December 27, 2010

VIA REGULATORY PORTAL AND EMAIL

Defense Acquisition Regulations System
Attn: Ms. Amy Williams, OUSD (AT&L) DPAP (DARS)
Room 3B855
3060 Defense Pentagon
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 ("the 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, a member 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 is a proposed revision of Part 227 of the Department of Defense Federal Acquisition Regulation Supplement ("DFARS") relating to Patents, Data, and Copyrights, as well as the associated clauses in Part 252 and certain commercial item provisions in Part 212. The stated purpose of the Proposed Rule is:

To remove text and clauses that are obsolete or unnecessary; relocate and integrate the coverage for computer software and computer software documentation with the coverage for technical data to eliminate redundant coverage for these subjects while retaining the necessary distinctions; eliminates or combines the clauses associated with technical data and computer software, consistent with the revised and streamlined regulatory coverage; relocates, reorganizes, and clarifies the coverage for rights in works; and relocates to the DFARS companion resource, Procedures, Guidance, and Information (PGI), text that is not regulatory in nature and does not impact the public.


The Section recognizes that the Proposed Rule is the result of many years of work on behalf of many Department of Defense ("DoD") personnel and commends that effort. In particular, the Section commends the drafters for many clarifying, explanatory, and new aspects of the proposed DFARS revisions, such as:

- Affirming that data rights assertions may be made after award and providing an applicable procedure.

- Clarifying the doctrine of segregability, which is used to determine the license rights that are most appropriate for each segregable element of technical data or computer software.

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2 This letter is available in pdf format at: http://www.abanet.org/contract/regscomm/home.html under the topic "Research and Development and Intellectual Property."
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- Specifically addressing the common practice of providing the Government “access” to technical data or computer software residing on a contractor’s or other private computer system as an alternative to physical delivery of the information on paper, a disk, or other media.

- Clarifying the obligation of third parties permitted access to technical data or computer software delivered to the Government with Limited, Restricted, or Government Purpose Rights (“GPRs”) to not disseminate the information further.

- Clarifying that when the Government releases Limited Rights technical data or Restricted Rights computer software under one of the listed bases for disclosure, the owner of the technical data or computer software must be notified of the disclosure.

- Affirming that copyright legends are permissible and providing an Unlimited/Unrestricted Rights legend appropriate for use with a copyright legend, allowing easier distinction between commercial technical data or computer software and Unlimited/Unrestricted Rights technical data or computer software.

- Likewise, clarifying that any accurate legend consistent with commercial practices is permitted to be placed on commercial technical data and computer software (this is now required, and the requirement aspect is discussed further below).

- Clarifying that severability will strike only the provisions of a commercial license that are inconsistent with federal procurement law and that the remainder of the license remains in effect.

- Retaining the presumption that the deliverables in contracts for commercial items were developed exclusively at private expense.

- Affirming that subcontractors and the Government have a direct relationship with respect to intellectual property rights that co-exists with the privity of contract between the prime contractor and the Government.

- Recognizing that the rights between the prime contractor and subcontractor may be so different than those between the Government and the prime contractor so that if a different clause is appropriate for the subcontract, it must also be included in the prime contract as applicable to the subcontract.
• Expressly stating that a subcontractor delivering technical data or computer software with other than Unlimited Rights may submit it directly to the Government, although subcontracts may continue the common practice of delivering to the next-higher tier contractor.

• Recognizing that in the proposed DFARS, the Small Business Administration’s regulation that provides that Small Business Innovative Research (“SBIR”) data rights apply to Phase III SBIR awards, which are usually not awarded using SBIR funding, as well as to Phase I and Phase II awards, and that the SBIR rights continue until five years after the last deliverable is made on the last phase of the SBIR award.

• Clarifying that technical data, computer software documentation, and computer software are excluded from coverage of special works and existing works.

The Section provides these additional comments to address particular concerns it has identified with the Proposed Rule and provides possible alternatives to assist DoD in crafting its final rule.

II. COMMENTS

Generally, the Section notes that most of the proposed revisions with which it takes issue exceed the stated intent “to simplify and clarify DFARS part 227, Patents, Data, and Copyrights, and move to PGI text that does not impact the public.” 75 Fed. Reg. 59412. The Section welcomes those changes that are consistent with the Government’s intent. Where substantive changes have been inserted in the existing regulations, however, the Section members were not unanimous in their reactions, but a consensus view is provided below.

A. Procedures, Guidance and Information

The Proposed Rule references a companion Procedures, Guidance, and Information (“PGI”) document to which portions of the guidance set forth in the current DFARS are to be moved. Nevertheless, that companion document was neither released nor enclosed with the Proposed Rule. Because the Proposed Rule and the companion PGI are inextricably intertwined, the Section recommends that the rule not be finalized until this companion PGI document is published. Indeed, although the public generally does not comment on PGIs, under these circumstances, the Section recommends that the public be afforded the opportunity to comment on this companion document as well as on the Proposed Rule.
1. DoD Policies and Procedures for Acquiring Technical Data Relating to Commercial Items and Commercial Computer Software

As with DFARS Case 2007-D003, on the basis of the comparatively minor modifications to the DoD Technical Data Statute made by 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, the Section is concerned that the Proposed Rule abandons the treatment of technical data relating to commercial items and commercial computer software established by the Federal Acquisition Streamlining Act of 1996 (“FASA”), Pub. L. No. 103-335. Specifically, the Proposed Rule requires the use of the non-commercial item clause for commercial item technical data or commercial computer software if any costs of development or modification will be at the Government expense:

Also use the clause at 252.227-7013 in all solicitations and contracts when the contractor will be required to deliver commercial technical data or commercial computer software (in addition to the clause at 252.227-7015), if the Government will pay any portion of the costs of development or modification of a commercial item, commercial technical data, or commercial computer software.


Section 802(b) of the FY 2007 NDAA eliminated the presumption of development at private expense for commercial items only for major systems, subsystems, or components thereof. Section 815(a)(2) of the FY 2008 NDAA

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4 “Major system” means that combination of elements that will function together to produce the capabilities required to fulfill a mission need. The elements may include hardware, equipment, software, or any combination thereof, but exclude construction or other improvements to real property. A system is a major system if—

(1) The Department of Defense is responsible for the system and the total expenditures for research, development, test, and evaluation for the system are estimated to be more than $189.5 million or the eventual total expenditure for the acquisition exceeds $890 million;

(footnote continued to next page)
expressly retained that presumption for commercial-off-the-shelf ("COTS") items. With regard to what properly may be characterized as a commercial item, the question whether it was “development exclusively at private expense” is only relevant to a very narrow category of commercial items, as evident in the definition of a commercial item. Specifically, paragraph (8) of the definition of a commercial item states:

(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. The balance of the commercial item definition is unaffected by the statutory change – the source of funding has no part in the test. Moreover, the changes in the various NDAAs only affect DoD procurements of major systems. Because the commercial item requirements of FASA and its successors control to the extent not modified by the NDAAs, the Section recommends that the applicability of the noncommercial item data rights clauses be limited, as required by statute, to procurements specifically addressed by the FY2007 and 2008 NDAAs – that is, to acquisitions of major weapons systems or components or subcomponents thereof only.

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(2) A civilian agency is responsible for the system and total expenditures for the system are estimated to exceed $2 million or the dollar threshold for a “major system” established by the agency pursuant to Office of Management and Budget Circular A-109, entitled “Major System Acquisitions,” whichever is greater; or
(3) The system is designated a “major system” by the head of the agency responsible for the system (10 U.S.C. 2302 and 41 U.S.C. 403). FAR 2.101.

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 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.
2. Direct Relationship Between Government and Subcontractors

The Proposed Rule is helpful in highlighting that “[i]ntellectual property rights are one area in which there is a direct legal relationship created between the Government and subcontractors, at any tier.” 75 Fed Reg. 59412. That is, “[t]he Government’s license rights are granted directly from the subcontractor, as the owner of the deliverable intellectual property; the Government and subcontractor are allowed to transact business directly with one another; the higher-tier contractors are prohibited from using their position to acquire rights in subcontractor technology (i.e., other than by mutual agreement in an arms-length negotiation).” Id. Although the current DFARS guidance in DFARS 227.7203-13(e) (subcontractors may transact directly with the government on rights in software), 227.7103-15(b) (subcontractors may transact directly with the government on rights in technical data), and 252.227-7013(k)(4) (higher-tier contractors not to use contract as leverage for greater rights in technical data) and 252.227-7014(k)(2) (higher-tier contractors not to use contract as leverage for greater rights in software) tacitly recognize these points, the Proposed Rule makes the points unambiguous. It clarifies that for commercial and non-commercial technical data and computer software alike, higher-tier contractors are prohibited from using their power to award contracts as economic leverage to obtain rights in technical data or computer software from their lower tier contractors.

However, the Proposed Rule either intentionally or inadvertently eliminates a subcontractor’s right to appeal an adverse Contracting Officer’s decision. Because subcontractors may deal directly with the Government regarding challenges to data rights restrictions, the current version of the DFARS provides subcontractors the right to appeal directly adverse determinations by the Contracting Officer. DFARS 252.227-7037(g)(2)(ii), (iii). The Proposed Rule purports to limit appeals to only “Contractors,” thereby eliminating the right for subcontractors to appeal. DFARS 252.227-7037(f) (proposed). The Proposed Rule should be modified to correct this oversight.

3. Intellectual Property Infringement Claims

Historically, contractors have had difficulty obtaining administrative relief for claims of intellectual property infringement. The preamble of the Proposed Rule notes that the section on notification and disclosure to claimants (now 227.7004)
was completely rewritten to positively state that it is the Government’s policy to settle meritorious claims, that the agency making such a determination should coordinate with other agencies on their potential liability, and that if a claim is to be denied, the responsible agency should notify the claimant and provide a basis for the denial.

75 Fed. Reg. 59413. The Proposed Rule provides the requirements for filing such claims.

The Section considers this a positive development as it will reduce unnecessary litigation. Nevertheless, it offers the following specific comments:

  - With regards to subparagraph (a)(6) to DFARS 227.7002, the required elements for a claim includes “any additional information that will expedite the resolution of the claim.” To ensure that the claimant knows when the agency has determined that additional information is required, we recommend requiring the agency to give notice of any information deemed necessary to expedite resolution of the claim to the claimant within a reasonably established period of time after receipt of the claim.
  - the word “all” in paragraphs (c)(1)(iv) through (viii) and (2)(vii) should be changed to “any” because it is possible there are no “licenses,” “litigation,” “contracts,” etc.

  - (b): No individual or office has been identified with authority to make the final denial. The Section recommends that an individual or office be identified so that the claimant can determine who has the authority to make the decision.
  - Where Alternative Dispute Resolution does not take place during the administrative process, to assist the agency in preparing a denial that may better withstand a challenge for being arbitrary and capricious under the Administrative Procedure Act, the Section recommends revising the
Proposed Rule to require a denial to itemize each ground of defense and provide any evidence supporting that ground. Claim charts should be preferred as they are with respect to the initial claim. The aim of a well-documented denial is to avoid litigation; incomplete denials will inevitably lead to challenges and litigation.

- (b)(3): The Section recommends removing the guidance to draft a denial notice “to avoid any admissions against interest.” The denial should accurately and completely present the agency’s position, whatever that position is.

- The Section recommends that the Proposed Rule be revised to require that the agency’s decision on a contractor’s claim expressly state or otherwise be clear that it is the denial of the claim or portions of the claim. This is significant because the statute of limitations is tolled from the date the claim is filed until the date of its denial. Because the denial restarts the clock for damages under 28 U.S.C. § 1498, the Section recommends it should contain unambiguous language regarding the agency’s final decision, such as: “This is the agency’s final decision denying your infringement claim.”

- (c): The Section recommends that the administrative claims process provide for, if not encourage, use of alternative dispute resolution (“ADR”) by the Government and contractor. Intellectual property disputes are fertile ground for ADR in the private sector, and various DoD components have been aggressive in using ADR to resolve complex issues. See, e.g. SECNAVINST 5800.13A (“ADR techniques shall be used as an alternative to litigation or formal administrative procedures to the maximum extent practicable.”).


- Article 1(a) applies only to U.S. patents. For that reason, the Section recommends that there is no need for license “throughout the world” when only licensing U.S. patents.
4. **Section 227.7102 Policy**

   a. **Commercial Items**

   The Proposed Rule’s policy on the one hand recognizes that commercial item sellers need only provide technical data or computer software “that is customarily provided to the public,” but on the other proposes three additional exceptions requiring commercial item contractors to provide technical data or computer software that:

   (i) Are form, fit, or function data (applies only to technical data);

   (ii) 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 part of a military system, when such information is not customarily provided commercial users or the data provided to commercial users is not sufficient for military purposes; or

   (iii) Describe the modification of a commercial item made at Government expense to meet the requirements of a Government solicitation;


   Although these exceptions are in the current DFARS as to noncommercial technical data, they are nonetheless problematic because the proposed provision relates to commercial items. These proposed exceptions are inconsistent with the commercial items policy imposed by FASA and as implemented in FAR 12.211 and FAR 12.212. The commercial item changes under FASA were an attempt to make government procurements of commercial items as similar as possible to private sector commercial item procurements. Thus, when the Government is in the commercial marketplace, it should be treated to the maximum extent practical, like another commercial customer. See, e.g., § 8002 (restricting the use of FAR contract clause for commercial item acquisitions); § 8104 (requiring agencies to specify there requirements in terms of function and performance specifications to maximize the acquisition of commercial items). This change had the dual benefit of encouraging more commercial vendors to participate in the Government market while, at the same time, reducing the acquisition costs to the Government by
acquiring more non-specialized commercial items under commercial terms and conditions. DoD has implemented recent changes to more carefully police the products and services that are treated as commercial items, but at the same time, to ease requirements on those products and services that pass the test as truly commercial. This change alone will drive many commercial item offerors away from the DoD market.

Not only is the proposed change burdensome on commercial item providers generally, it also contains DoD-unique requirements that are not required by other federal government customers. Thus, DoD and other federal agencies would have inconsistent treatment of commercial items.

Further, the proposed rule would apply these exceptions for the first time to computer software -- commercial or noncommercial. Computer Software providers will be less likely to sell to the DoD market for the reasons stated above.

To the extent DoD seeks to take advantage of the commercial marketplace, it is impracticable to impose exceptions to vendors' commercial practices in every case. If an agency has a specific requirement for a specific procurement, the Section suggests that the agency make that exception a requirement of the specific procurement. Indeed, the proposed changes are inconsistent with the agency's primary consideration: "to acquire only the technical data and computer software, and the rights in that data and software, that are necessary to satisfy agency needs." 75 Fed. Reg. 59425, DFARS 227.7102(a)(proposed). These global exceptions are likewise inconsistent with the requirement that such commercial item supplier "shall not be required to . . . (2) relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose commercial technical data or commercial computer software except for a transfer of rights mutually agreed upon." Id., DFARS 227.7102(b)(2) (proposed).

b. Rights in Vessel Hull Design

The Section also believes that Proposed Rule's policy does not provide the procurement community sufficient guidance regarding the Government's rights in vessel design. 75 Fed. Reg. 59426, DFARS 227.7102(i) (proposed). Although the Section recognizes that the vessel hull protection statute is confusing, we believe DoD now has the opportunity to provide clarification. The Section, therefore, suggests that the Proposed Rule set forth what constitutes Limited Rights, GPRs, and Unlimited Rights in a vessel hull.
5. Deferred Delivery Contract Clause

The Proposed Rule states that the deferred delivery contract clause should be used “when it is in the Government’s interest to defer the delivery of technical data or computer software.” 75 Fed. Reg. 59425, DFARS 227.7103-5(a) (proposed). The Section suggests that the procurement community would benefit from additional specific guidance. For example, the clause directs the use of the deferred ordering clause “when a firm requirement for a particular data item(s) has not been established prior to contract award but there is a potential need for the data.” Similar concrete guidance should be provided for the use of the deferred delivery clause.

6. Activities Covered

a. Required Rights

The Proposed Rule states that “[t]he license granted for noncommercial technical data and noncommercial computer software under the clauses covers the following activities: (i) Access; (ii) Use; (iii) Reproduction; (iv) Modification; (v) Release; (vi) Performance; (vii) Display; and (viii) Disclosure.” 75 Fed. Reg. 59427, DFARS 227.7104-1(c)(1) (proposed). The Section recommends that the Proposed Rule clarify that such broad rights are not required in every case. Indeed, the contract clauses set forth a far narrower scope of rights. The Proposed Rule may present significant difficulty when dealing with trade secrets. If the trade secret owner grants the Government the right to reproduce, release, perform, display, and disclose a trade secret without specifically identifying the conditions for sublicensing, the trade secret may simply cease to exist.

b. Addition of the Right to “Access” Data and Software

The Proposed Rule attempts to address “access,” an important issue in 21st century government contracting. Contractors are receiving an increasing number of requests from contracting agencies to obtain access to non-final technical data and computer software. This is often work-in-process or draft information that may contain information proprietary to a single contractor or multiple contractors. These requests for access often require real-time or near real-time access to the non-final information through an integrated digital environment. The Government’s desire to access this information is understandable as it seeks to increase efficiency. Providing such access to non-final information can help reduce costs and accelerate schedules. Nevertheless, the concern remains that the proposed DFARS revisions do not provide adequate protection of contractor intellectual property rights.
The government licenses in the existing regulations specify the rights granted by copyright law and trade secret law (i.e., use and disclose are trade secret rights, and the rights to reproduce, distribute, prepare derivative works, publicly display and publicly perform are copyright rights). The addition of the right to “access” data/software raises ambiguities, as described below. Because this is not one of the rights granted by copyright or trade secret law, it is not necessary in a license grant. The Government’s rights to access data/software will instead be determined by other provisions in the contract that address what must be delivered, and how those deliveries will occur. Thus, because of questions that the insertion of this “right” raises, the access right should be deleted from the license grants.

The concern is that the addition of the right to “access” data and software will be read as somehow granting rights in data or software that has not yet been delivered or that is not a deliverable under the contract – but to which the Government is given “access” through provisions requiring the establishment of integrated data environments or via other means (e.g., informal exchanges during technical discussions, etc.). The addition of an “access” right in existing licenses should not be read as somehow defining the scope of rights, or granting the Government specific rights in such non-deliverable/pre-delivery data or software. The data rights statute requires the Government to identify and list data deliverables so that contractors can clearly understand what is being provided and the associated requirements regarding assertions and marking. 10 U.S.C. § 2320(b). Much of the data to which the Government is given informal access is not so listed, asserted, or marked using DFARS legends. The legends and copyright markings used throughout industry and which have been interpreted by a large body of case law are well understood and should be sufficient to identify information in which the Government receives other than Unlimited Rights. Therefore, requiring all such data to be subject to the same formal requirements exceeds the statutory requirement to identify data deliverables.

If the Government wishes to address its license rights in non-deliverable/pre-delivery data and software, the Section believes that further revisions are necessary to establish a new category of information and a new category of rights for access to that information.

7. Grant of Rights to Third Parties’ Intellectual Property

The Proposed Rule appears inconsistent with the FAR in its anticipation that the agency may grant a contractor approval to use a third party’s technical data or computer software without any statutory authority. Although the FAR provides contractors authorization and consent to infringe U.S. patents, the longstanding
policy has been to require contractors to obtain permission from copyright owners before including copyrighted works, owned by others in data to be delivered to the Government. See FAR 27.102(e). In addition, the FAR contains the following regarding treatment of technical data:

> Contractors may have proprietary interests in data. In order to prevent the compromise of these interests, agencies shall protect proprietary data from unauthorized use and disclosure. The protection of such data is also necessary to encourage qualified contractors to participate in and apply innovative concepts to Government programs. In light of these considerations, agencies shall balance the Government’s needs and the contractor’s legitimate proprietary interests.

FAR 27.402(b).

The FAR makes it clear that protecting private intellectual property is primary. In contrast, the Proposed Rule appears to support infringement of private intellectual property if warranted by a profit-oriented, cost-benefit analysis:

> (3) Only grant approval to use a third party’s intellectual property (excluding patents) in which the Government will not receive a license when the Government’s requirements cannot be satisfied without the third party material or when the use of the third party material will result in cost savings to the Government which outweigh the lack of a license.


The Section is concerned that the cost-benefit analysis portion of the Proposed Rule will have significant unintended consequences, including undermining the public’s confidence in the fairness of the public procurement system and increasing the likelihood of litigation against the Government by the owners of intellectual property. Additionally, we respectfully contend that DoD also does not have special authority for such a deviation from the FAR rule. We also note that the Proposed Rule does not put the agency on notice that such action will constitute a regulatory taking of private property by a sovereign power and do not believe a cost-benefit analysis is sufficient given the possible ramifications. Accordingly, the Section urges DoD to remove this provision in the final rule.
8. Requiring Technical Data Pertaining to an Item To be Furnished with Unlimited Rights.

a. Items Developed Exclusively at Private Expense

Consistent with 10 U.S.C. § 2320(a), current regulations provide that the Government is granted unlimited rights in technical data pertaining to an item, component, or process developed exclusively with government funds, or in technical data developed with government funds in contracts that did not require the development, manufacture, construction or production of an item, component, or process. The Proposed Rule modifies this language.

Proposed DFARS 227.7104-3(b)(2) addresses technical data that do not pertain to items or processes and states that certain contracts may require the creation of technical data for a conceptual design or similar effort that does not require the development, manufacture, construction, or production of items or processes. This language is consistent with the current regulations. Paragraph (c)(4) of this same provision, describing the technical data in which the Government is granted Unlimited Rights, nonetheless revises this language and states that the Government is granted unlimited rights when the “technical data or computer software, or the items, processes to which the technical data pertain, are developed exclusively with Government funds.” This simplification of the language creates an ambiguity in situations where a contractor may be asked to create a new report or analysis relating to a component already developed exclusively at private expense. In such cases, the development of the technical data itself may be exclusively funded by the Government, but the underlying component is funded exclusively by the contractor. In such cases, because of the continuing sensitivity of such data, the Section recommends that DoD modify the language or guidance provided to clarify that such data will be provided with Limited Rights – in other words, if the data pertains to an item developed exclusively at private expense, that is what governs the determination of the Government’s rights – and not the funding used to create the new data itself.

In addition, we recommend that DoD consistently use the language adopted for paragraph 252.227-7013(b)(1) for the various rights categories. We note, for example, that as currently drafted, this new formulation is used only for Unlimited Rights and GPRs; the description of data to which the Government obtains Limited Rights (in paragraph (b)(3)) was not modified. We recommend that DoD consistently address this issue.
b. Items Developed Exclusively at Government Expense

When an item or process is developed at government expense, the Proposed Rule grants the Government Unlimited Rights in the “technical data pertaining to” such item or process. 75 Fed. Reg. 59428, DFARS 7104-3(c)(1) (proposed). Where the Government contracts with a private organization to develop an item or process and only includes in the agreement contract line items and deliverables pricing the item or process and does not include contract line items and deliverables pricing the technical data pertaining to that item, the Government and the private party have reached no mutual agreement on the pricing for any technical data pertaining to that item. The Proposed Rule presumes that any technical data pertaining to the items must have been developed in the course of a government-funded effort. There are many instances when additional technical data relating to such an item is developed at private expense for commercial purposes or any number of other reasons. The proposed rule provides insufficient basis for the Government’s assertion of Unlimited Rights. The Section is concerned that this aspect of the Proposed Rule may constitute a regulatory taking of property and requests that it be revised.

Computer software design documentation is included in the definition of technical data, rather than in the definition of computer software under this Proposed Rule. 75 Fed. Reg. 59466, DFARS 252.227-7013(a)(6)(i) (proposed). If the final rule is similar to the Proposed Rule, the Government would obtain Unlimited Rights in the design details, algorithms, processes, flow charts, formulas, and other information when they pertain to an item or process developed at private expense. An unintended consequence of this change is that a third party could use the computer software design documentation to develop nearly identical or reverse-engineered delivered computer software, even though these were items not included in the contract price and may have been developed entirely at private expense. This is a significant substantive change that goes well beyond the stated purpose of the Proposed Rule and is inconsistent with the disclaimers made in the preamble. Accordingly, the Section urges DoD to delete this provision.

9. Commercial Licenses

The Section suggests inserting “together with the commercial license agreement and made a part of the contract” between “enumerated” and “in a license agreement” for clarity in 75 Fed. Reg. 59429, DFARS 227.7104-5(b) (proposed). We also urge that DoD take the opportunity to state that the commercial license agreement shall have the same precedence as the contract’s schedule of supplies/services, whether or not the license is expressly a part of the Schedule, and
notwithstanding use of FAR 52.212-4(s) in certain contracts. The use of FAR 52.212-4(s) in FAR Part 12 contracts, for example, makes license agreements for software fourth in precedence within a government contract document, typically placing the license as lower in precedence than the clauses in the Schedule of the contract that may address rights in computer software and technical data. To ensure that this approach does not cause further order of precedence issues with other aspects of the contract, this could be implemented as an “Alternate” in the clause.

10. Class Use and Non-Disclosure Agreement

The Section recommends that DoD define and describe the “class” use and non-disclosure agreement referenced at 75 Fed. Reg. 59432, DFARS 227.7107-1(c)(1) (proposed).

11. Exceptions to Limited, Restricted, and Commercial Items Rights

The Proposed Rule reflects the mechanisms in the current DFARS data rights clauses that were intended to protect the owner of Limited, Restricted, or Commercial Item Rights technical data or computer software from losing value in its intellectual property in the event the Government had an immediate need to release or disclose it to a third party. The three exceptions in all the proposed data rights clauses are:

(i) The reproduction, release, disclosure, access, or use is--
   (A) Necessary for emergency repair and overhaul;
   (B) A release or disclosure of technical data (other than detailed manufacturing or process data) to, or access or use of such data by, a foreign government that is in the interest of the Government and is required for evaluational or informational purposes; or
   (C) A release or disclosure of computer software design documentation to, or access by, a contractor or subcontractor performing a service contract (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use such computer software documentation to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations or for emergency repair or overhaul of items or processes;

The Section has several concerns regarding these exceptions. First, the first and last exceptions may be problematic for organizations that have developed technical data or computer software at private expense. For example, technology companies that have private investors or are hoping to sell the company at some point are particularly leery of the erosion in the value of intellectual property these exceptions cause.

Second, unlike other exceptions to statutory requirements, such as competition, there is no requirement for the Contracting Officer to document any support for a determination that one of the three exceptions applies. Third, the descriptions of the exceptions are very broad. For example, the term “emergency” is not defined by statute, in the FAR, or in the DFARS. With the procurement community admittedly understaffed, there are many actual and perceived emergencies, making the first exception potentially overbroad. Fourth, because the vast majority of contracts are now service contracts, nearly any contractor could be told by the Government to make unlicensed derivative works of the original owner’s software under the third exception.

The mechanisms that are intended to protect the original intellectual property owner: use and non-disclosure agreements, notice by the Government of the use, destruction by the service contractor, and notice of the destruction to the original owner are more often ineffective and unenforceable. As an initial matter, the use and non-disclosure agreement is entered into on a generic basis by most DoD service contractors. The agreement is more administrative and, in the Section’s view, does not specify what technical data or computer software of which organization is of concern so as to put contractors on notice of their obligations. Furthermore, the Government may not consistently notify the original owner of the Limited, Restricted, or Commercial Item Rights technical data or computer software (particularly subcontractors) that its privately developed information is being released or disclosed to a third party. Because there is no requirement for an audit, reporting, or review of this process, the Government is not obligated to grant such a request. Similarly, there may be no records or notices if the recipient service contractor ever destroys the original organization’s Limited, Restricted, or Commercial Item Rights technical data or computer software and, therefore, an original owner may not receive notification of such destruction.

Because of these issues, it is reasonable to believe that a multitude of unlicensed derivative works based on privately developed Limited, Restricted, and Commercial Item Rights intellectual property exists throughout the Government and among its service contractors without the knowledge of the original owner -- until a competitor suddenly has its technology. Moreover, given the change that
would relieve the Government of liability for disclosures or other improper acts by an “authorized recipient;” these “authorized” disclosures become even more problematic.

The Section suggests that without implementation of internal controls, the “protections” are hollow words that do nothing to prevent these exceptions from overtaking the rule, thereby continually discouraging entrepreneurial and inventive organizations from doing business with the Government. We believe the better rule is not to permit such disclosure without the consent of the providing party. In the alternative, controls such as determinations and findings, record-keeping requirements, and review by more senior personnel and intellectual property counsel are necessary to instill public trust in the process.

12. Unlimited Rights in User’s Documentation

The Proposed Rule requires the Government to obtain Unlimited Rights in “[c]omputer user’s documentation required to be delivered or otherwise provided under this contract.” 75 Fed. Reg. 59477, DFARS 252.227-7013(b)(1)(x) (proposed). This is similar to the proposed provision discussed above relating to “technical data pertaining to an item or process.” Development of user’s documentation is costly and typically is valuable and protectable intellectual property. It is unlikely that many private organizations will realize that the rights and pricing for its user’s documentation is governed by part of a long and complex clause that is incorporated into the contract by reference only. The Section strongly recommends that the Government identify any information it needs as a deliverable contract line item and identify the rights it requires in the schedule in lieu of this potentially hidden clause.

13. 252.227-7015 Technical Data and Computer Software – Commercial

The Section has several concerns with the treatment of commercial technical data and commercial computer software in the Proposed Rule that appears inconsistent with FASA, the statute that governs acquisition of commercial items.

First, the Proposed Rule provides that agencies “[u]se the clause at 252.227–7015, Technical Data and Computer Software—Commercial, in all solicitations and contracts when the contractor will be required to deliver commercial technical data or commercial computer software.” 75 Fed. Reg. 59429, DFARS 227.7104-8(a)(2) (proposed). Nevertheless, this requirement is inconsistent with the requirements under FAR 21.211 and FAR 12.212. FAR 12.211 provides:
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.

Similarly, FAR 12.212 provides:

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.

The Section respectfully submits that the requirement to use this new DFARS clause is not supported by any agency-specific DoD statute and is inconsistent with FAR guidance implementing FASA.

Second, the clause requires contractors to grant the Government certain minimum license rights in technical data. These minimum license rights are not customary or standard for commercial data/software. For example, for certain technical data, the Government grants itself Unlimited Rights. 75 Fed. Reg. 59454, DFARS 252.227-7015(b)(2)(i)-(v) (proposed). Similarly, the clause requires commercial suppliers to grant the Government the “minimum rights” to “access, use, modify, reproduce, release, perform, display, or disclose commercial technical data (including computer software documentation) within the Government.” Id., DFARS 252.227-7015(b)(3) (proposed). These provisions are inconsistent with FAR 21.211 and FASA.

Third, and most problematic, the new clause requires contractors to mark their commercial technical data and commercial computer software with restrictive legends and “[t]he form of the marking or notice must be consistent with best commercial practices, and must accurately describe the Government’s rights.” Id., DFARS 252.227-7015(d) (proposed). Significantly, if commercial technical data or commercial computer software is not so marked, the Proposed Rule appears to excuse the Government, and other persons to whom the Government may have released or disclosed the data, from any liability for any release or disclosure. 75 Fed. Reg. 59455, DFARS 252.227-7015(e)(1) (proposed). The Section respectfully contends that there is no authority for any such marking requirement, and the requirement is likely to have harsh consequences on vendors who are unaware of the requirement. Furthermore, vendors may not be willing to make changes to their packaging used for world-wide commercial sales to address DoD-specific marking
requirements and simply stop doing business with the Government.\textsuperscript{6} Finally, to the extent commercial vendors continue to do business with the Government, the cost to the Government for commercial products is likely to increase as a result of this DoD-unique requirement.

Fourth, the clause seeks to relieve the Government from any liability for release or disclosure by an "authorized recipient." If the Government is aware that an "authorized recipient" is not taking the appropriate steps to protect technical data or computer software, the clause nonetheless releases the proprietary commercial technical data or commercial computer software to any government recipient, leaving the owner without any remedy.

Finally, the Section suggests that DFARS 252.227-7015 Technical Data and Computer Software - Commercial, is unnecessary as there is no need for a special regulatory clause to cover commercial items whether they are technical data or computer software. There is no clause in the present DFARS covering the acquisition of commercial computer software and the Proposed Rules does not identify how the lack of a special commercial software DFARS clause has created problems since the last DFARS revision. Furthermore, there is no need to complicate the acquisition of commercial software with such a clause as the documentation for the acquisition of commercial computer software and commercial computer software documentation presently is adequately covered in the current FAR.

The Section is concerned that the net result of these changes will be to discourage many commercial contractors from participating in government contracting. In addition, it is likely to increase the costs for those commercial items that are made available to the Government while decreasing the efficiencies sought to be realized with commercial item contracting.

14. Marking Requirements

The Section recommends that, in undertaking this substantial revision to its rules, DoD also take the opportunity to correct the current harsh impact if a contractor inadvertently fails to mark technical data and/or computer software

properly in accordance with existing rules. The current rules for marking data and computer software are quite complex, and the ramifications of incorrect or inadvertently omitted marking are severe. A contractor risks losing valuable data rights if documents are inadvertently mismarked. To alleviate these harsh results and any potential windfall to the Government, the Section recommends the following:

a. DoD should eliminate the requirement for the contractor to demonstrate that the omission of the notice was inadvertent. See DFARS 227.7105-2(b)(2)(ii). Oftentimes, there is no way to determine why something did not happen – in essence, to prove a negative. It is reasonable to assume that contractors do not intend to incorrectly mark their data such that they risk waiving their valuable data rights. Accordingly, the final rule should remove the requirement for contractors to demonstrate inadvertent disclosure.

b. We suggest elimination of the six-month time limit on corrective action. If there has not yet been a disclosure and a contractor is willing to acknowledge that the Government has no liability, there is no reason to prohibit a contractor from correcting a missing or erroneous marking. Otherwise, the Government may receive an unintended windfall.

c. DoD also should remove the requirement that automatically grants the Government Unlimited Rights in technical data delivered to the Government without restrictive markings. Instead, the final rule should allow the Government to treat such unmarked data as if it has Unlimited Rights unless and until a contractor discovers the error and notifies the Government. If the contractor promptly corrects the error before any disclosure outside the Government and agrees that the Government has no liability, then the actual status of the data should be restored.

d. We also suggest modifying paragraph (g)(1)(i) to reflect the standard government and industry practice of placing the entire data rights legend on the cover of the CDRL or other deliverable item, and then using an abbreviated statement on the subsequent pages of the document that refers to the legend included on the
cover. For example, the first sentence of paragraph (g)(1)(i) could be modified to read:

The authorized legends shall be placed on the transmittal document or storage media, and for printed material, on the title/cover page of the printed material containing technical data or computer software for which restrictions are asserted. Mark each subsequent sheet or data with abbreviated marking(s) to indicate the applicable restrictive rights assertion(s) and refer to the title/cover page for additional information.

e. The Proposed 252.227-7015 clause allows and even encourages custom negotiation of license rights. Nevertheless, when third party commercial computer software is incorporated in a contractor’s deliverable, source code for that software is usually not available to the contractor, and the contractor usually has no way to modify the software to add any sort of legend. This raises the issue of what marking technique for commercial computer software is acceptable under the contract to notify the Government of restrictions. Must a legend display when the software runs? If so and not otherwise addressed in the revisions to the DFARS rules, this may also violate the current requirement at DFARS 227.7203-10(b)(1) that no such legends be used if they will delay operation of the software if it might be used in combat. Other questions exist such as: Is a label on the media on which the software is provided sufficient? Is a label or statement in or attached to the computer software documentation sufficient? When the software is loaded into an electronic box, such as a Line Replaceable Unit, what marking technique should be used where the computer software documentation will not be available? Where special rights are negotiated for commercial software, must those special rights be marked on the computer software or is the recitation of the negotiated license in the contract terms sufficient? Does DoD have preferred methods of marking commercial software? Given these questions, the Section recommends that DoD provide additional guidance regarding the
acceptable methods for notifying the Government of its
license rights.

15. Copyrights

The Proposed Rule continues to apply a broader government-wide copyright
license in noncommercial technical data and noncommercial computer software
generated or produced at government expense under a DoD contract containing the
DFARS 252.227-7013 clause than is specified by Executive Order ("EO") 12591,
which the Proposed Rule or the FAR implements.⁷ The present DFARS and the
Proposed Rule provide that a contractor that generates noncommercial technical
data and noncommercial computer software at government expense on a DoD
contract containing the DFARS 252.227-7013 clause retains title to the copyright in
such noncommercial technical data and noncommercial computer software with
DoD obtaining a government-wide royalty-free perpetual license in such technical
data and computer software equivalent to an Unlimited Rights license rather than a
GPR license. The difference in the scope of these two licenses is that the Unlimited
Rights license not only provides DoD with government-wide royalty-free perpetual
rights in the generated technical data and computer software but also grants the
Government the right to sublicense the technical data and computer software to
others for any purpose whatsoever. The present DFARS, but not the Proposed
Rule, makes clear that the Government’s copyright license in technical data under
this clause is the same as the license rights that the Government obtains in technical
data under this clause. The proposed change in effect substantially undermines the
value of the contractor’s title to commercial copyright in noncommercial technical
data and computer software first generated under the contract.

⁷ See also, DoD’s Guide, Intellectual Property: Navigating Through Commercial Waters Issues
and Solutions When Negotiating Intellectual Property with Commercial Companies, Under
Secretary of Defense for Acquisition, Technology and Logistics, October 15, 2001 (the “DoD
Guide”).
Further, the DoD Guide discusses the Government’s copyright right license in Chapter 4, Issue Category 3-G and states that “only in the rarest of cases should the Government demand – over the IP owner’s objection – more than GPRs to copyrighted material, even if the material was entirely developed at Government expense.”\(^8\) Nevertheless, the present DFARS and the Proposed Rule provide that the Government obtain Unlimited Rights in most cases. The DoD Guide suggests that the Contracting Officer should negotiate to reduce the Government’s license right in copyright material to GPRs only. Because the Government should only acquire a broad Unlimited Rights copyright license in the “rarest of cases,” the Proposed Rule should contemplate negotiated copyright licenses in most DoD contracts with the DFARS 252.227-7013 clause to meet the requirements of EO 12591 and the DoD Guide. Alternatively, the Section proposes that the Government’s Unlimited Rights copyright license be changed to a GPR copyright license. Such action would be consistent with paragraph (c)(ii) of the FAR rights in data clause and Alternate IV to the FAR clause, which provides for a GPR license in the Government whenever the Government permits a contractor to retain title to the copyright in noncommercial technical data and computer software developed at government expense.

16. Assertions

a. Scope of Assertions Obligation.

Proposed clause 252.227-7017(b) clause states that the requirements of this provision apply only to technical data and computer software “to be delivered or otherwise provided with other than unlimited rights.” (Emphasis added). The existing clause does not include the “otherwise provided” language and refers only to the delivery of data. If the requirements for submitting assertions are made to apply to all data that is “otherwise provided” to the Government, the assertions lists will need to include assertions for all technical data or computer software to which the Government may be given access, for example, through an integrated data environment or other electronic database or technical working group, but that will not ultimately be a deliverable under the contract. This substantially broadens the assertion requirements and will lead to unnecessarily lengthy assertions lists as contractors try to anticipate all data that the Government might be provided under the contract – especially in light of increasing government demands to have insight/access to the contractor’s internal systems on which working documents,

\(^8\) DoD Guide at 4-21.
drafts, and non-deliverable data are stored. The Government cannot expect that contractors should be listing every piece of data that will be provided or to which the Government is given access through these informal means. As drafted, these regulations would appear to require such assertions because providing informal access to documents and software in this manner could be interpreted as "providing" the Government with such data/software. If the Government requires assertions for every piece of data or software to which the Government may be given access through such informal means, then contractors will be much less willing to share materials such as works in progress and undeliverable documents, thus potentially reducing, for example, the Government’s ability to participate in integrated product teams for major weapons programs. In addition, it will lead to substantially greater costs to police such data—costs that will eventually be passed through to the Government. Thus, the Section recommends removing the “otherwise provided” language from 252.227-7017(b) and (c)(3) and in paragraph 252.227-7018(d) (proposed).²

b. Submission of Licenses

Proposed clauses 252.227-7017(c)(4)(ii) and 252.227-7018(f)(4)(ii) require the contractor to submit copies of negotiated, commercial, and other non-standard licenses with its assertions. This requirement has the potential to be administratively burdensome for prime contractors, subcontractors, and suppliers. Given the additional time that will be required to prepare the assertion list and gather the necessary supporting information (e.g., copies of licenses), the cost and schedule impacts may be significant. Accordingly, we recommend that the final rule state that the duty to provide such licenses should be “to the extent then reasonably available.” This qualification would recognize that contractors are not always able to obtain copies of such licenses by the date of proposal submission.

c. Requiring Subcontractor Signatures on Prime Contract Assertions Lists

The Section is concerned that adding subcontractors, whose assertions are included in the assertions list to sign that assertions list may be administratively burdensome, especially during the rush of proposal preparation, and may not provide the Government with any corresponding benefit. Thus, the Section proposes deletion of this requirement. If DoD nonetheless retains this requirement,

² The “otherwise provided” language does not appear in the proposed 252.227-7018(b).
we believe language should be added expressly stating that such signatures may be provided in counterparts, electronically, or through some other less burdensome means so as to provide flexibility.

17. Terminology

a. Defined Terms

The proposed contract clauses of the Proposed Rule define the terms “technical data,” “commercial technical data,” “noncommercial technical data,” “computer software,” “commercial computer software” and “noncommercial computer software.” Nevertheless, the Proposed Rule does not consistently use these defined terms. In addition, the Proposed Rule appears to omit the terms “commercial” or “noncommercial” before the words “technical data” or “computer software.” In a number of instances, the Proposed Rule uses the term “data” when the term “technical data” appears more appropriate and uses “software” when the Proposed Rule appears to refer to “computer software.” These inconsistencies could lead to confusion because the FAR defines the term “data” to mean both technical data and computer software whereas the Proposed Rule assumes that the undefined term “data” refers to technical data only and not to computer software. Proposed DFARS 227.7102 illustrates this point. This section uses the term “data” and “software” in subsection (a) when it appears to mean “technical data” and “computer software”; it uses the undefined term “technical information” and the term “data” in subsection (b)(1)(ii); in subsection (d)(2)(ii), it refers to “data and software” whereas subsection (d)(2)(i) refers to “technical data” and (d)(2)(iii) refers to “technical data”; and (d)(5) refers to deliverable “data and software.” In some instances the term “technical data” and “computer software” appear in a sentence and thus the reference to “data and software” later in the sentence most likely means “technical data” and “computer software.” In other cases, the sentence repeats the correct references to “technical data” and “computer software” but in other instances the terms “technical data” and “computer software” only appear in the preamble of a provision and are then used inconsistently in other subsections of the provision. To avoid confusion, the Section recommends that DoD ensure that defined terms are used consistently in all parts of the final rule.

b. Ambiguous Terms

(1) Emergency repair and overhaul

The Proposed Rule repeats and expands on the DFARS’ use of “emergency repair and overhaul” as a basis for the release of Limited Rights technical data to third parties. Nevertheless, it is unclear whether this term refers to “emergency
repair and emergency overhaul” or to “emergency repair” and any type of overhaul. If the latter is the intended meaning, the DFARS permits a very broad use of Limited Rights data, i.e., routine overhaul. If the intended use of Limited Rights technical data is only for emergency overhauls, then this ambiguity should be resolved by revising “emergency repair and overhaul” to “emergency repair and emergency overhaul.”

(2) Derivative Works

Proposed Rule 227.7104-6, Rights in derivative technical data and computer software, provides that the clauses at 252.227-7013 and 252.227-7014 “protect the Government’s rights in technical data and computer software, or portions thereof, that the contractor subsequently uses to prepare derivative [technical] data or [computer] software or subsequently embeds or includes in other data or software. The Government retains the rights it obtained under the development contract in the unmodified portions of the derivative [technical] data or [computer] software.” Nevertheless, the concept of derivative works is not further explained in the Proposed Rule, nor is the term used currently in the DFARS. The Section recommends that DoD define this new term in the final rule.

If the Proposed Rule is intended to reflect the derivative works concept in the copyright law, i.e., a work based on a preexisting work, then it should recognize that (i) this concept applies to other than development contracts as specified in proposed section 227.7104-6 because this same concept would apply equally to the Government’s rights in commercial technical data and in commercial computer software, and (ii) this provision should also include rights of the parties when the Government prepares or has the contractor prepare a derivative work based on the technical data and computer software delivered under the contract. For example, if the Government acquires technical data with Limited Rights, DFARS 252.227-7013 still permits the Government to “modify” the technical data within the Government, or the contract may specify that the contractor is to modify its Limited Rights technical data pursuant to the contract. Because such a modification would be prepared at government expense (and under the copyright law would be a derivative work), it is not entirely clear what rights the Government and the contractors have in such modified Limited Rights technical data. With respect to Restricted Rights computer software, the FAR provides that the Restricted Rights apply to both the original computer software and the modified computer software. The DFARS, however, is silent on this point. Having raised the issue of the Government’s rights in derivative technical data and computer software prepared by a contractor at private expense, DFARS 227.7104-6 should also cover the contractor’s rights in derivative technical data and in computer software prepared
by the Government at the government’s expense. We also recommend that the final rule provide that the Government has Limited Rights or Negotiated Rights only in the modified Limited Rights technical data.

(3) Within and Without the Government

The DFARS and the Proposed Rule provide for certain rights in the Government with respect to Limited Rights and Restricted Rights that differ dependent upon whether the Government’s use or release is “within the Government” or “outside of the Government.” For example, the Limited Rights definition provides for the use or release of technical data “within the Government.” See DFARS 252.227-7013(15) (proposed rule). Similarly, GPRs permit certain releases “outside the Government.” See DFARS 252.227-7013(14) (proposed rule), but it is not clear whether the term “within the Government” means that such technical data or computer software is only available to government employees or whether it means that the use or release is permitted within a government facility by either government or contractor employees located at such facility. The Section recommends that DoD clarify this term.

18. Nondisclosure Agreement

Proposed section 227.7107-2(d) contains a use nondisclosure agreement (“NDA”). There appears to be no authority to modify this agreement if circumstances require such a modification. The Section suggests that the instructions permit modifications in the language of the agreement. If the Government is proposing to disclose a contractor’s proprietary information to a third party, we believe the rule should reflect that a contractor may use its own NDA.

B. Responses to Questions Posed

The Proposed Rule (75 Fed. Reg. 59418-19) includes several questions from the drafters, seeking specific comment from the public. The Section provides the following comments in response:

1. Location of Definitions

The Section appreciates DoD’s effort to make the clauses incorporated in contracts less cumbersome, but it also agrees that the clauses are not complete without the definitions. We propose that the DFARS Part 252-227 definitions be included in one clause, but that the first line of every clause in that section
incorporate the definitions clause by reference and require it to be included in all contracts and subcontracts containing the operative clauses.

2. Location of Prescriptive Section

The Section notes that throughout the FAR and DFARS, the prescriptive sections describing when to use a contract clause are sometimes separated by subject matter within a Part and at other times, they are located together at the end of the Part. The recent trend has been to locate the prescriptive clauses together, and we recommend the final rule adopt the new approach.

3. Renumbering the Clauses

The Section recommends that the clauses be renumbered as in the Proposed Rule. Those new to the DFARS will not notice the different and those familiar with the DFARS will realize that changes have been made and will make a greater effort to understand the new clauses.

4. Adding a Scope Section to the Clauses

The Section agrees that a “scope” section may help the procurement community understand that multiple clauses may apply to one contract line item under the doctrine of segregability.

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,

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