PART 27—PATENTS, DATA, AND COPYRIGHTS
SUBPART 27.4—TECHNICAL DATA, OTHER DATA, COMPUTER SOFTWARE, AND COPYRIGHTS

27.470 Scope.

(a) Sections 27.470 through 27.482 set forth the Department of Defense policies, procedures, implementing instructions, solicitation provisions, and contract clauses relating to requirements for the acquisition of technical data and computer software as well as rights in technical data, other data, computer software, and copyrights. These sections also set forth policies, procedures, implementing instructions, solicitation provisions, and contract clauses pertaining to data, copyrights, and restricted designs unique to the acquisition of construction and architect-engineer services.

(b) Specific information concerning requirements for the acquisition of computer software is found in DoD Directive 5000.19-L, Volume II, "Acquisition Management Systems and Data Requirements Control List".

(c) These sections do not encompass rights in computer software acquired under GSA authorized ADP Schedule Pricelist contracts. Such rights are governed by the terms of the GSA contracts.

Title in Contractor
a) Incentive to development
b) Recognize foreign & negotiate for rights and pay true value
c) Impose a discipline on agencies acquisition duty.

227.471 Definitions.

"Commercial computer software", as used in this subpart, means computer software which is used regularly for other than Government purposes and is sold, licensed, or leased in significant quantities to the general public at established market or catalog prices.

"Computer", as used in this subpart, means a data processing device capable of accepting data, performing prescribed operations on the data, and supplying the results of these operations; for example, a device that operates on discrete data by performing arithmetic and logic processes on the data, or a device that operates on analog data by performing physical processes on the data.

"Computer data base", as used in this subpart, means a collection of data in a form capable of being processed and operated on by a computer.

"Computer program", as used in this subpart, means a series of instructions or statements in a form acceptable to a computer, designed to cause the computer to execute an operation or operations. Computer programs include operating systems, assemblers, compilers, interpreters, data management systems, utility programs, sort-merge programs, and ADPE maintenance/diagnostic programs, as well as applications programs such as payroll, inventory control, and engineering analysis programs. Computer programs may be either machine-dependent or machine-independent, and may be general-purpose in nature or be designed to satisfy the requirements of a particular user.

"Computer software", as used in this subpart, means computer programs and computer data bases.

"Computer software documentation", as used in this subpart, means technical data, including computer listings, and printouts, in human-readable form which (a) documents the design or details of computer software, (b) explains the capabilities of the software, or (c) provides operating instructions for using the software to obtain desired results from a computer.

"Data", as used in this subpart, means recorded information, regardless of form or characteristic.

"Detailed manufacturing or process data", as used in this subpart, means technical data necessary to enable manufacture of end-items, components and modifications, or to enable the performance of processes.

"Developed," as used in this subpart, means that the item, component or process exists and works as intended. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component or process has been analyzed and/or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of testing is required in addition to analysis depends on the nature of the item, component, or process and the state of the art. To be considered "developed" the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market.

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"Form, fit, or function data", as used in this subpart, means technical data pertaining to items, components, or processes for the purpose of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics and performance requirements (e.g., specification control drawings, catalog sheets, envelope drawings, qualification requirements, etc.).

"Government purpose license rights", as used in this subpart, means rights to use, duplicate, or disclose technical data (or in the SBIR Program only computer software), in whole or in part and in any manner, for Government purposes only and to have or permit others to do so for Government purposes only. Government license rights includes purposes of competitive procurement but do not grant to the Government the right to have or permit others to use technical data (or the SBIR Program only computer software) for commercial purposes.

Permits disclosure to gov't activities but not commercial use probably unenforceable

"Limited rights", as used in this subpart, means rights to use, duplicate, or disclose technical data, in whole or in part, by or for the Government, with the express limitation that such technical data shall not, without the written permission of the party furnishing such technical data be: released or disclosed in whole or in part outside the Government; used in whole or in part by the Government for manufacture, or in the case of computer software documentation, for preparing the same or similar computer software; or used by a party other other than the Government, except when:

(a) [illegible] Release, disclosure or use is necessary for emergency repair or overhaul; provided that such release, disclosure, or use thereof outside the

Government shall be made subject to a prohibition against further use, release, or disclosure and that the party furnishing the data be notified by the contracting officer of such release, disclosure or use;

(b) ~~(2)~~ Release or disclosure of to a foreign government, that is in the interest of the United States and is required for evaluational or informational purpose under the conditions of (1) above, except that such release or disclosure may not include detailed manufacturing or process data, or

(c) ~~(3)~~ Any other purposes specifically stated in the contract or separate license agreement.

"Private Expense", as used in this subpart, means that the cost of development has not been paid in whole or in part by the Government and that such development was not sponsored by or required as an element of performance under a Government contract or subcontract; provided, however, independent research and development and bid and proposal costs are deemed to be at private expense.

$1 Contemplates "private expense"

"Restricted rights", as used in this subpart, means rights that apply only to computer software, and include, as a minimum, the right to--

(a) Use computer software with the computer for which or with which it was acquired, including use at any Government installation to which the computer may be transferred by the Government;

(b) Use computer software with a backup computer if the computer

Government shall be made subject to a prohibition against further use, release, or disclosure and that the party furnishing the data be notified by the contracting officer of such release, disclosure or use;

(b) (2) Release or disclosure of to a foreign government, that is in the interest of the United States and is required for evaluational or informational purpose under the conditions of (1) above, except that such release or disclosure may not include detailed manufacturing or process data, or

(c) (3) Any other purposes specifically stated in the contract or separate license agreement.

"Private Expense", as used in this subpart, means that the cost of development has not been paid in whole or in part by the Government and that such development was not sponsored by or required as an element of performance under a Government contract or subcontract; provided however, independent research and development and bid and proposal costs are ~~considered~~ charged to be at private expense.

"Restricted rights", as used in this subpart, means rights that apply only to computer software, and include, as a minimum, the right to--

(a) Use computer software with the computer for which or with which it was acquired, including use at any Government installation to which the computer may be transferred by the Government;

(b) Use computer software with a backup computer if the computer

for which or with which it was acquired is inoperative;

(c) Copy computer programs for safekeeping (archives) or backup purposes; and (d) modify computer software, or combine it with other software, subject to the provision that those portions of the derivative software incorporating restricted rights software are subject to the same restricted rights. In addition, restricted rights include any other specific rights not inconsistent with the minimum rights in (1)-(4) above that are listed or described in a contract or described in a license or agreement made a part of a contract.

"Technical data", as used in this subpart, means recorded information, regardless of the form or method of the recording of a scientific or technical nature (including computer software documentation). Such term does not include computer software or data incidental to contract administration, such as financial and/or management information.

"Unlimited rights", as used in this subpart, means rights to use, duplicate, release, or disclose, technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or to permit others to do so.

"Unpublished", as used in this subpart, means that technical data or computer software which has not been released to the public nor been furnished to others without restriction on further use or disclosure. For the purpose of this definition, delivery of limited rights technical data to or for the Government under a contract does not, in itself, constitute release to the public.

227.472 Acquisition Policy for Technical Data and Rights in Technical Data.

227.472-1 General. The acquisition of technical data and the rights to use such data requires a balancing of competing interests.

(a) The Government's Interests. The Government has extensive needs for many kinds of technical data and the rights to use such data. Its needs may well exceed those of private commercial customers. For defense purposes, millions of separate equipment and supply items, ranging from standard to unique types, must be acquired, operated, and maintained, often at points remote from the source of supply. Functions requiring varied kinds of technical data include training of personnel, overhaul and repair, cataloging, standardization, inspection and quality control, packaging, and logistics operations. Technical data resulting from research and development and production contracts must be obtained, organized and disseminated to many different users. Finally, the Government must make technical data widely available in the form of contract specifications in the interest of increasing competition, lowering costs and providing for mobilization by developing and locating alternative sources of supply and manufacture.

(b) The Contractor's Interests. Commercial organizations have a valid economic interest in technical data pertaining to items, components, or processes which they have developed. Such technical data is often closely held in the commercial sector because its disclosure to competitors could jeopardize the

competitive advantage it was developed to provide. Public disclosure of such technical data can cause serious economic hardship to the originating company and would not be in the interest of the United States in encouraging innovation as well as encouraging contractors to develop at private expense items, components or processes for use by the Government.

(c) The Balancing of Interests.

(1) There is no necessary correlation between the Government's need for technical data and a contractor's economic interest therein. However, in balancing the Government's requirements for technical data against a contractor's interest in protecting its technical data, there may be a considerable identity of interest. This is particularly true in the case of innovative contractors who can best be encouraged to develop at private expense items of military usefulness where their rights in such items are scrupulously protected.

(2) It is equally important that the Government foster successful contractual relationships and encourage a ready flow of data essential to Government needs by confining its acquisitions of technical data to cases of actual need. Certainly the Government must not be barred from bargaining and contracting to obtain the technical data that it needs, even though that technical data normally may not be disclosed in commercial practice. Moreover, when the Government pays for research and development work which produces new knowledge, products, or processes, it has an obligation to foster technological progress through wide dissemination of the new and

useful information derived from such work and where practicable to provide competitive opportunities for supplying the new products and utilizing the new processes.

(3) At the same time, acquiring, maintaining, storing, retrieving, and distributing technical data in the vast quantities generated by modern technology is costly and burdensome for the Government. For this reason alone, it is necessary to control closely the extent and nature of technical data acquisition. Such control is also necessary to ensure Government respect for its contractors' economic interest in technical data relating to their privately developed items.

227.472-2 Establishing Minimum Requirements. It is the policy of the Department of Defense to obtain only such minimum technical data and data rights as are essential to meet the Government's needs. Consideration shall be given to such factors as: whether or not the item, component, or process will be competitively acquired; whether repair and overhaul work will be contracted out or serviced in-house; whether the repair or replacement parts will be commercial items, or acquired by form, fit or function data, performance specifications or by detailed engineering drawings. Once the Government's technical data needs are properly identified, the appropriate technical data rights to meet those needs can be determined. Whether the Government already has or will need to acquire the necessary rights in the technical data, or will need to consider alternate procurement procedures, will depend on either the category of the data or whether the item, component, or process was developed exclusively with Federal

funds, exclusively at private expense, or in part with Government funds and in part at private expense (See 227.472-5). In deciding how to acquire such data and data rights, or how to otherwise achieve the Government's purposes, it is the policy of the Department of Defense to use procedures that are the least intrusive on the contractor's economic interests as is practicable. (See Subpart 217.72 for additional guidance.)

227.472-3 Early Identification. In order to determine what minimum technical data and data rights to obtain in each acquisition, it is necessary for the Government to identify its various uses of and needs for technical data as early as is practicable in the acquisition of any item, component, or process. Such identification should be made before contract award or, for major weapons systems, prior to entering Full Scale Development. It is also important that contractors be required to provide early identification of any technical data that they intend to deliver with any restrictions on its use.

227.472-4 Statutory Prohibition. In accordance with 10 U.S.C. 2320(a)(2)(F), a contractor or subcontractor (or a prospective contractor or subcontractor) may not be required, as a condition of being responsive to a solicitation or as a condition for the award of a contract, to sell or otherwise relinquish to the United States any rights in technical data beyond those to which the Government is entitled under section 227.472-5. It is permissable, however, to consider in the evaluation of offers such factors as the impact on life cycle costs of limitations on the Government's ability to use or disclose the technical data.

227.472-5 Standard Rights In Technical Data. The data rights to which the Government is entitled are determined as follows:

(a) If the Government has funded or will fund the entire development of the item, component, or process, then the Government is entitled to and will normally obtain unlimited rights in the technical data.

(b) If the Government has funded or will fund a part of the development of the item, component, or process, then the Government is entitled to unlimited rights in the technical data. However, the Government should not acquire more data rights than it needs. Therefore, unless the contracting officer determines, during the identification of needs process, that unlimited rights are required, the Government will obtain Government Purpose License Rights if the contractor has or will contribute more than fifty percent of the development cost of the item, component or process or if the contractor is a small business firm or non-profit organization that agrees to commercialize the technology. The Government will normally obtain unlimited rights in all other cases.

(c) If the item, component, or process is developed by a contractor or subcontractor exclusively at private expense, the Government is entitled to limited rights. Such data must be unpublished and identified as limited rights data. However, if the Government determines that it needs rights in technical data greater than limited rights, the contracting officer may negotiate, pursuant to 227.472-6, with a contractor or subcontractor to acquire additional rights necessary to meet the

Government's needs, provided that the additional rights are necessary to enhance competition by developing alternative sources of supply and manufacture. As an alternative, the contracting officer may consider alternate proposals from the contractor or subcontractor to enhance competition.

(d) Notwithstanding (a), (b) and (c) above, the Government is entitled to unlimited rights in the technical data in the following categories:

(1) Technical data prepared or required to be delivered under any Government contract or subcontract and constituting corrections or changes to Government-furnished data;

(2) Form, fit or function data pertaining to end-items, components or processes, prepared or required to be delivered under any Government contract or subcontract;

(3) Manuals or instructional materials (other than detailed manufacturing or process data) prepared or required to be delivered under a Government contract or subcontract necessary for installation, operation, maintenance or training purposes; and

(4) Technical data which is otherwise publicly available or has been released or disclosed by the contractor or subcontractor without restriction on further release or disclosure.

227.472-6 Obtaining Greater Rights In Technical Data. If the Government determines that it needs rights in technical data greater than limited rights, the contracting officer may negotiate with a contractor or subcontractor to acquire

additional rights necessary to meet the Government's needs, provided that the additional rights are necessary to develop alternative sources of supply and manufacture (See 227.473-2). As an alternative to acquiring additional rights, the contracting officer may consider other proposals from the contractor or subcontractor as to how to achieve the same objectives.

227.472-7 Waiving Unlimited Rights in Technical Data. In those cases under 227.472-5 where the Government would normally obtain unlimited rights, the Government may agree to waive these unlimited rights, provided that, in accordance with 10 U.S.C. 2320(a)(2)(G)(ii), the United States receives, as a minimum, a royalty-free license to use, release, or disclose the data for purposes of the United States ,including purposes of competitive procurement (i.e. Government Purpose License Rights). However, such lesser rights may only be obtained under this paragraph after a determination by the contracting officer that the Government does not need unlimited rights and that the contractor agrees to commercialize the technology.

227.472-8 Subcontracts. It is the policy of the Department of Defense that prime contractors and higher-tier subcontractors shall not use their power to award subcontracts as economic leverage to acquire rights in the technical data of their subcontractors for themselves. Accordingly, a subcontractor, who would have the right pursuant to 227.472-5 to furnish technical data with limited rights, may furnish such limited rights data directly to the Government rather than through the prime contractor.

227.473 General Procedures.

227.473-1 Early Identification of Government Rights.

(a) ~~(1)~~ Prenotification of Government Rights.

In order for the Government to make informed judgments concerning the competitive reprocurement potential of items, components, processes or computer software developed at private expense that an offeror intends to delivery under a resultant contract, offerors shall identify to the maximum practicable extent in their responses to solicitations such privately developed items, components, processes, or computer software and the technical data which they:

(1) ~~(i)~~ intend to deliver with limited rights;

(2) ~~(ii)~~ intend to deliver with Government purpose or unlimited rights; or

(3) ~~(iii)~~ have not yet determined which rights should apply.

If delivery of technical data under a resultant contract is expected, the provision at 252.227-7035, Prenotification of Rights in Technical Data, shall be included in the solicitation. If an offeror asserts limited rights to any technical data in its proposal responding to this requirement, Government failure to object to or reject any such assertion shall not be construed to constitute agreement to any such data rights assertion. Offerors will furnish, at the written request of the contracting officer, evidence supporting any such rights contention when the criteria governing rights in technical data, as set forth in the clause at 252.227-7013, are applied.

(b) ~~(2)~~ Notification of Government Rights.

Because continuing information is needed under a contract about a contractor's intention to use in the performance of the contract any items, components, processes or computer software for which technical

data would be subject to limited rights or computer software would be subject to restricted rights, the contractor will be required to advise the contracting officer of this fact promptly prior to committing to the use of the privately developed item, component or process. If possible, the schedule should indicate the specific areas to which limited or restricted rights are of concern and the notice requirements should only address those areas.

(1) ~~(i)~~ Under the clause at 252.227-7013, the contractor is not required to advise the contracting officer as to items, components, processes or computer software for which notice was previously given in the same contract pursuant to the prenotification procedure, or with respect to standard commercial items that are manufactured by more than one source of supply. Also, the contractor need not obtain contracting officer approval to use any item, component, process or computer software in the performance of the contract. If Government control on the contractor's use of privately developed items, components, processes or computer software is desired, special provisions must be included in the contract.

(2) ~~(ii)~~ Subsequent to contractor notification, if the contracting officer agrees that certain technical data would be subject to limited rights, the contracting officer may then determine whether to negotiate for a licensing arrangement, the purchase of additional rights, or to adopt another suitable alternative. Such alternatives may include modifying the specifications so as not to require or permit use of the privately developed items, components, processes or computer software.

227.473-2 Obtaining Greater Rights in "Private Expense" Data.

(a) ~~(1)~~ In accordance with DFARS 227.472-6 the Government may obtain greater rights or options for such rights in any technical data pertaining to items, components, or processes developed exclusively at private expense for which the Government would otherwise only be entitled to limited rights. These greater rights may be obtained by negotiation of a lump sum fee, royalty, or other consideration and where appropriate, should also include access to such technical assistance as may be necessary to qualify additional sources. These negotiations may be conducted either by the Government, or upon Government request by the prime contractor or higher-tier subcontractor. Such greater rights shall be stated in the contract schedule as a separate item with a specific price and shall not be obtained under this paragraph unless it is determined after a finding upon a documented record that—

(1) ~~(i)~~ there is a need or requirement for disclosure of "Private Expense" technical data outside the Government for purposes such as for reprocurement or evaluation of the item, component, or process to which the technical data pertains; and

(2) ~~(ii)~~ If the specific rights obtained are for reprocurement, then the anticipated net savings in competitive reprocurements from additional sources will likely exceed the acquisition cost of the technical data and rights therein.

(b) ~~(2)~~ In contracts for major systems or major subsystems, it may be in the best interest of the Government to acquire repair parts or components directly from a subcontractor, rather than

obtaining greater rights in technical data. In such cases, the clause at 252.227-7017, Rights in Technical Data--Major System and Subsystem Contractor, may be used. Also, the Government's right to purchase such items directly from subcontractors shall be without the payment of any fee or royalty by the Government or subcontractor for the use of the prime contractor's technical data.

227.473-3 Certifications. Reserved.

227.473-4 Marking and Identification Requirements.

(a)(1) Technical data delivered to the Government pursuant to any contract requirement shall be marked with the number of the prime contract, and the name of the contractor and any subcontractor who generated the technical data. Each piece of technical data submitted with limited rights shall also be marked with--

(1)~~(i)~~ the authorized restrictive legend; and

(2)~~(ii)~~ an indication (for example, by circling, underscoring, or a note) of that portion of the piece of technical data to which the legend is applicable. The Government shall include such identifying markings on all reproductions thereof.

(b)(2) The contractor has the responsibility to assure that no restrictive markings are placed on technical data except in accordance with the "Rights in Technical Data and Computer Software" clause at 252.227-7013. Copyright notices as specified in Title 17 United States Code, Sections 401 and 402, are not considered "restrictive markings".

When the clause at 252.227-7013 "Rights in Technical Data and Computer Software" is required, the clause at 252.227-7018, "Restrictive Markings on Technical Data", shall also be included in the contract. The contractor's procedures required by this clause shall be reviewed by the Contract Administration Office. In addition to the rights afforded to the Government by the clause at 252.227-7018, "Restrictive Markings on Technical Data", the following actions are available to insure proper marking of technical data:

(1) ~~(i)~~ Failure to establish, maintain and follow such marking procedures may be deemed to render technical data nonconforming and subject to FAR Section 46.102 and to withholding of payments under the "Technical Data--Withholding of Payments" clause.

(2) ~~(ii)~~ When a pre-award survey is requested by the purchasing office, the quality assurance review shall include as an item of special inquiry an examination of the prospective contractor's procedures for complying with the "Restrictive Markings on Technical Data" clause.

(3) ~~(iii)~~ The contractor's procedures for complying with the "Restrictive Markings on Technical Data" clause shall be reviewed when holding post-award conferences pursuant to FAR Subpart 42.

(c) ~~(3)~~ <u>Unmarked or Improperly Marked Technical Data.</u>

Pursuant to the Validation Procedures of 227.473-5 and the clause at 252.227-7037, Validation of Restrictive Markings on Technical Data, the Government has the right to require the contractor or subcontractor to furnish sufficient evidence to justify the propriety of any restrictive

markings used by the contractor on technical data delivered to the Government under a contract or subcontract.

Technical data received without a restrictive legend shall be deemed to have been furnished with unlimited rights. However, within six months after delivery of such data the contractor may request permission to place restrictive markings on such data at his own expense and the Government may so permit if the contractor--

(1) ~~(i)~~ demonstrates that the omission of the restrictive marking was inadvertent,

(2) ~~(ii)~~ Justifies that the use of the markings is authorized, and

(3) ~~(iii)~~ relieves the Government of any liability with respect to the use of disclosure of such technical data.

(d) ~~(4)~~ If technical data is received with restrictive markings which the Government believes are improper, the Government will nevertheless honor the restrictive legend until the issue is resolved in accordance with the Validation procedures.

(e) ~~(5)~~ If technical data which the contractor is authorized by the contract to furnish with restrictive markings is received with improper markings, the technical data shall be used according to the proper restriction and the contractor shall be required by written notice to correct the markings to conform with those specified in the contract. If the contractor fails to correct the markings within 60 days after notice,

Government personnel may correct the markings at the contractor's expense, notify the contractor in writing, and will thereafter use the technical data accordingly.

227.473-5 Validation of Restrictive Markings on Technical Data.

(a) Policy and Procedures.

(1) General. 10 U.S.C. 2321 sets forth rights and procedures pertaining to the validation of restrictive markings asserted by contractors and subcontractors on the use, duplication, or disclosure by the Government and others of technical data delivered under contracts or subcontracts for supplies or services. 10 U.S.C. 2320 provides authority for the Department of Defense to establish remedies when data delivered or made available under a contract is found to not satisfy the requirements of the contract (e.g., contains improper or unauthorized restrictive legends). The Government may review the validity of any restriction on technical data, delivered or to be delivered under a contract, asserted by the contractor or subcontractor. Such review should be accomplished, if possible, before acceptance of the technical data. During the period within three years of final payment on a contract or within three years of delivery of the technical data, whichever is later, the contracting officer may review and make a written determination to challenge the restriction. The Government may, however, challenge a restriction on the release, disclosure or use of technical data at any time if such technical data (i) is publicly available; (ii) has been furnished to the United States without restriction; or, (iii) has been otherwise made available without restriction. Whenever the contracting officer

finds it appropriate to question the validity of restrictive markings on data provided by contractors or subcontractors, the contracting officer shall follow the procedures set forth below. Only the contracting officer's final decision resolving a formal challenge by sustaining the validity of a restrictive marking constitutes "validation" as addressed in 10 U.S.C. 2321. A decision by the Government, or a determination by the contracting officer, to not challenge the restrictive marking or asserted restriction shall not constitute "validation".

(2) Prechallenge Request for Information.

(i) Prior to making a written determination to challenge, and to assure that the formal challenge process is not unduly or prematurely invoked, the contracting officer should request the contractor or subcontractor to furnish information explaining the basis for any restriction asserted by the contractor or subcontractor on the right of the United States or others to use technical data developed, delivered, or to be delivered, under a contract. In this regard, if the information provided is incomplete, the contracting officer may request the contractor or subcontractor to furnish additional information in the records of, or otherwise in the possession of or available to, the contractor or subcontractor to justify the validity of the restrictive marking (e.g., a statement of facts accompanied by supporting documentation). Such requests from the contracting officer should be in writing and should state a reasonable time for submission of the required data.

(ii) The contracting officer should also request information and advice from the cognizant Government activity having interest in, or control of, the data regarding the validity of the markings. If the contracting officer receives advice that the validity of restrictive markings on technical data is questionable, the contracting officer shall request that the individual or office raising the question provide written rationale for the assertion.

(iii) If the contracting officer, after reviewing the information provided pursuant to (2)(i) and (ii) above, and any other available information, determines that reasonable grounds exist to question the current validity of a restrictive marking, and that continued adherence to the marking would make impracticable subsequent competitive acquisition of the item, component, or process to which the technical data relates, the contracting officer shall proceed in accordance with paragraph (3) of this section. If, when requesting information under (2)(i) above, the contractor or subcontractor fails to respond to the contracting officer's written request within a reasonable period, the contracting officer shall proceed in accordance with paragraph (3) of this section.

(3) Challenge.

(i) If the contracting officer determines that a challenge to the restrictive marking is warranted, the contracting officer shall promptly send a written challenge notice to the contractor or subcontractor. The contracting officer's determination to

challenge shall be in writing and shall be made within the three year period cited in paragraph (a)(1) above. The challenge to the restrictive legend shall be issued by the contracting officer in a written notice to the contractor that shall:

(A) state the specific grounds for challenging the asserted restrictions;

(B) require a response within 60 days justifying and providing appropriate evidence as to, the current validity of the asserted restriction;

(C) state that a DoD contracting officer's final decision, issued pursuant to paragraph (f) of the clause at 252.227-7037, sustaining the validity of a restrictive marking identical to the asserted restriction, within the three-year period preceding the challenge, shall serve as justification for the asserted restriction if the validated restriction was asserted by the same contractor or subcontractor (or any licensee of such contractor or subcontractor) to which such notice is being provided.

(D) state that a response will be considered a claim within the meaning of the Contract Disputes Act of 1978 and must be certified in the form prescribed in FAR 33.207, regardless of dollar amount, and

(E) state that failure to respond to the challenge notice will constitute agreement by the contractor or subcontractor with Government action to strike or ignore the restrictive legends.

(ii) The contracting officer shall extend the time for response as appropriate if the contractor or subcontractor submits a written request showing the need for additional time to prepare a response.

(iii) Any written response from the contractor or subcontractor shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.), and must be certified in the form prescribed by FAR 33.207, regardless of dollar amount.

(iv) If a contractor or subcontractor has received challenges to the same restrictive markings from more than one contracting officer, the contractor or subcontractor is to notify each contracting officer of the existence of more than one challenge. This notice shall also indicate which unanswered challenge was received first in time by the contractor or subcontractor. The contracting officer who initiated the first in time unanswered challenge is the contracting officer who will take the lead in establishing a schedule for the resolution of the challenge to the restrictive markings. This contracting officer shall coordinate with all the other contracting officers, formulate a schedule for responding to each of the challenge notices, and distribute such schedule to all interested parties. The schedule shall provide to the contractor or subcontractor a reasonable opportunity to respond to each challenge notice. All parties must agree to be bound by this schedule.

(4) Final Decision.

(i) Final Decision When Contractor Fails to Respond. If the Contractor or subcontractor fails to respond to the challenge notice, the contracting officer will then issue a final decision that the restrictive markings are not valid and that the Government will either strike or ignore the invalid restrictive markings. The final decision shall be issued as a final decision under the Disputes clause at FAR 52.233-1. This final decision is to be issued as soon as possible but not later than 60 days after the expiration of the time period of (3)(i) or (ii) above. Following the issuance of the final decision, the contracting officer may then strike or ignore the invalid restrictive markings in accordance with FAR 52.227-7037.

(ii) Final Decision When Contractor or Subcontractor Responds.

(A) If, after reviewing the response from the contractor or subcontractor, the contracting officer determines that the contractor or subcontractor has justified the validity of the restrictive marking, the contracting officer shall issue a final decision to the contractor or subcontractor sustaining the validity of the restrictive marking, and stating that the Government will continue to be bound by the restrictive markings. The final decision shall be issued within 60 days after receipt of the contractor's or subcontractor's response to the challenge notice, or within such longer period that the contracting officer has notified the contractor or subcontractor of the longer period

that the Government will require. The notification of a longer period for issuance of a final decision will be made within 60 days after receipt of the response to the challenge notice.

(B)(1) If, after reviewing the response from the contractor or subcontractor, the contracting officer determines that the validity of the restrictive marking is not justified, the contracting officer shall issue a final decision to the contractor or subcontractor in accordance with the Disputes clause at FAR 52.233-1. Notwithstanding paragraph (e) of the Disputes clause, the final decision shall be issued within 60 days after receipt of the contractor's or subcontractor's response to the challenge notice, or within such longer period that the contracting officer has notified the contractor or subcontractor of the longer period that the Government will require. The notification of a longer period for issuance of a final decision will be made within 60 days after receipt of the response to the challenge notice. Such a final decision shall advise the contractor or subcontractor of the rights of appeal under the Contract Disputes Act.

(2) The Government will continue to be bound by the restrictive marking for a period of 90 days from the issuance of the contracting officer's final decision under (4)(ii)(B)(1) of this section. The contractor or subcontractor, if it intends to file suit in the United States Claims Court, must provide a notice of intent to file suit to the contracting officer within 90 days from the issuance of the contracting officer's final

decision under (4)(ii)(B)(1) of this section. If the contractor or subcontractor fails to appeal, file suit, or provide a notice of intent to file suit to the contracting officer within the 90-day period, the Government may cancel or ignore the restrictive markings, and the failure of the contractor or subcontractor to take the required action constitutes agreement with such Government action.

(3) The Government will continue to be bound by the restrictive marking where a notice of intent to file suit in the United States Claims Court is provided to the contracting officer within 90 days from the issuance of the final decision under (4)(ii)(B)(1) of this section. The Government will no longer be bound and may strike or ignore the restrictive markings if the contractor or subcontractor fails to file its suit within one year after issuance of the final decision. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, that urgent or compelling circumstances significantly affecting the interest of the United States will not permit waiting for the filing of a suit in the United States Court, the agency may, following notice to the contractor or subcontractor, cancel and ignore such restrictive markings as an interim measure pending filing of the suit or expiration of the one-year period without filing of the suit. However, such agency head determination does not affect the contractor's or subcontractor's right to damages against the United States where

its restrictive markings are ultimately upheld or to pursue other relief, if any, as may be provided by law.

(4) The Government will be bound by the restrictive marking where an appeal or suit is filed pursuant to the Contract Disputes Act until final disposition by an agency Board of Contract Appeals or the United States Claims Court. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, that urgent or compelling circumstances significantly affecting the interest of the United States will not permit awaiting the decision by such Board of Contract Appeals or the United States Claims Court, the agency may, following notice to the contractor or subcontractor, cancel and ignore such restrictive markings as an interim measure pending final adjudication. However, such agency head determination does not affect the contractor's or subcontractor's right to damages against the United States where its restrictive markings are ultimately upheld or to pursue other relief, if any, as may be provided by law.

(5) Appeal or Suit.

(i) If the contractor or subcontractor appeals or files suit and if upon final disposition the contracting officer's decision is sustained, the restrictive markings on the technical data shall be cancelled, corrected, or ignored. If upon final disposition it is found that the restrictive marking was not substantially justified, the contracting officer shall determine the cost to the Government of reviewing the restrictive marking

and the fees and other expenses incurred by the Government in challenging the marking. The contractor is then liable to the Government for payment of these costs unless the contracting officer determines that special circumstances would make such payment unjust.

(ii) If the contractor or subcontractor appeals or files suit and if upon final disposition the contracting officer's decision is not sustained, the Government shall continue to be bound by the restrictive markings. Additionally, if the challenge by the Government is found not to have been made in good faith, the Government shall be liable to the contractor or subcontractor for payment of fees or other expenses incurred by the contractor or subcontractor in defending the validity of the marking.

(6) Privity of Contract.

These procedures for reviewing the validity of restrictive markings on technical data do not create or imply a privity of contract between the Government and subcontractors.

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227.473-6 Remedies for Noncomplying Technical Data. Reserved.

227.473-7 Non-Disclosure Agreements.

Technical data obtained with rights other than unlimited, shall not be released outside the Government unless the recipient of the data agrees to sign a non-disclosure and/or non-use agreement consistent with the conditions of the restrictive rights. Normally, such agreements shall be provided by the originator of the data. However, it should be clearly understood that the Government shall incur no liability for unauthorized use or disclosure by any third party of any such data.

227.474 Alternative Methods of Obtaining Greater Rights.

227.474-1 Reserved.

227.474-2 Reserved.

227.474-3 Direct Licenses.

Direct licensing is another approach to enhance competition in privately developed items, components, or processes. In this approach an acquisition strategy is used that calls for a contractor to transfer data and technology directly to another source. While this approach has the advantage of allowing the contractor to maintain direct control over the use of its limited rights data, it may not be useful when the Government needs to maintain direct control over the data to support the competitive procurement. Such direct licensing arrangements are most useful in special situations such as in leader company contracting in accordance with FAR Part 17.4. For this reason, direct licenses are generally not appropriate for the acquisition of items, components, or processes having an estimated total acquisition cost of less than $50 million of RDT&E funds or $200 million of production funds.

227.474-4 Expiration of Restrictive Rights Legends.

(1) As an alternative to obtaining greater rights in limited rights technical data, the Government may negotiate a time limitation on such data. Time limits shall be negotiated on a case-by-case basis and shall balance the contractor's economic interest in the data with the Government's need for competition and an enhanced defense industrial base. The negotiation objective will not exceed seven years. At the expiration point, the Government will normally obtain Government

purpose license rights.

(2) If a decision is made to establish a time period for the expiration of limited rights legends, the clause at 252.227-7013, Rights in Technical Data and Computer Software, with its Alternate I, shall be included in solicitations and any resultant contract. The time period, the expiration data of the legends and the rights to be obtained by the Government shall be specified in the contract. Each piece of data furnished under the contract with limited rights shall be marked with the special legend and expiration date set forth in Alternate I to the basic clause at 252.227-7013, Rights in Technical Data and Computer Software.

(3) If it is determined that only a portion of the limited rights data delivered under a contract will be acquired with a time period for the expiration of the special legends, the contract shall specifically identify that portion of the data, and Alternate I to the basic clause 252.227-7013, Rights in Technical Data and Computer Software, may be appropriately modified to limit its application only to that portion.

227.479 Contracts Awarded Under Small Business Innovation Research Program (SBIR Program).

(a) P.L. 97-219, "Small Business Innovation Development Act of 1982", requires certain agencies to establish a Small Business Innovation Research Program (SBIR Program). The public law also includes terminology providing for "retention of rights in data generated in the performance of the contract by the small business concern". The Small Business Administration (SBA) issued Policy Directive No. 65-01 on 19 November 1982 to provide policy direction for the conduct of the Small Business Innovation Research Programs within the federal agencies. The policy directive was issued pursuant to the authority contained in the public law.

(b) In the policy directive, the SBA in essence recommended that, except for program evaluation, agencies should protect technical data and computer software generated under an SBIR Program contract (funding agreement) for a period of two years from the completion of the contract under which the technical data and computer software were generated, unless the agencies obtained permission to disclose such data and software from the contractor. The SBA also recommended that, effective at the conclusion of the two-year period, the Government shall have a royalty-free license in the technical data and computer software for Government use. This license has been amended pursuant to P.L. 99-500 and P.L. 99-591 to specifically include the right to use the technical data for competitive procurement. The SBA further recommended that the contractor, with prior written permission of the contracting officer, be afforded ownership of copyright in technical data and computer software generated under an SBIR Program contract and that the contractor be allowed to publish (subject to national security considerations, if

any) such data and software. The policy directive considered it appropriate that the Government should receive a royalty-free license under any copyright and that each publication should contain an appropriate acknowledgement and disclaimer statement.

(c) The clause at 252.227-7025, Rights in Technical Data and Computer Software (SBIR Program), incorporates the coverage recommended by the SBA policy directive and shall be included in all contracts awarded under the SBIR Program in which technical data or computer software is required to be prepared, originated, developed, generated, or delivered. The clause differs from the clause at 252.227-7013, Rights in Technical Data and Computer Software, in that it provides for the two (2) year period of limited rights after which the Government receives a Government purpose license in certain technical data and computer software that would otherwise be subject unlimited rights. While use of the clause is limited to contracts awarded under the SBIR Program, Contracting Officers may use the basic concept when negotiating for greater rights in limited rights technical data.

227.480 Copyrights. Reserved.

227.481 Acquisition of Rights in Computer Software. Reserved.

227.482 Solicitation Provisions and Contract Clauses.

(a)(1) The contracting officer shall insert the basic data clause at 252.227-7013, Rights in Technical Data and Computer Software, in solicitations and contracts when technical data is specified to be delivered or computer software may be originated, developed, or delivered, provided that such clause shall not be used in solicitations and contracts--

(i) When existing works are to be acquired in accordance with Section 227.477;

(ii) When special works are to be acquired in accordance with Section 227.476;

(iii) When the work will be performed by foreign sources outside the United States, its territories, possessions, or Puerto Rico, in which case the clause at 252.227-7032, Rights in Technical Data and Computer Software (Foreign) applies;

(iv) When performance will be limited solely to architect-engineer services or construction, in which case either the clause at 252.227-7022, Architect-Engineer Work--Unlimited Rights, or the clause at 252.227-7023, Architect-Engineer Work--Sole Property Rights, applies; and

(v) When the contract is awarded under the DoD Small Business Innovation Research Program (SBIR Program), in which case the clause at 252.227-7025, Rights in Technical Data and Computer Software (SBIR Program), applies.

(2) The contracting officer shall use the clause with its Alternate

I in accordance with the policy at 227.474-4.

(3) The contracting officer shall use the clause with its Alternate II under the circumstances specified at 227.480.

(b) The contracting officer, in order to prevent any misinterpretation of the scope of the clause at 252.227-7013, Rights in Technical Data and Computer Software, in the contract may insert the clause at 252.227-7016, Contract Schedule Items Requiring Experimental, Developmental, or Research Work, in solicitations and contracts when the solicitations and contracts, in whole or in part, call for experimental, development, or research work as an element of performance.

(c) The contracting officer may insert the clause at 252.227-7017, Rights in Technical Data--Major System and Subsystem Contracts, in solicitations and contracts for major system or major subsystems under the circumstance specified at 227.473-2(2).

(d) The contracting officer shall insert the clause at 252.227-7018, Restrictive Markings on Technical Data, in all solicitations and contracts in accordance with 227.473-4(2).

(e) The contracting officer shall insert the provision at 252.227-7019, Identification of Restricted Rights Computer Software, in solicitations and contracts in accordance with 227.481.

(f) The contracting officer shall insert the clause at 252.227-7020, Rights in Data--Special Works, in solicitations and contracts as required by 227.476.

(g) The contracting officer shall insert the clause at

252.227-7021, Rights in Data--Existing Works, in solicitations and contracts as required by 227.477.

(h) The contracting officer shall insert the clause at 252.227-7022, Government Rights (unlimited) in solicitations and contracts in accordance with 227.478-2(a)(1)(i).

(i) The contracting officer shall insert the clause at 252.227-7023, Drawings and Other Data to Become Property of Government, in solicitations and contracts in accordance with 227.478-2(a)(1)(ii).

(j) The contracting officer shall insert the clause at 252.227-7024, Notice and Approval of Restricted Designs, in solicitations and contracts in accordance with 227.478-5.

(k) The contracting officer shall insert the clause at 252.227-7025, Rights in Technical Data and Computer Software (SBIR Program), in solicitations and contracts in accordance with 227.479.

(l) The contracting officer shall insert the clause at 252.227-7026, Deferred Delivery of Technical Data or Computer Software, in solicitations and contracts in accordance with 227.475-2(b).

(m) The contracting officer shall insert the clause at 252.227-7027, Deferred Ordering of Technical Data or Computer Software, in solicitations and contracts in accordance with 227.475-2(c).

(n) The contracting officer shall insert the provision at 252.227-7028, Requirement for Technical Data Certification, in solicitations in accordance with 227.473-3.

(o) The contracting officer shall insert the clause at 252.227-7029, Identification of Technical Data, in all solicitations and contracts in accordance with 227.473-4.

(p) The contracting officer shall insert the clause at 252.227-7030, Technical Data--Withholding of Payment, in solicitations and contracts in accordance with 227.475-3.

(q) The contracting officer shall insert the clause at 252.227-7031, Data Requirements, in solicitations and contracts in accordance with 227.475-1.

(r) The contracting officer shall insert the clause at 252.227-7032, Rights in Technical Data and Computer Software (Foreign), in solicitations and contracts in accordance with 227.475-6.

(s) The contracting officer shall insert the clause at 252.227-7033, Rights in Shop Drawings, in solicitation and contracts in accordance with 227.478-2(a)(2).

(t) The contracting officer may insert the provision at 252.227-7035, Prenotification of Rights in Technical Data, in solicitations in accordance with 227.473-1.

(u) The contracting officer shall insert the clause at 252.227-7036, Certification of Technical Data Conformity, in all contracts in accordance with 227.473-3.

(v) The contracting officer shall insert the clause at 252.227-7037, Validation of Restrictive Markings on Technical Data, in solicitations and contracts which require the delivery of technical data.

252.227-7013 Rights in Technical Data and Computer Software. As prescribed at 227.482(a)(1), insert the following clause:

RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE (MAY 1987)

(a) Definitions.

The terms used in this clause are defined in 227.471 of the Department of Defense Supplement to the Federal Acquisition Regulation (DFARS).

(b) Rights in Technical Data.

(1) Limited rights. The Government shall have limited rights in:

(i) technical data, listed or described in an agreement incorporated into the Schedule of this contract, which the parties have agreed will be furnished with limited rights in accordance with 227.472-6; and

(ii) unpublished technical data pertaining to items, components, or processes developed exclusively at private expense, and unpublished computer software documentation related to computer software that is acquired with restricted rights, other than such data included in (b)(3)(i), (iii), or (iv), below. Limited rights shall be effective provided that only the portion or portions of each piece of data to which limited rights are to be asserted are identified (for example, by circling, underscoring, or a note), and that the piece of data is marked with the legend below:

A. the number of the prime contract under which the technical data is to be delivered;

B. the name of the contractor and any subcontractor by whom the technical data was generated;

LIMITED RIGHTS LEGEND

Contract No. _____.

Contractor: _____.

_____ _____ _____ _____

_____ _____ _____ _____

The restrictions governing the use of technical data marked with this legend are set forth in the definition of "Limited Rights" in DFARS 227.471 and other limitations as specifically agreed to in writing in accordance with DFARS 227.473-2. A copy of the agreed to limitations shall be affixed to all data subject to such limitations. This legend, together with the indications of the portions of this data which are subject to such limitations, shall be included on any reproduction hereof which includes any part of the portions subject to such limitations. The limited rights legend shall be honored only as long as the data continues to meet the definition of limited rights.

(2) Government Purpose License Rights. The Government shall have Government purpose license rights in:

(i) unpublished technical data pertaining to items, components, or processes for which the Government has funded, or will fund, a part of the development cost, unless the contracting officer has determined that the Government requires unlimited rights, and:

(A) the contractor has or will contribute more than 50 percent of the development cost of the item, component, or process; or

(B) the contractor is a small business firm or nonprofit organization that agrees to commercialize the technology; and

(ii) unpublished technical data listed or described in an agreement incorporated into the Schedule of the contract, which the parties have agreed will be furnished with Government purpose license rights in accordance with DFARS 227.472-6 or 227.472-7.

Government purpose license rights shall be effective provided that only the portion or portions of each piece of data to which such rights are to be asserted are identified (for example, by circling, underscoring, or a note), and that the piece of data is marked with the legend below:

A. the number of the prime contract under which the technical data is to be delivered,

B. the name of the contractor and any subcontractor by whom the technical data was generated, and

GOVERNMENT PURPOSE LICENSE RIGHTS LEGEND

Contract No. _____.

Contractor: _____.

_____ _____ _____ _____

_____ _____ _____ _____

The restrictions governing the use of technical data marked with this legend are set forth in the definition of "Government Purpose License Rights" in DFARS 227.471. This legend, together with the indications of the portions of this data which are subject to such

limitations, shall be included on any reproduction hereof which includes any part of the portions subject to such limitations and shall be honored only as long as the data continues to meet the definition of Government purpose license rights.

(3) Unlimited rights. Unless other rights have been agreed to in writing in accordance with DFARS 227.472-7, the Government shall have unlimited rights in:

(i) technical data prepared or required to be delivered under this or any other Government contract or subcontract and constituting corrections or changes to Government-furnished data or computer software;

(ii) form, fit, or function data pertaining to items, components, or processes prepared or required to be delivered under this or any other Government contract or subcontract;

(iii) manuals or instructional materials (other than detailed manufacturing or process data) prepared or required to be delivered under this contract or any subcontract hereunder necessary for installation, operation, maintenance, or training purposes.

(iv) technical data, which is otherwise publicly available, or has been, or is normally released or disclosed by the contractor or subcontractor, without restriction on further release or disclosure;

(v) technical data in which the Government has funded, or will fund, the entire development of the item, component, or process.

(vi) technical data in which the Government has funded, or will fund, a part of the development cost of the item, component, or process,

and the contractor has not or will not contribute more than 50 percent of the development cost;

(vii) technical data in which the Government has funded, or will fund, a part of the development cost of the item, component, or process, and the contractor is a small business firm or nonprofit organization that does not agree to commercialize the technology; and

(viii) technical data in which the Government has funded, or will fund, a part of the development cost of the item, component, or process, and, notwithstanding (b)(3)(vi) and (vii) above, the contracting officer has determined, in accordance with DFARS 227.472-5(ii), that the Government requires unlimited rights.

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(c) Rights in Computer Software.

(1) Restricted Rights.

(i) The Government shall have restricted rights in computer software, listed or described in a license or agreement made a part of this contract, which the parties have agreed will be furnished with restricted rights, Provided, however, notwithstanding any contrary provision in any such license or agreement, the Government shall have the rights included in the definition of "restricted rights" in paragraph (a) above. Such restricted rights are of no effect unless the computer software is marked by the contractor with the following legend.

RESTRICTED RIGHTS LEGEND

Use, duplication, or disclosure is subject to
restrictions stated in Contract No. _____
with _____ (Name of Contractor)_____

and the related computer software documentation includes a prominent statement of the restrictions applicable to the computer software. The contractor may not place any legend on computer software indicating restrictions on the Government's rights in such software unless the restrictions are set forth in a license or agreement made a part of this contract prior to the delivery date of the software. Failure of the contractor to apply a restricted rights legend to such computer software shall relieve the Government of liability with respect to such unmarked software.

(ii) Notwithstanding subdivision (i) above, commercial computer

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software and related documentation developed at private expense and not in the public domain may, if the contractor so elects, be marked with the following legend:

RESTRICTED RIGHTS LEGEND

Use, duplication, or disclosure by the Government is subject to restrictions as set forth in subdivision (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at 52.227-7013.

(Name of contractor and address)

When acquired by the Government, commercial computer software and related documentation so legended shall be subject to the following:

(A) Title to, and ownership of, the software and documentation shall remain with the contracter.

(B) User of the software and documentation shall be limited to the facility for which it is acquired.

(C) The Government shall not provide or otherwise make available the software or documentation, or any portion thereof, in any form, to any third party without the prior written approval of the contractor. Third parties do not include prime contractors, subcontractors and agents of the Government who have the Government's permission to use the licensed software and documentation at the facility, and who have agreed to use the licensed software and documentation only in accordance with these restrictions. This provision does not limit the right of the

Government to use software, documentation, or information therein, which the Government may already have or obtain without restrictions.

(D) The Government shall have the right to use the computer software and documentation with the computer for which it is acquired at any other facility to which that computer may be transferred; to use the computer software and documentation with a backup computer when the primary computer is inoperative; to copy computer programs for safekeeping (archives) or backup purposes; and to modify the software and documentation or combine it with other software, Provided, that the unmodified portions shall remain subject to these restrictions.

(2) Unlimited Rights in Computer Software. The Government shall have unlimited rights in:

(i) computer software resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any Government contract or subcontract;

(ii) computer software required to be originated or developed under a Government contract, or generated as a necessary part of performing a contract;

(iii) computer data bases, prepared under a Government contract, consisting of information supplied by the Government, information in which the Government has unlimited rights, or information which is in the public domain;

(iv) computer software prepared or required to be delivered under this or any other Government contract or subcontract and constituting

corrections or changes to Government-furnished computer software; and

(v) computer software, which is otherwise publicly available, or has been, or is normally released, or disclosed by the contractor or subcontractor without restriction on further release or disclosure.

(d) Technical Data and Computer Software Previously Provided Without Restriction. Contractor shall assert no restrictions on the Government's rights to use or disclose any data or computer software which the contractor has previously delivered to the Government without restriction. The limited or restricted rights provided for by this clause shall not impair the right of the Government to use similar or identical data or computer software acquired from other sources.

(e) Copyright.

(1) In addition to the rights granted under the provisions of paragraphs (b) and (c) above, the contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world, of the scope set forth below, under any copyright owned by the contractor, in any work of authorship prepared for or acquired by the Government under this contract, to reproduce the work in copies or phonorecords, to distribute copies or phonorecords to the public, to perform or display the work publicly, and to prepare derivative works thereof, and to have others do so for Government purposes. With respect to technical data and computer software in which the Government has unlimited rights, the

license shall be of the same scope as the rights set forth in the definition of "unlimited rights" in DFARS 227.471. With respect to technical data in which the Government has limited rights, the scope of the license is limited to the rights set forth in the definition of "limited rights". With respect to computer software which the parties have agreed will be furnished with restricted rights, the scope of the license is limited to such rights.

(2) Unless written approval of the Contracting Officer is obtained, the contractor shall not include in technical data or computer software prepared for or acquired by the Government under this contract any works of authorship in which copyright is not owned by the contractor without acquiring for the Government any rights necessary to perfect a copyright license of the scope specified herein.

(3) As between the contractor and the Government, the contractor shall be considered the "person for whom the work was prepared" for the purpose of determining authority under Section 201(b) of Title 17, United States Code.

(4) Technical data delivered under this contract which carries a copyright notice shall also include the following statement which shall be placed thereon by the contractor, or should the contractor fail, by the Government:

> This material may be reproduced by or for
> the U.S. Government pursuant to the copyright
> license under the clause at 252.227-7013 (date).

(f) Removal of Unauthorized Markings.

(1) Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may, at the contractor's expense, correct, cancel, or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder in accordance with the clause of this contract entitled "Validation of Restrictive Markings on Technical Data", DFARS 252.227-7037.

(2) Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may correct, cancel, or ignore any marking not authorized by the terms of this contract on any computer software furnished hereunder, if:

(i) the contractor fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the markings; or

(ii) the contractor's response fails to substantiate, within sixty (60) days after written notice, the propriety of restricted rights markings by identification of the restrictions set forth in the contract.

In either case, the Government shall give written notice to the contractor of the action taken.

(g) Relation to Patents. Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(h) Limitation on Charges for Data and Computer Software. The

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contractor recognizes that it is the policy of the Government not to pay, or to allow to be paid, any charges for data or computer software which the Government has a right to use and disclose to others without restriction and contractor agrees to refund any such payments. This policy applies to contracts that involve payments by subcontractors and those entered into through the Military Assistance Program, in addition to US Government prime contracts. However, it does not apply to reasonable reproduction, handling, mailing, and similar administrative costs.

(i) Acquisition of Data and Computer Software from Subcontractors.

(1) Whenever any technical data or computer software is to be obtained from a subcontractor under this contract, the contractor shall use this same clause in the subcontract, without alteration, and no other clause shall be used to enlarge or diminish the Government's or the contractor's rights in the subcontractor data or computer software which is required for the Government.

(2) technical data required to be delivered by a subcontractor shall normally be delivered to the next higher-tier contractor. However, when there is a requirement in the prime contract for data which may be submitted with other than unlimited rights by a subcontractor, then said subcontractor may fulfill its requirement by submitting such data directly to the Government, rather than through the prime contractor.

(3) The contractor and higher-tier subcontractors will not use their power to award subcontract as economic leverage to obtain rights in technical data or computer software from their subcontractors.

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(j) Notice of Government Rights.

(1) Unless the Schedule provides otherwise, and subject to (2) below, the contractor will promptly notify the Contracting Officer in writing of the intended use by the contractor or a subcontractor in performance of this contract of any item, component, or process for which technical data would contain any restrictions on the Government's right to use, disclose, or have others use such data.

(2) Such notification is not required with respect to:

(i) standard commercial items which are manufactured by more than one source of supply; or

(ii) items, components, or processes for which such notice was given pursuant to prenotification of rights in technical data in connection with this contract.

(3) Unless the schedule provides otherwise, Contracting Officer approval is not necessary under this clause for the contractor to use the item, component, or process in the performance of the contract.

(End of Clause)

ALTERNATE I (May 1987). As prescribed at DFARS 227.474-4, add the following paragraph to the basic clause:

( ) (i) Notwithstanding any other provision of this contract, the Government shall have (specify additional Government rights here, i.e., reprocurement) rights in restrictive rights technical data furnished under this contract, effective on the day immediately following the date specified in the contract for, the expiration of the restrictive rights legends. Such expiration date shall be marked on each piece of data

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subject to expiring restrictions furnished under the contract.

(ii) Technical data subject to the expiration of restrictive rights shall be marked with the limited rights legend set forth in paragraph (b)(2)(i) above with the title of the legend modified to read:

RESTRICTIVE RIGHTS LEGEND (SUBJECT TO EXPIRATION)

Contract No. _____

Contractor: _____

The following statement shall also be added to the legend:

Restrictive rights shall become (specify additional Government rights here i.e., reprocurement) rights on (insert expiration date).

The modified legend shall be included on any reproduction of the restrictive rights data, in whole or in part.

ALTERNATE II (MAY 1981). As prescribed at 227.480, add the following paragraph to the basic clause:

( ) Publication for sale. If, prior to publication for sale by the Government and within the period designated in the contract or task order, but in no event later than 24 months after delivery of such data, the contractor publishes for sale any data (1) designated in the contract as being subject to this paragraph and (2) delivered under this contract, and promptly notifies the Contracting Officer of these publications, the Government shall not publish such data for sale or authorize others to do so. This limitation on the Government's rights to publish for sale any such data so published by the Contractor shall continue as long as the data is protected as a published work under the

copyright law of the United States and is reasonably available to the public for purchase. Any such publication shall include a notice identifying this contract and recognizing the license rights of the Government under this clause. As to all such data not so published by the Contractor, this paragraph shall be of no force or effect.

252.227-7014 Reserved.

252.227-7015 Reserved.

252.227-7016 & 252.227-7017 Reserved.

52.227-7018 Restrictive Markings on Technical Data. As prescribed at 27.473-4(2) insert the following clause:

RESTRICTIVE MARKINGS ON TECHNICAL DATA (May 1987)

(a) The contractor shall have, maintain, and follow throughout the performance of this contract, procedures sufficient to assure that restrictive markings are used on technical data required to be delivered hereunder only when authorized by the terms of the "Rights in Technical Data and Computer Software" clause of this contract. Such procedures shall be in writing. The contractor shall also maintain a quality assurance system to assure compliance with this clause.

(b) As part of the procedures, the contractor shall maintain (1) records to show how the procedures of paragraph (a) above where applied in determining that the markings are authorized, as well as (2) such records as are reasonably necessary demonstrate that any restrictive markings on technical data delivered under this contract are authorized.

(c) The contractor shall, within sixty (60) days after award of this contract, identify in writing to the Contracting Officer by name or title the person(s) having the final responsibility within contractor's organization for determining whether restrictive markings are to be placed on technical data to be delivered under this contract. The contractor hereby authorizes direct contact between the Government and such person(s) in resolving questions involving restrictive markings.

(d) The Contracting Officer may evaluate or verify the contractor's procedures to determine their effectiveness. Upon request, a copy of such written procedures shall be furnished. The failure of the Contracting

Officer to evaluate or verify such procedures ahll not relieve the contractor of the responsiblity for complying with paragraphs (a) and (b) above.

(e) If the Contracting Officer should give written notification of any failure to maintain or follow the established procedures, or of any material deficiency in the procedures, the corrective action shall be accomplished within the time specified by the contracting officer.

(f) This clause shall be included in each subcontract under which technical data is required to be delivered. When so inserted, "Contractor" shall be changed to "Subcontractor."

(end of clause)

252.227-7019 through 252.227-7024 Reserved.

252.227-7025 Rights in Technical Data and Computer Software (SBIR Program). As prescribed at 227.479, insert the following clause:

RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE (SBIR Program) (MAY 1987)

(a) Definitions.

The terms used in this clause are defined in 227.471 of the Department of Defense Supplement to the Federal Acquisition Regulation (DFARS).

(b) Rights in Technical Data.

(1) Limited rights. The Government shall have limited rights in:

(i) technical data, listed or described in an agreement incorporated into the Schedule of this contract, which the parties have agreed will be furnished with limited rights in accordance with 227.472-6; and

(ii) unpublished technical data pertaining to items, components, or processes developed exclusively at private expense, and unpublished computer software documentation related to computer software that is acquired with restricted rights, other than such data included in (b)(3)(i), (iii), or (iv), below. Limited rights shall be effective provided that only the portion or portions of each piece of data to which limited rights are to be asserted are identified (for example, by circling, underscoring, or a note), and that the piece of data is marked with the legend below:

A. the number of the prime contract under which the technical data is to be delivered;

B. the name of the contractor and any subcontractor by whom the technical data was generated;

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LIMITED RIGHTS LEGEND

Contract No. _____.

Contractor: _____.

_____ _____ _____ _____
_____ _____ _____ _____

The restrictions governing the use of technical data marked with this legend are set forth in the definition of "Limited Rights" in DFARS 227.471 and other limitations as specifically agreed to in writing in accordance with DFARS 227.473-2-6 and 227.473-2. A copy of the agreed to limitations shall be affixed to all data subject to such limitations. This legend, together with the indications of the portions of this data which are subject to such limitations, shall be included on any reproduction hereof which includes any part of the portions subject to such limitations. The limited rights legend shall be honored only as long as the data continues to meet the definition of limited rights.

(2) Government Purpose License Rights. For a period of two (2) years (or such other period as may be authorized by the Contracting Officer for good cause shown) after the delivery and acceptance of the last deliverable item under the contract, the Government shall have limited rights and, after the expiration of the two-year period, shall have Government purpose license rights in:

(i) technical data prepared or required to be delivered under this or any other Government contract or subcontract and constituting corrections or changes to Government-furnished data or computer software.

(ii) form, fit, or function data pertaining to items, components, or processes prepared or required to be delivered under this or any other Government contract or subcontract,

(iii) manuals or instructional materials (other than detailed manufacturing or process data) prepared or required to be delivered under this contract or any subcontract hereunder necessary for installation, operation, maintenance or training purposes,

(iv) technical data, which is otherwise publicly available, or has been, or is normally released or disclosed by the contractor or subcontractor, without restriction on further release or disclosure, and

(vi) any other technical data prepared or required to be delivered under this contract or subcontract hereunder, which is not otherwise subject to limited or unlimited rights pursuant to subparagraph (b)(1) or (b)(3), herein; or any "private expense" technical data in which the Government may have obtained such greater rights in accordance with DFARS 227.472-7.

Government purpose license rights shall be effective provided that only the portion or portions of each piece of data to which such rights are to be asserted are identified (for example, by circling, underscoring, or a note), and that the piece of data is marked with the legend below:

A. the number of the prime contract under which the technical data is to be delivered,

B. the name of the contractor and any subcontractor by whom the technical was generated, and

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Contractor: _____.

_____ _____ _____ _____

_____ _____ _____ _____

For a period of two years after delivery and acceptance of the last deliverable item under this contract, this technical data shall be subject to the restrictions contained the definition of "Limited" rights in DFARS 227.471. After the two year period, the data shall be subject to the restrtictions contained in the definition of "Government purpose license" rights in DFARS 227.471. The Government assumes no liability for unauthorized use or disclosure by others. This legend, together with the indications of the portions of the data which are subject to such limiitations, shall be included on any reproduction hereof which contains any portions subject to such limitations and shall be honored only as long as the data continues to meet the definition on Government purpose license rights.

(3) Unlimited Rights. The Government shall have unlimited rights in:

(i) technical data required to be prepared or delivered under this contract or any subcontract hereunder that was previously delivered to the Government with unlimited rights; and

(ii) technical data that is publicly available or has been or is normally released or disclosed by the contractor without restriction on further use or disclosure.

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(c) Rights in Computer Software.

(1) Restricted Rights.

(i) The Government shall have restricted rights in computer software, listed or described in a license or agreement made a part of this contract, which the parties have agreed will be furnished with restricted rights, Provided, however, notwithstanding any contrary provision in any such license or agreement, the Government shall have the rights included in the definition of "restricted rights" in paragraph (a) above. Such restricted rights are of no effect unless the computer software is marked by the contractor with the following legend.

RESTRICTED RIGHTS LEGEND

Use, duplication, or disclosure is subject to
restrictions stated in Contract No. _____
with _____ (Name of Contractor)_____

and the related computer software documentation includes a prominent statement of the restrictions applicable to the computer software. The contractor may not place any legend on computer software indicating restrictions on the Government's rights in such software unless the restrictions are set forth in a license or agreement made a part of this contract prior to the delivery date of the software. Failure of the contractor to apply a restricted rights legend to such computer software shall relieve the Government of liability with respect to such unmarked software.

(ii) Notwithstanding subdivision (i) above, commercial computer

software and related documentation developed at private expense and not in the public domain may, if the contractor so elects, be marked with the following legend:

RESTRICTED RIGHTS LEGEND

Use, duplication, or disclosure by the Government is subject to restrictions as set forth in subdivision (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at 52.227-7013.

(Name of contractor and address)

When acquired by the Government, commercial computer software and related documentation so legended shall be subject to the following:

(A) Title to, and ownership of, the software and documentation shall remain with the contracter.

(B) User of the software and documentation shall be limited to the facility for which it is acquired.

(C) The Government shall not provide or otherwise make available the software or documentation, or any portion thereof, in any form, to any third party without the prior written approval of the contractor. Third parties do not include prime contractors, subcontractors and agents of the Government who have the Government's permission to use the licensed software and documentation at the facility, and who have agreed to use the licensed software and documentation only in accordance with these restrictions. This provision does not limit the right of the

Government to use software, documentation, or information therein, which the Government may already have or obtain without restrictions.

(D) The Government shall have the right to use the computer software and documentation with the computer for which it is acquired at any other facility to which that computer may be transferred; to use the computer software and documentation with a backup computer when the primary computer is inoperative; to copy computer programs for safekeeping (archives) or backup purposes; and to modify the software and documentation or combine it with other software, Provided, that the unmodified portions shall remain subject to these restrictions.

(2) Government Purpose License Rights. For a period of two (2) years (or such other period as may be authorized by the Contracting Officer for good cause shown) after the delivery and acceptance of the last deliverable item under the contract, the Government shall have limited rights and, after the expiration of the two-year period, shall have Government purpose license rights in:

(i) computer software resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any Government contract or subcontract;

(ii) computer software required to be originated or developed under a Government contract, or generated as a necessary part of performing a contract; and

(iii) any other computer software prepared or required to be delivered under this contract or subcontract hereunder, which is not otherwise subject to restricted or unlimited rights pursuant to subparagraph (c)(1) or (c)(3), herein.

Government purpose license rights shall be effective provided that each unit of software is marked with an abbreviatd license rights legend reciting that the use, duplication, or disclosure of the software is subject to the same restrictions included in the same contract (identified by number) with the same contractor (identified by name). The Government assumes no liability for unauthorized use, duplication, or disclosure by others.

(3) Unlimited Rights. The Government shall have unlimited rights in:

(i) computer software required to be prepared or delivered under this or any subcontract hereunder that was previously delivered or previously required to be delivered to the Government under any contract or subcontract with unlimited rights;

(ii) computer software that is publicly available or has been or is normally released or disclosed by the contractor without restriction on further use or disclosure; and

(iii) computer data bases, consisting of information supplied by the Government, information in which the Government has unlimited rights, or information which is in the public domain.

(d) Technical Data and Computer Software Previously Provided Without Restriction. Contractor shall assert no restrictions on the Government's rights to use or disclose any data or computer software which the contractor has previously delivered to the Government without restriction. The limited or restricted rights provided for by this clause shall not impair the right of the Government to use similar or identical data or computer software acquired from other sources.

(e) Copyright.

(1) In addition to the rights granted under the provisions of paragraphs (b) and (c) above, the contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world, of the scope set forth below, under any copyright owned by the contractor, in any work of authorship prepared for or acquired by the Government under this contract, to reproduce the work in copies or phonorecords, to distribute copies or phonorecords to the public, to perform or display the work publicly, and to prepare derivative works thereof, and to have others do so for Government purposes. With respect to technical data and computer software in which the Government has unlimited rights, the license shall be of the same scope as the rights set forth in the definition of "unlimited rights" in DFARS 227.471. With respect to technical data in which the Government has limited rights, the scope of the license is limited to the rights set forth in the definition of "limited rights". With respect to computer software which the parties have agreed will be furnished with restricted rights, the scope of the license is limited to such rights.

(2) Unless written approval of the Contracting Officer is obtained, the contractor shall not include in technical data or computer software prepared for or acquired by the Government under this contract any works of authorship in which copyright is not owned by the contractor without acquiring for the Government any rights necessary to perfect a copyright license of the scope specified herein.

(3) As between the contractor and the Government, the contractor shall be considered the "person for whom the work was prepared" for the purpose of determining authority under Section 201(b) of Title 17, United States Code.

(4) Technical data delivered under this contract which carries a copyright notice shall also include the following statement which shall be placed thereon by the contractor, or should the contractor fail, by the Government:

> This material may be reproduced by or for the U.S. Government pursuant to the copyright license under the clause at 252.227-7025 (date).

(f) Removal of Unauthorized Markings.

(1) Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may, at the contractor's expense, correct, cancel, or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder in accordance with the clause of this contract entitled "Validation of Restrictive Markings on Technical Data", DFARS 252.227-7037.

(2) Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may correct, cancel, or ignore any marking not authorized by the terms of this contract on any computer software furnished hereunder, if:

(i) the contractor fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the

markings; or

(ii) the contractor's response fails to substantiate, within sixty (60) days after written notice, the propriety of restricted rights markings by identification of the restrictions set forth in the contract.

In either case, the Government shall give written notice to the contractor of the action taken.

(g) Relation to Patents. Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(h) Limitation on Charges for Data and Computer Software. The contractor recognizes that it is the policy of the Government not to pay, or to allow to be paid, any charges for data or computer software which the Government has a right to use and disclose to others without restriction and contractor agrees to refund any such payments. This policy applies to contracts that involve payments by subcontractors and those entered into through the Military Assistance Program, in addition to US Government prime contracts. However, it does not apply to reasonable reproduction, handling, mailing, and similar administrative costs.

(i) Acquisition of Data and Computer Software from Subcontractors.

(1) Whenever any technical data or computer software is to be obtained from a subcontractor under this contract, the contractor shall use this same clause in the subcontract, without alteration, and no other clause shall be used to enlarge or diminish the Government's or the contractor's rights in the subcontractor data or computer software which is required for the Government.

(2) technical data required to be delivered by a subcontractor shall normally be delivered to the next higher-tier contractor. However, when there is a requirement in the prime contract for data which may be submitted with other than unlimited rights by a subcontractor, then said subcontractor may fulfill its requirement by submitting such data directly to the Government, rather than through the prime contractor.

(3) The contractor and higher-tier subcontractors will not use their power to award subcontract as economic leverage to obtain rights in technical data or computer software from their subcontractors.

(j) Notice of Government Rights.

(1) Unless the Schedule provides otherwise, and subject to (2) below, the contractor will promptly notify the Contracting Officer in writing of the intended use by the contractor or a subcontractor in performance of this contract of any item, component, or process for which technical data would contain any restrictions on the Government's right to use, disclose, or have others use such data.

(2) Such notification is not required with respect to:

(i) standard commercial items which are manufactured by more than one source of supply; or

(ii) items, components, or processes for which such notice was given pursuant to prenotification of rights in technical data in connection with this contract.

(3) Unless the schedule provides otherwise, Contracting Officer approval is not necessary under this clause for the contractor to use the item, component, or process in the performance of the contract.

(End of Clause)

252.227-7026 through 252.227-7036 Reserved.

252.227-7035 Prenotification of Rights in Technical Data.

As prescribed iat DFARS 227.482(t), insert the following provision:

252.227-7035 PRENOTIFICATION OF RIGHTS IN TECHNICAL DATA (MAY 1987)

(a) Prenotification of Government Rights.

In order for the Government to make informed judgments concerning the competitive reprocurement potential of items, components, processes or computer software developed at private expense that an offeror intends to deliver under a resultant contract, offerors shall identify to the maximum practicable extent in their responses to this solicitation such privately developed items, components, processes, or computer software and the technical data which they:

(i) intend to deliver with limited rights;

(ii) intend to deliver with Government purpose or unlimited rights; or

(iii) have not yet determined which rights should apply.

This requirement does not apply to standard commercial items which are manufactured by more than one source of supply. If an offeror asserts limited rights to any technical data in its proposal responding to this requirement, Government failure to object to or reject any such assertion shall not be construed to constitute agreement to any such data rights assertion. Offerors will furnish, at the written request of the contracting officer, evidence to support any such rights contention.

(End of Provision)

252.227-7036 Reserved.

252.227-7037 Validation of Restrictive Markings on Technical Data.

As prescribed in 227.482(v), insert the following clause:

VALIDATION OF RESTRICTIVE MARKINGS ON TECHNICAL DATA

(a) Definition. "Technical data", as used in this clause, means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer software documentation) relating to supplies acquired or to be acquired by the Government. Such term does not include computer software or financial, administrative, cost or pricing, or management data, or other information incidental to contract administration.

(b) Justification. The contractor or subcontractor at any tier is responsible for maintaining records adequate to justify the validity of markings that impose restrictions on the Government and others to use, duplicate, or disclose technical data delivered or required to be delivered under the contract or subcontract, and shall be prepared to furnish to the contracting officer a written justification for such restrictive markings in response to a challenge under (d) below.

(c) Prechallenge Request for Information.

(1) The contracting officer may request the contractor or subcontractor to furnish a written explanation for any restriction asserted by the contractor or subcontractor on the right of the United States or others to use technical data. If, upon review of the explanation submitted, the contracting

officer remains unable to ascertain the basis of the restrictive marking, the contracting officer may further request the contractor or subcontractor to furnish additional information in the records of, or otherwise in the possession of or reasonably available to, the contractor or subcontractor to justify the validity of any restrictive marking on technical data delivered or to be delivered under the contract or subcontract (e.g., a statement of facts accompanied with supporting documentation). The contractor or subcontractor shall submit such written data as requested by the contracting officer within the time required or such longer period as may be mutually agreed.

(2) If the contracting officer, after reviewing the written data furnished pursuant to (c)(1) above, and any other available information pertaining to the validity of a restrictive marking, determines that reasonable grounds exist to question the current validity of the marking and that continued adherence to the marking would make impracticable the subsequent competitive acquisition of the item, component, or process to which the technical data relates, the contracting officer may formally challenge the validity of the marking as described in (d) below.

(3) If the contractor or subcontractor fails to respond to the contracting officer's request for information under (c)(1) above, and the contracting officer determines that continued adherence to the marking would make impracticable the

subsequent competitive acquisition of the item, component, or process to which the technical data relates, the contracting officer may formally challenge the validity of the marking as described in (d) below.

(d) Challenge.

(1) Notwithstanding any provision of this contract concerning inspection and acceptance, if the contracting officer determines that a challenge to the restrictive marking is warranted, the contracting officer shall send a written challenge notice to the contractor or subcontractor. Such challenge shall:

(i) state the specific grounds for challenging the asserted restriction;

(ii) require a response within 60 days justifying, and providing appropriate evidence as to, the current validity of the asserted restriction; and

(iii) state that a DoD contracting officer's final decision, issued pursuant to (f) below, sustaining the validity of a restrictive marking identical to the asserted restriction, within the three-year period preceding the challenge, shall serve as justification for the asserted restriction if the validated restriction was asserted by the same contractor or subcontractor (or any licensee of such contractor or subcontractor) to which such notice is being provided.

(2) Failure to respond to the challenge notice will constitute agreement by the contractor or subcontractor with

Government action to cancel, correct, or ignore the restrictive legends.

(3) The contracting officer shall extend the time for response as appropriate if the contractor or subcontractor submits a written request showing the need for additional time to prepare a response.

(4) The contractor's or subcontractor's written response shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.), and shall be certified in the form prescribed by FAR 33.207, regardless of dollar amount.

(5) A contractor or subcontractor receiving challenges to the same restrictive markings from more than one contracting officer shall notify each contracting officer of the existence of more than one challenge. The notice shall also state which contracting officer initiated the first in time unanswered challenge. The contracting officer initiating the first in time unanswered challenge after consultation with the contractor or subcontractor and the other contracting officers, shall formulate and distribute to all interested parties a schedule for responding to each of the challenge notices. The schedule shall afford the contractor or subcontractor an equitable opportunity to respond to each challenge notice. All parties agree to be bound by this schedule.

(e) Final Decision When Contractor or Subcontractor Fails to Respond. Upon a failure of a contractor or subcontractor to

submit any response to the challenge notice, the contracting officer shall issue a final decision to the contractor or subcontractor in accordance with the Disputes clause at FAR 52.233-1, pertaining to the validity of the asserted restriction. This final decision shall be issued within sixty (60) days after the expiration of the time period of (d)(1)(ii) or (2) above. Following the issuance of the final decision, the contracting officer may then strike or ignore the invalid restrictive marking.

(f) Final Decision When Contractor or Subcontractor Responds.

(1) If the contracting officer determines that the contractor or subcontractor has justified the validity of the restrictive marking, the contracting officer shall issue a final decision to the contractor or subcontractor sustaining the validity of the restrictive marking, and stating that the Government will continue to be bound by the restrictive marking. This final decision constitutes validation as addressed in 10 U.S.C. 2321. The final decision shall be issued within sixty (60) days after receipt of the contractor's or subcontractor's response to the challenge notice, or within such longer period that the contracting officer has notified the contractor or subcontractor that the Government will require. The notification of a longer period for issuance of a final decision will be made within sixty (60) days after receipt of the response to the challenge notice.

(2)(i) If the contracting officer determines that the validity of the restrictive marking is not justified, the contracting officer shall issue a final decision to the contractor or subcontractor in accordance with the Disputes clause at FAR 52.233-1. Notwithstanding paragraph (e) of the Disputes clause, the final decision shall be issued within sixty (60) days after receipt of the contractor's or subcontractor's response to the challenge notice, or within such longer period that the contracting officer has notified the contractor or subcontractor of the longer period that the Government will require. The notification of a longer period for issuance of a final decision will be made within sixty (60) days after receipt of the response to the challenge notice.

(ii) The Government agrees that it will continue to be bound by the restrictive marking for a period of ninety (90) days from the issuance of the contracting officer's final decision under (f)(2)(i) of this clause. The contractor or subcontractor agrees that, if it intends to file suit in the United States Claims Court it will provide a notice of intent to file suit to the contracting officer within ninety (90) days from the issuance of the contracting officer's final decision under (f)(2)(i) of this clause. If the contractor or subcontractor fails to appeal, file suit, or provide a notice of intent to file suit to the contracting officer within the ninety (90)-day period, the Government may cancel or ignore the restrictive markings, and the failure of the contractor or

subcontractor to take the required action constitutes ag
with such Government action.

(iii) The Government agrees that it will continue t
bound by the restrictive marking where a notice of intent
file suit in the United States Claims Court is provided to
contracting officer within ninety (90) days from the issuan
of the final decision under (f)(2)(i) of this clause. The
Government will no longer be bound, and the contractor or
subcontractor agrees that the Government may strike or ignore
the restrictive markings, if the contractor or subcontractor
fails to file its suit within one (1) year after issuance of
the final decision. Notwithstanding the foregoing, where the
head of an agency determines, on a nondelegable basis, that
urgent or compelling circumstances significantly affecting the
interest of the United States will not permit waiting for the
filing of a suit in the United States Claims Court, the
contractor or subcontractor agrees that the agency may,
following notice to the contractor or subcontractor, cancel and
ignore such restrictive markings as an interim measure, pending
filing of the suit or expiration of the one (1) year period
without filing of the suit. However, such agency head
determination does not affect the contractor's or subcontractor's
right to damages against the United States where its restrictive
markings are ultimately upheld or to pursue other relief, if
any, as may be provided by law.

reement

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e an appeal or suit is filed pursuant
s Act until final disposition by an
ct Appeals or the United States Claims
ng the foregoing, where the head of an
n a nondelegable basis, following notice to
urgent or compelling circumstances
cting the interest of the United States will
ng the decision by such Board of Contract
Jnited States Claims Court, the contractor or
agrees that the agency may cancel and ignore such
arkings as an interim measure pending final
. However, such agency head determination does not
contractor's or subcontractor's right to damages
e United States where its restrictive markings are
y upheld or to pursue other relief, if any, as may be
by law.

g) Final Disposition of Appeal or Suit.

(1) If the contractor or subcontractor appeals or files and if, upon final disposition of the appeal or suit, the tracting officer's decision is sustained--

(i) The restrictive marking on the technical data shall e cancelled, corrected, or ignored; and

(ii) If the restrictive marking is found not to be tially justified, the contractor or subcontractor, as all be liable to the Government for payment of

the cost to the Government of reviewing the restrictive marking and the fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Government in challenging the marking, unless special circumstances would make such payment unjust.

(2) If the contractor or subcontractor appeals or files suit and if, upon final disposition of the appeal or suit, the contracting officer's decision is not sustained--

(i) The Government shall continue to be bound by the restrictive marking; and

(ii) The Government shall be liable to the contractor or subcontractor for payment of fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the contractor or subcontractor in defending the marking, if the challenge by the Government is found not to have been made in good faith.

(h) Duration of Right to Challenge. The Government may review the validity of any restriction on technical data, delivered or to be delivered under a contract, asserted by the contractor or subcontractor. During the period within three years of final payment on a contract or within three years of delivery of the technical data, whichever is later, the contracting officer may review and make a written determination to challenge the restriction. The Government may, however, challenge a restriction on the release, disclosure or use of technical data at any time if such technical data (i) is publicly available; (ii) has been furnished to the United States without

restriction; or (iii) has been otherwise made available without restriction. Only the contracting officer's final decision resolving a formal challenge by sustaining the validity of a restrictive marking constitutes "validation" as addressed in 10 U.S.C. 2321. A decision by the Government, or a determination by the contracting officer, to not challenge the restrictive marking or asserted restriction shall not constitute "validation".

(i) Privity of Contract. The contractor or subcontractor agrees that the contracting officer may transact matters under this clause directly with subcontractors at any tier that assert restrictive markings. However, this clause neither creates or implies privity of contract between the Government and subcontract.

(j) Flowdown. The contractor or subcontractor agrees to insert this clause in subcontracts at any tier requiring the delivery of technical data.

(End of Clause)

not responsive to international competitive pressure

not responsive to need to discipline ordering of data -

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