award and ending 20 years after that date unless, after award, the agency and the contractor negotiate for some other protection period for the SBIR/STTR data. Upon expiration of the SBIR/STTR data protection period, the Government has government purpose rights in the SBIR/STTR data. These government purpose rights do not expire. See 252.227-7018 for the definition of the SBIR/STTR data protection period and PGI 227.7104-2 for additional guidance on the SBIR/STTR data protection period.

(b) During the SBIR/STTR data protection period, the Government may not release or disclose technical data or computer software that is subject to SBIR/STTR data rights to any person except as authorized for limited rights technical data or restricted rights computer software, respectively.

(c) The Government and contractor or subcontractor may negotiate special license rights only after contract award. The Government shall not make contract award conditional on the contractor or subcontractor negotiating or consenting to negotiate special license rights. Negotiation of special license rights is authorized only after contract award by mutual agreement of the parties.

(d) The Small Business Administration’s SBIR and STTR Program Policy Directive (effective May 3, 2023) provides for special consideration regarding the handling (e.g., disclosure, reverse engineering) of prototypes generated under SBIR and STTR awards, to avoid effects that may appear to be inconsistent with the SBIR and STTR program objectives and to allow the SBIR/STTR awardee to retain rights in SBIR/STTR data during the SBIR/STTR data protection period.

(e) The clause at 252.227-7018 governs the Government's license rights in SBIR/STTR data. However, the following clauses or guidance governs the Government's license rights in any data that are not SBIR/STTR data:

(1) For technical data pertaining to other than commercial products or commercial services or to any portion of a commercial product or commercial service that was developed in any part at Government expense, the clause at 252.227-7013, Rights in Technical Data—Other Than Commercial Products and Commercial Services, governs such technical datain accordance with 227.7102-4(b).

(2) For technical data pertaining to any portion of a commercial product or commercial service that was developed exclusively at private expense, the clause at 252.227-7015, Technical Data—Commercial Products and Commercial Services, governs such technical data, in accordance with 227.7102-4(b).

(3) For other than commercial computer software or computer software documentation, the clause at 252.227-7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, governs such software and computer software documentation, in accordance with 227.7203-6(a)(1).

(4) For commercial computer software and computer software documentation, the license customarily provided to the public governs such software and documentation, in accordance with 227.7202-3.

227.7104-3 STTR program requirements.

(a) Before award of a contract under the STTR program requirements only, the provision at 252.227-7040, Additional Preaward Requirements for Small Business Technology Transfer Program, requires offerors to submit, as part of their proposal, a written agreement between the offeror and a research institution that allocates any rights in intellectual property and the offeror's written representation that the offeror is satisfied with the agreement. The contracting officer shall review the agreement to ensure it does not conflict with the requirements of the solicitation or any right to carry out follow-on research. If such conflicts exist and cannot be resolved, the submitted proposal is not eligible for award.

(b) At contract award for STTR program requirements, in accordance with the clause at 252.227-7041, Additional Postaward Requirements for Small Business Technology Transfer Program, the contracting officer shall attach to the contract the accepted written agreement and representation provided by the contractor pursuant to the provision at 252.227-7040.

(c) After contract award, for any modification to the written agreement between the contractor and research institution, the contracting officer shall review the agreement and representation to ensure the modified agreement adheres to the requirements of 252.227-7041. If acceptable, the contracting officer shall attach the modified agreement to the contract.

227.7104-4 Solicitation provisions and contract clauses.

(a)(1) Use the clause at 252.227-7018, Rights in Other Than Commercial Technical Data and Computer Software–Small Business Innovation Research Program and Small Business Technology Transfer Program, in solicitations and contracts, including solicitations and contracts using FAR part

12 procedures for the acquisition of commercial products and commercial services, when SBIR/STTR data are delivered, developed, or generated during contract performance, and when any portion of contract performance is governed by SBIR or STTR policies (e.g., performance of one or more subcontracts qualifies as a phase III SBIR or STTR award). See 227.7104-1(d) for guidance on contracts or subcontracts governed by SBIR or STTR policies.

(2) For the remainder of the technical data or computer software that is delivered, developed, or generated under the contract, use the following clauses as applicable, in accordance with the prescriptions for those clauses:

(i) 252.227-7013, Rights in Technical Data–Other Than Commercial Products and Commercial Services.

(ii) 252.227-7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation.

(iii) 252.227-7015, Technical Data–Commercial Products and Commercial Services.

(b) Use the following provision in solicitations and the following clauses in solicitations and contracts that include the clause at 252.227-7018, in accordance with the prescriptions for the provision and clauses:

(1) 252.227-7016, Rights in Bid or Proposal Information.

(2) 252.227-7017, Identification and Assertion of Use, Release, or Disclosure Restrictions.

(3) 252.227-7019, Validation of Asserted Restrictions–Computer Software.

(4) 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(5) 252.227-7028, Technical Data or Computer Software Previously Delivered to the Government.

(6) 252.227-7030, Technical Data–Withholding of Payment.

(7) 252.227-7037, Validation of Asserted Restrictions on Technical Data (paragraph (e) of the clause contains information that must be included in a challenge).

(c)(1) Use the provision at 252.227-7040, Additional Preaward Requirements for Small Business Technology Transfer Program, in solicitations that contain the clause at 252.227-7041.

(2) Use the clause at 252.227-7041, Additional Postaward Requirements for Small Business Technology Transfer Program, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, for acquisitions under the STTR program.

227.7105 Contracts for the acquisition of existing works.

227.7105-1 General.

(a) Existing works include motion pictures, television recordings, video recordings, and other

audiovisual works in any medium; sound recordings in any medium; musical, dramatic, and literary works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; and works of a similar nature. Usually, these or similar works were not first created, developed, generated, originated, prepared, or produced under a Government contract. Therefore, the Government must obtain a license in the work if it intends to reproduce the work, distribute copies of the work, prepare derivative works, or perform or display the work publicly. When the Government is not responsible for the content of an existing work, it should require the copyright owner to indemnify the Government for liabilities that may arise out of the content, performance, use, or disclosure of such data.

(b) Follow the procedures at 227.7106 for works which will be first created, developed, generated, originated, prepared, or produced under a Government contract and the Government needs to control distribution of the work or has a specific need to obtain indemnity for liabilities that may arise out of the creation, content, performance, use, or disclosure of the work or from libelous or other unlawful material contained in the work. Follow the procedures at 227.7103 when the Government does not need to control distribution of such works or obtain such indemnities.

227.7105-2 Acquisition of existing works without modification.

(a) Use the clause at 252.227-7021 , Rights in Data–Existing Works, in lieu of the clause at 252.227-7013 , Rights in Technical Data–Other Than Commercial Products and Commercial Services, in solicitations and contracts exclusively for existing works when—

(1) The existing works will be acquired without modification; and

(2) The Government requires the right to reproduce, prepare derivative works, or publicly perform or display the existing works; or

(3) The Government has a specific need to obtain indemnity for liabilities that may arise out of the content, performance, use, or disclosure of such data.

(b) The clause at 252.227-7021 provides the Government, and others acting on its behalf, a paid-up, non-exclusive, irrevocable, world-wide license to reproduce, prepare derivative works and publicly perform or display the works called for by a contract and to authorize others to do so for government purposes.

(c) A contract clause is not required to acquire existing works such as books, magazines and periodicals, in any storage or retrieval medium, when the Government will not reproduce the books, magazines or periodicals, or prepare derivative works.

227.7105-3 Acquisition of modified existing works.

Use the clause at 252.227-7020 , Rights in Special Works, in solicitations and contracts for modified existing works in lieu of the clause at 252.227-7021 , Rights in Data–Existing Works.

227.7106 Contracts for special works.

(a) Use the clause at 252.227-7020 , Rights in Special Works, in solicitations and contracts where

the Government has a specific need to control the distribution of works first produced, created, or generated in the performance of a contract and required to be delivered under that contract, including controlling distribution by obtaining an assignment of copyright, or a specific need to obtain indemnity for liabilities that may arise out of the creation, delivery, use, modification, reproduction, release, performance, display, or disclosure of such works. Use the clause—

(1) In lieu of the clause at 252.227-7013 , Rights in Technical Data–Other Than Commercial Products and Commercial Services, when the Government must own or control copyright in all works first produced, created, or generated and required to be delivered under a contract; or

(2) In addition to the clause at 252.227-7013 when the Government must own or control copyright in a portion of a work first produced, created, or generated and required to be delivered under a contract. The specific portion in which the Government must own or control copyright must be identified in a special contract requirement.

(b) Although the Government obtains an assignment of copyright and unlimited rights in a special work under the clause at 252.227-7020 , the contractor retains use and disclosure rights in that work. If the Government needs to restrict a contractor's rights to use or disclose a special work, it must also negotiate a special license which specifically restricts the contractor's use or disclosure rights.

(c) The clause at 252.227-7020 does not permit a contractor to incorporate into a special work any works copyrighted by others unless the contractor obtains the contracting officer's permission to do so and obtains for the Government a non-exclusive, paid up, world-wide license to make and distribute copies of that work, to prepare derivative works, to perform or display publicly any portion of the work, and to permit others to do so for government purposes. Grant permission only when the Government's requirements cannot be satisfied unless the third party work is included in the deliverable work.

(d) Examples of works which may be procured under the Rights in Special Works clause include, but are not limited, to audiovisual works, computer data bases, computer software documentation, scripts, soundtracks, musical compositions, and adaptations; histories of departments, agencies, services or units thereof; surveys of Government establishments; instructional works or guidance to Government officers and employees on the discharge of their official duties; reports, books, studies, surveys or similar documents; collections of data containing information pertaining to individuals that, if disclosed, would violate the right of privacy or publicity of the individuals to whom the information relates; or investigative reports.

227.7107 Contracts for architect-engineer services.

This section sets forth policies and procedures, pertaining to data, copyrights, and restricted designs unique to the acquisition of construction and architect engineer services.

227.7107-1 Architectural designs and data clauses for architect-engineer or construction contracts.

(a) Except as provided in paragraph (b) of this subsection and in 227.7107-2 , use the clause at 252.227-7022 , Government Rights (Unlimited), in solicitations and contracts for architect-engineer services and for construction involving architect engineer services.

(b) When the purpose of a contract for architect-engineer services, or for construction involving architect-engineer services, is to obtain a unique architectural design of a building, a monument, or construction of similar nature, which for artistic, aesthetic or other special reasons the Government does not want duplicated, the Government may acquire exclusive control of the data pertaining to the design by including the clause at 252.227-7023 , Drawings and Other Data to Become Property of Government, in solicitations and contracts.

(c) The Government shall obtain unlimited rights in shop drawings for construction. In solicitations and contracts calling for delivery of shop drawings, include the clause at 252.227-7033 , Rights in Shop Drawings.

227.7107-2 Contracts for construction supplies and research and development work.

Use the provisions and clauses required by 227.7103-6 and 227.7203-6 when the acquisition is limited to—

(a) Construction supplies or materials;

(b) Experimental, developmental, or research work, or test and evaluation studies of structures, equipment, processes, or materials for use in construction; or

(c) Both.

227.7107-3 Approval of restricted designs.

The clause at 252.227-7024 , Notice and Approval of Restricted Designs, may be included in architect-engineer contracts to permit the Government to make informed decisions concerning noncompetitive aspects of the design.

227.7108 Contractor data repositories.

(a) Contractor data repositories may be established when permitted by agency procedures. The contractual instrument establishing the data repository must require, as a minimum, the data repository management contractor to—

(1) Establish and maintain adequate procedures for protecting technical data delivered to or stored at the repository from unauthorized release or disclosure;

(2) Establish and maintain adequate procedures for controlling the release or disclosure of technical data from the repository to third parties consistent with the Government's rights in such data;

(3) When required by the contracting officer, deliver data to the Government on paper or in other specified media;

(4) Be responsible for maintaining the currency of data delivered directly by Government contractors or subcontractors to the repository;

(5) Obtain use and nondisclosure agreements (see 227.7103-7) from all persons to whom

government purpose rights data is released or disclosed; and

(6) Indemnify the Government from any liability to data owners or licensors resulting from, or as a consequence of, a release or disclosure of technical data made by the data repository contractor or its officers, employees, agents, or representatives.

(b) If the contractor is or will be the data repository manager, the contractor's data management and distribution responsibilities must be identified in the contract or the contract must reference the agreement between the Government and the contractor that establishes those responsibilities.

(c) If the contractor is not and will not be the data repository manager, do not require a contractor or subcontractor to deliver technical data marked with limited rights legends to a data repository managed by another contractor unless the contractor or subcontractor who has asserted limited rights agrees to release the data to the repository or has authorized, in writing, the Government to do so.

(d) Repository procedures may provide for the acceptance, delivery, and subsequent distribution of technical data in storage media other than paper, including direct electronic exchange of data between two computers. The procedures must provide for the identification of any portions of the data provided with restrictive legends, when appropriate. The acceptance criteria must be consistent with the authorized delivery format.

Subpart 227.72 - COMPUTER SOFTWARE, COMPUTER SOFTWARE DOCUMENTATION, AND ASSOCIATED RIGHTS

227.7200 Scope of subpart.

(a)This subpart—

(1) Prescribes policies and procedures for the acquisition of computer software and computer software documentation, and the rights to use, modify, reproduce, release, perform, display, or disclose such software or documentation. It implements the following laws and Executive order:

(i) 10 U.S.C. 3013.

(ii) 10 U.S.C. 3208(d).

(iii) 10 U.S.C. 3771-3775.

(iv) 10 U.S.C. 3781-3786.

(v) 10 U.S.C. 4576.

(vi) Executive Order 12591 (subsection 1(b)(7)).

(2) Does not apply to—

(i) Computer software or computer software documentation acquired under GSA schedule contracts; or

(ii) Releases of computer software or computer software documentation to litigation support contractors (see subpart 204.74).

(b) See 227.7200 (b) for guidance and information in DoD issuances.

227.7201 Definitions.

(a) As used in this subpart, unless otherwise specifically indicated, the terms “offeror” and “contractor” include an offeror's or contractor's subcontractors, suppliers, or potential subcontractors or suppliers at any tier.

(b) Other terms used in this subpart are defined in the clause at 252.227-7014 , Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation.

227.7202 Commercial computer software and commercial computer software documentation.

227.7202-1 Policy.

(a) Commercial computer software or commercial computer software documentation shall be acquired under the licenses customarily provided to the public unless such licenses are inconsistent with Federal procurement law or do not otherwise satisfy user needs.

(b) Commercial computer software and commercial computer software documentation shall be obtained competitively, to the maximum extent practicable, using firm-fixed-price contracts or firm-fixed-priced orders under available pricing schedules.

(c) Offerors and contractors shall not be required to—

(1) Furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public except for information documenting the specific modifications made at Government expense to such software or documentation to meet the requirements of a Government solicitation; or

(2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose commercial computer software or commercial computer software documentation except for a transfer of rights mutually agreed upon.

(d) When establishing contract requirements and negotiation objectives to meet agency needs, the Government should consider the factors identified in 227.7203-2(b) and (c) for commercial computer software and computer software documentation, consistent with paragraph (c) of this section.

227.7202-2 Reserved.

227.7202-3 Rights in commercial computer software or commercial computer software documentation.

(a) The Government shall have only the rights specified in the license under which the commercial computer software or commercial computer software documentation was obtained.

(b) If the Government has a need for rights not conveyed under the license customarily provided to the public, the Government must negotiate with the contractor to determine if there are acceptable terms for transferring such rights. The specific rights granted to the Government shall be enumerated in the contract license agreement or an addendum thereto.

227.7202-4 Contract clause.

A specific contract clause governing the Government's rights in commercial computer software or commercial computer software documentation is not prescribed. As required by 227.7202-3 , the Government’s rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation shall be identified in a license agreement.

227.7203 Other than commercial computer software and other than commercial computer software documentation.

227.7203-1 Policy.

(a) DoD policy is to acquire only the computer software and computer software documentation, and the rights in such software or documentation, necessary to satisfy agency needs.

(b) Solicitations and contracts shall—

(1) Specify the computer software or computer software documentation to be delivered under a contract and the delivery schedules for the software or documentation;

(2) Establish or reference procedures for determining the acceptability of computer software or computer software documentation;

(3) Establish separate contract line items, to the extent practicable, for the computer software or computer software documentation to be delivered under a contract and require offerors and contractors to price separately each deliverable data item; and

(4) Require offerors to identify, to the extent practicable, computer software or computer software documentation to be furnished with restrictions on the Government's rights and require contractors to identify computer software or computer software documentation to be delivered with such restrictions prior to delivery.

(c) Offerors shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in computer software developed exclusively at private expense except for the software identified at 227.7203-5(a)(3) through (6).

(d) Offerors and contractors shall not be prohibited or discouraged from furnishing or offering to furnish computer software developed exclusively at private expense solely because the Government's rights to use, modify, release, reproduce, perform, display, or disclose the software may be restricted.

(e) For acquisitions involving major weapon systems or subsystems of major weapon systems, the acquisition plan shall address acquisition strategies that provide for computer software and computer software documentation, and the associated license rights, in accordance with 207.106(S-70).

227.7203-2 Acquisition of other than commercial computer software and computer software documentation and associated rights.

(a) Contracting officers shall work closely with data managers and requirements personnel to assure that computer software and computer software documentation requirements included in solicitations are consistent with the policy expressed in 227.7203-1 .

(b)(1) Data managers or other requirements personnel are responsible for identifying the Government’s life-cycle needs for computer software and computer software documentation . See PGI 227.7203-2(b) for further guidance on assessing life-cycle needs. In addition to desired software performance, compatibility, or other technical considerations, identification of life-cycle needs should consider such factors as —

(i) The offeror’s economic interests in software that has been developed at private expense (including the economic interests of small businesses and nontraditional contractors);

(ii) The Government’s costs to develop, acquire, maintain, store, retrieve, and protect the computer software and computer software documentation;

(iii) Multiple site or shared use requirements;

(iv) Whether the Government’s software maintenance philosophy will require the right to modify or have third parties modify the software,; and

(v) Any special computer software documentation requirements.

(2)(i) *Procurement planning*. To the maximum extent practicable, when assessing the life-cycle needs, data managers or other requirements personnel will address in the procurement planning and requirements documents (e.g., acquisition plans, purchase requests) the acquisition at appropriate times in the life cycle of all computer software, related recorded information, and associated license rights necessary to—

(A) Reproduce, build, or recompile the software from its source code and required software libraries (e.g., software libraries called, invoked, or linked by the computer software source code that are necessary for the operation of the software);

(B) Conduct required computer software testing and evaluation;

(C) Integrate and deploy computer programs on relevant hardware including developmental, operational, diagnostic, training, or simulation environments; and

(D) Sustain and support the software over its life cycle.

(ii) *Alternatives to delivery of source code and related software design details*. The assessment of life-cycle needs should consider alternatives to the delivery of source code and related software design details for privately developed computer software as necessary to meet the Government's needs, such as—

(A) Technical data and computer software sufficient to implement a modular open system approach or a similar approach (see PGI 227.7203-2(b)(2)(ii)(A) (DFARS/PGI view) for guidance on alternatives to source code and related software design details);

(B) Access to technical data or computer software, including access agreements for cloud-based or subscription-based software products or services; see PGI 227.7203-2(b)(2)(ii)(B) and (C) (DFARS/PGI view) for guidance on use of access agreements to contractor source code and related software design details;

(C) Software support and maintenance provided directly from the contractor; or

(D) Other contracting or licensing mechanisms including priced options, specially negotiated licenses, direct licensing between contractors for qualifying second sources, data escrow agreements, deferred delivery solutions, and subscription agreements. See PGI 227.7203-2(b)(2)(ii)(D) (DFARS/PGI view) for guidance on use of escrow agreements.

(3) When reviewing offers received in response to a solicitation or other request for computer software or computer software documentation, data managers must balance the original assessment of the Government's needs with prices offered.

(c) Contracting officers are responsible for ensuring that, wherever practicable, solicitations and contracts—

(1) Identify the types of computer software and the quantity of computer programs and computer software documentation to be delivered, any requirements for multiple users at one site or multiple site licenses, and the format and media in which the software or documentation will be delivered;

(2) Establish each type of computer software or computer software documentation to be delivered as a separate contract line item (this requirement may be satisfied by an exhibit to the contract);

(3) Identify the prices established for each separately priced deliverable item of computer software or computer software documentation under a fixed-price type contract;

(4) Include delivery schedules and acceptance criteria for each deliverable item;

(5) Specifically identify the place of delivery for each deliverable item; and

(6) Specify in the negotiated terms that any required other than commercial computer software, related recorded information, and associated license rights identified in the assessment of life-cycle needs in paragraph (b) of this section shall to the extent appropriate—

(i) Include computer software delivered in a digital format compatible with applicable computer programs on relevant system hardware;

(ii) Not rely on additional internal or external other than commercial or commercial technical data and software, unless such technical data or software is—

(A) Included in the items to be delivered with license rights sufficient to meet the Government’s needs; or

(B) Commercially available with license rights sufficient to meet the Government’s needs; and

(iii) Include sufficient information, with license rights sufficient to meet the Government’s needs, to support maintenance and understanding of interfaces and software version history when the negotiated terms do not allow for the inclusion of the external or additional other than commercial or commercial technical data and software.

227.7203-3 Early identification of computer software or computer software documentation to be furnished to the Government with restrictions on use, reproduction, or disclosure.

(a) Use the provision at 252.227-7017 , Identification and Assertion of Use, Release, or Disclosure Restrictions, in all solicitations that include the clause at 252.227-7014 , Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation. The provision requires offerors to identify any computer software or computer software documentation for which restrictions, other than copyright, on use, modification, reproduction, release, performance, display, or disclosure are asserted and to attach the identification and assertion to the offer.

(b) Subsequent to contract award, the clause at 252.227-7014 permits a contractor, under certain conditions, to make additional assertions of restrictions. The prescriptions for the use of that clause and its alternates are at 227.7203-6 (a).

227.7203-4 License rights.

(a) *Grant of license.* The Government obtains rights in computer software or computer software documentation, including a copyright license, under an irrevocable license granted or obtained by the contractor which developed the software or documentation or the licensor of the software or documentation if the development contractor is not the licensor. The contractor or licensor retains all rights in the software or documentation not granted to the Government. The scope of a computer software license is generally determined by the source of funds used to develop the software. Contractors or licensors may, with some exceptions, restrict the Government's rights to use, modify, reproduce, release, perform, display, or disclose computer software developed exclusively or partially at private expense (see 227.7203-5 (b) and (c)). They may not, without the Government's agreement (see 227.7203-5 (d)), restrict the Government's rights in computer software developed exclusively with Government funds or in computer software documentation required to be delivered under a contract.

(b) *Source of funds determination.* The determination of the source of funds used to develop computer software should be made at the lowest practicable segregable portion of the software or documentation (e.g., a software sub-routine that performs a specific function). Contractors may assert restricted rights in a segregable portion of computer software which otherwise qualifies for restricted rights under the clause at 252.227-7014 , Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation.

227.7203-5 Government rights.

The standard license rights in computer software that a licensor grants to the Government are unlimited rights, government purpose rights, or restricted rights. The standard license in computer software documentation conveys unlimited rights. Those rights are defined in the clause at 252.227-7014 , Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation. In unusual situations, the standard rights may not satisfy the Government's needs or the Government may be willing to accept lesser rights in return for other consideration. In those cases, a special license may be negotiated. However, the licensor is not obligated to provide the Government greater rights and the contracting officer is not required to accept lesser rights than the rights provided in the standard grant of license. The situations under which a particular grant of license applies are enumerated in paragraphs (a) through (d) of this subsection.

(a) *Unlimited rights.* The Government obtains an unlimited rights license in—

(1) Computer software developed exclusively with Government funds;

(2) Computer software documentation required to be delivered under a Government contract;

(3) Corrections or changes to computer software or computer software documentation furnished to the contractor by the Government;

(4) Computer software or computer software documentation that is otherwise publicly available or has been released or disclosed by the contractor or subcontractor without restrictions on further use, release or disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the software to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(5) Computer software or computer software documentation obtained with unlimited rights under another Government contract or as a result of negotiations; or

(6) Computer software or computer software documentation furnished to the Government, under a Government contract or subcontract with—

(i) Restricted rights in computer software, limited rights in technical data, or government purpose license rights and the restrictive conditions have expired; or

(ii) Government purpose rights and the contractor's exclusive right to use such software or documentation for commercial purposes has expired.

(b) *Government purpose rights.*

(1) Except as provided in paragraph (a) of this subsection, the Government obtains government purpose rights in computer software developed with mixed funding.

(2) The period during which government purpose rights are effective is negotiable. The clause at 252.227-7014 provides a nominal five-year period. Either party may request a different period. Changes to the government purpose rights period may be made at any time prior to delivery of the software without consideration from either party. Longer periods should be negotiated when a five-year period does not provide sufficient time to commercialize the software or, for software developed by subcontractors, when necessary to recognize the subcontractors' interests in the

software.

(3) The government purpose rights period commences upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required development of the computer software. Upon expiration of the government purpose rights period, the Government has unlimited rights in the software including the right to authorize others to use the data for commercial purposes.

(4) During the government purpose rights period, the Government may not use, or authorize other persons to use, computer software marked with government purpose rights legends for commercial purposes. The Government shall not release or disclose, or authorize others to release or disclose, computer software in which it has government purpose rights to any person unless—

(i) Prior to release or disclosure, the intended recipient is subject to the use and nondisclosure agreement at 227.7103-7 ; or

(ii) The intended recipient is a Government contractor receiving access to the software for performance of a Government contract that contains the clause at 252.227-7025 , Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(5) When computer software marked with government purpose rights legends will be released or disclosed to a Government contractor performing a contract that does not include the clause at 252.227-7025 , the contract may be modified, prior to release or disclosure, to include such clause in lieu of requiring the contractor to complete a use and nondisclosure agreement.

(6) Contracting activities shall establish procedures to assure that computer software or computer software documentation marked with government purpose rights legends are released or disclosed, including a release or disclosure through a Government solicitation, only to persons subject to the use and nondisclosure restrictions. Public announcements in the System for Award Management or other publications must provide notice of the use and nondisclosure requirements. Class use and nondisclosure agreements (e.g., agreements covering all solicitations received by the XYZ company within a reasonable period) are authorized and may be obtained at any time prior to release or disclosure of the government purpose rights software or documentation. Documents transmitting government purpose rights software or documentation to persons under class agreements shall identify the specific software or documentation subject to government purpose rights and the class agreement under which such software or documentation are provided.

(c) *Restricted rights*.

(1) The Government obtains restricted rights in other than commercial computer software, required to be delivered or otherwise provided to the Government under a contract, that was developed exclusively at private expense.

(2) Contractors are not required to provide the Government additional rights in computer software delivered or otherwise provided to the Government with restricted rights. When the Government has a need for additional rights, the Government must negotiate with the contractor to determine if there are acceptable terms for transferring such rights. List or describe all software in which the contractor has granted the Government additional rights in a license agreement made part of the contract (see paragraph (d) of this subsection). The license shall enumerate the specific additional rights granted to the Government.

(d) *Specifically negotiated license rights*. Negotiate specific licenses when the parties agree to modify the standard license rights granted to the Government or when the Government wants to

obtain rights in computer software in which it does not have rights. When negotiating to obtain, relinquish, or increase the Government's rights in computer software, consider the planned software maintenance philosophy, anticipated time or user sharing requirements, and other factors which may have relevance for a particular procurement. If negotiating to relinquish rights in computer software documentation, consider the administrative burden associated with protecting documentation subject to restrictions from unauthorized release or disclosure. The negotiated license rights must stipulate the rights granted the Government to use, modify, reproduce, release, perform, display, or disclose the software or documentation and the extent to which the Government may authorize others to do so. Identify all negotiated rights in a license agreement made part of the contract.

(e) *Rights in derivative computer software or computer software documentation*. The clause at 252.227-7014 protects the Government's rights in computer software, computer software documentation, or portions thereof that the contractor subsequently uses to prepare derivative software or subsequently embeds or includes in other software or documentation. The Government retains the rights it obtained under the development contract in the unmodified portions of the derivative software or documentation.

227.7203-6 Solicitation provisions and contract clauses.

(a)(1) Use the clause at 252.227-7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, in solicitations and contracts when the successful offeror(s) will be required to deliver computer software or computer software documentation. Do not use the clause when the only deliverable items are technical data (other than computer software documentation), commercial computer software or commercial computer software documentation, commercial products, commercial services (see 227.7102-3), special works (see 227.7205), or contracts 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.

(2) Use the clause at 252.227-7014 with its Alternate I in research contracts when the contracting officer determines, in consultation with counsel, that public dissemination by the contractor would be—

(i) In the interest of the Government; and

(ii) Facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

(b) Use the clause at 252.227-7016 , Rights in Bid or Proposal Information, in solicitations and contracts that include the clause at 252.227-7014 .

(c) Use the clause at 252.227-7019 , Validation of Asserted Restrictions—Computer Software, in solicitations and contracts that include the clause at 252.227-7014 . The clause provides procedures for the validation of asserted restrictions on the Government's rights to use, release, or disclose computer software.

(d) Use the clause at 252.227-7025 , Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, in solicitations and contracts when it is anticipated that the Government will provide the contractor (other than a litigation support contractor covered by 252.204-7014), for performance of its contract, computer software or computer software

documentation marked with another contractor's restrictive legend(s).

(e) Use the provision at 252.227-7028 , Technical Data or Computer Software Previously Delivered to the Government, in solicitations when the resulting contract will require the contractor to deliver computer software or computer software documentation. The provision requires offerors to identify any software or documentation specified in the solicitation as deliverable items that are the same or substantially the same as software or documentation which the offeror has delivered or is obligated to deliver, either as a contractor or subcontractor, under any other federal agency contract.

(f) Use the clause at 252.227-7037, Validation of Asserted Restrictions on Technical Data, in solicitations and contracts that include the clause at 252.227-7014 when the contractor will be required to deliver other than commercial computer software documentation (technical data). The clause implements statutory requirements under 10 U.S.C. 3781-3786. Paragraph (e) of the clause contains information that must be included in a formal challenge.

227.7203-8 Deferred delivery and deferred ordering of computer software and computer software documentation.

(a) *Deferred delivery.* Use the clause at 252.227-7026 , Deferred Delivery of Technical Data or Computer Software, when it is in the Government's interests to defer the delivery of computer software or computer software documentation. The clause permits the contracting officer to require the delivery of data identified as “deferred delivery” data or computer software at any time until two years after acceptance by the Government of all items (other than technical data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors or suppliers to deliver such data expires two years after the date the prime contractor accepts the last item from the subcontractor or supplier for use in the performance of the contract. The contract must specify the computer software or computer software documentation that is subject to deferred delivery. The contracting officer shall notify the contractor sufficiently in advance of the desired delivery date for such software or documentation to permit timely delivery.

(b) *Deferred ordering*. Use the clause at 252.227-7027 , Deferred Ordering of Technical Data or Computer Software, when a firm requirement for software or documentation has not been established prior to contract award but there is a potential need for computer software or computer software documentation. Under this clause, the contracting officer may order any computer software or computer software documentation generated in the performance of the contract or any subcontract thereunder at any time until three years after acceptance of all items (other than technical data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors to deliver such technical data or computer software expires three years after the date the contractor accepts the last item under the subcontract. When the software or documentation are ordered, the delivery dates shall be negotiated and the contractor compensated only for converting the software or documentation into the prescribed form, reproduction costs, and delivery costs.

227.7203-9 Copyright.

(a) Copyright license.

(1) The clauses at 252.227-7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, and 252.227-7018, Rights in Other Than

Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, require a contractor to grant, or obtain for the Government license rights which permit the Government to reproduce the software or documentation, distribute copies, perform or display the software or documentation and, through the right to modify data, prepare derivative works. The extent to which the Government, and others acting on its behalf, may exercise these rights varies for each of the standard data rights licenses obtained under the clause. When non-standard license rights in computer software or computer software documentation will be negotiated, negotiate the extent of the copyright license concurrent with negotiations for the data rights license. Do not negotiate copyright licenses for computer software that provide less rights than the standard restricted rights in computer software license. For computer software documentation, do not negotiate a copyright license that provides less rights than the standard limited rights in technical data license.

(2) The clauses at 252.227-7013, Rights in Technical Data— Other Than Commercial Products and Commercial Services, and 252.227-7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, do not permit a contractor to incorporate a thirdparty's copyrighted software into a deliverable software item unless the contractor has obtained an appropriate license for the Government and, when applicable, others acting on the Government's behalf, or has obtained the contracting officer's written approval to do so. Grant approval to use third-party copyrighted software in which the Government will not receive a copyright license only when the Government's requirements cannot be satisfied without the third-party material or when the use of the third-party material will result in cost savings to the Government which outweigh the lack of a copyright license.

(b) *Copyright considerations—special works.* See 227.7205 for copyright considerations when acquiring special works that are not SBIR/STTR data.

227.7203-10 Contractor identification and marking of computer software or computer software documentation to be furnished with restrictive markings.

(a) *Identification requirements*.

(1) The solicitation provision at 252.227-7017 , Identification and Assertion of Use, Release, or Disclosure Restrictions, requires offerors to identify, prior to contract award, any computer software or computer software documentation that an offeror asserts should be provided to the Government with restrictions on use, modification, reproduction, release, or disclosure. This requirement does not apply to restrictions based solely on copyright. The notification and identification must be submitted as an attachment to the offer. If an offeror fails to submit the attachment or fails to complete the attachment in accordance with the requirements of the solicitation provision, such failure shall constitute a minor informality. Provide offerors an opportunity to remedy a minor informality in accordance with the procedures at FAR 14.405 or 15.306(a). An offeror's failure to correct an informality within the time prescribed by the contracting officer shall render the offer ineligible for award.

(2) The procedures for correcting minor informalities shall not be used to obtain information regarding asserted restrictions or an offeror's suggested asserted rights category. Questions regarding the justification for an asserted restriction or asserted rights category must be pursued in accordance with the procedures at 227.7203-13 .

(3) The restrictions asserted by a successful offeror shall be attached to its contract unless, in accordance with the procedures at 227.7203-13, the parties have agreed that an asserted restriction is not justified. The contract attachment shall provide the same information regarding identification of the computer software or computer software documentation, the asserted rights category, the basis for the assertion, and the name of the person asserting the restrictions as required by paragraph (d) of the solicitation provision at 252.227-7017. Subsequent to contract award, the clauses at 252.227-7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, and 252.227-7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, permit a contractor to make additional assertions under certain conditions. The additional assertions must be made in accordance with the procedures and in the format prescribed by that clause.

(4) Neither the pre- or post-award assertions made by the contractor nor the fact that certain assertions are identified in the attachment to the contract, determine the respective rights of the parties. As provided at 227.7203-13 , the Government has the right to review, verify, challenge and validate restrictive markings.

(5) Information provided by offerors in response to the solicitation provision at 252.227-7017 may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use or disclose computer software or computer software documentation. However, contracting officers shall not—

(i) Prohibit offerors from offering products for which the offeror is entitled to provide the computer software with restrictions; or

(ii) Require offerors, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish rights in computer software except for the standard rights specified in the applicable clauses.

(b)*Contractor marking requirements.* The clauses at 252.227-7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, and 252.227-7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program—

(1) Require a contractor who desires to restrict the Government's rights in computer software or computer software documentation to place restrictive markings on the software or documentation, provide instructions for the placement of the restrictive markings, and authorize the use of certain restrictive markings. When it is anticipated that the software will or may be used in combat or situations which simulate combat conditions, do not permit contractors to insert instructions into computer programs that interfere with or delay operation of the software to display a restrictive rights legend or other license notice; and

(2) Require a contractor to deliver, furnish, or otherwise provide to the Government any computer software or computer software documentation in which the Government has previously obtained rights with the Government's preexisting rights in that software or documentation unless the parties have agreed otherwise or restrictions on the Government's rights to use, modify, produce, release, or disclose the software or documentation have expired. When restrictions are still applicable, the contractor is permitted to mark the software or documentation with the appropriate restrictive legend.

(c) *Unmarked computer software or computer software documentation*.

(1) Computer software or computer software documentation delivered or otherwise provided under a contract without restrictive markings shall be presumed to have been delivered with unlimited rights and may be released or disclosed without restriction. To the extent practicable, if a contractor has requested permission (see paragraph (c)(2) of this section) to correct an inadvertent omission of markings, do not release or disclose the software or documentation pending evaluation of the request.

(2) A contractor may request permission to have appropriate legends placed on unmarked computer software or computer software documentation at its expense. The request must be received by the contracting officer within 6 months following the furnishing or delivery of such software or documentation, or any extension of that time approved by the contracting officer. The person making the request must—

(i) Identify the software or documentation that should have been marked;

(ii) Demonstrate that the omission of the marking was inadvertent, the proposed marking is justified and conforms with the requirements for the marking of computer software or computer software documentation contained in the clauses at 252.227-7014 and 252.227-7018; and

(iii) Acknowledge, in writing, that the Government has no liability with respect to any disclosure, reproduction, or use of the software or documentation made prior to the addition of the marking or resulting from the omission of the marking.

(3) Contracting officers should grant permission to mark only if the software or documentation were not distributed outside the Government or were distributed outside the Government with restrictions on further use or disclosure.

227.7203-11 Contractor procedures and records.

(a) The clauses at 252.227-7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, and 252.227-7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program, require a contractor, and its subcontractors or suppliers that will deliver computer software or computer software documentation with other than unlimited rights, to establish and follow written procedures to assure that restrictive markings are used only when authorized and to maintain records to justify the validity of restrictive markings.

(b) The clause at 252.227-7019 , Validation of Asserted Restrictions—Computer Software, requires contractors and their subcontractors or suppliers at any tier to maintain records sufficient to justify the validity of markings that assert restrictions on the use, modification, reproduction, release, performance, display, or disclosure of computer software.

227.7203-12 Government right to establish conformity of markings.

(a) *Nonconforming markings*.

(1) Authorized markings are identified in the clauses at 252.227-7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, and 252.227-7018, Rights in Other Than Commercial Technical Data and Computer Software—Small

Business Innovation Research Program and Small Business Technology Transfer Program. All other markings are nonconforming markings. An authorized marking that is not in the form, or differs in substance, from the marking requirements in the clauses at 252.227-7014 and 252.227-7018 is also a nonconforming marking.

(2) The correction of nonconforming markings on computer software is not subject to 252.227-7019, Validation of Asserted Restrictions—Computer Software, and the correction of nonconforming markings on computer software documentation (technical data) is not subject to 252.227-7037, Validation of Asserted Restrictions on Technical Data. To the extent practicable, the contracting officer should return computer software or computer software documentation bearing nonconforming markings to the person who has placed the nonconforming markings on the software or documentation to provide that person an opportunity to correct or strike the nonconforming markings at that person's expense. If that person fails to correct the nonconformity and return the corrected software or documentation within 60 days following the person's receipt of the software or documentation, the contracting officer may correct or strike the nonconformity at the person's expense. When it is impracticable to return computer software or computer software documentation for correction, contracting officers may unilaterally correct any nonconforming markings at Government expense. Prior to correction, the software or documentation may be used in accordance with the proper restrictive marking.

(b) *Unjustified markings*.

(1) An unjustified marking is an authorized marking that does not depict accurately restrictions applicable to the Government's use, modification, reproduction, release, or disclosure of the marked computer software or computer software documentation. For example, a restricted rights legend placed on computer software developed under a Government contract either exclusively at Government expense or with mixed funding (situations under which the Government obtains unlimited or government purpose rights) is an unjustified marking.

(2) Contracting officers have the right to review and challenge the validity of unjustified markings. However, at any time during performance of a contract and notwithstanding existence of a challenge, the contracting officer and the person who has asserted a restrictive marking may agree that the restrictive marking is not justified. Upon such agreement, the contracting officer may, at his or her election, either—

(i) Strike or correct the unjustified marking at that person's expense; or

(ii) Return the computer software or computer software documentation to the person asserting the restriction for correction at that person's expense. If the software or documentation are returned and that person fails to correct or strike the unjustified restriction and return the corrected software or documentation to the contracting officer within 60 days following receipt of the software or documentation, the unjustified marking shall be corrected or stricken at that person's expense.

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

(a) *General*. An offeror's or contractor's assertion(s) of restrictions on the Government's rights to use, modify, reproduce, release, or disclose computer software or computer software documentation do not, by themselves, determine the extent of the Government's rights in such software or documentation. The Government may require an offeror or contractor to submit sufficient information to permit an evaluation of a particular asserted restriction and may challenge asserted

restrictions when there are reasonable grounds to believe that an assertion is not valid.

(b) *Requests for information*. Contracting officers should have a reason to suspect that an asserted restriction might not be correct prior to requesting information. When requesting information, provide the offeror or contractor the reason(s) for suspecting that an asserted restriction might not be correct. A need for additional license rights is not, by itself, a sufficient basis for requesting information concerning an asserted restriction. Follow the procedures at 227.7203-5 (d) when additional license rights are needed but there is no basis to suspect that an asserted restriction might not be valid.

(c) *Transacting matters directly with subcontractors*. The clause at 252.227-7019 , Validation of Asserted Restrictions—Computer Software, obtains the contractor's agreement that the Government may transact matters under the clause directly with a subcontractor or supplier, at any tier, without creating or implying privity of contract. Contracting officers should permit a subcontractor or supplier to transact challenge and validation matters directly with the Government when—

(1) A subcontractor's or supplier's business interests in its technical data would be compromised if the data were disclosed to a higher tier contractor;

(2) There is reason to believe that the contractor will not respond in a timely manner to a challenge and an untimely response would jeopardize a subcontractor's or supplier's right to assert restrictions; or

(3) Requested to do so by a subcontractor or supplier.

(d) *Challenging asserted restrictions*.

(1) *Pre-award considerations*. The challenge procedures in the clause at 252.227-7019 could significantly delay competitive procurements. Therefore, avoid challenging asserted restrictions prior to a competitive contract award unless resolution of the assertion is essential for successful completion of the procurement.

(2) *Computer software documentation*. Computer software documentation is technical data. Challenges to asserted restrictions on the Government’s rights to use, modify, reproduce, release, perform, display, or disclose computer software documentation must be made in accordance with the clause at 252.227-7037, Validation of Asserted Restrictions on Technical Data, and the guidance at 227.7103-13. The procedures in the clause at 252.227-7037 implement requirements contained in 10 U.S.C. 3781-3786. Resolution of questions regarding the validity of asserted restrictions using the process described at 227.7103-12(b)(2) is strongly encouraged.

(3) Computer software.

(i) Asserted restrictions should be reviewed before acceptance of the computer software deliverable under a contract. The Government's right to challenge an assertion expires three years after final payment under the contract or three years after delivery of the software, whichever is later. Those limitations on the Government's challenge rights do not apply to software that is publicly available, has been furnished to the Government without restrictions, or has been otherwise made available without restrictions.

(ii) Contracting officers must have reasonable grounds to challenge the current validity of an asserted restriction. Before challenging an asserted restriction, carefully consider all available information pertaining to the asserted restrictions. Resolution of questions regarding the validity of asserted restrictions using the process described at 227.7203-12 (b)(2) is strongly encouraged. After

consideration of the situations described in paragraph (c) 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 determine the validity of the assertion. Additional supporting documentation may be requested when the explanation provided by that person does not, in the contracting officer's opinion, establish the validity of the assertion.

(iii) Assertions may be challenged whether or not supporting documentation was requested. Challenges must be in writing and issued to the person asserting the restriction.

(4) Extension of response time. The contracting officer, at his or her discretion, may extend the time for response contained in a challenge, as appropriate, if the contractor submits a timely written request showing the need for additional time to prepare a response.

(e) *Validating or denying asserted restrictions*.

(1) Contracting officers must promptly issue a final decision denying or sustaining the validity of each challenged assertion unless the parties have agreed on the disposition of the assertion. When a final decision denying the validity of an asserted restriction is made following a timely response to a challenge, the Government is obligated to continue to respect the asserted restrictions through final disposition of any appeal unless the agency head notifies the person asserting the restriction that urgent or compelling circumstances do not permit the Government to continue to respect the asserted restriction. See 252.227-7019 (g) for restrictions applicable following a determination of urgent and compelling circumstances.

(2) Only a contracting officer's final decision, or actions of an agency Board of Contract Appeals or a court of competent jurisdiction, that sustain the validity of an asserted restriction constitute validation of the restriction.

(f) Multiple challenges to an asserted restriction. When more than one contracting officer challenges an asserted restriction, the contracting officer who made the earliest challenge is responsible for coordinating the Government challenges. That contracting officer shall consult with all other contracting officers making challenges, verify that all challenges apply to the same asserted restriction and, after consulting with the contractor, subcontractor, or supplier asserting the restriction, issue a schedule that provides that person a reasonable opportunity to respond to each challenge.

227.7203-14 Conformity, acceptance, and warranty of computer software and computer software documentation.

(a) *Computer software documentation*. Computer software documentation is technical data. See 227.7103-14 for appropriate guidance and statutory requirements.

(b) *Computer software*.

(1) Conformity and acceptance. Solicitations and contracts requiring the delivery of computer software shall specify the requirements the software must satisfy to be acceptable. Contracting officers, or their authorized representatives, are responsible for determining whether computer software tendered for acceptance conforms to the contractual requirements. Except for nonconforming restrictive markings (follow the procedures at 227.7203-12 (a) if nonconforming markings are the sole reason computer software tendered for acceptance fails to conform to

contractual requirements), do not accept software that does not conform in all respects to applicable contractual requirements. Correction or replacement of nonconforming software, or an equitable reduction in contract price when correction or replacement of the nonconforming data is not practicable or is not in the Government's interests, shall be accomplished in accordance with—

(i) The provisions of a contract clause providing for inspection and acceptance of deliverables and remedies for nonconforming deliverables; or

(ii) The procedures at FAR 46.407(c) through (g), if the contract does not contain an inspection clause providing remedies for nonconforming deliverables.

(2) Warranties.

(i) Weapon systems. Computer software that is a component of a weapon system or major subsystem should be warranted as part of the weapon system warranty. Follow the procedures at 246.7.

(ii) *Non-weapon systems*. Approval of the chief of the contracting office must be obtained to use a computer software warranty other than a weapon system warranty. Consider the factors at FAR 46.703 in deciding whether to obtain a computer software warranty. When approval for a warranty has been obtained, the clause at 252.246-7001 , Warranty of Data, and its alternates, may be appropriately modified for use with computer software or a procurement specific clause may be developed.

227.7203-15 Subcontractor rights in computer software or computer software documentation.

(a) Subcontractors and suppliers at all tiers should be provided the same protection for their rights in computer software or computer software documentation as are provided to prime contractors.

(b) The clauses at 252.227-7019, Validation of Asserted Restrictions—Computer Software, and 252.227-7037, Validation of Asserted Restrictions on Technical Data, obtain a contractor’s agreement that the Government’s transaction of validation or challenge matters directly with subcontractors at any tier does not establish or imply privity of contract. When a subcontractor or supplier exercises its right to transact validation matters directly with the Government, contracting officers shall deal directly with such persons, as provided at 227.7203-13(c) for computer software and 227.7103-13(c)(3) for computer software documentation (technical data).

(c) Require prime contractors whose contracts include the following clauses to include those clauses, without modification except for appropriate identification of the parties, in contracts with subcontractors or suppliers who will be furnishing computer software in response to a Government requirement (see 227.7103-15 (c) for clauses required when subcontractors or suppliers will be furnishing computer software documentation (technical data)):

(1) 252.227-7014 , Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation;

(2) 252.227-7019 , Validation of Asserted Restrictions–Computer Software;

(3) 252.227-7025 , Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends; and

(4) 252.227-7028 , Technical Data or Computer Software Previously Delivered to the Government.

(d) Do not require contractors to have their subcontractors or suppliers at any tier relinquish rights in technical data to the contractor, a higher tier subcontractor, or to the Government, as a condition for award of any contract, subcontract, purchase order, or similar instrument except for the rights obtained by the Government under the provisions of the Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation clause contained in the contractor's contract with the Government.

227.7203-16 Providing computer software or computer software documentation to foreign governments, foreign contractors, or international organizations.

Computer software or computer software documentation may be released or disclosed to foreign governments, foreign contractors, or international organizations only if release or disclosure is otherwise permitted both by Federal export controls and other national security laws or regulations. Subject to such laws and regulations, the Department of Defense—

(a) May release or disclose computer software or computer software documentation in which it has obtained unlimited rights to such foreign entities or authorize the use of such data by those entities; and

(b) Shall not release or disclose computer software or computer software documentation for which restrictions on use, release, or disclosure have been asserted to such foreign entities or authorize the use of such data by those entities, unless the intended recipient is subject to the same provisions as included in the use and nondisclosure agreement at 227.7103-7 and the requirements of the clause at 252.227-7014 , Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, governing use, modification, reproduction, release, performance, display, or disclosure of such data have been satisfied.

227.7203-17 Overseas contracts with foreign sources.

(a) The clause at 252.227-7032 , Rights in Technical Data and Computer Software (Foreign), may be used in contracts with foreign contractors to be performed overseas, except Canadian purchases (see paragraph (c) of this subsection) in lieu of the clause at 252.227-7014 , Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, when the Government requires the unrestricted right to use, modify, reproduce, release, perform, display, or disclose all computer software or computer software documentation to be delivered under the contract. Do not use the clause in contracts for special works.

(b) When the Government does not require unlimited rights, the clause at 252.227-7032 may be modified to accommodate the needs of a specific overseas procurement situation. The Government should obtain rights to the computer software or computer software documentation that are not less than the rights the Government would have obtained under the software rights clause(s) prescribed in this part for a comparable procurement performed within the United States or its outlying areas.

(c) Contracts for Canadian purchases shall include the appropriate software rights clause prescribed in this part for a comparable procurement performed within the United States or its outlying areas.

227.7204 Contracts under the Small Business Innovation Research Program.

When contracting under the Small Business Innovation Research Program, follow the procedures at 227.7104 .

227.7205 Contracts for special works.

(a) Use the clause at 252.227-7020 , Rights in Special Works, in solicitations and contracts where the Government has a specific need to control the distribution of computer software or computer software documentation first produced, created, or generated in the performance of a contract and required to be delivered under that contract, including controlling distribution by obtaining an assignment of copyright, or a specific need to obtain indemnity for liabilities that may arise out of the creation, delivery, use, modification, reproduction, release, performance, display, or disclosure of such software or documentation. Use the clause—

(1) In lieu of the clause at 252.227-7014 , Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, when the Government must own or control copyright in all computer software or computer software documentation first produced, created, or generated and required to be delivered under a contract; or

(2) In addition to the clause at 252.227-7014 when the Government must own or control copyright in some of the computer software or computer software documentation first produced, created, or generated and required to be delivered under a contract. The specific software or documentation in which the Government must own or control copyright must be identified in a special contract requirement.

(b) Although the Government obtains an assignment of copyright and unlimited rights in the computer software or computer software documentation delivered as a special work under the clause at 252.227-7020 , the contractor retains use and disclosure rights in that software or documentation. If the Government needs to restrict a contractor's rights to use or disclose a special work, it must also negotiate a special license which specifically restricts the contractor's use or disclosure rights.

(c) The clause at 252.227-7020 does not permit a contractor to incorporate into a special work any work copyrighted by others unless the contractor obtains the contracting officer's permission to do so and obtains for the Government a non-exclusive, paid up, world-wide license to make and distribute copies of that work, to prepare derivative works, to perform or display any portion of that work, and to permit others to do so for government purposes. Grant permission only when the Government's requirements cannot be satisfied unless the third party work is included in the deliverable work.

(d) Examples of other works which may be procured under the clause at 252.227-7020 include, but are not limited to, audiovisual works, scripts, soundtracks, musical compositions, and adaptations; histories of departments, agencies, services or units thereof; surveys of Government establishments; instructional works or guidance to Government officers and employees on the discharge of their official duties; reports, books, studies, surveys or similar documents; collections of data containing information pertaining to individuals that, if disclosed, would violate the right of privacy or publicity of the individuals to whom the information relates; or investigative reports.

227.7206 Contracts for architect-engineer services.

Follow 227.7107 when contracting for architect-engineer services.

227.7207 Contractor data repositories.

Follow 227.7108 when it is in the Government's interests to have a data repository include computer software or to have a separate computer software repository. Contractual instruments establishing the repository requirements must appropriately reflect the repository manager's software responsibilities.