Via Email

Office of the Assistant Secretary of Defense (Acquisition)
ATTN: LTC Andrew Lunoff/Designated Federal Officer (DFO)
3090 Defense Pentagon
Washington, DC 20301–3090

Re: Response to Government-Industry Advisory Panel; Request for Information on Rights in Technical Data and the Validation of Proprietary Data Restrictions, 81 Fed. Reg. 40290 (June 21, 2016)

Dear LTC Lunoff:

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

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the policy of the ABA.2

Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Anthony N. Palladino and Heather K. Weiner, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Intellectual Property.”

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I. BACKGROUND

Section 813(b) of the Fiscal Year (“FY”) 2016 National Defense Authorization Act (“NDAA”), Public Law No. 114-92, required the Department of Defense (“DoD”) to establish the Government-Industry Advisory Panel (“Panel”) that would review the statutory provisions at 10 U.S.C. §§ 2320 and 2321, and their implementing regulations, to ensure that the requirements are “best structured to serve the interests of the taxpayers and the national defense.” Although these provisions in Title 10 address only technical data, the Panel has extended its scope to include software. The Panel has thus interpreted its scope of analysis to also include DFARS subparts 227.71 and 227.72, and associated contract clauses.

On June 21, 2016, the Panel issued the RFI with specific questions intended to inform the Panel as it proceeds with its tasking. The Panel’s areas of inquiry are set forth and addressed in the body of this letter. The Section provides its comments below in response to these questions and welcomes the opportunity for its representatives to meet and discuss the points raised in this letter with the Panel at a future meeting.

II. COMMENTS

The Section identified the following significant points for potential discussion in response to the Panel’s identified questions. Where a particular question was not addressed, the Section found the subject matter to have been covered in other areas of the comments or the Section did not receive comments from its membership on the particular question:

1. Any issues, concerns, benefits, and/or appropriateness of 10 U.S.C. § 2320 and/or § 2321.

   - 10 U.S.C. § 2320(a)(1) addresses “patents” and “copyrights”, but does not expressly address “trade secrets” as now protected federally by the Defend Trade Secrets Act of 2016. Since trade secrets are an important form of federally protected intellectual property (“IP”) and are affected by technical data-rights law and regulations, 10 U.S.C. § 2320(a)(1) should be updated to address “trade secrets.”

   - 10 U.S.C. § 2320(a)(2)(E) lists factors to be used in establishing negotiated rights. The following factors should be added to the list:

     - The interest of the United States in encouraging contractors to commercialize items or processes for nongovernmental use.

     - The relative monetary contributions of the United States Government and contractor to the development of the item, component, or process.

   - The Section notes that recent amendments to 10 U.S.C. § 2320 have required contract clauses that erode contractor protections and contract certainty. As background, 10 U.S.C. § 2320(a)(2)(B) currently provides essential protections to the contractor community and requires including contract clauses that protect industry investment in
technologies. Further, 10 U.S.C. §§ 2320(b)(2) through (4) require regulations ensuring that government officials plan and acquire data using contract line-items and specific contract requirements. These requirements provide more clarity of scope and coverage, which is important for contractors and the associated supply base. 10 U.S.C. § 2320(a)(2)(F) also provides protections against government demands that can lead to reduced industry investments, such as not requiring contractors to give up rights in their technical data as a condition of award. But these protections have been eroded through the following changes in FY 2012 NDAA Section 815:

- Changes in 10 U.S.C. § 2320(a)(2)(D) to increase government rights to use privately developed technologies. For example, Section 815 introduces a complex and confusing concept of “Segregation/Reintegration” data. This concept expands the Government’s rights to use data for technologies developed exclusively at private expense if used for segregation and reintegration. This concept is sufficiently undefined that there is concern as to whether contractors will be able to protect their IP, especially because the terminology means that this concept will be applied at the lowest practicable and segregable level (meaning at the smallest parts that can be identified deep within a component).

- Section 815 expands deferred ordering for anything used in the course of the contract at any time. This expansion undermines the contractual certainty of each contract, undermines the planning required by each party under 10 U.S.C. §§ 2320(b)(2) through (4), and creates logistical challenges by extending the Government’s ability to order past contract closeout.

- In addition, through regulatory interpretation of 10 U.S.C. § 2305, DoD has greatly undermined the protections of 10 U.S.C. § 2320(a)(2)(F) by making the contractor’s conferral of technical-data rights an evaluation factor in such a way that it effectively requires contractors to surrender data rights in order to be found responsive in a procurement.

2. Any issues, concerns, benefits, and/or appropriateness of the current implementing DFARS regulations (subparts 227.71 and 227.72, and associated clauses), including the extent to which these regulations are consistent with and effective in implementing 10 U.S.C. §§ 2320 and 2321.

- The term “developed” is important to determining rights in noncommercial technical data or computer software. For technical data, the DFARS defines “developed” in terms of actual reduction to practice as defined in Title 35 of the U.S. Code. But the America Invents Act, Pub. Law No. 112–29 (“AIA”), deleted 35 U.S.C. § 102(g)(2) and has

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3 DFARS 252.227-7013(a)(7) (Feb. 2014). This term is defined differently for computer software in DFARS 252.227-7014(a)(7) (Feb. 2014).
largely removed the concept of “reduction to practice.” As a result, the reduction-to-practice concept now exists only in the context of subject inventions under 35 U.S.C. § 201(g) and in case law developed in interference practice before the AIA and its deletion of 35 U.S.C. § 102(g)(2). Since the reduction-to-practice concept is becoming less familiar, the Panel may want to consider using the concepts introduced in the AIA and applied under a “post-AIA” 35 U.S.C. § 102(a).

- DFARS 252.227-7018(b)(1) requires that when a Small Business Innovation Research (“SBIR”) data period expires, the SBIR data convert to Unlimited Rights data. But converting the SBIR data instead to Government Purpose Rights would suffice to allow the Government to make use of the data while also allowing the SBIR participant to commercialize its technology. This change would also better harmonize the DFARS SBIR data rights clause (DFARS 252.227-7018) with the FAR SBIR data rights clause (FAR 52.227-20). A small business may find it harder to attract outside investment if its products for commercial/nongovernmental sales contain key modules or stand-alone software applications developed in an earlier SBIR or Small Business Technology Transfer phase that the Government could provide to the small business’s competitors when the SBIR period expires. Thus, converting to perpetual Government Purpose Rights is more consistent with one of the purposes of the SBIR program, which is to “increase private sector commercialization of innovations derived from Federal [research or research and development].”

- Continuing to apply noncommercial DFARS clauses to commercial items conflicts with FAR 12.211 and 12.212. When 10 U.S.C. § 2320 or § 2321 is silent as to commercial versus noncommercial items, DoD policy should presume that it will procure commercial terms and apply commercial terms. As an example, 10 U.S.C. § 2320(a)(2)(B), (C), and (D) govern rights in technical data for an “item or process that is developed by a contractor or subcontractor exclusively at private expense.” DoD has taken the position that this provision requires commercial technical data to be governed by a special technical-data clause, DFARS 252.227-7015. DoD has also taken the position that DFARS 252.227-7013 should apply to technical data if those changes were developed with Government funding, even though changes to the commercial item are within the definition of FAR 2.101. The net result is that for a commercial item, as defined by FAR 2.101, the contractor faces complying with dual regimes under DFARS 252.227-7013 and 7015. This additional burden on a commercial supplier is not required by the text of § 2320, and the result is an apparent conflict with other statutory requirements providing a preference for commercial items and terms.

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4 Reduction to practice was more relevant to a first-to-invent system than to a first-to-file system.
6 See DFARS 227.7102-4.
• 10 U.S.C. § 2320(a)(2)(B) is designed to be implemented through clauses restricting the Government’s use of privately funded technology. But § 2320 does not require additional license rights beyond those “to release or disclose technical data pertaining to the item or process to persons outside the government or permit the use of the technical data by such persons.” Id. In contrast, the implementing DFARS 252.227-7013(b) provides for “royalty free, world-wide, nonexclusive, irrevocable license rights in technical data” within the Government. DFARS 252.227-7013(a) also extends the right to “modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government.” These rights are inconsistent with this type of data’s normal licensing practices, which restrict the license to a number of copies or to a specific location. As one example where these normal licensing practices can be found, DFARS 252.227-7014(a) defines Restricted Rights for software to reflect this norm as used in the software industry—by limiting distribution by number of copies. There needs to be some flexibility in the license for distributing the technical data in the same way there is flexibility in licenses limiting distribution for Restricted Rights software, including through use of Specifically Negotiated Licenses.

• Limited Rights are available for items or processes developed exclusively at private expense. The Government’s restrictions on use apply only to manufacture of the item, however, with no corresponding restriction on the Government’s use of the data to perform processes, such as for repair. This distinction between use of data for manufacture and use for repair makes it more difficult to license processes under the existing DFARS 252.227-7013 because even Limited Rights licenses appear to allow government personnel to compete with the contractor in performing the process. Because this distinction is not required under 10 U.S.C. § 2320, or another statute, and is created by the DFARS alone, harmonizing the limited rights would not require legislative action.

• DFARS 252.227-7013(e)(4) is inconsistent with 10 U.S.C. § 2321 and appears to provide a mechanism to reject contractors’ updated assertions outside of the validation process under DFARS 252.227-7037. Contractors’ assertion updates under DFARS 252.227-7013(e) thus should be rejected only if the conditions of updating are not met. Challenges to the assertions themselves should be pursued under the validation clause (-7037), and after delivery of the data.

• DFARS 252.227-7013(e) is unclear as to whether the contract needs to be amended when each updated assertion is submitted or whether mere submittal of the update is sufficient for contractual compliance. Although this amendment mechanism is useful for new assertions of which the contractor becomes aware, DoD should clarify how these amendments become effective under the relevant contract(s).

• DFARS 227.7103-13 and 227.7203-13 provide guidance on the Government’s rights to validate asserted restrictions. However, this guidance does not distinguish between reviewing restrictions and accepting contract data requirements lists (“CDRLs”). Section members report that this lack of distinction has prompted contracting officers to reject CDRLs merely because of disagreement over the asserted restrictions, which delays
providing technology to DoD users. Acceptance of a CDRL does not have to serve as an agreement with the asserted restriction (and it presumes the ability to review an accepted CDRL); DFARS 252.227-7037(e) makes that point, but it needs additional emphasis to prevent CDRL rejections based on disagreements that should be resolved under the validation processes of DFARS 252.227-7037 and 252.227-7019. This guidance should expressly confirm that acceptance of the CDRL does not mean agreement to the asserted restriction—and that potential disagreement with the restriction is not grounds for rejecting the CDRL.

- Unless specifically negotiated otherwise, DFARS 252.227-7013(b)(2) and 252.227-7014(b)(2) require Government Purpose Rights to expire at five years when an item or process is developed with mixed funding. After the expiration, the data become subject to Unlimited Rights. Yet, “Government Purpose Rights,” as defined in DFARS 252.227-7013(a) and 252.227-7014(a), can meet all the Government’s needs, including reprocurement, while still reserving the commercial market (and dual-use opportunities) to the contractor. Setting a default in which Unlimited Rights replace Government Purpose Rights after just five years (a relatively rapid expiration) reduces contractors’ incentives to create and market dual uses. Thus, Government Purpose Rights should have no expiration date, or at least they should have a default expiration date that account for long-lead-time technologies requiring more than five years for successful commercialization.

- DFARS 227.71 and 227.72 need better guidance on non-contractual data requirements, such as those needed for investigations, audits, and other DoD processes for which CDRLs are not usable or appropriate. DoD and other government entities often receive data outside of a contract deliverable that are believed to be necessary for government operations. In these situations, the door is open for government personnel to assert that the data are incorrectly marked even if no contractual clause requires rights markings for the “non-contractual” data. DFARS 227.71 and 227.72 clarify that data otherwise provided to the Government shall be protected and used solely for the purposes for which the data were received. The corresponding DFARS processes for these audits, investigations, and other activities should be revised with a similar statement establishing that data collected in these circumstances may not be used for other purposes and thus do not require rights assertions.  

- Section members have reported encountering provisions in statements of work, CDRLs, and other sections that conflict with terms and conditions prescribed by Sections H and I of the same contract/solicitation.

  - The Data Accession List (“DAL”) is an index of data generated under the contract and used by the program. The DAL’s purpose is to document compliance with an applicable statement of work. By the terms of DI-MGMT-81453A, which defines

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8 Other markings may be appropriate under the circumstances.
this index, the DAL is not a substitute for ordering CDRLs. Despite this
guidance, DoD contracting activities sometimes require any data on the DAL
index to be delivered as if the data had been ordered via CDRL. But using the
DAL this way could conflict with the DFARS 252.227-7027, the deferred
ordering clause, which provides the process for ordering data not specifically
identified as a CDRL at the time of contract formation. Although this practice has
been questioned, the Section understands that it may nonetheless remain
common.9

- In addition to creating a conflict with DFARS 252.227-7027, using the DAL as
  the functional equivalent of a “miscellaneous” CDRL for ordering undefined data
will not help agencies satisfy their requirements for planning on how to obtain
data necessary for programs. The data delivered under such mechanisms depend
entirely on the contractor’s internal processes as opposed to the Government’s
needs, resulting in data packages that may be viewed as incomplete. Therefore,
using the DAL to require data deliveries could conflict with DFARS 227.7103-1
and 227.7203-1, which require advanced planning for data known to be needed.

3. Any issues, concerns, benefits, and/or appropriateness of DoD’s policy and guidance on
IP strategy and management, including the extent to which such DoD policy and
guidance is consistent with and effective in further implementing the cited governing
statutes and regulations.

- The Section recognizes that DoD guidance (such as the DoD Open System Architecture
Data Rights Team’s Intellectual Property Strategy (August 2014)10) does advise against
actions such as an “unnecessary grab” for deliverables and/or data rights. The Section
has observed that this type of guidance would benefit from elaboration. For example,
DoD could offer more detailed guidance on what constitutes an “unnecessary grab.” The
Section contrasts the current level of detail there with the thorough guidance on ensuring
that deliverables and data rights are obtained while accounting for sustainment and
competition over “the entire system life cycle.”

- DoD has published guidance on using priced options and licensing data.11 Beyond
suggesting the use of priced options, DoD has not issued guidance on what can be used to
substantiate such licensing values in a review or audit by the Defense Contract Audit
Agency (“DCAA”) or another entity. Guidance on priced options should also include

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9 See Acquiring and Enforcing the Government’s Rights in Technical Data and Computer Software under
10 The document is available at http://bbp.dau.mil/docs/IP_Strategy_Brochure_FINAL_em.pdf. As one example of
an “unnecessary grab” that Section members have observed, anecdotal evidence suggests that DoD contracting
activities have increasingly sought to obtain Operations, Maintenance, Installation, and Training technical data
without restrictions.
mechanisms for ensuring such options meet DCAA requirements. Or, as an alternative to foster use of these options, DoD could create an express exception to cost and pricing data requirements for analyzing priced IP options.

- Section members report that DoD Instruction 5230.24 may conflict with CDRL requirements and may cause confusion over the effect of distribution statements on ownership and use rights for CDRLs.
  
  o DD Form 1423 for CDRLs includes Block 9 to specify the appropriate distribution-statement marking on CDRL deliverables. Occasionally, DoD contracting activities will require contractors to include a distribution-statement instruction in the CDRL’s Block 9 that conflicts with licensing provided for by the DFARS. These contracting activities in essence require contractors to mark a CDRL document contrary to an applicable assertion. If a contractor disputes or ignores this requirement, then the contracting activity might consider the CDRL late or subject to rejection. Although DoD Instruction 5230.24 expressly warns against this practice, Section members have encountered contracting personnel that refuse to amend the contract to ensure that the CDRL Block 9 requirements account for contractors’ otherwise allowable restrictions applied to proprietary information.

- The Section recommends a refresh of DoD 5010.12-M, Procedures for the Acquisition and Management of Technical Data, which has not been updated since 1993. The Section welcomes an update to this procedure for “provid[ing] a uniform approach to the acquisition and management of data required from contractors.”

4. Any issues/concerns associated with whether and how DoD personnel are prepared and equipped to implement DoD’s IP policy and guidance, and/or the governing statutes and regulations, including via DoD’s training curriculum, or otherwise.

- It appears to Section members that most DoD legal personnel are first educated on IP issues during the Army Judge Advocate General School’s introductory Contract Attorneys’ Course. Post-course evaluations indicate recognition of the subject matter’s importance and interest supports further instruction beyond this two-hour time block. The Section encourages DoD to consider whether additional targeted IP education would be beneficial for these attorneys, and whether the education should begin earlier. For example, the Section encourages earlier education on valuing IP, which can be difficult to support with traditional cost or pricing data (certified or otherwise). If equipped with this focused education on IP, DoD attorneys may be better positioned to identify and address IP issues earlier in the contracting lifecycle—thereby reducing disruption and negotiation later in performance.
5. The current approach in regulation (DFARS 227.71 and 227.72) of extending and adapting the scheme of 10 U.S.C. 2320 and 2321 to apply to computer software, including the approach whereby most of the statutory scheme is applied to noncommercial computer software but not to commercial computer software.

- The Section encourages documenting this policy of extension/application with an emphasis on the difference between software (which is the item being purchased) and technical data (which pertain to items being purchased). Indicative of the uncertainty about the extension, Section members have encountered in the field a default assumption that the rights and conditions applicable to technical data must apply in substantially the same form to computer software. Thus, when documenting the policy of extension/application, the Section encourages addressing the extent to which the technical-data scheme should be applied to software, particularly in light of the substantial amendments to 10 U.S.C. § 2320 by Section 815 of the 2012 NDAA.

- As one example, the Section encourages identifying expressly which terms of art should be extended or adapted for software. For instance, “form, fit and function” and “detailed manufacturing or process data” (part of the definition of Operations, Maintenance, Installation, and Training) have no application to software. The analogous terminology should be mapped to prevent confusion (such as for application program interfaces).

6. The current approach in regulation of treating “Rights in Technical Data” and “Rights in Computer Software and Computer Software Documentation” as two separate topics/subparts (i.e., DFARS 227.71 and 227.72, respectively), or whether they should be merged into a single topic/subpart.

- Maintaining separate clauses does not appear to have many benefits and could cause confusion. For example, contractors (and DoD personnel) may be uncertain about proper assertion of IP protections under the two clauses. On the other hand, technical data is a different area of IP with different expertise needs as compared to computer software/documentation. Thus, if DoD combines provisions concerning the two clauses, the Section encourages an iterative, collaborative approach to ensure clear definitions as well as training for DoD personnel.

- Before any effort to combine these provisions, the Section would suggest that DoD first update the provisions in substance. For example, the definitions for computer software do not yet include established technology concepts such as electronic data rooms and software-as-a-service. Bringing these provisions up to date should have a more immediate positive impact on streamlining negotiations and contracting than would combining the provisions.
7. **The applicability of 10 U.S.C. §§ 2320 and 2321, and the implementing DFARS requirements and clauses, to contracts and subcontracts for commercial items.**

- 10 U.S.C. §§ 2320 and 2321 were established to balance the needs of a noncommercial contractor and DoD. The concepts and requirements in the law and implementing clauses are consistent with noncommercial-procurement requirements that traditional contractors are prepared to address. Commercial companies often have different priorities and often lack the staffing depth needed to address DoD-unique requirements. Therefore, the policies behind these statutes should not be imposed on commercial items unless such policies are clearly consistent with commercial practices.

8. **Practices used by DoD in acquiring IP from non-traditional contractors, commercial contractors, and traditional contractors.** The request isn’t limited to where the law or regulations require a specific practice, but also includes where the Department uses a practice not required by law/regulation. For example, any of the following:

   a. **What worked?**

   - No comments received.

   b. **What didn’t work?**

   - DFARS 252.227-7017 requires contractors to identify and assert restrictions, in the proposal, for all technical data and computer software to be furnished after award. Listing assertions is a burdensome process that can add significant costs to preparing proposals. This process could be streamlined. For example, assertions could be based on technology. If DoD intends to use the assertions for an IP Strategy, a technology-based assertion process would have greater meaning as compared to asking for individual documents that may not provide insight into which data rights would be associated with particular items or processes being contracted for.

   - DFARS 252.227-7013 permits contractors to identify other assertions after award when based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the award decision. Section members report that DoD contracting activities have denied assertions after contract award even though the assertions are based on new information or inadvertent omissions and the inadvertent omissions would not have materially affected the contract award. This practice causes confusion with how the validation process works under DFARS 252.227-7037.

   - Contractors are required to provide assertions on technical data delivered on every contract. Contractors may deliver the same technical data on multiple contracts and yet are required to provide assertions on the same technical data for every contract. If a contractor has already established a restriction on technical data for one DoD contract, the contractor should not be required to re-establish the restriction for another DoD contract. The language in DFARS 252.227-7028 provides for simplifying the process of
establishing “duplicate” assertions. The Section encourages updating DFARS 252.227-7017 to allow this same simplified process without having to include a separate listing under DFARS 252.227-7028.

- Section members have reported a concern with negotiating IP with DoD in a timely manner. Negotiations often last for an extended time, with the agency personnel raising challenges sometimes months or years afterward. Additionally, Section members have encountered a reluctance to recognize IP assertions (in accordance with DFARS 252.227-7017 or DFARS 252.227-7013/7014) in resultant contracts, which has led to concerns/rework to be handled during performance, resulting in cost increases on both sides of the contract.

c. What was fair?

- No comments received.

d. What wasn’t fair?

- DFARS 252.227-7037 permits the contracting officer to direct a contractor or subcontractor to furnish a written explanation for any restriction asserted by the contractor or subcontractor. If the contracting officer determines that reasonable grounds exist to question the restriction’s validity, the contracting officer may challenge the restrictive marking. Contractors must respond within 60 days to support the restriction’s validity. If the contractor cannot respond within 60 days, the contracting officer may issue a final decision. The Section has two concerns.
  
  o First, contracting officers need not specify reasonable grounds for questioning the validity, which forces contractors to incur the time and expense to broadly justify all assertions. The contracting officer should be required to provide the grounds for questioning the validity of the marking so that the contractor can respond appropriately.

  o Second, 60 days is not adequate time to justify an assertion. Assertions are often based on items developed years or decades earlier given DoD lifecycles, for which development and financial records can be difficult to locate and integrate into a contractor’s response. The Section recommends allowing contractors more time to respond.

e. What practices encourage or discourage non-traditional contractors from entering the defense marketplace?

- The applicable regulations can be a challenge to follow, particularly for small businesses and commercial contractors. Section members report that prime contractors face delays because small businesses and commercial contractors may not have a complete understanding of requirements and practices for technical data and also may not have the
records to justify rights in technical data. DoD should consider exceptions for small businesses and commercial contractors for regulations related to rights in technical data. These changes would make DoD practices more consistent with guidance in FAR 12.302, 12.211 and 12.212 and DFARS 227.7102-1 and 227.7102-2, all of which encourage using commercial terms where possible.

- Attempts to acquire more IP rights than needed (e.g., “unnecessary grabs”) will discourage non-traditional and small business contractors from working with DoD. These companies often depend on key/competitive sensitive competencies that if released to industry could hinder their long-term business prospects.

f. What practices encourage or discourage commercial contractors from entering the defense marketplace?

- Section members report that the inconsistent application of commercial rules for identifying rights and marking can create a significant administrative barrier. The assertions lists of DFARS 252.227-7017 therefore should not be extended to commercial contractors. Further, the current clause prescriptions arguably require commercial companies to comply with twice the number of data-rights clauses as compared to noncommercial companies. For instance, companies providing commercial items may need to comply with both DFARS 252.227-7013 and -7015 whereas companies providing noncommercial items may be obligated to comply with only DFARS 252.227-7013.

- DoD, and other parts of the Government, has confusing and conflicting policies on end-user license agreements. Modifications to these agreements are often not consistent with the relative allocation of risks between the parties.

g. What practices encourage or discourage traditional contractors from privately investing in new products, technologies, and processes relevant to the missions of the DoD?

- Section members have reported that large traditional contractors may be disincentivized to pursue competitions if significant investments will be rewarded with fair and reasonable profits on account of competition that, in practice, may be heavily weighted to price factors.

- Section members have reported that repeated attempts to reclassify independent research and development (“IR&D”) funding as government funding have created an uncertain investment environment because contractors cannot reliably project their return on investment for IR&D funding.

- The revisions to 10 U.S.C. §§ 2320 and 2321 beginning in 2011 have increased the complexity of protecting privately investment in new technologies. The changes may also inadvertently incentivize contracting activities to create uncertain contract terms, which make it more difficult for companies to protect their core technologies.
9. **IP acquisition practices used by DoD that encourage or discourage use of commercial technologies.** For example, any of the following:

*a.* What practices encourage or discourage vendors from providing DoD access to innovative products, technologies, and processes that have been developed for commercial use?

- Industry has experienced DoD contracting activities’ reluctance to recognize commercial items as defined in the FAR. Potential contractors elect not to participate in the DoD market to avoid undue commerciality challenges.

- The process of “asserting” commerciality could be better described in the DFARS, especially as compared to the level of detail in DFARS provisions for noncommercial data-rights assertions. The DFARS should include guidance that would benefit (small) commercial companies when, for example, they are subcontractors on Part 15 procurements, such as when to make the claim, what form the claim should take, how long the process should take, and what rights of appeal exist.

- In addition, DoD guidance provides that procuring contracting officers’ (“PCO”) commerciality determinations may differ even when procuring data for the same item. At a minimum, a prior determination of commerciality should create a presumption of commerciality for future procurements of the same data. If a future PCO disagrees, the burden to overturn commerciality should be on the PCO.

- The process of licensing commercial software may be viewed as inefficient for similar reasons. Once a vendor has negotiated a license with one DoD component, that same license should be available for reuse in other DoD components. This is more consistent with commercial licensing practices in which commercial vendors create a single license for use with a particular industry and do not vary the terms so as not to unduly add to transaction costs.

*b.* What practices encourage or discourage the transition of Defense specific technologies into the commercial marketplace?

- The commercial-item and noncommercial-item rules presume that a particular item remains commercial (or noncommercial) indefinitely. There is no provision for a transition between these states, in particular for when items no longer qualify as commercial under FAR 2.101. DoD should provide a mechanism for a commercial contractor entering the defense market to rely on prior commercial restrictions without having to recreate evidence of development at private expense (versus public expense) because these contractors were not required to create and maintain that data while developing and selling the item in the commercial market.
10. Any issues, concerns, benefits, and/or appropriateness of DoD’s policy, guidance, and practices that link technical data management and other IP considerations with open systems architectures (OSA), and/or modular open systems approaches (MOSA).

- If contracting activities continue to challenge assertions of IP developed at private expense, then DoD may be put in the position of funding a greater share of the technology advances that it seeks to procure. If DoD’s funding share increases, MOSA may be lost as an area of focus, leading back to development of similar products by DoD (and other government) entities independently. In contrast, if private industry is incentivized to develop technology at private expense, MOSA would remain in focus and DoD would be able to procure modified/tailored products across the enterprise with greater efficiency.

11. Any issues, concerns, benefits, and/or appropriateness with sections 1701 (Modular Open System Approach in Development of Major Weapon Systems) and 1705 (Amendments Relating to Technical Data Rights) of the House Armed Services Committee markup of H.R. 4909, the NDAA for FY 2017.

- No comments were received.

III. CONCLUSION

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

Sincerely,

James A. Hughes
Chair, Section of Public Contract Law

cc:
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