



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Part 252**

**[Docket DARS-2019-0046]**

**RIN 0750-AK54**

**Defense Federal Acquisition Regulation Supplement: Modification of DFARS Clause "Readjustment of Payments" (DFARS Case 2019-D017)**

**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 an existing DFARS clause to clearly identify the Government official to be contacted when applying the terms of the clause, pursuant to action taken by the Regulatory Reform Task Force.

**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 Government point of contact in DFARS clause 252.227-7002, Readjustment of Payments. DFARS clause 252.227-7002 is included in all contracts that contain patent release and settlement agreements, license agreements, and/or assignments, executed by the Government, under which the Government acquires rights, and provide for payment of a running royalty. The clause addresses royalty terms, conditions, and payments, and requires the contractor to notify "the Secretary" upon granting more favorable royalty terms to the Government under another agreement.

Contractors do not notify the Secretary of Defense, Army, Navy, or Air Force when complying with this clause, and DFARS conventions no longer use "the Secretary" as a way to identify the Department responsible for issuing the contract or oversight of subsequent contract performance. Instead, contractors notify the contracting officer when such a notification is necessary under the clause. The contracting officer is the appropriate point of contact, as they are the individual responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships.

This rule updates the clause to identify the contracting officer, not the Secretary, as the individual to be notified

under the clause. As a result, this rule intends to clarify and simplify the notification required of contractors by the clause and avoid any miscommunication or misunderstanding between the Government and contractor when complying with the clause.

## **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 252.227-7002 serves as an agreement, through incorporation in the contract, between DoD and the contractor that, by execution of the contract, DoD is entitled to apply the more favorable royalty terms of future license agreements between the contractor and DoD to the contract that includes the clause. The clause also requires the contractor to notify DoD if the contractor grants more favorable terms to the DoD, and identifies how royalty payments will be handled in the event of a patent claim or appeal. 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. 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 Task Force reviewed the requirements of DFARS clause 252.227-7002 and determined that the DFARS clause should only be modified to update the point of contact for notifications.

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

This proposed rule does not create any new provisions or clauses. The rule clarifies the point of contact for an existing clause. This rule does not change the applicability of the affected clause, which applies to those valued at or below the SAT, if applicable, but not to commercial or COTS 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 Government point of contact.

#### **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.

#### **252.227-7002 [Amended]**

2. Amend section 252.227-7002 by—

a. Removing the clause date of "(OCT 1966)" and adding "(SEP 2019)" in its place; and

b. In paragraph (a), removing "the Secretary" and adding "the Contracting Officer" in its place.

