**DFARS Case 2018-D069**

**Validation of Proprietary and Technical Data**

**Final Rule**

**PART 227—PATENTS, DATA, AND COPYRIGHTS**

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**SUBPART 227.71--RIGHTS IN TECHNICAL DATA**

**\* \* \* \* \***

**227.7103-13 Government right to review, verify, challenge, and validate asserted restrictions.**

**\* \* \* \* \***

(c) *Challenge considerations and presumption*.

(1) *Requirements to initiate a challenge.* Contracting officers shall have reasonable grounds to challenge the validity of an asserted restriction. Before issuing a challenge to an asserted restriction, carefully consider all available information pertaining to the assertion. ~~The contracting officer shall not challenge a contractor's assertion that a commercial item was developed exclusively at private expense unless the Government can demonstrate that it contributed to development of that item.~~

(2) **[*Commercial items–p*]***~~P~~resumption regarding development exclusively at private expense*. 10 U.S.C. 2320(b)(1) and 2321(f) establish a presumption and procedures regarding validation of asserted restrictions for technical data related to commercial items~~, and to major systems,~~ on the basis of development exclusively at private expense.

~~(i)~~ *~~Commercial items~~*~~. Except as provided in paragraph (c)(2)(ii) of this section, c~~**[ C]**ontracting officers shall presume that a commercial item was developed exclusively at private expense whether or not a contractor or subcontractor submits a justification in response to a challenge notice. **[The contracting officer shall not challenge a contractor's assertion that a commercial item was developed exclusively at private expense unless the Government can specifically state the reasonable grounds to question the validity of the assertion. The challenge notice shall include sufficient information to reasonably demonstrate that the commercial item was not developed exclusively at private expense. In order to sustain the challenge, the contracting officer shall provide information demonstrating that the commercial item was not developed exclusively at private expense. The challenge notice and all related correspondence shall be subject to handling procedures for classified information and controlled unclassified information.]** ~~When a challenge is warranted, a~~**[A]** contractor's or subcontractor's failure to respond to the challenge notice cannot be the sole basis for issuing a final decision denying the validity of an asserted restriction.

~~(ii)~~ *~~Major weapon systems~~*~~. When the contracting officer challenges an asserted restriction regarding technical data for a major weapon system or a subsystem or component thereof on the basis that the technology was not developed exclusively at private expense—~~

~~(A) The presumption in paragraph (c)(2)(i) of this section applies to—~~

~~(~~*~~1~~*~~) A commercial subsystem or component of a major weapon system, if the major weapon system was acquired as a commercial item in accordance with subpart~~ [~~234.70~~](http://www.acq.osd.mil/dpap/dars/dfars/html/current/234_70.htm) ~~(10 U.S.C. 2379(a));~~

~~(~~*~~2~~*~~) A component of a subsystem, if the subsystem was acquired as a commercial item in accordance with subpart~~ [~~234.70~~](http://www.acq.osd.mil/dpap/dars/dfars/html/current/234_70.htm) ~~(10 U.S.C. 2379(b)); and~~

~~(~~*~~3~~*~~) Any other component, if the component is a commercially available off-the-shelf item or a commercially available off-the-shelf item with modifications of a type customarily available in the commercial marketplace or minor modifications made to meet Federal Government requirements; and~~

~~(B) In all other cases, the contracting officer shall sustain the challenge unless information provided by the contractor or subcontractor demonstrates that the item was developed exclusively at private expense.~~

(d) *Challenge and validation*. All challenges must be made in accordance with the provisions of the clause at 252.227-7037, Validation of Restrictive Markings on Technical Data.

\* \* \* \* \*

(2) *Pre-challenge requests for information.* (i) After consideration of the situations described in paragraph (d)(3) of this ~~sub~~section, contracting officers may request the person asserting a restriction to furnish a written explanation of the facts and supporting documentation for the assertion in sufficient detail to enable the contracting officer to ascertain the basis of the restrictive markings. Additional supporting documentation may be requested when the explanation provided by the person making the assertion does not, in the contracting officer's opinion, establish the validity of the assertion.

**\* \* \* \* \***

(4) *Challenge notice*. The contracting officer shall not issue a challenge notice unless there are reasonable grounds to question the validity of an assertion. **[For commercial items, also see paragraph (c)(2) of this section.]** The contracting officer may challenge an assertion whether or not supporting documentation was requested under paragraph (d)(2) of this ~~sub~~section. Challenge notices shall be in writing and issued to the contractor or, after consideration of the situations described in paragraph (d)(3) of this ~~sub~~section, the person asserting the restriction. The challenge notice shall include the information in paragraph (e) of the clause at 252.227-7037.

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**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

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**SUBPART 252.2—TEXT OF PROVISIONS AND CLAUSES**

**\* \* \* \* \***

**252.227-7037** **Validation of ~~r~~[R]estrictive ~~m~~[M]arkings on ~~t~~[T]echnical ~~d~~[D]ata.**

As prescribed in 227.7102-4(c), 227.7103-6(e)(3), **[2]**27.7104(e)(5), or 227.7203-6(f), use the following clause:

VALIDATION OF RESTRICTIVE MARKINGS ON TECHNICAL DATA (~~SEP 2016~~**[APR 2022]**)

**\* \* \* \* \***

(b) **[*Commercial items–p*]***~~P~~resumption regarding development exclusively at private expense*.

~~(1)~~ *~~Commercial items~~*~~.~~

~~(i) Except as provided in paragraph (b)(2) of this clause, t~~**[T]**he Contracting Officer will presume that the Contractor’s or a subcontractor’s asserted use or release restrictions with respect to a commercial item **[are]**~~is~~ justified on the basis that the item was developed exclusively at private expense.

~~(ii)~~ The Contracting Officer will not **[issue a ]**challenge **[unless there are reasonable grounds to question the validity of the assertion]** ~~such assertions unless the Contracting Officer has information that demonstrates~~ that the commercial item was ~~not~~ developed exclusively at private expense.

~~(2)~~ *~~Major weapon systems.~~* ~~In the case of a challenge to a use or release restriction that is asserted with respect to data of the Contractor or a subcontractor for a major weapon system or a subsystem or component thereof on the basis that the major weapon system, subsystem, or component was developed exclusively at private expense—~~

~~(i) The presumption in paragraph (b)(1) of this clause applies to—~~

~~(A) A commercial subsystem or component of a major weapon system, if the major weapon system was acquired as a commercial item in accordance with DFARS subpart~~ [~~234.70~~](http://www.acq.osd.mil/dpap/dars/dfars/html/current/234_70.htm) ~~(10 U.S.C. 2379(a));~~

~~(B) A component of a subsystem, if the subsystem was acquired as a commercial item in accordance with DFARS subpart~~ [~~234.70~~](http://www.acq.osd.mil/dpap/dars/dfars/html/current/234_70.htm) ~~(10 U.S.C. 2379(b)); and~~

~~(C) Any other component, if the component is a commercially available off-the-shelf item or a commercially available off-the-shelf item with modifications of a type customarily available in the commercial marketplace or minor modifications made to meet Federal Government requirements; and~~

~~(ii) In all other cases, the challenge to the use or release restriction will be sustained unless information provided by the Contractor or a subcontractor demonstrates that the item or process was developed exclusively at private expense.~~

(c) *Justification.* The Contractor or subcontractor at any tier is responsible for maintaining records sufficient to justify the validity of its 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. Except as provided in paragraph (b)~~(1)~~ of this clause, the Contractor or subcontractor shall be prepared to furnish to the Contracting Officer a written justification for such restrictive markings in response to a challenge under paragraph (e) of this clause.

(d) *Prechallenge request for information.*

**\* \* \* \* \***

(2) If the Contracting Officer, after reviewing the written data furnished pursuant to paragraph (d)(1) of this clause, or 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 **[will]**~~shall~~ follow the procedures in paragraph (e) of this clause.

**\* \* \* \* \***

(e) *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 **[will]** ~~shall~~ send a written challenge notice to the Contractor or subcontractor asserting the restrictive markings. **[The challenge notice and all related correspondence shall be subject to handling procedures for classified information and controlled unclassified information.]** Such challenge **[will]** ~~shall~~—

(i) State the specific grounds for challenging the asserted restriction **[including, for commercial items, sufficient information to reasonably demonstrate that the commercial item was not developed exclusively at private expense]**;

(ii) Require a response within ~~sixty (~~60~~)~~ days justifying and providing sufficient evidence as to the current validity of the asserted restriction;

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(2) The Contracting Officer **[will]**~~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.

(3) The Contractor's or subcontractor's written response shall be considered a claim within the meaning of 41 U.S.C. 7101, Contract Disputes**[,]** and shall be certified in the form prescribed at 33.207 of the Federal Acquisition Regulation, regardless of dollar amount.

(4) 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, **[will]**~~shall~~ formulate and distribute a schedule for responding to each of the challenge notices to all interested parties. The schedule **[will]**~~shall~~ afford the Contractor or subcontractor an opportunity to respond to each challenge notice. All parties will be bound by this schedule.

(f) *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 will issue a final decision to the Contractor or subcontractor in accordance with ~~paragraph (b) of this clause and~~ the Disputes clause of this contract**[. In order to sustain the challenge for commercial items, the Contracting Officer will provide information demonstrating that the commercial item was not developed exclusively at private expense.]** ~~pertaining to the validity of the asserted restriction.~~ This final decision **[will]**~~shall~~ be issued as soon as possible after the expiration of the time period of paragraph (e)(1)(ii) or (e)(2) of this clause. Following issuance of the final decision, the Contracting Officer will comply with the procedures in paragraphs (g)(2)(ii) through (iv) of this clause.

(g) *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 **[will]**~~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 **[will]**~~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 **[will]**~~shall~~ issue a final decision to the Contractor or subcontractor in accordance with the Disputes clause of this contract**[. In order to sustain the challenge for commercial items, the Contracting Officer will provide information demonstrating that the commercial item was not developed exclusively at private expense]**. Notwithstanding paragraph (e) of the Disputes clause, the final decision **[will]**~~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 of a period of ~~ninety (~~90~~)~~ days from the issuance of the Contracting Officer's final decision under paragraph (g)(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 paragraph (g)(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 agreement with such Government action.

(iii) The Government agrees that it 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 ~~ninety (~~90~~)~~ days from the issuance of the final decision under paragraph (g)(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 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, authorize release or disclosure of the technical data. Such agency determination may be made at any time after issuance of the final decision and will 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.

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(h) *Final disposition of appeal or suit.*

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(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 **[will]**~~shall~~ continue to be bound by the restrictive marking; and

(ii) The Government **[will]**~~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.

(i) *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 (~~3~~)~~ years of final payment on a contract or within ~~three (~~3~~)~~ years of delivery of the technical data to the Government, 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—\* \* \*

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(End of clause)

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