reporting systems in order to develop risk assessments.

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

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

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

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

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

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

(End of provision)

252.213–7000 [Removed and Reserved]

■ 13. Remove and reserve section 252.213–7000.

[FR Doc. 2023–05671 Filed 3–21–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 227, 237, 239, and 252

[Docket DARS–2019–0067]

RIN 0750–AK87

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

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2018.

DATES: Effective March 22, 2023.

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

SUPPLEMENTARY INFORMATION:

I. Background

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

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided as follows:

A. Summary of Significant Changes From the Proposed Rule

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

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

B. Analysis of Public Comments

1. Areas of Alignment With Industry

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

Response: DoD acknowledges the respondent's comments.

2. Application to Commercial Computer Software

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

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

limitations on commerciality of the additional software or related materials. Paragraph (b)(2) of 10 U.S.C. 4576 also indicates that the software deliverables should not rely on external or additional software with no limitations with respect to commerciality of that external or additional software. Similar to the respondents' comments about commercial software, paragraph (b) of the statute explicitly acknowledges circumstances where delivery of software is not feasible. In such cases, the statute and the final rule acknowledge alternative deliverable requirements. Accordingly, the statute may be applied to both noncommercial and commercial software, and the statute considers how DoD may consider and protect the intellectual property (IP) interests of its industry partners (including commercial vendors and nontraditional contractors).

DoD asserts that application of the statutory requirements for the Government to consider acquiring all of the additional software and related materials necessary to meet the Government's needs for deploying, operating, testing, and supporting acquired software over its life cycle is consistent with long-standing policy regarding the acquisition of commercial software. DoD's established policies and practices for acquiring commercial computer software and related documentation recognize that the Government may negotiate for additional deliverables and license rights that are necessary to meet the Government's needs when the standard commercial deliverables or rights do not meet agency needs (see DFARS 227.7202–1(a) and (c) and 227.7202–3(b)). For these reasons, DoD asserts that the final rule should apply to commercial software and documentation, while maintaining the policies set forth in DFARS 227.7202–1(c). The final rule has been revised to emphasize consistency with DFARS 227.7202–1(c), while permitting contracting officers the discretion to consider the factors identified in DFARS 227.7203–2(b) and (c), unless inappropriate under the specific circumstances of the acquisition. Because the final rule is consistent with the policies at DFARS 227.7202–1(c), this facilitates alignment with commercial licensing models, thereby incentivizing commercial vendors to do business with DoD.

In response to the respondents' concerns about the scope of the term ''all necessary license rights'' in DFARS 227.7203–2(b)(6)(ii)(A) and (B), this phrase has been changed to ''license rights sufficient to meet the Government's needs.'' The final rule is consistent with the policies and directives at DFARS 227.7203 and Department of Defense Instruction (DoDI) 5010.44, Intellectual Property (IP) Acquisition and Licensing, which encourage contracting officers to tailor the Government's license rights to the meet agency needs.

3. Minimum Rights

Comment: Several respondents recommended that the proposed rule should retain the term ''minimum'' in the phrase ''the Government's minimum needs'' in DFARS 227.7103–2(b)(1) and 227.7203–2(b)(1). The respondents asserted that removal of this term will be construed as expanding the scope of the Government's needs and encouraging an unbounded consideration of life-cycle needs. The respondents asserted that the Government may risk overpricing its requirements, based on an overly expansive interpretation of the proposed rule. The respondents also posited that an unbounded assessment of life-cycle needs may not consider obsolescence of software due to various factors, including future changes to hardware and software specifications, entrances and exits of software vendors to the market, and new disruptive technologies. One of the respondents also noted that the phrase ''the Government's minimum needs'' reflects long-standing DFARS policy, which was recommended by the Section 807 Committee in 1995.

Response: DoD notes that the proposed revisions were made partially in response to recommendations made in Tension Point Paper 2 in the 2018 Report Government-Industry Advisory Panel on Technical Data Rights (the ''Section 813 Panel Final Report''). In response to the advance notice of proposed rulemaking (ANPR) published at 85 FR 2101 on January 14, 2020, one respondent previously recommended that DoD should adopt the recommendations in Tension Point Paper 2. In Tension Point Paper 2, the Government and industry panel members recommended that the term ''minimum needs'' should be changed to ''lifecycle needs'' in the context of the Government determining its needs, including consideration of alternatives to traditional delivery methods.

As acknowledged by respondents during the public meeting held on March 10, 2022, there are long-standing concerns that the phrase ''the Government's minimum needs'' and the term ''minimum'' in particular, are ambiguous and purportedly misunderstood by contracting officers. Accordingly, the final rule removes the source of the ambiguity by removing ''minimum needs'' and replacing it with ''life-cycle needs.'' In addition, the phrase ''the Government's life-cycle needs'' is aligned with the recitation of ''life cycle'' in 10 U.S.C. 4576, which does not reference ''minimum needs.'' The statute supersedes recommendations made by the Section 807 Committee nearly three decades ago.

In response to the respondents' concerns about the scope of the term ''life-cycle needs,'' DoD notes that the assessment of life-cycle needs is informed and shaped by the considerations and factors in DFARS 227.7103–2(b)(1) and 227.7203–2(b)(1). The final rule further bolsters the list of factors in DFARS 227.7203–2(b)(1)(i) by including the Government's costs to develop computer software.

4. Guidance on Procurement Planning and Solicitation/Contract Requirements

Comment: One respondent expressed concerns that the proposed changes to DFARS 227.7202–1(d) and 227.7203–2(b) and (c) do not adequately address the complex state of software development across innovative, cloud-based technology firms. Another respondent asserted that the proposed rule disregards the value of the IP and investment of software developers. This respondent recommended that the final rule consider how acquisition requirements will impact the willingness of businesses (and specifically small businesses) to do business with the Government. The respondent suggested that DoD's assessments of life-cycle needs should consider incentives for traditional and nontraditional contractors (such as small businesses) to continue to develop computer software solutions at private expense for Government applications and to submit bids for Government contracts.

Another respondent recommended that the proposed rule at DFARS 227.7203–2(b)(2)(ii) should be changed to require consideration of the alternatives to delivery of source code and related software design details listed in DFARS 227.7203–2(b)(2)(ii), rather than merely recommending consideration of alternatives. One respondent also recommended changing the title of this section to ''Alternatives to delivery of source code and related software design details.''

Response: In accordance with 10 U.S.C. 3771 and DoDI 5010.44, the final rule was developed to respect and protect the IP interests and technology investment of industry (including small

businesses and nontraditional contractors), while considering DoD's investments and life-cycle needs. Accordingly, DoD adopted several of the respondents' recommendations. In particular, DFARS 227.7203–2(b)(1)(i) was revised to emphasize the economic interests of small businesses and nontraditional contractors. The final rule also clarifies guidance in the proposed rule related to access to technical data or computer software. The final rule references ''access agreements for cloud-based or subscription-based software products or services'' as an alternative to delivery of source code and design details in DFARS 227.7203–2(b)(2)(ii). The final rule also changes the title of DFARS 227.7203–2(b)(2)(ii), as recommended.

However, DoD has not adopted the respondent's recommendation to change the prescriptive guidance at DFARS 227.7203–2(b)(2)(ii) to require consideration of these alternatives to source code and related software design details. In accordance with FAR 2.101, the term ''should'' denotes that the instruction will be followed unless inappropriate for a particular circumstance. As acknowledged by various respondents, DoD must consider the feasibility or practicality of applying these policies. To that end, the term ''should'' provides contracting officers with the flexibility to consider the specific circumstances or nuances of an acquisition in applying the considerations in DFARS 227.7203–2(b)(2)(ii).

5. Proposed Changes to Part 237

Comment: Some respondents recommended that the proposed rule at DFARS 237.102 should not apply to service contracts, such as software-as-a-service contracts.

Response: DoDI 5000.74, Defense Acquisition of Services, indicates that IP needs must be addressed in acquisition strategies for service contracts. DoDI 5010.44 also indicates that acquisition, licensing, and management of IP is an important factor in acquisition, operation, maintenance, modernization, and sustainment, whether the IP is delivered as a product or as a service. In view of these DoD policies, the prescriptive guidance at DFARS 237.102 merely notes that contracting officers should consider the guidance in 227.7202 and 227.7203, and references existing, long-standing DFARS guidance. For these reasons, DoD has not adopted the respondents' recommendation that the rule should not apply to service contracts.

6. ''Restricted Rights'' Definition

Comment: Several respondents asserted that the revisions to the definition of ''restricted rights'' should be removed. The respondents asserted that the proposed revisions: (1) do not balance the interests of Government and industry; (2) conflict with existing DoD policies and statutes; and (3) are vague and internally inconsistent with respect to the terms ''reasonable'', ''development'', and ''use''. Several respondents indicated that the proposed rule does not adequately protect the developer's economic interests in software developed exclusively at private expense. Some respondents asserted that the proposed rule may impact the economic interests of small businesses and that it will discourage ongoing private investment and the delivery of privately developed software. The respondents also asserted that the proposed rule conflicts with existing DoD policies and statutes (*e.g.,* the statutory preference for specially negotiated licenses and Small Business Innovation Research/Small Business Technology Transfer Programs policy objectives), and is not supported by 10 U.S.C. 3771 and 3206.

Response: DoD notes that the revisions to the ''restricted rights'' definition were made partially in response to recommendations made in Tension Point Paper 13 in the Section 813 Panel Final Report. In response to the ANPR published at 85 FR 2101 on January 14, 2020, one respondent previously recommended that DoD should adopt the recommendation in Tension Point Paper 13. In Tension Point Paper 13, industry panel members agreed that the definition of ''restricted rights'' should be revised to permit the Government to make a ''reasonable'' number of copies to satisfy the Government's life-cycle needs, including DoD's programmatic and operational needs. Although the respondents indicated that the term ''reasonable'' is unbounded or vague, DoD notes that the current term ''minimum'' is also not limited or defined by a specific number of software copies. For these reasons, DoD has not adopted the respondents' recommendation to reinstate the phrase ''minimum number of copies.''

The proposed rule changed the number of copies that the Government is permitted to make for otherwise-authorized activities. The proposed rule does not expand the Government's license rights to distribute or use computer software. Because there are no purpose-based limitations on the Government's use of computer programs in paragraph (i) of the ''restricted rights'' definition, a ''restricted rights'' license permits Government use of computer programs for any purpose. Accordingly, the proposed rule included revisions that sought to reference and provide examples of the Government's authorized purposes and activities provided within the existing rights under the definition of ''restricted rights.''

For clarity, DoD revised paragraph (iii) of these definitions by: (1) removing the additional listing of specific, exemplary purposes included in the proposed rule; (2) removing the reference to ''use'' of computer software; and (3) permitting copies for ''other activities authorized in [the 'restricted rights' definition]'' to leverage existing rights under the clauses. The final rule also resolves an ambiguity in the ''restricted rights'' definition. Although the current rule expressly recognizes the Government's rights to use computer programs for any purpose in paragraph (i) of the definition, the rule only implicitly recognizes the Government's rights to use unmodified computer software for the specific purposes and activities for which the license expressly authorizes the software to be released to non-Government persons. To resolve this ambiguity, DoD revised paragraphs (v) through (vii) to expressly indicate that the Government has the right to use computer software for those same purposes, as well as other rights to computer software already provided to covered Government support contractors.

7. Future Rulemaking Should Address Recommendations Presented by the 2018 Government-Industry Advisory Panel on Technical Data Rights

Comment: Although the respondent acknowledged that this recommendation is outside the scope of implementing 10 U.S.C. 4576, the respondent recommended that DoD's future rulemaking address the specific Government-industry recommendations included in Tension Point Paper 12 of the Section 813 Panel Final Report. In particular, the respondent recommended that DoD should, in a separate rule, consider DFARS revisions that identify factors to be considered in determining whether to adopt a traditional acquisition approach or a software-as-a-service approach.

Response: To the extent that such recommendations fall within the scope of implementation of 10 U.S.C. 4576 and existing DoD policies, DoD considered recommendations in the Section 813 Panel Final Report.

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

This rule does not create any new solicitation provisions or contract clauses. It does not impact any existing provisions or clauses or their applicability to contracts valued at or below the simplified acquisition threshold, for commercial services, or for commercial products, including commercially available off-the-shelf items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules Under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VI. Regulatory Flexibility Act

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

This rule implements section 871 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115–91). Section 871 established new direction at 10 U.S.C. 2322a, Requirement for consideration of certain matters during acquisition of noncommercial computer software. The statute requires that DoD, as part of any negotiation for such software, consider all noncommercial computer software and related materials necessary to meet the needs of the agency.

DoD received no public comments in response to the initial regulatory flexibility analysis.

The rule may impact small entities that are awarded DoD contracts for noncommercial computer software, to include contracts under the Small Business Innovation Research and Small Business Technology Transfer Programs. Based on data from the Federal Procurement Data System (FPDS) and the Electronic Data Access (EDA) for FY 2019 through FY 2020, DoD estimates that an average of 6,263 unique small entities are awarded an average of 30,146 contract actions for noncommercial software annually.

This rule does not impose any new reporting, recordkeeping, or other compliance requirements.

There are no known alternatives that would accomplish the stated objectives of the applicable statute.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies to this rule. However, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved under Office of Management and Budget (OMB) Control Number 0704–0369, entitled DFARS Subparts 227.71, Rights in Technical Data; and Subpart 227.72, Rights in Computer Software and Computer Software Documentation, and related provisions and clauses.

List of Subjects in 48 CFR Parts 227, 237, 239, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 227, 237, 239, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 227, 237, 239, and 252 continues to read as follows:

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

PART 227—PATENTS, DATA, AND COPYRIGHTS

■ 2. Revise the heading for subpart 227.71 to read as follows:

Subpart 227.71—Technical Data and Associated Rights

■ 3. Amend section 227.7100—

■ a. In paragraph (a) introductory text by removing ''requirements in'';

■ b. By removing paragraph (a)(5);

■ c. By redesignating paragraphs (a)(6) through (9) as paragraphs (a)(5) through (8);

■ d. By revising the newly redesignated paragraphs (a)(7) and (8).

The revisions read as follows:

227.7100 Scope of subpart.

* * * * *

(a) * * *

(7) Public Law 103–355.

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

* * * * *

■ 4. Amend section 227.7103–2 by revising paragraph (b)(1) to read as follows:

227.7103–2 Acquisition of technical data.

* * * * *

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

* * * * *

■ 5. Revise the heading for subpart 227.72 to read as follows:

Subpart 227.72—Computer Software, Computer Software Documentation, and Associated Rights

■ 6. Revise section 227.7200 to read as follows:

227.7200 Scope of subpart.

(a) This subpart—

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

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

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

(iii) 10 U.S.C. 3771–3775.

(iv) 10 U.S.C. 3781–3786.

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

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

(2) Does not apply to—

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

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

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

■ 7. Amend section 227.7202–1 by adding paragraph (d) to read as follows:

227.7202–1 Policy.

* * * * *

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

■ 8. Amend section 227.7203–2—

■ a. By revising the section heading and paragraphs (b) and (c)(4) and (5); and

■ b. By adding paragraph (c)(6).

The revisions and addition read as follows:

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

* * * * *

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

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

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

(iii) Multiple site or shared use requirements;

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

(v) Any special computer software documentation requirements.

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

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

(B) Conduct required computer software testing and evaluation;

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

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

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

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

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

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

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

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

(c) * * *

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

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

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

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

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

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

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

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

PART 237—SERVICE CONTRACTS

■ 9. Add section 237.102–76 to read as follows:

237.102–76 Acquisition of computer software and computer software documentation under services contracts.

(a) See *227.7202* for policy on the acquisition of commercial computer

software and commercial computer software documentation for services contracts that require the development or modification of commercial computer software.

(b) See 227.7203 for policy on the acquisition of other than commercial computer software and other than commercial computer software documentation for services contracts that require the development or modification of other than commercial computer software.

PART 239—ACQUISITION OF INFORMATION TECHNOLOGY

■ 10. Amend section 239.101 by adding paragraph (4) to read as follows:

239.101 Policy.

* * * * *

(4) See 227.7203 for policy on the acquisition of other than commercial computer software and other than commercial computer software documentation.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 11. Amend section 252.227–7013 by revising the clause date and paragraph (a)(15) to read as follows:

252.227–7013 Rights in Technical Data—Other than Commercial Products and Commercial Services.

* * * * *

Rights in Technical Data—Other Than Commercial Products or Commercial Services (Mar 2023)

(a) * * *

(15) *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.

* * * * *

■ 12. Amend section 252.227–7014—

■ a. By revising the clause date and paragraph (a)(15)(iii);

■ b. In paragraph (a)(15)(v) introductory text by removing ''Permit'' and ''use'' and adding ''Use, and permit'' and ''use,'' in their places, respectively;

■ c. In paragraph (a)(15)(v)(A) by removing ''a release'' and adding ''any such release'' in its place;

■ d. In paragraph (a)(15)(v)(B) by removing ''non-disclosure'' and adding ''nondisclosure'' in its place;

■ e. In paragraph (a)(15)(vi) introductory text by removing ''Permit'', ''use'', and ''the repairs'' and adding ''Use, and permit'', ''use,'', and ''the emergency repairs'' in their places, respectively; and

■ f. By revising paragraph (a)(15)(vii) introductory text.

The revisions read as follows:

252.227–7014 Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation.

* * * * *

Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation (Mar 2023)

(a) * * *

(15) * * *

(iii) Make a reasonable number of copies of the computer software required for the purposes of safekeeping (archive), backup, modification, or other activities authorized in paragraphs (a)(15)(i), (ii), and (iv) through (vii) of this clause;

* * * * *

(vii) Use, modify, reproduce, perform, display, or release or disclose computer software to a person authorized to receive restricted rights computer software for management and oversight of a program or effort, and permit covered Government support contractors in the performance of covered Government support contracts that contain the clause at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, to use, modify, reproduce, perform, display, or release or disclose the computer software to a person authorized to receive restricted rights computer software, provided that—

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■ 13. Amend section 252.227–7015 by revising the clause date and paragraph (a)(4) to read as follows:

252.227–7015 Technical Data—Commercial Products and Commercial Services.

* * * * *

Technical Data—Commercial Products and Commercial Services (Mar 2023)

(a) * * *

(4) *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 financial, administrative, cost or pricing, or management information, or information incidental to contract administration.

* * * * *

■ 14. Amend section 252.227–7018—

■ a. By revising the clause date and paragraph (a)(18)(iii);

■ b. In paragraph (a)(18)(v) introductory text by removing ''Permit'' and ''use'' and adding ''Use, and permit'' and ''use,'' in their places, respectively;

■ c. In paragraph (a)(18)(v)(A) by removing ''a release'' and adding ''any such release'' in its place;

■ d. In paragraph (a)(18)(v)(B) by removing ''non-disclosure'' and adding ''nondisclosure'' in its place;

■ e. In paragraph (a)(18)(vi) introductory text by removing ''Permit'', ''use'', and ''the repairs'' and adding ''Use, and permit'', ''use,'', and ''the emergency repairs'' in their places, respectively;

■ f. In paragraph (a)(18)(vi)(A) by removing ''non-disclosure'' and adding ''nondisclosure'' in its place; and

■ g. By revising paragraphs (a)(18)(vii) introductory text and (a)(20).

The revisions read as follows:

252.227–7018 Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program.

* * * * *

Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program (Mar 2023)

(a) * * *

(18) * * *

(iii) Make a reasonable number of copies of the computer software required for the purposes of safekeeping (archive), backup, modification, or other activities authorized in paragraphs (a)(18)(i), (ii), and (iv) through (vii) of this clause;

* * * * *

(vii) Use, modify, reproduce, perform, display, or release or disclose computer software to a person authorized to receive restricted rights computer software for management and oversight of a program or effort, and permit covered Government support contractors in the performance of covered Government support contracts that contain the clause at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, to use, modify, reproduce, perform, display, or release or disclose the computer software to a person authorized to receive restricted rights computer software, provided that—

* * * * *

(20) *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.

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