Government Contracts Advisory

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The Department of Defense Proposes New Rules for Commercial Software and Technical Data Acquisitions

CONTACTS

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On September 27, 2010, the Department of Defense ("DOD") published a proposed rule that would significantly revise the Defense Federal Acquisition Regulation Supplement ("DFARS") Part 227, "Patents, Data, and Copyrights."[1] The proposed rule changes many aspects of DFARS Part 227. Most notable among these changes is a substantial expansion of the rights that the DOD receives when it acquires commercial computer software and technical data pertaining to commercial items (together "commercial data").

The greatest impact of the proposed rule is that it brings the acquisition of commercial data within the scheme that the DFARS sets forth for other types of software and data. Unlike these other types of software and data, the DOD currently purchases commercial data on the same terms that the software or data is licensed to the public (the "commercial license").[2] While the proposed rule purports to require that the DOD purchase commercial data using the commercial license, this requirement is heavily caveated. For example, the proposed rule prohibits any commercial license terms that are "inconsistent with Federal procurement law" and explicitly strikes such terms from the license.[3] Regardless of the terms of the commercial license, the proposed rule entitles the DOD to obtain unlimited rights in certain commercial technical data, including form, fit, and function data and data necessary for "operation, maintenance, installation, or training."[4] The proposed rule also grants the DOD the right to "access, use, modify, reproduce, release, perform, display, or disclose" commercial technical data, which includes computer software documentation, within the government if such an action is necessary for "emergency repair or overhaul" or to foreign governments for evaluational or informational purposes.[5] Finally, the proposed rule provides the DOD with the right to order certain commercial data on a deferred basis.[6]

The aggregate impact of the proposed rule would therefore be an expansion of the rights that DOD receives when it acquires unmodified commercial data.[7] This is a clear break from the present DOD policy of only taking minimal rights to commercial data. If this new scheme is implemented, contractors that provide the government with commercial data must place a renewed emphasis on protecting their intellectual property. Most importantly, contractors will now need to mark all commercial data provided to the government, even if that information is commercial in nature and was purchased by the government under a commercial license. Failure of a contractor to do so could result in the improper disclosure of commercial data by the DOD. Such an improper disclosure is particularly risky in the case of commercial data purchased from third-party vendors because most vendors (particularly software vendors) place stringent rules on how their commercial data may be used but do not mark that data. The risks of the proposed rule are further heightened by the rule's provision permitting the DOD to order certain commercial data on a deferred basis because it will almost certainly be more difficult for a contractor to secure limitations concerning the government's access to, and possible assertion of government license in, key commercial contractor technologies.

Beyond the above-discussed changes that specifically relate to commercial data, the proposed rule includes many other significant changes to DFARS Part 227. The most significant of these changes are: (1) the combination of DFARS Subpart 227.71, "Rights in Technical Data," and DFARS Subpart 227.72, "Rights in Computer Software and Computer Software Documentation," into a single, wholly re-written Subpart that addresses both software and technical data and treats both categories of information similarly; (2) new procedures for third-party filings of patent infringement claims and the creation of procedures for filing secrecy

order claims; (3) the clarification that a limited form of privity exists between subcontractors and the DOD when the subcontractor generates technical data or computer software that will ultimately be provided to the DOD; (4) a limitation on the conditions under which the government can negotiate special licenses; (5) the new requirement that contractors mark all noncommercial technical data or computer software that is provided to the DOD with unlimited rights when such information also is marked with a copyright notice; (6) the elimination of the familiar table at DFARS 252.227-7017 through which contractors are presently required to notify the DOD when they will provide the DOD with software or technical data with less than unlimited rights in favor of a more lenient rule that contractors may notify the DOD of restrictions by any method, so long as it accurately conveys the subject information and the relevant restrictions to the DOD; and, (7) the creation of a new Subpart 227.72, which covers the DOD's rights in "special works" and architectural and engineering services.

Comments on the proposed rule may be submitted to the DOD until November 26, 2010. Please contact the authors or the McKenna attorney that you typically work with for more information or if you have specific questions regarding this particularly dense proposed rule.

[1] 75 Fed. Reg. 59,412 (Sept. 27, 2010).

[2] DFARS 227.7202-1(a).

[3] Proposed DFARS 252.227-7015(b)(1).

[4] Proposed DFARS 252.227-7015(b)(2).

[5] Proposed DFARS 252.227-7015(b)(3).

[6] *See* Proposed DFARS 252.227-7027, "Deferred ordering of technical data or computer software," which applies to all software and technical data and states that the DOD's rights in software and technical data ordered under the clause will be determined by, among other things, DFARS 252.227-7015, "Rights in Technical Data and Computer Software—Commercial."

[7] It is also important to note that the noncommercial technical data and computer software clause (Proposed DFARS 252.227-7013) applies when the USG pays for development or modification of the commercial software, commercial data or commercial item. See 227.7104-8(a)(2). Thus, a commercial item will be subject to the more stringent requirements and rights allocations established by the-7013 clause. For example, technical data pertaining to a commercial item may ultimately be subject to an unlimited rights license.