

DEPARTMENT OF DEFENSE

48 CFR Parts 211, 227, and 252

[Defense Acquisition Circular (DAC) 91-8]

Defense Federal Acquisition Regulation Supplement; Rights in Technical Data

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: A proposed rule prescribing the final technical data regulations required by 10 U.S.C. 2320, Rights in Technical Data, was published in the **Federal Register** on June 20, 1994. Public comments were solicited. This final rule amends the Defense Federal Acquisition Regulation Supplement to prescribe those regulations. It includes changes to the proposed rule necessitated by the Federal Acquisition Streamlining Act of 1994 and changes made in response to public comments.

DATES: *Effective Date:* This rule is effective June 30, 1995.

Applicability Date: This rule is applicable for solicitations issued on or after September 29, 1995.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena Moy, OUSD(A&T)DDP/MPI, Room 3E144, The Pentagon, Washington, DC 20301-3060, Telephone 703-604-5875. Please cite DAR Case 91-312.

SUPPLEMENTARY INFORMATION:

A. Background

A total of 286 comments were received from 43 commentors. Each comment was analyzed and, in some cases, the comments are incorporated in this final rule. Approximately 75% of the comments fell into fourteen general topic areas. The analysis and disposition of those comments, and a description of other changes made as a result of law or public comment, follow (Note: The DFARS subparts numbered as 227.4 and 227.5 in the proposed rule published on June 20, 1994, have been renumbered to 227.71 and 227.72, respectively, in this final rule):

1. Government Purpose/Government Purpose Rights

Forty comments address these topics.

(a) Government Purpose

Several commentors suggested narrowing the definition of government purposes to U.S. Government contracts. One suggested expanding the definition to include the acquisition of replenishment parts, repair, and maintenance by third parties. These changes are not adopted. A more narrow

definition of government purpose ignores U.S. Government international responsibilities and foreign government or international organization development contributions made under cooperative agreements. The suggested expanded definition inappropriately converts third party commercial transactions to government purposes.

(b) Government Purpose Rights

(i) *Time period.* Some commentors suggested the five year exclusivity period is too short, should be measured from contract or subcontract payment, closure, or completion rather than award, and there is no need for the government to obtain unlimited rights in mixed funded data upon expiration of the exclusivity period. One commentor suggested the final rule should require negotiations in mixed funded situations. Those comments are not adopted. As several commentors observed, the five year exclusivity period is not mandatory. Paragraphs 227.7103-5(b) and 227.7203-5(b) identify that period as a nominal period and describe the circumstances under which longer periods should be negotiated. A limited exclusivity period balances the private and public development contributions by providing the private developer the sole opportunity to use the data for commercial purposes for a private developer the sole opportunity to use the data for commercial purposes for a specified time while assuring that all persons will have the opportunity to use the data for commercial purposes within a reasonable time.

(ii) *Extent of development contribution.* Several commentors observed that a contractor could restrict the availability of data for commercial purposes by making a minimal development contribution. Some suggested requiring a 50% contractor contribution as the basis for a government purpose rights license. Conversely, one commentor observed that an insignificant government contribution would enable the government to obtain a government purpose rights license in an otherwise private expense development. A commentor proposed an incentive formula which would link the period of a government purpose rights license to the funding contributed by the developer. These comments are not accepted. Generally, the Government will obtain a government purpose license when the private and government development contributions cannot be segregated (when costs are segregable, the developer may provide data or software developed exclusively

at private expense with appropriate restrictions). It would be unnecessarily burdensome and extremely impracticable to attempt to measure the exact contribution by each party when development costs cannot be segregated. The suggested incentive formula raises similar problems. Each government purpose rights license must display an expiration date after which any applicable restrictions do not apply. That marking must appear on the data or software when they are delivered. But, late charges or other accounting corrections reported after data delivery might change the expiration date derived by the proposed formula resulting in copies of the same data marked with different expiration dates.

2. Indirect Cost Treatment

Twenty-four comments addressed this topic. Several commentors expressed concern that developers will use creative techniques, manipulate accounting systems, or find "loopholes" to restrict the Government's ability to make technical data available for procurement purposes. Such cost accounting practices would be inconsistent with the cost principles in FAR Part 31 and the cost accounting standards in FAR Appendix B. Therefore, the proposed regulations have not been changed to accommodate those concerns. Two commentors suggested that developers might restrict the Government's rights in data and, consequently, the amount of data available to the developers' potential competitors, by charging manufacturing and production engineering costs to indirect cost accounts. Manufacturing and production engineering costs that can be identified with a particular final cost objective are direct costs and cannot be allocated to indirect cost accounts. Although FAR 31.202 permits an exception for a direct cost of minor dollar amount, that exception must be consistently applied to all final cost objectives and produce substantially the same result as treating the cost as a direct cost.

A commentor suggests all contracts have indirect cost allocations and, consequently, the Government's rights in data will be affected. The comment overlooks the fact that the definition of "developed at private expense" deals only with development costs. The allocation of officers' salaries, guard services, employee benefits, or similar expenses will not affect the allocation of data rights.

Another commentor suggests establishing a government participation threshold. Indirect development costs (excluding independent research and