VIA E-MAIL AND REGULATORY PORTAL

Defense Acquisition Regulations System
Attn: Ms. Amy Williams
OUSD(AT&L) DPAP (DARS)
3060 Defense Pentagon
Room 3B855
Washington, DC 20301-3060


Dear Ms. Williams:

On behalf of the Section of Public Contract Law of the American Bar Association (“the Section”), I am submitting comments on the above-referenced proposed rule, “Presumption of Development at Private Expense,” 75 Fed. Reg. 25161 (May 7, 2010), DFARS Case 2007–D003 (“Proposed Rule”). The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees contain members representing these three segments to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works. 1

The Section is authorized to submit comments on acquisition regulations under special authority granted by the American Bar Association’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and,

1 The Honorable Thomas C. Wheeler and James A. Hughes, Jr., 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.
I. Introduction

The Proposed Rule would amend the Defense Federal Acquisition Regulation Supplement ("DFARS") to implement both Section 802(b) of the National Defense Authorization Act ("NDAA") for Fiscal Year ("FY") 2007 and Section 815(a)(2) of the NDAA for FY 2008. Section 802(b) of the FY 2007 NDAA eliminated the presumption of development at private expense for commercial items for major systems, subsystems, or components thereof. Section 815(a)(2) of the FY 2008 NDAA retained that presumption for commercial-off-the-shelf ("COTS") items.

The Section respectfully contends that the Proposed Rule goes well beyond the scope and purpose of the provisions in Sections 802 and 815 of the FY07 and FY08 NDAA. Those statutory provisions, which are codified at 10 U.S.C. § 2321(i)(2), relate solely to the reversal of the presumption of development at private expense for commercial items under contracts or subcontracts for major systems (or subsystems or components thereof), where the contractor claims that the system, subsystem, or component was developed exclusively at private expense. The Proposed Rule goes well beyond the requirements of Sections 802 and 815, and would significantly alter the longstanding rules regarding the Government’s rights in intellectual property when acquiring commercial items:

- First, the proposed rule would have the effect of imposing the non-commercial DFARS data rights clauses and marking requirements on any contract for commercial items so long as there is any government funding of the development of the item, component or process – even though government funding is only one aspect of the broad statutory definition of “commercial item.”

- Second, the proposed rule purports to apply the entire DFARS data rights scheme to all subcontracts for commercial items, even though the presumptions in Sections 802 and 815 at most would apply to subcontracts awarded in connection with major systems (or subsystems or components thereof).

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This letter is available in pdf format at: http://www.abanet.org/contract/regscomm/home.html under the topic “Research and Development/Intellectual Property.”
Finally, the proposed rule would apply the presumptions regarding development at private expense to noncommercial software, even though the drafters of the rules expressly recognized that the authorizing statutes “apply only to technical data and not to computer software (which is expressly excluded from the definition of computer software),” 75 Fed. Reg. at 25163, and would improperly apply an all or none approach to the software rights determination that is inconsistent with the software rights scheme.

This significant alteration of the longstanding rules regarding the Government’s rights in intellectual property related to commercial items goes beyond the scope and purpose of the above-referenced statutes, and could have the unintended effect of discouraging commercial companies from doing business with the Department of Defense.

II. Comments

A. The Proposed Rule Goes Beyond The Scope And Purpose Of The Authorizing Statutes.

The statutory predicate for the proposed rule is 10 U.S.C. § 2321(f), and in particular, 10 U.S.C. § 2321(f)(2). Section 2321(f)(2) (as revised by Section 802 of the FY07 NDAA and Section 815 of the FY08 NDAA), which applies to “any contract for supplies or services entered into by the Department of Defense that includes provisions for the delivery of technical data,”3 provides:

(f) Presumption of Development Exclusively at Private Expense.—

(1) Except as provided in paragraph (2), in the case of a challenge to a use or release restriction that is asserted with respect to technical data of a contractor or subcontractor under a contract for commercial items, the contracting officer shall presume that the contractor or subcontractor has justified the restriction on the basis that the item was developed exclusively at private expense, whether or not the contractor or subcontractor submits a justification in response to the notice provided pursuant to subsection (d)(3). In such a case, the challenge to the use or release restriction may be sustained only if information provided by the

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3 See 10 U.S.C. § 2321(a).
Department of Defense demonstrates that the item was not developed exclusively at private expense.

(2) In the case of a challenge to a use or release restriction that is asserted with respect to technical data of a contractor or subcontractor (other than technical data for a commercially available off-the-shelf item as defined in section 35(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 431 (c)) for a major system or a subsystem or component thereof on the basis that the major system, subsystem or component was developed exclusively at private expense, the challenge to the use or release restriction shall be sustained unless information provided by the contractor or subcontractor demonstrates that the item was developed exclusively at private expense.


By its terms, the language in Section 2321(f)(2) is limited to situations in which a contractor attempts to restrict the Government’s rights in technical data related to major systems, subsystems, or components4 “on the basis that the major system, subsystem or component was developed exclusively at private expense, . . . .” Id. Despite the narrow scope and purpose of Section 2321(f)(2), the Proposed Rule includes provisions that would have the effect of broadly applying the standard DFARS data rights clauses and marking requirements for non-commercial items to any contract for commercial items that involves any Government funding, unless the contract is for commercial items “developed exclusively at private expense.” In particular, the Proposed Rule includes the following new provisions at DFARS 227.7102-4(b) and DFARS 227.7103-6(a):

227.7102-4 Contract clause.

(b) In accordance with the clause prescription at 227.7103-6(a), use the clause at 252.227-7013, Rights in Technical Data--Noncommercial Items, in lieu of the clause at 252.227-7015 if the Government has paid or will pay any portion of the development costs of a commercial item.

4 For purposes of this provision, a “major system” is defined as a combination of hardware, equipment, or software that (a) has been designated a “major system” by the head of the agency responsible for the system, or (b) involves total expenditures of $115 million or more for research, development, test, and evaluation for the system, or total expenditures of more than $540 million for procurement for the system. 10 U.S.C. §§ 2302(5), 2302d(a).
(c) Use the clause at 252.227-7037, Validation of Restrictive Markings on Technical Data, in all solicitations and contracts for commercial items that include the clause at 252.227-7015 or the clause at 252.227-7013.

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227.7103–6 Contract clauses.

(a) Use the clause at 252.227–7013, Rights in Technical Data—Noncommercial Items, in solicitations and contracts when the successful offeror(s) will be required to deliver to the Government technical data pertaining to noncommercial items, or pertaining to commercial items for which the Government has paid or will pay any portion of the development costs. Do not use the clause when the only deliverable items are computer software or computer software documentation (see 227.72), commercial items developed exclusively at private expense (see 227.7102–4), existing works (see 227.7105), special works (see 227.7106), or when contracting under the Small Business Innovation Research Program (see 227.7104). Except as provided in 227.7107–2, do not use the clause in architect-engineer and construction contracts.

75 Fed. Reg. at 25163 (emphasis added).

The Section is concerned that the provisions of the proposed rule at DFARS 227.7102-4(b) and DFARS 227.7103-6(a) are not authorized by and go well beyond the narrow scope and purpose of the statutory provisions that serve as the basis for this rule change, as discussed above. The Section is also concerned that these provisions improperly assume that if the Government paid for “any portion” of the development of a commercial item, that item somehow loses its commercial item status and is subject to the standard DFARS technical data rights clauses and marking requirements for non-commercial item contracts. This approach is contrary to existing statutes and regulations, which provide that private expense is but one of many factors to be considered in determining whether or not an item is a commercial item. In that regard, a “commercial item” is broadly defined by statute and regulation as follows:

Commercial item means—

(1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and—

(i) Has been sold, leased, or licensed to the general public; or
(ii) Has been offered for sale, lease, or license to the general public;

(2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for—

(i) Modifications of a type customarily available in the commercial marketplace; or

(ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;

(5) Installation services, maintenance services, repair services, training services, and other services if—

(i) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and

(ii) The source of such services provides similar services contemporaneously to the general public under terms and
conditions similar to those offered to the Federal Government;

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. For purposes of these services—

(i) Catalog price means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(ii) Market prices means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

(7) Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

(8) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.

FAR 2.101 (implementing statutory definition of “commercial item” as set forth in 41 U.S.C. § 403(12) and 10 U.S.C. § 2302(3)(I)).

Under this broad definition of commercial items, private expense is relevant solely in cases where a contractor claims commercial item status for a nondevelopmental item sold only to state and local governments.\(^5\) Thus, an item or

\(^5\) *Nondevelopmental* item means—(1) Any previously developed item of supply used exclusively for governmental purposes by a Federal agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement; (2) Any item described in paragraph (1) of this definition that requires only minor modification or modifications
process may qualify as a “commercial item” under one of the many other components of the commercial item definition, regardless of whether it was developed exclusively at private expense – including, for example, modifications of a type customarily available in the commercial marketplace and minor modifications made to meet federal government requirements, even if funded with government dollars. The Proposed Rule in effect ignores the other components of this broad definition of commercial items by requiring incorporation of the standard non-commercial item clauses and marking requirements except in the subset of contracts for commercial items developed exclusively at private expense.

The changes imposed by the Proposed Rule are significant because, under the current DFARS and FAR rules regarding commercial items, the Government’s long-stated policy is to only acquire the licenses customarily provided to the general public for any items or processes (including software) that meet the definition of “commercial items,” regardless of the source of funding:

DFARS 7102-1, Policy

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

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

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

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

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of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or (3) Any item of supply being produced that does not meet the requirements of paragraphs (1) or (2) solely because the item is not yet in use. FAR 2.101.
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DFARS 227.7202-1, Policy.

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

(Emphasis added; see also FAR 12.211 (“Except as provided by agency-specific statutes, the Government shall acquire only the technical data and the rights in that data customarily provided to the public with a commercial item or process. . . .”); FAR 12.212 (“Commercial computer software or commercial computer software documentation shall be acquired under licenses customarily provided to the public to the extent such licenses are consistent with Federal law and otherwise satisfy the Government’s needs. . . .”) (emphasis added).

The proposed changes to DFARS 227.7102-4(b) and DFARS 227.7103-6(a), which would apply the standard non-commercial data rights clauses to all contracts for commercial items except those which were developed exclusively at private expense, conflict with the longstanding policy in the FAR and DFARS that the Government should only require the license rights customarily provided to the general public.

The presumed application of the DFARS marking requirement to commercial items is particularly problematic. Commercial items likely will contain no DFARS restrictive markings on the associated technical data. As a result, these commercial items – which are likely not marked with the appropriate DFARS legend – could be deemed to provide unlimited rights. See, e.g., General Atronics Corp., 2002 BCA ¶ 31,798 (March 19, 2002). Therefore, the Section contends that the rule should not subject commercial item technical data to a validation of restrictive marking test because the test’s conclusion effectively would be predetermined.

B. The Proposed Rule Improperly Imposes Non-Commercial Item Data Rights Clauses And Marking Requirements On Subcontracts For Commercial Items.

The Proposed Rule also goes well beyond the scope and purpose of the authorizing statute by imposing non-commercial item data rights clauses and marking requirements on subcontracts for commercial items.
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Under the current DFARS data rights clause for non-commercial item contracts, DFARS 252.227-7013, contractors are only required to “flowdown” the standard data rights clause to subcontractors for “noncommercial items”:

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

(Emphasis added). The Proposed Rule would eliminate the italicized language in the current DFARS 252.227-7013, essentially requiring that the non-commercial item data rights clause be flowed down to commercial item subcontracts.6

Similarly, the current DFARS clause on validation of restrictive markings, DFARS 252.227-7037, expressly states that this requirement does not “flow down” to commercial item subcontracts:

(l) Flowdown. The Contractor or subcontractor agrees to insert this clause in contractual instruments with its subcontractors or suppliers at any tier requiring the delivery of technical data, except contractual instruments for commercial items or commercial components.

DFARS 252.227-7037(l) (emphasis added). Again, the Proposed Rule would eliminate the italicized language, requiring that the marking requirements be flowed down to subcontract for commercial items.7

Finally, the Proposed Rule would amend DFARS 212.504 to delete 10 U.S.C. §§ 2320 and 2321 from the list of laws inapplicable to commercial item subcontracts, 75 Fed. Reg. 25163, and proposes the inclusion of a new section (e)

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6 See also Proposed DFARS 227.7102-4(b) (deleting language currently contained in DFARS 227.7102-3(b), instructing contracting officers: “Do not require the contractor to include this clause [DFARS 252.227-7013] in its subcontracts for commercial items or commercial components.”).

7 See also Proposed DFARS 227.7102-4(c) (deleting language currently contained in DFARS 227.7102-3(c), instructing contracting officers: “Do not require the contractor to include this clause [DFARS 252.227-7037] in its subcontracts for commercial items or commercial components.”).
to 252.227-7015, Technical Data--Commercial Items, which requires flowdown of the standard non-commercial item data rights clause to all “subcontracts and suppliers,” without exception:

(e) Applicability to subcontractors or suppliers.


(2) Whenever any technical data will be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties.

Thus, the Proposed Rule would require all commercial item subcontractors to sign up to the standard DFARS non-commercial item data rights provisions. Again, this significant change goes beyond the narrow scope and purpose of the authorizing statute, which eliminates the presumption of development at private expense where a contractor claims that a major system, subsystems, and component of a major system was developed at private expense, but does not contemplate the additional modifications contained in the Proposed Rule. At most, the presumptions addressed in Sections 802 and 815 apply to subcontracts for major systems (or subsystems or components thereof);\(^8\) nevertheless, nothing in the authorizing statute indicates an intent to require all prime contractors on all contracts (other than “major systems”) to flow down the standard non-commercial item data rights clauses and marking requirements to their commercial suppliers on all government contracts. This requirement, which goes well beyond the reversal of the presumption of development at private expense that is the statutory basis for the Proposed Rule, could have the unintended effect of discouraging commercial companies from doing business with the Department of Defense. Instead, if an item furnished by a subcontractor qualifies as a “commercial item” (regardless of

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\(^8\) See 10 U.S.C. § 2321(f)(2) (“In the case of a challenge to a use or release restriction that is asserted with respect to technical data of a contractor or subcontractor (whether or not under a contract for commercial items) for a major system or a subsystem or component thereof on the basis that the major system, subsystem or component was developed exclusively at private expense, the challenge to the use or release restriction shall be sustained unless information provided by the contractor or subcontractor demonstrates that the item was developed exclusively at private expense.”) (emphasis added).
Government funding), then the DFARS data rights rules do not and should not apply.

C. The Proposed Rule Improperly Imposes The Procedures And Presumptions To Computer Software.

In issuing the Proposed Rule, the drafters expressly recognized that the authorizing statutes "apply only to technical data and not to computer software (which is expressly excluded from the definition of computer software)." 75 Fed. Reg. at 25163. Nevertheless, the Proposed Rule seeks to add the following new section (f) to clause 252.227-7019, Validation Of Asserted Restrictions--Computer Software:

(f) Major systems. When the Contracting Officer challenges an asserted restriction regarding noncommercial computer software for a major system or a subsystem or component thereof on the basis that the computer software was not developed exclusively at private expense, the Contracting Officer shall sustain the challenge unless information provided by the Contractor or subcontractor demonstrates that the computer software was developed exclusively at private expense.

75 Fed. Reg. at 25165.

The Section believes that this proposed change is flawed. First, as noted above, there is no statutory basis for this change. Second, rights determinations are not black and white. For example, if the contractor is asserting government purpose rights (i.e., mixed funding), then the contractor need not demonstrate development exclusively at private expense. Third, it is possible that the private expense and public expense portions of the development are segregable.⁹

⁹ Cf. FAR 52.227-14 (defining “restricted computer software” to include “computer software developed at private expense and that is a trade secret, is commercial or financial and confidential or privileged, or is copyrighted computer software, including minor modifications of the computer software”) (emphasis added); DFARS 252.227-7014(c) (implicitly recognizing that the Government does not acquire rights in “derivative computer software” that is subsequently developed or embedded in contractor developed software, but instead retains rights in the unmodified software from which a derivative work was prepared); DFARS 252.227-203-5(e) (“The clause at 252.227-7014 protects the Government’s rights in computer software, computer software documentation, or portions thereof that the contractor subsequently uses to prepare derivative software or subsequently embeds or includes in other software or documentation. The Government retains the rights it obtained under the development contract in the unmodified portions of the derivative software or documentation.”).
D. The Proposed Rule Creates Two Separate Standards For Civilian And DoD Agencies.

Finally, if the Proposed Rule is issued as currently drafted, the practical result could be that an item will be treated as commercial for purposes of intellectual property rights by civilian agencies, and as non-commercial by the agencies of DoD. This may dissuade at least some commercial item suppliers from contracting with DoD agencies or DoD prime contractors and may cause some current commercial item vendors to leave the government marketplace altogether. For many commercial item vendors, for whom the Government is not a key customer, the risks to their core intellectual property assets will far exceed the perceived benefits of the Government as a source of revenue. Therefore, we urge the Government to limit the scope of the Proposed Rule to its statutory predicate and to limit the application of this rule to commercials items within major systems, not to commercial items developed with any Government funding.

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,

Karen L. Manos,
Chair, Section of Public Contract Law

cc: Donald G. Featherstun
Carol N. Park Conroy
Mark D. Colley
David G. Ehrhart
Allan J. Joseph
John S. Pachter
Michael M. Mutek
Patricia A. Meagher
Council Members, Section of Public Contract Law
Co-Chairs, R&D and Intellectual Property Committee
Co-Chairs, Commercial Products and Services Committee
Kara M. Sacilotto