



**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

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

**[Docket DARS-2023-0044; Req No. DARS-2024-00016-FR]**

**RIN 0750-AL24**

**Defense Federal Acquisition Regulation Supplement: Modular Open Systems Approaches (DFARS Case 2021-D005)**

**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 certain elements of sections of the National Defense Authorization Acts for Fiscal Years 2012, 2017, and 2021, which establish contract requirements that enable modular open system approaches. In addition to the request for written comments, 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 14, 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 7, 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 2021-D005, using any of the following methods:

- o *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for "DFARS Case 2021-D005." Select "Comment" and follow the instructions to submit a comment. Please include "DFARS Case 2021-D005" on any attached documents.

- o *Email:* [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil). Include DFARS Case 2021-D005 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 certain elements of section 804 of the National Defense Authorization Act (NDAA) for FY 2021 (Pub. L. 116-283), section 809 of the NDAA for FY 2017 (Pub. L. 114-328), and section 815 of the NDAA for FY 2012 (Pub. L. 112-81). These statutes apply to DoD only; they do not impact other Federal agencies. Sections 804, 809, and 815 amended 10 U.S.C. 2320 (currently 10 U.S.C. 3771), and section 804 amended 10 U.S.C. 2446a (currently 10 U.S.C. 4401).

Sections 804 and 809 address rights in technical data for interfaces developed exclusively at private expense or with mixed funding. To the maximum extent practicable, section 804 also requires that DoD solicitations and contracts include modular system interfaces for modular systems deemed relevant in the acquisition strategy or other requirements documentation, and other contract deliverables that enable modular open system approaches. Section 815 addresses rights in technical data necessary for segregation and reintegration activities.

DoD previously published in the **Federal Register** proposed DFARS revisions to implement some of these statutory revisions 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. As part of the resumption and

reorganization of the DFARS data rights cases after the conclusion of the Government-Industry Advisory Panel, this statutory subject matter has been broken out in this separate case.

## **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 elements of the aforementioned NDAA sections, which establish contract requirements that enable modular open system approaches.

*Registration:* Individuals wishing to participate in the virtual meeting must register by December 7, 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](mailto:osd.dfars@mail.mil) and include "Public Meeting, DFARS Case 2021-D005" 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 2021-D005" 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).

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

An initial draft of the DFARS revisions under consideration is available in the Federal eRulemaking Portal at <http://www.regulations.gov>, by searching for "DFARS Case 2021-D005" and selecting "Supporting & Related Material". The strawman is also available at

[https://www.acq.osd.mil/dpap/dars/change\\_notices.html](https://www.acq.osd.mil/dpap/dars/change_notices.html) under the

publication notice for DFARS Case 2021-D005. The following is a summary of the approach DoD is considering and the feedback DoD is seeking from industry and the public.

*A. New or Updated Terms and Definitions Related to Modular Open System Approaches (MOSA)*

DoD is considering a revision to the DFARS to include various MOSA-related terms that are adopted or adapted from 10 U.S.C. 3771 and 4401 (formerly 10 U.S.C. 2320 and 2446a), such as "desired modularity", "interfaces", "major system component", "major system platform", "modular open system approach", "modular system", and "modular system interface." To the extent practicable, the DFARS definitions of these terms parallel those provided in the statutes. Although some of these terms are limited to weapon systems or major defense acquisition programs, 10 U.S.C. 4401 requires application of MOSA to all defense acquisition programs to the maximum extent practicable. To resolve these scope of applicability issues, the revisions under consideration do not limit the above terms to weapon systems or major systems. However, when required in accordance with 10 U.S.C. 3771 and section 804 of the NDAA for FY 2021, limitations regarding certain types of programs or systems are added to the guidance for contracting officers and the clauses.

In addition, DoD is considering updates to existing terms to enable the MOSA objectives of the statutes being implemented. For example, the revisions under consideration update the term "form, fit, and function data" to include the overall

characteristics of an item, component, or process that enable modular open system approaches. These revisions are made in the clauses at DFARS 252.227-7013, Rights in Technical Data—Other Than Commercial Products or Commercial Services; 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. The revisions under consideration clarify the definition of “form, fit, and function data” by incorporating additional elements that “permit identification of physically or functionally equivalent items or processes” from the Federal Acquisition Regulation definition of “form, fit, and function data”, such as configuration, mating, and attachment characteristics. The revisions under consideration also add similar MOSA-enabling characteristics to this definition that “permit identification of physically or functionally equivalent items or processes”, such as architecture, logical, interface, interoperability, compatibility characteristics. For the same reasons, the analogous term “form, fit, and function software” is added to DFARS 252.227-7014, Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation, and 252.227-7018, as well as the guidance for contracting officers. The revisions under consideration delineate the scope of these terms by expressly indicating that these terms do not include detailed manufacturing and process data, computer programs, or source code.

In addition, new terms "interface specification", "interface implementation data", and "interface implementation software" are added to 252.227-7013, 252.227-7014, 252.227-7015, and 252.227-7018. The updated definition of "form, fit, and function data" creates a need for the new DFARS term "interface specifications", which is a subset of form, fit, and function data or form, fit, and function software that pertains to or describes an interface. To enable the MOSA principles in sections 804 of the NDAA for FY 2021, 809 of the NDAA for FY 2017, and 815 of the NDAA for FY 2012, the terms "interface implementation data" (IID) and "interface implementation software" (IIS) are added to capture MOSA-enabling technical data and software that provide a greater level of detail than form, fit, and function data and software regarding a developer's implementation of an interface. In particular, IID is defined as technical data that-

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

(ii) 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.

Similarly, IIS is defined as computer software that-

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

(ii) Has sufficient detail necessary to permit segregation of computer software from, or reintegration of that software (or a physically or functionally equivalent item or process) with, other software.

A related DFARS Case 2019-D044, Rights in Technical Data, implements 10 U.S.C. 3772(a)(9), which references sections of 10 U.S.C. 3771 that are implemented in this case. Accordingly, the MOSA-related definitions and other content under consideration in this case are consistent with proposed revisions in DFARS 2019-D044 for which an advance notice of proposed rulemaking is being published on the same date as these proposed revisions for DFARS Case 2021-D005. DoD recommends review and consideration of both of these cases in tandem for a more holistic view of the proposed revisions for these related subject matters.

*B. License Rights related to Interface Data and Software*

DoD is considering a revision to the DFARS to implement statutory amendments to 10 U.S.C. 3771 (formerly 10 U.S.C. 2320) related to technical data rights. In addition, DoD is considering analogous changes to the DFARS related to software rights. These amendments primarily affect: (1) the types of technical data and software for which the Government has a "Government purpose rights" license; and (2) instances when

disclosure outside of the Government is permitted for technical data or software related to privately developed technology.

Consistent with 10 U.S.C. 3771(b)(4)(A)(ii) (formerly 10 U.S.C. 2320(a)(2)(D)(i)(II)), the definition of the term "limited rights" is revised to permit disclosure outside the Government if the reproduction, release, disclosure, or use is a release or disclosure of interface implementation data necessary for the segregation of an item or process from, or the reintegration of that item or process (or a physically or functionally equivalent item or process) with, other items or processes, subject to existing protections in the clauses (e.g., notice and nondisclosure agreements). Similarly, the definition of the term "restricted rights" is revised to permit contractors or subcontractors to use, modify, reproduce, perform, display, release, or disclose interface implementation software necessary for segregation of computer software from, or reintegration of that software (or functionally equivalent software) with, other computer software, subject to existing protections in the clauses.

Consistent with 10 U.S.C. 3771(b)(7) (formerly 10 U.S.C. 2320(a)(2)(G)), the license grant sections in DFARS 252.227-7013, DFARS 252.227-7014, DFARS 252.227-7015, and DFARS 252.227-7018 are updated to provide the Government with a "Government purpose rights" license to interface implementation data or software pertaining to a modular system interface-

- (i) Used in a modular open system approach;

(ii) For a modular system connected to a weapon system, major system, or major system component;

(iii) Developed exclusively at private expense; and

(iv) Identified in a solicitation or a contract.

Similarly, these requirements are applied to commercial software in the guidance at DFARS 227.7202-3(c) because there is no clause for commercial computer software. The existing guidance to contracting officers for commercial software centers around the standard customer licenses customarily provided to the public, unless the standard license does not meet the needs of the Government. To fit within this existing licensing framework for commercial software, the guidance under consideration at DFARS 227.7202-3(c) establishes the Government needs regarding license rights to support modular open systems approaches or modular systems.

DoD's approach to defining form, fit, and function data and software, IID, and IIS was critical in implementing the above license scheme in 10 U.S.C. 3771 (formerly 10 U.S.C. 2320). As discussed, IID and IIS provide a greater level of detail than form, fit, and function data and software. However, IID and IIS only have the level of detail necessary to enable segregation and reintegration activities. There were three objectives behind DoD's approach to defining these terms and developing this license scheme: (1) clarifying the scope of form, fit, and function data and software to better enable the MOSA objectives of the statutes being implemented; (2) limiting overlap and

avoiding confusion between IID or IIS and form, fit, and function data or software; and (3) providing clear boundaries on instances when limited rights data and restricted rights software that is IID or IIS may be disclosed outside of the Government. To accomplish this last objective and protect the private technology development investments of contractors, content requirements are included in the definitions of IID and IIS, and requirements related to the purpose of the Government's authorized use and release of such data and software are included in the limited rights and restricted rights definitions.

In addition, the revisions under consideration incorporate the new term "form, fit, and function software" within the license grant section of the software rights clauses. Because the Government has an unlimited rights license in form, fit, and function data, DFARS 252.227-7014, DFARS 252.227-7018, and the guidance for contracting officers related to commercial software at DFARS 227.7202-3(c)(1) are revised to indicate that the Government has an unlimited rights license in form, fit, and function software.

### *C. MOSA-related Requirements for Acquisition Plans*

In accordance with section 804(a)(2)(B) and (C), DoD is considering new requirements for acquisition plans in DFARS 207.103(i), which require that solicitations and contracts for new or existing systems identify modular system interfaces and certain MOSA-related technical data or software, to the maximum

extent practicable. The new guidance for acquisition plans also requires that bilateral contract modifications or other contracts include these MOSA-related requirements, when the existing contract for a new or existing system does not include these requirements.

To enable application of these requirements of section 804(a)(2)(B) and (C) to commercial software, the revisions under consideration at DFARS 227.7102-1(a) and 227.7202-1(c)(1) expressly indicate that the Government may require delivery of form, fit, and function software and the MOSA-related commercial technical data and software that is not customarily provided to the public in the above solicitation and contract requirements.

*D. MOSA-related Revisions Related to Contractor Assertions of Data and Software Rights Restrictions*

In view of the amendments to former 10 U.S.C. 2320(a)(2)(G), DoD is considering revisions to requirements related to contractor assertions of data and software rights restrictions. Generally, development at private expense, either exclusively or partially, is the basis for asserting restrictions. However, the revisions under consideration indicate that the Government has a government purpose rights license to interface implementation data or interface implementation software pertaining to a modular system interface, as described in paragraph (b)(2) of DFARS 252.227-7013, 252.227-7014, and 252.227-7018. Accordingly, DFARS 252.227-7013(e), 252.227-7014(e), 252.227-7017(d), and 252.227-7018(e) are revised to

include these new bases for contractor assertions for restrictions. The revisions under consideration also include a requirement for offerors and contractors to identify and describe modular system interfaces, if applicable.

*E. Seeking Public Comment on Additional Topics*

In addition to seeking public comment on the substance of the initial 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 initial draft 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 207, 215, 227, and 252**

Government procurement.

**Jennifer D. Johnson,**

*Editor/Publisher, Defense Acquisition Regulations System.*

[FR Doc. 2023-25407 Filed: 11/16/2023 8:45 am; Publication Date: 11/17/2023]