**DFARS Case 2022-D016**

**Update of Challenge Period for Validation of Asserted Restrictions on Technical Data and Computer Software**

**Final Rule**

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

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

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**252.227-7019 Validation of Asserted Restrictions--Computer Software.**

As prescribed in [227.7104](https://www.acq.osd.mil/dpap/dars/dfars/html/current/227_71.htm#227.7104)-4(b)(3) or [227.7203-6](https://www.acq.osd.mil/dpap/dars/dfars/html/current/227_72.htm#227.7203-6)(c), use the following clause:

VALIDATION OF ASSERTED RESTRICTIONS—COMPUTER SOFTWARE

(JAN 2025)

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(b) *Justification*. The Contractor shall maintain records sufficient to justify the validity of any ~~markings that~~ assert**[ed]** restrictions on the Government's rights to use, modify, reproduce, perform, display, release, or disclose computer software delivered**[,]** ~~or~~ required to be delivered**[, or otherwise provided to the Government]** under this contract and shall be prepared to furnish to the Contracting Officer a written justification for such **[asserted restrictions]**~~restrictive markings~~ in response to a request for information under paragraph (d) **[of this clause]** or a challenge under paragraph (f) of this clause.

\* \* \* \* \*

(d) *Requests for information*.

(1) The Contracting Officer may request the Contractor to provide sufficient information to enable the Contracting Officer to evaluate the Contractor's asserted restrictions. Such information shall be based upon the records required by this clause or other information reasonably available to the Contractor.

(2) Based upon the information provided, if the—

(i) Contractor agrees that an asserted restriction is not valid, the Contracting Officer may—

(A) Strike or correct the unjustified marking at the Contractor's expense; or

(B) Return the computer software to the Contractor for correction at the Contractor's expense. If the Contractor fails to correct or strike the unjustified ~~restrictions~~**[marking ]**and return the corrected software to the Contracting Officer within 60 days following receipt of the software, the Contracting Officer may correct or strike the **[marking]**~~markings~~ at the Contractor's expense;

(ii) Contracting Officer concludes that the asserted restriction is appropriate for this contract, the Contracting Officer shall so notify the Contractor in writing.

(3) The Contractor's failure to provide a timely response to a Contracting Officer's request for information or failure to provide sufficient information to enable the Contracting Officer to evaluate an asserted restriction shall constitute reasonable grounds for questioning the validity of an asserted restriction.

(e) *Government right to challenge and validate asserted restrictions*.

(1) The Government, when there are reasonable grounds to do so, has the right to review and challenge the validity of any restrictions asserted by the Contractor on the Government's rights to use, modify, reproduce, release, perform, display, or disclose computer software delivered, to be delivered under this contract, or otherwise provided to the Government in the performance of this contract. Except for software that is publicly available, has been furnished to the Government without restrictions, ~~or~~ has been otherwise made available without restrictions, **[or is the subject of a fraudulently asserted use or release restriction,]** the Government may exercise this right only within ~~3~~**[6]** years after the date(s) the software is delivered or otherwise furnished to the Government, or ~~3~~**[6]** years following final payment under this contract, whichever is later.

(2) The absence of a challenge to an asserted restriction shall not constitute validation under this clause. Only a Contracting Officer's final decision or actions of an agency Board of Contract Appeals or a court of competent jurisdiction that sustain the validity of an asserted restriction constitute validation of the restriction.

(f) *Challenge procedures*.

(1) A challenge must be in writing and shall—

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

(ii) Require the Contractor to respond **[in writing ]**within 60 days;

(iii) Require the Contractor to provide justification for the assertion based upon records kept in accordance with paragraph (b) of this clause and such other documentation that are reasonably available to the Contractor, in sufficient detail to enable the Contracting Officer to determine the validity of the asserted restrictions; and

(iv) State that a Contracting Officer's final decision, during the 3-year period preceding this challenge, or action of a court of competent jurisdiction or Board of Contract Appeals that sustained the validity of an identical assertion made by the Contractor (or a licensee) shall serve as justification for the asserted restriction.

\* \* \* \* \*

(g) *Contractor appeal—Government obligation*.

(1) The Government agrees that, notwithstanding a Contracting Officer's final decision denying the validity of an asserted restriction and except as provided in paragraph (g)(3) of this clause, it will honor the asserted restriction—

(i) For a period of 90 days from the date of the Contracting Officer's final decision to allow the Contractor to appeal to the appropriate Board of Contract Appeals or to file suit in an appropriate court;

(ii) For a period of 1 year from the date of the Contracting Officer's final decision if, within the first 90 days following the Contracting Officer's final decision, the Contractor has provided notice of an intent to file suit in an appropriate court; or

(iii) Until final disposition by the appropriate Board of Contract Appeals or court of competent jurisdiction, if the Contractor has—

(A) Appealed to the Board of Contract Appeals or filed suit in an appropriate court within 90 days; or

(B) Submitted, within 90 days, a notice of intent to file suit in an appropriate court and filed suit within 1 year.

(2) The Contractor agrees that the Government may strike, correct, or ignore the restrictive markings if the Contractor fails to—

(i) Appeal to a Board of Contract Appeals within 90 days from the date of the Contracting Officer's final decision;

(ii) File suit in an appropriate court within 90 days from such date; or

(iii) File suit within 1 year after the date of the Contracting Officer's final decision if the Contractor had provided notice of intent to file suit within 90 days following the date of the Contracting Officer's final decision.

(3)(i) The agency head, on a nondelegable basis, may determine that urgent or compelling circumstances do not permit awaiting the filing of suit in an appropriate court, or the rendering of a decision by a court of competent jurisdiction or Board of Contract Appeals. In that event, the agency head shall notify the Contractor of the urgent or compelling circumstances. Notwithstanding paragraph (g)(1) of this clause, the Contractor agrees that the agency may use, modify, reproduce, release, perform, display, or disclose computer software marked with—

(A) Government purpose legends for any purpose, and authorize others to do so; or

(B) Restricted or special license rights for ~~g~~**[G]**overnment purposes only.

(ii) The Government agrees not to release or disclose such software unless, prior to release or disclosure, the intended recipient is subject to the use and nondisclosure agreement at Defense Federal Acquisition Regulation Supplement (DFARS) 227.7103-7, or is a Government contractor receiving access to the software for performance of a Government contract that contains the clause at DFARS 252.227-7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. The agency head's determination may be made at any time after the date of the Contracting Officer's final decision and shall not affect the Contractor's right to damages against the United States, or other relief provided by law, if its asserted restrictions are ultimately upheld.

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(End of clause)

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**252.227-7037 Validation of [Asserted Restrictions]~~Restrictive Markings~~ on Technical Data.**

As prescribed in [227.7102-4](http://www.acq.osd.mil/dpap/dars/dfars/html/current/227_71.htm#227.7102-4)(c), [227.7103-6](http://www.acq.osd.mil/dpap/dars/dfars/html/current/227_71.htm#227.7103-6)(e)(3), [227.7104](http://www.acq.osd.mil/dpap/dars/dfars/html/current/227_71.htm#227.7104)-4(b)(7), or [227.7203-6](http://www.acq.osd.mil/dpap/dars/dfars/html/current/227_72.htm#227.7203-6)(f), use the following clause:

VALIDATION OF **[ASSERTED RESTRICTIONS]**~~RESTRICTIVE MARKINGS~~ ON TECHNICAL DATA (~~JAN 2023~~**[JAN 2025]**)

\* \* \* \* \*

(c) *Justification*. The Contractor or subcontractor at any tier is responsible for maintaining records sufficient to justify the validity of its **[asserted]**~~markings that impose~~ restrictions on the **[rights of the]** Government and others to use, duplicate, **[release, ]**or disclose technical data delivered**[,]** ~~or~~ required to be delivered**[, or otherwise provided to the Government]** under the contract or subcontract. Except as provided in paragraph (b) of this clause, the Contractor or subcontractor shall be prepared to furnish to the Contracting Officer a written justification for such **[asserted restrictions]**~~restrictive markings~~ in response to a challenge under paragraph (e) of this clause.

(d) *Prechallenge request for information*.

(1) The Contracting Officer may request the Contractor or subcontractor to furnish a written explanation for any **[asserted]** restriction ~~asserted by the Contractor or subcontractor~~ on the right of the United States or others to use**[, disclose, or release]** technical data. If, upon review of the explanation submitted, the Contracting Officer **[cannot determine]**~~remains unable to ascertain~~ the basis of the **[asserted restriction]**~~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 **[asserted restriction]**~~restrictive marking~~ on technical data delivered**[,]** ~~or~~ to be delivered**[, or otherwise provided to the Government]** 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 paragraph (d)(1) of this clause, or any other available information pertaining to the validity of **[an asserted restriction]**~~a restrictive marking~~, determines that reasonable grounds exist to question the current validity of the **[asserted restriction]**~~marking~~ and that continued adherence to the **[asserted restriction]**~~marking~~ would make impracticable the subsequent competitive acquisition of the item~~, component,~~ or process to which the technical data relates, the Contracting Officer will follow the procedures in paragraph (e) of this clause.

(3) If the Contractor or subcontractor fails to respond to the Contracting Officer's request for information under paragraph (d)(1) of this clause, and the Contracting Officer determines that continued adherence to the **[asserted restriction]**~~marking~~ would make impracticable the subsequent competitive acquisition of the item~~, component,~~ or process to which the technical data relates, the Contracting Officer may challenge the validity of the **[asserted restriction]**~~marking~~ as described 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 **[asserted restriction]**~~restrictive marking~~ is warranted, the Contracting Officer will send a written challenge notice to the Contractor or subcontractor**[ making the asserted restriction]** ~~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—

(i) State the specific grounds for challenging the asserted restriction including, for commercial products or commercial services, sufficient information to reasonably demonstrate that the commercial product or commercial service was not developed exclusively at private expense;

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

(iii) State that a ~~DoD~~ Contracting Officer's final decision, issued pursuant to paragraph (g) of this clause, sustaining the validity of a**[ prior asserted restriction]**~~restrictive marking~~ identical to the **[current ]**asserted restriction, within the ~~three~~**[3]**-year period preceding the **[current ]**challenge, shall serve as justification for the **[current ]**asserted restriction if the **[prior ]**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; and

\* \* \* \* \*

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

\* \* \* \* \*

(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 **[asserted restriction]**~~restrictive marking~~, the Contracting Officer will issue a final decision to the Contractor or subcontractor ~~sustaining~~ **[that sustains ]**the validity of the **[asserted restriction]**~~restrictive marking,~~ and ~~stating~~**[that states ]**that the Government will continue to be bound by the **[asserted restriction]**~~restrictive marking~~. **[The Contracting Officer will issue this]**~~This~~ final decision ~~will 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 that the Government will require. The **[Contracting Officer will provide ]**notification of ~~a~~**[any]** longer period for issuance of a final decision ~~will be made~~ within 60 days after receipt of the response to the challenge notice.

(2)(i) If the Contracting Officer determines that the validity of the **[asserted restriction]**~~restrictive marking~~ is not justified, the Contracting Officer will issue a final decision to the Contractor or subcontractor in accordance with the Disputes clause of this contract. ~~In order to~~**[To]** sustain the challenge for commercial products or commercial services, the Contracting Officer will provide information demonstrating that the commercial product or commercial service was not developed exclusively at private expense. Notwithstanding paragraph (e) of the Disputes clause, the final decision will 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 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.

(ii) The Government agrees that it will continue to be bound by the **[asserted restriction]**~~restrictive marking~~ for a period of 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 **[Court of Federal ]**Claims**[,]** ~~Court~~ it will 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 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 90-day period, the Government may cancel or ignore the restrictive markings~~,~~ **[that are based on the asserted restrictions,]** 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 **[asserted restriction]**~~restrictive marking~~ where a notice of intent to file suit in the United States **[Court of Federal ]**Claims ~~Court~~ is provided to the Contracting Officer within 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~~**[marking that is based on the asserted restriction]**, 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 **[Court of Federal ]**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 **[asserted restrictions]**~~restrictive markings~~ are ultimately upheld or to pursue other relief, if any, as may be provided by law.

(iv) The Government agrees that it will be bound by the **[asserted restrictions]**~~restrictive marking~~ where an appeal or suit is filed pursuant to the Contract Disputes statute until final disposition by an agency Board of Contract Appeals or the United States **[Court of Federal ]**Claims ~~Court~~. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, following notice to the Contractor that urgent or compelling circumstances will not permit awaiting the decision by such Board of Contract Appeals or the United States **[Court of Federal ]**Claims ~~Court~~, the Contractor or subcontractor agrees that the agency may 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 **[asserted restrictions]**~~restrictive markings~~ are ultimately upheld or to pursue other relief, if any, as may be provided by law.

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

(1) 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 sustained—

(i) The restrictive marking **[that is based on the asserted restriction]** on the technical data shall be cancelled, corrected, or ignored; and

(ii) If the **[asserted restriction]**~~restrictive marking~~ is found not to be substantially justified, the Contractor or subcontractor, as appropriate, shall be liable to the Government for payment of the cost to the Government of reviewing the **[asserted restriction]**~~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 **[asserted restriction]**~~marking~~, unless special circumstances would make such payment unjust.

\* \* \* \* \*

(i) *Duration of right to challenge.***[**

**(1)]** 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 ~~3~~**[6]** years of final payment on a contract or within ~~3~~**[6]** 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—

**[ (i)]**~~(1)~~ ~~Is~~**~~[~~Are]** publicly available;

**[ (ii)]**~~(2)~~ ~~Has~~**[Have]** been furnished to the United States without restriction; ~~or~~

**[ (iii)]**~~(3)~~ ~~Has~~**[Have]** been otherwise made available without restriction~~.~~**[; or**

**(iv) Are the subject of a fraudulently asserted use or release restriction.**

**(2)]** 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. 3785(c).

(j) *Decision not to challenge*. 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.”

(k) *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 **[restrictions]**~~restrictive markings~~. However, this clause neither creates nor implies privity of contract between the Government and **[subcontractor]**~~subcontractors~~.

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(End of clause)