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Ms. Jennifer D. Johnson
Editor/Publisher
Defense Acquisition Regulations System
Department of Defense

Electronic Submission: *www.regulations.gov, DFARS Case 2019-D044*

Re: NDIA Comments on Defense Federal Acquisition Regulation Supplement Rights in Technical Data (DFARS Case 2019-D044)

Enclosures:

(1) NDIA Presentation on December 15, 2023, at the virtual public meeting entitled "*Rights in Technical Data (DFARS Case 2019-D044)"*
(2) NDIA Proposed Line-in/Line-outs proposed rules in DFARS Case 2019-D044

Dear Ms. Johnson,

The National Defense Industrial Association (NDIA) appreciates the opportunity to provide comments on the advance notice of proposed rulemaking for DFARS Case 2019-D044, Rights in Technical Data.

NDIA is the nation's oldest and largest defense industry association, representing nearly 1,700 corporate and over 65,500 individual members from small, medium, and large contractors, a majority of which are small businesses. NDIA members design, manufacture, apply, and maintain the cutting-edge technologies, systems, and platforms that our armed forces rely upon to deter aggression and defend our nation and its interests. As such, our members' professional and informed views on this request for information reflect the complexity and nuance of the issues under discussion.

In response to the referenced Federal Register Notice (FRN) and further to our live presentation in Enclosure (1), NDIA offers comments and recommendations on proposed changes to the Defense Federal Acquisition Regulation Supplement (DFARS), namely Rights in Technical Data (DFARS Case 2019-D044). NDIA also provides specifically suggested edits to the strawman proposed rule in Enclosure (2), which supports the same. These suggested edits are highlighted in Enclosure (2). However, NDIA provides the below thematic changes to elaborate on the comments in Enclosure (2):

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Remove the Definitions from the Draft Proposed Revisions to the DFARS Deferred Ordering Clause

NDIA recommends the removal of the draft proposed definitions from DFARS 252.227-7027, Deferred Ordering of Technical Data or Computer Software (the "Deferred Ordering Clause"). The addition of the definitions unnecessarily lengthens the Deferred Ordering Clause. Alternatively, NDIA recommends revising the proposed LILO revisions to refer to the applicable DFARS data rights clauses, as shown in the enclosed revisions to the draft proposed Line-In/Line-Out (LILO) changes. Another potential solution is to move all relevant data rights definitions to a single location, as the DAR Council previously contemplated in a prior rulemaking.

Remove References to the Delivery of Technical Data from the Draft Proposed Revisions to the DFARS Validation Clauses at DFARS 252.227-7019 at 252.227-7037

NDIA understands that the proposed draft revisions to DFARS 252.227-7019, Validation of Asserted Restrictions--Computer Software, and DFARS 252.227-7037, Validation of Restrictive Markings on Technical Data, are based on the underlying statutory changes in paragraph (a)(10) of 10 USC 3772, entitled "Rights in technical data: provisions required in contracts." As the title makes clear, the statutory section is applicable to the provisions related to "rights" in technical data— rather than the validation of previously delivered technical data, which is governed by the validation statutes at 10 USC 3781-86.

NDIA is concerned that inserting references to the *delivery* of technical data or computer software in DFARS 252.227-7019 and 252.227-7037 will create confusion regarding the scope or use of the clauses, such as to order technical data or computer software. As such, NDIA recommends the deletion of the proposed draft revisions to DFARS 252.227-7037, and the deletion of the proposed draft delivery language in DFARS 252.227-7019, as shown in the enclosed LILO revisions. Alternatively, NDIA recommends moving the implementation of the statutory language to Subpart 227.

Applying the Deferred Ordering Clause to Commercial Contracts and Subcontracts for the Acquisition of Commercial Products Would Impose an Undue Burden on Commercial Companies.

NDIA recommends the deletion of the proposed new references to DFARS 252.227-7015, Technical Data—Commercial Products and Commercial Services, in the Deferred Ordering Clause, consistent with the longstanding DFARS policy in place since 1995, as discussed below:

NDIA

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A. The Current DFARS Deferred Ordering Clause Does Not Apply to Commercial Technical Data

At the public meeting for this DFARS Case, DoD representatives indicated their view that the existing DFARS Deferred Ordering Clause applies to commercial products. This view contravenes both the explicit language of the DFARS as well as the associated regulatory history and DoD's own written commentary in prior rulemaking and a related report to Congress, as discussed below. Establishing a clear view of the current state is imperative to assess the proposed revisions in this ANPR.

DFARS Subpart 227.71 (Technical Data and Associated Rights) sets forth DFARS policy governing the acquisition of technical data and promulgates separate regulations for the acquisition of "commercial" and "other than commercial" (i.e., noncommercial) technical data. The Subpart is divided into two key sections: (1) Commercial products, commercial components, commercial services, or commercial processes (DFARS 227.7102 et. seq.) and (2) Other than commercial (i.e., noncommercial) products, commercial services, or commercial processes (DFARS 227.7103 et. seq.).

The DFARS policy and clause prescription language for the Deferred Ordering Clause is set forth in DFARS 227.7103-8 (Deferred Delivery and Deferred Ordering of Technical Data). DFARS 227.7103-8 pertains only to other than commercial (i.e., noncommercial) technical data governed by Section 227.7103. DFARS 227.7103-8 does not govern Section 227.7102, which is applicable to commercial technical data.

While the Deferred Ordering Clause is expressly listed in the contract clauses identified in Section 227.7103, as applicable to other than commercial (i.e., noncommmercial) technical data, the clause is not prescribed in Section 227.7102 as applicable to commercial technical data. This important distinction has been acknowledged by Government and non-Government data rights experts. See e.g. Richard M. Gray and Ralph C. Nash, "Data Rights Details – Including Commercial Data and Computer Software; and Determining the Requirements for Delivery & Rights," Public Contracting Institute, 80 (July 13, 2017) (confirming that the Deferred Ordering Clause is "prescribed only [within] NONcommercial regulations") (emphasis in original).

DoD has clarified and confirmed this separate treatment for commercial and other than commercial (i.e., noncommercial) technical data and software in its own rulemaking actions:

- In the final rule to implement the 1995 revision of DFARS Part 227 in DAR Case 91-312, DoD stated: "*DoD activities shall use the guidance in subpart 227.71 and 227.72…" "Section 227. 7102 provides guidance on the acquisition of technical data pertaining to commercial items, components, or processes…Section 227.7103 provides guidance on the acquisition of technical data pertaining to noncommercial items, components, or processes."* Federal Register, Vol. 60, No. 124, pages 33471, 33570 (June 28, 1995). The final rule made

a clear distinction between the provisions that govern noncommercial and commercial technical data.

- In a 2010 proposed rule to revise DFARS Part 227 (DFARS Case 2010–D001), the DoD again discussed the rulemaking history of the 1995 DFARS revision and the separation of the data rights regulations governing commercial technologies from those governing noncommercial items, stating: *"The current version of DFARS part 227 was issued in 1995, as the result of a joint Government-industry committee that was formed by section 807 of the National Defense Authorization Act for FY 1991. The section 807 committee revised nearly the entire part 227 and clauses, and established separate coverage for the treatment of technical data at subpart 227.71, and for computer software and computer software documentation at subpart 227.72.* ***In addition, within each of these subparts, the materials were organized to provide separate sections for commercial technologies (227.7102 and 227.7202) and for noncommercial technologies (227.7103 and 227.7203)"*** (emphasis added). See 75 Fed. Reg. 59413, pages 59057 – 59604 (Sept. 27, 2010).

Notably, the existing Deferred Ordering Clause was last amended in April 1988. If the DoD intended for the clause to apply to "commercial items" (now referred to as "commercial products"), then it would have modified the clause and the associated clause prescription language in the 1995 DFARS rewrite. Presumably, DoD did not do so because a principal purpose of the 1995 DFARS rewrite and the underlying Federal Acquisition Streamlining Act of 1994 ("FASA") (P. L. 103-355) was to reduce the regulatory burden on companies selling commercial items to the Government.

Finally, in 2016, in response to congressional concern about the increase in the number of government-unique clauses applied and flowed down to contracts and subcontracts for the acquisition of commercial items, the DoD issued the "Report to Congress on Defense-Unique Laws Applicable to the Procurement of Commercial Items and Commercially Available Off-The-Shelf Items." The Report, which was mandated by Section 854 of the FY16 NDAA (Pub. L. 114-92), identified 85 DFARS clauses that are applicable to the procurement of commercial items or commercial off-the-shelf items at the prime and subcontract level. Notably, the DoD did not include the Deferred Ordering Clause in the listing of DFARS clauses applicable to commercial items (i.e., commercial products").

Accordingly, the DFARS regulations, the associated regulatory history, and DoD's own commentary make clear that the longstanding DFARS policy in place since at least 1995 is that the DFARS Deferred Ordering Clause does *not* apply to commercial technical data or software.

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B. The Data Accession List (DAL) Data Item Description (DID) Has No Regulatory Effect on the DFARS Deferred Ordering Clause

During the public meeting to discuss this DFARS Case, a government representative pointed to language in DAL DID DI-MGMT-81453 Revision B, which contemplates the inclusion of commercial license rights "codes" in the DAL, as establishing an authoritative reference indicating that the DFARS Deferred Ordering clause applies to commercial technical data. On the contrary, the DAL DID has no regulatory effect on the Deferred Ordering Clause, and a contrary interpretation would contravene the applicable law and regulations, as described below.

The applicable law and regulations do not require contractors to maintain a DAL, nor do they require DoD contracting officers to use the DAL DID (or any specific revisions thereto). Indeed, there is no mention of the DAL or the DAL DID in the DFARS, including the Deferred Ordering Clause or the associated clause prescription at 227.7103-8(b).

In 2006, the DoD implemented a "DFARS Transformation" initiative to "dramatically change the purpose and content of the DFARS." See the proposed rule for DFARS Case 2003-D073. The intent was to transform the DFARS to contain "only requirements of law, DoD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies/procedures that have a significant effect beyond the internal operating procedures of DoD or a significant cost or administrative impact on contractors or offerors." *Id*. The new DFARS policy regarding the purpose and content of the DFARS was incorporated into Section 201.301 in the final rule for DFARS Case 2003-D073.

In that same final rule, DoD also amended the DFARS to remove "procedures for use of specifications, standards, and data item descriptions…" and relocate DID references to "the DFARS companion resource, Procedures, Guidance, and Information (PGI)." See 211.201, Identification and availability of specifications.

The DFARS policy for agency acquisition regulations states that the DFARS contains: (i) Requirements of law; (ii) DoD-wide policies; (iii) Delegations of FAR authorities; (iv) Deviations from FAR requirements; and (v) Policies/procedures that have a significant effect beyond the internal operating procedures of DoD or a significant cost or administrative impact on contractors or offerors. See DFARS 201.301(a)(1). Relevant procedures, guidance, and information that do not meet the criteria in (i)–(v) above are contained in PGI. See DFARS 201.301(a)(2). Accordingly, any DIDs required by law or DoD-wide policy must be specified in the DFARS. Currently, the only DFARS clauses that invoke or reference mandated DIDs are 252.234–7003, Notice of Cost and Software Data Reporting System, and 252.234-7004, Cost and Software Data Reporting System.

If DoD intended for the DAL DID (or specific versions thereto) to be mandatory, then the DFARS would specifically require their use in conjunction with the Deferred Ordering Clause.

C. Mandating Applicability of the DAL DID to Commercial Products Would Have a "Significant Effect Beyond the Internal Operating Procedures of the DoD."

Applying the Deferred Ordering Clause and the associated DAL requirements to contracts and subcontracts for the acquisition of commercial products would have a significant effect on companies selling commercial products to the DoD. There is no equivalent requirement in the commercial marketplace to maintain a listing of technical data or software generated in the performance of contracts or supply chain agreements for the development or sale of commercial products or services. Moreover, requirements to add commercial technical data and software to a contract DAL would create downstream risks that customers will attempt to exercise the Deferred Ordering Clause to compel the delivery of sensitive commercial data or software modified in the performance of the contract, which commercial companies would not ordinarily release outside of the company under any circumstances. Even the most minor of modifications would put the newly generated data at risk of being ordered for delivery. To protect the underlying pre-existing data or software, commercial companies would have to undertake costly efforts to segregate the pre-existing data from the new data, a burdensome exercise that ultimately would yield data or software extractions that have almost no utility to the Government in extracted form.

DFARS rulemaking is governed by the Office of Federal Procurement Policy Act (OFPPA) (41 USC 1707), which states in part:

"*(a) Covered Policies, Regulations, Procedures, and Forms.-*

(1) Required comment period.-Except as provided in subsection (d), a procurement policy, regulation, procedure, or form (including an amendment or modification thereto) may not take effect until 60 days after it is published for public comment in the Federal Register pursuant to subsection (b) if it-

(A) relates to the expenditure of appropriated funds; and

(B)(i) has a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form; or

(ii) has a significant cost or administrative impact on contractors or offerors.

(2) Exception.-A policy, regulation, procedure, or form may take effect earlier than 60 days after the publication date when there are compelling circumstances for the earlier effective date, but the effective date may not be less than 30 days after the publication date…" (emphasis added).

If mandated to apply to commercial products, the DAL DID Revision B would have "a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form." Pursuant to the OFPPA, any "form" that has such a "significant effect…" may not take effect until 60 days after it is published for public comment in the Federal Register. Notably, the DAL DID Revision B has *not* been published for public comment.

D. DoD Must Comply with Applicable Statutory Requirements Before Applying the Deferred Ordering Clause to Contracts and Subcontracts for the Acquisition of Commercial Products.

The applicability of the Deferred Ordering Clause to contracts and subcontracts for the acquisition of commercial products would undermine the Federal Acquisition Streamlining Act of 1994 ("FASA") (P. L. 103-355), codified at 41 USC 1906 and 1907, as well as the more recently enacted 10 USC 3452 (applicable to DoD-unique provisions of law), which are aimed at reducing the regulatory burden on companies which sell commercial products and commercial services to the Government.

In accordance with 10 USC 3452, the DoD cannot apply a covered provision of law or contract clause requirement to contracts or subcontracts for the acquisition of commercial products or commercial services unless the Under Secretary of Defense for Acquisition and Sustainment makes a "written determination" that it would not be in the best interest of the Department of Defense to exempt contracts or subcontracts for the procurement of commercial products and commercial services from the applicability of the provision or contract clause requirement.

It's unclear whether the Under Secretary of Defense for Acquisition and Sustainment has made such a "written determination." If such a written determination had been made, then NDIA would expect the DFARS clause prescription language in Subpart 227 to be revised to expressly prescribe the applicability of the Deferred Ordering Clause to contracts and subcontracts for the acquisition of commercial products. Notably, the DAR Council did not propose to revise Subpart 227 as part of this ANPR. Therefore, the proposed insertion of references to DFARS 252.227-7015 in the Deferred Ordering Clause should be removed.

E. The Proposed Terms "Interface Implementation Data" (IID) and "Interface Implementation Software" (IIS) Are Unnecessary to Implement the MOSA and Segregation/Reintegration Requirements.

NDIA recommends changes to modify the references to IID and IIS in the Deferred Ordering Clause because the proposed terms are unnecessary to implement the underlying statutory requirements and may create confusion in implementation.

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NDIA and its membership firmly appreciate the government's desire to promote a strong, dynamic, and robust small business industrial base. We do, however, have concerns surrounding certain aspects of these proposed rules. For the reasons alluded to, we respectively suggest changes in light of the unique challenges faced by companies that operate in the defense sector. NDIA stands ready to assist in revising and updating these proposals and would welcome this collaboration.

NDIA appreciates the opportunity to address our concerns pertaining to this matter. If you have any questions related to these comments, please reach out to Michael Seeds at mseeds@ndia.org.

Sincerely,

National Defense Industrial Association

Enclosure 1

Rights in Technical Data (DFARS Case 2019-D044)

December 15, 2023

Moshe Schwartz
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NDIA Senior Fellow for Acquisition Policy

Rights in Technical Data (Deferred Ordering)

- **Clause proscription language references – 7015 clause – could create downstream disputes related to scope and applicability to commercial technical data.**
  - Recommendation: Delete that reference from clause itself.
- **Why are we changing the validation clause?**

Rights in Technical Data cont'd

- **Confusing new software terms**
  - *We talked about this yesterday*
  - New definitions not sufficiently clear
    - Why do we need new definitions – say it in the contract (that is reflected in statute and this would allow for more customization that reflects the system engineering)
    - (Lack of clarity in scope creates risk for downstream disputes)
  - Example: New definition of "Form, Fit and Function Software"
    - Why are we changing longstanding DFARS policy and potentially encompassing a broad swath of software architecture and design data with unlimited rights, which was previously deliverable with restrictions?
    - No express exclusion for all types of software design information analogous to detailed manufacturing or process data; only excludes source code (and computer programs).

DFARS Case 2019-D044
(S) Rights in Technical Data
Advance Notice of Proposed Rulemaking

PART 227—PATENTS, DATA, AND COPYRIGHTS

* * * * *

SUBPART 227.71—TECHNICAL DATA AND ASSOCIATED RIGHTS

* * * * *

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

* * * * *

(b) *Deferred ordering*. Use the clause at 252.227-7027, Deferred Ordering of Technical Data or Computer Software, when a firm requirement for a particular **[technical]** data item(s) has not been established prior to contract award but there is a potential need for the **[technical]** data. Under this clause, the contracting officer may order any data that has been generated in the performance of the contract or any subcontract thereunder ~~at any time until~~ **[upon a determination in consultation with the requiring activity that—**

(1) The technical data are needed for the purpose of reprocurement, sustainment, or modification, including through competitive means, of a major system or subsystem thereof, a weapon system or subsystem thereof, or any other than commercial product, service, or process, and

(2) The technical data—

(i) Pertain to an item or process developed exclusively with Government funds or developed with mixed funding;

(ii) Are interface ~~implementation~~ data necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes; or

(iii) Are interface ~~implementation~~ data pertaining to a modular system interface as described in paragraph (b)(2) of the clauses at 252.227-7013, ~~252.227-7015,~~ and 252.227-7018 (10 U.S.C. 3771(b)(7)) ~~; or~~

~~**(iv) Are an interface specification**~~**.**

(c) The obligation of contractors to deliver such data expires] ~~three~~**[6]** years after acceptance of all items ~~(~~other than technical data or computer software~~)~~ under the contract or contract termination, whichever is later. The obligation of subcontractors to deliver such data expires ~~three~~**[6]** years after the date the contractor accepts the last item under the subcontract. When the **[technical]** 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.

* * * * *

SUBPART 227.72—COMPUTER SOFTWARE, COMPUTER SOFTWARE DOCUMENTATION, AND ASSOCIATED RIGHTS

* * * * *

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

* * * * *

(b) *Deferred ordering*. **[(1)]** 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~~**[upon a determination in consultation with the requiring activity that—**

(i) The computer software or documentation is needed for the purpose of reprocurement, sustainment, or modification, including through competitive means, of a major system or subsystem thereof, a weapon system or subsystem thereof, or any other than commercial product, service, or process, and

(ii) The computer software or documentation—

(A) Is or ~~P~~pertains to ~~an item or process~~ computer software developed exclusively with Government funds or developed with mixed funding;

(B) Is included in a software interface ~~implementation software~~ necessary for segregation of computer software from, or reintegration of that software or functionally equivalent software with, other computer software; or

(C) Is included in a software interface ~~implementation software~~ pertaining to a modular system interface as described in paragraph (b)(2) of the clauses at 252.227-7014 and 252.227-7018 (10 U.S.C. 3771(b)(7))~~; or~~

~~**(D) Is an interface specification**~~**.**

(2) The obligation of contractors to deliver such software or documentation expires] ~~three~~**[6]** 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 **[software or documentation]** ~~technical data or computer software~~ expires ~~three~~**[6]** 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.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

SUBPART 252.2—TEXT OF PROVISIONS AND CLAUSES

* * * * *

252.227-7019 Validation of Asserted Restrictions—Computer Software.
As prescribed in 227.7104(e)(3) or 227.7203-6(c), use the following clause:

VALIDATION OF ASSERTED RESTRICTIONS—COMPUTER SOFTWARE (~~JAN 2023~~**[DATE]**)

* * * * *

[(i) *Decision not to challenge.* A decision by the Government, or a determination by the Contracting Officer, to not challenge the restrictive marking or asserted restriction shall not constitute validation~~, or foreclose the Government from requiring delivery of the computer software~~.]

(~~i~~**[j]**) *Flowdown.* * * *

* * * * *

252.227-7027 Deferred Ordering of Technical Data or Computer Software
As prescribed at 227.7103-8(b) **[and 227.7203-8(b)]**, use the following clause:

DEFERRED ORDERING OF TECHNICAL DATA OR COMPUTER SOFTWARE

(~~APR 1988~~**[DATE]**)

[(a) *Definitions.* ~~As~~**The terms used in this clause are defined in the clauses at Defense Federal Acquisition Regulation Supplement (DFARS) 252.227-7013, Rights in Technical Data—Other Than Commercial Products or Commercial Services or 252.227-7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, as applicable.—**

~~"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.~~

~~"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.~~

~~"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.~~

~~"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.~~

~~"Developed" means that—~~

~~(1) For 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 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;~~

~~(2) 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;~~

~~(3) 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; or~~

~~(4) 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.~~

~~"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.~~

~~"Form, fit, and function data" means technical data that describes the required overall physical, architecture, logical, configuration, mating, attachment, interface, interoperability, compatibility, 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 or functionally equivalent items or processes. The term includes interface specifications. The term does not include computer software documentation or detailed manufacturing or process data.~~

~~"Form, fit, and function software" means computer software that describes the required overall architecture, logical, configuration, interface, interoperability, compatibility, functional, and performance characteristics~~

~~(along with the qualification requirements, if applicable) of computer software to the extent necessary to permit identification of functionally equivalent computer software. The term includes interface specifications. The term does not include computer programs or computer software source code.~~

~~"Generated" means technical data or computer software first created in the performance of this contract.~~

~~"Interface" means a shared boundary between systems or system components, defined by various physical, logical, and functional characteristics, such as electrical, mechanical, fluidic, optical, radio frequency, data, networking, or software elements.~~

~~"Interface implementation data" means technical data that—~~

~~(1) Describes the detailed steps, sequences, characteristics, and conditions used or specified by the developer to implement an interface; and~~

~~(2) Has sufficient detail necessary to permit segregation of an item or process from, or reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes.~~

~~"Interface implementation software" means computer software that—~~
~~(1) Describes the detailed steps, sequences, characteristics, and conditions used or specified by the developer to implement an interface; and~~

~~(2) Has sufficient detail necessary to permit segregation of computer software from, or reintegration of that software (or a physically or functionally equivalent item or process) with, other software.~~

~~"Interface specification" means form, fit, and function data or form, fit, and function software that pertains to or describes an interface.~~

~~"Major system component" means a high-level subsystem or assembly, including hardware, software, or an integrated assembly of both, that can be mounted or installed on a major system platform through modular system interfaces. A major system component includes a subsystem or assembly that is likely to have additional capability requirements, is likely to change because of evolving technology or threat, is needed for interoperability, facilitates incremental deployment of capabilities, or is expected to be replaced by another major system component (10 U.S.C. 4401(b)(3)).~~

~~"Modular system" means a system or system component that—~~

~~(1) Is able to execute without requiring coincident execution of other systems or components;~~

~~(2) Can communicate across component boundaries and through interfaces; and~~

~~(3) Functions as a module that can be separated, recombined, and connected with other systems or system components in order to achieve~~

~~various effects, missions, or capabilities (10 U.S.C. 4401(b)(5); section 804(a)(4), Pub. L. 116-283).~~

~~"Modular system interface" means a shared boundary between major systems, major system components, or modular systems, defined by various physical, logical, and functional characteristics, such as electrical, mechanical, fluidic, optical, radio frequency, data, networking, or software elements (10 U.S.C. 4401(b)(4)).~~

~~"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 financial, administrative, cost or pricing, or management information, or information incidental to contract administration.~~

~~(b)]~~ In addition to technical data or computer software specified elsewhere in this contract to be delivered hereunder, the Government may, at any time during the performance of this contract or within a period of ~~three (3)~~**[6]** years after acceptance of all items ~~(~~other than technical data or computer software~~)~~ to be delivered under this contract, or the termination of this contract, order technical data or computer software generated in the performance of this contract or any subcontract hereunder~~.~~**[upon a determination that—**

(1) The technical data or computer software is needed for the purpose of procurement, sustainment, or modification, including through competitive means, of a major system or subsystem thereof, a weapon system or subsystem thereof, or any other than commercial product, service, or process; and

(2) The technical data or computer software—

(i) Pertains to an item or process developed exclusively with Government funds or developed with mixed funding (in the case of technical data) or was developed exclusively with Government funds or developed with mixed funding (in the case of computer software);

(ii) Is interface ~~implementation~~ data necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes;

(iii) Is included in a software interface ~~implementation software~~ necessary for segregation of computer software from, or reintegration of that software or functionally equivalent software with, other computer software; or

(iv) Is interface ~~implementation~~ data or is included in a software interface ~~implementation software~~ pertaining to a modular system interface as described in paragraph (b)(2) of the clauses at ~~Defense Federal Acquisition Regulation Supplement (~~DFARS~~)~~ 252.227-7013, Rights in Technical Data—Other Than Commercial Products or Commercial Services; 252.227-7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation; ~~252.227-7015, Technical Data—Commercial Products and Commercial Services;~~ and 252.227-7018

Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program (10 U.S.C. 3771(b)(7))~~; or~~

~~**(v) Is an interface specification**~~**.**

(c)] When the technical data or computer software is ordered, the Contractor shall be compensated **[only]** for converting the data or computer software into the prescribed form~~,~~ **[and]** for ~~reproduction and~~ delivery. The obligation to deliver the technical data **[or computer software]** of a subcontractor and pertaining to an item obtained from ~~him~~ **[the subcontractor]** shall expire ~~three (3)~~**[6]** years after the date the Contractor accepts the last delivery of that item from that subcontractor under this contract. The Government's rights to use ~~said~~**[the]** data or computer software shall be pursuant to the **[applicable clauses at DFARS 252.227-7013, 252.227-7014, ~~252.227-7015,~~ or 252.227-7018]** ~~"Rights in Technical Data and Computer Software" clause~~ of this contract.

(End of clause)

*** * * * ***

~~**252.227-7037 Validation of Restrictive Markings on Technical Data.**~~
~~As prescribed in 227.7102-4(c), 227.7103-6(c)(3), 227.7104(c)(5), or 227.7203-6(f), use the following clause:~~

~~VALIDATION OF RESTRICTIVE MARKINGS ON TECHNICAL DATA (JAN 2023~~**~~[DATE]~~**~~)~~

~~*** * * * ***~~

~~(j) *Decision not to challenge.* A decision by the Government, or a determination by the Contracting Officer, to not challenge the restrictive marking or asserted restriction shall not constitute "validation."~~**~~[validation, or foreclose the Government from requiring delivery of the technical data.]~~**

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