



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 207, 212, 215, 227, and 252

[Docket DARS-2019-0064]

RIN 0750-AK79

Defense Federal Acquisition Regulation Supplement: Negotiation of Price for Technical Data and Preference for Specially Negotiated Licenses (DFARS Case 2018-D071)

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

ACTION: Advance notice of proposed rulemaking.

SUMMARY: DoD is seeking information that will assist in the development of a revision to the Defense Federal Acquisition Regulation Supplement to implement sections of the National Defense Authorization Acts for Fiscal Years 2018 and 2019. In brief, for DoD only, those provisions provide for the negotiation of a price for technical data to be delivered under contracts for the engineering and manufacturing development, production, or sustainment of a major weapon system; and a preference for specially negotiated licenses for customized technical data to support the product support strategy of a major weapon system or subsystem thereof.

DATES: Interested parties should submit written comments to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of any proposed rule.

DoD is also hosting public meetings to obtain the views of interested parties in accordance with the notice published in the *Federal Register* on August 16, 2019, at 84 FR 41953.

ADDRESSES: Submit written comments identified by DFARS Case 2018-D071, using any of the following methods:

- o *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for "DFARS Case 2018-D071." Select "Comment Now" and follow the instructions provided to submit a comment. Please include "DFARS Case 2018-D071" on any attached documents.

- o *Email:* osd.dfars@mail.mil. Include DFARS Case 2018-D071 in the subject line of the message.

- o *Fax:* 571-372-6094.

- o *Mail:* Defense Acquisition Regulations System, Attn: Ms. Jennifer D. Johnson, OUSD(A-S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting

of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson,
telephone 571-372-6100.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is seeking information from the public, particularly experts and interested parties in Government and the private sector, that will assist in the development of a revision to the Defense Acquisition Regulation Supplement (DFARS) to implement section 835 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91) and section 867 of the NDAA for FY 2019 (Pub. L. 115-232). Both sections are for DoD only; they do not impact other Federal agencies. Section 835 enacted a new provision into permanent law (10 U.S.C. 2439) and added a new subsection (f) to 10 U.S.C. 2320. Section 867 expanded the scope of 10 U.S.C. 2439. As a result, 10 U.S.C. 2439 now requires that the Secretary of Defense ensure, to the maximum extent practicable, that DoD, before selecting a contractor for the engineering and manufacturing development of a major weapon system, production of a major weapon system, or sustainment of a major weapon system, negotiates a price for technical data to be delivered under a contract for such development, production, or sustainment. 10 U.S.C. 2320(f) now provides for a preference for specially negotiated licenses for

customized technical data to support the product support strategy of a major weapon system or subsystem of a major weapon system.

II. Discussion and Analysis

An initial draft of the proposed revisions to the DFARS to implement section 835 of the NDAA for FY 2018 and section 867 of the NDAA for FY 2019 is available in the Federal eRulemaking Portal at <http://www.regulations.gov>, by searching for "DFARS Case 2018-D071", selecting "Open Docket Folder" for RIN 0750-AK79, and viewing the "Supporting Documents". The strawman is also available at

https://www.acq.osd.mil/dpap/dars/change_notices.html under the publication notice for November 12, 2019, and DFARS Case 2018-D071. The following is a summary of DoD's proposed approach and the feedback DoD is seeking from industry and the public.

A. Negotiation of Price for Technical Data (10 U.S.C. 2439).

DoD is considering revising the DFARS to require the contracting officer to negotiate a price for data (including technical data and computer software) and associated license rights to be delivered or otherwise provided under a contract for services or for the development, production, or sustainment of a system, subsystem, or component. The contracting officer would be required to negotiate this price to the maximum extent practicable and before making a source selection decision or

awarding a sole-source contract. Currently, the DFARS does not require the contracting officer to negotiate a price for data and associated license rights before the source selection decision or award of a sole-source contract. Prices for data and associated license rights are often negotiated after contract award.

The primary proposed change regarding mandatory negotiation of prices for data is found in proposed DFARS 215.470(a). The primary proposed change seeks to apply the new statutory requirement of 10 U.S.C. 2439 in a manner that is consistent with the implementation of other statutory requirements (e.g., 10 U.S.C. 2320-2321) related to data (including technical data and computer software) and associated license rights (e.g., rights to use technical data to repair damage to a system). DoD's intent is to foster consistency in treatment amongst contracts awarded by DoD that require the delivery of data (including technical data and computer software) and associated license rights. The change would clarify that price negotiations must occur whether or not the resulting contract is competed. Although 10 U.S.C. 2439 requires negotiation of prices for data for major weapon systems, the regulatory coverage would include commercial technical data, noncommercial technical data, and computer software (and associated license rights), consistent with the manner in which DoD has implemented

10 U.S.C. 2320-2321 in the DFARS over the past 24 years.

Current DoD policy is to acquire needed technical data and computer software and associated license rights under contracts for the acquisition of supplies, services, and business systems. Accordingly, the primary proposed change would extend the scope of regulatory coverage to encompass contracts other than those for engineering and manufacturing development, production, or sustainment (including services contracts).

The House Armed Services Committee report accompanying the provision of the NDAA Bill that became section 835 of the NDAA for FY 2018 "urge[d] program managers when seeking technical data to consider the particular data that is required, the level of detail necessary, the purpose for which it will be used, with whom the government needs to share it, and for how long the government needs it." H.Rep. No. 115-200, at 165 (2017). Thus, Congress intended that a DoD contract must require the contractor to:

- Deliver or otherwise provide (i.e., make available to the Government) technical data and computer software; and
- Grant license rights to that technical data and computer software.

Accordingly, to foster consistency in treatment, the proposed DFARS 215.470(a) would require that contracting officers negotiate a fair and reasonable price for all data (including

technical data and computer software) and associated license rights to be delivered or otherwise provided under a DoD contract for services or for the development, production, or sustainment of a system, subsystem, or component. The requirement for price negotiation would not be limited to technical data to be delivered under a DoD contract for the engineering and manufacturing development, production, or sustainment of, a major weapon system.

The proposed DFARS 215.470(a) also seeks to address the concerns identified in Tension Point Papers 1, 4, and 5 of the Final Report of the Government-Industry Advisory Panel on Technical Data Rights (Section 813 Panel) submitted to the Congressional Defense Committees in mid-November 2018 pursuant to section 813(b) of the NDAA for FY 2016 (Pub. L. 114-92), as amended by section 809 of the NDAA for FY 2017 (Pub. L. 114-328). In brief, those Tension Point Papers state that offerors should provide in their proposals a detailed discussion of their intellectual property (IP) evaluation techniques and assumptions, and that contracting officers should be required to consider commercial IP valuation practices and standards when determining a fair and reasonable price for the requested IP.

The three valuation practices and standards traditionally used by commercial entities to calculate the value of IP for transactional and litigation purposes are the market method, the

cost method, and the income method. The market method consists of a comparison of proposed prices to other prices for similar IP, for example, a comparison of proposed prices to historical prices paid. The cost method involves a review and evaluation of the separate cost elements and profit or fee that make up the proposed prices. The income method considers the income a contractor's IP could generate in the future and the costs of generating that income, i.e., the economic benefit of the IP to the contractor.

Currently, contracting officers must comply with existing regulations at Federal Acquisition Regulation (FAR) 15.404-1, DFARS 212.209, and DFARS 215.404-1, which require contracting officers to use the market method first, followed by the cost method if it is not feasible to use the market method. The proposed DFARS 215.470(a) directs contracting officers to consult FAR 15.404-1, DFARS 212.209, and DFARS 215.404-1 when negotiating a fair and reasonable price for all data (including technical data and computer software) and associated license rights, delivered or otherwise provided under a DoD contract. Although nothing prohibits the contracting officer from using the income method, use of the income method is not discussed in the DFARS.

B. Preference for Specially Negotiated License Rights (10 U.S.C. 2320(f)).

New paragraph (f) of 10 U.S.C. 2320 establishes a preference for specially negotiated license rights (SNLR) through two new requirements, both of which relate to and require revisions to existing DFARS coverage. The DFARS currently authorizes, but does not express a preference for, the use of SNLR.

First, new 10 U.S.C. 2320(f) requires that the assessments and planning for a program's long-term needs for technical data for sustainment (required by 10 U.S.C. 2320(e)) must now include consideration of the use of specially negotiated licenses for customized technical data that supports DoD's strategy for sustainment of the major weapon system or subsystem being purchased. The underlying requirement to assess and plan for long-term technical data needs is implemented at DFARS 207.106(S-70), which applies to the program's needs for computer software and associated license rights, as well as data for major weapon systems and subsystems. Accordingly, the new requirements of 2320(f) are proposed to be implemented in a similar manner. Specifically, the new 10 U.S.C. 2320(f) requirement is proposed for insertion as new DFARS 207.106(S-70)(2)(ii), with existing paragraphs (ii)-(iv) renumbered accordingly.

Second, new 10 U.S.C. 2320(f) requires that, to the maximum extent practicable, programs for major weapon systems or subsystems thereof shall use specially negotiated licenses for

technical data to support DoD's strategy for sustainment of the systems or subsystems. While the current DFARS coverage does not include a preference for specially negotiated licenses, the DFARS authorizes the use of SNLR for all types of technical data and computer software, both noncommercial and commercial. The current DFARS enables the parties to enter into special licenses only by voluntary mutual agreement, and reinforces that any rights granted to the Government must be enumerated in an agreement that is incorporated into the contract. The DFARS currently identifies the minimum license rights that the Government is authorized to accept. For example, DFARS 227.7103-5, Government rights, specifies that, when negotiating specific license rights for technical data, the Government may not accept less than limited rights.

The proposed approach for implementing the new statutory preference for SNLR is to incorporate an appropriate statement of preference into the existing DFARS sections and clauses that already authorize and address, but do not currently express a preference for, SNLR. This implementation requires consideration of how a "preference" for SNLR can be integrated appropriately into the current regulatory structure that allows for SNLR on the basis of voluntary, mutual agreement. The proposed approach expresses a preference for use of SNLR "whenever doing so will more equitably address the parties'

interests than the standard license rights" provided in the applicable clause or allocation of rights. However, to ensure that SNLR are not merely authorized and encouraged, but are required to be considered, the approach also includes an affirmative requirement that, to the maximum extent practicable, the parties must enter into good faith negotiations whenever *either party* desires a special license. Thus, it is only in the case when neither party desires a special license agreement (e.g., because neither party anticipates doing so would more equitably address the parties' relative interests), that the parties are not required to negotiate.

The proposed approach also maintains the existing DFARS coverage, which reinforces that neither party can be forced to relinquish its standard license rights. Additionally, the proposed approach retains the DFARS statement of mandatory minimum license rights, as applicable (e.g., currently there is no required minimum license for commercial computer software or commercial computer software documentation). The approach includes the requirement from 10 U.S.C. 2320(f) that the special license must support the program's strategy for sustainment of the major weapon system or subsystem being purchased. The proposed approach also states that DoD may still challenge the basis for a contractor's assertions upon which a special license is based. DoD may challenge a contractor's assertions pursuant

to DFARS 252.227-7019, Validation of Asserted Restrictions-Computer Software, and 252.227-7037, Validation of Restrictive Markings on Technical Data, as applicable. Finally, the approach also seeks to standardize the nomenclature for such negotiated licenses using variations of the term "special" (e.g., special license, specially negotiated license rights), rather than the term "specifically," which is used inconsistently in the current DFARS.

This proposed implementation resulted in revisions to the existing DFARS coverage regarding SNLR for all forms of technical data and computer software, as follows:

(1) For commercial technical data, at 227.7102-2(b) and the associated clause at 252.227-7015(c).

(2) For noncommercial technical data, at 227.7103-5, and -5(d), and the associated clause at 252.227-7013(b)(4).

(3) For commercial computer software, at 227.7202-3(b) (for which there is no associated clause).

(4) For noncommercial computer software, at 227.7203-5, and -5(d), and the associated clause at 252.227-7014(b)(4).

(5) For the Small Business Innovation Research (SBIR) Program, at new 227.7104(d), and associated clause at 252.227-7018(b)(5).

Note that in the case of the SBIR Program, the proposed revisions limit the preference and authorization to negotiate special license agreements to be only after contract award, in

accordance with section 8, paragraph 6, of the SBIR Program and Small Business Technology Transfer Program Policy Directive, published in the *Federal Register* on April 2, 2019, (84 FR 12794), and which became effective on May 2, 2019.

C. Seeking Public Comment on Additional Topics.

In addition to seeking public comment on the substance of the draft DFARS revisions, DoD is also seeking information regarding any corresponding change in the burden, including associated costs or savings, resulting from contractors and subcontractors complying with the draft revised DFARS implementation. More specifically, DoD is seeking information regarding any anticipated increase or decrease in such burden and costs relative to the burden and costs associated with complying with the current DFARS implementing language.

III. 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.

IV. Executive Order 13771

This Advance Notice of Proposed Rulemaking is not subject to E.O. 13771.

List of Subjects in 48 CFR Parts 207, 212, 215, 227, and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

[FR Doc. 2019-24585 Filed: 11/8/2019 8:45 am; Publication Date: 11/12/2019]