



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 227 and 252

[Docket DARS-2023-0045; Req No. DARS-2024-00015-FR]

RIN 0750-AK82

Defense Federal Acquisition Regulation Supplement: Rights in Technical Data (DFARS Case 2019-D044)

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 (DFARS) to implement sections of the National Defense Authorization Acts for Fiscal Years 2012 and 2017, which address deferred ordering of technical data, including in cases when the Government does not challenge a restrictive marking or asserted restriction in technical data. In addition to the request for written comments on this proposed rule, DoD will hold a public meeting to hear the views of interested parties.

DATES: Comments on the advance notice of proposed rulemaking should be submitted in writing 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 a proposed rule.

Public Meeting: A virtual public meeting will be held on December 15, 2023, from 1:00 p.m. to 5:00 p.m., Eastern time. DoD also plans to reserve time on a separate date to be determined. The public meeting will end at the stated time, or when the discussion ends, whichever comes first.

Registration: Registration to attend the public meeting must be received no later than close of business on December 8, 2023. Information on how to register for the public meeting is provided under the **SUPPLEMENTARY INFORMATION** section of this notice.

ADDRESSES: *Public Meeting:* A virtual public meeting will be held using Zoom video conferencing software.

Submission of Comments: Submit comments identified by DFARS Case 2019-D044, using any of the following methods:

- o *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for "DFARS Case 2019-D044." Select "Comment" and follow the instructions to submit a comment. Please include "DFARS Case 2019-D044" on any attached documents.

- o *Email:* osd.dfars@mail.mil. Include DFARS Case 2019-D044 in the subject line of the message.

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

FOR FURTHER INFORMATION CONTACT: David E. Johnson, telephone 202-913-5764.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is seeking information from experts and interested parties in the Government and the private sector that will assist in the development of a revision to the DFARS to implement section 815(a)(2) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012 (Pub. L. 112-81) and section 809(c) of the NDAA for FY 2017 (Pub. L. 114-328). These statutes apply to DoD only; they do not impact other Federal agencies. Sections 815(a)(2) and 809(c) amended 10 U.S.C. 2320 (currently 10 U.S.C. 3771 and 10 U.S.C. 3772) by adding paragraphs (b)(9) and (b)(10), respectively. 10 U.S.C. 2320(b)(9) addressed the Government's rights for deferred ordering of technical data. 10 U.S.C. 2320(b)(10) established that the Government is not foreclosed from requiring the delivery of the technical data by the Government's failure to challenge restrictive markings or asserted rights in technical data.

DoD previously published in the **Federal Register** proposed DFARS revisions to implement the statutory revisions in the NDAA for FY 2012 as part of DFARS Case 2012-D022 on June 16, 2016, at 81 FR 39481. That case was suspended during the pendency of the Government-Industry Advisory Panel pursuant to section 813 of the NDAA for FY 2016. During that pause in rulemaking, section 809(c) of the NDAA for FY 2017 further revised the deferred

ordering statutory framework. As part of the resumption and reorganization of the DFARS data rights cases after the conclusion of the Government-Industry Advisory Panel, the implementation of these two statutory revisions has been broken out in this separate case due to the distinct subject matter and limited nature of the statutory revisions.

II. Public Meeting

DoD is interested in continuing a dialogue with experts and interested parties in the Government and the private sector regarding amending the DFARS to implement the aforementioned NDAA sections.

Registration: Individuals wishing to participate in the virtual meeting must register by December 8, 2023, to facilitate entry to the meeting. Interested parties may register for the meeting by sending the following information via email to osd.dfars@mail.mil and include "Public Meeting, DFARS Case 2019-D044" in the subject line of the message:

- Full name.
- Valid email address, which will be used for admittance to the meeting.
- Valid telephone number, which will serve as a secondary connection method. Registrants must provide the telephone number they plan on using to connect to the virtual meeting.
- Company or organization name.
- Whether the individual desires to make a presentation.

Pre-registered individuals will receive instructions for

connecting using the Zoom video conferencing software not more than one week before the meeting is scheduled to commence.

Presentations: Presentations will be limited to 5 minutes per company or organization. This limit may be subject to adjustment, depending on the number of entities requesting to present, in order to ensure adequate time for discussion. If you wish to make a presentation, please submit an electronic copy of your presentation via email to *osd.dfars@mail.mil* no later than the registration date for the specific meeting. Each presentation should be in PowerPoint to facilitate projection during the public meeting and should include the presenter's name, title, organization affiliation, telephone number, and email address on the cover page.

Correspondence, Comments, and Presentations: Please cite "Public Meeting, DFARS Case 2019-D044" 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.

III. Discussion and Analysis

An initial draft of the DFARS revisions under consideration is available in the Federal eRulemaking Portal at <https://www.regulations.gov>, by searching for "DFARS Case 2019-D044", and selecting "Supporting & Related Material." The strawman is also available at

https://www.acq.osd.mil/dpap/dars/change_notices.html under the publication notice for DFARS Case 2019-D044.

In addition, the revisions under consideration for this case include some definitions and other content that is consistent with revisions contained in a related case DFARS Case 2021-D005, *Modular Open Systems Approaches*, for which an advance notice of proposed rulemaking is being published on the same date as these revisions under consideration for DFARS Case 2019-D044. DoD recommends review and consideration of both of these cases in tandem for a more holistic view of the revisions under consideration for these related subject matters.

The following is a summary of the approach DoD is considering and the feedback DoD is seeking from industry and the public.

A. Deferred Ordering of Technical Data

Consistent with 10 U.S.C. 3772(a)(9) (formerly 10 U.S.C. 2320(b)(9)), DoD is considering a revision to the clause at DFARS 252.227-7027, *Deferred Ordering of Technical Data or Computer Software*, and the associated guidance to contracting officers at DFARS 227.7103-8 and 227.7203-8. In particular, the revisions under consideration include the statutory requirement for a determination that—

- The technical data is needed for the purpose of procurement, sustainment, modification, or upgrade (including through competitive means) of a major system or subsystem thereof, a weapon system or subsystem thereof, or any noncommercial product or process; and

- The technical data pertains to an item or process developed in whole or in part with Federal funds; or is described in subparagraphs (D)(i)(II), (F), and (G) of subsection (a)(2) of 10 U.S.C. 2320.

Subparagraphs (D)(i)(II), (F), and (G) of subsection (a)(2) of 10 U.S.C. 2320 (currently 10 U.S.C. 3771(b)(4)(A)(ii), (b)(6), and (b)(7)) reference technical data related to interfaces necessary for segregation and reintegration activities, technical data pertaining to interfaces developed with mixed funding, and technical data pertaining to modular system interfaces developed exclusively at private expense or with mixed funding, respectively.

The definition and other implementation of these types of technical data that enable modular open system approaches (MOSA) are core elements of the revisions under consideration in DFARS Case 2021-D005, which implement these and other new MOSA-related statutory requirements. To ensure consistency with DFARS Case 2021-D005, the revisions under consideration in this DFARS Case 2019-D044 incorporate the relevant definitions of such MOSA-related terms as they appear in DFARS Case 2021-D005, including the terms "interface implementation data", "interface implementation software", and "interface specification".

"Interface implementation data" means technical data that-

- Describes the detailed steps, sequences, characteristics, and conditions used or specified by the developer to implement an interface; and

- Has sufficient detail necessary to permit segregation of an item or process from, or reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes.

The term "interface implementation software" is defined similarly to cover computer software, rather than technical data, that meets the same criteria. "Interface specification" means form, fit, and function data or form, fit, and function software that pertains to or describes an interface. The terms "form, fit, and function data" and "form, fit, and function software" are also defined in this case and DFARS Case 2021-D005.

In particular, the revisions under consideration focus on the following categories of technical data in the implementation of 10 U.S.C. 2320(b)(9)(B)(ii) (currently 10 U.S.C. 3772(a)(9)(B)(ii)):

- Technical data described at 10 U.S.C. 3771(b)(4)(ii) (formerly 10 U.S.C. 2320(a)(2)(D)(i)(II)) is implemented by the combination of interface specification technical data and interface implementation data between an item or process or other items or processes necessary for the segregation of an item or process from, or the reintegration of that item, process, or a physically or functionally equivalent item or process with, other items or processes.

- Technical data described at 10 U.S.C. 3771(b)(7) (formerly 10 U.S.C. 2320(a)(2)(G)), and more specifically the subtype of such

data related to an interface developed exclusively at private expense, is implemented by the combination of interface specification technical data and interface implementation data pertaining to a modular system interface as described in paragraph (b) (2) of the clauses at DFARS 252.227-7013, Rights in Technical Data—Other Than Commercial Products or Commercial Services; 252.227-7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation; 252.227-7015, Technical Data—Commercial Products and Commercial Services; and 252.227-7018, Rights in Other Than Commercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program.

This implementation does not separately reference the technical data covered by 10 U.S.C. 3771(b) (6) (formerly 10 U.S.C. 2320(a) (2) (F)), which is technical data that pertains to interfaces developed with mixed funding, because this data is subsumed within another category of technical data already covered in the clause at DFARS 252.227-7027: "technical data [that] pertains to an item or process developed ... with mixed funding". Therefore, it is unnecessary to list "technical data that pertains to interfaces developed with mixed funding" as a separate category of technical data in the clause.

In short, DoD's approach to the DFARS revisions under consideration is centered on enabling MOSA, which is consistent with the statutory intent of 10 U.S.C. 3771(b) (4) (A) (ii), (b) (6), and (b) (7) (formerly 10 U.S.C. 2320(a) (2) (D) (i) (II),

(F), and (G), respectively). As discussed in the advance notice of proposed rulemaking for DFARS Case 2021-D005, interface implementation data (IID) (and analogously, interface implementation software (IIS)) provides a greater level of detail than an interface specification (i.e., form, fit, and function data or form, fit, and function software that pertains to an interface). Although the statutory framework allows the deferred ordering of IID or IIS that is necessary for segregation or reintegration or related to modular system interfaces, in any individual case DoD may not require the detail in IID or IIS and may require only the lesser detail provided in an interface specification.

For the same reasons, the revisions under consideration similarly apply the statutory amendments in 10 U.S.C. 3772(a)(9) (formerly 10 U.S.C. 2320(b)(9)) to computer software and computer software documentation in the clause at DFARS 252.227-7027, as well as the associated guidance for contracting officers.

B. Statutory Amendments Related to Challenges to Restrictive Markings or Asserted Restrictions in Technical Data

Consistent with 10 U.S.C. 3772(a)(10) (formerly 10 U.S.C. 2320(b)(10)), DoD is proposing to revise the clause at DFARS 252.227-7037, Validation of Restrictive Markings on Technical Data. In particular, the revisions under consideration at DFARS 252.227-7037, paragraph (j), indicate that a decision by the Government, or a determination by the contracting officer, to

not challenge a restrictive marking or asserted restriction shall not foreclose the Government from requiring delivery of the technical data.

Consistent with long-standing DFARS implementation of the procedures for validation of asserted restrictions, the revisions required by statute for technical data are also being considered for the analogous clause covering noncommercial computer software at DFARS 252.227-7019, Validation of Asserted Restrictions—Computer Software. The revisions under consideration add a new paragraph (i) related to software and documentation that closely parallels the language in DFARS 252.227-7037, paragraph (j).

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.

List of Subjects in 48 CFR Parts 227 and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.