Dear Ms. Williams:

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments in response to the above-referenced Proposed Rule.\(^1\) The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the ABA’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the policy of the ABA.\(^2\)

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\(^1\) Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Marian Blank Horn and Heather K. Weiner, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

\(^2\) This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Intellectual Property.”
I. INTRODUCTION

Section 815 of the Fiscal Year (“FY”) 2012 National Defense Authorization Act (“NDAA”) made the following amendments, among others, to 10 U.S.C. §§ 2320 and 2321:

(a) Expanded the scope and breadth of the Government’s license in Limited Rights technical data by adding a new (fourth) exception to the restriction on disclosing outside of the Department of Defense (“DoD”) technical data related to an item, component, or process developed by a contractor exclusively at private expense that are necessary for segregation or reintegration, and defining a new term for “segregation or reintegration data;”

(b) Added a new scheme for deferred ordering of technical data; and

(c) Extended the period of time during which the Government may challenge the validity of asserted restrictions from three to six years.

The Proposed Rule would revise the Defense Federal Acquisition Regulation Supplement (“DFARS”) to implement these changes. Although the relevant provisions in Title 10 address only technical data, the Proposed Rule would make similar changes to the DFARS provisions and associated contract clauses pertaining to computer software, commercial technical data, and commercial computer software.

The Section commends DoD for its use of a proposed rule to solicit input from stakeholders before implementing the changes to 10 U.S.C. §§ 2320 and 2321. Although the Section acknowledges that these statutory changes necessitated the Proposed Rule (at least for technical data), because much time has passed since the FY 2012 NDAA’s passage, the Section perceives that some provisions in the Proposed Rule may be overcome by more recent events. The Section notes that the Government-Industry Advisory Panel established by the Section 813(b) of 2016 NDAA (“Section 813 Panel”) is comprehensively reviewing 10 U.S.C. §§ 2320 and 2321 and their implementing regulations. For that reason, the Section respectfully recommends that DoD defer implementing FY 2012 Section 815 until the Section 813 Panel has completed its review. The review results may lessen, or obviate altogether, the need to make some of the changes identified in the Proposed Rule. The Section recommends that DoD use the Section 813 Panel’s findings as the basis for a future proposed rulemaking, including but not limited to the changes relating to commercial item issues addressed in the current Proposed Rule.

If DoD instead elects to proceed with the Proposed Rule, then the Section recommends that DoD make revisions for clarity and to effect only the limited changes required by FY 2012 NDAA Section 815.

II. COMMENTS

A. DoD Should Postpone this Rulemaking Because The Activities of the Section 813 Panel Advisory Could Render These Changes Moot.

The Government should consider tabling the Proposed Rule because it may become overcome by events in the near future. Section 813(b) of the FY 2016 NDAA required DoD to
establish the Section 813 Panel to review 10 U.S.C. §§ 2320 and 2321, and their implementing regulations, to ensure that the requirements are “best structured to serve the interests of the taxpayers and the national defense.” Notably, the Section 813 Panel has already issued a Request for Information on Rights in Technical Data and the Validation of Proprietary Data Restrictions, 81 Fed. Reg. 40290 (June 21, 2016). This Section submitted comments to the Section 813 Panel, which addressed topics that overlap with this rulemaking, such as the propriety of the changes to 10 U.S.C. §§ 2320 and 2321 that prompted this rulemaking. The Section 813 Panel could therefore have a profound effect of this proposed rulemaking. The Section therefore recommends that DoD table this Proposed Rule pending the outcome of the Section 813 Panel’s review to allow DoD to assess what impact that panel’s recommendations should have on this rulemaking.

B. If DoD Proceeds With the Proposed Rule, It Should Revise the Rule for Clarity and to Limit the Scope to the FY 2012 NDAA’s Required Changes.

Given the nature of the subject and the Section 813 Panel’s ongoing review, DoD should limit this rulemaking to the express scope of FY 2012 NDAA Section 815. As noted in the introduction to these comments, Section 815 provides for three major changes:

- Provides the Government with exceptions to Limited Rights restrictions to segregation and reintegration technical data, including the right to “release or disclose [segregation and reintegration] technical data to persons outside the Government, or [to] permit the use of [segregation and reintegration] technical data” by such persons;

- Authorizes the Government to “require at any time the delivery of technical data that has been generated or utilized in the performance of a contract” upon a determination that the technical data are needed for “reprocurement, sustainment, modification, or upgrade . . . of a major system or subsystem thereof, a weapon system or subsystem thereof, or any noncommercial item or process,” and either (1) “pertains to an item or process developed in whole or in part with Federal funds;” or (2) is segregation/reintegration data; and

- Extends the time to challenge data assertions from three years to six years or, in the case of “fraudulently asserted use or release restriction,” in perpetuity.

The Section recommends that, to the extent that this rule must be implemented, that key definitions be clarified in the final rule and that the final rule be limited to those changes necessary to implement the express provisions of Section 815 of the 2012 NDAA.

1. The definition of “segregation and reintegration data” is unclear.

The Section applauds the effort that went into creating a proposed definition for “segregation or reintegration” data. The Section proposes that the definition be augmented to provide the clarity necessary for the Government and contractors (at all tiers) to identify with certainty what qualifies as “segregation or reintegration” data.
As an initial matter, the proposed definition of “segregation or reintegration data” relies repeatedly on the words “segregation” and “reintegration.”\(^3\) In effect, segregation or reintegration data are defined as data necessary for the segregation or the reintegration, as determined by persons reasonably skilled in the art to perform such segregation or reintegration activities.

But what are “segregation” and “reintegration”? The concepts of segregation and reintegration are not terms of art in the data rights lexicon, and are not susceptible to an understanding from customary usage. Without definitions for these building-block terms, the Section is uncertain whether these concepts encompass particular processes. More specifically, the Proposed Rule leaves uncertain what constitutes “segregation and/or reintegration activities” (a phrase used in the Proposed Rule) and whether those activities must have occurred or merely be planned.

The Section recommends that these two terms be defined. For a point of reference, the Section notes that segregation and reintegration are terms often associated with open system architecture, and specifically between modules separated by well-defined interfaces. By way of example, one DoD guide uses the term “segregate” in the context of whether the “system’s applications [are] functionally segregated to function as independent entities,” and for proprietary elements, whether “those proprietary elements [are] segregated with well-defined interfaces such that modification of another component will not require modification of the proprietary product.” See Open Systems Architecture Contract Guidebook for Program Managers (Version 1.1, May 2013), Appendix 3, OSA Checklist, available at https://acc.dau.mil/adl/en-US/631578/file/73333/OSAGuidebook%20v%201_1%20final.pdf. In this context, “segregate” is defined in terms separating complete function elements from each other, and these elements are discrete items that the Government purchases or replaces during upgrades.

Such a definition would be consistent with Better Buying Power and DoD Instruction 5000.02 requirements for open systems architecture. The definition would also be consistent with Better Buying Power’s Incentivize Innovation in Industry and Government initiative that seeks to encourage industry investment in complete technologies, with the goal of increasing

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\(^3\) “Segregation or reintegration data means technical data or computer software that is more detailed that form, fit, and function data and that is necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically functionally equivalent item or process) with, other items or processes.

(1) Unless agreed otherwise by the Government and the contractor, the nature, quality, and level of technical detail necessary for these data or software shall be that required for persons reasonably skilled in the art to perform such segregation or reintegration activities.

(2) The segregation or reintegration of any such an item or process may be performed at any level, including down to the lowest practicable segregable level, e.g., a subitem or subcomponent level, or any segregable portion of a process, computer software (e.g., a software subroutine that performs a specific function), or documentation.

(3) The term—

(i) Includes data or software that describes in more detail (than form, fit, and function data) the physical, logical, or operational interface or similar functional interrelationship between the items or processes; and

(ii) May include, but would not typically require, detailed manufacturing or process data or computer software source code to support such segregation or reintegration activities.” 81 Fed. Reg. at 39501.
competition and improving technology insertion requirements. The Section recommends that DoD define the terms “segregation” and “reintegration” in a way that the Government, prime contractors, and the entire supply chain can reasonably identify which data are included—and that DoD do so in terms consistent with Better Buying Power requirements for interfaces, modules, or end items needed to perform upgrades at a functionally independent level (an end item or modular level).

2. **The use of the word necessary in the definition of segregation and reintegration is unclear.**

In addition, it would be helpful to bring further clarity to what it meant by the phrase “necessary for the segregation of an item or process from, or the reintegration of that item or process with, other items or processes.” For example,

- When are particular data “necessary” (as opposed to helpful)?

The data which would be necessary for such upgrades would depend on the end item or module in question. The Section assumes that, implicit in this “necessary” requirement is the notion that only minimal additional data are required, and that what are necessary are only what minimal data would be needed for a competent manufacturer. The Section recommends that DoD make that implication explicit by clarifying that the data “necessary” for segregation or reintegration be the data minimally necessary for a competent manufacturer to perform such an upgrade using a competing end item or module.

- Whose burden (the Government’s, or the Contractor’s, or that of the “owner” or “licensor” of the data, if different from the Contractor) is it to assert that certain data is, or is not, “necessary”?  

Consistent with the existing Federal policy that agencies shall balance the Government’s needs and the contractor’s legitimate proprietary interests in data, DoD should specify either that the burden is on the Government to make this showing, or alternatively, contractors should bear the burden but enjoy a rebuttable presumption that their designations as to what is necessary are correct.

- At what point in time is the decision made as to which data is “necessary” for “segregation” or “reintegration”?  

Fundamental concepts of contracting, including the prerequisite for a “meeting of the minds,” argue for a point in time that is sooner rather than later, and ideally by the time of contract award, but in no case after the period of performance of the contract.

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5 The term “competent manufacturer” is already one used for like purposes. See MIL-STD-31000, 3.1.6 (5 Nov. 2009) (“Competent manufacturer. A manufacturer that has demonstrated the capability to produce similar products at the same state of the art in the same or similar lines of technology.”)
3. The definition of segregation and reintegration data in the Proposed Rule includes inapt comparisons to and incorporations of other types of data.

The Proposed Rule defines segregation or reintegration data by comparison to form, fit and function (“FFF”) data: “Segregation or reintegration data means technical data or computer software that is more detailed than form, fit, and function data.”\(^6\) In fact, these two types of data may actually be equivalent (or at least overlap) in scope. FFF data is generally understood as data that permits characterization of interchangeable items, while segregation and reintegration data suggests the notion of information necessary to remove and reinstall items or components. Although segregation and reintegration are as yet not clearly defined and so the exact definition of segregation and reintegration data remains unclear, the Section submits that, if any comparison is appropriate, segregation and reintegration data would be more comparable to operation, maintenance, installation and training (“OMIT”) data because OMIT data covers the concept of maintenance and installation of items or components, albeit without the requirement for detailed manufacturing or process data. In either event, the definition of segregation or reintegration data should allow for the possibility of overlap between the existing categories of data—especially the well-known FFF and OMIT categories of data. In many cases, the data necessary to interchange and/or install a component could be identical to that necessary to reintegrate it, and the lack of reference to OMIT data while referring to FFF could lead to confusion as to whether the Government has unlimited rights in the data or merely an exception to Limited Rights data restrictions. Indeed, under existing practice, the Government has unlimited rights in FFF and OMIT data, and the definition of Limited Rights does not relate to or refer to FFF or OMIT data. The Section therefore recommends that segregation or reintegration data be defined without reference to FFF (or OMIT).

In addition, the Proposed Rule includes in the definition of segregation and reintegration data a confusing use of the term “Detailed Manufacturing or Process Data.”\(^7\) Historically, this was a term used to define data that was not OMIT, and only in the context of technical data. The Proposed Rule, however, incorporates Detailed Manufacturing or Process Data within the definition of “segregation or reintegration data” for both software and technical data, which appears to be inappropriate as “segregation or reintegration data” is more analogous to OMIT data. This reference to “Detailed Manufacturing or Process Data” is not mandated by Section 815. It is also inconsistent with existing practice, which does not define Limited Rights in terms of Detailed Manufacturing or Process Data because it is presumed that this level of data can also exist in Unlimited Rights and Government Purpose Rights data.\(^8\)

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\(^6\) 81 Fed. Reg. at 39500.
\(^7\) Id. at 39501 (Segregation or reintegration data “[m]ay include, but would not typically require, detailed manufacturing or process data or computer software source code to support such segregation or reintegration activities.”).
\(^8\) The existing definition of detailed manufacturing or process data is independent of data rights in DFARS 252.227-7013(a)(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
In addition, the application of the term Detailed Manufacturing or Process Data outside of technical data is not mandated by Section 815. Therefore, the Section recommends that DoD delete the provision of the proposed rule that refers to Detailed Manufacturing or Process Data or any similar concept.

In short, the Section recommends that the definition of segregation and reintegration data focus on the purpose to be served by the information as suggested above, namely, data necessary for a competent manufacturer to perform such an upgrade using a competing item, and not whether this information is more or less detailed than or encompassed by other pre-existing categories of technical data.

4. The definition of segregation and reintegration data should be limited by the NDAA’s language.

In assessing the level of detail required, the Proposed Rule provides:

The segregation or reintegration of any such an item or process may be performed at any practical level, including down to the lowest practicable segregable level, e.g., a subitem or subcomponent level, or any segregable portion of a process, computer software (e.g., a software subroutine that performs a specific function), or documentation.9

The Section also notes that the “lowest practicable level” concept is not based upon the express terms of the statute as it does not appear anywhere in Section 815. The Section is concerned that applying the Proposed Rule at this level could be interpreted to grant the Government extensive rights to use and disclose the contractor’s proprietary or trade secret technical data and computer software to such a degree as to eviscerate the contractor’s proprietary rights in that technical data and computer software. This would violate long standing Federal procurement policy and practice; undermine the above-noted initiatives under Better Buying Power 3.0; be unfair to the Government’s supply chain; disincentivize innovation; and discourage innovative commercial suppliers from selling to the Government at all, or from selling to the Government the best technologies and data at the best prices, terms and conditions.

The Section therefore recommends that the Proposed Rule be implemented at a level required to support open systems approaches using well defined consensus based interfaces. This would avoid the dangerously broad interpretation, further Better Buying Power and DoD Instruction 5000.02 requirements for open systems architectures using standalone functional elements, and also mirror the level at which competitive upgrades are purchased by DoD.

The Proposed Rule also exceeds the NDAA’s requirements by inserting “or computer software” into the definition of segregation or reintegration data. One of the strengths of the DFARS data rights approach is that it recognizes and embraces the differences between technical data and computer software, which have fundamentally different characteristics and are subject

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to very different considerations. The current DFARS provides a practical and workable approach that uniquely addresses each of these two types of intellectual property. The Section therefore recommends that DoD maintain that sound approach by limiting the rule to technical data as set forth in the NDAA. To the extent the rule is defined to include computer software, DoD should establish a separate definition that does not attempt to rely on hardware-based concepts and instead addresses the “segregation or reintegration” of software in terms of software interfaces, application programming interfaces, objects, and modules, and accounts for the differences between software executables and software source code and design data.

5. The Proposed Rule should not apply to commercial computer software and technical data related to commercial items.

To implement to the statutory preference for commercial items and commercial item contracting codified in the Federal Acquisition Streamlining Act (“FASA”)\(^\text{10}\), the Federal Acquisition Regulation (“FAR”) and DFARS require that the Government acquire commercial items or nondevelopmental items when they are available to meet the needs of the Government, and require prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial items or nondevelopmental items as components of items supplied to the Government.

The FAR and DFARS correspondingly espouse a policy favoring the acceptance of standard commercial license terms for commercial computer software and technical data relating to commercial items, although for commercial technical data a minimum set of rights are required under DFARS 252.227-7015.\(^\text{11}\) In addition, pursuant to the FAR and DFARS, offerors and contractors shall not be required to furnish to the Government technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public, or relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose commercial computer software or commercial computer software documentation except as mutually agreed.

The Proposed Rule is inconsistent with this statutory preference for commercial items and the associated Government policy regarding customary commercial licenses because the requirements for segregation and reintegration data are included in DFARS 252.227-7015, and are essentially required as an addition to commercial software licenses under DFARS 227.7202-3(b). Moreover, the Proposed Rule also requires that the new deferred ordering clause, DFARS 252.227-7029, be flowed to commercial vendors.\(^\text{12}\) The application of the segregation and reintegration data scheme to commercial computer software and technical data relating to commercial items is simply not realistic. Commercial suppliers are unlikely to agree to such non-standard provisions, even assuming they are equipped to provide such data.\(^\text{13}\) Even non-commercial contractors will likely not be able to acquire such rights from commercial item

\(^{10}\text{Pub. L. No. 103-355 (Oct. 13, 1994).}\)

\(^{11}\text{See, e.g., FAR 12.211, Technical Data; FAR 12.212, Computer Software.}\)

\(^{12}\text{DFARS 227.7102-4(d); DFARS 227.7202-3(c).}\)

\(^{13}\text{The Panel has already received statements to that effect. See Marjorie Censer, Technology companies, industry groups caution DOD on technical data rights, Inside Defense (Aug. 25, 2016), https://insidedefense.com/daily-news/technology-companies-industry-groups-caution-dod-technical-data-rights}\)
vendors in order to deliver them to the Government. The Section further notes that the application of this rule to commercial suppliers appears inconsistent, and works at cross purposes, with DoD’s outreach to non-traditional contractors, such as the Defense Innovation Unit Experimental initiatives in Silicon Valley and Boston.

The Section recommends that, because the requirement for deferred ordering as required in Section 815 and embodied in the Proposed Rule is sufficiently contrary to commercial practices, the Proposed Rule should not apply to commercial technical data or software at any level of the supply chain. To the extent that it determines it needs additional data from commercial vendors on a case-by-case basis, DoD should engage the vendors directly to achieve a commercially acceptable resolution for that specific need.

6. **The scope of data subject to deferred ordering should be limited and the proposed rule revised to account for increased contractor risks and costs.**

The revised deferred ordering language in the Proposed Rule is unclear and unbounded, and unworkable from a practical perspective.

First, under the Proposed Rule, the deferred ordering clause is required to be included in all solicitations except those under FAR Part 12. This does not square with 10 U.S.C. § 2320(b)(2) through (b)(4), which requires the agency to identify its deliverable requirements at the time of contracting. In addition, it is unclear what is encompassed within the term “data generated or utilized” in the performance of a contract. The simplest understanding is any data created or used in the performance of a contract. “Data generated” is somewhat bounded because it relates to data created under the statement of work being performed. Data “utilized” in the performance of a contract is, however, completely unbounded and could be quite extensive. For example, would it include background tools (e.g., commercial software applications)? Further, what would happen if the contractor uses only a portion of a larger suite of data, such as only specific pages of a report or a specific application within a software toolset? It is unlikely that there would be a legitimate government need for all of the data actually utilized in the performance of a contract, and more importantly, for background data. Instead, the Government should be required to comply with the requirements to comply with 10 U.S.C. § 2320(b)(2) through (4) and identify such data which the Government knows exist at the outset of contracting. The Section recommends that the use of the proposed new deferred ordering clause (DFARS 252.227-7029) be limited to those scenarios in which there is uncertainty as to the agency’s data requirements. Further, the Section recommends that the use of the proposed new deferred ordering clause (DFARS 252.227-7029) in those limited number of solicitations be confined to those scenarios in which the Government could not have reasonably anticipated the data being utilized by the contractor despite having complied with the preplanning required under 10 U.S.C. § 2320(b)(2) through (4) and intellectual property strategy required under DoD Instruction 5000.02. The Section further recommends that the term “utilize” be limited to those

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15 Id. at 39501
circumstances in which the utilization of particular technical data or computer software is a required element of performance of a contract.

In addition, under the existing rules, the Government has a data warranty under DFARS 252.246-7001. Nonetheless, the applicability of this warranty has historically been limited to data ordered under the contract because DoD rarely used DFARS 252.227-7027 to order the delivery of technical data or computer software. With the expanded scope of the deferred ordering under the Proposed Rule in DFARS 252.227-7029, however, the contractor is potentially exposed to warranty obligations for data it did not intend to deliver but which the Government may later claim was utilized. The Section recommends that this exposure be limited by specifying that contractors are not required to warranty data ordered under DFARS 252.227-7029.

Finally, the Proposed Rule at DFARS 252.227-7029(e) seeks to limit compensation to “the reasonable costs incurred for converting and delivering the technical or computer software into the required form. As a practical matter, the contractor may not have the rights to deliver the technical data and computer software to the Government, especially where such data was obtained prior to DFARS 252.227-7029 being implemented. Thus, to the extent that the Government wants the contractor to deliver such technical data or computer software, DFARS 252.227-7029(e) should also be revised to specify that such reasonable costs would include any increment in license fees incurred by the contractor.


The proposed DFARS 252.227-7029(d) acknowledges a fundamental problem with the concept of attempting to order data at any time:

This clause shall not be interpreted as imposing an obligation on the Contractor to preserve any technical data or computer software covered by this clause for longer than a reasonable period. However, this does not restrict the Government from including a contract requirement for the Contractor to preserve such technical data or computer software for a specific period.

As a threshold matter, this guidance is not of the type that should appear in an actual contract clause because it merely suggests ways that the Government could preserve data for purposes of the contract clause. Therefore, the Section recommends that the proposed DFARS 252.227-7029(d) be revised to delete “for longer than a reasonable period” and delete the entire second sentence.

Additionally, DFARS part 227 could benefit from including guidance on using priced CLINs when the Government requires the contractor to preserve any data. Without such guidance, DFARS 252.227-7029(d) may be read to invite imposing arbitrary preservation periods on contractors, such as indefinite requirements, without consideration of the costs

16 Id.
resulting from such requirement. Any such preservation requirements impose significant incremental costs on contractors; these costs should be borne by the Government, and importantly, are contrary to the basic requirements of simply defining and ordering the data that are needed as outlined in 10 U.S.C. §§ 2320(b)(2) through (4). Therefore the Section recommends adding the following language to DFARS part 227: “If a contracting officer elects to include a contract requirement for the contractor to preserve such technical data or computer software for a specified period, the Government shall compensate the contractor for the cost associated with such retention.”

8. The proposed infinite duration of deferred ordering ability is unreasonable and presents practical and contractual challenges.

Using the exact language of the NDAA, the Proposed Rule states that the Government can order technical data “at any time.”\(^\text{|17|}\) This indefinite period implicates fiscal law issues, such as what procurement funds will be used to compensate the contractor if data is ordered when there is no active contract and all moneys have expired. The Section recommends that the Proposed Rule be harmonized with fiscal law by limiting the deferred ordering period to the time that the contract remains open and procurement dollars remain available.

Section 815 limited the application of the new deferred ordering clause to cases where “the technical data is needed for the purpose of reprocurement, sustainment, modification, or upgrade (including through competitive means) of a major system or subsystem thereof, a weapon system or subsystem thereof, or any noncommercial item or process.” Proposed DFARS 252.227-7029(b)(1) documents this need as a specific finding required for the deferred ordering to proceed. Proposed DFARS 252.227-7029(b)(2), however, creates a different ordering option that removes this statutory requirement in certain cases. Specifically, DFARS 252.227-7029(b)(2) does not require a finding under DFARS 252.227-7029(b)(1) for “technical data or computer software resulting from basic research or applied research.” In the comments to the Proposed Rule, the Government indicates that this protection finding required under 10 U.S.C. § 2320(b)(9)(A) is not applicable to basic or applied research because “it is likely to be impracticable to require such a determination, but the circumstances are still directly related to a core objective of the statutory scheme (e.g., to ensure that the Government has access to data related to development funded in whole or in part by the Government).”\(^\text{|18|}\) This comment does not justify departure from the statutory language. In addition, creating two separate ordering options based on how the character of the data utilized is impracticable because the contracting officer will have no way of knowing at the time of ordering if the utilized data was basic or applied research or other data. The Section recommends that DFARS 252.227-7029(b)(2) be eliminated. In fact, because the technical data or computer software relating to “basic research or applied research” is likely to be the most sensitive data a contractor has, the Section recommends that deferred ordering not be extended to such data at all.

The Section also believes that the Proposed Rule should be revised to include enhanced procedural requirements to permit deferred ordering to incentivize the contracting officer to

\[^{17}\text{Id.}\]
\[^{18}\text{81 Fed. Reg. at 39484.}\]
properly and proactively order data it knows that the Government will need, and to disincentivize the exercise of the extreme option of deferred ordering. The Section proposes that the determination under DFARS 252.227-7029(b) should include what data was ordered under the contract, and why such data could not have been reasonably anticipated to be ordered under the routine provisions in DFARS 227.7103-2 and 227.7203-2. Further, if such data was specifically negotiated as data excluded from being a deliverable under the contract, the Section recommends that such an order be handled under the contractual change clause instead of DFARS 252.227-7029. Because the data necessary for segregation or reintegration is relatively sensitive for contractors, and often contains trade secrets and proprietary information not normally provided to competitors, the determination under DFARS 252.227-7029(b) should also include a separate process for ordering data necessary for segregation or reintegration. Specifically, there should be a presumption that data that is necessary for segregation or reintegration exists in FFF and/or OMIT data and does not require additional detail from the original contractor. If the Government finds such data is inadequate for actual segregation or reintegration activities, the Government would provide the contractor notice of that gap in data with specificity, and what additional specific data is necessary to perform those segregation or reintegration activities. The contractor would then be allowed to respond to such an additional requirement. If the Government, after reviewing such response, maintains the additional data is still needed, the Government would then require the contractor prepare its proposal per the deferred ordering processes in the proposed DFARS 252.227-7029. Such a process would ensure that only the data necessary for segregation or reintegration is provided, and also would allow the contractor to propose to instead provide FFF or OMIT data, which is less sensitive to the contractor, if it met Government needs.

III. CONCLUSION

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

James A. Hughes
Chair, Section of Public Contract Law

cc:
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