Angelena Moy
OUSD(A&T)/DDP-MPI
(703) 604-5386/87

Ms Davis:

Per our phone con, please accept the attached material for the FOIA Reading Room.

(1) The Rights in Technical Data proposed rule. - Changes to DFARS Parts 211, 227 and 252.

(2) Public comments on the proposed rule from #39 Public Commentors.

Please call me if you need more information.

Thank You,

A. Moy #645

INFO 91-312

FEDERAL MARITIME COMMISSION

46 CFR Part 502

[Docket No. 93-24]

Amendment to Rules of Practice and Procedure

AGENCY: Federal Maritime Commission.
ACTION: Proposed rule; withdrawal.

SUMMARY: The Federal Maritime Commission, after reviewing the comments received and evaluating the concerns that led to the Proposed Rule, is withdrawing the Rule and is discontinuing the proceeding. The Commission concludes that the rule is not needed at this time. The Commission will continue to address specific service of process situations on an ad hoc basis.

DATES: This action is effective June 20, 1994.

FOR FURTHER INFORMATION CONTACT: Joseph C. Polking, Secretary, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, D.C. 20573-0001, (202) 523-5725.

SUPPLEMENTARY INFORMATION: By Notice of Proposed Rulemaking ("NPR" or "Proposed Rule") published in the Federal Register, 58 FR 68841-68843 (Dec. 29, 1993), the Commission proposed to amend Rule 113, 46 CFR 502.113 of the Commission's Rules of Practice and Procedure to make the complainant in a private action responsible for service of its complaint when the Commission has been unsuccessful, for any reason, in effectuating service by certified or registered mail.

The only comment in response to the NPR was filed by the Maritime Administrative Bar Association ("MABA"), which opposes the Proposed Rule.

Background

Under Rule 113, the Commission is presently charged with the responsibility for service of private complaints, amendments to complaints, and complainant's memoranda filed in shortened procedure cases, while Rule 114, 46 CFR 502.114, requires that parties serve all other pleadings.[1] In administering Rule 113, the Commission has experienced occasions where complaints and other pleadings were returned by the United States Postal Service because the respondent refused delivery, an incorrect address was provided by the complainant, or the respondent had moved leaving no forwarding address. In such circumstances, the Commission has resorted to alternative methods of service such as utilizing a Commission investigator to personally find and serve the respondent, or serving the secretary of state pursuant to state law. The NPR noted that the Proposed Rule would conform the Commission's Rules regarding service more closely to the Federal Rules of Civil Procedure.

[1] Section 502.114 provides that all pleadings, documents, and papers (except requests for subpoenas) in proceedings before the Commission shall, when tendered to the Commission or the presiding officer for filing, show that service has been made upon all parties to the proceeding, and upon any other persons required to be served.

Comments

In opposing the Proposed Rule, MABA argues that the Shipping Act, 1916, 46 U.S.C. app. 821, and the Shipping Act of 1984, 46 U.S.C. app. 1710(b) ("Shipping Acts"), prohibit the Commission from shifting the burden of "personally serving private complaints from the Commission to private parties." Comments at 1-2. MABA's position is that only the Commission can serve the complaint, and that a "rule is which service of the complaint is performed by someone other than the Commission does not comply with the clear statutory command that the Commission 'shall furnish' a copy of the complaint." *Id.* at 2. Regarding the Commission's interest in bringing Rule 113 in conformity with the Federal Rules of Civil Procedure, MABA contends that the Federal Rules "are not underlain by a similar statutory obligation that the district court 'furnish a copy of the complaint' to a defendant." *Id.* at 3. Finally, MABA cites differences between district court and FMC proceedings, and "* * * practical reasons why the Commission should not abandon its statutory responsibility to serve a complaint." *Id.* at 3.

MABA argues that the Shipping Acts' statutory provisions governing complaints mean what they say and that the Commission is compelled to serve a respondent on behalf of a private complainant. It contends that because the Commission has national jurisdiction, field offices, and an extensive regulated persons index, it is also in a better position to personally serve the respondent. MABA believes that the Proposed Rule would place the burden of personal service on small companies, thereby acting as a possible barrier to the prosecution of claims before the agency, and exacerbating whatever service problems now exist.

Conclusion

Upon a reevaluation of the concerns that prompted this proposal, the Commission has decided not to proceed to a final rule. Any actual service of process difficulties in a specific case will be addressed on an ad hoc basis.

Therefore, it is ordered, That the Proposed Rule is withdrawn and this proceeding is discontinued.

By the Commission.

Joseph C. Polking,
Secretary.

[FR Doc. 94-14914 Filed 6-17-94; 8:45 am]
BILLING CODE 6730-01-M

DEPARTMENT OF DEFENSE

48 CFR Parts 211, 227, and 252

Defense Federal Acquisition Regulation Supplement; Rights in Technical Data

AGENCY: Department of Defense (DoD).
ACTION: Proposed Rule with request for comments.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement to prescribe the technical data regulations required by 10 U.S.C. 2320, Rights in Technical Data. The proposed regulations are intended to establish a balance between the interests of data developers and data users, encourage creativity, encourage firms to offer DoD new technology, and facilitate dual use development.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before August 19, 1994 to be considered during formulation of the final rule.

ADDRESSES: Interested parties should submit written comments to: Deputy Director Major Policy Initiatives, 1200 S. Fern St., Arlington, VA 22202-2808, ATTN: Ms. Angelena Moy, OUSD (A&T)/DDP. Please cite DAR Case 91-312 on all correspondence related to this proposed rule.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena Moy, (703) 604-5385/5386.

SUPPLEMENTARY INFORMATION:

A. Background

This proposed rule publishes for public comment regulations that adopt the recommendations of the Government-Industry Technical Data Advisory Committee established pursuant to the National Defense Authorization Act for Fiscal Years 1992 and 1993 (Pub. L. 102-190).

The Act required the Secretary of Defense to form a Government-Industry advisory committee to develop recommended regulations to supersede the interim regulations which presently

implement requirements of 10 U.S.C. 2320, Rights in Technical Data. Committee meetings began in July 1992 and ended in December 1993. The committee concluded that the existing regulations are a disincentive to companies that create new technology with their own funding to provide that technology to the Defense Department. The committee believes this proposed regulation establishes a balance between data developers' and data users' interests and will encourage creativity, encourage firms to offer DoD new technology, and facilitate dual use development. The protection of privately developed data is crucial, particularly for developers that have limited product lines.

This proposed rule revises and retitles Defense FAR Supplement Subpart 227.4, Rights in Technical Data; adds a new Subpart 227.5, Rights in Computer Software and Computer Software Documentation; amends Subpart 211.70, Acquisition and Distribution of Commercial Products; and, amends Part 252, Solicitation Provisions and Contract Clauses. Significant differences from the exiting regulations are summarized below.

a. License Rights

This proposed rule identifies any government rights in technical data or computer software as specific, nonexclusive, license rights the contractor has granted the Government. The standard license rights are defined in the proposed clauses at 252.227–7013, "Rights in Technical Data—Noncommercial Items" and 252.227–7014, "Rights in Noncommercial Computer Software and Computer Software Documentation." The rule provides that the contractor retains all rights not granted to the Government.

b. Non-Standard License Rights

This proposed rule permits the negotiation of nonstandard license rights whenever the parties agree that the standard rights are not appropriate for a particular procurement.

c. Elimination of "Required for Performance" Criterion

Existing DFARS regulations permit DoD to obtain unlimited rights in technical data if development was "required for the performance of a government contract or subcontract." This proposed rule eliminates that criterion.

d. Clarification of Indirect Cost Treatment

10 U.S.C. 2320 requires implementing regulations to define the treatment of indirect costs. The existing regulations require indirect costs of development to be considered government funded if development was required for the performance of a government contract. This proposed rule provides for all development accomplished with costs charged to indirect cost pools to be considered development accomplished at private expense.

e. Standard Government Purpose Rights

The existing rule gives the government unlimited rights in technical data that pertain to items, components, or processes developed with a mix of private and government funds unless the developer requests the exclusive right to commercialize and a license can be negotiated. It does not permit negotiations when the government anticipates the data will be needed for reprocurement. This proposed rule replaces those criteria with a standard license, applicable in all mixed funding situations, which is intended to recognize mixed funded development. The license allows the government to use the data for governmental purposes, including competition, but does not allow commercial use. Government purpose rights will be effective for five years following award of the development contract or subcontract or such other period as the parties negotiate. The Government has unlimited rights in the data upon expiration of the government purpose rights period.

f. Segregation of Development Costs

This proposed rule allows private expense determinations to be made at the lowest practicable level when determining rights in technical data or computer software.

g. Commercial Items (Other Than Commercial Computer Software and Commercial Computer Software Documentation)

The clause at 252.211–7015, "Technical Data and Computer Software—Commercial Items is removed. This proposed regulation adds a clause at 252.227–7015, "Technical Data—Commercial Items" that generally requires DoD to acquire only the technical data pertaining to commercial items or processes that are customarily provided to the public.

h. Separate Treatment for Computer Software

A new Subpart 227.5, "Rights in Computer Software and Computer Software Documentation" and a new clause, 252.227–7014, "Rights in Noncommercial Computer Software and Computer Software Documentation" are proposed to separate Computer software from technical data. This separation increases the volume of the regulations but provides greater flexibility to deal with new statutory requirements or technological advancements that affect either technical data or computer software only or affect both to varying degrees. The term computer software documentation is defined in these regulations to mean owner's manuals, user's manuals, installation instructions, and similar items that explain the capabilities of the software or provide instructions for use. Therefore, although computer software documentation is a form of technical data (10 U.S.C. 2302(4), most applicable requirements are contained in the software Subpart and clause.

i. Software Related Definitions

(1) The definitions of "computer program", "computer software", and "computer software documentation" are revised. Definitions of "developed" are added for computer programs, software, and documentation.

(2) The definition of "restricted rights" is revised. The existing rule's right to use software with the computer for which it was acquired is replaced by the right to use a program with one computer at one time. The Government's rights to transfer programs, modify restricted rights software, and permit others to use or modify software for the Government in specific situations, are clarified.

j. Commercial Computer Software and Commercial Computer Software Documentation

This proposed rule provides that the Government shall have only the rights specified in the license under which the commercial computer software or documentation is obtained. A contract clause is not prescribed.

k. Use and Nondisclosure Agreements

The standard nondisclosure agreement contained in the existing rule is amended. The proposed agreement covers third party use and disclosure of all data or software in which the Government's rights are restricted. The proposed regulations permit the use of class nondisclosure agreements.

l. Contracts Under the Small Business Innovative Research Program

Alternate 1 to the clause at 252.227–7013 of the existing rule is replaced by a new clause, 252.227–7018, "Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research Programs." A

single clause, rather than separate technical data and computer software clauses each with alternate provisions, reduces contractual burdens on these small businesses. Data generated under these contracts is required to be protected for five years instead of the four year statutory requirement.

B. Regulatory Flexibility Act

This proposed rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* This proposed rule modifies the circumstances under which the Government may release or disclose technical data or computer software to interested persons or permit those persons to use the technical data or computer software. An initial Regulatory Flexibility Analysis (IRFA), that updates the IRFA submitted for DAR Case 87-303 on March 29, 1988, has been prepared and will be provided to the Chief Counsel for Advocacy for the Small Business Administration. Comments are invited. Comments from small entities will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and cite DAR Case 91-312 in correspondence.

C. Paperwork Reduction Act

This proposed rule implements information collection requirements under 10 U.S.C. 2321 and requires the submission of other information to comply with requirements in 10 U.S.C. 2320 that are within the meaning of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* A request for clearance, superseding the analysis performed for DAR Case 87-303, will be submitted to OMB.

List of Subjects in 48 CFR Parts 211, 227, and 252

Government procurement.

Claudia L. Naugle,

Deputy Director, Defense Acquisition Regulations Council.

Therefore, it is proposed to amend 48 CFR parts 211, 227, and 252 as follows:

1. The authority citation for 48 CFR parts 211, 227, and 252 continues to read as follows:

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

PART 211—ACQUISITION AND DISTRIBUTION OF COMMERCIAL PRODUCTS

211.70 [Amended]

2. Subpart 211.70 is amended by revising the words "product" to read "item" and "products" to read "items" wherever they appear, except in section 211.7004-1(m) where the phrase "standard commercial items" remains unchanged.

3. Section 211.7001 is amended by removing paragraphs (c) and (d), by redesignating paragraphs (e) and (f) as (c) and (d), respectively, and by revising paragraph (a) to read as follows:

211.7001 Definitions.

* * * * *

(a) The terms *commercial products, existing or prior source* and *minor modification* are defined in the provision at 252.211-7012, Certifications—Commercial Products—Competitive Acquisitions.

* * * * *

§ 211.7004-1 [Amended]

4. Section 211.7004-1(h) is removed and reserved.

5. Section 211.7005 is amended by removing paragraph (a)(29) and by redesignating paragraphs (a)(30) through (a)(33) as paragraphs (a)(29) through (32) respectively.

6. Section 211.7005 is amended by removing paragraphs (b)(34) and (35); by redesignating paragraphs (b)(36) through (51) as paragraphs (b)(34) through (49), respectively; by redesignating paragraphs (b)(52) through (54) as paragraphs (b)(51) through (53), respectively; and by adding a new paragraph (b)(50) to read as follows:

§ 211.7005 contract clauses.

* * * * *

(b) * * *

(50) 252.227-7015 Technical Data—Commercial Items

Subpart 227.4—Rights in Technical Data

7. Subpart 227.4 is revised to read as follows:

Sec.

227.4 Rights in technical data.
227.400 Scope of subpart.
227.401 Definitions.
227.402 Commercial Items or processes.
227.402-1 Policy.
227.402-2 Rights in technical data.
227.402-3 Contract clause.
227.403 Noncommercial items or processes.
227.403-1 Policy.
227.403-2 Acquisition of technical data.
227.403-3 Early identification of technical data to be furnished to the Government with restrictions on use, reproduction, or disclosure.
227.403-4 License rights.
227.403-5 Government rights.
227.403-6 Contract clauses.
227.403-7 Use and non-disclosure agreement.
227.403-8 Deferred delivery and deferred ordering of technical data.
227.403-9 Copyright.
227.403-10 Contractor identification and marking of technical data to be furnished with restrictive markings.
227.403-11 Contractor procedures and records.
227.403-12 Government right to establish conformity of markings.
227.403-13 Government right to review, verify, challenge, and validate asserted restrictions.
227.403-14 Conformity, acceptance, and warranty of technical data.
227.403-15 Subcontractor rights in technical data.
227.403-16 Providing technical data to foreign governments, foreign contractors, or international organizations.
227.403-17 Overseas contracts with foreign sources.
227.404 Contracts under the Small Business Innovative Research Program.
227.405 Contracts for the acquisition of existing works.
227.405-1 General.
227.405-2 Acquisition of existing works without modification.
227.405-3 Acquisition of modified existing works.
227.406 Contracts for special works.
227.407 Contracts for architect-engineer services.
227.407-1 Architectural designs and data clauses for architect-engineer or construction contracts.
227.407-2 Contracts for construction supplies and research and development work.
227.407-3 Approval of restricted designs.
227.408 Contractor data repositories.

227.4 Rights in technical data.

227.400 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 requirements in the following laws and Executive Order:

10 U.S.C. 2302(4)
10 U.S.C. 2305 (subsection (d)(4))
10 U.S.C. 2320
10 U.S.C. 2321
10 U.S.C. 2325
Executive Order 12591 (Subsection 1(b)(6)).

(b) Does not apply to computer software or technical data that is computer software documentation (see 227.5).

227.401 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) The terms *Commercial items* and *minor modification*, as that term is used

with commercial items, are defined in the clause at 252.227-7015, "Rights in Technical Data—Commercial Items."

(c) Other terms used in this subpart are defined in the clause at 252.227-7013, "Rights in Technical Data—Noncommercial Items."

227.402 Commercial items or processes.

227.402-1 Policy.

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

(1) Required for repair or maintenance of commercial items or processes, or for the proper installation, operating, or handling of a commercial item, 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 requirements; or,

(2) That describe the modifications made to a commercial item or 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 to—

(1) Except for the technical data described in 227.402-1(a), furnish technical information related to commercial items or processes that is not customarily provided to the public;

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

227.402-2 Rights in technical data.

(a) The clause at 252.227-7015, "Rights in Technical Data—Commercial Items" provides the Government specific license rights in technical data pertaining to commercial items or processes. Generally, DoD may use, modify, duplicate, release, or disclose such 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, may not be released or disclosed to, or used by, third parties without the contractor's express permission.

(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 the contract license agreement or an addendum thereto.

227.402-3 Contract clause.

Use the clause at 252.227-7015, "Rights in Technical Data—Commercial Items", in all solicitations and contracts when the contractor will be required to deliver technical data pertaining to commercial items or processes.

227.403 Noncommercial items or processes.

227.403-1 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;

(4) Require offerors to identify, to the extent practicable, technical data to be furnished with restrictions on the Government's rights and require contractor's 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 227.403-5(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, release, or disclose technical data pertaining to those items may be restricted.

(e) As provided in 10 U.S.C. 2305, 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.

227.403-2 Acquisition of technical data.

(a) Procedures for acquiring technical data are contained in DoD 5010.12, DoD Data Management Program. 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 227.403-1.

(b)(1) Data managers or other requirements personnel are responsible for identifying the Government's minimum needs for technical data. Data needs must be established giving consideration to the contractor's economic interests in data pertaining to items, components, or processes that have been developed at private expense; the Government's costs to acquire, maintain, store, retrieve, and protect the 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. Reprocurement needs may not be a sufficient reason to acquire detailed manufacturing or process data when replacement items or spare parts can be acquired using performance specifications, form, fit and function data, or when there are a sufficient number of alternate sources which 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 assuring that, to the maximum extent 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) As required by 10 U.S.C. 2320, 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 separately priced 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.

227.403–3 Early identification of technical data to be furnished to the Government with restrictions on use, reproduction or disclosure.

(a) 10 U.S.C. 2320 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—Noncommercial Items." 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, to clause at 252.227–7013, "Rights in Technical Data—Noncommercial Items", 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 227.403–6(a).

227.403–4 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 227.403–5(a)(2) and (a) (4) through (9)), restrict the Government's rights to use, release, 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, release, 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 was 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 sub-component 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."

227.403–5 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. 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 subsection.

(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 227.403–5 (a)(2) and (a)(4) through (9); 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 non-disclosure agreement at 227.403–7; 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 non-disclosure 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 non-disclosure restrictions. Public announcements in the Commerce Business Daily or other publications must provide notice of the use and non-disclosure requirements. Class use and non-disclosure 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 227.403–5 (a)(2) and (a)(4) through (9); 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; or,

(ii) 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 227.403–5(c)(2) (i) or (ii), the intended recipient must complete the use and non-disclosure agreement at 227.403–7 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;

(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.

§ 227.403–6 Contract clauses.

(a) Use the clause at 252.227–7013, "Rights in Technical Data—Noncommercial Items" in solicitations and contracts when the successful offeror(s) will be required to deliver technical data to the Government. Do not use the clause when the only deliverable items are computer software or computer software documentation (see 227.5), commercial items (see 227.402–3), existing works (see 227.405), or special works (see 227.406); in Architect-Engineer and construction contracts (see 227.407); or, when contracting under the Small Business Innovative Research Program (see 227.404).

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

(1) In the interest of the Government; and,

(2) 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.

(c) Use the clause at 252.227–7016, "Rights in Bid or Proposal Data", in solicitations and contracts when the Government anticipates a need to use, subsequent to contract award, technical

data included in a bid or proposal that are not required to be delivered under the contract.

(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 contractors, for performance of its contract, technical data marked with another contractor's government restrictive legends.

(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 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.

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

(1) 252.227–7030, "Technical Data—Withholding of Payment";

(2) 252.227–7036, "Certification of Technical Data Conformity"; and,

(3) 252.227–7037, "Validation of Asserted Restrictions" (paragraph (d) of the clause contains information that must be included in a challenge).

227.403–7 Use and non-disclosure agreement

(a) Except as provided in 227.403–7(b), 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 non-disclosure agreement at 227.403–7(c) 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 computer software subject to restricted rights must be stipulated in an attachment to the use and non-disclosure agreement.

(2) For an intended release, disclosure, or authorized use of technical data or computer software subject to special license rights, modify paragraph 1.(c) of the use and nondisclosure agreement 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 non-disclosure 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 Non-disclosure Agreement" is:

Use and Non-disclosure 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 data rights lends 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 non-disclosure 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 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 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. timeshare, or use of 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 restrict 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 227.403–7(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 very claim or liability, including attorneys 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 the Agreement and ending upon _____ (Insert Date) _____. The obligations imposed by this agreement shall survive the expiration or termination of this agreement.

Recipient's Business Name
By_____.
Authorized
Representative_____
Representative's Typed Name and Title Date:

(End of Use and Non-disclosure Agreement)

227.403–8 Deferred delivery and deferred ordering of technical data.

(a) *Deferred delivery.* Use the clause at 252.227–7026, "Deferred Delivery of Technical Data and 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 data identified as "deferred delivery" data at any time until two years after acceptance by the Government of all items (other than technical data items) 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 of the data.

(b) *Deferred ordering.* Use the clause at 252.227–7027, "Deferred Ordering of Technical Data or Computer Software", when a firm requirement technical data 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 technical 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) under the contract or contract termination, whichever is later. The obligation of subcontractors to deliver such technical 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 technical data into the prescribed form, reproduction costs, and delivery costs.

227.403–9 Copyright.

(a) *Copyright license.* (1) The clause at 252.227–7013, "Rights in Technical Data—Noncommercial Items", requires 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 clause. 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 fewer rights than the standard limited rights license in technical data.

(2) The clause at 252.227–7013 does 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 227.405 or 227.406 for copyright considerations when acquiring existing or special works.

227.403–10 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 15.607. 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 227.403–13.

(3) The restrictions asserted by a successful offeror shall be attached to its contract unless, in accordance with the procedures at 227.403–13, 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. Subsequent to contract award, the clause at 252.227–7013, "Rights in Technical Data—Noncommercial Items" permits 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 227.403–13, 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, offerors shall not be prohibited from offering products for which the offeror is entitled to provide the Government limited rights in the technical data pertaining to such products and offerors shall not be required, either as a condition or being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish any greater rights in technical data when the offeror is entitled to provide the technical data with limited rights.

(b) *Contractor marking requirements.* the clause at 252.227–7013, "Rights in Technical Data—Noncommercial Items" requires—

(1) A contractor who desires to restrict the Government's rights in technical data to place restrictive markings on the data, provides instructions for the

placement of the restrictive markings, and authorizes the use of certain restrictive markings.

(2) The 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 pre-existing rights in that data unless the parties have agreed otherwise or restrictions on the Government's rights to use, modify, reproduce, release, 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 227.403-10(c)(2)) 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; and,

(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 "Rights in Technical Data—Non-commercial Items" clause at 252.227-7013; 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.

227.403-11 Contractor procedures and records.

(a) The clause at 252.227-7013, "Rights in Technical Data—Noncommercial Items", requires 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 Asserted Restrictions", 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.

227.403-12 Government right to establish conformity of markings.

(a) *Nonconforming markings.* (1) Authorized markings are identified in the clause at 252.227-7013, "Rights in Technical Data." 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 clause at 252.227-7013 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". 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 the person who has placed the nonconforming marking on the technical data 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 of the nonconformity, 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 the 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 sixty (60) days following receipt of the data, the unjustified marking shall be corrected or stricken at that person's expense.

227.403-13 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. 2321, the 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. 2321 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 and validation.* Contracting officers must have reasonable grounds to challenge the current validity of an asserted restriction. Before issuing a challenge to an asserted restriction, carefully consider all available information pertaining to the assertion. All challenges must be made in accordance with the provisions of the clause at

252.227-7037, "Validation of Asserted Restrictions".

(1) *Challenge period.* Asserted restrictions should be reviewed before acceptance of technical data deliverable under the contract. Assertions must be challenged within 3 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 software 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 227.403-13(c)(3), 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 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 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; or,

(ii) There is reason to believe that the contractor will not respond in a timely manner to a challenge and a failure to respond 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.* Do not issue a challenge notice unless there are reasonable grounds to question the validity of an assertion. Assertions may be challenged whether or not supporting documentation was requested from the person asserting the restriction. Challenge notices must be in writing and issued to the contractor or, after consideration of the situations described in 227.403-13(c)(3), the person asserting the restriction. The challenge notice must include the information in paragraph (d) of the clause at 252.227-7037, "Validation of Asserted Restrictions."

(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 sixty (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, "Validation of Asserted Restrictions." As provided in paragraph (f) 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.

227.403-14 Conformity, acceptance, and warranty of technical data.

(a) *Statutory requirements. 10 U.S.C. 2320—*

(1) Requires contractors to furnish written assurance at the time technical data are delivered or are made available to the Government that the technical data are complete, accurate, and satisfy the requirements of the contract concerning such data;

(2) 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,

(3) Authorizes agency heads to withhold payments (or exercise such other remedies and 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 ten 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 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 227.403–14(b)(4)), 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 227.403–12(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 from 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.

227.403–15 Subcontractor rights in technical data.

(a) 10 U.S.C. 2320 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—Noncommercial Items", and 252.227–7037, "Validation of Asserted Restrictions", implement the statutory requirements.

(b) 10 U.S.C. 2321 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, "Validation of Asserted Restrictions" 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 227.403–13(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 in response to a government requirement.

(1) 252.227–7013, "Rights in Technical Data—Noncommercial Items";

(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"; and,

(4) 252.227–7037, "Validation of Asserted Restrictions".

(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—Noncommercial Items" clause contained in the contractor's contract with the Government.

227.403–16 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.

(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 non-disclosure agreement at 227.403–7 and the requirements of the clause at 252.227–7013 governing use, modification, reproduction, release, performance, display, or disclosure of such data have been satisfied.

227.403–17 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 227.403–17(c)) in lieu of the clause at 252.227–7013, "Rights in Technical Data—Noncommercial Items" when the Government requires the unrestricted right to use, modify, reproduce, release, or disclose any technical data to be delivered under the contract. Do not use the clause in contracts for Existing or Special Works.

(b) The clause at 252.227–7032 may be modified to accommodate the needs of a specific overseas procurement situation, provided the Government obtains rights to the technical data that are not less than the rights the Government would have obtained under the data rights clause prescribed in this Part for a comparable procurement performed within the United States or its possessions.

(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 possessions.

227.404 Contracts under the Small Business Innovative Research Program.

(a) Use the clause at 252.227–7018, "Rights in Technical Data and Computer Software—Small Business Innovative Research Program", when technical data or computer software will be generated during performance of contracts under

the Small Business Innovative Research (SBIR) program.

(b) Under that clause, the Government obtains a royalty free license to use technical data marked with an SBIR Data Rights legend only for Government purposes during the period commencing with contract award and ending 5 years after completion of the project under which the data were generated. Upon expiration of the 5 year restrictive license, the Government has unlimited rights in the SBIR data. During the license period, the Government may not release or disclose SBIR data to any person other than—

(1) For evaluational purposes.

(2) As expressly permitted by the contractor; or,

(3) A use, release, or disclosure that is necessary for emergency repair or overhaul of items operated by the Government.

(c) Do not make any release or disclosure permitted by 227.404(b) unless, prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at 227-403-7.

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

(1) In the interest of the Government; and,

(2) 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.

(e) Use the following provision and clauses in SBIR solicitations and contracts that include the clause at 252.227-7018:

(1) 252.227-7017, "Identification and Assertion of Use, Release, or Disclosure Restrictions";

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

(3) 252.227-7030, "Technical Data—Withholding of Payment";

(4) 252.227-7036, "Certification of Technical Data Conformity"; and,

(5) 252.227-7037, "Validation of Asserted Restrictions" (paragraph (d) of the clause contains information that must be included in a challenge).

(f) Use the following clauses and provision in SBIR solicitations and contracts in accordance with the guidance at 227.403-6 (c), (d), and (e)

(1) 252.227-7016, "Rights in Bid or Proposal Data";

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

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

§ 227.405 Contracts for the acquisition of existing works.

§ 227.405-1 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 227.406 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 227.403 when the Government does not need to control distribution of such works or obtain such indemnities.

§ 227.405-2 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—Noncommercial Items", 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, "Rights in Data—Existing Works", provides the Government, and others acting on its behalf, a paid-up, non-exclusive, irrevocable, worldwide 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.

§ 227.405-3 Acquisition of modified existing works.

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

§ 227.406 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 content, performance, use, or disclosure of such works. Use the clause—

(1) In lieu of the clause at 252.227-7013, "Rights in Technical Data—Noncommercial Items", when the Government must own or control copyright in all works first produced, created, or generated and required to be delivered under a contract.

(2) In addition to the clause at 252.227-7013, "Rights in Technical Data—Noncommercial Items" 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.

227.407 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.

227.407-1 Architectural designs and data clauses for architect-engineer or construction contracts.

(a) Except as provided in 227.407-1(b), 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.

227.407-2 Contracts for construction supplies and research and development work.

The provisions and clauses required by 227.407-1 shall not be used 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.

227.407-3 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.

227.408 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 non-disclosure agreements (see 227.403-7) 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 227.5—Rights in Computer Software and Computer Software Documentation

8. A new subpart 227.5 is added to read as follows:

227.5 Rights in computer software and computer software documentation

Sec.

227.500 Scope of subpart.
227.501 Definitions.
227.502 Commercial computer software and commercial computer software documentation.
227.502-1 Policy.
227.502-2 Obtaining commercial computer software or commercial computer software documentation.
227.502-3 Rights in commercial computer software or commercial computer software documentation.
227.502-4 Contract clause.
227.503 Noncommercial computer software and computer software documentation.
227.503-1 Policy.
227.503-2 Acquisition of noncommercial computer software and computer software documentation.
227.503-3 Early identification of computer software or computer software documentation to be furnished to the Government with restrictions on use, reproduction, or disclosure.
227.503-4 License rights.
227.503-5 Government rights.
227.503-6 Contract clauses.

227.503–7 [Reserved]
227.503–8 Deferred delivery and deferred ordering of computer software and computer software documentation.
227.503–9 Copyright.
227.503–10 Contractor identification and marking of computer software or computer software documentation to be furnished with restrictive markings.
227.503–11 Contractor procedures and records.
227.503–12 Government right to establish conformity of markings.
227.503–13 Government right to review, verify, challenge, and validate asserted restrictions.
227.503–14 Conformity, acceptance, and warranty of computer software and computer software documentation.
227.503–15 Subcontractor rights in computer software or computer software documentation.
227.503–16 Providing computer software or computer software documentation to foreign governments, foreign contractors, or international organizations.
227.503–17 Overseas contracts with foreign sources.
227.504 Contracts under the Small Business Innovative Research Program.
227.505 Contracts for special works.
227.506 Contracts for architect-engineer services.
227.507 Contractor data repositories.

227.5 Rights in computer software or computer software documentation.

227.500 Scope of subpart.

This subpart—

(a) 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 disclosure such software or documentation. It implements requirements in the following laws and Executive Order:

10 U.S.C. 2302(4)
10 U.S.C. 2305 (subsection (d)(4))
10 U.S.C. 2320
10 U.S.C. 2321
10 U.S.C. 2325
Executive Order 12591 (subsection 1(b)(6))

(b) Does not apply to computer software or computer software documentation acquired under GSA schedule contracts.

227.501 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 Computer Software and Computer Software Documentation."

227.502 Commercial computer software and commercial computer software documentation.

227.502–1 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 to such software or documentation to meet the requirements of a DoD solicitation;

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

227.502–2 Obtaining commercial computer software or commercial computer software documentation.

Commercial computer software or commercial computer software documentation shall be acquired, to the maximum extent practicable, using the procedures at 211.70.

227.502–3 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.

227.502–4 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 227.502–3, the Governments rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation shall be identified in a license agreement.

227.503 Noncommercial computer software and noncommercial computer software documentation.

227.503–1 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;

(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 contractor's 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 227.503–5(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, release, or disclose the software may be restricted.

227.503–2 Acquisition of noncommercial computer software and computer software documentation.

(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 27.503–1.

(b)(1) Data managers or other requirements personnel are responsible for identifying the Government's minimum needs. In addition to desired software performance, compatibility, or other technical considerations, needs determinations should consider such factors as multiple site or shared use requirements, whether the Government's software maintenance philosophy will require the right to modify or have third parties modify the software, and any special computer software documentation requirements.

(2) 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 assuring that, to the maximum extent 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 user 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; and,

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

227.503–3 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 Noncommercial Computer Software and Noncommercial 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, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation" 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 227.503–6(a)(1).

227.503–4 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, release, or disclose computer software developed exclusively or partially at private expense (see 227.503–5 (b) and (c)). They may not, without the Government's agreement (see 227.503–5(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 (eg., 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 Noncommercial Computer Software and Noncommercial Computer Software Documentation."

227.503–5 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. 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 this 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 at 227.503–5(a), 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 form 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 permit or 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 non-disclosure agreement at 227.403–7; 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 non-disclosure 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 non-disclosure restrictions. Public announcements in the Commerce Business Daily or other publications must provide notice of the use and non-disclosure requirements. Class use and non-disclosure 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 noncommercial computer software required to be delivered or otherwise provided to the government under this contract that were 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 227.503–5(d)). 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.

§ 227.503–6 Contract clauses.

(a)(1) Use the clause at 252.227–7014, "Rights in Noncommercial Computer Software and Noncommercial 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 of commercial computer software documentation, commercial items (see 227.402–3), special works (see 277.505), contracts under the Small Business Innovative Research Program (see 227.404), or in Architect-Engineer and construction contracts (see 227.407).

(2) Use the clause with the 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 252.227–7019, "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.

(c) Use the clause at 252.227–7037, "Validation of Asserted Restrictions", in solicitations and contracts that include the clause at 252.227–7014 when the contractor will be required to deliver noncommercial computer software documentation (technical data). The clause implements statutory requirements under 10 U.S.C. 2321. Paragraph (d) of the clause contains information that must be included in a formal challenge.

(d) Use the clause at 252.227–7016, "Rights in Bid or Proposal Data", in solicitations and contracts when the

Government anticipates a need to use, subsequent to contract award, computer software or computer software documentation included in a bid or proposal that are not required to be delivered under the contract.

(e) 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, for performance of its contract, computer software or computer software documentation marked with another contractor's restrictive legend(s).

(f) 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.

227.503–7 [Reserved]

227.503–8 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 and 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.

227.503–9 Copyright.

(a) *Copyright license.* (1) The clause at 252.227–7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation", requires 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 clause at 252.227–7013 does not permit a contractor to incorporate a third party'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 227.505 for copyright considerations when acquiring special works.

227.503–10 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 15.607. 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 227.503–13.

(3) The restrictions asserted by a successful offeror shall be attached to its contract unless, in accordance with the procedures at 227.503–13, 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. Subsequent to the contract award, the clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation", permits 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 227.503-13, 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 computer software or computer software documentation.

(b) *Contractor marking requirements.* The clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation" requires—

(1) 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, provides instructions for the placement of the restrictive markings, and authorizes 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.

(2) The 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, reproduce, 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 227.503-10(c)(2)) 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; and,

(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 "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation" clause at 252.227-7014; 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.

227.503-11 Contractor procedures and records.

(a) The clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation" requires 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.

227.503-12 Government right to establish conformity of markings.

(a) *Nonconforming markings.* (1) Authorized markings are identified in the clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation." 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 clause at 252.227-7014 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". 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 that 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 the existence of a formal 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 sixty (60) days following receipt of the software or documentation, the unjustified marking shall be corrected or stricken at that person's expense.

227.503–13 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 227.503–5(d) when additional license rights are needed but there is no basis to suspect that an asserted restriction right not be valid.

(c) *Transacting matters directly with subcontractors.* The clause at 252.227–7019 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; or,

(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, "Validation of Asserted Restrictions—Computer Software" 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 "Validation of Asserted Restrictions" clause, 252.227–7037, and the guidance at 227.403–13. The procedures in that clause implement requirements contained in 10 U.S.C. 2321. Resolution of questions regarding the validity of asserted restrictions using the process described at 227.403–12(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 3 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 227.503–12(b)(2) is strongly encouraged. After consideration of the situations described in 227.503–13(c), 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 in 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.

§ 227.503–14 Conformity, acceptance, and warranty of computer software and computer software documentation.

(a) *Computer software documentation.* Computer software documentation is technical data. See 227.403–14 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 227.503–12(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 246.770.

(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.

§ 227.503.15 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 is 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", 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 227.503–13(c) for computer software and 227.403–13(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 227.403–15(c) for clauses required when subcontractors or suppliers will be furnishing computer software documentation (technical data))—

(1) 252.227–7014, "Rights in Noncommercial Computer Software and Noncommercial 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 Computer Software and Computer Software Documentation" clause contained in the contractor's contract with the Government.

227.503–16 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 persons or authorize the use of such data by those persons.

(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 persons, or authorize the use of such data by those persons, unless the intended recipient is subject to the same provisions as included in the use and non-disclosure agreement at 227.403–7 and the requirements of the clause at 252.227–7014 governing use, release, or disclosure of such data have been satisfied.

227.503–17 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 252.503–17(c)) in lieu of the clause at 252.227–7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation" when the Government requires the unrestricted right to use, modify, reproduce, release, or disclose any computer software or computer software documentation to be delivered

under the contract. Do not use the clause in contracts for Special Works.

(b) The clause at 252.227-7032 may be modified to accommodate the needs of a specific overseas procurement situation, provided the Government obtains rights to the computer software or computer software documentation that are not less than the rights the Government would have obtained under the data rights clause prescribed in this Part for a comparable procurement performed within the United States or its possessions.

(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 possessions.

227.504 Contracts under the Small Business Innovative Research Program.

When contracting under the Small Business Innovative Research Program, follow the procedures at 227.404.

227.505 Contracts for special works.

(a) Use the clause at 252.227-7020, "Rights in Data—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 content, performance, use, or disclosure of such software or documentation. Use the clause—

(1) In lieu of the clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial 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.

(2) In addition to the clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation", 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 the information contained in 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 this clause 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.

227.506 Contracts for architect-engineer services.

Follow 227.407 when contracting for architect-engineer services.

227.507 Contractor data repositories.

Follow 227.408 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.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

9. Sections 252.211-7000 through 252.211-7014 and sections 252.211-7018 through 252.211-7021 are amended by revising the word "item" to read "product" wherever it appears.

10. Section 252.211-7006(a) is revised to read as follows:

252.211-7006 Title and risk of loss—commercial items.

* * * * *

(a) Except for technical data or commercial computer software, title to products furnished under this contract shall pass to the Government upon final acceptance, regardless of when or where the Government takes physical possession, unless this contract specifically provides for earlier passage of title. Title to technical data or commercial computer software shall remain with the contractor unless otherwise specified in this contract.

* * * * *

11. Section 252.211-7012 is amended by revising paragraph (b); by revising paragraph (c)(1); by redesignating paragraph (c)(2) as paragraph (c)(4); and by adding new paragraphs (c)(2) and (c)(3) to read as follows:

252.211-7012 Certifications—commercial items—competitive acquisitions.

* * * * *

(b) *Definitions:*

As used in this provision:

(1) The term *commercial products* includes commercial computer software, commercial computer software documentation, and other commercial items.

(2) *Commercial items* means items, other than computer software, developed or regularly used for other than Government purposes that—

(i) Have been sold, leased, or licensed to the public; or,

(ii) Have been offered for sale, lease, or license to the public; or,

(iii) Have not been offered, sold, leased, or licensed to the public, but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of the resulting contract; or,

(iv) Satisfy a criterion expressed in (b)(2)(i), or (ii) or (iii) and would require only minor modification to meet the requirements of the procuring agency.

(3) *Commercial computer software* means software developed or regularly used for non-governmental purposes which—

(i) Has been sold, leased, or licensed to the public; or,

(ii) Has been offered for sale, lease, or license to the public; or,

(iii) Has not been offered, sold, leased, or licensed to the public, but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of the resulting contract; or,

(iv) Satisfy a criterion expressed in (b)(2)(i), or (ii) or (iii) and would require only

minor modification to meet the requirements of the procuring agency.

(4) *Computer software* means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer databases or computer software documentation.

(5) *Commercial computer software documentation* means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the commercial computer software or provide instructions for using the commercial computer software.

(6) *Computer database* means a collection of recorded data in a form capable of being processed by a computer. The term does not include computer software.

(7) *Computer program* means a set of instructions, rules, or other routines, recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

(8) *Minor modification* means:

(i) For commercial items, a modification that does not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process, or is of the type customarily performed in the commercial market place.

(ii) For commercial computer software, a modification that does not significantly alter the nongovernmental function or purpose of the software or is of the type customarily provided in the commercial marker place.

(9) *Existing or prior source* means entities that are furnishing or previously furnished items or software to the Government, in accordance with Government unique product descriptions, drawings, or specifications, that have not been sold to the public and are being replaced by commercial items or commercial computer software.

(c) The offeror (insert name of offeror) hereby certifies that:

(1) The product(s) offered are commercial items or commercial computer software documentation that satisfy the criteria at paragraph—

_____ (b)(2)(i);
_____ (b)(2)(ii);
_____ (b)(2)(iii); or
_____ (b)(2)(iv) of this provision.

The product(s) offered are commercial computer software that satisfy the criteria at paragraph(s)—

_____ (b)(3)(i);
_____ (b)(3)(ii);
_____ (b)(3)(iii); or
_____ (b)(3)(iv) of this provision.

(3) The product(s) offered in response to this solicitation is (are)—

_____ Identical to the product(s) previously furnished to the Government; or,

_____ A minor modification of a product(s) previously furnished to the Government.

* * * * *

252.211-7015 [Removed and Reserved]

12. Section 252.211-7015 is removed and reserved.

252.211-7016 [Removed and Reserved]

13. Section 252.211-7016 is removed and reserved.

252.211-7017 [Removed and Reserved]

14. Section 252.211-7017 is removed and reserved.

252.222-7021 [Amended]

15. Section 252.211-7021(b)(1) is amended by adding an additional clause at the end of the clause list reading "252.227-7015 Technical Data—Commercial Items."

16. Section 252.227-7013 is revised to read as follows:

252.227-7013 Rights in technical data—Noncommercial items.

As prescribed in 227.403-6(a), use the following clause:

RIGHTS IN TECHNICAL DATA—NONCOMMERCIAL ITEMS (XXX 1994)

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

(1) *Computer data base* means a collection of data recorded in a form capable of being processed by a computer. The term does not include computer software.

(2) *Computer program* means a set of instructions, rules, or routines recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

(3) *Computer software* means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer data bases or computer software documentation.

(4) *Computer software documentation* means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

(5) *Detailed manufacturing or process data* means technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

(6) *Developed* means that an item, component, or process exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered "developed", the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component or process be actually reduced to practice within the meaning of Title 35 of the United States Code.

(7) *Development exclusively at private expense* means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

(i) Private expense determinations should be made at the lowest practicable level.

(ii) Under fixed price contracts, when total costs are greater than the firm fixed price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at Government, private, or mixed expense.

(8) *Developed exclusively with government funds* means development was not accomplished exclusively or partially at private expense.

(9) *Developed with mixed funding* means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

(10) *Form, fit, and function data* means technical data that describes the required overall physical, functional, and performance characteristics, (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(11) *Government purpose* means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or authorize others to do so.

(12) *Government purpose rights* means the rights to—

(i) Use, modify, reproduce, release, perform, display, or disclose technical data within the government without restriction; and,

(ii) Release or disclose technical data outside the government and authorize persons to whom release or disclosure has been to use, modify, reproduced, release, perform, display, or disclose that data for United States government purposes.

(13) *Limited rights* means the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the government, use the technical data for manufacture, or authorize the technical data to be used by another party,

except that the Government may reproduce, release or disclose such data by persons outside the government if reproduction, release, disclosure, or use is—

(i) Necessary for emergency repair and overhaul; or,

(ii) A release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the Government and is required for evaluation or informational purposes; and,

(iii) Subject to a prohibition on the further reproduction, release, disclosure, or use of the technical data; and,

(iv) The contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, or use.

(14) *Technical data* means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

(15) *Unlimited rights* means rights to use, modify, reproduce, perform, display, release, or disclose technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Rights in technical data.* The contractor grants or shall obtain for the government the following royalty free, worldwide, nonexclusive, irrevocable license rights in technical data other than computer software documentation (see 252.227-7014 for rights in computer software documentation):

(1) *Unlimited rights.* The Government shall have unlimited rights in technical data that are—

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

(ii) Studies, analyses, test data, or similar data produced for this contract, when the study, analysis, test, or similar work was specified as an element of performance.

(iii) 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.

(iv) Form, fit, and function data;

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

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

(vii) Otherwise 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 technical data to another party or the sale or transfer of some or all of a business entity or its assets to another party;

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

(ix) Data furnished to the government, under this or any other government contract or subcontract thereunder, with:

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

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

(2) *Government purpose rights.* (i) The Government shall have government purpose rights for a five year period, or such other period as may be negotiated, in technical data—

(A) That pertain to items, components, or processes developed with mixed funding except when the Government is entitled to unlimited rights in such data as provided in (b)(ii) and (b)(iv) through (b)(ix) of this clause; or,

(B) 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.

(ii) The five year period, or such other period as may have been negotiated, shall commence upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required development of the items, components, or processes or creation of the data described in (b)(2)(i)(B). Upon expiration of the five year or other negotiated period, the Government shall have unlimited rights in the technical data.

(iii) The Government shall not release or disclose technical data in which it has government purpose rights unless—

(A) Prior to release or disclosure, the intended recipient is subject to the non-disclosure agreement at 227.403-7; or,

(B) The 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."

(iv) The contractor has the exclusive right, including the right to license others, to use technical data in which the government has obtained government purpose rights under this contract for any commercial purpose during the time period specified in the government purpose rights legend prescribed in paragraph (f)(2) of this clause.

(3) *Limited Rights.* (i) Except as provided in subparagraphs (b)(1)(ii) and (b)(1)(iv) through (b)(1)(ix) of this clause, the Government shall have limited rights in technical data—

(A) Pertaining to items, components, or processes developed exclusively at private expense and marked with the limited rights legend prescribed in paragraph (f) of this clause; or,

(B) 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.

(ii) The Government shall require a recipient of limited rights data for emergency repair or overhaul to destroy the data and all copies in its possession promptly following completion of the emergency repair/overhaul and to notify the Contractor that the data have been destroyed.

(iii) The contractor, its subcontractors, and suppliers are not required to provide the Government additional rights to use, modify, reproduce, release, or disclose technical data furnished to the Government with limited rights. However, if the Government desires to obtain additional rights in technical data in which it has limited rights, the contractor agrees to promptly enter into negotiations with the contracting officer to determine whether there are acceptable terms for transferring such rights. All technical data in which the contractor has granted the Government additional rights shall be listed or described in a license agreement made part of the contract. The license shall enumerate the additional rights granted the Government in such data.

(4) *Specifically negotiated license rights.* The standard license rights granted to the Government under subparagraphs (b)(1) through (b)(3) of this clause, including the period during which the Government shall have government purpose rights in technical data, may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the Government lesser rights than are enumerated in paragraph (a)(13) of this clause. Any rights so negotiated shall be identified in a license agreement made part of this contract.

(5) Prior government rights. Technical data that will be delivered, furnished, or otherwise provided to the Government under this contract, in which the Government has previously obtained rights shall be delivered, furnished, or provided with the pre-existing rights, unless—

(i) The parties have agreed otherwise; or,

(ii) Any restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose the data have expired or no longer apply.

(6) *Release from liability.* The contractor agrees to release the Government from liability for any release or disclosure of technical data made in accordance with paragraphs (a)(13) or (b)(2)(iii) of this clause, in accordance with the terms of a license negotiated under (b)(4) of this clause, or by others to whom the recipient has released or disclosed the data and to seek relief solely from the party who has improperly used, modified, reproduced, released, performed, displayed, or disclosed contractor data marked with restrictive legends.

(c) *Contractor rights in technical data.* All rights not granted to the government are retained by the contractor.

(d) *Third party copyrighted data.* The contractor shall not, without the written approval of the contracting officer, incorporate any copyrighted data in the technical data to be delivered under this contract unless the contractor is the copyright owner or has obtained for the Government the license rights necessary to perfect a license or licenses in the deliverable data of the appropriate scope set forth in paragraph (b) of this clause, and has affixed a statement of the license or licenses

obtained on behalf of the Government and other persons to the data transmittal document.

(e) *Identification and delivery of data to be furnished with restrictions on use, release, or disclosure.* (1) This paragraph does not apply to restrictions based solely on copyright.

(2) Except as provided in subparagraph (e)(3) of this clause, technical data that the contractor asserts should be furnished to the Government with restrictions on use, release, or disclosure are identified in an Attachment to this contract ("the Attachment"). The contractor shall not deliver any data with restrictive markings unless the data are listed on the Attachment.

(3) In addition to the assertions made in the Attachment, other assertions may be identified after award when based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the source selection decision. Such identification and assertion shall be submitted to the contracting officer as soon as practicable prior to the scheduled date for delivery of the data, in the following format, and signed by an official authorized to contractually obligate the contractor:

"Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data. The contractor asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following technical data should be restricted—

Technical Data to be furnished With Restrictions*	Basis for Assertion**	Asserted Rights Category***	Name of Person Asserting Restrictions****
(LIST)	(LIST)	(LIST)	(LIST)

*If the assertion is applicable to items, components, or processes developed at private expense, identify both the data and each such item, component, or process.

**Generally, the development of an item, component, or process at private expense, either exclusively or partially, is the only basis for asserting restrictions on the Government's rights to use, release, or disclose technical data pertaining to such items, components, or processes. Indicate whether development was exclusively or partially at private expense. If development was not at private expense, enter the specific reason for asserting that the Government's rights should be restricted.

***Enter asserted rights category (e.g., government purpose license rights from a prior contract, rights in SBIR data generated under another contract, limited or government purpose rights under this or a prior contract, or specifically negotiated licenses).

**** Corporation, individual, or other person, as appropriate.

Date _____

Printed Name and Title _____

Signature _____"

(End of Identification and Assertion)

(4) When requested by the contracting officer, the contractor shall provide sufficient information to enable the contracting officer to evaluate the contractor's assertions. The contracting officer reserves the right to add the contractor's assertions to the Attachment and validate any listed assertion, at a later date, in accordance with the procedures of the "Validation of Restrictive Markings on Technical Data" clause of this contract.

(f) *Marking requirements.* The contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, or disclose technical data to be delivered under this contract by marking the deliverable data subject to restriction. Except as provided in paragraph (f)(5) of this clause, only the following legends are authorized under this contract: The Government purpose rights legend at subparagraph (f)(2); the limited rights legend at subparagraph (f)(3) of this clause; or, the special license rights legend at subparagraph (f)(4); and/or a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(1) *General marking instructions.* The contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark the appropriate legend on all technical data that qualify for such markings. The authorized legends shall be placed on the transmittal document or storage container and, for printed material, each page of the printed material containing technical data for which restrictions are asserted. When only portions of a page of printed material are subject to the asserted restrictions, such portions shall be identified by circling, underscoring, with a note, or other appropriate identifier. Reproductions of technical data or any portions thereof subject to asserted restrictions shall also reproduce the asserted restrictions.

(2) *Government purpose rights markings.* Data delivered or otherwise furnished to the Government with Government purposes rights shall be marked as follows:

"GOVERNMENT PURPOSE RIGHTS

Contract No. _____

Contractor Name _____

Contractor Address _____

Expiration Date _____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(2) of the clause at 252.227-7013 contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings."

(End of Legend)

(3) *Limited rights markings.* Data delivered or otherwise furnished to the Government with limited rights shall be marked with the following legend:

"LIMITED RIGHTS

Contract No. _____

Contractor Name _____

Contractor Address _____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(3) of the clause at 252.7013 contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named contractor."

(End of Legend)

(4) *Special license rights markings.* (i) Data in which the Government's rights stem from a specifically negotiated license shall be marked with the following legend:

"Special License Rights

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these data are restricted by contract no. _____ (Insert contract number) _____, license no. _____ (Insert license identifier) _____. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings."

(End of Legend)

(ii) For purposes of this clause, special licenses do not include Government purpose license rights acquired under a prior contract (see subparagraph (b)(5) of this clause).

(5) *Pre-existing data markings.* If the terms of a prior contract or license permitted the contractor to restrict the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data deliverable under this contract, and those restrictions are still applicable, the contractor may mark such data with the appropriate restrictive legend for which the data qualified under the prior contract or license. The marking procedures in subparagraph (f)(1) of this clause shall be followed.

(g) *Contractor procedures and records.* Throughout performance of this contract, the contractor and its subcontractors or suppliers that will deliver technical data with other than unlimited rights, shall—

(1) Have, maintain, and follow written procedures sufficient to assure that restrictive markings are used only when authorized by the terms of this clause; and,

(2) Maintain records sufficient to justify the validity of any restrictive markings on technical data delivered under this contract.

(h) *Removal of unjustified and nonconforming markings.* (1) *Unjustified technical data markings.* The rights and obligations of the parties regarding the validation of restrictive markings on technical data furnished or to be furnished under this contract are contained in the clause at 252.227-7037, "Validation of Restrictive Markings on Technical Data"

foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation for commercial purposes or authorize others to do so.

(11) *Government purpose rights* means the rights to –

(i) Use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation within the government without restriction; and,

(ii) Release or disclose computer software or computer software documentation outside the government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose the software or documentation for United States government purposes.

(12) *Minor modification* means a modification that does not significantly alter the nongovernmental function or purpose of the software or is of the type customarily provided in the commercial marketplace.

(13) *Noncommercial computer software* means software that does not qualify as commercial computer software under (a)(1) of this clause.

(14) *Restricted rights* apply only to noncommercial computer software and mean the Government's rights to—

(i) Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;

(ii) Transfer a computer program to another Government agency without the further permission of the contractor if the transferor destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer. Transferred programs remain subject to the provisions of this clause.

(iii) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;

(iv) Modify computer software provided that the Government may—

(A) Use the modified software only as provided in subparagraphs (a)(14)(i) and (iii) of this clause;

(B) Not release or disclose the modified software except as provided in subparagraphs (a)(14)(ii), (v) and (vi) of this clause.

(v) Permit contractors or subcontractors performing service contracts (see FAR 37.101) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations, provided that—

(A) the government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

(B) Such contractors or subcontractors are subject to the use and non-disclosure agreement at 227.403–7 or are government contractors 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";

(C) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the government pursuant to subparagraph (a)(14)(iv) of this clause, for any other purpose; and,

(D) Such use is subject to the limitation in subparagraph (a)(14)(i) of this clause.

(vi) Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made, provided that—

(A) The intended recipient is subject to the use and non-disclosure agreement at 227.403–7 or 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"; and

(B) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the government pursuant to subparagraph (a)(14)(iv) of this clause, for any other purpose.

(15) *Unlimited rights*, means rights to use, modify, reproduce, release, perform, display, or disclose, computer software or computer software documentation in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Rights in computer software or computer software documentation*. The contractor grants or shall obtain for the government the following royalty free, worldwide, nonexclusive, irrevocable license rights in noncommercial computer software or computer software documentation. All rights not granted to the government are retained by the contractor.

(1) *Unlimited rights*. The government shall have unlimited rights in:

(i) Computer software developed exclusively with government funds;

(ii) Computer software documentation required to be delivered under this contract;

(iii) Corrections or changes to computer software or computer software documentation furnished to the contractor by the government;

(iv) Computer software or computer software documentation that is otherwise publicly available or has been released or disclosed by the contractor or subcontractor without restriction 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;

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

(vi) Computer software or computer software documentation furnished to the government, under this or any other government contract or subcontract thereunder with—

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

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

(2) *Government purpose rights*.

(i) Except as provided in paragraph (b)(1) of this clause, the government shall have government purpose rights in computer software developed with mixed funding.

(ii) Government purpose rights shall remain in effect for a period of five years unless a different period has been negotiated. Upon expiration of the five year or other negotiated period, the government shall have unlimited rights in the computer software or computer software documentation. The government purpose rights period shall commence upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required development of the computer software.

(iii) The government shall not release or disclose computer software in which it has government purpose rights to any other person unless:

(A) Prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at 227.403–7; or,

(B) The recipient is a government contractor receiving access to the software or documentation 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."

(3) *Restricted rights*. (i) The government shall have restricted rights in noncommercial computer software required to be delivered or otherwise provided to the government under this contract that were developed exclusively at private expense.

(ii) The contractor, its subcontractors, or suppliers are not required to provide the government additional rights in noncommercial computer software delivered or otherwise provided to the government with restricted rights. However, if the government desires to obtain additional rights in such software, the contractor agrees to promptly enter into negotiations with the contracting officer to determine whether there are acceptable terms for transferring such rights. All noncommercial computer software in which the contractor has granted the government additional rights shall be listed or described in a license agreement made part of the contract (see paragraph (b)(4) of this clause). The license shall enumerate the additional rights granted the government.

(4) *Specifically negotiated license rights*. (i) The standard license rights granted to the

government under subparagraphs (b)(1) through (b)(3) of this clause, including the period during which the government shall have government purpose rights in computer software, may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the Government lesser rights in computer software than are enumerated in paragraph (a)(14) of this clause or lesser rights in computer software documentation than are enumerated in paragraph (a)(13) of the clause at 252.227-7013, Rights in Technical Data—Noncommercial Items.

(ii) Any rights so negotiated shall be identified in a license agreement made part of this contract.

(5) *Prior government rights.* Computer software or computer software documentation that will be delivered, furnished, or otherwise provided to the Government under this contract, in which the Government has previously obtained rights shall be delivered, furnished, or provided with the pre-existing rights, unless—

(i) The parties have agreed otherwise; or,

(ii) Any restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose the data have expired or no longer apply.

(6) *Release from liability.* The contractor agrees to release the government from liability for any release or disclosure of computer software made in accordance with subparagraphs (a)(14), or (b)(2)(iii) of this clause, in accordance with the terms of a license negotiated under (b)(4) of this clause, or by others to whom the recipient has released or disclosed the software, and to seek relief solely from the party who has improperly used, modified, reproduced, released, performed, displayed, or disclosed contractor software marked with restrictive legends.

(c) *Rights in derivative computer software or computer software documentation.* The Government shall retain its rights in the unchanged portions of any computer software or computer software documentation delivered under this contract that the contractor uses to prepare, or includes in, derivative computer software or computer software documentation.

(d) *Third party copyrighted computer software or computer software documentation.* The contractor shall not, without the written approval of the contracting officer, incorporate any copyrighted computer software or computer software documentation in the software or documentation to be delivered under this contract unless the contractor is the copyright owner or has obtained for the Government the license rights necessary to perfect a license or licenses in the deliverable software or documentation of the appropriate scope set forth in paragraph (b) of this clause, and prior to delivery of such—

(1) Computer software, has provided a statement of the license rights obtained in a form acceptable to the contracting officer; or,

(2) Computer software documentation, has affixed to the transmittal document a statement of the license rights obtained.

(e) *Identification and delivery of computer software and computer software documentation to be furnished with restrictions on use, release, or disclosure.*

(1) This paragraph does not apply to restrictions based solely on copyright.

(2) Except as provided in subparagraph (e)(3) of this clause, computer software that the contractor asserts should be furnished to the government with restrictions on use, release, or disclosure is identified in an Attachment to this contract ("the Attachment"). The contractor shall not deliver any software with restrictive markings unless the software is listed on the Attachment.

(3) In addition to the assertions made in the Attachment, other assertions may be identified after award when based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the source selection decision. Such identification and assertion shall be submitted to the contracting officer as soon as practicable prior to the scheduled date for delivery of the software, in the following format, and signed by an official authorized to contractually obligate the contractor:

"Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Computer Software. The contractor asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following computer software should be restricted—

Computer Software to be Furnished With Restrictions*	Basis for Assertion**	Asserted Rights Category***	Names of Person Asserting Restrictions****
(LIST)	(LIST)	(LIST)	(LIST)

* Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions on the Government's rights to use, release, or disclose computer software.

** Indicate whether development was exclusively or partially at private expense. If development was not at private expense, enter the specific reason for asserting that the government's rights should be restricted.

*** Enter asserted rights category (e.g., restricted or government purpose rights in computer software, government purpose license rights from a prior contract, rights in SBIR software generated under another contract, or specifically negotiated licenses).

**** Corporation, individual, or other person, as appropriate.

Date _____

Printed Name and Title _____

Signature _____"

(End of Identification and Assertion)

(4) When requested by the contracting officer, the contractor shall provide sufficient information to enable the contracting officer to evaluate the contractor's assertions. The contracting officer reserves the right to add the contractor's assertions to the Attachment and validate any listed assertion, at a later date, in accordance with the procedures of the "Validation of Asserted Restrictions—Computer Software" clause of this contract.

(f) *Marking requirements.* The contractor, and its subcontractors or suppliers, may only assert restrictions on the government's rights to use, modify, reproduce, release, or disclose computer software by marking the deliverable software or documentation subject to restriction. Except as provided in paragraph (f)(5) of this clause, only the following legends are authorized under this contract: the government purpose rights legend at subparagraph (f)(2); the restricted rights legend at subparagraph (f)(3) of this clause; or, the special license rights legend at subparagraph (f)(4); and/or a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(1) *General marking instructions.* The contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark the appropriate legend on all computer software that qualify for such markings. The authorized legends shall be placed on the storage container or the software and each page, or portions thereof, of printed materials containing computer software for which restrictions are asserted. Instructions that interfere with or delay the operation of computer software in order to display a restrictive rights legend or other license statement at any time prior to or during use of the computer software shall not be inserted in the software, or otherwise cause such interference or delay, unless the contracting officer's written permission to deliver such software has been obtained prior to delivery. Reproductions of computer software or any portions thereof subject to asserted restrictions, shall also reproduce the asserted restrictions.

(2) *Government purpose rights markings.* Computer software delivered or otherwise furnished to the government with government purpose rights shall be marked as follows:

"GOVERNMENT PURPOSE RIGHTS

Contract No. _____

Contractor Name _____

Contractor Address _____

Expiration Date _____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (b)(2) of the clause at 252.227-7014 contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of the software or portions thereof marked with this legend must also reproduce the markings."

(End of Legend)

(3) *Restricted rights markings.* Software delivered or otherwise furnished to the Government with restricted rights shall be marked with the following legend:

"RESTRICTED RIGHTS

Contract No. _____
Contractor Name _____
Contractor Address _____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (b)(3) of the clause at 252.277–7014 contained in the above identified contract. Any reproduction of computer software or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such software must promptly notify the above named contractor."

(End of Legend)

(4) *Special license rights markings.* (i) Computer software or computer software documentation in which the government's rights stem from a specifically negotiated license shall be marked with the following legend:

"Special License Rights

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by contract no. _____ (Insert contract number) _____, license no. _____ (Insert license identifier) _____. Any reproduction of computer software, computer software documentation, or portions thereof marked with this legend must also reproduce the markings."

(End of Legend)

(ii) For purposes of this clause, special licenses do not include government purpose license rights acquired under a prior contract (see subparagraph (b)(5) of this clause).

(5) *Pre-existing markings.* If the terms of a prior contract or license permitted the contractor to restrict the government's rights to use, modify, release, perform, display, or disclose computer software or computer software documentation and those restrictions are still applicable, the contractor may mark such software or documentation with the appropriate restrictive legend for which the software qualified under the prior contract or license. The marking procedures in subparagraph (f)(1) of this clause shall be followed.

(g) *Contractor procedures and records.* Throughout performance of this contract, the contractor and its subcontractors or suppliers that will deliver computer software or computer software documentation with other than unlimited rights, shall—

(1) Have, maintain, and follow written procedures sufficient to assure that restrictive markings are used only when authorized by the terms of this clause; and

(2) Maintain records sufficient to justify the validity of any restrictive markings on computer software or computer software documentation delivered under this contract.

(h) *Removal of unjustified and nonconforming markings.* (1) *Unjustified computer software or computer software documentation markings.* The rights and obligations of the parties regarding the validation of restrictive markings on computer software or computer software documentation furnished or to be furnished under this contract are contained in the clauses at 252.227–7019, "Validation of Asserted Restrictions—Computer Software" or 252.227–7037, "Validation of Restrictive Markings on Technical Data", respectively. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may ignore or, at the Contractor's expense, correct or cancel a marking if, in accordance with the procedures of those clauses, a restrictive marking is determined to be unjustified.

(2) *Nonconforming computer software or computer software documentation markings.* A nonconforming marking is a marking placed on computer software or computer software documentation delivered or otherwise furnished to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to 252.227–7019 or 252.227–7037. If the contracting officer notifies the contractor of a nonconforming marking or markings and the contractor fails to remove or correct such markings within sixty (60) days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming markings.

(i) *Relation to patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(j) *Limitation on charges for rights in computer software or computer software documentation.* (1) The contractor shall not charge to this contract any cost, including but not limited to license fees, royalties, or similar charges, for rights in computer software or computer software documentation to be delivered under this contract when—

(i) The Government has acquired, by any means, the same or greater rights in the software or documentation; or,

(ii) The software or documentation are available to the public without restrictions.

(2) The limitation in paragraph (j)(1)—

(i) Includes costs charged by a subcontractor or supplier, at any tier, or costs incurred by the contractor to acquire rights in subcontractor or supplier computer software or computer software documentation, if the subcontractor or supplier has been paid for such rights under any other Government contract or under a license conveying the rights to the Government;

(ii) Does not include the reasonable costs of reproducing, handling, or mailing the documents or other media in which the software or documentation will be delivered.

(k) *Applicability to subcontractors or suppliers.* (1) Whenever any computer software or computer software documentation is to be obtained from a subcontractor or supplier for delivery to the government under this contract, the contractor shall use this same clause in its subcontracts or other contractual instruments, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. No other clause shall be used to enlarge or diminish the government's, the contractor's, or a higher tier subcontractor's or supplier's rights in a subcontractor's or supplier's computer software or computer software documentation.

(2) The contractor and higher-tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in computer software or computer software documentation from their subcontractors or suppliers.

(3) The contractor shall ensure that subcontractor or supplier rights are recognized and protected in the identification, assertion, and delivery processes required by paragraph (e) of this clause.

(4) In no event shall the contractor use its obligation to recognize and protect subcontractor or supplier rights in computer software or computer software documentation as an excuse for failing to satisfy its contractual obligation to the government.

(End of clause)

ALTERNATE I (XXX 1994)

As prescribed in 227.503–6(a)(2), add the following paragraph to the basic clause:

(l) *Publication for sale.*

(1) This paragraph only applies to computer software or computer software documentation in which the government has obtained unlimited rights or a license to make an unrestricted release of the software or documentation.

(2) The government shall not publish a deliverable item or items of computer software or computer software documentation identified in this contract as being subject to paragraph (l) of this clause or authorize others to publish such software or documentation on its behalf if, prior to publication for sale by the government and within twenty-four (24) months following the date specified in this contract for delivery of such software or documentation, or the removal of any national security or export control restrictions, whichever is later, the Contractor publishes that item or items for sale and promptly notifies the contracting officer of such publication(s). Any such publication shall include a notice identifying the number of this contract and the government's rights in the published software or documentation.

(3) This limitation on the government's right to publish for sale shall continue as long as the software or documentation are reasonably available to the public for purchase.

(END OF ALTERNATE I)

18. Section 252.227–7015 is added to read as follows:

252.227–7015 Technical data—commercial items.

As prescribed in 227.402–3, use the following clause:

TECHNICAL DATA—COMMERCIAL ITEMS (XXX 1994)

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

(1) *Commercial items* means items, other than computer software, developed or regularly used for other than governmental purposes that—

(i) Have been sold, leased, or licensed to the public; or,

(ii) Have been offered for sale, lease, or license to the public; or,

(iii) Have not been offered, sold, leased, or licensed to the public but will be available for commercial sale or license in time to satisfy the delivery requirements of this contract; or,

(iv) Satisfy a criterion expressed in (b) (1), (2), or (3) and would require only minor modification to meet the requirements of the procuring agency.

(2) *Contrator* includes the contractor's subcontractors and suppliers at any tier.

(3) *Form, fit, and function data* means technical data that describes the required overall physical, functional and performance characteristics, (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(4) *Minor modification* means a modification that does not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process, or is of the type customarily performed in the commercial market place.

(5) *Technical data* means recorded information, regardless of the form or method of recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

(b) *License.* (1) The Government shall have the unrestricted right to use, modify, reproduce, release, or disclose technical data, and to permit others to do so, that—

(i) Have been provided to the Government or others without restrictions on use, modification, reproduction, release, or further 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;

(ii) Are form, fit, and function data;

(iii) Are a correction or change to technical data furnished to the contractor by the Government; or,

(iv) Have been provided to the Government under a prior contract or licensing agreement through which the Government has acquired the rights to use, modify, reproduce, release, or disclose the data without restrictions.

(2) Except as provided in paragraph (b)(1) of this clause, the Government may use, modify, reproduce, release, or disclose technical data within the Government only. The Government shall not—

(i) Use the technical data to manufacture additional quantities of the commercial items; or,

(ii) Release, disclose, or authorize use of the technical data outside the Government without the contractor's express permission unless a release, disclosure or permitted use is necessary for emergency repair or overhaul of the commercial items furnished under this contract.

(c) *Additional license rights.* The contractor, its subcontractors, and suppliers are not required to provide the Government additional rights to use, modify, reproduce, release, or disclose technical data. However, if the Government desires to obtain additional rights in technical data, the contractor agrees to promptly enter into negotiations with the contracting officer to determine whether there are acceptable terms for transferring such rights. All technical data in which the contractor has granted the Government additional rights shall be listed or described in a special license agreement made part of the contract. The license shall enumerate the additional rights granted the Government in such data.

(d) *Release from liability.* The contractor agrees that the Government, and other persons to whom the Government may have released or disclosed technical data delivered or otherwise furnished under this contract, shall have no liability for any release or disclosure of technical data that are not marked to indicate that such data are licensed data subject to use, modification, reproduction, release, performance, display, or disclosure restrictions.

(End of Clause)

19. Section 252.227–7016 is added to read as follows:

252.227–7016 Rights in bid or proposal data

As prescribed in 227.403–6(c), 227.404(f), or 227.503–6(d), use the following clause:

RIGHTS IN BID OR PROPOSAL DATA (XXX 1994)

(a) *Definitions.*

(1) As used in this clause the term *data* means technical data or computer software.

(2) For contracts that require the delivery of technical data, the terms *technical data* and *computer software* are defined in the clause at 252.227–7013, "Rights in Technical Data—Noncommercial Items" or, if this is a contract awarded under the under Small business Innovative Research Program, the clause at 252.227–7018, "Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research Programs".

(3) For contracts that do not require the delivery of technical data, the term *computer software* is defined in the clause at 252.227–7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation" or, if this is a contract awarded under the under the Small business Innovative Research Program, the clause at 252.227–7018, "Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research Programs".

(b) Prior to contract award—

(1) The offeror agrees that the Government may reproduce the bid or proposal, or any portions thereof, to the extent necessary to evaluate the offer.

(2) Except as provided in paragraph (d) of this clause, the Government shall use information contained in the bid or proposal only for evaluational purposes and may not disclose, directly or indirectly, such information to any person including potential evaluators, unless that person has been authorized by the Head of the Agency, his or her designee, or the contracting officer to receive such information.

(c) Subsequent to contract award—

(1) Except as provided in paragraphs (c)(2) and (d) of this clause, the Government shall have the rights to use, modify, reproduce, release, perform, display, or disclose information contained in the contractor's bid or proposal within the Government. The Government shall not release, perform, display, or disclose such data outside the Government without the contractor's written permission.

(2) The Government's rights in Data that are required to be delivered under this contract are determined by the "Rights in Technical Data—Noncommercial Items", "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation", or "Rights in Noncommercial Technical Deta and Computer Software—Small Business Innovative Research Programs" clause(s) of this contract.

(d)(1) The Government's rights with respect to Data contained in the contractor's bid or proposal that were provided to the contractor by the Government are subject only to restrictions on use, modification, reproduction, release, performance, display, or disclosure, if any, imposed by the developer or licensor of such Data.

(2) The Government's rights, including the right to permit others to use, modify, reproduce, release, perform, display, or, disclose bid or proposal Data, shall not be restricted in any manner if such Data has been otherwise provided to the Government or to other persons without restrictions on further 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 the business entity or its assets to another party.

(e) The contractor shall include this clause in all subcontracts or similar contractual instruments and require its subcontractors or suppliers to do so without alteration, except to identify the parties.

(END OF CLAUSE)

20. Section 252.227–7017 is added to read as follows:

252.227–7017 Identification and Assertion of Use, Release, or Disclosure Restrictions.

As prescribed in 227.403–3(b), 227.404(e), or 227.503–3(a), use the following provision:

IDENTIFICATION AND ASSERTION OF USE, RELEASE, OR DISCLOSURE RESTRICTIONS (XXX 1994)

(a) The terms used in this provision are defined in following clause or clauses contained in this solicitation—

(1) If a successful offeror will be required to deliver technical data, the clause at 252.227-7013, "Rights in Technical Data—Noncommercial Items" or, if this solicitation contemplates a contract under the Small Business Innovative Research Program, the clause at 252.227-7018, "Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research Programs".

(2) If a successful offeror will not be required to deliver technical data, the clause at 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation" or, if this solicitation contemplates a contract under the Small Business Innovative Research Program, the clause at 252.227-7018, "Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research Programs".

(b) The notification and identification requirements in this provision apply only to technical data, including computer software documentation, or computer software to be delivered with other than unlimited rights. For contracts to be awarded under the Small Business Innovative Research Program, the notification and identification requirements do not apply to technical data or computer software that will be generated under the resulting contract. Notification and identification is not required for restrictions based solely on copyright.

(c) Offers submitted in response to this solicitation shall identify, to the extent known at the time an offer is submitted to the Government, the technical data or computer software that the offeror, its subcontractors or suppliers, or potential subcontractors or suppliers, assert should be furnished to the Government with restrictions on use, release, or disclosure.

(d) The offeror's assertions, including the assertions of its subcontractors or suppliers or potential subcontractors or suppliers, shall be submitted as an attachment to its offer in the following format, dated and signed by an official authorized to contractually obligate the offeror.

"Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data or Computer Software.

The offeror asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following technical data or computer software should be restricted:

Technical Data or Computer Software to be Furnished With Restrictions*	Basis for Assertion**	Asserted Rights Category***	Name of Person Asserting Restrictions****
(LIST)*****	(LIST)	(LIST)	(LIST)

*For technical data (other than computer software documentation) pertaining to items, components, or processes developed at private expense, identify both the deliverable technical data and each such item, component, or process. For computer software or computer software documentation identify the software or documentation.

**Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions. For technical data, other than computer software documentation, development refers to development of the item, component, or process to which the data pertain. The Government's rights in computer software documentation, generally may not be restricted. For computer software, development refers to the software. Indicate whether development was accomplished exclusively or partially at private expense. If development was not accomplished at private expense, or for computer software documentation, enter the specific basis for asserting restrictions.

***Enter asserted right category (e.g., Government purpose license rights from a prior contract, rights in SBIR data generated under another contract, limited, restricted, or government purpose rights under this or a prior contract, or specially negotiated licenses).

****Corporation, individual, or other person, as appropriate.

*****Enter "none" when all data or software will be submitted without restrictions.

Date _____

Printed Name and Title _____

Signature _____"

(End of Identification and Assertion)

(e) An offeror's failure to submit, complete, or sign the notification and identification required by paragraph (d) of this clause with its offer may render the offer ineligible for award.

(f) If the offeror is awarded a contract, the assertions identified in paragraph (d) of this provision shall be listed in an attachment to that contract. Upon request by the contracting officer, the offeror shall provide sufficient information to enable the contracting officer to evaluate any listed assertion.

(END OF PROVISION)

21. Section 252.227-7018 is revised to read as follows:

252.227-7018 Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research Program.

As prescribed in 227.404(a), use the following clause:

RIGHTS IN NONCOMMERCIAL TECHNICAL DATA AND COMPUTER SOFTWARE—SMALL BUSINESS INNOVATIVE RESEARCH PROGRAM (XXX 1994)

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

(1) *Commercial computer software* means software developed or regularly used for non-governmental purposes which—

(i) Has been sold, leased, or licensed to the public;

(ii) Has been offered for sale, lease, or license to the public;

(iii) Has not been offered, sold, leased, or licensed to the public but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of this contract; or,

(iv) Satisfies a criterion expressed in (a)(1)(i), (ii), or (iii) and would require only minor modification to meet the requirements of this contract.

(2) *Computer database* means a collection of recorded data in a form capable of being processed by a computer. The term does not include computer software.

(3) *Computer program* means a set of instructions, rules, or routines, recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

(4) *Computer software* means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer databases or computer software documentation.

(5) *Computer software documentation* means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

(6) *Detailed manufacturing or process data* means technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

(7) *Developed* means—

(1) (applicable to technical data other than computer software documentation) an item, component, or process, exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state where it could be offered for sale or sold on the commercial market, nor must the item, component or process be actually reduced to practice within the meeting of Title 35 of the United States Code.

(ii) A computer program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that

the program can reasonably be expected to perform its intended purpose.

(iii) Computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the software can reasonably be expected to perform its intended purpose.

(iv) Computer software documentation required to be delivered under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

(8) *Developed exclusively at private expense* means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

(i) Private expense determinations should be made at the lowest practicable level.

(ii) Under fixed price contracts, when total costs are greater than the firm fixed price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at Government, private, or mixed expense.

(9) *Developed exclusively with Government funds* means develop was not accomplished exclusively or partially at private expense.

(10) *Developed with mixed funding* means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

(11) *Form, fit, and function data* means technical data that describe the required overall physical, functional, and performance characteristics, (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(12) *Generated* means technical data or computer software first created in the performance of this contract.

(13) *Government purpose* means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software for commercial purposes or authorize other to do so.

(14) *Limited rights* means the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or permit the technical data to be used by another party, except that the Government may reproduce, release or disclose such data or permit the use or reproduction of the data by persons outside the Government if reproduction, release, disclosure, or use is—

(i) Necessary for emergency repair and overhaul; or,

(ii) A release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the Government and is required for evaluational or informational purposes; and,

(iii) Subject to a prohibition on the further reproduction, release, disclosure, or use of the technical data; and,

(iv) The contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, or use.

(15) *Minor modification* means a modification that does not significantly alter the nongovernmental function or purpose of computer software or is of the type customarily provided in the commercial marketplace.

(16) *Noncommercial computer software* means software that does not qualify as commercial computer software under (a)(1) of this clause.

(17) *Restricted rights* apply only to noncommercial computer software and mean the Government's rights to—

(i) Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;

(ii) Transfer a computer program to another Government agency without the further permission of the contractor if the transferor destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer. Transferred programs remain subject to the provisions of this clause.

(iii) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;

(iv) Modify computer software provided that the Government may—

(A) Use the modified software only as provided in subparagraphs (a)(17) (i) and (iii) of this clause;

(B) Not release or disclose the modified software except as provided in subparagraphs (a)(17)(ii), (v) and (vi) of this clause.

(v) Permit contractors or subcontractors performing service contracts (see FAR 37.101) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations, provided that—

(A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made.

(B) Such contractors or subcontractors are subject to the non-disclosure agreements at 227.403–7 or are Government contractors 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";

(C) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to subparagraph (a)(17)(iv) of this clause, for any other purpose; and,

(D) Such use is subject to the limitation in subparagraph (a)(17)(i) of this clause.

(vi) Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made, provided that—

(A) The intended recipient is subject to the non-disclosure agreement at 227.403–7 or 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"; and,

(B) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to subparagraph (a)(17)(iv) of this clause, for any other purpose.

(18) *SBIR data rights* mean a royalty free license for the Government, including its support service contractors, to use, modify, reproduce, release, perform, display, or disclose technical data or computer software generated and delivered under this contract for any United States government purpose.

(19) *Technical data* means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

(20) *Unlimited rights*, means rights to use, modify, reproduce, release, perform, display, or disclose, technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Rights in technical data and computer software.* The contractor grants or shall obtain for the government the following royalty free, worldwide, nonexclusive, irrevocable license rights in technical data or non-commercial computer software. All rights not granted to the Government are retained by the contractor.

(1) *Unlimited rights.* The Government shall have unlimited rights in technical data, including computer software documentation, or computer software generated under this contract that are—

(i) Form, fit, and function data;

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

(iii) Corrections or changes to government-furnished technical data or computer software;

(iv) Otherwise publicly available or have been released or disclosed by the contractor

or a 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 technical data or computer software to another party or the sale or transfer of some or all of a business entity or its assets to another party:

(v) Data or software in which the Government has acquired previously unlimited rights under another government contract or through a specific license; and

(vi) SBIR data upon expiration of the SBIR data rights period.

(2) *Limited rights.* The Government shall have limited rights in technical data, that were not generated under this contract, pertain to items, components or processes developed exclusively at private expense, and are marked, in accordance with the marking instructions in paragraph (f)(1) of this clause, with the legend prescribed in subparagraph (f)(2) of this clause.

(3) *Restricted rights in computer software.* The government shall have restricted rights in noncommercial computer software required to be delivered or otherwise furnished to the Government under this contract that were developed exclusively at private expense and were not generated under this contract.

(4) *SBIR data rights.* (i) Except for technical data, including computer software documentation, or computer software in which the Government has unlimited rights under paragraph (b)(1) of this clause, the Government shall have SBIR data rights in all technical data or computer software generated under this contract during the period commencing with contract award and ending upon the date five years after completion of the project from which such data were generated.

(ii) The Government may not release or disclose SBIR data to any person, other than its support services contractors, except—

(A) As expressly permitted by the contractor;

(B) For evaluational purposes; or,

(C) A release, disclosure, or use that is necessary for emergency repair or overhaul of items operated by the Government.

(iii) A release or disclosure of SBIR data to the Government's support services contractors, or a release or disclosure under paragraphs (b)(4)(ii)(B) or (c) of this clause, may be made only if, prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at 227.403–7 or is a Government contractor receiving access to the technical data or 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) *Specifically negotiated license rights.* The standard license rights granted to the government under paragraphs (b)(1) through (b)(4) of this clause may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the Government lesser rights in technical data, including computer software documentation, than are enumerated in paragraph (a)(14) of this clause or lesser rights in computer software than are enumerated in paragraph (a)(17) of this clause. Any rights so negotiated shall be identified in a license agreement made part of this contract.

(6) *Prior Government rights.* Technical data, including computer software documentation, or computer software that will be delivered, furnished, or otherwise provided to the government under this contract, in which the government has previously obtained rights shall be delivered, furnished, or provided with the pre-existing rights, unless—

(i) The parties have agreed otherwise; or,

(ii) Any restrictions on the government's rights to use, modify, release, perform, display, or disclose the technical data or computer software have expired or no longer apply.

(7) *Release from liability.* The contractor agrees to release the Government from liability for any release or disclosure of technical data, computer software, or computer software documentation made in accordance with paragraphs (a)(14), (a)(17), or (b)(4) of this clause, or in accordance with the terms of a license negotiated under paragraph (b)(5) of this clause, or by others to whom the recipient has released or disclosed the data, software, or documentation and to seek relief solely from the party who has improperly used, modified, reproduced, released, performed, displayed, or disclosed contractor data or software marked with restrictive legends.

(c) *Rights in derivative computer software or computer software documentation.* The government shall retain its rights in the unchanged portions of any computer software or computer software documentation delivered under this contract that the contractor uses to prepare, or includes in, derivative software or documentation.

(d) *Third party copyrighted technical data and computer software.* The contractor shall not, without the written approval of the contracting officer, incorporate any copyrighted technical data, including computer software documentation, or computer software in the data or software to be delivered under this contract unless the contractor is the copyright owner or has obtained for the Government the license rights necessary to perfect a license or licenses in the deliverable data or software of the appropriate scope set forth in paragraph (b) of this clause and, prior to delivery of such—

(1) Technical data, has affixed to the transmittal document a statement of the license rights obtained; or,

(2) Computer software, has provided a statement of the license rights obtained in a form acceptable to the contracting officer.

(e) *Identification and delivery of technical data or computer software to be furnished with restrictions on use, release, or disclosure.* (1) This paragraph does not apply to technical data or computer software that were or will be generated under this contract or to restrictions based solely on copyright.

(2) Except as provided in subparagraph (e)(3) of this clause, technical data or computer software that the contractor asserts should be furnished to the Government with restrictions on use, release, or disclosure is identified in an Attachment to this contract ("the Attachment"). The contractor shall not deliver any technical data or computer software with restrictive markings unless the technical data or computer software are listed on the Attachment.

(3) In addition to the assertions made in the Attachment, other assertions may be identified after award when based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the source selection decision. Such identification and assertion shall be submitted to the contracting officer as soon as practicable prior to the scheduled date for delivery of the technical data or computer software, in the following format, and signed by an official authorized to contractually obligate the contractor:

"Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data or Computer Software.

The contractor asserts for itself, or the persons identified below, that the Government's right to use, release, or disclose the following technical data or computer software should be restricted—

Technical data or computer software to be Furnished With Restrictions*	Basis for Assertion**	Asserted Rights Category***	Name of Person Asserting Restrictions****
(LIST)	(LIST)	(LIST)	(LIST)

*If the assertion is applicable to items, components, or processes developed at private expense, identify both the technical data and each such item, component, or process.

**Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions on the Government's rights to use, release, or disclose technical data or computer software. Indicate whether development was exclusively or partially at private expense. If development was not at private expense, enter the specific reason for asserting that the Government's rights should be restricted.

***Enter asserted rights category (e.g., limited rights, restricted rights, government purpose rights, or government purpose license rights from a prior contract, SBIR data

rights under another contract, or specifically negotiated licenses).

****Corporation, individual, or other person, as appropriate.

Date _____
Printed Name and Trade _____
Signature _____

(End of Identification and Assertion)

(4) When requested by the contracting officer, the contractor shall provide sufficient information to enable the contracting officer to evaluate the contractor's assertions. The contracting officer reserves the right to add the contractor's assertions to the Attachment and validate any listed assertions, at a later date, in accordance with the procedures of the "Validation of Asserted Restrictions—Computer Software, and/or "Validation of Restrictive Markings on Technical Data" clauses of this contract.

(f) *Marking requirements.* The contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, or disclose technical data or computer software to be delivered under this contract by marking the deliverable data or software subject to restriction. Except as provided in paragraph (f) (6) of this clause, only the following markings are authorized under this contract: the limited rights legend at subparagraph (f)(2) of this clause; the restricted rights legend at subparagraph (f)(3), the SBIR data rights legend at subparagraph (f)(4), or, the special license rights legend at subparagraph (f)(5); and/or a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(1) *General marking instructions.* The contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark the appropriate legend to all technical data and computer software that qualify for such markings. The authorized legends shall be placed on the transmittal document or storage container and, for printed material, each page of the printed material containing technical data or computer software for which restrictions are asserted. When only portions of a page of printed material are subject to the asserted restrictions, such portions shall be identified by circling, underscoring, with a note, or other appropriate identifier. Instructions that interfere with or delay the operation of computer software in order to display a restrictive legend or other license statement at any time prior to or during use of the computer software shall not be inserted in the software, or otherwise cause such interference or delay, unless the contracting officer's written permission to deliver such software has been obtained prior to delivery. Reproduction of technical data, computer software, or any portions thereof subject to asserted restrictions shall also reproduce the asserted restrictions.

(2) *Limited rights markings.* Technical data not generated under this contract that pertain to items, components, or processes developed exclusively at private expense and delivered or otherwise furnished with limited rights shall be marked with the following legend:

"LIMITED RIGHTS

Contract No. _____
Contractor Name _____
Contractor Address _____

The Government's right to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(2) of the clause at 252.227-7018. Any reproduction of technical data or portions thereof marked with this legend must also produce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named contractor."

(End of Legend)

(3) *Restricted rights markings.* Computer software delivered or otherwise furnished to the Government with restricted rights shall be marked with the following legend:

"RESTRICTED RIGHTS

Contract No. _____
Contractor Name _____
Contractor Address _____

The Government's right to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (b)(3) of the clause at 252.227-7018. Any reproduction of computer software or portions thereof marked with this legend must also produce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named contractor."

(End of Legend)

(4) *SBIR data rights markings.* Except for technical data or computer software in which the Government has acquired unlimited rights under subparagraph (b)(1) of this clause, or negotiated special license rights as provided in subparagraph (b)(5) of this clause, technical data or computer software generated under this contract shall be marked with the following legend. The contractor shall enter the expiration date for the SBIR data rights period on the legend:

"SBIR DATA RIGHTS

Contract No. _____
Contractor Name _____
Address _____

Expiration of SBIR Data Rights Period _____

The Government's right to use, modify, reproduce, release, perform, display, or disclose technical data or computer software marked with this legend are restricted during the period shown as provided in paragraph (b)(4) of the contract identified above. No restrictions apply after the expiration date shown above. Any reproduction of technical data, computer software, or portions thereof marked with this legend must also reproduce the markings."

(End of Legend)

(5) *Special license rights markings.* (i) Technical data or computer software in which the Government's rights stem from a specifically negotiated license shall be marked with the following legend:

"Special License Rights

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this technical data or computer software are restricted by contract no. _____ (Insert contract number) _____, license no. _____, (Insert license identifier) _____. Any reproduction of technical data, computer software, or portions thereof marked with this legend must also reproduce the markings."

(End of Legend)

(ii) For purposes of this clause, special licenses do not include government Purpose License Rights acquired under a prior contract (see subparagraph (b)(6) of this clause).

(6) *Pre-existing data markings.* If the terms of a prior contract or license permitted the contractor to restrict the government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software, and those restrictions are still applicable, the contractor may mark such data or software with the appropriate restrictive legend for which the data or software qualified under the prior contract or license. The marking procedures in subparagraph (f)(1) of this clause shall be followed.

(g) *Contractor procedures and records.* Throughout performance of this contract, the contractor, and its subcontractors or suppliers that will deliver technical data or computer software with other than unlimited rights, shall—

(1) Have, maintain, and follow written procedures sufficient to assure that restrictive markings are used only when authorized by the terms of this clause; and

(2) Maintain records sufficient to justify the validity of any restrictive markings on technical data or computer software delivered under this contract.

(h) *Removal of unjustified and nonconforming markings.* (1) *Unjustified markings.* The rights and obligations of the parties regarding the validation of restrictive markings on technical data or computer software furnished or to be furnished under this contract are contained in the clauses at "252.227-7037, "Validation of Restrictive Markings on Technical Data" or 252.227-7019, "Validation of Asserted Restrictions—Computer Software", respectively. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may ignore or, at the Contractor's expense, correct or cancel a marking if, in accordance with the applicable procedures of those clauses, a restrictive marking is determined to be unjustified.

(2) *Nonconforming markings.* A nonconforming marking is a marking placed on technical data or computer software delivered or otherwise furnished to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to 252.227-7019 or 252.227-7037. If the contracting officer notifies the contractor of a nonconforming marking or markings and the contractor fails to remove or correct such markings within sixty (60) days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming markings.

(i) *Relation to patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be

construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(j) *Limitation on charges for rights in technical data or computer software.* (1) The contractor shall not charge to this contract any cost, including but not limited to, license fees, royalties, or similar charges, for rights in technical data or computer software to be delivered under this contract when—

(i) The Government has acquired, by any means, the same or greater rights in the data or software; or,

(ii) The data are available to the public without restrictions.

(2) The limitation in paragraph (j)(1)—

(i) Includes costs charged by a subcontractor or supplier, at any tier, or costs incurred by the contractor to acquire rights in subcontractor or supplier technical data or computer software, if the subcontractor or supplier has been paid for such rights under any other Government contract or under a license conveying the rights to the Government;

(ii) Does not include the reasonable costs of reproducing, handling, or mailing the documents or other media in which the technical data or computer software will be delivered.

(k) *Applicability to subcontractors or suppliers.* (1) The contractor shall assure that the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320, 10 U.S.C. 2321, and the identification, assertion, and delivery processes required by paragraph (e) of this clause are recognized and protected.

(2) Whenever any technical data or computer software is to be obtained from a subcontractor or supplier for delivery to the Government under this contract, the contractor shall use this same clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. No other clause shall be used to enlarge or diminish the Government's, the contractor's, or a higher tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data or computer software.

(3) Technical data required to be delivered by a subcontractor or supplier shall normally be delivered to the next higher-tier contractor, subcontractor, or supplier. However, when there is a requirement in the prime contract for technical data which may be submitted with other than unlimited rights by a subcontractor or supplier, then said subcontractor or supplier may fulfill its requirement by submitting such technical data directly to the Government, rather than through a higher-tier contractor, subcontractor, or supplier.

(4) The contractor and higher-tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in technical data or computer software from their subcontractors or suppliers.

(5) In no event shall the contractor use its obligation to recognize and protect subcontractor or supplier rights in technical data or computer software as an excuse for failing to satisfy its contractual obligation to the Government.

(End of clause)

ALTERNATE I (XXX 1994)

As prescribed in 227.404(c) or 227.504(c), add the following paragraph to the basic clause:

(l) *Publication for sale.* (1) This paragraph applies only to technical data or computer software delivered to the Government with SBIR data rights.

(2) Upon expiration of the SBIR data rights period, the Government will not exercise its right to publish or authorize others to publish an item of technical data or computer software identified in this contract as being subject to paragraph (l) of this clause if the contractor, prior to the expiration of the SBIR data rights period, or within two years following delivery of the data or software item, or within twenty-four months following the removal of any national security or export control restrictions, whichever is later, publishes such data or software item(s) and promptly notifies the contracting officer of such publication(s). Any such publication(s) shall include a notice identifying the number of this contract and the Government's rights in the published data.

(3) This limitation on the Government's right to publish for sale shall continue as long as the technical data or computer software are reasonably available to the public for purchase.

(END OF ALTERNATE I)

22. Section 252.227–7019 is revised to read as follows:

252.227–7019 Validation of asserted restrictions—computer software.

As prescribed in 227.503–6(b), use the following clause:

VALIDATION OF ASSERTED RESTRICTIONS—COMPUTER SOFTWARE (XXX 1994)

(a) *Definitions.* (1) As used in this clause, unless otherwise specifically indicated, the term *Contractor* means the contractor and its subcontractors or suppliers.

(2) Other terms used in this clause are defined in the "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation" clause, 252.227–7014, of this contract.

(b) *Justification.* The Contractor shall maintain records sufficient to justify the validity of any markings that assert restrictions on the Government's rights to use, modify, reproduce, perform, display, release, or disclose computer software delivered or required to be delivered under this contract and shall be prepared to furnish to the contracting officer a written justification for such restrictive markings in response to a request for information under paragraph (d) or a challenge under paragraph (f) of this clause.

(c) *Direct contact with subcontractors or suppliers.* The Contractor agrees that the contracting officer may transact matters under this clause directly with subcontractors or suppliers at any tier who assert restrictions on the Government's right to use, modify, reproduce, release, perform, display, or disclose computer software. Neither this clause, nor any action taken by the Government under this clause, creates or implies privity of contract between the Government and the Contractor's subcontractors or suppliers.

(d) *Requests for information.* (1) The contracting officer may request the Contractor to provide sufficient information to enable the contracting officer to evaluate the Contractor's asserted restrictions. Such information shall be based upon the records required by this clause or other information reasonably available to the Contractor.

(2) Based upon the information provided, if the—

(i) Contractor agrees that an asserted restriction is not valid, the contracting officer may—

(A) Strike or correct the unjustified marking at the Contractor's expense; or,

(B) Return the computer software to the Contractor for correction at the Contractor's expense. If the Contractor fails to correct or strike the unjustified restriction and return the corrected software to the contracting officer within sixty (60) days following receipt of the software the contracting officer may correct or strike the markings at that Contractor's expense.

(ii) Contracting officer concludes that the asserted restriction is appropriate for this contract, he or she shall so notify the Contractor in writing.

(3) The Contractor's failure to provide a timely response to a contracting officer's request for information or failure to provide sufficient information to enable the contracting officer to evaluate an asserted restriction shall constitute reasonable grounds for questioning the validity of an asserted restriction.

(e) *Government right to challenge and validate asserted restrictions.* (1) The Government, when there are reasonable grounds to do so, has the right to review and challenge the validity of any restrictions asserted by the Contractor on the Government's rights to use, modify, reproduce, release, perform, display, or disclose computer software delivered, to be delivered under this contract, or otherwise provided to the Government in the performance of this contract. Except for software that is publicly available, has been furnished to the Government without restrictions, or has been otherwise made available without restrictions, the Government may exercise this right only within three years after the date(s) the software is delivered or otherwise furnished to the Government, or three years following final payment under this contract, whichever is later.

(2) The absence of a challenge to an asserted restriction shall not constitute validation under this clause. 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) *Challenge procedures.* (1) A challenge must be in writing and shall—

(i) State the specific grounds for challenging the asserted restriction;

(ii) Require the Contractor to respond within sixty (60) days;

(iii) Require the Contractor to provide justification for the assertion based upon records kept in accordance with paragraph (b) of this clause and such other documentation that are reasonably available to the Contractor, in sufficient detail to enable the contracting officer to determine the validity of the asserted restrictions; and,

(iv) State that a contracting officer's final decision, during the three year period preceding this challenge, or action of a court of competent jurisdiction or Board of Contract Appeals that sustained the validity of an identical assertion made by the Contractor (or a licensee) shall serve as justification for the asserted restriction.

(2) The contracting officer shall extend the time for response if the Contractor submits a written request showing the need for additional time to prepare a response.

(3) The contracting officer may request additional supporting documentation if, in his or her opinion, the Contractor's explanation does not provide sufficient evidence to justify the validity of the asserted restrictions. The Contractor agrees to promptly respond to the contracting officer's request for additional supporting documentation.

(4) Notwithstanding challenge by the contracting officer, the parties may agree on the disposition of an asserted restriction at any time prior to a contracting officer's final decision or, if the Contractor has appealed that decision, filed suit, or provided notice of an intent to file suit, at any time prior to a decision by a court of competent jurisdiction or Board of Contract Appeals.

(5) If the Contractor fails to respond to the contracting officer's request for information or additional information under subparagraph (f)(3) of this clause, the contracting officer shall issue a final decision, in accordance with the "Disputes" clause of this contract, pertaining to the validity of the asserted restriction.

(6) If the contracting officer, after reviewing the written explanation furnished pursuant to subparagraph (f)(1) of this clause, or any other available information pertaining to the validity of an asserted restriction, determines that the asserted restriction has—

(i) Not been justified, the contracting officer shall issue promptly a final decision, in accordance with the "Disputes" clause of this contract, denying the validity of the asserted restriction.

(ii) Been justified, the contracting officer shall issue promptly a final decision, in accordance with the "Disputes" clause of this contract, validating the asserted restriction.

(7) A contractor receiving challenges to the same asserted restriction(s) from more than one contracting officer shall notify each contracting officer of the other challenges. The notice shall also state which contracting officer initiated the first in time unanswered challenge. The contracting officer who initiated the first in time unanswered challenge, after consultation with the other contracting officers who have challenged the restrictions and the contractor, shall formulate and distribute a schedule that provides the contractor a reasonable opportunity for responding to each challenge.

(g) *Contractor appeal—Government obligation.* (1) The Government agrees that, notwithstanding a contracting officer's final decision denying the validity of an asserted restriction and except as provided in paragraph (g)(3) of this clause, it will honor the asserted restriction—

(i) For a period of ninety (90) days from the date of the contracting officer's final decision to allow the Contractor to appeal to the appropriate Board of Contract Appeals or to file suit in an appropriate court;

(ii) For a period of one year from the date of the contracting officer's final decision if, within the first ninety (90) days following the contracting officer's final decision, the Contractor has provided notice of an intent to file suit in an appropriate court; or,

(iii) Until final disposition by the appropriate Board of Contract Appeals or court of competent jurisdiction, if the Contractor has: (A) appealed to the Board of Contract Appeals or filed suit in an appropriate court within ninety (90) days; or, (B) submitted, within ninety (90) days, a notice of intent to file suit in an appropriate court and filed suite within one year.

(2) The Contractor agrees that the Government may strike, correct, or ignore the restrictive markings if the Contractor fails to—

(i) Appeal to a Board of Contract Appeals within ninety (90) days from the date of the contracting officer's final decision; or,

(ii) File suit in an appropriate court within ninety (90) days from such date; or,

(iii) File suit within one year after the date of the contracting officer's final decision if the Contractor had provided notice of intent to file suit within ninety (90) days following the date of the contracting officer's final decision.

(3) The agency head, on a non-delegable basis, may determine that urgent or compelling circumstances do not permit awaiting the filing of suit in an appropriate court, or the rendering of a decision by a court of competent jurisdiction or Board of Contract Appeals. In that event, the agency head shall notify the Contractor of the urgent or compelling circumstances. Notwithstanding subparagraph (g)(1) of this clause, the Contractor agrees that the agency may use, modify, reproduce, release, perform, display, or disclose computer software marked with (i) government purpose legends for any purpose, and authorize others to do so; or, (ii) restricted or special license rights for government purposes only. The Government agrees not to release or disclose such software unless prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at 227.403–7; or, 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." The agency head's determination may be made at any time after the date of the contracting officer's final decision and shall not affect the Contractor's right to damages against the United States, or other relief provided by law, if its asserted restrictions are ultimately upheld.

(h) *Final disposition of appeal or suit.* If the Contractor appeals or files suit and if, upon final disposition of the appeal or suit, the contracting officer's decision is—

(1) Sustained—:

(i) Any restrictive marking on such computer software shall be struck or corrected at the Contractor's expense or ignored; and,

(ii) If the asserted restriction is found not to be substantially justified, the Contractor shall be liable to the Government for payment of the cost to the Government of reviewing the asserted restriction and the fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Government in challenging the restriction, unless special circumstances would make such payment unjust.

(2) Not sustained—

(i) The Government shall be bound by the asserted restriction; and,

(ii) If the challenge by the Government is found not to have been made in good faith, the Government shall be liable to the Contractor for payment of fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A) incurred by the Contractor in defending the restriction.

(i) *Flowdown.* The contractor shall insert this clause in all contracts, purchase orders, and other similar instruments with its subcontractors or suppliers, at any tier, who will be furnishing computer software to the Government in the performance of this contract. The clause may not be altered other than to identify the appropriate parties.

(End of clause)

23. Section 252.227–7020 is revised to read as follows:

§ 252.227–7020 Rights in special works.

As prescribed in 227.405–3, 227.406(a) and 227.505(a), use the following clause:

RIGHTS IN SPECIAL WORKS (XXX 1994)

(a) *Applicability.* The clause applies to works first created, generated, or produced and required to be delivered under this contract.

(b) *Definitions.* As used in this clause:

(1) *Computer data base* means a collection of data recorded in a form capable of being processed by a computer. The term does not include computer software.

(2) *Computer program* means a set of instructions, rules, or routines recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

(3) *Computer software* means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer data bases or computer software documentation.

(4) *Computer software documentation* means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

(5) *Unlimited rights* means the rights to use, modify, reproduce, perform, display, release, or disclose a work in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do to.

(6) The term *works* includes computer data bases, computer software, or computer software documentation; literary, musical, choreographic, or dramatic compositions; pantomimes; pictorial, graphic, or sculptural compositions; motion pictures and other audiovisual compositions; sound recordings in any medium; or, items of similar nature.

(c) *License rights.* (1) The Government shall have unlimited rights in works first produced, created, or generated and required to be delivered under this contract.

(2) The contractor shall assign to the Government copyright in all works first produced, created, or generated and required to be delivered under this contract. The contractor, unless directed to the contrary by the contracting officer, shall place the following notice on such works:

"© (*Year date of delivery*) United States Government, as represented by the Secretary of (*department*). All rights reserved."

For phonorecords, the "©" marking shall be replaced by a "P".

(3) The contractor grants to the Government a royalty free, worldwide, nonexclusive, irrevocable license to reproduce, prepare derivative works from, distribute, perform, or display, and to have or authorize others to do so, the contractor's copyrighted works not first produced created, or generated under this contract that have been incorporated into the works deliverable under this contract.

(d) *Third party copyrighted data.* The contractor shall not incorporate, without the written approval of the contracting officer, any copyrighted works in the works to be delivered under this contract unless the contractor is the copyright owner or has obtained for the Government the license rights necessary to perfect a license of the scope identified in paragraph (c)(3) of this clause and, prior to delivery of such works—

(1) Has affixed to the transmittal document a statement of the license rights obtained; or,

(2) For computer software, has provided a statement of the license rights obtained in a form acceptable to the contracting officer.

(e) *Indemnification.* The contractor shall indemnify and save and hold harmless the government, against any liability, including costs and expenses, (1) for violation of proprietary rights, copyrights, or rights of privacy or publicity, arising out of the creation, delivery, use, modification, reproduction, release, performance, display, or disclosure of any works furnished under this contract, or (2) based upon any libelous or other unlawful matter contained in such works.

(f) *Government furnished information.* Paragraphs (d) and (e) of this clause are not applicable to information furnished to the contractor by the Government and incorporated in the works delivered under this contract.

(End of clause)

252.227–7021 [Amended]

24. Section 252.227–7021 is amended by revising the introductory text to read "As prescribed in 227.405–2(a), use the following clause:".

252.227–7022 [Amended]

25. Section 252.227–7022 is amended by revising the introductory text to read "As prescribed in 227.407–1(a), use the following clause:".

252.227–7023 [Amended]

26. Section 252.227–7023 is amended by revising the introductory text to read "As prescribed in 227.407–1(b), use the following clause:".

252.227–7024 [Amended]

27. Section 252.227–7024 is amended by revising the introductory text to read "As prescribed in 227.407–3, use the following clause:".

28. Section 252.227–7025 is added to read as follows:

252.227–7025 Limitations on the use or disclosure of Government furnished information marked with restrictive legends.

As prescribed in 227–403–6(d) or 227.503–6(e), use the following clause:

LIMITATIONS ON THE USE OR DISCLOSURE OF GOVERNMENT FURNISHED INFORMATION MARKED WITH RESTRICTIVE LEGENDS (XXX 1994)

(a)(1) For contracts requiring the delivery of technical data, the terms *limited rights* and *government purpose rights* are defined in the "Rights in Technical Data—Noncommercial Items" clause, 252.227–7013.

(2) For contracts that do not require the delivery of technical data, the terms *government purpose rights* and *restricted rights* are defined in the "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation" clause, 252.227–7014.

(3) For Small Business Innovative Research program contracts, the terms *limited rights* and *restricted rights* are defined in the clause at 252.227–7018, "Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research Programs."

(b) Technical data or computer software provided to the contractor as Government furnished information (GFI) under this contract may be subject to restrictions on use, modification, reproduction, release, performance, display, or further disclosure.

(1) *GFI marked with limited or restricted rights legends.* The contractor shall use, modify, reproduce, perform, or display technical data received from the Government with limited rights legends or computer software received with restricted rights legends only in the performance of this contract. The contractor shall not, without the express written permission of the party whose name appears in the legend, release or disclose such data or software to any person.

(2) *GFI marked with Government purpose rights legends.* The contractor shall use technical data or computer software received from the Government with Government purpose rights legends for Government purposes only. The contractor shall not, without the express written permission of the party whose name appears in the restrictive legend, use, modify, reproduce, release, perform, or display such data or software for any commercial purpose or disclose such data or software to a person other than its subcontractors, suppliers, or prospective subcontractors or suppliers, who require the data or software to submit offers for, or perform, contracts under this contract. Prior to disclosing the data or software, the contractor shall require the persons to whom disclosure will be made to complete and sign the non-disclosure agreement at DFARS 227.403–7.

(3) *GFI marked with specially negotiated license rights legends.* The contractor shall use, modify, reproduce, release, perform, or display technical data or computer software received from the Government with specially negotiated license legends only as permitted in the license. Such data or software may not be released or disclosed to other persons unless permitted by the license and, prior to release or disclosure, the intended recipient has completed the non-disclosure agreement at 227.403–7. The contractor shall modify paragraph 1.(c) of the disclosure agreement to reflect the recipient's obligations regarding use, modification, reproduction, release, performance, display, and disclosure of the data or software.

(c) *Indemnification and creation of third party beneficiary rights.* The contractor agrees:

(1) To indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorneys 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 technical data or computer software received from the Government with restrictive legends by the contractor or any person to whom the contractor has released or disclosed such data or software.

(2) That the party whose name appears on the restrictive legend, in addition to any other rights it may have, is a third party beneficiary who has the right of direct action against the contractor, or any person to whom the contractor has released or disclosed such data or software, for the unauthorized duplication, release, or disclosure of technical data or computer software subject to restrictive legends.

(END OF CLAUSE)

252.227–7026 [Amended]

29. Section 252.227–7026 is amended by revising the introductory text to read "As prescribed in 227.403–8(a), use the following clause:".

252.227–7027 [Amended]

30. Section 252.227–7027 is amended by revising the introductory text to read "As prescribed in 227.403–8(b), use the following clause:".

31. Section 252.227–7028 is revised to read as follows:

252.227–7028 Technical data or computer software previously delivered to the Government.

As prescribed in 227.403–6(e) or 227.503–6(f), use the following provision:

TECHNICAL DATA OR COMPUTER SOFTWARE PREVIOUSLY DELIVERED TO THE GOVERNMENT (XXX 1994)

The offeror shall attach to its offer an identification of all documents or others media incorporating technical data or computer software it intends to deliver under this contract with other than unlimited rights that are identical or substantially similar to documents or other media that the offeror has produced for, delivered to, or is obligated to deliver to the Government under any contract or subcontract. The attachment shall identify—

(a) The contract number under which the data or software were produced;

(b) The contract number under which, and the name and address of the organization to whom, the data or software were most recently delivered or will be delivered; and

(c) Any limitations on the Government's rights to use or disclose the data or software, including, when applicable, identification of the earliest date the limitations expire.

(End of Provision)

252.227–7029 [Removed]

32. Section 252.227–7029 is removed and reserved.

252.227–7030 [Amended]

33. Section 252.227–7030 is amended by revising the introductory text to read "As prescribed in 227.403–6(f)(1), use the following clause:".

252.227–7031 [Removed and Reserved]

34. Section 252.227–7031 is removed and reserved.

252.227–7032 [Removed and Reserved]

35. Section 252.227–7032 is removed and reserved.

252.227–7033 [Amended]

36. Section 252.227–7033 is amended by revising the introductory text to read "As prescribed in 227.407(c), use the following clause:".

252.227–7036 [Amended]

37. Section 252.227–7036 is amended by revising the introductory text to read "As prescribed in 227.403–6(f)(2), use the following clause:".

252.227–7037 [Amended]

38. Section 252.227–7037 is amended by revising the introductory text to read "As prescribed in 227.403)6(f)(3), use the following clause:".

[FR Doc. 94–14321 Filed 6–17–94; 8:45 am]
BILLING CODE 3810–01–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Notice of Availability of Draft Modifications to the Recovery Action Plan for the Recovery Implementation Program for the Endangered Fish Species in the Upper Colorado River Basin

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces the availability for public review of draft modifications to the Recovery Implementation Program Recovery Action Plan (RIPRAP) dated October 15, 1993. The RIPRAP identifies specific actions and timeframes currently believed to be necessary to recover the endangered fish in the most expeditious manner possible in the Upper Colorado River Basin (Upper Basin). The Upper Basin is defined as the Colorado River drainage upstream of Lake Powell, with the exception of the San Juan River drainage. The RIPRAP will serve as a measure of accomplishment so the Recovery Program can continue to serve as the reasonable and prudent alternative to avoid the likelihood of jeopardy to the continued existence of the endangered fish for projects undergoing section 7 consultations. Critical habitat for the endangered fish was formally designated on April 20, 1994. The Recovery Program is also intended to serve as the reasonable and prudent alternative to avoid the likely destruction or adverse modification of critical habitat. Therefore, modifications to the RIPRAP are being proposed so the Recovery Program can serve as the reasonable and prudent alternative to avoid adverse modification to critical habitat as well as to avoid the likelihood of jeopardy resulting from depletion impacts of new projects and all existing or past impacts related to historic water projects with the exception of the discharge by historic projects of pollutants such as trace elements, heavy metals, and pesticides. The proposed modifications were developed by FWS in coordination with the Recovery Program's Management Committee. The Service solicits review and comment from the public on the draft changes to the RIPRAP.

DATES: Comments on the revised RIPRAP must be received on or before August 4, 1994.

ADDRESSES: Persons wishing to review the draft RPRAP modifications may obtain copies by contacting the Assistant Regional Director—Ecological Services U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, Colorado 80225; FAX (303) 236–0027. Written comments should be sent to the address given above. Comments received are available upon request for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Jacobsen (see above address), telephone (303) 236–8189.

SUPPLEMENTARY INFORMATION:

Background

Four native fish species that inhabit the Colorado River Basin are federally listed as endangered: the Colorado sqawfish (*Ptychocheilus lucius*), humpback chub (*Gila cypha*), bonytail (*Gila elegans*), and razorback sucker (*Xyrauchen texanus*). Each of these four species was once abundant in the Upper Basin; however, they have declined in numbers and are now threatened with extinction from their natural habitat. Factors accounting for the current status of these species include direct loss of habitat, changes in water flow and temperature regimes, blockage of migration routes, and interactions with introduced (nonnative) fish species. The Fish and Wildlife Service (Service) has maintained since 1978 that a jeopardy situation exists in the upper Colorado River basin and that actions must be taken to reverse the decline of endangered fish populations and habitat. The Service has described this conclusion through section 7 of the Endangered Species Act (Act) in over 224 biological opinions on project impacts on the endangered fish in the Upper Basin.

In 1988, the Governors of Colorado, Utah, and Wyoming, the Secretary of the Interior, and the Administrator of the Western Area Power Administration entered into a cooperative agreement to implement the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin (Recovery Program). The purpose of the Recovery Program is to recover the four endangered fish in the Upper Colorado River Basin while providing for future water development to proceed in compliance with the Endangered Species Act, Interstate Compacts, and State law. Participants in the Recovery Program include the Service, the Bureau of Reclamation, the States of Utah, Wyoming, and Colorado, the Western

Lakeland to the Tampa-St. Petersburg-Clearwater, Florida television market.

Initial Regulatory Flexibility Analysis

4. The Commission certifies that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by § 601 (3) of the Regulatory Flexibility Act. A few cable television system operators will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96–354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

Ex Parte

5. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 CFR §§ 1.1202, 1.1203 and 1.1206(a).

Comment Dates

6. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before September 14, 1994, and reply comments on or before October 14, 1994. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, NW., Washington, D.C. 20554.

7. Accordingly, this action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by § 0.321 of the Commission's Rules.

List of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission.

William H. Johnson,

Acting Chief, Cable Services Bureau.

[FR Doc. 94–20856 Filed 8–24–94; 8:45 am]

BILLING CODE 6712–01–F

DEPARTMENT OF DEFENSE

48 CFR Parts 211, 227, and 252

Defense Federal Acquisition Regulation Supplement; Rights in Technical Data

AGENCY: Department of Defense.

ACTION: Proposed rule; extension of comment period.

SUMMARY: This document extends the public comment period for the proposed rule on Rights in Technical Data that the Department of Defense had published on June 20, 1994 (59 FR 31584).

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before September 9, 1994, to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: Deputy Director, Major Policy Initiatives, PDUSD (A&T) DP; ATTN: Ms. Angelina Moy; 1211 S. Fern Street, Room C–109, Arlington, VA 22202–2808. Please cite DAR Care 91–312 in all correspondence related to this proposed rule.

FOR FURTHER INFORMATION CONTACT: Ms. Angelina Moy, telephone (703) 604–5386.

Claudia L. Naugle,

Deputy Director, Defense Acquisition Regulations Council.

[FR Doc. 94–20969 Filed 8–24–94; 8:45 am]

BILLING CODE 5000–04–M

the assessments. Reclamation will take all necessary actions to prevent the delivery of irrigation water to ineligible land.

The Department of the Interior has determined that the proposed rule does not constitute a significant regulatory action under Executive Order 12866 because it will not: (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the executive order.

National Environmental Policy Act

Neither an environmental assessment nor an environmental impact statement is required for this rulemaking because, pursuant to 40 CFR 1508.4 and Departmental Manual part 516 DM 6, Appendix 9, § 9.4.A.1, this action is categorically excluded from the provisions of the National Environmental Policy Act.

Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget as is required by 44 U.S.C. 3501 *et seq.* and assigned clearance numbers 1006–0005 and 1006–0006.

Small Entity Flexibility Analysis

The proposed rule will not have a significant economic effect on a substantial number of small entities.

Civil Justice Reform

The Department of the Interior has certified to the Office of Management and Budget that this proposed rule meets the applicable standards provided in sections 2(a) and 2(b)(2) of Executive Order 12778.

Authorship

This proposed rule was prepared by staff in the Reclamation Law Administration Branch, D–5640, Bureau of Reclamation, Denver, Colorado.

List of Subjects in 43 CFR Part 426

Administrative practice and procedure, Irrigation, Reclamation, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, it is proposed to amend 43 CFR Part 426 as follows:

Dated: May 16, 1994.

Elizabeth Ann Rieke,

Assistant Secretary—Water and Science.

PART 426—RULES AND REGULATIONS FOR PROJECTS GOVERNED BY FEDERAL RECLAMATION LAW

1. The authority citation for Part 426 is revised to read as follows:

Authority: 43 U.S.C. 371–383; 43 U.S.C. 390aa-390zz-1; 31 U.S.C. 9701.

2. Section 426.24 is redesignated as § 426.25, and new section 426.24 is added to read as follows:

§ 426.24 Assessments of administrative costs.

(a) *Forms submittal.* A district will be assessed for the administrative costs described in paragraph (e) of this section when irrigation water has been delivered to landholders that did not submit certification or reporting forms prior to the receipt of irrigation water in accordance with § 426.10(e). The assessment will be applied on a yearly basis in each district for each direct and indirect landholder that received irrigation water but failed to comply with § 426.10(e).

(b) *Forms corrections.* Where corrections are needed on certification or reporting forms, the requirements of § 426.10(a) will be deemed to have been met so long as the district provides corrected forms to the Bureau of Reclamation within 45 days of the date of the Bureau's written request for corrections. A district will be assessed for the administrative costs described in paragraph (e) of this section when corrected forms are not provided within this 45-day time period. The assessment will be applied on a yearly basis in each district for each direct and indirect landholder for whom corrected forms are not provided within the applicable 45-day time period.

(c) *Parties responsible for paying assessments.* Districts shall be responsible for payment of the assessments described in paragraphs (a) and (b) of this section.

(d) *Disposition of assessments.* The administrative costs assessed and collected pursuant to paragraphs (a) and (b) of this section will be deposited to the general fund of the United States Treasury as miscellaneous receipts.

(e) *Assessment for administrative costs.* The assessment for administrative costs shall initially be set at $260. This is based on an average of the direct and indirect costs the Bureau of Reclamation incurs performing activities to obtain certification or reporting forms from landholders that failed to submit such forms prior to receipt of irrigation water and form corrections that are not submitted by the designated due date. This initial $260 assessment for administrative costs will be reviewed at least once every 5 years and adjusted, if needed, to reflect new cost data based upon the Bureau's costs for communicating with district representatives and landholders to obtain missing or corrected forms; assisting landholders in completing certification or reporting forms for the period of time they were not in compliance with the form requirements; performing onsite visits to determine if irrigation water deliveries have been terminated to landholders that failed to submit the required forms; and performing other activities necessary to address form violations. Notice of the revised assessment for administrative costs will be published in the **Federal Register** in December of the year the data are reviewed.

[FR Doc. 94–15509 Filed 6–27–94; 8:45 am]

BILLING CODE 4310–94–P

DEPARTMENT OF DEFENSE

48 CFR part 211, 227, and 252

Federal Acquisition Regulation Supplement; Rights in Technical Data

AGENCY: Department of Defense (DoD).

ACTION: Correction of proposed rule with request for comments.

SUMMARY: This action is to correct the address for submission of written comments for the proposed rule on Rights in Technical Data, which was published in the **Federal Register** on June 20, 1994 (59 FR 31584).

FOR FURTHER INFORMATION CONTACT: Ms. Angelena Moy, telephone (703) 604–5385/6.

Claudia L. Naugle,

Deputy Director, Defense Acquisition Regulation Council.

Accordingly, the Department of Defense is correcting the proposed rule on Rights in Technical Data as follows:

On page 31584, column 3, the first sentence of the paragraph entitled **ADDRESSES:** is corrected to read:

"Interested parties should submit written comments to: Deputy Director Major Policy Initiatives, 1211 S. Fern St , Room C–109, Arlington, VA 22202–2808, ATTN: Ms. Angelena Moy, OUSDA (A&T)/DDP."

[FR Doc. 94–15647 Filed 6–27–94; 8:45 am]
BILLING CODE 3810–01–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1831 and 1852

Revision to NASA FAR Supplement Coverage on Precontract Costs

AGENCY: Office of Procurement, Procurement Policy Division, National Aeronautics and Space Administration (NASA).

ACTION: Notice of proposed rulemaking.

SUMMARY: This rule proposes to amend the regulations pertaining to precontract costs to specify the content of letters to contractors which authorize the incurrence of precontract costs, make clear the circumstances when precontract costs would be appropriate, and clarify that precontract costs are not allowable unless the clause "Precontract Costs" is included in the contract. In addition, the proposed rule revises the prescription for the clause to allow its use in other than cost-reimbursement contracts. Also, the rule proposes to change the title of that clause from "Date of Incurrence of Costs" to "Precontract Costs" to more accurately reflect its purpose.

DATES: Comments must be received on or before August 29, 1994.

ADDRESSES: Submit comments to Mr. Joseph Le Cren, Contract Pricing and Finance Division (Code HC), Office of Procurement, NASA Headquarters, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Mr. Joseph Le Cren, (202) 358–0444.

SUPPLEMENTARY INFORMATION:

Background

Although NASA has used authorization letters for precontract costs for many years, there has been little standardization in the contents of the letters. In addition, the current NASA FAR Supplement coverage at 1831.205–32 does not make it clear when the use of precontract costs would be appropriate, or that the clause at 1852.231–70 is required to be in the contract in order for precontract costs to be allowable. In addition, the clause prescription incorrectly states that the clause only should go in cost-reimbursement contracts. The clause would also be applicable to fixed-price incentive or redeterminable contracts and to terminated firm-fixed price contracts, as the cost principles at (FAR) 48 CFR Subpart 31.2 would be applicable. The proposed rule specifies the information to be included in precontract cost authorization letters to contractors, identifies when the use of precontract costs would be appropriate, as well as requires the clause at 1852.231–70 be used for precontract costs to be allowable. The proposed rule also retitles the clause at 1852.231–70 from the "Date of Incurrence of Costs" to "Precontract Costs" to more accurately reflect the purpose of the clause.

Impact

NASA certifies that this regulation will not have a significant economic impact on a substantial number of small entities under Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule does not impose any reporting or record keeping requirements subject to the Paperwork reduction Act.

List of Subjects in 48 CFR Parts 1831 and 1852

Government procurement.

Tom Luedtke,

Deputy Associate Administrator for Procurement.

Accordingly, 48 CFR Parts 1831 and 1852 are proposed to be amended as follows:

1. The authority citation for 48 CFR Parts 1831 and 1852 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

PART 1831—CONTRACT COST PRINCIPLES AND PROCEDURES

2. Section 1831.205–32 is revised to read as follows:

1831.205–32 Precontract costs.

(a) The authorization of precontract costs is not encouraged and shall be granted only when there will be a sole source award or a single offeror has been selected for negotiations as the result of a competitive procurement, the criteria at (FAR) 48 CFR 31.205–32 are met, and a written request and justification has been submitted to and approved by the procurement officer. The justification shall (1) substantiate the necessity for the contractor to proceed prior to contract award, (2) specify the start date of such contractor effort, (3) identify the total estimated time of the advanced effort, and (4) specify the cost limitation.

(b) Authorization to the contractor to incur precontract costs shall be in writing and shall (1) specify the start date of incurrence of such costs, (2) specify a limitation on the total amount of precontract costs which may be incurred, (3) state that the costs are allowable only to the extent they would have been if incurred after the contract had been entered into, and (4) state that the Government is under no obligation to reimburse the contractor for any costs unless a contract is awarded.

(c) Precontract costs shall not be allowable unless the clause at 1852.231–70, Precontract Costs, is included in the contract.

3. Section 1831.205–70 is revised to read as follows:

1831.205–70 Contract clause.

The contracting officer shall insert the clause at 1852.231–70, Precontract Costs, in contracts for which specific coverage of precontract costs is authorized under 1831.205–32.

4. Section 1852.231–70 is revised to read as follows:

1852.231–70 Precontract costs.

As prescribed in 1831.205–70, insert the following clause:

Precontract Costs

(XXX 19XX)

The contractor shall be entitled to reimbursement for costs incurred on or after _____ in an amount not to exceed $ _____ that, if incurred after this contract had been entered into, would have been reimbursable under this contract.

(End of clause)

[FR Doc. 94–15606 Filed 6–27–94; 8:45 am]
BILLING CODE 7510–01–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 575

[Docket No. 91–68; Notice 03]

RIN 2127–AC64

Consumer Information Regulations; Federal Motor Vehicle Safety Standards; Rollover Prevention

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of proposed rulemaking (Consumer Information Regulation); Termination of rulemaking (Federal Motor Vehicle Safety Standard).

SUMMARY: As part of its comprehensive efforts to address the problem of light vehicle rollover, this agency is

Listing of Public Commentors

1. AERO Gear Incorporated
2. American Bar Association
3. American Gear Manufacturers Association
4. Associated Aerospace Activities Incorporated
5. Bell Helicopter TEXTRON
6. British Defence Staff Washington
7. Business Software Alliance
8. COGR (Council on Governmental Relations)
9. Columbia Gear Corporation
10. DERCO Industries, Incorporated
11. DOW Corning
12. Dube', Barry
13. Electro-Methods, Incorporated
14. FMS Corporation
15. Grey Associates
16. HUGHES
17. IDCC (Integrated Dual-use Commercial Companies)
18. Independent Defense Contractor Association
19. Jo-Bar Manufacturing Corporation
20. Kaye, Scholer, Fierman, Hays & Handler
21. M/A COM, Incorporated
22. Management Consulting
23. Motorola

24. Multi-Industry Associations
25. Oja, Richard W.
26. Overton Gear and Tool Corporation
27. Pacific Sky Supply Incorporated
28. Precision Gear Incorporated
29. Process Gear
30. Proprietary Industries Association
31. Reliance Gear Corporation
32. Saxon Corporation
33. Seidman & Associates, P.C.
34. Shipbuilders Council of America
35. Sidley & Austin
36. Software Publishers Association
37. SPECO Corporation
38. SRI International
39. UNC (The Aviation Company)

Total number of Public Commentors = 39

AERO GEAR INC.

1050 Day Hill Road, Windsor, Connecticut 06095 Tel. (203) 688-0888

August 1, 1994

Mr. Robert Donatuti
Deputy Director for Major Policy Initiatives
1200 S. Fern St.
Arlington, VA 22202-2808
Attn: Ms. Angelena Moy, OUSD (A&T)/DDP

Subject: DAR case 91-312

Dear Mr. Donatuti;

I am writing to you to respond to your request for comments on the proposed changes in regulations governing rights in technical data. We do not develop data, but for the past six years have utilized technical data provided by the government to produce quality spare parts for the government at competitive prices.

We at Aero Gear are concerned that these changes will negatively affect our business opportunities. As a small business, we are also concerned that this rule is being promulgated for the benefit of large prime contractors at the expense of small business competitors for the aftermarket. We are bringing this matter to the attention of our elected representatives, in hope that Congress will fully review the impact of this change on competition and, ultimately, on American taxpayers.

We are particularly concerned about the following:

Changes in language making any data developed in the performance of a government contract proprietary, thereby resulting in less data available. We don't believe that data resulting from development of a defense end product should be the property of the OEM.

Data charged to an indirect pool will become proprietary to the OEM. We fully understand the argument that CAS will not allow misuse of this flexibility, but still believe that the OEM's will find this to offer a loophole. (This is demonstrated by the fact that OEM members of the 807 panel fought hard to achieve this concession.)

We are aware of contentions that these changes will apply only to future developments. We are afraid, however, that these changes may be applied to system upgrades, contract enhancements, etc., and seriously affect the spare parts market.

The more data there is available, the more competition. The more competition, the greater the savings to the taxpayer. We, as taxpayers, have a right to the savings produced through the competition as well as a right to data **developed - according to any formula - with any of our tax dollars.** Approximately 10% of our sales volume relies upon available technical data. Though this is a small part of our business, it is important that we maintain or expand it.

To summarize, we believe that this proposal will unnecessarily harm the ability of qualified small businesses to provide spare parts at a cost savings to the taxpayer. By affecting thousands of component manufacturers across the country, it will further erode the second tier suppliers which form an essential segment of our defense industrial base. Finally, it will result in American jobs being sent offshore and higher costs that Secretary Perry is hoping to avoid.

Yours truly,

Roger Burdick

CC:

Senator Lieberman
Senator Dodd
Representative Kennelly

#19
8/19/94

1993-94

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Writer's Address and Telephone

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August 18, 1994

Deputy Director
Major Policy Initiatives
ATTN: Ms. Angelena Moy, OUSD (A&T)/DDP
1200 South Fern Street
Arlington, Virginia 22202-2808

Re: DAR Case 91-312, Defense Federal Acquisition Regulation Supplement, Rights in Technical Data, 59 Federal Register 31, 584 (June 20, 1994)

Dear Ms. Moy:

This letter is written on behalf of the Section of Public Contract Law of the American Bar Association pursuant to special authority extended by the Association's Board of Governors for comments by the Section on acquisition regulations. The Section consists of attorneys and associated professionals in private practice, industry and government service. The Section's governing Council and substantive committees contain a balance of members representing these three segments, to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services and public works. The views expressed are those of the Section and have not been considered or adopted by the Association's Board of Governors or its House of Delegates and therefore, should not be construed as representing the policy of the American Bar Association.

On June 20, 1994, the Department of Defense ("DOD") issued a proposed rule and request for comments to revise policies and guidance contained in DFARS 227.4 (Rights in Data and Copyrights), the corresponding clause in DFARS 252.227-7013, "Rights in Technical Data and Computer Software", and related sections and clauses. The proposed rule reflects recommendations of the Government-Industry Technical Data Advisory Committee made pursuant to Section 807 of the Fiscal Year 1992/1993 National

Defense Authorization Act. Section 807 required the Committee to make recommendations for final regulations to implement 10 U.S.C. § 2320, "Rights in Technical Data".

The Section's comments on several of the significant changes made in the proposed rule are set forth below. (References to the "Superseded regulation" refer to the existing technical data regulations contained in DFARS Subpart 227.4 and Part 252 that would be replaced by the proposed rule).

1. Elimination of "required for performance" criteria.

The proposed regulation addresses our earlier concerns and the Section supports the revision.

The proposed clause set forth at DFARS 252.227-7013, "Rights in Technical Data--Noncommercial Items (XXX 1994)", eliminates the "required for performance" criteria previously contained in DFARS 252.227-7013 "Rights in Technical Data and Computer Software (OCT. 1988)" subparagraphs (a)(11), (a)(12) and (a)(16). The "required for performance" criteria permitted DOD to obtain unlimited rights in technical data for items, components or processes developed at private expense, if development was "required for the performance of a government contract or subcontract." See DFARS 252.227-7013 "Rights in Technical Data and Computer Software (OCT. 1988)", subparagraphs (a)(11) and (b)(1)(i).

In earlier comments on the superseded technical data regulations, the Section noted that the "required for performance" standard overemphasized whether development was or was not required under a government contract. While ignoring the parties' respective level of funding and other factors, including prior contractor commitment or expertise in the development effort. The now-superseded language potentially impaired rights of contractors who developed such items concurrently at private expense. As noted in those earlier comments, the superseded regulation established a fairly arbitrary standard that was not capable of being flexibly and practicably applied.

2. Retention of "source of funds" basis for allocation of rights.

The provisions of the proposed rule contained in DFARS 227.403-4(b) and 252.227-7013, "Rights in Technical Data--Noncommercial Items (XXX 1994)" subparagraphs (a)(7)

through (9), retain the "source of funds" criteria that required determination of the source of funding used to develop the items, component or process, and then uses that source of funds criteria as the basis for allocating rights between the government and the contractor.

In recommending this change, the Advisory Committee correctly noted that 10 U.S.C. § 2320 generally provides for the allocation of technical data rights based upon the source of the funds used to develop an item, component or process. The Section concurs that, to the extent that 10 U.S.C. § 2320 controls a particular contract, the "source of funds" basis is an equitable method to allocate rights to the Government and developers of technical data and/or computer software.

3. The definition of "developed".

The proposed rule set forth in DFARS 252.227-7013, "Rights in Technical Data-Noncommercial Items (XXX 1994)" subparagraph (a)(6), retains the essence of the preexisting definition of the term "developed" that the superseded regulations contained. See DFARS 252.227-7013 "Rights in Technical Data and Computer Software (OCT. 1988)" subparagraph (a)(10). The superseded regulations used two concepts to define "developed"; existence and workability, and the proposed regulation retains these concepts.

Under the proposed regulation, technical data exists if an item has been constructed or a process has been practiced. Workability requires sufficient analysis or testing to show that a process or item has a high likelihood of operating as intended. The Section comments that continuation of the "existence" and "workability" tests in the proposed clause is unduly stringent as a definitive test of "developed" in the context of technical data. Under modern "real world" conditions, an item or process reasonably can be considered developed even where such item or process has not been constructed or practiced. Development of aircraft using computer simulation and design is an example.

The Section recommends deleting the requirement that the item or process "exist," or at a minimum, adding language to the requirement that recognizes that computer simulation or modeling can substitute for a physical demonstration of "existence." An analogy would be the concept of "reduction to practice" in the patent area.

4. Clarification of "developed at private expense".

DFARS 252.227-7013, "Rights in Technical Data--Noncommercial Items (XXX 1994)" subparagraph (a)(7), as

set forth in the proposed rule, provides clarification that items, components or processes developed with costs charged to indirect cost pools or with non-Government funds will be considered as developed at private expense.

The new rule makes explicitly clear that development accomplished with costs charged to indirect cost pools or costs not allocated to a government contract, or any combination thereof, shall be considered development at private expense. The Section considers that the proposed revision is consistent with the requirement of 10 U.S.C. § 2320 that implementing regulations define the treatment of items, components or processes developed utilizing funding from indirect costs pools. The Section further comments that the proposed revision provides equitable protection to data developer's internal background systems and engineering systems.

The Section supports adoption of the provision as proposed.

5. **Creation of fixed "Government Purpose Rights".**

DFARS 252.227-7013, "Rights in Technical Data--Noncommercial Items (XXX 1994)" subparagraph (b)(2), as contained in the proposed rule, establishes fixed Government Purpose Rights in technical data ("GPR"), where such data are developed with mixed Government and private funding. Under GPR, the Government obtains a five year (or other negotiated) license to use the data for government purposes, including competition, but which provides protection to the developer's exclusive right to commercialize the data during the period of the GPR license. At the end of the fixed five year or other negotiated period, the Government receives unlimited rights.

The superseded technical data rights regulation provided the Government with unlimited rights in technical data developed with mixed private and governmental funding unless the developer requested the exclusive right to commercialize and a mutually acceptable license could be negotiated. The superseded regulations did not permit such license negotiations where the Government anticipated that the data would be needed for reprocurement.

The proposed regulation grants the Government a license to use the data for governmental purposes (including competition), but simultaneously protects a developer's exclusive right to commercialize the data for five years from the date of the contract, or other negotiated period.

The Section considers that the proposed revision is an improvement to the previously existing regulation, but observes that automatic translation into unlimited rights for the Government upon expiration of the fixed period (thereby making the formerly GPR data available on a worldwide basis) may be overbroad. The Section recommends that the minimum fixed period be enlarged (beyond five years) or that the five year period spring from the date of final payment rather than the award date of the contract or subcontract. Development contracts may span several years, and the data developed under such mixed funding contracts may not be "developed" as defined in the regulations until near the end of contract performance. Under such circumstances, the date of final payment would be a more equitable basis from which to initiate Government Purpose Rights. It would minimize the need to negotiate a separate period.

Alternatively, the GPR period should be made indefinite to encourage domestic commercialization and to provide support for U.S. Industry. To further support U.S. Industry the definition at DFARS 52.227-7013(a)(11) should exclude disclosure of GPR data outside the United States except for evaluation and informational purposes only.

6. Separate coverage for computer software.

The Section recommends adoption of the framework as proposed.

DFARS Subpart 227.5 "Rights in Computer Software and Computer Software Documentation", as added in the proposed regulation, creates new separate coverage for computer software. A new clause, DFARS 252.227-7014, "Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation (XXX 1994)", is also added.

Although the proposed separate treatment for computer software costs adds additional clauses and regulatory coverage to the DFARS, the Section concurs with the Advisory Committee's rationale that separate regulatory treatment for computer software provides greater flexibility to deal with future statutory or technological developments. The Section believes that a separate clause and regulation for computer software is practical and beneficial.

7. Private expense determinations.

Proposed DFARS 227.403-4(b) and 252.227-7013, "Rights in Technical Data-Noncommercial Items (XXX 1994)" subparagraph (a)(7)(i), provide that determinations of whether data were developed at private expense are to be made at the lowest

practicable level. The proposed regulation notes that the determination of the source of development funds should be made at any practical sub-item or sub-component level or for any segregable portion of a process. DFARS 227.403-4(b).

The Section views the proposed revision as promoting more effective and appropriate private expense determinations and supports adoption of this provision as proposed.

8. General comments.

Some Section members, generally representing technical data developers, still consider that there are problems with DOD's data rights policy. Conversely, at the other end of the spectrum, one commenting Section member (representing primarily data replicators and users) considers that the proposed rule unduly favors data developers. The Section consensus is that the revisions contained in the proposed regulation represent an improvement to DOD's existing technical data and computer software provisions, strike a difficult balance between private and governmental interests in this area, and better support long-term private sector investment in technology development for DOD and commercial purposes compared to the existing regulations.

CONCLUSION

The Section respectfully requests that these comments be considered in the issuance of a final rule. The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as may be required.

Sincerely,

John B. Miller, Chair
Section of Public Contract Law

cc: Frank H. Menaker, Jr.
James F. Hinchman
Laurence Schor
Marshall J. Doke, Jr.
Karen Hastie Williams
Donald J. Kinlin
Council Members
Chair and Vice Chairs
Patent and Data Rights Committee
Laura K. Kennedy
Richard C. Loeb

#18 8/19/94

AMERICAN GEAR MANUFACTURERS ASSOCIATION

JOE T. FRANKLIN JR., CAE
EXECUTIVE DIRECTOR

August 15, 1994

Deputy Director for Major Policy Initiatives
1200 S. Fern Street
Arlington, VA 22202-2808
Attn: Ms. Angelena Moy, OUSD (A&T)/DDT

Reference: DoD Proposed Rules, DAR Case 91-312

The American Gear Manufacturers Association represents companies manufacturing gears and gearing products in the United States. Our membership is 95% small businesses. As a point of reference, no movement of DoD weapon systems would be possible without gearing. As a result, gears have been determined to be critical components in several U.S. government studies[1] as well as the Defense Production Act.

Given that context, *there is absolutely no possibility that AGMA can support the recommended changes in DAR Case 91-312.* It is clear to those who understand the spare parts procurement processes and the defense realignment strategies of the Original Equipment Manufacturers (OEMs) that *these changes will significantly enhance the OEM control of the defense aftermarket while easily excluding competition, generally provided by small businesses.* In the case of gearing, these changes will enhance the ability of the OEMs to channel more subcontracting opportunities to foreign partners. Gears are not products on which the United States should be foreign-dependent.

---

[1]*National Security Assessment of the U.S. Gear Industry*, U.S. Department of Commerce, Bureau of Export Administration, Office of Industrial Resource Administration, January, 1991.

The Effect of Imports of Gears and Gearing Products on the National Security," U.S. Department of Commerce, Bureau of Export Administration, Office of Industrial Resource Administration, Strategic Analysis Division, July, 1992.

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Loss of "in Performance of a Government Contract" Language

We are concerned about many of the changes. One is the method of determining access to data. Under DFARS 227.402-72(a), "Rights in Technical Data--Unlimited Rights," the Department of Defense is entitled to unlimited rights in data which are required for the performance of a Government contract or pertaining to items, components, or processes developed exclusively at Government expense. As a result, these rights exist in the public domain and can be utilized to bid for DoD, commercial and foreign sales. A primary concern is the recommendation found in DFARS 252.227-7013, "Rights in Technical Data--Noncommercial Items." Under this proposed rule, DoD would still have unlimited rights in data developed entirely at Government expense, but no longer to all data developed in performance of a government contract.

The Definition of "Private" Expenses/Mixed Funding

Perhaps even more dangerous is the way data rights will be determined based upon the method of funding--public or private expense. The potential for serious abuse exists in the recommended definition of "private expense." Under the committee's recommended regulation and clause, indirect costs charged to a government contract and paid for by taxpayers would be treated as a private expense (DFARS 252.227-7013(a)(7),(9). And when an item, component or process is paid for entirely at private expense, the Government would only have limited rights (DFARS 227.403-5(c). These limited rights could not be used for competitive purposes since the data could not be disclosed or released outside the Government (DFARS 252.227-7013(a)(13).

Another disturbing recommendation surrounds the use of mixed funded data. Even if only a portion of the development cost is claimed to have been at private expense, the Government would automatically have only Government Purpose Rights (GPR) in the data for five years (DFARS 227.403-5(b). This is a stark contrast to the existing regulations, which allow unlimited rights unless otherwise negotiated. Under the proposed regulations, the OEM would be able to limit the Government to GPR by paying for, or charging indirectly, some possibly insignificant portion of development while the taxpayer funds the rest. In that case, competitors could not use the data--developed largely at public expense--to compete for commercial and foreign sales during the five-year period. There is no mechanism established in the recommendations to ensure potential competitors timely access to GPR data for DoD procurement during the period. Alternate sources need access to pertinent technical data before a solicitation is issued to obtain necessary source approvals and to submit timely responses. Under current regulations, alternate sources use FOIA and agency cash sales programs to obtain such data, but since GPR would be proprietary to the OEM that data could be with held under FOIA Exemption 4 governing confidential business information and not releasable under cash sales programs.

Current accounting practices allow OEMs to charge significant design and development costs to indirect accounts. AGMA monitored the committee meetings and heard the OEM representatives argue passionately that indirect costs, particularly manufacturing production and engineering (MP&E) be considered private expense. (They even pressured Chairman

Eleanor Spector on this point until she conceded to their wishes and included mp&e in the definition.) OEMs commonly charge the development of mp&e specifications essential to competition as indirect mp&e under FAR 31.205-25. Examples of manufacturing processes used to produce critical gearing include non destructive inspection and heat treating. It is often impossible to obtain source approval without the OEM manufacturing processes and the right to use them.

The result is that the only data available to our members will be that portion funded 100% by the Government as a direct cost. Therefore, *data developed and funded by our members' taxes will be unavailable to them.*

The Result

We are certain that our members will be jeopardized by the changes. We are already facing a job loss to foreign countries because OEMs look for every opportunity to feed offset agreements and foreign partnerships. These changes will give them one more opportunity to export our jobs and our critical capabilities, and the result will be increased foreign dependence for gearing.

AGMA attended the last 18 months of the Section 807 committee deliberations. We were disappointed at the way the OEMs, representing themselves as "industry" dictated policy and tried to control the outcome of discussions. Their tactics included refusing to allow us to attend an "industry" meeting when we were invited by Eleanor Spector as well as unpublicized meetings with high level DoD officials. The 807 product clearly demonstrates their success: alternate sources to the OEMs will be greatly constrained and DoD will return to the high OEM price scandals of the early 1980's. It is unbelievable to us, that in this period of downsizing the defense budget, DoD would allow the OEMs to engineer these changes giving them exclusive use of data that might otherwise help to control costs and maintain American jobs and capabilities.

The Section 807 Committee Chairman Eleanor Spector has noted several times that less data will result in less competition. Less competition will have a direct impact upon small business opportunities, and we don't believe that the affected small business community is even vaguely aware of the changes contemplated by DoD. We strongly urge DoD to suspend the implementation of the final rule until the appropriate Congressional committees, and the affected small businesses, can be made aware of the significance of these changes.

Sincerely,

Joe T. Franklin, Jr.

8/11/94

ASSOCIATED
AEROSPACE
ACTIVITIES
INCORPORATED

August 5, 1994

Deputy Director Major Policy Initiatives
1200 S. Fern Street
Arlington, VA 22202-2808

Attention: Ms. Angelena Moy/OUSD(A&T)/DDP

Subject: Technical Data Restrictions on Small Business
(DAR Case 91-312)

Dear Ms. Moy:

1. We have been advised your office is the contact point for expressing our objection to proposals for specific rights to technical data recommended by Section 800 and 807 panels.

2. It is our understanding several recommendations have been made that directly concern us (as well as other small businesses) who work directly with Air Force, Navy, and Defense Logistics Agency in the procurement of spare parts. This is based on the proposals on technical data outlined in the Federal Register of June 20, 1994.

3. It should be noted that the Section 800 and 807 panels were dominated by large business and OEM interests, and Small Business was only minimally represented. For this reason, we do not feel decisions reached were balanced and equitable with the interests of Small Business.

More specifically, we find the following suggested changes unacceptable as not in our best interests as an operating Small Business organization.

A. Any proposed policy changes that would restrict the right of small businesses to obtain and use technical data developed under Government contract for purposes of competing for DOD requirements.

B. Elimination of the "Required For Performance Criterion", under which the DOD gives up the basic policy of obtaining unlimited rights to technical data even if development is "required for the performance of a government contract or subcontract".

C. Modification of the existing regulations that require indirect costs of development to be considered government funded, and replacement with modified regulations which provide that indirect costs to be development accomplished at private expense.

4. By placing the above recommendations into practice, those small businesses who provide support directly to the DOD will be severely impacted or decimated. Further, it will force "sole-sourcing" to OEM's and

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revert spare parts procurement procedures back to the failures and cost abuses of the past. A direct result of "sole-sourcing" forced Congress to eliminate past excessive costs and procurement scandals by legislating the Competition In Contracting Act (CICA) and establishing "Competitive Advocates" into procurement activities in order to allow Small Business an inroad and to expand competition.

For your information, noted below is a section from a Report to Congress by the Office of Federal Procurement Policy entitled "Review of the Spare Parts Procurement Practices of the Department of Defense" issued during that time period.

> "Responding to a request from Congress, the General Accounting Office (GAO) conducted an in-depth review of the effectiveness of the program and the accuracy of reported accomplishments. The GAO noted in its report dated August 2, 1982, that technical data is critical to the breakout process. The GAO concluded that SBA's efforts resulted in large dollar savings in relation to the program's costs." (underlining is ours)
>
> "To date, approximately 2,329 items have been successfully "broken-out" for competition at the four ALC's. Documented savings are $43.8 million."

5. We are finding the "Competitive Advocate" program set up by Congress to accelerate and manage the "break-out" program has already been emasculated in Air Force procurement programs. To now remove the ability to obtain the technical data and drawings will effectively close down small business as competition to the OEM's, deny the government the typical cost savings noted above, and retrogress procurement to the higher costs and abuses of the past. We urge you to take such actions available to you to eliminate proposals to change the data rights policies.

Sincerely,

ASSOCIATED AEROSPACE ACTIVITIES, INC.

D. E. Johnson
President

cc: File

#15 8/17/94

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August 16, 1994

Deputy Director Major Policy Initiatives
1211 S. Fern Street
Room C-109
Arlington, VA 22202-2808

Attn: Ms. Angelena Moy, OUSDA (A&T)/DDP

Subject: Proposed DoD Rule on Rights in Technical Data published in the Federal Register on June 20, 1994

Dear Ms. Moy:

Overall I compliment DoD on the direction it is moving. However, there are still a few changes which need to be made to fulfill Congress's charter given to the Section 807 Committee. To that end, I have enclosed some comments to the proposed rule which I hope you will find helpful.

Thank you for the opportunity to comment. If you have any questions or desire to discuss the enclosed comments, please call the undersigned at (817) 280-2252.

Sincerely,

Jack A. Stein, Chief Attorney
Government Contracting, Procurement,
and Intellectual Property

Encl.

In Reply Refer to:
09:JAS:mh-1093

Comments on Proposed DoD Rule on Rights in Technical Data

1. 227.403-5 Government rights

a. This section provides a series of paragraphs stating under what circumstances the Government acquires "unlimited" rights. Although (a)(1) now reflects the deletion of "required for the performance of a government contract or subcontract" and ties the issue to funding, many of the remaining paragraphs, such as (a)(2), (a)(4) and (a)(5), are open ended and do not state that the work must be exclusively funded with direct Government contract funds. We suggest that the introduction to "unlimited" rights state unequivocally that the "exclusive funding" determination be a foundational step in this process. Otherwise, one could argue that the Government obtains "unlimited" rights in any form, fit or function data [see (a)(4)] or in data related to an element of performance [see (a)(2)], regardless of whether the Government exclusively funds the effort.

b. This section also addresses Government purpose rights, i.e. data developed with mixed funding. However, there has been no attempt to address the mixture of funding as was the case in some earlier drafts. It now appears that the Government need only fund a small percentage of the work to obtain Government purpose rights. Upon the expiration of the five year or other negotiated period, the Government would then obtain "unlimited" rights. Although we recognize that it is difficult to establish the required mix of Government and contractor funding for Government purpose rights, it seems inequitable that the Government could eventually obtain "unlimited" rights based on minimal Government funding. This appears to create a disincentive for those companies which have substantial commercial business or otherwise desire to continue to do Government business while at the same time aggressively pursuing "Defense Conversion initiatives." Companies would be more inclined to participate in mixed funding efforts if the Government was required to contribute substantial funding, for example, at least 50% of the effort. If the Government has Government purpose rights, it can certainly accomplish its charter and acquire those goods and services needed to conduct the Government's business. Therefore, we propose that either a substantial percentage of required Government funding be included or, in the alternative, that the automatic conversion to "unlimited" rights revision be deleted and that the data remain "Government purpose rights" indefinitely. In addition, the Government may want to consider providing the contractor with an option to extend the Government purpose rights period for an additional five years or otherwise allow the contractor the option to reimburse the Government at the end of the initial five year or negotiated/extended period for the Government's share of its funding and thereby exclude release of the data for commercial purposes.

c. With respect to "Government purpose rights," we also recommend that "Government purpose" be expressly restricted to the U.S. Government for the procurement of goods and services under a U. S. Government contract and that use of the data by a "foreign government" be classified as a "commercial purpose."

d. We also recommend that (b)(2) be revised to make it clear that the Contracting Officer "should freely grant" longer Government purpose rights periods based on the contractor's representation that the longer period is needed in order for the contractor to maximize recovery of its investment in the commercial arena. Unless such a statement is made, Contracting Officers will be hesitant to negotiate longer periods or will require a level of substantiation which is unreasonable given the uncertainties of future business events.

e. We have a problem with (b)(3) which provides that the Government purpose rights period commences upon execution of the contract, subcontract, letter contract, etc. Since the Government obtains "unlimited" rights upon the expiration of this period, it is important to remember the intent of Government purpose rights in the first place. If a contractor invests substantial funds in a mixed funding situation, it wants to be assured that application of the data in the commercial arena is viable for a reasonable period of time in order to recapture its investment. Under the current language, this period may have run or otherwise been substantially reduced before the contractor has the opportunity to make an impact in the commercial sector. Therefore, we recommend that this provision provide that the Government purpose rights period only commence upon delivery to the Government of the data.

2. 252.227-7013 Rights in technical data - Noncommercial items

a. Paragraph (a)(7) defines "Development exclusively at private expense" to include "...costs not allocated to a government contract..." This phrase is confusing and somewhat inconsistent with the phrase "costs charged to indirect cost pools." We recommend that this phrase be deleted and that the following be substituted: "costs not charged directly to a government contract."

b. The definition of "Developed with mixed funding" would also have to be changed to reflect the comment in paragraph 2.a. above.

c. This clause should be further revised based upon the comments provided in paragraph 1. above.

d. Paragraph (e)(2), Identification and delivery of data to be furnished with restrictions on use, release, or disclosure, states, in pertinent part, that "...The contractor shall not deliver any data with restrictive markings unless the data are listed on the Attachment." Although paragraph (e)(3) allows additional assertions to be added "after award when based on new information or inadvertent omissions," this provision could be interpreted as a de facto "list or lose." In addition, we can see where factual disputes could arise over the implementation of the phrases "new information" and "inadvertent omissions." In order to clarify this provision, we recommend that the provision be revised to make it clear that a failure to list the data for any reason, excusable or otherwise, does not prevent a contractor from asserting its rights. It should be further stated that a failure to agree will be considered a "dispute" under the contract to be resolved pursuant to 252.227-7037. The Contracting Officer should be required to accept the additions to the Attachment until the Government has successfully challenged the contractor's assertions pursuant to the above provision.

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Mrs Eleanor Spector
OSD(USD)(A)
Room 3E 144
The Pentagon
Washington DC 20301

Your reference

Our Reference Pats/L/93/01

Date 25 July 1994

Dear Eleanor

I said I would send you a note on the proposed new DFARS provisions covering data rights prior to our meeting on 4 August.

I have annexed to the present letter a note detailing our concerns. In brief they are as follows:

1. **Internationally Collaborative Programmes**.

   a. There is no instruction to Contracting Officers to use the Govt-to-Govt Programme MoU as the basis of the contract where the work supports an internationally collaborative programme.

   b. It is also questionable as to whether the current draft is sufficiently flexible to allow departure from the standard rights to allow sharing of technology with the partner Governments.

2. **Government Purpose Rights**.

   a. Does the definition of GPR allow for exchanges of information between a foreign Government and its contractor?

   b. 'Defense Purpose' rights of use in MoU's require special consideration if Security Assistance is to be covered.

   c. MoU and existing treaty provisions pre-empt the need for UK Government signature of a Use and Non-disclosure Agreement.

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d. A requirement for the UKG to sign a legally binding agreement causes problems (see the history of the 'Chapeau' Agreement').

3. **Discrimination Against Foreign Contractors**.

Countries such as the UK who have a bilateral co-operation MoU with the US would expect exemption from 252.227-7032 (comparable to Canada).

4. **CALS Requirements**.

We are interested in your vision of how 227.408(c) and (d) would operate with a CALS Integrated Weapon System Data Base (IWSDB).

I look forward to meeting you on 4 August. I am copying this note to Mike Cifrino and Vince Knox as they are involved in the issues and have indicated that they will be present at the meeting.

Regards

Freda

(Miss Freda Sedgwick)

Copy:

Mr M Cifrino
Mr V Knox

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1. **Internationally Collaborative Programmes.**

(a) When we enter into internationally collaborative programmes which are supported by contractors we, of course, have to accept that our standard domestic contracting practices will not necessarily suit the requirements of the programme. For this reason we must set out in the Government-to-Government MoU the areas where we need to modify or compromise on our normal procedures. Past practice tells us that the Intellectual Property Rights provisions in MoU's are often one of the most difficult areas and require the hardest compromises. It is therefore essential to keep domestic practices flexible to accommodate the compromises which are agreed in the MoU.

(b) In the UK it is understood that the MoU will be the master document which drives the programme and that implementing contracts must comply with the MoU. Contracting officers must therefore look to the MoU first in determining appropriate contract conditions and must depart from standard national conditions where needed. In the simplest case (eg a 50/50 joint USG/UKG development contract) it may be sufficient to use standard conditions and arrange for both the USG and the UKG to be equal recipients of rights. In less simple cases a wholly different structure may be required. In nearly all cases the UKG's contractor will be required to provide more rights under the contract than would be required under a standard domestic contract as a natural consequence of the requirement to provide rights to the USG.

(c) Although the proposed new DFARS suggests at paras 227.403-5 and 227.503-5 that approaches other than the standard approach may be used, there are three problems.

(i) no language is included to alert the Contracting Officer to the need to provide for rights to other Governments and their representatives when contracting under internationally collaborative programmes.

(ii) nothing is said about the need to construct the contract in accordance with the MoU,

(iii) the DFARS indicates that rights broader than those specified in the standard conditions cannot be secured from Industry if there is to be any departure from standard conditions. Clearly this could lead to problems, particularly if Restricted, or Limited Rights information is involved and there is a requirement to pass this information to another Government or its contractors for use in the programme.

2. Government Purpose Rights (GPR).

a. Definition of GPR.

(i) In some instances where our Governments decide to collaborate on a programme, national work has already begun and contracts have already been placed. We must then rely on the flexibility built into our standard conditions in order to share the results.

(ii) In the past the US has been able to rely to a large extent on Unlimited Rights to support these kinds of programmes. In the future GPR will be more prevalent and it was for this reason that I first raised with the 807 Committee the issue of how broadly the GPR right was to be defined. It was then defined to include internationally collaborative programmes.

(iii) We assume that the present definition allows not only passage of GPR data to a foreign Government, but also allows onward passage to that Government's contractors. We would welcome your confirmation of this.

(v) We also assume that GPR data would not be available to the foreign Government for 'Defense Purposes' where those purposes include Security Assistance. If the MoU for the collaboration requires this right to be available to the foreign Government, the USG's contract would therefore present a problem. This is important since some MoU's require 'Foreground Information' to be available to the Participants for 'Defense Purposes'. Contracting Officers who are

procuring in support of these programmes will therefore need to be alerted to the potential difficulties.

(b) Use and Non-Disclosure Agreement.

(i) We note with some concern that there is a requirement for foreign Governments receiving GPR information to sign a Use and Non-disclosure Agreement. The mechanism which is currently used to constrain a foreign Government's use of information is the project MoU. This usually contains detailed provisions concerning use and disclosure rights in a contractor's information and is backed up by a number of general arrangements. These include two treaties (the NATO Agreement on the Communication of Technical Information for Defence Purposes, the UK/US Agreement Concerning Defence Co-operation Agreements [the 'Chapeau Agreement']) and an MoU (the December 1985 US/UK Co-operation MoU). In our view there is no need for a further undertaking such as that given in proposed DFARS para 227.403-7.

(ii) If undertakings such as those in para 227.403-7 were to be required within an international exchange, we would expect them to be given reciprocally. The USG would therefore be expected to adhere to the same restrictions.

(iii) The Agreement at para 227.403-7 provides an additional problem for the UKG as it appears to require a legally binding agreement from the signing Government. We have already indicated to DoD that this causes us a problem and we have been through a prolonged period of difficult debate on the issue. After 18 months of delayed international programmes we finally resolved this by signing the 'Chapeau' Agreement in 1993. We would not wish to re-open this debate now.

3. **Discrimination Against Foreign Contractors**.

We note from paras 227.403-17 and 227.503-17 of the proposed new DFARS that DoD intends to retain clause 252.227-7032.

However, there is no indication that it does not apply to countries with whom the US has a co-operation MoU such as the December 1985 UK/US MoU. We assume that, as we have agreed not to discriminate against each other's contractors, clause 252.227-7032 would not be used for UK contractors. We would suggest that some clarifying text should be included to indicate that, in addition to its not applying to Canada, the clause also does not apply to other MoU countries.

4. **CALS Requirements**.

We note with interest the provisions of para 227.408(c) and (d). We are currently considering the implications of standard IPR contract clauses for the CALS concept of an Integrated Weapon System Data Base (IWSDB). It would seem from 227.408(c) and (d) that a sub-contractor who has Limited Rights data may be able to avoid contributing that data to a IWSDB maintained by his prime contractor if he so wishes. We would be interested in any thoughts you may have on this point and whether any consideration has been given to it in the light of the CALS philosophy.

8/19/94
#75

Business Software Alliance

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August 19, 1994

Deputy Director
Major Policy Initiatives
1211 S. Fern Street
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Arlington, Virginia 22202-2808

Attention: Ms. Angelena Moy
OUSDA (A&T)/DDP

Re: DAR Case 91-312

Dear Ms. Moy:

The Business Software Alliance (BSA) is pleased to have the opportunity to provide written comments on the Department of Defense's (DOD) proposed rule on Rights in Technical Data as published in the Federal Register on June 20, 1994. 59 Fed. Reg. 31584. The Business Software Alliance represents the major software publishers including Apple Computer Inc., Aldus Computer, Inc., Autodesk Inc., Claris, Inc. Intergraph Corp., Lotus Development Corporation, Microsoft Corporation, Novell, Inc., and Santa Cruz Operations. The three components of the "core" software industry, customer computer programming services, prepackaged software, and computer integrated design, in aggregate, now account for $36.7 billion in value added to the U.S. economy. For the entire period 1982 to 1992, the software industry grew by 269 percent in real terms, while the remainder of the economy grew by about 30 percent.

Even though the federal government represents a small percentage of total sales for BSA members, our companies view their federal customers as an important part of their overall sales effort. For that reason, BSA applauds DOD's efforts to update and clarify current technical data regulations with regard to rights in commercial computer software and commercial computer software documentation in order to make them more consistent with the practices in the commercial marketplace. By eliminating existing impediments, DOD not only benefits BSA member companies by reducing some of the extra costs associated with doing business with the Government, but will also increase the level of competition for the Government's business with a reduction in prices being the anticipated result.

Summary

BSA is generally pleased with the clear intent of the proposed regulations. Proposed new Subpart 227.5, *Rights in Computer Software and Computer Software Documentation*, and in particular, section 227.502, *Commercial computer software and commercial computer software documentation*, evidence the recommendations of the Government-Industry Technical Data Advisory Committee. In particular, BSA strongly supports the concept of having the Government rely on the protections available in the commercial marketplace to protect the Government's interests when purchasing commercial computer software and documentation.

At the same time however, BSA strongly recommends that existing ambiguities in the proposed regulations be eliminated so that the intent of the regulations is reflected in the actual language. Principally, this involves modifying the regulations to reflect that whenever DOD purchases commercial computer software and documentation that was developed without any government funding, DOD shall acquire that software and documentation pursuant to the terms of the existing commercial licenses except in exceptional and rare circumstances. Without these recommended changes, DOD contracting officials, when following the exact requirements of the regulations as currently drafted, will once again impose unnecessary and burdensome requirements on commercial software manufacturers contrary to the intent of the regulations. It is absolutely critical that the current ambiguities in the proposed regulations be eliminated so that there is no doubt that when purchasing commercial software and commercial software documentation, DOD contracting officials will rely solely on existing commercial licenses.

Detailed Comments

For ease of reference, BSA offers the following detailed comments in numerical order of the proposed regulations.

227.500(b)

This section states that Subpart 227.5, *Rights in computer software or computer software documentation*:

> [d]oes not apply to computer software or computer software documentation acquired under GSA schedule contracts.

Comment

DOD represents a major source of purchases of commercial computer software and documentation via GSA schedules. By exempting those purchases from the DOD regulations, the proposed regulations perpetuate a dual system of coverage for computer software and documentation purchased by DOD that is inconsistent with statutory requirements. That system, as it currently exists, results in DOD offices buying software pursuant to the civilian agency technical data clause rather than the DOD clause.

GSA could and should easily amend its schedule solicitation for software by adding a clause that states that for purchases by DOD of commercial software and documentation, the DOD rules shall apply. Because the clear intent of those rules for commercial software and documentation is to use commercial licenses, no additional paperwork would be necessary or duplicated and DOD users of popular commercial products that are purchased by virtually every DOD buying office would need to follow only a single set of regulations.

Recommendation

Delete "[d]oes not apply" from the first line and replace it with the word "[a]pplies."

227.501(b)

This Section provides that relevant terms used in the Subpart, 227.5, *Rights in computer software or computer software documentation*, are defined in the clause at 252.227-7014, *Rights in Computer Software and Computer Software Documentation*. That clause provides the following definitions of particular importance to members of BSA:

> (1) *Commercial computer software* means software developed or regularly used for non-governmental purposes which --
>
> (i) Has been sold, leased, or licensed to the public;
>
> (ii) Has been offered for sale, lease, or license to the public;
>
> (iii) Has not been offered, sold, leased, or licensed to the public but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of this contract; or,

(iv) Satisfies a criterion expressed in (a)(1) (i), (ii), or (iii) and would require only minor modification to meet the requirements of this contract.

(4) *Computer software* means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer databases or computer software documentation.

(5) *Computer software documentation* means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

Comment

The proposed definition of *commercial computer software* is so broad that it includes computer software that was developed, at least in part, with government funds as well as truly commercial software that was developed without any government funds. With very few exceptions, the vast majority of what the commercial marketplace would define as commercial computer software is developed exclusively at private expense.[1]

Furthermore, the proposed definition, by requiring that *commercial computer software* be "developed or regularly used for non-governmental purposes" ignores the fact that commercial software manufacturers view the government marketplace in the same way as they view other commercial industries. As a result, in an effort to remain competitive and be responsive to the peculiar needs of a particular industry or marketplace, software manufacturers will develop, at their own expense and without any government funding, specialized software that meets the needs of a particular set of users. The resulting software is commercial because it was developed without government funding, but it may or may not be sold to commercial customers that do not

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[1] BSA has been unable to identify a single product manufactured by its members and sold to commercial customers that was developed, even in part, with any government funding.

have the same need of government users.[2] Under the proposed regulations however, that software would not qualify as *commercial computer software*.

In addition, the proposed regulations are based, in part, on the basic premise that the Government deserves greater rights in computer software that was developed, at least partially, with government funds. As currently drafted, however, the proposed definition for *commercial computer software* includes computer software developed at least partially with government funds. That result is inconsistent with the proposed policy that "[c]ommercial computer software or commercial computer software documentation shall be acquired under the licenses customarily provided to the public. . . ." 227.502-1(a).

The proposed regulations also create the situation where Clause 252.227-7014 is inserted in a solicitation which requires the delivery of both truly commercial as well as noncommercial software.[3] That clause creates a number of requirements, including marking, verification, and audit requirements that increases significantly the costs and risks of doing business with the Government for commercial software manufacturers without providing any real benefits to the Government when buying commercial software that was developed without government funds and in which the government does not have any particular special interests.

In order to ensure that commercial software manufacturers are not burdened by the increased requirements, while still ensuring that the Government receives appropriate rights when it has participated in funding the development of software, the proposed definition for *commercial computer software* should be changed so that only software developed without government funding is included. Furthermore, the test for defining *commercial computer software* with regard to the rights obtained by DOD should be based on the source of funding for software development and not the particular marketplace for which the software was developed.

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[2] A good example of this type of development is the recent court decision mandating that e-mail documents be retained as agency records. Software manufacturers, recognizing both the need for specialized e-mail features created by the court rulings and the size of the actual market for such software may develop, at their own expense, specialized e-mail software for government use. It is unlikely, however, that the software will ever be "regularly used for non-governmental purposes" because few if any private sector industries have a similar, court enforced requirement.

[3] Paragraph 227.503-6(a)(1) states that the clause 252.227-7014 is not to be used "when the *only* deliverable items are . . . commercial computer software of [sic] commercial computer software documentation." Emphasis added.

In addition, in order to make the proposed regulations consistent, the term *commercial computer software documentation* should be defined in a similar manner as *commercial computer software*. It will do a commercial computer software manufacturer little good if it is able to eliminate the unnecessary costs associated with providing commercial software to the Government to then turn around and have them imposed on the commercial software documentation that is sold with the software.

Recommendation

Eliminate the phrase "developed or regularly used for non-governmental purposes" from the definition of commercial computer software.

Add the following paragraph to the definition of commercial computer software:

; and (v) was developed exclusively at private expense.

Add the following paragraph at 242.227-7014:

(1) *Commercial computer software documentation* means software documentation developed or regularly used for non-governmental purposes which --

(i) Has been sold to the public;

(ii) Has been offered for sale to the public;

(iii) Has not been offered or sold to the public but will be available for commercial sale in time to satisfy the delivery requirements of this contract; or,

(iv) Satisfies a criterion expressed in (a)(1) (i), (ii), or (iii) and would require only minor modification to meet the requirements of this contract; and (v) was developed exclusively at private expense.

227.502-1(c)(1)

This subparagraph provides that offerors and contractors shall not be required to:

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 to such software or documentation to meet the requirements of a DOD solicitation;

Emphasis added.

Comment

The term "technical information" is an undefined term in the proposed regulations as well as the entire FAR that is only used in one other place in the proposed regulation. *See* 227.402-1(b)(1). It is unclear why this subparagraph uses this term or what the term means.

Furthermore, this subparagraph, as presently drafted, will create the unacceptable situation whereby a commercial software manufacturer will be required to provide DOD with technical data for which DOD did not fund the development. This would occur when a commercial software manufacturer responds to a particular government marketplace need by modifying or developing, at its own expense, software that will satisfy a particular government need. When that need is inserted into a solicitation, this subparagraph would require the manufacturer to provide DOD with the technical data supporting any such modification. This should occur only when DOD has specifically funded the modification work.

Recommendation

Substitute the term "technical information" with the term "technical data."

Insert the words "at DOD's expense" after the phrase "documenting the specific modifications made to such software".

227.502-3(b)

This subparagraph provides that the Government is to negotiate for any additional rights not conveyed under the software license provided to the public. The subparagraph states:

> 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.

Comment

The need for the Government to obtain from commercial software manufacturers rights beyond those customarily available in the commercial marketplace should be extremely rare and limited. Because of the significant additional costs and potential difficulties associated with such negotiations,[4] the Government contracting officer should be required to justify in writing the need for the additional rights and obtain approval for seeking the additional rights from at least one level above the contracting officer. This is particularly true for those DOD offices that have been requiring the use of escrow agreements for source code for widely available commercial software programs. Those additional requirements only add to the cost of doing business with the government without adding any real value to the process.

Furthermore, the concept of "negotiation" addressed in this subparagraph implies that the additional rights will be discussed after and not before contract award. The need for additional rights should clearly be known to the Government prior to submission of offers as a result of the market research and analysis performed by government officials as required by FAR 7.105, 10.002(a)(2), and 11.004. As a result, except in the rarest of cases, the need for additional rights will be known at the time the solicitation is being prepared and potential officers will be able to assess the additional costs.

Finally, because additional rights can be a price related factor, consideration should be given in the contract evaluation criteria for the relative value of the additional rights in the same manner that is encouraged for warranties by DFAR 211.7004-1(i).

Recommendation

Replace subparagraph 227.502-3(b) with the following:

> If the Government has a need for rights not conveyed under licenses customarily provided to the public, the Contracting Officer shall prepare a written justification for the additional rights needed which shall be

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[4] For example, additional rights would, by necessity be provided at some additional cost to the Government. However, the very definition of not being "customarily provided" in the commercial marketplace will mean that the price for the additional rights, if negotiated after contract award, will require the submission of cost or pricing data, something that most commercial software manufacturers cannot do without incurring an enormous expense.

approved at a level above the Contracting Officer. The additional rights needed shall be clearly specified in the solicitation. Evaluation factors included in the solicitations shall be structured to permit consideration of the relative value to the Government of the additional rights required. The specific rights granted to the Government shall be enumerated in the contract license agreement or an addendum thereto.

(c) If the Government determines that additional rights are needed after contract award, the Contracting Officer shall prepare a written justification for the additional rights needed which shall be approved at a level above the Contracting Officer. The Government shall 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.

227.503 Noncommercial computer software and noncommercial computer software documentation

Although the heading of this Section states that it is applicable to *noncommercial computer software* and *noncommercial computer software documentation*, the vast majority of the references are to the much more broadly defined *computer software* and *computer software documentation*. Indeed, there are only two references to "noncommercial" computer software or documentation in the entire section. *See* 227.503-5(c) and 227.503-6(c). As a result, because of the numerous references to *computer software* and *computer software documentation* Government officials and others could easily be misled to believe that the numerous requirements of the Section apply to truly commercial as well as software and documentation developed at least in part with Government funds.

Those requirements, when applied to the products developed and manufactured by BSA members without any government funding, are extremely onerous and costly and are inconsistent with commercial practices. For example:

(1) **Subsection 227.503-4(a)** grants the Government "irrevocable license" in "computer software or computer software documentation." Many commercial software licenses are, in fact, revocable if the user violates the terms of those licenses.

(2) **Subsection 227.503-5(a)(2)** states:

The Government obtains an unlimited rights license in--(2) Computer software documentation required to be delivered under this contract.

As defined by Clause 252.227-7014(a)(15), the term:

> *Unlimited rights* means rights to use, modify, reproduce, release, perform, display, or disclose, computer software or computer software documentation in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

A literal reading of the proposed regulations means that all computer software documentation delivered to the Government can be reproduced without cost by anyone in the Government or by anyone authorized by the Government. Such broad and unfettered authority is certainly inconsistent with the stated policy of Subsection 227.502-1(a) that states "Commercial computer software documentation shall be acquired under the licenses customarily provided to the public. . . ."

(3) **Subsection 227.503-5(a)(4)** states:

> The Government obtains an unlimited rights license in--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 form 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.

Emphasis added. The term "publicly available" is an undefined term in the proposed regulation as well as in the FAR. A literal interpretation of the term would describe all commercial computer software defined by the proposed regulations and would mean that the Government receives unlimited rights in commercial software.[5] The term is, in fact, unnecessary because the clear intent is to provide the Government with unlimited rights for software or documentation that has been released without restrictions as delineated in the second clause of paragraph (a)(4).[6]

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[5] BSA recognizes that the term is also used in existing regulations. BSA is unaware of any case law that has interpreted this term so broadly. However, the proposed regulations provide DOD the opportunity to appropriately eliminate completely any such misinterpretation.

[6] The concept of publicly available without restrictions is actually used in the proposed regulations at 227.403-13(c)(1)(i).

(4) **Subsection 227.503-10(b)**, by invoking the requirements of Clause 252.227-7014, requires:

> 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. . . .

Because Clause 252.227-7014 is inserted in all solicitations for software or documentation except for those that are *exclusively* for commercial software or documentation, this subsection and clause will require commercial software manufactures to continue to mark all software manufactured with the appropriate government markings. Once again, this is inconsistent with the clear policy of Subpart 227.502 to purchase commercial computer software "under the licenses customarily provided to the public. . . ." Furthermore, because a software manufacturer is unaware at the time software is manufactured whether it is destined for purchase by the Government, all software manufactured must be marked in order to avoid the draconian result of giving the Government unlimited rights in unmarked software. This subsection continues unnecessarily the need for software manufactures to mark with Government prescribed markings all software manufactured.

(5) **Subsection 227.503-10(c)** states:

> 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.

The literal interpretation of this regulation states that unmarked "computer software or computer software documentation," which includes commercial software and commercial computer software documentation, is delivered to the Government with unlimited rights unless marked. There is currently no exclusion in the draft regulations for commercial software and documentation that is supposed to be bought pursuant to commercial terms.

(6) **Subsection 227.503-11** requires contractors as well as software manufactures to establish written procedures and maintain records in order to be able to justify restrictive markings. The subsection states:

> 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.

This requirement is inconsistent with the policy set forth that commercial computer software and documentation are to be bought pursuant to commercial terms which do not require records to be kept and made available for government audit.

Recommendation

Replace the term *computer software* and the term *computer software documentation* with *noncommercial computer software* and *noncommercial computer software documentation* each and every time they appear.

Conclusion

The Business Software Alliance applauds DOD's effort with regard to the proposed regulations. It is important, however, that the regulations be amended to ensure that commercial software developed without any government funding or assistance is sold to the Government under the same terms and conditions as it is in the commercial marketplace in order to receive the benefits of increased competition and lower costs. With implementation of the changes proposed above, BSA strongly supports the adoption of the new regulations.

Sincerely,

Robert Holleyman

Robert W. Holleyman, II
President

#31 8/19/94

COGR
an organization of research universities

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August 18, 1994

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Deputy Director Major Policy Initiatives
1200 South Fern Street
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ATTN: Ms. Angelena Moy, OUSD (A&T)/DDP

Subject: DAR Case 91-312

Dear Deputy Director:

The Council on Governmental Relations (COGR) is pleased to provide comments on the proposed rules for amending the Defense Federal Acquisition Regulation Supplement: Rights in Technical Data, published for comment at 59 FR 31584, June 20, 1994.

COGR is an organization with a membership of 138 U.S. research universities. These universities are engaged in research activities funded by the federal government and virtually all receive some support from the Department of Defense under research and development contracts that will be subject to the new rules. The strong interest of the academic community in data rights and computer software was recognized by the Congressional requirement that the academic community be represented on the government-industry advisory committee.

I. General State of Support

For the most part, the interests of the universities as data and software developers parallel those of the industry developers. Over the past two decades, significant advances in computer software technology, particularly, have had their origins within the U.S. research university community. The Department of Defense (DOD) has funded advances in computer hardware design, parallel processing, artificial intelligence and systems integration software from the university community, causing the research universities to become major contributors to U.S. defense and economic competitiveness capabilities. Yet, over the past decade, the university developer community, like its industrial counterpart, has found that federal government rights inhibit rather than encourage industrial commercialization of DOD funded computer hardware and software technological advances. COGR views the proposed rule changes as a major step forward in addressing an imbalance in the allocation of rights which has hampered university efforts to effectively transfer computer-related technology for commercial development.

We believe these improvements in DOD procurement regulations will encourage industrial investment in university-generated data and computer technology and will reduce the barriers to government-industry-university partnerships in research.

II. Specific Endorsements

Government Purpose Rights for Computer Software Developed With Mixed Funding

The vast majority of research universities in the United States has developed strong technology transfer capabilities. Bolstered by the passage of the Bayh-Dole Act in 1980 (P.L. 96-517) giving universities the right to retain ownership of and to commercially license inventions developed under federal funding, universities embraced technology licensing as a significant and effective mechanism for converting basic research to a tangible public benefit. While Bayh-Dole provided a framework that encouraged commercialization of patented technology by reserving to the government only the rights necessary to meet the government's mission objective, there was no such corollary for unpatented technology. Conversely, the government's unlimited rights in data has prevented universities from retaining sufficient rights in computer software necessary to induce private investment. As a result, much has been left to languish in the public domain - too complex for the ordinary private citizen to use, too much of a risk for private company capital investment.

By declaring that computer software developed with mixed funding will entitle the government to a government purpose license, but not to unlimited rights, the proposed regulations will provide universities with the residual rights necessary to successfully attract commercial partners for transferring the software into the marketplace. Furthermore, it will encourage computer software companies to provide private funding for universities to enhance, port to new platforms and further develop computer software initially created with DOD funding.

One disadvantage is the five year limitation on government purpose rights which universities do not endorse as a reasonable standard term. Indeed, it appears arbitrary. Instead, we recommend an unlimited period as long as the public has reasonable access to the product. The five year term imposed by the new regulations does not take into account the development time, private resource investment, necessity for maintenance, user interest in enhancement at private expense, or any other criteria based on marketplace realities. Further comments on the five year government

purpose right term limitation are provided in the Recommendations section of this letter.

Elimination of "Required for Performance"

The "required for performance" category enabling the government to claim unlimited rights in both technical data and computer software developed solely at private expense has stood as a major example of preferential treatment demanded under government procurement programs. COGR commends the advisory committee on recognizing that "required for performance" fails both a fairness test and the source of funds test and should be eliminated. Its elimination will remove a barrier to industry-university-government partnerships especially within the computer industry where companies have been unwilling to risk losing "core" systems to unlimited government rights.

Indirect Cost Treatment

While this clarification in the proposed regulations will have little direct effect upon most universities, redefining development costs charged to indirect cost pools as private expense will eliminate yet another barrier to industry-university-government programs. Recent university experiences under the Technology Reinvestment Project have shown clearly that companies that do not traditionally do business with the government are unwilling to participate in consortia or joint ventures where developments routinely charged to indirect costs pools might become subject to government rights. The universities are encouraged that this change in the DOD regulations will permit more joint venturing with companies and particularly with small businesses that generally are not government contractors.

Separation of Computer Software from Technical Data

Separating computer software from technical data recognizes technological reality and is endorsed. The separation makes it possible to more clearly define the allocation of rights where new or specific legal theories may be applied to computer technologies, and also takes into consideration the reality that computer software is often a high-value marketable product whereas technical drawings, reports, evaluations generally are not. The Committee recommendation that the government accept negotiated license rights in computer software that is developed as a commercial product, regardless of source of funds, will provide powerful encouragement for universities to aggressively pursue timely transfer of computer software to the marketplace.

III. Shortcomings/Recommendations

Five-Year Limitation on Government Purpose Rights

COGR strongly opposes the five-year limitation placed on government purpose rights. The specter of the government asserting unlimited rights after a period of only five years is a great disincentive to private investment and ensures mediocrity in product development. With such limited period of commercial exclusivity commercial developers will forgo innovation and capital investment in quality products in favor of product shortcuts and quick profits. Success in transferring university-developed software, rarely ready for public use when a research project is finished, depends directly upon industry's positive calculation of development and marketing costs versus expected market share. A five year exclusive marketing period, measured from the contract date, is insufficient to induce commercial investment. In fact, five years of government purpose rights will not establish five years of commercial benefit to the contractor because no product is ready for marketing at the beginning of a contract period. At best, it may be ready for the commercial market place only by the end of a contract and at worse, much later. Consequently, the five year limitation as a benefit to the contractor is illusory and it will continue to provide a strong disincentive for commercial investment.

The universities would also point out that the short duration of government purpose rights ensures that small or start up businesses, the major job creators in this country, will not become university licensees. By the time the commercial potential or product is realized, generally at the end of a contract period, there will simply not be adequate time for a small or start-up business to raise the necessary capital to bring the product to the marketplace. COGR urges a reexamination of the five-year limitation. Replacing it with (i) an unlimited period as long as the public has reasonable access to the products; or (ii) a limited period, but keyed to first commercial sale; or (iii) a preferentially longer period for small businesses would all have merit.

If the current proposed language is left unchanged, we urge DOD to emphasize in its guidance to contracting officers that longer period of GPRs are to be looked upon favorably as long as the contractor or its designee is diligently pursuing commercialization.

Marking Requirements

The university community joins its industrial counterparts in vigorously opposing the "mark or lose it" mandate of the regulations. While the Committee's recommendations do include a triage clause that would allow the contractor to cure a situation where unmarked or mismarked data or computer software finds its way to the government, the requirements are extremely burdensome and punitive. Moreover, we believe, they are wrongly based on the concept of data "provided" or "furnished' to the government rather than on data and computer software which are deliverables. The collaborative nature of many university research programs, especially those involving industry/government joint ventures or consortia, places privately developed data and computer software at extreme risk of inadvertently falling into government hands without marking. Erecting barriers on collaborative research programs is never productive, but in this case it is detrimental. If universities and their industry partners may lose valuable rights through well intentioned sharing of information with government colleagues because of a failure to mark, then such collaboration becomes a risk factor. COGR urges a reexamination of the "marking" requirements to provide better protection for data and computer software to which the government may have access but which is not a "deliverable."

IV. Concerns Specific to the Research University Community

Unlimited Rights in Studies, Analyses or Test Data

A significant portion of university research funded by DOD falls into the categories of studies, analysis, testing, evaluation and like theoretical investigation. These programs provide excellent training for students as well as providing information of use to the government and to industry. In fact, much of the basic research done by universities falls into these categories as a convenience for separating Defense 6.1 funding from Defense 6.2 funding. The university community takes issue with placing technological data relating to these categories under unlimited rights regardless of the source of funds. Very often testing and evaluation projects undertaken in universities require use of third-party owned materials. Since data from such activity may reveal commercial trade secrets, access to third-party owned materials is difficult to obtain if the government will be entitled to unlimited rights in data. We believe that data derived from testing, evaluation, and analysis should be subject to a source of funds test and should not automatically carry unlimited rights. COGR recommends modifying the definition of this category of unlimited rights data to specifically address these concerns.

Obligations of Indemnification Under Nondisclosure Agreements

The university community has a major concern that accepting Government Furnished Information with Restrictive Legends will expose them to indemnification liability that is not tenable for nonprofit educational institutions. The new language proposed for the "Use and Non-disclosure Agreement" at 252.227-7025 requires recipients of GFI marked with restrictive legends to indemnify the government for the recipient's use and misuse of the information and for the use or misuse by any third party to whom the information is released. COGR believes that the burden for third-party use should be shifted to the third party and urges substitution of a contractual requirement that permits disclosure only to third parties who have agreed to indemnify the government for the misuse or unauthorized release of the GRI.

V. Conclusion

Overall, the university community sees the Committee's recommendations as positive movement towards a more balanced procurement policy. However, the proposed rules still fall far short of recognizing how business is done in the commercial marketplace. While the universities acknowledge the special needs of government procurement, we believe that procurement goals should be better balanced with Administration goals of dual-use conversion, U.S. competitiveness and encouraging job growth in the major industries and small businesses. Subjecting R&D procurement to a serious "government needs" test would signal a major change in thinking, and might well result in cost reductions. COGR endorses the adoption of these new proposed rules as a staging platform for the next step which would see the government pro-actively encourage and recognize industry cost-sharing, private innovation, industry-university-government partnerships and university technology transfer as worthy goals of government procurement.

Sincerely,

Milton Goldberg

Milton Goldberg

#14 8/17/94

Columbia Gear Corporation

A Subsidiary of Vesper Corporation

August 11, 1994

Mr. Robert Donatuti
Deputy Director for Major Policy Initiatives
1200 South Fern Street
Arlington, VA 22202 2808
ATTN: Ms. Angelena Moy, OUSD (A&T)/DDP

RE: DAR Case 91-312

Dear Mr. Donatuti:

I am writing to you today to respond to your request for comments on the proposed changes in regulations governing rights in technical data. We do not develop data, but utilize technical data provided by the government to produce quality spare parts to the government at competitive prices. Columbia Gear has been manufacturing defense related products for over 20 years.

We at Columbia Gear are legitimately concerned that these changes will negatively affect our business opportunities. We are also concerned that this rule is being promulgated for the benefit of large prime contractors at the expense of small business competitors for the aftermarket. We are bringing this matter to the attention of our elected representatives, in the hope that Congress will fully review the impact of this change on competition and our tax dollars.

We are concerned about the following:

- *Changes in language making any data developed in performance of a government contract will result in less data being available. We don't believe that data resulting from development of a defense end product should be the property of an OEM.*

- *Data charged to an indirect pool will become proprietary to the OEM. We fully understand the argument that CAS will not allow misuse of this flexibility, but still believe that the OEMs will find this a loophole to crawl through. (This is demonstrated by the fact that OEM members of the 807 panel fought hard to achieve this concession.)*

- *We are aware of contentions that these changes will only affect future development. We are afraid, however, that these changes may be applied to system upgrades, contract enhancements, etc., and seriously affect the spare parts market.*

530 County Road 50 • P.O. Box 1000 • Avon, MN 56310 • (612) 356-7301 • FAX (612) 356-2131

MEMBER OF AGMA

August 11, 1994

The more data there is available, the more competition. The more competition, the greater the savings to the taxpayer. We, as taxpayers, have a right to the savings produced through the competition as well as a right to data developed--according to any formula--with any of our tax dollars.

To summarize, we believe that this proposal will unnecessarily harm the ability of qualified small businesses to provide spare parts at a cost savings to the taxpayer. By affecting thousands of component manufacturers across the country, it will further erode the second tier suppliers which form an essential segment of our defense industrial base. And finally, it will result in American jobs sent offshore and a return to the $500 toilet seat Secretary Perry is hoping to avoid.

Sincerely,

Lyle Nuhring
General Sales Manager

copy: Senator Joe Bertram
Congressman Collin Peterson

9408DON.LCN/dms

DERCO INDUSTRIES, INC.

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#17
8/18/94

11 August 1994

Deputy Director
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1200 S. Fern Street
Arlington,.VA 22202-2808

Attn: Ms. Angelena Moy, OUSD (A+T) DDP
Ref: DAR Case 91-312

Dear Deputy Director Moy:

As a member of the small business community serving the Department of Defense and the Commercial market, I submit comments to the proposed rules as detailed in the June 20, 1994, Federal Register, 807 Committee.

The overall affect of the proposal changes will have a devastating effect on the small businesses that currently act as Department of Defense contractors and subcontractors. We are opposed to any changes which, in affect, reduce competition, increase costs, and place an undue burden on the small business community and the tax payers.

1. The proposed change to limit technical data charged as indirect costs to limited rights status will inhibit competition. An Original Equipment Manufacturer can adjust the way development costs are credited, thereby ending the DOD's free access to the technical data they have funded. The result will be increased costs and less competition.

2. The proposed change to eliminate the requirement for DOD obtaining unlimited rights when data was developed under a government contract will also inhibit competition. Again, when the DOD has funded the development of the data, DOD should have the right to use the data to encourage competition and lower future costs.

3. We oppose a mix of private and government funding for development resulting in 5 years of Government Purpose Rights, without imposing a percentage guideline. A nominal investment can engender an OEM to 5 years of exclusivity and over-priced spares. To allow for adequate recoupment of DOD investment, a 50% threshold for private investment should be added to the rule.

4. We also oppose the rule stating the DOD will be given data rights only as customarily provided to the public. The basis of private agreements should not be implemented in DOD contracting, as this will further reduce DOD's return on investment for technical design, thereby increasing overall costs.

Any efforts to amend the technical data rights regulations must be evaluated by the entire industry and studied carefully for the impact on all sides of the defense industrial base. A committee should include OEM's as well as DOD and small businesses. The end result must not be unnecessarily increased defense costs, restricted competition, and a weakening of military readiness.

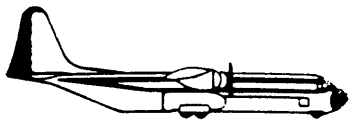
Best Regards,

Mark Hoehnen

Mark Hoehnen
General Manager
Derco Industries, Inc.

Enclosures:

DERCO INDUSTRIES, INC.



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The Honorable Sam Nunn
Chairman
Senate Armed Services Committee
Dirksen Building, Room SD303
Washington D.C., 20510

The Honorable Ron Dellums
Chairman
House Armed Services Committee
2120 Rayburn House Office Building
Room 2108
Washington D.C., 20515-6035

The Honorable Jere W. Glover
Chief Counsel
Office of Advocacy
U.S. Small Business Administration
409 3rd Street, S.W., 7th Floor
Washington D.C., 20416

Electro-methods, Inc.
Attn: Donald M. Judson, President
P.O. Box 54
330 Governors Highway
South Windsor, CT 06074

Wisconsin Procurement Institute, Inc.
Attn: Barry Holland
840 Lake Avenue
Racine, WI 53403-1566

The Honorable Dale Bumpers
Chairman
Committee on Small Business
United States Senate
Russell Senate Office Build6

The Honorable Larry Pressler
Ranking Minority
Committee on Small Business
United States Senate

DOW CORNING

August 18, 1994

Ms. Angelina Moy
OUSD (A&T) DDP
1211 South Fern Street
Arlington, VA 22202-2808

Subject: DAR Case 91-312

Dear Ms. Moy:

This letter is in regard to the subject DAR Case.

First of all, I want to emphasize I support your effort to update the Federal Acquisition Regulation Supplement *"Rights in Technical Data"*. Although my views are represented in the more comprehensive letter from the IDCC committee signed by Mr. Frank Abbott, there is one item which I would like to comment further on - that is the stated five year period for Government Purpose Rights.

The way the proposed change is written the five year period commences with the effective date of the contract. If it is a three year contract, which is common, it would mean that at the completion of a contract there would only be two years remaining to introduce a product and develop a market. For high technology materials, such as Dow Corning produces and sells, it commonly takes five to ten years to develop a market for a product. An extreme example is continuous ceramic fiber tow. Dow Corning and many other companies have been carrying our research, development and marketing products for greater than 15 years. Furthermore, many companies have been selling ceramic fiber tow for 5 years or more. I doubt that any company is satisfied or encouraged with the development of the market to date. Unfortunately, it will probably take at least another 10 years to develop an attractive market for ceramic fiber tow. In this situation a 5 year Government Purpose Rights would be inadequate.

I realize that the proposed change, five year period is followed by *"or such other period as the parties negotiate"*. My fear is, however, that the COs will view this as the recommended period, and will be difficult to move to a more reasonable period. I would recommend not mentioning a specific period, simply state a reasonable number of years will be determined in negotiations. If you feel a

number of years is required it would be more equitable to cite a range such as 5 to 17 years. A third alternative would be to have the Government Purpose Rights period start at the termination of the contract.

I appreciate the opportunity to comment on this important effort to update the DFAR regarding Rights in Technical Data.

Sincerely,

Ward Collins
Sr. Manager, Cooperative R&D
Dow Corning Corporation
Phone: (517)-496-6114
Fax: (517)-496-5324

sk.moy.a3

#30
8/19/94

17 Aug 94

From: Barry Dube'
2150 Duckwalk Court
Waldorf, Md 20602

To: Deputy Director
Major Policy Initiatives
1200 S. Fern St.
Arlington, Va 22202-2808
Attn: Ms. A. Moy

Subj: DFAR CASE 91-312 COMMENTS

Dear Ms. Moy,

Attached are my comments concerning the subject Case. I am employed in the area of technical data acquisition and application, and generate my comments from my 14 years in this business. As a taxpayer, I felt it important to identify impact areas, both bad and good. Most of the proposed changes are acceptable, however, several areas negetively affect the government's ability to properly operate because of conflicting mandates between Public Law and Defense regulations, or acquisition process controls.

The attached document contains for each problem a problem statement, proposed correction, and brief reason for correction need. Many corrections reflect an approach of teaming with the offerors/contractors, where both parties keep each other's needs in perspective and neither side has an overwhelming advantage. Of note is the comment for mixed funding and the beneficial partnering that can occur if the correction is implemented, and the comment for Competition in Contracting Act (CICA) impact.

I look forward to hearing from you. If I can be of any further assistance, please contact me at the above address or evenings at (301) 843-0653, days at (301)221-8876.

respectfully,

Barry Dube'

Reader note: Subpart 227.4 (Rights on Technical Data) proposed changes are considered acceptable except where commented upon.

1. 227.403-1 (Policy)

Problem: As written, this subparagraph has two problems:

First, 227.403-1(e) is in direct conflict with policy defined at 227.403-2(b)(1) because the former disavows competitive reacquisition of form, fit, or function identical items and the latter requires such action.

Second, 227.403-1 (e) is in direct contradiction with Competition In Contracting Act (CICA) (i.e. Public Law 98-369). CICA compliance requires competition and other socio-economic support, such as small business set aside or minority owned businesses. Other derivative programs, such as DOD Spare Parts Breakout Program, will also be effectively terminated by this policy.

Correction: Add as new subparagraph at 227.403-1(e), as (3) the following: *"(3) The selected lifecycle support methodology shall be "contractor life and type" support and the anticipated item service life does not exceed 7 years."* Life and type means no internal to DOD organic support.

Reason: Only short life span items/products are suitable candidates for commercial organic support or for negating CICA benefits. This must be a controlling consideration. Conflicting criteria must also be removed.

2. 227.403-4(a)(1) (License Rights) and 227.403-5(b)(1)(i)

Problem: (a) These two sections do not define or place objective boundaries as to what "mixed funding" represents. This vagueness is untenable. By a contractor's spending the symbolic one (1) dollar as part of an indirect cost pool, he would be permitted to claim mixed funding and apply government purpose rights almost without hindrance. (b) Furthermore, there is no incentivization to promote commercial investment as part of clause - which is what it's purported reason was claimed as being.

Correction: (a) Modify as follows: In the third sentence, after the words "..funding, the Government," insert the following text: *"in accordance with the below schedule."*.
(b) After third sentence, indent and add this following schedule:

MIXED FUNDING INCENTIVIZATION FORMULA:
For every ten percent increment of private funding applicable to the data in the areas of direct costs (i.e. excluding general and administrative), the contract terms except as excluded above, shall (a) permit application of government purpose license rights to technical data for a period of one calendar year for each ten percent increment, and (b) create provisions to utilize dedicated contractor support for the product, item, or process for a period of one-half (.5) calendar year for every ten percent increment of funding. For increment values over sixty percent, the contractor and government will enter into negotiations for application of DFAR Appendix D, Component Breakout. Rounding of increment values shall apply the following rule to the "ones" digit: "Ones" values less than or equal to five, round to the nearest "tens" position; "ones" value greater than five, round to the next higher "tens" position." (e.g. 13<15, round to 10; 47>45, round to 50).

Note: The clause at 252.227-7013(b)(1)(ix)(B)(2) should be changed also to reflect this formula vice the 5 year period currently stated. Formula can be placed in either location, with 252.227-7013 being the preferred location.

Reason: As written, these sections do nothing to either forge a genuine incentive program for offerors and contractors or provide for the government to benefit from the partnership. The recommended rewrite provides for a fair and equitable socio-economic rule for both parties. Additionally, it's time schedule permits proactive and flexible program office implementation of lifecycle support requirements consistent with DODI 5000.2 and availability of funds and resources at various points of the program's lifecycle. In short, it's reinventing government so that both Industry and the DOD reap maximum benefits while encouraging creativity.

3. 227.402-1 (Commercial Items or Processes)

a) Problem: Subparagraph (a)(1) Prohibits DOD from acquiring data needed for the crucial lifecycle functions of rework and spare parts replacement. These are separate and distinct lifecycle functions that, if omitted, render the hardware in need into a non-mission capable (NMC) status. The only circumstance where this is not present is disposable parts. NMC status for most weapon systems hardware is untenable under most conceivable scenarios.

Correction: Two part correction needed: Part one is to insert the terms "*government rework*" and "*procurement of suitable replacement parts*" in the first sentence of (a)(1) after the words "... repair or maintenance." The second correction is to add a new subparagraph (3) under (b) as follows: *(b)(3) comply with 227.402-1(a) when life and type organic support has been contracted for from the offerors and contractors.*

Reason: a) This correction allows DOD to provide for lifecycle support necessary to preclude NMC status.

b) Provides for alternate course of action to DOD to permit our better utilization of commercial capabilities to perform organic support. This action is in line with elimination of specifications and DOD data rights erosion.

4. 227.402-2 (Rights in Technical Data)

Problem: Subparagraph (a) is in direct conflict with the implementation of the clause at 252.227-7015. Specifically, this clause (227.402-2) makes the statement that DOD use of such data is limited to internal DOD functions, the "Generally" caveat not withstanding; however, the clause at 252.227-7015 permits unlimited application of "form, fit, and function" data. Form, fit, and function data will be extensively used both internal to DOD and external by suppliers/competitors to furnish either spare, replacement, or repair parts needed to keep contractors' commercial products operational. The conflict between text and intent must be remedied.

Correction: Modify 227.402-2 (a) as follows: Second sentence delete the word "Generally"; in place there of insert the

following phrase. *"With the exception of technical data addressed at 227.402-1(a)(1) and 227.402-1(a)(2)."*

Reason: Provides clarification and allowance of use of form, fit, and function data products for repair, rework, and spares support.

5. 227.403-1(b)(2):

Problem: This statement is vague in meaning as to just what "acceptance of technical data" means. Very extensive corporate experience in specifying and enforcing contracted for data requirements under this phrase proves that it is too nebulous to realistically apply as is.

Correction: Delete existing sentence and substitute in place the following:

(2) Establish or reference both contractor/offeror and DOD data managers procedures to be applied to determine the following:

(a) Suitability of technical data for intended lifecycle support usage as defined by program Acquisition Plan (AP) or Integrated Logistics Support Plan (ILSP), and

(b) Compliance with contractually specified ordering provisions.

Reason: The term "acceptability" is not specific enough and frequently causes dissension between supplier and buyer. Rather, the usage of acceptable to perform expected lifecycle task and acceptable to contractual provisions need to prevail and be defined.

6. 252.227-7013: Omitted from the definitions

Problem: Section is the topic of "Copy Right." Copy Right issues are frequently surfacing as contractors attempt to apply copy rights to technical content of technical data, versus classic authorship. This abuse must be stopped.

Correction: Include under definitions, the reference to P.L. and short definition of copyright as follows: *"Copyrights: See 17*

U.S.C. 102; defined as works of authorship that exclude protection of application to ideas, procedures, processes, regardless of form, in which described, explained, or otherwise illustrated."

Reason: Correct problem area suffering from misapplication and abuse.

7. 252.227-7013 Alternate 1 (xxx1994)

Problem: By nature of its language, this clause will systematically prohibit the government form entering into competitive acquisition for many years (not just 2-see subpar. 3) after the date of any contractually ordered, unlimited rights technical data products. The government, to comply with Freedom of Information Act (FOIA), as well as put out bid sets in anticipation of competitive contract activities, often publishes the data in question immediately after receipt. By stringing the DOD along with undelivered technical data, the development contractor could (probably will) exercise this clause and effectively stop competition of the development or production efforts; i.e. it makes the contractor sole source until he decides to release (allow the DOD to publish) the technical data to general public.

Correction: *a) Best alternative: Delete this alternate in its entirety.* It has too severe an impact to competition of major acquisitions to permit.

b) If deletion not possible, mitigate danger to competition by inserting new sentences at end of subparagraph (3) as follows:

"This limitation, however, shall not preclude or inhibit DOD engaging in competitive acquisition activities. The contractor shall be required to abide by Freedom of Information Act and furnish any data within the reasonable schedule establish by the DOD contracting officer."

Reason: The DOD competition process, mandated by CICA, could be severely hampered by contractors "dragging their feet" in supplying unlimited rights technical data to potential competitors.

8. Note: This problem also applies to 252.227-7014 alternate 1.

9. 252.227-7015 (Technical Data Commercial Items)

Problem: This clause is silent as to use of technical data for the purpose of internal Government use of maintenance, repair, and rework. If policy is silent as to expectations of partners, it will become a point of dissension.

Correction: Add new subparagraph as (b)(1)(v) as follows:

> "*(v) Are needed for purposes of internal government functions of maintenance, repair, and rework.*"

Reason: If DOD cannot repair, rework, or maintain the item through the form, fit, and function data, weapon system non-mission capable status will result, or conversely, the implication is either mandated (by default) development contractor support for as long as item is in inventory, else the item is disposable.

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COMMENTARY - DAR CASE 91-312

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uly 22, 1994

eputy Director
lajor Policy Initiatives
200 S. Fern Street
rlington, VA 22202-2808

ttention: Ms. Angelena Moy / OUSD

Subject: DAR Case 91-312 - Pentagon Acquisition Reform

Dear Ms. Moy:

For the purposes of establishing Electro-Methods credentials of knowledge and experience, we would point to our 23 plus years of spare parts direct contracting with the U.S. Military at a number of depots and overhaul and repair facilities. In 1993, Electro-Methods had a contract dollar volume with Tinker Air Force Base of 16.1 million. This figure placed EMI at number 19 of the top 20 at Tinker. We have attached a "breakout" chart of our dollar volume with individual services and/or specific facilities. Electro-Methods has been a valued supplier to allied nations and their manufacturers. These include Germany (MTU), France, Japan (Ishikawajima), Taiwan (North American Council), Australia (Air Force), The Netherlands (Philips-Eindhoven), Denmark (Air Force) Norway (Jet Norsk), Belgium (Fabrique Nationale), Canada (RCAF), Israel (Bet Shemesh)-Israel, Israel Procurement Mission, Turkey Air Force. EMI is a designated alternate source for 1600 components and/or assemblies. Our facilities utilize the latest in metalworking equipment such as computer assisted design/computer assisted manufacture, programmed stamping machines, several welding units including vacuum stations, plating facilities, heat treating furnaces, non-destructive test departments, electrical discharge machines. Electro-Methods employs more than two hundred individuals. EMI has had an "in house" DCAS representative inspector since 1972. The company operates employing statistical process control and total quality management.

SUBJECT: CASE 91

The current "reform" measures for the proposed Pentagon Procurement Program are of concern for us. First, the participation of small business personnel was limited to one member on the 807 Group. A second issue of concern which flawed in that there was a failure to seek suggestions from current competition advocates and "on line" procurement personnel i.e. Contracting Officers. In listening to and reading of the deliberations of the 807 Group, there seemed to be a propensity of the members to aid the Major Prime Contractors/Original Equipment Manufacturers to the determent of Small Business. There appears to be a program of isolating the Small Business Independent Contractors from the spare parts logistical support market place, via this move will substantially increase the cost of replacement parts. In fact, the revisions proposed by Group 807 will cause DoD to be paying more for less and seriously impeding our DoD military services readiness factor. That [redacted]urn is just one element which would endanger the national security of [redacted] U.S.A.

As conceived by the 807 Group, our allies utilizing U.S.A. designed weapons systems would procure their logistical support replacement parts from either the OEM's and/or the Department OF Defense. This does not take restraint of trade into consideration the fact that these allies have procurement missions established in the U.S.A. which have sought out and utilized the Small Business Defense Contractor in obtaining parts at keeping costs at lower level than those via OEM/DOD. Another benefit to our allies is a shorter delivery cycle permitting a lower level of inventory. This direct acquisition minimizes the paperwork load. Which is a major element in administration costs.

Entrusting administration to OEM's would seem to be disregarding the sorry performances of the OEM's in performing services in the military sector. There is a litany of malpractice situations. Witness the attached news articles. We list the OEM's and the fines imposed by Governmental Legal Actions.

General Electric
UTC/Sikorsky
Teledyne
McDonnell Douglas
[redacted]oeing

It is noteworthy that in most instances the various waste, fraud and abuse acts were uncovered by whistle blowers as versus the U.S. Government surveillance bodies - DCAA, GAO, Congressional Committees. To shift administration to the OEM's would be giving them keys to the treasury and the combination to bank safe.

There would be a potential conflict of interest should the OEM's be placed in charge of selecting alternate sources for individual parts and/or assemblies. We are aware that many OEM's have alliances with and percentile ownerships of foreign manufacturers. This beclouds the competitive market and has the potential to export the jobs of the nation's sillilled labor force. We recognize the global economies of today's world are such that "offsets' are a way of life. In accepting this reality, we would believe that offsets come from the commercial side of the corporate business. This would permit the stipulation that Defense dollars be spent in the U.S.A. thereby maintaining the actual metalworking manufacturing infrastructure. The GAO finds offsets of as a [illegible]wed policy.

LEGAL ACTIONS

BOEING	Paid 75 million covering "mischarges" on contracts.	Wall Street Journal
LITTON INDUSTRIES	Paid 3.9 million Gov't charge of conspiracy and wire fraud.	L.A. times
	Paid 82 million Fine for overcharging.	
GENERAL ELECTRIC	Paid 130 million 16 instances involving false billing, money laundering, weapons procurement fraud, bribery, Israel, Saudi Arabia & Egypt.	Rolling Stone
	Falsification of test results Cleveland plane dealer.	
	Whistleblower awarded 13 million of a G.E. 59.5 million for fraud.	Journal Inquirer
GRUMMAN CORP.	Paid 20 million for improper financing dealings.	Washington Post
LOCKHEED	Investigation of bribery in Korea cited for possible violation of foreign corrupt practices act.	Wall Street Journal
LUCAS INDUSTRIES	Paid 12 million supplied subquality parts used by F18 aircraft.	Wall Street Journal

LEGAL ACTIONS

MCDONNELL DOUGLAS	Air Force Officers refuse to testify on 1.5 billion cost overruns.	Associated Press
KAMAN CORP. RAYMOND ENGINEERING	Paid 765,000. fine for overcharges.	Hartford Courant
TELEDYNE	Paid 112.5 million result of whistle blowers efforts	Wall Street Journal
	Indicted for Illegal export of munitions pellets	Wall Street Journal
UNITED TECHNOLOGIES	Sikorsky / Saudi Arabia bribery.	Hartford Courant
	Paid 150 million for overcharging.	Hartford Courant
	Overcharges of Israel purchases thru General Dotan of Israel Air Force	Hartford Courant Washington Times
	Hamilton Standard cited for price increases from 8 million to 23 million in 3 years for space shuttle design.	Hartford Courant

[redacted]

Washington and Roy Rowland of Georgia.

Boeing Agrees to Pay U.S. $75 Million To Settle Allegations of Mischarging

By Roy J. Harris Jr.
Staff Reporter of The Wall Street Journal

Boeing Co. admitted that it mischarged the federal government for defense-contract costs and agreed to pay $75 million to settle the government's claims.

In Seattle, the U.S. attorney's office announced that the settlement resolved three separate investigations, conducted over six years, into allegations of Boeing mischarges that involved thousands of programs between 1980 and 1991. U.S. Attorney Katrina Pflaumer said actual mischarges were far less than $75 million, and that Boeing's payment "includes interest, penalties and the cost of our investigation."

But Boeing disputed the government's contention that the settlement included penalties. Ms. Pflaumer wouldn't say how much the government would count as a penalty amount and noted that the agreement with Boeing was aimed at producing "a tax-neutral settlement." Generally, penalty payments wouldn't be deductible.

Overhead Costs

The government said its investigations involved several agencies and a federal grand jury. One eight-year criminal investigation, it said, had looked into allegations that Boeing violated the federal False Claims Act by improperly charging to U.S. contracts "millions of dollars in research and development costs, which Boeing falsely characterized as overhead associated with Boeing's manufacturing and production efforts." The accounting "improperly shifted costs to the government which should have been absorbed by Boeing," the U.S. said.

It said mischarging was "particularly egregious in Boeing divisions that were exploring the application of artificial intelligence to computers." According to Ms. Pflaumer, the involvement of artificial intelligence spread the mischarging activity "over literally thousands of different contracts." Some major artificial-intelligence programs dealt with space-static environmental systems and military ai. craft command and control systems, th government said.

In settling, the U.S. said, Boeing als admitted "improperly charging to govern ment contracts several million dollars ir foreign direct selling costs" it incurred anc mischarging "for millions of dollars in hazardous-waste disposal costs."

No Admission of Liability

A Boeing spokesman, questioned about the U.S. attorney's comments, conceded that "mistakes were made." But the 11-page settlement document that Boeing signed stated that the company wasn't admitting any liability or any law violations.

While the big airliner maker and defense contractor has sufficient reserves to cover such payments, the spokesman didn't say how Boeing would account for the settlement.

In Boeing's formal statement on the matter, Theodore Collins, vice president and general counsel, made no reference to mischarges. While "some unintended cost-classification errors" were resolved, he said, the settlement's "real significance is that it resolves several long-standing accounting issues and establishes mutually agreed-upon definitions and processes for the future." The statement said the U.S. attorney's office "had noted that Boeing cooperated in the settlement of the matter."

Kurt P. Hermanns, an assistant U.S. attorney on the case, said the investigations had produced "insufficient evidence of criminal intent to defraud." The case started, he said, as the result of "some astute auditing work" by the Defense Contract Audit Agency. He called the government's note about cooperation from Boeing "a very narrow comment, in the context of the settlement negotiations alone."

Litton Industries pleads guilty in defense-contract fraud probe

Los Angeles Times

WASHINGTON — Defense contracting giant Litton Industries Inc. pleaded guilty to federal fraud charges Friday and agreed to pay $3.9 million in fines, civil claims and prosecution costs arising from the 1988 Ill Wind defense procurement scandal.

The negotiated plea marked the final case in a 7½-year-long Justice Department legal campaign that resulted in the conviction of 64 government officials, consultants and corporate executives from 10 defense contracting companies and brought in $250 million in penalties.

The massive procurement scandal erupted in the mid-1980s at the peak of the military spending boom, and the ensuing investigation broke important new ground in the prosecution of white-collar crime, including the first use of wiretaps against corporate and government lawbreakers.

It also brought a significant tightening of the procedures the Defense Department uses in doing business with contractors and outside consultants, ending the previous laxity that had allowed both sides to trade insider information and play favorites on big contracts.

In a statement issued after Friday's plea, Attorney General Janet Reno called the probe, which was begun during the Reagan administration, "one of the most successful... ever undertaken," saying it "fundamentally changed how white-collar crimes are investigated."

She predicted that the techniques honed in the Ill Wind prosecution would serve as a prototype for future investigations into crimes involving fraud in environmental, medical, insurance and consumer issues, as well as in government contracting.

The criminal charges to which Los Angeles-based Litton pleaded guilty Friday alleged that executives of the company's Litton Data Systems hired consultants with contacts inside the Pentagon to provide them with confidential information needed to win Navy and Marine Corps procurement contracts.

The negotiated plea marked the final case in a 7½-year-long legal campaign that resulted in the conviction of 64 government officials.

Although Litton ultimately was unsuccessful — it failed to win contracts on two of the projects and decided against submitting a bid on a third after the probe became public — the government charged the company with conspiracy and wire fraud.

The incidents, which occurred between March 1987 and June 1988, involved contracts for the advanced tactical air command central, a multimillion-dollar Marine Corps radar and ground-control system; the AN/UYQ-21 electronic display; and a Marine Corps signal converter.

The two executives of Litton Data Systems — Thomas D. McAusland, former senior vice president of business development, and Christopher M. Paford, former business development director — were convicted in an earlier case.

Litton Industries, Inc., in a statement issued Friday, said it had pleaded guilty only because it technically is legally responsible for all actions taken by senior-level managers, but insisted that it had neither broken any law nor benefited from any of the deals.

Litton Unit Agrees to Pay $82 Million To U.S. to Settle Contract-Padding Case

By DAVID J. JEFFERSON
Staff Reporter of THE WALL STREET JOURNAL

LOS ANGELES—A unit of Litton Industries Inc. agreed to pay the government $82 million to settle a whistle-blower's charges that it padded government contracts to shift costs away from its commercial customers.

The Litton Systems Inc. unit had faced a potential liability of $650 million in damages and penalties in the case, which was originally filed in 1988 under the False Claims Act, the so-called whistle-blower statute that allows private citizens to sue for fraud on behalf of the government. In addition to the $82 million, Litton agreed to pay $4 million to the nongovernment plaintiffs for attorneys fees.

In the suit, the government and former Litton employee James Carton, a technical director of the Litton Computer Services division of Litton Systems, alleged that Litton had systematically shifted computer-usage costs from commercial to military customers at its Woodland Hills, Calif., office. In some cases, Litton charged the government as much as 10 times more for the same work as it charged commercial customers. Assistant U.S. Attorney Howard Daniels, who handled the case, said, Litton masked the misallocation through a complex computerized accounting system, the plaintiffs alleged.

The company settled the suit without any admission of wrongdoing or liability.

Mr. Daniels said it hasn't yet been decided how much of the $82 million Mr. Carton and the other nongovernment plaintiff in the case, the Washington, D.C.-based nonprofit group Taxpayers Against Fraud, will receive, though they are entitled to between 15% and 25% under the False Claims Act.

Chairman Defends Position

"A decision to settle is a difficult choice when you believe your position is correct," Litton Chairman Alton J. Brann said in a statement. "This decision was made in recognition of the potentially significant amount at risk and the disruptive force of long-term litigation. The mutually acceptable agreement fully disposes of an issue that could have taken several more years to resolve through the judicial process."

Litton's exposure in the case was significantly heightened in July 1992: A federal court judge, ruling on several issues in the case, found that Litton Systems had misallocated costs at the computer-services business, violating several procurement laws and overcharging the Pentagon by an estimated $50 million.

If the case had gone to trial, Litton, a Beverly Hills-based advanced-electronics and defense-systems maker, would have had to prove it didn't knowingly violate the law — despite evidence that the company consulted two accounting experts who told Litton its cost system was illegal. The U.S. attorney's office in Los Angeles contended that Litton managers lied to government auditors and knowingly filed false papers with the government to conceal the unlawful accounting practices."

Issue of U.S. Rules

John E. Preston, Litton's senior vice president and general counsel, said, "We believe that we correctly interpreted these complex government regulations, and that the Litton employees involved acted in good faith." He added: "It is our further belief that the accounting system in place at Litton Computer Services division actually lowered the costs to all customers, including the government, by several million dollars. It unfortunately illustrates the difficulty in attempting to do government and commercial work in the same facility."

The suit claimed that Litton, using the same computer to account for its commercial and defense customers, had altered costs through a so-called "memory cap" that underrecorded computer usage and gave commercial customers discounts while overbilling the Pentagon. The practice occurred between 1981 and 1992, the government said.

Litton announced the settlement after the close of trading. In composite trading yesterday on the New York Stock Exchange, Litton's shares closed at $36.50, up $1.125, or 3.2%.

RS

WHY THE MIGHTY GE CAN'T STRIKE OUT

For street criminals, three strikes and they're out. For corporations, it's a whole different ballgame

[WASHINGTON]

LED BY BILL CLINTON, THE CRIME FIGHTERS OF WASHINGTON HAVE HIT upon a wondrous new weapon for stomping on criminals: Three strikes and you're out. For anyone convicted of committing three ci[illegible] of violence, from armed robbery to rape and murder, the judicial remedy will be permanent. Lock 'em up for life; throw away the key.

Leave aside all the reasons why this probably won't deter violent crime any more than the revival of the death penalty has discouraged homicides. The idea is so simple and direct – and so wildly popular that only the bravest politician will dare question it. At both the state and federal levels, the principle is going to be enacted into law.

Meanwhile, there is another variety of repeat offender who skips from one florid crime to the next and yet never encounters the same kind of angry reckoning. The crimes of these offenders are mainly about money – stealing public money – but some of the offenses can also endanger lives.

Let's name some of these recidivists: Boeing, General Electric, Grumman, Honeywell, Hughes Aircraft, Litton Industries, Magnavox, Martin Marietta, McDonnell Douglas, Northrop, Raytheon, Rockwell International, Teledyne, Texas Instruments, United Technologies.

All of these corporations are major defense contractors, and all have been caught defrauding the federal government in one way or another. And all of these companies have been nailed at least three times in recent years. Typically, they pay a fine or negotiate a settlement and promise not to do it again. The pattern of corporate crime is not restricted to defense contractors, of course, but they offer the most dramatic examples of a system that street criminals might reasonably describe as unequal justice.

GE seems almost in a criminal class by itself. At least, it gets caught more often than others. According to the Project on Government Oversight (the folks who first spotlighted the $600 toilet seats that the Pentagon was buying in the '80s), GE has been involved in 16 different episodes of lawlessness – everything from false billings and weapons-procurement fraud to money laundering and bribery. Hughes Aircraft has nine strikes against it, and it's still at the plate. Grumman, Martin [illegible] and Teledyne have each had five offenses against the taxpayers.

GE has pumped out more than $130 million in fines and settlements to cover its various transgressions. Since 1986, the federal government has collected more than $588 million under the False Claims Act from corporations that tried to cheat on contracts and got caught, usually because a whistle-blower on the inside went public. How widespread is such crime? A 10-year survey by a George Washington University professor found that two-thirds of the *Fortune* 500 were involved in one or more "significant illegalities." Seventy-five of the corporations were involved in five or more cases.

The three-strikes approach may or may not do much to frighten street hoodlums, but a similar approach to corporate crime would certainly put the squeeze on recidivist CEOs by hitting their bottom line. Ralph Nader has proposed that repeat offenders – companies that regularly defraud taxpayers – be banned from selling to the government for a fixed period of time. The same principle could be extended further to cover the multitude of special tax breaks and subsidies made available to business: If you regularly break the law, you are not eligible to share in Uncle Sam's pork and gravy.

Let's not hold our breath waiting to see if this idea catches on in Washington. The same defense contractors who get nailed so regularly for fraud are currently lobbying Congress to weaken the False Claims Act, complaining that it's unfair to them. The message is clear: Muggers who wear suits should get an unlimited number of strikes. ■

BY WILLIAM GRE[illegible]

CARTOON BY JIM M[illegible]

Government sues GE over engine problem

Associated Press

CLEVELAND — The Justice Department is suing General Electric Co., accusing it of suppressing test results showing 7,000 military and commercial jet engines — including those on Air Force One — had dangerous electrical flaws.

The government is seeking at least $100 million in damages in the lawsuit unsealed Thursday in federal court, The Plain Dealer reported Friday.

The Justice Department said the alleged flaws could cause fires or loss of power. No crashes were mentioned in the suit.

GE, which builds the engines in suburban Cincinnati, denied the allegations — first leveled by a whistle-blower — and said its engines have the best safety and reliability record in the world.

"It is unconscionable to raise baseless allegations that could wrongly raise concerns in the public mind," GE spokesman George Jamison told The Associated Press.

The company said it told the Pentagon and Federal Aviation Administration of the whistle-blower's safety concerns in 1992.

General Electric, which competes with the East Hartford, Conn.-based jet engine builder Pratt & Whitney, has its corporate headquarters in Fairfield, Conn.

The allegations in the lawsuit involve a process that shields a jet plane's electrical components from microwave and radar transmis-

Please see GE, Page B2

GE sued on jet engine problems

Continued from Page B1

sions, radios and other devices that can interfere with engine operation.

"These GE engines unnecessarily endanger the health and well-being of pilots, maintenance service personnel and passengers, including a very real likelihood of loss of life," the government said.

The lawsuit said Air Force One, the president's plane, "is also prone to an electrical system breakdown, engine malfunction, or worse, because of GE's fraud."

Federal officials said the suspect jet engines power such military jets as the F-14 and F-16 fighters, the stealth bomber, the B-1 bomber and the AWACS reconnaissance plane. Commercial engines said to be susceptible to the defects are used on Boeing 747s and the European-built Airbus.

An independent review of thousands of engine service reports filed with the FAA since 1990 by airline mechanics found no instances of electrical problems of the type described by the Justice Department, The Plain Dealer said.

Dick Williams, the president of Aviation Data Source in Denver, who conducted the computer search of FAA records, said, "Maybe it's not happening, or maybe it's something that is difficult to diagnose."

Feds sue GE over engine test results

By The Associated Press

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Selling hardware overseas

A bribe investigation of General Electric raises difficult questions

On March 30, 1992, John F. Welch Jr., the chairman and chief executive officer of General Electric, received a disturbing letter in his Fairfield, Conn., office. The letter was sent by Zohair Hak, a GE technical director based in Cairo. GE was already under investigation for allegedly fixing prices in the industrial-diamond market. Four months later, the company would agree to pay nearly $70 million in fines for defrauding the Pentagon on sales of aircraft engines to Israel.

Hak's letter brought Welch more bad news. The engineer claimed that GE officials had paid hundreds of thousands of dollars in bribes to win a $124.7 million contract with the Egyptian government for a sophisticated radar system. Welch ordered an investigation. The Department of Justice and Rep. John Dingell, a Michigan Democrat, are currently investigating the matter.

Making payments. From the evidence amassed to date, it looks as if Hak had certainly stumbled onto a problem. Hak said that the bribes had resulted from a $2.75 million subcontract GE had signed with Universal Traders Co. (UNITRA), run by Aly Mansour, a former general in the Egyptian Air Force. According to a report of GE's investigation into the bribe allegations, UNITRA spent $485,000 to pay for the travel and living expenses of Egyptian military officers involved in awarding the radar contract. Mansour told GE that the officers were paid by UNITRA—not with GE money—at Egypt's request. The 133-page investigative report says GE "should have prevented" the payments.

U.S. News has obtained a copy of the report. In the document, GE's investigators state that Hak's allegations of bribes could not be substantiated; other Hak allegations, however, were confirmed. GE investigators found, for instance, that UNITRA had hired the chairman of the Egyptian negotiating team that approved the award of the GE contract; the officer received $64,700 from UNITRA between 1988 and 1992. Aly Mansour told GE the payments were not improper. He discussed the possibility of hiring the officer, he says, only after GE won the radar contract. Martin Marietta, which has since acquired the GE unit that won the Egyptian radar contract, says it has taken corrective measures as a result of the UNITRA flap.

The case nevertheless illustrates the difficulty of policing sales of American military hardware overseas. GE had certified to both the American and Egyptian governments that it had paid no commissions to obtain the radar contract. But according to GE's own investigative report, "the services to be performed by UNITRA under its consulting agreement might render the payments to UNITRA a fee or commission."

GE knew of UNITRA's track record. The company has represented American and other corporations on nearly $1 billion worth of Egyptian military contracts. Some have caused problems. According to the U.S. General Accounting Office and the Defense Contract Audit Agency, Loral Aerospace International, a New York-based defense electronics company, paid UNITRA a $1 million commission to help secure a 1988 military contract with Egypt. Such payments could be illegal; Loral says they were proper in this instance because the money came from corporate profits—not from government funds.

In the international arms bazaar, different rules often apply. In the GE case, company officials informed UNITRA that payment of travel or living expenses for the Egyptian military officers was illegal; GE, however, paid directly for more than $19,000 in travel costs for the Egyptian officers. GE's investigators concluded that no payments of any kind should have been made to the Egyptian officers. "GE realizes that payments such as those discussed ... leave the payer vulnerable to accusations of bribes or gratuities and are, in any event, contrary to sound contracting procedures." ■

Allies. *Presidents Clinton and Hosni Mubarak: Egypt buys billions of U.S. military supplies.*

Welch. *Troubled*

BY DOUGLAS PASTERNAK

BUSINESS

GE whistleblower awarded $13 million

By SONJA BARISIC
Associated Press Writer

CINCINNATI — The man who alerted the government to alleged fraud by the General Electric Co. in sales to Israel's military will receive $13.4 million of GE's $59.5 million civil fine.

Chester Walsh "performed a service to the United States," U.S. District Judge Carl Rubin said Friday in awarding the money.

Rubin also ordered GE to pay $2.4 million in fees and $221,514 in costs to Walsh's lawyers. GE said it would appeal that part of Rubin's decision.

Under federal law, Walsh, a GE manager in Israel from 1984 to 1989, could have received up to 25 percent of GE's fine, or $14.8 million. At hearings last month, U.S. Justice Department lawyers argued that Walsh deserved less.

They noted that Walsh didn't file the lawsuit that brought the charges to light until 1990, three years after he consulted lawyers about the alleged fraud. Walsh has said he feared for his life at the time.

Rubin agreed with the government and reduced Walsh's portion of the settlement to 22.5 percent, or $13.4 million.

"The evidence does indicate that he was aware of the fraud long before he filed his complaint ... and that his silence facilitated the continuation of the fraud for some period of time," the judge wrote.

But he added that the government would not have had a case without Walsh's assistance.

GE, based in Fairfield, Conn. also paid a $9.5 million criminal fine after pleading guilty in July to fraud charges involving the diversion of $40 million in U.S. military aid to Israel.

The money was supposed to pay for F-16 engine and maintenance contracts. Instead, as much as $11 million was funneled into a personal fund controlled by Israeli Air Force Brigadier Gen. Rami Dotan and Herbert Steindler, a GE manager. Dotan is in jail in Israel for his part of the scheme.

Walsh is to be paid Dec. 14.

James Helmer, one of Walsh's lawyers, said he was happy with the award, despite the slight reduction.

"We believe his order will serve as a beacon for other citizens to come forward and prosecute fraud against the taxpayers," Helmer said.

A Justice Department spokesman could not be reached for comment Friday evening. The switchboard operator said no one was in the office.

GE, which isn't affected by Walsh's award, said in a statement Friday that Walsh doesn't deserve the money. The company also said it would appeal the amount of the attorney's fees.

"These two decisions create a perverse incentive for defense employees to delay reporting wrongdoing while they watch their bounty grow, and for attorneys to counsel their clients to delay reporting while suspected fraud continues, in order to reap a windfall in attorney's fees," the company said.

'Ill Wind' Case Is Settled By Grumman

By John Mintz
Washington Post Staff Writer

Grumman Corp. is ending Justice Department allegations of improper financial dealings by paying $20 million and granting federal officials limited oversight of its ethics programs.

The Long Island-based firm's agreement to make the payment had been known previously, but not the government's monitoring of the ethics programs.

Grumman did not admit guilt. It declined substantive comment yesterday, but said it previously set up reserves for the payment.

Under the deal, Grumman must make permanent a program already in place that, among other things, trains employees about ethical issues.

The settlement ends a three-year investigation of the firm, one unit in the "Ill Wind" probes of defense firms.

Grumman cooperated with investigators, disclosing instances of wrongdoing and arranging for investigators to interview 40 employees. The firm also disciplined some employees, stopped dealing with some suppliers and changed procurement rules.

Former Grumman chairman John O'Brien was forced out of the firm in 1990 after the board of directors learned that he had secret financial ties to the late James T. Kane, a Long Island lobbyist and Grumman contractor.

O'Brien pleaded guilty to filing false personal loan applications, and seven other people were convicted in the matter.

The agreement between prosecutors and the firm details O'Brien's and Grumman's complex financial relationships with Kane, including $600,000 in disguised loans Kane gave to O'Brien.

O'Brien, who was to repay only the interest, used the money to buy homes for his two children, and in $875,000 home for himself, the agreement said.

A Grumman vice president took $50,000 from Kane. Another had Kane help put her daughter through college and had him invest $400,000 in her husband's construction firm.

In addition to bid-rigging and other frauds involving Kane companies, Grumman officials improperly pressured Grumman vendors into making contributions to a Kane-controlled political action committee, intended to help politicians who promoted the firm's interests.

Some Grumman employees were given monetary quotas to be raised from Grumman vendors for political campaigns, the document said. Employees who refused to join in were threatened with firing. Grumman officials also threatened to stop doing business with contractors who refused to give money.

Lockheed Faces Possible Action By Air Force

By Roy J. Harris Jr.
And Thomas E. Ricks
Staff Reporters of The Wall Street Journal

Lockheed Corp. could face possible suspension from new Air Force contracts because of its indictment Wednesday, along with two former employees, on charges of making illegal foreign payments.

An Air Force spokeswoman said the service is "considering whether suspension or debarment is appropriate in this case." A decision on what to do, or if the service should take any action at all, isn't likely to be reached for several weeks, she said.

Any suspension or other action could be aimed at either the nation's No. 2 defense contractor or a unit that was involved in the alleged wrongdoing. The business cited in the case is Lockheed Aeronautical Systems Co. in Marietta, Ga., which last year was responsible for $1.8 billion of Lockheed's overall $6.9 billion of new contracts.

'Excellent Record'

Robert Gusman, Lockheed's assistant general counsel, said in an interview, however, that he didn't expect any suspension or action barring Lockheed from competition. "Lockheed has an excellent record of integrity, so the prospect of suspension is very remote," he said. He said such a review by the Air Force is normal in cases of an indictment, but that given the importance of Lockheed's programs to the Department of Defense," he would expect Lockheed to have a chance to present its case before any action is taken.

A grand jury in Atlanta charged that Lockheed and two former executives, Allen R. Love and Suleiman A. Nassar, violated the Foreign Corrupt Practices Act and committed other offenses in making payments to Leila L. Takla. Ms. Takla, retained in the 1980s as a consultant in Egypt, was involved in helping Lockheed sell C-130 Hercules aircraft to Egypt, the grand jury charged, although she was a government official at the time.

According to the indictment, Lockheed and the two former executives concealed payments being made to Ms. Takla, who was ineligible to receive consulting fees or commissions because of her position in the Egyptian parliament from 1987 to 1990. The payments allegedly related to Lockheed's sale of three C-130 cargo planes for $79 million.

Forfeiting Commission

To hide the payments to her, including commissions of $600,000 for each aircraft, an Egyptian company was set up that was to be run by her husband, Abdelkerim Darwish, but actually was under her control, the indictment said. Payments were made in $3,000 increments to various Swiss banks, it was charged. The indictment also said that after U.S. investigators discovered improper payments, a letter was prepared in October 1989 "purportedly forfeiting their entire $1.8 million commission." Three months later, however, Lockheed began negotiating what the grand jury called a $1 million "termination fee" in lieu of her commission.

The indictment resulted from an investigation by the Defense Criminal Investigative Service with assistance from the Defense Contract Audit Agency, and authorities in Switzerland and Egypt. The case was handled by the U.S. attorney's office in Atlanta.

In a statement, Lockheed said it "emphatically denies the allegations in the indictment and intends to vigorously defend itself against the charges." Mr. Love didn't return a phone call, and Mr. Nassar couldn't be located. Lockheed said Mr. Love had retired, and that Mr. Nassar was "no longer an employee."

Lockheed is also the producer of the F-16, the main Air Force fighter, and the next-generation F-22 fighter, along with numerous missile and space systems.

In the mid-1970s, Lockheed was among the major defense contractors tarred in a scandal over overseas bribes, eventually admitting to having made $38 million in questionable payments to win foreign business. The company then launched a major overhaul of its sales efforts abroad aimed at eliminating the kind of activity that had drawn it into controversy.

Unit of Lucas Says It Falsified Weapons Data

Plea Agreement Sets Fine, New Oversight Standard For Military Contractors

By Andy Pasztor
Staff Reporter of The Wall Street Journal

A unit of British industrial giant Lucas Industries PLC, admitting it falsified tests of missile launchers sold to the U.S. Air Force, agreed to pay $12 million in penalties and hire an outside ethics watchdog reporting directly to the Justice Department.

The criminal charge and plea agreement, filed yesterday in federal district court in Brooklyn, N.Y., set a new high-water mark for federal intervention to make sure that major military contractors abide by U.S. laws and regulations.

The court-mandated monitor, for example, will have broad power to conduct investigations, review past and present compliance efforts, become involved in personnel decisions and otherwise keep prosecutors informed about any suspected quality-control or ethical lapses. The new position amounts to a chief ethics officer for the unit who must be acceptable to, and who ultimately works for, the government.

While previous agreements have required outside directors to supervise such tasks, prosecutors said that the Lucas Aerospace Communications & Electronics subsidiary is the first large defense concern to give a court-ordered outsider effective control over its internal investigations and its compliance with criminal and civil laws.

The unit, based in Hopkinton, Mass., produces electronic equipment and missile launchers that came under scrutiny after some of them failed in the Persian Gulf War.

But yesterday's move won't solve all of the British company's legal problems in this country. A separate criminal investigation of allegedly substandard aircraft parts Lucas manufactured for use on the Navy's F/A-18 jets is continuing, according to company and law-enforcement officials. Government agents conducted a search last year of facilities where Lucas manufactures so-called gearboxes that provide power to certain electronic equipment on F/A-18s.

The U.S. Attorney's office in Los Angeles, which is handling the gearbox inquiry, declined to comment. The gearboxes are considered critical safety items because they convert power from the F/A-18s engines to drive generators, fuel pumps and hydraulic systems. Industry and government officials familiar with that case said that prosecutors, among other things,

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Lucas Unit Admits to Falsifying Data on Weapons Sold to Military

Continued From Page A3

want to determine whether potential defects in the Lucas-built equipment contributed to any F/A-18 accidents. Lucas is cooperating with the investigation.

Regardless of how the Los Angeles investigation turns out, the plea filed in Brooklyn sets a precedent for future settlements with contractors caught cheating the Pentagon.

Jonny Frank, a senior investigations counsel who handled the New York investigation, said the plea agreement is "a very large step forward" in applying in the defense arena some federal oversight techniques commonly used in organized-crime cases. "Rather than allow the company to investigate itself, it provides independent oversight . . . to make sure the corporation stays out of trouble," he said. The agreement is expected to become final next week after a court hearing.

Court documents filed by the government disclosed that between 1984 and 1991, about 4,400 classified devices, called launcher electronic units, were delivered to the Air Force without undergoing all required testing. According to court filings, workers and supervisors submitted fraudulent and sometimes forged certifications that the devices had passed rigorous vibration and extreme-temperature tests. The investigation of the launchers was reported earlier this year.

The devices, used in firing Maverick air-to-ground missiles, first came under suspicion when many failed during the Persian Gulf War. Company and prosecutors determined that the malfunctions weren't responsible for any "friendly-fire" casualties. But subsequent Air Force inspections did turn up defective soldering, broken resistors and other deficiencies in some units, court filings said. The launchers were manufactured by operations of Lucas Aerospace that are based in Garden City, N.Y.

As part of the plea agreement, Lucas Aerospace agreed to pay a $4 million criminal fine, $7.5 million to inspect and repair launchers, and $500,000 to reimburse U.S. investigation costs. Lucas said it already had launched "a series of monitoring and compliance measures to guard against any misconduct by its employees."

In addition to the firing units, the plea agreement covers false testing of certain Army radios in the fall of 1993 by another Lucas facility in Harleton, Pa.

Pentagon May Bar U.K.'s Lucas From Contracts

Investigators Claim Parts It Made for U.S. Planes Pose Safety Hazards

By Andy Pasztor
Staff Reporter of The Wall Street Journal

The Pentagon has proposed barring Lucas Industries PLC from future contracts, citing investigators' claims that substandard aircraft parts from the British company pose serious safety hazards for military pilots, industry and federal officials said.

The expanding criminal investigation focuses on suspected false testing and chronic quality-control problems afflicting Lucas's aerospace operations in the U.S.

The Navy, which stopped accepting certain Lucas parts for its primary jets last summer and issued fleetwide notices highlighting potential safety problems, has told criminal investigators that 167 emergency landings of F/A-18 aircraft in the past year and a half are attributable to Lucas-supplied equipment.

A federal grand jury in Los Angeles is expected to begin hearing testimony about the matter shortly. While the existence of the investigation had been reported previously, the scope and details weren't disclosed before.

The failures "have caused engine fires, aborted missions and were factors in the loss of aircraft," according to a confidential report sent last month by the Pentagon inspector general's office to each of the armed services.

In addition, Justice Department and Pentagon investigators were concerned enough to alert the Federal Aviation Administration about suspected falsified test data, alleged unauthorized repairs, and other problems they discovered in three searches since last summer at Lucas plants in California and Utah. The referral letter sent earlier this year to the FAA's Western regional office in Los Angeles, according to one person familiar with it, noted the widespread nature of the alleged

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Defense Department May Bar U.K.'s Lucas From Future Jobs

Continued From Page A2

improprieties and pointed to the use of suspected defective parts in gearboxes built for a number of military and commercial engines.

The same Lucas unit producing gearboxes for the F/A-18, the Navy's main fighter plane, also make them for the F-16 that is the backbone of the Air Force's fighter arsenal, and for B-2 Stealth bombers and F-117 Stealth fighters. Lucas also recently won a contract to provide similar parts for use on McDonnell Douglas Corp.'s MD-80 jetliners.

Lucas's chairman, Sir Anthony Gill, met with top Navy legal officials yesterday to try to stave off administrative action. In Reston, Va., a Lucas spokesman confirmed the Navy's move to cut off all new military business, but he maintained that Lucas has "no knowledge of a link in the investigation between our products and the problems of the F-18s."

Bernard Carey, the spokesman, also said that company officials "have done their best to take remedial action to make the product right," including a "completely new management team" at one plant, stepped-up internal compliance reviews and hiring outside consultants to conduct independent quality-control audits at all U.S. facilities. "We've obviously also had to keep our civil customers informed" about the inquiry, the spokesman said.

A decision by the Navy could take months. But in the meantime, criminal investigators will dig more deeply into the operations of Lucas Western Inc., based in City of Industry, Calif.

The Lucas unit's Utah and California plants produce primarily military parts, including the gearboxes, which are used to convert engine power to run essential safety-related equipment on jet planes. On the twin-engine F/A-18, for example, Lucas-built gearboxes at each engine provide power to generators, fuel pumps and parts of the hydraulic system. Lucas is the sole source of the parts for the planes, and Navy officials are concerned that a prolonged investigation or suspension of deliveries could force them to idle many planes on aircraft-carrier decks.

Australia, Canada and other countries also purchased some of the roughly 3,000 of the so-called airframe mounted accessory drives for F/A-18s made over the years.

A Navy spokesman didn't have any immediate comment. The Los Angeles U.S. attorney's office and the Defense Criminal Investigative Service, which is participating in the investigation, also declined to comment.

The criminal inquiry comes on the heels of a $12 million guilty plea by another Lucas unit that admitted to falsifying tests of missile launchers sold to the Air Force and radios sold to the Army.

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With 17 U.S. facilities currently doing about $200 million of business annually with the Pentagon, Lucas has relied on acquisitions to increase its defense market share in this country. All of the units implicated in irregularities were purchased in the late 1980s. World-wide, 25% of the company's $4-billion-plus in annual sales come from aerospace operations.

According to the Pentagon investigators' report, company officials "removed rejection tags from defective components" and then "falsely marked quality-assurance logs" that the same parts were acceptable. Lucas also "may have conducted unauthorized repairs" without informing the government, the report indicates.

After tearing down dozens of gearboxes, investigators concluded that poor workmanship and allegedly substandard parts were responsible for many of the chipped gears, damaged bearings and metal shavings that often caused the parts to fail. The F/A-18 gearboxes "have a mean time between failure rate" of only about one-fifth of their design limit, according to the Pentagon report, and all 66 of the devices Lucas presented to the Pentagon for acceptance by the end of last month failed inspection.

—Jeff Cole contributed to this article.

Five Air Force Officials Boycott Probe Of C-17 Jet Cost Overrun

WASHINGTON (AP) — Five Air Force officials boycotted a House panel's hearing yesterday into $1.5 billion in cost overruns and other problems with the C-17 cargo jet. The chairman threatened to force them to testify.

"Despite . . . extraordinary efforts to secure cooperation from the department, there has been no change in their position," Rep. John Conyers, D-Mich., told the House Government Operations subcommittee.

At the hearing, Sen. Charles Grassley, R-Iowa, said he has moved to block the recommended promotion of one of three generals involved, and urged stepped-up efforts to determine whether unwarranted payments to the C-17 contractor amounted to violations of criminal law.

And Derek Vander Schaaf, Defense Department deputy inspector general, reviewed the tangled troubles of the McDonnell Douglas cargo jet, ranging from a quality control controversy over rivets to ballooning costs.

The panel was also treated to a video showing a stress test in which a C-17 wing cracked under pressure lower than called for by specifications.

Conyers told the hearing that the Pentagon had refused to order five officials connected with the C-17 program to testify before his subcommittee on legislation and national security.

"I believe their testimony is needed to complete the subcommittee's investigation," Conyers said.

The officials are Michael B. Donely, assistant secretary of the Air Force for financial management and Eleanor Spector, director of defense procurement, as well as three officers involved in the C-17 program, Lt. Gen. Edward P. Barry, Maj. Gen. Michael Burnitko and Maj. Gen. John M. Nausem.

An inspector general's report has recommended discipline for some of those involved in the C-17 program, and Conyers said the Pentagon told him Tuesday that under the circumstances it would be unfair to force the five to testify.

Conyers also quoted Pentagon officials as saying their own review of the case, due to be completed next month, should be allowed to proceed "without the pressures of a congressional hearing."

Conyers said a pending departmental investigation was no excuse for holding up House hearings and added that the subcommittee would meet next week to consider issuing subpoenas that would force the five to testify.

Lawmakers took the opportunity to vent frustration at the program, with Grassley crossing the Capitol from the Senate for the hearing. He said the promotion of Nausem to lieutenant general was recommended to the Senate on Jan. 20 but that he has asked the Armed Services Committee to hold it up.

"It defies all reason and understanding," Grassley said.

"Has fraud been committed in any of the C-17 contracts?" the Iowa senator asked. "If so, this must be handled in the proper manner."

"The facts suggest that criminal laws may have been violated," he said.

Vander Schaaf said that "this question of criminality came up . . . late in this process." He stopped short of a direct opinion, but did say that "several individuals engaged in highly improper action."

Agreement will settle government complaint

By MARK PAZNIOKAS
Courant Staff Writer

Raymond Engineering Inc. of Middletown has agreed to pay the U.S. government $765,993 to settle a complaint that the company overcharged for a component used in the U.S. Army's $3 billion Patriot missile program.

U.S. Attorney Christopher F. Droney announced Thursday the civil settlement with Raymond, which is a division of Kaman Diversified Technologies of Bloomfield. Kaman is one of the nation's 100 largest defense contractors.

Kaman admitted no wrongdoing in agreeing to the settlement. A spokesman said the settlement was cheaper than risking a lawsuit by the government. "These things can get really expensive with attorney's fees," said Ken Nasshan, the spokesman.

The government said Raymond failed to disclose pricing data to the prime contractor, Raytheon Co. of Bedford, Mass., which led to Raytheon passing on overstated costs to the Army.

Raymond paid the government $62,000 to settle a similar complaint in November 1992, also involving the Patriot missile. Raymond paid $265,000 in October 1993 for failing to disclose pricing data on a Navy contract, the government said.

Federal law requires contractors to disclose their most complete and current pricing data when negotiating contracts.

Nasshan said the company disclosed information consistent with defense industry practices.

"It really was a technicality," he said of the latest settlement.

Teledyne to Pay $112.5 Million To Settle Suits

Accord Appears to Resolve Two U.S. Fraud Cases; First-Period Charge Set

By Andy Pasztor
Staff Reporter of The Wall Street Journal

LOS ANGELES – Teledyne Inc. agreed to pay a total of $112.5 million to resolve two longstanding whistle-blower suits alleging fraud and improper testing of electronic parts it sold to the Pentagon through the 1980s.

The tentative agreement, which had been expected for months but remains subject to final court approval, will turn out to be among the handful of largest civil fraud settlements involving military contractors. Despite the considerable financial drain on Teledyne, in many ways yesterday's announcement represented relatively good news for the company.

Settlement discussions, for example, have involved amounts significantly larger than $112 million. The company also managed to avoid the risks and potential embarrassment of going to trial. The agreement marked the culmination of a concerted effort by Teledyne to resolve nagging legal claims that have diverted management's attention, drained resources and clouded the firm's future for the past few years.

Teledyne previously pleaded guilty to making false statements to the Pentagon and paid $17.5 million to settle related criminal charges. The settlement announcement came after the close of regular trading. In composite New York Stock Exchange trading yesterday, Teledyne shares fell 62.5 cents, or 4%, to $14.375.

The Los Angeles-based maker of defense electronics, consumer products and specialty metals took a charge for the full amount of the proposed settlement against earnings for the first quarter, though the agreement calls for some of the payments to be stretched out over the next year. For the quarter ended March 31, Teledyne reported a loss of $55.1 million, or 99 cents a share, compared with a loss of $155.5 million, or $2.81 cents a share, in the year-ago period.

Donald Rice, the company's president and chief operating officer, called the agreement "an important milestone, which certainly ought to allow us to focus more attention on running the business."

Since 1989, Teledyne has been the focus of no fewer than eight separate federal criminal investigations and at least that many civil probes. As previously reported, the Justice Department had joined both of the whistle-blower suits that were resolved yesterday.

As part of the settlement package, Teledyne

Teledyne Inc. Agrees To Pay $112.5 Million To Settle Two Suits

Continued From Page A2

to settle a 1989 civil case alleging that its Systems division kept a double set of books and padded costs on government contracts by showing federal auditors phony files.

Teledyne also agreed to pay an additional $85 million to settle a 1990 suit that the company's Relays division failed to properly test switches sold to the Pentagon.

Three months ago, when Teledyne suspended its cash dividend for the first time ever, there was speculation that a settlement was close. In filings with the Securities and Exchange Commission over the years, the company asserted that it didn't have reliable estimates of potential damages and therefore wasn't able to set aside funds to pay anticipated settlement costs.

UTC, whistleblower settle lawsuit

The Associated Press
and Journal Inquirer Staff

United Technologies Corp. has settled a lawsuit with a former employee who claimed the company demoted him for refusing to participate in a scheme to bribe Saudi officials to win helicopter sales, according to a published report.

The settlement with lawyers for Thomas F. Dooley was reached Friday, but both sides refused to discuss specifics, according to The Hartford Courant, which cited anonymous sources.

UTC spokesman Matt Nazzollo said Tuesday only that the case was dismissed, but neither he nor Michael J. Mueller, Dooley's lawyer, would disclose whether the settlement involved any cash payment.

Dooley, a Middle East sales representative for UTC's Stratford-based Sikorsky Aircraft division, had asked for $130 million in damages in the lawsuit, which was filed in U.S. District Court in Washington in October 1991.

Dooley said he was threatened and then demoted in 1988 because he would not go along with the bribery scheme, in which he claimed 13 companies and eight individuals were involved.

He contended that UTC officials conspired with the Saudi royal family to skirt U.S. export restrictions and to deceive Congress to sell helicopters.

The lawsuit said the bribes were disguised as commissions, consulting fees, and contracts for services to support helicopter sales. He said payoff money was passed through a Saudi businessman to two Saudi princes.

At the time, Marty Moore, also a UTC spokesman, said an internal investigation by the company's law firm found the allegations "without merit."

The Justice Department and a congressional investigations subcommittee headed by Rep. John Dingell, D-Mich., have been looking into Dooley's allegations.

Justice Department officials could not be reached for comment. Aide Peter D.H. Stockton, a research analyst for Dingell's subcommittee, said it's unclear what effect the settlement will have on the probe.

"A lot of times when these things are settled, you lose your whistleblower and their law firm," Stockton said.

Since Dooley filed his lawsuit, there has been a long series of legal skirmishes over other issues. Late last year, Dooley claimed Sikorsky and its British partner had tried to evade U.S. export laws.

Dooley and his lawyers said they had evidence that the company and its British partner, Westland Group plc, applied to the British government to sell Pratt & Whitney jet engines for Boeing 747s to Iraq or Iran. They also claimed Sikorsky and its British partner tried to sell helicopters to Iraq in the years before the 1991 Persian Gulf War.

Documents filed in court said that the sales "helped (or attempted to help) Iraqi leader Saddam Hussein build up his war machine."

Moore vigorously denied any wrongdoing at the time.

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The Hartford Courant.

Established 1761

Tuesday, July 14, 1992

Eastern Edition

Newsstand 50¢

June CLIV, Number 196

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UTC to settle fraud charges

By MIRANDA S. SPIVACK and ROBERT WEISMAN
Courant Staff Writers

WASHINGTON — United Technologies Corp., which has steadfastly denied any wrongdoing in the Ill Wind probe of Pentagon procurement, is moving toward an agreement with federal prosecutors to plead guilty in the next few weeks to criminal charges stemming from the five-year fraud investigation.

If the plea agreement goes through, it would remove a cloud over the Hartford-based defense contractor — the nation's seventh-largest — as it attempts to fend off at least two other investigations of its dealings for defense contracts.

But a decision by UTC executives to enter a guilty plea after they have proclaimed for years that the company has done no wrong in the Pentagon procurement scandal calls into question the company's credibility, some defense industry analysts said.

Company officials refused to confirm Monday that a plea bargain was in the works. Joseph J. Aronica, the federal prosecutor running the investigation in Alexandria, Va., also refused to comment Monday on Ill Wind.

But sources close to the investigation confirmed that UTC has been negotiating with Aronica and is close to an agreement on a plea. They said it might come later this month or early in August. The Wall Street Journal reported Monday that the company would be fined $2 million for criminal wrongdoing.

Rumors have circulated for weeks that UTC was negotiating with prosecutors to limit liability to the corporation rather than to any individuals. There also has been speculation that the company might enter a guilty plea to

Please see UTC, Page A6

JTC expected to plead guilty to fraud charges in federal case

lued from Page 1

e charges that bribes were paid 'entagon officials in return for le information about governd contracts.

ITC's Pratt & Whitney division is to have received inside informa- about rival General Electric's posal for the F101 engine on the y's F/A-18 jet fighter.

he reported $3 million fine, if ur ate, would be paltry compared h other criminal and civil penal- that already have been assessed the fraud investigation, and it ght not account for possible civil alties in the case that could be ght by the Justice Department.

or example, in September 1991, isys, another major defense con- ctor, agreed to pay $190 million ettle criminal and civil charges mming from the Ill Wind investi- tion.

One possible explanation for the er reported fine for UTC is that ell never was able to use the infor- ation it obtained about GE's en- e contracts to make a competi- e offer to win a larger share of the vy's business.

GE at that point was so far ahead engine development that Pratt uld not catch up technologically, there appear to be no illicit profits return to the government.

Defense industry analysts were prised not by the report that UTC as negotiating a guilty plea, but by the reported $3 million figure, which they said was low compared with other recent guilty pleas in defense cases.

Retired Navy Capt. James Bush, associate director of the Center for Defense Information in Washington, said the reported settlement could undermine the credibility of government prosecutors, as well as UTC.

"Three million dollars sounds like a slap on the hand for United Technologies," Bush said. "There's enough concern in this country that white-collar criminals go unpunished, and here they appear to be doing it again."

Nicholas Heymann, analyst for County NatWest USA, an investment firm in New York, said he had expected UTC would wind up paying a fine of at least $35 million.

"That's not much by today's standards," Heymann said of the $3 million figure. "It's like a dad telling his kid, 'You can't go to the ballgame for the first out.'"

Senior UTC executives have repeatedly told employees and the public in company letters and other statements that they "believe that no UTC employee knowingly received stolen information" from former Navy assistant secretary Melvyn R. Paisley, a key figure in the investigation.

Paisley pleaded guilty in June 1991 to several charges, including turning over to a Pratt official in April 1987 government information that he had obtained concerning rival GE's proposal for the F101 engine.

The Pratt official has never been formally named, but he has been identified by several sources as Eugene Tallia, head of Pratt's Washington office at the time. He has declined comment in the past, and he could not be reached Monday.

Heymann said Wall Street would be as relieved by the expected outcome as UTC. UTC stock closed up 25 cents Monday at $31.50 a share on the New York Stock Exchange.

"It will be good to have it behind them," Heymann said. "It will be nice for their top management not to have to worry about this. It clears the air so they can concentrate on what the company needs to focus on at this point — their restructuring."

He was referring to the company's plan, announced last January, to cut nearly 16,000 jobs worldwide and $1 billion a year in operating costs by mid-decade.

Although a plea agreement does not necessarily answer questions about the role of individuals, it would end legal pressure on executives such as Robert F. Daniell, president, chief executive officer and board chairman, who approved hiring Paisley. Part of the plea agreement appears to stipulate that no individuals be charged.

The decision to negotiate a plea agreement with prosecutors in Ill Wind, after four years of denials from UTC, could cast doubt on claims by UTC officials in two other cases, people close to the investigation said.

UTC officials have denied wrongdoing in a civil lawsuit by a Sikorsky employee charging that company officials bribed members of the Saudi ruling monarchy to obtain helicopter contracts. The company also has denied wrongdoing in a continuing Justice Department and congressional investigation of charges that Pratt officials had made illicit payments in connection with an Israeli Air Force engine contract.

On July 8, Benjamin Sonnenschein, a Fair Lawn, N.J., businessman, pleaded guilty in a Brooklyn federal court to criminal charges that two companies he owned acted as a go-between through which Pratt funneled $6 million to an associate of an Israeli Air Force general who is now serving a jail sentence in Israel for taking bribes from American defense companies, including GE.

GE is said to be ready to sign a plea agreement with the Justice Department and pay a $70 million fine to settle charges that it diverted U.S. military aid bound for Israel and bribed the general, Rami Dotan.

The forthcoming guilty plea by UTC in the Ill Wind investigation follows guilty pleas by several others associated with the company.

Officials of Norden, a UTC division in Norwalk, Conn., that specializes in military radar, also have been convicted or pleaded guilty.

Norden consultant Thomas E. Muldoon, who investigators described as a key figure, was convicted in 1989 by a federal jury of conspiracy, bribery and interstate commerce violations for paying Jack E. Sherman, a Marine Corps official, to help a California company compete for a battlefield communications system. He was sentenced to 27 months in prison.

William M. Galvin pleaded guilty in 1990 to charges that he had bribed Paisley and a former deputy assistant Air Force Secretary to win Pentagon contracts for his clients, which included Pratt and Norden. Paisley and Galvin had become business partners after Paisley left the Navy in 1987.

James Kaplan, a senior vice president of business development at Norden, pleaded guilty in 1989 to charges of conspiracy to defraud the government and theft of government property. He was sentenced to six months in a halfway house and fined $5,000.

Roger K. Engel, Norden vice president for advanced programs, pleaded guilty in 1990 to conspiracy to defraud the government and theft of government property. He, too, was sentenced to six months in a halfway house and fined $5,000.

C.J. Richardson, Norden business unit manager, pleaded guilty in 1989 to charges of conspiracy to defraud the government and theft of government property and was sentenced to five months in a halfway house.

'Ill Wind' at a glance

■ The Justice Department investigation into weapons-buying fraud and bribery was made public June 14, 1988, when federal agents raided 31 sites nationwide. Here is what the probe has chalked up, not including United Technologies Corp.'s reported plea agreement:

Convictions: 56 convictions include 28 corporate executives, 13 consultants, nine government officials and 6 corporations.

Fines: $225 million in projected fines, modified contracts and recovered money.

Evidence: 44 search warrants producing 250,000 documents; more than 500 subpoenas issued.

Connecticut connections: Raided were East Hartford-based Pratt & Whitney's office in Washington, D.C., and three of Norwalk-based Norden Systems' sites in Connecticut.

SOURCE: Assistant U.S. Atty. Joseph Aronica, Alexandria, Va. — The Hartford Courant

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)HN DIAMOND
ıted Press Writer

SHINGTON — A con- charged the Navy $544 park plug connector avail- l local hardware stores for . In a new page in the gon's book of high-priced ers and toilet seats, a panel is investigating le price gouging by the of an unmanned re- issance aircraft.

spark plug connector un the motor of the Navy's r Unmanned Aerial Ve- a drone aircraft used to connaissance videotape of fronts for Marines and ground troops.

Three Navy whistleblowers, frustrated by their own superiors, alerted the House Armed Services investigations subcommittee to what they said was chronic overbilling for spare parts.

The committee probe turned up what appears to be egregious overpricing by the contractor, Pioneer UAV Inc. of Hunt Valley, Md.

Pioneer UAV has argued to both the Navy and the subcommittee that the Navy never paid $544 for the part. Instead, the connector was included in a "parts package" priced at $25,000. But a subcommittee investigator confirmed Friday that the price quoted by the company for the individual part is $544.

BUSINESS

Whistleblower needs money, lawyer says

By The Associated Press

HARTFORD — Douglas D. Keeth was high on the corporate ladder of United Technologies Corp. when he risked it all by filing a whistleblower lawsuit.

The executive-turned-whistleblower will get a record $22.5 million, under a settlement announced Wednesday, for reporting that UTC's Sikorsky division improperly billed the government for work before it was done.

Keeth will need the money, according to his attorney, David Golub of Stamford. Golub said Keeth's chances of finding another corporate job are probably "nil."

Keeth didn't have much to say after UTC agreed to pay a record $150 million to settle the government's claims.

"Everybody gets 15 minutes of fame, and mine is 'no comment,'" he said when contacted by phone just after the settlement was announced.

Keeth was removed from his job as UTC's vice president of finance in February 1990.

Golub said Keeth acted on principle when he blew the whistle.

"This was not a disgruntled employee, who was turning on his employer for money," Golub said. "This was a rising star in the company who risked his career to do the right thing. Remember, at the time he filed his lawsuit, Mr. Keeth didn't know whether he would receive anything."

Golub said Keeth's status as a whistleblower has made him a pariah in the corporate community; he has been unable to find work since he filed the suit.

Keeth, 46, who now lives in Keene, N.H., with his wife and two college-age children, was heading an internal audit of Sikorsky's billing practices in 1988, when he filed the lawsuit.

The action alleged that UTC knowingly and fraudulently billed the federal government prematurely for helicopter work at its Stratford-based Sikorsky Aircraft division, going back as far as 1982.

Keeth accused company officials of trying to conceal details of the improper billing practices from the Department of Defense after the company had disclosed the existence of the problem and agreed to investigate. He alleged the company was continuing to file false claims over his objections.

Keeth alerted company officials to the practice in a report in March 1989, but was told that all copies of the report must be destroyed, the lawsuit said. A month later, he was told to turn over all copies of the report to company lawyers, the lawsuit said.

Golub said Keeth, who had steadily advanced at UTC since taking a job with the company in 1978, was faced with a choice: he could shut up and keep his vice president's job, or he could speak up and face the consequences.

UTC did not admit to any fraudulent intent in the settlement with the government. The $150 million compensates the government for penalties and interest from 1982 to the present on payments the company received prematurely, said U.S. Attorney Christopher Droney.

Although the company never received more money in total than permitted under its contracts, the inflated payments constituted interest-free loans from the government, said Assistant Attorney General Frank W. Hunger, head of the Justice Department's civil division.

UTC voluntarily returned more than $80 million to the Pentagon in 1988 through refunds and billing adjustments. The company then voluntarily disclosed to the government that Sikorsky had erroneously calculated progress payment billings, and began its own investigation.

Golub said now that a settlement has been reached, Keeth is planning to "sit down and make some decisions" about his future.

Whistleblower reaps $22.5 million as UTC settles suit

By MARK PAZNIOKAS and MICHAEL REMEZ
Courant Staff Writers

A former United Technologies Corp. executive will be rewarded by the government with a record $22.5 million for blowing the whistle on the company after it improperly charged the military for helicopter work.

UTC has agreed to pay $150 million to settle Justice Department claims that its Sikorsky Aircraft Division overcharged for work on Black Hawk helicopters during the 1980s.

The $22.5 million awarded to Douglas D. Keeth, a former UTC vice president of finance, described by his lawyer as someone who was a "rising star in the company," amounts to 15 percent of the money the government recovered.

■ Related story, Page D3

The award is the largest ever under a federal law dating back to the Civil War that rewards citizens who uncover fraud with a portion of the money they save the government, the Justice Department said.

United Technologies did not admit any wrongdoing in the civil settlement and it will not be suspended from bidding or receiving any new government contracts.

The civil litigation Keeth initiated against UTC has been under seal since it was filed in 1989. In a short proceeding at 3 p.m. in U.S. District Court in Bridgeport, Judge Alan H. Nevas unsealed the file after the government informed him that a settlement had been finalized.

UTC unexpectedly made the deal public at 6 p.m., revealing that the company had discovered, investigated and voluntarily disclosed the overbilling to the government.

The Justice Department, which had planned to make the settlement public today, was left scrambling to respond. Their version, which emerged later in the evening, included an allegation that UTC had suppressed elements of its internal investigation.

U.S. Attorney Christopher Droney said the government attacked "corruption" and inaccuracies in the voluntary disclosure made by UTC. Keeth's attorney, David Golub of Stamford, was blunter.

His client was the main author of an internal investigative report that concluded there had been willful overbilling at Sikorsky — and UTC suppressed Keeth's findings, Golub said.

Please see UTC, Page A20

UTC settles suit; pays U.S. $150 million

Continued from Page 1

UTC gave the government "a much different report," which minimized the company's financial exposure and its fault, Golub said.

Marty Moore, a spokesman for the company, denied there was a coverup. "I think there is absolutely no reason to believe that," he said.

Droney said Sikorsky had regularly overcharged the government on progress payments — payments made at various stages in the development of the Black Hawk helicopter. He said Sikorsky had inflated the amount of work completed and collected the payments before it was entitled to them.

The inflated payments constituted interest-free loans from the government, said Assistant Attorney General Frank W. Hunger. But at the end of the contracts, Droney said, the money paid out was approximately the contracted price.

Reached at his home in Burlington late Wednesday, Keeth would not comment on the award.

Golub said Keeth was motivated by principle, not profit, and was "very pleased with the outcome."

"When he brought the lawsuit, the risk was he gets nothing and he has no career," Golub said. "He had to make a decision as to whether he should go to the mat, and he did over a matter of conscience."

Keeth, 48, who is married and the father of two children, had been named director of audit at UTC while in his 30s and was vice president of finance when he filed the complaint five years ago.

"He didn't want to destroy his career. It turned out, in the long run, it was financially beneficial to him," Golub said of Keeth's decision to become a whistleblower. "What he really wanted was to have a long and productive career at UTC. He was on track for that. He was really corporate America in all," Golub said.

Sikorsky had disclosed to the Pentagon in 1988 that the billing errors stemmed from a computerized inventory control system.

At that time, Sikorsky agreed to pay back close to $80 million to the Department of Defense through a combination of refunds and billing adjustments.

Keeth was a member of a UTC team that then conducted an internal investigation. Golub said Keeth had been "a vigorous force for full disclosure to the government."

The case was investigated by Defense Criminal Investigative Service, the FBI and the Naval Criminal Investigative Service.

The statement released late Wednesday by UTC said money had been set aside earlier to cover the settlement amount.

In its 1993 annual report, UTC noted that the Justice Department "has stated it would accept $150 million in full settlement of the matter, which compensates the government for damages it has suffered."

In its statement, UTC said: "Sikorsky at no time received a dollar more in final payment than the prices agreed upon in its contracts. The settlement compensates the government for interest on the amount of progress payments received prematurely."

Under procedure outlined in the whistleblowing law, Droney said, the whistleblower sues the company and the government joins in prosecution of case.

Droney said some of the investigation was done in Connecticut but the Justice Department in Washington negotiated the settlement. The department's lead attorney was David Sobell.

The law under which whistleblowers can collect money dates to the Civil War. Golub said it stems from shipments of "ammunition" that, when opened during battle, contained nothing but sawdust.

Pratt aided overpricing scheme, report says

UTC head says firm had unwitting role in Israelis' diversions

By MICHAEL REMEZ
Courant Staff Writer

Pratt & Whitney officials helped members of Israel's air force illegally siphon off millions of dollars in U.S. defense money in the late 1980s, congressional investigators disclosed Tuesday.

And although a report by the General Accounting Office says there is no proof that those in charge of the East Hartford based jet-engine maker knew of the diversions, it says the company should have figured it out.

Testimony to be delivered today to Congress by investigators from the GAO suggests that Pratt officials played a role in an overpricing scheme orchestrated by former Israeli air force Brig. Gen. Rami Dotan and associates.

"We found that, between 1986 and 1991, Pratt & Whitney and Israeli Ministry of Defense officials helped Israeli Air Force officials and others to divert U.S. foreign military assistance funds and circumvent certain program restrictions," the draft document says.

The evidence is to be presented today at a hearing before the House subcommittee on oversight and investigations, headed by U.S. Rep. John D. Dingell, D-Mich.

Pratt and its parent company, United Technologies Corp., have maintained steadfastly that Pratt did not knowingly violate any laws or procurement regulations. The Israeli government has said that it began the investigation that uncovered the fraud and alerted U.S. officials to the wrongdoing.

Robert F. Daniell, chairman and chief executive officer of UTC, is scheduled to present the company's position before the Commerce and Energy subcommittee today.

Please see Pratt, Page A10

Pratt helped Israelis siphon defense funds, report says

Continued from Page 1

The GAO report is also critical of Pentagon oversight of sales by U.S. defense contractors to foreign governments, a process the report says relies too heavily on the receiving country's efforts to safeguard U.S. dollars.

In prepared testimony, Daniell says that Pratt was an unwitting participant in a deception contrived by Dotan and his associates. Dotan is now serving a 13 year sentence in an Israeli jail for defense procurement fraud.

"Our inquiry found that no Pratt & Whitney employee deliberately or knowingly violated company policies or governmen[illegible]ations," Daniell wrote. "At [illegible] time, it is clear, in retrosp[illegible]ur procedures were not adequate in one particular kind of circumstance: subcontracting with a customer-directed source."

In most cases, the diversions involved Dotan's directing Pratt to give subcontracting work — at inflated prices — to companies that turned out to be associated with Dotan.

By the time Dotan was arrested in 1990, Pratt had paid $6.5 million to two companies to design computer programs valued at about $600,000, according to the GAO. The companies — Yrreico Inc. and Air Tech Inc. — had been incorporated by a New Jersey businessman, Benjamin Sonnenschein, at the direction of a Dotan associate, Yoram Ingbir.

Last summer, Sonnenschein, a relative of Ingbir's with no background in computer work, pleaded guilty in a federal court in Brooklyn, N.Y., to criminal charges that the two companies acted as go-betweens through which Pratt funneled millions to the Israelis.

The question has been whether Pratt officials knew about the diversion. The report alleges that Pratt forwarded the computer programs to Israel without inspecting or testing them. "In return, Pratt & Whitney received a 45 percent markup on each subcontract," investigators wrote.

In another example, Pratt contracted with Ingbir's engineering firm — at the direction of the Israeli air force — for work on engine parts known as pump modules. An American firm offered to do the entire job for $4.2 million, but Pratt gave the Israeli firm a $1.35 million contract for part of the work and gave a $3.9 million contract to the American company — Bendix Engine Control Systems — for the rest.

That drove up the price for the entire project by $1 million, from $4.2 million to just over $5.2 million, the report says. And Bendix had to help Ingbir Engineering with the design work.

Pratt has not been charged with any wrongdoing in its dealings with Dotan or Ingbir.

Last summer, Fairfield-based General Electric, Pratt's main rival f[illegible]n engine sales, pleaded g[illegible] U.S. District Court in Cin[illegible] conspiring with Dotan in a money laundering scheme. GE agreed to pay a $69 million fine. The company placed much of the blame on a single employee.

In July, Dingell's committee heard testimony from John F. Welch, GE's chairman and chief executive officer. Welch apologized to Congress for his company's role in the scandal.

Today, Daniell is expected to face questions on the extent and depth of Pratt's internal investigation.

The draft GAO testimony lays out a scenario that suggests that Pratt profited from its dealings with Dotan associates, must have realized something was wrong and could have taken steps to expose the problems.

Pratt and UTC officials have countered that Pratt had little choice when directed by the Israeli to give work to certain subcontractors. And they say questions raised with Dotan or other Israelis were parried with statements about Israel's security and the need to maintain secrecy.

The GAO report also includes least one allegation that Pratt officials knowingly skirted federal restrictions on the use of the military aid money and that the company failed to keep proper records.

"Although all indications point to a diversion scheme involving Government of Israel and subcontractor personnel, Pratt & Whitney chose to ignore these in[illegible] acted in such a way t[illegible] avoid notice of the set[illegible]tions," the GAO testimony [illegible]

Sikorsky faces flak on helicopter sales

By MIRANDA S. SPIVACK
Courant Staff Writer

WASHINGTON — A former executive of a British munitions company has charged that Sikorsky Aircraft executives failed to tell the U.S. government that Sikorsky and a British partner were selling armed helicopters to Saudi Arabia, in a potential violation of U.S. export law.

If the assertion by Gerald H. James, made in the sworn testimony of a federal court deposition, is proved true, it also could strengthen claims made by a onetime Sikorsky arms trader — Thomas F. Dooley — that top officials of Sikorsky and others were involved in a bribery scheme to obtain a helicopter contract with the Saudis and to arm the helicopters in a way that circumvented U.S. arms export control laws.

Sikorsky President Gene Buckley said in an interview last week that he had no knowledge of the assertions by James, onetime head of Astra Holdings in Britain. Astra had business ties with Sikorsky's British partner, Westland, a helicopter company.

Buckley predicted, however, that a lawsuit brought by Dooley against Sikorsky would be resolved in favor of the company and its corporate parent, Hartford-based United Technologies Corp.

Dooley claims in that suit that he was demoted and punished after going to his superiors with claims that Sikorsky was engaged in a bribery scheme. Because of its panoply of claims of nefarious dealings in the Middle Eastern arms trade, the lawsuit has caught the attention of congressional investigators and Justice Department officials. Federal authorities are conducting parallel probes of allegations that UTC and Sikorsky, among other defendants, agreed to pay substantial bribes to

Please see Sikorsky, Page A4

HARTFORD COURANT, Monday, November 30, 1992

korsky faces more flak in charges on helicopter sales

from Page 1

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position on file in U.S. Dis-
rt in Washington, James told lawyers that Buckley and UTC's Washington office chief, Bill Paul, knew about plans to arm the helicopters in the course of the sale, but did not notify the U.S. government.

That assertion could be used by Dooley to claim that UTC officials showed by their activities that they were engaged in deliberate acts that were part of the groundwork for the alleged bribery scheme involving members of the Saudi government and ruling family.

Withholding such information in defiance of federal law could be seen as elements of a conspiracy. However, lawyers for UTC and Sikorsky have indicated throughout pretrial proceedings that company officials did not intend to withhold this type of information from the U.S. government, and would have made the necessary statements to U.S. agencies if the helicopters were to be armed.

Paul could not be reached, but Marty Moore, a UTC spokesman in Hartford, said, "As we have stated repeatedly, we don't believe there is any merit to the allegations raised in the lawsuit."

Lawyers for UTC and Westland attempted to debunk James's credibility during the deposition, and tried to portray him as a disgruntled former executive who was fighting with his prior employer, Astra, about compensation.

James acknowledged in sworn testimony that he thought he and other former Astra managers were being labeled scapegoats in the collapse of the company. The lawyers also got James to acknowledge that he believes the company still owes him money, but James said the company was in receivership, so the claim was probably moot.

James also said under questioning from UTC and Westland lawyers that he did not believe that, ultimately, any armed helicopters would be sold to the Saudis without U.S. export approval.

The Dooley case, still months away from trial, has caught the attention of Rep. John D. Dingell, D-Mich., as well as the Justice Department and the FBI. Dingell's investigations subcommittee is conducting an inquiry into dealings of another UTC unit, Pratt & Whitney, and its relationship with Hamid Dotan, a former Israeli military officer who was convicted in a kickback and payoff scheme.

Dingell held one hearing on the Dotan affair and Dotan's involvement with General Electric, which paid $69 million in federal fines and penalties in connection with that company's role in the scheme. He is expected to hold a hearing on the Dotan-Pratt relationship early next year. Federal prosecutors also have been examining the ties between Dotan and Pratt, but there is no timetable for completion of that probe.

Sikorsky sale to Saudis investigated

The Associated Press

A former executive of a British munitions company contends Sikorsky Aircraft and a British partner sold armed helicopters to Saudi Arabia without informing the U.S. government, a potential violation of federal export law.

Richard R. James said in a deposition filed in U.S. District Court in Washington that Sikorsky President Gene Buckley and Bill Paul of United Technologies Corp.'s Washington office knew about plans to arm Black Hawk helicopters being sold to Saudi Arabia, but did not notify the U.S. government.

Failing to report the proposed arming of the helicopters could be found to be a violation of U.S. export laws and could carry substantial penalties.

James is a former head of Astra Holdings in Britain, which had business ties with Sikorsky's British partner, Westland, a helicopter company. His claims could lead to a criminal investigation by federal prosecutors and action by Congress, which oversees U.S. arms sales abroad.

It also could strengthen allegations in a lawsuit against the company filed by Thomas F. Dooley, a onetime Sikorsky arms trader. Dooley alleges that some Sikorsky executives were involved in a bribery scheme to obtain a helicopter contract with the Saudis and to arm the

See SIKORSKY, next page

SIKORSKY

Continued from previous page

helicopters in a way that would not violate U.S. law.

Lawyers for Sikorsky and UTC, a Hartford-based parent, said company officials did not intend to withhold information from the government.

Lawyers for Sikorsky and Westland portrayed James as a disgruntled former executive fighting with his prior employer, Astra, about compensation.

James said he and other former Astra managers were being labeled scapegoats in the collapse of the company. He said Astra owes him money, but that he likely won't get paid because the company is in receivership.

He also said he did not believe any armed helicopters would be sold to the Saudis without U.S. approval.

Buckley said he had no knowledge of James' claims. He also predicted Dooley's lawsuit would be resolved in favor of UTC and Stratford-based Sikorsky.

In his lawsuit, Dooley contends that he was demoted and punished after going to his superiors with allegations that Sikorsky was engaged in a bribery scheme.

Federal authorities are investigating the allegations, and U.S. Rep. John D. Dingell, D-Mich., plans to hold hearings on Dooley's claims.

Pratt aided overpricing scheme, report says

UTC head says firm had unwitting role in Israelis' diversions

By MICHAEL REMEZ
Courant Staff Writer

Pratt & Whitney officials helped members of Israel's air force illegally siphon off millions of dollars in U.S. defense money in the late 1980s, congressional investigators disclosed Tuesday.

And although a report by the General Accounting Office says there is no proof that those in charge of the East Hartford based jet-engine maker knew of the diversions, it says the company should have figured it out.

Testimony to be delivered today to Congress by investigators from the GAO suggests that Pratt officials played a role in an overpricing scheme orchestrated by former Israeli air force Brig. Gen. Rami Dotan and associates.

"We found that, between 1986 and 1991, Pratt & Whitney and Israeli Ministry of Defense officials helped Israeli Air Force officials and others to divert U.S. foreign military assistance funds and circumvent certain program restrictions," the draft document says.

The evidence is to be presented today at a hearing before the House subcommittee on oversight and investigations, headed by U.S. Rep. John D. Dingell, D-Mich.

Pratt and its parent company, United Technologies Corp., have maintained steadfastly that Pratt did not knowingly violate any laws or procurement regulations. The Israeli government has said that it began the investigation that uncovered the fraud and alerted U.S. officials to the wrongdoing.

Robert F. Daniell, chairman and chief executive officer of UTC, is scheduled to present the company's position before the Commerce and Energy subcommittee today.

Please see Pratt, Page A10

Pratt helped Israelis siphon defense funds, report says

Continued from Page 1

The GAO report is also critical of Pentagon oversight of sales by U.S. defense contractors to foreign governments, a process the report says relies too heavily on the receiving country's efforts to safeguard U.S. dollars.

In prepared testimony, Daniell says that Pratt was an unwitting participant in a deception contrived by Dotan and his associates. Dotan is now serving a 13-year sentence in an Israeli jail for defense procurement fraud.

"Our inquiry found that no Pratt & Whitney employee deliberately or knowingly violated [illegible] policies or [illegible] regulations," Daniell wrote. "At the [illegible] time, it is clear, in retrospect, that our procedures were not adequate in one particular kind of circumstance: subcontracting with a customer-directed source."

In most cases, the diversions involved Dotan's directing Pratt to give subcontracting work — at inflated prices — to companies that turned out to be associated with Dotan.

By the time Dotan was arrested in 1990, Pratt had paid $6.5 million to two companies to design computer programs valued at about $600,000, according to the GAO. The companies — Yeruico Inc. and Air Tech Inc. — had been incorporated by a New Jersey businessman, Benjamin Sommerschield, at the direction of a Dotan associate, Yoram Ingbir.

Last summer, Sommerschield, a relative of Ingbir's with no background in computer work, pleaded guilty in a federal court in Brooklyn, N.Y., to criminal charges that the two companies acted as go-betweens through which Pratt funneled millions to the Israelis.

The question has been whether Pratt officials knew about the diversion. The report alleges that Pratt forwarded the computer programs to Israel without inspecting or testing them. "In return, Pratt & Whitney received a 45 percent markup on each subcontract," investigators wrote.

In another example, Pratt contracted with Ingbir's engineering firm — at the direction of the Israeli air force — for work on engine parts known as pump modules. An American firm offered to do the entire job for $4.2 million, but Pratt gave the Israeli firm a $6.35 million contract for part of the work and gave a $3.9 million contract to the American company — Hendrix Engine Control Systems — for the rest.

That drove up the price for the entire project by $1 million, from $4.2 million to just over $5.2 million, the report says. And Hendrix had to help Ingbir Engineering with the design work.

Pratt has not been charged with any wrongdoing in its dealings with Dotan or Ingbir.

Last summer, Fairfield-based [illegible] Domestic, Pratt's main rival for [illegible] engine sales, pleaded guilty in U.S. District Court in Cincinnati to complying with Dotan in a money laundering scheme. GE agreed to pay a $69 million fine. The company placed much of the blame on a single employee.

In July, Dingell's committee heard testimony from John F. Welch, GE's chairman and chief executive officer. Welch apologized to Congress for his company's role in the scandal.

Today, Daniell is expected to face questions on the extent and depth of Pratt's internal investigation.

The draft GAO testimony lays out a scenario that suggests that Pratt profited from its dealings with Dotan associates, must have realized something was wrong and could have taken steps to expose the problems.

Pratt and UTC officials have countered that Pratt had little choice when directed by the Israeli to give work to certain subcontractors. And they say questions raised with Dotan or other Israelis were parried with statements about Israel's security and the need to maintain secrecy.

The GAO report also includes at least one allegation that Pratt officials knowingly shirked federal strictures on the use of the military aid money and that the company failed to keep proper records.

"Although all indications point to a diversion scheme involving Government of Israel and subcontractor personnel, Pratt & [illegible] chose to ignore these [illegible] acted in such a way that [illegible] avoid notice of the act or [illegible]tions," the GAO testimony says.

ntractor to testify in Israeli defense plot

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eral Accounting Office hat $12.5 million was di- n weapons projects ap- he United States, which

The GAO estimates $12.5 million was diverted in an Israeli military scheme.

gives Israel $1.8 billion annually in military aid on the condition the money is spent on approved projects.

Mr. Daniell's testimony is the latest chapter in the "Dotan Affair," so called for former Israeli Brig. Gen. Rami Dotan.

The air force general, now serving a 13-year prison sentence in Israel on bribery and other convictions, diverted as much as $70 million in U.S. funds since the mid-1980s, according to subcommittee investigators.

Most of the money was used for projects not approved by the United States, such as power plants on Israeli military bases.

A relatively small part of the diverted money — about $200,000 — ended up in the personal bank accounts of Dotan and a co-conspirator, the subcommittee determined.

"What started out innocently as aid to a valued ally appears to have turned into a sordid tale of theft, bribery, money laundering and attempted kidnapping or murder," says subcommittee Chairman John D. Dingell, Michigan Democrat.

Mr. Dingell says Dotan paid a hit man $50,000 to "kidnap, beat and possibly kill" Opher Pail, a former Israeli Ministry of Defense employee in New York who blew the whistle on the general.

Mr. Dingell today is expected to question sharply Mr. Daniell's contention that Pratt & Whitney employees merely succumbed to the demands of a prized customer, Israel, and were unaware of the illegal diversions.

"From our own investigation and from published reports, it is now clear that sales by Pratt & Whitney to the government of Israel were used by people outside the company to divert U.S. government funds for unauthorized purposes, apparently including embezzlements by corrupt Israeli officials," Mr. Daniell says.

The Justice Department is investigating the jet engine maker for possible violation of the foreign corrupt practices act.

Pratt & Whitney is the second major U.S. defense contractor to acknowledge contract irregularities in the "Dotan Affair."

Contractor faulted in aid-diversion case

A major American defense contractor had to know about efforts by two subcontractors to help Israeli officials divert millions of dollars in U.S. foreign aid to corrupt Israeli military officers, congressional investigators contended yesterday.

The General Accounting Office told a House panel that Pratt & Whitney must have known that the Israeli Ministry of Defense assisted in diverting $12.5 million in U.S. military aid from 1986 to 1991 through an overpricing scheme organized by former Israeli air force Brig. Gen. Rami Dotan and others.

Robert Daniell, chairman and chief executive officer of United Technologies, Pratt & Whitney's parent company, said he regretted the involvement of Pratt & Whitney in the scheme, describing the scandal as "an embarrassment to me personally and to the corporation."

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Current Defense Minister Kown Young-Hae was not charged, according to BAI Chairman Lee Hoi-Chang.

"We conducted a thorough investigation of [current Defense Minister Kown Young-Hae] bank accounts and where the money for the purchase of his house came from, but we did not find anything suspicious," the BAI chairman said July 9.

After examining the BAI's findings, prosecutors on July 13 questioned 12 local arms dealers and executives about their alleged bribing of the former defense officials. Another 20 local arms makers were scheduled to be summoned by prosecutors for questioning by the end of last week.

The July 9 announcement by BAI officials came after the end of a special inspection of the Yulgok Project — a $40 billion arms modernization program here begun in 1974. The probe was launched by the BAI on April 27 after charges that the Korea Fighter Program — Seoul's $6.2 billion purchase of 120 F-16 fighters from Lockheed Corp., Calabasas, Calif. — was influ-[illegible]d by illegal lobbying.

[illegible]ring the probe of the Yulgok Project's 900 arms programs, the BAI intensely investigated 23

Chairman Lee. The programs involved the purchase over the past 10 years of everything from signal flares to jet fighters, according to BAI officials.

In addition to the Korea Fighter Program controversy, the companies are suspected of promising kickbacks in return for involvement in projects like Seoul's purchase of P-3C Navy patrol aircraft, the Korea Destroyer Experiment Project, the Korea Tank Project and the Korea Helicopter Experiment Project.

U.S. defense firms involved in programs targeted in the probe denied wrongdoing last week. Several said they had not been contacted by South Korean investigators.

Officials of Lockheed Fort Worth Co., which took over management of the Korean Fighter Program in March after acquiring General Dynamics' aircraft division in Fort Worth, Texas, denied charges of improper lobbying in the Korean Fighter Program competition. Citing cost concerns, South Korea defense officials in 1991 switched from the F/A-18 to the F-16 fighter.

Lockheed Fort Worth "has never exercised unlawful influence in the [Korean Fighter Program]," Gordon England, Lock-

South Korea Broadens Arms Scandal Probe

KOREA, From Page 3

"We are confident that the ongoing inspection of the [Korean Fighter Program] by the Korean government will reconfirm that we have conducted our Korean business in a fair and legitimate manner."

Company officials also said a 1991 investigation of the fighter program by the U.S. General Accounting Office, the investigative arm of Congress, exonerates the company. U.S. officials disputed Lockheed's assertion.

"Several limitations imposed on our work, including access to records and people, would not allow us to confirm the integrity of General Dynamics' activities in the Korean Fighter Program," a General Accounting Office source said July 16.

U.S. officials said no report on the investigation was prepared, and restricted correspondence between government auditors and lawmakers who requested the probe, including House Majority Leader Richard Gephardt, D-Mo., has not been released.

Gephardt's congressional district includes St. Louis, headquar-[illegible] F/A-18 maker McDonnell [illegible]s Corp.

U.S. officials confirmed July 16 that Korean investigators contacted the General Accounting Office last spring to obtain copies of the restricted correspondence on its Korean Fighter Program investigation along with related information.

Lockheed also manufactures the P-3 patrol aircraft. Company spokesman Hugh Burns in Washington said July 16, "We are not involved in any wrongdoing [connected with the South Korean P-3 program] in terms of our sales and marketing activities."

Sikorsky Aircraft, Stratford, Conn., is supplying kits for UH-60 helicopters to Korean Air under the Korea Helicopter Experiment Project. Korean Air is assembling the aircraft in South Korea. Begun in 1990, the program calls for building 80 helicopters.

Sikorsky officials declined comment on the Korean investigation or audit. "Under the terms of our contract we cannot make any comment on the helicopter program," Sikorsky spokesman Foster Morgan said July 16.

Staff Writers Robert Holzer and George Leopold contributed to this report from Washington.

NASA, Hamilton Standard face questions on space toilet's price

By SUZANNE SATALINE
Courant Staff Writer

WASHINGTON — The question posed to the gods of American space flight Tuesday was not how one goes to the bathroom in space, for that had been figured out long ago.

Tuesday, Congress asked the folks from NASA why the $8 million price tag for a space shuttle toilet swelled to $21.4 million in three years. Why, the members of the House space subcommittee asked, in the search for fecal containment, was there no cost containment?

"We cannot ask Americans to tighten their belts and have NASA be dropping its pants on a $23 million toilet seat," said Rep. Timothy J. Roemer, D-Ind.

At first, the answer from representatives of the National Aeronautics and Space Administration and Hamilton Standard, which built the space outhouse, was that the Improved Waste Collection System is no ordinary toilet.

Rather, like many of the weighty matters NASA deals with in a weightless environment, the space john is considered life-support equipment — as important to the astronauts as the air they breathe.

A working space toilet "can affect the morale and affect the mission," said Dan Germany, manager of NASA's orbiter and equipment program.

"Sleeping, eating and waste disposal is all done in a close, confined area," Germany said. "If waste is not properly managed, the crew's health is at risk."

To simulate all the comforts of home, Hamilton Standard has designed a toilet to keep the user on it and the waste in it. The commode, about half the size of a refrigerator, has toe bars and thigh bars, odor bacteria filters, a urine fan separator and a system for fecal compression — to make sure the fecal matter doesn't hit the urine fan.

The toilet is necessary, NASA contended, for extra-long days in space. If the agency is going to lengthen its missions, keeping men and women rotating around the globe for two weeks to a month, something had to be done to keep all that stuff on board.

"I want to get to the bottom of this," growled Rep. F. James Sensenbrenner Jr., R-Wis.

Maj. Gen. Jeremiah Pearson III, associate administrator of NASA's space flight office, blamed the agency for problems all the way down from bloated bureaucracy to missed requirements, to poor guesses on the cost of parts, to a system that allowed Hamilton Standard and contractor Rockwell International to keep pumping up the cost to cover mistakes. Just getting the system to compress waste increased the costs.

"I am not at all proud of our cost performance," said Fred Morris, a vice president and general manager at Hamilton Standard, a division of Hartford-based United Technologies Corp. "We clearly underestimated the total complexity. Most of [the blame] was on us."

The members turned up their noses.

"I appreciate your candor," Sensenbrenner said, "but let me say I'm really disgusted."

Other members piled praise on an agency they have long admired, but warned that taxpayers who came of age with Neil Armstrong would believe NASA had been smeared by "Toiletgate."

"Whatever NASA's reputation was 30, 31 years ago," said Rep. Martin R. Hoke, R-Ohio, "now the reputation is that of a bureaucracy that is woefully, irredeemably mired — in its own red tape."

Teledyne Indicted In Plot to Export Munition Pellets

Teledyne Inc. was indicted by a federal grand jury in Washington, D.C., along with three foreign companies and two individuals, on charges that they illegally conspired to export to the Middle East zirconium pellets designed for use in munitions.

The Teledyne Wah Chang Albany unit of Los Angeles-based Teledyne last year was temporarily suspended from receiving licenses for munition-related exports after Teledyne was indicted in a Miami federal court in a related case. Then, the company was charged with exporting zirconium illegally to Chilean arms broker Carlos Cardoen, who allegedly used it in cluster bombs subsequently sold to Iraq. The Miami case is continuing.

In a statement, Teledyne called the latest allegations of export violations unwarranted, and said it would "vigorously defend itself against the charges." The company said an export license had been obtained, based on assurances by the Greek government that the exported material wouldn't be improperly diverted. Teledyne also said that in contesting the Miami charges in court, it had had five of seven original charges dismissed. Subsequently, the government chose to bring this action in the District of Columbia, Teledyne said.

According to the latest charges, Teledyne and companies from Greece, Germany and Belgium conspired with a Teledyne Wah Chang salesman and a Belgian businessman in 1987 and 1988 to export zirconium pellets worth about $3.5 million. Exports allegedly were conducted without a proper license from the State Department, and after the parties allegedly made false statements to the Commerce Department.

Teledyne could face fines of more than $20 million and possible debarment from U.S. export privileges if convicted, according to prosecutors. The former suspension of the Teledyne Wah Chang Albany unit has been in effect since July 26. The company has said the government's evidence in the Miami case doesn't support the allegations in that case, and has also said that the suspension isn't having a material adverse affect on its financial condition.

The company has been involved in numerous investigations in recent years. It has actively resolved many claims of wrongdoing against it, agreeing, for example, to pay more than $150 million in fines, penalties and civil settlements stemming from some of the cases. Teledyne, a diversified defense contractor and maker of industrial and consumer products, has said it may sell off some military businesses as part of a plan to emphasize nondefense operations.

Defense-Sector 'Offset' Deals

Draft for GAO Finds Fault With Side Accords Tied To Arms Sales Abroad

By Jeff Cole
Staff Reporter of The Wall Street Journal

The decline of the nation's defense industry is being hastened by side deals in foreign arms-sale contracts that place work with foreign companies and transfer technology to them, a draft of a General Accounting Office report concludes.

The "offset" arrangements, while legal, send jobs and technology abroad and are expensive for taxpayers, for the defense companies that make offsets part of their arms deals, and for some nondefense businesses, the draft says. The report, based on an examination of 48 contracts valued at $11.6 billion, is expected to be presented today at a hearing of a House Energy and Commerce subcommittee on commerce, consumer protection and competitiveness.

Offset agreements "are hurting our country and taking jobs away from the United States," said Rep. Cardiss Collins, an Illinois Democrat and chairwoman of the subcommittee, which is scrutinizing arms sales with an eye toward tougher limits on offsets.

Big defense companies have historically argued that offset agreements are necessary for competition with European arms-makers, which offer generous offset terms to buyers in the Middle East, Asia and elsewhere.

The GAO report, however, noted that the U.S. is the only seller nation to provide outright grants for buyers to use in paying for their arms. With those grants eliminating the element of foreign competition, the study said, negotiations over offsets often allow customers to pit competing U.S. prime contractors against each other and squeeze them for extra technology, subcontract work and other concessions.

During the last two decades, the report said, buyer nations have won $60.1 billion in U.S. foreign-military financing grants and loans to help pay for their purchases of U.S. tanks, planes, helicopters and other systems. Defense contractors, meanwhile, have provided offset benefits that sometimes equal the value to the sale itself, and can require the U.S. company to provide help selling the buyer nation's nondefense goods abroad.

Extent of Inquiry

In its investigation of offsets, the GAO, the investigative arm of Congress, examined arms sales between three major U.S. defense companies and the nations of Israel, Turkey, Egypt and Greece. The companies aren't named in the report to protect proprietary information, but countries are McDonnell Douglas Corp., General Dynamics Corp., Lockheed Corp., United Technologies Corp. and the aircraft-engines unit of General Electric Co.

The GAO draft report said offset-related subcontracts placed with foreign suppliers "resulted in a loss of some production work" for the seller companies. The arrangements also "result in displacement of U.S. subcontractors and create new competitors" abroad.

Without mentioning specific companies, the draft listed examples of domestic suppliers losing business or being forced to shut down because their contracts had been transferred overseas to Israel, Turkey or elsewhere. The report said U.S. defense-company managers told the GAO in confidential interviews that even if domestic subcontractors can match the costs and terms offered by a foreign supplier, prime contractors "would select the foreign supplier to satisfy the offset obligation."

Sale to Israel

One recent example, not mentioned in the report, involved McDonnell Douglas's successful contest against Lockheed to sell $1.8 billion in fighters to Israel. U.S. grant funds are paying for most of the Israeli purchase. Both companies offered extensive offsets or assurances of "industrial participation" in the future. The report did note that at times in the past, Israeli companies have been paid to produce parts for weapons systems that the U.S. provided to Israel "free of charge."

Some policy and market experts believe such generous U.S. practices help ensure the loyalty and strength of strategic allies, establish U.S. industrial leadership and lock up future business for the biggest American defense companies. "It's clearly been an American advantage," says Gerald Segal of the International Institute for Strategic Studies in London.

U.S. defense companies generally deny that taxpayers help pay the cost of offset arrangements, and that corporate coffers suffer to any great degree from the added expense. But the GAO found not only that the government helps bankroll offset agreements, but that expenses for U.S. investment in foreign companies and for other offset dealings "are being taken out of contract profit or company earnings." In one example cited, U.S. defense companies financed a Greek corporation that invested in medical diagnostics, sportswear manufacturing, advanced wire-bending machines, software systems and textiles.

ratt using 'sweat shops'?

ion questions links with China; company denies charges

JWARD FRENCH
l Inquirer Staff Writer

ST HARTFORD — The Machinists today called for an investigation into ık between Pratt & Whitney and what officials called "sweat shops" in main-China.

t both a Pratt official and an aerospace st today rejected the suggestion that t-shop labor in China is producing jet-ıe parts for Pratt.

ccording to the union, Chinese workers ing the equivalent of only pennies a day oeing employed to produce aircraft en- parts for Pratt. As a result, union ials said, the company is tangled in a ble-edged moral dilemma — supporting ı labor practices in the first place, and ific U.S. jobs to do it.

It's a disgrace that Pratt & Whitney turns he sweat shops of China to produce parts e made by workers right here in Con-ticut," according to a statement the ion distributed to Pratt workers today. e statement also asks workers to come ward with any evidence they may have of e Pratt-Chinese link, adding once suffi-nt proof is gathered, the union will take case to Connecticut's congressional del-gation.

Mary Ellen Jones, a Pratt spokeswoman, id the company does "sell engines in hina. And we have been talking with otential partners," she said, as part of the ompany's ongoing efforts to compete in an ncreasingly global marketplace.

But the manufacture of aircraft parts is a ophisticated business requiring equally ophisticated and skilled workers, Jones said, flatly denying any use of sweat-shop labor.

Mark Bobbi, an aerospace analyst with Newtown-based Forecast International, also said Pratt isn't very likely using Chinese sweat shops to produce high-technology engine parts.

Parts for Pratt's industrial gas-turbine engine, converted from aircraft engines, are being made by the Chengdu company in the People's Republic of China, Bobbi said. But wages being paid workers there are U.S. and European standards, he said, they're far removed from sweat-shop levels.

"The Chinese are no slouches," Bobbi said, adding mainland China has been improving steadily its ability to produce aerospace products over the past decade. And because such production requires skilled labor, he said, wages are appreciably higher than pay earned by laborers and workers in textile factories and other industries.

In addition, he said, the number of jobs involved in aerospace production in all of China isn't enough to make a dent in the aerospace labor base in the U.S.

Machinists union officials, however, are convinced otherwise. And in today's statement, union officials called on Pratt workers to help them make their case, and to push for federal laws to stop such practices.

"The aim is to call on Congress to hold hearings on this ugly and job-threatening corporate practice, and demand legislation to address the problem," according to the statement.

"If the IAM gets its way, it will not only be immoral, it will be illegal to take such advantage of oppressed Chinese workers," the union said.

Machinists have been seeking a variety of methods to stem the tidal wave of layoffs at Pratt in recent months, which included more than 500 jobs lost last week alone.

The layoffs are part of the company's effort to cut 8,200 workers from its ranks by the end of 1994, a move announced in January to compensate for a decline in defense business and commercial airline orders alike.

Considerable verbiage has been devoted to the quality factors of the logistical support program. For example, there has been question of the reliability of performance by the small business independents specifically at Kelly Air Force Base and the F100 aircraft engine. One element of shutting out the Independents is the introduction of a category called "Fracture Critical Parts". Significantly not a single small business supplied component was found to be the cause of engine failure or an aircraft crash. Another plus on the independence side of ledger is the face that the mandatory overhaul and repair cycle was upgraded from 1200 hours to 4000 hours. One can only surmise as to the under the fracture critical parts only the OEM is allowed to supply the parts at heavy cost increase.

MAJOR QUALITY PROBLEM:

The most serious problem arose at Voi-Shan - a supplier of proprietary fasteners. It was determined that the material did not comply with specs and was "under strength" thereby jeopardizing safety factors in numerous weapons systems - aircraft, tanks, et al. Investigation revealed the manufacture has been conducted by Japanese sources.

There was a number of items which - if OEM's are placed in administrative control - circumvent the 1984 Goldwater-Nichols Competition In Contracting Act.

1. Blueprints from OEM's rather than as currently structured. Small Businesses now obtain the blueprints, specifications and regulations from the services in 4 to 6 weeks. We have been informed that depots encounter a 4 to 6 months delivery factors.

2. Minor changes - particularly dimensions - necessitate a re-qualification by an established alternate source. This practice can well delay a procurement freezing out an economical source and elevating the OEM to being the only qualified source at increased cost.

F100-PW-229 FAILURES AFFECT F-15E READINESS

STANLEY W. KANDEBO/NEW YORK

Two back-to-back engine failures in two Alaska-based U.S. Air Force F-15Es have left the service with unflyable fighter/bombers and an array of unanswered questions surrounding tests that failed to accurately predict operational stress levels encountered by the aircraft's Pratt & Whitney F100-PW-229 powerplants.

Twenty-three engines—at least half of the powerplants in the 20 F100-PW-229-powered F-15Es based at Elmendorf AFB, Alaska—have been removed from flight status after two of the aircraft suffered in-flight engine failures in a single week.

According to Air Force officials, both aircraft were operating from Eielson AFB, Alaska, due to repair runway work at Elmendorf. The first engine failure was uncontained and occurred on June 10 when an F-15E was climbing to altitude. The second, a contained failure, followed on June 17 and occurred when the pilot was flying a "rather benign" flight profile. Both pilots were able to land their aircraft safely, but in the first instance the F-15 was forced to land on a commercial strip in Galena, Alaska.

Early analyses by Air Force officials indicate that the engine failures are a continuation of fourth stage turbine blade-cracking problems that first surfaced in the Pratt & Whitney F100-229 powerplant about one year ago.

APPROXIMATELY 75 F-15Es based at Elmendorf; Lakenheath, England, and Nellis AFB, Nev., ultimately will be affected by the ailing F100-229s. To date, Lakenheath's F-15s have been trouble-free, probably because international agreements restrict their operational high-speed, low-level flight activities—conditions which appear to promote the cracking problem. To avoid replicating the conditions under which the blades failed, all F100-229-powered F-15Es will be restricted to speeds under 550 kt. at low altitudes, at least until an interim fix is implemented.

Due to interim blade fixes initiated earlier this year, some 54 F-16C/Ds based at Mountain Home AFB, Idaho; McEntire AFB, Ga., and Nellis AFB are not immediately affected by the blade-cracking problem.

To prevent additional engine failures, Pratt and the Air Force have mandated blade changes in many F100-229s powering F-15Es. Specifically affected are all F-15E-based F100-229 engines that accumulated more than 200 tactical cycles prior to the installation of engine control vibration avoidance software earlier this year. Twenty-one engines are immediately affected at Elmendorf as well as the two engines that already experienced failures—a total of 23.

To expedite the return of Elmendorf's F-15Es to operational status—the aircraft would be used to support forces in Korea in time of war—the Air Force last week began to ship replacement blades to the base. All of the blades incorporate an interim configuration developed to temporarily fix F100-229s powering F-16C/Ds.

HIGHTIME/C. LLOYD MOJO

F100-229 propulsion problems ultimately will affect the operational status of approximately 75 F-15Es worldwide.

Engine modules and 12 engines pulled from McDonnell Douglas and Lockheed aircraft production lines also are being directed to Elmendorf. Additionally, two more powerplants undergoing overhaul and repair and two at Edwards AFB, Calif., also were expected to be sent late last week to help alleviate the situation.

Air Force officials believe they have sufficient assets to cover the localized engine shortage at Elmendorf, and they are confident all aircraft affected by the engine problem will return to operational status in several weeks. Typically, it takes three days to remove an engine, reblade it and reinstall it. Officials said several sets of blades were expected to reach the base last week, and that Pratt & Whitney personnel had been dispatched to assist in the reblading effort.

In contrast to reblading, replacing an F-15E's engine takes less time, typically several hours. However, of the 16 engines planned for dispatch to Elmendorf, only nine are equipped with interim fixes that eliminate the turbine blade-cracking problem and the 550-kt. flight speed restriction.

F100-229 fourth-stage turbine blade problems were first diagnosed about one year ago after two Elmendorf-based F-15Es suffered blade failures in April and June, 1993. Investigation of the initial failure determined a casting defect caused the blade to break.

As a result, blade inspections were stepped up, an extensive reblading effort was instituted and all suspect blades were purged from the F100's logistics system. When a second failure occurred in what was assumed to be a defect-free blade in June, 1993, analyses led officials to a new reason for the failures.

From engine tests run in the spring and fall of 1993, officials were able to deduce that two vibrational problems were causing the failures. First, small blade cracks were being initiated when the engine was operating in cruise power ranges at some specific altitudes and engine speeds. The cracks were then propagating due to the combined effects of the cruise power range vibration and a non-integral (non-resonance) vibration that occurs when the engine operates in the military power regime.

To alleviate the blade-cracking, Pratt and the Air Force decided upon a single long-term fix and separate interim fixes for F100-229-powered F-16C/Ds and F-15Es. The long-term fix called for developing a more robust blade and disc assembly in which the blade root and disc are widened. This design, which adds 13 lb. to the engine, is now undergoing ground qualification testing and is expected to be available in November.

SINCE THE F-16 is a single-engined aircraft, the short-term fix for its F100-229s focused on operational safety. Consequently it was decided to replace the original bill of material fourth-stage turbine blades with an interim blade. The interim blades, which were fielded in April, have a redesigned shroud that improves their damping characteristics.

In addition to the interim blade, officials also plan to install software that

should allow the powerplant's digital electronic engine control (DEEC) to avoid conditions that generate crack-initiating vibrations. This software is undergoing operational tests and should be available this summer.

A DIFFERENT SHORT-TERM solution was approved for use in the F100-229 -powered F-15E because F-15E engine blades had already been heavily inspected following the first fourth blade failure. Additionally, the first failure also prompted Air Force officials to change F100-229 turbine blades in F-15Es once they accumulated 600 tactical cycles.

As a result of these inspections and replacements, Air Force and contractor officials felt that risks were low and passed on performing interim blade retrofits. Instead, they believed that if the engines accumulated fewer than 300 tactical cycles, and if vibration avoidance software was added to the engine's DEECs, their bill of material blades would last until the permanent fix was installed. The DEEC software was fielded in April. But the two in-flight failures that occurred this month have challenged the wisdom of not reblading the F-15E's F100-229s.

Preliminary analyses of the blades and discs recovered from this month's failures point to troubles with the powerplant's fourth stage turbine blades. According to Air Force officials, calculations now indicate that the failed fourth stage blades were subjected to non-integral vibratory stresses that were about 50% greater than those generated in tests last year at the USAF's Arnold Engineering Development Center near Tullahoma, Tenn.

Officials now theorize that blade cracking growth occurred at a far greater rate than was anticipated due to the higher than expected stresses. The real issue, according to USAF officials, is why there was such a large variance between predicted stress levels and levels encountered in actual flight. Investigators and researchers hope to find out soon.

Despite the dearth of information surrounding the disparity in anticipated stresses, the Air Force and Pratt late last week were moving towards agreement on a new interim fix for the F-15Es.

ACCORDING TO USAF officials, a favored option is to retrofit the F100-229-powered F-15E fleet with interim blades developed for the F-16C/D's F100-229 engines. Alternatively, if the new, permanent blade/disc redesign is available before the completion of the interim blade retrofit, the permanent fix would be installed. ■

COMANCHE PRODUCTION SLASHED IN FIRST FIVE YEARS

DAVID FULGHUM/WASHINGTON

Production of the first RAH-66 Comanche scout/attack helicopter has been speeded up six months, but the total number of aircraft to be built in the first five years of the program has been slashed.

The Army's new helicopter program will produce 153 Comanches between mid-Fiscal 2000 and the end of 2005 instead of the 408 that had been scheduled, according to Brig. Gen. Orlin Mullen, the Army's Comanche program manager.

Mullen said the Army had chosen a "very conservative ramp" to full-scale production to mitigate changes or retrofits to early production helicopters.

THE CHANGE IN SCHEDULE also was portrayed as a response to Defense Dept. concerns—in particular, the conventional systems committee of the Defense Acquisition Board (DAB)—that there was too much concurrency in the program.

"They said, 'we are concerned with the accumulation of risks associated with engineering changes,'" Mullen said.

Comanche program officials decided the best way to answer these concerns was to make development and production of the RAH-66 longer, slower and more careful, he said. Full rate production of 120 aircraft per year will not be reached until after 2005 instead of in 2004.

The new Comanche development plan shows "a very conservative ramp—three, eight, ten, twelve—that mitigates or reduces the chance of having large numbers of aircraft that have to have changes made on them," Mullen said.

Congressional critics contend that the real reason for the program's slowdown is simple lack of funding. The U.S. Army has given maintenance of a "large force structure priority over modernization," a Congressional staff member said. "You can say almost any program has too much concurrency."

Critics claim that unmanned aerial vehicles like the Army's Hunter or the joint-service Pier 2 UAV could do the reconnaissance role more cheaply and with less danger to aircrews.

An additional alteration of the program was to smooth the demonstration/validation and engineering and manufacturing development (EMD) stages into a single development phase.

"People have thought we are trying to either start EMD early or avoid the decision process; [but] we're not," Mullen said. "Frankly, we're adding to the trips we would make" to the Pentagon and Congress by scheduling more reviews to explain and justify the program.

"We're trying to . . . have the approving oversight agencies involved on a continuous basis," Mullen said. "It makes our job easier if people are informed all along about how we are doing."

The first flight of a Comanche prototype was slipped from November, 1995, to early 1996. The second prototype will fly first in mid-Fiscal 1998. A third prototype will not be built; however, three low-rate initial production aircraft will be used as test aircraft instead (*AW&ST* June 6, p. 81).

Conducting the final EMD demonstrations with low-rate production aircraft will not only save the cost of building an EMD prototype, but also address criticism of the AH-64 Apache program that operational testing was conducted with a nonrepresentational aircraft, Mullen said.

THE NEW SCHEDULE will result in production of three Comanches in Fiscal 2000, eight in 2001, 10 in 2002, 12 in 2003, 48 in 2004 and 72 in 2005, where Mullen's program chart ended. The rate eventually will reach 120 helicopters per year, but the exact year has not yet been set. The previous schedule had RAH-66s being built at a rate of 24 in 200 48 in 2002, 96 in 2003 and 120 in bo 2004 and 2005.

Readiness of the first operational C manche unit would slip six months fro early 2003 to late 2003. Mullen sa that so far there is no change in the pr duction objective of 1,296 total aircra but "I would not be surprised if th evolved [downward] as force structur [shrink]."

Program officials have decided to ab don the helicopter's triple redundant sa ty system where it makes significant s ings in design or production costs, ev at the cost of added weight.

For example, "It allowed us to use a minum instead of [more expensive] li um aluminum," Mullen said.

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ATTACHED IS AN INDEPENDENT ANALYSIS OF F-100 ENGINE REPLACEMENT PARTS PRICES AS THEY WOULD BE SUBJECT TO COST PRICE INCREASES. IN ESSENCE THE AIR FORCE WOULD BE PAYING MORE FOR LESS. YOU MAY WISH TO HAVE THE GAO CONDUCT THEIR OWN INVESTIGATION TO VERIFY OR REFUTE THE PROJECTION ON 191 COMPONENTS.

In 1992, Kelly Air Force Base identified 411 engine components in the F-100 that they determined should be designated as fracture critical or durability critical. This terminology was not an adjective used to describe jet engine components as a result of any catastrophic disaster or simulated flight failure analysis, but rather a definition buried in a 1984 Military Standard for the Engine Structural Integrity Program.

Once uncovered, it has become the focal point of attention at Kelly by providing a loophole to the 1984 Competition in Contracting Act by allowing the Air Force to rescind contractor approval to manufacture these components and direct these orders back to the prime manufacturer.

Contractors who previously supplied specific components to the Air Force suddenly found their approvals withdrawn, their contracts terminated for the convenience of the government, and the re-qualification requirements imposed by the Air Force so ludicrous that even the prime manufacturers would be hard pressed to meet them.

All of this translates to dollars, frivolously spent at the taxpayers expense. How much? Based on a current analysis of Pratt & Whitney's stock list price to the government and the last competitive procurement price of 191 fracture/durability designated components, the government would save over $400,000.00 per F-100 engine or $1.4 Billion for one set of the 191 fracture/durability components if they competitively procured these items for the 3400 F-100 engines currently in US Air Force Inventory.

The figure of $1.4 Billion does not include the unfathomable cost being incurred in ongoing termination settlements and re-procurement charges.

National Health Care, Flood and Drought Relief as well as the Entitlement Programs would benefit tremendously from the savings realized through competitive procurement. The Air Force could purchase over 400 new F-100 engines, or 56 F-16 aircraft or 3 C-17 aircraft. The Air Force would be well served to re-invest the savings from competitive procurements to support their needs instead of continuing to request budget increases in a time of spending reductions.

The Defense Budget historically has been based for the last ten years on competitive procurement of replacement spares, which has allowed DOD to reduce its annual expenditures for spares while maintaining consistent inventory stock levels.

It is not the government's responsibility, nor should it be the government's task to insure the prime manufacturers are supported with defense procurement acquisition levels that defy the overall world-wide economic slowdowns. The government should insure that both the small business community and the prime contractors are adequately supported to maintain their existence, taking into consideration overall defense cutbacks and current economic factors.

At a time of increased pressure to reduce the budget/deficit, it is unconscionable that the Government would place itself in such a precarious position as to have to choose between mission readiness or a self serving OEM enrichment program.

FRACTURE CRITICAL/DURABILITY CRITICAL PARTS

NOUN	PART NUMBER	STOCK LIST PRICE	BREAK OUT PRICE	BREAK OUT SAVINGS	%SAV D
ACTUATOR PRIMARY	4052340	9674.21	7075.47	2598.74	27%
ACTUATOR PRIMARY	4074746	10881.19	8018.86	2862.33	27%
AIR-OIL COOLER	UA535953-7	1365.99	1037.40	328.59	24%
BEARING NO 2	4000352	1737.84	1375.00	362.84	21%
BEARING NO 2	4000425	1737.84	1375.00	362.84	21%
BEARING NO 2	4037050	1737.84	1375.00	362.84	21%
BEARING NO 3	4035421	2144.19	1650.00	494.19	23%
BEARING NO 3	4035594	2144.19	1650.00	494.19	23%
BEARING NO 3	4048700	2144.19	1650.00	494.19	23%
BEARING NO 3	4056777	2144.19	1650.00	494.19	23%
BEARING NO 4	4059297	1712.56	1355.00	357.56	21%
BEARING NO 4	4059298	1712.56	1355.00	357.56	21%
BEARING NO 4	4059299	1712.56	1355.00	357.56	21%
BEARING NO 4	4059349	1712.56	1355.00	357.56	21%
BEARING NO 4	4061007	1712.56	1355.00	357.56	21%
BEARING NO 5	4055599	1202.05	983.00	219.05	19%
BEARING NO 5	4066596	1202.05	983.00	219.05	19%
BEARING NO 5	4066597	1202.05	983.00	219.05	19%
BEARING NO 5	4066598	1202.05	983.00	219.05	19%
BEARING NO 5	4067082	1202.05	983.00	219.05	19%
BLADE COMP STG 2	4041272	762.19	561.71	200.48	27%
BLADE COMP STG 2	4051092	34.22	25.07	9.15	27%
BLADE COMP STG 4	4063904	47.97	35.75	12.22	25%
BLADE COMP STG 5	4040205	39.83	30.78	9.05	24%
BLADE COMP STG 6	4040806	43.67	34.98	8.69	21%
BLADE COMP STG 8	4044908	39.22	30.18	9.04	24%
BLADE COMP STG 8	4052808	34.88	27.73	7.15	21%

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FRACTURE CRITICAL/DURABILITY CRITICAL PARTS

NOUN	PART NUMBER	STOCK LIST PRICE	BREAK OUT PRICE	BREAK OUT SAVINGS	%SAV	D
BLADE COMP STG 9	4040809	32.93	26.38	6.55	19%	
BLADE COMP STG 10	4040810	33.85	26.50	7.35	22%	
BLADE COMP STG 11	4040811	33.80	27.80	6.00	19%	
BLADE COMP STG 12	4040812	31.94	25.86	6.08	20%	
BLADE COMP STG 13	4040813	35.42	27.26	8.16	23%	
BLADE RTG ASSY	4066777	231.82	176.00	55.82	24%	
ADE RTG ASSY	4057239	21468.98	14500.00	6968.98	33%	
LADE TURB STG 1	4057491	802.70	152.50	650.20	81%	
BLADE TURB STG 2	4057002	462.82	113.00	349.82	76%	
BLADE TURB STG 4	4067004	133.87	118.00	15.87	12%	
CASE ASSY 10-13	4056162	14360.60	11362.00	2998.60	21%	
CASE ASSY 10-13	4062766	9643.41	1794.45	7848.96	82%	
CASE ASSY COMP	4040995	3283.81	2420.00	863.81	27%	
CASE ASSY COMP	4037989	81.67	60.63	21.04	26%	
CASE ASSY COMP	4046497	9199.88	6780.00	2419.88	27%	
CASE ASSY DIFF	4068322	79942.41	22174.00	57768.41	73%	
CASE ASSY DIFF	4070870	79942.41	22174.00	57768.41	73%	
CASE FAN INLET	4001727	41849.70	30235.00	11614.70	28%	
CASE FAN STG 3	4043285	4340.27	3400.00	940.27	22%	

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FRACTURE CRITICAL/DURABILITY CRITICAL PARTS

NOUN	PART NUMBER	STOCK LIST PRICE	BREAK OUT PRICE	BREAK OUT SAVINGS	%SAV	D
CONVERG NOZZLE	4077809	1358.99	980.00	378.99	28%	
COUP ASSY GEARBOX	4067183	778.78	389.00	389.78	50%	
DAMPER BLADE	4024039	3.69	2.13	1.56	43%	
DAMPER BLADE	4012715	4.96	1.68	3.28	67%	
DISK COMP	4059171	14472.58	11800.00	2672.58	19%	
DISK COMP	4069904	10290.52	8142.00	2148.52	21%	
SK COMP	4030605	9270.54	5750.00	3520.54	38%	
ISK COMP STG 8	4040108	9186.13	5300.00	3886.13	43%	
DISK COMP STG 8	4061508	9186.13	5970.57	3215.56	35%	
DISK COMP STG 9	4022609	18463.13	12345.50	6117.63	34%	
DISK COMP STG 10	4022610	8687.94	5800.00	2887.94	34%	
DISK COMP STG 10	4069910	8687.94	7150.00	1537.94	18%	
DISK COMP STG 11	4022611	16646.82	13000.00	3646.82	22%	
DISK TURB STG 1	4059091	24027.64	9475.00	14552.64	61%	
DISK TURB STG 2	4059092	22209.28	6996.00	15213.28	69%	
DISK TURB STG 4	4043704	10590.97	9127.00	1463.97	14%	
DIVERGENT NOZZLE	4056264	1790.36	1234.00	556.36	32%	
DIVERGENT SEAL	4072683	442.14	347.90	94.24	18%	
DIVERGENT SEAL	4076459	455.41	402.00	53.41	12%	

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FRACTURE CRITICAL/DURABILITY CRITICAL PARTS

NOUN	PART NUMBER	STOCK LIST PRICE	BREAK OUT PRICE	BREAK OUT SAVINGS	%SAV	D
DRIVESHAFT COMP	4047579	14802.49	11320.00	3482.49	24%	
DUCT FAN FORWARD	4046405	46174.90	38000.00	8174.90	18%	
DUCT FAN FORWARD	4065899	36847.00	31500.00	5347.00	15%	
DUCT SEG TURB	4057521	137.19	109.90	27.29	21%	
DUCT SEG TURB	4070422	119.52	95.75	23.77	21%	
DUCT SEG TURB	4066963	472.58	398.00	74.58	16%	
DUCT SEG TURB	4063721	459.65	405.14	54.51	12%	
FUEL OIL COOLER	UA539800-1	6113.15	5031.00	1082.15	18%	
GEARBOX COVER	4047095	456.78	327.00	129.78	29%	
GEARBOX LINK ASSY	4031264	54.93	44.00	10.93	19%	
HOUSING ASSY BRG	4018466	1361.45	1200.00	161.45	12%	
HOUSING ASSY BRG	4018467	1361.45	1200.00	161.45	12%	
HOUSING ASSY BRG	4035597	1361.45	1200.00	161.45	12%	
HOUSING ASSY BRG	4040284	8188.98	6035.00	2153.98	27%	
HOUSING ASSY BRG	4061549	1361.45	1200.00	161.45	12%	
HOUSING	4068639	1579.66	1300.00	279.66	18%	
HOUSING	4057683	146.48	124.00	22.48	16%	
LINER ASSY	4057394	310.31	287.66	22.65	8%	
LINER COMB	4066944	10352.24	8650.00	1702.24	17%	
LINER CONVERG	4060955	95.61	87.22	8.39	9%	
LINER CONVERG	4068401	95.61	87.22	8.39	9%	

FRACTURE CRITICAL/DURABILITY CRITICAL PARTS

NOUN	PART NUMBER	STOCK LIST PRICE	BREAK OUT PRICE	BREAK OUT SAVINGS	%SAV	D
NUT DRIVESHAFT	4026463	463.43	349.00	114.43	25%	
NUT DRIVESHAFT	4047224	3482.26	1735.00	1747.26	51%	
OIL TANK	4043867-706	5911.33	3900.00	2011.33	35%	
OIL TANK	4066724-700	6258.14	5350.00	908.14	15%	
RING ASSY BRG 4	4071088	5560.76	5027.00	533.76	10%	
RING ASSY IN	4037628	10800.09	1250.00	9550.09	89%	
RING ASSY IN	4061761	3077.16	2124.50	952.66	31%	
RING ASSY IN	4067727	1078.48	922.00	156.48	15%	
RING ASSY OUT	4032800	8172.97	769.28	7403.69	90%	
RING ASSY OUT	4060230	2001.33	1764.00	237.33	12%	
RING ASSY TURB	4023077	2173.45	563.00	1610.45	75%	
RING ASSY TURB	4063436	1184.74	975.00	209.74	18%	
RING ASSY TURB	4042692	988.93	761.00	227.93	23%	
RING ASSY TURB	4066127	363.05	320.00	43.05	12%	
RING SEG TURB	4057764	238.25	210.00	28.25	12%	
RING SEG TURB	4066963	472.58	398.00	74.58	16%	
SEAL AIR BRG 4	4036962	1600.73	725.00	875.73	55%	
SEAL AIR COMP	4066997	10818.92	2660.00	8158.92	76%	
SEAL AIR COMP	4064666	1394.38	1000.00	394.38	29%	
SEAL AIR COMP	4061280	1872.55	1380.00	492.55	27%	
SEAL AIR COMP	4064667	1685.21	1350.00	335.21	20%	
SEAL AIR COMP	4064670	2446.25	2375.00	71.25	3%	
SEAL AIR COMP	4079078	2446.25	2375.00	71.25	3%	
SEAL AIR COMP	4062764	4008.85	2711.00	1297.85	33%	
SEAL AIR COMP	4062765	2963.71	2250.00	713.71	25%	

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FRACTURE CRITICAL/DURABILITY CRITICAL PARTS

NOUN	PART NUMBER	STOCK LIST PRICE	BREAK OUT PRICE	BREAK OUT SAVINGS	%SAV D
SEAL AIR COMP	4061976	1916.20	1577.00	339.20	18%
SEAL AIR COMP	4061977	2902.85	2389.00	513.85	18%
SEAL AIR COMP	4050978	1547.58	1080.00	467.58	31%
SEAL AIR COMP	4061978	1682.57	1240.00	442.57	27%
SEAL AIR COMP	4061979	1860.42	1472.00	388.42	21%
SEAL AIR COMP	4043280	2916.74	1970.00	946.74	33%
SEAL AIR COMP	4050980	2916.74	1970.00	946.74	33%
SEAL AIR COMP	4061780	1519.49	1299.00	220.49	15%
SEAL AIR COMP	4041591	2887.20	1240.00	1647.20	57%
SEAL AIR COMP	4047471	2887.20	1240.00	1647.20	57%
SEAL AIR COMP	4061771	1698.74	1398.00	300.74	18%
SEAL AIR COMP	4047472	2931.62	1980.00	951.62	33%
SEAL AIR COMP	4061772	1430.16	1177.00	253.16	18%
SEAL AIR COMP	4041592	2931.62	1980.00	951.62	33%
SEAL AIR TURB	4057764	238.25	210.00	28.25	12%
SEAL AIR TURB	4064338	1266.15	1058.00	208.15	17%
SEAL AIR TURB	4063721	459.65	197.00	262.65	57%
SEAL AIR TURB	4064337	2764.81	2099.00	665.81	24%
SEAL ASSY FACE	4031516	1296.28	929.65	366.63	29%
SEAL ASSY FACE	4031517	1296.28	929.65	366.63	29%
SEAL ASSY FACE	4033283	603.83	445.00	158.83	27%
SEAL ASSY FACE	4012468	670.60	313.90	356.70	54%
SEAL ASSY FACE	4035883	1311.34	700.00	611.34	47%
SEAL ASSY FACE	4014756	1387.73	910.00	477.73	35%
SEAL ASSY FACE	4014757	1387.73	910.00	477.73	35%

FRACTURE CRITICAL/DURABILITY CRITICAL PARTS

NOUN	PART NUMBER	STOCK LIST PRICE	BREAK OUT PRICE	BREAK OUT SAVINGS	%SAV D
STATOR ASSY	4064066	22783.20	7160.00	15623.20	69%
STATOR ASSY	4064067	22286.70	6850.00	15436.70	70%
STATOR ASSY	4064068	21429.44	6606.00	14823.44	70%
STATOR ASSY	4064069	17368.52	6560.00	10808.52	63%
STATOR ASSY	4064071	8714.93	5916.26	2798.67	33%
STATOR ASSY	4067481	17214.69	7819.60	9395.09	55%
STATOR ASSY	4056232	15454.44	10900.00	4554.44	30%
STATOR ASSY	4067482	21877.41	10856.61	11020.80	51%
STATOR ASSY	4064083	5760.77	4640.00	1120.77	20%
SUMP ASSY BRG	4053992	218.66	157.00	61.66	28%
SUPPORT ASSY	4034875	5221.99	4494.00	727.99	14%
SUPPORT ASSY	4041794	5407.43	3985.00	1422.43	27%
SUPPORT ASSY	4034246	2437.01	1445.00	992.01	41%
SUPPORT DUCT	4055259	3738.40	2608.86	1129.54	31%
SUPPORT DUCT	4063469	858.75	833.00	25.75	3%
SUPPORT DUCT	4070421	3188.68	1267.00	1921.68	61%
SUPPORT RING	4066128	1490.65	1313.87	176.78	12%
SUPPORT RING	4061514	1346.92	1079.00	267.92	20%
SUPPORT SEAL	4065651	8364.26	6350.00	2014.26	25%
SUPPORT SEAL	4028004	5814.38	4285.00	1529.38	27%

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FRACTURE CRITICAL/DURABILITY CRITICAL PARTS

NOUN	PART NUMBER	STOCK LIST PRICE	BREAK OUT PRICE	BREAK OUT SAVINGS	%SAV D
SUPPORT STATOR	4037612	11405.34	4054.81	7350.53	65%
SUPPORT STATOR	4056576	14256.47	8949.00	5307.47	38%
SUPPORT STATOR	4073624	14256.47	12188.00	2068.47	15%
SYNC RING ASSY	4043182	6302.63	5000.00	1302.63	21%
TIEROD NUT	4027072	9.24	6.32	2.92	32%
TIEROD NUT	4046424	4.19	3.10	1.09	27%
TIEROD NUT	4054479	7.01	6.47	.54	8%
TIEROD NUT	4059418	10.08	7.14	2.94	30%
TIEROD NUT	4070809	34.29	19.64	14.65	43%
TIEROD REAR	4048151	11.07	8.20	2.87	26%
TIEROD REAR	4048152	10.89	8.20	2.69	25%
TIEROD REAR	4048153	9.44	6.78	2.66	29%
TOWER SHAFT	4011830	458.30	332.00	126.30	28%
TURB EXH CONE	4043522	1064.49	1048.00	16.49	2%
TURB EXH CONE	4057104	1064.49	784.50	279.99	27%
TURB EXH CONE	4067118	917.50	637.95	279.55	31%
VALVE OIL	4069248	4.22	3.25	.97	23%
VALVE OIL	4065818	20.80	15.35	5.45	26%
VANE ASSY TURB	4039683CLN	906.39	397.80	508.59	56%
VANE VAR COMP	4038450	321.23	291.63	29.60	10%
VANE VAR COMP	4038550	434.27	357.40	76.87	18%
VANE VAR COMP	4066750	677.49	485.00	192.49	29%
VANE VAR COMP	4066950	702.63	507.00	195.63	28%
VANE VAR COMP	4043454	123.04	88.25	34.79	29%
VANE VAR COMP	4062264	119.10	94.24	24.86	21%
VANE VAR COMP	4043455	110.62	79.34	31.28	28%
VANE VAR COMP	4062265	113.17	89.55	23.62	21%

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FRACTURE CRITICAL/DURABILITY CRITICAL PARTS

NOUN	PART NUMBER	STOCK LIST PRICE	BREAK OUT PRICE	BREAK OUT SAVINGS	%SAV D
VANE COMP	4063958	4.69	3.46	1.23	26%
VANE COMP	4063959	5.37	4.30	1.07	20%
VANE TURB	4056771CLJ	2163.73	1130.00	1033.73	48%
VANE TURB	4056771CLK	1713.16	1510.00	203.16	12%
VANE TURB	4056771CLL	1908.46	1130.00	778.46	41%
VANE TURB	4056771CLM	2105.47	1200.00	905.47	43%
VANE TURB	4056771CLN	2105.47	1130.00	975.47	47%
VANE TURB	4056781CLL	1676.52	1170.00	506.52	31%
TOTALS		$997,786.30	$579,524.08	$418,262.22	42%

3. First Articles: Another rear regard action by OEM's has been the introduction by DoD requiring that alternate small business sources re-qualify every two years their manufacturing process even if the component is currently being produced by the Independent. Thus added cost and extended delivery cycles.

4. Currently Independent Small Businesses contracting directly to OEM's are experiencing payment cycles of 90 to 120 days after delivery. To put progress payments under OEM's would be a fiscal disaster for DoD and a murderous financial burden on the Independents. Markets other than defense are fraught with fiscal problems many of which involvement of bankruptcies. See Wall Street Journal article by Stephanie Mehta.

One of the reputed cost cutting moves within the military is the bundling of several different parts in a bid package. The packaging usually has within it a proprietary part unavailable to an independent. One of the conditions of these groupings is that a potential contractor must bid all items or be classified as "non-responsive" DoD/OEM's version of a poison pill.

6. An imperfection in the Navy Aviation Supply Office procurement is a high frequency of bid sets with the notation "prints" not available. This is ingenuous since Naval Air Technical Service facility is in the same compound in Philadelphia. Thus a road block cuts the Small Business Independent off at the pass.

Businesses Try to Cope With Customers' Bankruptcies

Aircraft-Parts Dealers Learn Painful Lessons From Filings by Airlines

By Stephanie N. Mehta
Staff Reporter of The Wall Street Journal

Jim Newham has somehow managed to navigate Casi Ltd., his small aviation-parts business, through a turbulent economy. The problem is, many of his customers keep going bankrupt.

Eight of Casi's airline clients have filed for protection from creditors during the six-year history of the Bay Shore, N.Y., company. He says at least three other customers have gone out of business without attempting to reorganize.

Mr. Newham says sales from Casi's core business—buying, trading and selling parts for commercial airlines — have dropped a third from $2.4 million in 1990, the company's strongest year. Profits also are down, he adds. And now, two airlines in bankruptcy proceedings are suing Casi to recover more than $56,000 that they paid during the months before their bankruptcy filings. "I'm completely demoralized," the entrepreneur says.

Yet he is surviving. While the ripple effect of multiple airline bankruptcies has sunk many competitors, Mr. Newham and some other aviation-industry entrepreneurs are keeping their small firms afloat by taking a "lessons learned" approach. They're offering new services, pooling resources, screening old accounts and using stricter credit standards when they court new clients.

Casi, which means "almost" in Spanish, is pursuing more consignment work, for example. By concentrating on commission sales of other companies' parts and equipment, Mr. Newham says he was able to boost [illegible] 1993 total sales to $2.1 million, up about 24% from 1992.

Admittedly, such tactics sound like nothing more than good business sense. But struggling small companies often find it tough to shift gears when their biggest customers file for bankruptcy protection, says Saul Eisen, president of the National Association of Bankruptcy Trustees in Washington.

An airline operating under Chapter 11 of the U.S. Bankruptcy Code sometimes continues to ask a small business for its services — and its credit. Small companies "need the business to keep their own business moving," says Mr. Eisen, who also practices law in Cleveland. But if an airline never emerges from bankruptcy, he adds, a small supplier can end up with even greater losses.

Jack Blickenstaff, president of Aero Instruments & Avionics Inc., took a chance on Continental Airlines. The small aircraft-parts repair concern in North Tonawanda, N.Y., worked for the carrier before, during and after its latest turn in bankruptcy court, from December 1990 to April 1993. But after seeing some clients go broke and his bills then go unpaid, Mr. Blickenstaff says he became much more cautious about extending credit to Continental Air.

Today, Aero Instruments no longer seeks new accounts with major airlines. Instead, it is cultivating business with freight carriers and airline start-ups. And it imposes tougher credit guidelines. In the past, the firm would sometimes allow a client to let payments lapse. Not anymore, Mr. Blickenstaff says. "We're more careful today than we were three or four years ago," he says of the 98-employee firm.

Repeated rides in the creditor's seat taught Ed Wagner the value of local legal help in bankruptcies. Mr. Wagner, president of International Technical Consultants Inc., a Miami supplier of aircraft parts, has found local representation is especially important when a debtor's trustee ends up suing its creditors.

That's what happened a few months after Flagship Express Services Inc. of Ypsilanti, Mich., filed for bankruptcy protection last December. The freight and cargo carrier's trustee sued the unsecured creditors paid by Flagship Express during the 90 days before its bankruptcy filing. Mr. Wagner, previously hit by such "preferential-payment suits," decided to contest this one. But he could not afford a lawyer in the Detroit area, where the case was filed.

So, Mr. Wagner persuaded 14 other small creditors, including Casi and Aero Instruments, to pool their resources and retain a Southfield, Mich., attorney to represent them.

The idea is novel, Mr. Eisen says. Most small-business creditors are less organized than the ones being sued by Flagship Express. But bankruptcy lawyers are skeptical about whether those creditors will succeed. Federal bankruptcy law lets trustees maximize a debtor's estate by retrieving payments made to unsecured creditors in the 90 days before a filing. Unsecured creditors such as Mr. Newham later divide what's left of the estate after the lawyers and secured creditors, such as banks, get paid.

Basil Simon, Flagship Express's trustee, says he understands the frustrations of small-business creditors. "It's tough," he says. "But I still have to pursue them."

Mr. Newham doesn't expect to see much—if any—of the money that Flagship Express owes him. When Continental emerged from bankruptcy protection last year, Casi received a check for $67.51. That represented three cents for every dollar the airline owed the supplier.

Casi also is being sued by Midway Airlines for $36,000 in another preferential-payment suit. "I can't afford that," Mr. Newham says. "What am I supposed to do? Go out and mortgage my house and pay them?"

Mr. Newham admits that the lawsuits have taken an emotional toll on him. "He runs a wonderful business. But the unfairness is something that's driving him crazy," says Christopher Steele, a Setauket, N.Y., attorney for Casi.

The multiple client bankruptcies also have taken a toll on Mr. Newham's eight-employee operations. He now wants to sell or lease part of the company's 16,000-square-foot headquarters. Meanwhile, he adds, Casi cannot afford to acquire new inventory and is trying to sell its stock of aging second-generation aircraft parts.

And the saga isn't over. Mr. Newham is bracing himself for more airline bankruptcies in the next few years. So why does he stay in business? He says he loves the aviation business too much. "That's my life," the 58-year-old entrepreneur explains. "What else would I do? The next thing to do is retire."

7. Generic Qualification: We believe that generic qualification will lessen the administrative burdens of the Government with its attendant cost reductions within the military and additionally via the supplier network. Such designs would encompass spacers, seals, blades and vanes, vane and shroud assemblies et al.

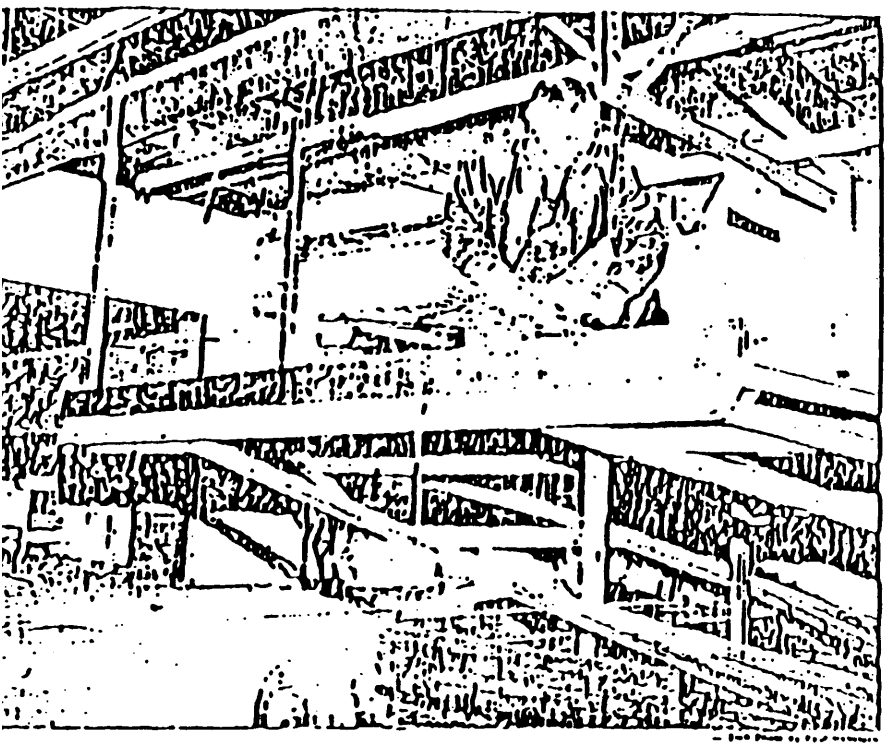
8. Should OEM's be assigned administration of DoD procurement, we believe that our access to freedom of information will be seriously curtailed.

9. Overhaul & Repair Rights: Numerous Independent Small Businesses have developed procedures and techniques for repair of a variety of components. This requires substantial investment of their own funds. Should such be done on military units, we believe that the developer be granted exclusivity in military contracting of 3 years in order to recover funds expended in the research and development process.

10. There has been a battle raging between small business and OEM's for more than 2 years within the 807 Group. With only one small business representative in the group, the voice of Small Business was seriously curtailed. Letter writing to members of congress was a weapon used to stimulate a sense of justice for the independent contractors who have given credibility to the competition in contracting act in its goal to save taxpayer monies by reducing costs.

DAILY OKLAHOMA

Defense Sales Turf Fight Waged



shower of sparks illuminates the path of a finishing grinder operated by Van Harvey at Sterline, a manufacturer of commercial aircraft parts at Wiley Post Airport. Sterline is hoping to expand its business as government subcontractor making equipment for military aircraft, but like others is facing increased competition for dwindling defense dollars.

Big Suppliers Battle Smaller Competitors

By James Johnson
Staff Writer

Big defense contractors facing a military spending famine are hoping the Pentagon will rid them of competition from small contractors.

Critics say what the prime contractors propose could become the biggest government giveaway of the year.

At issue are contracts to manufacture and sell spare parts for the major hardware being bought by the government.

"For a long time the big contractors felt that a lot of the spare parts business was too small to bother with," said Roger K. Graves, executive director of the Oklahoma Aerospace Contracting Assistance Center.

"Now that the Defense Department is letting fewer major contracts, the big manufacturers are looking to get back into small items they didn't used to want to mess with."

It's like a big fish vying with small fry for food scraps it once disdained, Graves said.

Graves' consulting organization helps small manufacturers in Oklahoma obtain government contracts, particularly through Tinker Air Force Base and Fort Sill but also from a variety of other sources.

He said about 50 client firms are receiving assistance from the center. He said 18 are in Oklahoma City and another group is in Tulsa. The rest are located throughout the state, he said.

Acting under pressure from major defense contractors, Congress created a committee in the Defense Department appropriations act to examine contractors' pleas to own as company property the specifications and pro-

See SQUEEZE, Page 1-C

Squeeze

From Page 1-C

cesses involved in production of items. The government has been giving this information to competing spare parts manufacturers.

The government has been acting under the theory that it retains title to specifications and processes developed under government financing.

The committee is due to report to the Pentagon next month. If the prime contractors get their way, small contractors could be frozen out of spare parts production in a few years, Graves said.

He said elimination of competition for spare parts contracts also could signal a return to the bad old days of 1999 pliers, $135 hammers and other outlandishly priced hardware ranging from step stools to toilet seat covers, which figured in Defense procurement wasteful spending scandals as recently as 1990.

Phillip Waller, director of competition advocacy at Tinker Air Force Base, declined to be interviewed about Oklahoma subcontractors who provide spare parts to Tinker repair shops.

However, the base public affairs office said Waller's office knows of no record telling the number of such subcontractors.

The Tinker statement said the competition advocacy office also doesn't know whether subcontractors are having difficulty getting specifications necessary for spare parts manufacture.

In San Antonio, Nick Reynolds, co-owner of Aeroglobal, a consulting firm serving spare parts subcontractors, and member of the study committee preparing to report to the Pentagon, said the report probably will be late.

"We've been meeting since July, and it looks like the report will be slipped until February," he said.

Reynolds said the committee appears to be weighted in favor of the big prime contractors, but evidence of possible compromise has developed recently.

He said that without compromise, he plans to complicate the final recommendation to the Defense Department with a minority report.

"If the original suppliers retain the data flow from the development of the manufacturing process, a small company can't reproduce a part from blueprints alone," he said.

Reynolds said small subcontractor competition for spare parts production keeps costs to the government significantly lower.

"If what the prime contractors are proposing goes through it has the potential to cancel all of the gains we realized through contract competition during the 1980s," he said.

issues, it noted the munitions base was "the only one not yet addressed." It added that critical munitions capabilities are central to U.S. military strategy.

The report recommends a five-step plan "to preserve a munitions production capability for this nation." The first and most urgent action is to "establish a floor under munitions funding of approximately $2 billion." Such a floor, the report contends, will permit the munitions industrial base sector "to rationalize its capabilities and achieve greater efficiencies to meet military requirements as they are more clearly defined," during a period of several years.

Second, the Defense Department "must reform and streamline the research, development, and procurement process." The report continues that the Pentagon "must aggressively move toward more commercial business practices and standards."

Third, the government must develop a coordinated set of policies that will "allow the efficient rationalization and functioning of the munitions industry." These policies should include a "suitable application of antitrust laws."

The report's fourth recommendation deals with rewarding commercial sector investment in munitions research and development and value-based contracting.

Another recommendation calls for closely reviewing sales by the Pentagon of excess ammunition to "end the counterproductive competition with potential commercial opportunities." *(National Defense, February 1994, page 33).* The report suggests that constraints placed on the munitions commercial industrial sector in making international sales should be removed so long as the transactions serve "U.S. national interests and promote the competitiveness of U.S. industry."

Report From Pentagon Committee Questions Changes to Data Rights

A minority report was submitted by Nick Reynolds, member of the Defense Department Technical Data Advisory Committee, to Eleanor Spector, Defense Department director of procurement—who also chairs the committee.

The report calls for a change in the regulations concerning technical data rights. Reynolds contends the change in technical data rights amounts to a "creative accounting giveaway" allowing original equipment manufacturers to keep data rights paid for by the taxpayers by charging development to the Defense Department indirectly rather than as a direct expenditure.

By indirectly charging the Defense Department, the original equipment manufacturers would obtain data rights paid for by the taxpayer and assure a monopoly position in the government and commercial market, according to Reynolds. He said that this data, developed at taxpayer expense in the performance of a government contract "should remain available to small businesses for the purposes of competition."

Reynolds maintains that there would be "immense business losses by hundreds, if not thousands, of small businesses" if the changes in data rights are made.

Reynolds is president of the Independent Defense Contractors Association and vice president of AeroGlobal Logistics, San Antonio, Texas.

Teaming Created Legal Twilight Zone For Firms Working on Cluster Bombs

Alliant Techsystems, Hopkins, Minnesota, and Aerojet, Rancho Cordova, California, agreed to pay $12 million after being accused of violating antitrust laws. The two companies had teamed to produce combined effects munitions for the U.S. military.

In 1992, the Army approved a plan for a joint contract to build the weapons. The Justice Department contends that the service did not approve the teaming and pricing portions nor did it have the authority to do so.

The Defense Department has been pushing companies toward teaming arrangements in the hopes of maintaining a viable commercial industrial base with a minimum of direct government involvement or cost. A hard-line antitrust policy is seen by some legal experts as having a chilling impact on future teaming and merger agreements within the defense industry.

Antitrust concerns ended the proposed purchase by Alliant Techsystems of a significant portion of the Olin Corporation, St. Petersburg, Florida, more than a year ago. Just as Aerojet and Alliant Techsystems are the only companies that make cluster bombs in the United States, Olin and Alliant Techsystems are the only producers of several types of tank ammunition.

AGENCY/ CAPITOL HILL

Senate Seeks Answers to Budget Shortfall and Korean Nuke Crisis

Dr. William J. Perry was sworn in as the new defense secretary, but not before he had to answer Senate inquiries concerning the Pentagon's reported $30 billion to $50 billion budget shortfall in the Fiscal 1995 through Fiscal Year 1999 time frame.

Dr. Perry estimated the disparity to be $20 billion for the out years beyond Fiscal Year 1995. He suggested the only ways to offset the gap would be by modifying budget spending limits, by restructuring programs, and by increasing efficiency through acquisition reform.

In response to widespread concern regarding nuclear weapons proliferation in North Korea, Dr. Perry said the United States—through diplomatic means would seek to prevent North Korea from manufacturing these weapons of mass destruction.

GAO Report Questions Whistleblower Protection, Education on Employee Rights

A recent U.S. General Accounting Office (GAO) report points to a high degree of dissatisfaction with the Office of the Special Counsel's handling of federal employees who have sought protection under the Whistleblower Protection Act of 1989.

GAO surveyed 945 employees that sought assistance of the special counsel's office. The bulk of the respondents gave the special counsel's office "low marks for overall performance." More than a third of them gave the office low marks.

The report also said that there needs to be better education of federal employees about "the extent of their rights and protections under the whistleblower statutes and the nature of the compliant process."

GAO recommended that "the special counsel explore the reasons for whistleblower complainant's dissatisfaction with the Office of the Special Counsel process and work with the subcommittee to develop an appropriate strategy for addressing these concerns."

National Lab, Pentagon, and EPA Team Develop New Pollution Detection Device

The Environmental Protection Agency (EPA) is developing protocols for a mobile analytical unit developed at Los Alamos National Laboratory, New Mexico, with Air Force funds.

A Los Alamos official said that the unit can "quickly measure minute amounts of a wide range of chemicals to a level of sensitivity that exceeds EPA standards." The unit uses a portable ion-trap mass spectrom-

Small firms battle defense contractors

THE WASHINGTON POST

WASHINGTON – It's a David-and-Goliath struggle, only this time the stakes are billions of dollars of Pentagon contracts, and both contestants agree the government is leaning toward Goliath.

The Davids are hundreds of small factories and machine shops around the country. They say the Pentagon is about to impose new rules that could put many of them out of business and cost taxpayers money.

The Goliaths, the nation's largest defense firms, say the small firms are opportunists who use Pentagon rules to learn the big companies' technological secrets and make money off them.

The last round is scheduled for Wednesday, when a Pentagon advisory panel will hold a final meeting before issuing recommendations to Defense Secretary Les Aspin.

Industry and government officials say the panel – headed by Eleanor R. Spector, the Pentagon's procurement director – has dismissed almost all the small firms' complaints and will find for the large companies on most issues. Pentagon officials declined comment.

The dispute is this: Who owns the rights to the equipment inside the military's planes, tanks and submarines? Is it the government, which helped pay for the research? Or is it contractors, which spent a fortune developing the technologies?

The law has said for years that if taxpayer money paid for all the research on some gear, then the United States owns rights to it. That means outsiders can get that information from the government, if it's unclassified. But on most military technologies, companies and the Pentagon share research costs, so ownership questions are legally muddled.

In 1984, after Pentagon scandals about $5,000 coffee pots and $2,000 pliers, Congress tried to lower costs for military gear by promoting competition. A series of laws and regulations in the mid-1980s expanded the types of technical information the government could disseminate so companies other than the main, or "prime,"

A new industry of "replicator" firms was born. They comb through contracting publications for news of Pentagon bid competitions, then file Freedom of Information requests for technical data on the desired equipment. Blueprints in hand, the small firms bid on the parts contracts, often underbidding the primes because their overhead costs are lower than the big firms'.

Replicators say that if the Pentagon rules against them, hundreds of small factories could go under.

"It's very likely this would put us out of business," said Phillip Rodriguez, president of Aeronautical Systems Inc., a Manassas, Va.-based replicator supplying parts for throttle controls on F-15 fighter jets and gear boxes on Navy helicopters.

Eighteen months after Nicaraguan immigrant Rodriguez founded the firm in 1988, it had 15 employees and revenue of $3.5 million – all because he obtains other companies' blueprints. He said he feels no guilt about the fact that his firm has almost no expertise in technology or manufacturing but only hires factories to make parts for which he's acquired plans.

"The market grew tremendously," he said, "and the wealth was spread."

Moreover, replicators say that if the Pentagon constricts the flow of data to outsiders, military parts costs will rise. They contend that they've saved taxpayers $20 billion since 1984; by contrast, allies of the primes say the savings were only about $2 billion.

Meanwhile, prime contractors say some replicators do shoddy work – and cost the government money – because they don't understand the precise function of the gears, screws, valves and pipes they make.

But the primes' main gripe is replicators are making off with technology the primes spent millions developing.

"These are our family jewels," said Joel W. Marsh, government acquisition director for United Technologies Corp., a large Connecticut-based defense firm.

"If you buy a Ford, you get an operators manual," said Leroy J. Haugh, vice president for procure-

TUESDAY, DECEMBER 7, 1993

The Washington Post

BUSINESS

Small Firms Battle Giants Over Defense Dollars

Pentagon Panel Appears Ready to Favor Big Contractors on Information Access Rules

By John Mintz
Washington Post Staff Writer

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See STRUGGLE, D6, Col. 1

Contractors Battle Over Information

STRUGGLE, From D1

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"The market grew tremendously," he said, "and the wealth was spread."

Matthew Forelli, co-owner of a New York firm that makes military aircraft gears, said that if he loses the ability to obtain the primes' drawings, 20 of his 45 factory workers and six of his 12 office employees would be laid off.

"No data means no business," Forelli said.

Moreover, replicators say that if the Pentagon constricts the flow of data to outsiders, military parts costs will rise. They contend that they've saved taxpayers $20 billion since 1984; by contrast, allies of the primes say the savings were only about $2 billion.

"This will take us back to the early 1980s and before, when we had spare-parts abuses," said Nick Reynolds, co-owner of a Texas-based firm that advises small Pentagon contractors and a leader in the replicators movement. "We thought we'd killed that snake called overpriced spare parts."

Meanwhile, prime contractors say some replicators do shoddy work—and cost the government money—because they don't understand the precise function of the gears, screws, valves and pipes they make.

But the primes' main gripe is replicators are making off with technology the primes spent millions developing.

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"If you buy a Ford, you get an operators manual," said Leroy J. Haugh, vice president for procurement at the Aerospace Industries Association, which represents large defense firms. "But you don't get all the blueprints to build a Ford in your garage."

Recently the replicators persuaded a few dozen members of Congress to send letters to the Pentagon pushing their case. But the replicators admit they've been out-lobbied by the big firms.

"I feel like a flea," said replicator Forelli, "crawling up the leg of the elephant."

The Hartford Courant

Established 17

Sunday, November 15, 1992

Parts war: defense giants vs. subcontractor

By ROBERT WEISMAN
and MIRANDA S. SPIVACK
Courant Staff Writers

A program designed to end military purchases of high-priced hammers and toilet seats is in jeopardy, caught in a David-and-Goliath struggle between major defense contractors and small companies vying for dwindling defense dollars.

Each side is accusing the other of trying to muck up sales to the Pentagon at a time when such sales are expected to continue their downward trend. The outcome could affect the profits of larger contractors and the survival of smaller ones, including many in Connecticut.

Their dispute, expected to come to a head in Washington next spring, has its roots in a competition-in-contracting law passed eight years ago to help the military save money.

The law created the "breakout program" which, for the first time, permitted the Pentagon to buy replacement parts for aircraft, ships and armored vehicles directly from subcontractors rather than from the weapons' prime contractors.

Now that program is under intense scrutiny, and the outcome could have a great effect on Connecticut companies and jobs.

The issue pits prime contractors, such as Hartford's United Technologies Corp., which have lost profits on replacement parts, against their own networks of subcontractors, which have developed important new markets with the military.

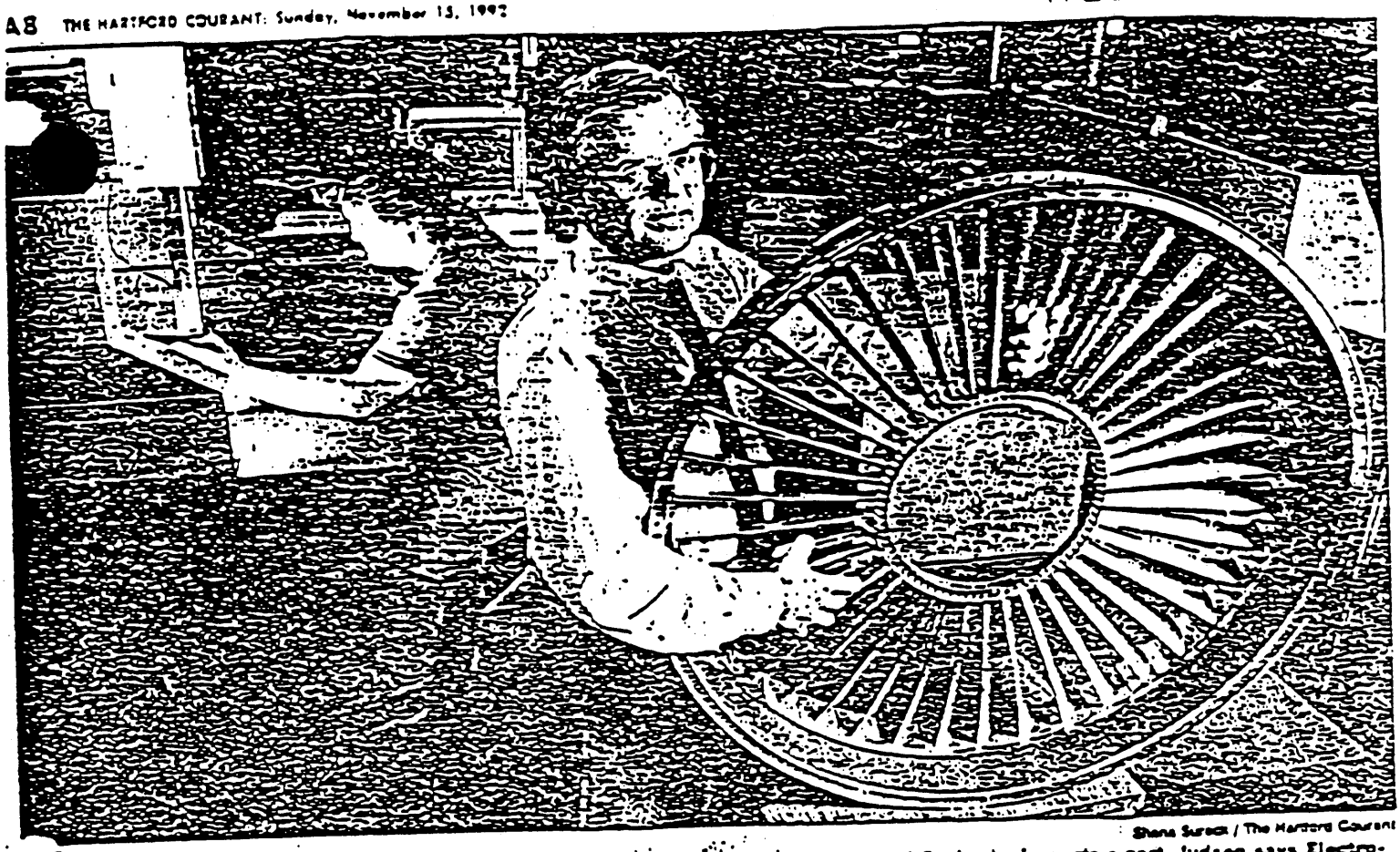
Under pressure from the prime contractors, federal officials are reviewing whether to shift control of key weapons design data from the government back to the primes.

The prime contractors insist the proposed changes in regulations, which could be adopted next year, would improve efficiency and reduce the number of defective parts delivered to the government. But many subcontractors argue the changes effectively would lock them out of a key market — the military — and make them entirely dependent on the prime contractors.

On the surface, the dispute is technical, centering on whether prime contractors or the government should control the design specifications and blueprints for weapons.

But beneath the arcane language, the stakes could not be higher for subcontractors in Connecticut and

Please see Defense, Page A8.



Shana Suresh / The Hartford Courant

...ld M. Judson, president of Electro-Methods Inc., with one of ... hind him, Michael Coulombe inspects a part. Judson says Electro-... engine parts manufactured at his South Windsor plant. Be... Methods does about 75 percent of its business with the military.

Defense firms at odds over contracting rule

Continued from Page 1

across the nation. Simply put, hundreds of toolmakers, machine shops and other small companies fear they could be put out of business if they are denied access to the data.

In recent years, the breakout program has saved the government tens of millions of dollars, its advocates maintain. It has also been a boon to subcontractors at a time when the prime contractors have been scaling back on their domestic suppliers and buying more parts from abroad.

"They're trying to turn the clock back," said Ronald V. Williams, a Hartford aerospace consultant representing J.T. Slocomb & Co. of South Glastonbury and Numet Machining Techniques of Stratford. "They want to go back to a sole-source environment that could cost Connecticut thousands of jobs."

The hottest topic

No one knows the full extent of the state's vulnerability because most of the subcontractors clustered around Pratt & Whitney and Hamilton Standard in central Connecticut, or around Sikorsky Aircraft and Textron Lycoming in southern Connecticut, work for both prime contractors and the government. As privately held businesses still beholden to the primes, few will speak publicly about their qualms for fear of antagonizing powerful customers.

But the threat to the breakout program has been the hottest topic during the past few weeks at private meetings of toolmakers and government contracting officials in Connecticut and other states. Many have sent representatives to hearings on the issue in Washington and at military bases, while others have sent letters to the committees contemplating changes, to lawmakers and to President-elect Clinton.

One of the few who has been willing to talk publicly, Donald M. Judson, president of South Windsor parts-maker Electro-Methods Inc., does about 75 percent of his business with the military. This fall, for example, his company won $10 million worth of contracts from Tinker Air Force Base to help retrofit jets.

Judson contends Electro-Methods would be unable to bid on such work without access to the systems designs, developed by the prime contractors with taxpayer money.

"This would put us out of business," Judson said of the proposed changes in data rights. "Four years from now, the government wouldn't be able to get competitive bidding for their parts. They would have to get the parts from the primes."

Prime contractors, however, depict the issue in terms of efficiency.

Herbert Fisher, a former Pentagon official tracking the data rights debate for the Aerospace Industries Association, a trade group for the primes, paints a picture of millions of pages of systems data — components specifications and drawings — spread across the country in far-flung government repositories.

Few are computerized, so if the Air Force wants to put out bids for replacement parts on a fighter jet, for example, bureaucrats must call around and gather the information from different sites, Fisher said. Meanwhile, the jet may sit idle for weeks in a hangar, he said.

"You need to be able to store and retrieve the data in a timely matter," said Joel Marsh, the Washington-based director of government acquisition policy for United Technologies Corp. Like other prime contractors, UTC has volunteered to store the data for the government at operating divisions such as Pratt, Hamilton Standard and Sikorsky.

Responsibility for keeping the weapons design data would restore to the prime contractors enormous leverage over the flow of replacement parts ranging from jet engine pumps to helicopter gearboxes — leverage the primes had enjoyed for decades until the mid-1980s.

Before the Competition in Contracting Act of 1984, almost all parts for Air Force jets, Navy ships and Army tanks were ordered by the services through prime contractors, which would buy the parts from subcontractors and mark up their prices to reflect administrative costs.

"If you wanted to be in the defense replacement parts business then, you sold to the primes," said J. Michael Slocom, a Falls Church, Va., government contracting attorney who represents subcontractors.

Horror stories

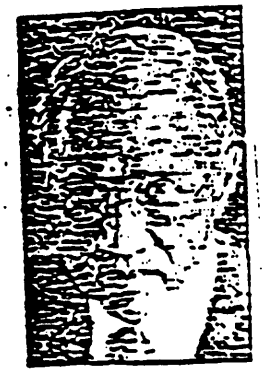
That system dated back to World War II. But it was rocked by the publicized Pentagon procurement scandals of the 1980s. Embarrassed by reports of costly bolts and coffee pots, former Defense Secretary Caspar Weinberger and his allies in Congress passed the new law promoting competition in military contracting. "It was a response to the horror stories," said UTC's Marsh.

Industry officials maintained the high price of parts, while seemingly outrageous, simply reflected the fact that they required specialized tooling and were custom-built in small numbers to particular specifications, such as the need to withstand intense gravitational pull. But that explanation did not wash with the general public nor its representatives on Capitol Hill.

In the years since the 1984 law took effect, prime contractors have had to turn over their design data to the military systems commands. Subcontractors across the nation, aided by government competition advocates, have forged business ties with the military services.

The services, for their part, have identified parts suitable for competition and developed parts-tracking and cost-accounting procedures.

Because the cost of a weapon reflects many factors, ranging from the price of raw materials to the number of units ordered each year, there is no firm estimate on how much the government has saved through the breakout program. Advocates insist the savings have been substantial, though they say the savings have been partly offset by the administrative costs of the program.



■ Chong

"It's taken a lot of time and effort to get the breakout program off the ground," said Avon aerospace consultant Luis Chong. Chong said subcontractors throughout the state are terrified they will lose their ability to sell to the government. "If the government loses control of the specifications, a lot of subcontractors will go out of business," he warned, "because a lot of them do work only for the government."

For subcontractors in Connecticut, an aircraft industry hub, the breakout program is especially important. Air Force jet fighters, bombers and other aircraft, even more than ground or naval systems, contain thousands of rotating parts which must be replaced after set numbers of flights. Many of those parts are built in Connecticut and, through bypassing prime contractors, the subcontractors and the government have, in Slocum's words, "split the difference on the profit."

There has been constant tension in recent years between the primes, which continue to own the technical data, and the government, which has rights to it and disseminates it widely enough to make the ownership irrelevant. Almost every year, Pentagon officials have tinkered with procurement regulation clauses in an effort to resolve those tensions.

In the current data rights debate, Congress and the Pentagon each has set up a committee made up of industry and government representatives to examine two aspects of the same issue. Those tracking the issue say the Pentagon likely will propose new regulations before February.

One committee is weighing a proposal to give the government "limited rights" to the data in the belief that prime contractors should be allowed to keep some data proprietary for national security reasons and to accelerate the conversion of military technology to civilian use. The second panel is examining a proposal to shift control of all data back to the primes but require them to use more competitive procedures.

"Under either proposal, the subcontractors would be at the mercy of the primes," Slocum said. "This would shut these folks down."

The prime contractors prefer a system enabling them to retain their data, whether it was developed privately or with partial government funding, and give it up only with a request from the Pentagon.

"If you go into a restaurant and order a meal, you don't get the recipe," Fisher said. "But if you want the recipe, you can go in and bargain for it. If you buy a thousand meals, the chef may throw in the recipe."

The subcontractors are bracing for a battle. "We're absolutely concerned about it," said Kip Brockmyre, chairman of the National Tooling and Machining Association, which represents subcontractors. "If the changes are not acceptable, we'll fight them."

The New (Old) Industrial Policy

U[illegible] the Pentagon to subsidize commercial products is a bad idea

BY ROBERT J. SAMUELSON

THE CLINTON ADMINISTRATION'S LATEST EXCURSION into industrial policy is its most troubling. The Pentagon proposes spending $587 million over five years to enable U.S. companies to capture 15 percent of the world market for "flat-panel displays." These are used for lap[illegible]mputers, videogames, advanced instruments—and cockpit [illegible]ys for jet fighters. The plan is a huge overreaction to a real [illegible]m: ensuring adequate supplies of vital components. The effort smacks of political grandstanding to show that the [illegible]n administration is championing U.S. industry and jobs. [illegible] true that flat-panel displays will be a part of future weapons [illegible]s—everything from displays in tanks to, possibly, hand-[illegible]napping devices for soldiers—and that there are now no U.S. suppliers. Japanese companies control about 95 per[illegible] f the $5.6 billion world market, which is forecast to grow to [illegible]illion by 2000, according to Stanford Resources Inc., a [illegible]ch firm. The Japanese haven't cooperated on [illegible]se projects, says the Pentagon. The remedy, [illegible]s to create a new U.S. industry that would exist [illegible]y to serve civilian markets.

[illegible]s is novel. Previously, the Defense Department [illegible]anced civilian research and development in [illegible]ope that military applications might result; [illegible]viously, it also has supported defense contrac[illegible]ir[illegible]ut it has never before invoked "dual [illegible]ec[illegible]gies—that is, technologies that have [illegible]n and defense applications—as the reason to [illegible]lize an entire nondefense industry. It would do [illegible]rough subsidies that, though granted for R&D, [illegible] require companies to build commercial fac[illegible]. In practice, they're production subsidies.

[illegible]one denies that these factories would aim pri[illegible]r at civilian markets. Consider the numbers. [illegible]en 1995 and 2000, the Pentagon may buy 15,000 [illegible]splays annually. By contrast, world production [illegible]lays now totals 33 million units and should rise [illegible] million units by 2000, says Stanford Resources. The U.S. [illegible]t is about 6.5 million units. Defense needs, then, account for two tenths of 1 percent of U.S. demand in units, though in [illegible]value the military displays—which cost more because they [illegible]o be customized for combat conditions—might represent 1 [illegible]ercent of sales.

[illegible]: White House is plainly eager to use the Pentagon as a [illegible]e for "technology policy." (That's the newest variant of [illegible]strial policy.") Not surprisingly, the first suggestion for a flat-[illegible] program came from Laura Tyson, chairwoman of the Coun[illegible] Economic Advisers, who raised it with White House eco[illegible]: adviser Robert Rubin, according to a Business Week story [illegible]yson confirms. Rubin then urged the Pentagon, which had [illegible]financing R&D in display technology, to study the matter.

[illegible]hnology policy is politically seductive because it appeals to [illegible]ationalism and Americans' faith in gadgetry. The lesson isn't [illegible]n Commerce Secretary Ronald Brown, former chairman of [illegible]emocratic Party. He's sharply expanded Commerce's Ad[illegible]d T[illegible]ology Program that subsidizes projects involving [illegible]t[illegible]dvanced materials or computer software. In 1990, the ATP spent $10 million. For 1995, Brown wants to spend $451 million on the way to $744 million by 1997.

Unfortunately, the popular appeal of technology policy rests on two widespread misconceptions.

The first is that a few "critical" technologies determine living standards and global economic success. "It's a totally wrong notion," says science specialist Bruce Smith of the Brookings Institution. What matters is a complex mix of many technologies, management practices, work habits, culture and government policies that is too intricate to control. Technology is only one influence. Consider a simple example: airlines. Americans and Europeans fly the same jets; yet, U.S. carriers are vastly more efficient (in 1989, they handled twice as many passengers with only 25 percent more workers).

A few 'critical' technologies don't ensure economic success

The second myth is that Japan successfully practices technology policy and that we must follow suit or be shut out of high-tech industries. True, some Japanese industries have benefited from government aid; so have some U.S. industries. But in general, Japanese government support for R&D is less than ours, reports economist Gary Saxonhouse. Less than 2 percent of nondefense business R&D is financed by government in Japan compared with 22 percent in the United States. And some recent Japanese technology projects have failed badly: notably, high-definition TV.

The point is that, in encouraging new commercial technologies, it's hard for government to improve consistently on the "market," which is simply many companies trying many things until someone discovers what works best. This does not mean that all government projects will flop. But on average, they will waste money, fall prey to political pressure and distort competition. Sadly, business groups don't oppose these boondoggles on principle, because no one wants to offend the White House needlessly and companies that might benefit will "take the money if government is dumb enough to give it away," as one lobbyist says.

The potential harm goes beyond waste. If America expands its freewheeling subsidies, other countries may do likewise. Indeed, the Clinton administration had global trade rules modified to permit bigger subsidies. Now, the Pentagon is creating a mechanism to transform alleged R&D subsidies into subsidies to build commercial factories. Perversely, this may make it harder for many U.S. companies to plan their investments, because they won't know whether foreign competitors may be subsidized.

None of this means the Pentagon should ignore flat-panel displays: they are an important technology with military uses. But the response should be less extravagant and more patient. Some U.S. firms are beginning or expanding production; in the future, foreign companies are likely to establish U.S. plants. And in any case, today's tiny U.S. production capacity is still large enough to meet the Pentagon's small needs many times over in an emergency. The situation, in short, is not as desperate as the Pentagon says. The rush to create a commercial industry suggests, as Brookings' Smith puts it, that "they almost forget that the Defense Department has a defense mission."

Technical Data Rights:

Without doubt the major concern of the Small Business Independent Defense Contractors is access to technical data. Let all understand that this does not involve the PWA 2037 engine - power plant for the C-17 aircraft. Nor is there concern regarding rights for the CFM 56 a joint venture of G.E. and SNECMA which powers the KC-135 tanker aircraft.

Both of these engines were developed with private funds and thus are not in the "public domain" sector the government pays the private businesses for a product.

We are leery of a new category designated "government purpose limited rights" which we believe would be interpreted as an obstacle to small business acquisition of necessary data to proceed with manufacture. It would appear that efforts to cut the independent out of the international military logistical support would be exercised under "GPLR".

We envision a retroactive accounting procedure built around indirect costs. It is possible that DoD would apply the GPLR formula to the F100 and F101 engines. We suggest that a grandfather clause be incorporated to preclude this distortion of sound business action of taxpayer funds acquiring full rights when paying for the development of these two engines. In the late 60's and early 70's.

Sincerely,

ELECTRO-METHODS, INC.

Donald M. Judson
President

DMJ:js

8/19/94
#29

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August 19, 1994
HAND DELIVERED

Deputy Director Major Policy Initiatives
Department of Defense
1211 South Fern Street
Arlington, VA 22202-2808

Attention: Ms. Angelina Moy
OUSD (A&T)/DDP

Our: SD94-0392/DC

Subject: Comments on Proposed Rule, DAR Case 91-312

Reference: Proposed Rule Changes to DFAR Supplement; Rights in Technical Data (Federal Register 10 June 1994)

Dear Ms. Moy:

FMS Corporation is a small business defense contractor that manufactures, develops and supplies tracked vehicle parts, system upgrade kits and assemblies domestically and internationally. Our largest customer by far is the US Army. As a small business that participates in both development and manufacturing, we are in the unique position of having experience in both areas that seem to have polarized the developer versus non-developer positions taken on the §807 Committee.

Our review of all of the written material available since learning of the Committee's existence in December 1993 and our experience as both a developer and non-developer makes us completely opposed to the proposed changes to rights in technical data contained in reference. Our position does not apply to proposed changes regarding rights in computer software.

The reasons for our opposition to the proposed rule are:

a. The changes facilitate the developer placing items in the mixed funding category and thereby permitting the developer to grant only Government Purpose Rights (GPR) to the government. The proposed rule permits indirect costs to be treated as a contractor contribution to the development, although in most cases a large portion of indirect costs are paid by the government. Without arguing the merits of the change regarding indirect costs, the

point must be made that there is no provision regarding the minimum amount or percentage of contractor cost which must be made against the development in order to permit the contractor to restrict the technical data rights of the government under mixed funding.

Title 10 USC 2320, which was identified as the driver for the Committee's effort, clearly intended in mixed funding situations, that rights in technical data be negotiated except in cases in which the Secretary of Defense determines (on the basis of criteria established in the regulations) that negotiations would not be practical. The current rule provides for negotiation and criteria to be used by the contracting officer, whenever government rights will be limited (DFAR 227.402-72(a)(2)) as required by statute. The proposed rule automatically limits the Government's rights in mixed funding situations without negotiation and does not provide criteria for negotiation as required by statute. The contractor's contribution toward the development can be as little as one dollar (direct or indirect).

The proposed rule's treatment of mixed funding will drastically increase the number of items and systems for which the government receives only GPR, and will encourage changes in contractor accounting systems to permit favorable contractor application of indirect costs. Rather than encouraging creation of new technology with a contractor's own funds, a stated reason for the change, in fact this will be a disincentive to privately funded development, since the contractor will easily be able to show mixed funding with even a token investment in the development.
If the proposed rule is to be implemented, it must be modified to require negotiation and provide for a minimum contractor contribution to the development (50 percent recommended) when GPR are claimed because of mixed funding. To comply with Title 10 USC 2320, it should also establish criteria to be used by the contracting officer in negotiating technical data rights.

b. The increased use of GPR will drastically reduce competition from small businesses and eliminate the gains achieved by the "Competition in Contracting Act", PL 98-369, and the Defense Procurement Improvement Act, PL 98-525 of 1984, which were the basis of "breakout". While the proposed rule would appear to protect competition on material for which GPR is assigned, since GPR data can be used for competition only for material purchased by the government, this is very misleading. The government will only be able to provide GPR data to potential US bidders when it solicits bids for the material. This gives the potential bidders as little as 15 days to respond. This is normally not enough time for a small business to determine its capability to manufacture, develop pricing and compete for the work. Effectively this rule will restrict the competition to those that have made the item before and those offshore sources that the developer has prequalified to make the item for them using GPR drawings provided by the developer. This is completely opposed to breakout objectives and procedures which encouraged potential bidders to

obtain unlimited rights drawings from the government to determine what they could make efficiently and be prepared to respond in a timely fashion to the next government bid requirement. Most small business manufacturers rely on this system and expend money, time and effort using this approach. This is the heart of breakout, good business practice and real competition that brings lower prices to the government when it needs them most.

c. It makes the developer/OEM the sole source for direct commercial foreign sales not only of complete systems but spares and upgrade kits as well. The increased use of GPR which will result from the proposed rule will effectively deny our friendly foreign nations, which we are encouraging to buy US systems, from competition for follow-on support spares and upgrade kit requirements. This is a complete reversal of the recent policy change pushed by the OEM to eliminate non-recurring cost (NRC) on direct commercial sales. The previous administration accommodated this long desired change to improve the US competitive position on international system sales. Follow-on support costs are a major factor in development of total cost of ownership when comparing competing weapon systems. The market gains offered by elimination of NRC in foreign commercial sales may be completely eroded by the proposed rule which effectively precludes competition to meet international follow-on support requirements. This change forces the foreign customer to ask why the US can compete its spares requirements, but the international customer cannot. The inconsistency in US policy caused by forcing the foreign customer to buy his follow-on requirements from the OEM, or the US Government through the FMS program will not be lost on these foreign governments. They currently routinely seek competition for follow-on requirements and they, like DoD, are under severe budget constraints at this time. The waste of US taxpayers money should also be considered when grant money such as Foreign Military Financing (FMF) is used for a direct commercial sale without competition.

d. The establishment of contractor data repositories would create a clear conflict of interest by placing the tools of our trade under the control of the largest competitor of the small business manufacturer. It should be noted that under the current system even the Service operated data repositories face significant delays when missing drawings are requested from the system OEM. Consider the responsiveness that would be given to a competitor's request to an OEM repository for drawings. The inclusion in the proposed rule of such an inappropriate concept, even though only permissive, reflects the strength of the OEM representation on the Committee.

In further support of our opposition to the proposed rule, the following observations and examples are offered:

a. The intent of the National Defense Authorization Act for Fiscal Years 1992 and 1993 (Public Law 102-190) was to provide a balanced Committee. It is apparent from a review of the Committee's report

to the Secretary of Defense, that small business manufacturers were under represented and the large OEM and developers were over represented on the Committee.

b. The OEM have long sought these changes and repeatedly have been denied. OEM lobbying has been responsible for both legislative initiatives, PL 102-190 and 10 USC 2320, on the basis that the current rule was defective. In fact the rule change is desired to provide additional advantage to the OEM over small business manufacturers.

c. The proposed rule is one more concession made to the OEM based on protection of the industrial base. (See "Supplemental Views of Certain Industry Members of the 807 Committee".) Unfortunately, the industrial base is equated by many only with the system OEM. Small business manufacturers are an essential part of the US industrial base and in fact are the true manufacturers of most parts and assemblies purchased by the Government and the OEM. Approval of this proposed rule will be at the cost of many small businesses, which are recognized as an essential part of the US industrial base.

d. Each year thousands of unlimited rights drawings are purchased from the Services by small business manufacturers under the provisions of Department of Defense Directive 5230.25. These drawings enable broader competition and hence lower prices to the US Government. Restricting this access will jeopardize many small business manufacturers' ability to survive. Has any attempt been made to query the Service repositories of technical data to determine how many requests are received each year and how many unlimited rights drawings are provided? This would quantify how many small businesses would potentially be affected by the proposed rule, i.e. the potential cost of the proposed rule to small business manufacturers and our industrial base.

e. The system OEM already have many advantages over others (primarily their small business competitors and subcontractors). These include:

(1) receiving every request for parts or upgrades by virtue of being the System OEM. Others have to find the business and prove they can perform.

(2) having more rights in technical data under the current rule than the government, which has paid completely or almost completely for the development.

(3) being free to legally mislead potential customers in regard to rights in technical data to the detriment of their competition. Attached is a redacted copy of a letter recently sent by an OEM to a foreign army to eliminate the competition. Note that all technical data at issue was unlimited rights data, purchased from the US Army, for which a US Department of State export license had been issued.

Note also the care taken to be legally correct, but to still mislead the foreign country regarding the ability of the competition to perform. In competing with the OEM, we are continually faced with proving that the System OEM does not own and cannot restrict our use of unlimited rights data provided by the Services. This case makes us wonder how many times we and other small businesses have lost foreign competitions because of similar letters.

f. The proposed rule places the small business competition in the position of having to go to its major competitor to obtain a license to use GPR data for individual items contained in kits or systems when a few items have been identified as GPR by the OEM. The proposed requirement to provide the OEM notification of customers which have signed Use or Non-disclosure Agreements (227.403-7) gives the OEM further competitive advantage by being made aware of all requirements and the identity of other companies planning to bid on them. This is fraught with anti-competitive problems for the small business manufacturer. The OEM are oriented toward legal action and can well afford taking such action. The cost to defend against these actions, which are sometimes frivolous, can be ruinous to a small business. Right or wrong the fear of legal action can run off the competition, delay the outcome beyond the bid due date, or eliminate the small business from the competition because the customer becomes aware of the possible legal action and does not wish to be involved or delayed. This is the real world in which we operate. Giving the OEM more rights in technical data will worsen this already difficult situation for small businesses.

g. Although the small business developers have aligned themselves with the OEM on the Committee, there is nothing in the proposed rule that improves their ability to have the OEM exercise their claim for special rights on their item. The existing rule emphasizes the right of subcontractors and lower tier developers to exercise this claim to rights through the prime contractor. Unfortunately, small business developers are anxious to participate in big programs and are easily dissuaded from exercising this right with the system OEM. This is similar to the wide spread practice of the OEM informally letting their suppliers know their displeasure, and the possible business consequences of quoting to the system OEM's competition.

Before closing, a review of the package sent to selected Committees of the House and Senate as required by PL 102-190, which included a copy of the Committee report, also deserves comment in several areas:

a. Reference to small business manufacturers as "replicators" (page 12) or "companies that replicate parts" (page 16) is degrading and is indicative of the disdain in which the Committee and OEM hold this essential element of the US industrial base, that in fact manufacture most parts used by the OEM and the government.

b. Although a minority report was submitted as required by PL 102-190, inclusion of a thinly disguised rebuttal paper to the minority report signed by several members of the Committee (identified as Supplemental Comments) appears highly irregular for inclusion in the Committee's report. We support the thrust of the minority report, although we are not members of the Independent Defense Contractors Association.

c. It appears clear from the report that the Services did not see the need for changes, but were overwhelmed by the majority or DoD pressure and agreed to the majority positions as long as they did not perceive any affect on the interest of their Service.

d. The opinion of the Small Business Administration regarding the impact on small business manufacturers was largely ignored and the actions required by the Small Business Regulatory Flexibility Act, PL 96-54, to perform analyses was not performed. As these changes will heavily impact small businesses, input and comments from small businesses should also be solicited in a small business forum other than the Federal Register. It is clear that the majority of small businesses, who will be impacted the most, were unaware of the pending rule change and the establishment or existence of the Committee and its charter.

We trust that these comments will be helpful in your review of this issue which FMS Corporation considers will have far reaching consequences on the US industrial base.

If there are any questions on these comments, please contact the undersigned at (703)416-2577.

Very truly yours,

FMS Corporation

John M. Manzo
Vice President,
Washington Operations

JMM/mz
enclosure

[redacted]

May 20, 1994

[redacted]
Army Ordnance Department
[redacted]
Attn: Chief of Ordnance

Subject: [redacted] Vehicle Upgrade Program, Tender [redacted]

The following information is provided concerning drawings submitted for Tender No. [redacted]

[redacted] is the owner of intellectual property developed for the [redacted] Family of Vehicles by [redacted] Under the Berne Convention, to which [redacted] is a signatory, marking is not required on the drawings to protect or secure a copyright in those drawings. Without proper permission, copying of these drawings constitutes a copyright infringement in [redacted]

[redacted] has authorized [redacted] to use [redacted] drawings associated with their response to the [redacted] Upgrade Tender [redacted]. We have not authorized any other company in [redacted] to use these drawings for the tender.

Please let me know if you need any other information concerning this matter.

Very truly yours,

[redacted]
Program Manager

[redacted]

Grey Associates
1541 School Road Hatfield, PA.

August 3, 1994

Ms. Angelena Moy, OUSD(A&T)/DDP
Director Major Policy Initiatives
1200 South Fern Street
Arlington, VA. 22202-2808

Re: Pentagon Acquisition Reform
DAR Case 91-312

Dear Ms. Moy,

The proposed acquisition changes recommended by the 807 Group and published in the Federal Register Monday June 20th, 1994 are disturbing both as a taxpayer and a women owned small business concern. It is our humble opinion that all the work that has been done by both industry and the government to date regarding cost savings and cost containment will be lost if the Pentagon adopts the 807 Groups recommendations.

We fail to see the logic behind the recommendations made by the 807 Group in that as taxpayers we pay for the development of a system which becomes public property and then transfer the responsibility of the management of the system to the OEM who will have the legal authority to charge the government whatever they feel the market will bear.

To highlight what the current system accomplishes through competition we are presenting a recent experience where the government had a requirement for a specific jet engine part, up until now this item was procured as a sole source item. The OEM presented pricing which was approximately twenty-seven percent (27%) lower than his previous pricing and awards. The competition for this item was furnished by the small business community who had spent their own monies, not the taxpayers, to qualify to manufacture this item and have the opportunity to present a proposal.

It is our opinion that if the 807 Groups recommendations are adopted the results will be a monopoly by the OEMs', that will be reflected by inflated prices for parts and a complete "lockout " of the small business community to bid competitively on all items controlled by the OEMs'.

In closing we strongly urge you to **reject** the 807 Groups recommendations

Sincerely,

Jean A. Grey
President

FAX COPY RECD 8/19/94 #34

Michael W. Sales Senior Patent Counsel

HUGHES

Subsidiary of GM Hughes Electronics
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Telephone: (310) 568-7028
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August 19, 1994

VIA TELECOPIER

Attn: Ms. Angelena Moy, OUSD (A & T) / DDP
Deputy Director Major Policy Initiatives
Room C109
1211 S. Fern St.
Arlington, VA 22202-2808

Re: DAR Case 91-312

Dear Ms. Moy:

Find enclosed the comments of Hughes Aircraft Company on the proposed rule respecting Rights In Technical Data and Computer Software. We believe the proposed rule has been fair in addressing a number of competing concerns. Our remaining concern is the need to clarify certain areas in the proposed regulations regarding copyright ownership, and simulation, so that there is no question that existing law and regulations are not being changed by the proposed rules. Other comments are basically housekeeping in nature.

Although there are certainly aspects of the rule with which we could take issue, we have kept our comments to an absolute minimum so that our comments are taken as seriously as possible.

We respect the tremendous effort which has gone into the proposed rules. We believe, with these few clarifications, the rules should provide a stable framework by which the contractor community and DoD can address these issues for years to come without the previous friction and uncertainty.

I would be happy to discuss any of these issues over the phone or in person.

We are providing a copy of these comments by FAX and the original separately by first class mail this date.

Sincerely,

Michael W. Sales
Corporate Patents and Licensing

MWS:rarg
cc: T. Snyder
T. Winland
Enclosure

Corporate Offices: 7200 Hughes Terrace
PO Box 80028, Los Angeles CA 90080-0028
(310) 568-7200

Comments To DAR Case 91-312 (all references are to DFARS 252 and 252.227-7013)

I. General Comments

A. We support the new policy in 227.403-4 that rights in technical data for "undeveloped" items components and processes will be determined by the source of funds used to create the data. This provides guidance where there has been a longstanding gap in the regulations and conforms the regulations to commercial practice. This policy should be clearly stated to also apply to "undeveloped" software in 227.5.

B. Existing DFARS Clauses 252.227-7034, 7038, and 7039 do not appear in the proposed rule. An express comment that these clauses are being deleted or an indication that they are being carried forward would be appreciated.

II. Copyright Ownership by Contractor

Recognition that the contractor owns the copyrights in the existing 7013 "clause", para (e), should be retained in the proposed rule. We recommend that the language in existing 7013, para (e) (1) - (4) be carried forward into the new 7013 clause. We urge that proposed para (d) be rewritten and retitled to address copyrights across the board, not just "Third party copyrighted data". In this regard, the existing copyright "note" in para (e) (4) is of major importance to contractors in that it clarifies that the Government's copyright license is for "reproduction" "by or for" the U.S. Government and thereby defines "Government purposes" under e(1). The proposed rule would arguably omit these e (1) and e (4) limitations, and create the misleading impression in some minds that copyrighted data and software could be reproduced for the benefit of commercial parties or foreign Governments. This does not seem to be the intent of the new rule since no agreement or concurrence in so major a change can be found anywhere in the Committee comments. Further, such a change would be economically damaging to developer contractors who must increasingly depend on foreign markets and commercial application of defense products and software to sustain their economic viability in the current declining domestic defense market.

We thus believe that the proposed para (d) would jeopardize an important incentive to contractors who develope defense technology and increase piracy of data and software in foreign and commercial markets. We strongly urge that the present copyright language in para (e) be retained.

III. Definition of "Government Purpose"

The new definition is too ambiguous.

The proposed rule defines Government purpose as "any activity in which the United States is a party, including agreements, sales or transfers by the U.S. Government" (paraphrased). The current copyright clause (and patent clause at FAR 52.227-12) limit the U.S. Government's license to essentially a license "by or for" the U.S. Government, i.e. United States government purposes. We believe Government purposes should continue to be limited to contracts for the direct benefit of the U.S. Government. As in our previous comment, we believe that the proposed change is significant and would tremendously impact developers at a time when foreign and commercial markets are critical to their economic viability and when these contractors, so critical to our national security, are fighting for their economic lives. Also, why should a contractor be deprived of a competitive edge in the foreign and commercial market, even for unlimited rights data when the U.S. Government has a royalty free license for its own purposes. Again, the Committee comments carry no discussion on this expansion of the definition of "Government purpose" compared to the prior provisions. Accordingly, we believe it was not their intent to make such a fundamental change. We therefore strongly urge that the proposed rule be clarified to limit Government purposes to "contracts or agreements for which the U.S. Government is a party and the end beneficiary".

IV. Definition of "Developed".

We believe the proposed rule should not continue to sidestep recognizing that "development" can be satisfied by computer simulation. Clearly, the proposed rule and the existing rule all recognize that "development" need not rise to the level of "actual reduction to practice". However, under current case law and as the attached legal opinion clearly demonstrates, there is no per se rule against simulation being a reduction to practice. We respectfully urge that the definition of "developed" be revised to indicate that a computer simulation will be considered developed when the item, component, or process, when working, conforms to the simulation except for "minor modifications". We believe this change would recognize the tremendous strides made in simulation and avoid undue friction and litigation based on basic unfairness and denial of commercial reality.

We note that prior to having a working item, component or process, rights in relevant data will be determined based on source of funding (227.403-4).

(End)

KIRKLAND & ELLIS
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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April 14, 1994

Via Facsimile

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William C. Schubert
Santa Barbara Research Center
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Re: Actual Reduction to Practice By Computer Simulation In Government Contracts

Dear Mike and Bill:

You have asked us whether a computer simulation of an invention can constitute an actual reduction to practice for the purposes of determining whether the invention is or is not a "Subject Invention" under FAR 27.303(a).

The issue you have raised is a novel one which no court has directly decided. It is thus not possible to predict with certainty what a court would hold. However, properly instructed, a court should hold that a computer simulation can constitute an actual reduction to practice for the purposes of FAR 27.303(a) and FAR 522.227-12(a)(6), provided there are adequate indicia that the computer simulation reliably demonstrates the workability of the invention for its intended purpose.

I. Background

According to Federal Acquisition Regulation ("FAR") 27.303(a)(1), all Government contracts must contain a "Patent Rights Clause" granting the Government a royalty-free license under patents for "Subject Inventions" developed in connection with the contract:

> The contractor may retain the right, title, and interests throughout the world to each subject invention... [but] the Federal Government shall have a non-exclusive, nontransferable, irrevocable, paid up license to practice or have practiced for on behalf of

the United States the subject invention throughout the world.

FAR 52.227(b).

"Subject Invention" is defined in the regulations as "any invention of the contractor conceived or first actually reduced to practice in the performance of work under th[e] contract; . . . ." FAR 52.227-12(a)(6).

You have posited the following hypothetical situation: Hughes simulates a novel and unobvious invention on a computer prior to the execution of a Government contract. The invention is actually built for the first time after the contract is executed. The invention, upon being built, works for its intended purpose as predicted by the computer simulation with only minor modification, if any.

The issue is whether the computer simulation would constitute a first actual reduction to practice such that the invention is not a Subject Invention under the Patent Rights Clause.

II. Discussion

A. Actual Reduction To Practice In General

The Federal Circuit has held, in the context of the Patent Rights Clause in Government contracts, that reduction to practice occurs "'when it is established that the invention will perform its intended function beyond a probability of failure,' so that whatever minor adjustments thereafter required may be considered mere perfecting modifications." Hazeltine Corp. v. United States, 820 F.2d 1190, 1196 (Fed. Cir. 1987) (quoting McDonnell Douglas Corp. v. United States, 670 F.2d 156, 161 (Ct. Cl. 1982)). However, if subsequent changes are necessary that are of "critical importance to achieving the objectives of the invention," then reduction to practice has not been shown. Leesona Corp. v. United States, 530 F.2d 896, 910 (Ct. Cl. 1976).

The Federal Circuit imposes a "rule of reason" standard in the determination of whether an actual reduction to practice has occurred. Holmwood v. Sugavanam, 948 F.2d 1236, 1238 (Fed. Cir. 1991). This rule requires the fact finder to "examine,

analyze, and evaluate reasonably all pertinent evidence" relating to an alleged actual reduction to practice. Id. at 1239.

Testing of an invention under its actual intended operating conditions is not required. The Court of Claims has held that

> [i]n assessing the evidence bearing on a reduction to practice question, an impossibly high standard should not be exacted; rather, the practicalities of the situation must be assessed and a determination made as to whether, under the circumstances, the tests conducted were sufficiently comprehensive to demonstrate the workability of the device.

Bendix Corp. v. United States, 600 F.2d 1364, 1370 (Ct. Cl. 1979).

Thus, "tests performed outside the intended environment can be sufficient to show reduction to practice if the testing conditions are sufficiently similar to those of the intended environment." DSL Dynamic Sciences, Ltd. v. Union Switch & Signal, Inc., 928 F.2d 1122, 1125 (Fed. Cir. 1991) (testing of railroad coupling for caboose adequately simulated by tests on freight car). See also, e.g., Williams v. NASA, 463 F.2d 1391, 1399 (CCPA 1972) (laboratory testing of invention intended for use in space adequately demonstrated workability of device for intended purpose); Eastern Rotocraft Corp. v. United States, 384 F.2d 429, 431 (Ct. Cl. 1967) (ground testing of cargo net intended for use in airplane adequately demonstrated workability of invention).[1]

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[1] The purpose of the actual reduction to practice requirement in the Patent Rights Clause is to provide the Government rights where it funded the development of the invention. McDonnell Douglas Corp. v. United States, 670 F.2d 156, 163 (Ct. Cl. 1982) ("One major aim of the Subject Invention provision is to protect the Government from having to pay for using an invention which it significantly helped to develop.") Generally, where the Government has borne the risk of demonstrating the invention's utility for its intended purpose, it is entitled to the right to practice the invention without compensation to the contractor. On the other hand, where the

(continued...)

B. Actual Reduction To Practice By Computer Simulation

1. Precedent Wherein The Issue Was Raised

Properly interpreted, the foregoing authority establishes that if there are sufficient indicia that Hughes' computer simulation reliably demonstrates that the invention will work for its intended purpose "beyond a probability of failure," then a properly instructed court should hold that an actual reduction to practice occurred when the invention was simulated on computer.

We have located only one case that has considered the issue of whether a computer simulation can be an actual reduction to practice. In McDonnell Douglas Corp. v. United States, 670 F.2d 156, 161 (Ct. Cl. 1982), the patented invention comprised a flight guidance logic system for an antitank missile. McDonnell had simulated the flight guidance system on computer prior to the execution of a contract with the Government. The missile was not actually built and flown until after the contract was in force.

McDonnell argued that the patented invention was not a Subject Invention under the Patent Rights Clause because the computer simulation constituted an actual reduction to practice prior to the contract. The Court of Claims did not directly decide whether a computer simulation could ever constitute an actual reduction to practice under FAR 52.227-12(a)(6). Rather, the Court held, on the facts of the case before it, that no actual reduction to practice could have taken place prior to the contract because actual flight testing of the missile demonstrated "significant flaws" in the design of the flight guidance system. These flaws conclusively demonstrated that the computer simulation was inadequate to prove the workability of the invention for its intended purpose. Id. at 161. Thus, the Court stated that "[t]ests which fail to simulate the varying and

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[1] (...continued)
contractor has borne the risk of development, the contractor is generally entitled to compensation for use of the invention by the Government. Cf. Dowty Decoto, Inc. v. Dept. of the Navy, 883 F.2d 774, 778-79 (9th Cir. 1989) (item was "developed" by contractor when contractor took the risk of investing money to transform the invention from a speculative idea into a workable item).

multiple conditions of the invention's intended environment will not serve to prove the operability, stability and reliability of the invention for practical use." Id. at 162.

The trial division of the Court of Claims, in McDonnell Douglas, did discuss without deciding whether a computer simulation could be considered an actual reduction to practice. In dicta, the Court stated that, "there is no valid basis for refusing to accept computer simulations as the full legal equivalent of an actual reduction to practice." McDonnell Douglas Corp. v. United States, 208 USPQ 728, 733 (Ct. Cl. Tr. Div. 1980). The full Court of Claims did not comment on the trial division's statement in the course of its review. The statement does suggest that a court is likely to endorse the argument that a computer simulation could be considered an actual reduction to practice in appropriate circumstances.[2]

2. Application Of Precedent To Computer Simulations

The reasoning in the McDonnell Douglas cases (both the trial decision and appellate decision of the Court of Claims), combined with the general legal principles discussed in part II.A, ante, indicates that a properly instructed court should hold that Hughes' computer simulations constitute an actual reduction to practice, provided there are adequate indicia that the computer simulation reliably demonstrates the workability of the invention for its intended purpose. However, because no court has directly addressed the issue, it can not be said with certainty that a court would so hold.

One persuasive indicia of reliability is whether subsequent testing of a physical embodiment of the invention verifies the predictions made in the computer simulation that the invention will work for its intended purpose without

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2 In addition, a recent Federal Circuit case, Sewall v. Walters, No. 93-1230, Slip Op. at 11 (Fed. Cir. Apr. 7, 1994), held that a successful computer simulation of an invention, which verified the operability of the inventor's postulates, supported a holding of a conception prior to the date of the simulation. The issue of whether the computer simulation supported an actual reduction to practice was not before the Court. However, the Court's reasoning may indicate some level of judicial acceptance of computer simulations as evidence on invention issues.

modifications of "critical importance to achieving the objectives of the invention." It is also important that the computer simulation mimic the varying and multiple conditions of the invention's intended environment.

If the computer simulation mimics the invention's intended environment and subsequent physical testing verifies the simulation, then a properly instructed court should hold that the computer simulation constituted an actual reduction to practice of the invention.

If subsequent modifications are necessary to make the invention work, the determination of whether a computer simulation is a reduction to practice will turn on whether these modifications are in the nature of "mere perfecting modifications." If the modifications are mere perfecting modifications, a properly instructed court should still hold that actual reduction to practice occurred during the computer simulation.

On the other hand, if subsequent testing of a physical embodiment of the invention indicates that critical modifications must be made to the embodiment that had been computer simulated, then a court would likely hold that the computer simulation did not prove that the invention was workable for its intended purpose and therefore did not constitute an actual reduction to practice.

In a close case, a court would probably entertain and consider expert testimony on the issue of whether any subsequent modifications were of "critical importance" or whether they were "mere perfecting modifications."

C. The Physical Embodiment Requirement

Language exists in some older cases that a court may interpret as holding that an actual physical embodiment of a device is a prerequisite for a holding of an actual reduction to practice. See, e.g., Eastern Rotocraft Corp. v. United States, 384 F.2d 429, 431 (Ct. Cl. 1967) ("Reduction to practice occurs when the workability of an invention can be demonstrated. Workability means that a physical form of the invention has been constructed which functions.") However, if properly instructed, a court should not regard this authority as requiring a per se requirement that a physical embodiment must always be constructed

to show an actual reduction to practice for at least four reasons.

First, in Eastern Rotocraft and other cases containing similar language, the courts were not presented with the facts posited here; i.e., a computer simulation coupled with sufficient indicia that the simulation reliably demonstrates the workability of the invention for its intended purpose. While statements that go beyond the issues presented in prior cases may be respected, the Federal Circuit has stated that such statements do not control later decisions where the issue is actually presented to the court. Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700, 708 n. 8 (Fed. Cir. 1992).

Second, later case law indicates that the Federal Circuit does not favor rigid, per se rules in the reduction to practice analysis. The Federal Circuit favors a "rule of reason" test, which requires the fact finder to "examine, analyze, and evaluate reasonably all pertinent evidence" relating to an alleged actual reduction to practice. Holmwood v. Sugavanam, supra. The Federal Circuit's adoption of a rule of reason test cautions against application of any per se rules relating to actual reduction to practice. Moreover, the Court of Claims' prohibition in Bendix Corp. v. United States, supra, against an "impossibly high standard" in view of the "practicalities of the situation" suggests that a physical embodiment is not required in appropriate circumstances.

Third, in McDonnell Douglas, wherein the issue of computer simulation was raised, the Court of Claims did not decide the case merely by reference to a per se rule requiring a physical embodiment. The Court's analysis suggests that a computer simulation could be considered an actual reduction to practice as of the date of the simulation. See section II.B., ante.

Fourth, as recognized by the Court of Claims Trial Division, technology has become increasingly reliant on computers to forecast, as well as verify, operations of highly sophisticated equipment. McDonnell Douglas, 208 USPQ at 733. The Court's recognition of this fact is even more true today than it was fourteen years ago when the Trial Division's opinion was issued.

Thus, a properly instructed court should not impose a rigid, per se requirement that a physical device be constructed as a prerequisite for a holding of an actual reduction to practice.

III. Conclusion

The hypothetical situation you have raised presents a legal issue of first impression. It is thus not possible to predict with certainty what a court would hold.

However, in the hypothetical situation that you posed, wherein the physical embodiment of the invention works as the computer simulation predicted, and the computer simulation accurately simulated the environment of the invention, a properly instructed court should hold that an actual reduction to practice had taken place as of the date of the computer simulation.

Please do not hesitate to call if you have any questions or comments.

Very truly yours,

KIRKLAND & ELLIS

By:
Philip C. Swain

#16 8/11/94

Integrated Dual-use Commercial Companies

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Frank Abbott
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August 10, 1994

Ms. Angelina Moy
DUSD (A&T) / DDP
1211 South Fern St.
Arlington, VA 22202-2808

Dear Ms. Moy,

This letter is forwarded on behalf of the Integrated Dual-Use Commercial Companies (IDCC) providing comments on DFARS Case 92-D010, the proposed rule to amend the DoD Federal Acquisition Regulation Supplement (DFARS) subpart 227.4 "Rights in Technical Data" and the corresponding clause DFARS 252.227-7013.

The IDCC is a consortium of large commercial companies. Its members are Alcoa, Corning, Cummins Engine, Dow Chemical, Dow Corning, DuPont, W.L. Gore and Associates, Hoechst Celanese, Honeywell and 3M. The IDCC believes that comprehensive changes are necessary in the acquisition process to allow the government and its prime contractors to purchase commercial products and services from commercial companies. The pending acquisition reform legislation is expected to address some of the barriers that currently inhibit commercial sales to the government. Regulatory reform of data rights is also essential. As product and data developers, IDCC member companies invested approximately $4.7 billion in R&D in 1993. Products or processes developed through this investment must be protected. Applicable technical data must be restricted from release or disclosure to others, since the products, processes and data represent the "life blood" of a commercial company's ability to compete on the world market.

The IDCC generally supports the positions taken by the Government - Industry Technical Data Committee in its report to the Secretary of Defense. Our comments on the policy issues that the committee identified as significant are as follows:

a. Basis for Allocating Data Rights - IDCC members believe strongly that the data creator owns the data and should have the exclusive right to license others. Clearly, this is the case where the data was developed through private funding. Where the government has fully funded the product or process, the government

should be able to receive data rights licenses that are needed consistent with its objectives. Where funding is mixed, appropriate licenses could be negotiated. However, it should be recognized that commercialization of products is served by allowing product or process creators to exclusively market technology created through private, government or a mix of funds. It should be recognized that commercial companies often invest substantial funds over many years to develop technology positions. This primary part of technology must be recognized. The position taken by the committee is acceptable if it is clear that government rights in data flow from a license granted by the data creator.

b. Definition of "Developed" - IDCC does not believe the current definition in regulations, using the concepts of existence and workability, are consistent with modern design and development practices. Computer aided design and manufacturing techniques often eliminate the need to reduce designs to practice and construct physical demonstrations to prove workability. Therefore, we believe that the use of automated design techniques should be permitted to substitute for the existence test, where it can be determined that simulation provides reasonable assurance that the item can be built.

c. Background Systems/Engineering Systems - The position taken by the committee whereby the expense definitions and treatment of indirect costs, which permit background and engineering systems to be considered items developed exclusively at private expense, is acceptable. Background systems, engineering systems and the intellectual property of commercial developers must be protected in order to encourage the availability of resultant products or services to the government.

d. Expense definitions and indirect costs. - The existing criterion of "Required for performance", which allows the government to claim unlimited rights in data for products developed at private expense with concurrent performance occurring under a government contract, is inconsistent with other statutory and regulatory requirements and is not acceptable. In addition, the current criterion allows the government similarly to claim unlimited rights where private funds were used by a subcontractor to develop a product that was necessary in performance of a contract or subcontract. The documented committee discussion on this issue was on the mark, where it was concluded and recommended that this " required for performance" criterion should be eliminated as the basis for the government claiming unlimited rights. The committee position where all non-government funds are considered private expense is clear and appropriate. Where mixed private and government funding is involved, the IDCC agrees that the DFARS clause 252.227-7013, "Rights in Technical Data and Computer Software" should be updated to reflect the concept of mixed funding.

With regard to the treatment of indirect expenses, IDCC strongly believes that all indirect expenses represent the allocation of private funds and should be considered private expenses. The Cost Accounting Standards preclude

inconsistent cost charging. The committee position in the work product advocating that costs allocated to indirect cost pools should be considered private expenses is appropriate.

e. Data Rights under Mixed Funding Situations - 10 USC 2320 requires the government and its contractors to negotiate rights in data developed at mixed expense. The experience of member companies is that too often government contracting officers demand unlimited rights in these situations. While the issue gets resolved, it often takes months of discussions and negotiations. The government contracting officer's position of demanding unlimited rights and refusing to accept a license is inconsistent with statute and leads to the lack of confidence that a commercial supplier's rights will be protected from use by others.

The committee work product recommendation for adoption of government purpose rights for a nominal 5 year period commencing with the award of a contract to the data developer is acceptable conceptually, as long as provision is also made for negotiation of other than a 5 year baseline where appropriate. The purpose is to protect the rights of the product, process and data developer in its pursuit of commercialization. It must be recognized that the process of commercialization cannot be tied to a 5 year period but must reflect the specific circumstances associated with the contract, subcontract and product. In many cases the committee position for a 5 year period will not be appropriate and this should be recognized up front. We would also suggest for consideration changing the start date from contract award to contract completion.

f. Commercial Items - IDCC members have very serious concerns with the provisions of 10 USC 2320 that permit the government to use or disclose form, fit or function data for commercial items. The disclosure of commercial data can impact a company's commercial business. It is strongly recommended that the existing DFARS 211 technical data requirements be replaced with a policy requiring the negotiation of specific license rights in conjunction with commercial items and that the policy prohibit the release of any commercial product data without the developer's concurrence. Normally, the government should not seek data beyond that which is customarily provided to commercial customers.

g. Separate Treatment for Computer Software - The committee's work product, which proposes to separate computer software and computer software documentation from technical data requirements and further distinguishes between commercial and non-commercial software provides a reasonable approach to protect the interests of commercial companies.

h. Copyright Considerations - IDCC members do not believe the committee work product position combining the copyright and data rights licenses will necessarily clarify current regulations. Since the rights intended to be conveyed by data rights

and copyrights licenses are frequently not the same, it is recommended that the rights be separately identified in appropriate regulations.

i. Marking Requirements - IDCC members strongly oppose the "mark or lose" provisions contained in current regulations. The inadvertent absence of a marking should not change the reasons for which data was provided, such as government purpose rights. Continuation of these requirements places a burden on industry, especially commercial companies, to ensure that every piece of data is appropriately marked. Where commercial companies have provided data on commercial products, it is strongly recommended that controls be established to consult with the data creator prior to the release of data that is not marked to preclude inadvertent release.

j. Contractors as Technical Data Repositories - IDCC member companies support the committee work products approach whereby the government maintains data repositories but allows the establishment of contractor data repositories when consistent with defense agency procedures. One of the circumstances in which commercial data repositories should be considered is for commercial products or processes, whereby the data developer would be the data repository and paid for performing the service.

The IDCC position on computer software is consistent with the position on each data rights issue discussed above.

The Government - Industry Technical Data Committee recommendations as discussed in its report, will provide significant improvement to current regulations on data rights. However, it is also important that efforts be made to provide training to government technical, program and contracting personnel with regard to data rights. As commercial firms, IDCC members often face demands for unlimited rights, without the requester being able to articulate why the government needs those rights. In the interest of promoting the use of commercial products, government personnel should request only those rights which are needed. These rights must be obtained through appropriate licenses. The regulations should clearly provide this guidance to contracting officers.

We thank you for the opportunity to comment on the Government - Industry Technical Data Committee report.

Sincerely,

Frank Abbott

Frank Abbott
Chairman

August 5, 1994

Deputy Director Major Policy Initiatives
1200 S. Fern St.
Arlington, Va. 22202-2808
Attn: Ms. Angelena Moy, OUSD (A&T)/DDP

Reference:DOD Proposed Rules, Rights in Technical Data; DAR Case 91-312.

The Independent Defense Contractors Association represents the interests of many small companies that must rely on Government-provided technical data in order to manufacture spare parts for the Department of Defense. In our opinion, the proposed language that will govern how technical data will be acquired by the Government and made available to "non-developers" will effectively deny our members the opportunity to continue to do business with the Government. It is no secret that the Original Equipment Manufacturers have a concerted agenda to re-capture the spare parts market in light of the down-sizing of major weapon systems programs. For the past three years, we have observed several initiatives on the part of OEMs to influence legislation and regulation that would make it more difficult for DOD to maintain a competitive environment for spare parts. Proposed data rights changes are merely one of several priorities which, if enacted, will become a welcome reality for them.

The areas of the proposed language that we find particularly objectionable are discussed below.

Under DFARS 227.403, "Noncommercial items or processes", and the clause at DFARS 252.7013, "Rights in Technical Data - Noncommercial Items", DOD would continue to be entitled to unlimited rights in data

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developed entirely at Government expense. DOD would, however, no longer be entitled to unlimited rights in data required for the performance of a Government contract. Moreover, DOD's technical data rights would turn in large part upon whether development is charged to DOD as a direct or indirect cost -- a potential source of significant abuse. For example, let's address the potential impact of the Section 807 committee proposal to treat development charged to the Government as an indirect expense to be paid for at "private expense". By deeming development paid for with Government funds as being "private expense", DOD would sanction the use of creative accounting to eliminate competition. Data rights would be determined based upon whether development is charged to DOD as a direct or indirect charge, rather than whether it is paid for by DOD. This is of great concern because:

- most engineering development expenses can be charged indirect;
- design engineering may be chargeable indirect;
- accounting systems can be structured to eliminate competition; and
- DOD underestimates the OEMs desire to regain the spare parts market.

The easiest way for an OEM to assure itself of noncompetitive awards would be to charge development expenses such as manufacturing production and engineering expense (MP&E) to the taxpayer as an indirect cost. After all, M P & E is recognized in the form for CASB disclosure statements as an indirect cost, and most OEMs' already charge M P & E indirect. The potential for abuse is apparent when one remembers that most drawings provided by DOD for purposes of competing for aircraft spare parts require additional information to comply with OEM manufacturing processes. Examples of these OEM manufacturing processes are nondestructive inspection, heat treating, welding, etc. It is extremely difficult and in many cases impossible to obtain source approval from the military without the OEM manufacturing processes and the right to use them.

The OEM manufacturing processes referenced on drawings for military parts are the same as those used for commercial aircraft. Therefore, it would appear that either they may have been or could be :

- developed with M P & E, charged to the Government as an indirect expense, or;

developed at private expense , although development was required for the performance of a Government contract.

In either case the proposed revisions would deprive sources -- other than the OEM -- of essential data needed to compete. Even companies that manufactured the part for the OEM would be out of luck. If they had OEM manufacturing process data they could be precluded by limited rights legends from using it for direct Government work. The role of manufacturing processes in creating competition is significant.

The loophole could be used to preclude competition not only for parts for new weapon systems, but also for parts that have been competitively purchased for many years. OEMs manufacturing processes are constantly undergoing revision. An insignificant revision charged as indirect expense would result in a missing link that prevents alternate sources from competing. Under the proposed revision. OEM's could corner the market by charging minor revisions to the Government as indirect expenses. DOD would not obtain unlimited data rights even if the development reflected in the revision was required for performance of a Government contract.

Moreover, even though only a portion of development is claimed to have been at private expense, the Government would automatically have only Government Purpose Rights (GPR) in the data for five years (see DFARS 227.403.5(b) as opposed to unlimited rights unless otherwise negotiated under existing regulations. Under the proposed regulations, an OEM would be able to limit DOD to GPR data by paying for (or charging as an indirect cost) an insignificant portion of development while the DOD funds the rest. Although a competitor could use GPR data to compete for DOD contracts, it could not use it to compete for commercial or direct foreign government sales (see recommended DFARS 252.7013)1)(11), (12). Competition on DOD procurements would also be limited under the Committee's recommended changes because there is no mechanism in place or provided for to permit potential competitors timely access to GPR data. Specifically, in order to compete, alternate sources need access to pertinent technical data before a solicitation is issued to obtain necessary

source approvals and to submit a timely bid or proposal. The absence of competition will increase costs to commercial and foreign government buyers. Since many direct foreign government sales are funded with U.S. grant or aid funds, the Committee's recommendations would correspondingly increase costs to the U.S. taxpayer.

In summary, while we have objections to many of the proposed changes, we are most concened about the language that permits the treatment of indirect costs as a private expense. Our recommendation is that the existing language of the 1988 interim regulation be allowed to govern how costs (whether direct or indirect) affect the question of data rights.

Wendy Allen

Wendy Allen
Vice-President, Government Affa irs

11-35 8/23/94

Jo-Bar Mfg. Corporation

"Since 1951"

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Manufacturers of
Aircraft Fittings
Hydraulic Assemblies

August 15,1994

Deputy Director Major Policy Initiatives
1200 S.Fern St.
Arlington,Va. 22202-2808

ATTN: Ms.Angelene Moy OUSD(A&T)DDP

Subject: Procurement Reform DAR Case 91-312

Dear Mr. Chairman:

Congress is reviewing reform measures S.1587,H.R.2238, H.R. 3586,H.R.4263 and H.R. 4328. While we agree that the procurement system is complex, it took many years to accomplish the many good features and opportunities for small business, women-owned business and minority firms.

1. A critical component of procurement reform increases the small purchases value from $25000.00 to $100,000.00. Small firms will be hurt if these purchases are not adequately publicized in the Commerce Business Daily or the electronic equivalent. If it is not adequately publicized,small firms would be precluded from bidding; this reduced competition would raise the governments procurement costs.

2. Maintaining the small business smaller purchase reserve for purchases less than $2500.00 is the bread and butter of many smaller operations. While we agree that the paperwork should be minimal, this reserve is very necessary because these firms are often not able to compete for larger federal acquisitions.

3. The requirement for detailed reporting for any purchase of $10,000.00 or more is necessary to measure the results of increasing the threshold.

4. The linking of the small claims procedures to the simplified acquisition threshold from $10,000.00 to $100,000.00 would allow a more efficient process.

5. The Defense Acquisition Pilot Program and the proposed waivers include eliminating small business set-asides, purchase reserves, and, small disadvantaged business subcontracting. We oppose these proposals, as they not only eliminate specific opportunities for small business, but, add to the convenience of established close relationships in the administration. Waivers of statutes should not be undertaken so casually, and, we oppose blanket authority given to the Administrator of OFPP.

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Manufacturers of Aircraft Fittings Hydraulic Assemblies

6. We oppose the allowing of individual agencies to establish their own market place acceptance definition. This criteria should be in tune with small business, and, not set standards that are out of reach of many small firms. The COC program is a very successful government initiative that has helped many small firms. It would not be productive to allow development of procedures that would cancel the intended purpose of the COC program.

7. The development of technical data information, and, whether the development cost was charged and paid for by the DOD as a direct or indirect charge, should be determined available for competitive purposes, in the interest of small business and greater competition and reduced government costs. A careful analysis of the impact on small manufacturers must be made.

While reform efforts to simplify the procurement process are endorsed, we feel it must not be carried on the shoulders of small business.

Very truly yours,

JO-BAR Mfg. Corporation

Alga Masley, Sec. Treas.

AM:lc

#42
9/9/94

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September 9, 1994

Ms. Angelena Moy
OUSD (A&T)/DDP
Deputy Director/Major Policy Initiatives
1200 South Fern Street
Arlington, Va. 22202-2808

Re: DAR Case 91-312

Dear Ms. Moy:

Enclosed are comments concerning the above-referenced amendments to the Defense Federal Acquisition Regulation Supplement (Rights in Technical Data).

Sincerely,

Ronald K. Henry

PROVIDING COMPUTER SOFTWARE AND DOCUMENTATION TO FOREIGN PARTIES AND INTERNATIONAL ORGANIZATIONS

The proposed amendments to the Defense Federal Acquisition Regulation Supplement (Rights in Technical Data) grant the government "government purpose rights" in computer software developed with mixed funding.

"Government purpose rights" entitle the government to release or disclose computer software and documentation outside the government and to authorize persons to whom release or disclosure has been made "to use, modify, reproduce, release, perform, display, or disclose the software or documentation *for United States government purposes*." 252.227-7014(a)(11) [Emphasis supplied.]

The term "government purpose", however, is defined as "any activity in which the United States Government is a party, *including cooperative agreements with international or multinational defense organizations or sales or transfers by the United States Government to foreign governments or international organizations*." 252.227-7014(a)(10) [Emphasis supplied.]

The proposed rule also expressly provides that, subject to Federal export controls and other national security laws and regulations, the Department of Defense may release or disclose computer software or documentation in which it has obtained "unlimited rights" to foreign governments, foreign contractors, and international organizations. Where the government has

obtained software "for which restrictions on use, release, or disclosure have been asserted" release and disclosure in connection with foreign contracts is still permitted, but only if the intended recipient has agreed to be bound by U.S. government regulations governing the use, release, or disclosure of restricted data. 227.503-16.

There are no other stated conditions on transfers to foreign buyers. For example, there is no express requirement that the government consider the impact of the transfer on the domestic defense industrial base, nor is there any express requirement that the government charge foreign users for access to licensed software.

Therefore, whether software and documentation is obtained with "government purpose rights" or "unlimited rights," the U. S. government may assert the right to transfer it directly to foreign governments or to others for the use of foreign governments -- without charge -- and without regard to its impact on the industrial base.

Two concerns are raised by the possible assertion of such rights under these provisions.

First, software and documentation obtained with "government purpose" rights -- purchased at U.S. taxpayer expense for performance of U.S. government contracts -- should be limited to uses by and for the *United States* government, not foreign governments or foreign corporations.

The justification for "government purpose" rights is to facilitate the use of software and documentation by and within the government, and to promote competition in U. S. government procurements -- not to subsidize procurements by foreign governments or foreign corporations.

Second, the possible exercise of "government purpose rights" and "unlimited rights" to allow the use of government-acquired software and documentation in support of contracts with foreign governments or foreign corporations not only subsidizes foreign buyers at the expense of the United States taxpayer, but also deprives the software developer of valuable markets. By turning costly software into a "free good," the government destroys its value to the developer and discourages developers from competing for U.S. government contracts.

Any use of this provision to confer a free benefit on foreign buyers, at the expense of U.S. developers who could otherwise sell such software in foreign markets, undermines U.S. export policies and further contributes to our balance of trade deficit. The risk of improper subsidies to foreign buyers and the risk of lost export sales are particularly severe concerns because the proposed rule would convert "government purpose" rights into "unlimited rights" after five years. Such a conversion may encourage the government to assert this authority in support of commercial contracts with no colorable claim to a "government purpose."

The import of this provision was succinctly explained in "supplemental views" submitted by a group of industry members to the 807 report:

> The government, after expiration [of the government purpose rights] receives unlimited rights in the technical data[,] thereby making that data available on a world wide basis. The government members of the committee presented a number of justifications for this expiration, significant among them being the argument that it was an intolerable burden to maintain the security required on government purpose rights for an indefinite period. In addition, *the expiration was included to give the spare parts replicators greater opportunity to sell spare parts directly to foreign governments.* We believe that these reasons are insufficient to justify an automatic expiration of rights. *The period should at least be extended or, preferably, made indefinite to encourage commercialization and provide support for U.S. industry.* 807 Report, Supplemental Views of Certain Industry Members, at 4. [Emphasis supplied.]

If the Defense Department is determined to claim authority to transfer software and documentation to or for the benefit of foreign governments, the exercise of this power should be constrained. At a minimum, the government should charge foreign users the market value of the software and documentation it proposes to transfer. In addition, the Department of Defense should be required to consult with the Department of Commerce before authorizing any such transfer, in order to assess the impact of the transfer on the defense industrial base, U.S. balance of payments, and U.S. trade policy.

Although the government could, on its own initiative, refrain from asserting the right to give away software and documentation in support of foreign contracts, amendment of the

rule would provide firm guidance to agencies and contractors alike. In either event, in the implementation of these rules, the use of government-held licenses to subsidize foreign government purchases is a waste of limited and valuable resources, and contrary to sound trade policies.

Therefore:

(A) the exercise of "government purposes" licenses should be limited to uses by and for the *United States* government;

(B) the transfer of software and software documentation by the U.S. government at less than fair market value to or in support of a contract with a foreign buyer should be prohibited unless the Agency head states that the transfer is necessary to the national security interests of the United States, with a presumption against such a finding in any case in which the copyright holder is willing to contract with the foreign buyer for purchase of the software and documentation at fair market value; and

(C) consultation with the Department of Commerce should be required before authorizing any transfer of software or software documentation at less than fair market value, if the transfer is to or in support of a contract with a foreign buyer in order that the DOC might assess the impact of the proposed transfer on the defense industrial base and U.S. trade policies.

#41
recd 9/9/94

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September 8, 1994
Via Federal Express No. 1412304946

Deputy Director
Major Policy Initiatives
PDUSD (A&T) DP
Attn: Ms. Angelina Moy
1211 Fern Street, Room C-109
Arlington, VA 22202-2808
Phone: 703-604-5386

Re: DAR Care 91-312
DFARS Rights in Technical Data
Comments on Proposed Rules of 6/20/94

Dear Ms. Moy:

Reference is made to the DFARS rules on rights in technical data that were proposed in the Federal Register of June 20, 1994. As prime contractor and subcontractor, M/A-COM, Inc., and its subsidiaries ("M/A-COM") have supplied technical data and computer software to the U.S. Department of Defense ("DoD"). M/A-COM is a leading supplier to the wireless telecommunications, surveillance, and defense-related industries of radio frequency, microwave, and millimeter wave semiconductors and components. Currently, one third of M/A-COM's business is for DoD applications. M/A-COM has several comments on the proposed rules. The first two are the most important to us, but we feel strongly about all of them. Our comments are as follows:

1. We strongly urge that a **single** set of data rights clauses be adopted for use by the DoD and the non-DoD agencies of the US Government. M/A-COM is a medium-sized Government contractor. We had total sales of $340 million in fiscal year 1993, of which between 43% and 50% were direct or indirect sales to the Government. It is disproportionately expensive for a company of our size when compared to larger Government suppliers to have to set up, staff, and implement procedures under two sets of extremely detailed data rights clauses. The penalty if we don't is the potential loss of our data rights to the Government. Whether we do or don't, we are at a very significant disadvantage compared to the many larger Government suppliers.

2. We strongly recommend that the complex restrictive marking requirements of proposed rules 252.227-7013(f) and 252.227-7014(f) be deleted and that a **single** legend be used whenever the Government has less than unlimited rights. The proposed rules have no less than six different legends to use, depending on which of the following rights are granted: (1) government purpose rights in technical data, (2) limited rights in technical data, (3) special license rights in

technical data, (4) government purpose rights in computer software, (5) limited rights in computer software, or (6) special license rights in computer software. Moreover, the appropriate legend must appear (a) on the container or transmittal letter and (b) on **every** page where the restricted data appears, and the restricted technical data on each page must be **specifically identified** by circling, underscoring, or noting. There may be more than one type of rights on a given page, requiring two legends and additional specific identification on each such page. This is absurdly complex and burdensome, especially for medium-sized contractors such as M/A-COM. If we fail to comply, the penalty is potential loss of our data rights. Just as under comment no. 1, whether we comply, at disproportionate cost, or we don't, we are put at a very significant disadvantage compared to larger suppliers.

We have three specific recommendations. First, no specific identification by circling, underscoring, noting, etc., should be required. Second, the legend should only be required on the first page of the technical data or computer software. Third, there should be only a single legend to be used, no matter what data rights (less than unlimited) are granted to the Government. A suggested legend is as follows:

> RESTRICTED GOVERNMENT DATA RIGHTS
> Contract No. _____
> Contractor Name _____
> Contractor Address _____
> _____
> The Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data and/or computer software contained herein, or to permit others to do so, are restricted by the above contract. Any person, other than the Government, who has been provided access to all or any part hereof must promptly notify the above contractor. Any reproduction permitted under the contract of all or any portion hereof must also reproduce this legend.

This approach is sufficient in most commercial contexts and should be sufficient in Government contracting. It puts a potential user on notice and provides him/her with the contractor's name and address so that he/she can inquire about the restrictions. Moreover, even within the proposed rules themselves, such inquiry notice is contemplated by special license rights legends.

3. As to identification and assertion of data rights in proposed rules 252.227-7013(e)(2) and 252.227-7017(c), it should be enough for the contractor to identify the technical data in which the data rights are asserted. The contractor should not **also** be required to identify the associated item, component or process. The contracting officer could ask for this information on specific technical data if desired, but in most cases this additional level of detail is unnecessary.

4. Proposed rules 252.227-7016(c) and (d) effectively give the Government, subsequent to contract award, unlimited rights in data contained in proposals, unless the offeror imposes restrictions. This is backwards. The general rule should be that the Government has no rights other than to evaluate the data unless otherwise provided in the contract, if awarded. This is the present rule and it ought not to change.

5. The proposed rules that prescribe the use of certain proposed contract clauses seem to contemplate that, in a given contract, there will be either (a) commercial technical data (or commercial software) **or** (b) non-commercial technical data (or non-commercial software). (See, e.g., 227.406(a) prescribing 252.227-7013, 227.503-6(a)(1) prescribing 252.227-7014, and 227.402-3 prescribing 252.227-7015.) This may not be the case. A single contract may cover both. Accordingly, insertions must be made in the prescribed contract clauses to make clear whether commercial or non-commercial data is concerned. For example, "pertaining to non-commercial items, components, or processes" should be inserted in the first sentence of 252.227-7013(a)(14) after the word "information" or at the end of the sentence; and "pertaining to commercial items, components, or processes" should be inserted in the first sentence of 252.227-7015(a)(5) after the word "information" or at the end of the sentence.

6. As to data in which the Government is initially granted government purpose rights, proposed rules 252.227-7013(b)(2) and 252.227-7014(b)(2) provide that the Government shall have unlimited rights after five years, unless otherwise agreed. The present rule does not specify a default period after which the rights become unlimited. The present approach should be retained or a much longer default period provided, e.g., fifteen (15) years, which approximates the 17-year period of patent protection. Many, if not most technologies have a life of significantly more than five years.

7. We recommend that following badly needed clarifying sentence be added to the "relation to patents" provisions (e.g., proposed rules 252.227-7013(b)(2) and 252.227-7014(b)(2)):

> To the extent that any patent rights clause contained in this contract such as 52.227-11, 52-227-12, or 52-227-13 applies to any invention described or contained in any technical data or computer software or computer software documentation, the patent rights clause shall apply and this clause clause shall not apply.

We thank you for your consideration of these comments. If time permits, a specific response would be appreciated.

Sincerely,

Ralph V. G. Bakkensen
Assistant General Counsel &
Intellectual Property Coordinator

cc: Kermit Birchfield
Bob Fucile

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August 15, 1994

Ms. Angelina Moy
DUSD (A&T) / DDP
1211 South Fern St.
Arlington, VA 22202-2808

Dear Ms. Moy,

This letter is to provide comments on DFARS case 92-D010. I am an independent consultant working with commercial firms to enable them to accept government business without segregation of activities. I am primarily involved with large commercial firms and specifically a group called IDCC (Integrated Dual-use Commercial Companies). The IDCC Chairman will separately submit comments regarding the 807 panel recommendations. The material that follows supports the fact that the proposed changes are needed if the government is to tap the vast technological resources that exist in commercial firms. This information was developed in doing research for an article that I am writing on commercial firms doing R&D with the government.

Considering the leaders in each of the 37 industry groups from the 1994 Business Week R&D Scoreboard, 95% of the firms that invest the greatest percentage of their sales in R&D do $2 million or less in RDT&E with DOD. The two exceptions are 3M and Zenith.

68 % of the firms that invested the most dollars in R&D in each of the 37 industry groups had less than $2 million in DOD RDT&E awards. These 37 firms invested more than $30 Billion in R&D in 1993. After eliminating the firms that invested more than $800 million (Boeing, GM, IBM, GE, 3M, Motorola, Xerox, Intel, and AT&T - all firms that can segregate government R&D) those avoiding DOD R&D contracts increases to 87 percent.

91% of the Fortune 500 Industrials had less than $2 million in RDT&E DOD awards. Why?

One of the major reasons that commercial firms are reluctant to do R&D with the government is the fear of losing or tainting intellectual property that has been developed to provide the future of the firm.

The sources of the above information are the *1994 Business Week R&D Scoreboard*, *The 1994 Fortune 500 Industrials*, and the BNA publication titled *500 Contractors Receiving the Largest Dollar Volume of Prime Contracts Awards For Research, Development, Test, and Evaluation, Fiscal 1992*. I will be updating the above material and completing the article as soon as I receive the data for RDT&E for fiscal 1993.

Hopefully this information is helpful.

Robert C. Spreng

MOTOROLA

August 9, 1994

Department of Defense
Deputy Director Major Policy Initiatives
ATTN: Ms. Angelena Moy, OUSDA (A&T)/DDP
1211 Fern Street, Room C-109
Arlington, VA 22202-2808

Dear Ms. Moy:

Reference Federal Register 20 June, 1994 (59 FR 31584) which requested public comments on proposed changes to the Defense Federal Acquisition Regulations Supplement regarding Rights in Technical Data. Motorola appreciates the opportunity to provide the attached comments and recommendations for your consideration in developing a final rule.

Very truly yours,

James E. Muehleisen

Motorola Inc., Government and Systems Technology Group
8201 E. McDowell Rd., P.O. Box 1417, Scottsdale, AZ 85252

August 9, 1994

Comments Regarding Proposed DFAR Rules on Intellectual Property Rights

The Intellectual Property Department of Motorola's Government Systems & Technology Group (GSTG) has reviewed the Department of Defense proposed rule regarding rights in technical data and computer software as published in the Federal Register, Vol. 59, No. 117, June 20, 1994. In response to the proposed rule changes Motorola GSTG has the following overall comments:

1. On April 6, 1994, the proposed regulations were forwarded to the Senate Armed Services Committee from Deputy Secretary of Defense John Deutch as a report containing the recommendations of the § 807 Government-Industry Technical Data Committee. In the forwarding letter, Mr. Deutch remarks that the recommendations satisfy an important goal in that they **"do not affect the ability of any contractor, including spare parts replicators, to use data developed partially or totally with government funds to compete for U.S. Government contracts or subcontracts."**

As a first comment, note that such a goal is achievable without granting unlimited rights to the U.S. Government.

The Government itself has no need for rights beyond GPLR, and GPLR treatment is consistent with the general royalty-free patent license for Government purposes which the Government receives in patentable intellectual property under FAR 52.227-12(JUN 1989).

Unlimited rights, which allow for non-Governmental uses, should be beyond the regulatory interest and scope of the proposed rule.

Even if unlimited rights are granted to ostensibly benefit the spare / repair parts contractors and subcontractors, the granting of unlimited rights to the Government has an extreme adverse effect on businesses that are data and software creators (including small businesses). The adverse effect can be so severe as to cause some businesses to refuse altogether to deal with the Government.

A significant substantive change to stimulate business and to improve the quality and innovativeness of the technology available to the Government would be to eliminate unlimited rights in computer software and technical data and to implement a rule providing only for limited or restricted rights and GPLR.

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2. **The proposed regulations address previous omissions in the treatment of computer software** (including the availability of GPLR, the opportunity to segregate restricted rights code from unlimited rights code, and the validation process regarding disputes in the marking of code) which is appropriate.

However, the proposed rule addresses those deficiencies by creating a completely separate set of provisions dealing specifically with the rights in computer software.

Because there is significant overlap between rights in technical data and rights in computer software, however, the creation of a completely new section unnecessarily complicates the regulation by making it excessively long and redundant.

The same objective of complete coverage of rights in computer software could have been accomplished more efficiently by making additions only to the extent rights in computer software differ or require additional definitions. By determining rights in computer software using the same definitions and rules as for technical data (to the maximum extent possible), and clearly pointing out where the treatment of computer software differs from the treatment of technical data, the user would have explicit clarification as to distinctions in treatment. As the draft rule is proposed, such distinctions are discernible only by detailed study and comparison of the technical data and computer software sections.

3. **The following are viewed as potentially negative changes in the proposed rule:**

a. the proposed rule states that private expense includes costs not allocated to a Government contract; there would appear to be potential ambiguity in cost accounting which might cause a problem--also, this language may invite contractors to selectively charge important developments to other than Government contracts in a sub-optimum manner in order to protect key technology;

b. the data developer is obliged to identify and list data at the outset of the contract on which it will place restrictions on use, release, or disclosure; the developer can enlarge the listing during performance of the contract only (i) based on new information, or (ii) to correct inadvertent omissions which would not materially affected the source selection decision.

These proposed changes are significantly more burdensome and onerous than the current rule which allows the contractor to protect items, components, processes, or code different from that proposed at contract award if the developer gives notice before committing to the use of such items, components, processes, or code.

4. Notwithstanding the above, the following are viewed as positive changes. In comparison with the current rule, the proposed regulations provide:

a. additional clarification that developments accomplished with costs charged to indirect cost pools will be treated as development at private expense;

b. much greater clarity with respect to definitions related to computer software;

c. for the availability of GPLR automatically for items, components, or processes developed with mixed funding (rather than the contractor asking for such rights, along with negotiation); moreover, the five year period of GPLR can be extended by negotiation;

d. recognition of segregability or separability, under which the rights determination to modifications of particular items, components, or processes, or code are distinguished from the rights determination to the items, components, or processes; and

e. for the elimination of acquisition by the Government of unlimited rights if the development of items, components, or processes was "required for the performance of a government contract or subcontract".

#38
8/20/94

August 26, 1994

Ms. Angelena Moy
OUSD (A&T)/DDP
Deputy Director Major Policy Initiatives
1200 S. Fern Street
Arlington, VA 22202-2808

Dear Ms. Moy:

The undersigned industry associations appreciate the opportunity to comment on the proposed rule on Rights in Technical Data which was published in the Federal Register on June 20, 1994. We commend the efforts and results of the "807 Committee". In our judgment, the proposed rule developed by the Committee reflects a considered treatment of the issues and the interests of both Government and private industry. It reflects reasonable compromises and practical solutions to many of the issues and problems inherent in the current interim regulation.

The 807 Committee product is the culmination of a ten-year effort to implement statuory provisions enacted in 1984 and codified at 10 U.S.C. 2320 and 2321. These provisions were enacted in part as a result of diverse regulations promulgated by the Military Services in the early 1980s, and were intended to achieve uniform regulations which balanced the interests and rights of the government and the creators of technical data. Several attempts to develop such regulations eventually resulted in the current (1988) interim regulation. However, this regulation did not achieve a fair allocation of rights, and industry was unsuccessful in its efforts to effect modifications.

Congress intervened to resolve this stalemate by including in the FY1992 DoD Authorization Act a provision directing the formation of a Federal Advisory Committee, which came to be known as the 807 Committee. The Committee provided a public forum in which representatives of all groups interested in technical data rights could meet and negotiate as equals. The Committee charter and format allowed the parties to fully discuss, debate, negotiate, and otherwise explore the needs, limits and views of each of the participants.

The final Committee work product, achieved only through extensive negotiations and compromise, does not and could not fully satisfy every individual or group. It is, however, the well-reasoned effort of dedicated representatives of every group and constituency impacted by the regulation, and represents a major advance in fairness of treatment of the creators' rights in technical data. We strongly believe the proposed regulation is a significant improvement over the current interim regulation, and should be the baseline for any future improvements.

We therefore recommend that the proposed regulation be adopted without substantive changes at this time. It is a significant improvement in the decade-long attempt to balance the interests and needs of the creators of technical data (many of whom are represented by the undersigned associations), the users of technical data, and the Government, and reflects the extensive debate and compromise among the 807 Committee members. Any substantive modifications made at this stage of the process, especially changes to accommodate the narrow interests of any particular group, will destroy the hard-won consensus of the Committee and the improved regulation it has produced. We would strongly oppose any final rule that undid the 807 Committee's work. If any substantive changes are considered, we urge that the 807 Committee be reconvened to discuss and resolve such changes at a public hearing.

Some of the more significant compromises and concessions made by the creators of technical data in developing the proposed regulation are listed and briefly discussed in Attachment A.

These clearly illustrate the commitment of the 807 Committee to correct some of the inequities in the 1988 interim regulation and to develop a more balanced treatment of data rights as directed by Congress in 1984.

Finally, while we urge adoption and promulgation of the 807 Committee product to replace the current interim regulation, we also believe that there are a number of issues -- some treated by the proposed regulation, and some not -- for which the final words have not yet been written. Some of these issues are noted in Attachment A, and these and others will become apparent as technology, statutes, business practices, and procurement policies evolve. Some were beyond the scope of the Committee's efforts, and some may be created by the new regulation itself. We have attempted to outline these future concerns in Attachment B, and pledge our respective organizations to continue the cooperative Government/industry effort to build on the work of the 807 Committee and ensure that the regulations continue to reflect a balanced allocation of rights in technical data.

Don Fuqua
Aerospace Industries Association

Dan C. Heinemeier
Electronic Industries Association

James R. Hogg
National Security Industrial Associaiton

S.O. Nunn
Shipbuilders Council of America

J. Richard Iverson
American Electronics Association

Lawrence F. Skibbie
American Defense Preparedness Association

Bettie S. McCarthy
Proprietary Industries Association

Matthew Coffey
National Tooling & Machining Association

Jack Janetatos
Marine Machinery Association

Kenneth McLennan
Manufacturers Alliance for Productivity and Innovation

ATTACHMENT "A"

AREAS OF COMPROMISE

¥ EXPIRATION OF "GOVERNMENT PURPOSE RIGHTS" LICENSE

The proposals require that the Government be granted this license automatically whenever an item, component, or process (ICP) is developed with "mixed" funding. During a five (5) year period, starting with contract/subcontract award or modification, the creator of the related technical data has the exclusive right to commercialize the ICP. After that period expires, the Government is entitled to an unlimited rights license in the ICP, without regard to the contribution or interests of the developer.

In most cases, the period of exclusivity will be too short, making it unlikely that a contractor/subcontractor will be able to capitalize satisfactorily on its private investment. Further, upon expiration of the five (5) year period, the technical data is available on an unrestricted world-wide basis. As a consequence, the domestic industrial base could lose a competitive advantage to subsidized foreign competition.

While the time period appears to be negotiable, there is no incentive for the Contracting Officer to negotiate and many barriers exist which the Contracting Officer could use as excuses to avoid negotiation. Further, the Contracting Officer is not encouraged by any policy guidance in the regulatory text to extend the period in order to encourage commercialization of the technology or to reflect the private investment of the contractor/subcontractor. As a consequence, not only will private investment be discouraged, but the best private developments of Industry may not be made available to the Government.

¥ DEFINITION OF "DEVELOPED"

The definition, as it applies to items, components, and processes (ICP), ignores the reality of commercial computer aided design, manufacture and simulation practices. The definition is unreasonable since it requires the existence of a prototype before the ICP can be deemed to be "developed" and before the technical data depicting the ICP is protectable as "limited rights" technical data.

Contractors and subcontractors are reluctant to spend private funds on any development where the cost of prototyping is prohibitive. Additionally, modern manufacturing techniques often make "traditional" prototyping superfluous. For example, the Boeing 777 was designed using new computer aided processes which minimized prototyping. Thus, some of the most innovative concepts regarding new ICPs may not be disclosed to the Government because of the uncertainty of the scope of protection of the related proprietary technical data.

The definition, as it applies to "computer programs", also fails to recognize the value of computer software before executable code is tested on a computer. With current software development techniques, coding has become more mechanical. At times software creates other software, once the logic requirements of the software have been determined. The value of software is maximized -- not when it has run on a computer -- but when the logic requirements have been ascertained and "reasonable persons skilled in the software "art" believe that the software will work as intended."

For those reasons, Industry representatives on the Section 807 Committee recommended that the definition of "developed" require that the ICP "exist and/or be workable" not "exist and workable".

The definition problem as it relates to ICP is equally applicable to software. Hence, the definition of software must ultimately be revisited as well.

¥ LACK OF EFFECTIVE IMPLEMENTATION OF DATA REPOSITORIES

The proposal includes a new policy recognizing the need for a system wherein prime contractors make procurement data available to prospective offerors and contractors. However, the policy statements are equivocal and do not establish any implementing mechanism to achieve the policy requirements.

¥ EXPANDED "RESTRICTED RIGHTS" LICENSE IN NON-COMMERCIAL COMPUTER SOFTWARE

The proposal now permits third parties (who may be competitors of the original contractor or subcontractor) to have access to and the right to modify non-commercial computer software. Most developers firmly believe that the expansion of this license (the minimum license that may be granted in privately developed software) is a strong disincentive to the private development of new and improved software only for the Government. While it is not improper for the Government to demand an expanded restricted rights license in non-commercial computer software, we view it as bad policy.

¥ PAPERWORK BURDENS AND COMPLEXITY

The proposed clause at 252.227-7014, coupled with the proposed clause at 252.227-7019, requires, for the first time, the creation and maintenance of records and a system for proving the exclusive private development of computer software. In the past, the parties could simply agree that the Government would be granted a restricted rights license in non-commercial computer software (see the 1988 interim rule at 252.227-7013 (c)(1)(i)). Under the current interim rule, the only record that the contractor/subcontractor has to maintain is a copy of the license agreement that was made part of the prime contract.

The proposed clause at 252.227-7028 requires the tracking of individual items of technical data and computer software previously delivered, or to be delivered, to the Government. This new requirement will necessitate the creation and maintenance of new records and expensive systems. In contrast, under the I988 interim rule at 252.227-7028, contractors and subcontractors only have to identify compilations of technical data previously delivered to the Government, not individual items of technical data.

If these paperwork burdens are maintained in the final rule, the requirements should be prospective only. Records cannot be maintained if they were not created in the first instance. Neither the contractor/subcontractor nor the Government can afford to research retroactively and create the records which will be required by the proposed regulations.

Finally, there are complex marking requirements for both technical data and computer software. In the case of technical data, the restrictive legends must be placed on every page containing technical data deliverable to the Government with less than an unlimited rights license. That requirement will minimize the quantum of useful information that may be disclosed on a document page or on a drawing. In the case of non-commercial computer software, restrictive notices that "interfere with or delay the operation of computer software" are prohibited (see proposed regulation at 252.227-7014 (f)(1)). This last requirement places the contractor or subcontractor in an unreasonable position. Marking is required in order to protect the software, but under certain circumstances, marking is prohibited. More flexible marking requirements are needed.

ATTACHMENT "B"

FUTURE CONCERNS

¥ TREATMENT OF "COMMERCIAL ITEMS"

Current DoD policy encourages the acquisition of commercial items and their derivatives whenever those items satisfy or can be made to satisfy the needs of the Government. (See, for example, the Memorandum of SECDEF William J. Perry, "Specifications & Standards - A New Way of Doing Business", June 29, 1994.) Many of these acquisitions will not be possible unless made on a commercial basis. The proposed clause at 252.227-7015 ("7015 clause") does not comport with DoD's own present policy and direction.

For example, under the proposed rule, flowdown of the "7015" clause to preexisting suppliers and subcontractors is mandatory. The "7015" clause is not negotiable as are all other proposed clauses. Further, the license rights granted the Government in the "7015" clause are inconsistent with those granted to commercial customers. Finally, if commercial items are not exempt from 10 U.S.C. 2320 or 10 U.S.C. 2321, a commercial vendor will be obligated to prove that its proprietary technical data pertains to a (commercial) item that was developed exclusively at private expense.

The right of the Government to require a contractor or a subcontractor to prove exclusive private development of a commercial item is based upon statute and is one of the greatest impediments to the acquisition of commercial items by the Government. The Section 807 Committee elected not to recommend statutory changes to l0 U.S.C.2320 or l0 U.S.C.232l. However, acquisition reform bills currently pending in Congress may have a direct impact on the current proposals, especially in the area of commercial items. Any statutory reforms promulgated by Congress and the Clinton Administration should be incorporated in the proposed rule before it is made final.

¥ COMMERCIALIZATION OF TECHNOLOGY

The current proposal provides insufficient encouragement to commercialize federally funded technology. The Reagan Administration's Executive Order 12591 and the Clinton Administration's polices, announced during the late stages of the deliberations of the Section 807 Committee, state that consideration should be given to limiting the Government's use of technical data and computer software to "government purposes" only. The "developer" of the data and software should be encouraged to commercialize the technology it develops with federal funds. While the current proposal provides equivocal support to the commercialization of mixed funded developments, there is no affirmative policy guidance in the proposed regulatory text regarding the commercialization of federally funded developments.

The current proposals grant the Government an unlimited rights license in data pertaining to items, components, and processes and computer software developed exclusively with government funds. That places that data and software at risk of loss to foreign competition and does not provide the original contractor or subcontractor with sufficient incentives to commercialize the technology.

¥ NEW DIGITAL DATA ENVIRONMENTS

The proposed marking requirements fail to take into consideration the creation of electronic data bases (i.e., CALS Implementation Guide). Also, the subsequent use, storage, and delivery of individual data elements from such a data base (i.e., Contractor Integrated Technical Information Service (CITIS)) needs to be examined more closely. For example, the proposed marking requirements contemplate the use of a paper or microfilm media (hard copy). In a digital environment (diskettes, computer tapes, optical disks, computer memory), these requirements will be unworkable and unwieldy.

In another scenario, a digital drawing may be viewed on the screen of a computer workstation in such a manner that any restrictive legend may be avoided and not seen by the user. When downloading the drawing to a printer, the legend may not be printed. When extracting salient information from a digital drawing, the restrictive legend might not be extracted. Thus, technical data that may have initially been properly marked may not be effectively marked when a user accesses the data or uses it as intended in a digital environment.

The proposed regulations do not appear to have carefully considered the problems that will be experienced in the new digital environments. These issues will have to be confronted as CALS and CITIS requirements are implemented within the defense contractor community. Failure to do so will result in inequitable and inappropriate use, and unwarranted disclosure of contractor and subcontractor proprietary technical data and computer software.

RICHARD W. OJA
Consultant
Aerospace Prime & Subcontracts

August 8, 1994

Deputy Director Major Policy Initiatives
1200 S. Fern Street
Arlington, VA 22202-2808

ATTN: Ms. Angelena Moy, OUSD (A&T)/DDP

Subject: Data Rights/DAR Case 91-312

Please consider the following comments to the DFARS proposal, 59 FR 31584, June 20, 1994 as included in the CCH Government Contracts Service revision Number 1245 dated July 27, 1994. These include typo's as well as a few substantive comments.

1. 227.403-3 (c) - In first line, correct the 2nd "to" to read "the".

2. 227.403-5 (b) (ii) - The "(ii)" needs to be moved to the left 2 spaces.

3. 227.403-5 (b) - The word/term "research contract" is not defined elsewhere. Is research intended to be limited to mean "research" as included in the term "experimental, developmental or research work"?

4. 227.403-6 (d) - The word "contractors" should read "contractor". Alternatively the phrase "of its contract" could be revised to read "of the contract".

5. 227.403-7 (b) - The phrase "Government contractors which require" should read " Government contractors who require".

6. 227.403-8 (b) - In the 1st sentence, 4th line. revise the phrase "firm requirement technical data" to read "firm requirement for the technical data".

7. 227.403-8 (b) - In the 1st sentence, 5th line, insert a comma "," before the word "but".

7. 227.403-9 (a) - In the 1st sentence 4th line, move the commas to read "to grant or obtain for the government, license rights".

8. 227.403-9 (a) - In the 4th, 5th and 10th lines the word "government" should be capitalized to read "Government". This should be consistently use where it is applicable.

2 Rainbow Lake, Irvine, CA 92714 • (714) 733-9104

9. 227.403-10 (a) (3) - In the 1st sentence, the phrase "attached to its contract should read "attached to the contract".

10. 227.403-10 (b) - Capitalize the word "The" at the beginning of the sentence.

11. 227.403-10 (b) (i) - The wording after the 1st phrase is awkward and could be revised to read "A contractor who desires to restrict the Government's rights in technical data to place restrictive markings on the data. It also provides instructions for the placement of the restrictive markings, and authorizes the use of certain restrictive markings. The word "certain" could be changed to read "specific".

12. 227.403-10 (b) (2) - In the 1st sentence, line 4 and 5, there seems to be a wording problem in the phrase " in which the Government has previously obtained rights with the Government's pre-existing rights in that data". Is a word missing between "obtained" and "rights"? I believe this is intended to reflect the requirement in 252.227-7013 (f) (5), but there is something wrong.

13. 227.403-10 (c) (1) - In the 2nd sentence. change the period "." to a comma "," after the 1st phrase.

14. 227.403-12 (a) (1) - Reverse the order of sentences 2 and 3 and then delete the word "also" in the phrase "is also a nonconforming marking."

15. 227.403-12 (a) (2) - In the next-to-last sentence, revise the phrase "correct any nonconforming markings" to read "correct or strike any nonconforming markings." Also revise 252.227-7013 (h) (1) to be consistent. It is both cost effective and expedient to permit the Government to "correct or strike" an improper restrictive marking.

16. 227.403-12 (b) (2) (i) - Reverse the order of the 1st phrase in the sentence to read "Correct or strike". This makes it consistent with the order used elsewhere.

17. 227.403-12 (b) (2) (ii) - In line 2, insert the words "or striking" after the word "correction"

18. 227.403-13 (c) (1) (iii) - In the 5th line , the phrase "in the software" seems to be incorrect. It should be revised to read "in the technical data".

However, since 227.503-13 (d) (2) incorporates "the guidance at 227.403-13" the phrase could be revised to read "in the technical data or software." NOTE: This is the type of problem which was intended to be eliminated by having separate treatment for computer software. I have not specifically reviewed the computer software regulations for any other incorporation by reference areas.

19. 227.403-14 (a) (1) - In the last line correct the spelling of the word "contract".

RWD 2-6

20. 227.403-15 (b) - The "(b)" is missing and should be inserted prior to the beginning of the sentence "10 U.S.C. 2321 permits...."

21. 227.503-10 (b) (1) and (2) - The same issues noted in Items 11 and 12 above apply here.

22. 227.503-12 - The same issues noted in Items 15, 16 and 17 above apply here.

23. 252.211-7012 (b) (3) - Paragraph "(3)" is duplicated in its entirety and should be deleted.

24. 252.227-7013 (b) (6) - The release from liability provision is the MAJOR PROBLEM with the proposed data rights provisions. I have been following the new data rights regulations as they have evolved over the past few years and this is the first time that I've noticed a release provision like this. I would like to know more about this particular item and would appreciate hearing from someone who has some current insight. I would appreciate having someone call me at (714) 733-9104. My FAX uses the same number.

This release provision should not be accepted by an innovative contractor or subcontractor who agrees to deliver technical data with restrictions. As I see it, this is the only unacceptable provision in the entire proposed data rights regulations. The 252.227-7013 clause is the basic data rights clause and it is a mandatory clause in all solicitations and contracts for noncommercial items when the successful offeror/s/ will be required to deliver technical data. The problem occurs only when the technical data will be delivered with restrictions.

The problem is that the proposed release expressly absolves the Government (and also the higher tier contractors in Subcontract situations) of liability for any wrongful use by other parties of data which was delivered with restrictions (i.e. Government Purpose Rights or Limited Rights data). This is because: 1) the contractor expressly agrees to release the Government from liability for any third party (or fourth party or more) violations, and 2) the contractor expressly agrees to look solely to the party who has violated the rights of the contractor. Both the Government and the higher tier contractors (i. e. the Prime contractors) are ostensibly off the hook and the small innovative subcontractor, who is in the least favorable position to seek legal relief, is on the hook. I prefer to leave the situation as it currently is and leave the owner of the data with all of the currently available contract and legal remedies. The small innovative subcontractor will be reluctant to deliver limited rights data unless the release provision is either deleted or modified.

NOTE: This same issue also applies to 252.227-7014 (b) (6) and 252.227-7018 (b) (7).

25. 252.227-7013 (b) (6) - In the second line, capitalize the word "Government".

RWD 3-6

26. 252.227-7013 (e) (3) - The Identification and Identification Attachment is poorly placed on the page which makes it difficult to understand. There is no reason to present the Attachment in 4 columns. Column 1 would generally require a listing of the data. However, columns 2 to 4 would generally require only one entry (assuming the same information would apply to all of the listed items in column 1). It would be easier to understand if the Attachment is presented in one column in the regulations.

It might also help to separate the 1st sentence of the narrative from the title (Make the title all caps) to make it clear that "IDENTIFICATION AND ASSERTION OF RESTRICTIONS ON THE GOVERNMENTS USE, RELEASE OR DISCLOSURE OF TECHNICAL DATA" is the title for the Attachment.

I also recommend shortening the title to "IDENTIFICATION OF RESTRICTED USE DATA" to also save a great deal of space whenever the Attachment is described in contract documents.

I understand the proscribed wording for the Attachment is intended to be mandatory. However the 4 explanatory notes are not necessary. It would help prevent future misunderstandings if there is a note which states " The 3 explanatory notes (*, **, ***, and ***) are not required to be included as part of the Attachment." This would leave it open as an alternative when a Prime Contractor prepares the Attachment as a form to be filled in by a lower tier Subcontractor.

27. 252.227-7013 (h) (1) - In line 8, add a period at the end of the 1st sentence (i.e. after the phrase "on Technical Data".).

28. 252.227-7013 (h) (1) - In line 11, change "correction or cancel" to read "correct or strike". Use of the word "strike" is preferred to using "cancel" and is consistent with the use of the word "strike" in 227.403-12 (a) (2). Also add the wording from 227.403-12 (a) (2), "When it is impractical to return technical data for correction, contracting officers may unilaterally correct or strike any nonconforming markings." (also see Item 15 above). In many cases it is more cost effective for the contractor to send a FAX authorizing the Government (or higher tier contractor) to correct or strike nonconforming or unjustified restrictive markings.

29. 252.227-7013, ALTERNATE I - Add an introductory statement, "As prescribed in 227.403-6 (b), add the following paragraph to the basic clause:".

30. 252.227-7014 (b) (6) - The comments in Items 24 and 25 above also apply.

31. 252.227-7014 (e) - The comments in Item 26 above also apply.

RWG 4-6

32. 252.227-7014 (f) (1) - In the 2nd sentence, insert "transmittal document or" before the word "storage container. This makes it consistent with 252.227-7013 (f) (1).

33. 252.227-7015 - The title to both this paragraph and the clause should be revised to read, "Rights in Technical Data-Commercial Items" and "RIGHTS IN TECHNICAL DATA-COMMERCIAL ITEMS" respectively. This gives commercial items the same stature and makes it consistent with 252.227-7013, 252.227-7014 and 252.227-7018.

NOTE: I prefer to relocate all of the Rights in Technical Data-Commercial provisions immediately after the Rights in Technical Data-Noncommercial Items. This would give Commercial Items a more equal status with Noncommercial Items.

34. 252.227-7016 (c) (2) - Insert ,"Rights in Technical Data-Commercial Items" after "Computer Software Documentation,". The Commercial Items should also be included in this paragraph.

35. 252.227-7017 (a) - In line 2, insert "the" prior to the word "following'.

36. 252.227-7017 (d) - The comments in Item 26 also apply.

37. 252.227-7017 (d) - The comments in Item 26 also apply.

38. 252.227-7017 (d) - The Attachment includes a 5th explanatory note (i.e. "***** Enter "none" when all data or software will be submitted without restrictions.") which should be deleted to make it consistent with 252.227-7013 and 252.227-7014. It is much more efficient to require the Attachment only when an offeror intends to include a restrictive marking on any data to be delivered under a proposed contract. In the vast majority of solicitations there will not be a requirement to submit an "Attachment". Applying this logic further, there is no reason to require an "Attachment" in a contract which would state "none".

39. 252.227-7018 (b) (7) - The comments in Item 24 also apply.

40. 252.227-7018 (e) (3) - The comments in Item 26 also apply.

41. 252.227-7018 (k) (4) ALTERNATE - Add a "I" after the word "ALTERNATE" in the title.

This concludes my comments. When I first decided to respond I did not envision all of this detail. I'm sure many of the items have been brought up by others.

Most of my contract clients are small innovative subcontractors and data rights is an important part of my consulting business. It was also important for over 25 years when I previously served as Director of Contracts for the Aerospace Group of Parker Hannifin Corporation.

RWD 5-6

I am available if there are any questions regarding the items which I commented upon.

Sincerely,

Richard W. Oja

Richard W. Oja, CPCM

RWO 6-6

BIOGRAPHICAL SKETCH: RICHARD W. OJA

* B.A. (Business) from Michigan State University (1959)

* National Contract Management Association (NCMA) member since 1967 (currently Orange County Chapter)
* Professional Designation in Government Contracts, UCLA Extension (1969)
* J.D. (Law), Western States University College of Law (1975)

* Member, California Bar since 1976

* Certified Professional Contract Manager (CPCM), NCMA since 1976

* Pony Express Award, NCMA Southwestern Region (1980)

* Member, Machinery and Allied Products Institute (MAPI) Government Contracts Council (1981-1986)
* University of California Irvine Extension Member Advisory Council for Contract Management Program since 1983
* American Bar Association (ABA) Public Law Section (1984 - 1994)

* Fellow Award, NCMA (1987)

Mr. Oja has been actively working in Aerospace Contracts since July 1959 when he began his Contracts career at North American Aviation, Los Angeles Division as a Senior Statistician analyzing Subcontractor Proposals on the B-70 Program. Since then he was at Parker Hannifin Corporation for 27 years, serving in various production control/contracts/program management positions, most recently serving as Director of Contracts for the Aerospace Group coordinating all aspects of contracts in this multi-division operation. He performed a key role in the formulation of contract policies and implementation, as well as understanding and interpreting Government regulations, specifications and procedures as they apply to both fixed and cost reimbursement contracts in the contract, finance, quality and technical areas. He also conducted training for Parker's contracts and procurement personnel for many years. He directed Parker's first successful Contractor Procurement System Review (CPSR), coordinated Offset Programs, Export Licensing and served as the Small and Disadvantaged Business Liaison Officer. Since leaving Parker in 1986, Dick is self employed as an Aerospace Contracts Consultant specializing in Proposals, Pricing, Problem Evaluation, Data Rights, T&Cs, Changes, Terminations and Training.

RWO

AMERICAN GEAR MANUFACTURERS ASSOCIATION

Overton
Gear and Tool Corporation
530 WESTGATE DRIVE · ADDISON, ILLINOIS 60101-4584
Area Code 708·543·9570

July 19, 1994

Mr. Robert Donatuti
Deputy Director for Major Policy Initiatives
1200 S. Fern Street
Arlington, Va. 22202-2808

Attn: Ms. Angelena Moy, OUSD (A&T)/DDP

Subject: DAR CASE 91-312

Dear Mr. Donatuti:

I am writing to you today to respond to your request for comments on the proposed changes in regulations governing rights in technical data. We do not develop data, but utilize technical data provided by the government to produce quality spare parts to the government at competitive prices. We have been making parts for programs such as the M60 tank engine, final drives for the M113, M1, M2, landing struts for the C5A, antenna raising gearboxes for the Navy since 1968.

We at Overton Gear & Tool Corporation are legitimately concerned that these changes will negatively affect our business opportunities. As a small business, we are also concerned that this rule is being promulgated for the benefit of large prime contractors at the expense of small business competitors for the aftermarket. We are bringing this matter to the attention of our elected representatives, in the hope that Congress will fully review the impact of this change on competition and our tax dollars.

We are concerned about the following:

* Changes in language making any data developed in performance of a government contract will result in less data being available. We don't believe that data resulting from development of a defense end product should be the property of an OEM.

* Data charged to an indirect pool will become proprietary to the OEM. We fully understand the argument that CAS will not allow misuse of this flexibility, but still believe that

THE OEMs will find this a loophole to crawl through. (This is demonstrated by the fact that OEM members of the 807 panel fought hard to achieve this concession.)

We are aware of contentions that these changes will only affect future development. We are afraid, however, that these changes may be applied to system upgrades, contract enhancements, etc., and seriously affect the spare parts market.

The more data there is available, the more competition. The more competition, the greater the savings to the taxpayer. We, as taxpayers, have a right to the savings produced through the competition as well as a right to data developed--according to any formula--with any of our tax dollars. In a given year, we rely on technical data access for five to ten percent of our business.

To summarize, we believe that this proposal will unnecessarily harm the ability of qualified small businesses to provide spare parts at a cost savings to the taxpayer. By affecting thousands of component manufacturers across the country, it will further erode the second tier suppliers which form an essential segment of our defense industrial base. And finally, it will result in American jobs sent offshore and a return to the $500 toilet seat Secretary Perry is hoping to avoid.

Yours very truly,

OVERTON GEAR AND TOOL CORP.

Charles A. Brannen

CAB:mt

#39
rec'd 9/1/94

PACIFIC SKY SUPPLY INCORPORATED

8230 San Fernando Road, Sun Valley, California 91352
(818) 768-3700 FAX (818) 767-6278
F.A.A. Repair Station QQPR566K

August 19, 1994

Deputy Director
Major Policy Initiatives
1200 S Fern Street
Arlington, VA 22202-2808

ATTN: Ms. Angelena Moy
OUSD (A&T)/DDP

RE: DAR Case 91-312

Dear Ms. Moy:

As a small business manufacturer, and contractor to the DOD, Pacific Sky Supply, Inc. is opposed to any additional restrictions proposed by the S 807 Technical Data Committee limiting the availability of technical data to U S manufacturers for the reasons below:

Loss of U S Jobs & Manufacturing Capability: The practical effect of limiting data is limiting competition and maintaining artificially high prices. This makes US manufactured goods less competitive in the international market, and would result in loss of business and jobs to foreign competition. The OEMs are incorrect if they think that customers will be forced to buy from them if they are the only source. The real world is more realistic than that, and customers will either choose another product or find a way to buy it cheaper outside the US.

Inflate Costs to US Taxpayer: We are aware of an item that an OEM purchases from a vender for approx $200.00; marks up 500% commercially, and 380% to the DOD. There are current buys totalling over 2,400 units outstanding for this item[1], and the OEM will not permit the actual manufacturer to sell directly to the government. Before a minor specification change, the part was produced competitively for approx $32[2]. With the minor

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[1]San Antonio ALC solicitations: F41608-94-R-49517 648 ea 6891570 Kit, F41608-94-R-49072 1,458 ea 23039657 Facing. Defense Industrial Supply Center contract #SO0500-94-C-0810 300 ea 6829451 Outer Member.

[2] See attached procurement history for 6789589/23039657 Facing.

(proprietary) change, the effect of which limits the contract to the OEM, the taxpayer will pay over ten times what it should.

After years of benefitting from substantial cost savings through competitive procurements that are only possible if data is freely available, why is S 807 Committee now recommending changes. The reason is obvious: A self serving committee made up primarily of OEMs is attempting to increase profits with artificial rule changes.

I urge you to consider the source of this recommendation and act in the best interest of American taxpayers and small business manufacturers.

Sincerely,

Thomas E. Smith
President

CD-FICHE (R) 8-18-1994 Version 8.31

INC:77777 HM:N FIIG:A23900 DA:

N:2840-00-714-5787 AIN:FACING,PROPELLER BR ISC:2 DML:J

Part Number	RNCC	RNVC	RNFC	DAC	CAGEC	VENDOR 1/ 4
	MCRL					
▸23039657	3	2		4	63005	GENERAL MOTO
6789589	5	2	3	4	24617	GENERAL MOTO
6789589	5	2		5	63005	GENERAL MOTO
6789589	5	9	3	4	73342	GENERAL MOTO

Procurement History Data: 00-714-5787 FACING,PROPELLER BR

Date	Contract No.	SOS	Quantity	Price	UI	Typ	CAGEC	Vendor 1/7
▸02/93	F4160893D0498	FPZ	288	340.00			63005	GENERAL MOTO
02/93	F4160893D0498	FPZ	300	350.00			63005	GENERAL MOTO
12/87	F3460187G0004	FPZ	1500	31.90	EA		63005	GENERAL MOTO
12/87	F3460187G0004	FPZ	1533	33.40	EA		63005	GENERAL MOTO
05/85	F3460185G0005	FPZ	172	49.88	EA		63005	GENERAL MOTO

F2 ->VEN F4 -> Save F5 -> PRNT +--> Next/Prev ESC --> Prev Window

Increase in price after "proprietary" change: from $31.90 to $350.00 for essentially the same part.

#36
8/23/94

PRECISION GEAR INCORPORATED
48-09 108th Street · Corona, New York 11368 · 718-592-7100
FAX: 718-592-2525

July 20, 1994

Mr. Robert Donatuti
Deputy Director For Major Policy Initiatives
1200 S. Fern Street
Arlington, VA 22202-2808
ATT: Ms. Angelena Moy, OUSD (A&T)/DDP

SUBJ: DAR Case 91-312

Dear Mr. Donatuti:

I am writing to you today to respond to your request for comments on the proposed changes in regulations governing rights in technical data. We do not develop data, but utilize technical data provided by the government to produce quality flight safety critical (life support) spare parts to the government at competitive prices far below typical OEM pricing. We have been performing this service for over 20 years saving DOD millions of dollars.

We at Precision Gear Incorporated are legitimately concerned that these changes will negatively affect our business opportunities. As a small business, we are also concerned that this rule is being promulgated for the benefit of large prime contractors at the expense of small business competitors for the aftermarket. We are bringing this matter to the attention of our elected representatives, in the hope that Congress will fully review the impact of this change on competition and our tax dollars.

We are concerned about the following:

- Changes in language making any data developed in performance of a government contract will result in less data being available. We don't believe that data resulting from development of a defense end product should be the property of an OEM. The data belongs to you & I, the taxpayer. #74

- Data charged to an indirect pool will become proprietary to the OEM. We fully understand the argument that CAS will not allow misuse of this flexibility, but still believe that the OEMs will find this a loophole to crawl through. (This is demonstrated by the fact that OEM members of the 807 panel fought hard to achieve this concession.) #75

ESTABLISHED 1936

• We are aware of contentions that these changes will only affect future development. We know, however, that these changes may be applied to system upgrades, contract enhancements, etc., and seriously affect the spare parts market. #76

It seems: "Less data means less competition" E. Spector 1993. The more competition, the greater the savings to the taxpayer. We, as taxpayers, have a right to the savings produced through the competition as well as a right to data developed--according to any formula--with any of our tax dollars. The breakout program has saved the taxpayer $20 billion annually since its enactment in 1984. #78

To summarize, we believe that this proposal will unnecessarily harm the ability of qualified small businesses to provide spare parts at a cost savings to the taxpayer. By affecting thousands of component manufacturers across the country, it will further erode the second tier suppliers which form an essential segment of our defense industrial base. And finally, it will result in American jobs sent offshore and a return to the $500 toilet seat Secretary Perry is hoping to avoid.

Sincerely,

Matthew S. Forelli
President
& The Employees of Precison Gear Incorporated

8/11/94

PROCESSGEAR
3313 West Newport Avenue
Chicago, Illinois 60618-5596
(312) 583-1616
708-398-9980

Drew

July 20, 1994

The Honorable Paul Simon
United States Senate
Washington, DC 20510

Dear Senator Simon:

I am writing to make you aware of the concerns of our company regarding a proposed rule change in the Defense Federal Acquisition Regulations (DFARS). A DoD committee has proposed a rule change which will significantly affect our ability to do business and will result in increased costs to the taxpayer.

We are a small business that manufactures gears for industrial applications which includes the Government.

I have enclosed a copy of our comments to DoD. Briefly, the rule change will result in significantly less data for competitive purposes in DoD procurement - i.e., the prime contractors will have great leeway to insist the Government purchase components from them or to offshore source the components to foreign companies to meet offset credits or further foreign marketing arrangements. As DoD Director of Procurement, Eleanor Spector has repeatedly stated, "less data means less competition." The results, simply stated, will be the export of American jobs, decimation of a crucial element of the defense industrial base and increased costs to the taxpayer.

Employees of our company in Illinois need for you to urge Congressional leaders to hold hearings on this issue before the final rule takes effect. Please contact Sen. Dale Bumpers, Chairman of the Small Business Committee and ask them to hold hearings ~~and request delay of implementation~~ until Congress has had the opportunity to review the issue. DoD's own analysis admits: "This proposed rule may have a significant economic impact on a substantial number of small entities."

Thank you in advance for your leadership on this issue. It is of great importance to the many skilled workers in Illinois.

Sincerely,

Process Gear Company, Inc.

Jeff Monger
President

COPY

July 20, 1994

Mr. Robert Donatuti
Deputy Director for Major Policy Initiatives
1200 South Fern Street
Arlington, VA 22202-2808
Attn: Ms. Angelena Moy, OUSD (A&T)/DDP

Subject: DAR Case 91-312

Dear Mr. Donatuti:

I am writing to respond to your request for comments on the proposed changes in regulations governing rights to technical data. We do not develop data but do utilize technical data provided by the government to produce quality spare parts for the government at competitive prices and have done so for many years.

We are legitimately concerned that these changes will negatively affect our business opportunities. As a small business we are also concerned that this rule is being promulgated for the benefit of large prime contractors at the expense of small business in the aftermarket. We are also bringing this matter to the attention of our elected representatives in the hope that Congress will fully review the negative impact of this change on competition and on our tax dollars.

We are concerned about the following:

1. That changes in language making any data developed in performance of a government contract will result in less data being available. We don't believe that data resulting from development of a defense end product should become the property of an OEM.

2. That data charged to an indirect pool will become proprietary to the OEM. We fully understand the argument that CAS will not allow misuse of this flexibility but still beleieve that the OEMs will find this a loophole through which to crawl. (This is demonstrated by the fact that OEM members of the 807 panel fought hard to achieve this concession.)

3. We are aware of contentions that these changes will only affect future development. We are fearful however, that these changes may be applied to system upgrades, contract enhancements, etc. and seriously affect the spare parts market.

-cont-

The more data available, the more competition. The more competition, the greater the savings to the taxpayer. We as taxpayers have a right to the savings produced through the competition as well as a right to the data developed, according to any formula, with any of our tax dollars.

To summarize, we believe that this proposal will unnecessarily harm the ability of qualified small businesses to provide spare parts at a cost savings to the taxpayer. By affecting thousands of component manufacturers across the country it will further erode the second tier suppliers which form an essential segment of our defense industrial base. Finally, it will result in American jobs sent off-shore and a return to the $500 toilet seat that Secretary Perry is hoping to avoid.

Sincerely,

#21
8/19/94

Proprietary Industries Association

Innovation at Private Expense

220 North Glendale Ave., Suite 42-43, Glendale, CA 91206 (818) 502-1031 FAX (818) 502-9078
733 15th St. NW, 7th Floor, Washington D.C. 20005 (202) 393-0020 FAX (703) 241-1035

August 16, 1994

Ms. Angelena Moy
OUSD (A&T)/DDP
Deputy Director Major Policy Initiatives
1200 S. Fern Street
Arlington, VA 22202-2808

Re: Comments on Proposed Rule
DAR Case 91-312

Dear Ms. Moy:

The Proprietary Industries Association (PIA) commends the Government for proposing improved regulations which, for the most part, are workable for contractors and the Government. Nevertheless, changes are needed before the regulations are in final form in order to meet the letter and intent of statutes and to conform to agreements made between Government and Contractor groups in the last several years. Most of these changes are minor but important.

Larger, longer-term changes are needed because world events and technology have overtaken the slow regulation drafting process. These changes address at least four issues: 1) protection of data rights when the data is created or stored in an electronic medium; 2) adapting the regulations to commercial products and contractors; 3) computer software; and 4) reducing the cost of administrating the regulations. Addressing these areas could require substantial changes to the regulations but should be done.

PIA is a national organization of DoD subcontractors which develop innovative products at private expense and represents an important segment of the aerospace industry that is primarily small business. PIA was founded in 1985 and has concentrated nearly all its effort on the formulation and administration of data rights regulations that are fair and encourage innovation at private expense. We are a member of the Government Industry Technical Data Advisory Committee and we support in general the product of that committee.

The small but important changes needed in the proposed rule, before it is issued in final form, are contained in the attached Appendix A, along with brief reasons why. Some of the issues associated with the longer-term changes are spelled out in Appendix B. For these issues, we do not have quick, easy solutions but recommend that a suitable ad hoc group be put

Proprietary Industries Association
Innovation at Private Expense

220 North Glendale Ave., Suite 42-43, Glendale, CA 91206 (818) 502-1031 FAX (818) 502-9078
733 15th St. NW, 7th Floor, Washington D.C. 20005 (202) 393-0020 FAX (703) 241-1035

together to develop the solutions. This is necessary to avoid immediate criticism of the regulations for being out of step with Administration policy and current technology.

PIA thanks the Department of Defense for the opportunity to participate in the Government-Industry Technical Data Advisory Committee. Our decision to join in the supplementary comments and our additional comments herein do not diminish our admiration for the accomplishments of the Committee and the personal contributions of the members. We are especially appreciative for the firm leadership of Ms. Eleanor Spector, which was a key factor in bringing the diverse membership to a near-unanimous recommendation.

Very truly yours,

P.L. Kearney
Director

PLK/b

cc: E. Spector

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Appendix A (Specific Comments)

SUBPART 227.400

227.400(a) Scope of Subpart -

Under this clause there is a general comment associated with the Government's ability to MODIFY technical data. This should be limited such that it is not in derogation of the design agent's authority. This is a matter of operational integrity and safety. **Delete all references to "MODIFY" in the following places:**

400(a), line 2	403-7(a)(2), line 6
402-1(b)(2), line 2	403-7(c)(1)(a), line 1
402-2(a), line 4	403-7(c)(1)(b), line 1
403-7(a), line 3	403-13(a), line 2
403-7(a)(1), line 2	403-17(a), line 7

Reason

Public Law 98-525 §1216, 10 U.S.C. §2320 (a)(2)(A) does not require this degree of usage. It only lists use, release or disclosure of technical data. There is no mention of, or provision for modification.

227.402-2(a) Rights in Technical Data

Substitute "written" for "express" at last line.

Reason

Clarification and to provide a substantive record of permission.

227.402-2(b) Rights in Technical Data

Line 5, change "the.. agreement" to "a special license agreement made a part of."

Line 6, substitute "to the contract" for "thereto."

227.402-2(c) -

Add this new subparagraph: "A Contractor, at any tier, having the clause at DFAR 252.227-7013, Rights in Technical Data - Non-Commercial items, in its contract, shall use the clause at 252.227-7015, Rights in Technical Data — Commercial Items, in solicitations and contracts

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when the lower-tier contractor will be required to deliver technical data pertaining to commercial items or processes.

Reason

For consistent application of the policies established regarding commercial items or processes, contractors must have the ability to use the -7015 clause at lower tiers of contracting.

227.402-3 Contract Clause

Add "components" in last line between "commercial items" and "or processes."

Reason

Consistent with scope of regulations.

227.403-4(a)(1) Technical Data Pertaining to Items, Components, or Processes

At line 10, after "funding" add "and the government has obtained government purpose rights."

Reason

Clarification.

227.403-4(b) Source of Funds Determination

At line 5 and line 7, after "limited rights" add "or Government purpose rights."

Reason

Clarification and inclusion of Government Purpose Rights (GPR).

227.403-5 Government Rights

(a)(1) and (a)(2) - There is little conceptual difference between these two categories and, as such, both should include the phrase "developed exclusively with Government funds." Therefore, with regards to rights allocation:

(a)(2) line 3, delete the words after "was" and add "and will be developed exclusively with Government funds."

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(a)(3) - Construction is unclear; refers to type of contract while all of other categories specifically focus on type of determination.

(a)(9) - Delete

Reason

DFARS 227.403-5, Government Purpose Rights - There is no conceptual reason why, at the expiration of the GPR period, the government should obtain unlimited rights. (See 10 U.S.C. 2320 (c)(1), which discusses only the need "to use (or have used) for any purpose of the United States under the contract.") Allocation of rights should be a matter of negotiation dependent upon the circumstances and upon the proportion of funding of the data supplied by the Government and the contractor. Further, the time period for expiration of Government Purpose Rights is highly dependent upon the nature of the data involved and the related item, component, or process.

227.403-5(b)(1)(ii)

See comment at 227.403-5(a)(3), above.

(b)(2)

Line 3 - Delete "Either party" and substitute "Parties at any tier"

Line 10 - At the end of the clause, add the following sentence: "The period for subcontractors might not be the same as that for prime contractors."

Reason

To allow for fair negotiation of a GPR period through all subcontracting tiers.

(b)(3)

Line 2 change "execution" to "completion."

Reason

The period of time should commence upon completion of a contract or subcontract. This would allow an adequate GPR period since development contracts normally run from 4-8 years.

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227.403-5(d)(1) Specifically Negotiated License Rights

At the end of (1), add the following: "Specifically negotiated license rights can apply to subcontractors only through negotiated agreement with that specific subcontractor."

Reason

Special license rights must be negotiated with the owners of the data.

(d)(2)

Line 5, after "... such rights.", add "Negotiations shall include all subcontractors who are owners of the subject data."
Line 11 change "prior to negotiating... such as " to "Prior to negotiating for additional rights in limited rights data, consider the guidelines in Defense FARS Supplement (DFARSS) No. 6, "DOD Spares Breakout Program, and such alternatives as --."

Reason

This limits the risk of the prime negotiating away the rights of their subcontractor's data.

227.403-5(d)(2)(iv)

Add new section that reads: "(iv) Negotiation of long-term reprocurement spares pricing agreements."

Reason

To add another alternative for use by subcontractors and suppliers.

227.403-7 Use and Non-Disclosure Agreement

(c)(1)(b) - At lines 7 and 8 delete "Contractor" and substitute "owner of the data." Also at line 7, delete "Recipient" and substitute "Government."

At line 9, delete "Contractor's."

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Reason

The government, rather than the recipient should make notification and such notification must be to the owner of the data, for clarity purposes.

227.403-8(b) Deferred Ordering

At line 2, after "software", add "in all research and development contracts."

At line 13, after "data", add: "that the Government has already paid for".

Reason

Both parties should know what data requirements are present at the outset of the contract, via negotiation. By adding "paid for by the government," contractors are restricting government access to only that data which the government pays for. Consistent with DFARS 252.227-7017 provisions when data generated at private expense is ordered, the cost for delivery of such data shall be negotiated with the contractor. Private expense data includes costs greater than those of delivery and reproduction.

227.403-10 Contractor Identification and Marking of Technical Data to be Furnished with Restrictive Markings

(a)(1) - At line 4, after "award" add: "to the extent known"

Reason

Consistency with 7017.

(a)(5) - Delete first sentence and "However,".

Reason

Contrary to statutory disallowance of the requirement to submit unlimited data rights as a consideration for award. [10 USC 2320 (a)(2)(F)]

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227.403-12 Government Right to Establish Conformity of Markings

(a)(2) Nonconforming markings:

At line 12, delete "or strike."

At last line, delete the period and add: "as agreed upon by the Contractor."

Reason

If the contracting officer desires to "strike" the legends he should be required to go through the validation process.

(b)(1) Unjustified markings: Second sentence, at line 8, delete "either", delete "... or with mixed funding (situations under which the Government obtains unlimited or government purpose rights)"

Reason

Clarity of the example.

(b)(2) - At line 2, delete "unjustified" and substitute "restrictive." Also at line 2, after "markings." delete the period and add: "in accordance with the provisions of the clause at 252.227-7037, Validation of Asserted Restrictions."

Reason

"Unjustified" may only be established through the validation procedures.

227.403-13 Government Right to Review, Verify, Challenge and Validate Asserted Restrictions

(c)(2)(i) Pre-Challenge Requests for Information - At line 6 delete "determine...assertion." and substitute "ascertain the basis of the restrictive marking."

At line 10, delete "establish" and substitute "justify."

Reason

To agree with DFARS 252.227-7037(c)(1).

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(c)(2)(ii) - At line 4 delete "does not" and add: "and any other available information pertaining to the validity of a restrictive marking do not"

Reason

To agree with DFARS 252.227-7037(c)(2)

(c)(3) - line 6 after "transact," add "pre-challenge,"

Reason

To allow subcontractors to participate in all levels of the validation process.

(c)(3)(ii) - At lines 3 and 4 change "would...restrictions;" to "may inhibit the Government's ability to resolve the issue;"

(c)(3)(iii) - Line 1, add: "If the Contracting Officer takes action through the prime contractor, the Contracting Officer shall grant appropriate time extensions to allow the subcontractors/suppliers to submit a timely response.

Reason

Until the subcontractor actually receives the challenge, the validation process cannot effect the subcontractor's rights.

227.403-14 Conformity, Acceptance, and Warranty of Technical Data

(b)(2)(i) - At line 2 after "may" add "be."

Reason

Correction of clerical error.

227.403-15 Subcontractor Rights in Technical Data

(a) Add reference to DFARS 252.227-7015, "Technical Data - Commercial Items."

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Reason

Clarification.

(c) - In line 4, delete "parties" and substitute "party supplying the data."

In line 6, after "requirement", add: "These clauses convey rights in technical data to the Government only."

Reason

To clarify that rights of use are granted to the government only.

CLAUSES

252.227-7013 Rights in Technical Data — Noncommercial Items:

As found in 252.227-7013 please delete all references to "modify" or "modification" in the following:

(a)(12)(i), line 1	(b)(5)(ii), line 2
(a)(12)(ii), line 3	(b)(6), line 8
(a)(13), line 1	(f), line 2
(a)(15), line 1	(f)(2), within the legend
(b)(3)(iii), line 3	(f)(3), within the legend

(a)(7) - At line 2, after "with", delete the remainder of the subparagraph and substitute: "... costs charged to indirect cost pools, direct costs not charged to a government contract, or any combination thereof."

Reason

The first phrase of the (a)(7) definition, as originally written, refers to all indirect cost pools including IR&D and B&P, which are allocated across all contracts, including Government contracts. The second phrase, as originally written, would disallow those very indirect cost pools as private expense because they are allocated to Government contracts. This would act to always create a mixed-funding situation and to cancel the very effect that the writers of the regulation are seeking. The recommended changes allow the language to refer to direct costs which are not charged against a government contract. This change then establishes two, discrete categories of private expense costs. These are the only categories of costs to be

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considered and the clarifying words are required to ensure proper understanding. The changes were considered necessary by DCAA and ex-DCAA auditors who would normally be involved in the issue.
Only indirect costs are "allocated" to contracts; direct costs are "charged" to contracts. The costs in the indirect cost pools are the costs that are so allocated.

(a)(7)(ii) - Line 6 (last line), after "expense", add: "unless the contracting officer has agreed otherwise."

Reason

This is not an unusual occurrence and especially in the event where an unfunded change leads to an overrun, the opportunity to negotiate an allocation of rights should be available.

(b)(1)(ii) - Line 3-4 change "specified... performance" to "paid for with Government funds."

Reason

To agree with Subpart 227.4.

(b)(2)(i) - At line 1, begin first sentence with "Except as provided in paragraphs (b)(1) and (b)(3) of this clause,"

Reason

To conform with the rest of the clause and for clarity.

(b)(2)(ii) - At lines 1-2 change: "The five...of the" to: "The government purpose rights period shall commence upon completion of the".

Lines 8-10 change "the five...technical data." to "the government purpose rights period, the Government shall have such rights in the technical data as have been negotiated with the contractor."

Reason

See comment at 227.405-5(1)(9).

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(b)(3)(i)(A) Limited Rights - At lines 2 and 3 delete "and marked with the limited rights legend."

Reason

Legends describe rights but do not convey them.

(b)(3)(ii) - At line 5 delete "Contractor" and substitute "owner of the data."

Reason

It is the owner of the data, not the prime contractor, who needs this notification.

(b)(3)(iii) - At lines 8-12

Change: "..contracting officer..in a license"

To: "...contracting officer and with any subcontractors or suppliers involved to determine whether there are acceptable terms for transferring such rights. All technical data in which the Government has then been granted additional rights by the owners of the data shall be listed or described in a license...."

Reason

To clarify the role of subcontractors and suppliers.

(b)(4) - At line 6, delete "parties" and substitute "government and any owners of the technical data."

(e)(3) Identification and delivery of data to be furnished with restrictions on use, release or disclosure:

At line 3 delete "unless the inadvertent omissions would have materially affected the source selection decision"

Reason

10 U.S.C. 2320(a)(2)(F) - Violative of this statutory language.

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(e)(4)

At line 5 delete "reserves the right to add the" and substitute "shall add all reasonable."

Reason

Must do so to protect owner of the technical data.

(f)(2) Marking Requirements:

Within the legend, add "subcontractor/supplier" to "contractor name"

(f)(3).

Within the legend, add "subcontractor/supplier" to "contractor name"
Reason

Necessary to know to whom the challenge or questions are to be addressed.

(g) Contractor Procedures and Records:

At line (1), delete "throughout performance of this contract".

(g)(1), line 1 begin first sentence with "Throughout performance of this contract,"

(g)(2), line 1. Begin the first sentence with "Throughout the validation period of 252.227-7037."

Reason

Clarification. If the contract has already been performed, the government has three years to challenge.

(k) Applicability to Subcontractors or Suppliers

(k)(4) - At line 1, delete "will" and substitute "shall"

Reason

Required to ensure compliance with appropriate statutory language. See 10 U.S.C. 2320 (a)(2)(F).

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CLAUSE

252-227.7015 Technical Data - Commercial Items

As found in 252.227-7015, please delete all references to "modify" or "modification" on the following:

(b)(1), line 1	(b)(2), line 2
(b)(1)(i), line 2	(c), line 3
(b)(1)(iv), line 3	(d), line 7

(a)(1)(iv) - Line 1 delete "(b)(1), (2), or (3)," and substitute "(a)(1)(i)(ii) or (iii)."

Reason

Referenced section (b)(3) does not exist; other references are inappropriate.

(b)(1)(i) - Line 5 delete "software" and substitute "technical data"

Reason

Correction of clerical error.

(b)(1)(ii) - after "data", add: "describing the commercial end unit"

Reason

Without this addition, the interpretation of "form, fit and function" could reach down into piece part level. If that is what is meant, that is what should be said.

(b)(2)(i) - At line 2 change "items," to "item or any of its parts;"

Reason

Without this addition, the clause could reach down into piece part level. If that is what is meant, that is what should be said.

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(b)(2)(ii) - At line 3, add "written" between "express permission".

Line 6, after "contract", add "and the Contractor is unable to meet the Government's needs."

Reason

To safeguard the position of the parties.

(c) - Delete

Reason

Impractical. Also inconsistent with the structure of every other data clause.

(d) Release From Liability

There should be a brief marking requirement that would support the government's position under this clause.

CLAUSE

252.227-7016

As found in 252.227-7016 please delete all references aid "modify" or "modification" in the following:

(c)(1), line 3
(d)(1), line 4
(d)(2), line 2

(a)(2) - At line 1 before "contracts" add "solicitations and "

(a)(3) - At line 1 before "contracts" add "solicitations and"

Reason

To extend protection to solitications.

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(c)(1) - At line 2, after "clause," add "as provided in the resulting contract."

(e) - Last line, delete "parties" and substitute "party owning the data."

Reason

If the government does not select the contractor for award, it should not have any rights in their data.

CLAUSE

252.227-7017

(b) - In line 1, delete "notification and". After "identification", add: "and assertion".

(e) - In line 2, delete "notification and". After "identification", add: "and assertion".

Reason

To agree with the clause title.

(e) - At line 3, after "offer" add "and after request to do so by the contracting officer,"

Reason

227.403-10(a) states that failure to do this is only a minor irregularity.

(g) Add new subparagraph (g):

"This identification and assertion required by paragraph (d) may be updated with other assertions identified after contract award when based on new information or inadvertent omissions."

Reason

Consistency with 227.403-3(c).

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CLAUSE

252.227-7025

As found in 252.227-7025 please delete all references to "modify" or "modification" in the following:

(b), line 4
(b)(1), line 1
(b)(2), line 6
(b)(3), line 1
(c)(1), line 5

New (c): Add the following:

(c) Upon completion of the work under this contract, the contractor shall return all GFI marked with limited or restricted rights legends or, with permission of the contracting officer, shall destroy such GFI and certify such destruction in writing to the contracting officer.

(c) - Change to **(d)(i)** and **(ii)**

Reason

It is necessary to ensure that copies of data with restrictive markings do not remain in possession of third parties.

CLAUSE

252.227-7028

In line 2 delete "documents on other media incorporating".

In lines 4-5, delete "or substantially similar to documents or other media" and substitute "technical data or computer software."

In line 6 delete "produced for"

Reason

Clarification. This is beyond coverage of the clause; government rights are fully covered in "delivered to" or "obligated to deliver" language.

(a) - Delete. Change "**(b)**" and "**(c)**" to "**(a)**" and "**(b)**"

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Reason

We are only dealing in the context of the contract requiring delivery, not production of data.

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Appendix B -- (Long-term Comments)

Protection of Data Rights when Data is Stored in Electronic Media:

The marking requirements fail to take into consideration the creation of electronic data bases IAW MIL-HDBK-59B, CALS Implementation Guide, and the subsequent use, storage, and delivery of individual data elements from that data base IAW MIL-STD-974, Contractor Integrated Technical Information Service (CITIS). As written, the restrictive legends and instructions for their application presuppose that technical data is presented in a paper or microfilm medium (i.e., hard copy). In fact, application of these legends becomes unwieldy, if not useless, when data is recorded on electronic media (e.g., diskettes, tapes, optical disks) or is accessed from a CITIS. For example, the technical data that comprises an electronic engineering drawing file is not viewed, as it is on paper, "through" a drawing format that includes legends, title blocks, revision blocks, etc. Instead, the format information is usually placed in a separate section, or overlay, of the drawing file for reference. It then becomes possible for those using the electronic data file to never see the legend even though they have been using the file and to copy the technical data without the section including the legend.

Legending software that is part of a weapon system component is also difficult, if not impossible, under the regulation's requirements. Owners of technical data and of the attendant data rights are told that we must legend the software if we are to maintain a claim to restricted rights, but that we must not use a restricted-rights legend when it would impede the use of the software program itself. How then are we to maintain restrictive rights and "legend" a program that is embedded in an E-prom in an engine control unit, or a program that is, itself, the engine control?

It is also necessary to define the "granularity" of data at which data rights are to be identified. (Granularity can be defined along a continuum from as large as an entire data base, to an individual drawing file, to as small as each datum in the data base. In a CITIS, for example, it would be possible for a DoD user to gain access to an integrated data base, withdraw technical information that is used on an engineering drawing as well as in ILS reports and other technical publications, and use it in some way. He must have some way of knowing if there are restrictions on any of the data that he has accessed. By tying legends to the data end-products (reports, drawings, etc) rather than to the data that goes into them, he will not be able to discover what his limitations are. Since today's DoD contracts contain requirements for CALS and CITIS activities, there is urgency to an answer to this question. If the means to

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maintain data rights claims (i.e., listing and legending) do not offer industry the actual, practical ability to protect proprietary data in the electronic environment, it would become a violation of 10.U.S.C. 2320 to require such delivery.

Adapting the regulations to commercial products and customers:

The regulations, despite the new changes, are still not conducive to the participation in Government contracting of high-quality commercial contractors that develop at private expense. For example, 10 U.S.C. 2320 allows the Government to obtain rights in technical data and computer software that encompass the concepts of "use, release, and disclose." These concepts were part of the ASPR and the DAR language that predated the 2320 statute and were carried into the regulatory language in the FAR and throughout the various versions of the DFARS to date. The latest version of the DFARS, however, adds the concepts of "modify, reproduce, perform, and display" to the types of usage the Government would be allowed in general in technical data and computer software. It would seem that these generalized additions to the list of usages are meant to strengthen the concept of rights in copyrighted material (including ADPE software), especially the problem of creating derivative works.

By inserting these usages throughout the rights regulation and not limiting them to copyrighted material, however, the DoD creates the probability of damage to the foundations of the technical data process. The problem is especially serious in the matter of creating a general "right" to "modify" technical data. It is far less of a problem to modify a motion picture created to teach hygiene to DoD troops than it is to modify a drawing of a proprietary detail part of the guidance mechanism of a fighter aircraft. Modification presents a major problem for contracts in which an original equipment manufacturer (OEM) remains the design control authority (DCA) for the procured item. If the Government can unilaterally modify the technical data that describes the item or component, the OEM cannot then maintain the currency of that data or warrant its accuracy. If such right of modification is then extended to third parties, as in government purpose rights (GPR) situations, the problems become even more grave. The OEM will be unable to comply with 10 U.S.C. 2320 (b)(6), which requires that:

> "...the contractor [is required] to revise any technical data delivered under the contract to reflect engineering design changes made during the performance of the contract and affecting the form, fit, and function of the

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items specified in the contract and to deliver such revised technical data to an agency within a time specified in the contract..."

The issue is also of grave concern in certain software situations. Unilateral modification by a Government agency of a word-processing program for the advantage of its local users is of much less consequence than unilateral modification by a Government agency of the software program that itself comprises a component of a weapon system. This second case of modification, which amounts to a Class 1 change, must be accomplished only on a bilateral or multi-lateral basis that includes the OEM/DCA to ensure that changes do not endanger the operation of the program and ultimately of the weapon system itself.

One solution to this problem could be that the "rights" to modify, reproduce, perform, and display are plainly limited to copyrighted material that does not carry any other data rights restrictions related to trade secret status. This compromise would meet the Government's needs in items such as motion pictures, music, and ADPE software without endangering the integrity of industry's technical data. If such limitations are not possible, another solution could be to limit the "right" of modification to that technical data and computer software for which the Government has become the DCA. This would relieve the original owner of their data from the impossible task of keeping up with changes made by others and would relieve that owner from unfair data warranty requirements.

Rights in Computer Software

There is a general underlying problem regarding the treatment of computer software and computer software documentation throughout these regulations. Although they will operate reasonably well when the Government licenses third-party commercial software programs for use on its ADPE, these regulations are laced with difficulties when applied to the purchase of computer programs related to items or components that are part of weapons systems.

First, the problems of marking requirements for a digital product such as a software program and of modification of software programs that are part of a weapon system are discussed above. Second, the basic restricted rights as defined in 252.227-7014 properly allow for the use of software programs in data-processing computers but do not take into account the requirements to use a software program that is the engine control aboard a fleet of aircraft. Third, to expect all software documentation — including design documentation — to be delivered with unlimited rights is to fail to

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recognize that documents such as Software Design Documents are as detailed, and as proprietary, as any Engineering drawings or manufacturing process descriptions.

Reducing the cost of administration

This body of regulation, in the attempt to cover wide possibilities, has created a complex and expensive administration requirement. These costs are leveled on the contracting community -- from prime contractors to small subcontractors -- and on the Government. The entire structure could be reshaped with savings in mind. For example, if the negotiation and validation of data rights designations were completed during the life of the contract, without need for a later validation process, the contracting community and the Government would be relieved of the necessity of record retention and auditing over the long period of time prescribed by the current validation process. This would also encourage participation in DoD programs of the innovative subcontractor which, with the proposed regulation, remains apprehensive about its ability to protect its proprietary interests and forgoes such participation.

#37
rec'd
8/30/94

RELIANCE GEAR CORPORATION

30 WEST FAY AVENUE • ADDISON, ILLINOIS 60101-5181
PHONE (708) 543-6640 • FAX (708) 543-0520

August 11, 1994

Mr. Robert Donatuti
Deputy Director for Major Policy Initiatives
1200 S. Fern Street
Arlington, VA 22202-2808
Attn: Ms. Angelena Moy, OUSD(A&T)/DDP

SUBJ: DAR Case 91-312

Dear Mr. Donatuti:

I am writing to you today to respond to your request for comments on the proposed changes in regulations governing rights in technical data. We do not develop data, but utilize technical data provided by the government to produce quality spare parts to the government at competitive prices. We have been doing this since 1965. We are a small company and are not able to devote a lot of engineering time in the manufacturing of these gears. We rely heavily on all the facts being on the prints and/or specs provided to us by our customers and prospective customers.

We at Reliance Gear Corporation are legitimately concerned that these changes will negatively affect our business opportunities. As a small business, we are also concerned that this rule is being promulgated for the benefit of large prime contractors at the expense of small business competitors for the aftermarket. We are bringing this matter to the attention of our elected representatives, in the hope that Congress will fully review the empact of this change on competition and our tax dollars.

We are concerned about the following:

* Changes in language making any data developed in performance of a government contract will result in less data being available. We don't believe that data resulting from development of a defense end product should be the property of an OEM.

* Data charged to an indirect pool will become proprietary to the OEM. We fully understand the argument that CAS will not allow misuse of this flexibility, but still believe that the OEMS will find this a loophole to crawl through. (This is demonstrated by the fact that OEM members of the 807 panel fought hard to achieve this concession.)

(Continued on Page 2)

* We are aware of contentions that these changes will only affect future development. We are afraid, however, that these changes may be applied to system upgrades, contract enhancements, etc., and seriously affect the spare parts market.

The more data there is available, the more competition. The more competition, the greater the savings to the taxpayer. We, as taxpayers, have a right to the savings produced through the competition as well as a right to data developed--according to any formula--with any of our tax dollars.

To summarize, we believe that this proposal will unnecessarily harm the ability of qualified small businesses to provide spare parts at a cost savings to the taxpayer. By affecting thousands of component manufacturers across the country, it will further erode the second tier suppliers which form an essential segment of our defense industrial base. And finally, it will result in American jobs sent offshore and a return to the $500 toilet seat Secretary Perry is hoping to avoid.

Sincerely,

L. R. Maros
Reliance Gear Corporation

LRM:ck

THE SAXON CORPORATION

2047 WEST MALONE
SAN ANTONIO, TEXAS 78225

P.O. DRAWER BB
SAN ANTONIO, TEXAS 78211

August 5, 1994

Deputy Director for Major
Policy Initiatives
1200 S. Fern Street
Arlington, VA 22202-2808
ATTN: Ms. Angelena Moy
OUSD (A&T)/DDT

Subject: DOD Proposed Rules, DAR Case 91-312, Data Rights

Dear Ms. Moy:

The Saxon Corporation does not support the recommendations that are being proposed in DAR Case 91-312. We are a small business and have survived for over two decades by providing the Department of Defense with a capability to repair Government assets at the best prices and at a level of quality that is difficult to match - both inside and outside the Government.

Virtually all of our business is conditioned on the unlimited use of and access to technical data and technical orders required to perform maintenance and repair on Original Equipment Manufacturers' products that the DOD uses to accomplish its daily mission. Although the OEM's can do the work themselves, the rigors of competition have established The Saxon Corporation as a source that can do it better and cheaper. However, some of the changes which the "807 Committee" is proposing has the potential of denying us the opportunity to compete for this business in the future. What we find troublesome is the Committee's decision to allow indirect costs to be treated as private expenses. Where all or part of a development is funded with private expenses, rights to the data become either limited to the developer only, or subject to Government purpose restrictions.

Limited rights obviously mean that requirements for maintenance or repairs would be restricted to the company that originally made the equipment. Even if the Government funded all the development, any portion paid out of an indirect cost element would add a private fund to the mix, thereby yielding Government Purpose Rights. We know from experience that once a solicitation has been announced, there is not enough time for us to secure and execute a non-disclosure agreement before the contract is awarded. Therefore, even when the Government (read "taxpayer") pays for all development, no one but the developer will be allowed to present a proposal. This does not make good business sense, much less good procurement sense.

I have been retired from a Senior Executive Service position at Kelly AFB, Texas for five and a half years. For the last six of my thirty seven years with the Air Force, I served as the Deputy Director of Contracting at Kelly AFB. During my tenure in this position, the procurement system underwent tremendous change some of which came about only after much resistance and acrimony. But what these changes did during the 1980's was to create a system of competition within DOD that resulted in far better support to the field than we had ever had, superior prices that saved Kelly AFB alone hundreds of millions of dollars each year, and a renewed confidence in a previously flawed procurement system that gave hope to both Government and contractor personnel that competition does work. I struggled daily to make every one of my employees an advocate of competition - and we succeeded.

I stay close to the Government's business. My company depends on it. What I have seen over the past five years is a very concerted effort on the part of major defense contractors to undue all those years of effort that yielded a workable competitive procurement system. Engine parts that were once competed among four, five or six companies are now too "critical" to compete. They must be bought from only the engine manufacturer; forget that competitor's parts have been flying in Air Force engines for ten years. I have seen the size of the Competition Advocate Office reduced from over 300 people to less than 30. I have seen repair requirements for which we competed for years be held up because companies had to attempt to "re-qualify", often unsuccessfully. Now I see the Department of Defense capitulate to the prime contractors by rewriting data rights regulations that have no other ostensible purpose than reducing or eliminating competition. Why else would the primes have made these changes such a priority?

I appeal to those in a position of authority or influence within the Defense Department to resist an extremely deleterious change to data rights regulations that can only put companies such as mine out of business, not to mention what effect it is going to have on the taxpayers of the country. We worked hard to make the procurement system work, through competition, better prices and better support. Please don't permit the OEM's to undo all our efforts.

Regards,
THE SAXON CORPORATION

Robert L. Blocker
Vice President

Copy:
- Congressman H.B. Gonzales
- Congressman R. Dellums (HAC)
- Congressman J. Murtha
- Senator S. Nunn (SAC)

RLB/lv
94-08-12

#22
8/19/94

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August 17, 1994

BY FEDERAL EXPRESS

Deputy Director
Major Policy Initiatives
OUSD (A & T)/DDP
1200 S. Fern Street
Arlington, VA 22202-2808

ATTN: Ms. Angelena Moy

Re: DAR Case 91-312

Dear Ms. Moy:

I am writing in response to the notice of proposed rulemaking published in the *Federal Register* of June 20, 1994, for DAR Case 91-312. The proposed rule is that recommended by the § 807 DoD/Industry Technical Data Advisory Committee.

DoD should not adopt the proposed rule. If adopted, this proposal would result in:

- DoD again purchasing overpriced spare parts from OEMs on a noncompetitive basis;
- DoD imposing its noncompetitive practices on domestic commercial markets and our allies;
- a loss of U.S. manufacturing capability and jobs as OEMs send work previously performed by more efficient small business manufacturers abroad to satisfy offset agreements and other arrangements.

These points are discussed in detail below.

I. § 807 Recommendations Would Lead to a Return of Spare Parts Abuses

An acid test of any procurement policy is whether the taxpayers get what they pay for. The § 807 recommendations should be rejected because they fail this test.

Taxpayers would not get what they pay for. Data rights would turn upon *how development was charged*, rather than *whether development was paid for by DoD*.

In a totally bizarre arrangement contractors could claim rights in data for items, components or processes *paid for by DoD*, by charging development to DoD as an indirect rather than direct cost. This practice would enable a so called "original equipment manufacturers" (OEMs) to preclude more efficient (lower priced) small business manufacturers, from competing against them for DoD, commercial and direct sales to foreign government.

No accounting changes are needed for an OEM to avail itself of this government giveaway. OEMs already charge the development of manufacturing process specifications essential for competition as an indirect expense. Also, FAR § 31.202(b) and CAS § 402.50(e) permit minor amounts of otherwise direct expense to be charged indirect for reasons of practicality.

OEMs can use creative accounting to obtain additional benefits and keep more data paid for by the taxpayer. Costs the government considers direct may be charged indirect if a contractor's disclosed accounting practices charge development to cost objectives other than a Government contract. CAS does not preclude a contractor from changing its accounting practices to charge costs previously charged direct indirect.

The indirect cost issue is discussed in more detail in my commentary in the April 13, 1994, *Government Contractor* entitled "'What's Mine is Mine and What's Yours is Mine' - The Return of Overpriced DoD Spare Parts" at pp. 8 - 10. A copy is enclosed and its entire contents incorporated in these comments.

Provisions under which OEMs would serve as data repositories should also be rejected. Such provisions would place OEMs in an untenable conflict of interest situation because they would benefit from not providing data to potential competitors.

II. § 807 Recommendations Would Impose DoD's Noncompetitive Practices on Commercial Markets and Our Allies. Additional Costs Will Be Borne in Part by U.S. Taxpayers

§ 807 proponents contend that the recommendations will further the use of dual use technology and DoD purchase of commercial products. Instead the recommendations would result in DoD imposing its noncompetitive regime on commercial markets.

As previously discussed, OEMs would be able to claim limited rights in data by charging all development costs indirect. In addition to forcing DoD to purchase noncompetitively, this would preclude competition on a large number of commercial and direct foreign government purchases.

OEMs will be able to even further restrict competition for commercial and foreign government procurement by charging an insignificant portion of development costs indirect. Under the proposal, the Government would be limited to Government Purpose Rights (GPR) where even 1 penny of development costs are charged indirect. GPR cannot be used to compete for commercial requirements or direct sales to foreign governments.

In sum, the problems are that: (1) no contractor contribution is required to claim GPR if development is charged to indirect costs, and (2) even if the indirect cost giveaway did not exist, the percentage of contractor financed development required to claim GPR is too low. Once again, John Q. Taxpayer does not get what he paid for.

DoD justifies the GPR giveaway on grounds that foreign Government and commercial customers are not its concern. DoD contends it is not its concern if foreign Government and commercial customers pay more.

DoD's argument ignores that much of these costs are ultimately born by the U.S. taxpayer. Foreign government purchases of military equipment are often paid for with funds from U.S. grants in aid. The flying public (taxpayers) will pay higher fares as airlines pass the cost of overpriced spare parts through to them.

The small business manufacturers that use data paid for by the taxpayer to create cost saving competition are taxpayers too. There is no reason that they should not be able to use items, components or processes developed at taxpayer expense for legitimate business purposes.

Based on the above it is recommended that DoD: (1) not adopt the indirect cost giveaway; and (2) require that a contractor pay for more than one half of development costs to claim GPR.

III. § 807 Recommendations Would Lead to a Loss of U.S. Jobs and Manufacturing Capability

The § 807 proposal ignores the role small business manufacturers play in the defense industrial base and as

providers of jobs. Small business manufacturers, rather than the OEMs, are U.S. manufacturing capability. OEMS, for the most part, purchase parts for assembly of weapons systems or for resale at a markup.

The § 807 proposal will result in DoD again purchasing noncompetitively from the OEMs. The OEMs are unlikely to subcontract manufacture to these small businesses as they did before competition was mandated by 1984 legislative reforms. Instead, they would likely follow their recent practice of subcontracting abroad to satisfy offset agreements and other arrangements. As a result U.S. jobs and manufacturing capability would be lost forever.

CONCLUSION

The § 807 Committee recommendations should be rejected. They are contrary to the public interest because U.S. taxpayers would not get what they pay for.

Thank you for the opportunity to present my views. If you have any questions, or need additional information, please let me know.

Sincerely,

Paul J. Seidman

Enclosure

The Government Contractor

information and analysis on the legal aspects of procurement for contracts professionals

Vol. 36, No. 15 April 13, 1994

★ "'What's Mine Is Mine and What's Yours Is Mine'—The Return of Overpriced DOD Spare Parts"—In 1984, legislation was enacted to end DOD's noncompetitive purchases of overpriced spare parts. Such legislation includes the Competition in Contracting Act (P.L. 98-369), the Defense Procurement Improvement Act of 1984 (P.L. 98-525), and the Small Business and Federal Procurement Competition Enhancement Act of 1984 (P.L. 98-577). As a result, so-called "original equipment manufacturers" (OEMs) lost the replacement parts market to more efficient small business manufacturers. After the enactment of these reforms, the small businesses that had fought for them returned to their factories. For the next 10 years, they provided DOD with high-quality parts at a fraction of the prices previously paid the OEMs. Meanwhile, representatives of the OEMs remained in Washington and lobbied for legislation to regain the spare parts business lost to competition. One result was enactment of the National Defense Authorization Act for Fiscal Years 1992 and 1993 (P.L. 102-190) which called for the creation of the § 807 Government/Industry Technical Data Committee. Appointments of industry members to the Committee were largely from the OEM community. As a result, the Committee's technical data rights recommendations largely favor the interests of the OEMs.

The OEMs contend that adoption of the Committee recommendations will encourage "dual use technology" and the purchase of commercial products. However, as discussed in more detail below, adopting the § 807 Committee recommendations will cause substantial harm. There are three fundamental reasons. *First*, the Committee's recommendations, if adopted, will result in DOD once again purchasing overpriced spare parts from OEMs on a noncompetitive basis. *Second*, the recommendations will result in DOD imposing its own noncompetitive practices on our domestic commercial markets and on sales to our allies. *Third*, U.S. manufacturing capability and jobs will be lost.

Overpriced Spare Parts—Under the current provisions of the DFARS, particularly DFARS 227.402-72(a), "Rights in Technical Data—Unlimited Rights," DOD is entitled to unlimited rights in data (1) required for the performance of a Government contract or (2) pertaining to items, components, or processes developed exclusively at Government expense. Unlimited rights data are in the public domain and can be used for any purpose, including competing for DOD, commercial, and foreign government requirements (see DFARS 227.401(19)).

Under the § 807 Committee's recommendations—particularly DFARS 227.403, "Noncommercial items or processes," and the contract clause found at DFARS 252.227-7013, "Rights in Technical Data—Noncommercial Items," DOD would continue to be entitled to unlimited rights in data developed entirely at Government expense. DOD would, however, no longer be entitled to unlimited rights in data required for the performance of a Government contract. Moreover, DOD's technical data rights would turn in large part upon whether development is charged to DOD as a direct or indirect cost—a potential source of significant abuse.

The potential for abuse lies in the Committee's recommended definition of "private expense." Under the Committee's recommended regulation and clause, *indirect costs* charged to a Government contract and paid for by DOD would nonetheless be treated as *private expense* (see recommended DFARS 252.227-7013(a)(7), (9)). Where an item, component, or process is paid for *entirely* at private expense, the Government would have only *limited*

rights in the technical data pertaining to it (see recommended DFARS 227.403-5(c)). Limited rights data could not be used for competitive purposes as the data could not be disclosed or released outside the Government (see recommended DFARS 252.227-7013(a)(13)).

Moreover, even where only a *portion* of development is claimed to have been at private expense, the Government would automatically have only Government Purpose Rights (GPR) in the data for five years (see recommended DFARS 227.403-5(b)) as opposed to unlimited rights unless otherwise negotiated under existing regulations. Under the proposed regulations, an OEM would be able to limit DOD to GPR by paying for (or charging as an indirect cost) an insignificant portion of development while DOD funds the rest. Although a competitor could use GPR data to compete for DOD contracts, it could not use it to compete for commercial or direct foreign government sales (see recommended DFARS 252.227-7013(a)(11),(12)). Competition on DOD procurements would also be limited under the Committee's recommended changes because there is no mechanism in place or provided for to permit potential competitors timely access to GPR data. Specifically, in order to compete, alternate sources need access to pertinent technical data *before* a solicitation is issued to obtain necessary source approvals and to submit a timely bid or proposal. Small business manufacturers currently use the Freedom of Information Act and agency "cash sales" programs to obtain this data before a solicitation is issued. Since GPR data are proprietary to the OEM, that data could be withheld under FOIA Exemption 4 governing confidential business information and not releasable under "cash sales" programs.

Thus, under the Committee's recommendations, DOD would be entitled to *unlimited rights*—i.e., the right to use, modify, reproduce, perform, display, release, or disclose technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so (see recommended DFARS 227.252.7013(a)(15))—*only* in data pertaining to items, components, or processes paid for *in full* by the Government as a *direct cost* under a particular contract. Allocating technical data rights on the basis of the classification of the underlying costs as direct or indirect will severely limit the availability of technical data to spare parts manufacturers. This will in turn limit competition for these parts and facilitate pricing abuses. It follows, therefore, that when the OEMs speak of protecting *"their"* data, they are now referring to data whose development costs were charged to DOD as indirect expenses and *paid for by the taxpayer.* In other words, "what's mine is mine and what's yours is mine."

The current FAR cost principles, the Cost Accounting Standards, and the case law permit OEMs to charge what can be significant amounts of design and development costs to indirect accounts. No accounting changes may be needed for OEMs to charge certain development costs indirect and thereby preclude competition. For example, OEMs commonly charge the development of manufacturing process specifications essential for competition to DOD as indirect manufacturing and production engineering (M&PE) costs under FAR 31.205-25. So long as the Government's rights in technical data did not turn on the manner in which M&PE was charged, how OEMs charged them was not critical from a competition standpoint. Where as now, however, the Committee has recommended changing the method for allocating technical data rights, the OEM's practice is crucial. It is not surprising, therefore, that OEMs fought stridently to have indirect costs, particularly M&PE, characterized as private expense and to thereby limit the Government's rights in the data and competition.

Costs other than M&PE expenses also may be charged indirectly. FAR 31.202(b) and CAS 402.50(e) permit "minor" amounts of otherwise direct costs, such as the costs of design development activity, to be charged indirect for reasons of practicality. This provides another means for an OEM to preclude data, whose development was paid for by the Government, from being used for competitive procurement purposes. The "minor" amounts of otherwise direct costs that can be charged indirect under this rule can be substantial. In *Sperry Gyroscope Co.*, ASBCA 9700, 1964 BCA ¶ 4514, the Board held that $136,000 in otherwise direct pre-1964 development dollars could be charged indirect under this exception. How far the OEMs will be able to push this "minor amount" exception to direct charging in order to claim rights in data paid for by DOD is unclear.

Furthermore, costs that the Government

views as direct development costs may nonetheless be chargeable indirectly in accordance with an OEM's disclosed accounting practices. CAS 418.30(a) defines a "direct cost" as any cost that "is identified specifically with a particular final cost objective." Thus, "[a]ll costs *identified specifically with a contract* are *direct costs* of that contract," and "[a]ll costs *identified specifically with other final cost objectives* of the contractor are *direct costs of those cost objectives*" (emphasis added). Although the case law is murky, significant amounts may be chargeable indirect under this definition and under cases holding that cost objectives are determined by a contractor's accounting system rather than contract requirements (see *Texas Instruments*, ASBCA 18621, 79-1 BCA ¶ 13800, *aff'd.*, 79-2 BCA ¶ 14184, and *Boeing Co. v. U.S.*, 862 F.2d 290 (Fed. Cir. 1988), 7 FPD ¶ 160; see also, Goodrich, "Identifying Final Cost Objectives & Classifying Direct Costs," 91-7 CP&A REPORT 3 (JULY 1991)). Costs charged to a cost objective other than a contract are considered indirect costs unless a contractor *elects* to reallocate them from an intermediate cost pool to the contract as a direct charge (see Shapiro, "Direct vs. Indirect Costs—A Choice," 89-2 CP&A REPORT 3, 8–9 (Feb. 1989)). Accordingly, a contractor could treat development expenses as indirect costs provided those costs benefit multiple final cost objectives under the contractor's accounting system.

Additionally, the CAS do not preclude a contractor from changing its accounting practices to charge costs previously charged direct indirectly, thereby preventing DOD from obtaining rights in data necessary for competition notwithstanding that the items, components, or processes were developed at taxpayer expense (see FAR 30.602-3). The CAS only require advance notice of a change and that the contractor absorb any increase in contract price. DOD is without authority to withhold approval of a change unless the system, as changed, would not comply with the CAS or with the FAR cost principles (see FAR 30.602-3 and FAR 30.202-7).

Finally, the Committee's recommendations also could be used by an OEM to preclude competition on previously competed spare parts. OEMs continually revise manufacturing process specifications during the life of a weapon system. From time to time, they also make minor design changes. These manufacturing process and design changes typically are paid for by DOD under component improvement programs. An OEM could preclude competition on previously competed spare parts by charging all or part of the development costs for these minor revisions to DOD as an indirect expense.

In light of the foregoing, it is evident that the Committee's recommendation to allocate technical data rights on the basis of the classification of development costs as direct or indirect will have a detrimental effect on competition and the price of spare parts and presents a serious potential source of charging abuse.

Effect on Commercial and Foreign Government Buyers—Small business contractors use Government-owned technical data to compete for domestic commercial sales and direct sales to friendly foreign governments in addition to DOD requirements. (Direct sales are where a U.S. company sells directly to a foreign government. They are distinguished from sales under the Foreign Military Sales program, in which DOD acts as the purchaser for a foreign government.) If the Committee's recommendations are adopted and OEMs can claim limited rights in data by charging the costs of all development indirect, data currently available to small business contractors would no longer be available to them and they would be precluded from competing on a large number of commercial and foreign government procurements.

Furthermore, under the Committee's proposal, (a) GPR data could not be disclosed by DOD for use in connection with commercial or direct foreign government sales (see recommended DFARS 227.252.7013(b)(2)), and (b) an OEM could limit DOD's rights in data to GPR for five years where it pays for as little as $1 of development costs itself, or worse, charges that $1 to DOD as an indirect cost. Therefore, competition by small business contractors on commercial and foreign government procurements would be further eroded at a minimum for the five-year period GPR data would be protected.

The absence of competition will increase costs to commercial and foreign government buyers. Since many direct foreign government sales are funded with U.S. grants-in-aid, the Committee's recommendations would correspondingly increase

costs to the U.S. taxpayer.

Loss of U.S. Jobs and Manufacturing Capability—The inability of small business parts manufacturers to obtain vital information as a result of the Committee's recommendations will likely result in the loss of many jobs. Specifically, an often-overlooked fact is that small businesses rather than OEMs are U.S. manufacturing capability. The OEMs for the most part are not manufacturers but rather are "assemblers," "dealers," or "importers." They purchase parts from others and then assemble them into weapon systems or, after adding a hefty markup, merely resell them as replacement parts.

Until recently, the OEMs purchased parts from domestic small business manufacturers. Increasingly, however, they have been entering into offset agreements with foreign governments that require them, as a condition of sale, to subcontract abroad. As a result of these offset agreements and other arrangements, OEMs are increasingly purchasing parts abroad. If the § 807 Committee recommendations are adopted, contracts previously awarded to domestic small business parts manufacturers will be awarded noncompetitively to OEMs because small businesses will be unable to obtain critical manufacturing information. The OEMS will subcontract their work abroad. U.S. jobs and manufacturing capability will be lost forever causing substantial harm to the U.S. economy and defense industrial base.

Conclusion—The recommendations of the § 807 Committee will result in increased costs to the taxpayer, as well as a loss of U.S. jobs and manufacturing capability. As stated in the Minority Report of Committee Member Nick Reynolds, President of the Independent Defense Contractors Association: "Given a reduced defense budget, one would think that the politically astute thing for DOD to do would be to take steps to maximize its 'bang for the buck'. In today's economic scenario, DOD does not serve itself well playing Santa Claus to large defense contractors at the expense of the taxpayer."

The foregoing comment was prepared for THE GOVERNMENT CONTRACTOR *by and contains the opinions of* **Paul J. Seidman**. *Mr. Seidman is a principal in the law firm of Seidman & Associates, P.C., McLean, VA, and represents companies competing against OEMs for spare parts procurements. He serves as procurement policy counsel to the Independent Defense Contractors Association.*

#20
8/19/94

Shipbuilders Council of America
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4301 N. Fairfax Drive
Arlington, Virginia 22203
Tel: 703-276-1700 Fax: 703-276-1707

Serial 535-SN

August 17, 1994

Deputy Director Major Policy Initiatives
1211 South Fern Street
Arlington, VA 22202-2808

Attn: Ms. Angelena Moy
OUSD (A&T)/DDP

Subject: Rights in Technical Data (DAR Case 91-312)

Dear Ms. Moy:

On behalf of the Shipbuilders Council of America, the national association representing American shipyards, marine equipment suppliers, and naval architects, I wish to submit the following comments with respect to the proposed rule on rights in technical data.

On balance, we believe that the proposed rule represents an improvement over existing regulations in that it gives greater recognition to the substantive rights of those contractors which incur expenses associated with technological research and development. Nevertheless, we believe that the following suggestions would further improve upon the proposed rule.

- **Paragraph 227.403-4(b):** Recommend the word "limited" be changed to "unlimited" in the third line from the end of the paragraph. This is a significant editorial correction.

- **Paragraph 227.403-5(b):** Recommend that this paragraph be amended to define a reasonable period of time to be more than five years. In this regard, merely stating that a longer period may be negotiated ignores the reality that in a number of instances, some contracting officers simply refuse to negotiate a longer period. Furthermore, as long as the Government has the right to engage in reprocurement from third parties, as it can when it has Government Purpose License Rights, there is no need for the Government to obtain unlimited rights in mixed funding situations after five years.

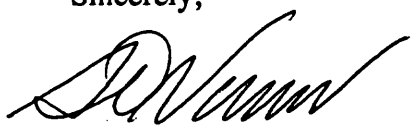
- **Paragraph 227.403-10(a)(5):** Recommend deletion of the first sentence that begins with the words "Information provides" and ends with the words "disclosed technical data." This sentence is contradictory to the statement that follows, which states that offerors shall not be prohibited from offering products unless the offeror relinquishes its rights in technical data. To make relinquishing of rights an evaluation factor does act as a force to relinquish rights or be downgraded in the procurement evaluation. In this re-

gard, Paragraph 227.403-1(d), Page 31587, clearly indicates that offerors "shall not be prohibited or discouraged from. . .offering to furnish items. . .developed at provided expense solely because the Government's rights to use. . .technical data. . .may be restricted."

- **Paragraph 252.227-7013(a)(7):** Recommend deletion of the first sentence that begins with the words "Development exclusively" and ends with the words "any combination thereof" and insert the following in lieu thereof, "Developed exclusively at private expense means development of the item, component or process was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a Government contract as direct costs, or any combination thereof." In this regard, the word "Development" is incorrect. It should read "Developed." (See the definitions in the previous paragraphs.) The reason for this proposed change is that the term "cost not allocated to a Government contract" is contradictory to the objective that charging to indirect cost pools entitles the contractor to retain rights. Indirect costs pools are allocated to contracts. It is assumed that if the term is changed to not allocated to the Government contract as a direct cost, the true meaning will be obtained.

- **Paragraph 252.227-7013(e):** Recommend that this paragraph be modified. In this regard, the requirement to identify data on an attachment at the commencement of a contact may be impracticable in major weapons procurements. In many instances, contracts are undertaken on the basis of concurrent development. This paragraph could be interpreted as requiring the contractor to suffer when new information is uncovered after contract award which raises the question of new information versus inadvertent admissions. The requirement for listing of data should be on a best effort basis. The thrust of this paragraph, which indicates that an inadvertent admission would affect the source selection, is counter to the statements elsewhere in the regulation that a contractor may not be forced to give up rights in data in order to obtain a contract.

Sincerely,



S. O. Nunn
Acting President

#27
8/19/94

SIDLEY & AUSTIN
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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August 19, 1994

BY HAND DELIVERY

Deputy Director
Major Policy Initiatives
Office of the Under Secretary
of Defense (Acquisition)
1211 South Fern Street
Room C-109
Arlington, Virginia 22202-2808

ATTN: Ms. Angelina Moy, OUSDA (A&T)/DDP

Re: Comments on Proposed Rule on Defense Federal Acquisition Regulation Supplement; Rights in Technical Data

Dear Sir:

This letter provides comments on the proposed rule to amend the Defense Federal Acquisition Regulation Supplement ("DFARS") provisions on rights in technical data. The proposed rule was published in the Federal Register on June 20, 1994. See 58 Fed.Reg. 31584-620 (1994). I commend the Section 807 panel for its efforts on this important subject. On the whole, the proposed rule provides greater clarity regarding the respective rights of contractors and the United States Government in technical data and computer software and this development is to be welcomed.

I am, however, greatly concerned by the expansive scope of the proposed definition for "Government purpose" set forth in proposed DFARS 252.227-7013(a)(11), and the definition of "Government purpose rights" set forth in proposed DFARS 252.227-7013(a)(12). See 59 Fed.Reg. 31605. If adopted, these definitions are likely to result in direct commercial competition between the United States Government and developers of technical data in the area of foreign military sales, which is surely not the intent of the drafters of this rule or of the Section 807 panel. Furthermore, this expansion is contrary to the historic and equitable approach of the United States Government in this area, which has

allowed the developers of data, primarily with their own funds, to exploit that data for commercial purposes, without interference or competition from the U.S. Government.

I. PROPOSED DEFINITION OF "GOVERNMENT PURPOSE"

The current DFARS provisions on technical data rights, DFARS 252.227-7013 (October 1988), does not include a separate definition of "Government purposes." There is, however, a limited definition of "Government purposes" which is embedded in the current definition of Government Purpose License Rights ("GPLR"). DFARS 252.227-7013(a)(14) (October 1988) thus states:

> Government purpose license rights (GPLR), as used in this clause, means rights to use, duplicate, or disclose data (and in the SBIR Program, computer software), in whole or in part and in any manner, for Government purposes only, and to have or permit others to do so for Government purposes only. Government purposes include competitive procurement, but do not include the right to have or permit others to use technical data (and in the SBIR Program, computer software), for commercial purposes.

The current definition of "Government purposes" essentially provides that (1) competitive procurement is a Government purpose subject to GPLR treatment and (2) having or permitting persons outside the United States Government to use technical data subject to GPLR treatment for commercial purposes is impermissible.[1] No mention is made of foreign military sales ("FMS") in this current definition and industry has rightfully assumed that the use of GPLR in this manner would not result in the United States Government "hav[ing] or permit[ting] others to use technical data. . .for commercial purposes."

The proposed rule includes a separate definition of "Government purpose" which is as follows:

> Government purpose means any activity in which the United States Government is a party, including cooperative agreements

[1] It should be noted that the term "commercial purposes" is not defined in either the current version of DFARS 252.227-7013 or in the proposed version of that clause.

> with international or multilateral defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or authorize others to do so.

Proposed DFARS 252.227-7013(a)(11), 59 Fed.Reg. 31605. The first sentence of the proposed definition substantially expands the definition of "Government purpose" from its current definition. The phrase "any activity in which the United States Government is a party" is extraordinarily broad and provides no limitations on the use of technical data, regardless of the nature of the United States Government's participation in an "activity." To avoid an excessive encroachment into the commercial sector and unwarranted infringement of private rights —— which was surely not intended by the Section 807 panel —— the "activity" in question should be limited to government contract matters that are undertaken by the United States Government for its own use, not for use by third parties.

This, however, is not the theme of the proposed definition of "Government purpose," which expands its scope to include (1) cooperative agreements with international or multilateral defense organizations or (2) sales or transfers by the United States Government to foreign governments or international organizations. Neither situation is specified in the current definition of "Government purposes" and neither situation can reasonably be read as falling under the ambit of competitive procurement, which can only be reasonably understood as competitive procurements for the United States Government. It is patently clear, therefore, this new definition will include a number of situations that are not covered by the current definition of "Government purposes."

It is equally clear that when the U.S. Government seeks to provide technical data in connection with such sales or transfers, it is acting in a commercial capacity. By acting in such a manner, the U.S. Government is depriving the contractor which developed nearly all of the technical data through its own sources of funding the right to pursue the non-U.S. Government market for the product without Government interference. Instead, the U.S. Government is acting as a commercial competitor of the contractor, which should not be tolerated and which is contrary to historic Government policy and the apparent intent of this proposed rule.

The proposed definition of "Government purpose" suggests that it is permissible to use technical data for "any activity in which the United States Government is a party," but retains the existing definition's prohibition on the use of technical data by the U.S. Government, or "others," for commercial purposes. This distinction, especially in the context of "sales or transfers by the United States Government to foreign governments or international organizations," is meaningless and results in providing a substantial commercial benefit to the contractor which has been allowed the use of such data, although that contractor contributed nothing to its development.

Thus, the first sentence of the definition of "Government purpose" is overly expansive. It should be changed to read as follows:

> Government purpose means any activity in which the United States Government is a party, **excepting** sales or transfers by the United States Government to foreign governments or international organizations under the Foreign Military Financing program.

The second sentence of the proposed definition of "Government purpose" properly retains the portion of the existing definition which refers to "competitive procurement." I support the expansion of the definition of prohibited activities to include "modify, reproduce, release, perform, display or disclose" in addition to "use" of technical data. However, I am concerned that the "have or permit" language in the current definition has been replaced with "authorize others to do so." The existing language indicates that the Government should not passively allow others to use GPLR technical data in a prohibited commercial manner. By changing the language to "authorize," the Government appears to be washing its hands of attempting to undertake even a modicum of effort to prevent the improper use of Government Purpose Rights data, regardless of how a contractor may have come to obtain that information. I would therefore recommend modifying the second sentence to read as follows, with the changes indicated in boldface type:

> Government purposes include competitive procurement **for the United States Government**, but do not include the rights of the United States Government to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or for the United States Government to **have, permit or** authorize others to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes.

II. PROPOSED DEFINITION OF "GOVERNMENT PURPOSE RIGHTS"

The proposed definition of "Government Purpose Rights," proposed DFARS 252.227-7013(a)(12), consists of two subparagraphs. The definition of "Government Purpose Rights" should be changed to reflect the above-suggested changes to the proposed definition of "Government purpose" in proposed DFARS 252.227-7013(a)(11). I suggest changing the word "government" in subparagraph (i) to "United States Government" so that it is clear that Government purposes apply only to the United States Government, and not to any and all governments in the world. Accordingly, subparagraph (i) would read as follows (with the new language in boldface):

> (12) Government purpose rights means the rights to --
>
> (i) Use, modify, reproduce, release, perform, display, or disclose technical within the **United States** Government without restriction.

Subparagraph (ii) of proposed DFARS 252.227-7013(a)(12) should be modified to further restrict the unauthorized dissemination reflect the changes discussed above so that it reads as follows (with changes in boldface type):

> (12) Government purpose rights means the rights to --
>
> * * *
>
> (ii) Release or disclose technical data outside the **United States** Government and authorize persons to whom release or disclosure has been [made][2] to use, modify, reproduce[3], release, perform, display or disclose that data for United States government purposes **as defined in this clause.**

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[2] A word is clearly missing from the version published in the June 20, 1994 Federal Register. See 59 Fed.Reg. 31605. The word "made" is appropriate.

[3] The word "reproduced" is used in the proposed rule published in "Federal Register." All of the other verbs are in the present tense.

I believe that adoption of these changes will further clarify the rights of both the United States Government and private contractors in the area of Government purpose technical data rights. Thank you for your consideration.

Sincerely,

Melvin Rishe

August 19, 1994

Deputy Director
Major Policy Initiatives
1211 S. Fern Street
Room C-109
Arlington, VA 22202-2808

Attention Ms. Angelena Moy
OUSDA (A&T)/DDP

RE: DAR Case 91-312

Dear Ms. Moy:

The Software Publishers Association (SPA) appreciates the opportunity to comment on the Department of Defense's proposed rule on Rights in Technical Data as published in the June 20, 1994 Federal Register (59 Fed. Reg. 31584). The SPA is the principal trade association of the personal computer software industry. Since 1984, it has grown to over 1100 members, representing the leading developers in the business, education, and consumer software markets.

As we have often noted in our comments on Multiple Award Schedule reform, the software industry is interested in reducing the cost of doing business with the government. Doing business with the government should be similar to doing business in the commercial marketplace, which would result in greater competition and lower prices for government customers. The proposed rule is generally consistent with this principle, and would clarify current regulations concerning rights in commercial computer software and documentation. However, some points require further clarification.

The regulations must be revised to provide that commercial software developed without government funding or assistance is subject to the same terms and conditions as would be encountered in a commercial transaction. Specifically, GSA should amend its MAS solicitation for software to state that DOD rules should apply to DOD purchases of commercial software and documentation. Therefore, the word "not" should be deleted from Section 227.500(b). This would make DOD purchases consistent with one set of regulations, streamline the procurement process, and more closely follow commercial licensing practice.

Software Publishers Association

1730 M Street • Suite 700 • Washington, DC • 20036-4510 • Telephone (202) 452-1600 • Fax (202) 223-8756

The definition of "commercial computer software" and its attendant documentation should be clarified to refer only to software developed without government funding. Such a change would reflect the reality that the vast preponderance of software products in the commercial marketplace are developed without government funding, and would reduce the cost and risk to vendors of doing business with the government.

In subsection 227.503, the terms "computer software and computer software documentation" should be replaced with "noncommercial computer software" and "noncommercial software documentation", respectively, throughout, for clarification. The subsection title indicates that it addresses only the latter, but use of the former terms could be misleading. For example, as currently written in subsection 227-503-10(b), by invoking clause 252.227-7014, the proposed rule states that software that does not have restrictive markings will be considered as delivered to the government with unlimited rights. The rule would also require manufacturers to establish written procedures and records to justify restrictive markings. It is vital that the rule be changed to minimize the potential pitfalls for manufacturers seeking to protect their intellectual property while licensing commercial software to DOD. Many SPA members are small firms that do not have the resources to establish and maintain rigorous procedures and records requirements, and would regard doing business with the government as too risky and burdensome. The government benefits in the long run and will attract a wider range of products and more competition if it simplifies and streamlines the procedures for vendors to guard their intellectual property.

Software Publishers Association

DOD's efforts to refine procurement and technical data rights in the proposed rule are laudable. But the regulations must be refined further to reflect the commercial marketplace and reap its competitive benefits. Commercial software that has been developed without government funding must be sold to the government under commercial terms and conditions.

Thank you for the opportunity to comment on the proposed rule.

Sincerely,

Douglas R. Miller
Government Affairs Manager

#40
Rec'd 9/8/94
from Congressman Hobson

SPECO Corporation

P.O. Box 1288
Springfield, OH 45501
513 - 390-3000
Fax 513 - 390-0593
Fax 513 - 390-0597

July 28, 1994

Mr. Robert Donatuti
Deputy Director for Major Policy Initiatives
1200 S. Fern Street
Arlington, VA 22202-2808
ATT:Ms. Angelena Moy, OUSD (A&T)/DDP

Subj: DAR Case 91-312

Dear Mr. Donatuti:

I am writing to you today to respond to your request for comments on the proposed changes in regulations governing rights in technical data. We do not develop data, but utilize technical data provided by the government to produce quality spare parts to the government at competitive prices. SPECO has provided this service since 1950.

We at SPECO are legitimately concerned that these changes will negatively affect our business opportunities. As a small business, we are also concerned that this rule is being promulgated for the benefit of large prime contractors at the expense of small business competitors for the aftermarket. We are bringing this matter to the attention of our elected representatives, in the hope that Congress will fully review the impact of this change on competition and our tax dollars.

We are concerned about the following:

Changes in language concerning data developed in performance of a government contract will result in less data being available. We don't believe that data resulting from development of a defense end product should be the property of an OEM.

Data charged to an indirect pool will become proprietary to the OEM. We fully understand the argument that CAS will not allow misuse of this flexibility, but still believe that the OEMs will find this a loophole to crawl through. (This is demonstrated by the fact that OEM members of the 807 panel fought hard to achieve this concession.)

We are aware of contentions that these changes will only affect future development. We are afraid, however, that these changes may be applied to system upgrades, contract enhancements, etc., and seriously affect the spare parts market.

The more data there is available, the more competition. The more competition, the greater the savings to the taxpayer. We, as taxpayers, have a right to the savings produced through competition as well as a right to data developed--according to any formula--with any of our tax dollars.

To summarize, we believe that this proposal will unnecessarily harm the ability of qualified small businesses to provide spare parts at a cost savings to the taxpayer. By affecting thousands of component manufacturers across the country, it will further erode the second tier suppliers which form an essential segment of our defense industrial base. And finally, it will result in American jobs being sent offshore and a return to the $500 toilet seat Secretary Perry is hoping to avoid.

Sincerely,

David R. Riley
President and COO

#23
8/19/94

SRI INTERNATIONAL

Science & Technology Group
Contracts Department

FACSIMILE TRANSMITTAL SHEET

Message To:
FAX NUMBER: 703-604-5971
COMPANY:
ATTENTION: Alyce Sullivan

DATE: 8/18/94

Message From:
NAME: PAUL ROSATI
TELEPHONE: 415-859-5761
REFERENCE:

This is transmitted from fax number (415) 859-2829
NUMBER OF PAGES: 1 PLUS THIS TRANSMITTAL SHEET

Please see attached.

Dear Alyce,
If you need more information, please contact me at phone 415-859-5761.
Regards, Paul Rosati

The information contained in this facsimile transmittal is intended only for the use of the individual or entity named above, and may contain information that is privileged, confidential, or exempt from disclosure under applicable law. If you are not the intended recipient, you are hereby notified that any distribution or copying of this information is strictly prohibited. If you have received this communication in error, please notify us by telephone (collect) and return the original message to us by mail at the address shown below. Thank you.

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Comments to 6/20/94 Proposed Rule Change to DFARS Subpart 227.4

President Clinton and Vice President Gore in "Technology for America's Economic Growth, A New Direction to Build Economic Strength" (2/22/93) states on page 23 "...the federal government will begin steps necessary to achieve the following reforms...• Agencies should obtain rights in technologies developed under government contracts only to the extent necessary to meet the agencies' needs, leaving contractors with the rights necessary to encourage private sector investment in the development of commercial applications."

As a contract negotiator for the private sector it is oftentimes difficult and time consuming in getting the government negotiator to recognize my company's needs. My recommendation is to include prescriptive language that a buyer and seller can refer to that explains the need. For example, " During the performance of the proposed contract, the seller will be drawing upon and utilizing a part of its existing intellectual property base that has potential commercial value. Such intellectual property includes technical data and computer software arising out of or developed under previous contracts supported by varying degrees of government and private funds. In order to protect the seller's economic interests in future commercial development or utilization activities, the seller's contract deliverables of technical data and computer software under the resultant contract will be provided with license rights for government purposes only for a period of 5 years." After the government buyer can read and recognize the seller's needs, then there should be a simple menu-type selection system (using either -X clauses or Alternate clauses) that allows easy and clear selection of the exact license right that is given, e.g., GPLR.

#20
8/19/94

UNC
THE AVIATION COMPANY

UNC INCORPORATED
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Annapolis, Maryland 21401-7394
410/266-9101

Marc R. Jartman
Vice President
Government Affairs

August 18, 1994

Department of Defense
Deputy Director Major Policy Initiatives
1200 S. Fern Street
Arlington, VA 22202-2808
ATTENTION: Ms. Angelena Moy

Reference: DAR Case 91-312

Dear Ms. Moy:

UNC Incorporated manufactures and remanufactures jet engines and aircraft gas turbine engines, refurbishes helicopters and provides aircraft maintenance and pilot training services. The company employs 7,000 and serves Department of Defense (DoD) and commercial customers worldwide.

The company provides aircraft engine parts to original equipment manufacturers (OEMs) for new equipment as well as replacement parts and repairs for aftermarket sales. UNC also provides spare parts and repairs directly to the military under the Spare Parts Breakout Program. In addition, UNC provides third party maintenance of military aircraft and other equipment for DoD. In each phase of our DoD business, we are dependent upon technical data being readily available from the government in order to provide competitively priced products and services.

The proposed regulations appear to be unjustifiably biased toward equipment developers to the detriment of the government and its suppliers of logistical support. One particularly offensive aspect of these regulations would permit a developer to limit the government to "government purpose rights" related to an item developed primarily at government expense with a small amount of private funding or, worse yet, developed completely at government expense with a small amount of government indirect development expense.

Because of the ease by which a developer could cause "mixed" funding to be used for development or "private" funding to be used for a slight modification of equipment, we believe that the new regulation will open the door to abuses by developers who are pressured to retain follow-on sole-source logistics support business for the systems they have developed. Sole-source contracting is much more

costly to the government than competitive contracting, particularly when it involves developers and OEMs who, for good reasons, have overhead cost structures significantly greater than the contractors that provide logistical support to DoD.

Contracting officers may be getting an erroneous message from the new regulations regarding the importance of data rights for the government. Under the current regulations a contracting officer starts from a negotiating position where the government has unlimited data rights. Under the new regulations the contracting officer most likely will be dealing with a "mixed" funding situation where "government purpose rights" is the starting point. Further, the new regulations will place contracting officers in a conflict of interest position. They will face the dilemma of aggressively pursuing maximum data rights for the government aiming at future competitive support or favoring the current development program by economizing on the pursuit of data rights. In the latter case, DoD and the U.S. taxpayer would pay significantly more in the long run for use of data which should rightfully belong to the government. This type of policy level decision would appear to be more appropriately made by senior service or DoD acquisition executives.

We strongly recommend that the current regulations regarding data rights remain in effect. They more fairly protect the taxpayers' investment in the development of military equipment and provide DoD greater flexibility in obtaining competitive, lower cost logistical support for military equipment during its operational life cycle.

Should DoD choose to continue its efforts to change the regulations we urge that the attached modifications to the proposed regulations be incorporated. These would provide guidance and direction regarding the importance of technical data rights in achieving the economies of competitive logistical support in the future.

We hope you will find our comments informative and constructive. If you have any questions or desire any additional input please do not hesitate to call.

Sincerely,

MJ/lkt
Attachment

Attachment to UNC Incorporated Letter Dated August 18, 1994

COMMENTS ON PROPOSED DFAR SUPPLEMENT
RIGHTS IN TECHNICAL DATA

1. 227.403-1(f) [add] In accordance with Subpart 217.75, acquisition of replenishment parts, whether or not under the DoD Spare Parts Breakout Program (see Appendix E), shall be fully evaluated with regard to rights in technical data which are to be acquired by the Government for such replenishment parts. For acquisition contracts exceeding $5,000,000, contracting officers shall make every effort to obtain, as a minimum, government purpose rights (as defined in 252.227-7013(a) (11) from prospective contractors. Where the government is due "unlimited" rights or "government purpose" rights and these rights are not obtained, the contracting officer will notify the head of the procuring activity who will evaluate recommendations and make the final decision whether to further pursue the acquisition of the appropriate level of data rights. If the appropriate level of data rights is not obtained, the results of this effort shall be memorialized in the contract file and forwarded to the Under Secretary of Defense, Acquisition and Technology.

2. 227.403-4(a)(1) When an item, component, or process is developed with mixed funding, the Government may use, release, 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) such as Acquisition of Replenishment Parts under Subpart 217.75 and repair and maintenance by third parties.

3. 252.227-7013(a)(11): Government purpose means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, acquisition of replenishment parts and repair and maintenance by third parties, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or authorize others to do so.

4. 227.403-13(a) [add at end of paragraph] For acquisitions involving provisioning (as that term is used in Appendix E) and for acquisition of replenishment parts under Subpart 217.75, contracting officers shall carefully examine during the challenge period the need to initiate challenge and validation procedures regarding a contractor's assertions of restrictions.

Attachment to UNC Incorporated Letter dated August 18, 1994

*5. 227.503-1(e) [add] In accordance with Subpart 217.75, acquisition of replenishment parts, whether or not under the DoD Spare Parts Breakout Program (see Appendix E), shall be fully evaluated with regard to rights in noncommercial computer software and noncommercial computer software documentation which are to be acquired by the Government for such replenishment parts. For acquisition contracts exceeding $5,000,000, contracting officers shall make every effort to obtain, as a minimum, government purpose rights (as defined in 252.227-7014(a)(10) from prospective contractors. Where the government is due "unlimited" rights or "government purpose" rights and these rights are not obtained, the contracting officer will notify the head of the procuring activity who will evaluate recommendations and make the final decision whether to further pursue the acquisition of the appropriate level of data rights. If the appropriate level of data rights is not obtained, the results of this effort shall be memorialized in the contract file and forwarded to the Under Secretary of Defense, Acquisition and Technology.

*6. 227.503-2(b)(1) Data managers or other requirements personnel are responsible for identifying the Government's minimum needs. In addition, to desired software performance compatibility, or other technical considerations, needs determinations should consider such factors as multiple site, shared use requirements, acquisition of replenishment parts, or maintenance and repair by third parties, whether the Government's software maintenance philosophy will require the right to modify the software, and any special computer software documentation requirements.

*7. 227.503-13(a) [add] For acquisitions involving provisioning (as that term is used in Appendix E) and for acquisition of replenishment parts under Subpart 217.75, contracting officers shall carefully examine during the challenge period (see procedures in 252.227-7019) the need to initiate challenge and validation procedures regarding a contractor's assertions of restrictions.

*8. 252.227-7014(a)(10) Government purpose means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, acquisition of replenishment parts and maintenance and repair by third parties, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation for commercial purposes or authorize others to do so.

Attachment to UNC Incorporated Letter Dated August 18, 1994

9. 252.227-7018(a)(13) Government purpose means any activity in which the United states Government is a party, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, acquisition of replenishment parts and maintenance repair by third parties, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software for commercial purposes or authorize others to do so.

Notes: The underlined sections are additions to proposed rules.

The above paragraphs marked with an asterisk (*) related to rights in non commercial computer software and documentation are included since technical data may be recorded, stored and transmitted in the form of computer software.