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**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 204, 209, 212, 227, 237, and 252**

**[Docket DARS-2014-0017]**

**RIN 0750-AH54**

**Defense Federal Acquisition Regulation Supplement: Disclosure to Litigation Support Contractors (DFARS Case 2012-D029)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is adopting as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2012 that provides DoD the authority to allow its litigation support contractors access to "sensitive information" subject to certain restrictions.

**DATES:** Effective **[Insert date of publication in the FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy G. Williams, telephone 571-372-6106.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD published an interim rule in the Federal Register at 79 FR 11337 on February 28, 2014, to implement section 802 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112-81), which provides DoD the express authority to allow its litigation support contractors access to "sensitive information," provided that the litigation support contractor is subject to certain restrictions on using and disclosing such information. Two respondents submitted public comments in response to the interim rule.

## **II. Discussion and Analysis**

DoD reviewed the public comments in the development of the final rule. A discussion of the comments received and the changes made to the rule as a result of those comments follows:

### A. Summary of Significant Changes From the Interim Rule

1. A new paragraph (b) (4) is added to the provision at DFARS 252.204-7013 and a new paragraph (b) (5) is added to the clause at DFARS 252.204-7014 to clarify that the offeror and the contractor, respectively, shall destroy or return to the Government, at the request of the contracting officer, all litigation information in its possession upon completion of the authorized litigation support activities.
2. A new paragraph (b) (2) is added to the clause at DFARS 252.204-7014 to clarify that the contractor shall not disclose litigation information to any entity outside the contractor's organization

unless, prior to disclosure, the contracting officer has provided written consent.

## B. Analysis of Public Comments

### 1. Inclusion of Third Party Information

Comment: One respondent commented that the interim rule went beyond the definition of "sensitive information" provided in 10 U.S.C. 129d because, as implemented, "sensitive information" is not limited to information owned by the Department of Defense. The respondent suggested that the absence of the language "obtained from a person" as used in Exemption 4 of the Freedom of Information Act (5 U.S.C. 552(b)(4)) indicates that 10 U.S.C. 129d was intended to apply only to information "owned by the Department of Defense." The respondent stated that because the interim rule does not limit the scope of sensitive information to only information owned by DoD, the rule could expose the Government to liability or penalties for unauthorized disclosure of information under the Federal Tort Claims Act, or a taking of property under the U.S. Constitution, the Procurement Integrity Act, 41 U.S.C. 2101 et seq., and the Trade Secrets Act, 18 U.S.C. 1905. The respondent called for rescission of the interim rule until the definition of "sensitive information" was narrowed.

Response: The statutory language and legislative history do not indicate that 10 U.S.C. 129d is limited only to information owned by the Department of Defense (or the U.S. Government). Prior to,

and notwithstanding, the enactment of the statute, DoD was authorized to disclose information that it owns. 10 U.S.C. 129d authorizes disclosure of "sensitive information," without limitation related to the ownership or source of the information, for the sole purpose of providing litigation support to DoD. To narrow the definition as the respondent suggests would obviate the need for any statutory authorization. The new DFARS subpart 204.74 established by the interim rule implements the statutory authorization for litigation information, including sensitive information owned by or obtained from non-DoD sources. Disclosure of such information is thus authorized by law when done pursuant to DFARS subpart 204.74. No change is made in the final rule.

## 2. Safeguarding Unclassified Controlled Technical Information

Comment: One respondent questioned whether litigation support contractors, and their subcontractors, will be required to comply with the requirements at DFARS clause 252.204-7012, formerly entitled "Safeguarding of Unclassified Controlled Technical Information."

Response: The requirements of the clause at DFARS 252.204-7012, now entitled "Safeguarding Covered Defense Information and Cyber Incident Reporting," will apply to contractors, and their subcontractors, as required by the clause.

## 3. Disposition of Litigation Information

Comment: One respondent suggested that the interim rule should

be amended to include requirements for the information provided to a litigation support contractor to be destroyed or returned to DoD when no longer needed or at the end of contract performance.

Response: Paragraph (b) (4) is added to the provision at DFARS 252.204-7013 and paragraph (b) (5) is added to the clause at DFARS 252.204-7014 to clarify that the contractor shall destroy or return to the Government, at the request of the contracting officer, all litigation information in its possession upon completion of the authorized litigation support activities.

#### 4. Use of Litigation Information

Comment: One respondent suggested limiting the authorized use of litigation information to the litigation support required by the individual contract, under which the litigation information was received.

Response: Litigation support contractors must be able to use the litigation information provided by the Government as needed. A contractor may provide litigation support under multiple contracts. In such instances, limiting the scope of authorized use to only the contract under which the litigation information was provided could require the Government to provide the same information multiple times. Having to exchange and handle multiple copies of the same information increases the risk of inadvertent disclosure and the cost of performance and administration. No change is made in the final rule.

## 5. Third Party Beneficiary Rights

Comment: One respondent stated that if "sensitive information" includes information owned by third parties, then the interim rule should be amended to require litigation support contractors to comply with Federal Acquisition Regulation (FAR) 9.505-4(b) and have a direct nondisclosure agreement between the owner of the sensitive information and the litigation support contractor. The respondent also stated that the third party beneficiary rights are illusory without notice to the owner of the sensitive information.

Response: A direct nondisclosure agreement or prior notice requirement could prejudice the Government by providing premature warning of possible litigation or of the Government's litigation strategies. Accordingly, DoD has determined that requiring a direct nondisclosure agreement pursuant to FAR 9.505-4(b) for litigation support contractors would not be in the Government's interest. 10 U.S.C. 129d does not require that DoD confer upon an owner of sensitive information any third party beneficiary rights; however, at paragraph (d) of the clause at 252.204-7014, DoD has chosen to provide third party beneficiary rights analogous to those afforded by paragraph (c) of the clause at DFARS 252.227-7025. No change is made in the final rule as a result of this comment.

## 6. Appropriateness of an Interim Rule

Comment: One respondent stated that issuing an interim rule was not appropriate because there was inadequate justification for the

determination of urgent or compelling reasons for doing so. The respondent suggested that, without further justification, a proposed rule was more appropriate and urged rescission of the interim rule.

Response: DoD published the basis for its determination that urgent and compelling reasons existed to authorize the use of an interim rule. After consideration of the respondent's comment, DoD determined that rescission of the interim rule was not warranted.

#### 7. Release of Information to Litigation Support Subcontractors

Comment: One respondent stated that while litigation support contractors are required to flow down the clause at DFARS 252.204-7014 to subcontractors, it is not clear whether litigation support contractors and any subcontractors would be subject to DFARS clause 252.204-7000, Disclosure of Information.

Response: This rule does not affect the applicability of the clause DFARS at 252.204-7000. In accordance with its prescription at DFARS 204.404-70(a), the clause applies to all solicitations and contracts when the contractor will have access to or generate unclassified information that may be sensitive and inappropriate for release to the public. That clause will flow down to subcontracts, in accordance with paragraph (c) of the clause. There is no conflict between the DFARS 252.204-7000 clause and the DFARS 252.204-7014 clause, at the prime or subcontract level. The clause at DFARS 252.204-7000 prohibits the release of information

outside the contractor's organization without permission from the contracting officer, while the DFARS 252.204-7014 clause requires the litigation support contractor to protect against any unauthorized releases of information, and does not authorize the contractor to make any releases outside the contractor's organization. However, to minimize any potential confusion, paragraph (b) (2) is added to the DFARS 252.204-7014 clause to state more clearly that it does not authorize the contractor to release litigation information outside the contractor's organization without permission of the contracting officer. Contracting officers, in conjunction with the Government litigation team, maintain control over the flow of information to litigation support contractors and outside parties.

#### 8. Prescription Conflict

Comment: One respondent pointed out that the prescription in the interim rule at DFARS 204.7403(c) would have precluded DFARS 252.204-7015 from ever being included in a contract.

Response: This error was corrected in a technical amendment to the DFARS published in the Federal Register at 79 FR 13568 on March 11, 2014.

#### C. Other Changes

A summary of revisions made to the rule to make necessary conforming changes, clarifications, and editorial changes follows:

##### 1. Definitions

- a. The definition of "litigation information" is revised to clarify that information contained in publicly available solicitations will not be protected from disclosure as litigation information, because the information has already been released to the public. A corresponding policy statement is also added at DFARS 204.7402(c).
- b. A policy statement is added at DFARS 204.7402(d) to state that contracting officers, when sharing sensitive information with a litigation support contractor, shall ensure that all other applicable requirements for handling and safeguarding the relevant types of sensitive information re included in the contract (e.g., FAR subparts 4.4 and 24.1; DFARS subparts 204.4 and 224.1).
- c. The definition of "litigation support contractor" is revised to clarify that, in addition to experts and technical consultants, the term also includes the contractor's subcontractors and suppliers. The text "the Department of Defense" is also removed, since the clause is only used in DoD contracts.
- d. DFARS subpart 204.74, the provision at 252.204-7013, and the clauses at 252.204-7014 and 252.204-7015 are revised to include the full text of all relevant definitions, rather than cross-referencing the definitions that were provided in full-text only in the contract clause at DFARS 252.204-7014. Further, the definition of "sensitive information" is clarified by removing the term "confidential information" and replacing it with "controlled

unclassified information" in subpart 204.74, the provision, and the clauses.

## 2. Conforming changes

a. A conforming change has been made to DFARS 209.505-4(b) (i) in order to differentiate between the requirements that pertain to litigation support contractors from the requirements for other contractors, consistent with the changes in this rule.

b. DFARS 209.505-4(b) (ii) is added to clarify the policies and procedures (set forth in 204.74 and associated provisions and clauses) governing access to proprietary information for litigation support activities as an element of the coverage for organizational and consultant conflicts of interest.

## 3. Technical Clarifications

a. At paragraph (c) (2) of the provision at DFARS 252.204-7013 and at paragraph (d) (2) of the clause at DFARS 252.204-7014, the reference to "data or software" is changed to "litigation information" and the reference to "the unauthorized duplication, release or disclosure" is changed to "any such unauthorized use or disclosure," to more accurately refer to all of the unauthorized activities described at paragraph (c) (1) of the provision and paragraph (d) (1) of the clause.

b. The term "Solicitation" is removed from the title of the provision at DFARS 252.204-7013, as it is not necessary because the title already refers to "Offerors."

c. Paragraph (b) of the clause at DFARS 252.204-7014 is revised to state that the contractor "shall" instead of "agrees and acknowledges" to ensure the contractor complies with the limitations set forth in paragraph (b) during contract performance.

d. The title of the clause at DFARS 252.204-7015 is revised to "Notice of Authorized Disclosure of Information for Litigation Support" to more accurately depict the intent of the clause.

**III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items**

The prescriptions for use of the provision and clauses of this rule, which implement section 802 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012 (Pub. L. 112-81) include use in contracts and subcontracts valued at or below the simplified acquisition threshold (SAT) and contracts and subcontracts for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items.

**A. Applicability to Contracts at or Below the SAT**

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the SAT. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best

interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Director, Defense Procurement and Acquisition Policy (DPAP), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

DoD has determined that it is in the best interest of the Federal Government to apply the rule to contracts and subcontracts in amounts not greater than the SAT. Section 802 of the NDAA for FY 2012 was enacted to ensure DoD litigation support contractors protect sensitive information from any unauthorized disclosure and are prohibited from using such information for any purpose other than providing litigation support services to DoD. Based on data available in the Federal Procurement Data System (FPDS) for FY 2015, 421 of the 453 total DoD awards for professional attorney services or associated legal services were valued at less than the SAT. An exception for contracts valued at or under the SAT would exclude a large portion (93 percent) of the contracts intended to be covered by section 802, thereby undermining the overarching public policy purpose of the law and adversely affecting the Government's ability to successfully engage in legal proceedings.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. 41 U.S.C. 1906 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Likewise, 41 U.S.C. 1907 governs the applicability of laws to COTS items, with the Administrator for Federal Procurement Policy the decision authority to determine that it is in the best interest of the Government to apply a provision of law to acquisitions of COTS items in the FAR. The Director, DPAP, is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

Given that the requirements of section 802 of the NDAA for FY 2008 were enacted to protect sensitive information provided to DoD litigation support contractors from unauthorized use and disclosure, DoD has determined that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of commercial items, as defined at FAR 2.101. Based on data available in FPDS for FY 2015, 352 of the 453 total DoD

awards for legal support services were classified as commercial contracts. An exception for contracts for the acquisition of commercial items, would exclude 78 percent of the contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

#### **IV. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### **V. Regulatory Flexibility Act**

DoD does not expect this final rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, a final regulatory flexibility analysis has been prepared and is summarized as follows:

This rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) to implement statutory authority (10 U.S.C. 129d) for DoD to allow its litigation support contractors to have access to "sensitive information," provided that the litigation support contractor is subject to certain restrictions on using and disclosing such information.

The objective of the rule is to expressly authorize DoD to provide its litigation support contractors with access to certain types of non-public information, provided that the litigation support contractors are required to protect that information from any unauthorized disclosure, and are prohibited from using that for any purpose other than providing litigation support services to DoD.

No significant issues were raised by the public comments in response to the initial regulatory flexibility analysis published with the interim rule.

According to data available in the Federal Procurement Data System for fiscal year 2015, DoD awarded 453 total contracts for legal support services to 212 unique vendors. Of those awards, 340 awards or 75 percent were made to 162 small businesses.

The rule imposes no reporting, recordkeeping, or other information collection requirements; rather, the rule subjects litigation support contractors to certain restrictions on using and disclosing litigation support information. DoD

organizations using litigation support contractors are generally already using very restrictive nondisclosure agreements to govern any sensitive information that may be provided to, or developed or discovered by, the litigation support contractors in providing litigation support services for DoD. These DoD organizations will likely review their current practices and make any necessary modifications to ensure that there are no inconsistencies with the new requirements. As such, DoD does not expect the rule to have a significant economic impact on the small businesses affected by this rule.

There are no known significant alternatives to the rule. The impact of this rule on small business is not expected to be significant.

#### **VI. Paperwork Reduction Act**

The rule contains no new information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

**List of Subjects in 48 CFR Parts 204, 209, 212, 227, 237, and 252**

Government procurement.

**Jennifer L. Hawes,**

Editor, Defense Acquisition Regulations System.

Therefore, the interim rule amending 48 CFR Parts 204, 212, 227, 237, and 252 which was published at 79 FR 11338 on February 28, 2014, is adopted as a final rule with the following changes:

1. The authority citation for 48 CFR parts 204, 209, 212, and 252 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

**PART 204—ADMINISTRATIVE MATTERS**

2. Section 204.7401 is revised to read as follows:

**204.7401 Definitions.**

As used in this subpart—

Computer software means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer data bases or computer software documentation.

Litigation information means any information, including sensitive information, that is furnished to the contractor by or on behalf of the Government, or that is generated or obtained by the contractor in the performance of litigation support under a contract. The term does not include information that is lawfully, publicly available without restriction, including information contained in a publicly available solicitation.

Litigation support means administrative, technical, or professional services provided in support of the Government during or in anticipation of litigation.

Litigation support contractor means a contractor (including its experts, technical consultants, subcontractors, and suppliers) providing litigation support under a contract that contains the clause at 252.204-7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors.

Sensitive information means controlled unclassified information of a commercial, financial, proprietary, or privileged nature. The term includes technical data and computer software, but does not include information that is lawfully, publicly available without restriction.

Technical data means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

3. Section 204.7402 is amended by adding paragraphs (c) and (d) to read as follows:

**204.7402 Policy.**

\* \* \* \* \*

(c) Information that is publicly available without restriction, including publicly available solicitations for litigation support services, will not be protected from disclosure as litigation information.

(d) When sharing sensitive information with a litigation support contractor, contracting officers shall ensure that all other applicable requirements for handling and safeguarding the relevant types of sensitive information are included in the contract (e.g., FAR subparts 4.4 and 24.1; DFARS subparts 204.4 and 224.1).

4. Section 204.7403 is revised to read as follows:

**204.7403 Solicitation provision and contract clauses.**

(a) Use the provision at 252.204-7013, Limitations on the Use or Disclosure of Information by Litigation Support Offerors, in all solicitations for contracts that involve litigation support services, including solicitations using FAR part 12 procedures for the acquisition of commercial items.

(b) Use the clause at 252.204-7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors, in all solicitations and contracts that involve litigation support services, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items.

(c) Use the clause at 252.204-7015, Notice of Authorized Disclosure of Information for Litigation Support, in all

solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items.

**PART 209—CONTRACTOR QUALIFICATIONS**

5. Amend section 209.505-4 by—

- a. Redesignating paragraph (b) as paragraph (b)(i);
- b. In newly redesignated paragraph (b)(i), removing “For contractors” and adding “For contractors, other than litigation support contractors,” in its place; and
- c. Adding new paragraph (b)(ii).

The addition reads as follows:

**209.505-4 Obtaining access to proprietary information.**

(b) \* \* \*

(ii) For litigation support contractors accessing litigation information, including that originating from third parties, use and nondisclosure requirements are addressed through the use of the provision at 252.204-7013 and the clause at 252.204-7014, as prescribed at 204.7404(a) and 204.7404(b), respectively. Pursuant to that provision and clause, litigation support contractors are not required to enter into nondisclosure agreements directly with any third party asserting restrictions on any litigation information.

**PART 212—SOLICITATION PROVISIONS AND CONTRACT CLAUSES FOR THE ACQUISITION OF COMMERCIAL ITEMS**

**212.301 [Amended]**

6. Amend section 212.301 by—

a. In paragraph (f) (ii) (E), removing the term “Solicitation”;

and

b. In paragraph (f) (ii) (G), removing “Disclosure of Information to Litigation Support Contractors” and adding “Notice of Authorized Disclosure of Information for Litigation Support” in its place.

**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

7. Amend section 252.204-7013 by—

a. Revising the section heading.

b. In the clause heading, removing “Support Solicitation Offerors” and adding “Support Offerors” in its place;

c. Removing the clause date “(FEB 2014)” and adding “(MAY 2016)” in its place;

d. Revising paragraph (a).

e. In the paragraph (b) introductory text, adding “that” after “acknowledges”;

f. In paragraph (b) (1), removing “That all” and adding “All” in its place;

g. In paragraph (b) (2), removing “That the” and adding “The” in its place;

h. In paragraph (b) (3), removing "That" and adding "The" in its place and removing "contracts." and adding "contracts; and" in its place;

i. Adding paragraph (b) (4); and

j. In paragraph (c) (2), removing "such data or software, for the unauthorized duplication, release, or disclosure" and adding "such litigation information, for any such unauthorized use or disclosure" in its place.

The revisions and addition read as follows:

**252.204-7013 Limitations on the Use or Disclosure of Information by Litigation Support Offerors.**

\* \* \* \* \*

(a) Definitions. As used in this provision—

Computer software means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer data bases or computer software documentation.

Litigation information means any information, including sensitive information, that is furnished to the contractor by or on behalf of the Government, or that is generated or obtained by the contractor in the performance of litigation support under a contract. The term does not include information that is

lawfully, publicly available without restriction, including information contained in a publicly available solicitation.

Litigation support means administrative, technical, or professional services provided in support of the Government during or in anticipation of litigation.

Sensitive information means controlled unclassified information of a commercial, financial, proprietary, or privileged nature. The term includes technical data and computer software, but does not include information that is lawfully, publicly available without restriction.

Technical data means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

(b) \* \* \*

(4) Upon completion of the authorized litigation support activities, the Offeror will destroy or return to the Government at the request of the Contracting Officer all litigation information in its possession.

\* \* \* \* \*

8. Amend section 252.204-7014 by-

- a. In the clause heading, removing the clause date "(FEB 2014)" and adding "(MAY 2016)" in its place;
- b. In paragraph (a), revising the introductory text and the definitions of "Litigation information", "Litigation support contractor", and "Sensitive information";
- c. Revising paragraph (b);
- d. Redesignating paragraphs (c), (d), and (e) as paragraphs (d), (e), and (f);
- e. Adding a new paragraph (c);
- f. In newly redesignated paragraph (d)(2), removing "such data or software, for the unauthorized duplication, release, or disclosure" and adding "such litigation information, for any such unauthorized use or disclosure" in its place; and
- g. In newly redesignated paragraph (f), removing "this paragraph (e)" and add "this paragraph (f)" in its place.

The revisions and addition read as follows:

**252.204-7014 Limitations on the Use or Disclosure of Information by Litigation Support Contractors.**

\* \* \* \* \*

(a) Definitions. As used in this clause—

\* \* \* \* \*

Litigation information means any information, including sensitive information, that is furnished to the contractor by or on behalf of the Government, or that is generated or obtained by the

contractor in the performance of litigation support under a contract. The term does not include information that is lawfully, publicly available without restriction, including information contained in a publicly available solicitation.

\* \* \* \* \*

Litigation support contractor means a contractor (including its experts, technical consultants, subcontractors, and suppliers) providing litigation support under a contract that contains this clause.

Sensitive information means controlled unclassified information of a commercial, financial, proprietary, or privileged nature. The term includes technical data and computer software, but does not include information that is lawfully, publicly available without restriction.

\* \* \* \* \*

(b) Limitations on use or disclosure of litigation information.

Notwithstanding any other provision of this contract, the Contractor shall—

(1) Access and use litigation information only for the purpose of providing litigation support under this contract;

(2) Not disclose litigation information to any entity outside the Contractor's organization unless, prior to such disclosure the Contracting Officer has provided written consent to such disclosure;

(3) Take all precautions necessary to prevent unauthorized disclosure of litigation information;

(4) Not use litigation information to compete against a third party for Government or nongovernment contracts; and

(5) Upon completion of the authorized litigation support activities, destroy or return to the Government at the request of the Contracting Officer all litigation information in its possession.

(c) Violation of paragraph (b) (1), (b) (2), (b) (3), (b) (4), or (b) (5) of this clause is a basis for the Government to terminate this contract.

\* \* \* \* \*

9. Amend section 252.204-7015 by-

a. Revising the section heading, introductory text, the clause heading, and paragraph (a); and

b. In the paragraph (b) heading, removing "Authorized disclosure" and adding "Notice of authorized disclosures" in its place.

The revision read as follows:

**252.204-7015 Notice of Authorized Disclosure of Information for Litigation Support.**

As prescribed in 204.7403(c), use the following clause:

NOTICE OF AUTHORIZED DISCLOSURE OF INFORMATION FOR LITIGATION  
SUPPORT (MAY 2016)

(a) Definitions. As used in this clause—

Computer software means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer data bases or computer software documentation.

Litigation support means administrative, technical, or professional services provided in support of the Government during or in anticipation of litigation.

Litigation support contractor means a contractor (including its experts, technical consultants, subcontractors, and suppliers) providing litigation support under a contract that contains the clause at 252.204-7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors.

Sensitive information means controlled unclassified information of a commercial, financial, proprietary, or privileged nature. The term includes technical data and computer software, but does not include information that is lawfully, publicly available without restriction.

Technical data means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does

not include computer software or data incidental to contract administration, such as financial and/or management information.

\* \* \* \* \*

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