development and bid or proposal costs) charged in excess of the threshold would be considered mixed funding. The suggestion is not practicable. There is no basis for equitably estimating the government participation threshold prior to contract award. Burdensome accounting and audit surveillance procedures would be required to determine which item or items, and consequently data rights, were affected by the over threshold contribution.

3. Commercial Items

Twenty-two comments addressed this topic. A commentor suggests the proposed ''Technical Data—Commercial Items'' clause (252.227–7015) limits the data that DoD can acquire for commercial items and presumes that commercial items were developed at private expense. The clause in the proposed rule did neither but has been modified to provide that presumption as required by the Federal Acquisition Streamlining Act of 1994.

A commentor suggests modifying the clause to permit disclosure of commercial data to third parties so that those persons might operate or maintain the commercial item and contends that 227.7102–1(a)(1) prohibits DoD from acquiring technical data needed for rework and spare parts replacement. The suggestion and comment are not adopted. Paragraph 227.7102–1(a)(1) does not prohibit the acquisition of rework data. Disclosure to third parties might jeopardize a contractor's financial interest in its product and, therefore, is inconsistent with DoD policy to encourage contractors to offer commercial products to satisfy DoD requirements. However, DoD may negotiate to acquire the rights to do so under 252.227–7015(c). The commentor also suggests the definition of commercial items is too broad. The definition of commercial items has been modified to reflect the definition contained in the Federal Acquisition Streamlining Act of 1994. Several commentors suggest modifying 227.7102 to clarify that the restrictions in paragraph 227.7102–2(a) do not apply when the Government's data rights are not restricted. They also suggest modifying 252.227–7015(b)(1) to conform with 10 U.S.C. 2320 which does not permit a contractor to restrict the Government's rights in data necessary for operation, maintenance, installation, or training. The suggestions are adopted.

One commentor suggests the license rights granted the Government by the clause at 252.227–7015 are inconsistent with those granted to commercial customers. The suggestion is not adopted. Rights under that clause are consistent with 10 U.S.C. 2320.

A commentor suggests substituting ''written'' for ''express'' in 227.7102–2(a) to provide a substantive record. The suggestion is adopted. The commentor's suggestion to conform the last sentence in 227.7102–2(b) with corresponding language in the clause at 252.227–7015 is partially adopted. That commentor's suggestions to: (i) add a new paragraph 227.7102–2(c) to require contractors subject to the clause at 252.227–7013 to use the clause at 252.227–7015 in its contracts with subcontractors or suppliers furnishing technical data for commercial items is partially adopted by modifying 252.227–7013(k); (ii) include ''components'' in 227.7102–3 and make editorial changes to 252.227–7015(a)(1) and (b)(1)(i) are adopted; (iii) expand the restriction in 252.227–7015(b)(2)(i) is partially adopted; (iv) limit form, fit, and function data to data describing the commercial end unit is inconsistent with the commentor's suggestion to include ''components'' in 227.7102–3 and consequently not adopted; (v) require written permission prior to a release, disclosure, or authorized use of technical data for emergency repair or overhaul is not adopted because it is impracticable in emergency situations; and, (vi) delete 252.227–7015(c) is not adopted because the paragraph, which permits the parties to negotiate suitable license rights, is consistent with commercial practice.

4. Markings

Eighteen comments addressed this topic. Several commenters suggested that the marking provisions at 252.227–7013 and 252.227–7014 are mandatory, overly complex, and burdensome. One commentor recommended replacing the prescribed markings with a single, simplified marking that would appear only on the ''first page of the technical data or computer software.'' Other commentors also questioned the need to mark the portions of a page of printed material containing technical data or computer software for which restrictions are asserted.

Marking is not mandatory but contractors must mark when they desire to restrict the Government's rights to use, modify, reproduce, release, perform, display, or disclose data or software. Such markings are commonly used in commercial practice to protract proprietary data or trade secrets. The suggested simplified marking, which would be placed only on the first page of printed material is not practicable because it would unnecessarily restrict release or disclosure of unrestricted information submitted with the restricted information.

A commentor suggests the clause at 252.227–7014 will require commercial software manufacturers to place government markings on such software and 227.7203–10(c) will result in the Government's obtaining unlimited rights in unmarked commercial computer software. Neither the clause at 252.227–7014 nor paragraph 227.7203–10(c) apply to commercial computer software. However, if a contractor intends to satisfy a government requirement for noncommercial computer software with derivative software created by integrating commercial computer software with computer software developed with Government funds under a contract that contains the clause at 252.227–7014, the contractor might consider using a marking authorized by 252.227–7014, or a marking agreed to by the contracting officer, to protect its commercial interests in the derivative software.

One commentor suggests the requirement to mark each page of technical data deliverable with less than unlimited rights will reduce the amount of useful information that might be displayed on a page. Marking each page enhances protection of the contractor's data. That commentor also suggests that the prohibition on marking non-commercial computer software with legends that might interfere with or delay the operation of the software places the contractor in an untenable position regarding protection of its software rights. As expressed in 227.7203–10(b)(1), the prohibition was intended only for non-commercial computer software that will or might be used in combat situations or under conditions that simulate combat situations. Therefore, 252.227–701(f)(1) has been modified accordingly.

Two commentors suggest the marking procedures will be unworkable in digital environments. They also suggest that data might not be protected adequately in a digital environment because the markings might be extracted from the data or not seen by the user. Those comments are not accepted. However, 252.227–7013(f)(1) and 252.227–7014(f)(1) have been changed to clarify markings when such data are transmitted. Extractable markings are not unique to the digital environment and contractors have appropriate forums for redress if their data or software are improperly used, released, or disclosed.

A suggestion to add ''subcontractor/supplier'' to each legend is not adopted. The first sentence of 252.227–7013(f) clearly covers subcontractors and suppliers.