



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 252

[Docket DARS-2019-0049]

RIN 0750-AK49

Defense Federal Acquisition Regulation Supplement: Modification of DFARS Clause "Release of Past Infringement" (DFARS Case 2019-D012)

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to update pronouns used in a clause.

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

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571-372-6093.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to update the pronouns used in DFARS clause 252.227.7001, Release of Past Infringement. This clause is included, when necessary, in contracts that contain patent

release and settlement agreements, license agreements, and assignments. The clause addresses the release of claims or demands of certain inventions associated with the contract. Within the clause text the contractor is identified using the pronouns "he" or "him." Current drafting convention simplifies and clarifies clause language by referring to a contractor as "the contractor" in clause text. This rule updates this clause to conform the text to current drafting conventions.

II. Discussion and Analysis

The modification of this DFARS text implements a recommendation from the DoD Regulatory Reform Task Force. On February 24, 2017, the President signed Executive Order (E.O.) 13777, "Enforcing the Regulatory Reform Agenda," which established a Federal policy "to alleviate unnecessary regulatory burdens" on the American people. In accordance with E.O. 13777, DoD established a Regulatory Reform Task Force to review and validate DoD regulations, including the DFARS. A public notice of the establishment of the DFARS Subgroup to the DoD Regulatory Reform Task Force, for the purpose of reviewing DFARS provisions and clauses, was published in the *Federal Register* at 82 FR 35741 on August 1, 2017, and requested public input. One public comment was received on this clause.

Comment: The respondent advised that the clause is never used and should be deleted from the DFARS. The respondent

recommended that, instead of the clause, a policy statement permitting DoD to enter into settlement agreements where patent and copyright infringement is alleged by a third party owner of a patent or copyright would suffice.

Response: DFARS clause 252.227-7001 serves as an agreement, through incorporation in the contract, between DoD and the contractor that, by execution of the contract, the contractor releases DoD from all claims and demands the contractor has (or will have) against DoD for the use or manufacture by DoD of inventions specifically covered by patents and applications identified under the contract. The clause applies to the requirements and content of the individual contract. As such, the clause is necessary, when applicable, in the contract to represent the agreement to such terms by both parties, as they relate to the specific contract. A general statement of policy does not fulfill the intent of this clause. Additionally, the clause is available for use, when applicable and necessary, and can be modified to meet particular circumstances for the specific requirement, with consultation with cognizant patent or legal counsel.

This clause is beneficial to DoD by facilitating a standard and uniform incorporation of more common terms and conditions associated with patent and license agreements and assignments into applicable contracts, without having to draft the language

of these more common terms and conditions with each contract. This approach also ensures the same language is incorporated into each contract, which helps DoD avoid miscommunications or misunderstanding and maintain consistency in negotiating such terms and conditions DoD-wide.

The DoD Regulatory Reform Task Force reviewed the requirements of DFARS clause 252.227-7001 and determined that the DFARS clause should only be updated to conform to current drafting standards.

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

This rule only updates pronouns used in DFARS clause 252.227-7001. The rule does not impose any new requirements on contracts at or below the simplified acquisition threshold and for commercial items, including commercially available off-the-shelf items

IV. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the Federal Acquisition Regulation is Office of Federal Procurement Policy statute (codified at title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure or form (including an amendment or

modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because DoD is not issuing a new regulation; rather, this rule merely updates the contact information already provided for in existing clauses.

V. Executive Orders 12866 and 13563

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 not a significant regulatory action and, therefore, was not 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.

VI. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VII. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section IV. of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

VIII. Paperwork Reduction Act

The rule does not contain any 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 Part 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 252 is amended as follows:

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for part 252 continues to read as follows:

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

252.227-7001 [Amended]

2. Amend section 252.227-7001 by—

- a. Removing the clause date of "(AUG 1984)" and adding "(SEP 2019)" in its place; and
- b. In the clause text, removing "which he", "acquired by him", and "(description of subject matter)" and adding "which the Contractor", "acquired by the Contractor", and "[*description of subject matter*]" in their places, respectively.

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