



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 227, 239, and 252**

**[Docket DARS-2019-0067]**

**RIN 0750-AK87**

**Defense Federal Acquisition Regulation Supplement:**

**Noncommercial Computer Software (DFARS Case 2018-D018)**

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

**ACTION:** Advance notice of proposed rulemaking; notification of meeting.

**SUMMARY:** DoD is seeking information that will assist in the development of a revision to the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2018, which establishes considerations for the acquisition of all noncommercial computer software, related data and documentation, and associated license rights. In addition to the request for written comments on this advance notice of proposed rulemaking, DoD will hold a public meeting to hear the views of interested parties.

**DATES:** *Comment Date:* 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.

*Public Meeting Date:* The public meeting will be held on February 18, 2020, from 10:00 a.m. to 1:00 p.m., Eastern time. The public meeting will end at the stated time, or when the discussion ends, whichever comes first. Further information for the public meeting may be found under the heading SUPPLEMENTARY INFORMATION.

*Registration Date:* Registration to attend the public meeting must be received no later than close of business on February 11, 2020.

**ADDRESSES:** *Public Meeting:* The public meeting will be held in the Pentagon Library and Conference Center (PLCC), Conference Room B6, 1155 Defense Pentagon, Washington, DC 20301.

Conference Room B6 is located on the lower level of the PLCC.

*Submission of Comments:* Submit written comments identified by DFARS Case 2018-D018, using any of the following methods:

- o *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for "DFARS Case 2018-D018." Select "Comment Now" and follow the instructions provided to submit a comment. Please include "DFARS Case 2018-D018" on any attached documents.

- o *Email:* [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil). Include DFARS Case 2018-D018 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](http://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 experts and interested parties in Government and the private sector that will assist in the development of a revision to the DFARS to implement 10 U.S.C. 2322a, which was added by section 871 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91). Section 10 U.S.C. 2322a requires that, as part of any negotiation for an acquisition of noncommercial computer software, the Secretary of Defense consider to the maximum extent practicable during the appropriate time in the life cycle, all the noncommercial and related materials necessary to meet the needs of the agency. As a result, any noncommercial

computer software or related materials identified should be acquired to the extent appropriate.

## **II. Public Meeting**

DoD is hosting a public meeting to obtain the views of experts and interested parties in Government and the private sector regarding amending the DFARS to implement statutory amendments and revise policies and procedures for acquisition of all noncommercial computer software, related data and documentation, and associated license rights. DoD also seeks to obtain information on the potential increase or decrease in public costs or savings that would result from such amendments to the DFARS.

*Registration:* To facilitate security screening and entry to the PLCC, individuals wishing to attend the public meeting must register by close of business on the date listed in the **DATES** section of this document, by sending the following information via email to [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil):

- (1) Full name.
- (2) Valid email address.
- (3) Valid telephone number.
- (4) Company or organization name.
- (5) Whether the individual is a U.S. citizen.
- (6) The date of the public meeting the individual wishes to attend.

(7) Whether the individual intends to make a presentation, and, if so, the individual's title.

*Building Entry:* Upon receipt of an email requesting registration, the Defense Acquisition Regulations System will provide notification to the Pentagon Force Protection Agency (PFPA) that the individual is requesting approval for entry to the PLCC on the date provided. PFPA will send additional instructions to the email address provided in the request for registration. The registrant must follow the instructions in the PFPA email in order to be approved for entry to the PLCC; failure to follow the instructions in the PFPA email may result in the registrant being restricted from entry to the Pentagon to attend the public meeting.

One valid government-issued photo identification card (i.e., driver's license or passport) will be required in order to enter the building.

Attendees are encouraged to arrive at least 45 minutes prior to the start of the meeting to accommodate security procedures.

Public parking is not available at the PLCC.

*Presentations:* If you wish to make a presentation, please submit an electronic copy of your presentation to [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil) no later than the registration date listed in the **DATES** section of this document. Each presentation should be in PowerPoint to facilitate projection during the public meeting

and should include the presenter's name, organization affiliation, telephone number, and email address on the cover page. Please submit presentations only and cite "Public Meeting, DFARS Technical Data Rights Cases" in all correspondence related to the public meeting. There will be no transcription at the meeting. The submitted presentations will be the only record of the public meeting and will be posted to the following website at the conclusion of the public meeting: [https://www.acq.osd.mil/dpap/dars/technical\\_data\\_rights.html](https://www.acq.osd.mil/dpap/dars/technical_data_rights.html).

*Special accommodations:* The public meeting is physically accessible to persons with disabilities. Requests for reasonable accommodations, sign language interpretation, or other auxiliary aids should be directed to Valencia Johnson, telephone 571-372-6099, by no later than the registration date listed in the **DATES** section of this document.

The TTY number for further information is: 1-800-877-8339. When the operator answers the call, let the operator know the agency is the Department of Defense and the point of contact is Valencia Johnson at 571-372-6099.

### **III. Discussion and Analysis**

An initial draft of the proposed revisions to the DFARS to implement section 871 of the NDAA for FY 2018 is available in the Federal eRulemaking Portal at <http://www.regulations.gov>, by searching for "DFARS Case 2018-D018", selecting "Open Docket

Folder" for RIN 0750-AK87, and viewing the "Supporting Documents". The following is a summary of DoD's proposed approach and the feedback DoD is seeking from industry and the public.

*A. Requirement for consideration of certain matters during acquisition of noncommercial computer software.* The primary proposed changes to implement 10 U.S.C. 2322a would revise DFARS 227.7203-2. The requirements of subsection (a) of 10 U.S.C. 2322a are added to DFARS 227.7203-2(b) to require that, to the maximum extent practicable, the Government's needs determinations must address the acquisition at appropriate times in the life cycle of all computer software, related data, and associated license rights necessary to meet the Government's needs for specific computer software life cycle activities (e.g., reproducing, building, recompiling, testing, and deploying the software).

The requirements of subsection (b) of 10 U.S.C. 2322a are proposed to be added as a new paragraph (6) under DFARS 227.7203-2(c), to require that noncommercial computer software or data required to be delivered as a result of the considerations addressed during the needs determination (as revised at 227.7203-2(b)), to the extent appropriate, includes:

- Computer software delivered in a digital format compatible with applicable computer programs on relevant system hardware; and
- All necessary external or additional computer software or data, along with all necessary license rights; or
- Delivery of sufficient information to support maintenance and understanding of interfaces and software revision history, along with all necessary license rights, if the necessary external or additional computer software or data will not be delivered.

The proposed implementation of these new requirements includes adaptations of the statutory language intended to take advantage of existing DFARS defined terms and nomenclature, and to better support the implementation of the statutory objectives in DoD acquisitions. For example, although the statute focuses on detailed aspects of the delivery requirements for noncommercial computer software, the proposed DFARS revisions also recognize that the Government must consider and acquire appropriate license rights in order to utilize those deliverables. Accordingly, references to "necessary license rights" or "associated license rights" are included throughout the proposed implementation.

Additionally, the proposed revisions use the established DFARS defined term "computer program" in place of the statutory reference to "working computer software system binary files," and add a new definition for the term "data." The new definition for the term "data" is proposed for inclusion in DFARS 227.001, and is an adaptation of the definition of that term in FAR 52.227-14(a). As a result, the definition of "technical data" at DFARS 252.227-7013(a)(15), 252.227-7015(a)(5), and 252.227-7018(a)(20) is revised slightly to avoid an inconsistent use of the term "data."

The proposed revisions also add appropriate cross-references to the new proposed implementing coverage. For example, a new paragraph was added to DFARS 227.7202-1(d), so that factors identified in 227.7203-2(b) and (c), when adapted as appropriate, are considered for commercial computer software and computer software documentation. In addition, DFARS 239.101 is revised to add a reference to the coverage of noncommercial computer acquisitions in 227.7203.

*B. Section 813 Panel Final Report of the Government-Industry Advisory Panel on Technical Data Rights.*

The proposed revisions to DFARS 227.7203-2 also address concerns raised in 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. For example, the 813 Panel's Tension Point Paper No. 27, "Failure to Define and Order CDRLs (Reliance on Deferred Ordering and DAL to Obtain Data)," emphasizes the importance of the Government identifying its data needs early in the program life cycle, and a preference for upfront ordering of data rather than relying on mechanisms such as deferred ordering pursuant to DFARS 252.227-7027. The paper suggests that the Government's approach to data ordering should be consistent with the program's intellectual property strategy, which should be developed and updated to account for potential changes in the life cycle sustainment plan.

*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.

**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 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.

**V. Executive Order 13771**

This advance notice of proposed rulemaking is not subject to E.O. 13771.

**List of Subjects in 48 CFR Part 227, 239, and 252**

Government procurement.

**Jennifer Lee Hawes,**

*Regulatory Control Officer, Defense Acquisition Regulations System.*

[FR Doc. 2020-00430 Filed: 1/13/2020 8:45 am; Publication Date: 1/14/2020]